REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL SUIT NO. 203 OF 2009

BISHOP DANIEL MUTHUKA NGUI.....PLAINTIFF

VERSUS

BERNARD NGANDA MUTUA.....1ST DEFENDANT

MUSYOKA LEVI.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff, namely Bishop Daniel Muthuka Ngui by his plaint claims special damages, general damages, interest and costs of this action following a road accident where he was a passenger on the 1st defendant's motor vehicle and pleaded that the same was caused by the negligence of the defendants as particularized in paragraph 5 of the plaint and relied on the doctrine of *res ipsa loquitor*. He pleaded that he suffered loss and injuries as per paragraph 6 of the plaint. The 1st defendant denied that the plaintiff was travelling as a passenger aboard the vehicle KAH 919R; he denied negligence on the part of his driver and pleaded that the accident was caused and contributed to by the negligence of the plaintiff as particularized in paragraph 7 of the defence. He pleaded that he sought contribution and indemnity from the 2nd defendant, denied the injuries and denied the applicability of the doctrine of res ipsa loquitor. The 2nd defendant denied that the plaintiff was a passenger on the suit vehicle, denied the particulars of negligence as indicated in paragraph 5 of the plaint. In the alternative, the 2nd defendant pleaded that he admitted negligence on the part of the 1st defendant, denied the injuries, the loss and damage and pleaded that the said accident was wholly caused or materially contributed to by the negligence of the plaintiff as itemized in paragraph 9 of the defence. The 2nd defendant pleaded that the award be reduced by the amount contributed by the 1st defendant and the plaintiff.

2. On record is an application by the 1st Defendant to join the trustees of the Church of the province of Kenya, Mombasa diocese as a third party as well as a claim for contribution by the 1st defendant against the 2nd defendant and against the 1st defendant by the 2nd defendant. It seems the 3rd party was not enjoined into the proceedings as there is no evidence to that effect.

3. Both the plaintiff and the defendants called their witnesses to testify during the trial of this matter. The plaintiff called 2 witness whilst the 1st defendant was his own witness and so was the 2nd defendant and the defendants closed their case.

4. PW1 was the plaintiff who testified that on 8th February, 2008 he was heading to Makueni aboard a vehicle KAH 919R that belonged to a church faithful Mr. Benard Nyanga in the company of five people who were the driver Benard Nyanga, Nicholas Nzili, Pastor Jack Juma, Munyalo Ndunge and himself. He told the court that on the way to Makueni Hospital they had an accident along Makindu- Wote road, his vehicle was on left side towards Wote when it tried to avoid a collision with a vehicle KAH 967Z, Toyota pickup that was swaying and veering off its side. He told the court that Bernard tried to avoid the collision by going onto the right side of the road and the pick- up then swayed back onto its right side and the collision happened. He notified court that the driver of his vehicle was driving slowly. It was his testimony that after the accident, he lost consciousness and found himself at Makueni hospital and realized he had a fracture on the right hand at the wrist. He told the court that he was treated on the morning of 9th February, 2008 and presented the treatment notes for Makueni hospital. It was his testimony that his family moved him from Makueni District Hospital to Machakos District Hospital on 9th February, 2008. At Machakos hospital, an x-ray was conducted on him which indicated that he had broken (3) ribs on right side. He told the court that he stayed at Machakos hospital from 9th February, 2008 to 19th February, 2008. When he was released, he went on with treatment at Kijabe Hospital where he was x-rayed and referred to Nairobi hospital for scan and then went back to Kijabe hospital. He told the court that he was then operated on 28th May, 2008 on the right side at the hip area and released from Kijabe hospital on 3rd June, 2008. It was his testimony that a metal plate was placed during the operation and that he spent Kshs. 159,215/= for the treatment at AIC Kijabe, Kshs 6,470/= as consultation fees and presented a Bundle of receipts that were marked P. Ex. No. 2. However In-patient receipt for 159,215/= was not produced. It was his testimony that at Nairobi hospital, he paid KShs. 2,266.60 under No. OPR74070/08 (P. Ex. No. 3). At Nairobi West Hospital he paid KShs. 6,500/= for the referral to Kijabe (Receipt No. 375096 of Nairobi West Hospital, P. Ex. No.4) He had a medical report from Nairobi West Hospital dated 10th April, 2008 and the Report was produced as well as the treatment notes and Nairobi West Hospital referral letter that were marked P.Ex.5. He continued to testify that the accident was reported at the police station and he received a police abstract for which he paid Kshs. 200/=. He tendered Receipt No. 1824190 that was marked as exhibit No. 6. And the Police Abstract

