



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL 38 of 1999

DAN MACHARIA KAMAU APPELLANT

VERSUS

STANLEY MWANGI KIMAMO RESPONDENT

(Appeal from original Judgment in Senior Principal Magistrate's Court at Murang'a in SPM's Civil Case No. 523 of 1995 dated 29th March 1999 by Ms F. F. Wanjiku – P.M.)

J U D G M E N T

On or about the 24th March 1995 at about 5.45 a.m. Wilson Githinji Mwangi, a minor was walking to Wambwe Primary School where he was a student in class 4. He was walking off the road in the company of Joseph Kimani and **Kimamo**. On approaching Gathunguru tea factory, the Defendant's motor vehicle registration number KYT 697, a bus and christened **Kangari air bus** violently collided into the said **Wilson Githinji Mwangi** as a consequence whereof **Wilson Githinji Mwangi** sustained severe injuries from which he died on the same day. This accident was witnessed by **Joseph Kimani**. Following the accident the estate of the deceased led by his father, **Stanley Mwangi Kimamo** sued the owner of the bus for compensatory damages.

It was the testimony of Joseph Kimani that the bus did not stop following the accident but proceeded on its journey despite his screams and those of **Kimamo**. The bus was headed in the same direction as the three students. With the assistance of the light from Gathunguru Tea Factory, **Joseph Kimamo** was able to recognise the bus and noted its registration number. He was familiar with the bus as it used to ply that road frequently. **Joseph Kimani** further testified that they never heard the bus approach from behind because of the noise from the tea factory and also because the bus had no lights both in front and the rear. Upon being hit by the bus, the deceased landed on the road about 20 feet from the point of impact. The deceased had been walking two metres behind the rest of the group.

P.W.2, **Stephen Kiiru Gachuri** was on the same road on the material day and time. He was on his way to work at tea the factory. The bus passed him as it headed towards Miholo which is in the same direction as Wambwe Primary School. When shortly he reached Gatunguru shopping centre he met two children crying i.e. **Kimamo** and **Kimani** (P.W1). **Kimani** told him that the deceased had been hit by **Kangari air bus**. P.W.2 saw the body of the deceased sprawled on the road. As he knew the deceased's parents he went and informed them. According to this witness no other vehicle had passed him before he reached the scene of accident. An hour later the bus came back whilst P.W.2 was still at the shopping centre. Despite the road having been blocked with logs, the driver of the bus somehow manouvered the bus, avoided the logs and drove on. The driver of the bus never stopped despite the fact that the body of the deceased was still lying at the scene. The bus was however stoned. The driver of the bus then drove to Nyakianga police station and reported the incident of being attacked by a rowdy mob at the scene of the accident.

P.W.3, **Stanley Mwangi Kimaru**, the father of the deceased on being informed by P.W.2 of the accident rushed to the scene accompanied by his wife. He came across the body of the deceased and noted that the head had been smashed. He was told by the school children present that **Kangari air bus** was responsible for the death of the deceased. A while later the same bus came by. It never stopped but proceeded to the police station where P.W.3 found it. P.W.3 reported the accident and the driver as well as the turn boy were all arrested. Accompanied by two police officers P.W.3 came back to the scene and collected the body. A post mortem was later conducted by **Dr. Njau** who confirmed that the deceased died as a result of injuries occasioned by a road traffic accident. Following further investigation, the driver of the subject bus was then charged in Kangema court with the traffic offence of careless driving. As at the time the case leading to this appeal was being heard in the Senior Principal Magistrate's Court at Murang'a, the traffic case had not been concluded.

The Defendant who is the appellant in this appeal of course denied liability. He denied knowledge of the accident. Through D.W.II **Simon Njihia Macharia** and D.W.III **Simon Kariuki Kuria** who were the Conductor and driver of the bus respectively on the material day, the defendant stated that on the material day the duo drove along Gikoe-Miholo road at about 5 a.m. They reached Miholo at about 6 a.m. without any incident. At 6.30 a.m. they left Miholo for Gatunguru. On reaching Gatunguru, they found men who stopped the bus. However members of public started stoning the bus and they drove on to Nyakianga police station and reported incident. Whilst at the police station two people came in a vehicle and claimed that their bus had caused a fatal road accident. They denied having caused the accident. They claimed that if indeed they had hit the deceased they would have known. To them therefore they were not at all involved in the fatal accident or any other accident or at all in which the deceased was a victim.

Having carefully evaluated the evidence tendered, the learned magistrate had no difficulty in concluding that it was the defendant's motor vehicle that had hit the deceased on the material day and caused his death. This was because P.W.1 and P.W.2 saw the motor vehicle. There was no other motor vehicle on that road at the material time and the failure of the driver to stop at Gatunguru shopping centre on his return journey despite the road having been blocked by logs lend credence to the testimonies of P.W.1 & P.W.2 that it was the defendant's vehicle that was involved in the fatal accident. The learned magistrate therefore found the defendant liable in full for the accident and also awarded the Plaintiff Kshs.81,310/= being special damages that had been pleaded and proved. The learned magistrate then directed the advocates involved to take another date for the assessment of General Damages.

