REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 293 OF 1998

PAGRAS NDUNGU KIRORI ..... PLAINTIFF

VERSUS

JOSEPH GITAU WAWERU ..... 1ST DEFENDANT

PAUL MBURU MUTHUMBI ..... 2ND DEFENDANT

JUDGEMENT

Pagras Ndungu Kirori (herein referred to as the plaintiff) was the owner of a motor vehicle Reg. KAB 642Q Isuzu 3.3 pick up (covered). This vehicle was travelling towards Nairobi along the Naivasha-Nairobi road.

Paul Mburu Muthumbi (herein referred to as the 2nd defendant) is the owner of a motor vehicle Isuzu bus registration KZP 099. The said bus was in the possession of Joseph Gitau (herein referred to as the 1st defendant), who was at the time the lawful driver and or agent of the 2nd defendant

From the evidence before the court, Joseph Gitau defendant No.1 was driving the said bus KZP 099. He was along the Naivasha- Nairobi road. He saw a vehicle that had blocked the road. He tried to drive off the road to go round the vehicle. The weather was wet. The bus got stuck in the grass with at least seven feet of the lorry being stuck along the main road.

A vehicle registration KWX 656 came from the same direction. It hit the Isuzu bus reg. No. KLP 044 and then hit the plaintiffs vehicle that was coming from the opposite direction.

The occupants of motor vehicle KWX 656 were three in number. Two died on the spot and one was taken to hospital. They have since filed suit in the Senior Resident Magistrates Court and are not party to this suit. I shall mention more on this later.

The Isuzu 3.3 covered pick up registration number KAB 642Q belonging to the plaintiff sustained material damage only.

The plaintiff then sued the 1st and 2nd defendant and prayed that he be compensated for the loss of his motor vehicle. The 1st and 2nd defendant entered appearance and filed defence and denied negligence.

On the 4th December 1998, they appeared before Aluoch J in an exparte application to apply for leave to file 3rd party notice. This they were granted. The third party notice was to be issued against the motor vehicle registration KWX 656 (not party to this suit).

Nothing seems to have happened concerning the 3rd party proceedings thereafter. No service was done; no 3rd party directions was taken up.

The plaintiff proceeded against the two defendants. The trial was held on the 1.3.2000. From the plaintiffs evidence, he produced the judgement, proceedings of the lower court duly certified. In the said Traffic Court proceedings the 1st defendant had been charged with 3 counts of causing death by obstruction contrary to section 46 of the Traffic Act Cap.403 Laws of Kenya.

He was thereafter found guilty, convicted and fined on all three counts. He did not appeal. The plaintiff relied on section 47A of the Evidence Act to produce this evidence. Namely:-

> "A final judgment of a competent court in any current proceedings which declares any person to be guilty of a current offence shall after the expiry of time limited for appeal against such ..., or after the date of the decision of any appeal herein, whichever is the latest, he takes as conclusive evidence that the person so convicted was guilty of the offence as charged."

This section should in fact be read with section 34(1)

> "Evidence given by a witness in a judicial proceedings is admissiable in a subsequent judicial proceeding or at a later stage in the same proceedings for the purposes of proving the fact which it states in the following circumstances.
>
> a) _____
>
> b) _____
>
> c) _____
>
> d) _____
>
> 2) _____
>
> a) _____
>
> b) _____"

Liability in this aspect was not challenged by the defendants. They had a defence pleaded and filed. They did not call any witnesses to give an explanation.

As a result the plaintiff relied on the court of appeal decision of:-

> J.F.A. Ogol Vs Wilson Mumbuu Muruthi
>
> CA 125/84 (Kisumu) (U.R)
>
> Hancox, Nyarangi JJA & Gachuhi Ag. JA

Whereby the appellant, a pedestrian was knocked on the Haile Selassie Avenue close to a round about. The defendant did not call any witnesses but stated through their advocate from the bar that the appellant was negligent. That the doctrine of res ipsa loquitor did not apply.

The Court of Appeal did not accept the respondents statement that the respondent had a right to remain silent and rely on a submission of a no case to answer.

It was held that the defendant must personally show that he was not negligence even if the accident remained unexplainable. The defendant must discharge that duty and or onus which lays on him to show

on the balance of probabilities that the accident was not done due his fault.

This was not down. The subordinate court found that the 1st defendant had left his bus on the road. There was no moving lights or traffic. The defendant had claimed things were placed on the road and a flash torch was with the turnboy. The evidence was never believed by the trial magistrate.

The police arrived on the scene and found the 1st defendant had run away. He gave himself up the following day. As to liability I hereby hold that the 1st and 2nd defendants are liable at 100% jointly and severally. The 2nd defendant is vicourisly liable.

As to quantum, whereby I find that the plaintiff is entitled to damages, the plaintiff pleaded particulars of Special Damages as follows:

a) Cost of police abstract	Ksh. 100/-
b) Assessment	Ksh .2,900/-
c) Towing charges	Ksh. 11,520/-
d) Pre accident value	Ksh.850,000/-
c) Less Salvage value	Ksh.150,000
e) Cost of hiring alternative vehicle for 71 days at Ksh.13,500 per day	Ksh.958,500
	Ksh.1,689,440/-

The parties entered into a consent whereby the defendants conceeded to item (a),(b),(c) of Special Damages. Judgement was accordingly entered by consent on the agreed sum of Ksh.14,520/-.

What was left was to prove item (d) and (e) above.

The plaintiff gave evidence that he incurred the above costs. He called PW2 an assessor who produced his report. He stated that the vehicle was incurred for Ksh.600,000/-. It was valued at Ksh.850,000. To repair it would costs Ksh.450,000/-. This would be uneconomical. As such the vehicle should be a right off.

The salvage value be placed at Ksh.150,000/-.

The plaintiff stated he bought the vehicle back at the price stated in the report. If this is the case, then the plaintiff is only entitled to the repair costs of the vehicle. Namely Ksh.450,000/-.

As to the hiring of an alternative vehicle for 71 days, I am satisfied that the plaintiff is a business man.

He uses the vehicle to deliver Pharmaceutical Products in East Africa. He therefore needed a vehicle at all times to be able to run his business. It took him 71 day to get his vehicle back. He called PW2, who hired out his vehicle to him. I am satisfied that this claim has been proved. I hereby enter judgement on this claim for Ksh,958,500/-.

In summary:

Judgement be and is hereby entered on liability against the defendants 1 and 2 both jointly and severally

at 100%. Award:

Judgement be and is hereby entered on quantum under Special Damages. Agreed by consent of the parties ie:-

a) Cost of police abstract report Ksh.100/-

b) Assessment Ksh.2,900/-

c) Towing Charge Ksh.11,520/-

Ksh.14,520/-

The court awards Ksh.450,000/- being the costs of repairs. Kshs.958,000/- being the costs of hiring an alternative vehicle, namely, loss of user. _____ Total Ksh.1,423.520/-

I award costs of the suit to the plaintiff. I award interest on the Special Damages from the date of filing suit.

Dated this 2nd day of March 2000 at Nairobi.

M.A. ANG'AWA

JUDGE