



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Suit 33 of 2001

SIMEON OMBISI PLAINTIFF

VERSUS

KAMAU NGUGI 1ST DEFENDANT

DANIEL MUTHUI KIBARA 2ND DEFENDANT

JUDGMENT

Simeon Ombisi Maiko who is the plaintiff herein initially filed this suit against Kamau Ngugi on 21/5/2000, in which he claimed both general and special damages from Ngugi, as well as costs of the suit and interest thereon, on account of injuries which he had sustained following a road traffic accident which he alleges was caused by Ngugi's negligence.

The initial plaint was amended on 4/6/2001 to specifically plead the special damages, and on 29/6/2001, Maiko amended his plaint yet again to join Daniel Muthui Kibara as the 2nd defendant on the grounds that he was the owner of the vehicle, which was being driven by Ngugi (hereinafter called the 1st defendant), at the material time.

The plaintiff's case then, is that the 1st defendant drove the said motor vehicle carelessly causing it to hit him thereby occasioning him serious injuries leading to his hospitalization and amputation of his right leg above the knee amongst other injuries. He attributes the blame to the defendants, and prays for judgment for general damages, special damages, costs and interest.

Despite the fact that in a situation where one seeks judgment against more than one party it is incumbent upon the plaintiff to clearly state against which party he seeks the particular orders and likewise whether he seeks judgment against the defendants jointly and severally or jointly or even then severally, it is however not clear against which of the two he seeks judgment as his prayer merely states "*REASONS WHEREFORE the plaintiff prays for judgment against the defendant (underlining mine):*".

Be that as it may, in their defence the defendants denied that the accident had occurred or that they were negligent, and averred that if it did occur, the accident was actually caused by the plaintiff who in their contention, was negligent in the manner in which he used the road, thus being liable for the accident.

The plaintiff led evidence in support of his case and called five witnesses, while the defendants called five witnesses.

His case was that the 2nd defendant's vehicle registration number KUA 424, then under the control of the 1st defendant, rammed into him after hitting a motorcyclist, as a result of which he sustained injuries to both his legs, his hip joint and also suffered bruises on both hands; that he was admitted at the Moi Teaching and Referral Hospital where he remained for 14 days during which time his right leg was amputated below the knee, and that efforts to wear an artificial limb have not been successful because of injuries which he sustained on his hip.

A medical practitioner whom he consulted four and a half months after the accident (PW2), confirmed that the plaintiff had sustained the said injuries and also testified how his right leg had been completely crushed and with multiple fractures necessitating the amputation. A Consultant Orthopaedic Surgeon (PW5), who testified how he had performed an emergency amputation of the plaintiff's right lower limb as it had been crushed with injuries to blood vessels and nerves and had excessive bleeding, further supported this fact.

A police officer (PW6) who investigated the accident testified how he visited the scene within 30 minutes of the occurrence of the accident; how he established that motorcycle registration number KAK 742Y, the 2nd defendant's vehicle and a pedestrian were involved; that the motorcyclist and pedestrian had already been evacuated and taken to the hospital by the time of his arrival; that he concluded that the accident had occurred at the said junction as the vehicle made an attempt to turn to the right, but however conceded that the motor vehicle which was also damaged on its right front part was not being driven fast as there were no skid marks on the road, and further that no criminal charges were preferred against the 1st defendant as there was no evidence against him. The 1st defendant's evidence was that he was on his way to Kapsoya having just fueled his vehicle at the Caltex Petrol Station on the Uganda Road near Raymonds; that he had slowed down because of the bumps on the road and that having noticed that there were no pedestrians at the point, he started turning right into the Kapsoya junction; but that after a moving for a meter, he noticed a motorcycle whose headlights were off, moving fast towards him; that he braked instantly but the motorcycle rammed into his vehicle as a result of which the rider lost it's control and it veered onto the pavement where it rested; that when he went to establish what had happened to the rider, that he found the bike lying on top of a person who he later learnt was a pedestrian and not the rider.

