



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.238 OF 1995

JOSIAH GATHAIYA NJUGUNA.....PLAINTIFF

=V E R S U S=

KENYA BYUS SERVICES.....DEFENDANT

J U D G M E N T

The Plaintiff Josiah Gathaiya Njuguna, has sued the Kenya Bus Services Ltd for damages arising out of an accident which occurred on 26/2/1993 along Race Course Road, Nairobi when the Plaintiff was boarding the Defendant's bus No. KVV 013 at a point along that road in the afternoon at 3.30 p.m.

In his evidence the Plaintiff said he was walking along the road to catch a bus opposite Khalsa Girls School. *"The bus came and I moved to board the bus when the driver started to move the bus."* The Plaintiff had held on to the rail by the door of the bus. He could not hold onto the rail for long and he fell down. The bus moved as he held on to the step and his lower limbs were already on the ground beneath the bus. He was dragged for a distance of about 100 meters until the driver was stopped by passengers. By this time the Plaintiff was exhausted and he released his grip on the part of bus he was clinging to, that is the step. When the bus stopped his right leg was too near the bus and it was crushed. He was removed from underneath the bus and taken to hospital. The driver of the vehicle, Pius Kamande Ngugi testified and said he had stopped at the bus stage for passengers to enter and alight. He mentioned that the accident happened opposite Khalsa Girls School and there was no stage. He also said when his attention was drawn to the Plaintiff he had to reverse – *"So they can remove the Plaintiff from underneath. His leg was caught up."* He insisted that there was no stage but in re-examination he said he did not see anyone at the stage. That the stage was there is confirmed by DW.2 the witness from the firm of Deter and Detect Investigators who testified that although accident occurred on 26/2/93 he visited the area on 1/3/93. In his sketch he indicates "a stage" at a distance of what he says was 30 meters to where the bus stopped. This witness made report on the information given by the driver and the conductor of the bus. His evidence is therefore not independent. In addition he was acting on hearsay.

In their submissions counsel for Plaintiff proposed liability on the 100% basis against the Defendant's driver on the grounds that there was nothing to stop passengers boarding the bus on front door. The door should have been closed after the driver checked through the side mirrors that no one was by the entrance and if he had done so he would have seen the Plaintiff hanging by the rail before starting the bus. He failed in his duty to ensure the passengers were safely on board. The Defendant counsel submitted that the Plaintiff jumped onto a moving bus but this evidence shows that it was the bus which moved while the Plaintiff was already holding on to the bus. There is no evidence that he jumped on to the moving vehicle and if the driver saw him jump on to the bus he was bound to stop the vehicle immediately to avoid crushing him. As it is the driver did not see anything until he was alerted by shouts

of the passengers urging him to stop. The fact that the driver had to move the vehicle to enable the people to remove the Plaintiff from underneath the bus supports the Plaintiff that he was falling from the bus when he let go the rail and had to support himself by holding on to the step to avoid falling down and possibly being crushed by the vehicles wheels. It is my view that on a balance of probability the Plaintiff has shown that the driver of the Defendant was driving the vehicle carelessly without due care and that the driver was 100% liable for the accident.

On the issue of quantum consideration has to be given to the period spent in hospital which was 7 months. His left leg was amputated. His right leg was also injured. He had two operations of amputations above knee level and revision surgery. There was skin grafting procedure for the right thigh. He was fitted with artificial left leg in 1995. He could not walk long and therefore he could not return to his job. He was left with ugly right leg scars and loss of muscle. He limps. His treatment for injuries sustained on 26/2/93 took up to 1995 when he was fitted with artificial leg. He has permanent deformity.

The doctor suggested that with a sympathetic employer the Plaintiff could perform sedentary office work. The doctor also indicated that he will need to replace the artificial leg 3 times during his life time. The recommended limbs would have to be imported at the price of Kshs.200,000/-.

The evidence is that since the accident he has not been able to obtain any alternative employment to-date. He was aged 28 years at the time of accident as per P.3 Form.

Counsel proposes multiplier of 26.

I have perused the authorities cited and I am of the view that a multiplier of 17 would be more reasonable at the age of 28 years. This would bring the possibility of holding a job to the age of 45 years. There is great uncertainty in the job of a salesman. Economic well-being is not guaranteed. There are always retrenchments and early retirements. Also the expectation of life is very low these days.

For these reasons award for loss of future earnings is calculated thus:- $17 \times 12 \times 3380$ yielding Kshs.689,000/-. For pain and suffering and loss of amenities I award Kshs.600,000/-.

For the 3 artificial limbs for the left leg the recommendation is for Kshs.200,000/- for an imported artificial limb. I agree with the opinion of the doctor and I award kshs.600,000/- for the 3 replacements.

Of the special damages I find proved Kshs.5,500/- which is allowed plus Kshs.100/- for Police Abstract.

In the premises judgment is entered for Plaintiff against Defendant in the sum of:-

- a) Special damages - Kshs. 5,600/-
- b) Costs of 3 artificial limbs Kshs.600,000/-
- c) Loss of future earnings Kshs.689,000/-
- d) For pain and suffering Kshs.600,000/-

TOTAL Kshs.1,894,600/=

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The Plaintiff shall also have interest and costs.

Dated at Mombasa this 3rd day of March, 2004.

JOYCE KHAMINWA

J U D G E

3/3/04

Khaminwa, J.

Chege – Court Clerk

Mr. Kiarie – for Plaintiff

Somanta – H/B for Defendant.

Judgment read in open court in their presence.

JOYCE KHAMINWA

J U D G E