



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

**Civil Suit 354 of 2000**

**YUNIS MALIK.....PLAINTIFF**

**VERSUS**

**ELIUD MURIITHI.....1ST DEFENDANT**

**JAMES NG'ANG'A.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff, Yunis Malik, filed suit against the defendants Eliud Mureithi and James Ng'ang'a seeking to be paid damages as compensation for the injuries that he sustained in traffic accident that occurred on the 24th of August 1997 involving motor vehicles registration numbers KAG 812H and KSS 138. According to the plaint, the plaintiff avers that as he was driving his motor vehicle registration number KSS 138 along Nakuru-Nairobi road, the 2nd defendant caused motor vehicle registration number KAG 812H to veer from its side of the road on to the side of the road that the plaintiff was driving his said motor vehicle as a result of which the two motor vehicles collided resulting in the plaintiff sustaining serious injuries. His motor vehicle was extensively damaged beyond repair. It was declared written off. The plaintiff blames the defendants for the said accident. On their part, the defendants deny that they caused the said accident. They stated in their defence that it was the plaintiff who solely or substantially caused the accident which occurred on the material day. The defendants denied that the plaintiff suffered any injuries as a result of the said accident and put him to strict proof. Issues having been agreed and settled, the suit proceeded to hearing.

PW1, Mohammed Yunis Malik (hereinafter referred to as the plaintiff) testified that on the 24th of August 1997 he was driving his motor vehicle registration number KSS 138 (Toyota Saloon) along Nairobi-Nakuru road. The journey was uneventful until he reached Marura area near Naivasha. Ahead of him, he saw a matatu overtaking another matatu. The plaintiff testified that he drove his motor vehicle to the extreme left side of the road to avoid colliding head on with the overtaking matatu. The matatu also moved to the extreme left side of the road. The plaintiff still drove his vehicle to the extreme left side, off the road, but the driver of the matatu did the same. The two motor vehicles collided head on off the road on the left side of the road as one is facing Nakuru. The plaintiff later learnt that the registration number of the matatu was KAG 812H. He testified that at the time of the accident he was driving at an approximate average speed of 90 km/h. The road condition was dry. Visibility was good. The plaintiff testified that he flashed the lights of his motor vehicle to warn the driving of the oncoming motor vehicle in vain. He further testified that he swerved off the road and applied the brakes in a vain attempt to avoid the collision.

The plaintiff blamed the driver of motor vehicle registration number KAG 812H for causing the said accident because the said driver was driving his motor vehicle on his side of the road. The said driver was also driving the said motor vehicle at a high speed. After the accident, the plaintiff became unconscious. He regained his consciousness when he was already admitted at Pine Breeze hospital Nakuru. He was

admitted at Pine Breeze Hospital for 21/2 days. His hospitalisation costs Kshs 20,785/= (Invoice produced as plaintiff's exhibit No. 1). The plaintiff was taken to Aga Khan Hospital Nairobi where he was admitted for eleven days. He incurred a medical bill of Kshs 355,286/=. The invoices were produced as plaintiff's exhibit No. 2(a) (b) (c) & (d). A payment receipt was produced as plaintiff's exhibit No. 3. The plaintiff paid a further sum of Kshs 30,000/= for his treatment (produced as plaintiff's exhibit No. 4). He went for medical check-up and paid Kshs 1,500/= (plaintiff's exhibit No. 5). The plaintiff testified that after being discharged, he was put on complete bed rest. A plate was inserted to set his fractured leg.

The plaintiff testified that as a result of the said accident he sustained the following injuries; He fractured his right leg, he fractured three ribs on the right side of his chest; His right arm was bruised and stitched. The right side of his head was also injured. He required stitching. The plaintiff testified that as he was recovering from his injuries, the plate which was inserted in his leg broke. He was readmitted at Aga Khan Hospital for a second operation. He was admitted for seven days. He was charged Kshs 43,617/10 (invoice produced as plaintiff's exhibit No. 6). The amount of the invoice was paid (receipt produced as plaintiff's exhibit No. 7). The plaintiff paid a further sum of Kshs 30,000/= for treatment (receipt produced as plaintiff's exhibit No. 8). The plaintiff testified that he was admitted for three days at Nakuru War Memorial Hospital when he experienced pain in his stomach. The medical bill was Kshs 31,145/=. He paid the money (receipts produced as plaintiff's exhibit No. 9 and 10). He further testified that after the accident his motor vehicle was written off. A valuation report was prepared by one Bhola. The pre-accident value of the motor vehicle was assessed at Kshs 280,000/=. He testified that he was not able to utilise the salvage. It was his evidence that after the said accident he was forced to close his garage business. He asked the court to order the defendants to compensate him for the injuries sustained and the damage to his motor vehicle.

