REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 250 OF 2003

G M O (MINOR SUING THROUGH HIS FATHER AND

NEXT FRIEND F E O.....PLAINTIFF

VERSUS

1. KULSUM ALIBHAI

2. IQBAL MOHAMED HUSSEIN.....DEFENDANTS

J U D G M E N T

This is a claim for both general and special damages for the injuries that the plaintiff suffered in an accident on the 11th July 2002.

The plaintiff, then a thirteen year old minor, suing through his father and next friend F E O, claims in his further amended plaint that on the 11thJuly 2002 at about 1.10 p.m. while standing on the pavement along Ronald Ngala road near High Life Bar in Mombasa the second defendant so dangerously and negligently drove motor vehicle registration number KAG 244 M that he hit him thereby causing him serious head injuries. His case is that after the accident he was admitted at Pandya Memorial Hospital for about three months. As a result of the accident he suffered brain damage which has rendered him completely dependant on other people. He therefore claims general damages for pain and suffering and loss of amenities and special damages of sh.656,005/= being medical expenses.

The defendants dispute both liability and the claim for damages. In their joint statement of defence the second defendant denies driving negligently and states that the accident was solely caused or alternatively contributed to by the negligence of the plaintiff.

I will first deal with issue of liability and then proceed to assess the quantum of damages if I find both the defendants or either of them liable.

On the issue of liability the main evidence we have on record is that of Kepha Benjamin Mutinda, PW3, who testified for the plaintiff and the second defendant himself.

K B M then a class-mate of the plaintiff testified that on 11th July 2002 at about lunch time, he went with the plaintiff and two other boys, E O and C J to Sports View Hotel along Ronald Ngala road to drink water. The road was a dual carriage with an island in the middle. On their way back the witness and C J crossed the left lanes of the road as one faces town from Nyali onto the island and turned back to see if their friends had also crossed. The witness said he then saw a motor vehicle coming in high speed from Nyali direction. It went over to the pavement where the plaintiff was standing and hit after which it lost control but drove off. In cross examination he was firm that the plaintiff had not started crossing the road and that the vehicle which was on the outer lane hit the plaintiff on the pavement.

The second defendant on the other hand denied leaving the road and going over to the pavement. He said that as he drove on the inner lane of that road at a speed of between 40 and 45 KMP a boy all of a sudden hit the left side of his vehicle. He said the boy ran from the front side of a parked trailer and hit the left hand side mirror of his car. There were no other vehicles on the road and he did not see the plaintiff or the other boys.

The second defendant further testified that after hitting the plaintiff he stopped. He then saw a crowd of people running to the scene and fearing for his life he drove off to his place of work. He said as he was alone at his office he was not able to report the accident to the police until the evening of the following day. Inspector Ali Ngoni to whom he claimed he reported the accident booked the report in the OB and after recording his statement asked him to go until he called him. He did not call him but after about six weeks he was summoned to Makupa Police station by Inspector Muriithi. On arrival there he was thrown into cells and the following day he was charged with reckless driving, failing to stop after an accident and failing to report an accident.

After considering this evidence as well as the accident Sketch Plan produced by Inspector Ali Ngoni, PW4, I am satisfied that the second defendant did not go over to the pavement. I think as it is the left side of the second defendant's vehicle which hit the plaintiff and as PW3 was already on the island he (PW3) thought the plaintiff was hit on the pavement. But I accept his evidence that the second defendant was

driving at high speed. If he was driving at a speed of between 40 to 45 KPM as he claimed, he could, even if the plaintiff ran onto the road as he claimed, have managed to stop without hitting him.

I agree with Mr. Nyabena, Counsel for the plaintiff, that the second defendant contradicted himself. In examination in chief he said the plaintiff ran onto the left side of his vehicle from the front of a parked trailer. In cross- examination, however, he said he did not see the plaintiff at all. He saw him after hearing a bang.

