



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 95 OF 2002

SYLVANO N. NYAGA)

JEREMIAH J. M. NYAGA) PLAINTIFFS

VERSUS

JOSEPH KOGI NGOTHO)

GRACE WANJUGU MAINA)

ESSO MOTORS LIMITED) DEFENDANTS

J U D G M E N T

By a further amended plaint dated 8th March 2004 Sylvano N. Nyagah and Jeremiah J. M. Nyaga (hereinafter referred to as 1st and 2nd Plaintiffs respectively) seek special and general damages from Joseph Kogi Ngotho (1st Defendant), Grace Wanjugu Maina (2nd Defendant) and Esso Motors Ltd. (3rd Defendant) for loss suffered by the two Plaintiffs and personal injuries suffered by the 1st Plaintiff as a result of the negligence of the defendants, their servants, agent and or employee.

The 1st Defendant filed a defence in which he admitted the accident and ownership of motor vehicle KAH 235 B, but denied that motor vehicle KAH 235B was being controlled or driven negligently. The 1st Defendant maintained that the accident was solely caused by the negligence of the 1st Plaintiff in driving recklessly and at an excessive speed and in failing to keep to his left side of the road and driving onto the path of the 1st Defendant's on coming vehicle.

The 2nd Defendant also filed a defence in which she denied liability to the Plaintiffs and maintained that the amended plaint was incompetent and did not disclose any cause of action against him. The 3rd Defendant for its part denied ownership of motor vehicle KAH 235B and maintained that the plaint is defective and incompetent and ought to be struck out.

A total of 7 witnesses testified in proof of the Plaintiff's case. Briefly their evidence was as follows:

The 2nd Plaintiff (P.W.1) is the owner of motor vehicle Registration No. KAC 308 U. At the material time the motor vehicle was being driven by the 1st Plaintiff who is the son of the 2nd Plaintiff. He was driving from Chaka along Nanyuki Karatina Road. The 2nd Plaintiff was in the company of his cousin Tom Ikaho Ngige (P.W.2) and three other people. As they were driving past Kerichu, the road was curved and there was a depression. The road was slippery since it was drizzling and 1st Plaintiff was therefore traveling at a speed of about 80 KPH. As he was approaching the curve, there was light of a motor vehicle approaching from the opposite direction. Shortly thereafter a Kanta vehicle appeared being driven very fast from the opposite direction. The 1st Plaintiff braked and swerved left, but the Kanta vehicle veered to

the side where the 2nd Defendant's motor vehicle was, hitting it with its rear part, damaging the 2nd Plaintiff's motor vehicle on its front driver's side. The 1st Plaintiff was seriously injured and was taken to Karatina Hospital from where he was transferred to Nairobi Hospital where he remained unconscious for 5 days and underwent two surgical operations, receipts for payments made to the hospital, Doctor's and medication were produced as P Exh. 5 to 7 and 9 to 20 and added up to Kshs.1,153,651/=.

As a result of the injuries suffered by the 1st Plaintiff, he proceeded to the U.S.A. where he obtained further treatment at Parkland Memorial Hospital in Dallas Texas and incurred a further sum of U.S. Dollars 5,199.51 in respect of which a bundle of receipts and bills were produced as P Exh. 26.

As a result of the 1st Plaintiff's injuries he was unable to continue with his business of marketing communication and video production, his family had to move from their house in Kileleshwa Estate to the less prestigious Onyonka Estate. His children had also to move from the prestigious Makini Primary School to the less prestigious Hospital Hill Primary School. The 1st Plaintiff therefore claimed special damages for all the expenses incurred and damages for loss of income. As a result of the accident, the 2nd Plaintiff's motor vehicle was extensively damaged. A report produced by Leonard Maina Kingori (P.W.5) a valuer with Automobile Association (A.A.) gave the pre-accident value of the motor vehicle as Kshs.1,260,000/=.

The 2nd Plaintiff therefore claimed damages for loss of the motor vehicle and loss of use of the motor vehicle. P.C. Francis Ayoma (P.W.6) an officer attached to Nyeri Traffic Base testified that according to their file the Driver of the Kanta vehicle was charged but absconded. He produced a police abstract report of the accident.

