



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL NUMBER 251 OF 1993

JOSEPHAT KAMAU WAMBURU.....PLAINTIFF

VERSUS

JOHN KAMERE1ST DEFENDANT

NAMA HARIS WHOLESALERS2ND DEFENDANT

NEW NYANZA WHOLESALERS LTD.....3RD DEFENDANT

STEPHEN K. KURUGU4TH DEFENDANT

JUDGMENT

1. The plaintiffs claim is stated in his Further Amended plaint amended on the 9th September 2010 by leave of court and filed on the same date.

On the 22nd April 1991, the plaintiff was a fare paying passenger in Motor vehicle Registration No. KXD 140, a *matatu* owned by the 2nd Defendant that collided with the 1st Defendants Isuzu lorry Registration No. KZL 129 along the Gilgil-Nakuru Road. Seven persons in the *matatu* died and the survivors were critically injured and among them was the plaintiff. This information is clearly indicated in the day's Occurrence Book (O.B) produced by No. P.C. Fredrick Gitari, a police officer from the Gilgil police station. The plaintiff sustained serious injuries. A medical report on his injuries prepared by Dr. Omuyoma on the 14th August 2014 was produced by consent of all parties who confirmed preliminary medical report by Dr. Bodo who attended to him. He was treated at several hospitals, among them Nakuru Provincial General Hospital, Agakhan and Mater Hospitals.

2. Ownership of the two vehicles is not in dispute, nor was the occurrence of the accident and the plaintiffs injuries.

In dispute, evidenced by the pleadings, evidence and submissions is which the two vehicles caused the accident and/or contributed to the occurrence.

3. The Pleadings

The plaintiff in his Further Amended plaint filed on the 9th September 2010 blames the drivers of both vehicles for the accident and states the particulars of negligence attributed to each of them.

The Defendants in their Further Amended Statement of defence filed on the 19th October 2010 and 8th

June 2012 respectively blamed each other for the causation of the accident.

4. Plaintiffs Evidence

The plaintiff testified as PW1. He produced motor vehicle records from KRA (Pex 1 and 2) to confirm ownership of the two vehicles as the 1st and 2nd Defendants.

It was his testimony that while a passenger in the *matatu* KXD 140 and while at the Gilgil Railway crossing going downhill, the *matatu* changed lanes to overtake other vehicles and came on to the lane of an oncoming vehicle the lane of the Lorry KZA 729, and that a collision occurred on the overtaking lane. He blamed the *matatu* for driving on the lane of the oncoming vehicles and driving fast and without due care. He blamed the lorry driver for not swerving or taking any action so as to avoid the head on collision.

5. Upon cross examination by defence advocates, the plaintiff testified that the *matatu* moved to the climbing lane for oncoming vehicles but the lorry was on its lane but failed to swerve to avoid head on collision with the *matatu*, yet it had room to swerve. It was his further evidence that the *matatu* was moving fast but could not estimate the speed.

He produced a bundle of receipts and invoices from the various hospitals. He stated that his employment with National Housing Corporation(NHC) was terminated in 1996 due to the injuries, and a letter to that effect was produced as Pext 6.

He sought damages for the injuries and special damages in the sum of Kshs.882,858/= with interest and costs of the case.

6. PW2 was PC Fredrick Gitari, an officer from Gilgil Police station where the accident was reported.

He had and produced the occurrence book for the day. He confirmed that seven passengers in the *Matatu* died and among the injured was the plaintiff.

His testimony was that KXD 140, the *Matatu* was travelling from Naivasha towards Nakuru with 16 passengers while the Lorry KZL 729 was travelling towards Naivasha carrying maize flour and it was going uphill while the *matatu* was going downhill, that it was overtaking a trailer on a yellow line, hit the trailer at its rear side, lost control and rammed the front of the Isuzu lorry.

The O.B., P3 form and Police Abstract were produced as PExt No.9, 10 and 11 respectively.

