



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2288 OF 1998**

- 1) Material Loss Claim
- 2) Motor vehicle collision between two vehicles/three vehicles
- 3) Liability:- 100% against the defendant not proved.
- 4) Quantum:

- a) Special damages
 - Material loss claim
 - Not pleaded nor particularized
 - Suit dismissed
- b) Special Damages
 - withdrawn
 - Towing Charges - Ksh.6,000/-
 - Assessors fee - Ksh.4,000/-

5) Case law – Nil

6) Advocates:-

R.N. Kamiro Advocate for the plaintiff

J.N. Mbugua holding brief for H. Adika advocate for the defendant

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2288 OF 1998**

DAVID MWAURA NDURUHU PLAINTIFF

VERSUS

BOOTH MANUFACTURES CO. LTD. DEFENDANTS

JUDGMENT

On the 25th day of November 1995 David Nganga Kiai (PW3 herein) was driving a motor vehicle mini bus that belonged to David Mwaura Nduruhi the plaintiff herein.

An on coming vehicle travelling from the opposite direction collided with a vehicle in front of it, left its lane and travelled toward the plaintiffs vehicle PW3, the driver drove off the road and stopped. The said vehicle collided into the plaintiffs vehicle whilst stationary.

The plaintiff sued the defendant M/s Booth Manufacturing Co. Ltd as the owner of the vehicle and Elius Owino Okello as the driver of the said vehicle.

When the suit came for hearing the advocate for the plaintiff withdrew the suit against the 2nd defendant on the grounds that the 2nd defendants was deceased. He applied to amend his defence which the court permitted him to do and which application the defendant had no objections.

Both the two defendants had been represented by M/s Mbugua and Mbugua & Co. Advocates.

A defence for both defendants together with the memorandum of appearance was duly filed.

On the 10.9.04, the trial commenced whereby the plaintiff gave evidence claiming for compensation of his said vehicle. That the material loss sustained should be paid to him.

A) LIABILITY

From the evidence before the court, the driver (PW2) to the plaintiff stated that he was stationary when the defendants vehicle collided into him.

The accident is indeed not denied. The defendants joint defence stated that they were not the owners of the motor vehicle in question. That the 2nd defendant was on his own frolic at the time of the accident.

Ideally, the 2nd defendant should not have been represented by the advocates for the defendants who appear to have given a contradictory defence that prejudices him. This now has been over taken by event when the plaintiff withdrew the suit against the defendant.

The agreed issues, six in number can therefore be answered as such.

Issue No. 1 and 2

- 1) Whom does Motor vehicle KYY 997 Mitsubishi Lorry belong to as at 25.11.95?
- 2) Who owns motor vehicle KAB 715Y as at 25.11.95?

The plaintiff produced no certificate of search from the registrar of motor vehicle to confirm the ownership of the vehicle as of 25.11.95.

This therefore means that there is no proof to show that the defendants indeed owned the motor vehicle in question.

Issue No.3

Was the deceased Elius Owino Okello

an employee of the defendant?

No evidence was led as to this issue. I am unable to establish from the evidence whether the former defendant No.2 was an employee of the defendant.

Issue No.4

Is the defendant vicariously liable

for the action of Elius Owino Okello

As there has been no evidence deduced, this court is unable to confirm this fact.

I believe what the plaintiff should have pleaded was the doctrine of Res Ipsa Loquitur. "things speaks for itself." This was never pleaded. As such I would find that the particulars of negligence on the part of the 1st defendant has not been established.

I hereby dismiss this suit on liability.

B) POSSIBLE QUANTUM

I am required by law to compute the award. I would have given if the plaintiff had been successful in his case. This is covered by:-

Issue No.5.

What are the material damages occasioned to the motor vehicle KAB 715Y and the extent of liability for the defendant?

The plaintiff from his plaint failed to plead special damages and particularize the material loss. All along the advocate for the plaintiff referred his claim as a General Damage Claim. As such he argued that he need not plead the particulars of damages to be amended.

I would not agree to this. A material loss claim is a Special Damage Claim that arises from tort. Special damages must be pleaded, particularized and proved strictly. Thus the plaint should have read the following particulars:-

re-accident value Ksh.

Less salvage Ksh.

Total Ksh. ““P

The suit can therefore not be sustained on this omission.

The plaintiff brought an assessor who stated that the plaintiff instructed him to do the assessors report. It is unclear whether in fact the said vehicle had an insurance cover.

From the assessors report of PW2 he computed pre-accident value at Ksh.950,000/- and the salvage at Ksh.180,000/-. According to law the plaintiff would have been entitled to Ksh.770,000/-.

The evidence though that came out was that the said amount of Ksh.180,000/- was never realized as the vehicle was never sold as a salvage. Even if it was an estimate, the value was not able to justify how a very, very old vehicle was valued at Ksh.950,000/-.

I would not have made an award herein on the grounds that the particulars of the Special Damages was never pleaded.

A) SPECIAL DAMAGES

When the plaintiff amended his plaint, he claimed Special damages for:-

i) Towing charges Ksh.6,000/-

ii) Assessors fee Ksh.4,000/-

Before the trial commenced the plaintiff withdrew these claims. I hereby mark the claims as withdrawn. I accordingly dismiss this suit.

In Summary:-

Material loss claim

1) Collision between 2-3 vehicles

2) Liability: - Nil not proved

3) Possible quantum.

a) Special Damages

Material loss claim Nil

Not plead nor

Particularized - dismissed

b) Special Damages - Withdrawn

i) Towing Charges - Ksh.6,000/-

ii) Assessor fee - Ksh.4,000/-

The suit is hereby dismissed with costs to the defendant. Dated this 15th day of June 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

R.N. Kamiro & Co. Ad vocates for the plaintiff

Mbugua & Mbugua Advocates for the defendant