



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

**Civil Case 56 of 2003**

**CHARLES MUTUA KAVITA ..... PLAINTIFF**

**VERSUS**

**HUSSEIN DAIRY LIMITED ..... DEFENDANT**

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

By a plaint filed in court on 19/8/03, the plaintiff Charles Mutua Kavita claims against the defendant Hussein Dairy Limited:

- a) General damages for pain suffering, loss of amenities, future medical care and lost income;
- b) Special damages of Kshs.147,380/= and such further special damages as will have been incurred by the time the suit is heard and determined;
- c) Costs and interest.

In the plaint, the plaintiff pleaded that he was the driver of motor- vehicle KUX 329 which he was driving along Nairobi-Mombasa Road near Athi River when his vehicle collided with motor-vehicle KAH 191Z which was negligently driven by the defendant's driver. As a result, the plaintiff suffered serious injuries for which he claims compensation.

The defendant denied the occurrence of the accident as pleaded and in the alternative, blames the occurrence of the incident on the negligence of the plaintiff.

The plaintiff's case commenced on 28/7/04, with the testimony of the plaintiff who recalled that he was employed by a company called Lamji as a driver. On 9/7/02 the plaintiff was driving motor vehicle KUX 329 from Emali, taking sand to Nairobi. He was accompanied by two turn boys who included PW2 Christopher Ndolo. He was driving at a speed of about 10-50 KPH. When near Devki Steel Mills near Athi-River at about 8.00 p.m, he met some 2 vehicles going to Mombasa direction. On meeting the 3<sup>rd</sup> vehicle, he noticed another vehicle overtaking and was on his lane. On the left side of the road, a Nissan Matatu was parked off the road. PW1 flashed lights for the on oncoming vehicle and braked but the vehicle that was overtaking was very near about 50 metres away and the vehicles collided and he lost consciousness. He could not have swerved to the left. He came to when at Kenyatta National Hospital on the 3<sup>rd</sup> day and he had lost both legs plus other injuries. He produced the police abstract issued by police as exhibit No. 2. The vehicle was found to belong to the defendant – (exhibit No. 3). He denied that his vehicle collided with the Nissan KAN 125 Q but that his vehicle hit the Nissan after the impact of the collision with KAH 191 Z.

PW 2 who was the turn boy corroborated PW1's evidence that the vehicle which KUX 329 collided with was overtaking another and came into KUX's (329) way and the driver could not swerve to the left as a Nissan was parked off the road. He said that the oncoming vehicle tried to go back to its side and KUX 329 collided with the trailer which was still in their path. He denied knowing what happened to the Nissan which was at the bus stage.

DW1 Blacious Kariuki Mureithi, was a driver of motor-vehicle KAH 191Z trailer. He said that he was driving the vehicle about 45 KPH. He said that the vehicle which came from the opposite direction tried to overtake and fearing that they would collide, swerved off the road. The cabin swerved by the trailer was hit by the oncoming vehicle (KUX). He was injured and his vehicle was both on the road and off the road. He was injured on the leg and later taken to hospital. He said that he could not have overtaken at the spot as his vehicle was very long. After the accident is when he saw a matatu vehicle KAN 125 Q in the shamba and was informed it was involved in the accident. He denied that he was overtaking but that PW1 is the one who was overtaking.

DW 2 Police Constable Anne Ndegwa, from Athi-River Police station was one of the officers who visited the scene of the accident once it was reported. She recalled that 3 vehicles were involved in the accident KAN 125 Q, KUX 329 driven by plaintiff and KAH 191Z driven by the defendant's driver. Police Constable Mathenge, who was with her, drew the rough sketch of the scene (DEX No. 1) with KUX 329 facing Nairobi and KAH facing Mombasa direction and KAN 125 Q was off the road and had been hit from the rear. Though the driver of KUX 329 was supposed to be charged, the investigations were never completed because he sustained serious injuries and the police never followed it up. PW1 was never issued with notice of intended prosecution but DW1 was. DW2 said that the procedure was that all drivers involved in the accident should have been issued with notice of intended prosecution, but not only one.

The occurrence of the collision between the vehicles KAH 191Z and KUX 329 is not denied. The question is how it all happened and who is to blame. Though PW1 and PW2 did not admit that there was also a collision between KUX 329 and another vehicle KAN 125 Q, it is apparent from the evidence and supported by the police abstract Exhibit No. 1 that that vehicle was also involved in the collision.

PW1 and PW2 talked of the vehicle KAN 125 Q having been parked off the road at a bus stop and that is why PW1 could not have swerved that direction to avoid a collision with the oncoming vehicle which was in the path of KUX 329. On the other hand, DW1 blames the accident squarely on PW1 for overtaking when it was not safe to do so and that KUX was the one in the path of motor KAH 191Z. Whereas PW1's evidence is supported by that of PW2, yet I doubt the truthfulness of their evidence because they totally avoided to tell the court that KAN 125 Q was in collision with their vehicle at any one time on that day till they were pressed in cross-examination. Even if PW1 would be excused if indeed the collision between KUX 329 and KAN 125 Q happened after the collision with KAH 191 Z, because he claims to have been unconscious after the accident, yet PW2 seems to have seen all that happened and did not testify to what happened to the KAN 125 Q. It is obvious they were trying to conceal the fact of the collision with motor-vehicle KAN 125 Q. It must have collided with KUX 329 and if it was hit from the rear as DW2 told the court, the court wonders which collision happened first, with KAN 125Q or with KAH 191 Z. I find and hold that PW1 and PW2 told the court half truths.