DW4 who heard the noise caused by the impact of the vehicle which were involved in the accident as he traveled in a matatu, testified how he had arrived at the scene soon after the impact and that though he had not witnessed the accident, he found the subject vehicle on the road and a motorcycle whose engine was still running as its wheel continued spinning as it lay on a man; that motorcycle was later switched off after which the man was removed from his position underneath it, and taken to the hospital.

DW3, who was driving by, arrived at the scene shortly after its occurrence. He testified how he noted that it had involved the subject vehicle and cycle; that another victim of the accident lay on the pavement where a motorcycle also lay; that he took the said victim to the hospital.

There is no doubt that a road accident occurred on the material day, time and place involving the vehicle, cycle. It is also common ground that the plaintiff sustained the stated injuries during the said accident. The issue that arises is whether these two defendants were liable for the accident, as the plaintiff would urge this court to find.

As stated earlier, the plaintiff bases his claim on negligence, and this being a civil claim the onus is on the plaintiff, who has to prove his case on a balance of probability.

It is trite that parties are bound by their pleadings and it is on record that the defendants attributed negligence to the plaintiff, yet, despite it now being trite law that "*a plaintiff who does not traverse the particulars of negligence as alleged by a defendant, admits the negligence as alleged in the defence*" (**Mount Elgon Hardware V. United Millers Ltd CA (Ksm) 19/1996**), the plaintiff however proceeded with the trial without seeking leave to reply to that particular aspect of the defence.

The defendants also amended their defence, during the trial, with the consent of the plaintiff, and with the leave of the court to include a new paragraph in which they averred that "*the plaintiff was hit by*

motor vehicle registration number KAK 752J which was not in anyway controlled by the defendant". The plaintiff did not make any attempts to reply to this particular aspect of the defence.

It cannot be gainsaid that in applying the aforementioned legal principle to this particular case, this plaintiff who did not traverse the defendants allegations of negligence against him as contained in the defence, and who also failed to traverse the further allegation that the accident was actually caused by a third party and not these defendants as per the aforementioned amendment, did in the circumstances concede to the allegation of negligence and the further fact that the accident was caused by the other vehicle which was not under the control of these defendants, and in which case, I find that he had no cause of action against the two defendants. I would in the circumstances dismiss his suit against the two with costs.

But I could be wrong in the above finding, in which case it would then be my duty to establish what, based on the evidence on record, and had he proved his case as is expected, he would have been entitled to by way of damages, it being incumbent upon this court to assess the damages that he would have otherwise been entitled to.

It is on record that though he prayed for both special and general damages, his counsel did not allude to general damages while making submissions, which leaves the court to base its findings on its own assessment of the case before it. Bearing in mind the fact that he lost the lower part of his right leg due to amputation, and that he also sustained several other injuries as outlined in his plaint and as shown in his evidence, I have had to look at the relevant case of law and especially **Dick v. Koinange [1973] EA 355**, and **Ugenya Bus Service vs. Gachoki [1986] KLR 566** in which cases, each of the plaintiff's leg was amputated, and where the plaintiffs were awarded £6500 and Shs. 200,000 respectively for general damages, pain, suffering and injuries. I would have taken inflation into account and awarded him Shs. 700,000 under this heading.

As for special damages which must not only be specifically pleaded but specially proven, I would have found that he had been able to prove that he would have been entitled to Shs. 296,600.70 made up as follows:

Police Abstract report fees	Shs. 100.00
Physiotherapists fees	Shs. 34,000.00
Cost of artificial foot	Shs. 261,000.70
Cost of medical report	Shs. 1,500.00

I would however not have made an award for medical expenses, as the relevant receipts were not produced in support of the claim as is expected.

Otherwise and for the reasons which I gave earlier on, a fact that makes me sympathise with the plaintiff, who by dint of his own pleadings, and probably due to no mistake of his own, conceded that he was liable for the accident and also that he actually filed suit against the wrong party, find that he has not proven his case against the two defendants on a balance of probability, and I do in the circumstances dismiss his case against the two with costs.

Dated and delivered at Eldoret this 29th day of November 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Miyienda for the plaintiff

Mr. Leitich holding brief for Mr. Limo for the defendants