



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO 549 OF 2002

KENYA BUS SERVICES LTD 1ST APPELLANT

JOHN MBAKA NJENGA 2ND APPELLANT

VERSUS

HENRY KIPKEMBOI 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

(An Appeal from the Judgment of Hon. R. N. Nyakundi, SPM
in Milimani Commercial Courts Civil Suit No.4384 of 1998
delivered on 16th September, 2002).

JUDGMENT

Henry Kipkemboi, the 1st Respondent, is a Police Officer with the Kenya Police Force.

On 12th June, 1997, he was on routine patrol duties with his colleagues in a police 999 car, registration No GK Z208. He was the Commander of that car and was seated in the front seat, with a driver. A third colleague sat in the back seat. It was 1 pm. They were on Ngong road. It is a busy road, especially at lunch time. They received information through the Police radio call that a motor cycle stolen moments before in the city of Nairobi had been sighted along Langata road. As they were proceeding along Mbagathi road, they saw the motor cycle, and promptly made a U-turn. Their driver turned on the signal lights, and the siren, and commenced chase. They signalled the motor cycle driver to stop. He was defiant, and continued to speed. They too, accelerated their speed, and continued to pursue him. Ngong road is a two-way road, not a dual carriageway. It is extremely busy, especially at lunch time, with both motor vehicles and pedestrians competing for limited space. The speed limit on Ngong road is 50 kph.

As they pursued the suspect, they drove at an excessive speed, overtaking several motor vehicles, some of which had moved to the side to give way. Then suddenly as they were overtaking a motor vehicle, they smashed into the right of an oncoming bus. They were in the centre of the road, the bus had just emerged into the main Ngong road from a minor road, Mugo Kibiso road. Kipkemboi was injured severely, while his two colleagues died. He sued the Bus company, and its driver, who are now the 1st and 2nd Appellant, respectively, and the Attorney General as the legal representative of the Government of Kenya, the owners of the police vehicle.

Based on the above facts, the lower court entered Judgment for Kipkemboi, holding the Appellants 85% to blame for this accident, and the Government 15%.

The learned Magistrate expressed himself, in part, as follows:

“I have carefully considered the circumstances of the case and materials presented before me as related to the scene of the accident and believe that the bus driver of KAD 447C was more to blame for the accident. In my judgment I affix liability at 85%. However, the driver of GK Z208 does not escape liability in the instant case though he had put on the siren, he had a duty to ensure that it was safe to overtake. In my Judgment I apportion liability on part of the driver of GK Z208 at 15%.”

It is against that Judgment that the Appellant bus company and its driver have appealed to this court, citing the following five grounds of appeal:

“1. The learned Magistrate erred in law and fact in failing to find that the driver of vehicle Number GK Z 208 was solely to blame for the suit accident as pleaded in the Defence before him. 2. The learned Magistrate erred in law and fact in finding that the Appellants were to blame for the suit accident to the extent of 85% a finding that has no factual basis given the evidence before him.

3. The learned Magistrate erred in law and fact in finding that the 2nd Appellant was to blame for the suit accident on the basis of the Traffic Rules to wit Rule 83 when the same was not pleaded neither was it an issue before him.

4. The learned Magistrate erred in law and fact in finding that failure on the part of the 2nd Appellant to comply with Rule 83 of the Traffic Rules in itself constitutes negligence.

5. The learned Magistrate erred in law and fact in making findings that are not borne out by the evidence before him.”

The only issue before this court is liability. Quantum is not in issue. The Appellants believe that its bus was not to blame for this accident at all, and at worst, the apportionment of liability should have been reversed – that is 85% in their favour. In his submissions before this court, Mr Njongoro, Counsel for the Appellants, argued that the trial court’s finding of fact that the bus driver did not give way, or keep a proper look-out was erroneous, as it failed to take into account the 2nd Defendant’s testimony which suggested that the bus was stationary at a zebra crossing when the police car ran into it; that the trial court’s interpretation of Rule 83 of the Traffic Rules, Cap 403, was incorrect, leading to a wrong conclusion (See *Gaynor vs Allen (1959) 2 AER 644* and *Marshall vs Osmond (1983) 2 AER 225*; and finally that the fact that the police car was speeding and overtaking on a busy road, constituted an act of negligence. He submitted that the police car driver should have been held fully or substantially liable.

