



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. R. 46 OF 1997

WILLIAM NDINYA OMOLLO..... PLAINTIFF

VERSUS

COMECON AFRICA LIMITED DEFENDANT

JUDGEMENT

The plaintiff herein William Ndinya Omollo came to this court suing the defendant Come Cons Africa Limited claiming both special and general damages as pleaded plus costs and interest. The reason for filing the case is set out in paragraphs 3 and 4 of the plaint. The key averments are that the plaintiff is the registered owner of motor vehicle registration number, KAG 185 Isuzu passenger bus while the defendant was the registered owner of motor vehicle registration number KQL 437 Leyland lorry pulling trailer number ZA 8986, that on 4th September, 1997 at about midday while the plaintiff's passenger bus was lawfully stopped at Londiani Police road block for a routine police check-up the defendant's lorry being negligently, carelessly and or recklessly driven and or controlled by the defendant's employee, driver and or agent was permitted and or allowed to violently run into the plaintiff's stationary bus causing extensive and untold damage to the said bus giving rise to this suit, that as a result of the said accident he has suffered both financial and psychological loss and damage which he purely blames the defendant for having caused. As a result of the accident he lost use of the said motor vehicle route operations which have been taken over by other companies to the detriment of the plaintiff. The particulars of negligence relied upon are set out in paragraph 7 of the plaint. They will also rely on the doctrine of *Res Ipsa Loquitor*. The special damages are set out in paragraph 8 of the plaint. As a result of the said accident the plaintiff lost the normal use of the said vehicle for 87 days at a daily income of Kshs.26,400/- bringing the total loss to Kshs.2,296,800.00. The plaintiff made 6 trips to Nairobi incurring full costs of Kshs.15,800.00, incurred costs to the motor vehicle assessor excess charges of Kshs.20,000.00, the total coming to Kshs.43,000.00. He also prays for general damages.

The defendant defended the suit and denied paragraphs 3, 4 and 5 of the plaint and places the plaintiff to strict proof thereof, denied paragraph 6 saying it is too remote a risk which even if other factors were proved would not attach to the defendant, denied in its entirety the contents of paragraph 7 of the plaint and put him to strict proof, denied the doctrine of *Res Ipsa Loquitor* applies. Further that if any accident occurred then the same was wholly caused and or substantially contributed to by negligence on the part of the plaintiff, his servant, agent and or contributed to by negligence on the part of the plaintiff, his servant, agent and or employee being the driver of motor vehicle registration number KAG 185Y Isuzu bus. The particulars of negligence attributed to the plaintiff are given in paragraph 6 of the defence, denied particulars of special damages alleged in paragraphs 8, 9, 10 and 11 of the plaint and the plaintiff is called to strict proof. The defendant also reserves the right to counter claim from the plaintiff for loss and damages caused to motor vehicle registration No. KQL 437 ZA 8988 and shall at an opportune moment seek the leave of this honourable court to do so. On the basis of the foregoing, prayed for this case to be dismissed with costs to them.

In the reply to defence the plaintiff joined issue with the defendant upon its defence save as the same consists of admission, that the statement of defence amounts to a general denial and will at the appropriate time crave for the honourable court's leave to strike out the same on this ground. In answer to paragraph 6 of the defence the plaintiff repeats the contents of paragraph 7 of the plaint and on that account prayed for judgement against the defendant as prayed for in the plaint.

Eight witnesses gave evidence for the plaintiff. PW1 is Keneth Mutisya Kelli a bus driver employed by the plaintiff. His evidence is that on 4th September, 1997 he was driving bus number KAG 185Y. He left Siaya at www.kenyalawreports.or.ke Page 4 of 29 6.00am heading to Nairobi. On reaching Londiani junction he came across a road block manned by traffic police who stopped him and he was told to pack it off the road on the side so that it can be inspected by the police. He packed it on the left as you face Nairobi. Police got in and started inspection. There was another vehicle – Mwananchi Bus packed behind him. There were other buses from Nairobi packed on his right as you face Nairobi. They were facing Kericho. There were police spikes on the road. PW1 suddenly saw a lorry coming at a speed swaying on the road overtaking the packed vehicles behind his bus and after a short time it came to his side swaying and hit his bus on the side of the turn boy and the bus rolled. It also knocked the bus behind him and then stopped. He was injured and lost consciousness and he does not know what went on. He was rushed to Kericho District hospital for treatment. He blames the lorry driver for the accident because he must have known there is a road block and he saw stationery vehicles ahead of him.

