REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIV APP 303 OF 93[1]

AKAMBA PUBLIC ROAD SERVICE LTD

AND

ANOTHER ……..APPELLANT

VERSUS

JOSEPH M. MUKUNDI ……RESPONDENT

J U D G M E N T

On 16th April 1987 the respondent's motor vehicle registration Number KQZ 282 was being driven by the said respondent's driver whose identity was not disclosed, along RukWa/Nile road within Nairobi when it was involved in a road traffic accident with an Akamba bus registration number KWP 912.

In this accident the respondent's said motor vehicle was damaged and the plaintiff filed a suit in the court of the Senior Resident Magistrate, (Sheria House) Nairobi, to claim from the appellant a sum of Kshs.108,650/= being loss of user of the motor vehicle for 28 days at a daily rate of Kshs.2,100/= per day, (Kshs.58,800/= cost of repairs of the motor vehicle (Kshs.38,360/=, booking fee for inspection (Kshs.120/=, police abstract report (Kshs.100/=) and assessors fees (Kshs.1,250/=).

The plaintiff blamed the accident on the negligence of the appellant, particulars whereof were stated in paragraph 2 of the plaint.

After a defence was filed to this suit by the appellant denying the particulars of negligence against them, the case was fixed for hearing before the Senior Resident Magistrate (J.K. Mbugua) later taken over by another Senior Resident Magistrate (M.M. Muya) who heard it on 6th April, 1993, 3rd and 11th August 1993. Judgment was delivered on 17th August 1993. wherein the plaintiff was awarded Kshs.58,800/= being loss of user of the motor vehicle; Kshs.38,360/= being repair charges, Kshs.100/= being inspection fees and Kshs.1,250/= being assessment fees plus costs of the suit and interest because the driver of the appellant bus driver was found to have been negligent in his manner of driving.

This decision did not find favour with the appellant who filed an appeal to this court on 23rd August 1993, in a memorandum of appeal which listed 4 grounds of appeal.

These grounds faulted the magistrate for failing to find the respondent to blame for the accident and/or liable for contributory negligence, hence failed to adjudicate the case before the court on the merits; that the learned magistrate erred in arriving at the conclusion the subject of the appeal in view of the evidence adduced before him during the trial of the suit; that he erred and misdirected himself in finding that the appellants were wholly to blame for the accident and that he erred in his approach to the assessment of damages for loss of user.

The appeal was fixed for hearing in this court on 25th September, 2002 when counsel for the appellant and the respondent in person appeared either to present or oppose the same. Counsel for the appellant submitted that liability was not proved and that there was no basis for the magistrate awarding special damages to the respondent.

He submitted that none of the respondent or his witnesses witnessed the accident while the sole defence witness whose evidence showed how the accident occurred was not believed in which case there was no evidence to show how the accident occurred. According to counsel, therefore, there was no acceptable evidence to show how the accident occurred hence the burden of proof intended by Section 108 of the evidence Act Chapter 80 Laws of Kenya was not discharged.

According to counsel, loss of user was not proved because no historical records showing the level of business were produced and that these being special damages strict proof was required. He prayed for the appeal to be allowed with costs.

The respondent in person supported the magistrates judgment. He said that the photographs taken of his lorry showed that it was hit by an overtaking vehicle and that if his driver had swerved, his lorry would have been hit at the cabin.

That the area of the lorry hit was bent towards the front which meant it must have been hit by an object from behind. According to him, the officer from KCC who testified in the case showed how, he, the respondent, was contracted to transport milk within and outside Nairobi.

He referred to the evidence from the insurance official showing why it took long to repair the lorry, the evidence of top assessors and production of the abstract report and how it blamed the driver of the bus for the driver.

The respondent stated that the judgment of the lower court was fair and prayed that this appeal be dismissed with costs. These are submissions of the parties which I have heard and recorded. I have also perused the lower court record of proceedings and judgment.

The particulars of negligence pleaded in the plaint (paragraph 7 thereof) were as follows:-

(a) driving at a speed which was too fast in the circumstances

(b) failing to keep any or any proper look out or to have any or any sufficient regard for other traffic on the said road,

(c) failing to have or to keep any or any proper control of the said vehicle,

(d) hitting the said vehicle KQZ 282 on the said road

(e) failing to stop, to slow down to swerve, or in any way so as to manage or control the said vehicle KWP 912 so as to avoid the collision.

(f) Failing to have any or any sufficient regard for the safety of the users of the said road.

These are particulars which should have been proved by the plaintiff before the degree of blame was apportioned. And only an eye witness as to how the accident occurred including the driver of the

respondent's vehicle would have testified to confirm these particulars.

Unfortunately there was no such witness to testify and the only evidence as to what happened was that of the respondent who was not at the scene when the accident occurred.

The respondent's evidence was mainly hearsay or he testified as if he was the motor vehicle inspection exparte which he was not His evidence did not show how the accident occurred.

And that of the defence witness Joseph Awino, the ton boy on the defendant's bus that the driver of the respondent vehicle swerved it to the side of the bus and hit it was not accepted by the learned magistrate who instead simply said in his judgment that "From th e assessment report the damaged parts of the plaintiff's vehicle are shown to have been on the right side of the lorry near the driver's door. If the accident occurred as the defendant's witness would like the court to believe, then the plaintiffs vehicle , which allegedly turned right while the defendant was overtaking would not have been hit at the right door."

This was not the issue and/or it did not form part of the particulars of negligence averred in the plaint.

The most important point here would have been the point of impact of this accident and that this would only have been confirmed by a police officer, if he visited the scene.

That the abstract report marked for identification (MF (3) said of the Result of Investigation that

"Driver of motor vehicle KWP 912 was to blame and insurance cover to deal ."

Was not evidence in support of the plaintiff's case as to how the accident occurred.

The investigating officer should have appeared in court with relevant sketch maps to show the place of impact and skid marks which would, in turn, have shown which of the two vehicles swerved to the other's side.

And only in this way, would liability in negligence in this accident have been apportioned.

Without this evidence being available to the court, there was no basis of apportioning liability against the appellant at 100%. And even if this was done, the damages sought were in the nature of special damages and though they were specifically pleaded in the plaint, they needed to be strictly proved by evidence.

A special damage represents a loss one has incurred and is not based on speculated loss.

This court's perusal of the lower court record reveals that no evidence at all was adduced by production of relevant records and receipts to demonstrate the loss the respondent incurred following the accident involving his said motor vehicle – see Ouma V Nairobi City Council [1976] KLR 297.

In my view the respondent did not prove his case on a balance of probabilities both on liability and special damages and that the learned magistrate's judgment was against the weight of evidence. I allow this appeal and set aside the magistrate's judgment and replace it with one dismissing his case with each party bearing his/its own costs of this appeal and the case below.

This shall be the order of this court.

Delivered this 3rd day of October, 2002.

D.K.S. AGANYANYA

JUDGE