



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

**Civil Case 1847 of 2002**

**AKAMBA PULIC ROAD SERVICES LTD .....PLAINTIFF**

**V E R S U S**

**1. BERNARD GITHATHU KAMAU**

**2. SHAGGY INVESTMENTS LIMITED .....DEFENDANTS**

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

On 29<sup>th</sup> March, 2000 there was a horrifying accident along the Nakuru–Kericho highway. It involved two buses: registration number KAE 283 D owned by the Plaintiff, and registration number KAJ 779 R. The two buses collided head-on. Bus KAE 283 D burst into flames on impact and was burned to a shell. There were many deaths, including both drivers.

It is the Plaintiff’s case that the accident was caused by the sole negligence of the driver of bus KAJ 779 R. Particulars of that alledged negligence are given in paragraph 6 of the plaint dated 23<sup>rd</sup> December, 2002. The Plaintiff has also pleaded that bus KAJ 779 R was owned by 1<sup>st</sup> Defendant; that it was in the custody, control, use and possession of the 2<sup>nd</sup> Defendant as the hirer thereof; and that it was being used to ferry fare-paying passengers **“with the full knowledge, agreement and concurrence of the 1<sup>st</sup> Defendant who is and at all material times was a director of the 2<sup>nd</sup> Defendant.”**

The Plaintiff seeks judgment against the Defendant jointly and severally for:-

- (a) The sum of KShs. 3,400,000/00, the same being the replacement value of bus KAE 283 D.
- (b) Loss of earnings @ KShs. 25,478/00 per day from 29<sup>th</sup> March, 2000 until the date of full payment thereof.
- (c) Costs of the suit
- (d) Interest on (a), (b) and (c) at court rates.

The Defendants were duly served with summons to enter appearance; they did not enter appearance or file defence. On 23<sup>rd</sup> July 2003 interlocutory judgment was entered against them. The matter then came up for assessment of damages on 4<sup>th</sup> July, 2007.

The Plaintiff called five witnesses. PW1 (**POLICE CONSTABLE JOHN MUNGAI**) produced in evidence the following documents:-

- Exhibit P1 ..... Police abstract on the accident.
- Exhibit P2 ..... Police covering report on the accident.
- Exhibit P3 ..... Fair sketch plan of the accident scene by the police (plus measurements and legends).
- Exhibit P4 ..... Inspection report on motor vehicle

KAE 283 D.

- Exhibit P5 ..... List of passengers in both buses.

He stated that police investigations revealed that the driver of KAJ 779 R was entirely to blame for the accident.

PW2 (**KARIUKI CHEGE**) is the principal officer of **ZAKACHE SECURITY SERVICES**; they are insurance loss investigators and adjusters. PW2 was instructed by **JUBILEE INSURANCE COMPANY LTD**, the insurers of bus KAE 283 D, to investigate the accident. He did so on 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> March, 2000. He compiled his interim report and signed it. He produced it in evidence as Exhibit P6. His finding was that the accident was solely caused by the negligence of the driver of bus KAJ 779 R.

PW3 (**ERICK WANDEDE**) is a traffic officer with the Plaintiff; the Plaintiff is a public transport company. His duties include checking on the movements of the Plaintiff's buses to ensure that they do not overload and are otherwise compliant with traffic laws. He produced in evidence as Exhibit P7 the passenger manifest of bus KAE 283 D at the time of the accident.

PW4 (**PATRICK OMINDE OUNA**) is an accountant working with the Plaintiff. His duties include maintaining the fixed-asset register of the Plaintiff. The Plaintiff's fixed assets include its fleet of buses.

PW4 testified that in the year 2000 the Plaintiff's fleet of buses included bus KAE 283 D, make, **Scania**. It was purchased from **Kenya Grange Vehicle Industries Ltd**, Nairobi on 12<sup>th</sup> October, 1994 for KShs. 6.8 million. He produced in evidence a document to that effect (Exhibit P8). He further testified that the bus was totally lost in the accident of 29<sup>th</sup> March 2000. Its value at the time of the accident was KShs. 3.4 million after allowing for depreciation at 12.5% per annum, which rate he said was the norm in the industry for accounting purposes.

PW4 further testified that bus KAE 283 D was insured. The insurer settled the Plaintiff's claim on the loss of the bus; however, he did not know when the claim was paid. He said that the bus was indeed replaced; he did not know when it was replaced, but ordinarily it would take three or four weeks from the time of the accident.

PW4 stated that the Plaintiff claims from the Defendants the value of the bus at KShs. 3.4 million, and also lost income at the rate of KShs. 24,478/00 nett per day, this being the average for the capacity of bus KAE 283D. He explained that the figure was arrived at as worked out in paragraph 8(b) of the plaint.

PW5 (**EVANS ASUGA ONGICHO**) works with the Plaintiff as the administrative manager. He is also an advocate of this court. His duties include keeping custody of the Plaintiff's legal documents, including registration books of its motor vehicles and title deeds. He also advises the management on the law. He produced in evidence the following documents:-

- Exhibit P9 ..... The original registration book of bus

KAE 283 D.

- Exhibit P10 ..... Search certificate dated 4<sup>th</sup> April, 2000 in respect to bus KAJ 779 R.
- Exhibit P11 ..... Certified copy of the certificate of incorporation of the 2<sup>nd</sup> Defendant.

PW5 stated that the 2<sup>nd</sup> Defendant was sued because the 1<sup>st</sup> Defendant was its director. He produced in evidence a certified copy of the 2<sup>nd</sup> Defendant’s memorandum and articles of association (Exhibit P12) and a copy of a list of its directors obtained from the Registrar of Companies (Exhibit P13).

That then is the evidence placed before the court. With regard to the 2<sup>nd</sup> Defendant, there is no evidence that it was operating bus KAJ 779 R at the time of the accident, or in any way connected with it. PW5 stated that the 2<sup>nd</sup> Defendant was sued because the 1<sup>st</sup> Defendant was its director; that is not a sufficient connection; the 2<sup>nd</sup> Defendant being a duly incorporated company has its own legal existence, separate from its directors or shareholders, including the 1<sup>st</sup> Defendant. It could not be properly sued simply because the owner of bus KAJ 779 R, the 1<sup>st</sup> Defendant, happened to be among its directors. There should have been evidence to prove on balance what was pleaded in paragraph 5 of the plaint that is, that at all material times the 2<sup>nd</sup> Defendant

**“was the hirer of or had the custody, control, use and possession of ... KAJ 779 R on behalf of or as agent of the 1<sup>st</sup> Defendant, and the said vehicle was used by the 2<sup>nd</sup> Defendant for ferrying fare-paying passengers ...”.**

There was no such evidence. There is thus no cause of action established against the 2<sup>nd</sup> Defendant. The interlocutory judgment entered against it on 23<sup>rd</sup> July, 2003 on liability cannot stand; it is hereby set aside. The suit against the 2<sup>nd</sup> Defendant be and is hereby dismissed with no order as to costs.

Regarding the 1<sup>st</sup> Defendant, I am satisfied from the evidence placed before the court that at the time of the accident of 29<sup>th</sup> March, 2000, he was the owner of bus KAJ 779 R (Exhibit P10). I am also satisfied that the said bus was on the road with the full knowledge and authority of the 1<sup>st</sup> Defendant, and that it was being driven by his servant in the course of his employment or by his agent duly authorized.

I am further satisfied that the accident that occurred between bus KAJ 779 R and bus KAE 283 D was caused by the sole negligence of the driver of bus KAJ 779 R (testimonies of PW1 and PW2 and Exhibits P1, P2, P3 and P6). The 1<sup>st</sup> Defendant, being the owner of bus KAJ 779 R, was vicariously liable for the tort committed by his servant or agent. The interlocutory judgment on liability entered against the 1<sup>st</sup> Defendant was thus properly entered.

I will now turn to the issue of quantum of damages. The Plaintiff has made two claims in this regard:

- (a) Replacement value of bus KAE 283 D: KShs. 3,400,000/00.
- (b) Loss of earnings @ KShs. 25,478/00 per day from the date of the accident to payment.

Regarding the first claim, I am satisfied from the evidence placed before the court that the bus was purchased for KShs. 6.8 million on 12<sup>th</sup> October, 1994. But it was nearly 5½ years old at the time of the accident on 29<sup>th</sup> March, 2000. I accept that depreciation at the rate of 12½ per cent per annum was the norm in the industry. The value of the bus at the time of the accident was therefore KShs. 2,125,000/00, not the KShs. 3.4 million claimed. It works out as follows:-

Value of the new bus KAE 283 D .....	KShs. 6,800,000.00
Less depreciation @ 12.5 % per annum	
for 5½ years .....	<u>KShs. 4,675,000.00</u>

**KShs. 2,125,000.00**

I will therefore award the Plaintiff KShs. 2,125,000/00 being the value of bus KAE 283 D at the time of the accident.

Regarding the claim for loss of earnings, I accept, from the evidence placed before the court, that the average nett daily income on the Nairobi–Kisumu route (round trip) was KShs. 25,478/00. But I do not accept that the Plaintiff did not operate a replacement bus on this route for three or four weeks following the accident of 29<sup>th</sup> March, 2000 pending purchase of a new bus to replace KAE 283 D. In all likelihood, the Plaintiff quickly re-organised itself and replaced bus KAE 283 D with another bus from its fleet pending purchase of a new replacement bus. I will therefore award the Plaintiff loss of earnings for only seven (7) days. That will be KShs. 178,346/00 worked out as follows:-

KShs. 25,478.00 x 7 = **KShs. 178,346.00.**

In the result, I will enter judgment for the Plaintiff against the 1<sup>st</sup> Defendant in the total sum of KShs. 2,303,346/00. There will be interest on this sum at court rates from the time of filing suit until payment in full. The Plaintiff shall also have costs of the suit plus interest thereon at court rates from the date of filing suit until payment in full. There will be orders accordingly.

**DATED, SIGNED AND PRONOUNCED IN OPEN**

**COURT THIS 24<sup>th</sup> DAY OF AUGUST 2007**

**H. P. G. WAWERU**

**J U D G E**