

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. 210 OF 1998

MARGARET N.D. DANIELPLAINTIFF

VERSUS

JAMES M. SAISI & ANOTHER.....DEFENDANTS

JUDGMENT

In this case, Margaret N.D. Daniel, the plaintiff seeks to recover both general and special damages from James Matunda Saisi and M/S Kenya Breweries Ltd, the defendants, for a damage to her motor vehicle and for a loss of its use while it was undergoing repair.

In her pleading the plaintiff averred that on 8th January 1998 her Isuzu Trailer reg. No. KAH 303J was being driven along Rongo-Migori road fully loaded with molasses when the 2nd defendant's motor vehicle reg. No. KAA 610R Nissan with a Trailer reg. No. 2B 2589 driven by the 1st defendant was so negligently driven that it violently rammed into the plaintiff's vehicle thereby causing extensive damage to it. The plaintiff further averred that as a result of the accident her vehicle had to undergo major repairs before it could be brought into running condition and that that caused her to incur losses for which she holds the defendants liable. The plaintiff further averred that when the accident took place she had a contract with M/S Agro chemical and Food Co. Ltd to transport for them at least 150 tons of molasses a week and at least 600 tons per month. She added that the agreed rate of transportation from Mumias Sugar Co.Ltd to Kisumu was Shs. 800/- per ton and Shs. 900/- per ton for transport to and /or from Sony and Nzoia Sugar Co. Ltd to Kisumu and that as a result of the aforesaid accident her motor vehicle was unroad worthy between 8th January 1998 and 22nd April 1998 and that the loss she suffered was Kshs. 510,000/- per month.

The defendants filed a defence in which they denied the negligence allegedly attributed to 1st defendant and the particulars of it given in the plaint. In the alternative they averred that the said accident was solely caused or substantially contributed to by the negligence of the plaintiff's servant and / or agent for which the plaintiff was vicariously liable. The defendants also gave particulars of the negligence they attributed to the plaintiff's driver and added that they have no knowledge of the alleged contractual arrangements between the plaintiff and the third parties.

Eventually the case came up for hearing when the plaintiff testified and called two witnesses . The defendants on their part did not offer any evidence but their advocates filed written submissions.

The first issue that I have to address is whether the defendants are liable for the accident which occurred on 8th January 1998 involving the motor vehicle registration Nos KAH 303J and KAA 610R/trailer ZB 2589. The plaintiff was not at the scene when the said accident took place but her driver Robert Nyamberi Hezron testified. In his evidence the driver who gave evidence as PW1 said that on 8th January 1998 he was transporting molasses from Sony Sugar Co. Ltd to Kisumu and that when he reached river Gucha he noticed as he was driving downhill that there was another lorry also coming down hill from the opposite direction. PW1 claimed that he saw that the lorry from the opposite direction was being driven very fast. He added that when he reached the bridge he realized that the trailer of the other lorry was already detached and it was moving alone forward on his lane. PW1 said that he stopped his vehicle at the left side of the road but the trailer of the other lorry came on fast and hit his lorry while it was stationary on the side of the road. PW1 claimed that the other lorry belonged to Kenya Breweries Ltd the 2nd defendant and was at the time driver by James Matunda Saisi the first defendant. According to PW1 his lorry suffered very extensive damage and that he was not able to drive it again from the scene and a break down had tow to Kisumu. He added that he recorded a statement at Kamagambo police station on the same day, and claimed that he was neither charged with any offence arising from the said accident nor has

he been summoned to appear in any court. PW1 added that when the accident took place the lorry was full of molasses which he was transporting but the whole of it poured out as a result of the accident.

On the material available to me I am satisfied that the accident was caused by the trailer of the lorry belonging to the 2nd defendant which got detached from the lorry as the lorry was being driven very fast down hill toward river Gucha. I accept the PW1's claimed that the plaintiff's lorry was hit after he had stopped it at the side of the road. In those circumstances I hold the 1st defendant negligent as he drove the lorry too fast when it was dangerous to do so. The 2nd defendant was also negligent in not ensuring that the trailer would not easily detached from the lorry. The 2nd defendant is therefore both liable and vicarious liable to the plaintiff in damages arising from the damage to her motor vehicle. The driver of the plaintiff's vehicle told the court that the lorry he was driving was so extensively damaged that he was not able to drive it after the accident and that it had to be towed away by a breakdown to Kisumu at the cost of shs. 58,000/- as indicated by Exhibit P.2 . This claim was pleaded in paragraph 7(iv) of the amended plaint. In the circumstances I allow this claim. The plaintiff also claimed that she paid to U.A. Provincial Co. Ltd excess premium of Shs. 27,750/- for the repair to her vehicle which was 15% of the total cost of repair of shs. 185,000/- paid by insurance Ltd. I am satisfied that the plaintiff is entitled to be paid this sum. I award this amount to the plaintiff.

As regards the claim for the loss of user of the vehicle the plaintiff put in as exhibit a one year contract she was awarded by Agro Chemical and Food Co. Ltd to transport molasses for them. Exhibit P.4 confirmed that her net monthly earning stood at an average of Kshs. 206,405/- . The plaintiff claimed that the vehicle was out of the road for 3.5 months and that during the period she would have hired out her vehicle and she would have earned another Shs. 182,000/- per month. These figures do not appear to take into consideration the normal stoppages to enable the vehicle to be serviced mechanical break downs, sicknesses of the driver and other imponderables. The plaintiff has not bothered to produce her balance sheet to confirm that the amounts she quoted were in fact her earnings. There are as tax and other statutory deductions she is expected to meet. The plaintiffs projected earnings from the transport under the contract were indicated to be shs. 206,450/- . Taking into account all the factors I have stated above I would accept her net earnings under this area at Kshs. 180,000/- per month. In respect to earnings from the special hiring out of the vehicle there is no evidence that this was a constant income which has to be taken out in calculation of her income. I would accept a sum of Shs. 100,000/- per month. The loss the plaintiff suffered was Kshs. 180,000/- + 100,000/- x 3.5 months = Kshs. 980,000/-.

There will therefore be judgment for the plaintiff against the defendants as follows –

- (i) Towing charges kshs. 58,000/-
- (ii) Excess premium kshs. 27,750/-
- (iii) Loss of User kshs. 980,000/-
- Kshs. 1,065,750/-
- (iv) Costs and interest

Dated and delivered this 22nd October, 2003.

B.K. Tanui

JUDGE