REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.12 OF 2000
JOASH NYABICHA ……..……..…….. PLAINTIFF
-VERSUS-
KENYA DEVELOPMENT AUTHORITY ….....……. 1ST DEFENDANT
ATTORNEY GENERAL……..…….. 2ND DEFENDANT
KIPKEBE TEA FACTORY …….…..……..3RD DEFENDANT

JUDGMENT

By a plaint dated 10th February, 2000, **Joash B.M Nyabicha, "the plaintiff"** sued **Kenya Tea Development Authority**, The **Attorney General** and **Kipkebe limited**, ***"the 1st, 2nd and 3rd defendants"*** respectively praying for Kshs. 494,322/50 special damages, General damages for pain and suffering, Aggravated damages, Terminal benefits and or damages for breach of contract, costs and interest against them jointly and severally.

Apparently, the suit was informed by the fact that the plaintiff had been an employee of the 3rd defendant since 26th July, 1993 as Assistant Manager. On or about 10th February, 1998 at about 5.00p.m., he was riding motorcycle registration number KAD 798Z owned by his employer aforesaid whilst on duty along Kipkebe-Mosobeti road when the driver of motor vehicle registration number KAA 823P an Isuzu lorry allegedly owned by the 1st defendant so negligently drove, managed and or controlled the said lorry that he caused or permitted the same to violently collide with his said motor cycle which was stationary thus injuring him. As required the plaintiff thereafter set out the particulars of negligence he attributed to the driver of the 1st defendant.

As a result of the said collision, the plaintiff was injured. The injuries sustained were closed fracture of the right tibia and fibula. He underwent treatment for the same between 11th February, 1998 and 22nd May, 1999 at Aga khan hospital that involved several operations. As at the time this suit was being heard, a further operation was required. In the process the plaintiff had incurred special damages in the total sum of Kshs. 446,472/50 being treatment expenses, transport, subsistence, medical report, value of his damaged clothes and police abstract.

On or about 1st January, 1999 whilst at his home the plaintiff was arrested allegedly on the instigation of the 3rd defendant and taken into custody and later charged with the traffic offence of riding a defective motorcycle arising out of the said accident before the Chief Magistrate's Court at Kisii in traffic case no. 188/1999. He was duly prosecuted until 28th July, 1999 when the said prosecution was determined in his favour by an acquittal. To the plaintiff, the prosecution aforesaid was malicious and without reasonable or probable cause. As a result he was greatly injured in his credit, character, reputation and suffered severe mental anguish and pain. He thereby suffered loss and damage. He incurred a total sum of Kshs. 47, 850/= in defending himself of the charge which sum he also claimed from the defendants. Finally, the plaintiff pleaded that on or about 19th October 1999, the 3rd defendant in breach of its contract of employment and without giving him notice or payment of 3 months salary in lieu of notice terminated his services and had not paid him his salary from the month of March 1998.

On being served with the suit papers, the 1st defendant was first to react. Through **Messrs Behan & Okero Advocates**, it filed an appearance and followed it up with a defence. In its defence, the 1st defendant denied all the allegations of the plaintiff touching on it. Though it admitted the occurrence of the accident, it nonetheless denied that the accident was caused by the negligence of its driver, servant and or agent. If anything the accident had been caused by reckless riding of the motorcycle by the

plaintiff. It proceeded to give particulars of negligence that it attributed to the plaintiff. In the circumstances it denied that the plaintiff suffered any injuries or sustained any loss or damage. With regard to the traffic charge preferred against the plaintiff, it was its position that the charges were preferred as a culmination of lawful investigations carried out by the police and following an inspection carried out on the motorcycle.

On 4th May, 2000 through **Messrs Timami & Co. Advocates**, the 3rd defendant also entered appearance and filed its defence. It also denied all the plaintiff's allegations in the suit touching on it. It admitted that though the plaintiff was its employee it denied however knowledge of the accident. It denied further that its servants, employees and or agents procured the arrest of the plaintiff nor did it breach its terms of employment with the plaintiff. The plaintiff's services ceased on 18th October, 1999 when his position of field assistant manager became redundant and he was paid all his terminal dues and benefits.