The plaintiff testified that he saw the oncoming matatu as a short distance of about 50 to 60 yards when the said matatu was overtaking in a corner. He reiterated that he was driving the said motor vehicle at a speed of about 90 km/h. It was his further testimony that the road was flat and good at the place where the accident occurred. He testified that he became unconscious after the accident and did not know the registration number of the motor vehicle; He only learnt about the registration number when he was informed by the police. He testified that he visited the scene with the police about 21/2 months after the accident. He was not aware if the driver of the matatu was charged with a traffic offence. He denied that he was driving his motor vehicle at a high speed. He testified that he had been a driver for 19 years and had not been involved in any accident apart from the accident in issue. He testified that he could not have avoided the accident because the oncoming motor vehicle was too close. He admitted that the valuation report did not give the salvage value. He testified that he had kept the salvage at his residence as a souvenir. He stated that the salvage could not be sold as he had cannibalised the engine and the gear box.

He admitted that the valuation report was prepared on the 20th of May 2002 while the accident took place in 1997. He testified that as a garage owner, he knew that the said motor vehicle could not be repaired. The plaintiff testified that he had not fully healed from the injuries that he sustained during the accident, and was under medication although he did not have any medical documents to prove that he was being attended to at the time the case was heard. He testified that on the 31st of December 1997 the screws which had been insert on the plate to fix the fractured bone broke. He required a second operation. He denied that the plate broke due to his negligence. The plaintiff testified that as a result of the accident, he no longer walked the way he used to. He reiterated that he recently saw a doctor because of the pain that he was experiencing in his leg.

PW2 Dr Mohammed Shabbir Malik testified that on the 24th of August 1997 he was called to see the plaintiff who had just then been injured in a road traffic accident. His initial assessment was that the plaintiff had sustained serious head and chest injuries. The plaintiff had also sustained comminuted fracture of the right femur. The plaintiff was unconscious. He also had numerous soft tissue injuries on his face and hands. PW2 applied splints on the right leg to stabilise the fracture. The plaintiff was then transferred to Aga Khan Hospital, Nairobi where he was admitted for two weeks. Thereafter he was discharged on clutches. On the 2nd of January 1998, about four months after the initial operation, the plaintiff was again admitted in hospital to remove the plate which had become dislodged. The plaintiff was admitted for eight days. A new plate was inserted. The femur bone had set. The plaintiff was

however walking with a limp.

PW2 further testified that the plaintiff had developed osteo-arthritis of the right hip joint and required medication to alleviate the pain that he was suffering from. The medical report was produced as plaintiff's exhibit No. 13. PW2 testified that he was paid Kshs 68,000/= by the plaintiff on the 14th of December 1998 for the medical services that he had rendered. The receipt was produced as plaintiff's exhibit No. 14. PW2 further testified that the medical report that he had produced as exhibit No. 13 was an interim report which had been prepared on the 16th of June 1998. A final report had not been prepared. PW2 testified that the plaintiff had the plate removed although the medical report did not reflect this fact. He further testified that the plaintiff had developed osteoarthritis which made him feel pain. It was his testimony that the plate broke when it got dislodged because it was holding numerous pieces of the bone which had been joined together. He did not discount the possibility that the plate could have been dislodged by movement or even a sneeze.

PW3 Mohammed Naim Mughal testified that he operated a garage and motor spare parts shop. He inspected motor vehicle registration KSS 138 owned by the plaintiff in 1997 at the police station. He prepared a report dated the 10th of October 1997. He assessed the pre-accident value of the motor vehicle to be Kshs 280,000/=.

He assessed the salvage value to be Kshs 42,000/=. He wrote another report of the same motor vehicle on the 20th of May 2002. The report was produced as plaintiff's exhibit No. 11. In his assessment, the said motor vehicle was totally written off. He testified that he charged the plaintiff the sum of Ksh 5,800/= to prepare the two reports. The 2nd report was produced as plaintiff's exhibit No. 15. PW3 conceded that he did not have any documents to prove that he had undertaken any courses that would qualify him to assess the values of motor vehicles. He however stated that he had been in the motor trade since he was young. He testified that he was familiar with motor vehicles and its respective values; At the time he prepared the report, PW3 owned a motor vehicle of a similar model to the plaintiff's. He admitted that he did not record the engine number and the chassis number of the vehicle in his report.

He conceded that although he saw the logbook of the vehicle when he prepared the report, he could not recall in whose name the said motor vehicle was registered. He testified that in his estimation the said motor vehicle could not viably be repaired as the engine and the gear box had been damaged beyond repair. He admitted that he had not given an itemized value of each part of the vehicle that was damaged to enable him reach the conclusion that the said motor vehicle should be written off. He reiterated that he normally assessed the value of the motor vehicle on as-is basis and obtain a salvage value therefrom. He testified that he did not have to had given details of the specific values of each part before arriving at the pre-accident value of the vehicle.

