



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING IN NAKURU)**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**CIVIL APPEAL NO. 181 OF 2011**

**BETWEEN**

**ANDREW MWORI KASAYA..... APPELLANT**

**AND**

**KENYA BUS SERVICE..... RESPONDENT**

*(Being an appeal from the Judgment of the High of Kenya at Kericho (Angawa, J.) Dated 7<sup>th</sup> December, 2009*

*in*

(H.C.C.A. NO. 22 of 2007)

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**JUDGMENT OF THE COURT**

The appellant **Andrew Mwori Kasaya** sued the respondent **Kenya Bus Services** in the Resident Magistrate's Court at Molo vide a plaint dated the 15<sup>th</sup> November, 2005 subsequently amended on the 9<sup>th</sup> January, 2007. In it, the appellant sought from the respondent special and general damages, costs, interest and any other relief that the court may deem fit to grant. The reliefs were in respect of injuries allegedly sustained by the appellant in an accident involving M/V registration number KAP 995N Scania Bus in which the appellant was at the material time travelling as a fare paying passenger along the Nakuru – Kericho road at **Londiani**. It was the appellant's averment that the said motor vehicle belonged to the respondent and it was at the material time being driven, controlled and managed by its driver, servant and or agent. He also contended that the accident was as a result of carelessness, negligence or unskillful driving, mis-controlling and or mismanagement of the said vehicle by the deceased driver of the respondent.

The respondent resisted the appellant's claim vide a defence dated the 26<sup>th</sup> June, 2006 and subsequently amended on the 29<sup>th</sup> January 2007. In it, the respondent denied any responsibility for the appellant's claim as laid. In the alternative, it pleaded that if any accident occurred then the same was wholly and totally occasioned by factors which were completely inevitable and beyond the control and without any negligence being involved on the part of the respondent. In the further

alternative, it was averred that if any accident occurred then the same was occasioned by the carelessness and negligence of the driver of a 3<sup>rd</sup> party vehicle in respect of which the respondent would enjoin in the proceedings as a 3<sup>rd</sup> party. Lastly, the respondent pleaded, that if any accident occurred then the same was an act of God and inevitable in the circumstances owing to elements of weather and natural terrain. In consequence thereof the respondent prayed for the appellant's claim to be dismissed with costs.

The appellant gave evidence and called three (3) witnesses. He also tendered documentary exhibits as part of his evidence. The respondents were given an opportunity to call their witnesses but failed to do so and the trial court being satisfied that they had been given ample time to do so, ordered the proceedings closed. Thereafter both sides filed written submissions.

In a brief judgment the learned magistrate **J. O. Oseko SPM** declined to find for the appellant when she delivered herself thus:-

**“The defendant opted not to testify. The plaintiff stated that he did not sue the driver of the defendant’s vehicle for he died in the accident. I have considered the plaintiff (sic) case pleading for evidence (sic). He has blamed the defendant for not driving the bus carefully. He contributed to no portion of the accident. He was merely a passenger. He has called evidence to prove he was involved in the accident. The defendant opted not to testify. But in the pleadings the defendant denied owning the motor vehicle in question. This issue was raised in the defence but not addressed by the prosecution. (sic) I therefore find the law with this regard settled in the case of Thuranira Karauri vs. Agnes Ncheche CH (sic) 192/96. In the absence of a certificate of search from the registrar of motor vehicle then this case cannot succeed. This is an important ingredient to be considered. Lack of which in my view renders the suit fatal. I dismiss the suit with costs to the defendants.”**

The appellant was aggrieved and appealed to the High Court citing various grievances. Parties were heard on their merits. In a judgment dated the 7<sup>th</sup> December, 2009 **Ang’awa J**, (as she then was) dismissed the appeal. The appellant is now before us on a second appeal. He has raised two grounds of appeal as the third ground appears incomplete namely;

