



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

**Civil Case 73 of 1998**

**SAMUEL KIBET NGETICH..... PLAINTIFF**

**VERSUS**

**ROBERT NANDWA SUNGUTI.....1<sup>ST</sup> DEFENDANT**

**AGRICULTURAL DEVELOPMENT CORPORATION.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The Plaintiff herein SAMUEL ARAP BETT NGETICH filed this suit against the defendants. The averments are that the 1<sup>st</sup> Defendant is an employee of the second defendant at all material time to this case. On the day of the accident the Plaintiff was lawfully driving his motor vehicle registration No.KAG 101 N Toyota Corolla along Nandi Hills Chemelil Road when the first defendant drove Tractor Reg. No.KAC 859G in such a careless and extremely negligent manner that he caused the same to collide with the plaintiffs motor vehicle. It is the Plaintiffs stand that the said Collision was due to negligence attributed to the first defendant particularized in paragraph 5 of the plaint. In consequence thereof the Plaintiff suffered injuries particurlized in paragraph 5 of the Plaint. There are:-

1. Multiple cut wounds on the face and both knees.
2. Fracture of the right temporal bone of the skull with accompanying scalp haematoma on the same side
3. Posterior dislocation of the hip joint with fracture of the iliac and inferior parts of the acetabulum.
4. Fracture of the lateral condyle of the right knee joint
5. Fracture lateral condyle of the right ankle joint
6. Comminuted compound fracture of the medial maleolus.

As a result of the said injuries the Plaintiff suffered special damages:-

1. namely costs of an abstract Kshs 100.00
2. cost of medical report Kshs 2,500.00
3. Medical bills/Expenses Kshs 105,115.00

4. Total Kshs 107,715.00.

The Plaintiff would also require cost of future medication of Kshs 350,000.00 for hip replacement.

In consequence of the aforementioned matters the plaintiff seeks special damages to the tune of Kshs 457,715.00, general damages, costs of the suit, interest and any other relief that the court may deem fit to grant.

The Defendant was served, entered appearance and filed a defence in which in paragraph 4 admitted that a collision occurred between Tractor KAG 859G and motor vehicle KAG 101N Toyota Corolla at the time and place mentioned in the plaint but denied particulars of negligence attributed to them. Further that without prejudice to the foregoing the defence blamed the plaintiff for the collision of the accident and gave particulars of negligence relied upon. Denied particulars of damages and special damages and put the Plaintiff to strict proof of all those allegations.

3 witnesses gave evidence for the plaintiff. P.W.1 was the Plaintiff. The total sum of his evidence is that:-

- He was driving motor vehicle KAG 101 N Toyota Corolla
- He was familiar with the road which had many pot holes.
- It was the hour of darkness and the weather was bad as it was drizzling.
- He was not drunk and he was driving carefully as he was aware of the presence of tractors on the road some of which had lights while others did not have the lights.
- He cannot say exactly how the accident occurred and whether the tractor was from the side road or a head, but what he knew is that the two vehicles collided and he blames the tractor driver for the accident.
- He suffered injuries which he narrated to the court.
- He also incurred special expenses which the court will revert to later on.

In his cross-examination he stated that he does not recall exactly how the accident happened but all he knows is that it is the tractor driver to blame for it as he himself was driving carefully.

P.W.2 a police officer who was then stationed at Songhor Police station at the time of the accident received the report of the accident through a phone call. Him and his companion were detailed by the OCS to go and guard the scene. On arrival at the scene he noted that the small vehicle which had been heading to Chemilili had swerved to the left upon impact and faced the sugarcane while the tractor was in the middle of the road facing away from Chemilili. Facing Nandi Hills, it had no lights on.

P.W.3 was the co passenger in P.W.1s vehicle. KAG 101N. She just suddenly realized they had hit a tractor which they had not seen as it had no lights. The time was at 7.30 p.m. Upon impact the vehicle turned and faced the direction they had come from. According to her she blames the tractor driver for the accident because it was in the middle of the road with no lights on. She just suddenly realized that they had hit the tractor.

