



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2115 of 2001**

**WYCLIFFE SIGANI ANALO ..... PLAINTIFF**

**VERSUS**

**BERNARD MUSYOKI ..... 1<sup>ST</sup> DEFENDANT**

**MUTYETUMO WHOLESALERS LTD. .... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. PROCEDURE AND BACKGROUND OF CASE**

1. On being involved in a road traffic accident as a passenger in a vehicle owned by his employer the plaintiff herein, Wycliffe Sigani Analo, filed this suit on 6 December 2001 in tort and claimed damaged against the driver and registered owner of the other vehicle driven by Bernard Musyoki the 1<sup>st</sup> defendant herein and owned by the 2<sup>nd</sup> defendant M/s Mityetumo Wholesalers Ltd.

2. He then thereafter filed a misc. application 1221/03 – (a separate application that bears the same number as the current case) in which he prayed to sue as a pauper. This application was heard by Nyamu J who dismissed the application on the grounds that:-

“an application for leave to sue [as a pauper] to be [first] filed before filing of the main suit. That no pauperism after a suit has been filed, can be granted”.

3. The plaintiff was represented in the main suit before me.

4. On the afternoon of the 9 March 1999, the plaintiff was travelling in a Tata pick up vehicle registration KAE 635 A. This vehicle had no seats at the back. The said vehicle was owned by the plaintiffs employer. Several workers were therefore on top of the said vehicle that had a side body. According to the evidence given by the plaintiff, he was seated right in the middle. There were other workers on either side of him. Their destination was the Aga Khan hospital where they were to do some work (construction I presume, as the plaintiff claimed that he had been working for 10 years for his employer as a welder).

5. As the vehicle neared the Chiromo round about and intending to go up Museum Hill, in Nairobi, another vehicle came from the Uhuru Highway on the down hill incline from Chiromo side and collided into third motor vehicle. This vehicle was registered No. KAE 428H whilst the vehicle the plaintiff was

travelling in was registration No. KAE 635A.

6. The impact of the collision caused the vehicle KAE 635A that the plaintiff was travelling in to overturn.

7. As a result of the said accident the plaintiff sustained injuries to his left arm. This arm in effect fractured on site and according to the doctor, actually had amputated. The plaintiff was rushed to Kenyatta Hospital where he was admitted for two days.

8. He then filed suit against the defendant who protested at the suit. It later transpired that the protest concerned the description of the 2<sup>nd</sup> defendant. The plaintiff amended his plaint on 4 April 2002. The defence filed an amended defence on 24.7.03 to replace the original defence filed on 18 April 2002.

9. Prior to the commencement of the trial, the parties agreed to the following admission of fact:-

i) That the 2<sup>nd</sup> defendant (M/s Mutyetuno Wholesalers Ltd).

Was the owner of motor vehicle reg. No. KAE 428H.

ii) That the said motor vehicle [reg] KAE 428H was involved in a collision with motor vehicle KAE 635H on 9 March 1999 (and not 2 March 1999).

10. At the closing submission after trial the advocate for the defendant conceded that the plaintiff was a passenger in the said vehicle. This admission takes care of issue one that in effect had questioned whether the plaintiff was indeed a passenger to the said vehicle.

11. The issue to be determined is that of liability. Although an accident occurred, the defendants denied that they were indeed negligent.

## II: LIABILITY

12. The advocate for the defendant stated in his submission before this court that the plaintiff had failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> defendant were negligent in any way. This was because the plaintiff who was a passenger never saw how the accident occurred and as such there was no proof of negligence.

13. The plaintiff's evidence was supported by the police who produced certified extract of the police abstract and O.B. It would have been of further assistance if any court proceeding were made available.

14. Where you have passengers and an accident occurs between two vehicles, the said passengers may sue either of the drivers. The doctrine of res Ipsa Loquitur would then apply, namely "things speak of themselves" Here an accident has occurred. It is not the passenger to prove who was negligent because the accident speaks for itself.

15. The issue of liability would be between the two vehicles in question. Indeed the defence actually contended that :-

"The accident was entirely caused and/or substantially contributed to by the negligence of the driver of motor vehicles KAE 635A"

16. The particulars of the driver of the motor vehicle Reg. KAE 635A was then elaborated stating that the said driver was negligent.

17. At the trial the defence called no evidence. What was even surprising is that they did not apply order 1 r 14 Civil Procedure Rules where:-

“A defendant claim as against any other person or defendant may be made not already a party to the suit herein after called (the third party) that he was entitled to contribution or including or

b) \_\_\_\_\_

c) \_\_\_\_\_

by leave of the court, issue a notice (herein after called a third party notice) to that effect and such leave shall be applied for by summons in chamber ex- parte supported by an affidavit.

2. \_\_\_\_\_

3. \_\_\_\_\_

4. \_\_\_\_\_

5. \_\_\_\_\_”

Namely, the defence blamed the other party for the said accident. If that is the case, then the defendants must take out third party proceeding to join the other party by to this suit. This had not been done because the defence stated that the plaintiff must prove its case.

