



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1680 OF 2002**

**GEORGE B. M. KARIUKI.....PLAINTIFF**

**-VERSUS-**

**ANASTASIS WINNIE WAINAINA.....1<sup>ST</sup> DEFENDANT**

**DANIEL NJUGUNA.....2<sup>ND</sup> DEFENDANT**

**PETER NJOROGE.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1) George B. M. Kariuki, the plaintiff herein, filed an action against Anastasia Winnie Wainaina, Daniel Njuguna and Peter Njoroge, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively vide the amended plaint dated 28<sup>th</sup> July 2009. In the aforesaid plaint, the plaintiff sought for judgment as follows:

- a) The pre-accident value of ksh.2,900,000/=.*
- b) Towing charges amounting to ksh.25,000/=.*
- c) Transport cost of ksh.100,000/=.*
- d) Interest on (a) at commercial rates and (b) and (c) at court rates.*
- e) Costs of this suit.*

2) The defendants relied on the defence they initially filed in response to the original plaint to deny the plaintiff's claim.

3) When this suit came up for hearing, the plaintiff testified and summoned James Kamau Njihia (PW2) and George Onyango Aketch (PW3) to testify in support of his case while the defendants relied on the evidence of the 1<sup>st</sup> (DW2) and 2<sup>nd</sup> defendants (DW1). It is the evidence of the plaintiff (PW1) THAT on 21.11.1999 he was driving his motor vehicle registration no. KAJ 079Q a Mercedes E230 along Nairobi-Eldoret road when the aforesaid vehicle was violently hit by the defendants' motor vehicle registration no. KAH 286B at the rear thus extensively damaging it.

4) PW1 further stated that the defendants Isuzu truck pushed his car onto the bus that was in front thereby damaging the car's front when it collided at the rear of bus registration KAE 261E. The plaintiff stated that at the time of the accident the 3<sup>rd</sup> defendant drove motor vehicle registration no. KAH 286B in his capacity as the employee and or agent of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

5) James Kamau Njihia (PW2) a motor vehicle valuer with AA of Kenya told this court that he inspected motor vehicle registration no. KAJ 079Q and prepared a report which was handed over to PW1 which report was produced as an exhibit. PW2 said that he estimated the value of the aforesaid motor vehicle at kshs.3,505,000/= which figure can either be higher or lower than the market price.

6) George Onyango Akech (PW3) stated that City Panel Beaters, his employer carried out a valuation of the plaintiff's motor vehicle. He stated that the motor vehicle was damaged beyond the scope of any economic repair therefore the motor vehicle was declared a write off. PW3 referred to a report signed by P. K. Merchant, (Now deceased) the managing director of City Panel Beaters. He pointed out that the report indicated that the pre-accident value of the car was ksh.2,900,000/= while the salvage value is ksh.180,000/= PW3 also stated that the

plaintiff was the insured over the motor vehicle.

7) Daniel Wainaina Njuguna (DW1) and Anastasia Winnie Wainaina (DW2) testified in support of the defence. DW1 denied being the owner of motor vehicle registration no. KAH 286B and stated that he was wrongly sued therefore the suit against him should be dismissed. DW1 stated that DW2 was his wife and that the 3<sup>rd</sup> defendant was DW2's driver. He denied that his name was written on the side door of the Isuzu truck which was involved in the accident.

8) Anastacia Winnie Wambui Wainaina (DW2) stated that she was out of the country when the accident occurred but she was informed of the accident by her driver who called her on phone. DW2 also stated that she was informed by her driver that her lorry was loaded, and that he was driving down hill and that when he tried to apply the brakes they failed therefore causing the accident.

9) DW2 further stated that she did a search and discovered that motor vehicle registration no. KAJ 079Q was registered in the name of Martha Karua and not the plaintiff hence the plaintiff lacks the locus standi to file this action.

10) DW2 denied that motor vehicle registration no. KAJ 079Q was a write off. The 1<sup>st</sup> defendant also told this court that her driver was arrested, tried, convicted for the traffic offence of careless driving and sentenced to pay a fine.

11) At the close of evidence, learned counsels were invited to file and exchange written submissions. The issues which arose for the determination of this court are basically two fold i.e **liability** and **quantum**.

12) On liability, the defendant argued that the plaintiff did not have the necessary locus standi to file this suit since he was not the registered owner of motor vehicle registration no. KAJ 079Q. It was pointed out that the official search show that the aforesaid motor vehicle was registered in the name of Martha Karua.

13) The plaintiff urged this court to reject the defendants' argument since the same was not pleaded in their defence. The plaintiff also pointed out that he specifically pleaded in the plaint that he was the owner of the vehicle.

14) I have examined the defendants' defence and it is apparent that the defendants did not allude that the motor vehicle was registered in the name of Martha Karua neither did they allege that the motor vehicle KAJ 079Q was owned by any other person other than the plaintiff hence it did not become a contentious issue and therefore the adduction of evidence by the was rendered unnecessary to show the plaintiff was the owner notwithstanding what the records of the Registrar of motor vehicles reflected.

15) I am convinced that the allegation in respect of the ownership of the suit motor vehicle was not traversed in the statement of defence as required under Order 2 rule 11(i) of the Civil Procedure Rules. The issue touching on ownership of KAJ 079Q not having been traversed, the law deems as admitted by dint of Order 2 rule 11(i) of the Civil Procedure Rules.

16) That aside, the plaintiff tendered evidence showing that he had possession and control of the aforesaid motor vehicle. The plaintiff told this court in cross examination that he has the log book over the aforesaid motor vehicle and that the motor vehicle was insured by Stallion Insurance Company with him indicated as the owner. Those assertions were never controverted by the defendants.

17) In my view, the non-registration of the plaintiff as the registered owner of motor vehicle registration no. KAH 286B, which he possessed, a fact that was not denied by the defendants, did not impact negatively against the plaintiff.

18) The certificate of ownership by the Registrar of motor vehicles is merely prima facie evidence of ownership which is rebuttable by dint of Section 8 of the Traffic Act (Cap 403 Laws of Kenya). For the above reasons, I find the plaintiff to possess the requisite locus to bring this suit.

19) The second issue which is related to liability is whether the 2<sup>nd</sup> defendant was properly sued. The plaintiff has stated that the name of the 2<sup>nd</sup> defendant was written on the side door of motor vehicle registration no. KAH 286B. The plaintiff pleaded that the 2<sup>nd</sup> defendant having printed his name on the motor vehicle held himself as the owner of the aforesaid motor vehicle.

20) It is clear from the evidence tendered that the plaintiff did not present reliable evidence showing that indeed the 2<sup>nd</sup> defendant's name was printed on the motor vehicle. The plaintiff also failed to show that he 2<sup>nd</sup> defendant was in control or possession of motor vehicle registration no. KAH 286B. I am convinced that Daniel Njuguna, the 2<sup>nd</sup> defendant herein is wrongly sued. Consequently the suit against him is dismissed.

21) The 1<sup>st</sup> defendant admitted in her evidence that she was the registered owner of motor vehicle registration no. KAH 286B and that the motor vehicle was driven by Peter Njoroge, the 3<sup>rd</sup> defendant, at the material time of the accident. The 1<sup>st</sup> defendant further admitted in her evidence in cross-examination that the 3<sup>rd</sup> defendant was tried, convicted and sentenced to a fine for the offence of careless driving.

22) The plaintiff gave evidence explaining how the accident occurred. The evidence tendered by the plaintiff clearly show that the 3<sup>rd</sup> defendant was negligent in controlling and managing motor vehicle registration no. KAH 286B.

23) Taking into account the evidence of the plaintiff and the fact that the 1<sup>st</sup> defendant admitted her driver, the 3<sup>rd</sup> defendant was convicted and sentenced for the traffic offence of careless driving, I am convinced that the plaintiff has on a balance of probabilities proved that the 3<sup>rd</sup> defendant was negligent and that the 1<sup>st</sup> defendant was vicariously liable for the acts and omissions of the 3<sup>rd</sup> defendant.

24) Having determined the issue touching on liability, I now turn my attention to quantum. The plaintiff has tendered both oral and documentary evidence to prove that he is entitled to the claim specified in his plaint. The defendants are of the submission that if this court goes by the valuation of Allied Assessors Ltd, which assessed the pre-accident value at ksh.2,900,000/= and the salvage value at kshs.180,000/= then the salvage value should be discounted.

25) The defendant relied on the valuation of Top Assessors which put the pre-accident value at ksh.2,700,000/= and the salvage value at ksh.250,000/=.

26) I have looked at the two valuation reports and with respect, I agree with the submission by the defendants that they give varying figures. It is also apparent that no independent assessor was contracted to carry the valuations.

27) However the truth is that the two reports were carried out years apart. The one by Allied Assessors Ltd was done in the year 2000 while the one done by Top Assessors was done 11 years later that is in the year 2011.

28) I am convinced that a fair valuation in the circumstances is that done by Allied Assessors Ltd since it was done shortly after the accident. Consequently, I award the plaintiff the pre-accident value of ksh.2,900,000/= less the salvage value of kshs.180,000. (i.e. 2,900,000-180,000=2,720,000/=)

29) The defendant has contested the claim of ksh.100,000/= for transport and ksh.25,000/= as towing charges on the ground that no evidence were tendered to prove those claims. Though the plaintiff did not tender documentary evidence to establish the aforesaid claims, it is clear from his testimony that he took the motor vehicle to D.T. Dobie and paid for the expenses attendant to the removal from the scene of the accident. I am convinced that the figures he quoted are not exorbitant but reasonable.

30) In the end, judgment is entered in favour of the plaintiff and against the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally as follows:

**(a)**

**i. Ksh.2,720,000/= being the pre-accident value of KAJ 079Q less the salvage value.**

**ii. Ksh.125,000/= representing both towing charges and transport costs.**

**iii. The aforesaid amount to attract interest at court rates from the date of judgment until full settlement.**

**iv. Costs of the suit.**

**(b) The suit as against the 2<sup>nd</sup> defendant is dismissed with costs being borne by the plaintiff**

**Dated, Signed and Delivered at Nairobi this 31<sup>st</sup> day of May, 2019.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

..... for the Defendants