REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT 55 OF 2004

CHARLES KOMOSO TOTON……..…….PLAINTIFF

VERSUS

REUBEN CHERUTICH CHEBON…….1ST DEFENDANT

JOB CHEBON T/A WOTE EXECUTIVE……...…….2ND DEFENDANT

JUDGMENT

In a Plaint dated 14th October 2003 but filed on 27th February 2004 Charles Komoso Toton sued Reuben Cherutich Chebon and Job Chebon t/a **"WOTE EXECUTIVE"** for general and special damages, costs of the suit, and interest thereon.

The Plaintiff claimed that on or about 19th May 2002, while the plaintiff was a lawful passenger in motor vehicle registration number KAN 276V, the 1st Defendant so negligently caused and/or permitted the said motor vehicle to be overloaded, an act which he knew was unlawful and endangered and/or threatened the lives of his passengers. As a consequence of the 1st Defendant\'s acts of negligence, the plaintiff was pushed out of the said motor vehicle and fell on the tarmac thereby sustaining very serious injuries for which he holds the 1st Defendant liable in negligence and holds the 2nd Defendant vicariously liable for the negligence of the 1st Defendant.

The Plaintiff sets out the common particulars of negligence, including the driving the motor vehicle without due regard to the safety of his passengers, and that as a result of the negligence of the 1st Defendant, the Plaintiff suffered -

(a) severe head injury with fracture of the base of the skull resulting in loss of sight in the right eye,

(b) fracture of the right humerus head with dislocation of the right shoulder joint,

(c) fracture of the left humerus in the lower one third.

The Plaintiff also claimed special damages -

(a) Medical Report……. Shs. 2,000/=

(b) Police Abstract ……. Shs. 100/=

(c) Medical Expenses……. Shs 76,874/=

(d) Further medical expenses to be particularized at the hearing of the case.

In an undated statement of defence filed on 27th June 2004, the Defendants while admitting the occurrence of the accident, denied that the 2nd Defendant was the registered owner of the motor vehicle KAN 276V and put the plaintiff to strict proof thereof. The Defendants similarly denied the particulars of negligence and put the plaintiff to strict proof thereof.

The Defendants also charged that if the accident occurred, which they denied, the accident was wholly and/or substantially contributed to by the plaintiff by his own acts of negligence, namely -

(a) failing to have due regard to his own safety,

(b) causing himself to hang dangerously on motor vehicle KAN 276V,

(c) hanging carelessly, recklessly and in a haphard manner and exposing himself to a risk,

(d) failing to obey traffic rules,

(e) being generally negligent.

Consequently the Defendants denied that the plaintiff sustained any injuries and/or that he suffered any damages, and put him to strict proof. The Defendant therefore prayed for dismissal of the plaintiff\'s suit.

THE EVIDENCE

(a) Plaintiff\'s Evidence

The Plaintiff himself testified, and called two other witnesses.

The date was 19th May 2002. The plaintiff, a member of the football team of Loruk had travelled with other players and fans to the neighbouring centre of Chemalingot for a football tournament. They had hired a bus registration number KAN 276V which belonged to the 2nd Defendant.

After the game, which Loruk lost, they got back into the bus, players and fans, so that the bus which had a capacity of 40-42 passengers *(according to the evidence DW2)* was overcrowded with some passengers riding on top of the bus.

According to the plaintiff\'s evidence, they had crossed the Nginyang River when the driver stopped to allow some passengers to alight, and that to allow those passengers to alight, he had given way for them to alight as the bus was **"too full".** As the plaintiff got back into the bus, the driver who had stopped the bus and was holding on the clutch released the clutch suddenly causing the vehicle to jerk forward with force, and thus throwing the plaintiff off balance, and causing him to fall on the tarmac and sustained severe injuries referred to above.

After going back to Loruk for medical aid, the Plaintiff was rushed to Kabarnet District Hospital where he was admitted and later referred to Moi Referral and Teaching Hospital Eldoret where he was admitted for 21 days and discharged. The Plaintiff was also referred to Nakuru General Provincial

Hospital for his eyesight, but it was too late. He had already lost sight of his right eye. The Plaintiff was also treated Tenwek Mission Hospital for treatment of his right hand, but his left hand had lost sense of touch.

Dr. Kiamba testified as to the plaintiff\'s injuries and in a Report PExh. 7, his prognosis was that the plaintiff suffered severe head injury during the accident. It resulted in permanent loss of the right eye sight and subsequent deterioration of vision to the right eye, Although the bilateral fractures of the humerus had healed and united, the function of the arms is reduced. The Plaintiff still had a plate on the left arm and has to undergo a second operation for removal of that plate. This would subject him to more pain and suffering. The Doctor classified the plaintiff\'s injuries as **"grievous harm."**

The cost of medical treatment at the various hospitals amounted to Ksh 76,874/=.

DW3 Corporal Hassan Noor testified that the OCS Loruk Police Station declined to issue a Police Abstract because the Report by the Plaintiff was made after one year, and that the subject vehicle had been involved in another accident, and had been written off.

(b) <u>The Defence Evidence</u>

While agreeing with the plaintiff with regard to the hiring of the subject vehicle, the defence evidence differed sharply from that of the plaintiff as to the circumstances of the accident, so much so that Mr. Kipkenei called DW1 *(the Driver),* a liar. According to DW1 there were no excess passangers, and he does not know what caused plaintiff to fall. DW1 was however good enough to take the plaintiff first to Loruk Dispensary and later to Kabarnet District Hospital, and also made a report of the accident to the Police. He denied stopping the vehicle with the use of the clutch, he engaged the first gear, and then heard his passengers scream, and went round to the back of the vehicle and found the plaintiff injured badly, and not talking. He denied speeding. He denied being a conductor on that date, and he had no excess passenger. He had only 40 passengers, the authorized capacity.

DW2, a fellow player, claimed that he saw it all. The bus was climbing slowly after crossing Nginyang River. There were no passengers alighting. The plaintiff alighted and run to the river and had a few laps of water with his hand to quench his thirst and then ran back. As he was trying to climb into the bus, he slipped and fell back. The vehicle was moving slowly. The bus was not overcrowded!

DW3 reiterated the evidence of DW2 that after crossing Nginyang river the plaintiff alighted to go and take a lap of water and upon returning, ***"he tried to climb back into the bus then he slipped and fell, and we screamed - "I saw him fall-off".***

In his view it was the plaintiff who was wrong, as he did not ask the driver to stop as we would all have drunk the water. We were all thirsty. He confirmed that the plaintiff played for Loruk and he had no relation with the Defendants.

In cross-examination by Mr. Kipkenei for the plaintiff DW3 testified -

"The plaintiff was injured very badly, and bled. He alighted and came following the vehicle after lapping water with his palms. I could not anticipate the accident. I could not help him. He was the team Captain, had seen the plaintiff ran across to drink water. It was about 50 metres from the river, and got to the bus after drinking water."

With the evidence of DW3 Mr. Kurgat learned counsel for the Defendants closed the defence, and made submissions that the plaintiff was 100% to blame and his suit should be dismissed with costs.

<u>LIABILITY</u>

From both the plaintiff\'s and the defence evidence, there is no doubt that an accident occurred involving the 2nd Defendant\'s motor vehicle being driven by the 1st Defendant. In that accident the

plaintiff suffered the severe injuries already referred to above. The question is, who caused the accident to occur? The plaintiff\'s counsel contends that it was all due to the Defendant\'s driver who carried passengers in excess of the vehicle\'s loaded capacity. The Defendant\'s counsel on the evidence contended that the accident was solely caused by the negligence of the plaintiff himself. He failed to ask the driver after the vehicle had crossed the Nginyang River and was climbing uphill, to stop and allow him and other players to have a drink of water from the flowing river. Having alighted from the moving vehicle, and ran back to the vehicle after a lap of water with his hands he failed to grip the handles of bus doors as his hands were wet and he fell, thus causing the injuries to himself.

On the other hand the plaintiff contended that the bus had stopped to allow some passengers to alight and that he had to give way as the bus had excess capacity, and that in the process of getting into the bus, the driver started off the bus suddenly so he was jerked and fell.

If this version of the evidence were accepted, then the plaintiff would not have suffered the kind of injuries he sustained. Usually when passengers alight from a bus to let other passengers go, and whether or not the bus is carrying the authorized or excess passengers, those passengers who are continuing on the journey stand by or near the door entrance/exit of the bus. As soon as the last passenger has alighted either the conductor, if there is one, or the driver if there is no conductor, calls out for the door to be shut so that the bus may continue to its next destination or stoppage stage. For that reason, I am inclined to accept the version of the evidence of Dw3 the Captain of the Loruk Team which was returning from a football tournament with friends of Chemolingot.

According to DW3, after the match -

"…. On our way back to Loruk after travelling about 9km after reaching Nginyang as the bus descended, one of our boys alighted to drink water and as he returned to the bus, he slipped and fell. I saw him fall, and we screamed and the driver stopped and went back to Chemolongot but got no assistance and we returned and took him to Kabarnet District Hospital."

