



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 75 OF 1998

DAVID MONDE NGUTHI ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

JASWINDER SINGH ENTERPRISES ::::::::::::::::::::::: 1 ST DEFENDANT

WILFRED WAKABA NJAU ::::::::::: ::::::::::::::::::::: 2 ND DEFENDANT

10 Coram: J. W. Mwera J.
Ngolya Advocate for Plaintiff
P. Mulwa Advocate for Defendant
C.C. Muli

J U D G E M E N T

On 20.3.98 the plaintiff sued the defendants jointly and severally in damages on account of a road accident which took place along Nairobi – Mombasa Road on 16.3.96. It was pleaded that while the plaintiff was driving his motor vehicle Reg. No. KDT 299 pickup on the said road the 2nd defendant managed the 1st defendant 20 motor vehicle Reg. No. KAE 277 P so negligently that he let it veer out of its lane into that in which the plaintiff's motor vehicle was and there they collided. In that accident, the plaintiff further pleaded, he suffered a mild concussion of the brain plus a deep cut in the right eye. That he fractured his mid-shaft right femur and sustained superficial cuts on the face, a cut wound on the right upper shoulder and a large abrasion on the right ankle joint. That as a result of these injuries the plaintiff formerly a civil servant could not resume duties and this meant loss of earning capacity. That he also needed provision for future medical attention and nursing care.

The defence filed on 17.4.98 denied the alleged claim and liability in negligence and that the plaintiff suffered no injuries and loss at all. But that if he did, he was the author of the same himself. That the plaintiff declined to resume work on his own volition and so the suit ought to be dismissed. It had been pleaded in the plaint that the defendant's motor vehicle was being driven at an excessive speed in the circumstances, and without due care and attention. That the 2nd defendant failed to 10 maintain proper control of the motor vehicle he was driving and that he did not keep a proper look-out so as to notice the plaintiff's motor vehicle on the road. It had further been stated that the 2nd defendant neither braked, swerved nor did anything to avoid causing the accident.

Both parties signed 9 issues dated 4.5.98.

In an amended defence filed on 8.3.99 it was averred that the plaintiff was negligent in his driving without looking out and minding other road users like the 1st defendant's motor vehicle. That it was the plaintiff who drove into the lane of the 20 defendant's motor vehicle and he did not slow down or in any way try to avoid the collision. The hearing opened on 24.2.2000 with the plaintiff (P.W.1) testifying.

The plaintiff told the court that he was driving from Sultan Hamud to Salama on the Mombasa – Nairobi Road on the material day. This was at about 9 p.m. and he had put on his head lights. Then he saw lights of a motor vehicle coming from Nairobi direction. There was a small corner. Then the on-coming motorist driving quite fast swerved into the lane of the plaintiff. That the plaintiff tried to move further to his left and his pick up stepped on the grass verge. But that the defendant's motor vehicle still came on until a collision took place off the road. That the plaintiff fell unconscious and came to noticing the defendant's lorry KAE 277 P. still on the road. By impact the plaintiff's motor vehicle was far on its left as one faced Nairobi. It had sustained damage on its right hand side from the front to the rear. It was later written off. That the plaintiff had had two fractures to the right leg, cuts near the ankle and the right arm was fractured at the shoulder. There were cuts on the face and below the 10 right eye. That the plaintiff was first moved to a clinic at Sultan Hamud and later to Avenue Nursing Home (Nairobi) where he stayed for three and half weeks. He was operated on the right leg there and later at M.P. Shah Hospital where he was for two more weeks. On discharge he developed complications and had to be admitted at Christ the King Hospital for a week.

The plaintiff produced a police abstract (Exh.P.1) and a P.3 form (Exh.P2). He placed before the court two medical reports by doctors Kibore and Madhiwala (Exh.P3 and 4) plus receipts for payments for medical attention and expenses amounting to Sh.415437/= (Exh.P5). That his motor vehicle was written off. That he 20 was not all cured yet. He walked with a stick with pains in the leg, four years down the line. That metal plates remained to be removed. That he was a civil servant and he had to retire early.

