



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 100 OF 1999RD

MARGARET AOKO DIERO PLAINTIFF

V E R S U S

AFRICAN LINE TRANSPORT CO. LIMITED.1ST DEFENDANT

HUSSEIN MUNIR ABDALLA2ND DEFENDANT

J U D G M E N T

In this case the plaintiff, Margaret Aoko Diero was traveling in motor vehicle KAG 054C along Mombasa/Nairobi Road when 2nd defendant being driver of vehicle no. KAH 139N with Trailer ZB6247 owned by first defendant drove in such a negligent manner that it rammed into the back of vehicle in which the plaintiff was a paying passenger thus causing her to suffer injury. The defendants filed defence and issued a third party notice against 2 other parties namely

Gusii Deluxe Services

Moses Mwangi Muchina

Thereafter the plaint was amended to bring the claim of special damages to 1.646.938/-.

Despite that leave was granted to defendant to serve third party notice to the parties named there is no evidence that the defendant pursued the matter. No direction was taken by defendant as required. No action seems to have been taken by the proposed third parties. I, therefore, proceed between the plaintiff and the defendant.

The plaintiff gave evidence herself. She said she was in fish business from Kisumu to Mombasa. At the material time 19/2/97 she was traveling from Kisumu to Mombasa in motor vehicle KAG 054C from Kisumu. On reaching Machakos junction on Kisumu/Nairobi/Mombasa road the vehicle began to sway from side to side and the driver suddenly hit the vehicle in front. She was sitting on line no. 6 and she could see in front. She stood up to see what was happening. There was a lorry stationery on the road. In the accident which occurred she was injured and lost consciousness on the way to hospital at Machakos. When she recovered consciousness in the hospital she found she had serious injuries on her body. She was transferred to Pandya Hospital and then to Bakrani Hospital here in Mombasa. She took a long time under treatment. She was taken to theatre for operation several times. She produced medical reports to prove her injuries. She produced exhibit 5 to confirm that she was in business of selling fish from Kisumu to Mombasa. However she had no documents to support the claim of her income which she said was 20,000/- profit every month. She also gave evidence on her medical expenses which amounted to shs.

1.646.938/- which was paid by her husband employed at Kenya Marine & Fisheries. The receipts were with her husband at his place of work. Her husband died in 1999, however she did produce some receipts from Bakrani Hospital. According to her the stationary vehicle was KAH 139N ZB6247 and it is the vehicle that caused the accident. The driver was tried and she went to give evidence in that trial but according to exhibit 11, the police traffic case file, it was marked that driver was acquitted under Section 215 CPC. After the death of her husband in 1999 she was left with 4 young children to feed for. The occurrence of the accident was confirmed by PW2 police constable who produced the police abstract showing that the 2nd defendant was charged with obstruction. For defence the evidence called was the production by this court officer of a copy of judgment made by Mwera Judge in High court Civil Suit no. 108/1997 at Machakos.

Moses Mwangi Muchina

-vs

1. Africanline Transport Co. Ltd.

2. Hussein Muhir Abdalla.

which case the suit arose out of similar accident. In this case the plaintiff was the driver of vehicle KAG 054C in which the plaintiff here was a passenger. On the evidence offered by the parties the High Court dismissed the plaintiffs suit.

In the Counsel's submission it was pointed out that the defendant had called no evidence and therefore the plaintiffs evidence was unchallenged. Whereas in the case between the drivers was dismissed the court was looking at evidence from a different angle. In the present case the plaintiff was a passenger in one of the vehicles. Her presence is not disputed. The fact that the accident occurred between the two vehicles is also not disputed. She felt the vehicle swaying from **"here and there"** on the road. Then the accident occurred. It was at night and she said she stood up from her seat on line to see what was happening and saw a stationary vehicle in front. She was not able to see its registration number. The accident happened at night.

On the issue of liability the particulars of negligence against the defendants are set out in the plaintiff being -

- a) causing obstruction by parking motor vehicle in the middle of the road.
- b) Failing to use reflective triangle signs as a warning of other motorists.
- c) Failing to have due regard to the safety of other road users.
- d) Failing to exercise reasonable care and attention.
- e) Failing to have any or any sufficient regard to the safety of the plaintiff.

The defendant denied these allegations of negligence and blamed the driver of the vehicle in which the plaintiff was a passenger being No. KAG. 054 C aforementioned. Consequently the defendants obtained leave to serve third party notice which was filed on 29.7.2001 seeking contribution and or indemnity in respect of the whole or any judgment which may be obtained by the plaintiff in this case. The notice required the defendant to enter appearance within 15 days after service -

"otherwise you will be taken to admit the plaintiffs claim against first and 2 nd defendant and the claim first and 2 nd defendants claim against you and you will be bound by any judgment given in this suit"

I have perused the court file and I do not see any return of service of the Notice or any other evidence that the third parties were served. No appearance has been entered in accordance with the third party

Notice. Counsel for defendant in his submission confirmed that the third party did not enter any appearance but did not indicate that third party notice had been served. The rule of law Order 1 rule 15 requires that a third party who is served must enter an appearance in the suit within the period specified in the notice. Only if so served can judgment in default be entered against him as provided under rule 16 thereof.

In the circumstances then my view is that the defendant does not deny that his vehicle was on the highway stuck for whatever reason. The case between drivers is not the answer to the passengers (plaintiff) claim. It was not a test case. The traffic police file produced in evidence without any objection from defendant shows that in the Traffic case number 2855 of 1997 was terminated when the second defendant was discharged on 13.10.97 under section 87 (a) C.P.C. before any evidence was given in court to prove or disapprove the offence of obstruction. The traffic case did not consider the merits of the case. An examination of the plaintiffs evidence shows that she was awake and she noticed the vehicle in which she was traveling was swaying this must be because the vehicle was traveling fast and the driver had suddenly noticed the obstruction. She did see the defendants vehicle stationary on the road. And she says there were no warning signs. No evidence was advanced by the defendants to rebut her statement. In the judgment of Mwera J. the court had the benefit of seeing both witnesses give evidence and chose to believe the defendant rather than the plaintiff. In the present case the court has seen only the plaintiff and as a passenger her evidence is sufficient to prove her case on a balance of probability. I, therefore find the defendant to blame on a 100% basis.

On the issue of quantum of damages the injuries suffered are set out in the medical reports of Dr. Rasik Patel and Dr. Hermant Patel. On 31/1/1998 the plaintiff was examined by Dr. Rasik Patel. She was recorded to be 29 years old. After about 1 year she was found to have injuries as follows:-

1. dislocation of the right ankle with fractures of Malleoli of both the tibia and fibula with a cut lacerated wound on medial side 5" x 4".
2. lacerated wound on the medial side of right leg "3 x 1"
3. lacerated wound on the right knee exposing patella
4. lacerated wound on lateral side of left leg 2" x 2"
5. cut wound on right thigh 8" x ½
6. lacerated wound on right side of face 2" x ½'
7. contusion of right hand and shoulder.

X ray examination showed fracture on the knee and pott fracture of the ankle and fracture of right hand scaphoid operation and introduction of Steinman pins was done. She was in hospital until May 1997. On 28.1.2000 the plaintiff now aged 31 was examined by Dr. H. Patel at which time she was suffering painful deformed right ankle. She was using clutches to walk about. The doctor recommended either an amputation of the leg and fitting with an artificial limb or an operation for Arthrodesis of right ankle Counsel for the plaintiff proposes a sum for shs. 2 million for pain suffering and loss of amenities. He relies on the authorities.

1. Leonard Boishi Shihicha -vs- Nairobi Delux Services and 3 others.

Where judgment was delivered on 15.4.94. The plaintiff was aged 28 (here she is 37) In that case the plaintiff was aged 28 years, he suffered crush injury to his right leg necessitating amputation above the knee, a comminuted fracture of left leg tibia and fibula he was rendered unconscious was hospitalized for 31 days during which he underwent 4 major operations. The award was shs. 800,000/- or loss of amenities shs. 367,288/- for loss of earnings he was a painter) costs of artificial limb shs. 100,000/-. This authority was to support the claim for loss of employment and income. However I do not find firm

evidence. She said she was obtaining fish from Kisumu which she sold in Mombasa and that she earned shs. 20,000/- but she had no supporting documents no bank statements or other documents to support such claims. However it is obvious that she did lose a degree of capacity to carry on her business and my view is that she is entitled to global sum under this head which I assess at 250,00/-.

For pain suffering and loss of amenities, her advocate has relied on 4 authorities.

- 1. Gladys Kadzo Tsofa –vs- Samuel K. Njoroge HCC. No. 207 of 1995 a case of multiple injuries where shs. 600,000/- was awarded.**
- 2. David Kavyu Ndaka –vs- Attorney General & Others H.C.C. NO. 90 (RD)/1998 at Mombasa a sum of shs. 600,000/- was also awarded for similar injuries including head injury.**
- 3. Victor Musogo –vs- Linus Watitio Kamiti H.C.C. No. 2797 of 1997 (NRB) an award of shs. 800,000/- was awarded in November 2000.**
- 4. Humphrey Karugu –vs- KPA HCC. NO. 30/1993 (Mombasa) shs. 1.5. million.**

In the present case the injuries are serious. She still has to undergo an advised operation of “**fusion reconstruction of right ankle**” at Kenyatta Hospital. Her right ankle is grossly deformed and painful. She was hospitalized for 4 months. She is unable to use her right leg for walking and she has to use crutches. The doctor shows that she has two alternatives either to get her right leg amputated and fit artificial limb or undergo operation Arthrodesis of right ankle. I am therefore convinced that a sum of shs. 1.250,000/- is adequate for compensation for all these injuries. I have already awarded shs. 250,000/- for loss of capacity to earn income. On the issue of special damages I find medical fees of shs. 1500/- (report) and shs. 2500/- for attendance by Dr. H. Patel proved shs. 100/- for police abstract is also proved. As for shs. 1646938/- medical report I find this money was not paid by the plaintiff. No evidence was produced to explain under what circumstance K.M.F.R.I. paid the money. As the plaintiff received services to award her would be to benefit her twice. She is not the correct person to claim. She was not open as to the terms of payment by her husband and employers. For that reasons I allow only for medical report and

Doctor bill on attendance and medical report.....shs. 4000/-

Police abstractshs. 100/-

Shs. 4100/-

Therefore judgment is entered against the defendant in the sum of

Shs. 1250.000/- General damages

Shs. 250.000/- Loss earning capacity

Shs. 4.100/- Special damages

Total 1504.100/-

With interest and costs.

Dated this 8th day of November, 2004.

J. KHAMINWA

JUDGE

