



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 412 OF 2014**

**KENYA BUS-RAPID T/A**

**KENYA BUS SERVICES MANAGEMENT CO. LTD.....APPELLANT**

**V E R S U S**

**PATRICK IRUNGU GICHURE.....RESPONDENT**

*(An appeal from the judgment of Hon. S. Atambo (Ms) Principal Magistrate*

*in Milimani CMCC No. 1757 of 2011 delivered on 8<sup>th</sup> day of August 2014.)*

**JUDGEMENT**

1) On 4<sup>th</sup> August 2008, a road traffic accident occurred along Landhies road involving motor vehicle registration no. KAW 976Q owned by the appellant herein and motor vehicle registration no. KAH 351L driven by the respondent herein. The respondent filed a compensatory suit against the appellant before the Chief Magistrate's court. Hon. S. Atambo, learned Principal Magistrate heard the suit and on 8<sup>th</sup> August 2014, judgment was delivered in favour of the respondent in the following terms:

- i. *Liability 95% : 5%*
- ii. *Ksh.1,200,000/= general damages less contribution.*
- iii. *Ksh.100,000/= for future medical expenses*
- iv. *Ksh.89,600/= special damages (not subject to contribution)*
- v. *Costs of the suit.*

2) The appellant being dissatisfied preferred this appeal and put forward the following grounds in its memorandum:

- 1. THAT the learned magistrate erred in fact and in law in failing to hold that the appellant's driver had put on hazards, deployed a lifesaver and placed branches on the road to warn other motorists that a motor vehicle KAH 351L was stationary.**
- 2. THAT the learned magistrate erred in law and in fact in failing to appreciate that the standard of proof is on a balance of probability and not on strict liability**
- 3. THAT the learned magistrate erred in law and in fact in failing to appreciate that the section of the road where the accident occurred was straight.**
- 4. THAT the learned magistrate erred in law and in fact in disregarding the plaintiff's admission that the accident occurred when he swerved to avoid a pothole and rammed into the defendant's motor vehicle.**
- 5. THAT the learned magistrate erred in law and in fact in failing to hold that drivers of motor vehicles have a duty to maintain a lookout for road users and especially those ahead of them.**

**6. THAT the learned magistrate erred in law and in fact in failing to hold that the injuries the plaintiff suffered were evidence that he must have been travelling at an excessive speed on the circumstances in excess of 50KPH hence unable to take evasive action upon noting the stationary bus on the road and causing him such severe injuries to his right femur.**

**7. THAT the learned magistrate erred in law and in fact in an extraneous finding that the defendant's driver ought to have moved the bus onto the outer lane inspite of evidence from the defendant's driver that attempting to do so would have damaged the bus.**

**8. THAT the learned magistrate erred in law and in fact in apportioning liability at 95% in favour of the plaintiff as against the defendant.**

**9. THAT the learned magistrate erred in law and in fact in awarding general damages of ksh.1,200,000/= which were excessively high in the circumstances.**

**10. THAT the learned magistrate erred in law and in fact in awarding damages for loss of earning of ksh.858,200/= while the same were unsubstantiated.**

**11. THAT the learned magistrate erred in law and in fact in failing to subject the special damages to contribution.**

3) The respondent too was dissatisfied with the decision hence he filed a cross-appeal and put forward the following grounds of appeal:

**1. The learned trial magistrate erred in law and fact in not awarding damages for loss of future earnings and/or loss of earning capacity pleaded and proved by the respondent.**

**2. The learned magistrate erred in law and in fact in her award of interest on special damages from date of judgement.**

4) When the appeal and cross-appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

5) Though the appellant put forward a total of 11 grounds of appeal, those grounds generally revolve around the question on liability and quantum. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. On liability, it is the submission of the appellant that the learned Principal Magistrate erred when she apportioned liability in the ratio of 95% :5% in favour of the respondent yet the evidence presented reveal otherwise. The respondent is of the submission that the trial magistrate arrived at the correct decision on liability considering the evidence and the submissions presented before the subordinate court. In her judgement, the learned Principal Magistrate stated that the plaintiff (respondent) proved on a balance of probabilities. On liability, the learned trial magistrate stated that because both PW1 (respondent) and DW2 (appellant) were road users, each had a duty to exercise caution no matter what and proceeded to apportion liability as stated hereinabove. She further formed the opinion that the appellant ought to have parked on the left side of the road and also ought to have alerted other motorists that his motor vehicle had stalled. The trial magistrate did not believe the assertion by the appellant that he had placed a lie save and put on an hazard light to warn other motorists. On my part I have re-evaluated the case that was before the trial court. The brief history of this case is that what gave rise to this suit is the road traffic accident involving the appellant's motor vehicle registration no. KAH 351L bust coach and driven by an authorised driver (DW1) and a matatu registration no. KAW 976Q which was being driven by the respondent. The accident occurred on 4<sup>th</sup> August 2008 along Landhies road and as a result the respondent suffered serious injuries which included inter alia a compound fracture of the right femur. It is the evidence of the respondent that the appellant's driver obstructed the road by parking the bus in the middle of the road. It is also stated that the appellant's driver did not place any warning signs to alert other road users. The respondent further stated that there were no visible life savers placed on the road and that the accident occurred at around 9.30pm when there was poor visibility. It is the evidence of the appellant's driver that the respondent realized too late that the bus was stationary therefore implying that he was not in a proper look out. A critical look at the respondent's evidence will reveal that he actually admitted that the appellant's bus had its hazard sign on. The appellant's driver had told the trial court that he had put on the hazards, deployed a life saver and placed tree branches on the road to warn oncoming traffic. He blamed the respondent for driving at high speed thus hitting on the left rear of the stationary bus. I have already stated that the learned Principal Magistrate did not believe the evidence tendered by appellant's driver. The trial magistrate formed the opinion that there was no evidence to show that the appellant's driver put on the hazard, life saver and some leaves on the road to warn other motorists. I have carefully examined the evidence tendered by Benson Muthembwa (DW1), the appellant's driver. He was categorical in his evidence in chief that he put on the hazard and life saver together with some leaves. In cross-examination DW1 stated that he had no option but to put on the hazard and a life saver to alert other motorists. Having re-evaluated the evidence presented by both sides, I have come to the conclusion that the learned Principal Magistrate fell into error when she concluded that there was no evidence to prove that the appellant had placed on the road warning signs. I am satisfied that there was credible evidence by DW1 that he had placed on the road a life saver and leaves and had further put on the hazard.

6) The learned Principal Magistrate was however right when she concluded that both the appellant's driver and the respondent acted irresponsibly. She however fell into error in apportioning liability. The evidence presented before the trial court tends to show that the respondent was in a high speed and was not in a proper look out. In the circumstances of this case I am convinced that liability should be apportioned in the ratio of 60%:40%.

7) Having come to the above conclusion on liability I now turn my attention to quantum. I have already enumerated the award given by the trial court. The respondent presented evidence showing that he sustained a fracture to the right femur, extensive burns to the left leg and a major sprain to both toes.

8) The aforesaid injuries were confirmed by the medical report prepared by Dr. Byakika. The respondent was awarded ksh.1,200,000/= for pain and suffering. The appellant is of the submission that the award was high and excessive. The respondent is of the submission that the

award is neither high nor excessive. On my part, I have looked at the authorities supplied and it is apparent that this court has previously awarded figures ranging between ksh.700,000/= and ksh.1.300,000/= in respect of near similar injuries. In my view the award of ksh.1,200,000/= is neither high nor excessive.

9) The second award to be challenged is the sum of ksh.858,200/= in respect of loss of earnings. It is the submission of the appellant that the award for loss of earnings was unsubstantiated. In its argument, the appellant stated that the award was not pleaded. It was further pointed out that there was no evidence tendered showing that the earned a sum of ksh.1,000/= per day. The appellant stated that the trial court misapprehended the point by awarding loss of earnings yet it was dealing with loss of earning capacity. The respondent was of the submission that the trial magistrate understood and made a finding that loss of earnings is a special damage claim which must be led and proved. It is also pointed out that loss of earning capacity is a prospective financial loss awarded as part of general damages and does not have to be specifically proved. The respondent is of the submission that the trial court did not contradict itself and beseeched this court to hold that from the reasoning and reading of the judgment of the trial court, it is apparent that the court in effect intended to award loss of earning capacity instead of loss of earnings. The respondent further argued that he not only pleaded but testified on both loss of earnings and loss of future earnings, loss of earning capacity hence the court ought to award him in both headings. I have carefully perused paragraph 6 of the plaint and it is apparent that the respondent pleaded for both damages of loss of earning capacity and loss of earnings at the rate of ksh.1,000/= per day from the date of the accident to the date of filing suit. It is also apparent from the evidence of the respondent that the respondent was not in a position to engage in any meaningful work or at all. In his evidence presented before the trial court, the respondent averred that he was a PSV driver earning ksh.1,000/=per day. He however did not produce any document in form a payslip or payment voucher to establish that assertion but he however produced a driver's licence and PSV licences. The record does not show that the appellant controverted the respondent's evidence. The Court of Appeal in **Jacob Ayinga Maruja & Another vs Simon Obayo (2005) eKLR** held inter alia

