



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIV CASE 1323 OF 01

- 1) Running down cause
- 2) Motor vehicle bus self accident
- 3) Passengers:-
 - i) Plaintiff No.1 male adult aged 50 years 2000
 - ii) Plaintiff No.2 female adult aged 41 years 2000
- 4) Liability: 100% against 1st and 3rd defendants

Interlocutory Judgment

7.3.02 deputy registrar.2nd
defendant suit withdrawn.

Order 48 CPR Order 9 a r 5 CPR.

5) Injuries

Plaintiff No.1

As per plaint

- a) Head injury scalp laceration scalp haematoma (blood collection)
- b) Sustained contusion to the right thigh muscles of the right leg
- c) Sustained abrasion on the on the left knee –not proved
- d) Sustained contusion on both sides of the chest wall
- e) A painful shoulder –not proved

As per Doctor's report

- a) Headaches and swelling on head
- b) Chest pains

- a) Pain and swelling over right knee (not pleaded).

Plaintiff No.2

As per plaint

- a) Deep cut in the head
- b) Chest contusions
- c) Muscular contusions to both thighs

As per Doctor's report

- a) Head injury
- b) Chest injury
- c) Thigh injuries

6) Quantum

I: General Damages

a) Plaintiff No.I

- i) Pain and suffering Ksh.50,000/-

II: Special Damages

a) Plaintiff No.1

- i) Police abstract –Nil not proved
- ii) Medical expenses –Nil proved
- iii) Medical report --Nil not proved

b) Plaintiff No.2

- i) Police abstract -Nil not proved
- ii) Medical expenses -Subject to compliance
- iii) Medical report -Subject to Ksh.2000/-compliance

Ksh.100,000/- -subject to compliance on special damages

7) Case law

8) Obiter dictum –a party is bound by his pleadings. Injuries sustained must be pleaded. Special Damages not pleaded, cannot be claimed.

9) Advocate:

T.R. Oira advocate for the plaintiff

No appearance for the 1st and 3rd defendants
Case against 2nd
defendant withdrawn

JOHN ODUORI PONDO 1ST PLAINTIFF

ELIZABETH ANYANGO OGOLA 2ND PLAINTIFF

VERSUS

MATHEW KIPNGETICH SOI 1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LTD ... 2ND DEFENDANT

MATHEW KIPTANGI NGENO 3RD DEFENDANT

JUDGMENT

On the 22nd day of August 2000 John Oduori Opondo (the 1st plaintiff herein) and Elizabeth Anyango Ogola (the 2nd plaintiff herein) boarded a bus known as the Luthansa Bus that was owned by Mathew Kipngetich Soi (the 1st defendant herein) and driven by Josiah Kiptang Ngeno (the 3rd defendant herein). This said bus was on hire - purchase with the NIC Bank Ltd (the 2nd defendant herein).

The bus Reg. KAH 919P was travelling from Busia to Nairobi. The two plaintiffs and others boarded the bus at Buluma. Whilst travelling towards Nairobi, the driver of the vehicle lost control near Ihindu along the Naivasha/Nairobi. The bus veered off the road and rolled several times. This caused an accident that resulted to the two plaintiffs and possibly others being injured.

The plaintiffs were rushed to the Mount Longonot Maternity and Nursing Home and further care for the 2nd defendant in Nairobi.

Both plaintiffs filed suit against the three defendants. The second defendant entered appearance and applied for its name to be struck out as its role was that of a financier only. This application was correctly granted (Githinji J. 22.10.02). There is therefore no suit against NIC Bank Ltd who appear as the registered co-owners of the vehicle but they are so only in the capacity of a financier. Financiers are not sued in accident cases for the negligence of a borrower.

A) LIABILITY

The 1st and 3rd defendants failed to enter appearance and file their defence. On the 7.03.04 an Interlocutory Judgment was duly entered by the deputy registrar as permitted under order 48 and order 9A r 5 CPR.

The effect of this judgment is that judgment is final on liability but provisional on quantum.

I hereby confirm that liability is therefore 100% against the 1st and 3rd defendants jointly and severally with the 1st defendant being vicariously liable.

B) QUANTUM

The two plaintiffs sustained injuries. They were both examined by:

Doctor J.K. Mogire

Orthopaedic Trauma Surgeon

MBCHB M.Med (Surg) Ortho (Cape Town)

I shall look at each plaintiffs injuries separately.

ii) Plaintiff No.1

Male adult aged 50 years in 2000

Date of report 24.10.02

Injuries as pleaded in the plaint

- a) Head injury scalp laceration. Scalp haematoma (blood collection)
- b) Sustained contusion to the right muscle of the right leg.
- c) Sustained contusion on both side soft chest wall.
- d) A painful shoulder.

Injuries as found per Doctor report

- a) Headaches and swelling on head
- b) Chest pains
- c) Pain and swelling of right knee.

From the doctors finding the plaintiff had sustained the above injuries but this has come with complaints of persistent headaches, dizziness, chest pains when the plaintiff carries loads and pain in his right knee.

The doctor found that the right knee must have been bleeding resulting to a blood clot thus causing pain. This gives the plaintiff a gait in his walk. The headaches and chest pains may or may not improve.

The doctors report was prepared two years after the accident. Nonetheless where there is a passage of time it is normally advisable that the latest report is put in.

I must commend the doctor for doing an excellent job in preparing the report and the very fine details he put in evidence.

I have though noted that what the plaintiff pleaded, in fact does not correspond to the doctors . For instance the plaintiff sustained abrasion to his left knee. What he proved was pain and swelling to his right knee. In fact on cross examined for clarification purpose by the court (the hearing being exparte) the doctor confirmed there was no broken bones. The injuries were “serious soft tissue injuries.”

I would indeed find that the plaintiff has proved he had laceration to his head and chest pain. There was no evidence from the plaintiff nor the doctor that he sustained any painful shoulder. There was no where that there were injuries to the thigh.

Injuries are one and indivisible. I would find, in absence of any case law submitted by the advocate for plaintiff, - that the injuries proved are soft injuries.

I hereby find that an award of Ksh.50,000/- be awarded.

ii) Plaintiff No.2

Female adult aged 41 years in 2000

Injuries as pleaded in the plaint

- a) Deep cut in the head
- b) Chest contusions
- c) Muscular continuous to both thigh

As per Doctor's report

- a) Head injury
- b) Chest injury
- c) Thigh injury

The doctor stated that after the plaintiff was admitted to Mt. Longonot Maternity & Nursing Home she was transferred to Kenyatta National Hospital for a follow up. I do not see further report from the latter hospital but I believe the plaintiff attended perhaps as a follow up and out patient.

The doctor found that the effect to the accident made her have persistent headaches and have visual disturbances.

On physical examination the doctor found the plaintiff in a fair general condition, large right frontal – parietal scalp. She had laceration scars, slightly hypertrophic, irregular in nature. She walked with length (short leg) gait side right.

The injuries though pleaded was of a deep cut to the head described as a laceration. The chest pains was just the residual mobility of the trauma and the quadriceps of the muscle contractive reflected the healing process by fibrosis as a result of a blunt trauma.

There was nowhere pleaded in the plaint of visual disturbances and poor memory. The doctor may have preferred the plaintiff to further specialist. He is of the opinion that her condition would worsen.

I find that the plaintiffs sustained soft tissue injuries. The doctor described this as “serious soft tissue injuries.” Nonetheless after two years from the accident and to present, the plaintiff complains of further pain to her lower back. The doctor kindly described this as the aftermath of the trauma to her body.

I would hereby find that the plaintiff be awarded Ksh.50,000/ - for the injuries sustained.

I do not accept the award of Ksh.1 million as suggested by advocate for plaintiff for each plaintiff.

II) SPECIAL DAMAGES

a) Plaintiff No. I

- i) Police abstract fee – Nil not proved
- ii) Medical expenses – Nil not proved
- iii) Medical report - Nil not proved

I find no evidence where the above claim which have to be strictly pleaded have been proved. I accordingly dismiss the same.

b) Plaintiff No.2

- i) Police abstract fee – nil not proved

ii) Medical expenses –

A bill of Ksh.6170/- was pleaded. I see no evidence to prove this. The document put in for Ksh.1,300/- is a cash sale. It is described as medicine from Nairobi hospital pharmacy. I have no evidence that this drug or medicine is in connection with the injury. The other two documents for Ksh.7,900/- and Ksh.3,500/- also inadmissible. Where a cash sale is issued it should be further enforced by a receipt where revenue stamps are placed not a cash sale. I dismiss this claim

c) Medical report

The amount pleaded was Ksh.2000/-. The doctor put forward Kh.2,000/- for the report and Ksh.700/- for consultation.

It is what a plaintiff pleads that is awarded. The amount claimed in evidence exceeds what is pleaded.

Further the documents tendered had not complied with section 20 of the Stamp Duty Act and as such it means that they are inadmissible until such compliance is done. One is not permitted to place a revenue stamp without complying with the stamp duty act after the receipt has been duly issued.

I would state that Ksh.2000/- - subject to the stamp duty act being complied with may be awarded.

I hereby enter judgment for the plaintiff for the proved sum.

In summary

- 1) Motor vehicle bus self accident
- 2) Passengers
 - i) Plaintiff No.1 male adult aged 50 years in 2000
 - ii) Plaintiff No. 2 female adult aged 41 years in 2000

3) Liability: 100% against the 1st and 3rd defendant. Interlocutory Judgment 7.3.02. Deputy Registrar .

Order 48 CPR

Order 9a r 5 CPR.

4) Injuries:

i) Plaintiff No.1

As per plaint

- a) Head injury scalp laceration Scalp haematoma (Blood collection)
- b) Sustained Contusion to the right thigh muscles of the right leg
- c) Sustained abrasion and the left knee – not pleaded
- d) Sustained contusion on both sides of the chest wall.
- e) A painful shoulder – proved.

As per Doctors report

- a) Headaches and swelling on head
- b) Chest pains
- c) Pain and swelling over right knee – not pleaded

ii) Plaintiff No.2

As per plaint

- a) Deep cut in the head
- b) Chest contusions
- c) Muscular contusions to both thighs.

As per Doctor's report

- a) head injury
- b) Chest injury
- c) Thigh injury

5) Quantum

I) General Damages

a) Plaintiff No.1

i) Pain and suffering Ksh.50,000/-

II) Special Damages

a) Plaintiff No.1

i) Police abstract fee– Nil not proved

ii) Medical expenses – Nil not proved

iii) Medical report – Nil not proved

b) Plaintiff No.2

i) Police abstract – Nil not proved

ii) Medical expenses – Nil

iii) Medical report - Subject to compliance

Ksh.2,000/- only Ksh.700/-

rejected.

To Ksh. 100,000/-.

Subject to compliance on Special Damages

I award the cost of this suit to the plaintiff. I award interest on general damages from the date of this judgment. Special Damages for Ksh.2000/- is conditional.

Dated this 9th day of March 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Ratemo Oira & Co. Advocates for the plaintiff

Kiboi & Co. Advocates for the defendant