Stung by the preliminary findings of the learned magistrate, the defendant preferred this appeal. The appeal it must be stated is actually against a partial judgment of the court as the appellant did not wait for the full judgment to be delivered following the assessment of general damages as ordered by the learned magistrate before he lodged the instant appeal. In his memorandum of appeal the appellant has listed 6 grounds upon which he is faulting the learned magistrate. These are that:

- 1. The learned Principal Magistrate erred in law and fact by giving judgment in favour of the Plaintiff in the absence of any collaborative evidence.**
- 2. The learned Principal Magistrate erred in law in deciding for the Plaintiff in the absence of any medical evidence as to the cause of death.**
- 3. It was total misdirection on the part of the learned Principal Magistrate to allow the sum of Kshs.81,310.00 special damages claimed by the plaintiff in the absence of any receipts or any other authentic documents to support and justify the claim.**
- 4. The learned Principal Magistrate misdirected herself in deciding the case in favour of the Plaintiff whereas the actual driver and possible perpetrator of the accident was not joined as a co-defendant.**
- 5. It was erroneous for the learned Principal Magistrate to give judgment in favour of the Plaintiff while a traffic case of causing death by dangerous driving was still pending at another (sic) court**

(Kangema) against the alleged driver of the bus in question.

6. The learned Principal Magistrate erred in allowing the Plaintiff's claim founded on a defective and incompetent plaint.

In support of the appeal, **Mr. Kimani** learned counsel for the appellant submitted that the special damages though pleaded were not specifically proved as the respondent merely tendered in evidence a written schedule of the expenses. On this issue counsel referred the court to the court of appeal decision in **Herbert Hahn v/s Amnk Singh (1982-88) 1 KAR 738** for the proposition that special damages must not only be pleaded but must be specifically proved. With regard to liability, counsel submitted that the respondent called 3 witnesses. P.W.1 was a young boy of 15 years who claimed that the bus had no lights and that he also never saw the driver. P.W.2 & P.W.3 never witnessed the accident and therefore their evidence was hearsay. To counsel, the Respondent did not prove his case to the required standard.

The appeal was opposed. **Mr. Mwangi** learned counsel for the Respondent submitted that it was not proper for the appellant to have appealed against a partial judgment. He should have waited for the entire judgment to be delivered before preferring this appeal. On liability counsel submitted that the appellant's driver was charged with a traffic offence meaning therefore that the appellant's driver was responsible for the accident. The cause of death is indicted in the death certificate as road traffic accident and accordingly the appellant cannot be heard to say that the deceased's cause of death was unknown. On special damages, counsel submitted that the same were pleaded and specifically proved. Special damages can be proved by oral evidence as happened in this case. On liability, counsel submitted that the young man of 15 years who testified as P.w.1 was the only eye witness to accident. His was tested under intense cross-examination and he remained firm and consistent.

I have as the first appellate court subjected the evidence tendered during the trial to fresh and exhaustive evaluation as required of me. Though nothing stops a party from filing an appeal from a partial judgment it is indeed proper and most desirable that a party should come on appeal on a full judgment. This will occasion a saving on valuable judicial time as well as reduce expenses on the part of the litigants. If an appellate court is called upon to make a decision on a partial judgment as in this case, it will mean that upon such decision being made the matter will again be remitted to the trial court to deal with the aspect of the case that had not been resolved or is still outstanding. Once a determination on the unresolved aspect of the case is made and any of the parties are aggrieved, then again an appeal will be preferred which again will have to be heard and determined by this court. As it is therefore the appellate court will have been called upon twice to deal with the same matter. The judiciary is not endowed with that luxury of time. Secondly every time an appeal is filed it is an expense to the parties involved. If two appeals are filed over the same matter it means that the parties involved would have expended twice as much. If however, a party files an appeal after a full and complete judgment he only expends once. I think the practice of litigants preferring appeals on partial judgments ought to be discouraged.

On the issue of special damages, I agree with the submissions of learned counsel for the appellant that the same ought not only to be pleaded but must also be specifically proved. Indeed that appears to be the holding in the case of **Herbert Hahn (supra)**. In holding number 2 of that authority, the learned judges of the court of appeal delivered themselves thus:

“..... The claim for depreciation was rightly rejected since it was for special damages which must not only be specifically pleaded but also strictly be proved, and no such proof was adduced at the trial”

