



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

**AT NAKURU**

**CIVIL CASE 50 OF 1998**

**GRACE WANGARI MWANGI.....PLAINTIFF**

**VERSUS**

**WOODVENTURE (K) LTD .....1<sup>ST</sup> DEFENDANT**

**The Estate and/or the Representative**

**Of the Estate of JOHN THUO KABAI (Deceased).....2<sup>ND</sup> DEFENDANT**

**CHARLES MAGESO.....3<sup>RD</sup> DEFENDANT**

**DOUGLAS OCHANG ONACHI.....4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

**Grace Wangari Mwangi**, the Plaintiff in this matter sued the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the Amended Plaintiff filed on 14<sup>th</sup> September, 1998.

According to the Amended Plaintiff the 1<sup>st</sup> defendant was at the material time the registered owner of motor vehicle registration number KAG 369H Nissan matatu wherein the plaintiff was travelling as a fare paying passenger on the 4<sup>th</sup> day of May, 1997.

The 2<sup>nd</sup> defendant is the personal representative of the estate of **John Thuo Kabai** who was the driver of the matatu KAG 369H and the bonafide purchaser of the same from the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant was the owner of motor vehicle registration number KAH 540L Mitsubishi lorry hereinafter described as the lorry and the 4<sup>th</sup> defendant was the owner of the said lorry.

On the 4<sup>th</sup> day of May, 1997 at about 2.40 p.m., the plaintiff was travelling as a fare paying passenger in the matatu which was under the control of **John Thuo Kasbai** deceased along Nairobi/Naivasha road when an accident occurred at Kinungi. According to the plaintiff a lorry KAH 540L which was travelling on the opposite side Nairobi/Nakuru side, veered off from its side of the road and came to the side the matatu was driving and hit the matatu and the accident occurred whereby the Plaintiff sustained very severe injuries.

The plaintiff lost consciousness as a result of the injuries and when she regained consciousness, she found herself at Nairobi hospital where she was admitted for a period of one month. The plaintiff told the court

that she suffered the following injuries which are also confirmed by the Medical Report of Dr. Akuku Okoth:-

- (1) **Fracture of distal 1/3 shaft of the left humerus**
- (2) **Fracture of medial aspect of distal humerus**
- (3) **Fracture of shaft of the distal end of radius and ulna.**
- (4) **Fracture of distal phalang of ring finger**
- (5) **The distal phalanges of little finger were held in flexion**

**Indicating of ligation injury.**

- (6) **Fracture of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> ribs posterior on the left side.**

The Plaintiff was operated on three occasions and she will require further operations to remove the metal plate as well as other follow up treatment, the plaintiff is still undergoing treatment. According to the plaintiff she has not fully recovered from the injuries sustained and

She said that she still attends regular clinic for follow up treatment and she cannot do heavy duties, her capacity to withstand heavy duties was reduced by the accident.

On cross-examination the plaintiff maintained that the driver of the matatu she was travelling in was not to blame for the accident. She entirely blamed the driver of the lorry whom she said was over speeding and veered off to the left side of the road and caused a multiple of accidents.

It is important to capture the plaintiff's verbatim evidence in chief:-

**“The driver of the lorry was to blame for the accident. He was over speeding and driving very carelessly, he left the left side of the road and came to the side of the road where the matatu was being driven. The driver of the lorry is the 4<sup>th</sup> defendant in this case. I knew he was charged with a traffic offence. The owner of the lorry is the 3<sup>rd</sup> defendant Charles Mageto.”**

Thus the plaintiff sought for compensation for the injuries sustained. She produced medical reports by Dr. Okoth Akuku dated 16<sup>th</sup> September, 1997, and 1<sup>st</sup> October, 1997, as well as a report by Dr. Gakuo dated 26<sup>th</sup> November, 1997, which confirms that the plaintiff still suffers from infections arising out of the fracture of the humerus and he recommended repeat surgery. Dr. Akuku also recommended counseling so that the plaintiff can cope with psychosomatic disorders connected with the ghastly accident in which so many people lost their lives. The plaintiff produced receipts in support of her medical expenses.

She produced receipts from Nairobi Hospital for Kshs.245,000/- and receipts issued by Dr. Gakuo for Kshs.179,500/-. The plaintiff did not call these medical doctors who prepared the medical reports, nor the investigating officer who carried out the investigation regarding the accident.

The plaintiff thus closed her case and the defendants did not call any witnesses.

The 1<sup>st</sup> and 2<sup>nd</sup> defendant submitted that there was no evidence adduced by the plaintiff to connect his client the 2<sup>nd</sup> defendant with the accident. The evidence by the plaintiff completely exonerated the owner and driver of the matatu from any blame.

On the other hand the 3<sup>rd</sup> and 4<sup>th</sup> defendants also submitted that the plaintiff failed to prove her case against the 3<sup>rd</sup> and 4<sup>th</sup> defendant.

This was a multiple accident involving several motor vehicles. The plaintiff said that she lost consciousness after the accident and thus her sole evidence as to who was to blame for the accident is inadequate evidence to make a finding that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were to blame for the accident. The 4<sup>th</sup> defendant was acquitted of the traffic charges for lack of evidence and with that outcome it was necessary for the plaintiff to call the investigating office to show which vehicles caused the accident.

Similarly Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant submitted that the plaintiff failed to discharge the burden of proof regarding the ownership of the lorry registration number KAH 540L.

The 3<sup>rd</sup> and 4<sup>th</sup> defendant denied ownership of the said motor vehicle in their defence and therefore the burden of proving the allegations was upon the plaintiff. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant relied on the Court of Appeal decision in Civil Appeal No.192 of 1996 Thuranira Karauri Vs Agnes Mcheru there the court of appeal held as follows:-

**“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a Certificate of Search signed by the**

Registrar a of Motor Vehicles showing the

**registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”**

In the alternative and without prejudice to the above, counsel argued that should there be a finding against the defendants, the court should consider that the 1<sup>st</sup> and 2<sup>nd</sup> defendants failed to lead any evidence to exonerate themselves from blame and therefore they should equally share the blame for the accident.

On quantum the 3<sup>rd</sup> and 4<sup>th</sup> defendants urged this court to consider a sum of Kshs.240,000/- as adequate compensation while drawing a parallel with the present case and the case of Kilonzo Mwangela –Vs- Msa Said & Another HCCC. No.103 of 1988, Mombasa where the plaintiff sustained almost similar injuries and was awarded Kshs.210,000/- in general damages.

That is the summary of the proceedings from which I have formulated the following issues for determination.

The principle issue is the one on liability. Who was liable for the accident that occurred on 4<sup>th</sup> day of May, 1997?

Did the plaintiff sustain the injuries, if so, to what extent and who should be liable to pay for the damages?

Who is the registered owner of the motor vehicle registration lorry KAH 540L?

Were the defendants negligent as pleaded, and particularised in the Plaintiff?

On the issue of liability, parties did not agree and it is therefore the duty of this court to determine.

According to the plaintiff's evidence she blamed the lorry which she said was driven at a high speed and veered off its side of the road. This caused a multiple accident involving several vehicles. The plaintiff who sustained severe injuries also lost consciousness. The plaintiff did not call the investigating officer to give evidence regarding this accident. In view of the circumstances of this accident whereby even the driver of the vehicle in which she too was travelling in died, it was necessary for the Plaintiff to avail an

Investigating Officer's evidence.

Considering the above facts, I find the plaintiff's evidence on the causation of the accident rather sloppy. The plaintiff was emphatic that the driver of the matatu on which she was travelling is not to blame. The driver of the lorry was acquitted of the traffic offence charge and although the standard of proof in civil matters is different from that of criminal cases, the plaintiff had a duty to discharge the burden of proof regarding the causation of the accident. Since the plaintiff exonerated the driver of the matatu in which she was travelling in from any blame.

The second issue this court should consider is whether the driver of the lorry should bear the blame of the accident in the absence of evidence. One cannot stop to wonder why the plaintiff in the first place sued the 2<sup>nd</sup> defendant and she alleged negligence on his part on the Plaintiff but exonerated him during the hearing from any blame. The Plaintiff did not amend the pleadings to change the particulars of negligence but between the Plaintiff and her own evidence, I would wish to go by her own evidence and take it that the driver of the Nissan matatu in which she was travelling was not to blame.

Submissions by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant that the plaintiff also failed to discharge her burden by proving the ownership of the motor vehicle registration KAH 540L by producing a certified copy of the registration are of considerable concern. Perhaps, counsel for the plaintiff while realizing this anomaly after closing the plaintiff's case, they quickly applied by way of Notice of Motion to re-open the proceedings but the application was denied for being too late, an afterthought and an abuse of the process.

In view of the above findings, it may not be necessary to dwell on the issue of quantum of damages as the plaintiff's case on liability cannot be sustained. On the same issue it is important to note that the plaintiff did also not call the doctors who prepared the medical reports. These reports were produced perhaps by consent of the parties. It is important in a contentious case like this to comply with the rules of evidence and call the makers of the documents.

At this stage it will suffice to state that this case be dismissed with costs.

It is so ordered.

Judgment read and Signed on 5<sup>th</sup> May, 2006.

MARTHA KOOME

JUDGE