



PERSONAL INJURIES

- Serious degloving injury on the left leg resulting in disability of 15-20% and other soft tissue injuries. No prospect of improvement.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS NAIROBI

CIVIL SUIT NO. 297 OF 2002

JACKSON WANYOIKE.....PLAINTIFF

VERSUS

KENYA BUS SERVICES LTD1ST DEFENDANT

GEOFFREY NJUKI.....2ND DEFENDANT

JUDGEMENT

In a plaint filed in court on 9.8.89 the plaintiff alleges that on or about the 30.8.8 at about 7.30 am he was walking on the verge of the road along Huruma Road in Nairobi when the second defendant so negligently drove, managed and controlled vehicle registration number KWT 146 owned by the 1st defendant that he knocked down the plaintiff and as a consequence thereof the plaintiff was injured and has suffered loss and damage. The particulars of negligence are given. It is further pleaded that as a result of the accident the plaintiff sustained a wound in the right eyebrow as well as a degloving injury in the left knee with exposure of muscles. This latter injury led to the left leg becoming gangrenous, necessitating two skin grafts which were cosmetically anaesthetic. As a direct result of the said accident the plaintiff claimed general damages and special damages in the sum of Kshs.800 (being Kshs.700 as costs of the medical report and Kshs.100 as costs of the police abstract). The figure for the medical report was amended to Kshs.1000 on 10.12.02 on an oral application in the course of the trial.

In their statement of defence filed on 1.10.89, the defendants admit the occurrence of the accident pleaded and that the second defendant was at all material times the agent or servant of the first defendant. They however deny that the 2nd defendant was negligent as alleged and aver that the plaintiff was not walking on the verge of the road as pleaded but jumped off the motor vehicle while it was in motion and was accordingly solely to blame for the accident or in the alternative substantially contributed to the accident. The particulars of alleged negligence on the part of the plaintiff are given. The defendants also deny that the plaintiff suffered the injuries loss and damage pleaded.

In a short reply the plaintiff reiterates his allegations of negligence against the second defendant as well as of injuries loss and damage suffered. He also avers that he is a mature man incapable of doing what is alleged against him and denies these particulars of negligence. The issues agreed for trial were:-

- (1) Whether the plaintiff was walking on the verge of the road at the material time,
- (2) Whether the true facts of the accident are those set out in the plaint or in the defence,
- (3) Whether the second defendant is guilty of any of the particulars of negligence alleged in the defence (sic),
- (4) The nature and extent of the injuries, loss and damage suffered by the plaintiff and
- (5) The quantum of damages and costs that the plaintiff is entitled to from the defendants.

At the trial the plaintiff testified that on 30.8.88 at about 7.30 am he was travelling from Huruma Corner towards Kariobangi along the Huruma Road. He was with a friend called Mwangi. They were off the road on the left side. He was struck from the rear. He did not see the vehicle that hit him. He was later informed that he had been hit by a Kenya Bus Services vehicle. He further testified that he fell down unconscious and recovered consciousness at about 1.00 pm on the same day at Kenyatta National Hospital where he had been taken after the accident. He also testified that he suffered an injury to the back of the head, a cut on the left orbit of the eye and an injury to the left leg. He said he was operated on the leg three times and was hospitalised for three months and twenty days. He said that as a result of the injuries he could not stretch or bend his left leg and he had problems with walking. The left ankle joint was also stiff. He claimed to have scars at the back of the head and on the forehead.

On cross examination, the plaintiff revealed he was 26 years old. He insisted he was hit while on the pavement off the road and vehemently denied that he was a passenger in the bus. He said he was one metre off the road. He said there was no bus stop where he was hit and the KBS bus stop was about 30 metres away in the opposite direction. He conceded that his own doctor's report did not show that he became unconscious after the accident.

The plaintiff called one Samuel Mwangi Wanjiku as his witness. This witness testified that on 30.8.88 he and the plaintiff were walking towards Kariobangi market from Huruma on the left side of the road off the said road. He was ahead of the plaintiff. As they were walking, the witness heard the screeching of brakes. When he looked back he saw his friend lying under a Kenya Bus Services vehicle number KWT 146. The bus had come from behind them. The rear wheels of the bus were slightly in contact with the plaintiff's left leg. The bus was stationary. The witness turned back and asked the driver to reverse slightly so that the plaintiff could be disentangled. That was done and the plaintiff, who could not stand, was carried into the bus and taken to Kenyatta National Hospital.

On cross examination, the witness stated that the plaintiff was not a passenger. He further said that on leaving hospital he made a statement to the police. He insisted his name was on the police abstract of the accident as a witness. When it was pointed out to him that the name on the abstract form was for one P.C. Mwangi, he conceded that he was not P.C. Mwangi.