The quarrel that the appellant seems to have with the evidence in prove of special damages tendered by the respondent is that he merely produced a hand written schedule of expenses. He never produced any receipts to back up his claim. I do not think that the only way to prove special damages is by documentary evidence. Special damages can as well be proved by oral evidence and it is upto the party challenging the same to counter such evidence by cross-examination or any other evidence. If a witness states in his oral evidence that the special damages incurred amount to this and he is not challenged at all, I do not think that the court will discount such evidence merely because of lack of receipts or any other

document to support the claim. This is what happened in the circumstances of this case. The appellant produced a schedule of expenses incurred in the burial of the deceased. It amounted to Kshs.65,900/=. The respondent's counsel did not object to its production in evidence. Accordingly the appellant cannot be heard now to say that the special damages as regards funeral expenses were not specifically proved. In any event can one really say that the funeral expenses schedule tendered by the respondent was not documentary proof of the special damages incurred by the respondent? The appellant also faults the learned magistrate for awarding the Respondent Kshs.81,310/= as special damages yet in the schedule tendered in evidence, it would appear the respondent only incurred Kshs.65,900/= as special damages. I do not think that this submission is merited. In his own testimony the appellant testified that he spent Kshs.65,900/= towards funeral expenses and also paid Kshs.15,300/= for obtaining letters of administration. Counsel for the appellant did not at all challenge the later expense by the respondent in his cross-examination or by any other evidence. If the expenses involving funeral expenses, costs of obtaining grant of letters of administration, police abstract and certificate of death are all added up, they would come to Kshs.81,310/= which sum the learned magistrate had no problem awarding the respondent as special damages. I agree!

How about liability? P.W.1 was the only witness to the accident. He was aged 15 years. I do not think therefore that he was a minor whose evidence required corroboration. However if such corroboration was required, it was provided by P.W.2 who arrived at the scene soon after the accident and found the children crying and who immediately told him that the deceased had been hit by **Kangari air bus**. That bus had shortly before the accident passed P.W.2. No other vehicle had been sighted on the road shortly before the accident by either P.W.1 or P.W.2. The conduct of the driver and the conductor on reaching Gathunguru shopping centre tend to prove their guilt. They came across a road blocked by logs with the deceased body still at the scene. They were stopped by members of the public and instead of stopping they manouvered their way passed the logs and drove on. I do not think that this was a conduct of an innocent person.

P.W.1 was subjected to intense cross-examination by counsel for the appellant and he was not at all shaken young as he was. He remained firm and steadfast. He testified that the motor vehicle had no lights on. This fact was not seriously challenged by the appellant. If the vehicle did not have lights on at that hour of the night, how was the deceased expected to see it. Further the witness testified that they could not hear the bus approach due to the noise emanating from the nearby tea factory. If the driver of the bus had lights on and kept a proper look out he would have definitely seen the school children the deceased included and hooted to signify his approach. That way he would have avoided colliding with the deceased. From the impact and where the body of the deceased came to rest, it would appear that the bus was being driven at some speed. Mark you this was a bus. There is evidence that following the accident the appellant's driver was charged with the offence of careless driving. Although by the time the matter was being heard, the traffic case had not been concluded, the mere fact that a traffic charges were preferred against the appellant's driver is indicative of what the police perceived of his role in the accident. Even in the absence of the findings of the traffic case, there is irrefutable evidence that the appellant's driver was to blame for accident and by virtue of the doctrine of vicarious liability the ills of his driver must be visited upon him. The appellant takes the view that he should not have been penalised for the sins of his driver as he had not been enjoined in the proceedings as a co-defendant. In my view it is not absolutely necessary that one must enjoin an agent in the proceedings before liability can attach on the principal pursuant to the doctrine of vicarious liability. In any event what stopped the defendant from enjoining his driver in the suit by way of third party proceedings. After all did he not call him as a witness?

The appellant has also faulted the learned principal magistrate for finding for the respondent in the absence of any medical evidence as to the cause of death. I do not know what other evidence the appellant was required to tender so as to establish the cause of death of the deceased. P.W1, P.W.2 and P.W.3 all testified as to the cause of death of the deceased. Further a death certificate of the deceased was tendered in evidence and it clearly showed that the cause of death of the deceased was cardio Pulmonary arrest due to head injury due to Road Traffic Accident. This clearly shows that the deceased passed on as a result of fatal injuries sustained in the road traffic accident.

The appellant also maintains that it was erroneous for the learned Principal Magistrate to have given judgment in favour of the plaintiff while a traffic case was still pending in another court against the alleged driver of the bus in question. Certainly this complainant has no basis in law. The instant case was a civil suit whereas the traffic case was a criminal case in another court. The two cases were not similar as would have necessitated one being stayed pending the hearing and outcome of the other. I know of no requirement in law that says that whilst a traffic case is pending in court no civil proceedings arising from the same accident should not be entertained in another court!

Finally the appellant states that the principal magistrate erred in allowing the plaintiff's claim that had been founded on a defective and incompetent plaint. Learned counsel for the appellant never addressed me on the issue. I have perused the plaint and I am unable on my own to say with finality that the same is defective and or incompetent. I do not discern any such thing.

It is my judgment therefore that this appeal should be dismissed with costs. It is so ordered. The subordinate court's file should be remitted back to the principal magistrate's court, Murang'a forthwith for assessment of general damages by **F. F. Wanjiku**, P.M. or any other magistrate of competent jurisdiction.

Dated and delivered at Nyeri this 26th day of October 2007

M. S. A. MAKHANDIA

JUDGE