



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

**Civil Case 358 of 2001**

**SAMUEL NJOROGE MBURU.....PLAINTIFF**

**VERSUS**

**NGANGA KAMAU.....1<sup>ST</sup> DEFENDANT**

**MULTIPLE HAULIERS (E.A.) LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, Samuel Njoroge Mburu filed suit against the defendants seeking to be paid both special and general damages on account of injuries he alleges to have sustained on the 19<sup>th</sup> of August 2000 when he was lawfully traveling in motor vehicle registration number KAK 851G (*hereinafter referred to as the said motor vehicle*) which was involved in an accident with motor vehicle registration number 397 UDN along Busia-Kampala road in the Republic of Uganda. The plaintiff averred that the said accident was caused by the negligence of the 1<sup>st</sup> defendant who drove the said motor vehicle at a speed that was excessive in the circumstances and therefore caused it to collide with motor vehicle registration number 397 UDN. Upon being served with summons to enter appearance together with a copy of the plaint, the defendants filed a defence denying that they were the authors of the said accident. Instead the defendants blamed the driver of motor vehicle registration number 397 UDN who, in their view, drove his vehicle without due care and attention to other road users and especially the said motor vehicle and thus causing the collision. The defendants denied that this court had the requisite jurisdiction to hear and determine this case. They averred that the plaintiff ought to have filed this suit in Uganda and not in Kenya.

At the hearing of the suit, the plaintiff called four witnesses in his bid to establish his case. As the first witness, he testified that he was employed by the 2<sup>nd</sup> defendant as a driver and was being paid a sum of Kshs 13,000/= per month. On the 19<sup>th</sup> of August 2000, he had driven a lorry to Kampala but was instructed to go back to Busia Kenya to drive another lorry to Kampala. He was ferried from Kampala to Busia in motor vehicle registration number KAK 851G Mazda Pick-up which was being driven by the 1<sup>st</sup> defendant. He recalled that the journey was uneventful until when they reached a place called Maga near Iganga, when the 1<sup>st</sup> defendant tried to avoid a pot hole and in the process collided with an oncoming motor vehicle.

He testified that at the time the motor vehicle was involved in the accident, the 1<sup>st</sup> defendant was driving the said motor vehicle at a very high speed. He testified that during the accident the roof of the said motor vehicle caved in and pressed on his head thereby injuring his neck. He lost consciousness after the accident and came to when he was already admitted at a hospital in Jinja. He was later transferred to

Busia District Hospital Kenya and thereafter transferred to Mater Hospital Nairobi. He was admitted on the 23<sup>rd</sup> of August 2000 and discharged on the 3<sup>rd</sup> of October 2000. He testified that although the 2<sup>nd</sup> defendant paid the hospital bills then, the same were later deducted from his salary. He produced three receipts of Kshs 32,117/30, Kshs 300,000/= and Kshs 8,000/= as *plaintiff's exhibit No. 2(a, b & c)*. He testified that he was discharged from Mater Hospital before he was properly recovered due to lack of money. He testified that he has attended numerous physiotherapy sessions at the Nakuru Provincial General Hospital. He produced receipts totaling Kshs 1,050/= as *plaintiff's exhibit No. 4*. It was his testimony that due to the nature of his injuries, whenever he was required to undergo physiotherapy, he hired a taxi at Kshs 650/= per a round trip.

PW4 Peter Ndirangu Kagunya testified that he was hired by the plaintiff to take him from his house at Pipeline to the clinic where he underwent physiotherapy. He produced the bundle of receipts as *plaintiff's exhibit No. 5*. The total sum contained in the said receipts was Kshs 60,450/=. The defendants however disputed that the receipts were genuine because they were not stamped in accordance with the **Stamp Duty Act**. He further testified that he had purchased drugs worth Kshs 43,354/= from a pharmacy called Nabis Pharmaceuticals. The receipts in respect of the said drugs were produced by PW2 Daisy Muthoni Njage as *plaintiff's exhibit No. 6*. She admitted that the said receipts were not stamped in accordance with the **Stamp Duty Act**. She however confirmed that the said receipts were issued to the plaintiff when he purchased the drugs. The plaintiff saw Dr. K. S. M. Mbatia a consultant surgeon who prepared two medical reports on the injuries that he had sustained.

Dr. Kennedy Mbatia produced the said reports as *plaintiff's exhibit No. 7 & 9*. He testified that the plaintiff had sustained a cervical spine injury resulting in paraplegia. The plaintiff had also sustained a cut wound on his forehead. He had lost a left upper premolar tooth. He classified the injuries sustained by the plaintiff to be quadriplegia. He testified that the plaintiff could not be engaged in any gainful employment as he could not use his hands or even walk. He however conceded that the plaintiff's condition had improved considerably since he last examined him.

