



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCC CASE NO. 85 OF 2003**

**STEPHEN GACHETHIRE RANJAU (Suing as next of kin to**

**IRENE WANJIRA STEPHEN)..... PLAINTIFF**

**VERSUS**

**ROBERT MUCHAI..... DEFENDANT**

**JUDGMENT OF THE COURT**

The plaintiff, IRENE WANJIRA STEPHEN, served the defendant, Robert Muchai through the plaintiff filed in court on 14.7.2003. She brought the suit through her next friend Stephen Gachethire Ranjau who is her father. She sued for general damages and costs as a result of a road traffic accident in which she was allegedly injured on 21.6.2002.

From the plaintiff, it is alleged that on 21.6.2002, the plaintiff was traveling in motor vehicle registration number KAL 611R as a fare paying passenger from Ongata Rongai to the city center in Nairobi. That the defendant herein drove the motor vehicle in a careless and negligent manner, that he caused the same to overturn thus injuring the plaintiff severely. The plaintiff further alleges that at all times material to the suit, the defendant was the owner of motor vehicle registration number KAL 611R Nissan Matatu. That the accident from which the plaintiff was injured was a result of negligence on the part of the defendant, the particulars thereof being:-

- Driving at a very high speed.
- Driving without due regard to other road users.
- Failing to break, swerve and/or avoid the accident.
- Res ipso loquitur.

That the plaintiff suffered injuries on the head, cut wounds on the forehead, fracture on the right leg and injuries all over the body. That all these injuries have resulted into general damages. She thus prays for judgment in both general and special damages.

After the plaintiff was served on the defendant on 31.7.2003, the defendant did not enter appearance and on 24.9.2003, the plaintiff requested for interlocutory judgment against the defendant. Interlocutory judgment was accordingly entered on the same 24.9.2003.

An order was then made for the case to proceed to formal proof. Though the case was fixed for hearing on several occasions, it never took off for unexplained reasons. On 4.12.2003, hearing dates were taken for 22.1.2004 and an order was made that a hearing notice was to issue to the defendant as provided by the Civil Procedure Rules. There is no evidence on record that such notice was served on the defendant.

On the day of hearing on 17.11.2004 Mr. Kimathi for the plaintiff applied for the release of the next friend on the ground that the plaintiff had become of age and desired to pursue the case in her own right. The application was made pursuant to rule 12 of Order 31 of the Civil Procedure Rules (CPR). The application was granted as prayed.

The facts of the case briefly are that on 21.6.2002 at about 1.00pm, the plaintiff was a fare paying passenger in motor vehicle registration number KAL 611R, a Nissan Matatu plying the Ongata Rongai Nairobi city center route. That the vehicle was being driven very fast and on reaching Langata, the motor vehicle rammed into the rear side of a bus that was ahead of the matatu. That as a result of the collision the plaintiff who was sitting in the front seat next to the door suffered injuries on her forehead, a fracture of the right hand and another fracture on the right thigh. The plaintiff said she also suffered a cut on her right leg and minor bruises all over the body. She was initially treated at Nairobi West Hospital but was later transferred to Kenyatta National hospital (KNH) for further treatment.

In support of her case, the plaintiff produced hospital case summary from KNH as P exhibit 1, a physiotherapy treatment card from Consolata Hospital Nkubu as P Exhibit 2, a medical report dated 8.4.2003 by Dr. John Macharia as P Exhibit 3, the P3 form as exhibit 4, police abstract as P Exhibit 5 and demand notice to Standard Assurance Co. Ltd dated 19.3.2003 as P Exhibit 6.

From the doctors report, the injuries sustained by the plaintiff were a fracture of the right femur (mid-shaft with a fragment avulsed) with swelling of the right thigh, tenderness and swelling of the right elbow and a fracture of the lateral condyle of the right humerus and head of the right radius bone. The report also noted the plaintiff's then current complainants as weakness of the right upper and lower limbs and that the limbs pain when carrying weights. The doctor opined that because of the injuries sustained by the plaintiff, she would require further surgery to remove the implants later.

During her evidence in chief, the plaintiff gave no evidence on her current physical well-being or of any complaints that could be associated with the accident. The plaintiff did not also adduce any evidence on the need for future surgery to remove the implants on her body and indeed she did not plead the same.

As the case was not defended, there are no framed and/or agreed issues. I have looked at the plaint and the evidence on record and the following are in my view the issues to be determined by this court:-

- Is this suit properly before the court?
- If the answer to the above is yes, was the defendant negligent?
- Is the plaintiff entitled to the reliefs of both general and special damages as pleaded?
- Who is to pay the costs of the suit?

The suit was instituted on behalf of the plaintiff by one STEPHEN GACHETHIRE RANJAU, suing as next of kin to the plaintiff IRENE WANJIRA STEPHEN. At paragraph 1 of the plaint, the plaintiff averred as follows:-

**"1. The plaintiff is an adult male of sound mind and he is suing on behalf of his daughter, a minor\_ who has consented (emphasis mine) his address of service shall be c/o L. KIMATHI KIARA & CO. ADV. P.O. BOS 2403, MERU."**

**Order 31 rule 1 of the Civil Procedure Rules provides as follows:-**

**"1(1) Every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor.**

**2. Before the name of any person shall be used in any action as next friend of**

**any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed."**

Were the provisions of the above rule complied with? On perusal of the court file the only pleadings on the file are the plaint and the verifying affidavit. No written authority by the next friend was signed by the next friend to the advocate for the purpose of instituting the suit and there is no copy on the file of such signed authority. This absence of the signed and filed authority by the next friend to the advocate means that if the defendant had appeared in this matter, he would have invoked the provisions of Order 31 Rule 2(1) to have the suit dismissed. Defendant or no defendant, this court has to determine whether the absence of the signed and filed authority by the next friend is fatal to the plaintiffs suit. The provisions of Rule I of Order 31 is couched in mandatory language, so that where there is no signed and filed authority by the next friend, the suit is liable to be dismissed. In my view therefore, and having failed to comply with the requirements of Rule 1 of Order 31, the next friend could not properly have filed the suit on behalf of the plaintiff minor when he purported to do so on 14.7.2003. I would therefore dismiss the suit on that ground.

In light of the above findings, it is not necessary for me to go into. In my view therefore, and having failed to comply with the requirements of Rule 1 of Order 30, the next friend could not properly have filed the suit on behalf of the plaintiff minor when the next friend filed the suit on 14.7.2003. I would therefore dismiss the suit on that ground.

In light of the above findings, it is not necessary for me to go into the question determining the other issues as to whether or not the defendant was negligent, whether the plaintiff is entitled to the reliefs sought and finally as to who should bear the costs of the suit, as such determination would serve no useful purpose in a suit that stands dismissed under the provisions of Order 31 of the Civil Procedure Rules.

In the result, I dismiss the plaintiff's suit. Any costs incurred by the plaintiff in this case are to be born by the next friend, STEPHEN GACHETHIRE RANJAU.

It is so ordered.

Dated and delivered at Meru this 3rd day of February 2005.

**RUTH N. SITATI**

**Ag JUDGE**

**3.2.2005**