The defence called no evidence.

The Plaintiffs Counsel filed written submissions. The salient features of the same are.

(1) Records from the Registrar of motor vehicles records prove that the second defendant was the owner of motor tractor Ref. No. KAC 859G

(2) The uncontroverted evidence from P.W.1,2 and 3 is that P.W.1 was driving carefully on a familiar road known to be treacherous due to numerous potholes and plied by many tractors. He drove slowly as visibility was poor since it was drizzling and he kept on dimming his headlights due to rain and darkness when he suddenly rammed into a dark object on the road.

(3) The point of impact as confirmed by the sketch plan in the police file was more on the plaintiffs side with the tractor covering  $\frac{3}{4}$  of the road with the tail of the tractor at the far left which tends to suggest that the tractor had just emerged from a feeder road making a turn to the main road and that is when the impact occurred.

(4) The tractor had no lights on as the plaintiff who was driving carefully and lowly could have seen it and avoided it. The first defendant was to blame entirely and that blame binds the second defendant vicariously

(5) The investigation report in the police file blames the 1<sup>st</sup> defendant for the accident.

(6) On quantum of damages the counsel submitted that the injuries sustained by the plaintiff are severe and an award of Kshs 1,500,000.00 would be adequate. On future medical treatment this is necessary as recommended by both Doctors and the court is urged to take into consideration the rise in the cost as years go by. As for specials the court was urged to award the amount in the receipts produced.

For guidance they rely on the authorities filed by them.

Turning to the defence submissions counsel for the defence stressed the following points

1). That in his plaint the plaintiff contents that he was lawfully driving motor vehicle Reg.KAG 101N Toyota Corolla along Nandi Hills – Chemelil Road when the first defendant drove and managed their Reg. No.KAC859 G Marsey Ferguson in such a careless and extremely negligent manner that he caused it to collide violently into his motor vehicle and as a consequence thereof the plaintiff sustained various serious injuries.

2) That the defendants stand in its defence is that the plaintiff was the author of his own misfortune.

3) That in cross examination the plaintiff agreed in cross-examination that he would not tell how the accident occurred and for this reason he is non suited.

4) That the evidence on record shows that if any accident occurred as alleged then it was due to the plaintiffs own failure to exercise due care for his own safety as he acted carelessly and in a most negligent manner. On that account urged the court to dismiss the plaintiffs claim.

5) On quantum Counsel submitted that the injuries left no permanent disability whose compensation should not exceed 400,000.00 which should not be paid to him as he brought trouble to himself.

On the basis of the foregoing counsel for the defence urged the court to dismiss the plaintiffs entire claim as against the defendant.

In assessing the evidence herein the Court will take benefit of the issues agreed upon by parties on 16.7.98 and filed in court on 22.8.1998. Issue no.1 will be dealt with separately 2,3 and 4 together,5 and 6 together and then 7,8,9,10, and 11 together. As regards issue no 1 exhibit 1 which is a copy of records from the Registrar of Motor vehicles records dated 21.4.199 indicates clearly that the owner of M.Ferguson tractor Registration number KAC 859G is the second defendant. It was pleaded by the plaintiff in paragraph 4 of the pliant that on the material day the 1<sup>st</sup> defendant was driving the said motor tractor as the servants and agents, the second defendant. That the said 1<sup>st</sup> defendant had been authorized to drive the said tractor by the second defendant. In paragraph 3 of the defence, paragraph 4 of the plaint was denied and the plaintiff put to strick proof. The plaintiff reiterated in paragraph 3 of the reply to

defence that the 2<sup>nd</sup> defendant was the owner. Exhibit 1 is an authentic document from the relevant authority and settles the issue of ownership. Of the said tractor. Although no evidence exists to show that the 1<sup>st</sup> defendant was an agent or servant of the second defendant, the police file exhibit 15 contains findings to the effect that the 1<sup>st</sup> defendant was a driver of the 2<sup>nd</sup> defendant and he was on duty on that date and material time. This means that in the event of any liability being attached to the 1<sup>st</sup> defendant the second defendant will be held responsible through the doctrine of vicarious liability.

