



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 96 OF 2013**

**SECURICOR SECURITY SERVICES LTD..... APPELLANT**

**VERSUS**

**JACOB MWANGI WANDERE.....1<sup>ST</sup> RESPONDENT**

**ABERDARE LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. Christine Wekesa, Senior Resident Magistrate) delivered on 13<sup>th</sup> November, 2013 in Nyeri Chief Magistrates' Court Civil Case No. 183 of 2006)*

**BETWEEN**

**JACOB MWANGI WANDERE.....PLAINTIFF**

**-VERSUS-**

**ABERDARE LIMITED.....1<sup>ST</sup> DEFENDANT**

**SECURICOR SECURITY SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

On or about the 11<sup>th</sup> May, 2004 the appellant's motor vehicle registration number KAN 645 N (herein "the pickup) collided with the 2<sup>nd</sup> respondent's vehicle registered as KAG 412 J (herein "the lorry") along Karatina-Nyeri road within Nyeri town near Total petrol station. The 1<sup>st</sup> respondent, who was then a pedestrian off that road, was knocked down by the lorry and injured in the process. By a plaint dated 13<sup>th</sup> March, 2006 and filed in court on 15<sup>th</sup> March, 2006 the 1<sup>st</sup> respondent sued both the appellant and the 2<sup>nd</sup> respondent, who were the respective owners, of the pick and the lorry, for damages, both special and general, costs of the suit and interest thereof.

At the conclusion of the hearing, the learned magistrate found both the appellant and the 2<sup>nd</sup> respondent liable for the accident but in varied degrees; she apportioned liability at the ratio of 20:80 with the appellant bearing the larger responsibility. This appeal is against that judgment. In its memorandum of appeal, the appellant raised sixteen grounds of appeal; these grounds were, however, summarised and argued as six grounds in the submissions filed on the appellant's behalf; they were stated as follows: -

1. The learned trial magistrate erred both in law and in fact when she disregarded the evidence on record and proceeded to apportion liability at 20% :80% between the 2<sup>nd</sup> respondent and the

appellant respectively.

2. The learned trial magistrate erred both in law and in fact when she failed to consider the traffic court's decision whereby the appellant's driver had been charged with a traffic offence relating to the accident forming the cause of action in the civil case in the subordinate court.

3. The learned trial magistrate erred both in law and in fact when she failed to take into account that no evidence was adduced by the 2<sup>nd</sup> respondent to controvert the evidence adduced by the appellant in respect of the occurrence of the accident.

4. The learned trial magistrate erred both in law and in fact when she failed to appreciate that the 1<sup>st</sup> respondent had not proved his case to the required standard.

5. The learned trial magistrate erred both in law and in fact when she found the appellant entirely liable for the accident in disregard of the evidence adduced.

6. The learned trial magistrate erred both in law and in fact when she failed to consider the appellant's submissions and authorities cited.

According to the 1<sup>st</sup> respondent's plaint, the road traffic accident occurred as a result of the negligence of the drivers of the two vehicles. As a result of this negligence, he was knocked down and consequently he sustained serious bodily injuries. He particularised this injuries as a fracture on the 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> ribs; a fracture of the left femur mid shaft; metacarpal fractures on the right hand; and laceration on the right anterior chest wall.

He pleaded also that at the time of the accident, he was employed as a driver with Messrs. O Metric Construction Company Limited where he earned a salary of Kshs. 20,000 per month. As a result of the accident, he lost his job and was yet to recover from his injuries as at the time of filing suit.

Only the appellant entered appearance and filed a statement of defence opposing the suit. It admitted that it was the owner of the pickup and that it was involved in a road traffic accident with the 2<sup>nd</sup> respondent's lorry on 11<sup>th</sup> day of May 2004. It further pleaded that three pedestrians were fatally injured as a result of the accident but denied that the 1<sup>st</sup> respondent was ever injured as alleged or at all.

The appellant also denied that the accident was as a result of the negligence of its driver, servant or agent in driving, managing or controlling its motor vehicle. According to the appellant, the accident was solely caused by or substantially contributed to by the negligence, carelessness and recklessness of the driver of the 2<sup>nd</sup> respondent's motor vehicle.

The appellant also denied that the 1<sup>st</sup> respondent sustained any injuries or suffered any loss or damage or expense as alleged or at all.

The record shows that besides filing the statement of defence, the appellant also filed a notice of claim and indemnity and/or contribution against the 2<sup>nd</sup> respondent but it appears it was never served. As noted, the 2<sup>nd</sup> respondent itself neither entered appearance nor filed defence and thus a default judgment was entered against it.

