REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Case 76 of 1995

ABDI KAWIRI.....PLAINTIFF

VERSUS

YOU GUO JIANG SIETCO.....DEFENDANT

JUDGMENT

By this suit filed on 29th June, 1995 by the plaintiff against the defendants, the plaintiff claims special damages of shs.6,336,000/- loss of business, costs and interest arising from an accident which occurred on or about 17th May, 1995 between the vehicles owned by the parties for which the plaintiff held] he defendants responsible. On being served, the defendants filed a defence denying liability and counter claimed for damages for detention of its vehicle from 8th June, 1995 until date of release. The parties then framed issues and after aninfied trial which was nullified the suit came for retrial before this court on 24th February, 1997.

The issues left to the court for determination were as follows:

1. Was there an accident involving the plaintiff's motor vehicle A.A.K. 8947 trailer 8424 make Mercedes Benz semi trailer and the defendants Ford trailer 066 UAY/02/UAY on the 18th May, 1995 at about 12.00 a.m.

2. Was the accident caused due to the negligence and/or carelessness of the plaintiff or the defendants?

3. Was the plaintiff's trailer plus tanker thereon extensively damaged after the accident?

4. If the answer to issue 3 is yes, then is the plaintiff entitled to any compensation? And from when?

5. After the said accident, did the defendant suffer any material loss of use of motor vehicle and trailer registration No. 066 UAY/02/UAY which was detained by the plaintiff and is the plaintiff liable to pay the defendants damages for loss of use?

It is regretted that due to the lapse of time and misapprehension of the effect of S.47 of the Evidence Act, which necessitated an appeal and the failure of the court of appeal to deal with the matter on the basis of the proceedings of the lower court which were produced by the consent of the parties under S.61 of the Evidence Act as the parties had agreed to rely thereon during the proceedings, the parties herein have been seriously handicapped in prosecuting their cases as the drivers are either unavailable or would only be produced at great expense. Consequently prior to the hearing hereof, the parties by consent agreed to have the affidavits by the drivers of the vehicles to be treated as evidence in this case. The traffic case

proceedings were also produced as exhibits by consent. The plaintiff in addition to the affidavit evidence and evidence in the lower court called three witnesses while the defendant called 1 witness.

According to the affidavit evidence of the plaintiffs driver and as substantially supported by PW2, Sgt Charles Munyoki, who investigated the accident with a view to bringing traffic proceedings, on the material day, namely the 17th May, 1995 at about 12.05 the plaintiffs driver, one Jamal Hussein, now of Mpwapwa Tanzania was driving the plaintiff's motor vehicle registration No 8947/8424 Mercedes Benz truck and trailer loaded with soap, fat destined for Kampala Uganda. On reaching Ndengelwa along Webuye Bungoma Road while going towards Bungoma Malaba on the left side of the road, he saw a matatu vehicle ahead of him. He also noticed the defendants truck registration No 062 UAY driven by the 1st defendant which was following him, trying to overtake him and in a bid to avoid colliding with the oncoming and despite having been signalled by hand by the plaintiffs driver not to overtake as there was an oncoming vehicle, the defendants truck rammed into the sides of the plaintiff's trailer vehicle causing it to loose control and overturned on the left side of the road. After causing the accident the defendants vehicle did not stop but continued proceeding towards Malaba Town where it was intercepted by the plaintiffs driver with the assistance of another vehicle which was driving behind the defendant's vehicle. According to PW2, Sgt. Charles Munyoki who investigated the accident, he found some scratches on the left side of the defendants motor vehicle and formed the opinion that the defendants vehicle must have been the cause of the accident and charged the driver thereof with the offence of careless driving.

The defendants denied having caused the accident. According to the affidavit of the defendants driver, at about the material time, he was driving along Webuye-Malaba Road and was accused of having caused an accident on that day along the said road and the court made a "fair" judgment in the case. According to him on the material day he was in a convoy of 8 vehicles which were taking materials to Owen falls, his vehicle being the second. On that day to the best of his recollection, all was fine and was not involved in any accident along Webuye-Malaba Road. As he neared Malaba he was stopped and told that he had caused an accident and the only thing observed on his vehicle were marks on his tyres which were made as he was fueling in Nairobi. At the traffic hearing, the defendant's driver repeated the same story and that his vehicle was being followed another of their convoy who witnessed the manner in which he was driving. The driver of the vehicle following the defendants vehicle testified that on approaching the scene of the accident the defendants vehicle overtook the plaintiff's vehicle which started swaying and overturned. As the plaintiff's vehicle was swaying he saw a matatu vehicle coming from the opposite direction and stopped at the scene shortly. It was also his evidence that the plaintiffs vehicle was moving slowly.

On the above evidence, who was to blame for the accident? Although the defendant's driver does not admit having overtaken the plaintiffs vehicle which was going slowly, his only witness says that he did so as they approached Kanduyi. There is also evidence of scratches on the sides of the defendants vehicle, which was consistent with the contentions of the plaintiff's driver that the defendants vehicle rammed into his vehicle causing it to loose control and overturn. On account of this and on preponderance of evidence, I find that it was the defendants vehicle which caused the accident while trying to avoid colliding with an oncoming matatu vehicle and the driver may not have realized his actions as he was driving fast.

