



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 285 OF 2006

COSMAS MUTISO MUEMA.....PLAINTIFF

-V E R S U S-

KENYA ROAD TRANSPORTERS LIMITED.....1ST DEFENDANT

FORKLIFT & EQUIPMENT LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's case is that on or about the 26th July 2005, while the Plaintiff was driving motor vehicle Registration Number **KAM 917F/ZB8147** (hereinafter "**the Plaintiff motor vehicle**") along Mombasa-Nairobi Road near Tsavo River at Man Eaters, the Defendants' driver so negligently and carelessly drove the Defendants' motor vehicle Registration Number **KAL 117S/ZB4668** (hereinafter "**the Defendant motor vehicle**") that it collided with the Plaintiff motor vehicle causing it to overturn.
2. The Plaintiff blames the accident on the negligence of the Defendants' driver and claims that he suffered injury as a result of the same leading to amputation of one of his legs and to permanent incapacity.
3. The Defendants filed a Statement of Defence in which they denied that the accident was caused by the negligence on the part of their driver. They averred that if the accident occurred, which they denied, the same was caused and/or substantially contributed to by the Plaintiff.
4. The Defendants further denied that they are vicariously liable for the negligence of the driver of the Defendant motor vehicle.

The Plaintiff's Case

5. The Plaintiff called two witnesses; the Plaintiff himself as **PW1** and **Dr. Stephen Kanegeni Ndegwa**, the doctor who treated the Plaintiff at Jocham Hospital as PW2.
6. The Plaintiff testified that on the material day, he was driving the Plaintiff motor vehicle from Nairobi to Mombasa. At about 6 am, at Man Eaters, the Plaintiff was ascending a hill when he saw the Defendant motor vehicle coming downhill from Mombasa. According to the Plaintiff, the

- Defendant motor vehicle was being driven fast and in a zig zag manner.
7. The Plaintiff stated that he tried to flash his lights but the Defendant motor vehicle did not stop. The Plaintiff testified that he then applied brakes and tried to go to one side but the Defendant motor vehicle had come to the Plaintiff's lane causing the two vehicles to collide. The Plaintiff said that his vehicle was hit by the trailer of the Defendant motor vehicle at the cabin causing the cabin to dislodge. The cabin of the Defendant motor vehicle went ahead and fell down after dislodging.
 8. The Plaintiff claims that the accident was caused by the driver of the Defendant motor vehicle who was driving at a high speed, who did not heed the presence of the Plaintiff motor vehicle on the road and who failed to control the Defendants motor vehicle and to apply brakes.
 9. The Plaintiff testified that the point of impact was on his side of the road.
 10. The Plaintiff was taken to Voi Hospital but after 3 weeks he was transferred to Jocham Hospital in Mombasa where he was admitted for 18 days.
 11. The Plaintiff was charged with careless driving contrary to section 49(1) of the Traffic Act in **Makindu Traffic Case No. 237 of 2008** where he was acquitted for lack of proof of the offence.

The Defendants' Case

12. The Defendants called two witnesses; **David Ngure Mwaura (DW1)** who was the driver of the Defendant motor vehicle and **Wilson Kariuki Kiongo (DW2)** who was the turn man at the material time.
13. DW1 told court that on the material day, he was driving the Defendant motor vehicle from Mariakani headed to Nairobi at 50 kilometers per hour. On arrival at Tsavo, DW1 saw the Plaintiff motor vehicle well at an estimated distance of 70 meters while the same was approaching from the Nairobi side. DW1 testified that the Plaintiff motor vehicle swerved to his side of the road and despite DW1 flashing his headlamps, the Plaintiff did not respond. To avoid head-on collision, DW1 stated that he swerved to the right side of the road that was meant for the Plaintiff motor vehicle.
14. The witness stated that the Plaintiff motor vehicle hit the Defendant motor vehicle on the passenger side of the cabin before hitting the space between the cabin and the trailer, at the battery compartment. DW1 told court that as a result of the impact, the Defendant motor vehicle was raised up and it fell behind the Plaintiff motor vehicle. According to DW1, the point of impact was on his lane, that is, the lane towards Nairobi.
15. DW2, the Defendants' turn man, testified that he was in the cabin area of the Defendant motor vehicle when he saw the Plaintiff motor vehicle cross over to the former side of the road. He stated that, that prompted DW1 to swerve to the right side to avoid head-on collision. That when DW1 swerved, the Plaintiff motor vehicle was very close that it hit the battery on the left side of the Defendant motor vehicle.
16. DW2 testified that he was awake and had seen the Plaintiff motor vehicle when the same was very close to the Defendant motor vehicle, approximately 1½ meters away. He testified that he did not see the Plaintiff motor vehicle at 70 meters away like DW1 did because, in his own words, "may be I was looking down" and "[I] was not concentrating on the road." The witness told court that by the time he saw the Plaintiff motor vehicle, DW1 had already swerved to the right. He testified that the Plaintiff motor vehicle hit the battery on the left side of the Defendant motor vehicle.

