REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 438 OF 2000

KENYA BUS SERVICES LTD.……...……APPELLANT

VERSUS

DAVID KANYARI MWANGI……..RESPONDENT

J U D G M E N T

The case before the lower court arose out of a road traffic accident in which the respondent, while traveling as a fare paying passenger in the appellant's bus registration number KAD 899D on 4th December, 1996 was injured along Kiriaini-Murang'a road.

He blamed the appellant for the negligence of his driver, servants and/or agents in the manner of driving the motor vehicle on the fateful day. He filed a suit in the court of the Senior Resident Magistrate at Milimani Commercial Court's Nairobi on 5th November 1998 to claim from the appellant both general and special damages for the injuries sustained in the accident.

After a defence had been filed by the appellant denying liability, the case was fixed for hearing on 23rd September 1999 before the Senior Resident Magistrate (J.R. Karanja) when evidence of the plaintiff-respondent was adduced. The appellant offered no evidence.

Parties filed written submissions and judgment was delivered on 9th June 2000. The court found the appellant vicariously liable for the negligence of its driver in the manner he drove the motor vehicle in question and ordered it to pay to the respondent general and special damages amounting to Kshs.181,100/=.

This decision did not please the appellant who filed an appeal to this court on 30th August 2000 in a memorandum of appeal which listed seven (7) grounds of appeal.

These grounds queried both issues of liability and quorum. Counsel for the parties appeared before this court on 11th February 2003 and either urged or opposed this appeal.

Counsel for the appellant submitted that vicarious liability was not pleaded and that when the accident occurred the driver was not in the course of his duties but that he was on a frolic of his own.

That the magistrate erred in not following the decision in HCCC No. 1124/98 which arose from the same accident which suit was dismissed due to lack of proof of liability.

That the decision of the lower court should be reversed as regards liability.

On quantum, counsel stated that the respondent suffered soft tissue injuries and that general damages of

Kshs.90,000/= should have sufficed. He prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and submitted that since the defence called no evidence to contravert the respondent's evidence – the latter's evidence went unchallenged as to liability.

That the appellant called no evidence to prove the driver was on a frolic of his own when the accident occurred. As to quantum counsel stated that the respondent sustained very serious injuries as per the medical report and that the amount of general damages awarded to him were commensurate with such injuries. Counsel prayed that the appeal be dismissed with costs.

The respondent's claim in the case subject to this appeal was based on the negligence of the appellant's agent, driver and/or employee – (see paragraph 3 of the plaint).

Particulars of negligence of the appellant's agent were as follows:-

(a) The agent drove an unroadworthy motor vehicle at a highly excessive speed in the circumstances.

(b) Failed to swerve, steer manage handle and/or control the aforesaid motor vehicle so as to avoid the accident;

(c) Failed to have and keep proper control of the said motor vehicle so as to avoid the accident,

(d) Failed to brake, in time or at all so as to avoid the accident;

(e) Otherwise driving without due care and attention.

And when it came to hearing the case, only the plaintiffrespondent testified and this is what he said:-

"- - - - on 4th December, 1995 I was traveling in a bus registration No. KAD belonging to the defendant Compan y when it got involved in an accident.

The bus overturned while descending a stage. It reached a bend and rolled several times. I was injured in the process.

Prior to the accident the bus was moving at a very high speed."

The rest of the evidence related to the injuries the respondent sustained, his admission to the hospital and the examination by the doctor.

Nothing was said about the manner in which the accident occurred.

The defence called no evidence.

As one can see, apart from saying the bus was being driven at a very high speed, there was no evidence adduced to confirm that the bus was unroadworthy, that the driver failed to swerve, steer, manage handle and/or control the motor vehicle to avoid the accident, that the driver failed to brake in time or at all so as to have or keep proper control of the said motor vehicle, or that he drove without due care and attention.

But all these were particulars of negligence pleaded in the plaint and over which evidence was to be adduced to prove each of them on a balance of probabilities.

Driving at a high or very high speed is not in itself an act of negligence and it has to be accompanied by other acts as stipulated in paragraph 4(b) (c) (d) and (e) of the plaint and properly proven.

Nothing of this happened in the case subject to this appeal and I am not surprised the defence called no evidence as there was no evidence from the respondent's side to reply to.

Once therefore the issue of liability was not established by the respondent on a balance of probabilities, the issue of damages could not fall for a decision.

That the respondent's evidence was unchallenged was not itself, evidence to prove the respondent's case on a balance of probabilities. In civil cases the burden is on the plaintiff to prove his/her case and the defence has no burden to prove anything.

And as I have already indicated, that the driver of the bus drove it as an excessive speed, if at all, is not in itself an act of negligence upon which the learned magistrate Should have found the appellant liable for the accident.

Of course if the respondent had established the negligence of the appellant the burden would have shifted to the latter to show that its driver did not cause the accident in course of his duties if he was on a frolic of his own.

But in face of the shallow and insufficient evidence on the part of respondent there was no need for the shifting of the burden.

Thus, it is true as appellant states in the memorandum of appeal that: Ground (1) there was no evidence on record or at all to prove that the appellant was liable for this accident; on ground (2) that the appellant was not vicariously liable for the alleged acts of his driver as none were proved; ground (3) that the court erred in assessing damages for the respondent as there was no evidence or any basis for assessing such award.

In the ultimate result, I allow this appeal and set aside the lower court order with costs and substitute it with one dismissing the respondent's suit with costs.

Delivered this 19th day of February 2003.

D.K.S. AGANYANYA

JUDGE