When cross-examined he said that he had switched off the engine on instructions of police, that police were inspecting the bus as at that time there was no vehicle in front of him and he did not hear it brake. He had packed the bus off the tarmac and the engine was not on and he was not in motion. If the lorry driver knew that the vehicle had failed brakes he should have gone to the bush or he should have stopped but since there were vehicles on both sides he should have gone to the bush. He confirms it is the police who stopped them. It is his evidence that the lorry had no brakes otherwise he should have controlled them

PW2 is Dominic Wesonga Otieno. He resides at South Ugenya and he is a carpenter by profession at Nyarura. He boarded the accident bus on the material day heading to Kisumu and then Nairobi. At Londiani junction they were stopped by police for a routine check up. Their driver packed off the road and then police got in for a routine check. He suddenly saw a lorry from the front at speed. It left its side and then hit their bus causing their bus to move to the right as you face Nairobi. He was seated on the driver's side and he could see the front clearly. He saw the lorry come swaying. The bus rolled twice and then turned to face where it had come from. He lost consciousness and regained it at New Nyanza hospital.

When cross-examined he said he was injured and he sued the owner of the bus he was travelling in. The case was finalized and he had been paid damages. He confirms that the bus had stopped and the engine was off. It is his evidence also that if the lorry had problems the driver could have gone into the bush. The lorry driver was in the wrong as he should have PW3 is the motor vehicle assessor, one Peter Nderitu. He says he had been in that business for 10 years as at the time of trial. He recalls that on 11th September, 1997 he was requested to assess a motor vehicle which had been involved in an accident – KAG 185Y. The vehicle was extensively damaged and the damages are as per the report. He recommended that it was economical to repair the bus. He gave the garage what to repair and his estimate was that it would have taken one month to repair. He produced the report as exhibit 1 and he was paid Kshs.7,5000.00 by the plaintiff who was the owner of the vehicle (exhibit 2). He was also paid attendance fees of Kshs.10,000/-.

When cross-examined he said that he was a mechanic Grade 1. He was aware the report was for purposes of compensation but he did not inflate the figures. The prices of spare parts which he put were what he was given by the suppliers who were General Motors but he did not have the quotation before him.

According to him repairs would have taken one month although there is no indication of the said period on the report.

PW4 is the plaintiff William Ndinya Omollo. He received a report of an accident involving one of his

buses KAG 1857 which had occurred at Londiani Police Road Block. He is the sole registered owner as shown by exhibit 3 (logbook). On arrival at the scene he found his bus lying on the right as you face Nairobi in a ditch while Wanainchi Bus was on the left as you face Nairobi off the tarmac. Some passengers had been thrown through the window and the bus had hauled on them. PW4 called break down from Kericho to recover the bus and he paid Kshs.31,5000.00 as shown by exhibit 4. The bus was inspected by a motor vehicle inspector as shown by exhibit 5. The bus was extensively damaged and so PW4 brought mechanics to do minor repairs at the police station so that it could be driven to Nairobi for major repairs at Parkash Body Builders. Body building which was extensively damaged was done at Kshs.850,000.00 on the lower side as they used some seats which had not been extensively damaged as a new body costs between 1-3 million. Exhibit 6(a) and (b) is for Kshs.850,000.00. It took 87 days to repair the bus following the assessors report. He purchased all the spares from various shops as per exhibit 7. Other purchases were as per MFI 8(a), (b) and (c). The total cost for the spares was Kshs.1,105,90.00.

The bus was solely for business and during the time it was off the road he lost income as the bus was plying the Nyandorora road in Alego Usonga through Siaya to Nairobi and back and he was earning Kshs.26,000.00 at www.kenyalawreports.or.ke Page 8 of 29 an average after all the expenses were deducted and so he lost Kshs.2,296,800.00

When cross-examined the witness stated that he was the sole owner of the said vehicle as the logbook bears his name. He had purchased the bus in 1996 while new from Lake Land Motors and it is not loaned by his elder brother Raphael Okoth and all the three buses are registered in his name. It is his evidence that his brother owns trailers of 26 wheelers and 10 wheelers. PW1 was the driver on the material day. There was no way bill on this day because the journey was not completed. He repaired the vehicle because the remarks in the assessment report were that the vehicle could be repaired. It is his evidence that the particulars of damages in the plaint tally those in the assessment report, that although only one side of the bus was damaged it was necessary for him to do both sides as it could not get the normal body lining. He agrees the inspection report talked of minor pre-accident defects but he did not include their repairs in the repairs done. It is his evidence that cost of spares and minor body works came to Kshs.699,217.00. He denied the suggestion that he used the spares claimed here to make other vehicles. On income he said he gets Kshs.26,000.00 daily after expenses and then he invests it in business and he does not bank it in an account specifically for buses. He agrees he pays tax before he is given a receipt. On further cross-examination he stated that the only tax he pays in the motor transport business is the advance tax before the PSV licence is issued. He agreed that some way bills prepared shortly before the accident showed cash balance of Kshs.5,430.00; Kshs.16,070.00; Kshs.1,475.00; Kshs.7,500.00; Kshs.14,525.00; total Kshs.21,675.00; Kshs.9,360.00; Kshs.12,300.00. He agreed that in business you can earn more or less but he took an average figure on his working capital.

That he repaired the bus in good time but he did not delay the repairs because he wanted compensation. When re-examined he said that the highest way bills went was Kshs.24,940.00; Kshs.1,000.00; Kshs.60,000. And for the repair costs he says that was the lowest as other garages were charging more than what Parkash was charging.

PW5 Wilson Juma Odero is a conductor for Nyaugenya Bus employed by PW4. His work is to receive money from passengers and then prepare manifestos or way bills which they hand over to the inspector together with money to take to the employer. An example is exhibit 8 which was prepared by him. He is aware the vehicle was sent to Nairobi for repairs and PW4 sent him to buy spares for the repairs, the receipt for Kshs.345,657.00 as shown in exhibit 8(b) and he confirms they were used to repair the accident vehicle. When cross-examined the witness said that www.kenyalawreports.or.ke Page 10 of 29 he had been employed by PW4's father before but in 1996 is when PW4 employed him. He was a conductor and he could be assigned to any of the buses belonging to PW4. He confirms that he was given cash to go and buy the spares.

On daily collection he agrees that they are not constant as they vary from day to day. He agrees Kshs.26,000.00 could be average but not always. He has knowledge that the bus stayed for some time before it was removed after repairs but he does not know why. He also confirms that PW1 was the driver of the accident bus on the material day.

PW6 Michael Ouma is an employee of Parkash Auto and Body Builders in Nairobi. He stays in Nairobi. He is an accounts assistant, whose duties entail preparation of the cashbook and to maintain the petty cash book, raising of invoices and writing of receipts. He confirms exhibit 6 was issued in relation to a job they had given to them by the plaintiff for motor vehicle registration number. The invoice is advanced to the plaintiff and it is dated 29th November, 1997. It was for building of the body and it is for Kshs.850,000.00 which amount was fully paid after the job was done which payment was made on 6th December, 1997. The amount was paid in cash and a receipt issued. He produced the documents as exhibit 6(a) and (b).

When cross-examined he said that the job was complete when they raised the invoice. He confirmed their job was for body building only and they did not put any other spares on that bus. According to them it was more economical to give the bus a new body.

PW7 Joseph Oduor is a mechanic at Kisumu. He was hired by the plaintiff to repair the bus at Londiani police station so that it can move and go to Nairobi and he did so. It was driven to Nairobi and after two weeks he went to the garage of Parkash and carried on more repairs. It is the plaintiff who bought the spares and then told him to go and carry out the repairs. He confirms that he did the general repairs. He was paid Kshs.30,000/-, the man doing wiring was paid Kshs.18,000/= making a total of Kshs.48,000.00. He is the one who carried out the purchasing in respect of exhibit 8 (a) but he agrees that Omollo gave him money to buy those spares. He maintains it is him who purchased the parts and then he went to fit them having been authorized to do so by William Omollo Ndinya. They had permission of the owner of the garage to do so being assisted by two mechanics. He adds that Dash garage is his garage in Kisumu and the receipt was issued in Kisumu while the bus was in Nairobi. He confirms he was paid for the job done.

