



**Kamau v Coast Bus (Mombasa) Limited (Civil Appeal 76 of 2022)
[2024] KEHC 3232 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 76 OF 2022
DAS MAJANJA, J
APRIL 5, 2024**

BETWEEN

ANGELA KAMAU APPELLANT

AND

COAST BUS (MOMBASA) LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G. Kiage, SRM dated 5th May 2022 at the Magistrates Court at Mombasa in Civil Case No. 518 of 2016)

JUDGMENT

Introduction and Background

1. By a plaint dated 17.05.2011, the Appellant filed suit in the subordinate court claiming that on the night of 30.07.2011, she was a lawful fare paying passenger aboard the Respondent's bus from Mombasa to Nairobi. That the bus was hijacked at or near Makindu whereby the passengers were roughed up and/or assaulted and that specifically, the Appellant was subjected to loss of property and physical and/or sexual assault. The Appellant claimed that this attack was occasioned by the negligence and/or failure on the part of the Respondent to exercise due care for the safety and security of its passengers, the Appellant included and amounted to a breach of its duty of care to the Appellant.
2. The Appellant claimed to have been exposed to untold anguish and that she suffered injuries including head bruises in the right temple area with swelling and tenderness, neck bruises on the angle of the jaw/ neck right side and sexual assault. She thus held the Respondent vicariously liable and sought general and special damages from them.
3. In response, the Respondent stated that the hijacking was carried out by thugs armed with big guns who came in a high speed saloon car, blocked the bus and thereafter forcefully entered the bus and took over the same. It denied that the attack by the said thugs was occasioned by any negligence or failure on its part to exercise due care to the safety and security of the passengers on board,



including the Appellant or that it was guilty of any breach of its duty of care to the Appellant. The Respondent denied being vicariously liable or otherwise liable to the Appellant and averred that the matters complained of were caused wholly by the attack of the thugs over whom the Respondent had no control and for whom the Respondent was not responsible. In sum, the Respondent denied the Appellant's claim and urged the subordinate court to dismiss the same.

4. The Appellant responded to the Respondent's defence by stating that whilst the attack was carried out by gun wielding thugs, the same did not accost the Respondent's bus by use of a high speed saloon car or at all as alleged but partly by persons stationed on the roadside. She reiterated that the Respondent was liable in negligence and/or breach of contract in so far as its driver and/or agent stopped to carry passengers at points other than the designated ones at Voi and Mtito Andei thereby and in the prevailing circumstances compromising the safety of the passengers, the Appellant included. Thus, the Appellant insisted that the incident was in the circumstances avoidable and reiterated its claim against the Respondent.
5. The matter was set down for hearing where the Appellant testified on her own behalf (PW 1) whereas the Respondent called Munyi Suleiman (DW 1), who used to be employed by the Respondent as a loader at the time. Subsequently, the parties were directed to file written submissions and the subordinate court then rendered a judgment on 05.05.2022. The Subordinate Court found that the Respondent had nothing to do with the perpetrators of the incident of which the Appellant fell victim and that it would be unreasonable to expect them to have foreseen the attack and to have taken steps to avert the same as to do so would amount to asking the Respondent "to engage in "divination" . That although the Appellant stated that similar incidents had taken place around the same period, no evidence was tabled to validate this claim. Thus, the learned magistrate held that bottom-line, the Respondent fulfilled their reasonable duty of care vis-à-vis the Respondent and the attack upon her was not due to the lack of precautionary measures but an unfortunate occurrence which the Respondent could neither foresee nor forestall.
6. Following dismissal of the suit, the Appellant appealed to this court through her memorandum of appeal dated 27.05.2022.

Analysis and Determination

7. As this is a first appeal, I am aware that the court has a duty to re-evaluate and re-assess the evidence before the subordinate court and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).
8. The Appellant is aggrieved by the Subordinate Court's findings that the Respondent was not liable for the injuries suffered by the Appellant from the attack. She further faults it for not assessing the appropriate damages based on the facts and circumstances notwithstanding that her claim was dismissed.
9. Going through the record, I am unable to fault the Subordinate Court's findings and conclusion on liability. I agree with its reasoning that in as much as the Respondent owed the Appellant a common duty of care to ensure the requisite health and safety standards, there was nothing much the Respondent could do about the attack as the same was not foreseeable in the circumstances. The subordinate court was rightly guided by the Court of Appeal's decision in *Soma Properties Limited v HAYM* NRB CA Civil Appeal 74 of 2005 [2015] eKLR where it was held that the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each situation on the question of foreseeability. That to determine when a crime is foreseeable, will depend on a number of factors such as the nature of the business, frequency and similarity of prior incidents of



- crime on the premises and the neighborhood. Whereas the Appellant had stated that similar hijacking incidents had occurred to other bus companies, the subordinate court rightly found that no such evidence was tendered, which fortifies the position that the hijacking was unforeseeable.
10. Whereas I take judicial notice that some parts of the country have experienced such insecurity that bus companies sometimes hire armed security escorts for their trips, the same could not have been expected of the Respondent as there was no evidence of frequency of such incidences and thus, the same was not foreseeable. I agree that the hijacking incident that led to the Appellant's injuries was not due to lack of precautionary measures but an unfortunate misfortune that could still have occurred even with the best precautions. There was also no evidence of negligence on the part of the Respondent and that even though the bus stopped to pick passengers, the Appellant did not deny that the said stops were designated and were at Voi and Mtito Andei and not at the place of the hijacking in Makindu. The Respondent could not therefore be accused of making unscheduled and undesignated stops thus endangering the safety of its passengers. Thus, the Subordinate Court did not err in finding that the Respondent was not liable for the attack on the Appellant and the consequent injuries she sustained.
 11. On whether the trial court ought to have assessed damages even after finding that the Respondent was not liable for the Appellant's ordeal, the answer is in the affirmative and I fault the subordinate court for not doing the same. This court has always maintained that it is good practice for the trial court or court of first instance to assess damages even if it finds that liability has not been established. To dismiss a suit and fail to address the issue of damages is a serious indictment on the part of the trial court and both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. (See *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, *Gabriel Owe Okello v Ujenzi Quarries Ltd* [2017] eKLR and *William Mbugua Ng'ang'a v Mohammed Salim & another* [2020] eKLR).
 12. I now turn to assess damages that could have been awarded to the Appellant had she succeeded in her claim of liability against the Respondent. General damages are damages at large as the Court is guided by decided cases to ensure that similar injuries attract, so far as is possible, similar amounts (see *Odinga Jactone Ouma v Moureen Achieng Odera* [2016] eKLR). The injuries sustained by the Appellant were not disputed. The medical P3 form and report from Nairobi Women's Hospital confirm that she suffered physical injuries including bruises to the right temple area with swelling and tenderness. She also suffered bruises on the neck and there was evidence of sexual assault. The Appellant stated that an award of Kshs. 3,000,000.00 would have been appropriate considering that she also suffered psychological trauma, torture and pain. She relied on the decision in *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* [2020] eKLR.
 13. On its part, the Respondent proposed a sum of Kshs. 200,000.00 and it relied on the case of *David Gachiri Gatheru v M W M* [2006] eKLR. It also urged the subordinate court to be guided by the decision of *Kenya Hospital Association v DNN* [2021] eKLR. From these decisions, I find that the Respondent's decisions provided a proper and better guide to the trial court as they bear relevance to the circumstances of the Appellant. The decision cited by the Appellant was in respect to compensation for violation of various constitutional rights and not specifically tied to sexual assault and related injuries. The decision in David Gachiri Gatheru (supra) is relevant as it relates to an award of damages for a victim of sexual violence who also suffered psychological trauma and emotional distress and the case was against the actual perpetrator. The court awarded the victim Kshs. 200,000.00 in 2006.



Whereas the Appellant in this case was not the perpetrator of the heinous attack on the Appellant, had it been proved that its negligence contributed and compounded the Appellant's situation, it would still have been held liable and ordered to pay damages as was held in *Kenya Hospital Association v DNN* (*supra*). I further note that in *AAA v Registered Trustees Aga Khan University Hospital Nairobi* [2015] eKLR the court awarded Kshs. 500,000.00 for the victim's pain, distress, and mental anguish arising from the defendant's medical negligence. Considering inflation and the role the Respondent could have played in contributing to the Appellant's attack, I would have found an award Kshs. 800,000.00 appropriate in the circumstances.

Disposition

14. For the above reasons, it is my finding that the Appellant's appeal lacks merit. In view of the circumstances of the case, each party shall bear their own costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF APRIL 2024.

OLGA SEWE

JUDGE

