



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
CIVIL APPEAL NO. 177 OF 1999**

**SAMUEL GIKURU NDUNGU ..... APPELLANT  
VERSUS  
COAST BUS COMPANY LTD ..... RESPONDENT**

**(Appeal from the judgment of the Honourable Court of  
Kenya at Machakos (Justice Mwera) dated 18th  
November, 1999  
in  
H.C.C.C. No. 158 of 1993)  
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**JUDGMENT OF THE COURT**

The appellant, Samuel Gikuru Ndungu, unsuccessfully impleaded Coast Bus Company Limited, the respondent in this appeal, for special and general damages for injuries he sustained in a road traffic accident on 7th December, 1992.

In his amended plaint he averred, inter alia, that on the material date of the accident he was a fare-paying passenger in a motor vehicle registration number KAC 641H then owned by the respondent which was heading to Kitui; that the driver of the motor vehicle was a servant or agent of the respondent; and that his driving was negligent in that he was driving the vehicle too fast as a result of which he did not exercise or maintain sufficient control of it, whereupon it left the road along which it was being driven, hit a tree, overturned and fell into river Kituagathini. The appellant was seriously injured.

In a very short written statement of defence, the respondent admitted the accident, but averred that the motor vehicle concerned was KAC 642H not KAC 641H and that the accident was inevitable, but denied the appellant was a passenger therein or that he suffered any injuries. No issue was raised regarding the competence of the suit due to the failure by the appellant to join the driver of the accident motor vehicle as a party in the suit.

Only the plaintiff testified. His evidence was that he was a fare paying passenger in the respondent's bus, registration number KAC 641H, on 7th December 1992, while travelling to Kitui along the Machakos-Kitui road. It was being driven very fast. As it approached a certain river and while being driven downhill he heard some passengers at the rear part of the bus screaming and soon thereafter the motor vehicle hit a tree off the road, overturned and fell into the river. He said that the bus was overloaded and because of that he was unable to see the driver from where he was seated. As a result of the impact several standing passengers fell on him one of whom bit his left ear lobe tearing it before that other passenger died. Apart from the cut ear lobe, the appellant said that he suffered a fracture of the right ulna and radius, and a bruised back. He produced medical evidence to prove the extent of the injuries, and also a police abstract report to show not only that an accident involving motor vehicle registration number KAC 642H occurred on 7th December 1992, along the Machakos-Kitui road, but also that he was a passenger therein.

Notwithstanding that the appellant's evidence was uncontroverted, Mwera J. did not think that the appellant established by evidence that he was a passenger in the accident motor vehicle or that he established negligence against the respondent's driver. It was his view that the failure by the appellant to produce a fare receipt made his oral evidence that he was a passenger in the motor vehicle, unbelievable. The learned Judge was also of the view, although he did not explicitly say so, that the failure of the appellant to join the driver of the fateful bus was fatal to the appellant's claim. On the issue of negligence the learned Judge held that the appellant's evidence regarding the speed of the bus was merely an opinion. On the basis of those findings he dismissed the appellant's claim and thereby provoked this appeal.

The memorandum of appeal contains eight grounds which, except the one on the non-joinder of the driver, challenge the aforesaid findings of fact. We propose to deal first with the particulars of the accident motor vehicle before we go into the issues raised by the appeal itself. According to the amended plaint the accident motor vehicle was a bus registration number KAC 641H. The written statement of defence gives the registration particulars as KAC 642H. Although that was so no issue was framed thereon for the court's determination. The parties proceeded with the case, prima facie, on the basis that whether it was motor vehicle KAC 641H or KAC 642H the accident motor vehicle was owned by the respondent. Neither party was thus prejudiced and we do not think that in the circumstances, the variance in the particulars of the said motor vehicle should have any bearing on the outcome of this appeal.

As we stated earlier, the appellant did not sue the driver of the accident motor vehicle. In Omar Athman v. Garissa County Council, Nairobi High Court Civil Case No. 2484 of 1992 (unreported) which the trial Judge cited in his judgment but did not make any comments on, Aganyanya, J. struck out the plaintiff's suit for incompetence because the driver of a motor vehicle in a running down defended suit was not made a party in the suit. In his view the liability against the owner of the vehicle in such a case being vicarious is dependent on a decree against his driver on the same facts.

In Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123, the respondents who owned and maintained a boat involved in an accident in which one of the appellants was injured, were held vicariously liable for their driver's negligence even though the said driver was not a party in the suit. Likewise in Mwonia v. Kakuzi Ltd [1982- 88]1 KAR 523, the respondent was held liable for its driver's negligence although the driver was neither made a party nor did he testify in the case against his employer. Chesoni and Nyarangi Ag. JJA (Kneller JA, dissenting, but not for the reason that the driver was not joined) held that on the basis of the evidence before the court the respondent as owner of the accident motor vehicle was liable to the appellant in damages for the proved negligence of its driver.

From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employees' liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya J. that the non-joinder of the driver in an action as the one which gave rise to this appeal renders the suit incompetent.

Turning now to the evidence, the learned trial Judge did not attach much weight to the appellant's oral testimony regarding the cause of the accident upon which his claim was based. This is what he said in regard thereto:

"The plaintiff sat at the back of the bus. He did not say whether he was a driver himself but he was of the opinion that the bus was being driven fast and so passengers screamed. That remains an opinion. It ought to be proved by evidence that as a fact the driver was going at a high speed and in the circumstances that was negligent. That was not done here."

With respect to the learned Judge, apart from the general statement by the appellant that the bus was being driven too fast there were co-existing circumstances which made the appellant's statement to be more than a mere opinion. The other passengers in the bus screamed before the bus left the road, hit a tree and overturned before it plunged into a river. There is also uncontroverted evidence that the bus was

going downhill. Each of the facts taken alone might not establish negligence. However when taken together and also the fact that the bus eventually hit a tree, overturned and eventually fell into a river, they show that the bus driver did not have proper control of it, probably due to high speed. Mr Chacha Odera for the respondent conceded this, and further that the evidence on record clearly established negligence on the part of the respondent's driver, quite properly and commendably so. The learned trial Judge in our view, fell into grave error when he found otherwise.

As to whether the appellant was a passenger in the accident bus, the police visited the scene of the accident, and later prepared the abstract report of it. The appellant produced a copy of the report in evidence, and no evidence was adduced to controvert it. The appellant is shown in that report to have been one of the passengers in the accident bus. The learned trial Judge did not advert to this evidence. He appears to have thought that because the appellant had averred in his amended plaint that he was a fare-paying passenger, his failure to produce the fare receipt he was issued was evidence that he was not a passenger in the bus at the time of the accident. Such a receipt is evidence but not the only evidence in proof of the fact of the appellant, or any other person being a passenger in a particular motor vehicle. In the case before us, the police abstract report on the accident and the appellant's oral testimony clearly established that the appellant was a passenger in the accident bus on the date and time of the subject accident. The finding by the learned trial Judge to the contrary is clearly in error in view of that evidence.

Having come to the foregoing conclusions, it is our view that the dismissal of the appellant's case was clearly unjustified.

As regards quantum of damages the learned Judge said that he would have considered an award "something in the region of Kshs.250,000/= in damages," notwithstanding that the respondent's counsel had proposed a figure of Kshs.300,000/=. Considering the manner in which the learned Judge couched his language the sum of Kshs.250,000/= was not definite. In the circumstances we are free to fix what we consider to be a reasonable award. On the facts and circumstances of this case we consider Kshs.300,000/= as a reasonable figure on the head of general damages. The appellant gave evidence that he spent Kshs.1,000/= to obtain a medical report on his injuries and produced a receipt for the payment. He also stated that he paid Kshs.100/- for the police abstract report on his accident and produced a receipt in support. He had pleaded both items in his amended plaint and we are of the view that he is entitled to them.

In the result and for the foregoing reasons we allow the appellant's appeal, set aside the trial court's order dismissing his suit with costs and substitute therefor a judgment in his favour for Kshs.1100/= special damages, and Kshs.300,000/= general damages with costs and interest both here and in the court below. Dated and delivered at Nairobi this 7th day of July 2000.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**