



1. Running down cause
2. Motor vehicle bus/pedestrian collision
3. Plaintiff No.1
  - a) Pedestrian, female adult aged 40 years old in September 1997Plaintiff No.2
  - b) Husband to plaintiff No. 1  
Was never involved in accident nor was present
4. Liability:

75% against the 1st and 2nd defendant jointly and severally
5. Injuries

Plaintiff No.1

  - a) Head injury (cerebral concussion)
  - b) Multiple cuts and abrasion on face
  - c) Abrasion over right chest wall
  - d) Fracture right collar bone (clavicle)
  - e) Crush injury to right upper limb- resulting to amputation of limb
  - f) Crush injury to right lower limb resulting to above knee amputation

Plaintiff No.2  
Loss of consortium - Nil
6. Quantum:

Plaintiff No.1

I: General Damages

  - a) Pain and suffering and loss of amenities Ksh.900,000/-
  - b) Loss of future earning capacity Nil
  - c) Special damages Nil
  - d) Future medical care Nil
7. Obiter dictum
  - a) A husband is not to be party to a suit for personal injuries claim committed to his wife
  - b) He may be a witness to prove a claim of loss of consortium

II: Where special damages such as hospital bills have been paid by another the plaintiff is not entitled to claim unless there is subrogation claim by the insurance company or employer.
8. Case laws referred to:-
  - a) Mary Aoko Wawiye v Attorney General HcccA788/98 (Aganyanya,J)
  - b) Peter Ndumu v Telkom (K) Ltd Hccc73/97 (Wendoh J)
  - c) Samson Mutuku Kimwalu v Golden Harvest Mills Ltd Hccc 164.2002 (Ang'awa,J.
  - d) Kenya Bus Srvices v Jane Karambu Giama CA241/00 Omollo,Okubasu JJA, Ring era Ag JA
  - e) Jackson Wanyoike v Kenya Bus Services & Another, Ringera J.
  - f) Margaret Musinda Amukwe v Joseph Koech & Another S. Ondeyo,J CA 96/97
  - g) Attorney General v Joseph Waiyego (1982) –88 I KAR 84

- Simpson CJ, Lawlaw JA & Hancox AG J.*
- h) *Jane Katumbu Mwanzia v T.M. Mwanzui Hccc 3177/97*
- i) *Ferdinand Kalevu Kinyumu v Nzome Kimulu CA 290/01*  
*Amollo, Okubasu, Githunji JJA CA 290/01*
- j) *Baker v Market Harborough Industrial Co-operative (1953) I WLR 1472*
- k) *Welch v Standard Bank Ltd (1970) EA 115*
- l) *Isabella W. Karanja v Washington Matele (1982-88) I KAR 186*
- m) *Hay (Or Bouhill) v Young (1942) 2 ALL ER 396*
- n) *Texcal House Service station Ld v Timo Kalevi Jappinen & Another CA 134/98*  
*unreported*
- o) *Douglas Kalafa Ombera v David Ngama Hccc 754/98, unreported*
- p) *Ouma v Nairobi City Council 1976 KLR 297*
- q) *Prerestello v United Paints (1969) WLR 570*
9. Advocates

*C.N. Kihara for C.N. Kihara & Co. Advocates for the plaintiff*  
*G.M. Mutua for Mereka & Co. Advocates for the defendan*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 154 OF 1999**

**PITTY GATHIGIA BAARU & ANOTHER .....PLAINTIFF**

**VERSUS**

**KENYA BUS SERVICES & ANOTHER ..... DEFENDANT**

**JUDGMENT**

**I: PROCEDURE**

1. There are two plaintiffs in this suit. Pitty Gathigia Baabu a female adult plaintiff No.1 and wife to J. Gacheru Ngigi plaintiff No.2 herein. On the 15th of September 1997, Pitty was involved in a personal injury accident whilst along a Nairobi road when she is alleged to have been run down by he defendants No.1 vehicle M/s Kenya bus services driven by their a gent and or servant Charles Obiero Ogola, defendant No.2 herein.

2. When Pitty sued he two defendants, her husband was also pointing to the suit. His only claim against the defendant is that of loss of consortium. He was not present at the time of accident, he sustained no personal injuries and as such cannot claim the personal injuries and as such cannot claim he personal injuries committed on his wife by the defendants. It thus means that only the plaintiff should have sued. The husband may be called as a witness to prove he claim of loss of consortium.

3. The parties were extremely contentious in this suit. The trial hearing being held on 19.1.05, 26.1.05, 15.2.05, 16.2.05,17.2.05,3.3.05,15.3.05,17.5.05, 19.5.05,17.6.05 and 11.7.05. The advocate for the defendant had changed employment with his current firm and was not to able to continue defending the defendant due to his new commitments and was not able to proceed beyond mid June 2005. The defendants advocate provided an alternative Advocate to proceed with the trial.

4. The reasons for the contention laid in the defendants insisting that proof of all the documents be done with all the markers be summoned to give evidence. This indeed is the right of the defendant. Order 12 CPR requires that the costs of the witnesses

would be borne by the party requiring the witnesses to prove the marker of the document.

5. The parties prior to trial admitted the following statement of facts:-

- a) That it is hereby admitted that an accident occurred on 15.9.97
- b) That . . . the 1st defendant is a registered owner of motor vehicle KAD 553D
- c) That Charles Obiero Ogola (2nd defendant herein) is the servant and or agent/driver of the 1st defendant”

## **II: BACKGROUND OF CASE**

6. The parties “agreed issues” centred mainly on liability. A brief background of this case is that the plaintiff No.1 and her husband had on the 5.9.97 to visit a patient at a hospital at about 4.00 O’clock in the afternoon visiting hours was up by 6.00 p.m. When it was time to go, she realized that her husband had gone visiting other patients in the ward and she could not trace him. She decided to leave him and proceed home. She boarded a bus and alighted in town at Ambassador Hotel in Nairobi. She proceeded to the corner of Diamond Trust Bank now Family Trust Bank and bought some vegetables from hawkers along the pavement. This was along the Ronald Ngala Street. She then saw two buses come. She was on the left side of the road as you face Moi Avenue from Ronald Ngala road. She admitted that along the Ronald Ngala road there are iron barriers or guards to stop pedestrians coming into the road. She said that.

*“I went round the [iron] barrier and went to the side of the road on the pavement.”*

7. On completion of her shopping she entered to cross the road. She held her shopping bag, as the bus approached, the vehicles headlights were on. She stood to wait for the bus to go by. The iron pedestrian barrier was behind her as she stood along the road. Her intention was to cross over. The two buses were speeding and as the buses passed her, knocked her. She lost consciousness and was taken to the hospital.

8. Her eye witness, Kenneth Njoroge (PW5) (who is gainful employment in Nairobi) informed the court that he had attended a funeral committee at a hotel in Nairobi and went to the Ronald Ngala road near the junction of Moi Avenue, The time was between 7.00 p.m. and 8 p.m. in the evening. His intention was to cross the road. It was a two way traffic. He then saw two to three buses approach at a high speed. One bus slowed down, the third intended to over take and swerved. All the three buses were “Kenya buses.” The said Kenya bus swerved in such a way that it brushed and caught the plaintiff No.1 as she stood by the shoulder and threw her down. The vehicle then braked and ran onto her arm and leg. About four of them including PW5 escorted her to hospital. He managed to get her details later. He recalled her say “God is great and praise the Lord.”

9. Charles Obiero Ogolla, the 2nd defendant herein in his evidence informed this court that he drove along the Ronald Ngala road approaching Moi Avenue he felt someone hit the side of his bus. He asked the conductor to see if anyone had alighted from the moving bus? He stopped his vehicle to find the plaintiff lying on the ground. He stated that he had no idea that the plaintiff was knocked down and had not been aware of her. The streets were dark. The traffic lights were not working. He was baffled of how the plaintiff was knocked. He had ‘no mistake” done in the whole matter.

## **A: NEGLIGENCE**

10. The plaintiff claimed that the defendant’s driver was negligent in driving without due care and attention, over speeding, failing to maintain a proper look out and

failing to control the bus. On the other hand, the defendant claimed that the 1st defendant:-

- “i) Failed to observe and obey traffic lights
- ii) [Cross] the road recklessly without regard to the heavy flow of traffic.
- iii) Crossing the road when it was unsafe to do so.
- iv) Failing to wear reflective clothes at night when visibility was poor.
- v) Stopping at the middle of the road
- vi) Failing to have undue reared to the lawful presence of the motor vehicle reg KAD 553D on the road.”