Madan Mohan Aggarwal (D.W.1) testified on behalf of the Defendants. He testified that he is the proprietor of Esso Motor Sales & Service station which is a sole proprietorship and not a limited liability Co. as described in the plaint. He produced a licence (D Exh. 3) showing that his firm is licensed to sell motor vehicles through Hirepurchase agreements. He produced a Hire-purchase agreement (D Exh. 4) between his firm and the 1st Defendant for the purchase of a Mitsubishi Kanta Registration No. KAH 235 B, on hire-purchase terms of 18 monthly instalments of Kshs.57,635/= w.e.f. 1st January 1999. Thereafter the 1st Defendant took possession of the motor vehicle and had full control and management of the motor vehicle. D.W.1 maintained that his firm had only a financial interest in the vehicle and it was normal for the motor vehicle to be registered in the joint names of the Hirer and the Purchaser. D.W.1 further explained that Grace W. Maina was the original purchaser of motor vehicle KAH 235 B, but she returned the motor vehicle after which the motor vehicle was sold to 1st Defendant on hire-purchase terms.

The 1st Defendant also testified as D.W.2. He confirmed that he bought motor vehicle KAH 235 B on hire-purchase from the firm of D.W.1. He was using the motor vehicle for transportation and had engaged one Simon Kariuki as a Driver for the vehicle. On 18th July 1999, the vehicle was to transport tomatoes to Nairobi. On the night of 18th/19th July 1999, at around 1.00 a.m. He received information acting on which he proceeded to Kerichu where he found his motor vehicle had been involved in an accident. His motor vehicle was still at the scene but the other vehicle had already been removed from the scene. The 1st Defendant's motor vehicle was towed to Nyeri Police Station where it was inspected after which it was released to the 1st Defendant. The 1st Defendant confirmed that by the time of the accident he had already finished paying the Hire-Purchase instalments but was yet to have the motor vehicle transferred into his name.

Simon Kariuki Moses (D.W.3) and Richard Gitonga Ngoro (D.W.4) testified that they were driver and tan-boy of the 1st Defendant's motor vehicle on the material day. They were traveling from Nairobi to Nanyuki carrying empty tomato crates. At around 9.30 p.m. they were at a corner around Kerichu area when they saw the 2nd Plaintiff's motor vehicle coming at a high speed towards them with its full lights on. The vehicle was being driven on the wrong side of the road. D.W.3 tried to swerve off the road but the 2nd Plaintiff's vehicle knocked the Kanta on the rear right tyre and the Kanta overturned on the driver's side. D.W.3 & 4 were assisted by good Samaritans to come out of the Kanta.

They noted that the 2nd Plaintiff's motor vehicle had stopped slightly ahead in the middle of the road.

Both D.W.3 & 4 were injured and were taken to Nanyuki District Hospital where they were treated and discharged.

Thereafter D.W.3 wrote a statement at the police station and was served with a notice of intended prosecution. He was never however prosecuted. He denied having absconded or that there was any warrant of arrest issued against him.

Both counsels exchanged and filed written submissions each urging the court to find in favour of his client.

From the pleadings and evidence that has been adduced several issues have arisen.

First is the issue of ownership of motor vehicle KAH 235B. The Plaintiff has relied on the copy of records from the Registrar of motor vehicle produced as P Exh. XXIV to prove that motor vehicle KAH 235B belonged to the 2nd and 3rd Defendants as at 18th July 1999. The Defendants have however explained that at the material time the motor vehicle belonged to the 1st Defendant who had bought it from the 3rd Defendant under a hire-purchase agreement which has been produced as D Exh. IV but that the motor vehicle was still registered in the name of the previous hirer, as 1st Defendant did not have his ID card at the time of the transaction. I find that the 3rd Defendant has shown that it only had a financial interest in the motor vehicle and that the person who actually owned the motor vehicle and had full control was the 1st Defendant Although the 3rd Defendant contended that it was wrongly sued in the name of Esso Motors Ltd. It is evident that the name used for the registration of the motor vehicle was Esso Motors and the Plaintiff's cannot be blamed for the wrong title assigned to the 3rd Defendant, nor can the Plaintiff's be blamed for suing the 3rd Defendant as they were misled by the registration details of the motor vehicle.

