



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1056 OF 1999

WILLIAM WAWERU WANYOIKEPLAINTIFF

V E R S U S

DINESH M. ACHAR

EDWARD NGUGI MWANGI):::DEFENDANTS

J U D G M E N T

On 1st February 1999, the Plaintiff was travelling as a lawful passenger in motor vehicle registration number KAB 231M (hereinafter referred to as “the offending motor vehicle”) when it overturned and he was injured. At that time, the offending motor vehicle was registered in the name of the 2nd Defendant. On 27th December, 1999, the Defendants had entered into a sale agreement whereby the 2nd Defendant was to sell the offending motor vehicle to the 1st Defendant. Possession and control of the offending motor vehicle was to be delivered to the 1st Defendant on the date of execution of the agreement. As at the time of the accident the 1st

Defendant had not completed paying the agreed instalments which were scheduled to be completed in March, 1999, and, therefore, no transfer of the offending motor vehicle had been done. The 1st Defendant denies liability on the basis that he was not the registered owner of the offending motor vehicle. The 2nd Defendant on his part alleges that he is not liable for the Plaintiff’s injuries since he was not in control of the offending motor vehicle at the time of the accident. The first issue for determination by this court, therefore, concerns who is liable, as between the Defendants, for the Plaintiff’s injuries.

The issue of ownership of a motor vehicle is dealt with under section 8 of the Traffic Act (Cap. 403). That section provides as follows:-

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the motor vehicle.”

The provisions of this section are clear beyond peradventure. Although the 2nd Defendant is the registered owner of the offending motor vehicle, the evidence as a whole shows that ownership had been passed to the 1st Defendant who then alone had possession and control of it. Section 9 of the Act relied upon by the 1st Defendant deals with a situation where there has been a transfer as countenanced by Cap. 403, that is where the vendor of a motor vehicle sells it to another and signs the transfer forms. In the present case there was no transfer at all and on this ground this case is distinguishable from the case of **Francis Nzioka Ngao v. Silas Thiani Nkunga** NAIROBI Civil Appeal No. 92 of 1998 (Unreported) (KWACHI, OMOLO & OWUOR, JJ.A.). In the present case, I do not think that we have to go into the technicalities of registration as there was no transfer. We must limit ourselves to the issue of ownership and the evidence is that the 2nd Defendant was the registered owner and the 1st Defendant was in

possession, of the offending motor vehicle. In these circumstances, I am of the view that although the 2nd Defendant is registered as the owner of the offending motor vehicle, he has satisfied the requirements of section 8 of Cap. 403 that in fact the 1st Defendant was the real owner in possession and control. The evidence shows that the 1st Defendant had not completed payments to enable the offending motor vehicle to be transferred to him so that the requirements of registration provided for under section 9 of Cap. 403 cannot be brought into play at this point. It must also be remembered that in the **Francis Nzioka Ngao** case supra, it had been found that the conduct of the registered owner was not consistent with his statement that he had sold the motor vehicle to another person. That is not the case here at all. The 2nd Defendant is only here because he has been sued as the registered owner of the offending motor vehicle when in fact he had sold it to the 1st Defendant who was in possession and control of the same. In those circumstances it is not right and fair to hold the 2nd Defendant liable for the Plaintiff's injuries

which were sustained when the former had parted with the possession and control of the offending motor vehicle. Further, there is no evidence at all that the offending motor vehicle was engaged in a task beneficial to or on behalf of the 2nd Defendant. The law provides that for an owner to be held liable for injury caused by his motor vehicle when the same was under the use of another it must be shown that the motor vehicle was being used at the request of the owner or on his instructions in the performance of a duty or task delegated to that other by the owner. Otherwise, it is presumed that the owner had hired the motor vehicle leaving the person so hiring alone liable for loss occasioned during the period of hire. This matter was considered in **Joseph Cosmas Khayugila v. Gigi & Co. Ltd & Ano.** [1987] 2 KAR 93.

In that case, a motor vehicle owned by the 1st Respondent was delivered by its employee to the 2nd Respondent for repairs. The 1st Respondent's employee expressly instructed the 2nd Respondent not to drive the motor vehicle except for putting it in and taking it out of the garage. The 2nd Respondent drove it from the garage and knocked and injured the appellant. The question before the court was whether the 1st Respondent was liable for the 2nd Respondent's negligence. It was held that he was not. In determining the liability of an owner of a motor vehicle, APOLOO, J.A. (as he then was) suggested that one must consider the following tests:-

(a) Was the other person using the motor vehicle at the material time at the request of the owner or on his instructions?

(b) If so, was he driving it in performance of a task or duty delegated to him by the owner?

On the facts, both these questions must be answered in the negative. The 2nd Respondent was not only not using the offending motor vehicle at the time of the accident but had also parted with its control and possession to the 1st Defendant. The offending motor vehicle was not being driven on his instructions and it was not being driven in performance of a task or duty delegated by him. He is, therefore, not liable at all in this case. The suit against him is, therefore, dismissed with costs.

