



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Civil Case 106 of 1994**

**KENYA BUS SERVICES (MSA) LTD.**

**MAURICE KAREMA CHARO.....  
APPELLANTS**

**AND**

**AFRICANUS AUMA WANJALA.....  
RESPONDENT**

**( Appeal from judgment and decree of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 6<sup>th</sup> December, 1993**

**IN**

**H.C.C.C. NO. 177 OF 1989)**

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**JUDGEMENT OF THE COURT**

This is an appeal by the defendants from a judgment and decree of the superior court (Wambilyangah, J) dated December 6, 1993 in a suit by the plaintiff (respondent) in which he claimed damages for injuries he sustained as he attempted to board the first appellant’s motor vehicle registration number KUD 378 (the vehicle).

The facts of the case are brief. On February 16, 1988 the respondent while he attempted to board the vehicle, the second appellant suddenly drove off causing the respondent to fall off and sustain personal injuries. The respondents denied negligence and, in the alternative, pleaded contributory negligence. The injuries and damages were also in issue.

The driver’s own version of the accident as testified to by him in cross-examination was as follows:-

“The bus was full. Other passengers were standing. I do not know how many passengers there were. I do not know the capacity of the vehicle..... I do not know where in the bus he was at that time. I relied on the reflecting mirror to check that all passengers were in the vehicle .....

In the light of this and other evidence adduced before him the learned Judge found the driver negligent for the accident which occurred. He rejected the defence that the plaintiff was guilty of contributory or any negligence. On appeal, we have ourselves evaluated the whole of the evidence and do not find any

ground for interference with the learned Judge's findings on the issue of liability. We would have been able to interfere only if the appellants could show either:-

- (a) absence of negligence,
- (b) probability that the accident happened without negligence, or
- (c) that the accident was due to circumstances not within the second appellant's control.

We are satisfied with the learned Judge's findings of fact which established each of these propositions in favour of the respondent. On the issue of liability, therefore, the appeal fails.

As to the issue of the quantum, the learned Judge awarded a sum of KShs. 550,000/= by way of general damages. Having regard to the injuries sustained by the plaintiff the learned Judge awarded the general damages on the basis of the loss of a leg. He expressed himself thus:-

"The wound on the leg ..... had become septic leading to chronic ulcers on the leg. When the medical examination was done, the leg had swollen and chronic oedema of the foot and leg had developed .... In the end, the ulcers had become malignant and prompted Dr. R. Patel to prescribe the amputation of the leg if the life itself has to be saved."

In view of the above, we are not inclined to interfere with the learned Judge's award of general damages of KShs. 550,000/=. Nor do we, in our judgement, find any ground for interfering with the award of KShs. 100,000/= for posthesis. Upon a careful consideration of these two awards, we are not persuaded that they are so high as to compel us to say that the learned Judge must have applied any wrong principle. Nor is there any other ground to warrant any interference since we are not persuaded that they are in any way erroneous.

Different considerations, however, apply as to the award of KShs. 250,000/= awarded by the learned Judge in respect of loss of earning capacity. There was not even a general pleading with regard to this claim. In this case, such damages were not pleaded and although the matter was not taken up by the appellants' advocate, we cannot allow this part of the award to be sustained. Accordingly, the award of KShs. 250,000/= for loss of earning capacity is set aside. The appeal on quantum, therefore, succeeds to this limited extent.

For the reasons above stated, the decree of the superior court is varied by reducing the decretal amount of KShs. 900,000/= by KShs. 250,000/= to KShs. 650,000/=. The appellants shall have one-third costs of this appeal.

Dated and delivered at Mombasa this 21<sup>st</sup> day of July, 1995.

J. M. GACHUHI

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL