



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 34 OF 2000**

**STEPHEN NDIRANGU .....PLAINTIFF**

**VERSUS**

**JOSEPHINE ONGACHI ANDWATI.....1<sup>ST</sup> DEFENDANT**

**MICHAEL NJOROGE.....2<sup>ND</sup> DEFENDANT**

**BENSON NJAU KAYAI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. BACKGROUND AND PLEADINGS**

On the 21<sup>st</sup> December 1998 the plaintiff was travelling as a fare paying passenger in motor vehicle Registration Number KWF 114 along Nakuru-Nairobi Highway when it collided with another vehicle Registration Number KAG 380F then being driver by the 1<sup>st</sup> defendant. As a result of the collision, the plaintiff sustained serious injuries. He blamed both drivers of the two vehicles for negligence and sequential consequences. Particulars of negligence by each driver are stated as well as the particulars of injuries in his plaint dated 22<sup>nd</sup> July 2000 and Amended on the 7<sup>th</sup> May 2001.

He claims both special and general damages including costs of future medical treatment and damages for reduced earning capacity.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their joint defence dated 28<sup>th</sup> February 2000 denied the claims. The 3<sup>rd</sup> defendant too filed his defence and attributed negligence to the 1<sup>st</sup> and 2<sup>nd</sup> defendants by way of contributory negligence.

2. The trial commenced on the 13<sup>th</sup> December 2005 before Musinga J (as he then was) and continued before D.K. Maraga(as he then was) and finally before me on the 24<sup>th</sup> May 2016 when I took the defence evidence.

**3. PLAINTIFF'S CASE**

The plaintiff testified as PW1. His testimony was that he was seated at the front cabin of motor vehicle Registration No. KWF 114 and could see well, that a saloon car was coming from Nairobi direction overtaking a lorry but could not complete as it collided with the lorry on the lane of his vehicle. His evidence was that after the collision both vehicles landed on the left side off the road. He testified that the driver of his vehicle started reducing the speed to allow the saloon car to overtake as it was

approaching a corner but it nevertheless smashed into saloon vehicle.

4. He was injured and fractured his left leg and was hospitalised for 2½ months. He produced a medical report on his injuries (MFI 1) and receipt for fees for the report for Kshs.2,000/= = PExt 3.

He also produced the police abstract – PExt 4.

He placed blame on the driver of motor vehicle Registration No. KAG 380F the 2<sup>nd</sup> Defendant, – for overtaking when it was not safe to do so.

He stated that he still had metal plates *in situ* on the fracture site and wished to have them removed as advised by his doctor, but had no money for the service.

5. He produced a letter from his employer where he used to earn 7,609/= per month – PExt 8, but was forced to retire due to the injury but mitigated the loss by taking up driving at a daily wages of Kshs.1,200-/- in the temporary job he had. His evidence was that he continues to experience pains and urged that he required Kshs.60,000/= for removal of the plates in his leg.

6. Upon cross examination, the plaintiff stated that the *matatu* driver tried to evade the collision but due to a ditch on the left side of the road, he could not swerve further. He produced the bundle of treatment receipts as PExt 9.

7. **PW2 WAS DR. ISAAC KIPLIMO NGETICH**, a consultant Surgeon at the Rift Valley Hospital, Nakuru. He stated the plaintiff's injuries as:

- Fracture tibia fibula fracture – LT
- Closed fracture Lt femur
- Closed fracture Rt metacarpal of ring finger
- Cut tendo – achiles on the left
- Brain concussion – transient

He produced the medical report as exhibit – PExt 5. He assessed permanent disability at 40%.

The plaintiff's case was then closed.

## 8. **DEFENCE CASE**

At the commencement of the defence case, the court was informed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not appear, and interlocutory judgment was entered against them and that the 1<sup>st</sup> defendant has since died. The defendants case was thus urged through the **3<sup>rd</sup> defendant who testified as DW1, Benson Njau Kayai**

This defendant, Benson Njau Kayai was by consent of all parties allowed to testify without having recorded and filed a witness statement.

His evidence was that he was the driver of motor vehicle KAG 380T as well as the owner on the date of accident the 21<sup>st</sup> December 1998.

He testified that while around Stem Hotel along the Nakuru-Naivasha highway, he saw a *matatu* overtaking, and coming to his lane from Nairobi direction but before it could finish overtaking, it hit his vehicle head-on but on his correct left lane. He stated that he was not overtaking and blamed the *matatu* driver for the collision against whom he took out a notice of claim against him on the 30<sup>th</sup> October 2006.

9. On cross examination, he did not deny that the passenger (plaintiff) in the *matatu* may have been injured but placed blame squarely upon the co-defendants based on the notice of claim upon them. It was

his evidence that after the head on collision, his vehicle rested off to the left side of the road.

He denied having been driving fast and citing the Amended plaint, stated that he is exonerated from blame. He urged the court to uphold the interlocutory judgment entered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

10. I have considered the parties submissions *vis-a-viz* the pleadings and evidence adduced.

The plaintiff's submissions are dated 9<sup>th</sup> December 2016 while the 3<sup>rd</sup> defendant's are dated 26<sup>th</sup> May 2017.

## 11. ANALYSIS OF EVIDENCE, SUBMISSIONS AND FINDINGS

### Liability

I have perused the court file proceedings. The 2<sup>nd</sup> defendant entered appearance on the 28<sup>th</sup> February 2000 (Memorandum of Appearance filed on the 6<sup>th</sup> September 2005) and filed his defence on the same day.

The 1<sup>st</sup> defendant filed her statement of defence on the 6<sup>th</sup> September 2005. It is dated 28<sup>th</sup> February 2000 whereas the 3<sup>rd</sup> defendant filed his Amended defence on the 6<sup>th</sup> September 2005.

It is therefore not true that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not file their defences as submitted by the 3<sup>rd</sup> defendant. I have also not seen any entry of interlocutory judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I however confirm from the court records that they did not participate in the hearing of the case, that as I have stated earlier was before other Judges.

## 12. ISSUES FOR DETERMINATION.

There is no dispute on the occurrence of the accident or the ownership of the two motor vehicles. **The only issue for determination on liability is between the two vehicles which one caused the accident and whether each of them contributed to occurrence of the accident and if so to what percentages or extent.**

13. The totality of the plaintiffs evidence who was a passenger in motor vehicle registration No. KWH 114(*matatu*) owned by the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant is that as he was seated at the front cabin seat, he could see clearly what happened in front, that the 3<sup>rd</sup> defendant's vehicle was trying to overtake a lorry but failed, upon which it collided with the vehicle (*matatu*), despite the driver making attempts to avoid the collision by reducing the speed, and that the 3<sup>rd</sup> defendant's vehicle was being driven at a high speed, that after the collision, both vehicles rested on the left side of the road as one faces Nakuru direction. By his amended plaint filed on the 22<sup>nd</sup> July 2000, the plaintiff placed blame on all the defendants by way of contributory negligence.

14. On the other hand the 3<sup>rd</sup> defendant the only one who participated in the proceedings by his pleadings and evidence was categorical that it was the 2<sup>nd</sup> defendant who wholly and solely caused the accident.

Contrary to the plaintiff's evidence, it was the 3<sup>rd</sup> defendant's evidence that the collision was on its correct lane and after the collision, both vehicles rested off the road, on the left side as one faces Nairobi direction. This is a complete departure from the plaintiff's evidence as to the point of impact and final resting place of the two vehicles.

15. None of the parties called the investigating officer from the police station to give an independent opinion as to which party caused or contributed to the accident. Production of sketchplans as to the point of impact and resting place of the vehicles after the accident and/or skid marks would no doubt have assisted the court to have a clearer view of the scene. See **Caroline Ann Njoki Mwangi -vs- Paul**

## **Ndungu Muroki (2004) e KLR.**

From the evidence it is clear that each party was to some extent to blame. I do not agree with the 3<sup>rd</sup> Defendant's submission that the unequivocal statement in the Amendment plaint that the 2<sup>nd</sup> defendant caused the accident absorbs him from blame. It was his duty to call sufficient evidence to fully absorb himself from blame. Statements and allegations that are not supported by evidence remain as such **Section 107-109 of the Evidence Act**. Neither of the drivers of the two vehicles were charged with any traffic offence arising from the said accident.

16. I have considered authorities cited by the 3<sup>rd</sup> Defendant notably **Rosemary Wanjiru Kungu -vs- Elijah Macharia Githinji and Another (2014) e KLR**. and also the plaintiffs cited authorities **Joseph Musee Mua -vs- Julius Mbogo Mugi & Others (2013) e KLR**.

The burden of proof is always on the plaintiff, but such proof may shift to the defendant when circumstances demand, like in this case where both parties blame each other. Each has a duty to prove its case against the other on a balance of probability.

In the Court of Appeal decision in **Civil Appeal No. 739 of 2003 Caroline Anne Njoki Mwangi -vs- Paul Ndungu Muroki (2004) @ KLR**, faced with similar circumstances, the Honourable Judges rendered that:

***“I would in the absence of an official police sketchmap and on knowing who exactly is to blame on this matter and on a balance of probability hold that the parties are indeed equally to blame at the ratio 50% each.”***

17. In my considered view, it is not reasonably possible for a court to decide upon opposing and rival evidence tendered by witnesses on both sides as to who was to blame for the accident. The investigating officer, being an independent party would have been of great help to the court. None of the parties saw the necessity of calling him.

In the premises, it would be prudent and in line with judicial precedent, to come to the findings and conclusion that where there is no concrete evidence to determine who in a motor vehicle collision is to blame between two drivers both should be held equally to blame.

See **Civil Appeal No. 521 of 2007 in Commercial Transporters Ltd -vs- Registered Trustees of the Catholic Archdiocese of Mombasa (2015) e KLR**.

18. Accordingly, I come to the conclusion that all the defendants, the 1<sup>st</sup> and 2<sup>nd</sup> on the one part, and the 3<sup>rd</sup> on the other part shall be held equally to blame at 50% basis.

Having so decided, it therefore follows that the consequential damages arising from the accident, and the plaintiffs damages from the injuries, but subject to proof, shall likewise be apportioned in the manner stated above, on a 50:50 basis.

## **19. QUANTUM OF DAMAGES.**

**PW2 DR. ISAAC KIPLIMO NGETICH** in his medical Report on the plaintiff's injuries (PExt 5) tabulated the injuries as follows:

- Compound tibio fracture – Lt
- Closed fracture Lt femur
- Closed fracture Rt metacarpal of right finger
- Cut tendo – achiles on the left
- Brain concussion – transient

He was admitted for 3 months in hospital. At time of examination he had:

- Deformed right right finger metacarpal
- Surgical scar left thigh with palpable place
- Scars on leg, on medial aspect healed scar over the tender achilles
- Two centimeter shortening of left limb.

20. The plaintiff-submitted on the probable *quantum* of damages but the 3<sup>rd</sup> defendant did not, thus leaving this issue to the court's discretion.

The plaintiff proposed a sum of Kshs.3,000,000/= as appropriate damages and cited the case **HCCC No. 86 of 2008 – Joseph Musee Mua -vs- Julius Mbogo Mugi & 3 Others** where a sum of Kshs.2,500,000/= was awarded in November 2013.

I have perused the said authority. Injuries sustained by the plaintiff therein are stated as:

- having been unconscious for about 2 days
- Admitted in hospital for more than 2 months
- Several surgical procedures performed
- Injury to the leg, head and face
- fractured tibia & fibul
- two broken upper jaw teeth
- Chest injury and shoulder and bruises on left elbow
- left leg shortened
- 50% permanent disability

21. The plaintiff pleaded general damages for pain and suffering, damages for loss of earning capacity, special damages and cost of future medical treatment.

## 22. DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

There is no doubt that the plaintiff suffered pain as a result of the injuries. I have considered his three months admission in hospital and the surgical procedures he underwent. He still has plates *insitu* on his femur. He testified that he had healed but not to the previous state. He needed money to have the plates removed and that he experiences pains during cold seasons. See more on Paragraph 19 above.

I have considered relevant authorities, and minded that money can not bring back the physical frame that has been shattered to its original state-**West H. & Son Ltd -vs- Shepherd (1964) AC**, and also that assessment of general damages is at the discretion of the court. See also **H. Young Construction Co. Ltd -vs- Richard Kyule Ndolo (2014) e KLR**, among other relevant authorities.

23. The plaintiff's injuries though not completely similar, are comparable. The plaintiffs disability was assessed at 40%. Decided cases are only guidelines and each case ought to be considered upon its peculiar circumstances. No two cases can be 100% similar. I am of the view that the sum of Kshs.2,500,000/= proposed is on the higher side. What I am persuaded to be fair and reasonable compensation to the plaintiff is Kshs.1,700,000/=. That is what I award on this sub head.

## 24. DAMAGES FOR LOSS OF EARNING CAPACITY

The plaintiff was working with a salary of Kshs.7,609/=(PExt 8).

He could not go on with the work after the accident. He was retired. He took up a driving job after one year with a daily wages of Kshs.1,200/= but not a permanent job. His earlier job -PExt 7- was at AMM Engineering works.

The plaintiff was not without a job as he became a driver of a tour company with a daily salary/wages of

Kshs.1,200/= . Though not a permanent job at the time of the hearing, he would probably find a permanent job.

Damages for loss of earning capacity are normally classified and lumped up as general damages as they flow directly from the claim. They have to be proved by evidences of diminution of earning capacity, and awarded as part of general damages for pain, suffering and loss amenities See **Buttler -vs- Buttler (1984) e KLR**.

25. Damages under this head will vary with circumstances of each case, and ought to include factors such as age and qualifications of the claimant, his meaningful length of working life and his disabilities and previous service if any.

The plaintiff in this case had ably found himself a better job though part time employment. A permanent job would not be too far fetched.

I am therefore unable, upon considering the factors stated in the above **Buttler -vs- Buttler** case to grant a separate award on this subhead.

It is factored in the award of general damages.

## **26. COST OF FUTURE MEDICAL TREATMENT**

The plaintiff testified that he needed funds to facilitate removal of the plates in his femur, and stated Kshs.60,000/= according to Dr. Simiyu's advice whose report was not produced in court.

There is no dispute that a future medical expense is necessary but the plaintiff did not prove the amount. No medical report was produced to that effect, and indeed no submission was tendered in respect thereof. Though the claim was pleaded it was in my view, not proved and without prove, the exact cost is uncertain. The court is not permitted to make a guesswork, nor will it go out on a fishing expedition to find out, for instance, the cost of removal of a plate *insitu* in a femur.

I decline to award any such damages as having not been proved.

## **27. SPECIAL DAMAGES** of Kshs.289,993/= were pleaded.

A bundle of receipts being medical expenses were produced by the plaintiff (PExt 1). The defendant has not submitted in this issue.

PExt. 1 is a bundle of medical receipts from Breeze Hospital in the sum of Kshs.264,470/=. This is where the plaintiff was admitted. I have seen the discharge summary from the said hospital.

PExt 6 is for Kshs.3,000/= being Dr. Ngetich's fees on the preparation of the medical report.

The total of the above is Kshs.267,470/=. The said sum is proved. I shall award the same.

28. In the result, I find that the plaintiff has proved his case to the required standards, upon a balance of probability, to the extent stated. See **D.T. Dobie & Co. Ltd (K) -vs- Wanyonyi Wafula Chebukati(2014) e KLR**.

Accordingly, Judgment is entered for the plaintiff against the defendants as follows:

(a) **Liability** - 50% basis against the 1<sup>st</sup> & 2<sup>nd</sup> Defendant on the one part and 50% against the 3<sup>rd</sup> Defendant, on the other part.

(b) **Quantum of Damages**

**(i) For pain and suffering and loss of amenities - Kshs.1,700,000/=**

**(ii) Damages for loss of earning Capacity - Kshs. NIL**

**(iii) Cost of future medical treatment - Kshs. NIL**

**(v) Special damages - Kshs. 267,470/=**

**Total - Kshs.1,967,470/=**

**50% thereof - Kshs. 983,735/=**

29. Interest at court rates on special damages shall accrue from date of filing the suit while on general damages interest shall accrue from the date of this judgment.

The plaintiff is awarded costs of the suit, payable by the defendants on the basis of contributory negligence as stated in (a)above.

**Signed and Dated this 23<sup>rd</sup> Day of October 2017.**

**J.N. MULWA**

**JUDGE**

**Delivered this 31<sup>st</sup> Day of October 2017.**

**R. LAGAT KORIR**

**JUDGE**