At the hearing, the 1<sup>st</sup> respondent (PW2) testified that he was a welder and on 11<sup>th</sup> of May, 2012 he was walking back home when the lorry and the pickup collided near Nyeri petrol station in Nyeri town. The lorry was travelling towards Nyeri town while the pickup was travelling in the opposite direction towards Karatina. The 1<sup>st</sup> respondent was walking on the right-hand side of the road towards the direction of Nyeri town from Karatina. It was his evidence that the pickup was moving towards the petrol station while the lorry was on its left lane. The pickup then lost control and rammed into the lorry. In an attempt to avoid the accident, the driver of the lorry swerved to the far right to avoid the accident and in the

process knocked down the 1<sup>st</sup> respondent and other pedestrians who were walking on that side of the road. He sustained injuries that included a fracture on his left side and right hand. Five of his ribs were cracked and his chest was injured too. He was admitted for treatment at Nyeri general provincial hospital for two months and ten days; he testified that he was not completely healed at the time he testified. According to the 1<sup>st</sup> respondent, the drivers of both vehicles were responsible for the accident.

In answer to questions during cross-examination, the 1<sup>st</sup> respondent testified that the lorry was behind him and therefore he could not see it. He also testified that the driver of the pickup should not have attempted to overtake before the lorry passed him (the driver) or that he should have signaled that he was going, apparently, to the right.

**Dr Okoth Okore (PW1)** who examined the 1<sup>st</sup> respondent, testified that the latter sustained a fracture of the femur; a fracture of the left 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> ribs; laceration on the left chest wall; fractures of the right the metacarpals and bruises on the right-hand. He assessed the degree of permanent incapacity at 25%.

**Police Constable Mwanamisi Mbwana (PW3)** from Nyeri traffic base confirmed that the police having received a report of a road traffic accident involving two motor vehicles, a Mitsubishi lorry and pick up, on 11<sup>th</sup> May, 2004. According to the police officer, the accident occurred when the pickup attempted to overtake but ended up colliding with the lorry. The lorry lost control in the process and hit four pedestrians, including the 1<sup>st</sup> respondent. Since there were fatalities, the driver of the pick-up was charged with the offence of causing death by dangerous driving but was acquitted under **section 215** of the **Criminal Procedure Code, Cap.75**.

The driver of the pickup, Benjamin **Gitonga Koigi (DW1)**, testified that he was driving from Nyeri to Othaya on the material day when he saw another vehicle ahead of him entering a petrol station. He also saw a lorry, driving in the opposite direction on its way to Nyeri town. According to him, the lorry was being driven in a zig-zag manner. He was on the left side of the lorry. The lorry suddenly moved to his lane and therefore to avoid a head on collision, he drove to the far right towards the petrol station. He explained that he could not have swerved to the left because there was a pavement on that side of the road and there were pedestrians there too. His vehicle was hit on the left side. The lorry then drove off the road, over the pavement and hit the pedestrians. He was later charged with the offence of causing death by dangerous driving. He produced the proceedings in the criminal trial against him to support his case.

The picture of the scene of the accident which I gather from the evidence of the 1<sup>st</sup> respondent, the appellant's driver and the police officer is this: there is a petrol station on the right side of the road as one heads to Karatina from Nyeri town. As is any filling station off a busy highway such as the Nyeri-Nairobi road, there is ordinarily an entry point to and an exit from such a station. Ordinarily, motorists would enter such stations either through the entry route but it is not unusual to find some of them entering the station through the exit if, depending on the direction from which they are travelling or the layout of the station, it is convenient for them to do so. Whatever the case, a vehicle entering in this particular station would somehow have to leave the main road at some point. If my picture of the positioning of the station is correct, a vehicle travelling from the direction of Karatina to Nyeri town will enter the station without interfering with the flow of traffic from the opposite direction because the station is on the same left-hand side of the left lane. On the other hand, a vehicle travelling to Karatina from Nyeri will have to cross the road, to the right, to get to the petrol station regardless of whether one chooses to enter through the points marked as entry or exit.

Turning to the present case, the pick-up was travelling from Nyeri town to Karatina; for it to enter the station, it had to turn right and in doing so cross the path or the lane in which the vehicles coming from the opposite direction were travelling. My evaluation of the evidence is that the collision of the two vehicles occurred when the pickup made a deliberate attempt to enter the petrol station or simply attempted to overtake a vehicle or vehicles ahead of it. Regardless of whether it was overtaking or was going to the petrol station, this vehicle drove into the lane of the oncoming vehicles and in particular, the lorry.

