



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 378 OF 2002

JOHN GICHUKI NDIINGURI PLAINTIFF

VERSUS

NJERI CHUCHU DEFENDANT

JUDGMENT

When the suit was called out for hearing the defendant was absent. The hearing on 1.3.04 proceeded under order 9b r 3(a) CPR. On the day the suit was adjourned for the Doctors evidence on 2.3.04 the defendants filed a notice of change of advocates. The new advocate took over the matter because the former advocates returned the defendants file to her when she enquired from them why they failed to appear before court.

This court permitted the new advocate to recall the plaintiff who had given evidence and to be cross-examined. He was able to proceed with the trial and cross examine the doctor. There was a delay in the hearing of the case as the City Hall was on fire and the advocate for the plaintiff was not able to access his office situated at the City hall Annexe. The hearing was concluded on 18.3.04.

A) FACTS OF THE CASE

John Gichuki Ndiguri stated that he was a businessman. He would sell timber to various clients.

On the material day of the 29th of April 2002, he went and hired a lorry canter make KAE 307Q. His purpose was to deliver some timber to Kiambu. He collected the timber in the said vehicle then he transported the same to Kiambu. He then returned with the driver at about 5.00 p.m. The weather was wet and the vehicle had been travelling at a speed of about 100 kph. As they travelled and at about 5.30 p.m. the vehicle lost control. It collided into a tree.

The plaintiff sustained injuries and was admitted to the Kenyatta National Hospital for 4 months as a result of the injuries sustained.

He sued the plaintiff Njeru Chuchu as the registered owner of the vehicle.

The defendant entered appearance and filed defence through the then advocate M/s Maina Muchu & Co. Advocates. This defence was extremely brief and consisted of a five brief paragraph line.

It amounted to denials, save that, “the plaintiff was not lawfully travelling in the vehicle”.

B) LIAIBILITY

The defendant came to give evidence and infact did not dispute that an accident did occur. She

explained that the plaintiff had never been a lawful passenger.

She is a businesswoman. The vehicle Reg. Number KAE 307R was used solely to transport soda crates. On the material day in question she had sent her driver to have the vehicle taken to the garage as it required repaired. She later heard of the accident and was unable to explain how the plaintiff and her driver took the vehicle to go on the journey that she was not aware of.

She denied any liability on her part.

The plaintiff filed no reply to this defence. There was no attempt by the plaintiff to establish that he was a lawful passenger to be so authorized in the said vehicle.

I would note that the evidence of the two witnesses. I would believe the evidence of the defendant. I do so as the vehicle was reflected on the police abstract to be defective. The driver was careless in driving a defective vehicle. Further the owner of the said vehicle was known and was charged but the case seems to be pending before court. It seems that this driver may be a relative of the plaintiff.

I would dismiss this suit on the issue of liability.

I am required by law to state what my possible award would be if per chance the plaintiff was successful in this case. POSSIBLE AWARD

General Damages

a) Pain and suffering The plaintiff was examined by:-

Dr. Peter N. Njgi Medical Practitioner

MB Ch B M.med Date of report 21.01.03

Injuries sustained by the plaintiff

- i) Fracture of the distal 1/3 of the left femur
- ii) Fracture of the right midshaft femur
- iii) Dislocation of the right ankle joint
- iv) Deep bruises of the right leg.”

The pleading in the plaint state:

- “i) Fracture of both femur
- ii) Dislocations of right ankle
- iii) Massive injuries on both thigh
- iv) Deformed thighs”

I believe the doctors description is more accurate. The doctor is a medical practitioner. He is not an orthopedic.

In his very brief report he confirmed that the plaintiff sustained fractures both the femur; he dislocated the right ankle and sustained soft tissue injuries. The fractures are said to have required bone grafting and open reduction. The injuries are said to have healed.

I have not been given any case law by the advocate for the plaintiff. To the opinion of the doctor the healing was done well. There was no indication by the doctor of any future effects as a result of the injuries.

I would compute a possible award of damages at Ksh.150,000/-

b) Special Damages

The claim pleaded was:-

- i) Police abstract Ksh.100/-
- ii) Medical report Ksh.2000/-
- iii) Medical expenses Ksh.261,149/-
- iv) Loss of earning Ksh.25,000/-
- v) Wheel chair Ksh.4,800/-

i) Police abstract fee Ksh.100/-

No Government of Kenya receipt has been produced to court to prove this claim. I would not have made any award and would have dismissed this claim.

ii) Medical report fee Ksh.2000/-

The doctor produced an invoice/fee note for Ksh.1,750/-.

This is only proof that professional service had been rendered. It would require a receipt to prove that in fact payment had been made. I would not have made an award. If a receipt had been produced to support this claim only an award of Ksh.1,750/- would have been made and not Ksh.2000/- as pleaded.

iii) Medical expenses Ksh.261,149/-

The plaintiff document to support this claim was inadmissible in law. I would have rejected this claim. There was an allegation that this document may have been forged. I would not comment on this as parties abandoned proof of such allegations.

iv) Loss of earning Ksh.25,000/- per month.

The plaintiff produce his delivery book to reflect the amount of delivery he would do per day together with his costs. I would accept this claim of Ksh.25,000/- per month. I would have awarded Ksh.150,000/- being 6 months of loss of business.

The claim is nonetheless dismissed due to liability not being proved.

v) Wheel Chair Ksh.4,500/-

The plaintiff stated he no longer uses a wheel chair any more. I would not have made any award. The suit stands dismissed with costs to the defendant.

Dated this 23rd day of March 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Rumba Kinuthia & Co. Advocates for the plaintiff

Maina Muchiri & Co. Advocates for the defendant