The evidence of DW2 as to the occurrence of the accident is not of much help because she found when the accident had occurred and was only told what happened. The rough sketch produced by DW2 is not drawn to scale but can roughly indicate where the vehicles landed after the accident; KAH 191 Z off the road facing Mombasa direction, KUX 326 facing Nairobi and in the middle of the road whereas KAN 125 Q was totally off the road on the left side.

Having considered all the above and the fact that this accident occurred at night, this court is not in a position to tell what exactly happened but the fact is either one or both of the drivers were negligent and the best this court can do is to say that plague be on both their houses and apportion liability equally. Each party will bear 50% of the blame.

What is the effect of non joinder of the defendant's driver to the suit? The defence counsel relied on the case of **ANYANZWA versus GASPERS (1981) KLR 10** where the Court of Appeal held that a 3<sup>rd</sup> party who has been injured by the negligent act of an insured motor-vehicle of another person may only be compensated by the insurer if the driver of the defendant was joined to the suit and judgment obtained against that driver.

In this case the driver was not joined to the suit but the driver of the defendant's motor-vehicle testified as DW1 and explained exactly what happened. In the case of **MUGO versus ATTORNEY GENERAL (1989) KLR 211** the court held that the only persons whose negligence the court may consider are those actually before it who have opportunity of calling evidence, giving explanations and generally putting forward submissions on their own behalf. It was further held that it was permissible for the court to assess the evidence of the driver of the vehicle who was not party to the suit and reach a finding on the conduct of both drivers and though not named as a party he had the opportunity of putting forward his explanation and that of the employer. That is the position in this case. DW1 has testified and put forward his explanation and that of the employer. The defendant's argument that the case should fail for non-joinder of the driver is untenable in the circumstances.

The plaintiff suffered serious injuries. He lost both legs in the accident and moves using a wheelchair. He lost his capacity to work as a driver. There were two medical reports produced in respect of the plaintiff, one by Doctor Simiyu dated 7/7/03. It indicates that the plaintiff was admitted at Kenyatta National Hospital after the accident, with crushed lower limbs and was rushed to theatre. He was returned to theatre on 27/8/02 for fashioning of the stump on the left and on 21/1/03, to fashion the stump on the right. He attends orthopaedic and occupational therapy clinics. The Doctor found that his incapacity was 90%. Another report was prepared by Doctor R.P Shah dated 19/5/04, who noted that the plaintiff had been fitted with artificial limbs in 2003; had suffered a cut over the left hand and not able to resume work. In addition to the artificial limbs he uses crutches. Though he can move he cannot be able to perform his duties as a driver and he found that his permanent disability was reduced from 80% to 60%. Mrs Mwangangi, suggested an award of Kshs.2,400,000/= in damages and loss of amenities. He relied on the case of **H.C.C.C. 73/1997 PETER NDUMBU versus TELCOM (K) LTD** where this court made an award of Kshs.1,200,000/= for amputation of one leg. A sum of Kshs.1,620,000/= is claimed as lost income. He produced a letter and workman's compensation from his former employer Lalji Khimji Vasta which indicates that he earned Kshs.7,500/= per month.

On the other hand, counsel for the defendant submitted an award of Kshs.500,000/= and relied on **H.C.C.1098/00 MOSES OCHIENG OWILI versus BERNARD GITHATA KAMAU** where an award of Kshs.500,000/= was made by Justice Ang'awa for amputation of both legs.

I have considered the authorities that have been cited by both the plaintiffs and defence counsel. In the case of Peter Ndumu where I have made an award of Kshs.1,200,000/= for loss of one leg, the court took into account the fact that the victim was a child aged 8 years and percentage of incapacity was 70%. In the case cited by the defendants, the award was too low in my view. In this case the plaintiff is aged 35 years old. I make an award of Kshs.1,800,000/= for pain and suffering in respect of loss both legs.

The plaintiff earned Kshs.7,500/= per month. He may have worked for another 15 years before he retired. I will assess loss of earning at a sum of Kshs.1,350,000/= (7,500 x 12 x 15). There is a claim of Kshs. 147,380/= as special damages. The plaintiff produced receipts in support of the said claim which total Kshs. 70,470/=. However, the receipts in respect of hiring of taxis is Kshs. 44,375/= do not bear any revenue stamps as required by Section 19 of the Stamp Duty Act. The plaintiff should have endeavoured to get the stamps during the pendency of the case but he has not bothered. That sum cannot be awarded. The plaintiff will only be entitled to a sum of Kshs.26,095/= as proved special damages. In sum the plaintiff will have judgement against the defendant as follows:

Kshs.

1. Pain suffering and loss of amenities 2,000,000

2. Loss of earnings 1,350,000

3. Special damages 26,095

**Total 3,376,095**

Less 50% 1,668,047.50

(One Million, six hundred, sixty eight thousand and forty seven; fifty cents.) Judgment is hereby entered for the plaintiff against the defendant for the said sum.

Costs will be shared accordingly.

**R.V. WENDOH**

**JUDGE**

Read and delivered at Machakos this 8th day of December, 2006

In presence of

**R.V. WENDOH**

**JUDGE**