



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL SUIT NO. 68 OF 2005.

FREDRICK WANJALA MASIBO.....PLAINTIFF.

VERSUS

HENRY KIPKORIR ROTICH

ELDORET EXPRESS CO.....RESPONDENTS.

DAVID NYAKUNDI OMARI

J U D G M E N T.

This is a claim for damages arising out of a road traffic accident which occurred on the 29th December, 2004, along the Kitale/Eldoret road at Maili Saba involving a motor vehicle Reg. No. KLM 923, driven at the time by the plaintiff, **Fredrick Wanjala Masibo**, and a motor vehicle Reg. No. KDZ 399 driven at the time by the first defendant, **Henry Kipkorir Rotich**, as well as a motor vehicle Reg. No. KAM 063 E owned by the second defendant, **Eldoret Express Co. Ltd.**, and driven at the time by the third defendant, David **Nyakundi Omari**.

In the plaint dated 6th May, 2005, the plaintiff averred that he was driving his motor vehicle on the material date along the material road when it was violently hit by the first defendant's motor vehicle as a result of which he suffered serious injuries. He contended that the accident was caused by the negligent manner in which the first defendant drove, managed and/or controlled his vehicle and/or the negligent manner in which the third defendant drove, managed and/or controlled his motor vehicle.

The plaintiff averred that he suffered fracture of the right mandible, dislocation of the right temporomandibular joint, segmented fracture of the left femur, deep cut wounds of the right side of the nasal bridge and upper lip, loss of two lower incisor teeth and one upper incisor tooth, bruises on the back and multiple bruises on the lower and upper limbs as a result of which he suffered loss and damage. The plaintiff therefore filed this suit claiming general and special damages against the defendants jointly and/or severally as well as costs and interest of the suit.

The defendants denied the allegations of negligence made against them by the plaintiff and the allegation that the plaintiff suffered serious injuries due to the alleged accident.

The first defendant averred and contended that the accident was solely caused or materially contributed to by the plaintiff's negligence in the manner of driving his motor vehicle.

The second and third defendants contended that if the accident occurred as alleged by the plaintiff, then it

was wholly caused by and/or substantially contributed to by the negligence of the plaintiff and the first defendant in the manner in which they controlled and/or managed their respective motor vehicles.

All the defendants prayed for the dismissal of the suit with costs.

The plaintiff (**PW1**) stated in his testimony that he was a businessman dealing with hides and skins and on the material date at about 6.00 p.m., he was driving his motor vehicle Reg. No. KLV 923 Toyota Pickup towards Kitale town while in the company of his three sons Peter, Silas and Shadrack when the accident occurred. His vehicle was hit by the first defendant's motor vehicle Reg. No. KDZ 399 Peugeot 504 which was moving towards him from the rear. In front of him was the second and third respondent's motor vehicle Reg. No. KAM 063 E Isuzu Bus moving on the opposite side towards Eldoret. He gave the first defendant indication that there was an oncoming vehicle but the first defendant drove into the rear of his vehicle which was then pushed or pulled into the path of the oncoming bus resulting in a violent collision with the bus. He suffered loss of consciousness after impact and later found himself at the Kitale district hospital where he was admitted for about two (2) months for treatment of injuries suffered by himself. He incurred expenses in the treatment and produced necessary receipts to establish the same. His business suffered loss of income at the rate of Ksh. 100,000/= per month such that it had to be wound up. He could no longer walk without the help of a walking stick and has now become disabled. He blamed the defendants for the accident and said that the bus was at the material time being driven in a zigzag manner.

Christantus Masinde (PW2), a clinical officer at Kitale District hospital confirmed that the plaintiff was on that material 29th December, 2004 treated at the said hospital for multiple injuries on the lower mouth and chin, loss of teeth and dislocation of the mandibular joint among other injuries which were all classified as grievous. He (PW2) prepared and signed the necessary medical report (P3 form).

Dr. Wellington Kiamba (PW3), examined the plaintiff on 14th March, 2006, and compiled a report (P. Exh. 7) indicating that due to the fracture of the left leg, its function was diminished to approximately 40%. He also examined the plaintiff's son **Shadrack Sifuna Masibo (PW4)**, and prepared a separate report (P. Exh. 15) dated 12th May, 2005.

Shadrack (PW4), was in the plaintiff's vehicle at the material time of the accident. He indicated that the accident occurred at about 6.30 p.m. onwards while the vehicle was moving at a slow speed. He suddenly heard a big bang at the rear and immediately lost consciousness. He thereafter found himself in hospital.

He said that prior to the bang, the bus was on the opposite side of the road moving towards Eldoret. He was in the driver's cabin while his two brothers were at the rear-carrier of the vehicle. He suffered serious injuries while his brothers suffered fatal injuries.

Dr. Henry Khisa (PW5), treated the plaintiff while he was admitted at the Kitale District Hospital. He operated on him to correct a fracture of the femur and later prepared the discharge summary.

Abu Jumba Ihanda (PW6), an administrator and records clerk at the Kitale Nursing home indicated that the plaintiff was admitted at the said facility from the 28th March, 2008 to 19th April, 2008 and incurred a medical bill amounting to Ksh. 85,835/=. He produced the necessary record and receipts.

Cleophas Kipsang Songok (PW7), was on the material date of the accident at a bus stage waiting for a public service vehicle to take him to Kitale town. There was a drizzle and it was about 6.50 p.m. when he saw the plaintiff's vehicle heading towards Kitale town and being followed by the first defendant's vehicle. He suddenly heard a bang and realized that the plaintiff's vehicle had been hit by the first defendant's vehicle just a few metres from a nearby junction. The first bang was followed by a second bang caused by the second and third defendant's vehicle also hitting the plaintiff's vehicle which had been pushed to the other side of the road after being hit by the first defendant's vehicle.

He (PW7) indicated that the plaintiff's vehicle had emerged from a side road before entering the main road but blamed the first defendant for the accident.

In his testimony, the first defendant (**DW1**), indicated that he was an employee of the Kenya Defence force (KDF) based at Thika Barracks with a home in Kitale. His occupation was that of a driver and on the material date, he was heading to Kitale from Eldoret driving the motor vehicle Reg. No. KDZ 339 Peugeot 504 station wagon which belonged to him. He arrived at Maili Saba area within Kitale where there was a -T- junction. He was on the main road which was straight. It was a rainy day and a drizzle was in progress at the time. At the junction, the plaintiff's vehicle emerged from the minor murrum road into the main road without first stopping.

He (DW1) was only twenty (20) metres away at the time. He swerved his vehicle to his left to avoid a collision with the plaintiff's vehicle and with the second and third defendants' bus which was approaching from the opposite side. In the process, the plaintiff's vehicle proceeded forward and collided with the bus. His vehicle also slightly collided with the plaintiff's vehicle. He indicated that he was not overtaking the plaintiff's vehicle when the accident occurred and blamed the plaintiff for failing to stop at the junction before joining the main road. He said that the accident was reported to the police resulting with the plaintiff being charged with traffic offences. However, the charges were later dropped and he was instead charged with causing death by dangerous driving. He was found to have no case to answer and was acquitted by the court.

The third defendant (**DW2**), who was the driver of the ill-fated bus at the material time stated that he was ferrying passengers to Nairobi from Kitale. He left Kitale at about 6.00 p.m. and on arrival at the Maili Saba area, he saw ahead of him on the opposite side the first defendant's vehicle approaching from Eldoret along a straight stretch of the road. Also saw the plaintiff's vehicle at a junction. It was entering the main road from a minor road without stopping. He slowed down and moved towards the extreme side of the road. It was raining at the time. The first defendant's vehicle braked as the plaintiff's vehicle was entering the main road but all in vain. The first defendant's vehicle hit the rear of the plaintiff's vehicle pushing it into the path of the bus thereby causing a collision between the bus and the plaintiff's vehicle.

He (DW2) indicated that he was not driving at a high speed nor was he moving in a zigzag manner. He blamed the plaintiff for the accident in that he failed to stop at the junction.

From the pleadings and the evidence in support thereof, it is apparent that the occurrence of the accident and the ownership of the three vehicles involved are factors which were not at all or substantially disputed.

The basic issue for determination is whether the accident was caused by the negligence of the defendants or any one of them and if so, whether the plaintiff would be entitled to damages from both or either of them and to what extent.

On the outset, blame was laid on the first and third defendants by the plaintiff while the first and third defendant laid the same on the plaintiff.

Undoubtedly, the occurrence of the accident was at a straight stretch of the road thereby implying that proper visibility could only be hindered by the drizzle and the onset of darkness.

Indeed, the plaintiff stated that he only saw the bus approaching from the direction of Kitale. He did not see the first defendant's vehicle approaching from the direction of Eldoret even though he was at the junction and indicated that he observed both sides of the road. He conceded that the vehicle on the main road had the right of way but contended that he had already joined the main road from the minor road at the -T- junction and that he had already driven 150 metres away from the junction before the accident occurred. It was the plaintiff's contention that the first defendant was making an attempt to overtake the plaintiff's vehicle when the accident occurred. The plaintiff also contended that the bus was moving in a zigzag manner at the time thereby indicating that the third defendant was not free from any blame with regard to the cause of the accident.

However, it was the first and third defendant's contention that the plaintiff did not stop at the -T- junction to check clearance as he was required to do and instead moved directly into the main road from a minor

road thereby creating the dangerous situation which culminated in the accident.

The first defendant admitted that his vehicle hit the plaintiff's vehicle from the rear but contended that he was not driving at a high speed at the time and that he was doing a speed of 60 KPH as at the time he reached the junction. He stated that the collision between the plaintiff's vehicle and the bus was thirty (30) metres away from the junction prior to the bus reaching the junction. He admitted that his vehicle hit the plaintiff's vehicle before the bus collided with the plaintiff's vehicle. He absolved the bus-driver (third defendant) from blame and said that he (bus driver) attempted to avoid the collision and was not driving in a zigzag manner.

On his part, the third defendant indeed contended that he was not to blame for the accident and this explained why he was never charged with a traffic offence. He also contended that it was the plaintiff who created the dangerous situation by joining the main road at a junction when there was the first defendant's vehicle approaching from Eldoret and his bus approaching from Kitale.

The third defendant stated that the accident occurred ten (10) metres away from the junction and conceded that the plaintiff's vehicle was already on the main road when it was hit by the first defendant's vehicle.

It may be deduced from the facts foregoing that the third defendant did not play a significant role in the causation of the accident and was more or less a victim of the accident whose main players were the plaintiff and the first defendant.

The collision between the bus and the plaintiff's vehicle was prompted by firstly the first defendant's vehicle hitting the plaintiff's vehicle from the rear and pushing it into the path of the bus such that it made it difficult for the third defendant to avoid a collision with the plaintiff's vehicle. There was no evidence suggesting that the third defendant was at the time driving at a high speed and/or in a zigzag manner as alleged by the plaintiff.

It is rather interesting that the plaintiff's son (PW4) who was inside the plaintiff's vehicle at the time of the accident could not really tell how the accident occurred or who really caused it as between the plaintiff and the first defendant.

This was a freak accident which ought not have happened but for the negligence and/or recklessness of the plaintiff and/or the third defendant.

It is apparent that the accident occurred near the -T- junction and not at the junction itself meaning that the plaintiff had just joined the junction before his vehicle was hit from the rear by the first defendant's vehicle. There is great possibility that the plaintiff may have joined the main road without exercising proper look out for the vehicles which were already on the main road. This explains why he failed to take note of the first defendant's vehicle approaching from Eldoret. He ought to have exercised extreme caution knowing that the drizzle and on the on-setting darkness inhibited proper visibility. He was thus responsible for creating the dangerous situation which resulted in his vehicle being hit by the first defendant's vehicle after which it was pushed into the path of the bus approaching from the opposite direction.

Nonetheless, the first defendant was also under a duty to maintain safe distance and exercise extreme caution knowing that the road was slippery due to the drizzle and that the plaintiff's vehicle was approaching the main road from a feeder minor road. He did not keep safe-distance nor did he exercise extreme caution and that is why his vehicle rammed into the rear of the plaintiff's vehicle. The impact was strong enough to push the plaintiff's vehicle into the path of the bus meaning that most likely than not, the first defendant was at the time doing more than 60 KPH and even if he was doing the actual 60 KPH, the speed was rather unreasonable and high for a vehicle approaching a junction in slippery circumstances while there was another vehicle expected to join the major road from a minor road. His aforementioned omission and careless action undoubtedly contributed to the occurrence of the accident despite the dangerous situation created by the plaintiff.

The only independent witness to the accident was Cleophas (DW7). He merely confirmed that the accident occurred near the -T- junction but could not really say who was the responsible for the same although he made an attempt to implicate the first defendant.

Be that as it may, this court's opinion is that the plaintiff was largely to blame for the accident as compared to the first defendant. He conceded that the vehicles on the main road had the right of way yet he joined the material road in a hurry and without proper look out for other road users. His sudden entry into the main road was an act of recklessness and total disregard of the high way code. But for his negligent action, the situation on the road was not dangerous despite the drizzle and on setting darkness.

The first defendant's contribution to the accident was at a lesser degree. He approached the junction at an unreasonable speed and without exercising extreme caution given the slippery condition of the road. He ought to have slowed down upon seeing the plaintiff's vehicle on a feeder road approaching the main road.

So, on the question of liability, this court would apportion liability at 85% (eighty-five per cent) against the plaintiff and 15% (fifteen per cent) against the first defendant.

The second and third defendant did not play a significant role in the causation of the accident and are hereby absolved from blame. The case against them by the plaintiff is dismissed with costs to themselves. They are not under obligation to compensate the plaintiff in damages.

However, the plaintiff would be entitled to damages from the first defendant less his contributory negligence of 85%. He prayed for special damages in the sum of Ksh. 202,893/= for medical expenses, Ksh. 100/= for police abstract and Ksh. 1,000/= for the official search report.

The amount established by necessary documentary evidence was Ksh. 138,600/= (see P. Exhs. 2, 6, 11, 12 and 14). The plaintiff would thus be entitled to Ksh. 138,600/= special damages.

With regard to general damages for pain, suffering and loss of amenities, the medical report by Dr. Wellington Kiamba dated 12th May, 2005, indicated that the plaintiff suffered multiple bruises on the face, dislocation of the left wrist joint, fracture of the left tibia, deep cut wound on the left arm and soft tissues injuries on the chest. He was admitted to the Kitale district Hospital from the date of the accident to the 4th January, 2005. Thereafter, he continued treatment as an outpatient.

The fracture of the left tibia visited with a swell on the left leg, pain in the left ankle joint and chest.

Permanent disability was assessed at 20%.

However, in his report dated 14th March, 2006, (P. Exh. 7), Dr. Kiamba enhanced the injuries suffered by the plaintiff and re-assessed permanent disability at 40%. This turn of events was rather unusual. The injuries increased instead of decreasing. It could not therefore be said that the additional injuries emanated from the material accident. Consequently, it would not be prudent for this court to rely on the initial former report which was conveniently avoided herein by the plaintiff.

It would be on the basis of the initial report dated 12th May, 2005, that this court awards the plaintiff general damages in the sum of Ksh. 600,000/= for pain, suffering and loss of amenities.

With regard to loss of earnings and costs of future operation and medical expenses, the plaintiff did not by way of sufficient evidence make a case for the award of the same.

The loss of earnings was in particular not established by necessary documentary evidence including documents proving existence and operation of the alleged business.

In sum, the plaintiff would only be entitled to damages which have been credibly established by necessary facts and figures.

In that regard, judgment is entered for the plaintiff against the first defendant for the total sum of Ksh. 738,600/= less 85% contributory negligence together with costs and interest.

Case against the second and third defendants as indicated herein above is dismissed with costs.

[Delivered and signed this 31st day of July, 2014.]

J.R. KARANJA.

JUDGE.