



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 198 of 2003

SIMON MWANGI MUREITHI PLAINTIFF

Versus

MARTIN O. SHIKUKU

MWADIGA FUNDI

FREIZER M. NDUATI

SHABAN JUMA SHABAN DEFENDANTS

J U D G M E N T

On 31st October 2002 the plaintiff was travelling as a fare-paying passenger in motor vehicle registration number KAM 132N (KAM) a Nissan matatu, from Kwale towards Kombani. At Matairini that vehicle was involved in a head-on collision with another vehicle registration number KAD 456X (KAD) Mitsubishi saloon and the plaintiff suffered serious injuries. It is alleged that another matatu registration number KAM 273Y which was ahead of KAD suddenly stopped causing obstruction to KAD. In an attempt to overtake it KAD collided with KAM. The plaintiff has sued the owners of the three vehicles as well as the driver of KAM alleging negligence against their respective drivers.

In their defences the defendants have denied ownership of the vehicles. Before I deal with the issue of liability it is important to determine who was the owner of which vehicle.

PC George Odungo, P.W.1, was the investigating officer of the accident. He stated that KAM 273Y belonged to Martin O. Shikuku, the first defendant, that the owner of KAD 456X was Mwadiga Fundi the second defendant and that KAM 132N belonged to Frasier M. Nduati the third defendant. He said the information was given to him by the owners themselves who were people from the area where the accident occurred.

The sister of the plaintiff Billiah Muthoni Muriithi P.W.4 carried out a search at the registry of motor vehicles and produced certificates in respect of two of those vehicles. The certificate **Exhibit 5** shows that as at 20th July 2000 KAM 132N belonged to Frasier M. Nduati while **Exhibit 6** shows that as at 31st October 2002 the owner of KAM 273Y was Martin O. Shikuku. Apart from counsel's submissions that the ownership of the vehicles had not been conclusively determined the evidence of the Investigating Officer and the details in the certificates from the Registrar of Motor vehicles remain uncontroverted. Counsel for the third defendant submitted that there was no proof that KAM 132N belonged to the third defendant as at the date of the accident as the certificate produced showed that it

belonged to her as at 20th July 2000. She did not proffer any evidence herself to prove that she had ceased to be the owner as at the date of accident. To the contrary Omar Kadzoyo Tundo D.W.1 the driver of that vehicle at the material stated that he drove it as an employee of the third defendant. The second defendant did not testify or adduce any evidence to disprove what the Investigating Officer had said. In the circumstances I find that the plaintiff has proved on a balance of probabilities that the first defendant was the owner of KAM 273Y, the second defendant was the owner of KAD 456X and that the third defendant was the owner of KAM 132N.

Having resolved the issue of the ownership of the vehicles I now wish to deal with issue of liability. Who was to blame for the accident giving rise to this case? Were all the drivers of the vehicles or one or two of them to blame? If all were to blame to what extent was each to blame?

The evidence of the Investigating Officer does not help much on the issue of liability. He arrived at the scene after the accident had occurred. He said he was informed that the matatu KAM 273Y had suddenly stopped on the road causing obstruction to KAD. The person who gave him that information having not testified that evidence is hearsay and I reject it. The relevant and admissible evidence is that of the plaintiff and the driver of KAM 132N, D.W.1.

The plaintiff stated that after finishing the descent from Kwale at a sharp corner or bend he saw a stationary matatu KAM 273Y on the opposite side of the road. A saloon car emerged from behind the stationary matatu and in an attempt to overtake it collided with the one he was in. Before the collision he said the matatu he was in was moving very fast.

The driver of KAM 132N, Omar Kadzoyo Tundo D.W.1, stated that as he descended from Kwale he saw two vehicles, a matatu and a saloon car going the opposite direction. A person who was standing on the side of the road stopped the matatu and it stopped suddenly on the road but on its correct lane. The car while overtaking the stationary matatu went to his side of the road. He swerved off the road but the car swerved there also and his vehicle collided with the car. He said the collision was completely off the road on his side. He denied driving at a high speed as he had stopped and picked a passenger before he saw the two vehicles. At the time of collision he said he was driving at 50 – 60 KPH.

Both the plaintiff and D.W.1 said the matatu KAM 273Y suddenly stopped on the road causing obstruction to KAD. It was supposed to stop off the road. The police charged its driver for causing death by obstruction and I am told the traffic case is still pending in court. The driver of KAD was no doubt driving at a high speed and did not keep clear distance behind KAM 273Y. That is why he could not stop behind it and instead attempted to overtake at a corner. Faced with the oncoming KAM 132N he swerved to the extreme right colliding with it out of the road. He was obviously to a large extent to blame for the accident. The Investigating Officer P.W.1 he would have charged him had he survived.

The plaintiff said that KAM 132N in which he was riding was being driven fast. He, however, did not say at what speed it was moving.

Taking this evidence and all the factors into account I find that the drivers of KAD 456X, KAM 273Y and KAM 132N are 70%, 20% and 10% liable respectively. That disposes of the issue of liability and I now wish to deal with the claim for quantum of damages.

The plaintiff stated that on collision of the vehicles the rest of his body was thrown out of the window but his legs were trapped inside the vehicle. So his body hanged out of the window. He suffered cuts on the hand and back and fracture of the thoracic spine. He was taken to Kwale District Hospital but he was transferred later in the day to Coast General Hospital where he was admitted for three months. He was discharged on a wheel chair. In July 2004 he was admitted to Port Reitz Polio clinic where he is upto now. He was brought from that clinic to testify after which he was taken back.

While at home between February 2003 and July 2004 he said he was not able to go to the toilet on his own or even take a shower. His elder sister with whom he stayed, his parents having died in 2000, employed someone who used to assist him and carry him around. The wooden bed he slept on at home

caused him to develop serious bed sores. The doctor told him that he needs special bed and orthopedic mattress.

Dr. Udayan Sheth who has been treating him right from the time he was admitted to Coast General Hospital testified in this case. He said the plaintiff suffered a compressed fracture of the 11th and 12th vertebrae resulting in complete paraplegia i.e. complete paralysis below the umbilicus. He said the plaintiff's lower limbs are now completely paralysed and are flaccid with no sensation. In his report which he produced as Exhibit 3, Dr. Sheth stated that the plaintiff cannot walk at all and will have to be on a wheel chair for the rest of his life. He has no chance of recovery at all. He said he has suffered 100% permanent disability.

In his further testimony Dr. Sheth stated that the plaintiff being incontinent has to use catheters on a daily basis and proper care should be taken to prevent urinary infections. He will also need a paraplegic toilet whose cost he does not know. As he cannot walk he requires a wheel chair whose cost is about 25,000/=. To enable him turn and avoid bed sores he requires an orthopedic bed which costs about 50,000/=. The plaintiff, Dr. Sheth said, will also require physiotherapy for the rest of his life to avoid contractures i.e. tightening of the muscles. He will also require someone full time to move him around and generally assist him.

This evidence was not challenged by the defendants. In a nutshell this is a case of complete paraplegia. What then should be the reasonable award of damages that the court should make?

On the basis of the injuries suffered and the evidence tendered I propose to consider the claim for general damages under the heads of pain and suffering and loss of amenities, lost earnings, nursing care and future medical expenses, the cost of equipment the plaintiff requires and special damages.

As I have already stated when the accident occurred the plaintiff was thrown through the window but his legs were trapped in the vehicle. The rest of his body therefore hanged out of the window until he was removed from there. He was rushed to Kwale District Hospital but he was later that day transferred to Coast General Hospital where he was admitted for three months, upto the 27th January 2003. From that time to July 2004 when he was admitted to Port Reitz Polio Clinic he suffered serious bed sores at home. He has no doubt suffered a lot of pain. For pain and suffering basing his submissions on three authorities which I will consider in a moment, counsel for the plaintiff recommended a sum of Sh. 1,500,000/= as a reasonable award under this head. On his part counsel for the first, third and fourth defendants relied on a 1996 authority and recommended a sum of Sh. 400,000/=.

Before making an award in this case I find the words of Lord Morris of Borth-y-Gest in the case of *H. West & Sons Ltd. Vs Shepherd* (1964) AC 326 at p.345 quoted with approval by Justice Potter in **Tayab Vs Kinanu Civil Appeal No. 29 of 1982 (C.A.) (unreported)** providing useful guidance. Lord Morris said:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be endeavoured to secure some uniformity in the general method of approach, by common consent awards must be reasonable and must be assessed with moderation. Further more, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

While bearing the above caution in mind it must also be remembered that a plaintiff who has been injured and seriously disabled must be reasonably compensated for the loss and damages he has suffered.

What are the comparable authorities to be considered? Counsel have cited three but I wish to consider two. In **Kitaka Vs Masila, Nairobi Milimani Commercial Courts HCCC No. 235 of 1999** Mwera J awarded a sum of Sh. 1,000,000/= to a paraplegic on 15th November 2001. In **Kibucha & Another Vs Mosongo [1989] LLR 1657 (CAK)** the Court of Appeal upheld Mbaluto J's award of Sh. 850,000/= for

4. Paraplegic equipment	Sh. 77,600.00
5. Disposables and future medical Expenses	Sh. 200,000.00
6. Special damages	Sh. <u>1,600.00</u>
Total	Sh. <u>2,979,200.00</u>

The plaintiff shall also have costs and interest on this sum.

DATED and delivered this 17th day of May 2005.

D.K. MARAGA

JUDGE