The second issue is whether the accident between the 2nd Plaintiff's motor vehicle and the 1st Defendant's motor vehicle was caused by the negligence of the 1st Defendant's driver or the negligence of the 1st Plaintiff. In this regard I find the evidence of the police officer (P.W.6) not to be of much assistance as he was not the officer who visited the scene of the accident and could not therefore explain the basis upon which the decision to charge the 1st Defendant's driver was arrived at.

According to the evidence of P.W.2 and the 1st Plaintiff it was the 1st Defendant's driver who was driving very fast at a corner and drove carelessly on the side of the 2nd Plaintiff's oncoming vehicle thereby hitting the 2nd Plaintiff's motor vehicle. The defendants' witnesses however had a different version, that it was the 2nd Plaintiff's motor vehicle which was being driven very fast and which collided with the rear of the Kanta vehicle. It was clear from the evidence that the accident happened at night, at an area where there was a corner and that the road surface was wet and slippery. Under these circumstances, both driver's were under a duty to drive carefully and at a reasonable speed. It is evident from the impact of the accident which caused an extensive damage on the 2nd Plaintiff's motor vehicle and made the 1st Defendant's motor vehicle to overturn that the two vehicles were both traveling at a speed which was not reasonable in the circumstances. From the point of impact on the 2nd Plaintiff's motor vehicle which was on the right side of the 2nd Plaintiff's motor vehicle I find the defence evidence that the 2nd Plaintiff's motor vehicle was being driven on the wrong side of the road and knocked the rear right tyre of the Kanta unlikely. If that was so the Kanta would not have overturned on the driver's side as the impact on the Kanta would have been minimal.

I find that it was in fact the 1st Defendant's motor vehicle which veered onto the side of the 2nd Plaintiff's motor vehicle probably as a result of the slippery road surface. This was contributed to substantially by the excessive speed at which the 1st Defendant's motor vehicle was being driven and the inability of D.W.3 to control the motor vehicle. I find therefore that D.W.3 was more to blame for this accident. I would apportion liability as between the 1st Plaintiff and the 1st Defendant's driver at 20:80%. With regard to the issue of damages for loss of the motor vehicle and loss of use of the motor vehicle, it was for the 2nd Plaintiff to prove his loss. Evidence was adduced by the 2nd Plaintiff, P.W.2 and P.W.5 that the 2nd Plaintiff's motor vehicle was extensively damaged. No evidence was however adduced to show the extent of the damage or the estimated cost of repairs. P.W.5 purported to give a pre-accident

value of the motor vehicle as Kshs.1,260,000/= but gave no salvage value of the motor-vehicle. This means that assuming I was to accept the evidence of P.W.5, it is not sufficient to prove the actual loss suffered by the 2nd Plaintiff. The evidence of P.W.5 was however not impressive at all as he clearly contradicted himself on the very important question as to whether he did actually examine the 2nd Plaintiff's motor vehicle. He conceded in cross examination that he was not the one who went to examine the motor vehicle nor was he the one who signed the valuation report. I therefore reject the evidence of P.W.5 as hearsay and unreliable. I find that the 2nd Plaintiff failed to produce appropriate evidence in support of his claim for total loss of the motor-vehicle. While it is evident that the motor vehicle was damaged, the extent of the loss has not been proved and I am unable to award any damages for loss of the motor vehicle.

With regard to the claim for loss of use of the motor-vehicle. It is evident that the motor vehicle was extensively damaged and had therefore to be off the road. There is no evidence however as to the estimated time that was required for the repairs or if indeed the vehicle could be repaired. None of the advocates submitted on this issue.

Nevertheless in my considered opinion a sum of Kshs.1500/= daily for a period of 45 days 67,500/= would be reasonable compensation for loss of use of the motor-vehicle.

It is apparent from the evidence of Mr. David Oluoch Olunya (P.W.3) and his report dated 23rd February 2004, that the 1st Plaintiff suffered severe injuries which included:

- A severe closed head injury resulting in unconsciousness for 5 days and confusion for 12 days.
- A closed fracture of the right radius and ulna with dislocation of the elbow joint for which he underwent two operations.
- Diffusely swollen brain with contusion of the cerebellum.

The 1st Plaintiff was admitted in Hospital for about 35 days. The injuries have resulted in post-traumatic epilepsy, poor memory, cognitive function, feeling of inadequacy, reduction of right upper limb function and chronic post-traumatic brain syndrome. The 1st Plaintiff will require regular medication for the rest of his life and will also need a further operation to remove a plate in his right arm.

