



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 154 of 2003

BRIAN OMWEGA NYABUTO (*MINOR*) *SUING THROUGH HIS*

NEXT OF FRIEND SOPHIE NYABUTO.....PLAINTIFF

VERSUS

RINGWANI INVESTMENT T/A OTANGE BUS SERVICE.....1ST DEFENDANT

JOEL KIPKORE ARAP BIOMTO.....2ND DEFENDANT

JUDGMENT

The Plaintiff in this case is a minor aged 15 years. He has sued through his next of friend viz, **Sophie Nyabuto** who is the mother. On the other hand, the 1st defendant is a limited liability company incorporated in Kenya and carries on transport business within the Republic. According to **PW2 Brian Omwega Nyabuto** (*hereinafter known as the Plaintiff*) on 31st December, 2002 he was a lawful passenger in motor vehicle Registration No. KAH 986V Nissan Pick-up along Keroka-Sotik Road when the 2nd defendant negligently drove the Isuzu Bus Registration No. KAM 004 B and permitted the same to collide into the vehicle Registration No. KAH 986 V and as a consequence thereof the Plaintiff was seriously injured and has suffered loss and damages. During the trial, the Plaintiff deposed that on the material day while he was being driven by his grandfather on the Pick-up – Registration No. KAH 986 V he saw a bus being driven in a zig-zag manner before the same knocked them. The Plaintiff lamented that during the accident he sustained a severe head injury and became unconscious for three months. He recalled that by the time of the accident he had finished Primary School and he attained 360 marks in the K.C.P.E. Though he was called to Menengai High School, he could only join the same in January, 2004. That meant that he had to be out of school for a full year. When he sat for his first term examinations, he became Position 50 – out of a class of 50. That meant that he was at the bottom of the class – as shown by the Report Form – **Exhibit 9**. Besides the above, he further explained that after the accident he could **not** proceed with life normally since he had to be bathed for about two months and also had to use a wheelchair for about three months.

In addition to the above, he complained that he **cannot** walk properly and **cannot** participate in any sports. He also blamed his poor academic performance to the accident. The Plaintiff was categorical that the bus driver was to blame for the accident since his grandfather had stopped before the bus rammed into them. Due to the accident, the Plaintiff lost both his grandfather and brother.

PW1 – Dr. George Otieno Mugenya introduced himself as a consultant Surgeon. In his evidence, he stated that he had treated the Plaintiff on 31st December, 2002 following a road accident. The PW1 confirmed that the Plaintiff had sustained severe head injuries and that he was treated at Kaplong Hospital while unconscious. Though he was operated, his condition never improved. On taking the patient to the ICU, the PW1 stated that he was unconscious at level Glasgow Coma Scale 3. The right pupil was

dilated and fixed, while the left pupil was normal and was re-active to light. Due to the above, the PW1 put the patient on a ventilator (*a life supporting machine*) and started him on treatment to reduce intra-cranial pressure. On 3rd January, 2003 the PW1 caused a CT scan to be done and the same showed that the patient had fracture of the right parietal bone. He also had:

- *cerebral haemorrhage.*

- *Bilateral frontal oedema.*

Since the patient never showed much improvement, the PW1 recommended that he should be transferred to the Kenya National Hospital for a second opinion and further management. He was admitted there from 6th January, 2003 upto 4th February, 2003.

Eventually, he was transferred to the Nakuru Provincial General Hospital on 5th February, 2003. The patient was put through physiotherapy and daily dressing of the wound. On 7th March, 2003 the patient was discharged. Ultimately, the PW1 prepared a Medical Report – **P-Ex.6.**

The PW1 concluded that the Plaintiff had sustained severe head injury with primary brain damage and that despite vigorous management in the above hospitals he still had residual disability. He was of the opinion that there would be very little improvement and that Brian stands a high chance of developing epilepsy in future. He also predicted that Brian will **not** gain his full intellectual potential and that the quality of his life would be affected.

In her evidence, the PW3 – **Aquinetta Sophie Oloo** introduced herself as the mother to Brian. The PW3 explained how she had got the accident report on 31st December, 2002 and rushed to the scene where she was told that her father-in-law had already died – while the children had been taken to Kaplong Hospital. On arrival, she was told that one child had already died while the second child was in the theatre. Subsequently, she was advised to transfer the second child – who was unconscious – to either Nakuru or Nairobi.

On 6th January, 2003, the PW3 took her son to the ICU, Kenyatta National Hospital. The St. John's Ambulance that transported the boy charged Kshs.13,500 as shown by the Receipt – **P-Ex.10.** She further explained that her son was admitted at Kenyatta National Hospital for about a month and was discharged on 4th February, 2003. The PW3 had to pay hospital bills totalling Kshs.108,785 as shown by the two receipts – **P-Ex.11.** Consequently, the PW3 transferred her son to the Nakuru Provincial General Hospital and was charged Kshs.13,500 for transport as shown by the receipt – **P-Ex.12.** While at the Nakuru Provincial General Hospital, the PW3 was forced to pay an extra amount of Kshs.47,432 as shown by the receipts **P-Ex.13 (a), (b), (c) and (d).**

After her son was discharged, the PW3 started taking him for physiotherapy and medication to **Dr. Linek.** Due to the condition of her son, she had to use a taxi – and the total amount that she spent was Kshs.26,500 as shown by the receipts – **P-Ex.14.** While at the clinic of **Dr. Linek,** she spent a total of Kshs.66,800 as shown by **Ex.16.** Apart from the above, the PW3 also incurred the following expenses:

- *Nakuru Provincial General Hospital – Kshs.18,020.*

- *Drugs from Nairobi Hospital – Kshs.24,990 as shown by the receipts – Ex. 17.*

- *Food supplement from GLND – Kshs.26,670 as shown by Ex.18.*

- *Dr. Mugenya – Kshs.4,700 as shown by Ex.20.*

- *Drugs from Chemists – Kshs.1,320 as shown by Ex.21.*

The total special damages that she claimed was Kshs.418,941.

In his evidence, the PW4 – **PC Frederick Ringera** stated that he is based at Keroka Police Station where he performs traffic duties. He recalled that on 31st December, 2002, an accident was reported to their station involving – Isuzu Bus Registration No. KAM 004B and a Nissan Pick-up Registration No. KAH 986V along Kisii-Sotik Road. The PW4 conceded that it was **Cpl. Kilonzo** who visited the scene and consequently a Police Abstract was prepared. Though the PW4 stated that the case was still under investigations, he revealed that among the injured was **Brian Omwega** – the Plaintiff. Apart from the above, the PW4 also stated that though the Police Abstract was prepared by **Constable Wanjala**. Unfortunately the officer has passed away.

On the other hand, the 2nd defendant has denied the allegations of negligence that were levelled against him. According to the DW1 – **Joel Kipkorir Abiomto** (*hereinafter referred to as the 2nd defendant*) he was driving the Isuzu Bus Registration No. KAM 004B on 31st December, 2002. By then, he was driving from Kisii to Nairobi. However, on the way, he saw a Saloon car which overtook a cyclist and drove towards his right to go to a shop. The 2nd defendant reckoned that he was by then on his left. According to the 2nd defendant, the motorist then drove his vehicle back to the road and hit the door on the side of the turn-boy.

Apart from the above, the 2nd defendant also stated that the Saloon car was knocked on the driver's door and that by then he was going downhill while carrying passengers. After hitting the vehicle, his bus swerved to the right and on seeing the Saloon car coming back to the road, the 2nd defendant swerved to the right. As far as the 2nd defendant was concerned, he was driving at a low speed and that it was the driver of the Saloon car who was to blame for the accident. He explained how the driver of the Saloon car had gone off the road and went back immediately. The 2nd defendant confirmed that he was never charged for any traffic offence.

In his evidence, the DW2 – **Cpl. Nicholas Kilonzo** who used to be attached to Keroka Traffic Base deposed that on 31st December, 2002 he went to the scene of the accident where he drew a sketch-plan and arranged for the removal of a dead body to the mortuary. Both the bus and pick-up were facing Sotik and were on the left side of the road. The DW2 stated that he was of the opinion that the point of impact was on the middle of the road. At the end of his investigations, the DW2 could **not** tell which driver to blame and hence he recommended that an inquest be conducted.

After the close of the defence case, both Counsels made oral submissions to guide the Court on the award of general damages and also on liability. **Mr. Nyaramba** for the Plaintiff submitted that the 2nd defendant was wholly to blame for the accident because he drove on the wrong side of the road while going downhill. As far as quantum of general damages are concerned, **Mr. Nyaramba** urged the Court to award his client Kshs.5,000,000. In support of his submissions, he quoted the following authorities:

(a) Patrick Kimau Vs Judy Wambui Ndurumo

Civil Appeal No. 254 of 1996 [Nairobi]

The Court awarded the Plaintiff Kshs.1,500,000 as general damages for pain, suffering and loss of amenities on 15th August, 1997.

(b) Dickson Nyamai Kisira Vs Monique Mavova Futi

HCCC Appeal No. 138 of 1986 [Nairobi]

The Court awarded a sum of Kshs.2,750,000 to cover pain, suffering and loss of amenities, cost of rehabilitation overseas and loss of future earnings. The bulk of the award, amounting to Kshs.1,850,000 was for the latter item.

Burns Sutherland Vs Benson Macharia Karanja

HCCC No. 1162 of 1984 [Nairobi]

The Court awarded a sum of Kshs.1,000,000 as general damages for pain, suffering and loss of amenities.

On the other hand, **Mr. Mong'eri** for the defendants submitted that it was the driver of the motor vehicle registration No. KAH 986 V who was to blame for the accident. He further submitted that the defendant can only concede to the contribution of 10% for just being on that road.

As far as quantum of damages was concerned, he urged the Court to award a sum of between Kshs.500,000 to Kshs.800,000 before apportionment. In support of his submission, he quoted the case of **Atanas Isoso Vs National Water Conservation – HCCC No. 688 of 1991 [Mombasa]**.

The Plaintiff was awarded a sum of Kshs.450,000 as general damages for pain, suffering and loss of amenities.

Robinson Ndiri Vs Kenya Tea Development

HCCC No. 1679 of 1992 [Nairobi]

The Plaintiff was awarded Kshs.800,000 as general damages for pain, suffering and loss of amenities.

This Court has carefully perused the evidence on record together with all the quoted authorities. Having done so, it is apparent that the DW2 had stated that the point of impact was at the middle of the road. Unfortunately, his story does not tally up with the damage that was on the bus. He himself stated that the bus was damaged on the left hand side. Had the accident occurred in the middle of the road, then the damage on the bus would also have been on the right. Apparently, the damage on the bus seems consonant with the story of the Plaintiff viz, **Brian Omwega** that the same was going zig-zag. In addition to the above, the 2nd defendant himself conceded that after the accident, the bus swerved to the right. Besides the above, the explanation by the 2nd defendant that the deceased driver overtook a cyclist and drove towards his right to go to a shop and then drove back to the road and hit the door of the turn-boy never made any sense at all. A basic question would be, how did the 2nd defendant know that the deceased driver wanted to go to the shop?

Having had the opportunity to peruse the manner and demeanour of all the witnesses carefully, the Court believes that the Plaintiff was an honest, candid and truthful witness – his age notwithstanding. I find as a fact that it was the 2nd defendant who was wholly to blame for the accident. He is 100% liable for the accident.

As far as the quantum of damages is concerned, I have perused the quoted authorities and the age of the same. Having gone through the authorities carefully, it is abundantly clear that the Plaintiffs in the case of **Patrick Mutie Kimau Vs Judy Wambui Ndurumo and Burns Sutherland Lyali Vs Benson Macharia Karanja** sustained more injuries than the Plaintiff in the present case. However, the evidence of the PW1 was explicit on the kind of injuries that the Plaintiff sustained. He also explained the lengthy period of hospitalization that the Plaintiff had to endure. Besides the above, he also explained the possibility of the patient developing epilepsy in future and also inability to gain full intellectual potential. That apart, it is incumbent on this Court to take into account the rate of inflation for over 10 years when the quoted authorities were delivered. Doing the best that I can under the circumstances, I hereby award the Plaintiff:

- Kshs.2,500,000 for general damages for pain and suffering.

The upshot is that, the Court finds that the Plaintiff has proved his case on a balance of probabilities and hence I hereby enter judgment in his favour on the following terms:

(a) General Damages:

Kshs.2,500,000.00

(b) Special Damages:

Kshs.418,941.00 (

c) Costs of the Suit.

(d) Interest on (a), (b) and (c).

Right of Appeal explained.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Mong'eri for defendant.

Mr. Nyaramba for Plaintiff – Absent.

MUGA APONDI

JUDGE

20TH JULY, 2005