7. On cross examination by 1st Defendants Advocate, PW2 stated that the *matatu* was overtaking on a yellow line, and the lorry was going uphill and loaded as captured from the accident covering report.

Answering the 2nd defendants cross emanation, this officer stated that he was not the investigating officer but had the report on the investigations, where the Investigating officer blamed the *matatu* for the accident.

8. 1st Defendants Evidence

DW1 was Michael O. Amanyia the driver of the 1st Defendants Isuzu lorry registration No. KZL 729 on the material date.

His evidence was that while at Gilgil Railway crossing, and going uphill, there was a *matatu* that started overtaking, hit the trailer on the rear right, that it lost control and came on to his lorry lane and a collusion occurred on its left lane. He stated that he was going uphill and the *matatu* was overtaking on a yellow line and was speeding. He testified that as he was going uphill, he could not have been overspending. He blamed the *matatu*.

9. On cross examination, DW1 stated that he was then and currently an employee of the 1st Defendant and had recorded a statement with the police soon after the accident. He reiterated that the *matatu* hit the trailer, that it lost control but could not estimate the speed. He stated that he tried to avoid the accident by moving out of the road and that one of the six wheels was outside the tarmac but the *matatu* hit his lorry at the drivers right door side, and that he could not move further off the road as the space was small and the lorry would have overturned as it was heavy.

10. On cross examination by plaintiffs Advocate, DW1 reiterated that he was going uphill and the *matatu* together with the trailer were coming downhill and that he tried to avoid the accident but could not move off the road completely due to a trench off the road.

11. 2nd Defendant

This defendant did not call any evidence, nor filed it submissions.

The plaintiff and 1st Defendant filed their written submissions and highlighted the same.

12. I have carefully considered the evidence, submissions and parties pleadings, and exhibits/document produced, and authorities cited.

Issues for determination

As stated at the beginning of this judgment, the issues that arise are two fold:

(1) Which of the two vehicles caused the accident and/or contributed to the causation of the accident.

(2) The second issue is the matter of quantum of damages awardable to the plaintiff as a result of injuries he sustained in the accident.

13. Issue No. 1.

Evidence tendered is evidence and there is no dispute that the *matatu* KXD 140 was being driven downhill from Naivasha direction towards Nakuru and while around Gilgil was overtaking a trailer on a yellow line, that it hit the trailer rear and lost control and moved onto the uphill lane of vehicles from the opposite side, from Nakuru towards Naivasha direction where it met the Isuzu lorry on its uphill lane and rammed onto its front side killing five people and several other injured among them the plaintiff.

The driver of the *matatu* did not testify as he was said to have died. The plaintiff's evidence and that of the lorry driver corroborated each other and is uncontroverted.

14. The police investigation report together with the police abstract also place blame on the driver of the *matatu* KXD 140 for overtaking carelessly without due regard to other road users and over speeding, although none of the witnesses could estimate the speed the *matatu* was overtaking the trailer.

From the evidence which is largely uncontroverted, I am satisfied that the *matatu* was overtaking on a no overtaking zone, on a yellow line which forbids overtaking by vehicles.

I am also satisfied that the *matatu* was being driven at an excessive speed in the circumstances because had it been on normal speed, it would have not lost control and hit the trailer that was ahead of it. It would have overtaken and went to its lane successfully. The after effects of the careless overtaking and excessive speed is clearly evidenced by hitting the trailer, loss of control and colliding with the oncoming lorry head on.

15. The lorry driver testified that he saw all the above events and tried to move out of the road, and one

wheel out of the six wheels of his lorry rested on outside the tarmac but due to a trench off the left lane he could not move further. This evidence was not shaken on cross examination nor challenged by any other evidence.

Both the police investigation and the plaintiff's evidence agree that the 2nd Defendant's *matatu* driver was the sole cause of the accident and/or substantively caused the accident.