In cross examination the plaintiff told the court that the collision took place near a big pot hole in the road. That he moved off the road onto the verge where the defendant's motor vehicle hit P.W.1's pickup. That he had been going at about 60 K.P.H. and did not cause the accident. The collision was not head-on. The plaintiff said that had he sold his motor vehicle which he had had for about ten years he would have been given sh. 300,000/= for it. But it was a write-off; the rear wheels had fallen off on impact.

A motor assessor Joseph Njenga (P.W.2) testified next. He was instructed to assess motor vehicle KDT 299 (of the plaintiff) on 22.2.98. It had sustained a severe frontal damage in an accident. He put this motor vehicles pre-accident value at 10 Sh.175,000/= with salvage value of Sh.30,000/=/. He produced his report (Exh.P6) for which he had been paid Sh.5000/=. In his view this motor vehicle was a total write-off. It could not be economically repaired at all. P.W.2 maintained that he issued an invoice and P.W.1 paid, quite probably on no receipt. The defence did not call evidence and both sides submitted.

The plaintiff's side submitted that on the un rebutted evidence of negligence on the part of the 2nd defendant's driving, the defence take 100% liability. The defence were of the view that the plaintiff did not know the motor vehicle that collided with his and so a claim on liability failed. This court was unable to agree in that the 20 abstract (Exh.P1) shows that the lorry KAE 277 P collided with the plaintiff's motor vehicle KDT 299 on 16.3.96 on Mombasa – Nairobi road, near Ndolo Farm. Its owner was at postal address Box No. 236 Athi River – A. N. P. Transporters. The driver was not stated in Exh. P1 but the 2nd defendant Wilfed Wakaba was listed as a witness. This court is satisfied that from evidence here the defendant's severally and jointly take 100% liability.

Coming to general damages the plaintiff's side proposed Sh. 1 m. It cited two cases but they were not availed for perusal. It was further submitted that incurred medical and related expenses had been proved to the tune of Sh. 415437/= and that Sh.2000/= was paid for a medical report. The value of motor vehicle was put at Sh. 175,000/= less, salvage of Sh.30,000/= and the court was asked to award Sh.5000/= per towing charges whose origin was not established. And Sh.100/= for the abstract. All ended in a grant total of sh.1.5 M. 10 The defence citing cases of:

PETER KINGORI & ANR. VS. KAGIRI & ANOTHER NRI HCC C 2916/99

and

RHODA MBENJE VS. IKIARA MRU

considered Sh.300,000/= reasonable for paid suffering and loss of amenities. It was conceded that special damages of Sh. 415,437/= had been proved and that 20 Sh.145,000/= represents loss of the motor vehicle. That Sh. 5000/= for the motor vehicle assessor's report was not proved. Then without evidence, a contribution of 50% was put at the feet of the plaintiff.

There are two medical reports – by Dr. Kibore dated 12.6.97 – about a year and a quarter after the accident and by Dr. Madhiwala dated 30.7.98 – slightly two years after the accident.

Dr. Kibore noted that the plaintiff who was middle-aged suffered serious injuries that incapacitated him. He could not walk fast or do most day-to-day activities. The plaintiff was still on follow-up and that full recovery was unlikely. He went about with a fixed second left finger which required an operation. 10

On his part Dr. Madhiwala remarked that the plaintiff suffered multiple injuries that had healed well but that he was left limping and using a walking stick. And also that complete recovery was unlikely.

In this court's view and in the light of the doctor's reports the plaintiff suffered quite seriously and the medical opinion is that he may not recover fully. Of course a report closer to the trial of this suit would have been much more useful. But be that as it may in doing its best this court awards Sh.400,000/= general damages.

A sum of Sh. 415,437/- goes to medical and related expenses as proved. For 20 the loss of the motor vehicle the plaintiff gets Sh. 145,000/=.

The court then allows Sh.3000/= for the medical reports, the assessors report and the abstract. That is reasonable where receipts were not tendered.

The total award is

: General Damages	Sh. 400,000/=
Medical and Other Expenses	Sh. 415,437/=
Loss of motor vehicle	Sh. 145,000/=
Special Damages	<u>Sh. 3,100/=</u>
	<u>Sh. 963,537/=</u>

(Nine Hundred Sixty Three Thousand Five Hundred Thirty Seven Shillings) The plaintiff gets costs and interest. Judgement accordingly.

Delivered on 19th September 2001.

J. W. MWERA

JUDGE