produced as P.Ex.6a. He testified that he had a P3 form dated 8th February, 2008 from the police that was duly completed on 27th November, 2008 by Mr. C.K. Lavuta. It was his testimony that he had not completely healed, he had pains when he stands up after sitting and that he had been registered as a person with disability and presented a card of registration with Medical Council of Persons with disability Reg. No. NC W.D/P/258/930. He further told the court that he is disabled and was not able to walk as when he walks for long distances, he felt pain. It was his testimony that he gave notice of intention to sue and a notice to the Insurance Company that were to be produced.

5. On cross-examination, he testified that at the time of accident, he was sitting at the front passenger seat next to the driver. He told the court that the driver was driving at reasonable speed and he had no concern with the speed. It was his testimony that the accident was a head on collision and the impact was at the middle of the road. He informed the court that the expenses of his treatment at the Kijabe Hospital was paid in the ratio of ¼ by Church and ¾ by him. On cross-examination by the 2nd defendant, he stated that he was not wearing a seat belt as the vehicle did not have a seat belt. He testified that he did not know the driver of the other vehicle and he did not do search on the ownership of the other vehicle. On re-examination, he testified that the church paid the 40,000/= for Kijabe Hospital expenses and he paid the rest of the other expenses at the other hospitals. He told the court that the police investigated the matter. After the trial judge went on transfer, he was recalled and produced the medical bill from Kijabe Hospital that was marked as P. ex 5 and the 2nd medical report from Dr Adede as well as the receipt of Kshs 2,000/- that were marked as Pexh 7 a and b.

6. Pw2 was Constable David Chebii who testified that the OB indicated that KAH 976Z left its lane and collided with the suit vehicle. The plaintiff closed their case

7. The defence called one witness each. DW1 was Bernard Mutua Nganda who was the 1st defendant and he told the court that on the material day he was driving the suit vehicle heading to Wote and at Kivandini junction, he saw a pick up that was heading to the opposite direction and it swayed to the bush and then swayed to his lane and he tried to avoid it but it hit the suit vehicle on the passenger side and he was pushed on the edge of the road whereas the pickup landed in a ditch. He agreed with the version given by the plaintiff and added that the plaintiff was his co-driver, he also confirmed that the plaintiff sustained injuries. On cross-examination he testified that he was driving at a speed of between 20 to 40 Kph. On further cross-examination, he testified that he did not encroach onto the lane of the pickup and on re-examination he testified that he saw the pickup swerve on the left and then came suddenly to his side.

8. Dw2 was Cornelius Musyoka Levu who testified that on the material day his vehicle was KAH 967Z and that he saw the suit vehicle that came onto his lane and he attempted to swerve to the right and the suit vehicle hit his vehicle on the front and he landed in a ditch whereas the suit vehicle remained on the road. He told the court that he blamed the driver of the suit vehicle for the accident and he added that he was not charged with a traffic offence. On cross-examination, he testified that the suit vehicle encroached on his lane and when it delayed, he swerved his vehicle to the right to avoid an accident. He told court that he did not call the passengers as witnesses and he was not aware that the police blamed him for the accident. He denied being at high speed and added that he did not agree with the 1st defendant's version of the accident.

9. This was all the evidence that was heard by the court and from this evidence there are certain facts that are not disputed. It is not disputed and this I find as a fact that on 8th February, 2008 there was a head on collision accident between the suit vehicle and KAH 967Z and that the plaintiff was a passenger aboard the suit vehicle. What is in dispute however is what and who caused the collision. And it is this that will pre-occupy the court for the rest of this judgement.

10. The main issue(s) for determination by this court are (a) whether the 1st and 2nd defendant's negligence was the cause of the accident which led to the plaintiff sustaining injuries (b) whether, if the 1st and 2nd defendant was negligent, they are liable to compensate the plaintiff in damages, and to what extent.

