



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 653 of 1996**

**KENYA BROADCASTING CORPORATION.....PLAINTIFF**

**VERSUS**

**PAUL MBURU MUTHUMBI.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff commenced this suit by way of plaint which was filed in court on 15/09/1996 claiming that its motor vehicle registration number KAB 268B was damaged during an accident that occurred along Waiyaki Way involving the said motor vehicle and the Defendants motor vehicle registration number KYU 099. The Plaintiff ascribed the cause of the accident to the driver of the Defendants motor vehicle who the Plaintiff alleged –

- (a) *Drove the said motor vehicle without due care and attention;*
- (b) *Drove the said motor vehicle at an excessive speed in the circumstances;*
- (c) *Failed to keep any or any proper look out;*
- (d) *Failed to have any or any sufficient regard for the safety of other motor vehicles especially motor vehicle registration number KAB 268B.*
- (e) *Failed to apply the brakes of the said motor vehicle sufficiently in time or at all;*
- (f) *Failed to stop, slow down, swerve or in any way to steer, manage or control the said motor vehicle so as to avoid the said collision;*
- (g) *Caused the said collision;*

2. The Plaintiff averred that as a result of the said accident it suffered special damages in the sum of Kshs.716,038.00 broken down as follows:-

Pre-accident value                      Kshs.950,000.00

Less Salvage                              Kshs.245,000.00

Kshs.705,000.00

Police Abstract Report                  Kshs. 100.00

Assessment fees	Kshs. 2,478.00
Investigation fees	Kshs. 4,740.00
Costs of obtaining traffic	
Case Proceedings	<u>Kshs. 3,720.00</u>
Total	<u>Kshs.716,038.00</u>

and the Plaintiff claims the said sum from the Defendant together with costs and interest thereon at court rates and such other relief as this Honourable Court may deem just to grant.

3. The Defendant filed defence on 11/09/1998. Apart from admitting that the accident occurred the Defendant denied the allegations of negligence ascribed to his driver, servant and or agent and instead blamed the Plaintiff's driver, servant and/or agent for the same and accused him of:-

- (a) ***Failing to control motor vehicle registration KAB 268B properly.***
- (b) ***Failing to keep any or proper look out.***
- (c) ***Driving the said motor vehicle KAB 268B at an excessive speed in the circumstances.***
- (d) ***Failing to stop, slow down, serve or otherwise control the said motor vehicle KAB 268B in such a manner so as to void the said accident.***
- (e) ***Failing to apply the brakes of the said vehicle sufficiently in time or at all.***
- (f) ***Failing to observe the movement of motor vehicle KYU 099 on the public road.***
- (g) ***Allowing motor vehicle registration KAB 268B to collide with motor vehicle KYU 099 thereby causing the said accident.***
- (h) ***Changing lanes without ascertaining when it was safe so to do and when it was unsafe and dangerous so to do.***

4. At the hearing of the suit, the Plaintiff called three witnesses. PW1, Mr. Benjamin Lekume stated that prior to his retirement into farming he was in the employ of the General Service Unit (GSU) and attached to the Plaintiff herein as a security guard and used to escort the Plaintiff's vehicles. He recollected that on 31/10/1994, he was in the Plaintiff's motor vehicle registration No. KAB 268B driving along Waiyaki Way at about 5.30 a.m. This vehicle, he said, was being driven by one Johnson Kithome. PW1 testified further that as they drove along, they caught up with the Defendant's Isuzu bus – known as Mbukinya – registration No. KYU 099. He said that while the bus was moving in the middle lane their vehicle was in the left lane just near the International Casino. He stated further that after the Plaintiff's motor vehicle went past the bus, the bus accelerated, cut into their lane and hit the Plaintiff's motor vehicle from the rear at the rear back side, causing the Plaintiff's motor vehicle to lose control. He said the bus again followed the Plaintiff's motor vehicle and hit the Plaintiff's motor vehicle again on the left side near the driver's side. The Plaintiff's motor vehicle rolled onto the other side of Waiyaki Way and landed there. He said that Johnson Kithome who was driving the Plaintiff's motor vehicle died on the spot while PW1 sustained some minor injuries. Another person in the vehicle suffered a fractured right hand. PW1 stated further that thereafter he reported the matter to the Plaintiff's management who later reported the accident to Kilimani Police Station. PW1 stated that it was the Defendant's driver servant and/or agent who was responsible for the accident; and that indeed the said driver was later charged with the offence of causing death by dangerous driving.