Did the plaintiff contribute to the accident? The defendant did not say if the plaintiffs driver did anything prior to his vehicle being overtaken. The defendant's only witness at the traffic trial confirmed that the plaintiffs vehicle was going slowly. On his part, the plaintiff's driver states that he used signals including hand signals to warn the defendant's driver that there was an oncoming motor vehicle and should not overtake. As the defendants' vehicle was moving fast, it did not heed the warnings and had to swerve onto his vehicle in a bid to avoid a head on collision. As I cannot see what else the plaintiff's vehicle could have done to avoid coming in contact with the defendants vehicle, I find that it is the defendants vehicle which wholly caused the accused. The answer to the 1st and 2nd issue is therefore that there was an accident between the plaintiff motor vehicle and the defendants vehicle on the 17th May, 1995 (not 18th May, 1995 as erroneously stated in the issues) at about 12.00 noon and that the defendant was to blame for the accident in ramming into the plaintiffs vehicle while trying to avoid a head on collision with

a matatu vehicle.

The evidence relating to the damage suffered by the plaintiffs vehicle and the losses incurred as a result of the accident was adduced largely by PW1 Mr Abdi Ahmed Abdi. According to the said Abdi, who is also known and trades as S.S.A. Kawir, when he reached the scene of the accident, he found that his vehicle had overturned and the trailer had rolled on the left hand side of the road as one goes towards Malaba – from Webuye. The trailer was badly damaged and the fuel it was carrying was leaking. The truck pulling the trailer was also damaged and the oil it was carrying was also leaking. All its wheels were facing up and it was lying on its back.

After seeing the damaged vehicle, the witness engaged and assessor, namely Finnex Assessors the tank and the trailer could not be repaired while the lorry was repairable. The trailer and the tank were therefore written off. According to the witness, the trailer was worth Shs 3.9 including the tank However according to the assessors report, the pre-accident value is Shs. 3,100,000/- less Shs 1,800,000/- salvage value. He also stated that at that time he had a contract to transport fuel to Kampala at US 5200 per trip and usued to make 4 trips per month. As a result of the accident, he missed the use of their vehicle for 1 year, while a trailer was being made for him. He therefore hired another vehicle for that purpose. In cross-examination the witness conceded that at the time the accident took place, the trailer was 2 years old and was worth Shs 3.9 million.

The other witness who gave evidence on damages was PW3, Jackson Wetosi, an accountant by profession. He testified that he had prepared the plaintiffs accounts for year ending March, 1995. According to him the vehicle used to make a net profit of Shs 3,218,710/80 before taxation and Shs. 2,081,498/30 after taxation including depreciation of Shs 3,982,293/50. On their part the defendant did not produce any evidence on the loss they may have suffered as a result of the accident or detention of their vehicle. The cardinal rule of law relating to damages is that the offended party should where possible be compensated to the extent he should have been in if he had not suffered the loss. It is also an established principle of law that where specific damages are sought, they must not only be pleaded but specifically proved and that parties must always mitigate their losses. Suits are not intended for profits.

Keeping all the above principles in view the answer to the third issue, namely whether the plaintiffs trailer plus tanker was extensively damaged is definitely in the affirmative and that as a result of the said damages the plaintiff is entitled to compensation from the defendants jointly and severally. As no evidence was produced by the defendants on the loss they may have suffered as a result of the accident and/or detention of their vehicle, the answer to the fifth issue is in the negative.

On quantum, there is uncontroverted evidence that at the time the accident occurred the trailer and tank were worth Shs 3,100,000/- and that the salvage was worth Shs 180,000/-. The loss therefore suffered on account the damage to the trailer/tank was Shs 2,920,000/-.

On loss of user of vehicle the plaintiff testified that he used to make a profit of $20,000 per month and that it took 12 months for another tanker to be built. He should have however mitigated his losses by hiring others and indeed there is evidence that he did so later. I therefore would allow a maximum of 2 months period within which he should have made arrangements for alternative hired transport.

In the result and for the reasons herein before set out, I enter judgment for the plaintiff against the defendants jointly and severally as follows:

(a) Pre-accident value of trailer - Shs. 2,920,000/-

Tanker less salvage.

(b) Loss of business for 2 months at $ 20,000

Per month - Shs 2,580,000/-

Total Shs.5,500,000/-

(c) Cost of the suit

(d) Interest on (a), (b) and (c) from usual dates and or usual court rates.

I also dismiss the defendants counterclaim with costs and interest thereon at usual court rates.

Orders accordingly.

Dated at Bungoma this 26th day of April, 1999.

G.P. MBITO

JUDGE

Mr Masinde: I ask for release of my clients bank deposit made pursuant to the consent order filed on 4th September, 1998.

Order: As the suit is now over, the money in the advocates deposit is hereby ordered to be released to the plaintiff.

Order accordingly.

G.P. MBITO

JUDGE

14.5.99

Before J. Ombonya C.M.

c.c. Maurice

Mr Onyando: The bill be taxed as drawn. The sum of 320,594/-. It is exparte as the respondent is absent but served.

Order Bill taxed t Shs 320,594/-.

J. OMBONYA

CHIEF MAGISTRATE/

DEPUTY REGISTRAR