



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 744 OF 2005

- 1. JOAN OGALLO
- 2. C.A. O (minor suing through her Next Friend, 1st

Plaintiff)

3. L.A.O.....PLAINTIFFS

V E R S U S

- 1. BUSTRACK LIMITED
- 2. JOHN SANGANI.....DEFENDANTS

J U D G M E N T

The cause of action in the present suit arose out of a road accident which occurred on 2nd June, 2004 in Nairobi between **motor vehicle registration number KAL 046 S** driven by the 1st Plaintiff and **motor vehicle registration number KAE 112 W**.

The 1st Plaintiff is the 3rd Plaintiff's wife while the 2nd Plaintiff is their daughter; she was a passenger in motor vehicle KAL 046 S. The motor vehicle was registered in the name of the 3rd Plaintiff.

Damages are claimed by the 1st and 2nd Plaintiffs for personal injuries suffered in the accident and attendant treatment, and by the 3rd Plaintiff for material damage to motor vehicle KAL 046 S. The 1st Plaintiff also claims special damages by way of hiring alternative transport. She was the beneficial owner and user of the motor vehicle.

The Plaintiffs' case as set out in the **further amended plaint dated 7th August, 2008** is as follows: On 2nd June, 2004 at about 5.50 p.m., the 1st Plaintiff (as beneficial owner of motor vehicle KAL 046S) was lawfully driving the motor vehicle in Nairobi with the 2nd Plaintiff as her lawful passenger when motor vehicle KAE 112 W, a bus, hit it from behind. The Plaintiffs attribute the accident wholly to the negligence of the 2nd Defendant as driver of motor vehicle KAE 112W. Particulars of negligence are pleaded. It is further pleaded that the 1st Defendant is vicariously liable for the tort of the 2nd Defendant as the owner of the motor vehicle.

The 1st and 2nd Plaintiffs have further pleaded that they suffered personal injuries in the accident. Particulars thereof are given. General and special damages are claimed. Particulars of special damages in the sum of KShs. 55,000/00 for medical expenses are pleaded.

The 3rd Plaintiff has pleaded that as a result of the accident there was extensive material damage to motor vehicle KAL 046 S, particulars whereof are given. Special damages of KShs. 272,520/00 are claimed in this regard.

Further special damages of KShs. 304, 500/00 are claimed for hiring alternative transport (taxis) from the date of the accident to 10th December, 2004.

It is further pleaded in the alternative and without prejudice that the 1st Defendant agreed to pay special damages of KShs. 225,628/00 in settlement of the claim for material damage to motor vehicle KAL 046 S.

Costs of the suit and interest are also claimed.

The Defendants' defence, as set out in the amended defence dated 18th August, 2008, is as follows: Ownership of motor vehicle KAE 112 W by the 1st Defendant at the material time is denied. The 2nd Defendant denies that he was the 1st Defendant's servant or agent at the material time. Particulars of negligence, damage and injury are also denied.

Without prejudice to the foregoing, the Defendants plead that if an accident as pleaded occurred, the same was solely caused, or substantially contributed to, by the 1st Plaintiff's negligence in the manner of her driving motor vehicle KAL 046 S. Particulars of such negligence are pleaded.

The 1st Defendant has also denied that it agreed to pay KShs. 225,628/00 as claimed or at all in material damage.

Finally, the Defendants deny that any demand notice was given, and the Plaintiffs are put to strict proof thereof. I cannot quite see the issue here as liability was denied and the suit went to trial.

Before hearing commenced, the documents listed in parts 'B' and 'C' of the schedule to the Plaintiffs' list of documents dated 20th November, 2006 were by consent admitted in evidence and marked as **Exhibit P1**, subject to the makers of the documents in items 2, 3, 6 and 8 in part 'C' being called, if necessary, for cross-examination by the defence. Similarly, the Defendants' medical report dated 2nd July, 2007 prepared by Dr. P.M. Wambugu was admitted in evidence and marked as **Exhibit D1**, subject to the calling of the marker thereof for cross-examination by the Plaintiffs if necessary. Other documents were produced in evidence in the course of hearing.

For the Plaintiffs the 1st Plaintiff testified as PW1 and called two witnesses, **Mr. Joab Bodo** (PW2), a consultant orthopaedic surgeon (I understand that surgeons are referred to, not as "Doctor" but as "Mister"), and **John Ouko** (PW3), a panel-beater and the owner of a motor garage in Nairobi where the Plaintiffs' motor vehicle was repaired.

The Defendants did not call any witness.

I have considered the testimonies of the three witnesses. I have also read the written submissions filed on behalf of the parties.

No agreed statement of issues was filed. The Plaintiffs filed a statement of issues on 11th August, 2006. None appears to have been filed by the Defendants.

As I see it, the following are the main issues to be decided in this case:-

1. Was the 1st Defendant at the material time the owner of motor vehicle KAE 112 W?
2. Was the 2nd Defendant the driver of the motor vehicle?
3. Was the 2nd Defendant the servant or agent of the 1st Defendant in due performance of his duties at the material time?
4. Did an accident occur as pleaded between motor vehicle KAL 046 S (driven by the 1st Plaintiff) and motor vehicle KAE 112W (driven by the 2nd Defendant)?
5. Was the accident caused by the sole or contributory negligence of the Plaintiff?
6. Did the 1st Plaintiff suffer any injuries in the accident and if so, what is the extent thereof?
7. Did the 2nd Plaintiff suffer any injuries in the accident, and if so, what is the extent of those injuries?
8. Was there any material damage to the motor vehicle KAL 046 S?
9. What damages, if any, are due to the 1st Plaintiff?
10. What damages, if any, are due to the 2nd Plaintiff?
11. What damages, if any, are due to the 3rd Plaintiff in respect to material damage to motor vehicle KAL 046S?
12. Is the 1st Plaintiff entitled to any special damages for hiring alternative transport, and if so, what is the quantum thereof?
13. Who should bear the costs of the suit?

In the Defendants' written submissions some technical objections to the suit are raised. There are:-

1. That the further amended plaint does not comply with the provisions of **Order VII, rule 2** of the old **Civil Procedure Rules** (the **Rules**) in that a verifying affidavit was not filed with it.
2. That no consent of next friend in respect to the 2nd Plaintiff (a minor) was filed as required by **Order XXXI, rule 1(2)** of the Rules.

3. That if the 2nd Plaintiff is now an adult she has not complied with **Order XXXI, rule 12** of the Rules in that she has not elected whether or not to proceed with the suit.

Regarding the first objection, an amended pleading refers back to the original pleading. As the original plaint was duly verified by affidavit, I see no necessity for the further amended plaint to be verified by another affidavit. In any case, no prejudice can possibly have been occasioned to the Defendants by the omission.

As to the consent of the next friend, the same, dated 15th June, 2005, was filed together with the plaint. It is in the court record bearing the court date-stamp of 16th June, 2005.

Regarding the third objection, no proper evidence is before the court that the 2nd Plaintiff has since attained the age of majority. I will therefore proceed upon the basis that she is still a minor, duly represented by her next friend.

I will now examine the issues.

Issues Nos. 1, 2, 3 and 4

In the written submissions filed on behalf of the Defendants, no issue is raised at all regarding the 1st Defendant being the owner of the motor vehicle KAE 112 W at the material time, or the 2nd Defendant being the driver of the motor vehicle, or him being the servant or agent of the 1st Defendant in due execution of his duties, or that an accident occurred between the motor vehicle and motor vehicle KAL 046 S driven by the 1st Plaintiff.

In any event, there is sufficient evidence before the court to establish those four facts on a balance of probabilities, in the form of documents contained in Exhibit P1. Those documents are a copy of the records of motor vehicle KAE 112 W (document C 16), a letter dated 6th August, 2004 (document B 16) and police abstract on the accident (document C 1).

I am thus satisfied to the required standard indeed an accident occurred between motor vehicles KAL 046 S and KAE 112 W on 2nd June, 2004 along Argwings-Kodhek Road, Nairobi; that motor vehicle KAE 112 W was then owned by the 1st Defendant; and that it was being driven by the 2nd Defendant in the course of his duties as the servant or agent of the 1st Defendant.

Issues Nos. 5 and 6:

Who caused the accident?

The only evidence before the court regarding the happening of the accident is that of the 1st Plaintiff (PW1). She was the driver of motor vehicle KAL 046 S. The other driver involved (the 2nd Defendant, who was driving motor vehicle KAE 112) did not testify.

The 1st Plaintiff's testimony was that as she was driving along she noticed that the motor vehicle ahead of her had indicated that it was going to turn right. She then slowed down and stopped behind it. Looking into her rear-view mirror she noticed a bus coming up behind. It was travelling fast. It hit her car from behind, throwing it into the ditch on the left. The bus also hit the other motor vehicle that was turning to the right. That bus was motor vehicle KAE 112 W. That testimony of the 1st Plaintiff has not been challenged.

There is no evidence that the brake-lights of the 1st Plaintiff's car were not working. Brake-lights would normally be sufficient warning to following vehicles that the vehicle in front was slowing down or coming to a stop.

