



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL SUIT NO. 2 OF 2018**

**SPANISH COACH EXPRESS LTD.....PLAINTIFF**

**-VERSUS-**

**CHARLES NYAMWEYA MARUBE.....DEFENDANT**

**JUDGEMENT**

**Introduction:**

1. The plaintiff instituted this suit *via* a plaint dated 27/02/2018 and filed on 28/02/2018. The cause of action is said to arise from the damage caused to its motor vehicle registration No. KCA 801G (*the bus*) by the defendant's motor vehicle registration No. KBS 054L/ZD 9802 (*the prime mover/trailer*).
2. The plaintiff avers that it's authorized driver was driving the bus along the Nairobi-Mombasa highway on 01/03/2015 (*material day*) when as a result of the defendant's driver negligence, the trailer rammed into the bus and occasioned extensive damage thus causing it to be written off.
3. The plaintiff avers that it was fully compensated by its insurers, Heritage Insurance Company, and the insurance company has now filed this suit in the plaintiff's name under the doctrine of subrogation claiming for;

***a) Kshs 15,934,345/= together with interest at Court rates from the date of filing suit until payment in full.***

***b) Costs of the suit plus interest.***

***c) Such other or further relief that this Court may deem fit to grant.***

4. In its statement of defence filed on 22/03/2018, the defendant denied liability in *toto* and called for strict proof. After the preliminaries; the suit was eventually slated for hearing.

**The plaintiff's case:**

5. **PW1** was **PC Denis Kithinji**, a police officer from Sultan Hamud police station. He produced an OB (exh 2) in respect of an accident of 01/03/2015 at 0.30 hours along the Nairobi-Mombasa highway at Ngokomi area involving the bus and prime mover/trailer. He said that the bus was from Mombasa to Nairobi and the prime mover/trailer was from Nairobi to Mombasa. That the driver of the prime mover/trailer swerved from his lane and hit the oncoming motor vehicle leading to a fatality of a passenger in the bus. That the bus driver was not charged but the trailer's driver was charged with the offence of causing death by dangerous driving in Kilungu Traffic case No. 236/2015. He pleaded guilty and was sentenced to a fine of Ksh 150,000/= or 12 months imprisonment in default. He produced the police abstract as (exh 1).
6. On cross examination, he said that that the investigating officer PC Michael was transferred to another place and that the trailer driver was to blame for the accident.
7. **PW2** was **Bakari Omar**. He adopted his statement dated 1907/2018 in which he stated that he was a driver with the plaintiff company. That at the time of the accident, the bus was assigned to him to ferry passengers from Nairobi to Mombasa.
8. He said that on the material day, the weather was dry and visibility was good and at Kalimbani area, he encountered the prime mover/trailer which suddenly swerved to his lane. He applied emergency brakes and attempted to swerve to the extreme left but it was too late. The two vehicles collided and the bus was extensively damaged.

9. He said that the accident was reported to Sultan Hamud police station and officers from the station visited the scene, conducted investigations and concluded that the trailer driver was to blame. He was aware that the bus was written off and the insurer, Heritage Insurance Company, compensated the plaintiff.

10. On cross examination, he said he flashed and hooted but the prime mover/trailer stayed on his lane and hit the bus. That he had 10 years' experience in driving. That there was a sloppy area on his left side and the terrain could not allow him to swerve out of the road otherwise he could have rolled.

11. **PW3** was **Simon Karanja Ngugi**, a motor vehicle assessor with Vision Motors Consultant Ltd since 1991. He said that on 01/04/2015, they were instructed by Heritage Insurance Company to assess the bus in Nairobi, Industrial area. The bus had suffered serious impact and they treated it as a total loss as it was beyond economical repair. He produced the assessment report (*exh 3*), the fee note (*exh 4*) and the payment voucher (*exh 5*).

12. On cross examination, he said that he had exclusive experience in assessment and that the prices were based on prevailing prices at the time. He maintained that it would be uneconomical to repair the bus. That the impact was on the right side and the bus could not move due to damage. That the particulars of spares are both for the engine and mechanical parts. That the prices from dealers of bus spares do not vary very much. That the salvage value was Kshs 3 million.

13. **PW4** was **Gibson Maina Kamau**, the Legal manager of Heritage Insurance Company (*the company*). He adopted his statement dated 27/02/2018 where he stated that at all material times to these proceedings, there was a policy of insurance between the plaintiff and the company.

