



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Civil Case 1385 of 2001**

**REGINA NAMATAKA BENNAARS .....PLAINTIFF**

**VERSUS**

**FARMERS CHOICE COMPANY LTD. ....1<sup>ST</sup> DEFENDANT**

**DAVID MUHINDI MUTEGU .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Regina Namataka Bennars was involved in a road traffic accident on the 25<sup>th</sup> August 1998 when she was in a Saloon motor vehicle Reg. KAD 051J as a passenger. She sued M/s Farmers Choice and Co. Ltd together with their driver and or agent, one David Muhindi Mutegu for damages sustained due to the injuries occasioned to her.

2. She filed suit on the 16 August 2001. Parties took dates for hearing in March 2004 which may perhaps have been during the court vacation. Dates were further taken from 27 and 28 October 2004. The plaintiff was absent and the suit was duly dismissed. The plaintiff applied for the setting aside of the suit which infact was granted by this court for reasons that the plaintiff, a National of Uganda had since relocated to Uganda and had not been notified as to the exact date her case was to come up for hearing by her advocates. As this was not her mistake the court allowed the setting aside of the orders dismissing the suit.

3. The main hearing commenced on 21 and 22.9.2005 when the parties amended the plaint to correct the 1<sup>st</sup> defendant correct name to read Farmers Choice Ltd in place of Framers Choice Company Ltd.

4. The parties admitted the following facts that were not in dispute.

a) "That the 1<sup>st</sup> defendant named is the registered owner of motor vehicle KAK 918D.

b) That a collision occurred on the 25<sup>th</sup> August 1998 along [the] Nakuru-Eldoret road involving KAK 918D and KAD O5 IJ.

c) That the plaintiff was travelling in motor vehicle KAD 513 at the time of [the] alleged collision.

d) That a demand notice of intention to sue was given to the defendant

5. The issue in question left for this court to therefore determine is:-

a) Whether the alleged collision was caused by the negligence of the 2<sup>nd</sup> defendant as alleged?

b) Whether the plaintiff suffered loss and damages as a result of the collision and if so the quantum thereof?

c) Whether the plaintiff is entitled to the relief sought”

6. The parties did not address me on the issue of the verifying affidavit raised by the defendant nor did any of them address me on it. I would not therefore refer to it or make finding on it in the circumstances.

7. I turn to the issue of liability.

#### I: LIABILITY

Whether the said alleged collision was caused by the negligence of the 2<sup>nd</sup> defendant as alleged?

8.. Regina is a National of Uganda. On the material day of

25 August 1998 she had just travelled from Uganda Mbale with her husband (a Dutch National) and were planning to drive up to Nakuru to spend the night. They had reached Eldoret and passed the said town. As they travelled along the Eldoret/Nakuru road it was then that they saw the defendants on coming vehicle at about 100 meters away. The road was slippery. The on coming vehicle left its lane and thereafter collided into their vehicle, which was pushed and resulted to the two of them plaintiff and her husband being trapped into the vehicle. The cause of accident, stated the plaintiff was due to the defendants driver losing control of his vehicle due to over speeding.

9. David Muhindi Mutegi the 2<sup>nd</sup> defendant’s driver of the said vehicle stated that he indeed worked for the defendant as a salesman. For many years (30 years) he had travelled the said road. It was a notorious road in that oil tankers often split oil in that area. He approached the road with caution. The road dipped. It was drizzling and wet. The oncoming vehicle in which the plaintiff was travelling as a passenger came straight towards his vehicle and knocked him. He attributed the accident to the slippery road. He denied he was over speeding and stated that he was travelling at a slow pace of 40 KPH. He did admit that a Traffic Criminal court case had been preferred against him but since he attended court over 10 times and the plaintiff failed to attend, the case against him was dismissed.

10. This non-attendance to court can perhaps be explained by the fact that plaintiff’s husband had to travel to USA for medical treatment (nothing, states advocate for defendant, to do with this accident case). The plaintiff went with him. The plaintiff’s husband (and the only our possible witness) passed away. His body was flown back to Nairobi and buried in Nairobi.

11. I have therefore only two versions of what actually occurred. That version of story as described by the plaintiff and that by the 2<sup>nd</sup> defendant.

12. It is alleged by the 2<sup>nd</sup> defendant that the tarmac road was slippery with spilt oil that caused the road to be slippery. This line of defence was never pleaded by the 2<sup>nd</sup> defendant.