Mrs Kariuki, for the 1st Respondent (Kipkemboi), argued that the police car had its siren and lights on, and whereas all other motorists gave way, the bus did not. According to her, Rule 83 applied. She distinguished the *Gaynor* case which she said was on speed, whereas Rule 83 required all to give police cars “priority”. She asked that the lower court’s decision be upheld. Unfortunately, this Court did not have the benefit of the submissions of the Attorney General who, despite being served, failed to attend the hearing.

As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

As I indicated at the beginning of this Judgment, what is not in dispute is that this accident happened at lunch time on the busy Ngong road as the police motor vehicle was pursuing a motor cycle suspect (thief). The police car had its lights and siren on, but was driving at an excessive speed. It was attempting to overtake, and was in the middle of the road when the accident happened. Ngong road is a 50 kph zone. Those facts are not in dispute. What is in dispute is whether the bus was stationary at the zebra crossing,

or whether it emerged from a minor road onto Ngong road. The Appellant's witness said it was stationary, while the Respondent's witness said otherwise. The learned Magistrate found that the bus emerged from the minor road. I have no reason to upset that finding, which is properly based on the evidence before the lower court. The learned Magistrate had a choice to believe either version of the accident, and because he had the benefit of observing the witnesses, I must respect his finding. However, the issue is, was the bus driver keeping a proper look-out, and did he fail to give way to the police vehicle? The answer, I am convinced, is No. If he was he could have taken evasive action, as did everyone else. He could have stopped immediately he heard the siren, even if he saw the police car late because he was emerging from a minor road into Ngong road. But it is difficult to believe that he did not hear the sirens, or observe the flashing lights, as apparently everyone else did so. On the other hand, the police car was being driven at an excessive speed, at a busy time, on a very busy road. It was attempting to overtake in the face of oncoming traffic. That was reckless, and in complete disregard to the other road users. Clearly, the accident happened in the middle of the road, over the yellow line. The police driver was equally negligent, and I have no difficulty in holding both drivers equally to blame for this accident.

The Respondent has argued that Rule 83 of the Traffic Act absolves the police from liability when in the exercise of their lawful duties they are speeding – as long as the siren is on.

I would not support that argument. In my humble opinion it is not tenable in law. In my view, a police driver, like any other civil driver of a motor vehicle, owes a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger. The question that must be asked is this: Is it clear that the police driver, on this occasion, judged by the standard of an ordinary driver of a motor vehicle driven by an ordinary driver, on his private occasion, is to be held guilty of negligence causing the accident? The answer in this case is clearly "Yes". To drive at an excessive speed, at lunch time, on Ngong road, and attempt to overtake in the face of oncoming traffic, even with your siren on, is, in my view, highly reckless. Now, Rule 83 of the Traffic Act, Cap 403, only gives police vehicles "priority", but does not exempt them from the speed limit applicable to that road.

Rule 83 states as follows:

"Every driver shall, upon hearing the sound of any gong, bell (other than a bicycle bell) or siren indicating the approach of a police vehicle, ambulance or fire engine, at once give such vehicle right of way, and if necessary pull his vehicle to the nearside of the road and stop until the police vehicle, ambulance or fire engine has passed".

In England, unlike here in Kenya, the Traffic Act, expressly exempts police, fire brigade and ambulance vehicles from observing the applicable speed limits. Even then, in the case of Gaynor (supra) the Court held that that section only enables the driver of such vehicles to escape criminal sanction or liability, but not the civil liability in negligence. It is, therefore, my considered view that the police driver in this case was as guilty of negligence as the bus driver, and I hold both equally liable for this accident. Accordingly, and for reasons stated, this appeal, insofar as it relates to liability, is allowed. The Judgment of the lower court is set aside to that extent, and substituted with the Judgment holding both the first and second Appellant to bear 50% of the liability; and the 2nd Respondent 50% liability. The Appellants shall have the costs of this appeal. The lower court's judgment on quantum, and the award of costs, shall remain undisturbed.

Those shall be the orders of this court.

Dated and delivered at Nairobi this 8th day of August, 2005.

ALNASHIR VISRAM

JUDGE