



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 119 of 2001

PAUL KIVIU NZUMA

TITUS MUMO PAULPLAINTIFFS

VERSUS

JACKSON MWILUDEFENDANT

J U D G E M E N T

This suit was filed on 10/8/01. The two plaintiffs Paul Kiviu Nzuma, and Titus Mumo Paul, sued Jackson Mwilu, for general and special damages for injuries which they sustained on 31/1/01 when they were travelling as fare paying passengers in motor vehicle KAE 593 A belonging to the defendant, when it collided with motor vehicle KAN O63 A. In the plaint the plaintiffs claim that motor vehicle KAE 593 A was driven along Nairobi – Mombasa road near Daystar University, at such speed and in such a manner that it was involved in an accident. The particulars of negligence attributed to the defendant are pleaded at paragraph 6 of the plaint.

The defendant filed his defence on 4/9/01 in which the defendant denied the occurrence of the accident or that the plaintiffs were passengers in his motor vehicle. In the alternative the defendant pleaded that if any accident occurred it was caused by or substantially contributed to by the driver of motor vehicle KAN O63 A who is alleged to have driven the vehicle at a high speed and in such a manner that it collided with motor vehicle KAE 593 A.

A 3rd party notice was taken out by the defendant against Charles Mule Kisilu, the 3rd party who entered appearance on 6/2/02 and filed his defence on 25/2/02 in which he denied causing the accident or contributing to it and denied the particulars of negligence attributed to the 3rd party. At paragraph 4 of their 3rd party's defence, it was pleaded that the accident was wholly caused by the negligence of the defendant's driver. The 3rd party also denied knowledge of the plaintiff's injuries.

The plaintiffs were represented by Waruhiu, Kowade and Ng'ang'a Advocates while the defendant was represented by Ndonge, Mbugwa, Atudo and Macharia Advocates. Counsel for the 3rd party was B.M. Mutie Advocate.

The plaintiffs case opened on 7/7/05 with the testimony of Paul Kiviu the 1st plaintiff who recalled that he boarded the defendant's motor vehicle on 31/1/01 at Machakos heading for Nairobi. When they reached Daystar University, the driver of the vehicle in which they were traveling, KAE 593 A wanted to overtake a trailer which was ahead of that vehicle. During the overtaking, PW1 saw an oncoming vehicle from Nairobi direction. Their driver swerved off the road to the right side where the oncoming vehicle had also swerved and the two vehicles collided off the road. PW1 said he was seated on the 3rd seat, from the door and was able to see ahead. He said that the mini bus in which they were travelling was driven in high speed. He lost consciousness upon impact and upon coming to when still at the scene, found that he was injured.

PW2, Titus Mumo Paul, a son of PW1, was traveling with PW1 in motor vehicle KAE 593 A. He said the driver had been driving the vehicle very fast before they reached Daystar University and the driver of KAE, 593 A wanted to overtake a trailer. He was seated on the 5th seat from the driver. Before the driver of KAE 593 A could overtake, another vehicle came from the opposite side and the driver of KAE swerved off the road and the oncoming vehicle did like wise and they collided off the road. He came to when in an ambulance, on the way to hospital.

DW1, Patrick Musyimi Muindi, was the conductor in motor vehicle KAE 593 A on 31/1/01. He said that before the accident occurred, their vehicle got a puncture and there was a lorry ahead of that vehicle and their vehicle lost control and left the road towards the right as it was the right wheel that was punctured. He denied that the driver was trying to overtake the lorry that was ahead of them. He said the vehicle was driving about 60 KPH.

Benjamin Nzuki, Wambua (DW 2) was the driver of motor vehicle KAN O63 A on 31/1/01. He said that before he reached Daystar University he saw a vehicle overtaking a lorry. He flashed lights, slowed down but the overtaking vehicle did not slow

down and he tried to avoid a collision by swerving to his left but the vehicle that was overtaking also swerved to the same direction and the vehicles collided off the road. He said the defendant's driver started to overtake abruptly when the vehicle was about 25 metres away.

Pius Musau Ndisi, was travelling as a passenger in motor vehicle KAN 063 A from Nairobi heading to his rural home. Near Daystar University he saw something white pass ahead of them and left the road to the left and the vehicles collided off the road. He said motor vehicle KAN 063 A was driven at a speed of about 60 KPH.

Before I go ahead to consider the question of liability, I should list the issues that counsels agreed on. A statement of agreed issues was filed on 26/11/03. The issues are as follows:

- 1) Whether the defendant was the registered owner of motor vehicle Reg. No. KAE 593 A at the time of the accident.
- 2) Whether the plaintiffs were passengers in motor vehicle Reg. No. KAE 593 at the time of the accident.
- 3) Whether the defendant or the 3rd party are liable as authors of the collision between motor vehicles Reg. No. KAE 593 A and KAN 063 A.
- 4) Whether the said collision between motor vehicles Reg. No. KAE 593 A and KAN 063 A was as a result of the negligence of either of the Defendant or 3rd party.
- 5) Whether liability for the negligence resulting in the occurrence attaches against the defendant or the 3rd party either singularly or jointly and if jointly, at what percentage.
- 6) Whether the plaintiffs sustained any injuries as a result of the occurrence.
- 7) Whether the plaintiffs have suffered any loss and damages and if so what is the quantum.
- 8) Whether the defendant was served with demand and notice of intention to sue by the plaintiffs.
- 9) What orders should be made as regards costs in this suit.

I have carefully considered the evidence of the plaintiffs, the defence and the 3rd party, submissions filed by counsels and all the pleadings. Though the defendants denied the occurrence of a collision between motor vehicle KAE 693 A and KAN 063 A there is no doubt from the 5 witnesses testimonies that the 2 vehicles collided near Daystar University. They collided off the road.

At paragraph 5 of the plaint, it was pleaded that the defendant is the registered owner of motor vehicle Registration No. KAE 593 A. At paragraph 3 of the defence, the defendant denied the contents of paragraph 5 of the plaint meaning that he denied being the registered owner of the motor vehicle KAE 593 A. This was one of the issues for determination. The plaintiff never led any evidence from the Registrar of Motor Vehicles to ascertain who the owners of the vehicle, KAE 593 A, was. This matter is a test suit. There are about 40 other matters awaiting the outcome of this suit on the issue of liability. Though no direct evidence was adduced by the plaintiff, the police abstracts issued to the plaintiffs were produced in evidence as Exhibit No. 3 and 10. They were admitted in evidence in by consent of the parties. At paragraph 1 of the abstracts, it is indicated that motor vehicle KAE 593 A is owned by Jackson Mwilu Kisilu, and it was insured by Gate-Way Insurance Company at the time of the accident. Though admission of a document by consent does not mean admission of the contents yet the contents of the documents were never challenged by the defence and I find they represent the correct state of facts.

Further to the above, the defendant called a witness DW1, who testified that he had worked in the said vehicle as a conductor for 3 years prior to the accident. He was called by the defendant. He was the defendant's employee at the time of the accident. I am satisfied on a balance of probability that the evidence on record goes to show that the motor vehicle KAE 593 A belonged to the defendant at the time of the accident.

PW1 produced a bus ticket for a sum of Kshs.140/= as evidence that they were fare paying passengers in KAE 593 A. PW1 and 2 said the ticket was in respect of the both of them. Although the ticket is not specific as to which motor vehicle it was issued in respect of, there was no real challenge to this ticket by the defendant and 3rd party. The two plaintiffs were also issued with police abstract form PEX No. 3, issued to PW1 and PEX No. 10 issued to PW2. At paragraph 1 of the abstract, it is indicated that a collision did occur between the defendant's motor vehicle and 3rd party's vehicle on 31/1/01 near Daystar University. The plaintiffs were indicated as passengers. This evidence has not been controverted. I do find and hold that the two plaintiffs were passengers in motor vehicle KAE 593 A at the time it collided with the 3rd party's vehicle KAN 063 A.