It would appear that the 2nd defendant entered appearance but failed to file a defence. Upon application by the plaintiff interluctory judgment was on 14th August, 2001 entered by the Deputy Registrar of this court against the 2nd defendant.

The plaintiff did not file a reply to the 1st defendant defence. The significance of this omission will become apparent later in this judgment. The hearing of the suit commenced before **Wambilianga J**. as he then was. The testimony of the plaintiff was along the same lines as he had pleaded in his plaint already reproduced elsewhere in this judgment. Suffice to add that **Sasini** was the parent company of the 3rd defendant. On the day of the accident the plaintiff was riding to Mosobeti Market to buy vegetables. He had a pillion passenger by the name of **Charles Momanyi Ogutu**. It had drizzled. He saw the lights of an oncoming vehicle. He pulled over and stopped on the road side with one foot on the ground whereas the other was on the brakes of the motor cycle. That vehicle came and hit him and he fell down. It stopped and took him to Kaplong mission Hospital where he was admitted for a day and later transferred to Aga khan hospital Kisumu. He was operated upon but could not heal. Later he was referred to Aga khan Hospital Nairobi where he underwent yet another operation. He incurred expenses to the tune of Kshs. 567,637/50. Later he saw **Dr. Owuor** who prepared a medical report. He reported back to work but shortly thereafter was served with a letter of termination of his services. However was not paid all his dues. He could not tell though, what he was entitled to. He had however been paid a salary of 3 months in lieu of notice. On 1st January, 1999, he was arrested for riding a defective motorcycle. He was subsequently charged and prosecuted. However he was discharged under section 202 of Criminal Procedure Code. He tendered in evidence the traffic case proceedings, the police abstract, the P3 form, various receipts and the medical report for which he had paid Kshs. 2,500/=.

The case was thereafter stood over to 9th October 2003 for further hearing. However this was not to be until 17th February 2005 when the case came for hearing before **Bauni J.** Apparently, **Bauni J.** now deceased had taken over the reigns at this station. On that day a consent order was recorded the effect of which was to have the suit as against the 3rd defendant withdrawn and the medical reports by **Dr. H. P Owuor** dated 16th September 1999 and **Dr. D. A Rahim** dated 1st October 2003 admitted in evidence without calling the makers. Thereafter, parties entered into negotiations with a view to recording a consent on liability. However the case and the negotiations went cold until 7th July 2005 when the hearing was meant to resume before **Bauni J.** This time the advocate for the defendant was absent. However the plaintiff gave further testimony in support of his claim. At the end, he closed his case and written submissions were ordered to be filed by 27th July 2005. Come that day and a consent order was recorded in terms that the proceedings and orders made on 7th July 2005 be vacated upon payment of thrown away costs in the sum of Kshs. 8,000/=.

Thereafter the trail of the case again grew cold. It was not until 17th March, 2009 that it was resurrected by **Musinga J**. who also had taken over the running of the station from **Jeanne Gacheche J**. The learned Judge with the concurrence of the advocates directed that the proceedings be typed and the hearing of the case continue from where it had reached last. It was on that basis that the hearing resumed before me on 23rd March, 2010. It resumed with the cross-examination of the plaintiff.

The plaintiff stated in cross-examination that, he no longer worked for the plaintiff. He had investigated and found that the offending motor vehicle belonged to the 1st defendant. He confirmed however that according to the police abstract, the motor vehicle belonged to Nyansiongo Tea Factory. His pillion passenger was not injured in the accident as he had already alighted from the motor cycle. He conceded as

well that as a result of the accident he had been charged with the traffic offence but was acquitted because the prosecution failed to avail witnesses. He conceded also that Kshs. 78,636/= hospital fees was paid by **Minet Ltd**. There was also payment of Kshs. 167,998.50/= which too was effected by **Sasini Coffee and Tea Ltd**. On the overall, the plaintiff conceded that all if not, most of the items claimed as specials were paid by his employer or the insurance company and not himself personally.

Cross-examined by **Mr Eredi,** learned state counsel, the plaintiff stated that he had sued the attorney General because he caused his arrest and subsequent prosecution in the traffic offence. He was held at Keroka Police Station for 8 hours and not given police bond though he never asked for it. He had nothing to show that he had been detained in police custody. He had also not issued the Attorney General with the statutory notice before filing the instant suit.

The plaintiff then called his pillion passenger as a witness. He testified that he had been offered a lift by the plaintiff. As they were riding along, they saw a vehicle belonging to the 1st defendant ferrying tea leaves ahead of them. It was being driven in a zigzag manner. The plaintiff pulled over and he alighted. Immediately thereafter the motor vehicle hit the plaintiff and he fell down. The driver of the lorry stopped and together with other people in the lorry came over, carried the plaintiff into the lorry and took him to Kaplong Mission Hospital.

Cross-examined by **Mr. Onchoro**, learned counsel for the 1st defendant, the witness stated that they had seen the lorry about 50 metres away. He knew the motor vehicle belonged to the 1st defendant because it was ferrying tea leaves.

With that the plaintiff closed his case. Subsequent thereto, **Mr. Onchoro** indicated to court that he did not intend to call any witnesses in defence. He therefore closed his case. Parties then agreed to file and exchange written submissions. This was subsequently done by only the plaintiff and 1st defendant. For reasons which are unclear the 2nd defendant failed to do so. I have since read and considered them albeit carefully together with cited authorities.

The issues for determination of this case are in my view twofold; liability and quantum. Dealing with the 1st issue, its common ground that the case against the 3rd defendant was by consent withdrawn. This means that the plaintiff's claim for terminal benefits and all damages for breach of contract of employment against the 3rd defendant is not up for determination. Its also common ground that interluctory judgment was entered against the 2nd defendant. So that the plaintiff is merely left with assessment of damages with regard to the claim for false imprisonment and malicious prosecution against the 2nd defendant.

As I stated elsewhere in this judgment, the plaintiff upon being served with the defence, failed to file a reply. In the defence, the 1st defendant denied negligence attributed to him by the plaintiff. Instead it heaped the entire blame for the accident on the plaintiff for his wreckless and negligent manner he rode the motorcycle. It went ahead to give particulars of negligence of the plaintiff. These averments were not traversed as required or at all nor was their a joinder of issues. In the case **of Mount Elgon Hardware V United Millers, Kisumu C.A No. 19 of 1998 (UR),** the court of appeal held that if a party failed to traverse matters of fact pleaded as required by order VI rule 9 (1) of the **Civil Procedure rules,** that party is deemed to have admitted the same. Order VI rule 9 (1) aforesaid is in this terms:- ***"… Subject to subrule (4), any allegation of facts made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial.."***

In this case the plaintiff failed to file a reply to the defence nor traverse the same in particular with regard to the 1st defendant's allegation that the plaintiff was wholly to blame for the accident due to his negligence. Accordingly he is deemed to have admitted that he was negligent in the manner he went about riding the motor cycle. Hence he was the sole author of his misfortune. He cannot therefore blame the 1st defendant for his misfortune.

Further, the plaintiff had pleaded in paragraph 5 of the plaint that he was hit by "***the driver of the Isuzu lorry Registration No. KAA 823P owned by the 1st defendant".*** He was therefore required to prove that indeed the said motor vehicle belonged to the 1st defendant. Did he however discharge this burden? I do not think so. In a bid to prove his case against the 1st defendant on this score, the plaintiff tendered in evidence a police abstract and nothing more. However a perusal of the said police abstract shows that the name and address of the owner of the subject motor vehicle is Nyansiongo Tea Factory, P.O Box 261 Nyansiongo. It was not suggested in evidence that Nyansiongo tea factory had any connection with the 1st

