



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.1015 OF 2001**

**SAMUEL KARIUKI NYANGOTHI ..... PLAINTIFF**

**VERSUS**

**JOHAAN DISTELBERGER ..... DEFENDANTS**

**JUDGMENT**

**ON**

**LIABILITY**

This is a running down case. The parties did not bring it to my attention that there were several suit filed all over the republic against the same defendant for the wrongful injuries or deaths sustained as a result of an accident between the parties.

The advocates by chance disclosed that this indeed was a TEST suit.

If any party especially the defendant in this case wishes to have a test suit to prove liability between the parties the defendant must comply with Order 37 CPR. This order deals with the Selection of Test suit.

The defendant in this particular case is the same. Order 37 r 1 CPR is therefore relevant and reads:-

“Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order 1 could have been joined as co-plaintiff in one suit upon application of any of the parties the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directly that one of the suits be tried as a test case and staying all steps in other suits until the selection suit shall have been determined or shall have failed to be a real trial of the issues.

This works vice versa where the plaintiff is one and the defendants are several.

The reasons why we have a test suit is because the said case would not be an embarrassment to the court and parties where several courts decide on liability arriving at a different proportion from that of the first court trying the matter. As it stands the other parties are still able to obtain different orders on liability as they may not be bound to this courts finding.

I nonetheless will determine the issue of liability between the parties who are the two drivers of the respective vehicles.

**A: FACTS OF THE CASE**

The plaintiff herein called Samuel Kariuki Nyangoti had bought a motor vehicle Reg. KAL 219L that plied the Thika Garissa road ferrying fare paying passengers. The vehicle is commonly known as a matatu.

On the material day of the 9th of October, 2000 whilst driving the said vehicle with full passengers in the said vehicle of about 18 persons. The traffic was light and there was no vehicle on the road. As he neared a place called Kilimabogo he noted the defendants motor vehicle approach him from the opposite side. The vehicle came and instead of travelling straight ahead it suddenly turned to its right (this was the plaintiffs left) and cut across the said plaintiffs vehicle. It did this without indicating. The vehicle in fact turned at a very short distant from that of the plaintiffs that there was no time to break. The vehicles collided head on with the plaintiffs side and the defendants vehicle to the side.

The defendant was driving a Subaru motor vehicle. According to the defendants story all he knew as he was heading toward Fourteen falls he decided to branch off. He indicated, looked ahead and saw no vehicle. When he attempted to turn there was a knock/bang. He could not recall what happened and lost consciousness. He then was able to gain conscious for a very brief moment. He then got up and thereafter went into unconsciousness again after asking what happened.

Though the plaintiff called the other witnesses to narrate what occurred, they were witnesses in the said vehicle and had cases filed elsewhere. There was nothing wrong with them giving evidence in this case.

The defendant on the other side was infact alone in the vehicle. His witness DW2 stated that he was a passenger in a vehicle behind them. He then noted and was surprised why the defendant was slowing down and indicting to turn, when in fact their destination had not been reached. They were going to a conference venue. The defendant explained he wished to see some carpenters who were doing their furniture's although they in fact were not going there but to the conference

At the point of turning the witness saw the matatu vehicle and a collision occurred with the defendants vehicle being thrown in the air.

The said defendants said he returned to the scene when he was well and saw no skid marks. He noted a slight bend ahead.

I have been required by the plaintiff in his evidence that he was traveling at KPH of 80. He was not over speeding. The turn by the defendant was very sudden.

The defendant stated he never at any time saw the matatu and would only conclude that the said vehicle was over speeding.

I have examined the evidence of the plaintiff and defendant respectively and I would believe the plaintiff evidence. The defendant was respectable but said he has driving since 1958 and thus was an experienced driver.

I find that the liability, on the aspect of speed on the part of the plaintiff should be mentioned. The impact caused the plaintiffs vehicle to be write off according to him. This could only mean the impact was great. What caused this is the minute the collision occurred the vehicle turned/tipped over and crashed.

If the plaintiff was traveling below 80 KPH the impact from the accident would not have been so great. I would compute liability at 10% against the plaintiff and 90% against the defendant. Costs in the cause.

The parties are to take dates on the issue of quantum.

Dated this 18th day of December, 2002 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**