



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 339 OF 2014

NELSON MURAYA MURAGE. PLAINTIFF

VERSUS

SPARR DRILLING COMPANY LIMITED.,..... DEFENDANT

J U D G M E N T

The Plaintiff in this case Nelson Muraya Murage filed a plaint dated 7th August, 2014 against the Defendant Sparr Drilling Company Limited claiming general damages, special damages of Ksh.2000/- loss of earning capacity, costs of the suit and such further order which this Honourable court may deem just to grant.

In the plaint, the Plaintiff claims that on or about the 7th May, 2012, he was lawfully driving motor vehicle registration number KBA 927G along Kericho-Kisumu road when the driver of motor vehicle registration number KAM 450D so negligently drove, managed and/or controlled the said motor vehicle that it collided with motor vehicle KBA 927G as a result of which he was seriously injured. The particulars of negligence are set out in paragraph 4 of the plaint.

It was further pleaded that the Defendant is vicariously liable for the negligence of its driver, servant and/or agent who was driving its aforesaid motor vehicle at the material time. It was averred that as a result of the accident the Plaintiff sustained serious injuries as set out in paragraph 6 of the plaint and special damages, the particulars whereof are set out in paragraph 9 of the plaint.

In its defence filed in court on the 23rd September, 2014, the Defendant has denied ownership of motor vehicle KAM 450D and avers that none of its employees ever drove such a motor vehicle at the material time when the accident occurred. It has further denied the occurrence of the accident and has put the Plaintiff to strict proof.

The Defendant avers that there exists or existed no fiduciary, statutory or other relationship between it and the alleged driver of Motor Vehicle KAM 450D as to invite the doctrine of vicarious liability as against it. It has denied the particulars of injuries and special damages as pleaded and claimed by the Plaintiff.

In the alternative and without prejudice, the Defendant avers that if such an accident occurred involving the two vehicles as aforesaid but which is otherwise denied the same was wholly caused or substantially contributed to by the negligence on the part of the Plaintiff, the particulars of which are set out in paragraph 8 of the defence. The Defendant avers that it shall seek indemnity and/or contribution from the Plaintiff.

The Defendant further avers that in light of the aforesaid facts as pleaded, the court lacks jurisdiction to entertain the suit and that the suit has been filed in disregard of Sections 11 and 15 of the Civil Procedure Act as read with the Insurance (Motor Vehicle Third Party Risks) Amendment) Act 2013. It has urged the court to dismiss the suit with costs.

A reply to defence was filed on 17th October, 2014 which in general joins issue with the Defendant upon its defence and it reiterates the contents of the plaint.

At the hearing, only the Plaintiff and his Doctor testified. The Defendant did not call any witnesses in support of its defence. The Plaintiff testified as PW 2 while the Doctor who prepared the medical report for him gave evidence as PW 1. It was the Plaintiff's evidence that on the 7th May, 2012 he was driving motor vehicle registration Number KBA 927G along Kisumu - Kericho road and on reaching the junction of Kisii - Kisumu road an accident occurred involving the motor vehicle that he was driving and two other vehicles being registration Numbers KAM 433C and KAM 450D.

It was his evidence that he was driving uphill when he saw two oncoming vehicles driving behind a trailer and the driver of one of the vehicles that is KAM 450D started over taking and while at it, it collided with the vehicle that was he was driving. The collision was on his side of the road. He told the court that he tried to avoid the accident by going off the road but slightly ahead from where the collision occurred, and off the road, there was a stationary vehicle make probox and an embankment on the road and in those circumstances he was helpless.

After the impact, the lorry he was driving swerved and landed on the probox which was stationary but off the road and the person who was standing next to the probox died.

In his evidence, he told the court that he was driving up a steep hill and he was carrying heavy goods in the vehicle and was doing at a speed of 5 KPH because the vehicle was heavy.

In cross-examination he said that he sent someone to collect the police abstract for him because he was incapacitated. It was his evidence that if the Probox vehicle had not been stopped off the road near where the accident occurred he should have been able to avoid the accident, but all the same, the driver of motor vehicle KAM 450D was to blame for leaving his lane.

Parties submitted on both liability and quantum which submissions the court has duly read and considered together with the authorities that have been riled on.

Among the issues raised by the Defendant is that of ownership of its motor vehicle KAM 450D. The Defendant has submitted that the Plaintiff has failed to prove ownership of the aforesaid vehicle and has relied on Section 8 of the Traffic Act Cap 403 which provides: -

“The person in whose name a motor vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the motor vehicle.”

According to the learned counsel for the Defendant, the Plaintiff ought to have produced a copy of records from the registrar of Motor Vehicles so as to prove ownership of the vehicle alleged to have been involved in the accident. He has made reliance to the cases of **Titus Mutinda Kimiti Vs Gedion Kamau Karanja & Another (2009) eKLR** where he held: -

“... the Appellant could not rely on the information regarding the ownership of the motor vehicle contained in the police abstract.”

The Defendant having denied knowledge of the accident and any relationship between it and the alleged driver relied on the case of **Kyayigila Vs Gigi and Co. Ltd & Another [1987] KLR 97** where the Court of Appeal while dealing with the issues of vicarious liability had this to say:-

“In order to fix liability on the owner of a car for the negligence of its driver, it was necessary

to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as its agent."

It was submitted that the Plaintiff failed to discharge the onus of proving that the Defendant was vicariously liable for the alleged negligence of the driver.