The plaintiff testified that he had not fully recovered from the injuries that he had sustained during the accident and had lost the capacity to be gainfully employed. He testified that he could no longer drive vehicles as was his profession prior to the accident. He produced his employment card that was issued to him by the 2<sup>nd</sup> defendant as *plaintiff's exhibit No. 8*. He testified that at the time of the accident he was forty two years old and could have worked up to the age of seventy years. He denied that the said accident was caused by the driver of motor vehicle registration number 397 UDN and reiterated that the accident was caused due to the negligence of the 1<sup>st</sup> defendant who drove the said motor vehicle at a very high speed and rammed into the oncoming motor vehicle when he tried to avoid hitting a pothole.

The defendant called one witness, the 1<sup>st</sup> defendant. He testified that at the material time, he was employed by the 2<sup>nd</sup> defendant as a supervisor based at Kampala. He recalled that on the 19<sup>th</sup> of August 2000, while he was driving motor vehicle registration number KAK 851G Mazda Pick-up from Kampala to Busia, the said motor vehicle was involved in an accident at a place called Kakira near Jinja. He testified that among the passengers who were in the said motor vehicle was the plaintiff. It was his testimony that he was driving the said motor vehicle at a moderate speed of 80 kph when it was involved in the accident. He blamed the driver of motor vehicle registration number 397 UDN for causing the said accident in that he drove onto the lane of their motor vehicle as he was attempting to avoid sugarcane which had been dumped on the road. He testified that it was the said motor vehicle which caused the collision with his motor vehicle and in spite of his attempt to avoid the said accident by taking evasive action, it was all in vain as the two motor vehicles were too close. He denied that he had caused the said accident due to his negligence. The defendants then closed their case.

After the close of both the plaintiff's and the defendants' case the issues for determination by this court are three fold; firstly, whether this court has jurisdiction to hear and determine this suit taking into consideration that both the plaintiff and the defendants concede that the accident took place in Uganda. The second issue for determination, if the 1<sup>st</sup> issue will be determined in favour of the plaintiff, is whether the plaintiff has established that the said accident which caused his injuries was caused by the negligence

of the defendants. The third issue to be determined by this court is what damages, if any, should be paid to the plaintiff on account of the injuries that he sustained.

On the first issue, it is not disputed that the accident took place along Kampala-Jinja road near a place called Kakira in the Republic of Uganda. The plaintiff has submitted that this court has jurisdiction to hear and determine the case. On the other hand, the defendants have denied that this court has jurisdiction to hear this case because the accident occurred in Uganda and therefore the plaintiff ought to have filed the suit in Uganda. The plaintiff and the defendants have referred this court to several decided cases on this point. In my view however the point for determination by this court is simple. The 2<sup>nd</sup> defendant is a Kenyan Company. The 1<sup>st</sup> defendant is a Kenyan. The plaintiff is a Kenyan. The motor vehicle that the plaintiff was traveling in was registered in Kenya. According to **Section 14 of the Civil Procedure Act**;

***“where a suit for compensation for wrong done to the person or movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.”***

In the present case, although the accident took place in Uganda, the plaintiff had the option of filing the suit in Uganda where the accident took place or in Kenya where the defendant is domiciled. The plaintiff chose to file suit against the defendant in Kenya. That choice of jurisdiction does not render his suit incompetent. This is because the law allows it. I therefore find no merit with the objection by the defendants that this court lacks jurisdiction to hear and determine this matter. I therefore hold that this court has the requisite jurisdiction to hear and determine this matter.

On the second issue of whether or not the plaintiff had established that the said accident was caused by the negligence of the defendants, evidence was adduced by both the plaintiff and the defendants confirming that the said accident in deed took place on the 19<sup>th</sup> of August 2000. The plaintiff was a lawful passenger in motor vehicle registration number KAK 851G. He was traveling in the said motor vehicle between Kampala and Busia on official duty. No evidence has been presented to this court to dispute the fact that the plaintiff was on official duty when the accident occurred. According to the plaintiff the said accident occurred when the 1<sup>st</sup> defendant, who was driving the said motor vehicle at a high speed, attempted to avoid a pot hole and thus collided with an on coming vehicle registration number 397 UDN. The defendants dispute this version of events as narrated by the plaintiff. The 1<sup>st</sup> defendant testified that the said accident was caused when motor vehicle registration number 397 UDN was driven on the wrong side of the road and therefore collided with the suit motor vehicle when it was avoiding a heap of sugarcane which had been dumped on the road. The 1<sup>st</sup> defendant blamed the driver of motor vehicle registration number 397 UDN for causing the said accident.

