



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 32 of 2004

TABITHA KERUBO OMAMBIA PLAINTIFF

V E R S U S

AKAMBA PUBLIC ROAD SERVICE LTD. DEFENDANT

J U D G E M E N T

Tabitha Kerubo Omambia (the Plaintiff) is an adult female residing in Kakamega Municipality according to her pleadings. Her motor vehicle registration No. KAG 857J was involved in an accident on 11.9.99 along Luanda-Kisumu road in Luanda township. A Scania bus reg. No. KAJ 155A owned by Akamba Public Road Services Ltd. (the Defendant) was allegedly driven so negligently by an agent of the Defendant that it collided with the Plaintiff's said motor vehicle and destroyed it beyond repair.

The Plaintiff filed a suit against the Defendant claiming special damages in the sum of Shs.755,100/= for the loss of the said motor vehicle in Civil Suit No. 530 of 2002 in the Chief Magistrate Court at Kakamega. The original plaint was and still is missing in the court file. What is in the court file is Amended Plaint in the suit filed on 05.06.2003 and an amended statement of defence filed on 11-6-03 in which virtually all the allegations made by the Plaintiff in the plaint are denied.

On 4-4-2004, the Plaintiff applied in Kakamega H.C. Misc. Application No. 18 of 2004 for transfer to this court of Kakamega CMCC No.530 of 2002 which is now the suit herein, namely Kakamega High Court Civil Suit No. 32 of 2004. The order for the transfer was made on 5-3-2004 by consent of both counsel appearing for the plaintiff and the defendant.

The records placed before the court also show that on 18-10-2001, the Plaintiff did file a suit No. Kakamega H.C.C.C. No. 114 of 2001 against the Defendant claiming special damages in the sum of Shs.755,100/= for the loss of the said motor vehicle in the said accident. Appearance was entered by the Defendant on 16.11.01 to the suit and defence was filed on 23-11-01.

Before delivering judgement in this suit, I examined the effect on the suit herein of the pendency of suit No. 114 of 2001 in view of section 6 of the Civil Procedure Act, Cap 21. I observe that in his affidavit sworn on 4-2-2004 in Kakamega H.C.Misc. Civil Appl. No. 18 of 2004, Mr. Samba, learned counsel for the Plaintiff, deponed that suit Kakamega HCCC. 114 of 2001 was transferred to the lower court upon enhancement of the Chief Magistrate's jurisdiction to Shs.3 million and the same was registered in the lower court as Kakamega CMCC. No. 530 of 2002. Following the transfer of the Chief Magistrate from Kakamega, and there being no other magistrate with jurisdiction to the extent of Shs.3. million, the

Plaintiff sought transfer of the suit Number 530 of 2002 to this court, whereupon the order of 5-3-2004 aforesaid was made transferring the case to this court which was registered as Kakamega HCCC. No. 32 of 2004, being the suit herein. The issue of stay of suit under section 6 of the Civil Procedure Act does not therefore arise.

When the hearing of the suit opened on 21.9.04, Mr. Samba, learned counsel, appeared for the Plaintiff and Mr. Menezes, learned counsel, appeared for the Defendant. The Plaintiff testified that she had purchased motor vehicle reg. KAG 857J on 27.8.99 for Kshs.750,000/= from one Elijah Chimwani. She produced a sale agreement (Exhibit No. P1) dated 27.8.99 which stipulated, inter alia, that the Vendor of the said motor vehicle had received the purchase price monies except a balance of Shs.103,000/= which was to be paid within two months of the date of production by the Vendor of a log book and a signed transfer. The Plaintiff's driver died in the said accident in which all the passengers in the Plaintiff's said motor vehicle died. The driver of the Defendant's Scania bus reg. No. KAJ 155A, one John Funzi Tobila, was subsequently charged in SRM Cr. Case No. 816 of 2002 at Maseno with dangerous driving C/S 46 of the Traffic Act, Cap 403 in connection with the said accident and on 28.1.2004 was convicted of the offence and fined Shs.20,000/= and in default to a term of imprisonment for a period of 12 months. This evidence was contained in the police file, (exhibit No.P9).

The Plaintiff's claim for Shs.755,100/= was supported by the Assessment Report (exhibit No. P2) in which one Aggrey Kida, who was deceased at the time of the hearing had assessed the Plaintiff's matatu prior to the accident at Shs.755,100/=. One Moses Muthami, a partner and workmate of Aggrey Kida testified that the assessment report was signed by the latter and that he was privy to the inspection of the Plaintiff's matatu prior to the making of the assessment report. He was unable to show that he and Aggrey Kida had relevant or any qualifications as assessors. He signed exhibit No.P3 and ascribed Shs.45,000/= as the value of the salvage of the matatu.

The Plaintiff used the matatu to run matatu business. She called as PW3 her son, Daniel Were, who testified that he kept the recordings of the money the matatu business made from 1.9.99. The note Book produced as Exhibit No. P7 showed that the net sum per day made by the matatu between 1.9.99 and 11.9.99 vasculated between Shs.2500/= and Shs.3300/=.

The Defendant did not call any evidence but both parties put in written submissions.

It was not in dispute that the accident occurred on 11.9.99 between the two motor vehicles. The Defendant did not deny ownership of Scania bus No. KAJ 155A nor that it was being driven on the material date by its servant and/or agent. Evidence in exhibit No. P9 to the effect that the driver of the Scania bus No. KAJ 155A was prosecuted and convicted of dangerous driving (which resulted in the damage to the Plaintiff's matatu and deaths of the passengers in the matatu) was not controverted. The conviction of dangerous driving is *prima facie* evidence that the driver of the Scania bus No. KAJ 155A was negligent. Such *Prima facie* evidence was not rebutted by the Defendant which called no evidence.

