



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT 113 OF 1999 RD**

**JOEL JUMA MULATYA ..... PLAINTIFF**

**- V E R S U S -**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**J U D G M E N T**

The hearing of this suit was in absence of the defendant who though sued did not appear. The plaintiffs case is damages arising out of train accident that occurred on 24.3.1999 at Tsavo Park. The particulars of negligence are set out in the plaint. The plaintiff himself gave evidence as PW1. He said he was traveling in defendants train from Athi River to travel to Mwatate. He paid traveling charges shs. 215/- and obtained receipt no.0282 (exhibited), when the train reached Tsavo Park railway station the train started moving fast, there was noise (bang) stone hitting the train and suddenly the train overturned. He was injured he lost consciousness, he was admitted at Makadara. He had fractured humerus and as a result he can only manage light jobs. A medical report was produced by Dr. Patel (PW2) which indicates that the injury occurred on 24.3.99 . Injuries suffered:-

- 1. Comminuted fractures of humerus.**
- 2. Head injury – concussion.**

He was treated at Coast General hospital and discharged on 31.3.99 with a plaster on left arm. The plaintiff told the doctor that he was a hawker. Dr. Patel gave oral evidence in addition. He was paid shs. 3000/- to attend court and give evidence. The plaintiff blamed the driver for failing to control the train. He was driving fast. Plaintiff produced exhibit 4 being fees charged to the doctor for medical examination, receipt for shs. 230/- paid for xray and other miscellaneous payments. Receipt no. 215/- train ticket, receipt for shs. 3000/- for Doctor Patel's court attendance.

Upon perusal of the record there is a statement of defence filed on behalf of the defendant, on 14/3/00 in which the plaintiffs claim was denied quoting Section 83 of Cap. 397. There appears to be on the ground that original plaint sets the accident to have occurred on 24.2.98. This was subsequently amended to read 1999, which is the correct date of the accident.

On 16/11.2000 defendant changed its advocate but to the date of the hearing no further pleadings were filed for defendant. I now turn to submission made by plaintiff. On liability the evidence shows that the train was traveling at a high speed and it overturned. There being no other evidence to explain why the train left its rails and overturned the coaches thereby causing the injuries to the plaintiff a passenger, the court is satisfied that the train was driven without due care and attention, at excessive

speed, failed to avoid the accident and the train derailed and failing to slow down or in any other way to manage or to control so as to avoid accident. The negligence is proved and liability follows at 100%.

As for quantum the injuries are set out in the medical report. I have considered the extent of injuries and the authorities relied upon and I have come to the conclusion that a sum of shs. 400,000/- to cover the fracture and head injury would be adequate compensation as general damages. The special damages are pleaded and supporting documents exhibited. I allow and award special damages. Medical expenses shs. 1500/- medical report is pleaded shs. 3000/- is claimed as doctors court attendant fees. These items are supported by documents. I allow and award the same. The total award is therefore shs. 404500/- with costs and interest at court rates.

I now deal with matters raised in the defence. The limitation period had not expired since the plaint was amended to show the true date of accident as 24.3.99 not 1998 – Section 87 (b) of Cap. 397 does not apply. Regarding Section 83 of the Act the mode of settlement of claims for damages by agreement, or arbitration. As for agreement the defendant denied the claim and closed the door for discussion. Section 83 (1) the Chief Justice can appoint an arbitrator to deal with issue of quantum of damages but not liability. Upon being served with the plaint the defendant entered an appearance. Butt did not apply for order for stay of proceedings to go to arbitration. Defendant therefore submitted to jurisdiction of this court. Ms. Osino relied in the authority of High Court Civil Case no. 385 of 1987 at Mombasa (Bosire J as he then was) Umoja Electical Co.ltd. –vs- Castle Engineering & Construction Co. Where the court said:-

*“In absence of any reasons or any good reasons*

***courts will and have always done to enforce the arbitration clause for the simple reasons that it is a term of a contract between the parties.....”***

However in that case the arbitration provisions were part of agreement between the parties. In the present case the provisions are contained in the statute. My opinion is that the provisions of Cap. 397 do not prevent this High Court to hear and determine this suit. The High Court has under the Constitution unlimited jurisdiction to hear all suits and Cap. 397 cannot override the provisions of the constitution. Furthermore the defendant did not show any intention to follow these provisions and therefore the plaintiff case could not be allowed to be rendered nugatory.

I, therefore, enter judgment for the plaintiff against defendant in the sum of shs. 404500/-General and special damages plus costs and interest at court rates.

**Dated this 25<sup>th</sup> November, 2004.**

**J. KHAMINWA**

**JUDGE**

**25.11.04**

Khaminwa – Judge

Cege – Court Clerk

Mr. Mwendwa holding brief for Ms. Osino

Non appearance for other side.

**J. KHAMINWA**

JUDGE