



**REPUBLIC OF KENYA**

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

**CONSOLIDATED CIVIL APPEALS NOS. 97 & 104 OF 2010**

**SOUTH SIOUX FARM LIMITED.....1<sup>ST</sup> APPELLANT**

**FRANCIS NZIVO MANGUTI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**FALCON COACH LIMITED.....RESPONDENT**

***(Being an appeal from the original judgment and decree of C. Mbogo, Chief Magistrate in Eldoret CMCC No. 993 of 2006 delivered on 12<sup>th</sup> May 2010)***

**JUDGMENT**

1. The appellants are aggrieved by the judgment and decree in the Chief Magistrates Court dated 12<sup>th</sup> May 2010. The appellants lodged Civil Appeal 104 of 2010. The respondent is equally aggrieved. It lodged a separate appeal being Civil Appeal 97 of 2010. On 3<sup>rd</sup> July 2014, the two appeals were consolidated. The respondent's appeal was deemed to be the cross-appeal.
2. The respondent had brought a suit against the appellant for the tort of negligence. The respondent claimed that on 29<sup>th</sup> May 2006 its bus registration number KAV 249K (hereafter *the respondent's vehicle*) was being driven along Eldoret Nairobi road. The respondent pleaded that the 2<sup>nd</sup> appellant drove the 1<sup>st</sup> appellant's trailer registration number KAD 986U ZB 3262 (hereafter *the appellants' vehicle*) negligently or carelessly; rammed into the respondent's vehicle; and, caused extensive damage to the bus.
3. The respondent claimed for the costs of repairs, assessors fees and police abstract all totaling Kshs 1,512,200. It also claimed for loss of use of Kshs 1,000,000 calculated at the rate of Kshs 25,000 per day for fourty days. The appellants denied the claim. In particular, the appellants blamed the respondent for contributory negligence. The learned trial magistrate found that the appellants were 100% liable for the accident. He awarded the respondent Kshs 812,000 as special damages together with costs and interest.
4. The appellant has challenged those findings through a memorandum of appeal dated 10<sup>th</sup> June 2010. The appellant contends that the plaintiff did not prove its case on a balance of probabilities; that the learned trial magistrate erred by holding that the appellants' vehicle was being driven on a slope at high speed; that the trial court failed to appreciate that the respondent's driver was fatigued after driving for 11½ hours non-stop; that special damages were not sufficiently proved; and, finally, that the respondent was not entitled to costs. In a nutshell, the main appeal is against both liability and quantum of damages.
5. The appeal is contested by the respondent. Like I stated, the respondent had also filed a memorandum of appeal. It is dated 8<sup>th</sup> June 2010. I shall refer to it as the *cross-appeal*. The respondent contends that the lower court erred by rejecting part of its claim for loss of use and