11. I had been asked to answer the agreed issues agreed by he parties, namely:-

- i) Did the 2nd defendant swerve or permit the motor vehicle Reg KAD 553D to suddenly climb on onto the island pavement and knock the plaintiff?”
- ii) Was the 1st plaintiff in the middle of the road at the time of the accident?
- iii) Did the 1st plaintiff stop in the middle of the road, thus causing the bus to knock her?
- iv) At what time did the accident occur?
- v) Was it reasonable for the plaintiff to wear reflective clothing?
- vi) Is there any contribution from either the plaintiff No.1 and defendant No.2 on negligence and to what extent?’  
What locus does plaintiff No.2 have in this case?’

12. Looking at the above issues, the evidence before court has shown that the said accident occurred in the evening hours about 7.00 p.m. to 8.00 p.m. At this time of the evening it is falling dark. There were no street lights and there were no working traffic lights.

The plaintiff No.1 was at no time crossing the road. She had just finished shopping from hawkers who were selling their vegetables along the pavements. She held her bag and went to stand along the road with the intention of crossing the road. She stood at the edge of the road outside the pedestrian metal iron barrier. As the buses approached her she was not able to step back to get out of the way of the bus. The bus went by and knocked her crushing her right side of her body causing injuries to her right limbs, both upper and lower limbs.

13. The advocate for the defence took issues that the plaintiff stated that the Kenya bus climbed into the island pavement and knocked the plaintiff No.1. He is correct to state so as the plaintiff No.1 was not standing on the pavement but outside the pedestrian barrier. This was not part of the particulars of negligence but was an issue. The fact from the case that an accident occurred which fact is admitted. The case law of:-

Ferdinard Kalevu Kinyumu

V

Nzomo Kimulu

Mwera J Machakos CA 29/00

Deals with particulars of negligence being proved.

The issue before court is whether the plaintiff No.1 was the author of her misfortune or was the defendant No.2, the driver of the bus to blame?

I wish to first mention before that, as the diver approached Moi Avenue from Ronald Ngala road there is a set of traffic lights at a cross road before reaching Moi Avenue and is further seen that these lights were not working. The pedestrian cannot observe and obey traffic lights when they were not working. The defendant’s driver drove knowing the traffic lights were not working. The plaintiff standing at a dark street would not wear reflective clothes if manufactures of clothing in Kenya do not make clothes already with reflections.

**B: BLAME**

14. Both advocates referred me to the case law of:-

Isabella Wanjiru Karanja

v

Washington Matele

1982-88 IKAR 186

Potter,Kneller, JJA and Chesoni Ag. JA.

The plaintiff male adult pedestrian was knocked down by defendant's vehicle whilst crossing the Jogoo road in day light.

The trial judge found the plaintiff is to blame in negligence at 25% and the defendant at 75%. The defendant appealed and the plaintiff cross appealed. The court of appeal in dealing with liability stated that a driver such as the appellant defendant Isabella:-

*"Had under her control a lethal machine when Washington*

*(respondent defendant) had none.*

*She . . . was under an obligation to keep a great look out for other road users . . ."*

The case law referred inter alia to the case of:-

Malde v Angira

CA 12/ 1992

Where Law JA stated that "apportionment of blame represents an exercise of a discretion" by the court.

15. I find in this present case that the plaintiff No.1 should have taken care by standing behind the pedestrian metal iron barrier and ensured it was safe before attempting to cross the road.

She was indeed trapped by not able to move back. I also find that she contributed and is to blame for the accident. The defendant No.2, having the "lethal machine" under his control had indeed a greater care to ensure that his vehicle was driven with due care. He stated that for over 30 years that he had driven a vehicle, he had never had an accident. The fact remains that he was overspeeding. At 7.00 pm. – 8 p.m. in the evening it is still considered as rush hour in Nairobi. It is noted that the number of pedestrian on the road are moving. The street lights and traffic lights not working is a reflection of "bad governance." On the part of the local authority in Nairobi.

16. I appoint liability at 75% against the 1st and 2nd defendant jointly and severally with the 1st defendant being vicariously liable. The plaintiff No.1 is to bear 25% contributory negligence. I do not agree that apportionment should be at 50:50% ratio as suggested by the defence and in their case law of:-

Baker V. Market Haborough Industrial Co-operative 1953 (1) WLR 1472

17. The plaintiff No.2 has no locus in this case and would accordingly dismiss this suit against the two defendants with costs.

**III: QUANTUM**

18. a) General Damages

i) Pain, suffering and loss of amenities

As a result of the accident plaintiff No.1 sustained inter alia crush injuries to her right upper and lower limb which were later amputated.

