



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 265 OF 2004

KINYANJUI WANYOIKE PLAINTIFF

VERSUS

JONATHAN MUTURI CHOGA DEFENDANT

JUDGMENT

Kinyanjui Wanyoike, an elderly 72 years old man then was on the 23.10.01 standing on the pavement in the Nairobi streets along the Ronald Ngala street/Moi Avenue junction. An agent or servant of the defendant entered a motor vehicle commonly known as a matatu and negligently drove it into Wanyoike whilst he was still standing on the pavement. The said vehicle stood over him on the pavement and the driver agent and or servant ran away.

Members of the public managed to pull Wanyoike out but he was unable to stand as his right side leg sustained injuries. He was rushed to the police to make a report and later to the Kenyatta National Hospital where he was admitted.

He then filed this suit against the defendant Jonathan Muturi Choga, whom he described as a police officer and owner of the said vehicle.

The said defendant entered appearance and filed defence on the 28.6.04 whereby he denied the allegations of negligence. He attributed, in the alternative the accident to the defendant as the one who exposed himself to a needless peril, causing the accident and failing to have a proper look out.

The jurisdiction of the court was denied.

When the suit came for hearing, the parties admitted the jurisdiction of this court and that the plaintiff issued a demand notice with the intention to sue. I now look at the issue of liability.

I) LIABILITY

The plaintiff gave a descriptive version of how the said accident occurred. The driver of the said vehicle carelessly and recklessly drove the vehicle onto the pavement without a proper look out and completely ran him down. He was lawfully standing on the pavement along Ronald Ngala street with the intention of crossing the road. He just suddenly heard a sound and the vehicle ran him down and he fell forward then underneath vehicle.

In cross examination the advocate for the defendant implied that plaintiff failed to prove the defendant was the owner of the said vehicle. When the plaintiff attempted to show the advocate for the defendant proof of admission of the said accident by the defendant and his driver, this was not permitted nor pursued by the said advocate. When the advocate implied that there was indeed no accident or that he

was in the ay plaintiff termed it as “red lies.”

I have it further implied by the defence advocate that the driver should have been joined to this suit and or charged in the lower courts, but once again this line of arguments was enter pursued who infact would charge a police officers driver in court? The will of law requires that no person be above the law and who ever commits an offence worthy to be punished or for purposes of determine should be changed before a court of law. The matter was not perused.

I would find that the defendants driver and or agent ran over the plaintiff. There has been no defence pleaded on an inevitable accident. The accident was deliberate and reckless on the part of defendant’s agent. I would hold him vicourisly liable for this accident and found liability at 100%.

I now go to the issue of quantum.

II: QUANTUM

The issue for determination is the claim of General Damages, Pain and suffering and that of Special Damages.

A) General Damages

i) Pain and suffering

The plaintiff in evidence stated he was injured at his hip leg and ankle. These injuries were serious and he indeed came in a wheel chair being unable to walk. The discharge summary reflects ha the infact had an intertrochesteric fracture of the right femur.

A very scanty report was put in that was prepared by one.

Dr. P.M. Kariuki

M.B Chb (Nbi)

Report date 20.4.04

This report seems to be so brief that it does not explain the circumstances of he injuries. The injuries stated being:-

- 1) Intertrochesteric fracture of right femur
- 2) Factice pelvic

There is no evidence at all of a fractured pelvic. The plaint never pleaded this fact nor did the Dr’s report speak of a dislocated ankle, nor did the hospital discharge summary plead these injuries. Apart from stating there was a fractured pelvic no explanation was given by the doctor of such injuries.

No past history of the plaintiff was given. (The doctor was seated in court throughout the trial and was disqualified from giving evidence, parties put in the medical report by consent).

I find that the plaintiff is bound by his pleadings. I reject the claim by the doctor that the plaintiff sustained a fractured pelvic. What was pleaded was a fractured femur. I would therefore so find that the injuries proved are the said fractured femur. I would note none of the advocates submitted any case law in this matter. I would in the circumstances award Ksh.100,000/- for the head of damages of pain and suffering.

I now turn to special damages.

B) Special Damages

From the pleadings before me a claim of :-

- i) Hospital medical bills
- ii) And a police abstract

Should have been proved strictly.

The plaintiff put in a bundle of documents that were in admissible in evidence and objected to by the defence.

I reject the said claims as having not been proved and make no award.

I accordingly enter judgment for the plaintiff on the proved claims

In summary:

- 1) Pedestrian/motor vehicle, collision
- 2) Male adult aged 72 years in 2001
- 3) Injuries:
 - a) Fracture of right femur
 - b) Soft tissue injuries
 - c) Dislocation right ankle (not proved)
- 4) Liability 100% against the defendant
- 5) Quantum:

1) General Damages

- a) Pain and suffering Ksh.100,000/-

2) Special Damages

- a) Hospital bills Nil
- b) Medical report Nil
- c) Police abstract Nil

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment. The costs to be assessed at the subordinate courts scale.

Dated this 9th day of December, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Benard Njoroge & Co. Advocate for the plaintiff

C.W Maina, Kiarie & Co. Advocate for the defendant