



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1162 OF 2002

ROBERT GICHUHU MAINA PLAINTIFF

VERSUS

JOHN KAMAU DEFENDANT

J U D G M E N T

“Matatus” are public service vehicle in Kenya that carry fare paying passengers to various destinations. John Kamau (the defendant herein) was a registered owner of such a vehicle being registration number KAL 807X a Nissan uvan in make. This vehicle would ply from central province to Nairobi.

On the 2nd day of January 2001, the said vehicle was being driven by J.S. Kingori an agent or servant of the defendant. Robert Gichiga Maina (the plaintiff herein) boarded the said vehicle along the Murang’a Kiriani road. The vehicle had a total of 18 passengers. As the said vehicle travelled, Robert noticed that it was being driven at a high speed. He voiced his concerns with other passengers. Whilst along the Thika – Nairobi road he heard a bhang. The vehicle rolled and he (Robert) lost consciousness. He was taken to the Thika district hospital where he was admitted for three days then transferred to the Kenyatta National Hospital. He sustained spinal code injury that led him to be a paraplegia.

On the 10.7.02 he filed suit against the defendant for damages due to the negligence on the defendants part.

The defendant entered appearance and filed defence. The defence was a denial but the main defence was that the accident was “due to inevitable accident.”

Was then the defendant to blame for this accident?

A: LIABILITY

Issue 4 and 5 deals with the issue for liability. Before I look into this I wish to just determine issue 1,2 and 3.

The parties withdrew the issue No.1. Namely, the plaintiff is a male adult with a sound mind.

Issue No.2 – ie whether the defendant was the registered owned of the said vehicle. The plaintiff produced to court that copy for records from the registrar of motor vehicles. The certificate clearly shows that John Gitau Kamau is indeed the registered owner or the vehicle.

Issues 4 and 5

4) Whether the accident was caused by the negligence of the defendant driver?

5) Whether the said accident was inevitable or an act of God?

DW1, the driver of the said vehicle stated on the material day he had come from Othaya. He passed through Kiriaini and Murang'a. As he traveled, he would stop to pick and drop passengers. He had a total of 18 passengers at any given time.

Before he began the journey he inspected the tyres. These tyres were three weeks old. In his experience in his work he would change the tyres every 3 to 4 months.

The speed that he travelled was normally between 40 to 50 KPH. At times 70 to 80 KPH. He at no time was over speeding. On the material day he had reached Makuyu near Thika when he had a tyre burst. The vehicle never rolled but went into the side ditch.

The advocate for the defendant pleaded as to the defence an inevitable accident where this is pleaded no liability is and can be attributed to the defendant. He relied on the case law of:

Msuri Muhhiddin V Nazzor Bin Seif EL Kassaby & Another (1960) EA 201

The appellant was travelling in a bus that had a tyre burst to both the offside rear tyres. The bus overturned and the appellant sustained injuries.

The trial judge held after satisfying himself that the original 2nd defendant (The driver) was not driving in an excessive speed. He ensured the tyres were good and the driver discharged "the burden of showing how the accident could reasonably happened without negligence on his part. That the probable cause of the accident was "rough solid stone under the road." Thus the accident was found to be due to circumstances not within the respondents control."

The decision of the trial judge was upheld by the appellate court. From the evidence before this court the cause for the accident according to the defendant was a tyre burst. The plaintiff stated that he may not have known if the tyre burst but the cause for the accident was infact the over speeding on the part of the driver. The road from where he began the journey to some distance ahead was rough. As they neared Thika, the road, was smooth and condition good. This was confirmed by the defendants driver.

In the above case the trial judge had found that the driver of the vehicle was able to show and discharge that he had driven without negligence and the accident occurred without any control on his part.

A rough road can cause an accident but over speeding can also cause an accident. The driver is a person who is in control of the speed. As it was held in the above case.

"The speed of a vehicle in relation to the particular road conditions was a most material factor and one which normally was within the control of the driver of the vehicle and there was certainly a duty on a driver to keep a proper look out to ascertain the condition of the road and to adopt the speed of the vehicle to it."

The driver was driving on a good road when the alleged tyre burst occurred. He was over speeding and failed to control this speed. If he was indeed travelling at 50 to 60 KPH and if the tyre burst occurred the vehicle would have stopped without any incident. In this situation the said vehicle had a self accident thus causing personal injuries to the plaintiff. I would not agree that this accident was inevitable. I find that the same was caused due to the negligence of the defendants agent and or driver with the defendant being vicariously liable for his acts. I hereby find liability at 100%

I now look at the issue for quantum.

B) QUANTUM

Issue 6 and 8

6) Whether the plaintiff suffered any injuries and loss and if so to what extent?

7) Whether the plaintiff entitled to the relief's sought?

The plaintiff examined by:

Dr. P.M. Kariuki

MB Chb (Nrbi)

Date of report 19.10.01

The doctor is not a consultant nor do I have any evidence by him that he specializes in neurosurgeon. His brief two page report describes the plaintiffs injuries as:

- 1) Compound fracture of the T7 and T8 – paraplegia
- 2) Fracture of left styloid radial process
- 3) Injury to the bladder.

The doctor concluded that he is 100% paraplegia and cannot use both legs for ever.”

Dr. R.P. Shah

MB Ch .B F.R.C.s.

Consultant Surgeon

Date of report 10.3.04

Injuries:

- 1) Compress fracture of two thoracic vertebra of the spine consequent injury to spinal code – causing paralysis of both limbs.
- 2) Fracture of left wrist.

The doctor confirmed that the plaintiff cannot stand or walk and is confined to a wheel chair.

That he is indeed paralyzed for life. The plaintiff sustained a fracture to his wrist having a plate fitted in. He has poor control of passing urine disability be placed at 5% for the wrist injury.

I hereby confirm through the evidence of the doctors in their report that the plaintiff indeed is a paraplegia and in incapacitated.

That he has suffered personal injury loss and damage.

The advocate referred me to several case law in support of the award this court may give.

The defendant advocate brought to my attention the case law of Cecilia Mwangi v Mwangi CA 251/96.

Which case law was relied in the case of:

Mbaka Nguru & Another

Vs

On the issue of large awards:-

In the Mbaka Nguru case (supra) the trial judge had given an award for a paraplegia at Ksh.2.5 million for pain and suffering.

together with other claims the total came to Ksh.6.7 million. The court appeal reduced the award of Ksh.6.7 million to Ksh.1.5 million. The defendant recommended an award of Ksh.700,000/- .

The plaintiffs advocate sort an award of Ksh.2.5 million. He relied on the case law f:-

John Hugo Kinyaki V C.M.C. Motor Groups & Other Hccc 1366/97, Ang'awa,J.

John was involved in a road traffic accident. He suffered personal injuries to his T4 and T5 resulting to the paralysis of his lower limbs. An award of Ksh.1.5 million was given.

R. Oloo v Industrial Plaintiff (E.A.) Ltd Hccc 440/87 Kasanga Mulwa,J.

The plaintiff sustained a fall from a scaffold when it gave way.

He was with others constructing a dam. He lost 6 teeth and sustained back injuries. An award of Ksh.1 million was given together with a further Ksh.468,000/- for loss earning.

Under the head of:-

I: General Damages

i) Pain and suffering and Loss of amenities

I would find tht the plaintiffs medical report before this court could have been more detailed in describing the injuries. I would accept that the plaintiff suffered personal injuries and that he is a paraplegia. I note tht he had an injury to his wrist also. No detailed evidence was given by the plaintiff on the injury to his bladder.

I find that a fair award in the circumstances be Ksh. 1 million.

ii) Special Damages

The parties agreed to special damages of Ksh.1.500/-. To be awarded for the medical report subject to liability. The liability has now been established at 100%. I accordingly confirm this award. The claim for Ksh.100/- police abstract report is dismissed as having not been proved.

The plaintiff further went to claim the heading for damages for:-

a) Lost years

b) Loss of earning

The advocate for the plaintiff referred me to the case law of:-

Zablon Mariga

V

Morris Wambua Musila

(1982-88) I KAR 507.

Which case law relied on the case of:-

Pickett v British Rail

(1979) ALL ER 774

He also relied on the case of:-

Shieikh Mustaq Hassan

V

Nathan Kamau Mwangi & Others (1982 – 88) I KAR 946

In the above cases it deals with the death or injuries of the minor who due to the accident either sustained fatal accident injuries or paralysis injuries respectively.

The advocate stated that the plaintiff in this case was aged 21 years old at the time of the accident. He is young and would have lived to be able to have worked. He has lost those years in the future for his life. He therefore prayed that this award be given taking 16 years as a multiplier.

The case of:-

Nyabera Kigaregari v Agripina Many Aya (1987-88) I KAR 768) gave a minimum wage as the multiplicand – especially so where as in this case the plaintiff had not began his profession.

c) Loss of earning

The plaintiff established he was unemployed. As a result of this it is most certain that he had no earning that he had lost.

The advocate for the defendant did not support the two claim for loss of earning and lost years. He stated in relying on the case of:-

Matonol Nthekithe

V

Wood Products (K) Ltd

CA 281/2002

Tunoi, Lakha, Waki JJA

That the claim is a special damage claim.

In the above case the plaintiff/appellant has been involved in an industrial accident whereby his fingers No.2,3,4 and 5 were amputated.

The appellant prayed for loss of earning – inter alia. The court of appeal held that:-

“As to the claim of loss of earning there is need to be specifically pleaded and expressly proved. Although prayed for in the relief they are not specified in the particulars of special damages.”

I have perused the plaint and note that the plaintiff had not at any given time pleaded these claims under the special damages or at all. The plaintiff should have stated that the claim under these heads are prayed for where it is a future claim it needed to be pleaded.

I find that as there are no pleading on this, the same be and is hereby dismissed.

iii) Other claims.

In a matter concerning paraplegia injuries it is important that claims under special damages be made for equipment and materials to be used for the plaintiff. That such items as a bed, adult napkins catheter, modification for a house, nursing care, be pleaded and proved. No such claim was made or spoken of. No award would be made on these claims.

I enter judgment for the plaintiff on the proved claim.

In summary

- 1) Motor vehicle self accident tyre bust
 - 2) Fare paying passenger male adult aged 21 years old in 2001
 - 3) Injuries:-
 - a) Paraplegia
 - b) Fracture of left styloid radial process
 - c) Injury to bladder
 - 4) Liability: 100% against the defendant –vicariously liable
 - 5) General Damages
 - i) Pain and suffering and loss of amenities Ksh.1,000,000
 - 6) Special Damages
 - i) (agreed) medical report Ksh.1500/-
 - ii) (Dismissed abandoned) Police abstract report Ksh. 100/-
- Total Ksh.1,001,500/-

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

Interest on Special Damages from the date of filing suit.

Dated this 18th day of March, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

J. Ngaii Gikonyo & Co. Advocates for the plaintiff

B.M. Mutiel & Co. Advocates for the defendant