This version of how the accident occurred was supported by DW2.

The question is not whether or not the bus was overcrowded or overloaded. The question is not whether the plaintiff had alighted to let other passengers get out. The question is not also whether or not the plaintiff had alighted to go and quench his thirst by the flowing water of Nginyang River. The question is what caused, and how the plaintiff fell and **"got injured", "very badly and bled"** as per the evidence of DW3.

The answer to this question lies in determining the further question whether or not the driver of the motor vehicle, DW1, was driving the motor vehicle in the circumstances of the accident either recklessly and without due care, and attention, or too fast in the circumstances.

The plaintiff\'s version is that the driver had stopped the bus by stepping down the clutch, and that when he entered the bus, whether after letting other passengers alight, or from drinking water, the driver released the clutch, thus causing the bus to move forward suddenly and causing the plaintiff to lose his grip and balance, and then fell off the now moving bus.

DW3\'s version, supported by DW2 is that the plaintiff\'s hands after drinking water from the river, were wet and as he ran to the bus, he lost the grip to the bus entrance handles and fell.

Again whichever reason one looks at or chooses, the result on the causation of the accident is the same. It was the act of the driver (DW1), either releasing the clutch suddenly and taking off at a speed, or as DW1 himself testified he had engaged the first gear, a powerful gear to move the vehicle from the valley of the river on the climb. Consequently without paying attention as to whether there was anybody still outside, the bus, literally sped off, in the circumstances.

This in my humble assessment of the evidence, is the only rational explanation to the plaintiff\'s

very bad injuries and bleeding. Any other explanation to the injuries suffered by the plaintiff -

(i) severe head injury with fracture resulting in the loss of sight in the right eye;

(ii) fracture of the right humeral head with dislocation of the right shoulder joint;

(iii) fracture of the left humerus in the lower one third, would not be rational at all.

However boys will always be boys, they will try to even outsmart moving machines whose velocity they often disregard and believe in their own agility to over-come the velocity of a moving object. Had the plaintiff even stopped or kept running without grabbing handles to the entrance of the bus, he might not have fallen, and if he had, he would not have suffered the serious injuries he suffered. I therefore find him the plaintiff ten per cent (10%) responsible for the accident.

For those reasons I find and hold the 1st Defendant 90% responsible for the accident, and being the driver of 2nd Defendant find the 2nd Defendant vicariously liable.

QUANTUM

The Plaintiff\'s counsel claimed for a sum of Ksh 3,000,000/= in general damages. The Defendant\'s counsel submitted that a sum of shs 200,000/= as general damages, if the court found the Defendant\'s liable.

The rubric is that damages in these cases should not be disparate with those awarded in similar cases. Counsel for the Defendant referred me to several decisions **KIMANI VS. GITHOKA [2004] eKLR** where the court awarded Ksh 200,000/= general damages for loss of incisor tooth, fractures of the left shoulder joint, and bilateral fractures of both accetabuli and Ksh 800,000/= for future medical expenses. I received no assistance from the plaintiff\'s counsel.

This case is unique in its own way. The plaintiff suffered loss of one eye. Although the function of his fractured hands have been restored, but functionality will be permanently reduced. A plate in the left arm has to be replaced. There was no evidence it had been replaced, he will still incur medical expenses. This will certainly subject him to further pain and suffering.

In the circumstances I would award him Shs 1.6 million for pain and suffering. I would award him shs 150,000/= for future medical expenses noting the cost of treatment today is extremely high.

Special damages must be pleaded and proved. The plaintiff pleaded that medical expenses would be particularized on the date of hearing of the case. The plaintiff pleaded and proved the following -

(1)	Medical Report	Sh 2,000.00
(2)	Expert witness	Sh 10,000.00
(3)	Medical expenses	Sh 76,874.00
(4)	Police Abstract (None)	Sh 00.00
	Sub-total	Sh 88,874.00

I award the plaintiff the special damages in the sum of sh. 88,874/=.

In summary, I award the plaintiff the sum of Ksh 1,678,874/= made up as follows -

(1)	General damages	Shs 1,600,000

Less 10%		160,000
Sub-total	Shs	1,460,000

(2) Future medical expenses 150,000

(3) Special damages 88,874

Grand Total Sh 1,678,874/=

I also award the plaintiff interest on the above sum from the date of judgment until payment in full. The plaintiff shall also have costs of this suit.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 29th day of June, 2012

M. J. ANYARA EMUKULE
JUDGE