



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Suit 70 of 2000

PHILIP KIPKORIR CHERUIYOT PLAINTIFF

VERSUS

NEBCO K LTD1ST DEFENDANT

LAWRENCE AJUGA SIMO 2ND DEFENDANT

JUDGMENT

The plaintiff, Philip Kipkorir Cheruiyot filed suit against the defendants seeking to be paid damages on account of injuries he alleges to have sustained when he was traveling as a fare paying passenger in the defendants' motor vehicle registration number KAH 114N. He avers that the said motor vehicle was involved in an accident along Kericho Nakuru road at Kedowa on the 6th December, 1997. The plaintiff attributes the said accident to the negligence of the defendant's driver who negligently and carelessly drove the said motor vehicle that the same veered off the road and overturned and as a result of which the plaintiff sustained serious injuries. The plaintiff particularized the injuries that he had sustained in his plaint. The defendants filed a defence. They denied that the plaintiff was a passenger in the said motor vehicle. The first defendant denied it was the owner of the said motor vehicle. They further denied that they were negligent or that the said accident was caused by the negligence of the driver of the motor vehicle registration number KAH 114N. Issues having been agreed and settled this case was settled for hearing.

On the hearing date, the advocate for the defendants Mr. J. O. Soire failed to attend court. This court was satisfied that the said advocate for the defendants was properly served. The plaintiff told the court that he was ready to proceed with the case. This court therefore ordered the plaintiff to proceed with his case their absence of the defendants notwithstanding.

The plaintiff called one witness: himself. He testified that on the 6th December, 1997 while he was traveling as a fare paying passenger in motor vehicle registration number KAH 114N (hereinafter referred to as the said bus) from Nakuru to Kericho, the said motor vehicle was involved in an accident at Kedowa. The plaintiff testified that the said accident occurred due to the fact that the driver of the said bus was driving the said bus at a very high speed on a wet surface. The said bus was being driven downhill and at some point before the bus reached the base of the hill, the driver of the bus attempted to overtake a slower motor vehicle. Unfortunately for him, there was another oncoming motor vehicle which was occupying the overtaking lane. In a bid to avoid a head on collision, the driver drove the said bus off the road and as a result of which the bus overturned.

The plaintiff was injured in the accident. He told the court that he injured his right hand and his shoulder

was dislocated. He sustained a fracture of his right hand. The plaintiff told the court that he was admitted at Kericho Nursing Home, Tenwek Mission Hospital and Kijabe Mission Hospital where he was treated at various times for the injuries. The plaintiff produced the medical records from the three hospitals as plaintiffs exhibit 1(a), 2, 2(a) and 3. The plaintiff was examined by Dr. Kiamba who prepared a medical report of the injuries that the plaintiff had sustained. The medical report was produced as plaintiff exhibit no. 4. He paid Kshs.2,000/- for the preparation of the said report. The plaintiff later went to the police where he was issued with a P3 form (was duly filled by the Doctor) and a police abstract report which he produced as plaintiff's exhibit no. 5 and 6 respectively. The plaintiff undertook a search at the Registrar of motor vehicles to establish the owners of the said bus. He was able to establish that the same motor vehicle was owned by the 1st defendant. (See plaintiff's exhibit no. 7). The plaintiff prayed this court to order the defendants to pay him compensation for the injuries that he had sustained.

After the close of the plaintiff's case, this court ordered the plaintiff to present to this court written submissions on the quantification of damages. Unfortunately, at the time of writing this judgment no such submissions had been filed in court. I have therefore written this judgment without the benefit of the plaintiff's submissions. I have carefully considered the evidence adduced by the plaintiff in this case. I have also read the pleadings filed by the parties to this suit. Whereas the plaintiff claims that he was injured while he was traveling in the defendants motor vehicle, the defendants deny that the plaintiff was a passenger in the said bus and further that he was injured in the accident. The issue for determination by this court is whether the plaintiff has established a case for damages against the defendants on a balance of probabilities. In this case, the defendants failed to attend court when this case came up for hearing. This court therefore considered only the evidence of the plaintiff in arriving at its decision.

The plaintiff narrated to the court how he boarded the said bus. He was traveling from Nakuru to Kericho. He was a fare paying passenger in the said motor vehicle. He did not reach safely to Kericho. The said bus was involved in an accident on the road to Kericho near Kedowa. According to the plaintiff's testimony, the driver of the said bus was driving the said bus at a very high speed, although it had rained and therefore the surface of the road was wet. He further testified that the said driver drove the said vehicle at a high speed down a hill. Before the said motor vehicle reached at the base of the hill, the driver attempted to overtake another slower motor vehicle. There was an oncoming vehicle. In an attempt to avoid a head on collision, the driver drove the said bus off the road causing it to overturn and thereby injuring the plaintiff.

I have evaluated the evidence by the plaintiff which was uncontroverted. It is clear that the driver of the defendant's motor vehicle was negligent. He committed three cardinal sins in motoring; Firstly, he drove a heavy commercial motor vehicle at a very high speed on a wet surface. In case of any emergency, the braking distance of such a motor vehicle would be such that the driver would not be able to control the motor vehicle and stop it within the required distance. Secondly, he drove the said motor vehicle at a high speed down a hill. In such circumstances the motor vehicle would not be easily controlled in case occasion would arise for the said bus to be stopped within a short distance. Thirdly, the driver overtook another motor vehicle when it was not safe so to do especially as he was driving the said motor vehicle at a high speed downhill.

These three factors considered jointly contributed to the accident. I find that the driver was negligent. He did not have regard to the passengers whom he was carrying in the said bus. One of the passengers was the plaintiff. He has proved that he was a passenger in the said motor vehicle by the production of the police abstract report which lists him as being one of the passengers who was injured during the said accident. I therefore find the defendants jointly and severally to be liable for the said accident. They shall bear 100% liability in damages to the plaintiff.

On quantum the plaintiff has produced medical records which prove that he was treated at Kericho Nursing Home, Tenwek Mission Hospital and Kijabe Mission Hospital. A medical report prepared by Dr. Kiamba established that the plaintiff had sustained the following injuries: Fracture of the right humerus, injury to the right radial nerve due to compressed fracture of the right humerus resulting into radial nerve palsy and fracture of the head of the right humerus with dislocation of the right shoulder joint. In his opinion Dr. Kiamba stated as follows:

“Philip Kipkorir Cheruiyot has undergone a lot of pain and suffering since he was involved in this accident. The injuries he sustained have the following prognosis:

(1) Fracture of the femoral head and dislocation of the right shoulder joint – as the femoral head was resected, the shoulder joint has been disrupted. This joint has permanently impaired.

(2) Fracture of the right humerus in the mid shaft has united but there is tenderness at the fracture sight.

(3) Injury to the radial nerve has resulted into wasting of all muscles of his arm. Being a right handed person this injuries have highly incapacitated him. I classify the degree of injury as “grievous harm.” He should be awarded a permanent disability of thirty per cent (30%).”

According to the doctor, the injuries that the plaintiff sustained has made him lose the use of his right hand. There is no possibility that hhe would be able to effectively use the hand again. The plaintiff has been incapacitated from using his right hand because of muscle wastage his right hand can never be of use to him as it was before the accident. Having considered the opinion of the doctor and after evaluating the medical records produced in evidence as exhibits by the plaintiff and further having considered a comparable decision of **Barry Proudfoot vs Coast Broadway Company Ltd & Anor Nairobi HCCC No. 1265 of 1997 (unreported)** where the plaintiff therein suffered more or less similar injuries to the plaintiff in this case and doing the best that I can in the circumstance of this case, I assess the general damages to be paid to the plaintiff to be Kshs.600,000/-. The plaintiff was able to prove special damages of Kshs.2,000/- being the amount that he paid to Dr. Kiamba to prepare the medical report.

In the premises therefore judgment is entered for the plaintiff against the defendants both jointly and severally as hereunder:

(i) The defendants are hereby held to be 100% liable for the accident that resulted in the injuries that the plaintiff sustained.

(ii) Damages are assessed as follows:

a) General damages..... Kshs.600,000/-

b) Special damages Kshs. 2,000/-

TOTAL Kshs.602,000/-

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest on the special damages shall be paid from the date of the filing of the suit whilst interest on the general damages shall be payable from the date of this judgment.

DATED AT KERICHO THIS 10TH DAY OF FEBRUARY,2006

L. KIMARU

JUDGE