



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 364 OF 1998**

JOSEPH MAVULU MUTUAPLAINTIFF

VERSUS

SAMUEL NJOROGE MWANGIDEFENDANT

J U D G E M E N T

The plaintiff herein Joseph Mavulu Mutua filed this suit against the defendant averring that on 25.9.97 he was travelling in motor vehicle registration number KAH 446R along Machakos Masii road when the defendants driver and or agent so negligently drove, managed and or controlled the said motor vehicle that an accident occurred as a result of which the plaintiff sustained serious bodily injuries. The particulars of negligence are given, same to particulars of injuries and special damages. In consequence there of the plaintiff seeks both special and general damages, costs of the suit and interest at court rates.

The case was initially heard exparte and judgement given in favour of the plaintiff by my brother Judge on 7.3.2001 . That judgement was set aside by consent and the defendant allowed to defend the suit. The statement of defence annexed to the affidavit in support of the application for setting aside of the exparte judgement was deemed to be properly filed. The querments in that defence were that the defendant denied that there was an accident involving motor vehicle registration number KAH 446R at the material time or at all and puts the plaintiff to strict proof thereof, denies that the plaintiff was fare paying passenger in motor vehicle registration number KAH 446R at the material time or at all and puts the plaintiff to strict proof, denied allegations of negligence attributed to him, his servant driver and or agent as set out in paragraph 4 of the plaint and puts the plaintiff to strict proof thereof. In the alternative and without prejudice to the foregoing such an accident as the plaintiff may prove to have occurred which is denied was solely caused by circumstances beyond the control of the driver namely as the said vehicle was properly and carefully being driven along the said road the same suddenly went into a skid therefore not withstanding the exercise of all due care and attention the same went out of control, the defendant has no knowledge and makes no admission to the particulars of loss and damage allegedly suffered by the plaintiff and puts the plaintiff to strict proof thereof. On the basis of the foregoing the defendant prayed for the suit to be dismissed with costs.

Once again the defendants failed to show up for the hearing and this court being satisfied that they had due notice allowed the plaintiff to proceed exparte a second time. Two witnesses testified for the plaintiff PW 1 the Doctor whose evidence is based on the medical reports and PW 2 the plaintiff. PW 2 stated that on the material date he was travelling in Nissan Matatu registration number KAH 446R along Kitui Machakos, road heading to Machakos. The abstract exhibit 5 shows that he was a passenger in the said Matatu and he sustained injuries classified as grievous harm in the said accident. He was seated behind the driver and he could see the front clearly. The vehicle was speeding on a tarmacked but potholed road. The plaintiff then heard a bang and then the accident on a potholed section of the road which called for care. The witness does not recall the driver breaking, swerving or doing anything to avert the accident. He lost consciousness and he regained it the same day at Machakos General Hospital and found he had blood all over the right side of the body, pain all over the body and x-rays displayed showed fracture of the right

clavicle, fracture of all right ribs and fracture in the right hip bone, he was in hospital for one day and then the second day he was transferred to Kijabe hospital where he was admitted for one month.

He incurred medical expenses as per the certified receipts produced and also paid for the medical reports and abstract proved by production of exhibits 6a, b, 7 8 a, b 9 and 10. After the case proceeded exparte earlier on execution process was set in motion and properties of the defendant attached among them the accident vehicle as shown on exhibit 11. it is PW 2 evidence that the accident was caused due to the negligence of the defendant who is liable to compensate him for the injuries sustained.

The complaints as at the time of trial are that he feels pain on the right ribs, clavicle and the hip joint which only requires rest and not medication. He seeks compensation for the injuries sustained. PW 1 Dr. Z. Kibore filled the P3 and the medical reports dated 16.9.98 and the one of 25.11.2002. The injuries in the P3 are fractures of the right 2nd , 4th, 5th, 6th and 7th ribs, mild right sided chest pain, fracture of the right clavicle evidenced with the presence of a lump at the fracture site which was also tender and fracture right superior and inferior rami right pubic bone.

The medical report of 16.9.98 noted fracture of right side ribs 2,4,5,6, and 7, fracture right clavicle and fracture both superior and inferior pubic rami of the pelvis, blunt right chest injuries. The findings on examination were mild tenderness, elicited on right chest, swelling hard and bony at fracture site on right clavicle, patient to have a right side limp rather pronounced. Uses a walking stick.

In his opinion the person sustained multiple-le injuries of a serious nature. The effects of which he still suffers from. He will walk with a limp for a long time the limping gait may never revert to complete normality. The injury on the right clavicle has also left a visible ugly hardened painful swelling a sign of improper uniting of the fractured clavicle which will bother the person for long. The second medical report by Dr. Z. Kibore is dated 25.11.2002. The same injuries were noted. The findings on examination are that clavicle fracture site on right felt and seen as a small bony mass.