14. That sometimes on 02/03/2015, they received a report from the policy holder that the bus had been involved in an accident along the Nairobi-Mombasa road near Kalimbini area. That due to extensive damage, the bus was towed by S.K Mwandani t/a New Enterprises Breakdown to Leaky Storage Ltd's yard for safekeeping and assessment and the company paid Kshs 28,000/= for towing services. The bus was stored for 118 days at a cost of 42,064.04/= which was also paid by the company.

15. Further, he stated that the salvage was stored at Master Fabricators Ltd at a cost of Kshs 180,960/= which was also paid by the company.

16. That they engaged Messrs Vision Motor Consultants Ltd to assess the bus and the cost of repairing the mechanical damage was placed at Kshs 14,654,886/= which was more than 50% of the pre-accident value of Kshs 17,954,000/=. Accordingly, the vehicle was declared a write off and the company paid Kshs 5,481/= for the assessment services.

17. Further, he stated that they sought a second opinion from Messrs Motech Assessors & Valuers Ltd who placed the pre-accident value at around Kshs 17,575,000/= and recommended that the bus be declared a write off. The company paid Kshs 2,993/= for the valuation services.

18. Based on the two opinions, they paid their insured the pre-accident value of Kshs 17,954,000/= which was acknowledged via a receipt voucher dated 11/05/2015.

19. Further, PW4 stated that they also engaged Messrs Nguru Enterprises to sell the salvage by way of public auction and it was sold for Kshs 2,400,000/= to Mr. Salim Sheikham Salim of Buscar Ltd. The company paid Kshs 140,511/= to the auctioneers. He said that their claim is for Kshs 15,554,000/= being the pre-accident value less salvage value.

20. He stated that they also engaged investigators known as Messrs Windscope Loss Assessors Ltd to establish the whereabouts of the prime mover/trailer owners and the investigators established that it was registered in the name of Charles Nyamweya Marube. The company paid Kshs 22,400/= to the investigators.

21. He stated that under the terms of the policy, the insurer was entitled to bring a suit in the name of the policy holder to recover the amount spent in compensating the insured together with related expenses. That they issued a demand letter dated 26/05/2017 which attracted no response hence the suit. He produced the documents in the list of documents dated 27/02/2018 as (*exh 6*).

22. On cross examination, he said that they had an internal assessor who found PW3's report to be adequate. That the 2<sup>nd</sup> opinion was done by another company but was not in Court.

#### **The Defendant's Case:**

23. **DW1** was Charles Nyamweya Marube. He adopted his statement dated 25/04/2019 where he stated that at the time of the accident, he was the registered owner of Prime Mover and Trailer registration No. KBS 054L/ZD 9802 respectively. He recalled that on the material day, he received a call from his turn boy, Eric Manyoni Bogecho, who informed him that they had been involved in an accident with a Spanish bus at Kalimbini area. He was also informed that police from Sultan Hamud police station had visited the scene.

24. He proceeded to the scene and later to Sultan Hamud police station where he saw the two vehicles. He enquired on the circumstances that led to the accident and was informed that the bus was speeding from the opposite direction with full lights on and the two vehicles brushed each other on the right side.

25. He informed his insurer and was told that a claim of kshs 15,934,345/= had already been placed before them. He looked at the claim and assessment report and was certain that the bus was not damaged to the extent of being a write off. According to him, the assessment report was exaggerated in terms of costs of repairs for both mechanical and body works. DW1 based his assertion on the physical state of the vehicle which he states, was standing and only the front side of the driver was damaged. He also states that the salvage was grossly

undervalued.

26. On cross examination, he confirmed that the prime mover/trailer was involved in an accident on the material day. That he was not present but the driver (*Ali Asande*) and turnboy (*Eric Monyoni*) were there. He was aware that the driver was charged with careless driving and pleaded guilty to the offence. He disputed the assessment by the plaintiff's assessor but admitted lacking a background in motor vehicle assessment.

27. **DW2** was **Kamande Nduati**. He testified that he is a holder of a diploma in automotive engineering from Kenya polytechnic and has over 20 years' experience. That he assessed the bus car and was among the people who compiled the technical report of 23/04/2019. He said that they were instructed by Cooperative Insurance to give a report for the bus. He said that the bus was repairable at a total cost of Kshs 8,250,944/=.

28. He said that the report by Vision assessors was correct but the costs for the air conditioner and gear box were exaggerated. That the air conditioner is located at the roof of the bus and the roof was not damaged. That it was not necessary to give complete refurbishment of the air conditioner at a cost of 1.5M because the items of the operating mechanism could be repaired at a cost of Ksh 300,000/=.

