REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
HCCA NO. 55 OF 2002

JUSTUS THURANIRA(Suing as legal Rep. of the estate of Kithinji M'Irura (Deceased) …… APPELLANT

VERSUS

ABDUL HALIM T/A TAWFIQUE

BUS SERVICE …….. …… RESPONDENT

(Being an appeal from the Judgment and decree of Senior Principal Magistrate Mr. Njeru Ithiga in Meru CMCC No. 627 of 2001 dated 28th May 2002)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of Senior Principal Magistrate, Mr. Njeru Ithiga delivered on 28th day 2002 in Meru CMCC No. 626 of 2001. In the Memorandum of Appeal filed in court on 18.6.2002 the appellant, Justus Thuranira (suing as the legal representative of the estate of Kithinji M'Irura (deceased) has set out five grounds of appeal, namely,

1. That the learned trial magistrate erred in law and fact by totally disregarding the appellant's and witnesses evidence and dismissing the appellant's case.

2. That the learned magistrate erred in law and fact in failing to find the respondent wholly liable for the accident.

3. That the learned trial magistrate erred in law and fact in finding that the accident was inevitable.

4. That the learned magistrate's judgment is against the weight of evidence.

5. That the trial magistrate's judgment/decision is bad in law.

The appellant prays that the judgment of the learned trial magistrate be set aside and in its place the court should order that the plaintiff be awarded the damages as set out therein and costs.

From the pleadings, the appellant herein filed his case against the respondent in the lower court on 31.8.2001 being Meru CMCC No. 627 of 2001. The appellant sued in his capacity as brother and legal representative of the deceased, Kithinji m'Irura and instituted the proceedings on his own behalf and on behalf of the deceased's estate under both the Law Reform Act, Cap 26 Laws of Kenya and the Fatal Accidents Act, Cap 32 Laws of Kenya. He sued Abdul Halim t/A Tawfique Bus Service who was the

alleged owner and registered proprietor of a motor vehicle registration number KAK 151D, a Nissan Bus of which one Ali Omar, deceased, was the alleged authorized driver. The facts are that on or about 24.8.2000, along the Meru-Chuka road, the deceased was a fare paying passenger in the said motor vehicle when the defendant's authorized agent servant and/or driver so negligently, carelessly, recklessly and/or dangerously drove managed and/or controlled the said motor vehicle and caused an accident whereby the deceased sustained fatal injuries as a result of which the estate of the deceased has suffered loss and damage. In the plaint the plaintiff attributed the following particulars of negligence to the defendant:-

(a) Driving at an excessive speed in the circumstances.

(b) Driving on the wrong side of the road.

(c) Failing to break, slow down, serve and/or stop so as to avoid the accident.

(d) Driving without due care, prudence and skill.

(e) Failing to take due care and regard as to the safety of the passengers and especially the plaintiff.

(f) Failing to hoot or in any way warn other road users of his approach so as to avoid the accident.

(g) Failing to observe the high way code traffic rules and regulations.

(h) Driving recklessly, carelessly and dangerously.

(i) IN THE ALTERNATIVE the said motor vehicle must have been defective thus incapable of proper control and management.

The plaintiff averred that the deceased who was aged 70 years was working as a businessman earning Kshs. 10,000/= per month and was by the time of his death leading a healthy and active life which life was illegally and unlawfully shortened by the accident. The plaintiff prayed for special damages which were pleaded at Kshs. 15,150/= general damages under the Law Reform Act, Cap 26 Laws of Kenya and under the Fatal Accidents Act, Cap 32, Laws of Kenya and also prayed for damages for pain and suffering, costs and interest.

In its defence filed in court on 15.4.2002 through the firm of M/S BALI SHARMA & CO. Advocates of Nyeri, the defendant, while admitting that an accident occurred on 24.8.2000, denied that the defendant/appellant was a fare-paying passenger in the ill-fated motor vehicle and also denied that the motor vehicle was being driven negligently, carelessly, recklessly and/or dangerously. The defendant also denied all the particulars of negligence attributed to it as set out in paragraph 4(a) – (1) of the plaint. In the alternative the defendant pleaded that if the plaintiff was indeed a passenger in the ill-fated bus, a fact which the defendant denied, then the doctrine of volenti non fit injuria applied to him. Finally, the defendant denied the plaintiff's claim for both special and general damages. In his reply to defence, the plaintiff maintained that he had the capacity to sue and that the deceased was indeed a fare paying passenger in the defendant's motor vehicle registration number KAK 151D a Nissan bus on the fateful day. Further the plaintiff denied that the doctrine of volenti non-fit injuria was applicable in this case and reiterated that indeed the estate of the deceased had suffered loss and damage for which the defendant was liable.

In his three-page judgment the learned trial magistrate found that the plaintiff had failed to prove negligence against the defendants as pleaded and on his evidence on a balance of probability. The learned trial magistrate concluded that the accident was an inevitable accident in the absence of evidence from the late driver and independent witnesses. The defendant was thus found not liable to compensate the plaintiff. He added that if the plaintiff had proved negligence against the defendant, he would have awarded the plaintiff Kshs. 3000/= per month with a multiplier of 5 years thus translating to Kshs. 180,000/= under Law Reform Act and the following other amounts namely Kshs. 100,000/= for pain and

suffering, special damages in the sum of Kshs. 15,150/= all totaling Kshs. 305,150/=.

It is against that judgment that the appellant now appeals. In her submissions during the hearing of the appeal, Mrs. Gitonga for the appellant argued all the appellant's five (5) grounds of appeal in an effort to persuade this court to reverse the judgment of the learned trial magistrate arguing first ground 2 of the appeal, grounds 1, 4 and 5 together. Mrs. Gitonga submitted that the learned trial magistrate erred both in law and fact in dismissing the plaintiff's (appellant's) case in failing to find that the respondent was wholly liable in negligence for the accident and therefore liable for the accident and therefore liable to compensate the plaintiff/appellant. Mrs. Gitonga took the court through all the grounds of the appeal and cited some two authorities to show that indeed there was serious misdirection on the part of the trial magistrate in reaching the conclusion that he reached.

The appeal is opposed. Mr. Mahan of the firm of BALI-SHARMA & BALISHARMA Advocates submitted that the trial magistrate was perfectly right in reaching the conclusion that he did on the strength of the evidence before him, having found as he did that the accident occurred as a result of a tyre burst, and not due to negligence on the part of the respondent as alleged by the appellant. Further, it was argued on behalf of the respondent that the plaintiff's evidence was not only sketchy but uncorroborated and that the plaintiff did not adduce evidence to rebut the respondent's explanation as to the cause of the accident, namely that the accident was caused by a tyre burst. It was also argued on behalf of the respondent that infact the motor vehicle that caused the accident did not belong to the respondent as shown by exhibit DI.

What was the appellant's case before the trial court? PWI – Justus Thuranira – the plaintiff herein-told the court that the deceased who was his brother was traveling in the ill-fated bus on the material day. That it is PWI himself who paid for the deceased's fare in the bus KAK 151D Nissan Bus and that after the accident he reported the accident to Chuka Police Station and obtained a police abstract as P exhibit 1. He stated further that he obtained Grant of Letters of Administration through Succession Cause No. 85 of 2001 which enabled him to file suit on behalf of his deceased brother's estate. That prior to his death, the deceased operated a retail shop at Kongowea Mombasa apart from the fact that he was a carpenter and also sold fruits and vegetables. While under cross-examination, the plaintiff admitted that he had no evidence on the deceased's actual income and whether he was a carpenter or not. PW2 Njagi Robert told the court that on 24.8.2000 he was a passenger on the ill-fated bus together with two of his children. He stated that as they approached the Nithi bridge, the bus was very fast and that the driver failed to negotiate the corner at the bridge and plunged into the river. He stated that the driver was negligent. During cross-examination, PW2 told the court that he sat somewhere in the middle of the bus and as such could not see the driver in the driver's cabin. He also told the court that he did not hear any tyre burst before the bus plunged into the river.

The defendant's only witness, RASHID SULEIMAN MOHAMMED, DWI, the transport manager of the defendant M/S Tawfique Bus Service produced the certificate of registration and also a service record of the vehicle (D Exhibit 2) which showed that two new tyres were fitted and there was also change of engine oil on 5.8.2000. He also produced D exhibit 3 being an inspection report to show that the vehicle was inspected on 5.4.2000. He was neither in the vehicle nor at the scene of the accident but he said that when he saw the vehicle wreckage one rear right tyre had burst. He also said that the vehicle which was going down hill hit the guard rails before plunging into the river and that the bus driver Ali Omar who had worked for the defendant for about five years perished in the accident. During cross examination, the witness told the court that the bus was on the road from 5.8.2000 till the date of the accident and that he was not the one who prepared the job card (D exhibit 2) to confirm that the bus had been checked. Regarding ownership of the vehicle, he told the court that the bus belonged to Tawfique and added that he thought the cause of the accident was the tyre burst, and that passengers were not responsible for the accident.

In dismissing the plaintiff's case, the learned trial magistrate believed the evidence of DWI who he said attributed the cause of the accident to a tyre burst. The learned trial magistrate then proceeded to observe that there was no evidence from independent investigators as to the cause of the accident and that the court was left to rely on the evidence of PW2, NJAGI ROBERT who appeared to have been the only

witness at the scene and a victim of the accident. With respect to the learned trial magistrate, PW2 was not a witness at the scene. PW2 clearly told the court that he was a passenger in the illfated bus traveling to Mombasa together with two of his children, Wanja and Nkanata and that Nkanata perished in the accident. His testimony was that as they approached the bridge, the bus was very fast and that the driver failed to negotiate the corner at the bridge and fell into the river. The learned trial magistrate was of the view that other survivors of the accident should have been called to testify and say how the accident occurred and that the plaintiff did not challenge the defence evidence that the bus was regularly maintained and free from defect and that the cause of the accident was the tyre burst. On whether or not the accident was caused by a tyre burst, the only defence witness, DWI, only thought that the accident was due to a tyre burst. Against this evidence is the evidence of PW2 who testified that the bus was going fast as they approached the bridge and that the driver failed to negotiate the corner. It is immaterial that the said PW2 did not or could not see the driver in the cabin – the fact is that according to his evidence the bus was moving fast and as a result the driver failed to negotiate the corner and the bus thus plunged into the river. Other witnesses need not necessarily have been called. In the case of KENYA BUS SERVICES LTD V. KAWIRA (2003) E.A. 519 (Court of appeal Kenya), a case that was relied on by the respondent, similar facts existed and the respondent who sued as the personal representative of the deceased who died in a Kenya bus at the same Nithi Bridge called only one witness who was a passenger in the ill-fated Kenya bus whose testimony was that as the bus approached the Nithi Bridge, it was swaying from side to side and that the bus overturned over the bridge. I am satisfied that the evidence of PW2 established negligence against the driver of the bus which caused the death of the deceased when it plunged into the river as a result of the bus having been driven fast as a result of which speed the driver failed to negotiate the corner as the bus approached the bridge. As admitted by DWI, the passengers were not responsible for the accident. I find therefore that the learned trial magistrate erred in law and in fact in failing to find the respondent wholly liable for the accident. I find therefore that on the evidence on record, the respondent was wholly liable in negligence for the accident. It has not been disputed that Ali Omar the deceased driver was a driver for the respondent and that on the fateful day, he was acting as such driver in the course of his employment with the respondent.

It has been argued by the respondent that the bus was regularly and well maintained.The evidence by DWI is to the effect that the bus was inspected on 5.4.2000 though the DWI did not prepare the report. There is no evidence of another inspection of the bus before the date of the accident. DWI also told the court that the bus was on the road continuously from 5.8.2000 until the day of the accident. Such far and apart incidents of inspection and/or change of tyres and oil cannot be termed regular. The inference to be drawn from this is that the bus was not properly and regularly maintained and therefore the bus must have been defective and therefore incapable of proper control and management. If the learned trial magistrate had properly addressed his mind to the evidence before him, he would have found as a fact that the accident that gave rise to the death of the deceased was not an inevitable accident. The learned trial magistrate therefore erred in law and fact in finding that the accident was inevitable. As was held in the KENYA BUS SERVICES LTD V. KAWIRA case (supra) “buses, when properly maintained, properly serviced and properly driven do not run over bridges and plunge into rivers without explanation”. The explanation in this case is that the bus was being driven fast while going down a dangerous slope and the same bus was not properly maintained and serviced.

Although the defendant denied negligence in its defence, the only defence witness DWI did not in his evidence challenge the evidence of PW2 that the bus was being driven fast just prior to the accident and that the driver failed to negotiate a corner as a result of which the bus hit the bridge rails and fell into the river. PW2 saw the bus hitting the bridge rails and falling into the river. On this evidence, the learned trial magistrate should have found that the plaintiff had proved negligence against the defendant/respondent and condemned the respondent 100% liable in negligence for the accident. It is therefore my humble view that the learned trial magistrate erred in law and fact by totally disregarding the appellant’s and witnesses evidence and dismissing the appellant’s case. I also find that the learned trial magistrate’s judgment was against the weight of evidence. The appellant proved his case on a balance of probability. Further, the defence did not challenge PWI’s evidence that the deceased was a fare-paying passenger in the ill-fated bus apart from denying the same in the defence. There was also no evidence by the defence to challenge the plaintiff’s evidence that by the time he filed the suit, he had obtained Grant of Letters of Administrate intestate and properly filed suit as personal representative of the estate of the deceased under the Fatal

Accidents Act (Cap 32) and the law Reform act (Cap 26) of the Laws of Kenya. DWI's evidence was only to show that the bus was properly maintained and that he did not know Abdul Halim who has been sued trading as Tawfique Bus Services. On the issue of whether or not the right/proper party has been sued, DWI admitted under cross examination that the ill-fated bus belonged to Tawfique bus service. In this regard I refer to the provisions of Order I Rule 9 which provides as follows:-

> **"9. No suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

The facts before me are that the bus registration number KAK 151D which was traveling from Meru to Mombasa was involved in a fatal accident at the Nithi Bridge as a result of which the deceased died and that the bus belonged to Tawfique Bus services Limited. It matters not that the directors were not known to the plaintiff. There is also evidence before me that the deceased was a fare-paying passenger on the said bus. PWI bought the ticket for the deceased and escorted him to the bus and after the accident it was found that the deceased had perished in the accident. The plaintiff's case should therefore not be defeated on the ground only that Abdul Halim was not known to the defendant's witness DWI.

On the question of quantum, the learned trial magistrate stated in his judgment that if he had found the defendants liable in negligence, he would have made an award of a total of Kshs. 305,150/= as both general and special damages to the plaintiff. Special damages were pleaded at Kshs. 15,150/= and he would also have made an award under both the Law Reform Act and the Fatal Accidents Act. On the evidence before me, I would not interfere with the said award except to apply the 1/3 dependency ratio on the award under the Fatal Accidents Act. For the foregoing reasons, I allow the appeal and enter judgment for the plaintiff as against the defendant on liability at 100%. I make the following award on damage:- under the Factal Accidents Act, apply a multiplier of 5 years at Kshs. 3000p.m. which comes to Kshs. 3000x12x5=180,000/= less 1/3 dependency ratio of Kshs. 60,000/==120,000/=. I make the following awards under the Law Reform Act: loss of expectation of life – Kshs. 100,000/=, pain and suffering Kshs. 10,000/= and special damages of Kshs. 15,150/= all totaling Kshs. 245,150/=. I also award costs of the suit in the lower court to the plaintiff and interest thereon on special damages from the date of filing suit until payment in full and on general damages from the date of this judgment until payment in full. The appellant shall also have the costs of this appeal.

Dated and delivered at Meru this 3rd day of Dec. 2004.

RUTH N. SITATI

Ag JUDGE

3.12.2004