PW1 and 2 maintained in their evidence that the driver of KAE 593 A was attempting to overtake a trailer when they saw an oncoming vehicle. Similarly, DW2 and 3 testified that KAE was overtaking a trailer. It is unknown why the driver of KAE 593 A did not testify and tell court exactly what happened before the collision. DW1 said that the tyre of their vehicle KAE got a puncture and the vehicle then swerved to their right. If indeed the motor vehicle KAE 593 A was moving slowly as DW1 wants the court to believe then it would not be possible that it would swerve and veer off the road. It might have done so only if the defendant's vehicle was in very high speed. PW1 and 2 denied that they knew of any puncture. Besides, the defence should have adduced evidence from a motor vehicle inspector to corroborate their evidence that indeed the vehicle got a puncture

before it veered off the road. PW1 and 2 said that the defendant's vehicle had been driving behind the trailer for a while before it started overtaking. Neither of them could estimate the speed of the trailer but they said that the defendant's vehicle was driven very fast. From the evidence of PW1, 2, DW2 and 3, this court is persuaded to believe that the defendant's vehicle was overtaking the trailer. That is what is more likely than DW1's version of what happened before the collision.

DW2 testified that he saw the defendant's motor vehicle suddenly start to overtake when he was only about 25 metres away and in that spur of the moment, he managed to flash his lights, slow down and lastly swerve off the road. PW1 and 2 deny seeing the 3rd party flash lights of his vehicle. If the defendant's vehicle was in any high speed as alleged, it might have been impossible to do what DW2 said he did in such a short time. There is no evidence that DW2 attempted to apply emergency brakes to avoid the accident. It is however apparent that he tried to avert the accident by swerving off the road where both vehicles swerved to and collided. From the above, I do find that the defendant's driver was negligent in that he drove at an excessive speed so that he was unable to go back to his lane on sighting an oncoming vehicle; he drove on the wrong side of the road, failed to notice the presence of motor vehicle KAN 063 A and attempting to overtake when it was unsafe to do so. On the other hand, I do find that the 3rd party's vehicle must have been in high speed and failed to have any regard for other traffic on the road and hence failed to slow or control the vehicle to avoid a collision as a diligent driver should have done under the circumstances. The 3rd party should however be commended for having made an effort by swerving off the road. All in all, the defendant bears most of the blame as the driver drove in the path of the 3rd party and in the circumstances, I will apportion liability at 10% as against the 3rd party while the defendant bears 90%.

PW1 testified that he lost consciousness after the accident but came back to while at the scene. He had pains in the back, was injured on the head, left ear, left eye, left shoulder and legs. From the scene, he was taken to St. James Hospital in Nairobi and was transferred to Kenyatta National Hospital in Nairobi where he was admitted for one night and discharged but continued with treatment at Machakos District Hospital. He produced in evidence of a card from Kenyatta National Hospital PEX 2, a P3 form filled by the police Doctor, PEX No. 4. In the P3 form the 1st plaintiff was found to have had a healed scar on the scalp, blunt injury to the eyes and left shoulder joint; healed scar on right left leg and several healed scars on the left leg. PW4 also produced a bundle of documents (PEX 5 a – e) from Machakos General Hospital for the year 2001 till 2003. He was later attended to by Doctor Mehta in Nairobi because of continued headaches. He produced the report from Doctor Mehta as PEX No. 6 in which the Doctor found that he had bilateral subdural haematoma. PW1 further said Dr. J.M. Mwangi who prepared a report dated 12/7/01 (PEX No. 7) which indicates that PW1 was still attending physiotherapy to help improve left shoulder movements, was attending ophthalmology clinic and he found that he had chances of developing early post traumatic left shoulder joint osteoarthritis. The plaintiff was further examined by Dr. Maina Ruga and his findings are as per the report dated 20/8/03 (PEX 86) in which he found that the plaintiff suffered severe harm; injuries on the head with subsequent subdural haematoma, soft tissue injuries to the legs and left shoulder, pain, injury and temporary incapacity and was still undergoing physiotherapy at Machakos District Hospital. He had also been seen by Dr. Mdiba Warioko as per his report dated 13/5/03 (PEX 8 a) in which findings were basically similar to those found by Dr. Maina Ruga. I do find and hold that the 1st plaintiff did sustain injuries as a result of the accident.

PW2 testified that after the accident he lost consciousness but came to when in the ambulance. He was first taken to St. James Hospital, then to Kenyatta National Hospital. He was injured on the left leg, the back and face. He was issued with a P3 form which was filled by a police doctor (PEX 11). The police Doctor found that the witness had healed scars on the face, forehead, tenderness on lower back, healed scar on the lower back, healed scar on the lower leg – anterior. He assessed degree of injury as harm. He was first examined by Dr. Simiyu who prepared the report dated 19/6/01 (Exhibit No. 12) and found healed scars on the face, tenderness on the back, tibia. He assessed degree of injury as harm. He was further examined by Ndiba Warioko as per his report dated 13/5/03 PEX 13 (a) and Dr. Maina Ruga whose report is dated 22/8/03 PEX 13 (b). Dr. Warioko found that he suffered minor injuries from which he has fully recovered. Doctor Ruga too, found the 2nd plaintiff to have suffered soft tissue injuries with no permanent incapacity save for back pains which would subside with time. PW2 was examined by both his own doctor and those of the defendant and 3rd party who found that he suffered minor soft tissue injuries. The court does find that there is ample evidence to show that the 2nd plaintiff suffered injuries as a result of the collision of the defendants and 3rd party's motor vehicles.

On the issue of a quantum, plaintiff's counsel submitted an award of Kshs.600,000/= be awarded to the 1st plaintiff in general damages and Kshs.200,000/= in respect of the 2nd plaintiff. I have already considered the plaintiff's evidence and that of the doctor's who examined the above. The 1st plaintiff sustained the following injuries:

- 1) Cut on right occipital region 3 cm.
- 2) Injuries to both temporal scalp regions.
- 3) Blunt injury to hyperemic left and right eye.
- 4) Blunt injury to the left shoulder joint.
- 5) Multiple bruises and cut wound on shins.

The latest medical report on the 1st plaintiff was that of Doctor Maina Ruga PEX 8 (a) which indicates that the 1st plaintiff suffered severe harm, suffered temporary incapacity and was still following up with physiotherapy but all wounds had healed well. Counsel relied on several authorities in support of that submission. The case of **WAINAINA versus A.G. NRB H.C.C.C. 3473/91** where an award of Kshs.450,000/= was made in 1997 for injuries to the left eye resulting in loss of vision and permanent disability was assessed at 40%. In the case of **MUKO TIRIKOL MUIKO versus ATTORNEY GENERAL, H.C.C.C.**

2045/96 an award of kshs.300,000/= was made in 1996 for injuries to the right eye which reduced the vision in that eye, dislocation of the right hip joint and right forearm and multiple soft tissue injuries. The counsel annexed extracts from the authorities and the court did not have the benefit of reading the whole judgement in order to appreciate the special circumstances of each case. The defence counsel suggests an award of Kshs.50,000/= for each plaintiff and relied on the following authorities:

1. NICHOLAS KOBIA THRO' AGAA versus OVERSEAS TRADING H.C.C.C 5832/90 NAIROBI where an award of 10,000/= was made in 1993 for soft tissue injuries to the head, neck, eye and knee.
2. KENNETH ONYANGO versus HASSAN GENYA H.C.C. 3944/90, where an award of 50,000/= was made for soft tissue injuries to the chest, back, right and left leg.

The third party suggests an award of Kshs.70,000/= in respect of the 1st plaintiff and relies on the case of **MWALIMU ZANI KALA versus BONIFACE KOMBO H.C.C.1344/1988** where an award of Kshs.70,000/= was made for injuries to the neck and arm.

I have considered all these submissions in respect of the 1st plaintiff on quantum and I do find that the plaintiff's counsel cited cases in which the plaintiffs suffered much more serious and permanent injuries than the 1st plaintiff. On the other hand, the defendant and 3rd party counsels cited very old cases decided over 12 years ago. The injuries sustained in those cases were also minor as relates to the 1st plaintiff. In my judgement, I will take into account the rate of inflation since some of those decisions were made and the fact that the 1st plaintiff suffered severe soft tissue injuries, he still attends physiotherapy and I will make an award of Kshs.200,000/=.

In respect of the 2nd plaintiff, Doctor Maina Ruga's report which is dated 13/5/03, is the latest and indicates that he suffered harm, and had no permanent capacity. The plaintiff's counsel suggests an award of Kshs.200,000/= and relied on the case of **JOSEPH OTIENDE versus HAYER BISTIANY NRB H.C.C. 972/92** where in 1997 an award of kshs.130,000/= was made for injuries to the back, left hand resulting in severe backache. In the case of **DANIEL LINGETE versus CONSTATINO THOMAS H.C.C. 4084/83** the plaintiff was awarded General damages of Kshs.100,000/= in 1997 for blunt injuries to the head, chest, right knee bruises cut which healed and left keloid scars over the chest. Again counsel did not attach the full text of the authorities.

The defendant suggested an award of Kshs.50,000/= and relied on the same authority which the 3rd party suggests an award of Kshs.40,000/= and relied on the case of **FREDERICK HINGA BARAE versus KANNINGA CHAOTAKOONGIT H.C.C.C.5634/1989**, where the plaintiff sustained injuries to the head and chest. In my view an award of Kshs. 60,000/= will adequately compensate the 2nd plaintiff having considered the rate of inflation and the fact that he suffered minor injuries.

The 1st plaintiff claimed Kshs.13,600/= as special damages broken down as follows:

Hospital and discharges 10,000/=

Transport to and from hospital 1,500/=

Medical report 2,000/=

Police abstract 100/=

A bundle of receipts were produced as Ex. No. 9. and the court notes that in the said bundle there are some receipts which are dated before 31/1/01 when the cause of action arose. There are also receipts dated after 10/8/01. 10/8/01 is when this suit was filed and the special damages had already been pleaded and the figures were not pleaded in anticipation. The plaintiffs however never applied to amend the plaint before the hearing to include special damages incurred after the plaint was filed. I have carefully scrutinized the receipts produced as a bundle. PW1 wishes to be compensated for special damages named to date. However, once the plaint was filed on 10/8/01, the expenses named thereafter were not pleaded. The receipts pertaining to the period after plaint was filed are not included in the claim for special damages. The plaint should have been amended. No receipt was produced in respect of the medical report. There are no receipts in respect of transport to and from the hospital as pleaded. The 1st plaintiff did not produce a receipt for the police abstract. The only receipts I found relevant relate to treatment and physiotherapy all totaling Kshs.3,4000/= and that is what the 1st plaintiff will have in special damages..

The 2nd plaintiff did not produce any receipt in respect of the medical report. He produced a receipt PEX 14 in respect of the abstract (PEX 15) and a sum of 430/= for medical expenses and the total special damages proved for 2nd plaintiff is 530/=. The plaintiff will be entitled to the special damages subject to his complying with provisions of the Stamp Duty Act.

The plaintiffs will therefore have judgement as follows:

1st plaintiff: General damages Kshs.200,000.00

Special damages 3,400.00

Total Kshs.203,400.00

2nd plaintiff: General damages Kshs. 60,000.00

Special damages Kshs. 530.00

Total Kshs. 60,530.00

Liability will be apportioned at 10% as against the 3rd party and 90% as against the defendant plus interest from the date of judgement. There is no evidence of notice of intention to institute these proceedings having been served on the defendant and for that reason, the plaintiffs are not entitled to costs of this suit.

Dated at Machakos this 30th day of March 2006

R.V. WENDOH

JUDGE

Read and delivered in the presence of

R.V. WENDOH

JUDGE