On liability both sides have blamed the other for the causation of the accident. The particulars of negligence attributed to the defence are set out in paragraph 5 of the plaint. Those attributed to the plaintiff are also set out in paragraph 5 of the defence, in response of which the plaintiff reiterated his averments in paragraph 5 of the plaint denied those attributed to him by the defence and sought strict proof from the defence. The defence had also sought strict proof of negligence by the Plaintiff.

Two witnesses gave first hand evidence for the plaintiff. Those are P.W.1 and 3. As observed by the defence Counsel they do not know how the accident happened. It was dark, raining and the road had pot holes. Then suddenly P.W.1 realized he had hit a dark object on the road P.W.1 was injured. P.W.3 who had been slightly injured came out of the car and found the tractor in the middle of the road. It is testified that it had no lights. P.W.1 and 3 confirm that they saw no lights on the tractor. The evidence of P.W.3 that the tractor was in the middle of the road has been confirmed by the sketch plan and the legend exhibit 15, 16 and 17. These documents confirmed the sketch plan and measurements which show that the point of impact was on the left hand side as you face Chemelili which was the rightful lane of P.W.1s vehicle. It is further observed in those documents that the drive of the Tractor which was going to the opposite direction had pulled to its right thus going into the path of the oncoming vehicle from the opposite direction. This manner of driving on a dark night in the rain and on a road full of potholes was dangerous more so when the tractor had no lights. These are findings which cannot be ignored. They add weight to the plaintiffs and P.W.3s evidence that it is the tractor driver to blame for the accident. The fact of them not knowing how the accident happened cannot be used to absolve the defence of any blame because it is explained by the fact that it was dark, raining and the tractor had no lights. Had the tractor had lights the view ahead could have been visible to the two to enable them explain the movements of the two colliding vehicles prior to the collision. This has been answered by the findings at the scene immediately after the collision of the position of each vehicle, involved.

These findings point a finger at the tractor driver to have been in the wrong . It was wrong for him to move to his extreme right and into the path of the plaintiffs vehicle. Had he not done so, and had he not driven without lights the accident would not have happened. P.W.3 supported the evidence of P.W.1 that he was careful on a road he knew to be treacherous because of pot holes and presence of tractors. This testimony is not controverted.

Further the plaintiff pleaded the doctrine of Resipsa Loquitor on paragraph 5 (1). It is trite law that where pleaded the doctrine shifts the burden of proof on to the opposite party to disprove the allegations of negligence attributed to them. The defence gave no evidence to oust that doctrine. This adds support to the plaintiffs case and strengthens it that it is the defence to blame entirely for the cause of the accident. The defence is to blame 100% for the cause of the accident. The second defendant is bound through the doctrine of vicarious liability.

Having established liability, the court moves to assessment of damages. On specials the Plaintiff has tendered receipts for 100/= dated 24.2.78 for the abstract exhibit 2,3, two receipts from Uasin Gishu Memorial Hospital Ltd No.57282 dated 12.10.97 for Kshs 10,000.00 No.57829 from the same hospital dated 19.12.97 for Kshs 85,914.00 no 125913 dated 20.2.98 from Eldoret Hospital for Kshs 800.00, is dated 2.12.97, from Mater hospital for Kshs 6,000.00 and two from Chemists for Kshs 151.00 and 1,880.00. These were produced as exhibit 3,6,7,8,9 10 and11. They total kshs 104,845.00.

As for general damages the police abstract exhibit 2 lists the plaintiffs as one of the persons injured and that he had sustained serious injuries. Exhibits 5 the discharge advise from the Uasin Gichu Memorial Hospital Ltd dated 18.11.97 shows that the diagnosis was multiple injuries from road traffic accident. It shows a fracture of the medial malleolus dislocation of right hip and facial cuts. The P.3 dated 8.3.98

exhibit 4 lists the following injuries:-

1. Scars on the forehead. X-ray showed fracture of the right temporal,
2. healed bruises on the chest, on the right abdomen, on the right side.
3. Scars on the right arm
4. X-rays shows a fracture acetabulum. Multiple with posterior dislocation of hip joint. Compound fracture medial malleolus comminuted
5. Scars on both knees.

Two medical reports, were produced. The first one is dated 6.4.98 by Doctor Kibosia . The findings of the Doctor are that the plaintiff Robert suffered multiple injuries above following a road traffic accident on 11.10.97. he was managed surgically at Uasin Gishu Memorial Hospital where he was confined to bed for six weeks. Subsequently attended clinic in Nairobi, from the same up to the point of the report. The Doctor noted that the plaintiff had permanent disabilities namely.

Non union of fracture acetabulum a condition which will lead to osteoarthritis and whose treatment will involve a hip replacement which will cost him about Kshs 350,000.00.

Unstable right ankle joint. On that basis awarded him permanent disability of 30%. Exhibit 12 the first medical report was signed by Dr. Kibosia who had made entries in the P.3 Exhibit 4.

The second medical report exhibit 13 is dated 8.10.1999 by Dr. Joab Bodo. The findings on examination and opinion are as follows.

*“On examination his general condition was satisfactory. He was mentally clear with no clinical nerve deficit. He walked with slight limp on the right leg. The movements in the right hip joint were slightly restricted and tender. The movements in the right ankle joint were also slightly restricted and tender over the medial aspect of the ankle joint. The last x-ray of the right hip joint revealed early osteoarthritis in the right hip joint with reduced joint space.*

*The above named sustained injuries as outlined above. The fractures were all treated conservatively. The fracture of the right hip joint has already developed osteoarthritis. This will be progressive. It is my opinion that within five years time he will require a total hip replacement operation done on this hip joint for osteoarthritis. Clinically he has early osteoarthritis in the right hip joint. I would at the moment award 20% permanent impairment.”*

*From the two medical reports it is agreed that the plaintiff suffered serious injuries. The first report accorded him 30% permanent disability. While the second one done a year later accorded him 20% permanent disability. Both reports agree that he will require total hip replacement. The injuries go to affect his career as a police officer as submitted by his counsel. For purposes of guidance only both counsels have referred a number of decided authorities to this Court. In the case of **ISSA SWADI YUSUF AND ANOTHER VERSUS PETER NJOROGE AND ANOTHER NAIROBI HCCC 173 OF 1993**, the Plaintiff sustained:-*

- (1) A fracture of the right superior and inferior pubic rami
- (2) Fracture dislocation of the right sacro-iliac joint
- (3) Fracture of the neck of the right femur
- (4) Abrasion over the right lower abdomen.

The court awarded kshs 1,275,000.00 as general damages for pain suffering and loss of amenities, costs of future medical care Ksh 1,700,000.00 and specials of Kshs 5,852.25. Total Ksh 2,980,852.25.

The case of AGNES GACHIGI VERSUS GEORGE KIMANI WAGAITU AND ANOTHER NAIROBI HCCC NO.4819 OF 1987. In this case the plaintiff suffered a fracture of the left humerus, fracture of the left clavicle, dislocation of the hip, swollen upper aspect of the left chest, calf wound on eyelid, cut wound on chin, swollen upper left hand. The court awarded kshs 500,000.00 as general damages.

The case of BEATRICE WAIRIMU KIMANI VERSUS KENYA BUS SERVICES LTD IN NAIROBI HCCC NO.3503 OF 1998. In this case the Plaintiff suffered a fracture of the right femur, multiple bruises along the calf, lacerations on the medial aspect of the leg, fracture of the left tibia, cut on the left knee, swollen left knee, fracture of the left hand, fracture of the fifth lumbar vertebrae. The resultant disabilities noted were left foot drop. Back support necessary, inability to walk for much more than one km. The court awarded Kshs 400,000.00.

The case of LUCY NYAMBURA VERSUS STEPHEN NJUGUNA GATHUI NAIROBI HCCC NO.2418/90 where the Plaintiff suffered a ruptured urinary bladder, Fracture of the right tibia – fibula and fracture of the pelvis. The court awarded Kshs 1,000,000.00. The disabilities in this case were that the injuries healed with 920 cm long scar on the abdomen as a result of operation on the bladder. The right leg healed with 94 cm leg shortening which was also grossly swollen and hyper pigmented. She is likely to experience difficulties in delivery in the pelvis. She cannot wear high healed shoes and has to content herself with lawman sports shoes though comfortable are not presentable on her as a lady. She cannot dance, run or play any game and her social life has been impaired greatly.

The defence referred the court to the case of KIONGORA VERSUS V.U. MBULWA GICHU, NAIROBI HCCC 4350 OF 1989 where the plaintiff suffered fracture of both sides of the pelvis, pubic rami, dislocation of the right hip joint and injury to the urinary bladder where an operation to repair was carried out on the bladder. The court awarded Kshs 300,000.00. The case of JULIUS BAYA KARISA VERSUS KARANJA STORES AND ANOTHER MSA HCCC NO.902 of 1990. where the plaintiff suffered a comminuted fracture of the right side pelvis including a acetabulum and S/I joint, fracture of the left neck femur. He was hospitalized for 8 weeks during which he was kept on Tractor and discharged on crutches for 5 months. The injuries healed with a resultant permanent disability as raised at 10%. He walked with a complex deformity of right hip at 60, motivational movements were painful. The Court awarded 390,000.00.

The case of SOLOMON WAIGANJO NJOROGE VERSUS ANNE WAMBUI MWANGI, NAIROBI HCCC NO.4935 OF 1991. In this case the Plaintiff suffered fractures of the right hip on the greater trochanter miulla 1/3 levels and soft tissue injuries on the face and elbow. He suffered from painful and swelling legs. He could not walk for long and had to take pain relieving relieving tablets. The court awarded Kshs 500,00.00.

The decisions cited above by both sides were decided either in 1993 or before 1993. In making the final assessment on the head of general damages for pain, suffering and loss of amenities the court has to bear in mind the following principles or guidelines.

- (1) Each case depends on its own facts.
- (2) Awards in decided cases are meant to be mere guides.
- (3) Awards should not be either too high or too low
- (4) The awards should not be made to enrich a party but simply to restore the person to the position they were in before the accident.
- (5) Inflationary trends should also be taken into consideration.

This Court has considered the awards in the decided cases and finds that those cited by the plaintiff had other additional serious injuries with a higher percentage of permanent disability, then those of the plaintiff herein. Where as those cited by the defence were on the lesser scale with less disabling injuries than those of the plaintiff. Those cited by the defence made no provision for future medical care, Whereas the plaintiff herein requires future medical operations. The cost of future medical operation suggested way back in 1998 was 350,000.00. It is almost 10 years ago. The age of the awards is about 15 years ago.

The court has taken into consideration all the relevant factors herein inclusive of:-

- (1) Nature of injuries suffered by the plaintiff.
- (2) The effect of these injuries on his profession as a police officer.
- (3) The permanent disability and fact that oseteoarthritis had already set in
- (4) The fact that future medical operations is inevitable
- (5) taking into account an element of inflation in the awards in the decided cases and doing the best I can, I make the following assessment.

(a) General damages for pain suffering and loss of amenities Kshs 980,000.00.

Costs of future medical operation Kshs 850,000.00.

I therefore enter judgment in favour of the plaintiff against the defendant jointly and severally on the following terms:-

- 1). Special damages of shs 104,540.00.
- 2). General damages for pain suffering and loss of amenities Kshs 980,000.00.
- 3) Cost of future medical operation Kshs 850,000.00
- 4) Costs of the suit.
- 5) Interests at court rates from the date of filing till payment in full on the special damages and from judgment till payment in full on general damages, cost of future operations and costs awarded.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2007.**

**R. NAMBUYE**

**JDUGE**