11. Before I proceed to venture into my analysis of the law and the evidence, let me place my gratitude to counsel on record for their research and industry which was of immense assistance to the court. I may not however in the course of my judgement be able to recite every submission they made, this will not be out of disrespect to counsel but it will be due to reasons of brevity.

12. The answer to any of the above issue will depend on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. A well settled principle of ancient application is ***"ei incumbit probation quidicot not qui negat"***. This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter or a fact must prove but he who denies it need not prove it. The party on whom lies the burden must adduce evidence of the disputed facts or failing his contention. Simply put, he who alleges must prove.

13. The burden of proof intimately is connected with the standard or quantum of proof. When it has been ascertained where the burden of proof lies, it is necessary to know what evidence is required to discharge it. In contested actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability in his favour. It is clear that the burden to adduce evidence relates to disputed facts and not those which have been admitted.

14. And speaking of the degree of cogency which evidence must reach in order to discharge the burden of proof in civil cases Denning J, as he then was, said in the case of **Miller v Ministry of Pensions[1947] 2 All ER 794,**

> "That degree is well settled. It must carry a reasonable degree of probability, not so high as in a criminal case, but if the evidence is such that a tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not"

15. The question that one may therefore ask is, has the plaintiff in the light of the evidence proved his case to the requisite standard or was the defendant negligent in the circumstances. According to the learned authors of **Clerk Lindsell on Torts,16th Edition, Butterworths, P247**

"The tort of negligence is committed when damage, which is not too remote is caused by the breach of duty of care owed by the defendant to the plaintiff".

Thus the tort of negligence is committed when the damage is established. The duty in negligence, therefore, is not simply a duty not to act carelessly; it is a duty not to inflict damage carelessly. Put simply, there must exist a duty of care breach of which results in damage being suffered by the plaintiff.

16. In the case of **Blyth v Birmingham Waterworks Company(1856) llEX 781, 784**, Anderson B defined negligence in the following terms:-

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

17. And Lord Wright in **Lochgelly Iron Coal Company v M'Mullan [1943] AC 1 at 25**, talking about negligence, he stated as follows"

"In strict legal analysis negligence means more than heedless of careless conduct, whether in omission or commissions; it properly connotes the complex of duty, breach and damage thereby suffered by the person to whom the duty was owing".

18. The leading authority on this aspect of the law is the celebrated case of **Donoghue v Stevenson [1932] AC 562.** The facts in that case were that the plaintiff averred that he had suffered injury as a result of seeing and drinking contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by the owner of a café, from whom in turn, it had been bought by a friend of the plaintiff. The House of Lords, by a bare majority, held that if the plaintiff could prove that which she averred, then she could have a good cause of action. The decision in the above case by the House of Lords, established two propositions (1) that negligence is a distinct tort and (2) that the absence of privity of contract between a plaintiff and a defendant does not preclude liability in tort. It is also, of course, an undisputable authority for the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user. Although it has sometimes been said that the *ratio decidendi* of the case is limited to this proposition, it is now clear however, the case is an authority for something more.

19. As Lord Normand said in **London Graving Dock Company v Horton [1951] AC 737 26** that:

"The argument for the defender [in the Donoghue v Stevenson case] was that there were certain relationships such as physical proximity or contract which alone give rise to duties in law of *quasi – delicit* or tort, and that the relationship between the defender and the pursuer [the plaintiff] was not one of them. The decision was that the categories of negligence are not closed and that the duties of care are owed, not only to physical neighbours but anyone who is 'my neighbour' in the wider sense as stated by Lord Atkin''

Thus, the case of Donoghue v Stevenson is an authority for opening up new categories of liability but not for disregarding existing ones. The 'neighbour principle' was formulated by Lord Atkin as a proposition, but has now become widely accepted as the bench mark on the tort of negligence. Having referred to examples of specific situations or relations in which a duty had been held to exist Lord Atkin stated in Donoghue v Stevenson'.

"In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of a judge…There must be and is, some general conception of relations giving rise to a duty of care of which the particular cases found in books are but instances…The liability for negligence, whether you style it such, or treat it as in other systems as species of culpa is no doubt based upon the general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complains and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question 'who is my neighbour' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. The answer seems to be – persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question". (Emphasis added).

20. The law further requires that the plaintiff must show that the defendant was actually in breach of his duty to the plaintiff and further that the breach must take the form of an act or omission on the part of the defendant which falls short of the expected standard of discharge of such duty. Negligence as a tort is only actionable if actual damage is proved. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co – exist.