THE ISSUES

17. In my view, the following are the main issues for the court's determination:

- i. Who was to blame for the accident?
- ii. Are the Defendants vicariously liable for the accident?
- iii. How much damages, if any, is the Plaintiff entitled to?

Who is to blame for the accident?

18. This case is mainly centered on the evidence given in court by the witnesses who were involved in the accident and who are blaming each other for the accident. This of course is with the exception of PW2, the doctor who treated the Plaintiff. It is a case where the court must weigh the evidence of the Plaintiff against the evidence of the two Defence witnesses. In other words, it is a case where one party's word is applied against the other, without the evidence of an independent witness. No police or investigating officer was called to give evidence. The Plaintiff, however, produced the file in **Makindu Traffic Case No. 237 of 2008** where he was charged with careless driving and acquitted, to prove that he was not to blame for the accident.

19. Naturally, it is expected that one driver will blame the other for an accident. In deed, the drivers of the subject motor vehicles have blamed each other for the accident. The question that this court needs to answer is, whose evidence is more credible in the circumstances?

20. It is not in dispute that the accident occurred on 26th July 2005 along Mombasa Nairobi road at Man Eaters near Voi. It is also not in dispute that the accident involved the two subject motor vehicles and that the Plaintiff motor vehicle was ascending the hill while the Defendant motor vehicle was descending. The two drivers blame each other for driving in a zig zag manner; swerving to the other's lane and failing to heed the other's warning through flashed headlamps.

21. The Defendants' driver (DW1) stated that he swerved to the right side of the road, onto the Plaintiff's lane. He said that the reason for doing so was to avoid head-on collision with the Plaintiff motor vehicle which he claims to have encroached on his lane. DW1 did not however give an explanation why he did not swerve to the left side of the road. In my opinion, it would have been easier for DW1 to swerve to the left side than crossing all the way to the right. In any event, if the Plaintiff motor vehicle had encroached on the Defendant motor vehicle's lane (left side) yet DW1 had swerved to the right lane, it naturally follows that the accident would not have taken place because the motor vehicles would have simply exchanged lanes.

22. DW1 said that he had seen the Plaintiff motor vehicle approaching from as far as 70 meters away. That, in my view, was good distance to enable DW1 to either slow down, stop, swerve or control the Defendant motor vehicle in such a manner as to avoid the collision. He did not, however, explain why he did not do so.

23. DW1 testified that the Plaintiff motor vehicle hit the Defendant motor vehicle, first on the left side of the cabin and then on the side of the trailer just behind the cabin where the battery is held. The Plaintiff and DW2 did not however mention that the cabin was hit. According to the two, the Plaintiff motor vehicle hit the Defendant motor vehicle on the left side between the cabin and the trailer at the battery compartment. The two witnesses, who testified for opposing sides, could not have agreed on this if it was not true. This leads to the conclusion that the point of impact was on the side of the Defendant motor vehicle at the battery compartment. It then follows that by the time the two vehicles collided, the cabin of the Defendant motor vehicle was far much to the right of the road, an indication that it is the DW1 who had encroached on the Plaintiff's lane.

24. Who swerved first? DW2 told court that when he raised his head in time to see the Plaintiff motor vehicle start to cross over to the Defendant motor vehicle's lane, DW1 had already swerved to the right. He testified as follows:

“ DW2: I saw the Plaintiff vehicle when it was very close to us. It is from here to the

court clerk (1 ½ meters). I was awake.

PLAINTIFF'S ADVOCATE: How is it the driver saw it at 70 meters?

DW2: May be I was looking down. I was not concentrating on the road. By the time I saw the Plaintiff vehicle, I saw the Plaintiff cabin, our driver had swerved... I saw the Plaintiff vehicle when our driver had swerved. Our driver swerved into the lane of the vehicles coming from Nairobi.

25. This confirms the Plaintiff's testimony, that it is DW1 who swerved to the right side first before the Plaintiff swerved to the left to avoid collision.

26. The Defendants claimed that the Plaintiff motor vehicle was being driven in a zig zag manner. However, DW2 was not able to confirm those allegations. He gave self-contradicting testimony in court:

“PLAINTIFF'S ADVOCATE: How did you see the Plaintiff motor vehicle go zig zag since you did not concentrate on the road?

DW2: It went zig zag then it collided with our vehicle. I did not see the Plaintiff motor vehicle go zig zag. I was informed by the Plaintiff's turn man that the Plaintiff was driving zig zag. I did not see it at all.”

