REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO 37 OF 2002

ELIUD MANIAFU SABUNI .....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....RESPONDENT

JUDGMENT

In an amended Plaint filed in this court on 24.1.2002, Eliud Maniafu Sabuni, the plaintiff herein, claims that on 12th August 1999 along Kitale – Webuye road, his Motor vehicle KAG 134 X (which was a passenger service vehicle) was involved in an accident with motor vehicle KAH 352 F owned by Kenya Commercial Bank Ltd which was being driven by its servant or agent. The plaintiff avers that the said accident was solely due to the negligent and reckless manner in which the defendant's driver drove handled and controlled the defendant's motor vehicle. Several particulars of negligence are pleaded. The doctrine of *res ipsa loquitor* is also invoked. The plaintiff further claims that his motor vehicle was so extensively damaged that it was written off. He claims to have suffered loss and damage in the form of loss of motor vehicle and loss of income from the user of the said motor vehicle. He claims special damages in the sum of Kshs. 445,000/= being the value of the said vehicle less salvage value thereof plus the cost of the valuation report together with loss of user in the sum of Kshs.4,000/= per day from the date of the accident until the date of the Judgment. He also claims costs of the suit and interest on damages and the costs of the suit.

In an amended defence filed on 30.1.2001, the defendant denies the occurrence of the accident pleaded and that it was caused by the negligence of its driver as pleaded. It claims that if the accident occurred, the same was solely due to the negligence on the part of the plaintiff or his driver. Several particulars of the alleged negligence of the driver of motor vehicle KAG 134 X are given. The defendant also denies the losses claimed by the plaintiff and in particular contends that the claim for loss of income on a daily basis until the date of Judgment is misguided and bad in law.

The defendant also denies the applicability of the doctrine of *res ipsa loquitor.*

The parties agreed on issues for trial and the same were filed on 17.6.2002.

I think that same may be fairly summarised as follows:

(1) Whether or not the plaintiff has *locus standi* to institute the suit;

(2) Whether or not accident in issue was solely caused by the negligence of the defendant's driver or it

was contributed to by the negligence of the plaintiff's driver and, if there was contribution, what was the apportionment therefor;

(3) To what damages is the plaintiff entitled; and

(4) What are the appropriate orders on costs and interest. The trial proceeded before me on 17.6.2002 and 11.7.2002.

The evidence and the submissions thereon are on record and I need not reproduce them here in detail. What I intend to do is answer the issues raised on the basis of that evidence and those submissions.

The first issue is whether or not the plaintiff has *locus standi* to institute the suit. From the plaintiff's own evidence, which I believe, I find that although he had not completed the process of registration of motor vehicle KAG 134 X into his name at the time of the accident he had purchased the same from one Mohammed Ali Sheik Amin of Mombasa in January, 1997. He was therefore the owner of the motor vehicle at the time of the accident and had *locus standi* to institute this suit.

On the issue of liability, the plaintiff called three witnesses. Alex Wambai Kirong (PW 3), David Simiyu (PW 4) and Mary Nanjala Wachwenge (PW 5). The defendant did not call any evidence on the issue. Alex Kirong's evidence was essentially that on the material date and time, he was a passenger in a Nissan *Matatu* which was traveling in the direction of Kitale from Bungoma when Motor vehicle KAH 352 F, a KCB vehicle, attempted to overtake the vehicle in which he was and it collided with motor vehicle KAG 134 X which was coming from the Kitale direction. According to him, the KCB vehicle was overspeeding, the road was straight and at the time of the collision, the two vehicles from the Bungoma Direction were going uphill. At the time of the collision, the KCB vehicle had moved to the right side of the road and the vehicle from the opposite direction had attempted to stop on the right lane. It was also his evidence that the vehicle in which he was a passenger stopped and he himself and an administration police officer by the name Chelang'a who was also in that vehicle assisted in the rescue efforts. He noted that the driver of the KCB vehicle was unconscious. On cross examination by the defendant's Advocate the witness was unable to call the number of the vehicle in which he was and he insisted that the KCB vehicle was white. He was also very evasive about how and when he agreed to become a witness for the plaintiff in this case. The evidence of David Simiyu was that on the material date and time he witnessed the accident involving motor vehicles KAH 352 F, the KCB vehicle, the plaintiff's motor vehicle KAG 134 X when he was at Bishop Birech College near St Joseph's Secondary School. He was about 40 metres away from the road. According to him motor vehicle KAH 352 F which was traveling from the Bungoma direction towards Kitale was being driven at a very high speed and it was overtaking a Nissan vehicle infront of it. It overtook the said vehicle and collided with motor vehicle KAG 134 X which was coming from the opposite direction. The latter vehicle was being driven at normal speed on its lane and it had reduced speed on noticing the on coming vehicle. He blamed the driver of KAH 352 F for the collision because he left his lane and went to collide into another vehicle from the opposite direction. According to him the Nissan which was being overtaken did not stop. The witness further testified that the road was good and that at the time of the collision the vehicles from the Bungoma direction were going up hill. The driver of KAG 134 X died on the spot. The witness further testified that he participated in the rescue efforts. According to him the driver of the KCB vehicle was alive and conscious and he was able to speak to police officers who arrived at the scene. On cross examination, the witness maintained he was telling the truth about the accident. He stated that the vehicles did not collide in the middle of the road. He further said that the collision occurred near the gate of Bishop Birech College just before passing the gate. He further testified that the accident occurred during lunch hour and he was outside in the college compound when he observed the events described. He further stated that the driver of the Nissan *Matatu* died on the spot. According to him the KCB vehicle was light blue in colour.

Mary Wachwenge, the 3rd witness on liability testified that she was a passenger in the plaintiff's motor vehicle KAG 134 X. According to her the accident occurred near Bishop Birech College. The other vehicle involved was a KCB vehicle and it was light blue in colour. The vehicle in which she was a passenger was prior to accident being driven at a normal speed and the vehicle which collided into them came from the opposite direction. In cross examination, she said she saw another vehicle from the Bungoma direction ahead of KCB vehicle just before the collision. That other vehicle was passing them. She further said that the vehicle which collided into them was zigzagging and that the point of collision was shortly after passing the gate of Bishop Birech College. In reexamination, she stated that the zigzagging vehicle was on their side of the road.

On the basis of the above evidence, the plaintiff advocate submitted that the defendant should be held wholly to blame for the accident. The defendant's advocate for his part submitted that the plaintiff had not proved his case on liability. He attacked the evidence of PW 1 as unreliable. He submitted that the witness himself appeared confused and unreliable and that the evidence he had given was not credible on many grounds. In that regard, it was pointed out that whereas the witness could not even remember the registration particulars of the vehicle not even remember the registration particulars of the vehicle in which he was he had clear details of the other vehicles involved in the accident. It was also pointed out that his evidence that the vehicle in which he was stopped after the accident was contradicted by the evidence of the other two witnesses for the plaintiff on liability. It was further pointed out that his evidence that the KCB vehicle was white was contradicted by the evidence of the other two witnesses and even by the photographs produced in court. It was suggested that he was a mere hand picked witness. Counsel for the defendant also attacked the evidence of David Simiyu on the grounds that at a distance of 40 metres away he could not have perceived the things he described. It was also submitted that it was not possible for him to have remembered the details of the vehicles which collided and yet he could not remember the number of the vehicle which was being overtaken. It was strongly suggested that he only remembered things which were convenient to the plaintiff's case. It was further pointed out that his evidence that the plaintiff's driver died at scene was contradicted by Mr Kirong'. Also allegedly contradicted was his evidence that the point of collision was before the gate of Bishop Birech College. It was pointed out that the evidence of Mary Wachwenge was that the collision occurred after the college gate. His evidence that the KCB vehicle suffered no damage or very slight damage was also attacked as implausible. All in all it was submitted that he was another partial and handpicked witness who could not be expected to have told the truth. Counsel for the plaintiff also attacked the evidence of Mary Wachwenge. It was pointed out that she was only witness who said that the defendant's vehicle was zigzagging before the collision. It was also submitted that as she was in plaintiff's vehicle which was traveling from the opposite direction, she could not conceivably have seen that the defendant's vehicle had the inscription KCB on its sides. It was pointed out that her evidence that the plaintiff's vehicle had stopped at the time of collision was contradicted by that of Mr Simiyu who said the two vehicles were in motion. It was submitted that as she had admitted having sued the defendant in a separate case for personal injuries her evidence was that of a person with a fixed mind that the defendant was to blame for the accident. She could not be an objective witness, it was said. Defendant's advocate submitted that the plaintiff's evidence raised several unanswered questions and the issue of liability had not been established as against the defendant 100%. He submitted that where there was no clear evidence of how the accident had occurred the best course to adopt was to apportion it 50:50. He relied on the case of *Deina Asonga & 2 Others v M.S. Padam & Another* (HCCC No 72 of 1993, Eldoret) for the latter proposition.

I have carefully weighed the evidence given on liability together with my own assessment of the demeanor of the witnesses and the submissions made thereon. I agree with counsel for the defendant that Mr Kirong was an unrealiable witness. His demeanor was not that of a witness of truth. I do not belief his evidence at all. His insistence that the defendant's vehicle was white contrary to the other

witnesses' evidence and the court's observation of the photographs of the vehicle in question and his further testimony that the vehicle in which he was a passenger stopped after the accident (again contrary to the evidence of the other two witnesses) merely fortified my disbelief of him. As regard the evidence of David Simiyu, I must part company with counsel for the defendant. Mr Simiyu appeared to me to be a truthful witness. He was not shaken in cross examination at all. And I do not accept the suggestion that at 40 metres away from the scene of the accident, he could not have perceived the events he described. As regards the contradictions between his evidence and the evidence of Mr Kirong, I would easily resolve them in favour of the evidence of Mr Simiyu. So would the contradictions between his evidence and that of Mary Wachwenge. In my opinion Mary was unsure of her evidence. She did not inspire any confidence in the truth of her evidence save on the point that she was a passenger in the plaintiff's vehicle at the time of the collision and that the collision occurred on their side of the road. Thus in short, I believe the evidence of David Simiyu about how the accident occurred. On the basis thereof, I find that the defendant's driver was overtaking another motor vehicle on an uphill section of a straight road near the gate of Bishop Birech College when he collided into the plaintiff's vehicle which was being driven from the opposite direction. In driving on the wrong side of the road by overtaking on an uphill section of the road without any or any sufficient regard for the rights of motorists from the opposite direction he was utterly negligent. I also find from the evidence that the defendant's vehicle was being driven at an excessive speed at the time of the accident. All in all I find that the defendant's driver was wholly to blame for the accident and the defendant is vicariously liable for that. In those circumstances it would be idle to consider the applicability of the doctrine of *res ipsa loquitor.*

I now turn to a consideration of the issue of damages. The general objective of compensation in tortuous claims is *restitutio in integrum:* the victim of the tort should be restored as far as money can do so to as nearly the same position as he would have been had the tort not been committed. It follows that where the tort complained of has resulted in damage to the chattel, the plaintiff is entitled to either the cost of repair thereof (if the thing is capable of being repaired) or to the value thereof (if the thing cannot be repaired) and any consequential loss which is not too remote subject, of course, to the plaintiff's duty to mitigate such loss. Both types of loss are in the nature of special damages and the law is settled beyond peradventure that such damages must be pleaded with particularity and strictly proved.

In this case the plaintiff has pleaded that by reason of the accident his motor vehicle was so extensively damaged that it was declared a write off and that his constructive total loss was Kshs.440,000/= which is particularised as being a pre-accident value of Kshs. 530,000/= less the salvage value of Kshs 90,000/=. The consequential losses pleaded are the cost of the valuation report in the sum of Kshs.5,000/= and loss of income calculated at Kshs.4,000/= per day of each and every day till payment in full.

In support of the first aspect of the claim the plaintiff called one Leonard Maina Kingori (PW 2), a motor vehicle assessor, employed by the Automobile Association of Kenya. He testified that he did an assessment of the Plaintiff's vehicle on 18.1.2000. He found the same to be a write off which could not be economically repaired. He assessed the pre-accident value at Kshs.530,000/= and the salvage value at Khs.90,000/= He produced his report in evidence as exhibit 7. His evidence was not challenged in any material respect and his competence was not impugned. In the premises I find that the plaintiff has proved direct loss in respect of the destruction of this chattel in the sum of Kshs.440,000/= and he is entitled to compensation to that extent.

The second aspect of the claim is a little problematic. Not in respect of the fee paid for the valuation report. No. The evidence in that regard is clear that only Kshs.4,750/= was paid and not the Kshs.5,000/= pleaded. The plaintiff is entitled to the amount proved. What is problematic is the claim for loss of income from the user of the said vehicle. It is not in dispute that the plaintiff's Motor vehicle was for commercial use. And he testified that the vehicle used to be hired by institutions from time to time. In

1997 it was hired by the electoral commission for three days for Kshs.36,000/= And in 1999 it was hired by Marobo Secondary School and he was paid a total of Kshs.20,000/= in all as per exhibits 10(a) and 10(b). The difficulty is with the claim for Kshs.4,000/= per day from the date of the accident to the date of Judgment. The plaintiff's testimony is that he used to earn a gross income of Kshs.4,000/= daily. He produced records which were styled "Desert Star – KAG 134 X – Operations and Collections" for the years 1997, 1998 and 1999 as exhibits 11 (a) (b) and (c). He claimed that those records showed his net earnings for the days covered therein. In cross examination he stated that the records he had produced were transcribed from exercise books where he had entered the information obtained from the driver and the conductor. He did not produce the said exercise books in court. Neither did he produce any records of expenditure. He also testified that although he had a Bank account, he did not bank any income from the motor vehicle. He claimed that he spent the income as it was received on operations and his own domestic expenses. He also admitted that he was not paying income tax on the said income.

Counsel for the defendant submitted that the claim for loss of user had not been established as the documents produced by the plaintiff were not audited accounts, no tax returns on the income had been produced, no bank records had been produced, operational costs were not shown and the net income was not disclosed. He submitted that the plaintiff had not proved his claim and all he had done was throw evidence at the court in the same manner as in the case of *David Bagine v Martin Bundi* (C.A No 283 of 1996). He further submitted that since the plaintiff's vehicle was a write off, once he is compensated for the value thereof he could not claim for loss of user as that would be double compensation. He submitted that damages for loss of user are only appropriate where there is a temporary loss of user of the vehicle during the period of repairs thereof. He cited the case of *African Highlands Produce Ltd v John Kisorio* (C.A No 264 of 1999). He submitted that the plaintiff's claim should be rejected for those reasons.

The plaintiff's Advocate for his part submitted that the cases cited by the defendant's Advocate and the case of *Mwamba Transport Co Ltd v Kenindia Assurance Co Ltd* (HCCC No 6859 of 1991) which he himself cited showed that ordinarily damages for loss of user are awardable. He further submitted that the case of *David Bagine* was not clear on whether such damages could be awarded where the vehicle was a write off. He also submitted that the case of *African Highland Produce* was not to the point as it concerned mitigation of damages. He asked that the plaintiff should be awarded damages for loss of income for a reasonable period.

I have considered the above evidence and submissions on this aspect of the matter. I agree with counsel for the plaintiff that the cases show that damages for loss of a user of a motor vehicle are awardable in appropriate cases. Indeed as I have stated herein above when propounding the general principle of compensation, the plaintiff is entitled to damages for both the value of the chattel destroyed by the defendant's tortuous act and any reasonable consequential loss. And none of the cases cited by the defendant repudiate that principle. All they do is emphasize, correctly, that special damages – and loss of user is an item of special damage – must be pleased and strictly proved and that the plaintiff is under a legal duty to reasonably mitigate his loss.

There is no authority cited for the defendant's broad submission that damages for loss of user cannot be awarded in respect of a chattel which has been damaged beyond repair and I know of none. However I do agree with the submission that once the plaintiff has been compensated for the value of the vehicle he cannot then claim for damages for loss of user thereof subsequently. That would clearly be double compensation. That, however is not, in my understanding, the same thing as to say that a claim for the value of the article destroyed and for loss of user thereof cannot be entertained in the same action. I apprehend the position in law to be that the plaintiff whose chattel is damaged by the tortuous act of the defendant is entitled to damages for loss of user thereof for a reasonable time and that what is a

reasonable time is a matter of evidence in a particular case. In a situation where the chattel is not damaged beyond economic repair, the reasonable time would be the period found to be necessary for repair thereof. In a situation, such as the present one, where the chattel is found to be completely destroyed, that is to say, beyond economic repair, the reasonable period would be the time it would take the plaintiff to procure a similar chattel in the market.

So the issue which was unavoidable in this case ought to have been how long it would have taken for the plaintiff on the supposition that he were in means to acquire another Nissan *Matatu* from the market. I am afraid that no evidence in support of that issue was led. Had such evidence been led, it would then have been necessary to apply to proven daily losses to such a period. And in that latter aspect, I must agree with counsel for the defendant that the plaintiff did not prove the daily quantum of loss to the required degree. The records produced which were admittedly abstractions from records which were not produced were not the best evidence and they suffered from the deficiency of not disclosing any operational expenses. Add to that the fact that there was neither a record of any banking of any portion of the alleged profits nor any evidence of tax paid thereon and the conclusion that the plaintiff did not strictly prove the daily loss of income pleaded becomes well nigh irresistible.

Finally, although it may be cold comfort to the plaintiff, I desire to state that I am not holding that the plaintiff did not suffer any consequential loss for non user of his motor vehicle (the evidence is abundant that he did): what I am holding is that he has not proved the exact quantum of such loss to the degree of proof required of special damages. In the result I must reject his claim for loss of income.

The upshot of this matter is that there will be judgment for the plaintiff against the defendant for the sum of Kshs.444,750/= (say Kshs Shillings four hundred and forty four thousand seven hundred and fifty) together with the costs of the suit and interest thereon at court rates.

Dated and delivered at Bungoma this 25th day of July, 2002

A.G RINGERA

JUDGE