29. On cross examination, he said that the co-signatories of the report are S. Kangi and James Njihia who are motor assessors. That the three of them are usually given a job to make a joint report. That upon receiving instructions, they take the driver's statement and examine the vehicle physically. That they didn't see the damaged motor vehicle physically.

30. That Kenya garage, a franchise holder for Scania gave the 1<sup>st</sup> quotation at kshs 14,923,489/= as total repair costs and that was more than 50% of the pre-accident value. That vision consultants put the estimated cost of repairs at 15,654,886/=. He agreed that the estimated repair costs by Vision and Kenya garage were nevertheless the same.

31. He agreed that page 3 of the report by Vision assessors does not dispute the quotation by Kenya garage, that there was no attempt to negotiate the prices and it's not a must for the garage to agree with the assessor on items.

32. He said that the quotation of 11/01/2016 was issued to bus car coach by Kenya garage though it does not indicate its services and is not signed. He wouldn't know what bus car would have wished to repair. He said that the accident was on 01/03/2015 and the bus car quotation was issued one year later on 11/03/2016.

33. He said that latent defects are detected after dismantling the motor vehicle and during repair. He was not aware that the lorry which hit the bus was written off. He maintained that the air conditioner of 1.5M was not damaged in the accident. He said that assessment should be done as soon as an accident happens.

34. Further, he testified that storage of a motor vehicle is very crucial for assessment as delay in assessment may be affected by depreciation, wear and tear. That he never inspected the physical motor vehicle.

35. Having looked at the pleadings, evidence on record, statement of agreed issues and the rival submissions, it is my considered view that the following issues arise for determination;

- a) *Whether an accident occurred on 01/03/2018 between the bus and prime mover/trailer.*
- b) *If (a) above is answered in the affirmative, who was to blame and to what degree?*
- c) *Whether the bus was damaged and subsequently written off.*
- d) *Whether Messrs Heritage Insurance Company is entitled to bring this suit under the doctrine of subrogation.*
- e) *Whether the plaintiff is entitled to the orders sought.*

## **ANALYSIS**

### **Whether an accident occurred on 01/03/2018 between the bus and prime mover/trailer**

36. The police abstract from Sultan Hamud police station shows that on 01/03/2015 at 4.30am, an accident occurred at Kalimbini area along the Nairobi Mombasa highway involving motor vehicles registration Nos. KCA 801G make Scania bus and KBS 054L/ZD 9802 make Actros. PW1 and DW1 confirmed that indeed there was an accident between the two vehicles on the material day. Accordingly, it is a fact that an accident occurred on the material day involving the bus and prime mover/trailer.

### **Who was to blame for the accident and to what degree?**

37. The defendant submits that the accident scene was described as a flat area and contends that a reasonable driver would have swerved to avoid a head on collision. He submits that the plaintiff's driver was reckless and negligent for failing to take that crucial step. He concludes that both drivers were to blame as either of them could have taken appropriate steps as would be expected of experienced drivers. On the other hand, the plaintiff submits that the defendant is 100% liable.

38. The bus driver (PW2) testified that he was ferrying passengers from Nairobi to Mombasa and at Kalimani area; he encountered the prime mover/trailer which suddenly swerved to his lane. PW2 applied emergency brakes and swerved further left but it was too late.

39. His evidence was corroborated by the police officer (PW1) who further testified that the prime mover/trailer's driver was charged with the offence of causing death by dangerous driving in Kilungu Traffic case No. 236/2015 whereupon he pleaded guilty and was sentenced to a fine of Ksh 150,000/= or 12 months imprisonment in default. In that regard, the plaintiff submits that **section 47A of the Evidence Act** is instructive on the effect of a guilty plea. The section provides as follows;

*“A final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”*

40. The owner of the prime mover/trailer (DW1) admitted being aware that his driver, Ali Asande, had been charged with the offence of careless driving and had pleaded guilty. It is therefore clear that the prime mover/trailer was being driven by the defendant's authorized driver and he was the one at fault by encroaching onto the rightful lane of the bus. The defendant is therefore 100% vicariously liable for the accident.

**Whether the bus was damaged and subsequently written off:**

41. It is clear from the photographic evidence that the bus was damaged on the right side. According to the motor vehicle assessor (PW3), it would be uneconomical to repair the bus. His report indicates that the pre-accident value was 17,954,000/= and the cost of repairs would be 15,654,886/=.

