



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 385 OF 1999

ASIF JETHA PLAINTIFF

- VERSUS -

ANTONY NJOROGE WANJOHI

STAGE COACH COMPANY LTD. DEFENDANT

J U D G E M E N T

The plaintiff's motor vehicle registration number KAE 506E Mercedes Benz and Trailer registration Number Z36403 was being driven along the Eldoret-Nakuru Road on the 15th March, 1998 when at Mukinyai it was involved in a collision with the Defendant's motor vehicle Registration Number KAH 130J Bus. The plaintiff's motor vehicle suffered Damage and he attributes the accident to negligence on the part of the Defendants.

The Defendants filed a defence and save for the accident having taken place all the allegations of negligence and particulars of Damages were all denied. No Reply to the Defence was filed and at the hearing the defence did not call any evidence.

The Plaintiff in his evidence in chief stated that he was at the material time traveling in the Truck and on reaching a part of the road with a slight down hill drop towards his motor vehicle's direction of travel, the Defendant's Bus which was traveling towards the same direction collided with his vehicle from the rear. Some passengers in that Bus were slightly injured. He noted that there was a slight dent on the trailer and the Doors to the container loaded onto the Truck. When the driver attempted to restart the Truck engine it failed. The matter was reported to Molo Police Station and the Plaintiff was issued with a Police Abstract but results of the Police investigations at the time are given as pending.

The particulars of Negligence attributed to the 1st Defendant who was the authorized driver are given as:

1. Driving at an excessive speed in the circumstances given the time traffic, and nature of the road.
2. Failing to keep any or any sufficient look out.
3. Failure to notice and or insufficient time to notice the plaintiff's motor vehicle on the road.
4. Failing to slow down swerve, stop or otherwise manage control or propel the Defendant's motor vehicle so as to avoid colliding with the plaintiff's motor vehicle.

5. Failing to have any and or any sufficient regard for the safety and well being of other users and motor vehicles on the road, particularly the plaintiff's.
6. Deliberately and or recklessly driving and or propelling the 2nd Defendant's motor vehicle so as to cause the same to collide with the Plaintiffs motor vehicle.
7. Failing to exercise due skill attention care and prudence in all the circumstances.

The Plaintiff appointed a private loss Assessor GEORGE MATIA KIGURU (PW2) who carried out an assessment of the Damage to his Motor vehicle as well as the cost of Repairs. He prepared a report dated 31.3.98 having inspected the same on 25.3.98. Although not state in his evidence, PW2 did put a Note at the bottom of the 1st page of his report to the effect that at the time of Inspection, the motor vehicle KAE 506E Engine was already undergoing a Top Engine overhaul and the trailer was not available and the information on how the accident occurred was gathered from the plaintiff and one Christopher Ogola a Co-driver. There was no further evidence adduced on the issue of negligence nor was the Police file produced. And there having been no other evidence to the contrary, I hold the Defendant's 100% liable for the said accident. XXXX The immediate notable Damage suffered by motor vehicle KAE 506E and it's trailer are as described by the Plaintiff as a negligible dent at the rear of the trailer and the container it was ferrying. The plaintiff in his evidence in Chief as well as in cross-examination said the impact though from the rear did cause an Engine seizure as a result of the sudden impact. He denied that the Engine Seizure was as a result of either the Engine having been overdue for service or because the vehicle had been on the road for about 9 hours prior to the accident.

This was corroborated by PW2 who described the Damage Profile in his report as:

“The damage is consistent with the Truck whose particulars are provided above having sustained on impact on it's rear towards it's front from a solid obstruction resulting in a weight transfer causing shearing of engine and gear box mountings cracking air inlet conduct to turbo charger aluminum cost part of it and water outlet (aluminum cast) joint from the water pump. The crack on the water outlet joint occasioned rapid leakage of coolant necessitating switching off of the Engine. Effort to crank the Engine afterwards were futile and it was assumed to have ceased. On dismantling of the same, exhaust part valve seat and piston crown for cylinder number two nearside block were found broken and scored respectively which may have been occasioned by sudden cooling at standard atmospheric pressure and temperature. Container loaded at the rear trailer had it's doors and locking bars mildly dented and bent respectively”.

In cross examination the witness was firm that the damage to the Engine was caused by the impact to the rear of the trailer. There was no other evidence offered to the contrary.

PW2, did proceed to list down the damaged parts and their costs at Part V of his report and gives the total cost of the repairs as Kshs.340,346.60. The Plaintiff in his evidence stated that he had bought the spares from Sheila Auto parts for Kshs.175,968/= and the others from Silver Star Automobiles Ltd. for Kshs.132,327/= and had the same repaired by SOFTRA LTD. at a costs of Kshs.29,250/=. These give the total repairs costs as Kshs.337,545/= as opposed to Kshs.340,346.60 as given in the plaint. He paid a further Kshs.100/= for the Police Abstract and Kshs.4,000/= for the Assessors fees. These amounts were not disputed at the hearing.

At paragraph 8 of the plaint, the plaintiff further claimed loss of user for tow of his damaged trucks KAE 506E and KAG 546J which he used to tow two KAE 506E to Mombasa as well as to deliver the container to it's owners. He claimed that he used the two Trucks to transport goods for a company known as MARITRANS SERVICES LTD. from Kampala to Mombasa at a rate of U\$ 3,250/= per Mombasa-Kampala trip and U\$ 1,200/= for a Kampala-Mombasa trip giving a total of U\$4,550. After taking into account his overheads, he arrived at a Net profit of U\$ 3,000 per truck per trip.

He said each truck would make 2 trips to Kampala each month and the two trucks had lost a trip each as a

result of the accident. To support this claim the plaintiff called two witnesses from MARITRANS Services Ltd. namely Mr. Zacharia Jilo Mbonaya (PW4) a clerk who said that the plaintiff was one of the transporters the company would sub-contract the transportation of their goods from Mombasa to Kampala . To confirm the same he produced copies of invoices by the plaintiff's business concern New Ocean Transport to MARITRANS SERVICES LTD. for the months of February and March 1998 and a letter by the General manager and Financial Controller to Stanbic Bank instructing them to pay the plaintiff U\$ 13,000\$. ROSALIA NYALE (PW5) is the Financial Controller of MARITRANS SERVICES LTD. and confirmed the plaintiff was being paid for transport services he had rendered between Mombasa – Kampala. However apart from saying the plaintiff had been contracted by their Company as one of their Transporters there was no other evidence to confirm that indeed in the 4 years plaintiff did provide transport services and the number of trips as well as earnings per trip

The claim by the plaintiff is a special claim and apart from the fact that he had provided the services in the months of February and March, 1998, there was no further evidence to show that he was guaranteed of the two trips he claims by MARITRANS SERVICES LTD. This being a special claim he must prove the same and in this case the plaintiff has failed to do so and this claim fails.

I therefore award the plaintiff a total sum of Kshs.341,165/= plus costs and interest made up as follows:

Cost of repairs -	337,545.00
Assessment Report -	4,000.00
Police Abstract -	100.00
Total	341,165.00

Dated and Delivered at Mombasa this 12th day of April, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE