



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Cas 45 of 2002

JASPER JUMA NZUKI PLAINTIFF

VERSUS

JAMES WANYAMU MATHUKU 1ST DEFENDANT

MUTUKU WANYAMU 2ND DEFENDANT

JUDGMENT

1. On 11/4/2002, the Plaintiff Jasper Juma Nzuki filed this suit. He averred in his Complaint that he was the registered owner of M/V registration number KAE 694 Q, Isuzu Mini bus and that on 16/10/1999 at about 9.00 a.m. it was involved in an accident with M/V registration number KAL 902 C Nissan Atlas owned by the 1st Defendant but driven by the 2nd Defendant. The alleged accident occurred along Kitui/Mutomo area at Mbitini and that the 2nd Defendant's negligent and reckless control of the motor vehicle caused the accident and that at all times, he was an authorized servant and/or agent of the 2nd Defendant. The particulars of negligence are given at paragraph 6 of the Complaint as;

- a. Driving at a speed that was too excessive in the circumstances.
- b. Failing to keep any or any proper look-out or to have any or any sufficient regard for other road users reasonably expected to be on the said road.
- c. Failing to exercise or maintain any or any proper or effective control of the said motor vehicle registration number KAL 902 C.
- d. Causing or permitting the said motor vehicle registration number KAL 902 C suddenly and deliberately turn to the path of the Plaintiff's motor vehicle and thereto violently collide with motor vehicle registration number KAE 694 Q when he knew or ought to have known it was unsafe and dangerous so to do.
- e. Deliberately and maliciously pushing the Plaintiff's said motor vehicle registration number KAE 694 Q out of the road.
- f. Causing an obstruction on the said road.

- g. Failing to give any or any sufficient warning or signal of his approach.
- h. Driving in a careless and reckless manner.
- i. Failing to stop, to slow down, to swerve or in any other manner so to manage or control the said motor vehicle as to avoid the said accident.

2. It is further averred in the Plaint that as a result of the accident aforesaid, motor-vehicle registration number KAE 694 Q was extensively damaged and the Plaintiff suffered loss and damage as follows:-

- a. Police Abstract Kshs. 100.00
- b. Assessment Fee Kshs.14,000.00
- c. Towing Charges Kshs.29,000.00
- d. Cost of repair and Spare parts Kshs.933,057.10 (as

amended in court)

Kshs.976,157.10

3. It was the Plaintiff's other claim that he lost the use of the said motor-vehicle for three (3) months and since it was a public service vehicle bringing in Kshs.10,930.00 a day, he claimed loss of use for that period. Costs and interests thereon are also now sought.

4. In a Statement of Defence and Counter-claim filed on 2/5/2002, the accident is admitted but the particulars of negligence are denied. The damages and loss are also denied and instead it is averred that the accident was caused by the negligence of the driver of M/V registration number KAE 694Q and the particulars thereof are given as follows:-

- a. Driving at an excessive speed in the circumstances.
- b. Failing to keep any or to have any or any sufficient regard for other road users expected to be on the road.
- c. Failing to notice the presence of the First Defendant's motor vehicle on the road to avoid the accident.
- d. Failing to exercise or maintain any or any proper or effective control of the motor vehicle registration number KAE 694Q.
- e. Colliding with the Defendants motor vehicle.
- f. Failing to stop, to slow down, to swerve or in any other manner so to, manage or control the motor vehicle so as to avoid the accident.

5. In the Counter-claim, the Defendants seek special damages as follows:-

- a. Police Abstract Kshs. 100.00
- b. Cost of repair and spare parts Kshs. 30,000.00
- c. Towing Charges Kshs. 29,500.00

d. Legal Costs Kshs. 62,500.00

Kshs.122,100.00

6. It is also claimed that motor-vehicle registration number KAL 902 C was also a public service motor vehicle and while being repaired, the 1st Defendant lost its use for seven (7) days and that loss is counter-claimed in the suit.

7. All the claims in the Defence and counter-claim are denied seriatim in a Reply to Defence and Defence to counter-claim filed on 22/5/2002.