42. On the other hand, the defendant contends that the vehicle should not have been declared a total loss because the repair cost was Kshs 8,250,944/= which translates to 45.95% of the pre-accident value. He relied on the technical report compiled by DW2 and two others. I note that the report was not produced in evidence and in that regard, the plaintiff submits that DW2's evidence is unsupported by evidence and should be treated as hearsay. It cites the case of **Delta Haulage Services Ltd vs Complast Industries Ltd & Anor (2015) eKLR** where the Court held as follows;

*“In this present case, those documents that allegedly showed the extent of damage and the value of repairs were not produced. That being the case, the said documents remained that, mere documents in the Court record of no probative value whatsoever. Document become evidence when they are testified on and produced by a witness and marked by a Court accordingly.”*

43. In this case, the technical report is already in the file and this Court cannot pretend that it has not perused it. The inherent jurisdiction of the Court is unfettered and the technical report should be considered alongside the other documentary evidence in order to determine the issues conclusively.

44. DW2 agreed that they did not examine the damaged bus physically and that the technical report was based on the report by vision assessors and two quotations issued by Kenya Garage to Spanish coach and Buscar coach (*the company that bought the salvage*). According to him, the report from vision assessors was correct but the gear box and air conditioner were exaggerated.

45. As for the gear box, his contention was that it was included in the quotation to Spanish coach but omitted in the one to Buscar coach. The quotation to Spanish Coach is dated 03/03/2015 and the one to Buscar is dated 11/01/2016, almost one year after the accident.

46. From just looking at the quotation, one cannot tell which services were required by Buscar coach and DW2 admitted as much in cross examination. He also agreed that he was not in a position to tell what Bus car would have wished to repair. Having bought the salvage, I am of the view that it was probable for them to also buy a new gear box hence eradicating the need to repair.

47. On the flipside, it is common knowledge that when determining whether to write off or repair a motor vehicle, the estimates of all the damaged parts should be given for comparative analysis. This in my view justified the need to include the estimated cost of repairing the gear box in the quotation to Spanish coach.

48. As for the air conditioner, I can only describe DW2's opinion as guess work because neither him nor his co-assessors examined the bus physically. Their opinion cannot therefore oust that of Vision assessors who went to the storage yard and assessed the bus. Of importance is that even DW2 agreed that there was minimal difference in the estimated repair cost given by Vision assessors and Kenya Garage. The quotation given by Kenya Garage was kshs 14,923,469/= which DW2 agreed was more than 50% of the pre-accident value. Accordingly, I agree with the plaintiff that indeed the bus was extensively damaged and written off.

**Whether Messrs Heritage Insurance Company is entitled to bring this suit under the doctrine of subrogation:**

49. It is clear from the evidence of record that Heritage Insurance Company Ltd had insured the plaintiff's bus and that it released kshs17,954,000/= to the plaintiff as compensation. In **Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited [2018] eKLR**, the Court of Appeal (*Visram, Karanja & Koome JJ.A*) expressed itself as follows;

*“26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated.”*

50. Accordingly, it was in order for Heritage Insurance Company to institute this suit in the name of its insured.

**Whether the plaintiff is entitled to the orders sought.**

51. Having found that the plaintiff's bus was a write off and that the plaintiff was fully compensated by its insurer, the irresistible conclusion is that the insurer is entitled to recover the money paid to the insured. The evidence shows that the salvage was sold for Kshs 2,400,000/= which amount has been subtracted from the pre-accident value of Kshs 17,954,000/= to give a total of Kshs 15,554,000/=

52. As for the related expenses, I have carefully scrutinized the receipts and payment vouchers produced by the plaintiff and it is clear that the following items have been strictly proved;

Valuation charges	8,474.00
Towing charges	28,000.00
Storage charges	180,960.00
Advertisement & sale charges	140,511.00
Investigators' fees	<u>22,400.00</u>
<b>Total</b>	<b>380,345.00</b>

53. The above expenses however were not prayed in the plaint thus not available.

54. Accordingly, the plaintiff's claim has been proved to the required standard.

**Conclusion:**

55. In sum, the court finds that the suit has merit and make the following orders; Judgement is entered for the plaintiff against defendant for;

*i) Principle claim under subrogation Kshs 15,554,000/=.*

*ii) Costs.*

*iii) Interest from the date of filing of the suit.*

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2019.**

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**C. KARIUKI**

**JUDGE**