21. Accordingly, the learned author ***WVH Rodgers*, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** stated the essential elements of actionable negligence are as follows:-

a) There must be a duty to take care owed to the plaintiff

b) There must be a breach of that duty

c) There must be damage suffered by the plaintiff resulting from the breach of duty.

22. In order for a plaintiff to succeed on the tort of negligence against a defendant he or she must prove that the damages he or she suffered was or were a direct result of the defendant's negligence.

23. It is already an established fact that that on 8th February, 2008 there was head on collision accident between the suit vehicle and KAH 967Z and that the plaintiff was a passenger aboard the suit vehicle. It is also admitted that the accident occurred along Wote-Makindu Road. This leads me straight to the issue of negligence.

24. The burden to prove that there was negligence is on the plaintiff as per S.107, 108 and 109 of the evidence Act. To discharge that burden and relevant to this issue the plaintiff who was the passenger of the suit vehicle that was involved in the accident testified. He was therefore an eye witness. He told the court that the driver was driving at reasonable speed and he had no concern with the speed.

25. I have given PW1's evidence the attention it deserves and found it to be of some help to me to find that there was negligence. Although I must quickly add that there are other circumstances which indicate negligence. Dw1 is helpful in corroborating Pw1's version of the story. Which vehicle was on the wrong?

26. I find the evidence given by Pw1 not to be covering the particulars of negligence pleaded in the plaint sufficiently in respect of the 1st Defendant. Whereas in the plaint, the 1st defendant was said to have been driving on the wrong lane, Pw1's evidence absolved the 1st defendant and seemed to place blame on the 2nd Defendant. Dw 2's evidence was of no use to absolve him of blame, and I find that he would have gone an extra mile, especially in describing the manner that the 1st defendant's vehicle was being driven in a much a more succinct manner like Pw1 and Dw1 described it. There are questions which are unanswered in proving the alleged particulars of negligence on the part of the 1st defendant and it would have been his evidence to provide the answers. Further, there is no evidence from the investigating officer indicating the point of impact, there is no sketch map indicating if there were skid marks on the road.

27. Be that as it may, on evaluating all the evidence, there are areas which point to the negligence of the defendants. The first one I will deal with is the position of the vehicles after the accident. Pw1, Dw1 and DW2 told the court that the two vehicles were being driven from the opposite direction and the driver of the m/vehicle reg. number KAR 919R told the court that he swerved and went to the edge of the road and Dw2 confirmed that the said vehicle remained on the road. Dw2 told the court that his vehicle landed in a ditch having been hit on the front left. He told the court that he was not charged. The evidence of Pw1 and DW1 seem to agree that Dw2's vehicle suddenly came onto the road, however there is no evidence that is independent and speaks to the fact that Dw1 encroached onto the lane of Dw2.

28. It is my considered view that there is no evidence of anyone who was positioned on the road at the time of the accident; however there is evidence of good judgment, as to when it is safe to drive and avoid a collision. It leaves room therefore that it is more probable than not that the Dw2's vehicle which collided with KAR 919R came into the road without sufficient warning and vehicles being driven at a slow speed do not just run off the road and fall into a ditch. Secondly the 2nd Defendant's failure or refusal whichever is true, to call any independent witness had a negative impact on his denial of liability. In **Pushia d/o Roajibhai M. Patel Vs The Fleet Transport Co. ltd [1960] EA 1026** at page 1033 the EA African court of appeal said:

> ***"Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend on the particular circumstance of each case".***

29. In this regard I would for the reasons given find that to some extent (the degree of which I will later determine) the accident was caused by the negligence of the 2nd Defendant and to some extent, the injuries were contributed to by the plaintiff.

30. In the present case the evidence of Pw1 on the actions of the 1st defendant's driver in an attempt to swerve when need arose to avoid the accident meant there is evidence on the balance of probabilities to establish good judgement. The 2nd defendant's vehicle would not have run off the road if he was driving at a reasonable speed. I therefore find the 2nd defendant's conduct of over speeding on the road in line with the doctrine of *res ipsa loquitor* amounted to negligence that contributed to the accident. There was a need for the defendants to be prudent and failure to do so amounted to breach of duty of care.

31. What amounts to prudent conduct of a driver on the road has been stated in **Tart v Chitty & Co. (1931) ALL ER (Rep) 826 at 829 as follows**

> ***"……it seems to me that when a man is driving a motor car along the road he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he sees it".***

32. The duty is bigger if the driver is driving a vehicle carrying passengers**.** In **Brockhurst v War Officer** [1957] C.L.Y 2388 the Court of Appeal of England stated:

> ***"……..it is expected that a Public transport vehicle driver should at all times be aware of such obstacles on such roads. A driver should not assume that the road shall be clear all the time so as not to mind and look out to be prepared to slow down or stop suddenly in an emergency".***

33. For similar reasons as stated in the above case and my review of the evidence in this case, I find that the 1st defendant made a small contribution in the causation of the accident by being negligent himself. I take note that he deflected his course albeit not in good time and hence could not avoid the collision.

34. It was the strong argument of counsel for the 2nd defendant that the plaintiff failed to prove negligence. Counsel therefore asked court to dismiss the suit. Counsel added that the plaintiff contributed to the accident by failing to wear a seat belt therefore liability be found 60:30:10 against the 2nd defendant. Counsel for the 1st defendant urged the court that there is no evidence that the 1st defendant was negligent, therefore the 2nd defendant be found 100% liable.

35. I note that on the part of the plaintiff, there is no traffic accident report, sketch plan and the inspection of motor vehicles report. The failure or refusal to tender in evidence relevant exhibits which would help this court to reach a reasoned and evidence based conclusion will guide my final decision.

36. Having concluded that the defendants were each contributorily negligent, I must naturally proceed and apportion the degree of blame to each of the defendants bearing in mind that the owner of KAH 967Z was not joined as a party to the proceedings. In so doing I must take into account all the material facts and considerations. See **Khambi & Another v Mahithi & Another [1969] EA 70.** As seen in the first part of this judgment, I have considered the following;-

a) That the 1st defendant was driving a vehicle with passengers while it is unknown what the 2nd Defendant was carrying.

b) That 2nd defendant's vehicle got off the road hence suggesting over speeding on his part.

c) Nature of the scene of accident, is unknown. Is it a straight road, was the surface of the road slippery.

d) The plaintiff was not wearing a safety belt yet he ought to have been mindful of his safety.

e) That the 2nd defendant elected not to bring an independent witness such as his passengers so as to corroborate his explanation as regards the accident and dislodge the version of events as narrated by the plaintiff and 1st defendant.

37. Considering all the facts surrounding this case, the 2nd defendant must have been 80% to blame for the accident while the 1st defendant was 10% to blame, and the plaintiff 10% to blame.

38. The plaintiff prayed for special damages, general damages, interest and costs. Particulars of special damages were given by items in paragraph 6 of the plaint. Exhibits 1 to 7 were tendered in evidence for the same purpose. From the proceedings, there is no attempt to challenge the evidence-in-chief by cross examination of the said exhibits and this would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible. Pex2, 3 and 4 are receipts totaling to Kshs 159,197/- that Pw1 testified 40,000/- out of it was paid by the church. Pexh 6 is receipt of Kshs 200/-. The medical report receipt, copy of records receipt and the P3 form receipt is not in court. Therefore I will award special damages of 159,397/- together with interest to run as from the date of filing suit.

39. On general damages, the plaintiff sought Kshs 5,000,000/- whereas the 1st defendant has offered Kshs 800,000/- and the 2nd defendant Kshs 400,000/- I shall award Ksh 1,000,000/- and rely on the case of **Auto Selection Kenya Ltd v Charity Wanja (2015) eKLR** where the amounts of Kshs 800,000/- was awarded for similar injuries. I have factored the issue of inflation on the economy to arrive at that sum.

40. In the result it is my finding that the plaintiff has proved his case against the defendants jointly and severally on a balance of probabilities and I proceed to enter judgement as follows:

a. General Damages Kshs 1,000,000/-

b. Special Damages Kshs 159,397/-

c. Costs and

d. Interest.

All subject to 10%, 10% and 80% contribution as between plaintiff, 1st Defendant and 2nd Defendant respectively.

It is so ordered.

Dated and delivered at Machakos this 25th day of September, 2019.

D. K. Kemei

Judge