8. Wendoh J. commenced hearing of this suit on 22/9/2004 and in evidence, Francis Nzuki Nyamai, father and lawful attorney of the Plaintiff said that on 16/10/1999, he received a report regarding the subject accident and he proceeded to the scene. He noted the damage to the two motor-vehicles and he arranged for M/V KAE 694 Q to be towed to Kitui Police Station. He was issued with a Police Abstract (P. Exh. 2) and later he had the damage assessed. A report was produced as P Exh.3 while he paid Kshs.14,000/= to the Assessor (P. Exh.4). He towed the vehicle to Nairobi for repairs and he paid Kshs.29,000/= to do so. The repair charges came to Kshs.933,057/=. He stated that his son, the Plaintiff was stationed in Switzerland but paid his taxes and his profit per year from the mini bus was Kshs.1,681,017 in 1999. That he lost Kshs.10,390/= per day for the period the bus was grounded.

9. PW2, Patrick Musee Nzuki, a brother of the Plaintiff recalled that he was the conductor in motor vehicle KA3 694Q. He stated that the two motor vehicles were on the same road and as they were being driven towards Kitui, the driver of KAL 902 C overtook KAE 694 Q at Nzangathi. At Katothia area, KAE 694 Q overtook it but at Nzambani Secondary School, KAL 902C overtook the other. At Kyuluni, apparently KAE 694 Q tried to overtake KAL 902 C and the driver indicated that he wanted to do so. According to PW2, KAL 902 C was being driven in the middle of the road and on a sloppy area, KAE 694 Q made as if to overtake but the other vehicle blocked it and as it swerved back to the left, the two collided as KAL hit it on that side and it went off the road and overturned.

10. It was the evidence of PW1 and PW2 that on three previous occasions, KAL had blocked KAE and the matter had been taken to the 1st Defendant by PW1 but according to PW1, it was resolved amicably although it was intentionally done by children of the 1st defendant.

11. When PW2 was cross-examined he stated inter alia as follows:-

“KAL stopped...after the accident about 50 metres away. It was in high speed... They had blocked us 2 times before their father would talk to them. It is related to this case because it is blocking us that the accident occurred (sic).”

12. He later retracted the evidence of high speed when he was re-examined.

13. PW3, Joel Kitungu was working as the receipt writer in KAE 694Q on the material day and it was his evidence that the subject motor vehicles kept overtaking each other as they raced towards Kitui and that on the slope of Nzeu River, as KAE attempted to overtake KAL, the latter swerved to the right forcing the driver of KAE to brake and swerve to the left. The vehicles then collided.

14. PW4, Davis Mulinge Muimi, a Senior Clerical Officer stationed at Kitui Law Courts produced the record for **Kitui Traffic Case No.1319/1999** where the accused was one Mboya Kithuku. He was acquitted under Section 215 of the Criminal Procedure Code.

15. PW5, Fred Mukabwa, a mechanic produced receipts showing that KAE 694 Q was repaired for Kshs.933,057.10.

16. The defence called DW1, James Mutuku Wanyamu who was driving KAL 902 C on the material date. He stated that he was driving at 40 kph and that he was keeping to his lane when KAE tried to overtake on the left side but something happened and it crashed into the back of KAL. The driver of KAL told him that the steering of KAE had broken and that is why he lost control of the vehicle. His name was Mboya Kithuka and he was charged with a traffic offence. DW1 denied any negligence on his part and that Mboya had since died.

17. DW2, Mwema Ndambuki gave evidence similar to that of DW1 and I see no need to repeat it save that he denied the evidence that KAL tried to block KAE just before the accident occurred.

18. From the pleadings, evidence and submissions by advocates for the parties, these are the questions I should answer:-

- i. Since the accident is admitted, what caused it?
- ii. Who was negligent if all, in the control and/or management of the two motor vehicles?
- iii. To whom should liability attach and what quantum, if at all is payable?
- iv. Costs.

19. On the first question, the preliminary report by the police was to the effect that the driver of KAE 694Q was to blame for the accident and he was duly arraigned in the Kitui SRM'S Court to face the charges of careless driving contrary to section 49 (1) of the Traffic Act, and carrying excess passengers contrary to section 100 (2) of the Traffic Act. I have gone through the proceedings in **Kitui SRM'S Court Traffic Case No.1319/1999** and I agree with the advocate for the Plaintiff that the evidence of the witnesses for the prosecution was clear; that KAL was being driven in a zigzag manner and that it blocked KAE and then the accident occurred. In fact in his judgment, the learned trial magistrate, Njeru Ithiga Esq, SPM stated as follows:-

“From their testimonies, they (witnesses) exonerated their driver (the accused) and implied that the police should have arrested and charged the driver of M/V KAL 902 C JAMES MUTUKU WANYAMU with the offence of careless driving. The witnesses were called to support the prosecution. I think they testified as to the truth. They were not declared hostile. The evidence of PW7, PW8, PW9 and PW10 still remains (and) is not sufficient to prove the charge...”

The witnesses referred to were Agnes Mutua, Zipora Ngina Kisengese, Francisca Lemi and Musyoka Mukumbu and Titus Tundu and they were all passengers in KAE 694Q and gave similar evidence as above and I agree that their evidence is still relevant in this suit because it is similar to the evidence given in favour of the Plaintiff in the present suit.

20. Two other pieces of evidence are relevant at this point; the fact that prior to the incident, KAL had thrice blocked KAE on the same road, a fact that was actually not denied by the Defendants. The other is the admitted fact that the driver of KAL at all material times had no business being in the wheel because he had no driving license.

21. I am convinced in any event that on a balance, it is the driver of KAL who caused the accident by his reckless, unlawful manner of driving the subject motor-vehicle. I agree therefore that following the decision in **Salim & Another vs Kikava (1989) KLR 534** where there are two conflicting versions as to how an accident occurred, a judge is obligated “...on the issue of negligence... to consider the evidence before him and make a finding as to which version he accepted as true.” In this case, the evidence by the Defendants that the steering wheel of KAE broke hence the accident is an afterthought. In his evidence before the traffic court, James Mutuku Wanyamu said this;-

“I tried to avoid corrugation by turning to the right. When I swerved back is when the collision took

place.”

22. This evidence is consistent with the case for the Plaintiff and all other evidence by the Defendant pales away.

23. In answer to the first and second questions above, I am of the humble view that the accident was caused by the negligence of the driver of KAL 902 C and the counter-claim fails.

24. Having so said, liability must attach to the defendant.

25. On quantum, it is not denied that KAE was extensively damaged and it can only be true that Kshs.933,057.00 was spent in repairs as was the evidence of PW5, Fred Mukabwa. That amount was pleaded after amendment of the Plaint. Receipts for repairs and purchase of spare parts were produced and I see no reason to deny that sum.

26. The assessors fee of Kshs.14,000/= can only be but awarded as it was pleaded, proved in evidence and is in any event unchallenged. That also goes for the towing charges of Kshs.29,000/= and Police Abstract fee of Kshs.100/=.

27. Regarding loss of user, it is admitted that KAE 694 Q was a public service vehicle and that it brought in income. The Income Tax Report for 1999 when the accident occurred showed that the Plaintiff earned Kshs.1,681.017 from the motor vehicle That translates into Kshs.4,605.50 per day. It cannot be Kshs.10,390/= per day because what counts is the net profit lost when the vehicle was grounded and not in use. It has not been denied that the motor-vehicle was not in use for three (3) months which is equivalent to 90 days. This means that the proper sum to award for loss of user is Kshs.414,495/= and not Kshs.983,700/= as was claimed.

28. In the end therefore, I shall enter judgment as follows in favour of the Plaintiff even as I dismiss the Defendant’s counter-claim;-

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|--------------------|---------------------|
| a. Repair charges | Kshs. 933,057.00 |
| b. Assessor’s fees | Kshs. 14,000.00 |
| c. Loss of User | Kshs. 414,495.00 |
| d. Towing charges | Kshs. 29,000.00 |
| e. Police Abstract | Kshs. <u>100.00</u> |

Kshs.1,390,662.00

Costs shall be awarded to the Plaintiff.

Dated and delivered at Machakos this 17th day of **September** 2008.

ISAAC LENAOLA

JUDGE

In the Presence of: Mr Mati holding brief for Mr Tindika

Mr A.K. Mutua holding brief for Mr Thigu

ISAAC LENAOLA

JUDGE