Before the plaintiff closed his case, the police abstract report which had been marked for identification was produced as plaintiff's exhibit No. 15. The defendants choose not to call any evidence in their defence. The plaintiff and the defendant agreed by consent to present written submissions on quantum to the court by 25th of November 2004. By that date, only the plaintiff had presented written submissions on quantum.

I have read the pleadings filed by the parties to this suit and heard the evidence adduced during the trial of this case. I have also carefully read the written submissions presented to me by the plaintiff. The issues for determination are two fold; Firstly, has the plaintiff proved that the defendants were liable, on a balance of probabilities, for the accident that occurred on the 24th of August 1997 along Nakuru-Naivasha road involving the plaintiffs motor vehicle registration number KSS 138 and the 2nd defendants motor vehicle registration number KAG 812H? If the above issue is determined in the plaintiff's favour, secondly, what is the damages that would be assessed as payable to the plaintiff?

On the first issue, the plaintiff testified that he was driving his motor vehicle on the material day along Nakuru-Naivasha road. He was driving at an average speed of 90 km/h. The road at the scene was flat. It was a tarmac road. The road had good off sides (i.e. shoulders). Visibility was clear. It was about 2.00 pm. According to the plaintiff as he was driving his motor vehicle on his correct lane, he saw a matatu

(the 2nd defendant's motor vehicle) overtaking another matatu. He flashed his headlights. He took evasive action. He steered his motor vehicle off the road to avoid a head on collision with the matatu. The matatu took a similar evasive action. The more the plaintiff drove off the road, the more the driver of the matatu (motor vehicle registration number KAG 812H) acted in a similar fashion. According to the plaintiff's testimony the inevitable happened; the two motor vehicles were involved in a head on collision. The plaintiff was injured in the accident and lost consciousness. He regained his consciousness when he was already admitted at Pine Breeze Hospital. The plaintiff blamed the driver of the matatu (the 2nd defendant) for causing the said accident. In his evidence, the plaintiff states that the 2nd defendant was to blame for the said accident as he had driven the said motor vehicle in a reckless and careless manner to the detriment of other road users.

The plaintiff produced a police abstract report (plaintiff's exhibit No. 12) to establish that indeed the accident took place and that the same was reported at the Naivasha Police Station. This evidence by the plaintiff on circumstances that led to the accident was uncontroverted. Apart from the defence filed by the defendants, there is no other evidence in support of the denial of liability by the defendants. The defendants, as stated earlier, choose not to adduce any evidence in their defence. In the premises therefore after evaluating the unchallenged evidence of the plaintiff, I accept his version of the narration of the events that took place on the material day. The 2nd defendant who was driving motor vehicle registration number KAG 812H owned by the 1st defendant recklessly overtook another motor vehicle without first ascertaining if it was safe to so overtake. As a consequence of the 2nd defendant's negligence, the plaintiff who was driving on his correct lane of the road and at a moderate speed in his motor vehicle registration number KSS 138 was hit by the said motor vehicle. There is irrefutable evidence that the plaintiff tried to take evasive action, in a vain attempt to avoid colliding head on with the 1st defendant's motor vehicle.

I therefore hold that the plaintiff has proved on a balance of probabilities that it was the 2nd defendant, driving motor vehicle registration number KAG 812H who was solely to blame for the accident which occurred when the said motor vehicle collided with the plaintiff's motor vehicle registration number KSS 138. The 1st defendant as the owner of the motor vehicle is thus found vicariously liable in damages to the plaintiff. I hold that the defendants shall bear 100% liability.

On quantum, the plaintiff testified that upon the impact of the accident he lost consciousness. He was admitted at Pine Breeze Hospital for two and a half days. He paid Kshs 20,785/= for his hospitalisation. The invoice was produced as plaintiff's exhibit No. 1. He was transferred to Aga Khan Hospital where he was admitted for eleven days. He paid Kshs 355,286/= for his treatment at the said hospital. The invoices were produced as plaintiff's exhibit No. 2 (a) (b) (c) (d). He paid the said amount and was issued with a receipt marked as plaintiff's exhibit No. 4. He paid a further medical bill of Kshs 30,000/= (plaintiff's exhibit No. 4). For medical check-up, he paid Kshs 1,500/= (plaintiff's exhibit No. 5).

