



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 67 of 1995

MARY ANYANGO.....PLAINTIFF

VERSUS

JOANES AKULA.....1ST DEFENDANT

SHEM ONYANGO T/A KWEGA BUS.....2ND DEFENDANT

JUDGMENT

The plaintiff, Mary Anyango filed suit against the defendants Joanes Akula and Shem Onyango t/a Kwega Bus Service seeking to be paid damages for the injuries that she alleges to have sustained in a road traffic accident. According to her plaint, the plaintiff avers that she was travelling in motor vehicle registration number KAB 213V Isuzu bus owned by the 2nd defendant but driven by the 1st defendant when the said bus was involved in an accident on the 14th April 1994 along Nakuru-Eldoret road.

According to the plaintiff the said accident occurred when the bus owned by the 2nd defendant collided with motor vehicle registration number KAC 184F. As a result of the said accident, the plaintiff sustained injuries which she particularised in her plaint.

She urged the court to find in her favour and award her damages accordingly. The defendants denied the plaintiff's claim. In their defence, they averred that the accident was caused or substantially contributed by the driver of motor vehicle number KAC 184F. The defendants denied that they were liable to pay damages to the plaintiff. The defendants made an application to join the owners of motor vehicle registration number KAC 184F to the suit by issuing a third party notice. The application was however not prosecuted by the time the hearing of the suit commenced.

At the hearing of the suit the plaintiff called three witnesses who testified on her behalf. The defendant chose to close its case without calling any witness. PW1 Dr Wellington Kiamba testified that on the 6th of September 1994 he examined the plaintiff. He established that the plaintiff had sustained compound fracture of the left femur, fracture of the pelvis, fracture of the molar tooth of the lower jaw and soft tissue injuries to the left shoulder joint. At the time of examination, the plaintiff could not walk without support. She had pain in the chest and left shoulder. The plaintiff's left lower limb had a prominent deformity on the left thigh. The fracture of the left femur was malunited. The plaintiff had developed arthritis of the left knee joint. The pelvis was still tender and she was still suffering pain from the residual effect of the injuries that she had sustained on the chest and on the left shoulder joint. PW1 assessed the degree of permanent disability to be 20%. He produced the medical report as plaintiff's exhibit No. 1. He charged Kshs 2,000/= to prepare the report (receipt produced as plaintiff's exhibit No. 2) and was paid Kshs 5,000/= to attend court (receipt produced as plaintiff's exhibit No. 3). PW1 reiterated that he had prepared the said report six months after the accident and had relied on the x-rays, treatment cards, discharge summaries and also by physically examining the plaintiff to arrive at his findings. He however conceded that the discharge summary only referred to the fact that the plaintiff had sustained a fracture of the

femur. The soft tissue injuries of the shoulder were not indicated.

PW2, Mary Anyango Oduor (the plaintiff) testified that on the night of the 14th and the 15th of April 1994, she had boarded a bus owned by the 2nd defendant known as Kwega Bus Service, at Nakuru Bus Stage (Registration number KAC 513V). She intended to travel to Bunyala, Busia. She paid the fare. She was travelling in the company of Petronilla Ojwang'. When the bus reached near Rongai, it was involved in an accident. According to the plaintiff prior to the occurrence of the accident, she had seen a trailer parked on the left side of the road. Leaves had been strewn on the road to indicate that the trailer had broken down. The plaintiff testified that the bus hit the trailer from behind. According to the plaintiff, the accident was caused because the driver of the bus was driving at a very high speed. PW2 testified that she was able to witness the accident as she was sitted behind the driver. After the accident, she became unconscious. She regained consciousness after two days. She learnt that she had been injured. She stated that her left leg had been fractured. She was also injured on her left shoulder, and waist. She also fractured her two teeth. She was admitted at the Nakuru Provincial General Hospital and Pine Breeze Hospital where she underwent medical treatment. The medical notes were produced in a bundle as plaintiff's exhibit No. 4.

After being discharged from the hospital, the plaintiff went to the police station and was issued with a police abstract report (produced as plaintiff's exhibit No. 5). She was also issued with a P3 form which was duly filled by the doctor (plaintiff's exhibit No. 6). She testified that at the time of the trial she had not healed properly. The metal plate which had been fixed to stabilize the fracture had not been removed because the plaintiff did not have funds to pay for the operation. She saw a Dr Simiyu who told her that she would require Kshs 50,000/= to have the said plate removed. She testified that she had undergone further medical treatment after the accident. (Medical chits produced as plaintiff's exhibit No. 7).