- 1. That the learned Judge erred in law in finding that the absence of the motor vehicle search certificate was fatal to the case.**
- 2. That this being an accident claim the learned Judge misdirected herself in failing to direct the trial court to state the amount that would have been awarded as damages on liability if the case had succeeded.**

Learned counsel **Mr. Ogola Gordon** and **Nicholson Bett** appeared for the appellant and the respondent respectively. In his submissions to court, **Mr. Ogola** urged that the learned Judge misdirected herself on the burden of proof applicable in the instant appeal. In his view, the moment the appellant produced the receipt demonstrating that he was a fare paying passenger, the burden of proof then placed on him and which according to **Mr. Ogola** was on a balance of probability shifted to the respondent to demonstrate how the accident occurred. Since the respondent offered no evidence, that burden was never discharged. He further submitted that it was not mandatory that the appellant produces a search certificate from the Registrar of Motor Vehicles in order to prove responsibility against the respondent. It was sufficient for him to produce the police abstract to demonstrate as he did that the respondent was indeed the owner of the accident motor vehicle a fact that remains unrebutted to date.

In support of ground 2, **Mr. Ogola** urged that the correct position in law is that the trial court even when it declines to grant damages to a claimant as it did in the circumstances under review in this appeal, damages ought to have been assessed.

To buttress his arguments **Mr. Ogola** cited among others the case of Joel **Muga Opija versus East African Sea Food Limited Kisumu Civil appeal No. 309 of 2010** for the proposition that although the best way to prove ownership would be to produce to court a document from the Registrar of motor vehicles showing who the registered owner is, when the abstract is not challenged and is produced in court without any objection its contents cannot later be denied.

In response to the appellant's submissions, learned counsel **Mr. Nicholson Bett** conceded ground 2 that damages ought to have been assessed even if the appellant's claim was not allowed. Turning to ground one (1) **Mr. Bett** urged that the learned Judge cannot be faulted for dismissing the appellant's appeal as there was no proof of the ownership of the accident motor vehicle as the respondent had denied its ownership; the receipt the appellant tendered in evidence did not show the registration number of the motor vehicle the appellant was allegedly travelling in and; the police abstract was rightly rejected by the courts below as the circumstances prevailing in this appeal are distinguishable from those prevailing in the **Joel Muga Opija case** (supra).

To buttress his argument **Mr. Bett** cited among others the case of **Thuranira Karauri versus Agnes Ncheche [1997] eKLR** for the proposition that where the defendant denies ownership of the accident motor vehicle, it is incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of motor vehicles showing the registered owner of the said M/V.

This being a second appeal our mandate is as explicitly set out in **section 72(1)** of the Civil Procedure Act Cap 21 Laws of Kenya namely to concern ourselves with issues of law only. See also the case of **Maina versus Mugiria [1983] eKLR 79** for the holding inter alia that:-

**“In a second appeal only matters of law may be taken”**

We bear in mind the totality of the record in the light of the rival arguments set out above. In our view the issues that fall for our determination are as follows:-

1. Whether liability was proved against the respondents.
2. Whether the trial court ought to have assessed damages even after dismissing the suit.
3. Whether the assessment of damages should be remitted back to the High Court.

With regard to issue No.1, It is evident from the record that the only reason the two courts below failed to find the respondent liable for the accident was because of lack of, or failure of the appellant to produce a search certificate from the Registrar of Motor Vehicles to prove ownership of the offending vehicle to the respondent. In so finding both the two courts below approved the decision in the **Thuranira** case (supra), and dismissed the receipt the appellant produced as proof that he was a passenger in the accident vehicle which had no registration number of the accident vehicle.

This Court had the occasion to restate the position of the law on this aspect recently in the case of **Charles Mageto and Another versus Sospeter Ndung'u Kamau (Suing as the legal Representative of his late son Arthur Nderitu Ndung'u Nyeri CA No. 158 of 2011** where the following observations were made:

**“For these submissions, Mr. Mahida relied on the decision of this Court in Thuranira Karauri vs. Agnes Ncheche – [Civil Appeal No. 192 of 1996] (UR) where it was stated in obiter dicta thus:**

***“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the***

*plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership.”*

That decision has since been cited and followed by some courts, and was followed by Musinga Ag. J. (as he then was) in a similar case arising from this same accident (HCCA No. 188 of 2002) which Mr. Mahinda cited before us as an authority. We recently considered the Thuranira case (supra) in the case of Margaret Waithera Maina v. Michael K. Kimaru Civil appeal No. 16 of 2015 (UR) and observed that the courts are moving away from that rigid position and have stated as follows:-

*“It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”*

See Joel Muga Opija v East African Sea Food Limited [2013] eKLR; Superform Ltd & Anor. vs Gladys Nchororo Mbero (2014) eKLR; and Wellington Nganga Muthiora vs Akamba Public Road Services & Anor. (2010) eKLR.

Turning to proof by a passenger, we stated as follows in the Margaret Waithera Maina case (supra):

*“The notion that only documentary evidence would be acceptable for strict proof of all facts has been decried before by this Court and we echo the case of Jacob Ayiga Maruja & Another v. Simeon Obayo Civil Appeal No. 167/02 (UR), thus:*

*“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”*

The above being the correct position in law it is our view that the High Court fell into error when it upheld the trial court's findings on liability. We accordingly set aside that affirmation and substitute it with a finding that on the basis of the record as it was before the two courts below liability was established in favour of the appellant as against the respondent at 100%.

Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:

*“The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for*

**sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment”**

This principle has religiously been followed by the courts below. We highlight a few of such decisions on the point by way of illustration. In **Pamela Misiga Okelo versus Odero O Alfred [2011] eKLR** the following observation were made:

**“With regard to grounds 3 this court is satisfied that although the plaintiff’s claim had been dismissed it was imperative on the trial magistrate to make an assessment of damages the appellant would have been awarded had she succeeded”**

In **Lei Masaku versus Kalpama Builders Ltd [2014] eKLR** it was observed thus:

**“There is the issue of failure to assess damages. It has been held time and again by the Court of appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court.”**

**Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”**

See also **Gladys Wanjiru Njaramba versus Globe Pharmacy and another [2014] eKLR** for the observation that:-

**“It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissal of the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa versus Bhogals Garage CA No. 124 of [1993] (UR) Where the court held that the that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.’**

**And in the case of Matiya Byaba Loma & Another versus Uganda Transport Co Ltd. Uganda Supreme Court Appeal No. 10 of 1993 IV KALR 138 where the court held that:-**

**“the judge erred in not assessing the damage (sic) he would have awarded had the appeal court been successful in her claim”**

Lastly in **Masinga Ndonga Ndonge versus Kualam Limited [2016] eKLR**, in which the High Court reviewed the above decisions and reiterated the principle enunciated above.

The above case law is sufficient demonstration that the appellant was genuinely aggrieved and the respondent rightly conceded ground 2 of the appeal that both courts below fell into error when they abandoned their role to assess damages payable to the appellant had he succeeded in his claim.

With regard to issue No.3, on the basis of our finding in issue No. 2, and considering that this is the second appeal where only issues of law fall for consideration, the High Court had the jurisdiction under **Section 78** of CPA to assess the damages as the 1<sup>st</sup> appellate court.

In the result, we set aside the findings of the High Court and substitute therefor an order that on the basis of the record before it liability was established in favour of the appellant as against the respondent at 100%. We therefore remit the matter back to the High Court with directions to assess damages payable to the appellant. To this extent only does the appellant’s appeal succeed.

Proceedings both at the High Court and in this Court having been occasioned by errors and omissions occasioned by the courts, we find it prudent to order each party to bear their own costs.

Dated and Delivered at Nakuru this 14<sup>th</sup> day of July, 2016.

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**