



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 47 of 2003

JANE OTIENOPLAINTIFF

- Versus -

1. MOMBASA LINERS LIMITED

2. W.K.G TRANSPORTERS LIMITED.....DEFENDANT

JUDGEMENT

This is a claim for damages for the injuries the plaintiff suffered in a road traffic accident. The plaintiff avers in her plaint that on or about 2nd August 2002 she was traveling as a fare paying passenger in the first defendant's Isuzu bus registration number KAP 799A (the bus) from Mombasa to Kisumu. At Ngokoni near Sultan Hamud along Mombasa/Nairobi road, the bus collided with a lorry registration number KAN 674N towing trailer ZB 4204 (the lorry) as a result of which she suffered serious injuries. She attributes the cause of the accident to the negligence of the drivers of both vehicles. In their defences the defendants while admitting the collision each denied negligence on its driver's part and blamed each other for the accident.

In her testimony the plaintiff said that she did not know how the accident occurred as she was asleep at the time of the accident. She called Sgt. John Mwai Muriithi PW4 of Mtito Andei Police Station who investigated the accident. That officer stated that on 2nd August 2002 between 11.00 p.m. and 12.00 midnight he received a report of the accident and proceeded to the scene. At the scene he found the lorry stationary in the middle of the road facing Mombasa from Nairobi. On the left hand side as one faced Nairobi from Mombasa he saw the bus which had overturned and was lying on its side with three bodies in it and two others outside on the road.

After investigations Sgt. Muriithi blamed the lorry driver for the accident. In his opinion the lorry was being driven in the middle of the road and occupied part of the lane for the Nairobi bound traffic hence the collision. He charged the lorry driver with six counts of causing death by dangerous driving but he was, after trial, acquitted under Section 215 of the Criminal Procedure Code.

Neither of the defendants called any evidence. As already stated the plaintiff was asleep at the time of the accident and does not know which of the two drivers was to blame for the accident. All she remembers is that she found herself at Machakos District Hospital with broken limbs long after the accident. So the issue of liability has to be determined on the basis of the evidence of Sgt. Muriithi PW4. That witness as I have already stated went to the scene after the accident and found the lorry stationary in the middle of the road and the bus overturned on the left side of the road as one faces Nairobi from Mombasa. Is that conclusive evidence that the bus driver was not to blame at all for the accident as submitted by counsel for the first defendant? I do not think so. In the covering report Sgt. Muriithi said that it appeared that the prime mover swerved to its left leaving in the middle of the road its trailer into which the bus crashed. There is no evidence of the bus driver having taken any evasive action. In the

circumstances, I hold that the bus driver contributed to the cause of the accident to the extent of 25%. Accordingly, I enter judgment against the first defendant at 25% and against the second defendant at 75% on the issue of liability.

On quantum the plaintiff testified that she found herself at Machakos District Hospital with broken limbs. She had suffered a crash fracture of the right leg leading to its amputation below the knee, fracture of the left radius and ulna which was markedly displaced, deep cut on the left leg and injuries to the left shoulder and elbow. These injuries were confirmed by Dr. Jamlick Muthuuri who testified as PW2 and produced a report he prepared after examining the plaintiff. The plaintiff said he was admitted to Machakos District Hospital for two weeks after which he was transferred to Coast General Hospital where she remained for six weeks. She said that though she has a Jaipur artificial leg she can only walk for short distances as her left hand still pains her and she cannot hold anything heavy with it. Prior to the accident, she said, she used to trade in second-hand clothes and toothpastes, which she used to source from Mombasa and sell at Kisumu. As a result of the injuries she suffered she has been unable to continue with that business and she used the capital she had in defraying the medical expenses and paying school fees. She said she has lost a net income of between sh. 20,000/- and sh. 25,000/- that she used to earn monthly from that business.

For pain and suffering counsel for the plaintiff asked for an award of Sh. 1,800,000/- relying on the High Court decision in **Samuel Wangura Njoroge – Vs – Kenya Bus Service Limited, Nairobi HCCC NO> 495 of 1998** in which Mulwa J awarded Sh. 1,200,000/- for a left leg amputation. On his part, relying on the High Court decision in **Mohamed Abdalla – Vs – Saleh Mahdi Ali HCCC NO. 344** of 1994 in which Khaminwa J awarded Sh. 600,000/- for an amputation of the left leg at the knee level and the Court of Appeal decision in **Kenya Bus Service Limited – Vs – Samuel Wanguru Njoroge**, Civil Appeal No. 133 of 2001 (an appeal from the decision relied on by the plaintiff reducing the award of sh. 1,200,000/- to Sh. 500,000/- counsel for the plaintiff recommended a sum of between Sh. 600,000/- and Sh. 700,000/- for pain and suffering.

I have considered these authorities. Taking into account the fact that besides the amputation of the right leg the plaintiff suffered fractures of the left radius and ulna and other injuries I consider sum of Sh. 800,000/- as a reasonable award for pain and suffering. The plaintiff also claims damages for lost earning capacity. She says as a result of the injuries she suffered she is unable to carry on her *mitumba* business. Having been 48 years old at the time of accident her lawyer has recommended a multiplier of 15 years and a multiplicand of sh. 180,000/- and asked for an award of sh. 6,065,000/-. Counsel for the first defendant finds this a fanciful claim without any basis at all, the plaintiff having not produced any documentary proof, and submits that the same should be rejected outright.

The plaintiff did not produce any document in support of her *mitumba* business. The Consignment Notes Ex. 5 relate to the carriage of boxes of toothpastes. In cross-examination she said she lost all her documents in the accident. I do not believe her on that. She cannot have been carrying all her documents for a business she had carried on for four years prior to the accident. The consignment notes show that one Otieno Sidede used to send boxes of toothpaste from Mombasa to the plaintiff in Kisumu. And this continued even after the accident. There is no evidence to support her claim of loss of *mitumba* business and I reject it.

I want to accept the plaintiff's evidence that with a Jaipur prosthesis she is able to walk though for only short distances. That, to some extent, has affected her earning capacity which, in the absence of evidence, I estimate at Sh. 2,500/- per month. At the age of 48 years even without injury could not have continued with her business of selling toothpaste for long. I suppose a multiplier of 10 years will be reasonable. That works to an award of sh. 300,000/- under this head. Special damages of sh. 2,100/- and the doctors fees of sh. 5,000/- are conceded by the first defendant. But as only the special damages of sh. 2,100/- are pleaded I award only that sum. The plaintiff should be able to claim the doctor's fees for court attendance as part of her costs.

In the upshot I enter judgment for the plaintiff against the defendants in the said proportions in the sum of sh. 1,102,100/- made out as follows:-

General damages for pain and suffering sh. 800,000.00

Loss of sh. 300,000.00

Special damages sh. 2,100.00

Total sh 1,102,100.00

The plaintiff shall also have costs and interest.

DATED and delivered this 26th day of August 2005.

D. K. MARAGA

JUDGE