PW8 Joseph Onyango Agenya recalls that in 1997 he was working for PW4 in bus number KAG 185Y which was going to Nairobi but on the day of the accident he was not in the bus. They used to get Kshs.30,000/- per return trip after deducting all the expense or it could be less. He identified manifestos prepared by him being Kshs.7,000/- to Nairobi and then 28,000/- back to Nyandorora and he produced them as exhibit 10. When cross-examined he agreed that the earnings were not constant, sometimes high and other times too low. He says the bus stayed in the garage for about 3 months but he does not know why.

The defence called no witnesses. Written submissions were filed. On liability counsel for the plaintiff submitted that presence of motor vehicles at the scene ought to have warned the defendant's driver the need to slow and or move carefully, control his said motor vehicle so as to avoid any eventually. The traffic police road block had always been there permanently and that a majority of the users of the said road were aware of this fact. Even if the defendant was not aware of the road block the presence of a queue of packed vehicles on the said road at the said time was enough to warn the defendant of the use of the said portion of the road at that particular time. It is their stand that the position in law is that a person should not do or omit anything which he might reasonably anticipate or at least where such a person might reasonably be expected to be injured by failure to do so.

They submit that in this case the defendants driver failed to observe his duty by failing to brake or take such reasonable care as to avoid the accident as he saw the parked vehicles in time and as a reasonable man he could have averted the accident. The consistence herein shows that the defendant's driver was speeding and there is no evidence to controvert that evidence.

The fact that the plaintiff's car had been parked on its rightfully left side of the road and the defendant's agent swerved off the road to hit it from the said side being on the wrong side of the road is evidence of negligence and against the provision of the highway code. The bus was parked by the traffic police who must have ensured that it was safely parked off the road and it is their stand that the defendant's driver contravened the rules of the highway code and he has to be solely held liable as the collision arose at day time in a clear weather and the defendant could see far enough and when the limits of his vision was sound. On quantum counsel submitted that all the specials have been proved as per the receipts in exhibit 6, 4, 7 and 2. As for loss of income the plaintiff produced documents and he was supported by the

evidence of PW5, 6 and 7.

The plaintiff further relies on the case of **John Kanyi Murufani – versus- Kenya Railways, Nairobi HCCC. No.3394 of 1997** where it was held inter alia that it was wrong to make the defendant pay for the plaintiff storing the vehicle indefinitely once it was decided that it could not be repaired.

The case of **African Highland Produce Limited –versus- John Kisorio, Nakuru Court of Appeal Civil Appeal No/264 of 1999** where the accident vehicle was ready within 21 days but it was not collected until 6 months later. The Court of Appeal said that the respondent was entitled for loss of user for only 21 days at Kshs.6,800/- per day coming to Kshs.142,800.00.

The defendants on the other hand submitted that the prayer that this court should find the plaintiff's driver Kennedy Mutisya Kelly (PW2) to have substantially contributed to the accident on 4th September, 1997 on the following grounds namely:

1. That the said driver parked the bus registration number KAG 185Y close to the road and thereby posing grave danger to other road users; that the said driver did not warn the defendant's driver of the lorry registration No. KQL 437 that he had parked the bus very close to the road; that on the basis of the foregoing the said Mutisya committed very obvious acts of negligence and is substantially to blame for the accident.
2. That no evidence was adduced to prove that the driver of the said defendant's lorry KQL was being driven at a high speed.
3. Equally no evidence was led by any of the witnesses that the vehicle was defective and no evidence has been put forward to support the allegation of negligence against the defendants.
4. It is the defence's case that the plaintiff's driver caused the accident by parking the bus on the road which fact was not challenged at all by the plaintiff throughout the proceedings.

On quantum counsel submitted that the plaintiff's claim being hinged on a claim of special damages which must not only be pleaded but also proved and they submit that the following items were not proved:- www.kenyalawreports.or.ke

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1. 3 tyres and tubes 20 x 12 worth Kshs.96,000.00.
2. Labour mechanical Kshs.30,000.00
3. Labour electrical Kshs.18,000.00
4. Radiator Kshs.80,000.00
5. Front head assembly Kshs.16,700.00
6. 3 rims size 20 @ Kshs.47,000.00, total being Kshs.141,000.00

Which should be disallowed because no receipts were produced to support the said claim.