The Defendant contended that the Plaintiff could not maintain the claim because the matatu KAG 857J had not been registered in the name of the Plaintiff as at the time of the accident. Was the Plaintiff excluded by law from suing to recover the value of the matatu on the ground that the matatu had not been registered in her name and did not have its log book as a result. It was shown in evidence that the Plaintiff had purchased the matatu and that the seller had given the matatu to the plaintiff and that the latter was running a matatu business with it for her own benefit and to all intents and purposes she dealt with the matatu as if it was her own property save that the seller withheld a signed transfer and log book pending payment of the balance of the purchase price of Shs.103,000/=. The issue in this case is not whether the Plaintiff could prove she owned the matatu in which case she would have to produce a certificate of search or the log book itself. Rather, the issue was whether the claim was maintainable in absence of registration of the plaintiff as the legal owner of the motor vehicle whose value she claimed. The sale of the matatu in this case was governed by the provisions of the Sale of Goods Act, Cap 31. The circumstances of the sale of the matatu to the Plaintiff show that the parties intended the property in the matatu to pass on possession being given to the plaintiff not least because the latter was entitled to deal with the matatu as if she was the legal owner thereof including trading with it for her own benefit. The

retention of the log book and transfer form by the seller, was, ostensibly, to act as security for the unpaid balance of Shs.103,000/=. The agreement, viewed in the light of the evidence, does, to my mind, show that the property in the matatu had passed to the plaintiff on 27.8.99 when the latter bought it. This is my finding. In effect therefore, when the accident occurred on 11.9.99, the matatu belonged to the plaintiff even though registration of her name with the Registrar of Motor Vehicles had not been effected.

The property in the matatu having passed to the plaintiff prior to the accident, the plaintiff was entitled to claim its loss as she did. I observe that, as at 11.9.99 when the accident occurred, the matatu was lawfully on the road and section 9(1) of the Traffic Act had not been breached. And even if it were to be argued that it was breached, nevertheless in circumstances such as these, such breach would not undermine the claim although it might give rise to a violation which would result in a traffic offence.

The matatu cost Shs.750,000/= on 27.8.99. It was written off (with a salvage of Shs.45,000/=) on 11.9.99. The report by the assessors was not made by competent persons and it is my finding that it was not made by persons with expertise and therefore lacked value as a valuation report. But the matatu was in working condition and was on the road. Mr. Oloo, the defendant's counsel, puts its pre-accident value at 400,000/= less salvage. The Plaintiff claims Shs.780,000/= for the matatu. At the point in time when it was irreparably damaged in the accident, it was in working condition and was plying its route carrying passengers. But at the point in time when it was valued, it was a decrepit and valueless mangled wreck. Having been purchased on 27.8.99, the matatu had been on the road for barely a month when the accident in which it was destroyed on 11.9.99 occurred. It had cost the plaintiff Shs.750,000/=. This is not disputed. Nor is it suggested this price was inflated or did not represent roughly its value. The burden of proving that the matatu was valued Shs.780,000/= rested on the Plaintiff. On the evidence placed before the court, it would not be unreasonable to take that the price paid for it roughly represented its value for the simple reason that being a second hand vehicle, its condition dictated the price and generally reflected its value. Allowance for depreciation for about a month, ought to be made. It is my finding, after weighing all the circumstances and the evidence, that a sum of Shs.680,000/= as the pre accident value for the matatu would not be unrealistic. To that figure, I add Shs.100/= being the cost of the police abstract.

The Plaintiff prayed for compensation for loss of business at the rate of Shs.2500/= per day from 11.9.99 until the finalization of the suit. The Defendant's contention was that the Plaintiff was not entitled to more than days of loss of user. Quite correctly, the Defendant's counsel contended that the plaintiff was enjoined to mitigate her loss. The Defendant's counsel contended that a figure of Shs.2,000/= per day was the right figure for the loss suffered by the plaintiff. From the evidence tendered by the Plaintiff and Daniel Were, (PW3), it is my finding that the net sum made per day in the matatu business vacillated between Shs.2,500/= and 3600/= per day except on 5-9-1999 when it was Shs.1900/=. On the evidence and on the balance of probabilities it is my finding that a net figure per day of Shs.2,500/= is reasonable. It is not reasonable for the plaintiff to expect that the loss claimed should be had for the period from the date of the accident, to the date of finalization of the suit for the simple reason that the plaintiff was under a duty to mitigate the loss. Both Mr. Samba, learned counsel for the plaintiff and Mr. Oloo, learned counsel for the Defendant, were in concurrence in their submissions that the plaintiff is entitled to loss of business for a period of 21 days. It is my finding therefore that the plaintiff is entitled to compensation for loss of business for 21 days at the rate of Shs.2500/= per day. I therefore find that the Plaintiff has proved her claim on the balance of probabilities to the extent of Shs.732,600/= made up as follows:-

(i) Plaintiff's claim for the matatu reg.

No. KAG 857J Shs.680,000/=

(ii) Loss of business at the rate of Shs.2,500/=

per day for 21 daysShs. 52,500/=

(iii) Costs of police abstract form Shs. 100/=

Total.....Shs.732,600/=

In the result, I give judgement in favour of the Plaintiff against the Defendant in the sum of Shs.732,600/=. The said sum shall carry interest at court rates from the date of this judgement until full payment. The Defendant shall pay the costs of the suit.

Dated, signed and delivered at Kakamega this 15th February, 2007.

G. B. M. KARIUKI

J U D G E