- costs of repairs. The respondent's case is that the claim for loss of use and special damages were strictly proved. The respondent asserts that the trial court erred by insisting on audited accounts as proof of loss of use; and, that the respondent had tendered sufficient evidence to show the bus was repaired and put back on the road. In that regard, the judgment is impugned for disregarding the fact that the respondent got some spare parts from its own yard. The respondent submitted that it had produced documentary evidence to support the full claim on repairs. The respondent prays that part of the judgment dismissing its claim for special damages be set aside.
6. Regarding the main appeal by the appellants, the respondent contends that the lower court arrived at the correct finding on liability. I was urged to pay heed to the evidence of PW3 and PW4. It was submitted that the scene of the accident was still fresh when the investigating officer visited it; and, that the evidence of PW3 and PW4 was not shaken by cross-examination. The fact that the 2<sup>nd</sup> appellant (DW1) was arrested by the police was a pointer to his negligence. The respondent's learned counsel submitted that it does not matter too much which of the two vehicles was going uphill or downhill or whether the respondent's driver had been on the road for many hours. The respondent submitted that it was entitled to costs in the lower court and in this appeal. I was implored to dismiss the *appeal* and to allow the *cross-appeal*.
  7. The appellant has filed submissions dated 26<sup>th</sup> November 2014 with authorities annexed. The respondent's submissions were filed on 5<sup>th</sup> December 2014. On 15<sup>th</sup> July 2015, I heard learned counsels for both parties. I have considered the appeal and cross-appeal, the record of appeal, the supplementary record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
  8. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
  9. I will deal first with the element of negligence. The two vehicles were travelling in opposite directions. The respondent's driver (PW3) claimed that the appellants' vehicle was trying to overtake another vehicle. The appellants' driver started the maneuver late and could not complete it. His trailer hit the respondent's vehicle. It was a head-on collision. The respondent's bus was going *downhill* towards Burnt Forest in Eldoret on the left side of the road. That must be correct because DW2, the driver of the appellant's vehicle, conceded that he was driving *uphill* from Burnt Forest towards Nakuru.
  10. It was early in the morning. The trailer's headlamps were on. The driver was ferrying 15 tonnes of maize. I accept the submission by learned counsel for the appellants that the trailer could not have been doing an excessive speed as it climbed the hill. DW2 claimed that the respondent's bus was overtaking a canter when it rammed into his trailer. DW2 had just woken up and commenced his journey from Burnt Forest towards Nakuru. PW3 on the other hand had travelled for many hours from Mombasa at the point the accident happened. The accident was at 5:30 am on 29<sup>th</sup> May 2006 at Burnt Forest near Eldoret. He had left Mombasa at 5:00 pm the previous day (page 99 of the record). He had been on the road for well over *eleven* hours.
  11. One of the two drivers was obviously *not* telling the truth. Police Constable Rotich (PW4) was based at Tarakwa Police Station. PW4 took over the investigations from Police Constable Juma who visited the scene soon after the accident. He testified that the trailer was overtaking another vehicle. The point of impact was on the *right hand* side facing the direction of Nakuru. That means that the bus was on its correct side (*left side* facing Eldoret) when the trailer hit it. DW2, the driver of the trailer was charged for causing the accident in Eldoret Traffic case 1495 of 2006. The trailer had pre-accident defects. The bus had no such defects (page 103 of record).
  12. From that evidence, I have reached the inescapable conclusion that the accident happened when the 2<sup>nd</sup> appellant (DW2) tried to overtake another vehicle on a hilly stretch of the road. He was unable to complete the manoeuvre. The respondent's bus driver tried to swerve to the left but it was too late. A head-on collision occurred. It matters little that the trailer was not speeding: it went into the path of the oncoming traffic. I thus find the 2<sup>nd</sup> appellant was 100% liable for the accident. The 1<sup>st</sup> appellant was vicariously liable. There was no evidence proving contributory negligence. The mere fact the bus driver had been on the road for many hours is not such proof. It is only

speculative.

13. In the result, the trial court, though for different reasons, arrived at the *correct* conclusion that the accident was caused exclusively by the negligence of the appellants. The appeal on liability is thus devoid of merit and is dismissed.
14. I will now turn to the cross-appeal. PW2, George Mathu, was a motor vehicle assessor. He produced his report dated 10<sup>th</sup> July 2006. He *estimated* the total cost of repairs for the appellants' bus, including tax, to be Kshs 1,349,991. He charged Kshs 12,000 for the report. Upon cross-examination (page 97 of the record), he conceded that he did *not* know how much was paid for the *actual* repairs. He was categorical that he did not assess any other bus belonging to the respondent. He replied in cross-examination as follows-

*“If the vehicle was repaired at Kshs 800,000 then they were given a special discount. It would depend on where the spares were bought from”.*

15. PW1 was a manager of the respondent. He produced an invoice and payment receipt issued by Choda Fabricators dated 30<sup>th</sup> September 2006 for Kshs 800,000. The amount included value added tax. The amount was spent on repairs to the respondent's bus. Upon cross-examination (at page 92 of the record), he stated the following-

*“We paid shs 800,000 to Choda Fabricators. The parts valued at shs 700,000 were from our other bus. I do not have the list of parts removed. I do not have the value of the parts...the vehicle was repaired and is now on the road”.*

