



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 760 of 1993

FRANCIS MUSAU MBITHI PLAINTIFF

V E R S U S

1. SALIM RICHA SAID

2. OMAR DZIWA

3. WACHIRA

4. STEPHEN KIMANI NJOROGE

5. CHARLES KHAMASI

6. MAIN BUILDING CONTRACTORS DEFENDANTS

J U D G M E N T

The plaintiff was a self employed person, carrying on the business of buying and selling second hand clothes. He was involved in a road traffic accident while travelling as a fare paying passenger in a matatu. As a result of the injuries which he sustained, he filed this suit praying for judgment against the defendants, jointly and severally, for_

(a) Kshs. 6,385/- being special damages.

(b) General damages.

(c) Costs of and incidental to the suit.

(d) Interest at court rates from the date

of the filing of the suit until payment in full.

According to the plaintiff's evidence, the facts of the case were that on 11th January, 1993, the plaintiff was travelling from Diani to Mombasa in a matatu Reg. No. KAB 676X driven by the 1st defendant and owned by the 2nd defendants. Coming from the opposite direction was a Kenya Bus which was followed by another matatu Reg No. KZM 075, driven by the 3rd defendant and owned by the 4th defendant. Ahead of the matatu in which the plaintiff was travelling was a lorry which that matatu overtook. The

matatu behind the Kenya Bus started overtaking. Behind it were other motor vehicles which were so close that the matatu overtaking the Kenya Bus could not return to its lane. It therefore swerved to its right to avoid a head on collision with the matatu in which the plaintiff was travelling. But the two vehicles collided, and the matatu which was overtaking the Kenya Bus was hit on the left hand side of its body. The lorry which had just been overtaken by the matatu in which the plaintiff was a passenger caught up with them and also hit the matatu from behind. In all, three vehicles were involved in the accident. The plaintiff, who was seated at the front with the driver, was thrown out of the vehicle and hit the other vehicle with his left shoulder and mouth. He then lost consciousness.

The plaintiff prayed for judgment against all the defendants jointly and severally. Interlocutory judgment was entered against the 1st, 2nd and 6th defendants on 20th September, 1995, for failure to enter appearance. The 1st defendant was the driver of the matatu Reg. No. KAB 676X while the 2nd defendant was the owner thereof. The 6th defendant was the owner of the lorry which hit matatu Reg. No. KAB 676X from behind. On the basis of those facts, it is evident that the plaintiff was the innocent victim of careless and/or reckless driving by all the drivers of the three vehicles involved. In his evidence in court, he blamed the driver of the matatu in which he was travelling, stating that he was driving at a high speed of between 80 and 100 kph. He was categorical that if it was moving at a slower speed, "*he would have stopped without any problem.*" The court agrees with him entirely on that assessment. This court also finds that the driver of the other matatu, which was found to be Reg No. KZM 075, was also guilty of careless driving in that he started overtaking the bus when it was not reasonably safe to do so in view of the oncoming traffic. The 5th defendant, who was the driver of the lorry Reg No. KZA 248 owned by the 6th defendant was equally to blame for hitting the matatu in which the plaintiff was travelling. His doing so is evidence enough that he was driving too fast in the circumstances, otherwise he should have been able to stop in time before hitting that matatu which was in front of him. Since none of the defendants offered any evidence to counter the plaintiff's testimony, this court finds that the plaintiff has proved his case against all the six defendants and that he is entitled to judgment against all of them as prayed.

According to the medical report compiled by Dr. Hemant Patel on 25th August, 1993, and produced as the plaintiff's exhibit 3, the plaintiff was admitted to the ICU of the Coast Provincial General Hospital on the date of the accident. He had sustained head injury—concussion; fracture and dislocation of the right wrist; severe contusion with glass pieces on the left shoulder area; fracture radius – ulna (left wrist); and fracture neck of condyle (left side jaw). He was treated in ICU until 19th January, 1993 when he was transferred to the general ward and treated further for jaw and arm injuries till 8th February, 1993. He was discharged on 9th February, 1993 and continued treatment as an outpatient. He was readmitted on 26th April, 1993 for infection at fracture of left wrist area (osteomyelitis) and continued attending the hospital for dressings.

In a subsequent report dated 15th December, 1994 and produced as the defendant's exhibit No. 4, the infection of the left wrist had settled by October, 1993. The actual position as of December, 1994, was that the plaintiff was still experiencing pain on the left side on chewing; he was not able to eat hard food or meat; and he experienced pain and stiffness of both wrists and was unable to lift heavy things. The inability to eat meat and weakness of both hand grips were due to after-effects of injury, and this was permanent incapacity.

The plaintiff's counsel cited some authorities one of which was SISCO E. MURANGA NDANYA & 2 ORS v. COAST BUS SERVICES LTD. HCCC No. 4425 of 1990 (Nairobi) in which he submitted that for almost similar injuries the plaintiff was awarded Kshs. 2,400,000/-. That is not quite correct. In that case, apart from head injury concussion, the plaintiff had also sustained a fracture of the pelvis and hip, abdominal injuries due to injured bladder and urethra, and a fracture of the right clavicle. For all these, the court awarded general damages for pain and loss of amenities assessed at Kshs. 500,000/-. The plaintiff, who was a unit manager, was then awarded Kshs. 2,400,000/- for loss of earning/capacity on a multiplier of 16. In the present case, the plaintiff's background is very different, and so were his injuries save for the head injury.

It is not possible for two different people to sustain exactly the same injuries. Each case should therefore be decided on its own peculiar facts. Considering the quantum of general damages awarded in similar situations in the recent past, and the value of the Kenya Shilling today, I would assess the general damages for pain, suffering and loss of amenities at Kshs. 850,000/-.

The plaintiff also claimed special damages in the sum of Kshs. 6,385/- computed as follows-

- (a) Police abstract Report Form Kshs. 100.00
 - (b) X-rays examination Kshs. 1,000.00
 - (c) Medical examination and Kshs. 2,400.00
Reports
 - (d) Medical examination by Kshs. 1,800.00
Eye surgeon
 - (e) Medicines Kshs. 1,085.00
- TOTAL Kshs. 6,385.00

The principle of law applicable is that special damages must not only be specifically pleaded, but also strictly proved. In spite of the above pleading, the plaintiff produced receipts only for the medical examination and reports amounting to Kshs. 2,400/-. This is the only amount proved, and therefore the only amount to which he is entitled.

In sum, I enter judgment for the plaintiff against all the 6 defendants, jointly and severally, as follows-

- (a) *Kshs. 2,400/- by way of special damages.*
- (b) *Interest thereon at court rates from the date of the filing of the suit until payment in full.*
- (c) *General damages in the sum of Kshs. 850,000/- on account of pain and suffering and loss of amenities.*
- (d) *Interest thereon at court rates from the date hereof until payment in full.*
- (e) *Costs of the suit.*

Dated and delivered at Mombasa this 27th day of March, 2009.

L. NJAGI

JUDGE