



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 115 OF 2008

ATTORNEY GENERAL.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

WESLEY CHEBURIT CHELAL.....2ND DEFENDANT

JUDGEMENT

BACKGROUND

1. By a plaint filed on **30th June 2008**, the Plaintiff sought judgment to be entered in its favor against the defendants jointly for the sum of Kshs. 2,950,534 being the value of motor vehicle No. GK A002L or in the alternative the costs of the repair to the tune of Kshs. 1,677,000/= which resulted from an accident which occurred on 25th February 2007 along Naivasha – Gilgil road to Marula when the 2nd defendant negligently, carelessly and /or recklessly drove the motor vehicle registration number KAV 886S belonging to the 1st defendant and it collided with causing serious damage to it.

2. As a result of the accident, the motor vehicle registration number GK A002L was extensively damaged to the extent that it was declared uneconomical to repair and it is the plaintiff's argument that it is fair for the defendant to pay its value.

3. The Plaintiff pleaded the following particulars of negligence on part of the 2nd defendant: -

- a. Driving with excessive speed.
- b. Overtaking other vehicles when it was not safe to do so.
- c. Failing to notice the presence of motor vehicle GK A002L on the road.
- d. Failing to exercise caution when driving the said motor vehicle.
- e. Having no regard to other road users.
- f. Failing to observe the provisions of the traffic Act and highway code.

4. The defendants jointly filed their defence on 10th October 2008, denying the contents of the plaint. They denied any liabilities of the accident. The defendants denied occurrence of an accident ever happened on 25th February 2007 as alleged and states that if it happened, the same was occasioned by the negligence of the agent/servant of the plaintiff.

5. The defendants pleaded particulars of negligence on the agent, servant of the Plaintiff as follows: -

- a. Drove the motor vehicle GK A002L at an excessive speed in the circumstances.
- b. Failed to exercise or maintain adequate control of motor vehicle GK. A 002L.

- c. Drove motor vehicle registration No. GKA 002L without regard or adequate regard to the nature of the road he was driving on.
- d. Failed to accord any or sufficient regard to the nature, condition use and amount of traffic on the road or heed presence of motor vehicle KAV 886 S on the road.
- e. Drove without due care and attention.
- f. Failing to stop, slow down or take any evasive action so as to manage and or control motor vehicle registration no. GKA 002L
- g. Failed to observe provisions of the Traffic Act and the highway code.

6. The plaintiff availed 3 witnesses, while the defense chose not to call any witness.

PLAINTIFF'S EVIDENCE

7. PW1, Joseph Kiplagat Bartai confirmed that he was driving GKA 002L, on the material day testified being the driver of the Ministry of Planning and Evolution Department of (KEBS). He testified that on the 25th February 2007 while in the company of 2 other occupants in the vehicle, along the Naivasha Gilgil road at a place called Morendat, at a bend, a motor vehicle which was overtaking suddenly emerged; he tried to avoid the collision and moved to the left but the said motor vehicle also moved to the left. He said the GKA 002L vehicle collided with Toyota Hilux KAV 886S resulting in damage of the GKA 002L on the left side while the Toyota Hilux KAV 886S was damaged on the right side.

8. He testified that Toyota Hilux KAV 886S had 4 or 5 passengers, and 3 were seriously injured and they were taken to hospital. Thereafter they recorded a statement at the police station.

9. On cross examination, the PW1 stated that he was driving at a speed of 105 kilometers per hour allowed by law. He further stated that the road was normal but had a bend despite it having a broken yellow line. He said he saw the car when it was exactly 50 meters away; he reduced the speed and engaged the gear and tried to avoid the collision but the collision did happen. He testified that the collision did not occur on the road.

10. PW2 Sergeant Osman Mohamed, testified that he did recall on the 25th February 2007, him together with **Pc Omungun** recorded information of a traffic road accident which occurred along Nakuru- Naivasha road. He testified that he proceeded to the scene at Marula farm, where two motor vehicles GK. A002L and KAV 886S were involved in an accident.

11. He testified that he observed that motor vehicle KAV 886S was overtaking and without due regard to the speed of the motor vehicle it was overtaking collided with the GK. A 002L, and the occupants of both vehicles were rushed to different hospitals. Thereafter the driver of KAV 886S was charged with the offense of careless driving and the same was finalized where he was fined.

12. He testified that the road was 8 meters and the GK vehicle front left point was slightly off the road but the right part was on the tarmac. He testified that he went to the site as the investigating officer 15minutes after the accident had occurred. He confirmed that the road was straight and the GK had space where it would move out of the road to avoid the collision.