defendant. The police abstract had been applied for and obtained by the plaintiff. It is therefore correct to assume that most of the information therein was provided by the plaintiff. In alternative it also correct to assume that most of the information must have been gleaned from the records of the said motor vehicles by the police. One could therefore have hoped that with this information the plaintiff could have sued the owner of the motor vehicle as disclosed in the police abstract and if he was in doubt nothing stopped him from suing both. Much as he claimed under cross-examination that he investigated and established that the motor vehicle belonged to the 1st defendant he had no other evidence to back up that claim. Further, I doubt very much the correctness of such assertion in view of the contents of the police abstracts. The said police abstract was tendered in evidence way back in 2005 by the plaintiff. The plaintiff had opportunity and ample time to amend the plaint accordingly but did not. The plaintiff had time to look up the records kept by the motor vehicle registry to confirm the real owner of the motor vehicle and take appropriate remedial action but he did not. Still under cross-examination, he conceded that from the police abstract he tendered in evidence, it was apparent that the motor vehicle belonged to Nyansiongo Tea Factory and not the 1st defendant. Yet again he took no remedial measures. According to the plaintiff and his witness, he associated the motor vehicle with the 1st defendant merely because it was ferrying tea leaves. Is possible too that the plaintiff may also have made that assumption in suing the 1st defendant in this suit? That assumption cannot be wholly eliminated.

I have looked at paragraph 4 of the 1st defendant's defence. It does admit ownership of the motor vehicle. I am aware that a party is bound by his pleadings. However there is also a corresponding obligation that who allege or assert should prove. Clearly in this case, it is the plaintiff who alleged. It is up to him to prove. The plaintiff departed from his pleadings as to the ownership of the motor vehicle when he tendered in evidence the police abstract. The police abstract is a public document. Its contents cannot be varied, contradicted added to or subtracted from by oral evidence. It therefore matters not that the 1st defendant may have admitted ownership of the motor vehicle. It could be an error. It was up to the plaintiff to prove his case against the 1st defendant and in particular with regard to the ownership of the motor vehicle. However he only managed to prove that after all the motor vehicle belonged to a different entity other than the 1st defendant. The 1st defendant had no obligation to prove ownership of the motor vehicle or assist the plaintiff in his effort to build up his case. To hold otherwise, one may end up condemning the 1st defendant when in actual fact was not the registered owner of the subject motor vehicle.

It is also instructive that following the accident, the plaintiff was subsequently arrested and charged with the traffic offence of **"Driving (sic) a defective vehicle (sic)"** in Kisii Chief Magistrate Court Traffic case number 188 of 1999 according to the police abstract tendered in evidence. However the plaintiff was acquitted of the charge. The acquittal according to the proceedings tendered in evidence was under section 203 of the Criminal Procedure Code. The reason for the acquittal was because the prosecution had failed to avail witnesses. The submission on this issue and which I agree with is that the action of the police in preferring the traffic charge against the plaintiff and not the 1st defendant can only be construed, on a balance of probabilities, to mean that the plaintiff contributed to the accident in one way or another.

In conclusion on this issue of liability, Much as the 1st defendant did not adduce any evidence in support of its defence, it was still the duty of the plaintiff to prove the 1stdefendant's liability. He did not, first by not filing a reply and traverse to the defence. Of course I am aware that this issue was not canvassed by the parties in their submissions. However it is a matter of law which this court cannot close its eyes too. Secondly he failed to prove that the motor vehicle belonged to the 1st defendant. Finally there was the issue of him having been charged with a traffic offence arising from the said accident though acquitted. Taking all the foregoing into account, I am satisfied that the plaintiff has not proved on a balance of probabilities that the 1st defendant was liable to him for the accident.

Was the 1st defendant otherwise liable to the plaintiff for instigating his arrest, subsequent confinement and prosecution of the traffic case against him. The answer to my mind is in the negative. No doubt an accident involving the plaintiff with his motor cycle and a vehicle purportedly belonging to the 1st defendant occurred. It was bound to be reported to the police and investigated. There is no evidence that in reporting the accident if at all the 1st defendant was actuated by malice and or extraneous considerations. In any event having made a finding that the plaintiff did not prove that motor vehicle belonged to the 1st defendant, consideration of this issue any further is of no consequence.

Having found the 1st defendant not liable to the plaintiffs, I would dismiss this suit as against it. How about the liability of the 2nd defendant on account of malicious arrest and prosecution. Much as there was interlocutory judgment, it was still up to the plaintiff to prove the case that his prosecution by the police was activated by malice. No such evidence was tendered. In any event under cross-examination the plaintiff admitted to having filed the suit against the 2nd defendant without first issuing and serving the mandatory statutory notice pursuant to the Government proceeding Act. That omission was fatal to the case. The suit was thereby rendered incompetent and bad in law. On that basis I would dismiss the suit as against the 2nd defendant as well.

In a claim for damages it is a legal requirement that where such claim is dismissed, the court should ordinarily assess damages it would otherwise have awarded had it found in favour of the plaintiff, I will now proceed to do so.

No doubt the plaintiff sustained serious injuries. The medical reports by **Dr. H.P.Owuor** dated 6th September, 1999 and **Dr. D.O. Raburu** dated 1st October, 2003 concur that the plaintiff sustained serious injuries and underwent extensive and complicated treatment involving major surgical procedures. He had sustained compound fracture of the right proximal tibia and fibula. According to **Dr. Raburu**, ***"though the treatment started appropriately it is unfortunate that the healing process could not be achieved in time. Therefore the patient had to undergo repeated surgical procedures. The delay of healing has contributed to marked complications resulting in muscle wasting join, stiffness and general poor health. Further with good physiotherapy at the right moments most of the complications could have been tremendously lessened. However presently the person is reasonably compromised functionally. Therefore his inability to walk without crutches….."*** In his submissions, the plaintiff asked for kshs.1,350,000/= as general damages for pain, suffering and loss of ammenities. He supported that proposal with various authorities which I have carefully read and considered. However the injuries in those cases were severe. On the other hand, the 1st defendant proposed 450,000/=. In support thereof, the 1st defendant relied on an authority decided on 27th August, 1998, almost 12 years ago although the injuries sustained therein were comparable to those of the plaintiff's . Doing the best in the circumstances and taking into account the incidence of inflation, I think a sum of Kshs. 1,000,000/= as general damages for pain, suffering and loss of amenities would have sufficed. Though the plaintiff has claimed loss of future earning in his submissions, it was not pleaded in the plaint nor was evidence led in support thereof. I would in the premises discount the same.

As for malicious prosecution, the plaintiff suggested Kshs. 1,100,000/=. Neither the 1st and 2nd defendant offered submission on this head of damages. In view of the authorities cited and the escalation of inflation since the awards were made, I think a sum of Kshs. 150,000/= under this head would have been appropriate.

With regard to special damages pleaded, none of them were specifically proved. I would however take judicial Notice that a police abstract is normally issued on payment of Khs.100/=. Despite non-production of a receipt in proof I would have allowed it. Otherwise all other items under special damages were not specifically proved. For instance with regard to the 1st medical report, much as the plaintiff claimed to have paid Kshs. 3000 /= for the same, what he tendered in evidence was an invoice for Kshs. 2,500/= addressed to G.S. Okoth. He claimed Kshs. 20,000/= for transport and subsistence during treatment. Yet no aota of evidence documentary or otherwise was tendered in that regard. How about Kshs. 700/= for damaged clothes. Again no evidence credible or otherwise was tendered. As for treatment expenses totaling Kshs. 567,637/50 it became apparent under cross-examination that only a sum of Kshs. 446,472/50 had infact been spent and paid. However none of those payments came directly from the pocket of the plaintiff. Indeed all those expenses were met by either his employer or it's insurers. Small wonder that in his evidence under cross-examination he stated "***In fact all the itemized items were paid for by the insurance. I did not pay the same personally"***. The same goes for legal fees of Kshs. 37,500/= travelling and subsistence expenses of Kshs. 2,850/= and advocates travelling and subsistence expenses of Kshs. 7,500/= that he incurred in defending the traffic charge. In the upshot save for Kshs. 100/= for the police abstract which I would have allowed, I would otherwise have dismissed the reminder of the special damages claimed.

The entire suit is however for dismissal with costs to the 1st defendant.

Judgment dated, signed and **delivered** at Kisii this 16th July 2010.

ASIKE-MAKHANDIA

JUDGE