16. From that evidence, there was before the trial court an *opinion* by the motor vehicle assessor for the *estimated cost of repairs* of Kshs 1,349,991. PW1 had documentary evidence supporting expenditure on repairs and spare parts up to Kshs 800,000. I do not doubt him that other parts worth Kshs 700,000 were sourced from another bus. But the truth of the matter is that he did *not* give particulars of the parts, their unit values or the bus they were removed from. The motor vehicle assessor never inspected the other bus. In a word, the parts could have been from anywhere. Fundamentally, they were then second-hand parts. They needed to be valued and proved at the trial. That was not done. It is not a figure that could be thrown at the court purely calculated as the mathematical balance of the figure projected by the assessor or claimed in the plaint. See *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR. The result is that there was no concrete or cogent evidence *specifically* and *strictly* proving the value of spare parts worth Kshs 700,000.
17. It is a cardinal precept of the law of evidence that he who alleges must prove. See sections 107 and 109 of the Evidence Act. Special damages must be specifically pleaded and strictly proved. See *Kampala City Council v Nakaye* [1972] E.A 446, *Ouma v Nairobi City Council* [1976] KLR 297, *Kenya Bus Services v Mayende* [1991] 2 KAR 232 at 235, *Coast Bus Services Limited v Sisco Murunga & another*, Nairobi, Court of Appeal, Civil Appeal 192 of 1992 (unreported), *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR.
18. I concur with the learned trial magistrate that the respondent only *proved* the sum of Kshs 800,000 for repairs and spare parts from Choda Fabricators; and, a further Kshs 12,000 for the assessor's fees. It follows as a corollary that the cross-appeal on that item fails and is dismissed.
19. The claim for loss of use pleaded at paragraph 9 of the plaint was at the rate of Kshs 25,000 per day for *fourty* days. It had to be strictly proved. The respondent's vehicle was a commuter bus. PW1 produced a passenger manifest (pages 17 to 23 of the record). There were seven documents. The first is dated 22<sup>nd</sup> May 2006 showing the bus made a gross income of Kshs 23,350. The net income was Kshs 12,950. The second one is dated 23<sup>rd</sup> May 2006 for Kshs 39,600; the next is dated 24<sup>th</sup> May 2006 for Kshs 24,450, the fourth one for Kshs 31,300; the fifth one dated 26<sup>th</sup> May 2006 showed a net income of Kshs 16,850; the sixth document dated 27<sup>th</sup> May 2006 was for Kshs 41,900; and, lastly Kshs 15,650 for 28<sup>th</sup> May 2006.
20. From that evidence, the bus would generate different amounts of income on different days. From the seven samples provided, the amounts ranged from a net income of Kshs 12,950 to a high of Kshs 41,900 per day. The average for those seven days was 26,100. The documents were from the

- respondent company; but they were not controverted or seriously challenged in cross-examination. They are an acceptable means of proving income generated by the bus. Like PW1 stated, it depended on the number of passengers and running expenses. PW1 testified that the sum of Kshs 25,000 was an average (page 92 of the record). The respondent could have ideally produced an *account statement* of the net income from the bus for a number of weeks. The trial court would then have reasonably established the lost earnings for *fourty* days. But that is not the only way of establishing futuristic loss of use. I thus find that the claim of Kshs 25,000 per day for loss of earnings was proved on a balance of probabilities.
21. The next key question is the period the bus was off the road. The respondent had claimed a specific sum of Kshs 1,000,000 for *fourty* days. No evidence was led to show the date the vehicle was repaired and took to the road again. So much so that the multiplier of *fourty* days is in doubt. True, PW2, the motor vehicle assessor had estimated it would take *six weeks* to carry out the repairs. That was an estimate. The amount claimed was a substantial sum. Being a special damage, it called for *strict proof*. It cannot be assessed in the manner of general damages. The respondent did not also show any measures it had taken to mitigate its losses. See Jackson Kiptoo v Attorney General, Nairobi, Court of Appeal, Civil Appeal 240 of 2003 [2009] eKLR.
22. Granted those circumstances, the court has to come up with a reasonable number of days for compensation. It is not contested the bus was off the road. PW2 examined it at the garage. For example, its front right body and floor were ripped off; the driver's door was also ripped off; the windscreen was shattered. It required fabrication of the front, sides and roof, replacement of window frames, repainting and so forth. From the assessor's report, the repairs would take *six weeks*. Like I have said, the respondent could have mitigated the losses. It did not do so. In the circumstances, compensation for loss of use should not exceed *three weeks*. Loss of use is accordingly assessed at Kshs 25,000 multiplied by 21 days which is to say Kshs 525,000.
23. In the result, I uphold the findings of the trial court on liability. I also uphold the assessment on costs of repairs and assessor's fees at Kshs 812,000 in favour of the respondent. I set aside part of the judgment dismissing the respondent's claim for loss of use. Instead, I enter further judgment for the respondent against the appellants for loss of use in the sum of Kshs 525,000. Judgment is thus entered in the total sum of Kshs 1,337,000 in favour of the respondent against the appellant.
24. The respondent did not deliver a letter of demand before action. The appellants did not concede the claim in the lower court. Judgment was entered in favour of the respondent after a full trial. Under section 27 of the Civil Procedure Act, costs follow the event and are at the discretion of the court. I thus find that the respondent was entitled to costs in the lower court. I grant the respondent interest in the lower court. However, interest on the additional sums in this appeal shall run from the date of this judgment. As both parties have succeeded partly, each party shall bear its own costs in these appeals.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET** this 6<sup>th</sup> day of October 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

Mrs. Khayo for the appellants instructed by Nyairo & Company Advocates.

Ms. Chepkurui for Mr. Omondi for the respondent instructed by Omondi & Company Advocates.

Mr. J. Kemboi, Court clerk.