- (i) Cost of suspension worth Kshs.27,260.00 was not pleaded.
- (ii) The claim for wiring for a receipt dated 31st December, 1997 was not pleaded.
- (iii) There is a receipt dated 15th October 1997 the plaintiff does not disclose that the grease seals were repaired.

(iv) A receipt for Kshs.3,600/- dated 11th November, 1997 is in the name of Raphael Omollo and not the plaintiff herein. It was not equally pleaded.

(v) Receipts dated 5th May, 1997 for fuel Kshs.1,330/- was not pleaded.

(vi) Receipt dated 20th November, 1997 from Opondo Agencies for Kshs.22,650/- was not pleaded and it is duplex to receipt No. 24th October, 1997.

(vii) At paragraph 8 the amount pleaded is Kshs.12,098 while the receipt was for Kshs.27,898 and so the difference has not been explained.

(viii) That the claim for fuel was not pleaded and so the receipts dated 5th September, 1997 for Kshs.435.00; 28th August, 1997 for Kshs.700.00; 8th September, 1997 for Kshs.2,160.00 and 5th September, 1997 for Kshs.600.00 do not appear in the plaint and they should be disallowed.

(ix) In paragraph 8 (5) the plaintiff pleaded for Kshs.18,6000.00 and yet the receipt has Kshs.49,600.00 and the plaintiff did not explain the difference.

(x) The receipt dated 12th November, 1997 is for fire extinguisher and Cap it totals Kshs.850/=. The claim for fire extinguisher is not pleaded and it should be ignored.

(xi) Receipt dated 24th October, 1997 for Kshs.79,270.00 is alleged to be for the complete rear springs, spring hinges, rear shock yet the plaint reads that that the total

cost is for Kshs.49,600.00 while the variance has not been explained.

(xii) Item 22 at paragraph of the plaint is for axle units. There was no receipt produced for Kshs.141,000.00. (xiii) Item 2 is a claim for steering box Kshs.215,242.00. There was no receipt for this and the court is urged to disallow it.

(xiv) Item 3 at paragraph 8 of the plaint is a claim for oil cool assembly. There was no receipt for this. In view of the above they submit that the entire bundle of receipts exhibit 1(a)- 19 must be ignored.

(xv) The claims for fuel has not been proved.

(xvi) No receipt was produced for Kshs.20,000.00 for insurance policy excess.

5. The claim for general damages is wholly irrelevant and it cannot be supported.

6 That claim for loss of user is a special type of claim and the law requires that it be specifically pleaded and proved. The plaintiff has claimed Kshs.22,296,800.00. Evidence on record is that PW8 said that the bus was ready after one month but the plaintiff did not explain why it took him 87 days to collect it on 3rd January, 1997. From his own evidence he does not appear to have been impecunious as he drives a Mercedes and owns a fleet of other buses and this means that he was able to repair and pay for the bus within a reasonable period of time and this shows that he did not mitigate his losses.

They rely on the case of **African Highland Produce Company Limited –versus- John Kisorio Nakuru Court of Appeal 264/1999** where it was held that it is the duty of the plaintiff to take all reasonable steps to mitigate loss he has sustained consequent upon the wrongful act and he cannot claim for damages of any sum which is due to his own neglect. The question is what is reasonable for the plaintiff to do is one of fact and depends on the circumstances of this case.

On the basis of that authority they submit that the plaintiff herein did not act reasonably by not collecting the bus one month after its repairs and a claim for loss of user for 87 days is unreasonable. It is their stand that the plaintiff being an advocate of the High Court of Kenya and a transporter cannot be said to have had no money to release the bus. Having been ready within one month and yet it was collected 3 months later and this was of negligent act on the part of the plaintiff and so he should not benefit from it. 7. As regards the exact amount of loss the plaintiff said it was between Kshs.30,000-Kshs.50,000 per day depending on the season. It is their submission that it was not proved clearly as to the exact amount of daily collections as PW4 and 5 admitted that there are instances when collections came down to as low as Kshs.7,000/- or even less per day Kshs.3,300.00 and not Kshs.26,400/- as claimed by the plaintiff and the court is invited to assess a reasonable figure which they suggest to be Kshs.10,000/- per day for a period of one month.

