



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 152 of 1995

DUNCAN KAMBA KATAMBWA.....PLAINTIFF

VERSUS

1. KITUI EASTERN BUS SERVICE.....1ST DEFENDANT

2. JOHN KITANA SAMUEL VELALA.....2ND DEFENDANT

JUDGMENT

1. This suit was commenced by the filing of the Plaint on 10.4.1995 but was only concluded on 13.3.2008 although in fact hearing had started on 14.2.2001 before Mwera, J. Because the Defendant although served, properly, I should add, judgment was entered against it on 18.5.1995 and I note that the default judgment was slightly erroneous as the Deputy Registrar entered judgment for Kshs. 1,388,008.50 as prayed in the Plaint without waiting for that sum to be proved strictly by way of formal proof. I will suo motu set aside that part of the judgment and that being the case, the judgment on liability is upheld and this judgment will be limited to the quantum payable to the Plaintiff.

2. The cause of action arose out of an accident on 20.1.1994 involving motor vehicles registration numbers KAC 808A belonging to the Defendant and KAA 998 R belonging to the plaintiff. From the evidence of PW3, Duncan Katambwa and PW1, Eva Wangari Magua, the accident occurred when the driver of KAC 808 rammed head-on into KAA 998 R and the latter was completely destroyed and was subsequently written off. The accident occurred at Mukuyuni Bridge along the Masii–Machakos Road. According to P. Exhibit 1 the proceedings in Machakos CMCR. Case No. 953/94 the driver of KAC 808 A was convicted of the offence of reckless driving contrary to section 47 (1) of the Traffic Act, Cap 403 and that of driving the said motor vehicle without a road service license and having admitted both offences, was sentenced in count 1 to a fine of Kshs. 3,000/= and in default 3 months imprisonment and on count 2 to a fine of Kshs.600/= or in default 2 months imprisonment.

3. In the Plaint, the plaintiff at paragraph 6 thereof avers as follows:-

“By reasons of the matters aforesaid the plaintiff’s vehicle KAA 998 R was extensively damaged;

Particulars

a. Pre accident value Kshs. 771,730.00

b. Assessors Fees..... Kshs. 11,287.00

c. **Towing Charges** **Kshs. 5,000.00**

d. **Loss of User**..... **Kshs. 800,000.00**

Kshs. 1,588,000.00

4. Each of the above items has to be strictly proved and in respect of item (a), the Plaintiff's insurers sought three different valuations of the motor-vehicle, and according to PW2, Michael Ndegwa Githinji, a motor vehicle loss assessor, the average pre-accident value of the motor vehicle based on the three valuations was Kshs. 771,730/=. I have seen P. exhibit 2 and the valuations by M/S Assessors Easter Africa Ltd dated 1.7.1994 was Kshs. 663,841/= P.exhibit 3, the valuation by M/S Accident and General Investigations was Kshs. 750,000/= while that by M/S Autofield Assessors was Kshs. 1,053, 079/=. The average of Kshs. 771,730/= is unchallenged, is reasonable and I uphold that part of the claim.

5. Item (b) above is also properly proved because all the receipts produced by PW1 indicate that all the three assessors were paid a total of Kshs. 11,278/= which figure is unchallenged and I cannot fault the claim either. I uphold that claim.

6. Item (c) was not proved and I cannot award the Plaintiff the sum of Kshs. 5,000/= because all he said was,

"I paid Kshs. 5,000/= as towing charges. I have no receipt."

Without strict proof that claim is a mere statement of unproved facts and must fail.

7. Regarding item (d) the Plaintiff in his evidence before me stated as follows:-

"I claim Kshs. 800,000/= as loss of user because I used to use the vehicle for transporting materials including ballast, mangoes and charcoal. I made Kshs. 3,600/= -4,000/= per day. I do not have documents but I have some for Major Ngomba. I also supplied some schools e.g Kilonzo Secondary School."

8. He produced P. exhibit 8, a bundle of documents in a bid to prove this item, and I have looked at them. The letter from Kilonzo Secondary School is dated 12.2.2008 and the Principal of the school merely confirmed to the Plaintiff that he had done some work for the school in 1993 with his "**lorries**". The amount spent and the particular lorry of the "**lorries**" involved was not stated. Presumably also, the Plaintiff got paid for his work and I do not see what help that document is in respect of proof of the item under consideration.

9. The next document is dated 14.6.1997 and relates to an outstanding claim of Kshs. 25,180/= due to Kamba Timber and Hardware Store of Kitui. It is signed by one Onesmus Mitau on behalf of the store. Together with it is a letter dated 22.3.1993 from one M.K. Ngomba relating to certain materials he required from M/S Kamba Timber & Hardware and invoices and delivery notes are attached to it. I have tried to reconcile all these documents with the item and I am unable to fairly find that the loss of user is proved by the documentation. I say this with respect and sympathy to the Plaintiff because a specific sum is claimed and it must like all special damages be proved strictly. It would be a travesty of justice to award Kshs. 800,000/= based entirely on the Plaintiff's evidence and what I may loosely term speculative attempts at proof. If the Plaintiff was paid by Kilonzo Secondary school and by Major Ngomba what loss of user has he suffered? I submit none and in any event none has been properly proved? In the end therefore, judgment must be entered in the sum of Kshs. 783,000/= only in favor of the Plaintiff. Costs of the suit and interest thereon shall also be paid to the Plaintiff as prayed in paragraphs (b) (c) (d) of the Plaint.

10. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **April 2008**

ISAAC LENAOLA

JUDGE

In the presence of :- Mr.Ngolya holding brief for Mr. Ondabu for Plaintiff

No Appearance for Defendant

ISAAC LENAOLA

JUDGE

29/4/2008