



REPUBLIC OF KENYA

ANTONY MWANGIPLAINTIFF

V E R S U S

MARTIN MUIRURIDEFENDANT

J U D G M E N T

When the Plaintiff filed this suit on 6th January, 1994 he was a minor suing through his next friend, his mother. But when the suit was heard in November, 2007 he was already an adult and prosecuted the suit himself.

The suit is a claim for general and special damages for personal injuries suffered in a road accident which occurred on 6th January, 1991 along Maragua–Murang’a Road in Central Province. The Plaintiff’s case as pleaded is that he was a fare-paying passenger in motor vehicle registration number KZK 126, owned by the Defendant and driven by his servant or agent. The Plaintiff was travelling with his mother and a brother from Nairobi to Nyeri. The mother was taking them back to school. It is further pleaded that due to the negligence of the driver the motor vehicle left the road and hit a tree. Some passengers died while many others, including the Plaintiff, sustained injuries. Particulars of negligence and of injuries are pleaded.

The Defendant duly entered appearance and filed a short defence. He denied that he was the registered owner of the accident motor vehicle at the material time, or that the Plaintiff was a passenger in the vehicle, or that it was negligently driven, or that he suffered injuries, loss and damage as pleaded. The Defendant averred in paragraph 4 of his defence that the accident was “inevitable in the circumstances”.

By a joint statement of issues dated 7th November and filed on 7th December, 1994 the following are the issues to be determined in this suit:-

1. Was the Defendant the owner of motor vehicle registration number KZK 126 on the date of the accident?
2. Was the Plaintiff a passenger in the said motor vehicle on the date and at the place the said accident took place?
3. Was the said motor vehicle negligently and /or carelessly driven and managed by the Defendant’s servant and/or agent, thus giving rise to the said accident?
4. Was the accident inevitable in the circumstances?
5. Was the Plaintiff injured as a result of the said accident?

At the hearing the Plaintiff testified and called one witness, his mother. The Defendant did not call or lead any evidence.

I have considered the testimonies of the Plaintiff and his mother, TERESIA WANJIKU KIBE (PW2). I have also considered the written submissions of the learned advocates, including the cases cited. I will examine the issues in turn.

Issue No. 1: Was the Defendant the owner of the accident motor vehicle?

As proof of the Defendant's ownership of the accident vehicle at the time of the accident, the Plaintiff produced a police abstract of the accident (Exhibit P3). The abstract says that it concerns an accident involving TERESIA WANJIKU KIBE, ANTHONY MWANGI and SIMON KIBE of P.O. Box 77282, Nairobi which occurred on 6th January, 1991 along Maragwa–Murang'a Road. The accident involved vehicle registration number KZK 126, make Isuzu bus, and was reported at Murang'a Police Station. The name and address of the owner of the vehicle is given as MARTIN MURIUKI of P.O. Box 68281, Nairobi. The name of his insurance company is also given, PAN AFRICAN INSURANCE CO. LTD.

The abstract also informs that the driver of the vehicle died and a number of passengers, including ANTHONY MWANGI, were injured.

Is this police abstract sufficient evidence of the Defendant's ownership of the accident vehicle at the time of the accident? In the case of KARAURI vs NCHECHE [1995-1988] IEA 87, the same issue arose. The facts of the case were similar. The defendant in that case had similarly denied in his defence that he was the owner of the accident vehicle at the time of the accident. At the hearing he also did not call or lead any evidence. He produced a police abstract of the accident which the High Court held was sufficient evidence of the defendant's ownership of the accident motor vehicle. In allowing the defendant's appeal the Court of Appeal held, *inter alia*, that it was incumbent on the plaintiff to place before the court a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the vehicle as proof of ownership. Reliance on the contents of a police abstract was not sufficient proof. The words of the Court of Appeal were emphatic it said:-

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

In the present case the Defendant has denied ownership of the accident vehicle. By agreement of the parties that is the first issue to be determined in this suit. The Plaintiff produced only a police abstract as proof of the Defendant's ownership. The Defendant did not call or lead evidence.

However, the case is distinguishable from the aforesaid case of Karauri –vs– Ncheche because the Defendant herein has not denied that the accident vehicle was being driven by his servant or agent. The Defendant has further put forward the defence that the accident was inevitable in the circumstances. The Defendant, by his pleadings, has thus provided a connection between himself and the accident vehicle that corroborates the information contained in the police abstract.