8. The claim for general damages must fail. The claim for Kshs.1,955,650.00 must fail as not all receipts were pleaded.

9. On interest, since there was no prayer for the same it can only be obtained from the date of judgement.

On the court's assessment of the facts on liability it is clear that the defence offered no evidence. What we have on record are just pleadings. It is trite law that a pleading is not a piece of evidence. It therefore follows that the submission of the defence counsel when trying to fault the evidence of PW1 does not hold as in doing so he is trying to give evidence for his client from the bar. As matters stand now this court only has evidence from the plaintiff's side, that PW1 had parked the bus off the tarmac at a road block for police inspection when the defendant's lorry pulling a trailer came and rammed into it causing it to roll twice and then landed into a ditch on the opposite side of the road injuring passengers, some of them fatally. Their evidence is that they blame the lorry driver as he saw a long queue of vehicles and yet he did not stop. That the road block is almost permanent and the defendant's driver must have anticipated vehicles at that point which should have made him to drive carefully which he did not. There is no explanation from the defendant driver and so the plaintiff's evidence has not been ousted.

Further, the plaintiff pleaded the doctrine of Res Ipsa Loquitor which shifts the burden of proof on to the defendant to explain what happened. This is a clear case where the defendant's driver was required to come forward and explain why his lorry left its lane and then rammed into the plaintiff's bus which was parked off the tarmac, undergoing inspection by police. By failing to avail this explanation it means that the plaintiff's allegations as to negligence are not ousted. There can be no contribution from the plaintiff in the absence of evidence to show what wrong thing he did. The defence have thus not discharged the burden of proof placed upon them by the doctrine of Res Ipsa Loquitor. It remains that it is the defendant's driver who was in the wrong because for unexplained reasons he left his road and reared into the lane of the plaintiff's vehicle and rammed into it. The said driver was on duty acting in the course of his duty and so he vicariously binds his employers who are liable to compensate the plaintiff for any proven loss and damage. They are 100% liable.

Having established liability I now come to assess damages. The plaintiff has claimed both special and general damages. It has not been stated how the claim of general damages arises where there is a claim for specific material loss. The two are incompatible. Having not shown how the claim of general damages arises and there being no evidence adduced in respect of the same this court has no alternative but to agree with what the defence has submitted that the same is not maintainable. The court agrees with them that this claim is not maintainable and accordingly the claim for general damages is dismissed.

As for the claim of special damages it is trite law that it must be specifically pleaded and proved. The particulars pleaded are those set out in paragraph 8 of the plaint which this court will go over item by item.

1. Recovery and towing charges. The plaintiff (PW4) stated that the lorry had landed on some people who had died and since it was heavy they had to get a breakdown vehicle to recover it

by lifting it off the bodies and then towing it to the police station for inspection. Exhibit 4 dated 5th December, 1997 refers to KAG 185Y the accident vehicle and so I allow the same for Kshs.31,500.00.

2. It is for steering box assembly. It is recommended in the assessors' report (exhibit 1) that the same was to be repaired. It is shown on the receipt dated 15th October, 1997 for Kshs.215,242. The same receipt has other items like oil cooler for Isuzu motor vehicle, propeller shaft complete fitting. It is confirmed that these items too were to be repaired as per the assessors' report (exhibit 1).

3. This is item 3. What is pleaded for the shaft is more than what was spent and so the court allows what was actually paid as per exhibit 8(b). The court allows Kshs.345/- and Kshs.657/-. 4. Under item 4 there is the claim for real wheel shaft assembly including shaft bearings, seals and covers proved by production of receipt dated 17th October, 1997 for Kshs.49,600.00 which I allow.

5. Item 5 is for rear RHS wheel bearing inner and outer bearings for Kshs.18,060.00 no receipt has been exhibited for that and so it is not allowed.

6. Item 6 is for propeller shaft assembly for Kshs.11,640.00. No receipt for this and so it is disallowed.

7. Oil pipes assembly for Kshs.12,098.00 is not supported by a receipt and the same is disallowed.

8. Item 8 is for brake pipes assembly for Kshs.15,800.00 shown on a receipt dated 13th September, 1997 and are allowed.

9. Diesel tank is a receipt dated 5th November, 1997 for Kshs.52,365.00 and is allowed.

10. Rear RHS spring assembly is on receipt dated 24th October, 1997 and it is allowed. Rear RHS spring hinges are on the same receipt. Rear RHS shock absorber is also on the same receipt as item 10, 11 and 12 and I allow the same. The 3 total Kshs.79,270.00.

11. Item 13 is for fog lights 4 x 4 turbo for Kshs.5,350.00 which is on receipt dated 18th November, 1997. Front headlights assembly is on the same receipt as item 13 and they total Kshs.16,000.00 which is allowed. 12. Front indicator is on the receipt dated 20th November, 1997 for Kshs.4,590.00 which is allowed.

13. 3 rims size 20 @ Kshs.47,000.00. These are on the receipt dated 5th November, 1997 and are allowed.

14. Radiator is in the receipt dated 5th November, 1997 and it is allowed.

15. Body fabrication and condition of Kshs.850,000.00 are proved by production of exhibits 6(a) and (b) and are allowed.

16. Labour mechanical for Kshs.30,000.00 and labour electrical for Kshs.18,000.00 were proved by production of exhibit 8(c). The witness who gave evidence stated that he operates in Kisumu but he was hired to go and do repairs in Nairobi. There is nothing to show that this witness was lying and so that claim is allowed for Kshs.48,000.00.

17. Item 21 is for 3 tyres and tubes 20 x 12 for Kshs.96,600.00 which is proved by production of a receipt dated 15th October, 1997 for Kshs.96,600.00 which is allowed.

18. Item 22 is for an axle tube for Kshs.115.00. This is proved by production of the receipt

dated 5th November, 1997 (exhibit 8(a) and the same is allowed.

19. Payment to the assessor is proved by production of exhibit 2 for Kshs.7,500.00.

20. There is no receipt for payment of excess to the tune of Kshs.20,000.00 which is disallowed.

21. Item 25 is for fuel. PW4 said he used fuel to run around to the scene of the accident and then go to Kericho to look for a recovery vehicle and this is a reasonable claim. The receipts are dated 28th October, 1997 for Kshs.700.00; 5th September, 1997 for Kshs.1,330.00; 8th September, 1997 for Kshs.460.00 and 5th September, 1997 for Kshs.435.00. They total Kshs.5,195.00 which I allow.

22. Item seven which the court had disallowed is on the same receipt as item 8 and it is allowed.

The rest of the receipts were not pleaded and they are disallowed. The total under this head comes to Kshs.1,950,255.00.

The next head of claim is the one dealing with loss of user for 87 days. It is on record that the vehicle was used for financial gain. It was a bus used to ferry passengers for a reward. Way bills were produced to show that there were daily earnings which were not constant. At the peak, Kshs.30,000 – Kshs.50,000.00 was realized. At the lowest Kshs.3,000 – Kshs.7,000.00 was realized. The plaintiff took an average of Kshs.26,600.00 while the defence has suggested Kshs.10,000.00. The court has considered those suggestions in the light of the evidence adduced and finds that a daily average of Kshs.19,000.00 would be reasonable and appropriate.

As for the days of loss of user the plaintiff has asked for 87 days. The defendant has suggested one month. Indeed, some witnesses said that the vehicle would have been ready for collection within one month. The plaintiff gave an impression that he was financially able and clearing the bill was not a problem. It is not however, clear as to why the vehicle was not collected immediately after it was ready. It is however, to be noted that the garage owners did not explain the reason for the delay. Giving an allowance to re-use in a way to clear the bill, this court is of the opinion that 45 days would be appropriate loss of user which works out as follows $Kshs.19,000.00 \times 45 \text{ days} = Kshs.855,000.00$, which this court allows.

The defence raised the issue of interest on damages in its submissions. The guiding principle on this is that interest on a special claim runs from the date of filing unless the court rules otherwise. The interest herein will run from the date of filing of the claims.

As for costs they normally follow the event although the court has a direction to rule otherwise which direction has to be shown to have been exercised judiciously.

In the premises judgement is given in favour of the plaintiff against the defendant on the following terms:-

1. Special Damages

(a) Cost of repairsKshs.1,950,250.00

(b) Loss of userKshs. 855.000.00

Total Kshs.2,805.255.00

With interest at court rates from the date of filing till payment in full.

2. Costs of the suit.

3. The claim for general damages is **disallowed**.

Dated, Read and Delivered at Eldoret this Day of

.....

R. Nambuye

Judge

Judgement read in the presence of Nyaundi and Mrs. Kittony for the parties on 2nd

February, 2004.

George Dulu

Judge