He testified that he sustained injuries to his right leg. His right leg was fractured, His three ribs were fractured; His right arm was bruised and stitched; The right side of the head was bruised and stitched when he was admitted at the hospital, a plate was inserted on his leg to stabilize the fractured bone. After about four months, the plate broke, re-fracturing the femur bone. He was readmitted at Aga Khan hospital where he was operated again and another plate inserted. He was invoiced Kshs 43,617/10 (produced as plaintiff's exhibit No. 6). He paid the said amount (produced as plaintiff's exhibit No. 7). He paid a further sum of Kshs 30,000/= for medical treatment arising out of the injuries he sustained in the accident (produced as exhibit No. 8). PW2 Dr Mohammed Shabbir Malik testified that he examined the plaintiff and prepared as he called an interim medical report. According to him, the plaintiff had sustained head injury and was unconscious after the accident. He also sustained chest injuries and a compound communitated fracture of the right femur (thigh bone). Splints were applied to his right leg at Pine Breeze hospital and later the plaintiff was transferred to Aga Khan hospital where he was operated upon and a plate insert to stabilize the fracture. After healing, the plaintiff attended physiotherapy for a period of one and a half years. Although the bone had healed, the plaintiff was destined to walk with a limping gait. He has to be on drugs because of the pain in the right hip joint. The plaintiff had developed osteoarthritis. The medical report was produced as plaintiff's exhibit No. 14. PW2 testified that he was paid the sum of Kshs 68,000/= for attending the plaintiff during the entire period of his treatment.

Having evaluated the evidence adduced by the plaintiff and Dr Shabbir Malik I do find that the plaintiff has established that he suffered the following injuries during the accident; He suffered a head injury. He was unconscious for sometime after the accident. The plaintiff fractured three of his ribs. He fractured his femur. He also suffered soft tissue injuries to his head and right arm. The compound fracture of the femur was stabilized by having a plate inserted. The plate broke after four months. According to Dr Shabbir, the breaking of the plate could have been caused by physical activity or even by a sneeze. The plaintiff underwent a second operation. I do hold that the second operation that the plaintiff underwent was a natural consequence of the injury that he had sustained during the accident.

In his submission, the plaintiff has urged the court to award him the sum of Kshs 500,000/= as general damages for pain suffering and loss of amenities. He has relied on the decision of **Agnes Gachigi –vs- George Kimani Wagaitu Nairobi HCCC No. 4819 of 1987 (unreported)**. I have considered the said decided case. The injuries suffered by the plaintiff in the said case were more serious than the present case. However putting into consideration the incidences of inflation and considering the [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) Yunis Malik v Eliud Muriithi & another [2005] eKLR 9 injuries suffered by the plaintiff, the assessment of damages payable in the circumstances of this case shall be Kshs 400,000/=.

On special damages, I find that the plaintiff has proved that he paid Kshs 20,785/= when he was hospitalised at Pine Breeze Hospital (plaintiff's exhibit No. 1). He paid a further sum of Kshs 355,286/= for his treatment at Aga Khan hospital (plaintiff's exhibit No. 2(a) (b) (c) & (d) and receipt marked plaintiff's exhibit No. 4). For the second operation the plaintiff paid the Aga Khan Hospital the sum of Kshs 43,617/10 (plaintiff's exhibit No. 6). The amounts paid herein above were proved by the plaintiff. The plaintiff did not however prove that the sum of Kshs 31,145/= (plaintiff's exhibit No. 10) that he paid when he was admitted at the Nakuru War Memorial Hospital was directly connected with the injuries that he sustained during the accident. According to the plaintiff, he was admitted to the said hospital after suffering from stomach pains. I will disregard the same. I will further disregard the sum of Kshs 68,000/= which Dr Shabbir Malik claimed to have been paid by the plaintiff to attend him during the accident. There is no connection between the piece of paper produced as plaintiff's exhibit No. 14 and the injuries sustained by the plaintiff.

On the issue of the damage motor vehicle, the plaintiff is claiming the sum of Kshs 280,000/= being the pre-accident value of the motor vehicle. To support his case, he has relied on the two reports prepared by PW3, Mohammed Naim Mughal. I however noted that PW3 was not a qualified motor vehicle assessor. The two reports produced as plaintiff's exhibit No. 11 and 15 can be described at best, to be a product of guess work. The said reports are deficient of materials which would enable this court to arrive at a proper valuation of the plaintiff's motor vehicle which was allegedly written off. Matters were not aided by the fact that the defendants made no effort at all to have the value of the said motor vehicle ascertained by a professional motor vehicle assessor. In the circumstances of this case, I will award the plaintiff the sum of Kshs 100,000/= as the value of the said motor vehicle.

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

- (i) The defendants shall bear 100% liability for the accident.
- (ii) Quantum of damages is assessed at
  - (a) General damages for pain suffering and loss of amenities .....Kshs 400,000.0
  - (b) Proven special damages
    - (a) Medical expenses .....Kshs 419,688.10
    - (b) Value of the motor vehicle Kshs 100,000.00

TOTAL

Kshs 919,688.10

(iii) Costs of the suit.

(iv) Interest on the special damages shall be payable from the date of

filing suit while interests on the general damages shall be payable from the date of the judgment.

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

**L. KIMARU**

**JUDGE**