Inspector Ngoni, PW4, to whom the second defendant claims he reported the accident the following day, denied receiving any such report. On that piece of evidence together with the fact that the second defendant pleaded guilty to the charges of failing to stop after or report the accident I am satisfied that the second defendant was negligent and that he wanted to conceal the fact that he was the one who hit the plaintiff.

I am, however, equally satisfied that the plaintiff is not entirely without blame for the accident. His two colleagues successfully crossed the road and E O with whom he was left behind was not hit. I find that he also contributed to the cause of the accident. Having considered all the evidence on record on the issue of liability I apportion liability at 30% as against the plaintiff and as 70% against the second defendant.

It is common ground that the accident vehicle is registered in the name of the first defendant and at the material time it was being driven by her husband, the second defendant. The first defendant did not testify or call any evidence to suggest that the second defendant was, at the material time, not driving the vehicle as her agent or with her authority. As was stated in **Karisa versus Solinka [1969] 318** at page 322 which statement was followed in **Vyas Industries Ltd –VS- Diocese of Meru [1982] KLR 114 AT PAGE 117:**

"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible."

In the circumstances I must reject Mr. Shikely's submissions that the first defendant is not liable for the negligence of the second defendant. In the result I find the first defendant vicariously liable for the negligence of the second defendant.

That concludes the issue of liability. I now turn to the issue of quantum of damages.

As I have already said, after the accident the plaintiff was admitted to Pandya Memorial Hospital. Doctor Lawrence Gikonyo Gathua consultant surgeon who saw him immediately after admission and thereafter treated him until he was discharged testified in this case as PW1. He said the plaintiff suffered severe head injury with brain damage, multiple facial, arm and leg bruises and a scalp laceration. He was admitted to Pandya Memorial Hospital in a state of coma, fitting and only responded to painful stimulation. As he required life support he was admitted in ICU for 20 days after which he was transferred to HDU for another 5 days.

Doctor Gathua further testified that the plaintiff had weakness on the right side of the body. His right eye could not see well. He said Dr Mnjalla a consultant ophthalmologist whose opinion was sought on the injury to the eye made a diagnosis of the right optic atrophy. The nerve sending messages to the brain was damaged. In addition to facial palsy he also had defective speech. Though still bed ridden he was discharged on 2nd October 2002 with severe incapacities.

When doctor Gathua saw him a year after discharge he could walk with support and communicate a little. He was, however, completely dependant on other people. He had to be fed and taken to the toilet. At that time, in September 2003, the plaintiff had mental retardation and Dr. Gathua recommended that he be taken to a special school.

In cross examination Dr. Gathua said that though the plaintiff did not suffer any broken limbs he nonetheless suffered a serious head injury which among other things led the permanent loss of his right eye and may lead to epilepsy even in old age. He has not seen him since he wrote his report in 2003 and was not surprised to hear that he could walk on his own as he may have improved.

On the basis of these injuries the plaintiff's advocate Mr. Nyabena recommended a sum of Sh.3 Million as a reasonable award for pain and suffering and loss of amenities. In making that proposal he relied on the cased of **Grace Wanjiku Mbaga –VS- Mission to Seamen & another, Mombasa HCCC number 4 of 1992** and **Duncan Maina –VS- Antony Macharia Burugu, Nairobi HCCC number 2289 of 1996** which he said had similar injuries like those suffered by the plaintiff in this case and in each of which a sum of Sh.2,000,000/= was awarded.

Mr. Shikely for the defendants thought that is too a high a sum. He said Dr.Gathua's report of 18th September 2003 cannot now be relied upon. The plaintiff must have improved a lot since then as is evident from his ability to walk on his own and since he has not had any epileptic fits they should be ruled out. Regarding the eye injury he said the same should be ignored as no ophthalmologist was

called to give his opinion on that. Basing himself on the authorities of **Burns Sutherland Lyall –VS- Benson Macharia Karanja, Nairobi HCCC Number 1162 of 1984 and Ali Ruwa –VS- Somken Ltd, HCCC Number 12 of 1997** in each of which a sum of Sh.1,000,000/= he recommended a sum of Sh.1,500,000/= as a reasonable award under this head on 100% basis.

I have considered these submissions and read the authorities cited by both Counsels for the parties. Save for the case of **Ali Ruwa** the others are fairly old decisions and some had more serious injuries than those suffered by the plaintiff in this case.

The contention by Mr. Shikely that Dr. Gathua's report cannot be relied upon does not hold any water. The defendants were duty bound to

get the plaintiff examined by their doctor if they doubted Dr. Gathua's report

Taking all these factors into account and the fact that Dr. Gathua said that the plaintiff's life expectancy has considerably been affected I award him sum of Sh.2,500,000/= under this head.

The other head of damages sought are in respect nursing care and loss of future earning capacity. Given the age of the plaintiff Mr. Nyabena urged me to apply a multiplier of 30 year under each head.

Under Nursing Care he submitted that as stated by Dr. Githua the plaintiff will depend on others for he rest of his life. He urged me to accept the salary of Sh.3000/= per month which the plaintiff's mother, PW5, said she pays a househelp as reasonable and applying the multiplier of 30 award the plaintiff Sh.1,080,000/=.

Mr. Shikely on the other hand submitted that as the plaintiff's mother had a maid even before the accident the award should be based on half of that salary. He had no quarrel with the multiplier of 30 years. On the loss of earning capacity Mr. Shikely urged me to follow my decisions in **Ali Ruwa Case** and award the plaintiff a lump sum of Sh.150,000/=. Mr. Nyabena on his part urged me to base the award under this head on the minimum wage for 2006 of Sh.5,195/= an applying the multiplier of 30 years award the plaintiff Sh.1,870,200/=.

I have no reason to doubt PW5's evidence that the plaintiff cannot be left alone and that she has employed a maid she is paying Sh.3000/= per month to take care of him. In the circumstances award the plaintiff Sh.1,080,000/= proposed by Mr. Nyabena.

Like in the case of Ali Ruwa the plaintiff in this case has not been taken to a special school as recommended by Dr. Gathua. When he suffered the accident the plaintiff was about 13 years old. He is now about 16. We do not know if he would have completed his studies and what he would have ended up being. Besides that we do not know if he could have secured any form of employment. Taking all these factors into account I think a global award of Sh.150,000/= under the head of loss of earning capacity is reasonable and I award the plaintiff the same.

That leaves me with the claim for special damages. Sh.656,005/= being medical expenses is claimed under this head. Rastus Ouma Okoth , PW2, the Chief Admissions Officer who is also in charge of accounts at Pandya Memorial Hospital said the plaintiff was admitted in that hospital for 83 days and incurred a bill of Sh.653,905/=. He produced invoices covering that sum and receipts for Sh.310,000/= being part payment of that sum. He said there is an outstanding balance of Sh.267,705/= which the Hospital is still demanding from the plaintiff. Dr. Gathua also said he charged Sh.2000/= for the medical report which he produced as an exhibit and the plaintiff also caused a police abstract report to be produced which costs Sh.100/= to secure. I therefore find that the plaintiff has roved the sum of Sh.656,005/= claimed as special damages and I accordingly award him the same.

In the result I enter judgment for the plaintiff against both the defendants jointly and severally in the sum of **Sh.3,070,203.50** made out as follows:

General Damages	Sh.2,500,000.00
Nursing Care	Sh.1,080,000.00
Loss of Earning Capacity	Sh. 150,000.00
Special Damages	Sh. 656,005.00
	Sh.4,386,005.00
Less 30%	Sh.1,315,801.50
Balance	**Sh.3,070,203.50**

The plaintiff shall also have the costs of this suit and interest at court rates. Interest on the special damages shall be from 13th August 2004 when the Plaint was amended and that sum claimed and on general damages from the date of this judgment.

DATED and delivered this 30th November 2006

D.K. MARAGA

JUDGE