The reasons for reaching this conclusion are these; first, the driver of the pickup himself testified that he was on the left side of the lorry and his vehicle was hit on the left side. If the point of impact was on the left side of his vehicle, it simply means it was hit when attempting to cross the lorry's path. Second, in answer to questions during cross-examination at his criminal trial, this driver is recorded to have said this:

***I waited for the vehicle ahead to enter the petrol station. The lorry was far. So I did not wait for it to pass. The lorry was on the left from Karatina. I did not have to wait for it before crossing.***

The plain meaning of this statement is that there was at least one vehicle ahead of the pickup which was on its way to the petrol station. There was also an oncoming vehicle, which in this case was the lorry. In the judgment of the driver of the pickup, the lorry was far enough for him to either to overtake the vehicle ahead or to cross to the petrol station. This is what I understand his statements that, '***the lorry was far...I did not wait for it to pass...I did not have to wait for it before crossing***' to mean. The implication is that if this driver had waited for the lorry to pass before overtaking the vehicle ahead of him or crossing into the petrol station the collision would not have occurred and the accident would have been avoided; his judgment that the lorry was far enough for him to take any of these actions proved to be not only poor but ended up being fatal.

The fact that the driver of the lorry swerved to the far right would imply he attempted to avoid a head on collision with the pickup. The point of impact on this latter vehicle shows that either its driver also attempted to avoid the head on collision or that he was on his way to the petrol station; whichever the case, he should not have been on what I suppose was the wrong lane in the first place. Going by the 1<sup>st</sup> appellant's own evidence, it is not plausible, as he testified, that the lorry was being driven in a zig-zag manner or that it was being driven in his lane. The learned magistrate was correct to reject it.

In these circumstances, I would not have hesitated to find the appellant's driver 100% liable for the accident; however, since none of the parties cross appealed on liability, I will not disturb the learned magistrate's apportionment of liability.

### **Quantum of Damages:**

As noted earlier, the 1<sup>st</sup> respondent is established to have sustained the following injuries:

- a) Fracture of the left femur
- b) Fracture of the left 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs
- c) Lacerations on the left chest wall
- d) Fractures of the right metacarpals
- e) Bruises on the right hand

It was the doctor's evidence that he was treated at Nyeri Provincial General Hospital with an open reduction and internal fixation of the fracture with a K-nail. A plaster of paris cast was applied to the right hand. The wounds were cleaned and dressed. The wound in the left hand was infected and a debridement was done. The K-nail was removed in June 2005.

At the time of examination, the 1<sup>st</sup> respondent complained of recurrent pains in the left upper leg. There were lacerations on the back of the hand. The index finger was shorter. There were bruised scars on the left lateral chest wall. There was also a surgical scar on the upper leg laterally. The left leg was shorter than the right leg by 2 cm.

The degree of permanent incapacity was assessed at 25%

In the submissions filed in the subordinate court, the appellant proposed an award of a sum of Kshs 200,000/= as general damages and cited the decision in **High Court Civil Case No. 244 of 1998** where the claimant was awarded such a sum for a fracture of the left femur on the lower third; a fracture and dislocation of the right hip joint and a chest injury. A similar award was made **Regina Namataka Bennaars versus Farmers Choice Company (2005) eKLR** for a fracture of the right femur, a fracture of the neck and a chest injury.

The 1<sup>st</sup> respondent, on the other hand, proposed an award of **Kshs. 1,500,000/=** as general damages. Counsel for the 1<sup>st</sup> respondent cited the decisions in **Nakuru High Court Civil Case No. 429 of 1998 Timothy Wafula versus Sietco Development Africa Ltd** where the claimant suffered fracture of two ribs, chest injuries, injuries to the hand and shoulders and was awarded the sum of Kshs 800,000/= as general damages for pain, suffering and loss of amenities. He also relied on the decision in **Mombasa High Court Civil Case No. 180 of 1986, Joseph Poko Ochieng versus Kenya Bus Service Limited** where the claimant was awarded Kshs 1,100,000 for damages for pain, suffering and loss of amenities after he suffered fracture of the right femur, compound fracture of the left femur, a massive laceration on the left thigh and a cut of proximal media aspect on the right leg.

The award suggested by the appellant was, in my view, on the lower side considering that the extent of the injuries sustained by the claimants in the two cases were, in my humble view, less severe than those the 1<sup>st</sup> respondent sustained. Secondly, the awards were made more than 10 years ago and therefore if I have to consider the inflationary trends, as I have to, the sum of Kshs 200,000/= is not worth today what it was worth 10 years ago.

But I also think the sum proposed by the 1<sup>st</sup> respondent was also on the extreme; here though the awards in both cases were also made more than 10 years ago, the claimants in both case sustained far severe injuries than the 1<sup>st</sup> respondent. Taking all these factors into account my award would not deviate from what the learned magistrate awarded which is the sum of Kshs 500,000/= as general damages for pain suffering and loss of amenities. The special damages will remain at Kshs 3,200/=. The awards are, of course, subject to apportionment.

In the final analysis, I am inclined to uphold the learned magistrate's judgment; accordingly, the appellant's appeal is dismissed with costs to the 1<sup>st</sup> respondent.

**Signed, dated and delivered in open court this 22<sup>nd</sup> September, 2017**

Ngaah Jairus

**JUDGE**