Quite clearly motor vehicle KAE 112 W was being driven without due care and attention, and possibly too fast. That is why its driver, the 2nd Defendant, did not notice in good time that the motor vehicle in front was slowing down and coming to a stop behind another motor vehicle that was turning right.

I am satisfied from the evidence before the court that the accident was caused solely by the negligence of the 2nd Defendant. The 1st Plaintiff was not negligent in any way, and did not contribute to the occurrence of the accident.

Issues Nos. 6 and 7

What injuries, if any, did the 1st and 2nd Plaintiffs suffer?

PW2 (Dr. Bodo) examined both the 1st and 2nd Plaintiffs a day after the accident. He prepared and signed a medical report in respect to each of them. Those medical reports are part of Exhibit P1.

Regarding the 1st Plaintiff, the medical report concerning her, as well as PW2's oral testimony, verified her injuries received in the accident. These were a **whip-lash injury** to the neck and a **disc protrusion** in the lower back spine.

Mercifully, X-rays did not disclose any fracture. But the injuries were serious, requiring particularly physiotherapeutic treatment for an extended period of time, and also clinical treatment by way of pain medication.

The 1st Plaintiff appears to have healed well, though there is a risk of osteoarthritis, and the injuries will need monitoring for a long time. But there is no sufficient evidence before the court that any future further treatment will be necessary.

As for the 2nd Plaintiff, she suffered only a soft-tissue injury in the neck. She fully recovered.

Issue No. 8

Was there any material damage to motor vehicle KAL 046 S?

I am satisfied from the evidence before the court that indeed the motor vehicle suffered significant damage to the rear thereof (from the impact of the bus) and to the front (from being thrown into the ditch to the side of the road). There is the assessment report dated 29th July, 2004 (to be found in Exhibit P1). There is also the assessment dated 15th June, 2004 (Exhibit P4) prepared by PW3. Both indicate more or less the same damage.

There is also evidence that the 3rd Plaintiff and the 1st Defendant had negotiated settlement of this material damage at KShs. 225,628/00, and a discharge voucher prepared and signed. The Defendants cannot now object to the documents proving this settlement. They consented to their being admitted in evidence.

Issues Nos. 9 and 12:

What damages are due to the 1st Plaintiff?

I have already viewed the 1st Plaintiff's injuries and the treatment she received. I have also noted the prognosis by PW2. I have looked at the cases cited in the written submissions. The Plaintiffs' learned counsel suggests KShs. 500,000/00 for pain and suffering. On the other hand the Defendants' learned counsel suggests KShs. 250,000/00.

Doing the best I can, I will award the 1st Plaintiff KShs. 350,000/00 for pain and suffering.

The 1st Plaintiff is also entitled to special damages for medical treatment. PW2 charged and was paid only KShs. 25,000/00. I will award this sum.

What about the cost of hiring alternative transport? This claim was not proved to the required standard. It was not established why public transport could not have been adequate. The receipts produced in proof of payment therefor do not pass the test of veracity. The dates are mostly wrong, and the receipts appear to have been procured by the 3rd Plaintiff for purposes of this suit.

Issue No. 10:

What damages are due to the 2nd Plaintiff?

As for the 2nd Plaintiff, the testimony of the 1st Plaintiff, her next friend, and her medical report prepared by PW2, establish that she suffered some soft tissue injury to her neck. She recovered fully. I will award her damages of KShs. 50,000/00 for pain and suffering.

Issue No. 11:

What damages, if any, are due to the 3rd Plaintiff?

I have already held that the 3rd Plaintiff's motor vehicle suffered significant material damage. It was eventually repaired after about a year. PW3 was paid the sum of KShs. 258,750/00 for those repairs. This sum was strictly proved by receipts. I will award the same.

I will allow the further sum of KShs. 5,000/00 (towing charges), fees for AAA Assessment Report (KShs. 4,200/00), copy of records (KShs. 500/00) and police abstract (KShs. 100/00). All these sums have been proved strictly by way of receipts.

There will thus be judgment against the Defendants jointly and severally as follows:-

(a) For 1st Plaintiff

General damages: KShs. 350,000/00

Special damages: KShs. 25,000/00

(b) For 2nd Plaintiff

General damages: KShs. 50,000/00

(c) **For 3rd Plaintiff**

Special damages: KShs. 268, 550/00

There will be interested at court rates on the general damages from the date of judgment until payment in full, and on the special damages from the date of filing suit.

The Plaintiffs shall also have costs of the suit and interest thereon at court rates from the date of filing suit.

Those shall be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 26TH DAY OF AUGUST 2011.

H.P.G. WAWERU
JUDGE