



- 1) Running Down Cause
- 2) Motor vehicle accident between four motor vehicle
- 3) TEST SUIT ON LIABILITY
- 4) Liability: 100% against the 2nd defendant
- 5) Case law: Nil
- 6) Advocates:-
 - L.A. Machio for N. Mbigi advocate for the plaintiff
 - L.M. Kambuni advocate for the plaintiff in the lower court
 - A.K. Muchig advocate for the 3rd defendant
 - M.N. Ouma for attorney General advocate for the 2nd defendant

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.548 OF 2002

BERITA WANGARI MUCHENE PLAINTIFF

VERSUS

STEPHEN N. WAIRAGU & 2 OTHERS DEFENDANTS

JUDGMENT

ON LIABILITY ONLY

This is a test suit on the issue of liability. An accident occurred on the 19th day of April 2001 involving four motor vehicles. The plaintiff herein was a fare paying passenger in one of the said vehicle. She sustained injuries and sued the owners of three of the said vehicle.

It transpired that arising from the said accident several suits had been filed against defendants. Two known suits to the parties had infact been finalized. Another was pending also in the lower court.

On the 17th of November 2003 it was agreed by the parties on its notice of motion of 17.11.03 to file a TEST SUIT on the issue of liability. The said application was duly allowed by consent of the parties on 25.11.03.

The trial on liability commenced on the 10th of February 2004 in this High Court of Kenya Civil File No. 548 of 2002.

Berita Wangari Muchene

V

Stephen N. Wairagu & 2 Others

I wish to now deal with the issue of representation.

A: Representation.

The plaintiff herein is represented by:-

M/s Mbigi Njuguna & Company Advocates.

The 1st defendant:- Stephen M. Wairagu

The registered owner of vehicle Reg. KAK 338Z a Nissan public service vehicle (matatu) where the plaintiff was a passenger. His name was substituted on the 20.6.02 with one Simon Sunguti Khayumbi by an amended plaint dated the 20.6.02.

On the 1.11.02 the plaintiff withdrew the suit against the 1st defendant Simon Sunguti Khayumbi.

No advocate appeared for the 1st defendant both the former and latter.

No notice to enter appearance had been filed by the 1st defendant. At the time this notice to withdraw suit was filed the other defendants had pleaded negligence against the 1st defendant in their particulars of negligence.

The 2nd defendant:-..... The Attorney General

The Attorney General is being sued on behalf of the Ministry of Health. In this case, motor vehicle Registration GKJ 569 is an ambulance that was involved in the accident.

The 3rd defendant:- Sher Agencies Ltd.

This is the registered owner of motor vehicle KAC 891D a Volvo lorry. The vehicle was used to transport flowers between its farm in Naivasa and the Nairobi Jomo Kenyatta International Airport.

I must mention at this stage that there was a 4th motor vehicle (matatu) which was also involved in this accident. This said vehicle had never disclosed its identity by any of the parties. It is nonetheless not party to the suit.

B) Other Cases filed and stayed

i) Cases finalized

The parties were able to identify two cases that had been heard and finalized by the subordinate courts.

1) Simon Kamau Njoroge

V

Sher agencies Ltd & Another

SRM 166/01 at Limuru

Finalized on 17.7.03

2) James Kamau Wambui

V

Sher Agencies Ltd SRM 164/01 Finalised on 17.7.03

Using SRM 166/01 file to determine liability

ii) Cases pending and not finalized

Grace Wambui Njenga

V

Sher Agencies Ltd.

CMCCCC 2890/02 pending

Representation by the plaintiff

M/s Kambuni & Githae Advocates

The said advocates was in attendance at the trial to determine liability at the high court.

C) Liability

1) Whether an accident occurred on the 19th day of April 2001 along the Nairobi – Limuru road involving motor vehicles registration vehicle G.K J569 motor vehicle registration KAC 891D and vehicle registration KAK 388Z?

2) Whether the accident was solely caused by either the negligence on the part of the driver of motor vehicle registration numbers KAC 891D, GK J569 or KAK 388Z?

i) The facts of this case

The Nairobi-Limuru Highway is a dual carriage lane. On the material day of the 19th day of April 2001 at about 9.30 a.m. the 3rd defendant, Sher Agencies Ltd – motor lorry vehicle was being driven along the Nairobi Limuru road. It was travelling on the lane nearest the wall that divided the highway from on coming vehicles from the opposite side. The reason why it moved to the right dual carriage lane was to attempt to overtake a public service vehicle that was on the left lane. Before overtaking this vehicle (herein referred to as the 4th vehicle), the said 4th vehicle was slowing down and pulling off into a bus stop stage. At the said stage to the left of the road there was indeed already a stationary public service vehicle (matatu) which was parked and was completely off the left lane road. There were passengers in this vehicle. This vehicle is KAK 388Z the original 1st defendant.

An ambulance belonging to the Ministry of Health motor vehicle registration KG J569 overtook the lorry vehicle using the left lane. As it sped almost past the lorry it collided with the 4th matatu vehicle on the side of its right tale light. This 4th vehicle, (as stated earlier) was pulling off the road into the stage. The ambulance on hitting the 4th vehicle swerved and hit the lorry. The lorry in turn swerved to give the ambulance an opportunity to get between the two vehicles. In the process the lorry knocked the dividing wall of the highway. The impact caused the trailer or body of the lorry to overturn partially. This portion of the lorry landed on the stationary matatu public service vehicle belonging to the 1st defendant motor vehicle registration No. KAK 388Z. It hit the said vehicle to its side. The passenger inside the said vehicle sustained injuries, one of whom is the plaintiff in this case.

Who then was negligent in this accident?

The suit against motor vehicle registration KAK 388Z owners has been withdrawn. I would have held that no liability could possible be found against them. They were not parked onto the highway but were within the stage area. The 4th matatu public service vehicle appear to have had minor damages to its

vehicle.

They were not 3rd parties so called under order 1 r 7 CPR by the Attorney General.

The evidence before me is clear that the driver of motor vehicle registration GK J569 was wholly to blame for this accident. It is not true that his siren was being used. There was no proof that the driver was assigned to go and deliver any ailing person on an emergency.

I did rule in one case of a police vehicle that had its siren on and was chasing a suspect in another vehicle. That as a result of the speed the police vehicle knocked and collided with an on coming bus.

I held that the bus driver was to be held liable because the traffic rules provide that if a siren is sounded all vehicles must give way.

In this case there is no evidence at all that the vehicles are warned with a siren to give way. The issue of a siren sounding came from the state counsel giving a statement in cross-examination of a witness and from the bar.

Further I do not put any blame on the 3rd defendant M/s Sher Agencies Ltd. It is the negligence of government vehicle that caused the accident. It collided with a public service vehicle – lost control collided with the lorry belonging to the 3rd defendant and then stopped in the middle of the road.

If the 3rd defendant had not swerved, the ambulance would have been extensively damaged. Instead and most unfortunate the occupiers of the stationary public service vehicle (1st matatu) were injured and the vehicle damaged.

I would hereby find that the 2nd defendant – the Attorney General is vicariously liable for this accident at 100%.

I accordingly enter judgment for the plaintiff. The costs shall await the finalization of the suit on quantum for 2nd defendant. Any taxation is to await the finalization of this suit on quantum.

Dated this 11th day of February 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Mbigi Njuguna & Co. Advocates for the plaintiff

Attorney -General defendant No.2

Iseme Kamau & Maema Advocates for the 3 rd defendant