On the twin issues above, the Plaintiff submitted that the ownership of the Defendant's vehicle was not in dispute since a police abstract is a public document and having produced the police abstract, it was incumbent upon the Defendant who is disputing the contents of the police abstract to offer evidence to the contrary as prove in Civil Cases is on a balance of probability. In support of this contention the learned counsel for the Plaintiff relied on the case **Joel Muna Opija Vs East African Sea Food Limited [2013] eKLR**, where the Court of Appeal held that the best way to prove ownership of motor vehicle would be to produce a document from the Registrar of Motor vehicles showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied. He also relied on the case of **Joseph Kahinda Maina Vs Evans Kamau Mwaura & 2 Others (2014) eKLR** in which the learned judge made reference to the case of **Samuel Mukunya Kamunge Vs John Mwangi Kamuru** and the Court of Appeal decision in Civil Appeal No. 333 of 2003 (**Ibrahim Wandera Vs P N Mashur**) where the court of Appeal had this to say: -

"The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P O Box 98728 Mombasa as owner. This fact was not challenged. The Appellant was not cross-examined on it and that means that the Respondent was satisfied with the evidence... the police abstract form established ownership of the accident bus and the Appellant was properly given judgment by the trial court against the respondent."

Going by those Court of Appeal decisions and on the principle of precedent, the court finds that the evidence of ownership of motor vehicle produced by the Plaintiff by way of a police abstract is prove enough on a balance of probability and especially that the evidence was not controverted by any other evidence on the part of the Defendant.

On the issue of whether the Defendant is vicariously liable, the Court of Appeal in the case of **Kenya Bus Services Limited Vs Humphrey (2003) KLR 665** held: -

"... Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible."

It is not enough for the Defendant to merely deny that the driver was not its authorized agent and/or servant. He needs to go further and rebut the presumption and the only way to do so, is by adducing evidence... emphasis mine.

In the absence of such evidence on the part of the Defendant, the court finds that the driver was driving the vehicle with the authority of the Defendant and, therefore, the Defendant is vicariously liable.

On liability the Defendant did not adduce any evidence to challenge the evidence by the Plaintiff. From the evidence on record, the Plaintiff has discharged the burden of proving negligence against the Defendant's driver in that he told the court the Defendant's driver was overtaking when it collided with his vehicle and that the collision occurred on his side of the road. He did all he could have done to avoid the accident but there was a probox parked off the road and the road ahead of the probox has a deep trench and an embankment. This fact is confirmed by the fact that, after the impact the vehicle that he was driving landed on the probox that was off the road killing the person who was standing near it instantly. In the absence of any evidence to the contrary, this court holds the Defendant fully liable for the accident that was caused by the negligence on the part of its driver.

Having found the Defendant liable for the accident, this court now turns to the damages payable to him.

On general damages the court has given due consideration to the Doctor's opinion as per his testimony and the medical report that was produced as exhibit "1A". It is not in doubt that he sustained major injuries. On the left leg he sustained compound fracture and dislocation of the ankle joint. He was treated by doing surgical toilet and reducing the fractures and dislocation and immobilizing the leg with metal external fixators. He later underwent plastic surgical procedure during which time a full muscle and skin graft was mobilized and stitched to cover the large wound defect around the ankle joint.

On the right leg he had sustained extensive degloving injuries on the right foot. X-rays revealed fractures of the right foot metatarsals and tarsal bones. The injuries were treated by doing surgical toilet and later skin grafting. In the Doctor's opinion the injuries were indeed very major. He walks with difficulties and the feet are also deformed and he will never be able to walk far or fast. He will never earn a living as a driver and he will never play any sports or games either. He assessed the total sum of disabilities on both legs at 45%.

He will have to fit his shoes at a shoe maker because he is unlikely to get ready made proper sized convertual shoes. Both his feet have been very altered from normal, they are large and deformed. Cosmetically their appearance is quite disfiguring. The Plaintiff has sought damages under the following heads.

- a) General damages.
- b) Special damages of Kshs.2,000/-
- c) Loss of earning capacity.
- d) Costs of the suit
- e) Such further order which this Honourable Court may deem just to grant.

On general damages, the Plaintiff has prayed for Ksh.2,800,000 while the Defendant has suggested a figure of Ksh.600,000/-. This court is alive to the fact that award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries. See the case of **Simon Taveta Vs Mercy Mutitu Njeri (2014) eKLR** and also the case of **Jabane Vs Olenja (1986) I KLR**. The Plaintiff has relied on the cases of **Peace Kemuma Nyang'era Vs Michael Thuo & another (2014) eKLR** and that of **Florence Hare Mkaba Vs Pwani Tawakal Mini Coach & Another (2012) eKLR** where awards of Ksh.2,500,000/- and Ksh.2,400,000/- were made respectively.

The Defendant on its part has relied on the case of **Beatrice Wairimu Wandurua Vs Dorman Ltd [2009] eKLR** and that of **Paul N. Njoroge Vs Abdul Sabuni Sabonyo [2015] eKLR**.

I have read through the case of **Peace Kemuma** which is attached to the Plaintiff's submissions, the injuries sustained by the Plaintiff in that case are similar to the ones by the Plaintiff herein. I make a similar award of Ksh.2,500,000/- as general damages.

Delivered, signed and dated at Nairobi this 28th day of July, 2016.

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L NJUGUNA

JUDGE

In the presence

..... *For the Plaintiff*

..... *For the Defendant.*