I am thus satisfied on a balance of probabilities that the Defendant was the owner of the accident motor vehicle, registration No. KZK 126, at the time of the accident.

Issue No. 2: Was the Plaintiff a passenger in the said motor vehicle at the time of the accident?

From the unchallenged testimony of the Plaintiff and PW2 which is corroborated by the information contained in the police abstract (Exhibit P3), I am satisfied on balance that indeed the Plaintiff was a fare-paying passenger in the accident vehicle at the time of the accident.

Issues Nos. 3 & 4: Was the accident vehicle negligently driven by the Defendant's servant or agent, or was the accident inevitable?

Apart from denying that the accident vehicle was negligently driven, the Defendant has pleaded that the accident was inevitable in the circumstances. No particulars of this inevitability are given. As already noted, the Defendant did not lead or call any evidence. We therefore have only the unchallenged testimony of PW2 that the accident vehicle was being driven at a high speed and the driver lost control of it just before the accident. The vehicle was also overloaded.

Without any explanation from the Defendant as to how the accident occurred, I am satisfied from the testimony of PW2 that the accident vehicle was negligently driven by the Defendant's servant or agent, thus causing the accident. There is no evidence at all that the accident was inevitable as pleaded by the Defendant.

Issue No. 5: Was the Plaintiff injured as a result of the accident, and if so, what were those injuries?

At the time of the accident the Defendant was about 10 years old. When he testified he was about 26. Following the accident he was admitted at Murang'a District Hospital. After 4 days he was transferred to Kenyatta National Hospital where he remained for about 3 months. Thereafter he was followed up at the fracture clinic and referred for physiotherapy.

He was examined by one Dr. P. N. WAMBUGU on 30th September, 1991, nearly 9 months after the accident. The doctor prepared a medical report (Exhibit P1). He found that the Plaintiff had suffered the following injuries:-

- (i) Blunt and deep cut injuries to the frontal region of the head.
- (ii) Fracture of the left leg in the thigh region.
- (iii) Fracture of both arms.
- (iv) Deep cuts in the right knee region.
- (v) Deep cuts in the chest (*lumbar, iliac and gluteal* regions) and in the left head and *sub-mandibula* areas.
- (vi) Cuts on the tongue and parts of the mouth.

Treatment included stitching the wounds, and reducing and splinting the fractures. At Kenyatta National Hospital both arms were immobilized with *plaster of paris* casts. The fractured leg was put on traction for 3 months.

At the medical examination the Plaintiff complained of increased sleeping habits, swelling of the right eye region after exercise, pain in the left leg after playing or standing for long and inability to stretch the left arm fully around the elbow joint.

Dr. Wambugu's opinion was that the Plaintiff suffered very severe injuries to his body, including head injuries (leading to loss of consciousness for an unspecified period of time); fractures of both arms and left leg, deep cuts to the limbs and trunk; deformity of the left upper arm and hand; and marked *keloid* formation all over his body. His left leg was shorter than the right by 2 cm.

The doctor further opined as follows:-

- (i) The head injury may dispose the Plaintiff to epilepsy in the future, and may be associated with the increased sleeping habits complained of.
- (ii) The injuries suffered caused the Plaintiff very severe pain, body swelling and blood loss.
- (iii) He suffered physical and mental torture on account of the traction of the left leg and long stay in

hospital.

(iv) His scars are of cosmetic significance because of the *keloids*.

(v) The deformities of his left arm and hand are permanent.

(vi) The shortening of the left leg was causing him pain after exercise, but normal length of the limb was expected to be achieved later in life.

(vii) The swelling of the eye could be associated with severing of blood vessels in the cuts he got in the face.

Dr. Wambugu finally opined that though the Plaintiff's life expectancy may be normal, all the factors mentioned above will interfere negatively with his academic performance, social life and "many other related goals".

On 15th June, 2006, the Plaintiff was also examined by one DR. MAINA RUGA. He was then aged about 21 years and it was over 15 years since the accident. His complaints then were that he felt weak in the left upper limb while doing heavy manual work. The doctor noted that the fractures had healed well. The laceration wounds had also healed well but left scars. He noted no permanent incapacity. He prepared a medical report which was produced in evidence as exhibit P2.