An examination was carried out by:-

Dr. N.H. Bhanji

mb. Chb. Arzt.f Chirurg,(w. Germany)  
Consultant general surgeon and traumatologist  
Date of report 22.8.98  
Date of latest report 14.5.04

#### Injuries sustained

- 1) Head injury (cerebral concussion)
- 2) Multiple cuts and abrasions cuts and abrasions on the face.
- 3) Abrasion over the right chest wall
- 4) Fracture of the right collar bone
- 5) Crush injury to right upper limb leading to amputation of the same
- 6) Crush injury to the right lower limb leading to an aboveknee amputation to the same.

Dr. Bhanji informed this court in his evidence that on 15.9.97, plaintiff No.1 was admitted to hospital at Kenyatta National Hospital where an operation resulting to immediate amputation was under taken to the right upper limb and the right lower limb above the knee. She was transferred to Nairobi Hospital where the stumps to her amputated limbs were found to have been infected. She suffered renal failure and was taken into dialysis after being operated on the infected stump on 28.9.97. The doctor confirmed the above injuries sustained above. He prepared a recent report dated 14.5.04 seven years after the accident and found that a prosthesis had been fitted to the lower limb. The prosthesis being too large, a second one has since been fitted.

19. Her major complaint was the inability to drive a vehicle, work in the garden or do her house work chores. (Indeed the plaintiff No.1 brought as a witness her maid (PW6) who described the work she does to look after the plaintiff). The doctor found improvement from when he last saw her. There was no post-concussional syndrome, the renal condition requires to be examined, the prosthesis need to be changed with the passage of time as the stump change with time. The sinus discharge on the right shoulder stump had healed. On physically examining the plaintiff No.1 he found she had “a right convex scoliosis of the right lumbar spine” meaning a “secondary pelistilt as a result of the loss of the right lower limb and right arm” spine problems such as osteoarthritis is likely to develop. As a prolapse of an intertebal disc leading to disability.

20. The plaintiff prayed through her Advocate to be awarded Ksh.2.5 million. The authorities to support this that was relied on was the case law of:-

Peter Ndumu v Telkom (K) Limited  
Machakos Hccc73/97 Wendo,J.

As a result of a road traffic accident caused when the minor plaintiff was ridding a pillion passenger on bicycle. The defendant’s driver knocked down the bicycle sustaining injuries to the minor plaintiff that resulted to an amputation of the knee. The leg got gangrene as a result of the amputation. The defendants blamed the hospital in negligence. The degree of incapacity was 70% the court award Ksh.1.2. million.

21. In this present case the plaintiff is a female adult. Her amputation had infection, which was later operated on and renal failure being an added complication.

22. The defendants relied on the case law of:-

John Kitonga Muthoka

V

Josphat Irungu Mwangi  
Hccc828/01 Ang’awa

Where an award of Ksh.200,000/- was made for an amputated left.

As a result of injuries sustained.

The defence also relied on the case law of :-

Stephen Kibet Teigutwo

V

Stage Coach Limited

Hccc 920/99

Where the plaintiff had sustained a crushed left leg and Ksh.900,000/- was awarded.

23. The defence sort him award of Ksh.750,000/- be awarded under this head.

24. I note other case law referred to by the plaintiff being the case law of :

Mary Aoko Wawiye

v

Attorney General

Hccc788/98 (Aganyanya,J).

The injuries sustained by the plaintiff driver as a result of a road traffic accident collision between her vehicle and an army lorry was to the head, neck, right hand and right hip. The judge awarded damages for injuries including a hip replacement of Ksh.100,000/-

The method of making awards for separate injuries was found not to be law. I nonetheless find that this case does not deal with amputated limbs and indeed so all the other cases relied on by the plaintiff There are instances where injuries are those of fracture to the leg and or degloving injuries.

An industrial accident case of an adult male in the case law of:

Samson Mutuku Kimwali

V

Golden Harvest Mills Ld

Hccc 164/2002

An award of Ksh.500,000/- was made by this court.

25. I note that the injuries sustained by the plaintiff was indeed traumatic to her. She has indeed undergone so much, to adjust her life to the new situation she finds herself in.

26. I would in the circumstances award Ksh.900,000/- for the head of damages of pain suffering and loss of amenities.

b) Special Damages

27. It has been stated in the case law of:-

Perestello v United Paints

(1969) WLR 570 at page 590

That all issues other than those which the law does contemplate resulting from the infringement of a persons legal right should be pleaded

28. The plaintiff claimed the following special damages (amended as pleaded) in the plaint:-

i) Medical reports Ksh.10,000/-

ii) Police abstract Ksh. 100/-

iii) Hospital bills Ksh.1.224,837.40

iv) Related medical expenses Ksh. 6,000/-

v) Transport to and from hospital Ksh. 140,000/-

Total Ksh.1.374,837/40

i) Medical report

ii) Hospital bills

iii) Related medical expenses

In the above claim, the plaintiff informed the court that she was employed a clerk with the Kenya Power and Lighting Company. That at the time of the accident her bill was fully paid by her employer. She is therefore not permitted to come to court to claim this sum as it would amount to double enrichment. It is also noted that the defendant can only pay this claim if the employer or insurance company claims a subrogation claim in the name of the plaintiff. They therefore require to attend court as witnesses to indicate that the sum has been paid. At times, employers would deduct the sums paid from an employer's salary. In such a situation evidence must be led to this effect. I therefore reject the claim for medical report, bills and related medical expenses.

ii) Police abstract report 100/-

This was never supported by a receipt. See the case law of:-

Ouma v Nairobi City Council

1976 KLR 297 at pg 304.

The claim is hereby rejected.

v) Transport to and from hospital Ksh.140,000/-

This claim was never supported with any evidence. The same is rejected.

29. Loss of earning (Ksh.23,000 x 10 months = 230,000/-).

The injuries suffered by the plaintiff was serious yet at no time did she lose her earning. No evidence was led to indicate any loss. I reject this claim for Ksh.230,000/-.

30. Loss of future earning

The plaintiff is still in employment as a clerk with the Kenya power and Lighting company. During this period and after the accident she never lost any earning. Evidence on record actually shows that she had been promoted to a clerk grade 2 "B" since the accident. I reject this claim as having not been proved.

31. Future medical expenses

The doctor in his first report indicated that the plaintiff would require a sonogram instigation Ksh.100,000. This is to stop the discharging of sinus over the right shoulder. Refashioning scars on stump Ksh.200,000/- and prosthesis Ksh. 750,000/-. He also advised on psychiatric care.

The operation on sonogram instigation has taken place as has the refashioning of the scars on the stump. None of the claim was pleaded and particularized. A prosthesis is said to costs Ksh.750,000/-. The plaintiff did not plead this. She has one and is on her second prosthesis which she ought to have indeed pleaded and produced receipts purchasing the same. I would reject these claims as having not been particularized and proved as Special Damages included.

I accordingly enter judgment for the plaintiff on the proved sum.

32. In Summary:-

32.1 Motor vehicle bus/pedestrian collision

32.2. Plaintiff No.1

Pedestrian female adult aged 40 years old in September 1999.

Plaintiff No.2

Husband to plaintiff No.1.

Was never involved in accident nor present

No locus suit dismissed

32.3. Liability

75% against the 1st and 2nd defendant jointly and severally with the 1st defendant being vicariously liable.

32.4. Injuries:

1: Plaintiff No.1

- a) Head injury cerebral concussion
- b) Multiple cuts and abrasion on face
- c) Abrasion over right chest wall
- d) Fracture right collar bone clavicle
- e) Crush injury to right upper limb resisting to amputation of limb
- f) Crush injury to right lower limb resulting to above knee amputation

Plaintiff No.2

Los of consortium Nil

32.5. Quantum:-

1: General Damages

- a) Pain and suffering and loss of amenities Ksh.900,000/-
- b) Loss of earning Nil
- b) Loss of future earning Capacity Nil
- d) Future medical care Nil
- e) Special Damages
  - i) Medical reports Nil
  - ii) Police abstract Nil
  - iii) Hospital bills Nil
  - iv) Related medical expenses Nil
  - v) Transport to and from hospital Nil

NOTE The plaintiff has to demonstrate that she no longer earns any income now or in the future. She is still in employment.

The Special damages claims were paid in full by a third party.

Total	Ksh.900,000/-
Less 25%	Ksh.225,000/-
75%	Ksh.675,000/-

33. I award the costs of this suit to the plaintiff. I award the interest on General Damages from the date of this judgment

Dated this 14th day of July 2005 at Nairobi.

**M.A. ANG'AWA**  
**JUDGE**

C.N. Kihara & Co. Advocates for the Plaintiff  
Mereka & Co. Advocates for the Defendant