



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 135 of 2001

JAMES KATUA PETER PLAINTIFF

VERSUS

SIMON MUTUA MUASYA DEFENDANT

JUDGMENT OF THE COURT

1. The plaintiff herein, James KATUA PETER sued the three defendants jointly and severally for:-
 - a. General damages for pain, suffering and loss of amenities;
 - b. Special damages amounting to Kshs. 19,180/= (as amended);
 - c. Interest on (a) and (b) above at court rates;
 - d. Cost of the suit;
 - e. Any other relief that this Honourable court deems fit to grant.
2. The plaintiff's suit arises out of a road traffic accident that is alleged to have occurred on 1/01/1999 along the Mombasa road near Salama Trading Centre, involving the plaintiff who said he was travelling as a fare paying passenger in motor vehicle KAH 033C. The plaintiff said that the accident occurred as a result of the negligent driving of the 2nd defendant who was at all times material to the suit the driver of motor vehicle registration number KAK 770 X, A Nissan Matatu owned and registered in the name of the 1st defendant SIMON MUTUA MUASYA t/a MUIMI TOURS. The 3rd defendant was described as the registered owner of motor vehicle KAH 033C.
3. The defendants, having been duly served failed to enter appearance and to file defence and accordingly interlocutory judgment was entered against them.
4. The plaintiff told the court that on 1/01/1999, he was travelling as a fare paying passenger in motor vehicle Reg. Number KAK 770X, a Nissan Matatu along the Nairobi-Mombasa Highway and that some 2 km before reaching Salama Trading Centre, the 2nd defendant who was driving the said motor vehicle stopped the vehicle in the road as he dropped off a passenger. That as a result of the said action of stopping the vehicle in the road, another motor vehicle Reg. No. KAH 033C collided with the matatu and as a result of the said collision the plaintiff, who was sitting in the back seat was badly injured. The plaintiff was treated at various hospitals namely Machakos District General Hospital, Kenyatta National Hospital and South B Nursing Home. In all, the plaintiff was hospitalized for 2 ½ months at the KNH where he underwent surgery and had a POP fixed. He underwent a second operation at the South B

Nursing Home where the fractures were fixed with metal pins.

5. According to the plaint and also from the evidence of PW1, DR SUSAN MUSYOKA, the plaintiff suffered the following injuries:-

- a. Posterior fracture and dislocation of the left hip.
- b. Fracture of acetabulum roof.
- c. Comminuted fracture of left tibia and fibula.
- d. Fracture of medial malleolus.
- e. Cuts and bruises on the right eyebrow and on the left parietal area of scalp.

6. DR SUSAN MUSYOKA, PW1 said that she examined the plaintiff on 18/02/2006 and found that the main injuries were fracture dislocation on left hip, compound fractures of the left tibia and fibula and fracture of the left medial malleolus. Dr. Musyoka also stated that she found the plaintiff to be still in poor state of health and in much pain despite the protracted treatment and fixation of fractures using metal pins and POP. She also said that the plaintiff's left leg was shortened by 10 cm and that he also had ugly scars from the hip and leg and that the fracture scars were still quite telling. She also said that the plaintiff's hip region is not completely healed and that the plaintiff whose disability she assessed at 70% needs total hip replacement at an estimated cost of Kshs.500,000/=. Dr. Musyoka produced her legal-medico report as PExhibit 4 together with the plaintiff's payment receipts for the doctor's fee as PExhibits 5 (a) and 5 (b).

7. At the close of the plaintiff's case, I asked plaintiff's counsel to file written submissions on quantum of damages. The submissions were duly filed on the 18/07/2007. I have considered those submissions in light of the evidence adduced by the plaintiff. The plaintiff told the court that he was injured while he was travelling as a fare paying passenger in motor vehicle KAK 770X. He has also said that the accident in which he was injured occurred as a result of the negligent manner of driving and controlling of the two motor vehicles KAK 770X and KAH 033C. The issue that arises for determination is whether the plaintiff has made out a case against the defendants on a balance of probabilities. It is to be noted that the defendants neither entered appearance nor filed defence, so the plaintiff's case remains uncontroverted.

8. The plaintiff stated that as they approached Salama Trading Centre in motor vehicle KAK 770X, the 2nd defendant stopped the motor vehicle KAK 770X on the road as he dropped a passenger. It was then that motor vehicle KAH 033C came from behind at high speed and rammed into the rear of KAK 770X thereby injuring the plaintiff. I therefore find and hold that the 2nd defendant did not observe the traffic rules when he stopped the vehicle on the road instead of stopping it off the road. It is also clear that the driver of motor vehicle KAH 033C failed to keep safe distance between himself and the vehicle that was in front of him, for if he had kept a safe distance, he would not have rammed into the rear of the matatu.

9. From the above, I am satisfied that the two drivers equally contributed to the accident as a result of which the plaintiff was injured. In this regard, I find the three defendants to be jointly and severally liable for the accident at 100% liability.

10. The next issue for determination is quantum of damages payable to the plaintiff. The plaintiff produced medical records to show that he was hospitalized at the South "B" Nursing Home, and also consulted widely with Dr. James O Ochieng of the Kenyatta National Hospital Private Doctors' Plaza and also consulted Dr. SUSAN MUSYOKA of the Machakos Medical Clinic. Dr. Musyoka's Medico-Legal Report confirms the injuries complained of by the plaintiff. According to the said report, the plaintiff has been disabled up to 70% and that he needs total hip replacement. The plaintiff therefore prays for special damages in the sum of Kshs.19,180/= (as per the receipts). Pain and sufferings in the sum of Kshs. Two Million (2,000,000/=, of future earnings in the sum of Kshs. One Million (kshs. 1,000,000/=) and the cost of future operation estimated at Kshs.500,000, cost of future consultation at Kshs. 96,000/= and cost of

future medication estimated at kshs.60,000/=.

11. I have considered the two authorities cited to me by the plaintiff's counsel i.e. (i) MKS H.C.C.C No. 73 of 1997 – PETER NDUMU vs TELKOM (K) LTD and (ii) KERICH H.C.C.C. No. 70 of 2000 – PHILIP KIPKORIR CHERUIYOT vs NEBCO (K) LTD & ANOTHER, and I make the following awards:-

- i. For pain and suffering the plaintiff is awarded Kshs.2,000,000/= (Two Million).
- ii. Special damages in the sum of Kshs.19,180/= which have been proved by the plaintiff.
- iii. I make no award on loss of future earnings and cost of future medication as no evidence was placed before me in support of such claims nor were the claims pleaded.
- iv. Cost of future operation in the sum of Kshs. 500,000/= (Five Hundred Thousand only).
- v. Costs and interest.

12. Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE