



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

Civil Case 35 of 2001

JASAN NYOIKE KARIUKIPLAINTIFF

VERSUS

SIMON CHERUIYOT NG'ENO 1ST DEFENDANT

CHESIMET KIPLANGAT 2ND DEFENDANT

JUDGMENT

The plaintiff, Jason Nyoike Kariuki filed this suit against the 1st and 2nd defendants; the driver and owner of motor vehicle registration number KAK 856W respectively seeking for damages for injuries he claimed to have sustained when he fell off and was run over by the said bus.

According to the plaintiff, he alleged that on 30th March 1999, he was at the Gilgil Bus station, where he said he was working as a ticketing agent and while he was alighting from the bus, the 1st defendant drove the bus at a speed as a result he was thrown off the moving vehicle, knocked down and ran over by the said bus.

The same bus driver took him to Nakuru Provincial General Hospital where he was admitted for two weeks. He was later taken to Kijabe Hospital where he was hospitalized for a further one (1) week. Thereafter his leg was amputated below the knee and on 25th November 1999, he was fitted with an artificial leg. The plaintiff was reviewed by Dr Kiamba who prepared a medical report as well as Dr Andrew Hicks. The plaintiff told this court that when he used to work as an agent he used to earn between Kshs.6,000/- and 10,000/- which he used to bank in his account.

Presently he is not employed as he claims he cannot be able to move around as a bus agent. He thus prayed for compensation for the special damages for the expenses he incurred in hospital bills, fitting of the artificial leg and preparation of the medical report as well as future medical expenses.

Dr Wellington Kiamba (PW2) and a medical practitioner testified that he examined the plaintiff on 5th July, 1999 and prepared a medical report for which he charged Kshs.3,000/-.

According to this medical report, the plaintiff's permanent disability was assessed at 50% and the degree of injury was classified as harm.

John Kamau Karoki (PW3) who boarded the same bus registration number KAK 856W at Gilgil bus stop gave evidence. He told the court that he used to buy bus tickets from the plaintiff whenever he used to travel from Gilgil to Nakuru.

On this particular day of 30th March 1999, he bought a ticket from the plaintiff and was issued with a ticket, and thereafter the plaintiff came to the bus and while alighting after surrendering the cash, the bus was driven suddenly. In the process, the plaintiff was thrown out of the moving bus.

Paul Irungu Mwangi (PW4) operates a bicycle transport (*boda boda*) he told the court that on 30th March 1999, he was at the Gilgil bus stop waiting for passengers to be ferried in his bicycle. When he saw Mwananchi bus registration number KAK 856W. He said he saw the plaintiff board the bus and when he was alighting, the bus over ran him.

The police abstract form that gave details of the accident as recorded with the police was produced by **P.C Francis Kiprotich** (PW5). However this was not the investigating officer he only produced what was recorded on the occurrence book.

John Ogutu (PW6) is an Arthopaedic Technologist working with Bethanic Crippled Children's Centre at Kijabe Hospital. He confirmed that the plaintiff was fitted with an artificial leg in their establishment and he has been attending their clinic for adjustment of the artificial leg. The plaintiff was charged Kshs.15,000/-. He also confirmed that an artificial leg is normally replaced after five (5) years. He recommended that the plaintiff should get an imported artificial limb which will assist him in his duties of moving around.

Benedict Maina Waruntere (PW7) works with Kenya Commercial Bank, Gilgil in charge of Saving Department. He confirmed that he knew the plaintiff as the bank's customer and he used to deposit about Kshs.12,000/- per month from December 1998 to May 1999.

That is the summary of the plaintiff's case.

On the part of the defendant, both defendants testified and relied on the evidence of two other witnesses. **Samson Kiplagat Chesimet** confirmed that he was the registered owner of motor vehicle registration number KAK 856W which was driven by the 1st defendant on the material day. He denied having engaged the services of the plaintiff as his agent in Gilgil. He received information that somebody had been injured on his motor vehicle on 30th March, 1999 along Nakuru-Gilgil road.

Simeon Cheruiyot (DW2) was the driver of the subject motor vehicle on the 30th March 1999. He told the court he was driving while Langat was the conductor. He had been a driver for 20 years and he had worked for the 2nd defendant for three years within which time he denied that they engaged an agent for ticketing or the plaintiff for that matter. He said that he stopped the bus on the bus stop when the passengers waved at him, some people boarded and the conductor rang the bell signaling that he should drive on. He confirmed that all the passengers were seated and he started driving after a short distance, he heard as if the vehicle had stepped on something. He looked on the mirror and saw somebody lying on the road. He stopped the bus and took the victim to the Nakuru Provincial General Hospital and reported the matter to the police. He said he was driving at a speed of 40kmph and nobody notified him he wanted to alight. He said he was told by other passengers that the injured person was inside the bus. During cross-examination this witness said that he did not know whether the plaintiff was trying to alight from the vehicle.

The evidence of the 1st defendant was corroborated in every material aspect by that of **Stephan Langat** (DW 4). This witness was the bus conductor and he said that on the material day the bus stopped as usual at a bus stop at Gilgil and picked about five (5) passengers. When DW4 was collecting money from passengers, one passenger attempted to open the bus and jump out of the bus and he was run over by the bus. He blamed the plaintiff for the accident and for failure to alert the driver of his intention to alight.

Dr. Andrew Hicks (DW3) a general Surgeon and a Consultant at Nairobi Hospital gave evidence in support of a medical report he prepared on the plaintiff's injuries. Dr. Hicks examined the plaintiff on 25th June 2002 and prepared the report that was produced as an exhibit. He assessed the degree of impairment at 40% based on the Workman's Compensation Act.

According to the report the plaintiff suffered a below the knee amputation of his right lower limb with his tibia ending 11 cm below the knee joint. Dr Hicks also recommended that a locally fitted artificial limb would be less complicated due to maintenance and a simpler artificial limb can be obtained from Kenyatta National Hospital at between Kshs.15,000/-.

From the above summary of evidence, the issues for determination are principally the issues of liability, and whether the plaintiff contributed to the accident. The issue of future medical expenses and loss of future earnings, general damages and who should bear the costs of the suit.

I have carefully considered the written submissions and all the pleadings and the authorities cited by Counsel for the plaintiff and defendant for which I am grateful for their industry.

From the evidence of all the witnesses it is not at all disputed that the plaintiff was aboard motor vehicle registration number KAK 856W Isuzu which was a passenger bus. The issue of whether the plaintiff was an appointed agent or a "manaba" tout is nor here nor there as it was not even pleaded in the pleadings, it only emerged in evidence during cross examination. The issue for determination is whether the 1st defendant was negligent by driving too fast and failing to keep proper look out and for failing to slow down or to exercise due care or the plaintiff attempted to jump out of the moving bus and thereby volunteered to foreseeable risk and danger; **Volenti non fit injuries.**

The plaintiff told the court that when he was alighting from the bus, the driver drove at a speed and he fell down. His witness PW3 also said during cross-examination that he did not hear the plaintiff telling the driver of the bus to stop.

The defence witness DW4, the conductor said he was busy collecting money from the passengers, a passenger attempted to jump out of the moving bus. In this case, I am of the view that the plaintiff should have warned the driver of his intention to alight, and on the part of the driver, he should have ensured all the passengers were seated and the door safely locked before taking off from the bus stop. This way even if the plaintiff would have attempted to jump out this would not have been possible as the door would have been locked. In this regard I would apportion the liability at 50:50 between the plaintiff and the defendants.

I have considered the authority cited by Counsel for the defence in the case of Murgian Transport (K) Limited -Vs- John Katoga Malozi C.A.C.A. No.192 of 1997. The facts of this case are different from the present case in that the plaintiff in the Court of Appeal case drove a defective vehicle when the accident occurred. This is different from the present case where the plaintiff was aboard a passenger bus at a bus stop when he tried to alight he fell off and was run over. A passenger bus must of necessity be managed and controlled carefully at a bus stage where passengers are boarding and alighting.

On the issue of quantum, the plaintiff sustained a severe crush injury of his right lower limb below the knee leading to the amputation of the limb. He was unconscious for several hours and was hospitalized for about six weeks at the Provincial General Hospital Nakuru and for a further two (2) weeks at Kijabe Hospital.

I have considered the cases cited by both Counsels for the plaintiff and defendant in their written submissions. Counsel for the defendant suggested an award of Kshs.500,000/- while relying on the case of Kenya Bus Limited –Vs- Samuel Wanguru Njoroge C.A.C.A No.137 of 2001 while counsel for the plaintiff suggested Kshs.1,500,000/- while citing the case of Mohamed Mzee Mwinyi Haji –Vs- Coast Bus Ltd HCCC No 33 of 1993 Mombasa and of course taking into account the inflation due to passage of time.

I have taken all the above into consideration and I hereby award the plaintiff a sum of Kshs.700,000/- for pain and suffering. On the issue of future earning, it is obvious the plaintiff's ability to future earnings was reduced by the injuries he sustained. The plaintiff said he earned an average of about Kshs.7,000/- which he deposited in an account at Kenya Commercial Bank. The principles to be considered in determining whether an injured person is entitled to damages were settled in the Court of Appeal case of Butter –Vs- Butter [1984] KLR 225.

“A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury

The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as age. The qualifications of the claimant, his remaining length of working life, his disabilities and previous service.”

The Plaintiff was working in the informal sector and was earning approximately Kshs.7,000 per month. He was 33 years old when the accident occurred thus taking a multiplier of 17 years granted he would remain active up to the age of 50 years. I would put this monthly income at Kshs.6,000/-.

$$\text{Kshs.6,000} \times 12 \times 17 = 1,224,000 \text{ less } 40\% \text{ i.e.}$$

$$1,224,000 - 489,600 = 734,400/-$$

Granted that the plaintiff's capacity was reduced by 40%. I would deduct this as he said in his evidence he is a partner in a hotel business.

For future medical expenses the plaintiff will need to change the artificial limb. I would go by the recommendation by Dr. Hicks DW3 that a local artificial limb would be more viable. This requires regular maintenance and to be changed. I would award a sum of Kshs.150,000/- for future medical expenses and special damages of Kshs.22,065 for the following payments;

Kijabe Hospital - Kshs.14,875/-

Ministry of Health - Kshs. 4,190/-

Dr. Kiamba's report - Kshs. 3,000/-

TOTAL - Kshs.22,065/-

Judgment is therefore entered for the plaintiff as follows: -

Pain & suffering - Kshs. 700,000/-

Loss of future earnings - Kshs. 734,400/-

Cost of future medical expenses - Kshs. 150,000/-

Special damages - Kshs. 22,065/-

TOTAL - Kshs.1,606,465/-

Less 50% contribution

TOTAL - **KSHS.803,232.50/-**

The plaintiff shall be entitled to costs and interest.

Judgment read and signed at Nakuru this 7th day of July 2006.

MARTHA KOOME

JUDGE