I have evaluated the evidence adduced in this case. The evidence adduced by the defendants blaming the driver of motor vehicle registration number 397 UDN could have made sense if the defendants had issued a third party notice to the owner of the said motor vehicle. The defendants chose not to apply for a third party proceedings. The owner of motor vehicle registration number 397 UDN is not a party to this suit. He cannot therefore be held liable in damages by this court. Since the said owner of motor vehicle registration number 397 UDN is not a party to this suit, the only evidence that we are left with concerning whom to blame is between the evidence of the plaintiff and the evidence of the defendants. The defendants are not claiming that the plaintiff was negligent. In the circumstances of this case therefore, since the plaintiff was a passenger in the said motor vehicle and no allegation has been made that he was negligent, on a balance of probabilities, I do hold the defendants to be solely liable in damages for the injuries that were sustained by the plaintiff in the said accident.

On quantum, Dr. Mbatia examined the plaintiff on the 6<sup>th</sup> of July 2001 and on the 9<sup>th</sup> of September 2003 and prepared two medical reports which were produced in evidence by the plaintiff as plaintiff's exhibit No. 7 and plaintiff's exhibit No. 9. He established that the plaintiff has sustained the following injuries; injury to the cervical spine resulting in quadriplegia i.e. paralysis of the body involving the upper

and lower limbs, cut wound of the forehead and loss of a left upper premolar tooth. According to his findings the injuries sustained by the plaintiff were unlikely to heal although physiotherapy would improve his condition. He was of the opinion that the plaintiff had suffered a total permanent incapacity to the extent of 100% in accordance with the **Workmen's Compensation Act, Cap 236 Laws of Kenya**.

In a follow up report prepared on 9<sup>th</sup> of September 2003, Dr. Mbatia noted that the plaintiff still had weakness on all his four limbs. He was not able to lift anything with the upper limbs. He still walked with an unsteady gait and often fell down resulting in injuries and bruises on his body. He noted that the plaintiff was still to re-learn to coordinate and execute his movements. He noted that although the plaintiff was at the time undergoing physiotherapy, his condition was unlikely to improve therefore making him totally dependent on others. The evidence adduced by Dr. Mbatia was not controverted. I however noted that the plaintiff's physical condition had improved when he testified before court. Although the plaintiff was walking with the assistance of walking stick, his movement was well coordinated. The plaintiff walked without any difficulty. When he testified before court he was lucid although it was clear that he could not engage in his profession as a driver due to the injuries that he had sustained.

The plaintiff has submitted that he should be awarded the sum of Kshs 3,000,000/= as general damages for pain suffering and loss of amenities. He has relied on the decisions of **Joel Kipruto Chepkwony –vs- Aser Kipkosgei Philemon Nakuru HCCC No. 333 of 1999 (unreported)** and **Reuben Memo Werunga –vs- Michael Odido Nairobi HCCC No. 1728 of 1999 (unreported)**. On their part the defendants have submitted that the plaintiff should be awarded Kshs 600,000/= as general damages. They have relied on the decisions of **Titus Gichuhi –vs- The A. G. Nairobi HCCC No. 3088 of 1990 (unreported)** and **Sabina Kibirithu Gitonga –vs- William Chege & Anor Nairobi HCCC No. 2680 of 1986 (unreported)**. I have taken into consideration the above decided cases and in the light of the injuries that the plaintiff sustained, doing the best that I can in the circumstances, I award him Kshs 2,000,000/= general damages for pain suffering and loss of amenities.

The plaintiff proved that he paid the sum of Kshs 32,117/30, Kshs 300,000/= and Kshs 8,000/= to Mater Hospital when he was undergoing treatment. He also produced receipts of Kshs 60,450/= being the costs of hiring a taxi to take him to and from hospital when he was undergoing physiotherapy. He also produced receipts of Kshs 43,354/= being the amount he paid to Nabis Pharmaceuticals for drugs. The plaintiff, in his plaint pleaded that he should be awarded Kshs 106,404/= as special damages. During trial, he however adduced evidence which proved that he had incurred a sum more than the said amount of Kshs 106,404/=. It is trite law that a party must specifically plead special damages and specifically prove it. (**See Ali vs Nyambu t/a Sisera Store [1990] KLR 534 at page 537 para 40**). In this case, the plaintiff pleaded the sum of Kshs 106,404/= but instead adduced evidence establishing a higher figure. I will award him the sum of Kshs 106,404/= that he pleaded in his plaint.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as follows:

**(i) On Liability**

The defendant is found 100% liable

**(ii) On Quantum**

(a) The plaintiff is awarded Kshs 106,404/= as special damages.

(b) The plaintiff is awarded Kshs 2,000,000 general damages for pain suffering and loss of amenities.

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

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

**DATED at NAKURU this 31<sup>st</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**