**Ndungu v Coast Bus Co Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 7 July 2000

**Case Number:** 177/99

**Before:** Omolo, Lakha and Bosire JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Evidence – Plaintiff’s oral testimony – Documentary evidence – Production of documents by Plaintiff*

*– Failure to produce fare receipt – Whether failure to produce fare receipt rendered Plaintiff’s testimony*

*unreliable – Whether there was sufficient evidence to prove the Defendant’s liability.*

*[2] Practice – Negligence – Motor vehicle accident – Parties – Failure to join driver in suit – Whether*

*the failure was fatal to the suit.*

**Editor’s Summary**

The Appellant filed suit against the Respondent seeking damages for injuries sustained in an accident that allegedly occurred while he was travelling as a fare-paying passenger in the Respondent’s vehicle. The plaint averred that the accident occurred on 7 December 1992 when the driver of the Respondent’s motor vehicle registration number KAC 641H drove the vehicle in a negligent manner causing it to leave the road, hit a tree and plunge into a river. The Respondent’s defence admitted the occurrence of an accident but averred that the vehicle involved had a registration number KAC 642H and denied that the Appellant was a passenger therein. The Appellant, who was the sole witness at the trial, narrated how the accident occurred, described the injuries he sustained and produced medical evidence and a police abstract showing not only that an accident involving motor vehicle registration number KAC 642H occurred on 7 December 1992 but also that he was a passenger on the vehicle. The trial Judge dismissed the suit on the grounds, *inter alia*, that the Appellant’s failure to produce a fare receipt made his oral evidence that he was a passenger unbelievable, that the Appellant’s failure to join the driver was fatal to the claim and that the Appellant’s evidence regarding speed was mere opinion. On appeal, the Appellant challenged the trial Court’s findings of fact and conclusion that the failure to join the driver to the suit was fatal.

**Held** – The variance in the particulars of the motor vehicle prejudiced neither party and should not have a bearing on the outcome of the appeal. Failure to join a driver in a damages claim against his employer was not fatal as the employer’s liability largely depended on the pleadings and the evidence in support of the claim: *Selle and another v Associated Motor Boat Co Ltd and others* [1968] EA 123 and *Mwonia v Kakuzi Ltd* [1982] LLR 46 (CAK) applied; *Athman v Garissa County Council* Nairobi HCCC number 2484 of 1992 overruled. The circumstances surrounding the accident supported the Appellant’s evidence and showed that the driver was not in control of the vehicle hence the trial Judge erred in finding otherwise. Though a fare receipt was evidence of a person being a passenger in a particular motor vehicle, it was not the only such evidence and in this instance the police abstract and the Appellant’s oral testimony clearly established his status as a passenger on the motor vehicle at the material time. The trial Judge therefore erred in finding to the contrary. The appeal would be allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Athman v Garissa County Council* Nairobi HCCC number 2484 of 1992 – **O**

*Mwonia v Kakuzi Ltd* [1982] LLR 46 (CAK) – **AP**

*Selle and another v Associated Motor Boat Co Ltd and others* [1968] EA 123 – **AP**