**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**

**Judgment**

**OMOLO, LAKHA AND BOSIRE JJA:** 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 7 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 7 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 7 December 1992, along the Machakos-Kitui road, but also

that he was a passenger therein.

Page 464 of [2000] 2 EA 462 (CAK)

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 number 2484 of 1992 (UR) 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 and Another v Associated Motor Boat Company Ltd and 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] 46 (CAK), 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 A 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 employee’s 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 such as the one which gave rise to this appeal renders that suit incompetent.

Page 465 of [2000] 2 EA 462 (CAK)

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 an 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 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.

Page 466 of [2000] 2 EA 462 (CAK)

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 KShs1 100

special damages, and KShs 300 000 general damages with costs and interest both here and in the court

below.

For the Appellant:

*Information not available*

For the Respondent:

*Mr C Odera*