



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI
CIVIL CASE NO. 3034 OF 1996

YUNIS NOOR MOHAMED MANGIAPLAINTIFF

VERSUS

THE ATTORNEY GENERALDEFENDANT

JUDGMENT

A) FACTS OF THE CASE

Along the Marsabit Isiolo road there is an area known as Milima Tatu. The road at this point takes a slight bend. It was at this point that Yunus Noor Mohammed Mangia, a male Asian adult aged 39 years was driving his motor vehicle lorry registration number KAB 858V on the 5th of February 1996 at 7.30 a.m. The weather was clear, the road was made of muram. He saw a land rover travelling at a very high speed. He thought the said land rover would move to its correct lane. Instead, the land rover remained on the right lane instead of keeping to its left. The plaintiff swerved to its extreme left but was unable to avoid the head on collision.

As a result of the collision, a huge fire broke out. The two vehicles remained attached to each other as a result. The impact threw the vehicles to the middle of the road. The turn boy in the lorry was able to come out through the left side of the vehicle.

The plaintiff forced his way-out through the windscreen. He slid onto the land rover. This caused his buttocks, thighs and presumably feet to have 2nd degree burns. The turn boy and the plaintiff attempted to pull out the driver of the vehicles from inside the burning flame's. The driver was still alive. The plaintiff's arm sustained 1st degree burns. He collapsed but did not lose consciousness and was taken to the nearby Catholic Mission Hospital known as Liasamis. The driver to the land rover died on arrival to the hospital.

He had five passengers in the Land rover. They were burnt beyond recognition. Three were able to have been ascertained through their names. The other two names were not known.

The plaintiff was airlifted to the Aga Khan Hospital in Nairobi where he was admitted. On recovery he sued the Attorney General for Damages due to the personally injury sustained and to the material loss occasioned at the loss of his lorry.

The Attorney – General entered appearance and filed defence, where by blame was attributed to the defendant. There was indeed no survivors from the defendant vehicle. The plaintiffs turn boy or loader was not called to give evidence but he did give a statement to the investigators on the occurrence of the accident.

Who is to blame for this accident?

The Attorney General and the plaintiffs advocate entered into a statement of agreed issues to be determined by this court dated the 1st September 2003.

B) LIABILITY.

Issues 1,2 and 3

“1. Whether the collision between motor vehicles registration numbers KAB 858 V and G.K.U 276 was caused by the negligence of the driver of motor vehicle registration number GK U276 as the agent or servant to the Ministry of Education as alleged by the plaintiff.

2. Whether the collision aforesaid was caused by the negligence of the driver of motor vehicle registration number KAB 858V as alleged by the defence filed herein?

3. If both driver were to blame what would be the extent of their respective contribution?”

The advocate for the plaintiff had complied with a notice to admit documents under Order 12 r 2(2) (3) Civil Procedure Rules.

The plaintiff was able to produce an investigations report by M/s Hotline Security services which gave a detailed report on the said accident.

The scene of the accident was visited. The witness available were interviewed and a sketch map of the scene was made.

From the evidence before me, it appears that the land rover travelling from Isiolo to Marsabit was driving on the wrong side of the road. It failed to go back to its correct lane. From the sketch map the collision occurred on the extreme left side of the plaintiffs lane. He swerved and thus explains why the turn boy came out of the accident unhurt.

It is also noteworthy that the land rover failed to slow – down or swerved. The plaintiffs lorry was not over speeding nor was it on the right lane. The plaintiff and the land rover were at a bend in the road. The collision occurred. I believe the occupants in the land rover would have survived but an unexplained fire broke out. This fire, as per report is said to perhaps have come from the land rover.

The area being so remote – many times drivers carry petrol in the vehicle to fill their vehicle.

I have no case law from either parties. Nonetheless I would apply the principle that road user have a duty of care to drive diligently along the said road.

I find that the defendants agent and or driver is to blame for this accident. I compute liability at 100% against the defendant who is vicariously liable for the acts of his agent and or servant.

C) QUANTUM

Issue No.4

Whether the plaintiff suffered any injuries loss and damage as alleged in the plaintiff and what would be the extent of damages awardable on account of the said injuries loss and damage?

I begin with the personal injury claim.

i) General Damages

a) Pain and suffering

Dr. P.M. Wambugu MB Ch B M.Med Surg. (Nairobi) Consultant Surgeon Examined the plaintiff on the 18.4.02

Injuries:

- a) Blunt trauma to the head associated with a cut wound on the right cheek and an occupational swelling.
- b) 2nd degree on the anterior aspect of the right forearm and both feet
- c) 1st degree burns on buttock and thighs.

The injuries sustained was, according to the doctor consistent with blunt and thermal trauma. The plaintiff suffered soft tissue injuries mixed, supercritical and deep burns on various parts have the body. There was complete healing. The scarring was of cosmetic significance.

There was no total disability that occurred.

I would assess the injuries at Ksh.120,000/- I would notice that the plaintiffs right thumb has been amputated.

This was done in 1999 when he was involved in another accident not related to this present case.

For 1st and 2nd degree burns that required admission 16 days in hospital I would award Ksh.120,000/-.

ii) Material loss Damage

The plaintiff is a transporter. He owned his own lorry and would transport goods between Nairobi and the North Eastern Province.

The lorry, a Mitsubishi Fuso FM 515, was manufactured in 1991. A similar model would cost Ksh.5,054,650/-. The pre-accident value was assessed at 2.5 to 2.6 million - say 3 million.

The plaintiff took out an insurance policy claim for Ksh.1 million. He is therefore gone at a loss as it is no doubt he had under valued the vehicle.

The vehicle was a write off, according to the photograph taken.

An assessors report involving all the prices of each spare parts should be able to give the exact figure for the repairs. Where the sum of the costs of repairs is over and above the sum of the value of the vehicle then an assessor would state that the vehicle is uneconomical to repair. That it is advisable to buy a new vehicle rather than do the repairs.

In this case the plaintiff did not render any report from a motor vehicle assessor. What report he had was from the investigator and a note from a firm known as Integrated motor assessor. This firm deals in loss assessment, valuers and accident investigators. Their brief, one page letter, was to assess the pre-accident value of motor vehicle KAB 858V. Their report stated:-

“The vehicle was manufactured in 1991 Mitsubishi Fuso FM 515.

From instruction given to (them) (27.3.96) the present costs of a similar model of vehicle is Kshs.5,054,650/-.

Less depreciation for 3 years at 60% the value was assessed at between Ksh.2.5 million to 2.6 million.”

The plaintiff at once claimed Ksh. 3 million as the pre – accident value form the defendant.

In a material loss claim the pre-accident claim, say Ksh.3 million now being claimed, is subtracted from the salvage costs. The vehicle, if it is sold as is, how much would it costs? I see no evidence of this. If per chance it would cost say Ksh.500,000/- (this being a hypethetical figure) then the same is subtracted Eg

Pre- accident value 3 million

Less salvage Ksh.500,000/-

Total Ksh.2.500.000/-

The assessor would then examine the vehicle and document each item required to be replaced in the vehicle for repairs. This report by the assessor is very important. The spare parts cost, the panel beating costs and other incidental are taken form the market value of the day. The item to be replaced or repaired are itemized to include the labour and VAT costs. The total amount should not exceed the value of the vehicle. Therefore, if the sum does exceed the value of the vehicle then as stated earlier, the vehicle becomes uneconomical to repair. It must be sold off as a scrap. The amount it is sold for is known as a salvage which is deducted from the sum the vehicle was insured for.

This case, the plaintiff under insured his vehicle. He insured it for Ksh. 1 million. The insurance company could therefore pay him a sum not exceeding this amount. I am made to believe that the insurance company would not entertain a claim where someone has over insured a vehicle when its market value is much less.

I find in this case that the insurance company which was represented by PW2 a legal clerk, had infact computed their costs on a claim discharge that read:-

“Vehicle KAB 858V having been involved in an accident and damaged by fire. The vehicle is therefore treated as a total loss and therefore deleted from the policy schedule and premium exhausted. The salvage is now retained by the owner.

Emphasis my own

Pre-fire damage salvage Ksh.1 million

Less excess applicable Ksh.50,000/-

Less salvage value Ksh.70,000/-

Security personnel Ksh.10,500/-

Towing Ksh. 3,000/-

Ksh.893,500/-

I have only the word of PW2 that this amount was paid to the Plaintiff.

I find that there is no proof of payment that had been made to the plaintiff and the exact amount including the value added tax.

If per chance there had been proof of receipt given by the advocate for the plaintiff, through the plaintiff, my award would have been Ksh.1.000,0000/- which includes the salvage excess paid.

I would not award the salvage as the plaintiff retained this. I see that a salvage material which ought to be sold should not be retained by the owner. The effect is, that the owner buys back his vehicle, repairs it

but claims a total loss from the insurance company.

I believe there requires to be shown the true distinct position of a salvage. If the said owner of the vehicle is notified his vehicle is a write off but insists to retain the vehicle and does the repairs and if the repairs done are more then the claim by the insurance, such a party may only be paid the claim due at the market value. The costs must be mitigated. I believe this is the reasons why the advocate for the defendant may have referred me to the case of:-

Hahn v Sigh (1982-88) I KAR

Whereby the claimant/appellant had an accident in Nairobi. He spent more money, including flying back to Germany to obtain spare parts for a vehicle that was involved in an accident with the respondent vehicle.

The court held that the costs must be mitigated.

In this suit, as earlier stated, there was no assessor (nor a report) who came to give evidence that indeed the said vehicle was damaged to the extent that it was a write off or that it could be repaired. If we state that it is indeed a write off, the insurance company should have retained the vehicle and deducted the amount of value of the said salvage from what the vehicle would have obtained.

As it is, the amount of Ksh.70,000/- is a guess with no scientific basis as to how this figure was arrived at. If proved I would have accepted it.

I accordingly dismiss this claim under the subrogation claim by the insurance company.

I now look at the remaining claim of Special Damages.

Other Special Damage Claim

i) Cost of hiring security guard

(6 local casuals for 24 hours daily 5th to 10th February 1996 Ksh.36,000/-)

The plaintiff required only to note the names of these casuals and each time he would pay them, they would be required to sign or thumb print his book receipt as a sign that he indeed paid the guards.

This amount would have deducted the amount the insurance company are to pay him. I say so as the area is indeed remote and as such the casuals obtained may have been necessary.

As there is no proof that casual guards were hired, I dismiss this claim.

ii) Charges of towing "salvaged burnt out remains" of the motor vehicle lorry from the site to Marsabit site Ksh.60,000/-.

This amount was said to have been paid by his brother. There is no documentary proof of such payment. All the plaintiff required to do was to obtain receipt payments from the person who towed the vehicle or call the driver who towed the vehicle to the site. The insurance company computed the entitlement costs to Ksh.3,000/-. If this had been proved then ksh.3,000/- would have been deducted from Ksh.60,000/- leaving a balance of ksh.57,000/-.

iii) Costs of hiring aircraft to air lift the plaintiff from Liasmis to Nairobi Ksh 187,000/-

This bill was said to have been paid by someone else. The plaintiff produced a certificate from Trident Enterprises P.O. Box 43830 Nairobi Kenya that was dated 10.2.98. The general manager confirmed that:-

“Our company rented a Cessna twin-engine aircraft for Medevac of Mr. Yunus N. Mangia from Laisamis air strip to Wilson Airport on 5.2.96. The total charges was \$1,500/- equivalent to Ksh.87,000/-.”

The document was a reproduction from a computer. There was no rubber stamp from the said firm. What they required to do was to state whether the bill was paid or not. This was not done. A receipt of payment from them would have been sufficient.

I dismiss this claim. If perchance it was proved I would have awarded Ksh.87,000/-.

iv) Hospitalization and treatment Charges (provisional) Ksh.200,000/-

The plaintiff was air lifted to Aga Khan Hospital. He said his sister paid this bill. I have before me an invoice. The total comes to Ksh.163,125/-.

An invoice is for services rendered. There must be a receipt of payment to prove that indeed the said sum has been paid. A party cannot claim payments that have not been paid for and is owing. I hereby dismiss this claim. Where it would have been proved.

I would have awarded ksh.163,125/- including a small credit of Ksh.1,422/65 in the account.

I dismiss this claim.

v) Assessors fee Ksh.1,200/-

The assessor who gave the pre-value accident report submitted a fee note of Ksh.1,200/-. There was no receipt from the said Integrated Motor Assessors that they were indeed paid this fee. A rubber stamp stating “paid” by the payee is not sufficient.

In the onset I would dismiss this claim. If proved that payment was indeed made I would have awarded the amount pleaded of Ksh.1,200/-.

viii) Investigations fee 20,000/-

M/s Hotline Security service forward a fee note of Ksh.20,236/-.

There was no V.A.T reflected. Nonetheless the said firm should be able to issue a receipt for the purposes of proof to show that they indeed were paid. The receipt is issued to the insurance company.

As this was not done a rubber stamp by the insurance company is not sufficient to say tht the amount has been paid. This alone is not proof of payment. I would in the circumstances reject this claim. If it was proved then the sum of Ksh.20,000/- only would be awarded and not Ksh.20,236/-. The reasons being a party is bound by his pleadings and can only be awarded what he has pleaded.

I dismiss the Special Damages claim.

I enter judgment for the plaintiff the proved claims.

In Summary

- 1) Collision between two vehicles a lorry and a land rover
- 2) Material loss claim for the lorry
- 3) Personal injury claim for the plaintiff male adult driver aged 39 years old in 1996.
- 4) Injuries:

- a) 1st degree burns on right arm
- b) 2nd degree burns on buttocks and thighs
- c) 2nd degree burns on both feet
- 5) Liability 100% against the defendant
- 6) Quantum

i) General Damages

a) Pain and suffering Ksh.120,000/-

ii) Special Damages Nil

Possible awards

a) Material loss Ksh. 1 million

Subject salvage being deducted

iii) Security guard – hire costs (possible award) Ksh.3,000/

v) Towing charges Possible award Ksh.57,000/-

vi) Cost of hiring aircraft Possible award Ksh.87,000/-

vii) Hospitalization and treatment charges (Possible award) Ksh.163,125/-

viii) Assessor fee (Possible award) Ksh. 1,200/-

Total Ksh.1.311.325/-

The award under Special Damages is dismissed. Final Total Ksh.120,000/-

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

Dated this 23rd day of March, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Shapley Barret & co. Advocates for the plaintiff

Rotich state counsel for the Attorney -General - defendant