18. In a civil suit where there is an allegation of blame, the defence must prove that blame by enjoining that party . Failure to do this no orders can be made to a person not party to the suit.

(The plaintiff did not sue his employer for the accident. He may have other option to sue under the workman’s compensation and in tort within six years as the relationship is one of master/servant).

19. From the evidence before this court, as tendered by the plaintiff and his witness, the defendants vehicle was coming down hill at a high speed. It failed to give way at the round about – the other vehicle being already in the round about. The defendant vehicle collided into the other vehicle.

20. The defendants vehicle travelling from the major road but approaching around about required to stop and give way to traffic already in the round about. The defendants driver failed to stop and collided into the said vehicle contrary to the traffic rules requiring him to stop.

21. I hereby find that the defendant is liable for this accident being negligent in his action at 100%.

I now wish to address myself on quantum.

### III: QUANTUM

i) General Damages

ii) Pain and suffering and Loss of amenities

The plaintiff was able to call two doctors to prove his injuries. His left arms was amputated and seen by this court.

21.1 Dr. Z. Mwangi Kimani is a police doctor. He holds a Bachelor of medicine and Bachelor of surgery degree. He has been a general practitioner doctor with the Kenya police since 1990. He produced a P3 form in which he stated had been filed by another doctor now deceased (1999). He stated that the plaintiff had been examined and the said examination confirmed he sustained injuries to his arm by way of amputation. He produced a P3 form (original) that classified the injuries as harm.

21.II Dr. Fred Otsyeno Othoepadic surgeon holding a fellowship in Othoepadic. He held a masters

degree in surgery and a Bachelor in medicine. In his evidence he confirmed examining the plaintiff at Kenyatta hospital where he was then attached as a medical specialist in 1999. A latest report would have been made available.

21. I am satisfied that the plaintiff sustained injuries as a result of the said road accident.

22. The advocate for the defendant had prayed for suit to be dismissed on liability but on the issue of quantum he left it to the court. The advocate for plaintiff prayed I award a sum of Ksh.800,000/-.

23. In the past and similar authorities I have awarded a claim for damages on an amputated limb at the given sum. I think this is reasonable and I would accordingly award the same at Ksh.800,000/-

#### IV: Special Damages

24. The claim under special damages was duly abandoned. I dismiss the same.

25. Court attendance fee by a medical Doctor.

I wish to address myself to this claim as it has arisen time after time. Normally, the correct procedure in calling expert witnesses or any witnesses at all is governed by order 12 Civil Procedure Rules Order 15 r 3,4,14,15. Order 27 r 16 Civil Procedure Rules.

26. A notice to admit document or facts is served, in civil matters under order 12 Civil Procedure Rules upon the other party. If within 14 days no admission of documents or facts are made it is an indication to the other side that they need not call witnesses to prove the document in question and the plaintiff or defendant whichever the case may produce his evidence by producing the documents in court without calling the marker thereof through the litigation.

27. Where there is a notice of non-admission of facts and or documents then the witnesses to prove a document or fact must be called. Order XV governs the summons and attendance of witnesses. The party applies in writing to court to summons a witnesses. Once the court gives the orders and once a witness has been served with the order to attend court, the advocate for party deposits a sum of money in court to cover the witnesses expenses. That witnesses is notified that the money being deposited would be paid out to him (Order XV r 3). Once he has attended and if the money is not sufficient the court may make further orders for an additional sum to be paid. (Order XV r 4). The time and place specified where a witness fails to appear once summoned a proclamation may issue (Under XV r 10 Civil Procedure Rules). Attendance of a witness is required under order 15 r 14 and 15 Civil Procedure Rules.

28. A witness at a trial does not tender his court attendance fee to court as evidence for the court to reimburse the said witnesses or the party who has made such payment. This is because the doctor or the witnesses is not party to a suit. The expense is not a special damage expense. This will be tantamount to an advocate claiming his fees within the body of the plaint as a special damage claim. The issue of court attendance fee should be dealt with by a taxing master. It is an expenses that would generally be borne by the litigant.

29. I hope that this will clarify the question on court attendance fee.

#### 30. In summary

30.1. Motor vehicle collision between two vehicles

30.2 Male adult passenger aged 40 years old in 1999.

30.3. Injuries

a) Left upper limb amputated at site

30.4. Liability: 100% against the defendant

30.5 Quantum:

I: General Damages

a) Pain suffering and loss of amenities                      Ksh.800,000/-

II: Special Damages - Nil abandoned

Not pleaded future loss of earning

Future medical care \_\_\_\_\_

Total              Ksh.800,000/-

I award the costs of this suit to the plaintiff. I award interest on general damages from the date of this judgment.

Dated this 24<sup>th</sup> day of May 2006 at Nairobi.

M.A. Ang'awa

Judge

Karimbu Effendy & Co. Advocates for the plaintiff

Okoth & Kiplagat Advocates for the defendant