I have considered that the lorry was being driven uphill and was loaded with flour. I have considered several decisions cited by the plaintiff and the 1st Defendant in their submissions.

16. The 2nd defendant (*matatu* owner) did not by evidence or otherwise save for pleadings, try to show any probable cause of the accident that does not conote negligence or show absence of negligence.

The circumstances of the accident give rise to inference of negligence by the 2nd defendant's *matatu* and no otherwise.

In **Karanja -vs- Malele (1983) e KLR 147**, the court considered the two elements to be considered when assessing the issue of negligence, that is causation and blame worthiness. The court rendered that:

“---there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence is not seeing it before hand, and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion.”

17. For the above reasons, I am satisfied that the 2nd defendant's *matatu* registration No. KXD 140 was negligently driven, was carelessly overtaking another vehicle on a downhill slope on a no overtaking zone and continuous yellow line, and on an excessive speed that caused it to lose control and veer onto the path of the 1st defendant's lorry Registration No. KZL 129 causing a head on collision. Given the circumstances as analysed the 2nd defendant's lorry driver tried to avoid the accident but nevertheless the accident occurred.

I find the 2nd Defendant's vehicle KXD 140 wholly to blame for the accident from which the plaintiff sustained serious injuries, and therefore liable in damages to the plaintiff.

18. **Quantum of Damages**

The plaintiff sustained the following injuries seen from the medical records and particularly from the Medical Report dated 14th August 2014 prepared by Dr. Omuyoma and produced by consent of parties.

(1) Fracture of the lower 1/3 of the right femur

(2) Fracture lower 1/3 of left femur

(3) Colles fracture of right radius

(4) Compound fracture middle 1/3 right tibia and fibula

(5) Compound fracture 1/3 left fibia & fibula

(6) Fracture of frontal region of the scalp.

(7) Blunt injury to the anterior abdominal wall leading to internal bleeding into the peritoneum.

He was admitted and treated at the Provincial General Hospital, Nakuru and later at AgaKhan Hospital

for 3 ½ month where:

- 1. Open reduction and internal fixation of right and left femur were done.**
- 2. Manipulation of the colles fracture and application of POP**
- 3. Open reduction and fixation of the right femur on 15th May 1991**
- 4. Fracture of left femur was managed by a POP and dressings.**

At the date of examination, the plaintiff complained of pain in both legs especially after standing for long.

The doctor assessed a 40% permanent incapacitation.

19. The plaintiff proposed general damages in the sum of Kshs.4,000,000/= for pain and suffering and special damages of Kshs.882,858 as pleaded.

The Defendants made no proposals on quantum of damages.

20. Pain and Suffering and Loss of amenities

The plaintiff cited two authorities **Nairobi HCCC No. 287 of 2007 Simon Anomua -vs- Kioga Mukwano T/a Kioga Mukwano Transporters (2013) e KLR** and **NBI HCCC No. 889 of 2004 Michael Ngagi Karuri -VS- Gideon Ndungu Nguribu & Another (2013) e KLR**.

In the **Simon Anomua case** the plaintiff had his left leg amputated below the knee. He was a driver. His earning capacity was reduced with a 35% incapacitation. He was awarded Kshs.2 Million for pain and suffering on the 30th August 2013. In **Michael Njagi Kariri** (Supra) the plaintiff sustained a displaced fracture of right humerus with deformity and swellings of right forearm and fractures of right radius and ulna.

He also sustained injury to the lower limb, fracture of the right tibia and fibula with deformity of right thigh and segmented fracture of left femur with apparent shortening. He underwent six operations.

The court awarded Kshs.2 Million for pain and suffering on the 22nd August 2013.

21. I have considered that the plaintiff herein sustained multiple serious injuries with a 40% incapacitation.

In **HCCC No. 403 of 2012 Ziporah Wangila -vs- Eldoret Express Ltd & 2 Others, (2016) e KLR** I awarded a sum of Kshs.2,400,000/= on the 21st July 2016 to the plaintiff who had sustained very close and similar injuries.