It may be noted that the above evidence was taken by me on 13th February, 1995. The matter was then fixed for further hearing on 3.4.95. On that date neither the parties nor their advocates appeared in court. The matter was stood over generally. The next hearing date was 11.11.96. On that day the plaintiff's advocates applied for adjournment on the basis that the doctor who had examined the plaintiff was not available to testify. The matter was then stood over generally for fresh dates to be taken in the registry. Soon thereafter I served out of the judiciary first as the Solicitor General and then as Director of the Kenya Anti-Corruption Authority until January, 2001. For reasons which are inexplicable the parties did not show any interest in the matter again until 24.10.01 - a whole five years - when they agreed that the suit be fixed for hearing on 27th and 28th February 2002. On that date the matter was listed before Commissioner of Assize Ransley, as he then was who correctly directed that as the same was part heard before me it should be mentioned before me for further directions. And so it came to pass that on 10.12.02 and the 16.1.03 I heard the matter further. The discerning reader will learn a lesson from the foregoing about the efficiency of some members of the Kenya bar and the judicial system as a whole. Let me now revert to a narration of the evidence.

The plaintiff's third witness was Dr. Shashi K.C. Patel. This experienced doctor of 35 years standing testified that he examined the plaintiff on 24.4.89. He found that he had sustained a serious injury to his left knee and the left leg which involved loss of the skin and the tissue underneath on the whole knee and on the left leg up to the ankle joint. Such an injury, the doctor told me, is called a degloving injury. He further testified that the plaintiff remained in hospital for 3 ½ months and he underwent through 3 operations. The whole area of the injury was covered with skin grafting. He further testified that because of the injuries the plaintiff had considerable problems even at the present time. He had examined him a week before this testimony and found that the skin at the back of the knee stretches when the plaintiff stretched his knee. He also found that the plaintiff had a lot of itching in the grafted area of the skin. He had also as a result of the original injury developed a stiff knee. He could only bend it halfway, that is to say 90 degrees. That was the position evening 1989. He concluded that the plaintiff had not improved at all in that respect and he was unlikely to do so. He also found that he had a residual stiffness in the left ankle which made him limp slightly while walking. In his view, the plaintiff had considerable disability of the left leg following the injury. The doctor stood by his earlier prognosis in the medical report which he produced in evidence. He further testified that he had charged Kshs 1000 to examine the plaintiff and write the medical report. He produced his invoice to that effect and confirmed that the same had been paid. He further testified that he had charged Kshs 10,000 for his appearance in court to testify. He ended his evidence in chief by opining that the plaintiff's injuries could be improved with plastic surgery and that the cracks on the knee could be removed by removing the present skin graft and replacing it with another. On cross examination, the witness stated that when the plaintiff went to see him he presented his treatment card from Kenyatta National Hospital. He also said that he would award the plaintiff a disability of 15-20 per cent.

The defendants on their part called one witness. He was Mr. Geoffrey Njuki Kaigi, the 2nd defendant himself. He testified that he was driving motor vehicle KWT 146 on the material date. On 30.8.88 at about 7.30 am he was driving from Kenyatta National Hospital towards Kariobangi. When the vehicle reached Mathare on Huruma Road, he heard passengers in his vehicle calling on him to stop. He stopped. He was told by the passengers that somebody had jumped out of the bus and had fallen down. He went to where he had been told somebody had fallen. He found someone who told him his name was Jackson. The witness further testified that the person had fallen from the rear door. He said there was no stage where Jackson had fallen. He confirmed that the body of the person was on the edge of the road. He had not been crushed by the vehicle but he had an injury on his toe and on the knee of one leg. The witness put the injured person into the vehicle and took him to Kenyatta National Hospital. The witness was subsequently charged with dangerous driving but was acquitted. He produced the proceedings in evidence. He was emphatic that he was not driving at an excessive speed and that this vehicle had not left the road and knocked down the plaintiff. He blamed the plaintiff for the accident. On cross examination, the witness maintained that the plaintiff had jumped out of the bus. When he stopped the vehicle he found plaintiff three metres off the road.

At the conclusion of the evidence, the advocates made their submissions. Mr. Billing for the defendants submitted that the defendant's driver had given consistent evidence as to how the accident occurred and on the basis of such testimony; the plaintiff had not proved his case on a balance of probabilities. He asked that the suit be dismissed. In the alternative, he submitted that if the defendants were liable the plaintiff should be held to have contributed to the accident on the basis that he had not been keeping a careful look out. On quantum, counsel submitted that an award of Kshs.150, 000.00 would be fair as general damages. He pointed out that the plaintiff had suffered no fractures - only a degloving injury and consequent scarring. He conceded that the plaintiff had proved the special damages pleaded.

Mr. Wanyama, counsel for the plaintiff, on his part submitted that both the plaintiff and his witness were clear and consistent that the plaintiff was hit by the first defendant's vehicle off the road and from the rear. He added that from the record of traffic proceedings produced by the defendant in evidence as Defendant exhibit 1 it was clear that the plaintiff and his witness had given the same in the traffic court and the driver was acquitted on the basis that the registration number of the vehicle involved in the accident had not been given and the contradictions in the evidence of the two witnesses as regards the distances of the plaintiff from the tarmac at the time of the accident. Counsel also submitted that there was no admissible evidence from the defendant on how the accident had occurred: the evidence of defendant's witness was

all inadmissible hearsay. In those circumstances the plaintiff's evidence was the only admissible one on causation. He also contended that no contributory negligence could be visited on the plaintiff on the basis that he had not been keeping a careful look out for the reason that there was no such pleading in the statement of defence.

On quantum, the advocate asked for Kshs.550, 000.00. He relied on the cases of **JOHN KIMANI KAMAU V STEPHEN WARUI KIARIE** [HCCC N0.4503 OF 1993] and **PAUL OJINJO V KENYA RAILWAYS CORPORATION** [HCCC N0.1113 OF 1994]. In the former case, the plaintiff had suffered a fracture of the tibia and fibula, he had pain and swelling at the fracture site and he could not stand or walk for long. There were a few well healed scars at the fracture site. There was no obvious deformity of the leg but the plaintiff walked with a slight limp due to the fact that the right leg was shorter than the left one by one centimetre. He was awarded Kshs.200, 000.00 as general damages in April, 1995. In the second case, the plaintiff suffered a very severe crush injury to his leg the injury involved sensory loss. X-rays showed slight osteoporosis (a weakening of the bone density due to infection of the bone). He endured a lot of pain and the same was persisting three and half years after the accident. He must have suffered considerable loss of amenities. He was awarded Kshs.250, 000.00 as general damages for pain suffering and loss of amenities in January,

1995. Counsel for the plaintiff submitted that the plaintiff/s injuries herein were more serious than those in the cases cited. He further submitted that based on the injuries sustained and the medical evidence that the scarring had left extensive keloid scars and a discharging sinus and the necessity for plastic surgery the sum of Kshs.500, 000.00 would be appropriate as general damages. In a short reply Mr. Billing submitted that in HCCC No.1113 of 1994, the plaintiff suffered a leg disability of 40% whereas in the present case, the disability was assessed at 10-20%. He further submitted that the element of costs of future medical care is not to be considered as part of general damages. It is special damages which ought to be pleaded. He asked me to ignore possible future medical care in my assessment of general damages.

I have now considered the evidence and the submissions thereon. On the issues pertinent to liability I agree with the submissions of counsel for the plaintiff that there is no admissible evidence from the defendants on how the accident occurred. The second defendant had no personal knowledge of how the plaintiff came to be injured. He relied on what he was told by some passengers none of whom were called to testify on behalf of the defendants. I am afraid that such evidence is inadmissible hearsay. Be that as it may be, the burden of proof was on the plaintiff and he had to discharge it on a balance of probabilities. In that regard I believe the evidence of the plaintiff and his witness that he was knocked down by the defendant's bus when he was walking off the road and that he did not jump off from a moving bus as alleged. I do so notwithstanding the fact that plaintiff witness 2 - Mwangi Wanjiku - was in court throughout the testimony of the plaintiff and accordingly his evidence is entitled to little weight. That situation is however ameliorated by the fact that he did give substantially similar evidence in the traffic proceedings and it cannot therefore be said that his evidence was merely a regurgitation of the plaintiff's own evidence. In driving off the road for whatever reason, the 2nd defendant must be found to be negligent on that account only. In the premises I find that the defendants are liable to the plaintiff to the extent of 100%.

As regards quantum, I find that the plaintiff suffered a serious degloving injury of the skin to the left knee and left leg, bruising of the head, multiple, lacerations of the scalp and the right eyebrow. I do not believe his evidence that he lost consciousness for half a day for surely if he did his doctor would have mentioned it in the medical report. I also find that the plaintiff suffered very considerable pain as he was hospitalised for 31/2 months and underwent a total of three operations. I also find that the injuries I have disabled him to the extent of 15-20%. He is able to stretch or bend his leg only halfway and there's no prospect of improvement.

As regards cost of future medical care, I accept the submission by counsel for the defendant that the same are to be pleaded as special damages and that as they were not that factor cannot be taken into account in the assessment of general damages. Bearing all those considerations in mind and the submissions of the advocates for the respective parties, I think that an award of Kshs.300, 000.00 would be fair and reasonable compensation for the plaintiff for pain, suffering and loss of amenities. As regards special

damages, the pleaded amount of Ksh.1, 100.00 has been proved.

In the result there will be judgement for the plaintiff against the defendants jointly and severally in the sum of Kshs.300,000.00 as general damages and Kshs.1,100.00 as special damages. The plaintiff will also have the costs of the suit and interest on damages. Those, then, are the orders of this court.

DATED at **Nairobi** this 17th day of February 2003.

A.G RINGERA

JUDGE