Now, we are left with the Plaintiff and the 1st Defendant. The 1st Defendant's case is that since it had not been proved that he was the "registered owner" of the offending motor vehicle as pleaded in the Plaintiff, he ought to be absolved from liability. The absurdity of this argument is obvious. In my view, this is stretching the argument too far in a manner that is not helpful. The liability of the 1st Defendant will arise from his "ownership" of the offending motor vehicle and it will not make any difference whether or not he is the registered owner. I hope this deals conclusively with the question of liability. Now, I must turn to the question of quantum. Three medical reports were produced by consent. In his Plaintiff, the Plaintiff stated that he had sustained severe injuries which had rendered him paraplegic from the waist downwards. This is supported by the medical reports mentioned earlier. All the Doctors who examined the Plaintiff agree that he sustained 100% disability. This means that he cannot engage in any gainful occupation. I have looked at the authorities cited by both parties in support of a reasonable award for pain, suffering and loss of amenities and taking into account all the other relevant factors, I am satisfied that an award of K.shs. 1,500,000 would be reasonable under that head.

The Plaintiff was 41 years at the time of the accident. He was married with two children aged 14 and 10. His wife and children depended on him. He was a self-employed welder. Without producing any

documentary proof, he alleged that he was earning K.shs. 30,000/= per month. His wife, who was called as the second prosecution witness testified that the Plaintiff, gave her K.shs. 2,000/= per week for house keep. The Plaintiff and his witness did not impress me with their testimony on this question. They are a modest family and their evidence is not consistent with that fact. The Plaintiff's Advocates asked me to take judicial notice of the informal nature of incomes derived from the "jua kali" business in our country. I am not sure whether that is a matter for judicial notice. Be that as it may, I do not think that a welder in this country today commands such income as suggested by the plaintiff. The country has been through a period of economic hardship and I am aware that the "jua kali" sector has not been spared. When crossexamined, the Plaintiff's witness stated that her husband had not employed anyone. There is no evidence at all that he even owned his own welding equipment. All he could be is a welder for hire. Such a person is not likely to command the income alleged. I also think that lower middle class families cannot afford to expend K.shs. 2,000/= per week on household expenses for the size of the Plaintiff's family as claimed. They were not truthful at all on this question and I attach very little weight on their testimony. However, this does not mean that the Plaintiff did not have any income at all. He is a family man with children in school. I have no doubt that he did all he could to support his family. It is unfortunate that he cannot prove his income. This is understandable in view of the nature of his employment. I am left with no option than to adopt the basic minimum wage for a general labourer as laid down in the schedule of legal notice number 61 of 2000, that is K.shs. 3,046/= per month. In view of the plaintiff's age, I think that a multiplier of 15 years would be reasonable. The claim under loss of earning capacity will, therefore, work out as follows in K.shs:

$$3,046 \times 12 \times 15 = 548,280/=$$

The next matter is the cost of future medical care and rehabilitation.

There is no doubt that the Plaintiff will require the following:

- (a) Supply of a wheel chair;
- (b) supply of in-dwelling catheter and urine bags;
- (c) supply of pain and muscle spasm drugs;
- (d) orthopedic bed and air mattress;
- (e) balkam beams with a monkey chain;
- (f) care of a nurse or physiotherapy aid;
- (g) gloves;
- (h) warm clothes;
- (i) consultation of a urologist once every six months; and
- (j) other future rehabilitation requirements

The Plaintiff obtained a quotation for rehabilitation items and going by it, I will allow the following claims:

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|------------------------------------|-----------------|
| (a) Orthopaedic bed | K.shs. 98,000/= |
| (b) Air mattress | K.shs. 30,000/= |
| (c) Balkum beams with monkey chain | Kshs. 133,000/= |

(d) Weights for exercises	K.shs. 31,000/=
(e) Parallel Bars	K.shs. 106,000/=
T O T A L	K.shs. 398,000/=

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The Plaintiff already has a wheel chair and I see no reason to make an award for it again under this head. If the wheel chair is used well, it will help the plaintiff for a long time.

There is no doubt that the Plaintiff will need care all his life. His wife is a housewife and she will no doubt help in this case. However, there is no guarantee that she will be able to cope with taking care of her husband alone. His situation is different now and she will no doubt need help. But I do not think there is need for a permanent nurse. They may employ a part time nurse to come in whenever there is a need, say twice a week. This should not be too expensive and I think K.shs. 2,000/= per month will cover that. The cost of nursing care is, therefore, assessed as follows in K.shs: $2,000 \times 15 \times 12 = 360,000/=$

The Plaintiff will be required to see specialists throughout his life. He is a delicate man and will require drugs now and then. I accept his Advocate's proposal that an award of K.shs. 500,000 should be able to cover the contingencies of future medication.

Several receipts were produced in evidence in support of the claim for K.shs. 114,280/= as special damages and the same must be allowed. I, therefore, enter judgment for the Plaintiff as follows:-
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(a) Pain, suffering and loss of amenities	K.shs. 1,500.00/=
(b) Loss of earning capacity	K.shs. 549,280/=
(c) Cost of rehabilitation	K.shs. 398,000/=
(d) Cost of nursing care	K.shs. 360,000/=
(e) Cost of future medication	K.shs. 500,00/=
(f) Special damages	K.shs. 114,280/=
T O T A L	K.shs. 3,420,560/=

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The Plaintiff shall also have the costs of this suit.

DATED and DELIVERED at NAIROBI this 8th day of May, 2001.

ALNASHIR VISRAM

JUDGE.