For these injuries counsel for the plaintiff urged the court to award a sum of Kshs.4.5 million as general damages. He relied on two cases:

- (1) Nairobi HCCC 1977 of 2000 Paul Meshack Onyango v/s Dismus O. Nyanya.
- (2) Nairobi HCCC 2048 of 1999

James Oraro Machuka v/s Julius Nyabuti Ogeto.

Counsel further urged the court to award Kshs.72 million as loss of future earning based on a monthly earning of Kshs.200,000/= and a multiplier of 30. In this regard counsel relied on the following authorities:

1. Nairobi HCCC 674 of 2003 Paul Ngulo v/s Tour Africa Safaris Ltd & Another.
2. Nairobi HCCC 1977 of 2000 Paul Meshack Onyango v/s Dismus O. Nyanya.

In respect of future medical expenses a sum of Kshs.2,000,000/= was proposed. The court was further urged to award the special damages of Kshs.1,718,773.20 as pleaded.

Counsel for the Defendant did not make any proposals in respect of the amount of damages but urged the court to dismiss the Plaintiff's claim.

I have considered the authorities cited and the submission of counsel. I am of the considered opinion that a sum of Kshs.2.5 million would be adequate compensation to the Plaintiff for pain & suffering.

With regard to the claim for loss of future earnings I concur with the defence counsel that the 1st Plaintiff's alleged monthly income of Kshs.200,000/= was not established as no proper audited accounts for the 1st Plaintiff's business were produced. Although Bank statements for the business were produced in evidence but this does not present a fair reflection of the business's financial state as there is no evidence of the expenditure nor is there any evidence of income and loss. Given the evidence that the 1st Plaintiff was giving his wife Kshs.20,000/= monthly for the family's upkeep and was also paying a monthly house rent of Kshs.38000/= and school fees for the children. I would put his monthly income at a sum of Kshs.90,000/= (Ninety thousand). The 1st Plaintiff was about 40 years old at the time of the accident. In the circumstances a multiplicand of 15 years would be appropriate. Taking into account the 1st Plaintiff's permanent incapacity assessed by DR. Oluoch Olunya at 70% I would assess the Plaintiff's loss for future earnings as follows:-

$90,0000 \times 12 \times 15 \times 70 \div 100 = 11,340,000.$

I would further award a sum of Kshs.1,415,000 as per the evidence of P.W.3 in respect of future medical expenses.

With regard to the special damages the total amount spent for medical expenses according to the receipts produced added up to Kshs.1,153,651 plus US \$ 5199.51. The special damages pleaded in the plaint in respect of local medical expenses was 1,119,071/= together 1600/= for the medical report and police abstract whilst a further sum of Kshs.598,102.20 was pleaded in respect of the additional medical expenses incurred abroad. At the exchange rate of 80/= per dollar the amount proved is Kshs.408,960/=. The special damages proved is therefore Kshs.1,529,631. It was submitted that there was no evidence that the 1st plaintiff had made the payments personally and therefore the loss had not been established. The 1st Plaintiff's wife however testified that she made most of the payment for the local treatment though she also got assistance from friends and other family members. This is not a situation where payments were made through an insurance scheme and the 1st Plaintiff is merely trying to enrich himself unjustly. The payments were made on behalf of the 1st Plaintiff by his immediate family. I find that this was special loss which the 1st Plaintiff is entitled to recover. The upshot of the above is that having taken into account the apportionment of liability, I do give final judgment in favour of the 1st and 2nd Plaintiff as against the 1st Defendant as follows:-

2nd Plaintiff – Kshs.54,000/= loss of use of motor vehicle

1st Plaintiff General Damages

Pain & suffering Kshs.2,000,000/=

Loss of future earning Kshs.9,082,000/=

Future medical expenses Kshs.1,132,000/= Special damages Kshs.1,223,704.50.

The Plaintiff's shall have costs of the suit as against the 1st Defendant. The Plaintiff's suit as against the 2nd Defendant is dismissed.

The Plaintiff's shall further have interest on the special damages from the date of filing suit and general damages from the date of this judgment.

Dated, signed and delivered this 6th day of May 2005.

H. M. OKWENGU

JUDGE