She asked the court to order the defendant to pay her damages in compensation for the injuries sustained. She further testified that she was travelling at night and had seen the lorry parked ahead of the moving bus before the accident occurred. She saw the tree branches which had been left on the road. She did not see any motor vehicle coming from the front. It was her testimony that the bus hit the lorry which had been parked off the road. She testified that although she was issued with a receipt when she paid the bus fare, the same got lost when the accident occurred. She further testified that she did not sue the lorry owner because she was a passenger in the bus. She reiterated that the bus was being driven at a high speed. She conceded that she did not complain to the driver that he was driving the said bus at a high speed. She further reiterated that she was injured on her left leg (which was fractured), and waist. She fractured her two teeth. She testified that although the medical report indicated that she was admitted in hospital for three months, the total period that she was in hospital was six months. She denied that she had sustained the injuries elsewhere other than during the said accident. She conceded that according to the medical documents produced in court, the last time that she was attended to by a medical practitioner was in 1996.

PW3 Petronilla Otiato Oduor testified that the plaintiff was her friend. On the 14th of April 1994 she accompanied the plaintiff who was travelling to Busia. They boarded a bus registration number KAC 513V. It was involved in an accident at Ngata Farm with a lorry. According to PW3, the accident was caused by the driver who was driving the said bus at a very high speed. It was her testimony that tree branches had been placed on the road which indicated that there was a motor vehicle which had broken down ahead of the bus. She testified that before the accident occurred, a passenger shouted warning the driver that there was a lorry parked on the road ahead.

PW3 was sitted behind the driver. The bus then collided with the lorry which had been parked on the left side of the road. PW3 testified that the driver of the bus did not slow down the bus even though he had seen the tree branches on the road.

After the accident, the passengers moved out of the bus because it was on fire.

She helped remove the plaintiff from the bus as she appeared unconscious. She saw that the plaintiff left leg had been injured. She assisted in having the plaintiff taken to hospital (i.e. the Nakuru Provincial

General Hospital). She denied that she became unconscious after the accident. She stated that she was giving her testimony because she was with the plaintiff when the accident occurred and saw what happened. She denied that there was another motor vehicle coming from the opposite direction. She testified that she blamed the driver of the bus for causing the said accident as he was not careful. The driver appears not to have seen the motor vehicle parked in front, and further, even after the driver had seen the motor vehicle, he did not take any evasive action to prevent the accident. She reiterated that the lorry had been parked on the left side of the road.

After the close of the plaintiff's case, the defendants closed their defence without offering any evidence. The plaintiff and the defendants agreed by consent to file written submissions on liability and quantum as to damages. Both parties filed their written submissions. I have considered the evidence adduced in this case. I have also carefully read the written submissions filed. The issue for determination by this court is whether the plaintiff has established on a balance of probability that she was injured while travelling in the motor vehicle owned by the 2nd defendant and driven by the 1st defendant. If so, are the defendants liable in negligence to the plaintiff? What is the quantum as to damages? As stated at the beginning of this judgment it is only the plaintiff who offered evidence in this case. The defendants choose not to offer any evidence.

In her testimony, the plaintiff testified that she was travelling in motor vehicle registration number KAB 513V as a fare passenger on the night of the 14th of April 1994. The said motor vehicle was involved in an accident on the Nakuru- Kisumu road at Ngata Farm. According to the plaintiff, whose evidence was corroborated by the evidence of PW3, the driver of the bus drove into a lorry which had broken down on the road. The plaintiff testified that the passengers in the bus saw the lorry parked on the road. Tree branches had been strewn on the road to indicate that a motor vehicle had broken down ahead of the bus. According to PW2 and PW3, the driver of the bus appeared to have ignored this warning and rammed the bus at the rear of the parked lorry. The bus was consumed by fire after the accident. PW3 testified that she assisted in removing the plaintiff from the burning bus. The plaintiff was unconscious. She appeared to have sustained serious injuries on her left leg. PW3 assisted in having the plaintiff taken to hospital. The plaintiff was first admitted at the Nakuru Provincial General Hospital and later at the Pine Breeze hospital. From the documentary evidence produced in evidence by the plaintiff, she was admitted in hospital for about three months.

According to the plaintiff the said accident was solely caused by the negligence of the 1st defendant who was driving the bus. She held the defendants liable because according to her the said bus was being driven at an excessive speed in the circumstances. The plaintiff further testified that although there were tree branches left on the road to warn other drivers that there was a motor vehicle which had broken down on the road, ahead, the 1st defendant did not heed this warning thereby ramming into the parked lorry. The plaintiff's evidence was corroborated by that of PW3. The plaintiff was adamant that the owner of the lorry which the bus rammed into could not be liable to her in negligence as it was the 1st defendant who was careless and thus caused the said accident.