2. Rib fractures have healed well.

3. Gait on the right now normal. He was limping when he was first seen.

In the Doctors opinion the person suffered multiple injuries of a serious nature. Healing has on the whole been good. The occasioned aches he experiences should be relieved by analgesics his job some times entails long distance walking in the country side.

The plaintiffs counsel filed written submissions to the effect that judgement on liability should be entered at 100% in favour of the plaintiff as the defendant did not come to give evidence despite having applied to set aside a previous exparte judgement entered for the plaintiff and having admitted ownership of the motor vehicle herein on the affidavits supporting the application and the proclamation notices attached there to.

2. That on quantum an award of 800,000.00 should be made and specials of 22,117.00.

They rely on the case of Rose Nduta Muya versus Arthur Nelson Munene and another Nairobi HCCC no. 1377 of 1987 where the plaintiff suffered fracture of the 9th, 10th 11th and 12th ribs, fracture of the left tibia and fibula, loss of spleen and loss of pregnancy (miscarriage) the court assessed Kshs.400,000.00 as general damages.

The case of Tito Sekeni versus John Kanyuli Munguti & Sumra Transporters MSA HCCC 245 of 1992 where the plaintiff aged 29 years was crushed by another vehicle against the vehicle he was driving when he stopped and stood behind the vehicle. He sustained fractures of both left and right clavicle, fracture of the right scapula, fracture of the cervical spine, fractures of two ribs with surgical Empysoma and extensive abrasions with loss of skin on the right leg.

The plaintiff had along treatment. He complained of pains on the neck, cheeks both shoulders and

stiffness on the neck. He has been left with permanent ugly scars on right leg left thigh and left foot. General damages for pain suffering and loss of amenities assessed at kshs.4900,000.00.

The case of Andrew Achoki Mogoka versus Kenya Tea Development Authority Kisii HCCC no. 273 of 1989 where the plaintiff was involved in a road traffic accident and sustained fractures of the left superior and inferior pubic rami a vertical fracture through the sacro-iliac joint and subluxation of the left sacro-iliac joint, general damages for pain suffering and loss of amenities assessed at kshs.430,000.00.

The case of Kharma Odhiambo Omondi versus Crescent Construction Co. Ltd., Nairobi HCCC no. 2704 of 1987 where the plaintiff aged 42 years and employed as a watchman by a Nairobi firm received injuries in a road traffic accident being a compound fracture on both the left and right tibia and fibula bones, compound fracture of the left humerus, compound fractures of the left femur, severe soft tissue injuries the court assessed Kshs.450,000.00 as general damages for pain suffering and loss of amenities.

On liability it is clear that the plaintiff relies as negligence whose particulars are pleaded. From the evidence the accident was self involving. PW 2 was a passenger and he had no control over the manner the vehicle was being driven. He says the road was potholed and the driver was speeding and failed to control the vehicle properly causing it to roll. The defence called no evidence but pleaded that they deny the occurrence of the accident and denied that the plaintiff was a passenger in the said vehicle. The police abstract exhibit 5 shows that there was an accident involving the said motor vehicle and the plaintiff is named as one of the passengers who suffered injuries.

That allegation by the defence has thus been disproved.

It was further pleaded that the accident was inevitable despite exercise of due care on the part of the driver. It was necessary to call the driver to come and tell the court what he did to avoid the accident to controvert what the plaintiff, said that no steps were taken by him to avert the accident. In the absence of such a testimony the pleading of unavoidable accident remain a mere allegation. In the premises the defence has been ousted and so the defendants are 100% liable to compensate the plaintiff for the injuries sustained.

On the quantum there is the claim of special damages proved by production of exhibit 5 abstract and 7 its receipt for 150.00 receipts from Kijabe hospital for 17,330.00 exhibits 6 (a) (b), cost of x-rays as per exhibit 10 Kshs.70.00 and charges by Dr. Kibore as per exhibit 8 and 9 Kshs. 4,500.00. Total under this head Kshs.22,050.00 which I allow.

As for general damages I consider the fact that though the fractures were multiple they had healed satisfactorily and no serious permanent disabilities are experienced by the plaintiff. He was not on treatment as at the time of trial. He has occasional pain which are treated by rest and not medication. The plaintiff did not complain that the accident affected performance of his duties in any way. All the same it cannot be ignored that he suffered injuries and loss of blood. I have considered all the relevant factors and assess Kshs.320,000.00 as general damages for pain suffering and loss of amenities.

I therefore enter judgement for the plaintiff on the following terms:-

1. Special damages of Kshs.22,050.00 with interest at court rates from the date of filing till payment is full.
2. General damages for pain suffering and loss of amenities kshs.320,000.00 with interest at court rates from the date of judgement till payment is full.
3. Costs of the suit.

Dated, read and delivered at Machakos this 17th day of January, 2003.

R. NAMBUYE

JUDGE