13. PW3 Robert Nyoro Gakuyo testified as the senior superintendent attached to the Ministry of Transport and Infrastructure. He testified that he was in court to produce a motor vehicle inspection report dated 17th January, 2008, involving motor vehicle registration No. G.K. A002L. The report indicated that the point of impact was at the front, the radiator was damaged, bumper bar was damaged, windscreen was also damaged. He testified that after the inspection the vehicle was not repaired as it was extremely damaged and the spare parts were expensive. The report was prepared by **Mr. Mbugua** who has since retired.

14. On cross examination, he confirmed that the report indicated the motor vehicle as a salvage. The costs of the repair would be Kshs. 1,677, 000/= while he stated the value of the motor vehicle before the accident to be Kshs. 4,000,000/= he produced an invoice showing that the vehicle was purchased at kshs. 2,950,530 in the year 2005.

15. He further confirmed that the wheels and seats were in good condition and the gear box and fuel system were serviceable. He stated that as per the report the engine was suspected to be damaged but the same was not opened. The estimate value of repair *vis a vis* the value of the vehicle was estimated to 56% and therefore not economically viable to repair the vehicle.

PLAINTIFF'S SUBMISSIONS

16. The plaintiff submitted that it was not in dispute that indeed an accident happened on the 25th day of February 2008 as per the police abstract produced as evidence. It submitted that the accident was occasioned by the negligence of the 2nd defendant. In support of this argument he cited the case of **Donoghue vs Stevenson**. It was submitted that the 2nd defendant ought to have used the road in a manner that does not endanger the lives of other road users. The 2nd defendant proceeded to overtake a motor vehicle on the continuous yellow line.

17. Further it was submitted that the 1st defendant was vicariously liable for the actions of the actions of the 2nd defendant, reliance was placed in the case of **Jane Wairimu turanta vs Githae John Vickery & 2 others (2013) eKLR** that cited the celebrated case of **Morgan vs Launchbury (1972) all ER 606**.

18. The Plaintiff further submitted that it is entitled to the reliefs sought as they have pleaded and proved the same. It requests the court to rely on the inspection report submitted before the court in finding the true position of the motor vehicle.

DEFENDANTS' SUBMISSIONS

19. The defendant submitted that PW1 who was the driver of the GK. A0021 contributed to the collision by failing to swerve completely off the road to avoid the collision and he was not alert in that if the road was straight there is no way he could have seen the incoming vehicle only 10 meters away and further by driving at a speed of 105 Kilometer per hour. PW1 was driving in high speed and he failed to discharge his burden of proof as per the evidence act.

20. The defendant further submitted that the special damages pleaded have not been specifically proved; that the plaintiff's claim as pleaded is unattainable as only one limb of the damages can be awarded. The defendant further submitted that the vehicle was purchased in the year 2005 and the accident happened in the year 2007 and the vehicle is subject to depreciation which the plaintiff did not factor in and submitted that at the time of the accident, the vehicle would still not be valued at Kshs. 2,950,534/=.

ANALYSIS AND DETERMINATION

21. From the evidence adduced, there is no doubt that the plaintiff's vehicle was extensively damaged as result of collision with the defendant's vehicle. After considering evidence adduced I find the following as issues for determination: -

1. Who is to blame for the accident and to what extent.
2. Assessment of damages payable.

(i) Who is to blame for the accident and to what extent.

22. I take note of the fact that the plaintiff's driver PW1 was driving at a speed of 105 km per hour; and even if it is within the speed limit allowed by law, the speed was high and it must have made it difficult for the driver to apply emergency brakes and swerve to avoid the accident or reduce the impact of the accident.

23. I also take note of the fact that the plaintiff's vehicle was 2 years old at the time of the accident and it was necessary to take into consideration depreciation for the period of two years. It could not retain its initial value and it would be fair to put that into consideration while assessing damages.

24. In view of the above, I find it appropriate to apportion liability at a ratio of 20:80 in favor of plaintiff. Plaintiff to shoulder 20% liability and defendant 80 % liability.

(ii) Assessment of damages

25. The value for repair of the vehicle has been given as Kshs. 1,677, 000/=. Evidence adduced show that the vehicle was purchased in the year 2005 at kshs. 2,950,530. compensational claim is intended to return the claimant to the position at the time of the accident. It would be erroneous to allow compensation above the cost of purchase of the value as there is no way the vehicle would have failed to depreciate.

26. I will therefore allow amount sufficient to repair the vehicle to the condition it was in at the time of the accident which is kshs 1,677,000. The amount will be subjected to the ratio of 20:80 in favour of plaintiff.

27. FINAL ORDERS

1. Liability is apportioned at 20:80 in favour of plaintiff.
2. Plaintiff awarded kshs 1,677,000 less 20% contribution.
3. Costs of this suit to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021

.....
RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Mr. Weche Counsel for Plaintiff

Mrs. Githae Counsel for Defendant