IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3720 OF 1995

FARIDA KIMOTHO ::::::::::::::::::::::::::::::::PLAINTIFF

V E R S U S

ERNEST MAINA ::::::::::::::::::::::::::::::DEFENDANT

J U D G M E N T

This is a claim for damages in negligence arising from a motor accident. The matter was filed in this court on 18-12- 95 and was heard and went on appeal from where a new hearing was ordered. The plaintiff in her evidence at the second hearing of this suit said that she is a housewife now but at the time of accident she was Secretary with the Joint Kenya/Arab Chamber of Commerce. She stated that on 10- 3-95, she was a passenger in a matatu KYW 983 belonging to the defendant and driven by his employee. She was travelling from Town Center to South B in Nairobi where her home was but on reaching Mombasa road nearing the junction of Sore Road as the matatu negotiated a corner it overturned and the plaintiff got injured. She says the matatu was moving at a high speed. She received several injuries which are enumerated in the report by Doctor PETER NJAGI as :-

1. Crush injury to the right hand
2. Cut wounds on the dorsal aspect of the left hand
3. Comminuted fracture of the left clavicle (collar bone)
4. Deep wounds on the right upper arm
5. Wounds on the left wrist
6. Little fingers of right hand and middle ring finger amputated.

She was admitted at the Mater recordiae Hospital for 6 days from 10th March 1995 to 16th March 1995. The Doctor`s opinion was expressed thus:-

> “Farida seriously injured her right hand and lost her 3 right fingers, following the accident. She also sustained soft tissue injuries to her right arm, left hand and fracture of the left clavicle. The loss of the three right hand fingers is a permanent disability, which forced her to leave her occupation of a Secretary”.

She claims damages. She claims the defendant was negligent. The defendant entered defence denying liability and all the allegations in the plaint and at the hearing. They did not call any witness although Miss Tindi learned advocate for the defendant cross examined the plaintiff at length. During cross

examination defendant said she was seated in the cabin near the window of the matatu at the time of accident and she was able to see the matatu driver over speeding and when he took the corner recklessly the matatu inevitably overturned and people got injured.

She also said that the amount of KSh.37,975/= was paid by her husband`s employers Kenya Industrial Research to the Mater Hospital. In her submission Miss Tindi submitted that plaintiff did not prove that defendant caused the accident and there was no fault of the driver and that although PW1 says the vehicle was driven at very high speed she was no speed expert to give such opinion and that high speed alone is not negligence. But Miss Miencha for the plaintiff submitted that where a motor vehicle overturns, negligence need not be proved as it is presumed. She also added that negligence was not actually denied in the defence and in any case the plaintiff gave evidence. She was in the vehicle furthermore police abstract shows that the matatu driver was charged with offence of causing death by dangerous driving.

Looking at this evidence the immediate cause of the accident was overturning of the matatu and the evidence that connects this with the driving of the matatu was that of PW1 who said the driver attempted to take the corner at high speed. There was no evidence to contradict this although Miss Tindi says there was no negligence, but what is negligence? It is an omission to do something which a reasonable person would do or doing something which a reasonable person would not do.A reasonably careful driver would not take a corner or attempt to take such a corner at high speed. A reasonable driver would slow down at a corner and driver of any vehicle should owe a duty to those in his vehicle to drive carefully and not wrecklessly or at high speed under circumstances that slow speed was required.

To maintain an action in negligence the plaintiff must show first that the defendant owed a duty to the victim of the negligent act i.e the injured person. Secondly that the defendant negligently omitted to perform his duty and that the negligence was the effective cause of that injury. On the evidence and law I hold the driver of the matatu wholly negligent and consequently the defendant his employer or principal is vicariously liable.

Mrs Miencha stated that when a motor vehicle overturns the presumption is that the driver is negligent. She quoted no authorities for this proposition but I am not sure whether it is a rule of evidence or a principle of law or a mere statement but it is akin to and I believe that what Mrs Nyaencha meant to say was an attempted on here part to rely on the principle of RES IPSUR LOQUITOR which in wide terms is that in some cases the circumstances of the accident alone raise a sufficient presumption of negligence but as was said:-

> “The happening of accident is not in general prima facie evidence of negligence but the plaintiff must ordinarily give affirmative evidence of negligence on the part of defendant which caused the accident. The principle of ResIpsur Loquitor only shifts the onus of proof in that prima facie is assumed to be made out throwing on the defendant the task of proving that he was not negligent”.

See judgment of Simmonds L.J in WOODS V DUNCAN 1946 AC 419. Alastir Forbes V.P in the court of appeal case of MSURI MUHIDDIN V NAZZOR BIN SEF (1960) EA (207)

There he said:-

> “I accept Mr. Fraser Murray`s proposition that the respondents (defendants) can avoid liability if they can show either that there was no negligence on their part which contributed to the accident, or that the accident was due to circumstances not within their control”.

If Mrs Nyaencha meant this then it is fairly clear from the above that the defendant did not discharge the onus on him. He never gave any explanation that there would have been a cause other than his negligence or a plausible explanation which attributed the accident to some other cause.

The defendant in submission said the accident was as a result of inevitable accident, the same was only mentioned in pleading but no evidence to show what kind of defence, besides there ought to have been particulars of the nature of inevitable accident which ought to have been specially pleaded but that was

not so in this case. I have no doubt that defendant is liable and this has been proved on balance of probabilities. As for damages:

(i) Special damages:-

I am satisfied on evidence of receipts that this heading was proved as pleaded and I award the amount of KShs. 34,875/=

(ii) Loss of Earnings:-

She lost her fingers and could not work any more as secretary. She was 41 years and could have worked until 55 years but her wages were not shown. Claim for loss of earnings is a special damage and must be pleaded and proved. See court of appeal Civil Appeal No.192 of 1996 KARAURI VS NCHECHE. It was not pleaded nor proved. No award therefore can be given under this head.

(iii)For pain suffering and loss of amenities:-

I rely on DAVID TORTVS SAMUEL VS TANA RIVER EXPRESS & 3 OTHERS (MSA) HCCC.NO.721 of 1992. For amputation of right arm, head injury, loss of dominant eye Wambyanga Judge awarded KSh.850,000/= in 1993 but the value of money has now gone down so for the injuries the plaintiff here sustained I would give under this head KShs.880,000/= Total award therefore will be KSh.914,875/= plus interest and costs.

Delivered this 8th day of May 2002

A. I. HAYANGA

J U D G E

Read to Miss Tindi for Defendant

Mr. Lubulela for plaintiff