



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Civil Case 351 of 2000**

**ODEMA JAMES ACHOLA .....PLAINTIFF**

**VERSUS**

**PETER OTIENO OPIYO.....1ST DEFENDANT**

**JAMES ATICH NANDI.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff, Odema James Achola filed suit against the defendants seeking to be paid damages as a result of the injuries he alleged to have sustained whilst travelling as a fare paying passenger in motor vehicle registration number KAJ 285H along Awasi-Kisumu road on the 11th of September 1999. The plaintiff averred that the said motor vehicle owned by the 1st defendant was so negligently and carelessly driven by the 2nd defendant that he caused the same to overturn and thus caused the plaintiff to sustain serious injuries. The plaintiff pleaded that the said accident was caused by the 2nd defendant in that he was driving the said motor vehicle at a speed that was too fast in the circumstance. The plaintiff further pleaded that the 2nd defendant drove the said motor vehicle without due care and attention and further without regard to the safety of the plaintiff. The plaintiff averred that the doctrine of *res ipsa loquitur* applied. The defendants denied the averments made by the plaintiff. The defendants denied that the said accident ever took place. The defendants further denied that they owed the plaintiff a duty of care and thus liable to compensate him even if the accident in question took place. Issues having been agreed, the parties listed the suit for hearing before Justice Rimita. Justice Rimita heard the case to its conclusion. However Justice Rimita retired before he could deliver the judgment. The parties to this suit agreed by consent for this court to write the judgment based on the proceedings before Justice Rimita.

According to the plaintiff, a teacher by profession, (*then teaching at Eregi Teachers College*) he was travelling from Kisumu to Nakuru on the 11th of September 1999. He was travelling in a Nissan Matatu registration number KAJ 285H. He testified that he did not reach his destination as the said motor vehicle was involved in an accident. According to the plaintiff, the driver of the said Nissan Matatu was driving the said motor vehicle at a very high speed on a road that was potholed. He testified that because of the high speed the driver could not control the motor vehicle when it sustained a tyre burst. After the tyre burst the vehicle rolled. The plaintiff testified that he was thrown out of the motor vehicle and landed in a thicket. He was assisted by good Samaritans who took him to Nyanza Provincial General Hospital where he was admitted for one day. He was later transferred to the War Memorial Hospital, Nakuru where he was admitted from the 12th of September 1999 to the 2nd of October 1999. The discharge summary was produced as plaintiff's exhibit No. 1. The plaintiff testified that he sustained a cut on his face but his major injury was a fracture of his spine. He testified that initially he was unable to move and was confined in bed. He further testified that although he had regained movement to parts of his body the left side of his body was still numb. At the time of the trial the plaintiff was still undergoing physiotherapy. The attendance chit was produced as plaintiff's exhibit No. 2. It was his testimony that his left arm had been rendered useless. The drugs that he had taken for treatment had triggered diabetes a long term

ailment.

He testified that he could not dress himself or go for a call of nature without assistance. He had become impotent since the date of the accident. He reported the accident to the police and was issued with a police abstract report which was produced as plaintiff's exhibit No. 3. He was further issued with a P3 form (*produced as plaintiff's exhibit No. 4*). He was examined by Dr Siminyu who prepared a medical report. He testified that he incurred a lot of expenses while his injuries were being attended to by the medical professionals (*bundle of receipts were produced as plaintiff's exhibit No. 6*). At the time of the trial, the plaintiff was still undergoing physiotherapy at cost of Kshs 3,500/= per month. Further he needed someone to constantly take care of him. He could not take bath. He could not undertake any kind of work. He testified that he had the will power and believed one day he would be okay. The plaintiff was claiming costs of future earning at Kshs 36,000/=. At the time, he testified in court, he was still working but retired in July 2001 having reached the retirement age. He however testified that the likelihood of his being employed elsewhere was curtailed by his injuries (*a copy of the payslip was produced as plaintiff's exhibit No. 7*). He prayed for judgment to be entered by the court as prayed in the plaint.

He testified that the accident occurred in Awasi area along a stretch of road between a sugar plantation. The road was gently sloping. He could not remember if the accident occurred on a level ground. It was his evidence that the road was curved. There were no potholes where the accident occurred, although it was his evidence that the road was generally potholed. According to the plaintiff, the tyre burst occurred because the driver of the motor vehicle was driving the vehicle at a high speed on the potholes. The motor vehicle rolled after the tyre burst. The plaintiff could not recall how many times the motor vehicle rolled. He testified that he was seated on the front passenger seat with the driver. It was his testimony that the driver was talking to the conductor while mentioning the words "*masaa*" i.e. time. He took the words to mean that the two were conversing that they were late. He testified that he did not move out of the vehicle until he was thrown out. He denied that he assisted the driver to control the motor vehicle. He reiterated that he regained his consciousness when he was admitted at New Nyanza Hospital. He informed his family who went to the hospital and transferred him to Nakuru War Memorial Hospital. He further reiterated that he was still undergoing physiotherapy at the time he gave his testimony before court. He testified that he purchased a glucometer for the purpose of testing his blood. He was paying Kshs 3,500/= for an assistant. The assistant also bathed him. He did not have any documents to prove that he had employed an assistant.