27. The testimony by DW2 is self-contradictory. At one point he stated that he saw the Plaintiff motor vehicle going zig zag before colliding with the Defendant motor vehicle. At another point he stated that he, himself, did not see the Plaintiff motor vehicle going zig zag but was only informed by the Plaintiff's turn man. This testimony defeats the Defendants' allegations that the Plaintiff was driving in a zig zag manner. The Plaintiff's turn man was not called to confirm the statement he is alleged to have uttered to the effect that the Plaintiff was driving in a zig zag manner.

28. It is noteworthy that DW1 testified that the Defendant motor vehicle was raised up and it fell behind the Plaintiff motor vehicle on impact. This could be a pointer to the fact that the Defendant motor vehicle was being driven at high speed in the circumstances. In any event, DW1 admitted that his vehicle was moving at a high speed because it was descending the hill.

29. The Defence witnesses both told the court that they had been informed by the Plaintiff's turn man at the scene of the accident that the Plaintiff was drunk. The Plaintiff's turn man was not called to testify on the allegations. As such this court has no basis to believe that the Plaintiff was drunk as alleged.

30. The Plaintiff in my view was more consistent than the testimonies of the Defence witnesses. The Plaintiff's testimony was, in certain instances, even confirmed by the Defendants' own witness, DW2. In my opinion therefore, it is the Defendants' driver who swerved to the right first after which the Plaintiff tried to swerve to the left to avoid collision but it was too late. The vehicles collided. The Defendants' driver was, in my view, wholly to blame for the accident.

Are the Defendants vicariously liable for the accident?

31. In order to determine whether the Defendants are vicariously liable for the negligence of the driver of the Defendant motor vehicle, this court will address the question of ownership of the said vehicle as well as the question of whether the driver was an employee of the Defendants'.

32. The Plaintiff describes the Defendants at paragraph 3 of his **Further Amended Plaint** dated 5th February 2008 as **“the registered beneficial insured and or actual owner(s) of Motor Vehicle Registration Number KAL 117S/ZB 4668.”**

33.DW1, the driver of the Defendant motor vehicle testified in court as follows:

“I was an employee of Kenya Road Transporters and the vehicle I drove belonged to them. The Defence denying that fact is not true.”

That testimony, coming from the Defence side, is in my view, evidence that DW1 was employed by the 1st Defendant. To that end, the 1st Defendant was either the beneficial owner of the Defendant motor vehicle or had control over the use of the same. It could not have employed DW1 to drive the said vehicle if it did not have beneficial interest in it. The 1st Defendant did not produce any evidence to prove that DW1 was not their authorised driver. Doing so was however unnecessary since DW1 had already admitted that he was employed by the 1st Defendant. The 1st Defendant must therefore be held vicariously liable for the negligence of its duly authorised driver.

34.Both sides agree that the Defendant motor vehicle **KAL 117S** was registered in the name of the 2nd Defendant. But it is pertinent to note that both Defendants pleaded in their respective defences that the Plaintiff negligently caused collision with their vehicle **KAL 117S**. Both Defendants there accept by those defences that, that vehicle belonged to them. No evidence was lead on ownership of the trailer **ZB 4668**. However, since the trailer was being towed by the Defendant motor vehicle at the time of the accident, liability of the trailer should not be determined distinctly and separately from the prime mover itself. Once it is established that the driver of the prime mover was to blame, that in my opinion, is enough to hold the owners of the same liable for the negligence of the driver. It would therefore be superfluous to delve into ownership of the said trailer.

35.The Plaintiff did not lead any evidence to establish the link between the 1st and the 2nd Defendants. However, the Plaintiff produced a copy of Records to show that the Defendant motor vehicle was registered in the name of the 2nd Defendant. In my view, immediately the Plaintiff did that, the evidential burden shifted to the 2nd Defendant to demonstrate that the vehicle did not belong to it, either because it had sold it to the 1st Defendant or for any other valid reason. The 2nd Defendant did not demonstrate how the Defendant motor vehicle, which was legally registered in its name, got into the possession and control of the 1st Defendant and was in fact being driven at the material time by the 1st Defendant's authorized driver. 2nd Defendant certainly did not allege that DW1 was not its authorized driver of the vehicle **KAL 117S**.

36.In my opinion, therefore, both the 1st and the 2nd Defendants are liable for the negligence of the driver of the Defendant motor vehicle. They should be held to be jointly and severally liable for the accident. The Defendants' liability should be at 100%.

How much damages is the Plaintiff entitled to?

37.Having found that the Defendants were jointly and severally liable for the accident, the next question is how much damages the Plaintiff is entitled to?

General Damages for Pain, Suffering and Loss of Amenities

38.PW2. **Dr. Stephen Kanegeni Ndegwa**, the doctor who had treated the Plaintiff at Jocham Hospital testified on the Plaintiff's injuries and produced his Medical Report dated 28/4/2008. According to the doctor, the Plaintiff sustained the following injuries:

- i. Crushed left leg leading to amputation below the knee.
- ii. Fracture of cervical spine C1.
- iii. Fracture of lateral 1/3 of the right clavical.
- iv. Fracture of ribs 2,3,4.
- v. Fracture of the skull with hairline fracture of the zygomatic arch.
- vi. Dislocated right knee with torn lateral collateral ligament

- vii. Dislocation of cervical vertebra C6.
- viii. Multiple deep ugly cut wounds on the face measuring about 30 cm and which have healed with severe scarring.
- ix. Several cut wounds on the back which have healed with severe keloid formation.
- x. Several cut wounds on the left upper arm which have healed with keloid formation.
- xi. 15 cm deep cut wounds on the right leg.

39. According to the doctor, the Plaintiff suffered extreme severe life threatening multiple bone, joint and soft tissue injuries. The doctor opined that the Plaintiff would never resume his usual duties. He stated that the Plaintiff healed with the following complications:

- i. 100% permanent disability due to the loss of the left leg.
- ii. 10% permanent disability due to the weakness and inability to flex the right knee.
- iii. Permanent severe multiple scarring and keloid formation on the back.
- iv. Ugly prominent scarring on the face and scalp.
- v. Inability to enjoy his conjugal rights.

40. The Defendants, in their written submissions dated 4.5.2012, urged the court to find that the percentage of permanent disability of the Plaintiff is less than 50%. Assessment of a person's disability following an injury is a medical question that can only be answered by a medical doctor. The Defendants did not call any doctor to counter the expert opinion of the Plaintiff's doctor on the percentage of his disability. The court, therefore, has to rely entirely on the opinion of Dr. Stephen Kanegeni Ndegwa.

41. The Plaintiff prays for Kshs. 4,000,000.00 as damages for pain, suffering and loss of amenities. The Defendants on the other hand have urged the court to award the Plaintiff Kshs. 1,900,000.00 under this heading. After careful consideration of injuries suffered by the Plaintiff, the parties' submissions and the cases cited by counsel, I am of the view that damages for pain, suffering and loss of amenities should be assessed at **Kshs. 2,500,000.00** (Kenya Shillings two million and five hundred thousand).

Diminished or Loss of Future Earning Capacity

44. Both sides agree that the Plaintiff will not be in a position to revert to his exact pre-accident day-to-day activities. The doctor observed that the Plaintiff will not be in a position to resume his usual duties. The doctor assessed his permanent disability at 100%. That means that the Plaintiff will not be able to work and earn a living as he used to do before the accident.

45. The Defendants propose a multiplier of 19 years while the Plaintiff proposes 25 years. The Plaintiff was aged 31 years at the time of the accident. Considering the retirement age of 60 years, the Plaintiff would have worked for another 29 years before his retirement. The multiplier of 25 years proposed by the Plaintiff is, in my opinion, appropriate. The Plaintiff produced a pay slip indicating that he was earning Kshs. 9,200.00 per month. Damages under this head would therefore be:

$$\text{Kshs. } 9,200 \times 12 \times 25 = \text{Kshs. } 2,760,000.00$$

Loss of Income

46. Both the Plaintiff and the Defendants agree that a multiplier of 32 months is reasonable under this head. The award should thus be arrived at as follows:

$$\text{Kshs. } 9,200 \times 32 = \text{Kshs. } 294,400.00$$

Special Damages

47. The Plaintiff pleaded special damages of Kshs. 183,150.00. The following special damages were proved by way of receipts:

- i. Cost of prosthesis/artificial limb - Tz shs. 700,000.00 (at rate of Tz sh16 to 1 Ksh) = Kshs. 43,750.00
- ii. Transport to Tanzania - Tz sh. 160,000.00 (at rate of Tz sh16 to 1 Ksh) = Kshs. 10,000.00
- iii. Medicals Expenses – Kshs. 123,400.00
- iv. Medical Reports - Kshs. 3,500
- v. Total **Kshs. 180,650.00**

CONCLUSION

48. In conclusion, judgment is hereby entered in favour of the Plaintiff and against the Defendants jointly and severally as follows:

- i. Liability at 100% against the Defendants
- ii. Special damages.....Kshs. 180,650.00
- iii. General damages for pain, suffering and loss of amenities.....Kshs. 2,500,000.00
- iv. Damages for diminished or loss of future earning capacity.....Kshs. 2,760,000.00
- v. Damages for lost income..... Kshs. 294,400.00

TOTAL = KSHS. 5,734,650.00

49. The Plaintiff is awarded the costs of the suit and interest.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE