



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 108 of 1997

MOSES MWANGI MUCHINA PLAINTIFF

VERSUS

1. AFRICAN LINE TRANSPORT CO. LTD

2. HUSSEIN MUHIR ABDALLA DEFENDANTS

Coram:

J.W. Mwera - Judge

Mulu Advocate for plaintiff

A.F. Gross Advocate for defendant

Court clerk - Muli

JUDGEMENT

This suit was filed on 19.6.97 wherein the plaintiff claimed that on 19.2.97 when he was driving motor vehicle registration No.KAG 054C along Mombasa/Nairobi Road, he got to a point called Cescent Construction site. That the 2nd defendant had driven and stopped the 1st defendant's motor vehicle registration No.KAH 139N-ZB 6247 in such a negligent manner that it obstructed other motorists on the said road, like the plaintiff. As a consequence the plaintiff's motor vehicle collided with the 1st defendant motor vehicle leaving the plaintiff with a compound fracture of the right lower tibia plus bruises and other injuries to the trunk of his body. He prayed for damages, costs jointly and severally, including loss of earning prospects.

A joint defence was filed on 15.6.97, on their part the defendants averred that they were not liable in negligence but that the plaintiff solely or wholly contributed to the said accident by failing to notice the warning signs, reflectors, branches etc. that the 2nd defendant had placed behind his motor vehicle. That the plaintiff did not stop, swerve or brake to avoid the collision. Apparently there was no reply to this pleading but on 8.8.97 a statement of issues was filed by consent.

On 10.12.98 the plaintiff (P. W. 1) testified that on the material night he was driving a bus from Kisumu to Mombasa. He then came to where the defendant's lorry had stopped. Oncoming motor vehicles with

lights on made it impossible for the plaintiff to see this lorry. It had no warning lights or signs behind it. Its appearance was so abrupt that without time to swerve or brake the plaintiff's bus rammed into the rear of the stationary lorry. That he had been driving at 70 kph.

The accident was reported to the police and the plaintiff produced an abstract (Exhibit P. 1). He was admitted to Machakos General Hospital for 7 days then he moved to be attended to by Dr. Kiragu at Gill house Nairobi. Dr. Kibore examined him and made out the report which the plaintiff paid for (Exhibit P.2A-B). On his part Dr. Kiragu charged and the plaintiff paid Shs. 1,550/- (Exhibit P.3). The defence later directed the plaintiff to Dr. Bencivenga who examined and prepared a medical report (Exhibit P.4). Injuries were a fractured right leg which necessitated use of a crutch. He also suffered a wound to the left leg (Exhibit P5). The plaintiff told the court that he was no longer working as a driver. His last pay with the bus company he worked for, was Shs, 4,500/-. The plaintiff denied causing or contributing to the cause of that accident. He claimed that the rear gate of the defendant's trailer which bears reflectors was removed and placed on top of the trailer and the lorry had stopped in the middle of the road, on the plaintiff's side as he faced Mombasa.

In cross-examination the plaintiff told the court that his bus sustained much damage on the driver's side i.e. the right. But the lorry was not badly damaged. It had no warning signs that it had stopped at this point. That the 2nd defendant was tried in traffic case following that accident. The plaintiff who was unwell did not attend the trial. He did not know the outcome. In re-examination the plaintiff referred to his salary of Shs.3,400/- in April 1997.

Dr. Kibore (P.W.2) referred to the injuries sustained by the plaintiff in Exhibit P.2. He had seen him later and concluded that the plaintiff could no longer work as a driver since the accident (Exhibit P.6). Dr. Kibore could have estimated the plaintiff's disability at 15 per cent. Dr. Bencivenga put it at 10 per cent. The plaintiff ended with a shortened leg which impaired proper driving but he could do other jobs.

Cpl. Ngechu (P.W.3) then testified. He got a report of the accident in issue at 3 a.m. on the material night. He proceeded there and found the 2 motor vehicles above referred to. One container could not fit in the defendant's trailer and so it protruded behind. The trailer had stopped with all its wheels on the tarmac. The plaintiff's bus had been badly damaged on the front part, the plaintiff himself told the court that his driver's side was the part that was damaged. To P.W.2, this collision appeared to have taken place when the bus tried to avoid the trailer's rear which had inclined into the near lane with one wheel on the edge of the road. Not too long ago in this testimony it shall be recalled that P.W.2 had just testified that all the wheels of the trailer were in the lane. P.W.2 learned from a security guard with the trailer that it suffered 2 punctures. None of its occupants were present and there were no warning signs e.g. reflectors or branches placed on the road by the trailer driver. That it was P.W.2's team which then did that, That in the morning the trailer driver Abdallah came and he drove it to Kyumbi police post even before the punctures were repaired it moved slowly. P. W.2 told the court that the trailer occupied the whole near side lane i.e. to the left as one went to Mombasa and any motor vehicles coming along could only do so by getting in the lane of the oncoming motor vehicles. At this point there was a bridge and a deep galley. But there was room to park a little ahead. P. W.2 completed the investigations including taking statements and sketch plans and because of the 2nd defendant to be charged with obstruction. But he was acquitted. P.W.2 could not produce the sketch plan produced in the lower court. However the court allowed him to put in one, according to his recollection- the same to be considered along other evidence (Exhibit P.7). In cross examination this witness said that the bus had tended to go to the left of the road at the time of the accident.

That closed the plaintiff's case.

Next was the 2nd defendant Abdallah (D. W. 1). As he came to the scene already referred to some nails placed on the road (definitely by criminal elements) punctured five of his trailer in a line - from the lorry to the container carrier which carried coffee from Kampala. He pulled off the motor vehicle three quarters from the road. It could not go further left as one faced Mombasa. He stopped it. It was at night. Using the headlights D. W. 1 placed triangles and branches on the road to warn other motorists, together with lights remaining on. They were under security escort who had stopped at Kyumbi trading centre. He reported to

this aide and proceeded to Machakos town to call his employers to bring tyres. He stayed overnight at

Machakos. Tyres were brought the following morning. He went to the scene and learnt that at 2 a.m. a bus had hit into the trailer. He did not find it there. To D. W. 1 he parked the trailer in such a way that some motorists were using the lane. This motor vehicle could not move at all without replacing the punctured tyres. After that was done he moved it to Kyumbi police post. The trailer doors were not open at all. The 2 containers carrying coffee fitted in leaving 2 feet to close the doors and carry the coffee safely. His trailer was hit on the LEFT----- the part away from the road as one faced Mombasa direction (Exhibit D. 1). He was charged but acquitted of obstruction.

In cross-examination this witness added that as he left the trailer to report the punctured tyres, he left 2 of his colleagues in it. He denied leaving the trailer in the road without warning signs that it was there.

Fredrick Kyalo (D.W.2) was defendant's turn boy. He repeated the same story from the time their motor vehicle suffered punctures and how D, W. 1 drove it almost off the road and stopped. It carried coffee safely secured in the containers with door closed. They had placed signals and branches on the road. He went to sleep and wait in the cabin. He then heard a bang and their trailer shook. When he came out to check he found a bus had hit the trailer on the LEFT side. He had seen a motor vehicle coming from Mombasa direction. That when this motor vehicle got near the trailer's cabin, then the bus banged into the rear of it. It was at a straight point of the road. Police came took measurements and drew sketch plans.

Both sides submitted. The plaintiffs side placed substantial amount of the liability on the 2nd defendant and therefore on the 1st defendant vicariously. The cases of DCM THYSSENV. WAKISU ESTATE LTD. [1960] E.A. 2896 and KHAMBI & ANOTHER V. MAHITAI & ANOTHER [1969] E.A. 71 were cited on apportionment of negligence in situations as this. It looks like after citing these 2 cases the plaintiff's side would be happy with one hundred per cent liability to be borne by the defendants otherwise it could fairly be apportioned at ninety five per cent for the defendants and five per cent to the plaintiff. General damages were put at Shs.800,000/= citing the cases of;

NGWE MWALILI VS KELI HCCC 3217/89

MISHACK OLANG VS GOW1 HCCC 2371/90

& PATRICK KANGUNDU VS. MUSILU & ANOTHER HCCC 1202/90

In these cases damages ranged between Shs.250,000/= to Shs. 400,000/=.