5. PW2 was Charles Kioko Ndeto who said that while he was on duty at the Plaintiff's premises where

he worked as the Incharge of transport, he received a report of the accident from PW1, Benjamin Lekume. He said that he made a report of the accident to the Nairobi Area Police and thereafter the driver of the Defendant's motor vehicle, one Stephen Gagagiri Gacuri was charged with the offence of causing death by dangerous driving and also for failing to stop after an accident in traffic case No.2771 of 1994, though eventually the accused was discharged under Section 87(a) of the Criminal Procedure Code as per PExhibit 2. PW2 also produced the Police Abstract as PExhibit 1.

6. PW2 stated further that the Plaintiff's motor vehicle was a write off. He said also that the Plaintiff was paid a salvage value of Kshs.245,000/= as opposed to the pre-accident value of Kshs.950,000/=, leaving an unrealized amount of Kshs.705,000/=. PW1 stated further that the Plaintiff spent additional amounts in getting the police abstract, having the vehicle assessed after the accident, investigation into the accident and payment for the traffic case proceedings. The Discharge Voucher by Corporate Insurance for Kshs.245,000/= was produced in evidence as PExhibit 3. PW2 explained that the vehicle was underinsured because it had been bought duty free.

7. PW3 was **JOHN KINUTHIA KARIUKI**, a Claims Officer with Corporate Insurance Co. Ltd. He confirmed that motor vehicle registration No. KAB 268B had once been comprehensively insured by his employer for a period of one year from 22/10/1992 for Kshs.567,383/=. He said that after the vehicle was involved in an accident, it was taken to Toyota Kenya at Corporate Insurance's behest and that the assessment was done by Phoenix Assessors. That the motor vehicle was declared a write off. He said that the repair costs were assessed at Kshs.909,792/40 against the insured value of Kshs.567,382/= and the pre-accident value of Kshs.950,000/=. The Assessors Report was put in evidence as PExhibit 4. Credit Note No. 1859 dated 8/09/1995 was produced as PExhibit 5 while the cheque for requisition for the salvage value was produced as PExhibit 6. The invoice for assessment costs of Kshs.2,478/= was produced as PExhibit 7. The payment cheque for the assessment costs was produced as PExhibit 8. The highest bid for the salvage value of the motor vehicle as given by Juttla & Sons was produced as PExhibit 9. PW3 also stated that because of the accident, Corporate Insurance suffered further investigation costs in the sum of Kshs.4,740/= which amount was paid vide cheque number 8658 dated 31/03/1995 as per the Cheque Requisition put in evidence as PExhibit 10. Further PW3 stated that though the Investigator Corporate obtained court proceedings for which he was paid Kshs.3,720/= as per invoice No.448 dated 12/07/1995 and paid by cheque number 10656 dated 21/09/1995 through invoice dated 12/07/1995 and produced in evidence as PExhibit 11. The Cheque Requisition Form was produced in evidence as PExhibit 12.

8. PW3 explained that through the expenses were incurred by Corporate as insurer of the Plaintiff, these costs were recoverable from the negligent party. He also explained that though the amount paid by Corporate was the sum insured the Plaintiff is entitled to claim for the full value of the vehicle before accident.

9. Although the Defendant was duly served through his advocates, he did not appear at the hearing, therefore he tendered no factual evidence Mr. Gathogo, who was duly instructed by the firm of Wambugu, Mutende & Company Advocates appeared for the Plaintiff and also tendered written submissions. It was submitted on behalf of the Plaintiff that there was no doubt that it was the Defendant's motor vehicle Registration Number KYU 099 that caused the accident. Mr. Gathogo urged the court to find the Defendant 100% liable in negligence for the accident.

10. On quantum, it was submitted on behalf of the Plaintiff that the Plaintiff had proved the particulars of special damages as pleaded. Mr. Gathogo urged the court to find and to hold that the pre-accident value of the Plaintiffs' vehicle had been proved through the Assessment Report produced in evidence as PExhibit 4. He relied on the case of **Peter Njuguna & Another –vs- Ann Moraa – CA No. 23 of 1991** cited in **Summer Limited Meru vs Moses Kithinji Nkanata – HCCA No. 89 of 2004 at Meru** (unreported) where it was held that the pre-accident value of a motor vehicle is awardable only if there was evidence of that value. Regarding the other items adding up to the special damages, Mr. Gathogo submitted that each of the items had been specially proved through the various exhibits whose evidence remains uncontroverted. I would thus agree with counsel for the Plaintiff that in the absence of any other evidence to controvert the Plaintiff's evidence, I am satisfied that the Defendants motor vehicle KYU 099

was solely responsible for the accident that resulted in the loss of the Plaintiff's motor vehicle and also the death of the Plaintiff's employee.

11. Regarding the relationship between the Plaintiff and its insurer, M/s Corporate Insurance Company Ltd, Mr. Gathogo submitted that this was the relationship of insured and insurer. Quoting from Volume 25 of **Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 330**, Mr. Gathogo stated that the Plaintiff in this case is entitled to the sums claimed under the doctrine of subrogation. At paragraph 331(3) of the same volume of Halsbury's Laws of England, it is stated that the assured always remains the person who had control of the suit in any action. In the other cited authority of **Khanna vs Samuel [1973] EA 225**, Harris J stated as follows at pages 228-229.

*“Turning now to a consideration of the legal basis of the plaintiff's claim, it is trite law that moneys received by a plaintiff under a policy of insurance effected by him covering damage to his car through the negligence of a defendant cannot be taken into account by way of reduction of damages payable by that defendant. The principle here is that the right to payment of such moneys is merely res inter alios acta and therefore collateral, with the result that the receipt of such moneys by the plaintiff is quite irrelevant to his claim against the defendant. The rule was stated a century ago by Baron Pigott in Bradburn vs Great Western Rly. Co. (1874), L.R. 10 Ex. 1, where referring to a plaintiff who was the beneficiary under a policy of insurance covering the loss in respect of which his claim against the defendant was brought, he said at p.3.*

*“the plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; and accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.”*

12. In the **Khanna** case, it was held that **“the damage to the car should be reduced by the extra amount for which the wreck had been sold”**. In the instant case, the Plaintiff's position is that the car was a write-off and that it only fetched Kshs.245,000/= which the Plaintiff has in fact subtracted from the pre-accident value of the car. The Plaintiff in my view is thus entitled to the difference between the pre-accident value and the salvage value.

13. In the result, I am satisfied that the Plaintiff has proved his case both on liability and on quantum. Accordingly I enter judgment on liability for the Plaintiff as against the Defendant at 100%. On quantum I enter judgment for the Plaintiff as against the Defendant in the sum of Kshs.716,038.00 made up as follows:-

(i)	Pre-accident value.....	Kshs.950,000.00
	Less	
(ii)	Salvage Value.....	<u>245,000.00</u>
		<u>705,000.00</u>
(iii)	Police abstract Report.....	100.00
(iv)	Assessment Fees .....	2,478.00
(v)	Investigation Fees .....	4,740.00
(vi)	Costs of obtaining Traffic case proceedings	<u>3,720.00</u>
Total		<u>Kshs.716,038.00</u>

The Plaintiff will also have costs of the suit and interest thereon at court rates.

It is so ordered.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of November, 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

..... For the Plaintiff

.....For the Defendant