From the Plaintiff's testimony and the medical evidence available, I am satisfied that he suffered the injuries enumerated in the medical report prepared by D. Wambugu (Exhibit P1). These were serious injuries that required hospitalization for a long time. Treatment was painful and uncomfortable. There is a bright side, though; because of his young age at the time of the accident the Plaintiff's injuries healed very well. So well, in fact, that some of the fractures that he had suffered could no longer be detected when he was examined by the second doctor in June, 2006. No permanent incapacity was noted by that doctor. But the ugly scars are still there. I am also satisfied that due to the fractures that he suffered the Plaintiff cannot sustain heavy manual work. That is the only residual effect of the injuries, apart from the scars.

All the issues set out in the joint statement of issues dated 7th November, 1994 have now been answered. They have all been answered in favour of the Plaintiff. Regarding liability, therefore, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. I will enter judgment for him on liability at 100%.

I must now decide what damages should be paid to the Plaintiff. As already noted he suffered serious injuries and had a long and painful course of treatment. Though he healed very well on account of his age at the time of the accident, he has nevertheless been left with ugly scars on his body. He is also unable to sustain heavy manual work. But earning his living apparently does not involve heavy manual work. He is a businessman who sells shirts at Ngara Market in Nairobi.

I have considered the written submissions made by the learned counsels, including the cases cited. The Plaintiff has relied on one case, Nairobi HCCC No 2680 of 1986, Sabina Kibirithu Gitonga – VS – William Chege & Another (unreported). In that case the plaintiff suffered multiple injuries involving fractures of the *femur* and both *tibia* and *fibula* of the right leg, compound fracture of the right *ulna*, *brachial plexus* injury to the right hand resulting in complete paralysis of the hand, and multiple lacerations on the right arm and right thigh. He was in hospital for 10 months and underwent two operations. He could not work for 25 months. The fractures of the right leg healed with deformity that resulted in 1 cm shortening of the limb. His total body incapacity was assessed at 90%. On 19th November, 1993 he was awarded KShs. 750,000/00 for pain, suffering and loss of amenities (Githinji J, as he then was).

The Defendant cited two cases. The first one is Nairobi HCCC NO 2654 OF 1997, Richard Mungai Gichuhi –vs- Peter Nguru Kahia & Another (unreported). The plaintiff sustained a comminuted fracture

of the left lower end of the *tibia*, fracture of the left *patella* with mild displacement, fracture of the left *tibia* plateau, a comminuted fracture of *proximal* third of the left *femur*, a compound and comminuted fracture of the lower end of the right *patella*, a comminuted fracture of the *proximal* third of the right *tibia*, a *compartment syndrome* of the right leg, and soft tissue injuries. He was awarded only KShs. 180,000/00 on 6th February, 2002 (Ang'awa, J) for pain, suffering and loss of amenities.

The other case cited by the Defendant is Nairobi HCCC NO. 277 of 1996, James Kirambu Mbugua –vs D. V. Shah Eco (K) Ltd & Another. Here the Plaintiff sustained fractures of the *femur* in both legs, compound fractures of the left *tibia* and *fibula*, fracture of the right knee cap and cuts on the right leg. He was awarded only KShs. 200,000/00 on 13th February, 2000 (Ang'awa, J) for pain, suffering and loss of amenities.

It appears to me that the injuries suffered by the plaintiffs in the three cases cited were somewhat more serious than those suffered by the Plaintiff herein. The plaintiff in the case cited by the Plaintiff was in hospital for a much longer period and his injuries left him with total body incapacity of 90%. He was awarded KShs. 750,000/00 in 1993, quite a long time back. On the other hand, it is apparent to me that the damages awarded in the two cases cited by the Defendant were very much on the lower side, considering the injuries suffered by the plaintiffs there.

In the present case, taking into account all matters placed before the court, considering the diminished purchasing power of the Shilling, balancing this against that, and doing the best that I can, I will award the Plaintiff KShs. 400,000/00 for pain, suffering and loss of amenities. There was no proof of the special damages claimed, and I will award none.

In the result, I will enter judgment for the Plaintiff in the sum of Kenya Shillings Four Hundred Thousands (KShs. 400,000/00), the same being general damages. This sum will attract interest at court rates from the date of judgment till payment in full. The Plaintiff will also have costs of the suit plus interest thereon at court rates from the date of suit. Those will be the order of the court.

DATED, SIGNED AND PRONOUNCED, IN OPEN COURT THIS 9TH DAY OF OCTOBER, 2008 AT NAIROBI

H. P. G. WAWERU

J U D G E