A party is bound by their pleading. All that he put defence stated was that the driver of the said vehicle failed to keep a look out, drove too fast and without any adequate warning. Failed to ensure that no collision occurred. The plaintiff’s case had always been that he was and had been over speeding on the part of the 2<sup>nd</sup> defendant. In this circumstances of the case, I find the 2<sup>nd</sup> defendant to blame at 100% with the 1<sup>st</sup> defendant being vicariously liable for the acts of its agent and or servant. Liability herein is jointly and severally.

#### II: QUANTUM

13. The plaintiff stated that she had no medical cover. Her husband had one. When the members of public were able to release her and her husband from the trapped vehicle she found she was bleeding.

She was rushed to the Valley Hospital as she had not improved in the short time she was there she was air lifted through the services of 'AAR' and taken to the Nairobi Hospital.

14. General Damages

Pain and suffering

Regina was examined by:-

Dr L.N. Gakuu

MB. Chb.M. Med (Surgery)

Consultant Orthopaedic & Trauma Surgeon

a) Injuries

- i) Fractured neck femur
- ii) Fractured shaft femur
- iii) Chest injury

15. In the plaint Regina pleaded that she sustained:-

- i) Fracture to ribs
- ii) Fracture of femur shaft
- iii) Fracture of femur

16. The doctor in his report did not indicate whether it was the left or right side of the femur that had been injured. His very very brief report he gives the prognoses as:-

“This lady sustained multiple injuries of the chest with fractured neck femur and fractured neck shaft femur. This necessitated major surgery and eventually indent major surgery of total hip replacement. This replacement tends to get worse in 10 - 15 years time and will need revision at least twice in her life time.”.

17. The doctor physically examined the plaintiff and talks of a right thigh having a surgical scar and a left hip which has limited movement. The x-ray shows that right hip and not the left hip have a replacement whilst the left femur and not right femur had a healed circlage wires insitu.

18. It is unclear from the doctors report whether the fractured occurred. The plaintiff speak of the left femoral shaft but does not disclose what side of the femur.

19. For a hip replacement undergone there must be proof that it was as a result of the accident. The doctor does not disclose that he compared medical notes obtained from the United State of America or a medical report per se to indicate that indeed the hip replacement was as a result of the said accident? The pleading should have included that the injury sustained resulted to a hip replacement. No such pleading were made.

20. For a plaintiff to rely on the pleading that they inclined to prove, the particulars of injuries must be pleaded and particularized. In this case the plaintiff never spoke of any broken ribs. She spoke of a fractured femur to the right leg. I would as such accept that the injuries sustained was a fracture of the right femur. I would reject any other injuries as having not been proved nor pleaded.

21. For an award of pain and suffering, the plaintiff relied on no case law. The defendant relied on case laws that are unreported judgments. Only one out of these case law had been signed under order 20 r 3 Civil Procedure Rules. The rest of the authorities are rejected having not been complied with order 20 r 3 Civil Procedure Rules and section 90 of the evidence Act.

22. In the case law relied on by the defendants of:-

Samson Mango Emonde V George Odhiambo Kopar

Hccc1809 of 1986

Mbogholi Msagaha

“A motor vehicle collision occurred between two vehicles. The plaintiff and defendant were both a driver. The plaintiff sustained injuries and sued the defendant. The defendant filed a counter claim. The Hon. Judge found the defendant to blame for the accident and dismissed the suit. He then noted that plaintiff had comminuted fracture in the upper third of the right femur. He had a “k’ nail fitted but due to its small size it failed to immobilize the fracture. A plate was fixed but the wound developed an infection attributed to an operation in the Kakamega hospital. Pus formed and the plaintiff was readmitted. The leg was shortened by 1<sup>1</sup>/<sub>2</sub> inches. Even at the time of hearing the fracture had not united. Keloids on the abdomen and incisional bacteria formed. Bone grafting on the non-union bone was a possibility.”

The court made an award of Ksh.450,000/-.

23. In this case the defendant prayed an award for pain and suffering and loss of amenities be made of Ksh.250,000/-. The advocates for the plaintiff sought an award of Ksh.6 million. It is unclear under what basis his sum has been arrived at.

24. I am of the view that a fair award be given of Ksh.200,000/-.

### III Special Damages

25. The plaintiff pleaded the following special damages.

i) Medical fees in Kenya Ksh.412,015.39

The plaintiff produced medical invoices from Nairobi Hospital. She admitted that the invoices were indeed a running account long before the said accident. She said she informed her advocate not to include the said charges not concerned with this suit. The actual balance including the running account is Ksh.319,000./-.

26. III: Special Damages

Must not only be pleaded but also particularized. In this head particularized hospital treatment should have been made. Thereafter for every support in document of an invoice receipt ought to be tendered in evidence. What I have is letter from the hospital stating that she settled her bills. The question arises whether it was bills from the insurance company that paid the bills or the plaintiff. If it the plaintiff a receipt should have been duly produced by the hospital or a number of the receipt that was duly issued to her. I reject his claim.

ii) Transport Ksh.160,000/-

There was no evidence led as to transport of Ksh.160,000/-. This claim too is not particularized by giving the break down of the transportation. The nearest evidence given is AAR airlift of Ksh.60,000/- only confirming the bill has been settled. For a party to rely on the AAR bill of Ksh.60,000/- only the said sum of Ksh.60,000/- can be awarded. This court understands that only Ksh.60,000/- was incurred by way of an air lift and not Ksh.160,000/-. The balance of Ksh.100,000/- is rejected as not having been proved.

iv) Medical fees in USA \$44,562.46

This special damage has not been particularized. The claim of injuries sustained was not pleaded. The same is rejected. A medical report from the USA was never submitted to court.

v) Police P3 forms Ksh.300/-

I am not aware that the police charge for P3 form (this is a medical form to be filled by the police Doctor.)

This item was never spoken of by the plaintiff. No government receipt was tendered in evidence. I reject his claim.

vi) Police abstract report Ksh.100/-

There was no government police receipt from the plaintiff tendered to court on this. I hereby reject this claim.

27. I accordingly enter judgment on the proved sum.

v) Loss of earning

28. The plaintiff is now aged 67 years old. At the time of accident in 1998 she most certainly was aged 60 years old. She was employed as a teacher at the Loreto Musangari covenant school. She claim loss of earning from the time of he accident 25 August 1998. In her evidence she sates that she was paid her full salary until November 1999. Thereafter she was on half pay until she opted to return as her husband was taken to the USA for treatment where he thereafter died. Her last pay was in May 1999 but her contract was to end November 1999. The documents table to court it clearly shows exhibit 8 that payments were confirmed for the year 1998.

29. That apart from December being ½ pay to May it is probable she earned 8,725/-. This half pay up to May 1999 amounts to 32,350/-. Her contract was to expire in November 1999 – this gives an addition sum of Ksh.32,350/-. I would award the sum of Ksh.64,700/- as loss of earning during the period of her contract.

vii) Loss of future earnings

I award no sum for the loss of future earning.

The advocate for the defendant stated the plaintiff had passed retirement age. I would note that University lectures now retire at almost 70 years. Teachers too may work for a longer period. I would hereby make no award in this case for loss of future earning due to the plaintiff's age as a school teacher in a lower school.

iv) Future medical care

No evidence to this claim was tendered and is rejected.

I accordingly enter judgment only on the proved claim.

In Summary:-

- 29.1. Motor vehicle collision between two vehicle
- 29.2. Female adult aged 60 years old in 1998. Passenger
- 29.3. Injuries

I: Pleaded

- a) fracture of ribs (not proved)
- b) fracture of femur shaft
- c) fracture of femur

II: Mention

- a) fracture of the neck of femur  
(Non union and later hip replacement)
- b) Chest injury

III: Proved

- a) Fracture of the right femur

29.4. Liability

100% against the 1<sup>st</sup> and 2<sup>nd</sup> defendnt jointly and severally with the 1<sup>st</sup> defendnt vicariously liable.

29.5. Quantum

I: General Damages

- i) Pain and suffering       Ksh.200,000/-
- ii) Loss of earning       Ksh. 64,700/-
- iii) Loss of earning capacity    Nil
- iv) Future medical care   Nil

Total                   Ksh.264,700/-

I enter judgment for the plaintiff and award costs, interest on General Damages from the date of this judgment interest on Special Damages from the date of filing suit.

Dated this 27<sup>th</sup> day of September, 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Kamau Kuria & Kiraitu Advocates for the plaintiff

Kairu & Mc Corut Advocates for the defendant