There was damage for loss of income from the date of the accident to the date of trial. This court thought that such award would be by way of special damages. It could be specifically pleaded and proved. That was not the case here and it need not detain the court, until it is writing out its determination.

There was another head of prospective loss of income after trial. This is what this court thinks is called "loss of earning capacity," A monthly income of Shs. 5,000/= was put forth nobody can say where from and a multiplier of 20 Shs. 1,2M was proposed. Again this is not to make a short job of the plaintiff's case go this point, but there was no evidence produced about the plaintiff's income per month as a driver. He told the court that he earned Shs,4,500/= per month with allowances. He pleaded Shs.4,000/= per month. In cross-examination a document was shown to him and he stated that in April 1997 he earned Shs.3,400/-.

Special damages for hospitalisation, doctor's fees e.tc. were put at Shs.53,100/=. The gross award stood at Shs.2.2M. The defence was of the view that the accident was solely caused by the plaintiff. But if the court found otherwise he should bear 75 %. Going over to doctors reports and the defence citing its own cases (several) which this court similarly perused said that loss of earning capacity was not proved and only Shs, 52,100/= was proved for special damages.

Beginning with the issue of liability this court took time to look at evidence of both sides side by side. The

plaintiff told this court that the whole of the defendant's trailer stood in the lane as one drove to Mombasa. There were no reflectors, lights, signals or other marks to warn other motorists passing there. He came along driving 70 k.p.h. and being dazzled with lights from an oncoming motor vehicle, the defendant's trailer suddenly loomed before him. He could not swerve or stop. He rammed it in its rear. But that there the plaintiff's driver's side was badly damaged, one would have thought that if the defendant's trailer stood right in the middle of the lane, the plaintiff unable to swerve or brake should crush the front part of the bus into the rear of the trailer. In any case P.W.2 Cpl. Ngechu who could not produce the sketch plan he made on the scene had a different view or at least a conflicting one. First that the whole of the trailer stood in the lane as one drove to Mombasa as the plaintiff's bus was doing. There were no signs or branches e.t.c. But then in the same breath he told the court that one or two wheels of the trailer were on the verge of the road. Now these are two stories one excluding another. Coming to the damage, the plaintiff categorically told the court that his driver's side of the bus was badly damaged. Cpl. Ngechu saw the whole front part of the bus damaged after the collision. So who is saying the truth? Both P.W. 1 and 2 cannot be testifying of the same thing.

This court is inclined to believe the defence case. The trailer suffered a series of punctures. It was heavily loaded with coffee. Its driver, D. W. 1 drove three quarters of it all onto the left side as one faced Mombasa. It could not go further. Warnings were placed on the road. He left it to call for help. As P.W. 1 drove along, he was about to overtake the trailer. He saw lights of a motor vehicle coming from the opposite side. He could not overtake the trailer without risking a head-on collision. He pulled back into his lane and even attempted to pass the lorry on its left side i.e. of the road. He hit the rear left side of the trailer and his own right side of the bus was badly damaged. This can only be attributed to the plaintiff's inattention, lack of lookout and high speed. That was pleaded in the defence. It was not denied by way of reply (see 06 r, 9 C.P.R.). The plaintiff has himself to blame. Indeed had the 2nd defendant been wrong in that his stopping the trailer constituted obstruction in any way with all the stories from P. W. 1 and 2 plus sketches, he could not have been acquitted of such a charge.

In sum this suit is dismissed with costs.

Had his suit succeeded the plaintiff would have borne a greater ratio of liability and all damages worked out would have been subjected to that. General damages would have issued in the region of Shs.200, 000/- and Shs.350, 000/-.

Suit dismissed. Costs to the defendants.

Judgment accordingly.

Delivered on 15th December 1999

J.W. MWERA

JUDGE

15.12.99