

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Appeal 123 of 2010

JOHN GATHURI.....1ST APPELLANT

AKAMBA BUS SERVICES LTD.....2ND APPELLANT

~VERSUS~

SAMWEL OMONDI BUYA.....RESPONDENT

(Appeal arising from the judgment and decree of the Senior Resident Magistrate F. Kyambia in Bungoma Court in civil case no.777 of 2009)

JUDGMENT

On 8/9/2008 the Respondent boarded a bus registration number KAQ 832E make Scania at Nakuru to go to Malaba. At Kimaeti the bus lost control because of speed and went to hit a rock outside the road. He was injured on the head, right eye, right forearm, right leg and chest. He was treated at Bungoma District Hospital as an outpatient. He sued the Appellants for compensation in general and special damages for the injuries. He claimed that the 1st Appellant was the driver of the vehicle and employee of the 2nd Appellant whom he said was the owner of the vehicle. He blamed the accident on the negligence of the Appellants. The trial court found for the Respondent and awarded him Ksh.300,000/= in general damages and Ksh.2000/= in special damages. It also asked that he be paid costs and interest. The Appellants were aggrieved by the findings on liability and quantum and filed this appeal which I have considered.

In the trial court the Respondent gave evidence and called Dr. Samwuel Aluda (MD) (PW3) who examined him and P.C Patrick Nzioka (PW2) of Bungoma Police Station. PW2 was not the investigating officer and had not been to the scene, or attended to the accident report. He was only called to produce the police abstract. The Respondent testified that the bus belonged to the 2nd Appellant and that the driver was the 1st Appellant. He did not know them before the accident. He was not asked to say how he knew them. He did not give the driver's name. He did not say how he knew the 1st Appellant was the employee of the 2nd Appellant. He did not meet the two thereafter. He simply stated that the bus belonged to Akamba Bus. The defence did not offer any evidence, but in the written defence it was denied that the bus belonged to the 2nd Appellant. It was denied that the driver was the 1st Appellant. It was also denied that the 1st Appellant was the employee of the 2nd Appellant. In the appeal, the contention by the Appellants was that these matters were not proved.

Regarding the ownership of the bus, this is how the trial court dealt with the issue:

“As to whether the said motor vehicle was owned by the 2nd defendant, the 2nd defendant did not give any evidence to show it was not the owner of the said motor vehicle, neither did they call any evidence to show that it was not driven by the 1st defendant. I find that the said motor vehicle belonged to the 2nd defendant and was driven by the 1st defendant.”

The court fell into error in dealing with these issues. It was the Respondent who had claimed that the bus belonged to the 2nd Appellant and that it was being driven by the 1st Appellant who was the employee/agent of the 2nd Appellant. The burden was on him to call evidence to establish the claims. The

burden did not shift to the Appellants.

Regarding the ownership of the bus, it was expected that the Respondent does a search at the Motor Vehicle Registry to know who owned it at the time of the accident (**Thuranira Karauri v. Agnes Ncheche, Civil Appeal no.192 of 1996 at Nyeri**). No certificate of search was produced and therefore the issue of the ownership of the bus remained unresolved. It follows that the Respondent did not prove his claim and therefore the finding that the 2nd Appellant was liable was without basis. It was also not proved that the 1st Appellant was an employee of the 2nd Appellant, or that he was the driver of the bus at the time.

Liability not having been proved, it would be futile to discuss whether the quantum was justified. The result is that the appeal is allowed with costs. The judgment of the lower court is set aside and in its place there shall be judgment dismissing with costs the Respondent's suit against the Appellants.

Dated, signed and delivered at Bungoma this 2nd day of October, 2012.

A. O. MUCHELULE
JUDGE