The plaintiff in the present case urged me to award Kshs.2,000,000/= for pain and suffering. I have no hesitation in awarding Kshs.2,000,000/= damages for pain and suffering to the plaintiff.

22. The plaintiff did not plead damages for loss of earning capacity which he proposed an award of Kshs.1,269,000/=.

A claim for loss of earning capacity is a general damage. It is normally awarded as part of general damages for pain and suffering and loss of amenities being compensation to the party for the risk that he may never get employment or may lose the employment.

In his evidence, the plaintiff testified that he was employed by National Housing Corporation and was terminated due to the inquires Pext B5 -. I have seen the letter dated 29th September 1992. The

termination letter read at Paragraph 1 line 2:

“---the management has keenly observed that you cannot effectively carry out your normal duties ---- the management's decision to terminate your services on health grounds with effect from 31st October 1992.”

23. I have also seen the plaintiffs **October 1996** payslip (Pext 6) and his net salary after deductions of statutory deduction Kshs.12,209/= from a Gross Salary of Kshs.13,860/=. He testified that he could not stand for long and rainy weather affects his body operations and bones. Though not pleaded, evidence was led that the plaintiff lost his employment and future prospects of employment and earnings due to the accident.

24. In **Hccc No. 287 of 2007 Simon Anomua** (Supra) where the court held that **loss of earning capacity occurs when a party's chances in the future of any work in the labour market is lessened and loss of future earning capacity is awardable for real and assessable loss, proved by evidence.** The plaintiff was earning a gross salary of Kshs.13,860/= and a NET of Kshs.12,209/= per month when his services were terminated. He was then 48 years old. Dr. Omuyoma's Medical Report shows that as at 14th August 2014, the plaintiff was 61 years old, 13 years after the accident. That brings his age to 48 years in 1991, the date of accident. In my assessment he would have worked for a period of 12 years to retirement age with the National House Corporation save for other uncertainty of live, and his salary would too have improved with time.

I therefore find **a multiplier of 6 to be reasonable** in the circumstances.

25. I have taken into account the 40% incapacitation, and also that the plaintiff may be able to still find some other work to do. He cannot just sit idle and do nothing. He must mitigate his circumstances. He did not lead any evidence to his academic or professional qualifications. The Court will adopt a multiplier of 6 years with an income of Kshs.12,000/= per month as a lorry driver as fair and reasonable.

The court will therefore award the plaintiff damages for loss of earnings and earning capacity as follows:

$$12,000 \times 6 \times 12 = 864,000/=$$

See **Zipporrah Nangila** Case above.

26. **Special Damages**

The plaintiff pleaded a special damage of Kshs.882,858/= being Medical expenses. In his evidence he testified that the said sum was paid by his then employer as part of his medical benefits which were deducted from his salary.

I have looked at the payslip for October 1996.

I have not seen any amount deducted towards the medical expenses. The employer is said to have retained the payments receipts for reasons that it had paid the medicals expenses.

Without proof tendered of the expenses, I find no reason to award the same as no proof was tendered that the plaintiff paid the same. This claim is dismissed as not proved.

27. The upshot is that those reasons, judgment is entered for the plaintiff against the 2nd Defendant and dismissed against the 1st Defendant in the following manner:

(a) Liability at 100% against the second Defendant Stephen K. Kuguru.

(b) The case is dismissed against the 1st Defendant.

(c) General damages for pain and suffering Kshs.2,000,000/=.

(d) Damages for loss of earnings and earning capacity Kshs.846,000/=.

(e) Special damages – Nil

(f) Interest on (c) and (d) above to accrue at court rates from the date of this judgment.

(g) Costs of the suit to the plaintiff shall be borne by the 2nd Defendant.

(h) There shall be no costs awarded to the 1st Defendant.

Dated, Signed and Delivered this 20th Day of April 2017.

J.N. MULWA

JUDGE