



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 149 of 2002

PETER GITATI MAINA.....
PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

TITO MAWASI.....2ND
DEFENDANT

JUDGMENT

By a plaint filed on 23rd May 2002, the plaintiff stated that on or about the 22nd day of May 2001 he was lawfully travelling in motor vehicle registration number KAK 946L, Isuzu canter, along the Nairobi-Mombasa road when the second defendant negligently drove motor vehicle registration number 40KA62, Mercedes Benz lorry, along the said road in his course and scope of employment with the Department of Defence that he caused the same to violently collide with the plaintiff's aforesaid motor vehicle. The plaintiff set out the particulars of negligence as against the second defendant and in particular stated that the second defendant failed to stop when he was entering a main road from a side road.

Subsequent to the said accident, the second defendant was charged with dangerous driving in **Nairobi Chief Magistrate's Court Traffic Case No. 10535 of 2001**. He was convicted and sentenced to pay a fine of Kshs.5,000/-.

As a result of the said accident the plaintiff suffered the following injuries:-

- (a) Multiple cuts and bruises.
- (b) Fracture right tibia/fibula which was treated by open reduction and internal fixation using a metal plate and screws.
- (c) Shortening of the right leg.

According to a medical report by Mr. Angelo D'cunha, a consultant surgeon dated 12th March 2002, the

plaintiff's right leg was shortened by about 1cm and the same leg also had a 13cm surgical scar. The plaintiff walked with a marked limp on the right knee. The doctor further noted that the plaintiff was most likely going to develop osteoarthritis on his right ankle and right knee.

The plaintiff urged the court to award him general damages for pain suffering and loss of amenities.

Although the plaintiff had claimed special damages in the sum of Kshs.2,500/- on account of medical examination report fees and Kshs.100/- for police abstract, these claims were not proved and cannot therefore be awarded as it is trite law that special damages must not only be specifically pleaded but should also be strictly proved.

The defendants filed a joint statement of defence and denied that the second defendant was a driver of motor vehicle registration number 40KA62. They further stated that even if the second defendant was the driver of the aforesaid motor vehicle, the accident in question was caused by the negligence of the plaintiff in that he drove motor vehicle registration number KAK 946L at an excessive speed under the circumstances and he failed to see motor vehicle registration number 40KA62 in good time or at all to avoid the said accident. The defendants further stated that the plaintiff's suit did not lie against the Government for non compliance with the provisions of **Section 13A** of the **Government Proceedings Act** in that the plaintiff had not served upon the first defendant a statutory notice prior to the commencement of the suit.

When the matter came up for hearing on 3rd July 2006, the defendants were unrepresented despite the fact that the Hon. The Attorney General's representative at Sheria House Nairobi had been served with a hearing notice on 12th January 2006 and acknowledged such service by stamping and initialing the face of the said hearing notice.

The plaintiff's evidence was therefore unchallenged and considering the fact that the second defendant drove from a side road into a main road without stopping and as a result collided with the plaintiff's motor vehicle, and taking into account his conviction for the offence of dangerous driving, I find that the plaintiff has on a balance of probabilities established that the second defendant was wholly liable in causing the said accident. He was driving motor vehicle registration number 40KA62 in the course of his employment with the department of Defence which is represented by the first defendant and consequently the first defendant is vicariously liable for the negligence of the second defendant. The plaintiff produced a copy of a statutory notice dated 3rd of April 2002. The same was served upon the Hon. The Attorney General through post office box number 40112 Nairobi. It was a 30 days' notice and it clearly notified the Attorney General of the plaintiff's intention to file the present suit. I therefore hold that the plaintiff's suit was properly filed in compliance with the provisions of **Section 13A** of the **Government Proceedings Act**.

On quantum of damages, the plaintiff's advocate urged this court to award the plaintiff a sum of Kshs.1,000,000/- as general damages for pain suffering and loss of amenities. He cited several authorities in support of his submission. In **GRACE CHERUIYOT VS JAMES M. KARIUKI AND BIDCO OIL REFINARIES** HCCC NO. 56 OF 1998 at Nakuru, (unreported), the plaintiff therein suffered multiple fracture of the right clavicle, injury to the head, soft tissue injuries of the chest and lower limbs. She was awarded Kshs.450,000/- as general damages. In **IRENE WANJIKU GITONGA VS KINYANJUI NGETHE & 2 OTHERS** HCCC NO. 456 of 1996 at Nakuru, Rimita J (as he then was) awarded general damages of Kshs.1,000,000/- where the plaintiff had suffered fracture of the right femur, fracture of the left femur, fracture of the pelvis, fracture of the left tibia and fibula and laceration of the upper third of the left leg. Those injuries were much more severe than those which the plaintiff sustained in the present case.

Doing the best I can, I assess general damages at Kshs.600,000/- . I therefore enter judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs.600,000/- plus interest at court rates. The defendants will also bear the costs of this suit.

DATED, SIGNED and DELIVERED at Nakuru this 21st day of September, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Karanja for the plaintiff and N/A for Attorney General.

D. MUSINGA

JUDGE