REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 4058 OF 1994

DANIEL KARANJA KEIGE……....…….PLAINTIFF

versus

ISAAC GATHUMBI MUGO…….1ST DEFENDANT

ISAAC SAMSON GITHUTHU……. 2ND DEFENDANT

JUDGMENT

The plaintiff claims that on 29th July 1992 while walking along the Langata Road in Nairobi, he was hit and critically injured by the defendant's vehicle, registration number KAB 200W. He avers that the accident occurred due to the negligence, carelessness and recklessness of the defendant. He was thereafter admitted into hospital where he received medical treatment, Special damages having already been agreed upon, he now claims general damages, costs of this suit and interest.

Apart from conceding to the fact that the accident occurred at the time and place as indicated by the plaintiff, the 2nd defendant denies that he is liable as pleaded.He avers that the accident was as a result of the plaintiff's negligence, and that he dashed across the road without taking necessary precautions. He therefore puts him to the strict proof of the loss, damage and injuries suffered.

The plaintiff led evidence that on the material day, he had taken his motor vehicle for greasing at a petrol station on Langata road. There were two petrol stations fronting both sides of the road, and that he intended to cross the road to the other petrol station. According to him, on the nearer lane the vehicles were moving at a steady speed as the traffic was not very heavy, but on the opposite lane vehicles were moving slowly due to a traffic jam.

He was standing on the pavement by the side of the road, waiting to cross when he was knocked down. Although he claims to have been on the lookout, it was his evidence that he had not seen the subject vehicle before he was knocked down. Thereafter, when he came round he found himself in the hospital.

P.W.2 produced a police abstract report which indicates that the accident occurred on the said date, involving the plaintiff who was a pedestrian, and the subject motor whose driver was one Isaac Gathumbi Mugo.

The defendant however gave evidence that while driving in the heavy traffic, and at a crawling speed of less than 20 km.p.h., the plaintiff had emerged from the left-hand side of the road and just crossed the road.

It was also his evidence, that although he had swerved the car to the right, to avoid him, it was the plaintiff who had hit the car on its left side, and that upon impact he was then thrown upwards, he hit the

windscreen and landed on the left side of the road. In his opinion, it was the plaintiff's duty to be on the lookout.

The defence evidence was not convincing, as if he was driving at 20 km.p.h., the injuries suffered by the plaintiff would have been less critical. Indeed, and in my humble opinion he would only have been thrown upwards to land on the windscreen only if he had been hit by the front of a speeding vehicle. Being hit by the side at the said of 20 km.p.h. speed would have thrown him off the road towards the left side of the vehicle. Further the fact that it was a clear day, would have given the defendant ample time to stop the vehicle and thereby to avoid hitting him as he did. He claims to have heard a bang from someone who was running. I have on this point taken into account that at that time the plaintiff was 58 years old, he gave evidence that he wanted to see a friend across the street while his vehicle was being greased. He did not impress me as one who would have been in such a great hurry as to run across the street. Mr. Murimi, for the defendant submitted that the blame should be apportioned at 60/40 with the plaintiff taking the higher blame. I however fail to agree with the line of submission.

I find the evidence of the plaintiff more credible, and I do attribute negligence and carelessness at 100% to the defendant. He was wholly to blame for the accident.

Before I proceed further, it is imperative that I find at this stage that the suit against the 1st defendant cannot lie, as there is no cause of action against him. The plaintiff's witness did concede during examination-inchief that the actual driver and owner of the vehicle was the 2nd defendant. The 2nd defendant admitted in evidence that he was both the owner of the vehicle and that he was its driver at the material time.

Having found as I do, I shall now proceed to determine the quantum of damages.

At the time of the accident, the plaintiff was 54 years old, and was then employed as a driver with a tour company. According to Dr. Muhombe who compiled his medical report on 20th September 1993, the plaintiff was unable to resume his profession as a driver due to the right leg disability. Dr. Owinga who compiled his medical reports on 13th March 1998, six years after the accident. He was able to ascertain the injuries that the plaintiff had sustained injuries as follows:

- Fracture of the mid shaft of the right humerus and lateral end of the claride of the right shoulder joint which had healed completely and only removal of the implants remained.

- pelvic pubic diastasis which had also healed and what remained was the removal of the implants.

It was however his opinion that there would be no harm in leaving the metals in situ permanently specially the one in the humerus.

- Displacement tracture of the Symphysis pubic

- Burnt trauma to the lumbar spine with subsequent nerve root injury. The deformity of the right foot would be permanent. He attributed the 'drop foot' deformity to a most likely nerve root injury in the lumbar spine at the time of the accident.

The doctor noted that at 65 years of age, the body physical activity capability was already sliding down the scale.

The doctor also noted that though there were no hospital records to verify history of head injury, he might have had head injury, which he had fully recovered.

Compression fracture of the vertebrae of his lower back (L1 and L5 vertebrae)

Although the plaintiff claimed to have been in coma for about one week, there were no medical records to substantiate the fact.

He stated that he suffers for memory loss and that he is unable to sleep without painkillers. No proof of the former was provided, but the latter fact was corroborated by Dr. S.O. Omunga who observed that "The Lumbar spondylosis will continue to be painful now and then but it can be controlled by pain killers and at times physiotherapy"

I shall now proceed to determine the quantum for general damages.

The plaintiff adduced evidence that he would require further surgery in the future to remove the metal plates at an estimated cost of Shs.115,000.00. A letter from Dr. Owinga supported this. I do grant him the said sum.

In his submissions, Mr. Mathenge, for the plaintiff relied on the cases of Samuel Murage v Moses Kamau & Another HCCC No. 6779 of 1991 and on Burns Lyall v Benson Karanja HCCC 1162 of 1984.

It was his submission, that the injuries sustained by the plaintiffs in the two cases compared well to those sustained by his client, in which case, he should be awarded a sum of Shs.1, 000,000.00 which figure should also cater for inflation. It was also his submission that a further sum of Shs.115, 000.00 should be awarded to the plaintiff for future medical expenses.

In Lyall's case, where the judge awarded a sum of Shs.1,000,000.00 for pain and suffering, the plaintiff had been deprived of the prospect of a reasonable happy way of life and became at 31 "a disabled man barred for ever from taking part in the activities that he cherished". His chances of marriage had also diminished considerably.

In that case he was also awarded a sum for future medical expenses and loss of earning from date of accident to the date of judgment. In the case of Samuel Murage, who was at the time of the accident an employee of a bank, and which employment he retained after the accident.

He had lost consciousness for two months. He had suffered severe head injuries, hypertension and respiratory embarrassment, three cuts on the shoulder, had developed subdural haemotoma but after treatment suffered only clumsiness in walking with no permanent neurological effect, was awarded Shs.450,000.00.

Mr. Murimi however urged the court to take into account the plaintiff's age and it was his submission that general damages would range between Shs.350,000.00 and Shs.450,000.00. In his submission, the injuries suffered by the plaintiff were similar to those suffered by the plaintiffs in K. Muthamia v B. Barine and Another HCCC 39 of 1988 and also in the case of Rosemary W. Thumbi v Pennel M. Kimani HCCC No. 2797 of 1991 and finally in Joseph Gitubia v Luka Warui HCCC 2942 of 1988.

In the past two cases the plaintiffs were at the time of the accidents of advanced age at 63 and 56 years respectively, They had suffered injuries of almost a similar nature to the plaintiff, and were each awarded Shs.250,000.00. I have taken into account the fact that these two decisions were arrived at over ten years ago and inflation is an element that cannot be ignored. I consider that the plaintiff would have continued in gainful employment for a further 6 years had it not been for the accident and for the general pain, suffering and loss of amenities I would also award him Shs.550,000.00

Interest shall accrue thereon at court rates until payment in full. The 2nd defendant shall also bear the costs of the suit and interest thereon at court rates until payment in full.

Dated and delivered this 13th day of February 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. Murimi for 2nd defendant

Mr. Mathenge for Plaintiff.