At the time he gave his testimony, the plaintiff's family was residing in Nakuru. He was 55 years old. He lost hardship allowance and teaching practice allowance as he could not visit students when on teaching practice. The amount he lost was Kshs 5,399/=. He testified that he was retiring at the age of 55 years as required by regulation. He had intended to start a private school upon attaining the age of retirement. He could have been employed in private colleges to teach like a colleague of his who was teaching at a private college at the time. The plaintiff denied that he held the steering wheel and thus interfered with the driver's ability to control the motor vehicle. The plaintiff testified that he was a Bachelor of Science graduate from the University of Nairobi. He denied that he intended to stay at home after retirement. He reiterated that if the driver was not driving the vehicle at a high speed he would have controlled the vehicle. He denied that he interfered with the driver when the tyre of the motor vehicle burst.

PW2 Dr Morris Peter Siminyu testified that he examined the plaintiff and prepared a medical report. The report was produced as plaintiff's exhibit No. 8. He assessed the degree of permanent disability to be 50%. He testified that he attended to the plaintiff since he was admitted at War Memorial hospital from New Nyanza Hospital. During the plaintiff's treatment he was subjected to a high dose of drugs which caused him to become a diabetic. He testified that the plaintiff was on treatment for diabetes. He was of the opinion that the plaintiff was unlikely to recover fully from his injuries. He testified that he examined the plaintiff on the 24th of June 2000. The report consisted of three pages. He added the aspect of the sexual impotence of the plaintiff after being informed by the plaintiff's wife. He re-examined the plaintiff and confirmed the fact. He admitted that the said information (*i.e. the fact of impotence*) was not disclosed to him at the time he first examined the plaintiff. He testified that he attended to the plaintiff from the time he had sustained the accident. Initially the plaintiff could not move his limbs. He testified that the right upper limb was paralysed and could not improve beyond the point that he had reached. He

urged the court to consider his latest report on the plaintiff. He reiterated that he had stated the injuries that the plaintiff had sustained in all the reports.

After the plaintiff had closed his case, the defence called one witness, James Nandi Atich, the 2nd plaintiff (DW 1). He testified that he was employed by the 1st defendant, Peter Otieno Opiyo to drive motor vehicle registration number KAJ 285H, Nissan Matatu. On the 11th of September 1999 while he was driving the said motor vehicle from Kisumu to Nakuru the vehicle was involved in an accident at Awasi when it sustained a tyre burst. It was his testimony that at the time of the tyre burst he was driving the motor vehicle down a hill at an average speed of about 70 KPH. He testified that after the tyre burst he tried to control the motor vehicle in vain. He said that there was a passenger who was sitted in the front seat on his right who also held the steering wheel when the motor vehicle sustained the tyre burst. The motor vehicle tilted towards the passengers side. He testified that the motor vehicle zigzagged on the road until it went of the road, hit an embarkment and landed on its side. He reiterated that the motor vehicle did not roll over. After the vehicle had landed on its side, the passengers who were inside the motor vehicle were assisted to come out of the vehicle. It was his further testimony that at the time of the accident there were three people including himself in the front passenger seat. After the accident, one passenger lay on him.

DW1 stated that he was injured on the chest and was taken to the New Nyanza Hospital where he was treated. He denied that any passengers who was sitted on the front seat was thrown out of the motor vehicle. He stated that although the windscreen was broken it remained intact in its place. He further testified that he was not driving the said motor vehicle at a high speed as alleged by the plaintiff. He denied that the motor vehicle rolled after the accident. DW1 admitted that the accident indeed did occur. He stated that he was not charged by the police after the said accident. He admitted that he did not know the plaintiff or the position that he was seated at the motor vehicle when he accident occurred. He conceded that if a motor vehicle was involved in an accident when it was being driven at 70 KPH passengers could die. He testified that the motor vehicle was extensively damaged on its side after the accident. He reiterated that the motor vehicle did not overturn during the accident although it was extensively damaged. He testified that the motor vehicle fell on its side towards the passenger's side. He denied that he had driven the said motor vehicle at a high speed. He further denied that he was to blame for the accident. He reiterated that after the tyre burst, a passenger who was sitted in the front passenger seat held on the steering wheel and struggled with him.

After the close of both the plaintiff's and the defendant's case, the parties to this suit agreed to file written submissions on liability and quantum. However it is only the plaintiff who filed his submissions. I have read the pleadings filed by the parties to this suit. I have also considered the evidence that was adduced and the submissions made by the plaintiff. The issue for determination by this court is whether the plaintiff established, on a balance of probabilities, that he was a passenger in the motor vehicle owned by 1st defendant and driven by the 2nd defendant. The other issue for determination is whether the plaintiff established that he was injured when the said motor vehicle was involved in an accident. If the answer to the above issue is decided in favour of the plaintiff, what will be the quantum of damages payable to the plaintiff for the injuries sustained?

In his evidence, the plaintiff testified that on the 11th of September 1999 he was travelling from Kisumu to Nakuru in a Public Service motor vehicle registration number KAJ 258H. He paid the fare. At Ahero the said motor vehicle was involved in an accident. According to the plaintiff the driver of the said motor vehicle was driving at a high speed on a potholed road. He testified that the driver seemed to have been driving the said motor vehicle at a high speed in order to reach their destination sooner rather than later. It was while the said motor vehicle was being driven at the said high speed that it sustained a tyre burst. The driver lost control of the motor vehicle as a result of which the motor vehicle rolled. The plaintiff was thrown out of the motor vehicle and sustained serious injuries. The plaintiff blamed the driver of the said motor for the said accident. He produced a police abstract issued by the officer in charge Ahero traffic base as plaintiff's exhibit No. 3 which confirmed that the plaintiff was a passenger in the said motor vehicle when it was involved in the said accident.

The 2nd defendant, who testified on behalf of the defence, denied that he was negligent or that he caused

the said accident. According to him, he was driving the said motor vehicle at an average speed of 70 km/h. At the time the said motor vehicle sustained a tyre burst the 2nd defendant was driving on a road that was sloping down a hill. It was his testimony that when the said motor vehicle sustained the tyre burst, he tried to control it and safely stop it but was prevented from doing so by a passenger who was sitting on the front seat who wrestled the steering wheel from him. It is as a result of this struggle that the motor vehicle went off the road and fell on its side (*the passenger side*). The 2nd defendant denied that the said motor vehicle rolled or overturned although he admitted that the said motor vehicle was extensively damaged in the accident. The 2nd defendant blamed the passenger who held the steering wheel when the motor vehicle sustained a tyre burst. He denied that he was driving the said motor vehicle at a very high speed. It was his case that were it not for the passenger who held on to the steering wheel, he could have controlled the said motor after the tyre burst and the accident could not have occurred. He conceded that the plaintiff was not the passenger who had held on to the steering wheel when the motor vehicle sustained the tyre burst. He however denied that any of the passengers was thrown out of the said motor vehicle when it was involved in the accident. He however conceded that he did not know where the plaintiff was sitting on the said motor vehicle when it was involved in the accident.

I have evaluated the evidence adduced. It is not denied that the accident actually took place where by motor vehicle registration number KAJ 285H sustained a tyre burst and was extensively damaged. The plaintiff did establish on a balance of probabilities that he was a passenger in the said motor vehicle. The defendant blames a nameless passenger for the said accident. They alleged that after the said motor vehicle had sustained a tyre burst, the said passenger held on to the steering wheel and struggled with the driver and thus prevented him from controlling the said motor vehicle so that it could safely be controlled to stop. The defendant however conveniently choose not to name this passenger. No third party notice was issued to enjoin this nameless passenger to the suit. The 2nd defendant confirmed in his evidence that it was not the plaintiff who struggled with him when the motor vehicle sustained a tyre burst.

In the circumstances of this case, the defendant has not at all denied the plaintiff's case that he was injured while travelling in the said motor vehicle as a fare paying passenger. The plaintiff proved that the tyre burst was sustained by the motor vehicle because the 2nd defendant was driving at a high speed on a potholed road. It can safely be argued that the said motor vehicle sustained the tyre burst because the tyre hit a pothole as a result of which it was damaged and sustained a burst when the said motor vehicle was being driven at a high speed. There is no evidence which was adduced that could connect the plaintiff to the said tyre burst and the subsequent accident that occurred. This court therefore holds the 2nd defendant liable for causing the said accident. The 1st defendant is thus vicariously liable for the actions of its employee. The defendant is therefore found to be solely liable to the plaintiff in damages for the injuries that he sustained.

On quantum, PW2 Dr Maurice P. Siminyu testified that the plaintiff sustained a compressed fracture of the cervical spine with left sided hemi-plegia/hemi paresis. He also sustained multiple bruises on the right parietal region of the face and multiple soft tissue injuries all over his body. After the plaintiff had been treated, and at the time the medical report was prepared (*plaintiff's exhibit No. 5*) the plaintiff's medical condition had improved save for the fact that his co-ordination was still limited. The plaintiff had regained power in his right upper limb, then the right lower limb and then the left lower limb. The plaintiff had not recovered the use of his left upper limb. The said limb had to be supported by a hand sling. PW2 opined that the residual paralysis of the left upper limb and the weakness of the left lower limb have made the plaintiff unable to perform some of the routine duties like wearing clothes, going to the toilet, traversing the compound of the institution that the plaintiff at the time of the accident worked. PW2 was of the opinion that the said deficiencies would make the plaintiff dependant on an assistant to help him with the said chores.

PW2 stated that the plaintiff had developed diabetes due to the high steroid levels that was administered to him to treat the spinal injury which had compromised the function of his pancreas. The plaintiff would require medication to treat the diabetes. The plaintiff had further lost his sexual potency. He could no longer enjoy sexual intercourse with his wife. Dr Siminyu assessed the degree of residual permanent disability to be 50% under the **Workmen's Compensation Act**.

In his plaint, the plaintiff sought to be awarded general damages under the following heads; general damages for pain suffering and loss of amenities, general damages for future lost earnings and finally future nursing care. In his submission before court, the plaintiff submitted that he should be awarded Kshs 5,000,000/= for pain suffering and loss of amenities. He cited the case of **Julius Kirimi –vs- James Mwirigi M’ikiara Meru HCCC No. 96 of 1996 (unreported), Geoffrey Mutuba –vs- Maina Kuria & Anor Nairobi HCCC No. 821 of 1991 (unreported) and Margaret Wanjiru & Anor –vs- Hon. Attorney General & Anor Nairobi HCCC No. 5602 of 1989 (unreported)**. I have perused the said decided cases. In all of them, the injuries sustained were more serious than that suffered by the plaintiff. In the said cases, the plaintiffs had sustained complete fracture of the spinal cord and had become paraplegic. In the case of the plaintiff he sustained injuries to his spinal cord that made him to partially suffer paralysis of the left upper and lower limbs. The degree of disability was assessed at 50% while in the case of **Julius Kirimi** (supra) the degree of disability was assessed at 100%. I have however considered the fact that since some of the said decisions were made at least ten years ago. In the circumstances of this case and putting into consideration the totality of the injuries sustained by the plaintiff including the fact that he became a diabetic due to the medication that he received when being treated for the spinal injury and also the fact that he is now impotent, I will award him general damages of Kshs 1,800,000/= for pain, suffering and loss of amenities.

The plaintiff also pleaded that he should be awarded the loss of future earnings. In his testimony, the plaintiff testified that at the time of the accident, he was only two years away from reaching his retirement age. At the time of the hearing of the case the plaintiff was set to retire in July 2001. The evidence adduced by the plaintiff clearly showed that the injuries sustained in the accident did not affect his employment. He worked as a lecturer until he reached his retirement age. However it was his case that after retirement, he could have secured a job teaching at the private colleges in the country like some of his retired colleagues. I have no doubt that the plaintiff could have secured employment to teach in the said private colleges. However I am also aware that the plaintiff could have opted to enjoy his retirement at home without seeking any gainful employment. The injuries that he sustained in the accident has however restricted his options. I will allow his prayer for loss of future earnings based on the net pay that he received according to his payslip which was produced as plaintiff’s exhibit No. 7. The said net pay was Kshs 10,887/=. I will assess the years that he lost the opportunities to be gainfully employed to be three years.

The general damages awarded for loss of future earnings is thus:

$Kshs\ 10,887/= \times 12 \times 3 = Kshs\ 391,932/=$

The plaintiff pleaded that he should also be awarded the costs of future nursing care. I am aware that his head ought to have been classified as special damages. The plaintiff in his evidence did not adduce any evidence to prove that he had employed a nurse or a helper who assisted him after he sustained the said injuries. In the circumstances of this case, I do find that the plaintiff failed to prove that he is entitled to be awarded costs of future nursing care. The claim under this head, having not been proved is therefore disallowed.

The plaintiff pleaded that he should be awarded Kshs 168,260/= being the costs of treatment after he sustained the said injuries. At the hearing of the case the plaintiff produced receipts which established his claim. I therefore award him Kshs 168,260/- as special damages.

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

**(i) On Liability**

The defendants are found to be 100% liable for the accident.

**(ii) On quantum**

(i) General damages for pain, suffering and loss of amenities Kshs 1,800,000.00

(ii) General damages for loss of

Future earnings Kshs 391,932.00

(iii) Special damages Kshs 68,260.00

TOTAL 2,360,192.00

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

(iv) Interest on special damages shall be applied from the date of filing suit whereas interest on the general damages shall be applied from the date of this judgment.

**DATED at NAKURU this 13th day of May 2005.**

**L. KIMARU**

**JUDGE**