



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE 307 OF 1997**

**DR. HARISH CUNILAL SHAH ..... PLAINTIFF**

**VERSUS**

**RICHARD KIPKOECH SANG & ANOTHER ..... DEFENDANT**

**JUDGEMENT**

Dr. Harish Chemilal Shah is a medical practitioner based in Naivasha. There had been for a very long time no doctor in the Gilgil area, the next town from Naivasha. He therefore set up a practice in Naivasha which he would visit only three times in a week from 5.00 p.m. in the evening. He had been doing so for the last 20 years or thereabouts.

On the martial day of the 26th of August 1996 he left Naivasha at about 4.15 p.m and travelled in his motor vehicle registration number KAE 785P a Toyota Corolla Salon towards Gilgil to attend to his clinic. He was driving at a speed of 60 to 70 KPH.

As he travelled he noted three on coming vehicles. Suddenly a vehicle registration KAB661R (original numbers being (GKQ 570) over took these vehicles and headed straight for the plaintiffs side of the lane. The plaintiff swerved to his right to avoid a head on collision. A collision occurred but the plaintiff sustained injuries. He lost consciousness and regained it when a good Samaritan had driven him back to Naivasha town. He was admitted to hospital and was said to sustained injuries.

He sued the defendant No.1 as the driver of the said motor vehicle. As he was a Government employee he also sued the 2nd defendant the Attorney General herein.

It was then that the Attorney General entered appearance and filed defence denying the said allegations.

The parties had entered into an agreed issues that should be determined by this court. They nonetheless reduced these issues to five out of ten issues.

I therefore do not need to determine the following facts which have now been conceded to and concerns issues 1,2,3,7 and 8. Namely:-

That an accident took place on the 26th of August 1996 along the Nakuru/Naivasha road involving the vehicle registration KAB 661 R (GK 570) belonging to the office of the President and vehicle registration number KAE 785P belonging to the plaintiff. That the vehicle registration number KAB 661R (GKQ570) was driven at the material time by the 1st defendant.

That the 1st defendant drove the said vehicle in the course of this duty as an employee/servant and or agent of the Office of the President.

The Attorney General on behalf of the Office of the President owner of vehicle registration number 661R (GK Q570) is vicariously liable for the act of the 1st defendant and thus liable to pay damages to the plaintiff as claimed.

The issues that remain in dispute are issue 4 and 5 and 6 concerning liability. And issue No.6 and 9 concerning quantum. Issue No.10 deal with costs.

## A) LIABILITY

Issues 4 and 5

“Was the accident caused by the recklessness, carelessness and or negligence of the 1st defendant as alleged in para 5 of the plaint or was the accident caused or contributed (sic) to by the negligence of the plaintiff?”

The evidence before me discloses that the plaintiff was travelling at a speed of between 60 to 70 KPH. He was on his correct side of the lane. The 1st defendant left his lane and drove to the plaintiff lane in an attempt to over take other vehicles. He did so without due regard nor taking precaution that there was no on coming vehicle. His action was indeed reckless.

I hereby find that the 1st defendant is liable in this case at 100% with the Attorney General being jointly and severally liable with him and is further vicariously liable for the acts of the 1st defendant.

I now turn to the issue of quantum.

## B) QUANTUM

### 1) General Damages

#### i) Pain and suffering

The plaintiff after being involved in the said accident lost consciousness. He regained consciousness at Naivasha and on admission to hospital was found to have sustained injuries. He was later taken to the Aga Khan hospital then thereafter to the M.P. Shah hospital. He was treated by Dr. S. Patel. Dr. Patel came to court and gave evidence. He produced his report of 4.12.96. It would have been of further assistance if the latest report would have been also been put in. Dr. S. Patel F.R.C.S, F.I.C.S Consultant Orthopedic Surgeon The doctor found the following injuries were sustained.

#### i) Cerebral concussion

#### ii) Laceration of the forehead

#### iii) Fracture of four ribs left side of chest with bruising of the chest

#### iv) Fracture of the acetabulum of left hip joint without any displacement.”

To his opinion the skull did not reveal any body injury. The laceration on the forehead healed well. The ribs were healed consevertably as to the acetabulum – the left hip joint socket – he was treated and within 6 weeks was able to start walking gradually. The advocate for the plaintiff relied on the case law of:- Charles Muthoga V New Kahugera Bus Services Ltd & Another Hccc No.648/81 Unreported Mboghol-Msagha J. Where the plaintiff in the above case – a medical doctor was involved in a road traffic accident on the 30.4.79 along the Makuyu- Muragwa road. No details in the judgment is given as to whether the plaintiff was a passenger, a driver or the circumstances in which the accident arose. All I have is that the

defence was struck out and judgment was entered.

In assessing the damages to be awarded for injuries that included:-

- i) Cerebral concussion
- ii) Lacerations of the face
- iii) Left permanent rightly scars bruise of the lumbar sacral
- iv) Spine, left ankle,
- v) Avulsion fracture of the lateral condole of upper and of left tibia shock pain and suffering.”

An award of Ksh.450,000/- was given by the judge. The advocate for the defendants had no case law.

I find under this head of damage that the plaintiff indeed sustained the injuries as stated. He looked and appeared fully recovered although the doctor said he may suffer post osetheratis symptoms. I would find that a fair award in the circumstances relying on my past authorities to be Ksh.150,000/-.

ii) Special Damages I wish to first deal with the personal injuries expenses

a) Hospital Expenses Ksh.75,000/-

A sum of Ksh.75,000/- was pleaded. What I have is a receipt for Ksh.65,330/- and another for Ksh. 350/- Total of Ksh.65,680/-

This sum is for the hospital expenses at the M.P. Shah hospital. The law requires under seciton 19 of the Stamp Duty endorsed on it. As this has not been done – under seciton 20 of the said act I hereby give the plaintiff time to comply with the requirement by attending to the collector of stamp Duty. The sum established under this head is Ksh.65,680/- only.

ii) Specialist medical expenses Ksh.35,000/-.

The Doctor who treated the plaintiff charged Ksh.35,000/-. Dr. Patel put in his professional fee and declared that he indeed had been paid. I see no receipt to this effect and if perchance Ext P8 is a receipt, then the requirements to the stamp duty requires to be done. I would make no award under this head due to there being no official receipt.

iii) Air Fare to Bombay US\$629/-

I award this claim having been proved through Ext P.6. The plaintiff attended hospital in Bombay as there was no CT scan available in Nairobi.

iv) Per diem Ksh.20,000/-

Substance The plaintiff was required to particularize these expenses and prove them strictly. I see no such evidence. I reject this claim.

Material loss claims

v) Damage to the plaintiff motor vehicle Ksh.690,000/- What I have indeed is that the value of the motor vehicle before the accident was Ksh.680,000/-. The salvage was Ksh. 75,000/- Leaving a net of Ksh.605,000/-

This is how the pleading should have been reflected. I do not accept the figure of Ksh.690,000/- as being

correct. I looked at the assessors report put in by consent to the parties which reflects the correct position  
Ext.P4

I hereby further note that the vehicle was for Ksh.700,000/-. The excess was reflected at Ksh.35,000/- giving a figure of Ksh.665,000/-.

The advocate for the defendant states that the plaintiff cannot claim this as he has been paid by the insurance company and would amount to double in incurrence.

Such a claim I find is normally brought by an insurance company who through the plaintiff would claim for subrogation. I got the impression that the advocate was misled by the defendant's advocate that agreed to this sum. If that is the case I would be willing to review my orders.

If not, the said claim is hereby rejected.

ii) Assessors for Ksh.4,800/- The assess fee is supported by no invoice and receipt. There is a copy of the cheque requisition. I reject his claim.

ii) Towing charges Ksh.8,500/- There is only a cheque requisition form. There is no receipt nor proof of payment. I reject this claim.

iv) Towing charges Ksh.7,000/- There is a cash sale for Ksh.7000/-. This required to be supported by a formal receipt that the same had been paid. There is indeed no such proof. I hereby reject this claim.

v) Loss of user of motor vehicle for 3 months Ksh.360,000/- This claim was abandoned before trial commenced. I hereby dismiss it.

vi) Police abstract fee Ksh.100/- No receipt was submitted on this. The same is dismissed.

vii) Loss of income = Ksh.750,000/- to date The plaintiff produced his financial statement of year ending 1997. I believe what would have been of assistance are the statements for 1996 when the plaintiff was infact working and prior to the accident.

The plaintiff was able to walk again after 6 weeks. He was indisposed for a total of 2 months.

Taking the average income per month of Ksh.20,000/- as per the financial statements I would award Ksh.40,000/-. Under this head. I have not been told that the plaintiff had been incapacitated to date and therefore would reject the claim for damages from 1997 to 2004 namely 7 years.

I accordingly enter judgment for the plaintiff on the proved claim. In summary:-

1) Personal injury and material loss claim.

2) Driver male adult aged 56 years old in 1996

3) Motor vehicle collision between two vehicles.

4) Liability: 100% against the 1st and 2nd defendant jointly and severally with the 2nd defendant being vicariously liable for the acts of its agent and or service.

4) Injuries:-

i) Cerebral concussion

ii) Laceration of the forehead

iii) Fracture of 4 ribs

iv) Bruising of chest

v) Fracture of the acetabulum

5) Quantum

!) General Damages

i) Pain and suffering Ksh.150,000/-

6) Material Loss claim

a) Damages to motor vehicle Nil

b) Assessors fee Nil

c) Towing charges Nil

d) Towing charges II Nil

e) Police abstract Nil

f) Loss of user abandoned - dismissed.

g) Hospital expenses Ksh.65,680/-

Proved but subject to compliance of the stamp duty Act under Cap.480 Laws of Kenya.

h) Special Medical Expenses - Nil

i) Air fare to Bombay US\$629

j) Substance -Ksh.20,000/- -Nil not proved

Total -Ksh.150,000/-

+ -Ksh. 65,680/-

-Ksh.215,680/-

add -US\$ 629

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

The claim of Ksh.65,680/- on medical expenses is to await compliance under the Stamp Duty Act Cap.480 – section 20.

**Dated this 20th day of May 2004 at Nairobi.**

**M.A. ANG'AWA**

**JUDGE**

**Sharad Rao & Co. Advocates for the plaintiff Richard Kipkoech Sang – the defendant**