



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1296 OF 2001

NANCY WANJIKU MWANGIPLAINTIFF

VERSUS

PETER NJOROGE NGATADEFENDANT

JUDGMENT

1: PROCEDURE

1. A traffic road accident occurred between two motor vehicles on the 7 September 1999. Motor vehicle Reg. KAJ 002J owned by

Peter Njoroge Ngata a public service vehicle (matatu) that was carrying passengers and a motor vehicle Reg . KAJ 947Z Mitsubishi lorry owned by M/s Spinners and Spinners Co. Ltd.

2. As a result of this accident that occurred along the Kwamaiko Ruiru Road at a point near Yadini several persons sustained injuries including Mary Wanjiku Mwangi. All the litigants filed separate suits in different courts against the two defendants jointly and severally.

3. By the time this suit came for hearing, some suits were finalized whilst others were still pending. The finalized suits being:-

Gatundu S.R.M. case No.

- i) 24/00 Mwaura Kiarie v Spinners & Spinners & Another
- ii) 25/00 Leah W. Nganga v Spinners & Spinners & Another
- iii) 26/00 Fredrick Kungu v Spinners & Spinners & another
- iv) 27/00 Muigai Manjai v Spinners & Spinners & Another
- v) 28/00 Peter M. Nganga v Spinners & Spinners & Another
- vi) 29/00 Joe Ndungu v Spinners & Spinners & Another
- vii) 46/00 Charles H. Karanja v Spinners & Spinners & Another
- viii) 47/00 Stephen M. Nganga v Spinners & Spinners & Another

The pending suits being:-

I: Gatundu SRM case No:

- i) 90/00 Jane Muthoni v Sinners & Spinners & Another
- ii) 88/00 Kinya Muiruri v Spinners & Spinners & Another
- iii) 89/00 James K. Mwangi v Spinners & Spinners & Another
- iv) 104/00 Stephen Muturi v Spinners & Spinners & Another

II: Thika Resident Magistrate court case

- i) 1013/00 Geoffrey Gitau v Spinner & Spinners & Another
- ii) 410/01 Stanley Ndigu Ngugi v Spinners & Spinners & Another.
- iii) 842/00 Lucy Waithera Kariuki v Spinners & Spinners & Another

5. The existence of other suits was not made known to this High Court until the suit was set down for hearing. The plaintiff had sued

Peter Njoroge Ngata only (1st defendant herein). He in turn joined the 3rd party M/s Spinners & Spinners Ltd quite late in the proceeding.

6. The correct procedure in such a situation is where a defendant(s) is sued in tort by several litigant, an application under order 37 Civil Procedure Rules ought to be filed staying all suits pending the determination on a point of liability. This order reads as follows:-

Vi”Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order 1 could have been joined as co-plaintiffs in one suit, upon the application of any of the parties the court may, if satisfied that the issues be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suit until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.”

The defendant may make application also staying similar suits.

“r 2 where a plaintiff has instituted two or more suits and under rule 3 order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have determined or shall have failed to be a real trial of the issues.

My interpretation of these rules are that the court takes one suit and makes it a TEST case on the issue of liability. If per chance the court does not determine the issue in question on its merits and the suit is struck out, the next case should be used to determine the issue of liability regardless that on earlier suit had been struck out and such decision on technicalities “failed to be a real trial of the issues.”

6. The parties in this suit who were sued as defendants had spent considerable time trying to have several suits determine in several courts. This should be discouraged as the effect means that different courts would come up with the issue of liability different from each other thus causing an embarrassment. Litigation would be prolonged and the quick settlement and finalization of the suits not realized.

II: LIABILITY

7. On the 26th July 2005 the parties agreed to liability at the ratio of 50% against the defendant and 50% against the third parties. It was further agreed by all the parties concerned that respective consents on liability would be filed in the other files involved in this accident as concerns the 3rd party and the defendant. It was agreed strictly that each plaintiff was to prove that they in fact were involved in the accident and that they were injured.

8. The position of this suit before me is that liability against the defendant and 3rd party in favour of the plaintiff be at 50% ratio to 50% (and 100% in favour of the plaintiff) respectively.

I accordingly confirm this.

III QUANTUM

A General Damages

i) Pain, suffering and loss of amenities

9. Mary Wnjiku Mwangi, the plaintiff herein was aged 46 years old in 1999. She was then in employment with the Government of Kenya as a data machine operator. She enjoyed civil servant status. Her husband was then and still is unemployed. She decided to live in the rural areas with him and the children then commuted to Nairobi to work. On the material day of 7 September 1997, she was travelling to Nairobi in a public serviced vehicle Reg. KAJ 002J a minibus matatu. The vehicle travelled along the Kwamaiko Ruiru road at a place called Yadini near the Thika road. The said vehicle collided with another vehicle later to be identified as motor vehicle registration KAJ 947Z Mitsubishi lorry.

10. The plaintiff described how she was pulled out of the vehicle and part of her bone leg remained in the vehicle. She was rushed to the near by clinic for first aid then to the Thika Nursing home. There the doctors amputated her right leg. She sustained a fracture to her arm.

11. Two medical reports were tendered in evidence. The first report being:-

I: Dr. George K. Karanja

MB ch (nbi)

The doctor examined Nancy on a date not disclosed. The report is dated 31.1.2004.

Injuries:

11.a) Deep cut wound of the forehead with mild head injury

11.b) Simple comminuted fracture of the right humerus

11.c) Compound fracture of the right tibia, loss of bone segment

22.d.) Amputation of right leg below knee.

The doctors assessment was that the loss of the right leg was permanent. That a plate to the right arm required to be removed. He assessed the degree of permanent disability at 15%.

II: R.P. Shah

MB ch.b. FRCS

Consultant surgeon

Date of report .10.05

12. Injuries

12. a) Soft tissue injuries to head

12.b) Fracture of right arm humerus bone of right arm

12.c) Segmental fractures of tibia and fibula bones below knee level.

He confirmed that the right leg was amputated and there was a plate put to the right humerus. This plate was later removed in March 2004.

13. To the doctor's opinion the right humerus bone was fully healed and no disability was left save for a 5 inch operation scar. As to the right leg, this was amputated and stump had wounds. It has now healed but the loss of the leg is permanent. The permanent disability be put at 15%.

14. There was no report from an orthopedic surgeon. It is advisable for the latest doctor's report to be produced to court to confirm the actual status of injuries sustained which has been done.

15. None of the parties put in any case law but the two defendants sort that this court awards Ksh.500,000/-. The plaintiff gave no indication on the aspect of the award.

16. The loss of a limb is indeed a traumatic thing to happen to a person. One whole life style changes. The plaintiff as a data machine operator could still work but opted out on an early retirement pack-age with her employer.

17. I am satisfied that her arm is fully healed and her biggest disability is the amputated right lower limb. I would find as a fair award Ksh.800,000/-.

B: SPECIAL DAMAGES

The plaintiff withdrew the claims under Special Damages. I accordingly mark the same as withdrawn.

18. In Summary:

18.a) Motor vehicle accident collision between two vehicles.

18.b) Passenger female adult aged 46 years old in 1999.

18.c) Injuries:-

i) Soft tissue injuries

ii) Fracture of right humerus bone of right arm

iii) Segment fracture of tibia and fibula bone of right leg

iv) Amputation of right leg below knee level

18.d) Liability:

50% against defendant

50% against 3rd party

18.e) Quantum:

I: General Damages

i) Pain and suffering and loss of amenities Ksh.800,000/-

II: Special Damages

Marked as withdrawn.

Final total Ksh.800,000/-

Apportioned to pay by defendant Ksh.400,000/-

And 3rd party Ksh.400,000/-

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

Dated this 13th day of October 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Macharia & Co. Advocates for the plaintiff

L.K. Kirori & Co. Advocates for the defendant.

A.F. Gross & Co. Advocates for the 3rd party