**“We do not subscribe to the view that the only way to prove the profession of a person must be the production of certificate and that the only way of proving earnings is equally production of documents. That kind of stand would do alot of injustice to very many Kenyans.....”**

10) I am satisfied that the trial court correctly determined the question regarding loss of earnings. Though the trial magistrate nearly confused herself but she nevertheless arrived at the correct decision. The evidence presented by the respondent was cogent and believable to establish the award for loss of earnings. With respect, I am persuaded by the respondent's argument that in making the award for loss of earnings the trial court meant to make an award for loss of earning capacity. Consequently, nothing turns out on this ground.

11) The other complaint put forward by the appellant is that the trial

magistrate erred when she failed to subject the award on special damages to contribution. The respondent did not address this court over this ground. The record does not show that the learned Principal Magistrate attached any reasons to her order of not subjecting the award of special damages to contribution. I am persuaded by the argument of the appellant that the learned trial magistrate fell into error. All awards must be subjected to contribution.

12) In the end, the appeal partially succeeds. The appeal is allowed thus giving rise to the following orders:

**i. The order of contribution of 95%:5% is set aside and is substituted with an order apportioning liability in ratio on 60%:40%**

**ii. The appeal as against quantum is dismissed.**

**iii. The order excluding the award on special damages of ksh.858,000/= from being subjected to contribution is set aside and substituted with an order subjecting all awards to contribution.**

**iv. The final award is as follows:**

<b>a) General damages</b>	<b>ksh.1.200,000/=</b>
<b>b) Future medical expenses</b>	<b>ksh. 100,000/=</b>
<b>c) Loss of earnings</b>	<b>ksh. 858,200/=</b>
<b>d) Special damages</b>	<b><u>ksh. 89,000/=</u></b>
<b>Gross total</b>	<b>ksh.2,247,200/=</b>
<b>Less contribution 40%</b>	<b><u>ksh. 898,880</u></b>
<b>Net total</b>	<b><u>ksh.1,348,320/=</u></b>

**e) Plus costs of the appeal and the suit.**

13) The respondent filed a cross-appeal in which he listed two main grounds in his memorandum. I have already enumerated those grounds. When served with the memorandum of cross-appeal, the appellant raised a preliminary objection questioning the competency of the cross-

appeal. I think it is appropriate to first determine the preliminary objection before considering the merits of the cross appeal. It is the submission of the appellant that the cross-appeal was filed out of time and without prior leave being sought as envisaged under Section 79G of the Civil Procedure Act. The respondent did not address this court over the preliminary objection. The Civil Procedure Act and the Civil Procedure Rules do not expressly provide for the filing of a cross-appeal before this court unlike the Court of Appeal where the Court of Appeal rules provides. Under Section 79G of the Civil Procedure Act, a party who wishes to file an appeal may do so within 30 days. The court may extend time for filing of an appeal upon sufficient reason(s) being given. The appellant filed this appeal on 5<sup>th</sup> September 2014 and had the same served together with an application dated 12<sup>th</sup> September 2014 upon the respondent. The respondent waited until 28.10.2016 when he filed the cross-appeal. I hold the view that Section 79G Civil Procedure Act provides any party who is aggrieved by the decision of the subordinate to file an appeal within 30 days from the date of delivery of the decision. However, I am of the view that as regards cross-appeals, time i.e 30 days being to run from the date of service of the memorandum of appeal. In this appeal the respondent filed the cross-appeal way after the lapse of 30 days from the date of judgment. Time begun to run as from the date of service of the memorandum of appeal i.e. from 12<sup>th</sup> September 2014. By the time of filing the cross-appeal more than two years had lapsed from the date of service. The respondent did not seek for leave to file a cross appeal out of time. With respect, I agree with the submissions of the appellant that the cross-appeal is incompetent for want of leave. In my humble view, it was filed as an afterthought. Consequently the cross-appeal is hereby ordered struck out with costs for being incompetent.

Dated, Signed and Delivered in open court this 4<sup>th</sup> day of May, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondents