



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.5108 OF 1992

MUTHONI KABUGUAPLAINTIFF

VERSUS

CATHOLIC DIOCESE OF KIRINYAGA & 2 OTHERSDEFENDANT

JUDGMENT

This suit involving Rose Muthoni Kabugua (the plaintiff herein) was originally brought against

- a) M/S Catholic Diocese of Kirinyaga
- b) Father John Karimi and
- c) Arthur Wangai Kiiru.

On the 25.9.92

A. Delay of suit

For 14 years this suit had been pending before the High Court. When it did come finally for trial, the plaintiff withdrew the suit against the 1st defendant. At one time an attempt to withdraw the suit against the 3rd defendant was made and the parties agreed by consent to reinstate the suit against him.

Preliminary objection was raised and determined. The main content therefore was the issue of finality there was indeed contentious.

B. Liability

The plaintiff and defendant put in by consent of the parties the proceedings of the lower courts that involved the trial against the third party. He was charged with a traffic offence of causing a road accident and was duly fined Kshs.3,000/= or 6 months imprisonment.

The facts of this case is quite simple:-

The defendant No.3 was the driver and owner of a motor vehicle public service number known as a matatu. He was driving the said vehicle along the Nyahururu road heading towards Nyeri. He attempted to overtake another public service vehicle traveling towards the same direction. The road in front had an incline going up hill. The two vehicles drove abreast. Suddenly a pick up driven by the 2nd Defendant appeared. On noticing the two vehicles heading towards him, the 2nd Defendant drove off the road but the impact on the off road made him lose control and knock the public service vehicle (which is not party to this suit). The impact of the said collision caused the vehicle to overturn and the passengers (not party

to this suit injured).

The 2nd Defendant has as his sole passenger the plaintiff. Both of them were injured and rushed to hospital. The 2nd Defendant sustained injuries to both legs.

Her left leg was later amputated below the knee.

She sued the 1st 2nd and 3rd Defendants in negligence and sort to be paid damages.

The question arises as to whom indeed is to blame for this accident.

I have the benefit of the proceedings from the traffic court case proceedings that was introduced in evidence under Section 34 of the Evidence Act. I had the benefit of the 3rd Defendant giving evidence in court.

According to the 3rd Defendant he was behind the other public service vehicle and did not travel abreast. He said he saw an accident; stopped his vehicle and picked up the injured passengers whom he rushed to Hospital. He was then immediately charged in the Traffic Court case.

He insisted he was not to blame for the accident. The 2nd Defendant together with the other witnesses stated in the proceedings of the lower court that it was the 3rd Defendant who was overtaking at a place not appropriate to do so and was driving the vehicle at least with another.

I find the evidence before me is clear. That the 3rd defendant did overtake at an inappropriate place. That he then caused the said accident by obstructing an oncoming vehicle.

It was noted that the 3rd Defendants vehicle was never hit by any of the other two vehicles. The other two vehicles collided as a result of avoiding the accident.

I further note that the 3rd Defendant was found guilty by a court of law and was duly convicted for this said traffic offence. He was fined Kshs.3,000/= or 6 months imprisonment as earlier stated. He never appealed against this decision nor challenged the conviction. The fact that he did not do so amounts to an admission under Section 44 of the Evidence Act. Cap 80 Laws of Kenya.

I hereby find that the other two vehicles including that of the 2nd Defendant were not at all liable in negligence for this accident (The other driver's vehicle was infact never a party to this suit).

I hereby find the 3rd Defendant solely liable for this accident which liability I compute at 100%.

C) Quantum

At the time of the accident the plaintiff was aged 27 years old. She sustained Injuries to both her legs by way of fractures.

She was examined in 1991 by:-

Mr. Dr. W. Wokabi, Mb Chb M.Med

Consultant Surgeon

Date of report 24.9.91

Date of examination 2.9.91

Injuries:

a) [Crushed] injury of the left leg

b) Fracture of the right femur.

Admitted to hospital for 7 months. Two weeks after the accident the left leg was amputated. The right leg was treated conservatively.

She was examined 19 years later by:-

Joab Bodo Mb Ch B(AE) FRCS

Consultant Orthopedic Surgeon

Date of report 5.12.00

Injuries:

a) Fracture of right femur in the middle third

b) Compound commuted fractures of the left tibia and fibula.

The left leg was confirmed as having been amputated - the fracture of the right femur was well united with normal movements at the right knee. The parties referred me to no case law.

I have in the past made award on similar amputation between 200,000/= to Kshs.500,000/=. Where amounts are higher it is due to other serious injuries that accompany the injuries. I recall awarding a fairly high award for a pregnant lady run over by a lorry and who lost her child due to the accident and had her leg amputated.

In this case I would find as a fair award the sum of Kshs.500,000/= as fair in the circumstances.

I now look at the special damages.

D) Special Damages

The plaintiff abandoned this claim of special damages. I dismiss the same.

I enter Judgment for the Plaintiff on the proved claims.

In summary

1. Passenger female adult aged 27 years old in 1990.

2. Road traffic accident motor vehicle collision between two vehicles but involving three vehicles.

3. Injuries as per this report:

(a) Fracture right femur in the middle third.

(b) Compound comminuted fracture of the left tibia and fibula.

(c) Amputation.

4. Liability

a) 100% against the 3rd defendant only.

5. Quantum

a) Pain and suffering Kshs.500,000

II: Special Damages

Abandoned on 22.7.2004 _____

Total Kshs.500,000

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

Dated this 30th day of July 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Kimathi & Co. Advocates for the plaintiff

Mungai & Gakuru & Co. Advocates for the defendant