I have evaluated the evidence adduced by the plaintiff. The said evidence was uncontroverted. Although the defendants filed a defence blaming the owner of the lorry which was parked by the roadside for the accident, the defendants choose not to offer any evidence in support of their case. They did not serve the said owner of the lorry with a third party notice. As things stand, the evidence adduced by the plaintiff could well be the gospel truth. In the absence of any evidence to the contrary this court finds for the plaintiff. The evidence adduced by the plaintiff proves on a balance of probability that it was the 1st defendant who solely caused the said accident. He drove the said bus at a speed that was too high in the circumstances. He did not heed the warning placed on the road (of the tree branches) which indicated that there was a vehicle which had broken down which had been parked on the road. Further, he did not heed the warning by the passengers that there was a lorry which had been parked on the road.

For the said reasons I hold the 1st defendant liable in negligence to the plaintiff for the injuries that she sustained in the said accident. The 2nd defendant as the owner of the said bus is vicariously liable for the negligence of his employee, the 1st defendant.

The defendants submitted that the plaintiff had not proved that she was a passenger in the said bus because she had failed to produce a receipt that was issued to her when she paid the fare. I however believe the explanation given by the plaintiff that after the accident, she became unconscious and was not therefore able to take care of her personal belongings including the receipt. She testified that she lost the receipt in the confusion that took place after the accident. I do find that the plaintiff has proved on a balance of probabilities, that the defendants were solely liable for the said accident. Liability is therefore found against the defendants at 100%.

On quantum, according to Dr Wellington K. Kiamba who testified as PW1 the

plaintiff sustained the following injuries (plaintiff's exhibit No. 1):

- (i) Compound fracture of the left femur in the lower one third with butterfly fragments.**
- (ii) Fracture of the pelvis right pubic and ischium.**
- (iii) Soft tissue injuries of the left shoulder.**
- (iv) Fracture of the last molar tooth on the left jaw.**

According to his prognosis, the fracture of the left femur which had been set by an internally fitted plating and bone grafting had malunited. The plaintiff was walking with a prominent deformity. She had also developed post traumatic osteo-arthritis of the left knee joint. These disabilities were of a permanent nature.

The fracture of the pelvis was still tender on compression. The soft tissue injuries on the chest and left shoulder joint had healed but left residual pain on the chest and left shoulder joint. The said doctor assessed the degree of permanent disability to be 20%.

The defendants did not offer any evidence to counter the evidence of the plaintiff on injuries that she sustained. I will therefore rely on the evidence offered by the plaintiff on her injuries to assess the general damages for pain, suffering and loss of amenities payable. According to the plaintiff, she craves to be awarded Kshs 700,000/= as general damages for pain suffering and loss of amenities. In support of her assessment she has relied on the following decided cases: **Susan Wanja Evans –vs- Corporal Ndung'u & Anor Nairobi HCCC No. 258 of 1986 (unreported)**, **Josephine Malel Kimaiyo –vs- Simon Njoroi Kirichu & 3 others Nakuru HCCC No. 499 of 2000 (unreported)**; **Lenson Nchogo Isaboke –vs- Tarakuet Ltd & 3 others Nakuru HCCC No. 398 of 1997 (unreported)** and **Rosemary Wanjiru Thumbi –vs- Pennel Mwangi Kimani Nairobi HCCC No. 2797 of 1991 (unreported)**. On their part, the defendants have submitted that the plaintiff be awarded Kshs 300,000/= as general damages. They have relied on the following decided cases; **Eyana Kamau –vs- Cecilia Wanjiru Ndung'u Mombasa HCCC No. 16 of 1992 (unreported)**, **Khamis Mwakudlilola –vs- Laban Mukonjera Mombasa HCCC No. 274 of 1991 (unreported)** and **James Gaithaimu –vs- Muiruri Njuguna & Anor Nairobi HCCC No. 6323 of 1990 (unreported)**. I have carefully read the said cases referred to me. The plaintiff in the said cases sustained more or less similar injuries sustained by the plaintiff. However the authorities cited by the defendants are more than a decade old. Incidences of inflation has rendered the said decisions out of date. Doing the best that I can in the circumstances of this case, and taking into consideration the injuries sustained by the plaintiff (including the long term permanent effect of the injuries), I will award the plaintiff Kshs 500,000/= general damages for pain suffering and loss of amenities.

The plaintiff in his plaint sought to be awarded Kshs 2,100/= as special damages. Although she testified that the cost of future medical expenses to remove the plate imbedded on her femur bone would be Kshs 50,000/=, as she did not specifically plead it, I will therefore not allow the same. I will award her the sum of Kshs 5,000/= being the Doctors for attending court to adduce evidence on behalf of the plaintiff. I will award her Kshs 2,000 being the cost of preparing the medical report and Kshs 100/= paid for the police abstract report.

In the circumstances therefore judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

(i) Liability is found in favour of the plaintiff and against the defendant at 100%

(ii) The plaintiff is awarded damages as follows:-

(a) General damages for pain suffering and loss of amenities..... Kshs 500,000

(b) Special damages Kshs 7,100 TOTAL Kshs 507,100

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest shall be applied on the sum awarded at the usual court rates.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE