



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.2151 OF 1999

PRAMOD PATEL ----- PLAINTIFF

VERSUS

ESTHER WANJIKU ----- 1ST DEFENDANT

ATTORNEY-GENERAL ----- 2ND DEENDANT

JUDGMENT

On the 3rd of December, 1998, Mr. Pramod Patel, an advocate of the High court of Kenya was driving his motor vehicle registration number KAD 997B along Harambee Avenue in Nairobi City. As he approached the dual carriage which was adjacent to the Parliament building he was suddenly knocked by a vehicle traveling on the wrong side of the street. The said vehicle knocked his and was extensively damaged on the front that it was later described as being beyond mechanical repair.

Two good Samaritans rushed Mr. Patel to the Nairobi Hospital where he underwent medical treatment and minor surgery to his eye lids. His injuries that he sustained was the upper and lower eyelids right were lacerated with loss of lid soft tissue.

He sustained a deep cut over the frontal region of his forehead. The defendants is the attorney General who is sued on behalf of the Immigration Department. The driver of the vehicle Esther Wanjiku came to give evidence.

Esther stated that she has had 11 years experience as a driver. On the material day she was assigned to drive to the Central Bank. There was another vehicle that was following her. She was caught up in a traffic jam on her correct side of the road. She then crossed to the wrong side of a dual carriage lane. It was her expectation that the on coming vehicles would see her. She flashed her lights and hooted. The one oncoming vehicle came and collided with her. She expected the vehicle to swerve to the other lane on the same dual carriage way but it did not. She described this vehicle as a Peugeot when it was not.

The advocate for the state informed the court that she had seen her witness for the first time in court. That the reasons to cause the driver to drive on the wrong side of the road has now been given but she was unable to tender this evidence in court as she was bound by her defence and pleadings which did not plead the new evidence. In the defence the same stated that the plaintiff was negligent and substantially contributed to the accident. In fact this was not established.

I find that according to the statement of agreed issue the same can be answered as follows:-

It is not disputed that the plaintiff is the registered owner of motor vehicle registration number KAD 997B.

It is also not disputed that the Immigration department was the owner or user of motor vehicle registration GK Y427. It is further not disputed that Esther Wanjiku, the first defendant herein was the authorized driver of GK 4427.

As to issue No.2 on negligence I find from the evidence before me that the accident was solely caused by the 1st defendant's negligence. The plaintiff did not at all contribute to the accident. It is quite clear that the road was a dual carriage way. That the first defendant left her dual carriage way and drove on the opposite dual carriage way. From the sketch map produced there is a concrete island that positively divides the two roads.

The plaintiff stated he had not seen the defendant's vehicle nor did the vehicle flash and hoot. He just felt the impact of the collision and was in shock.

From the evidence before me, the 1st defendant is 100% liable for the accident. The 2nd defendant is vicariously liable for the acts of its agent and or servants (If the 2nd defendant wished to drive on the wrong side of the road she must obtain permission from relevant authorities) Liability is therefore entered against the two defendants both jointly and severally at 100%.

Issue No.4

I find that the plaintiff suffered injury and loss. The advocate for the defendant's stated that these injuries were soft tissue injuries. PW2 the medical doctor would not agree with this. The eye lids to the right eye were torn. There was bleeding from that eye which was stopped. He then had to operate for four hours to try to repair the said eye. He did so successfully. Luckily the eye ball was not damaged.

I find that the plaintiff is entitled to an award in damages. The advocates for the plaintiff relied on the case of:-

Michael Mutua Ndolo

Vs

James Munene Thuo

Hccc 1859/89

Ringera J

Whereby the plaintiff in the said case suffered a fracture of the floor of the right eye. The eye was at a slightly lower level to the left eye.

The trial judge awarded Ksh.110,000/-.

The advocate in this case prayed for Ksh.300,000/-.

The advocate for the defendant stated as this is soft tissue injuries an award of ksh.80,000/- be given.

In my opinion the injuries were more serious than soft tissue injuries. If the plaintiff did not have the economic power to seek immediate treatment his eyes would have been seriously damaged.

I would in the circumstances find a fair award of Ksh.200,000/- for the General damages of pain,

suffering and loss of amenities to be adequate.

The issue of Special Damages now requires to be addressed.

A claim of Ksh.516,327.95 was pleaded. AT the start of the trial the plaintiff abandoned the claim for:

Hospital attendance Ksh.26319.95

Cost of purchase of
medicine on 4.12.98 Ksh. 2,300/-

Costs of purchase of
Medicine on 22.12.98 Ksh. 470/-

The plaintiff further reduced the claim for:

- 1) The cost of constructive loss of his vehicle to Ksh.380,000/-
- 2) Medical treatment o f Ksh.100,000/-
- 3) Assessment fee Ksh. 3,619/-

Claim No.1 of Ksh.380,000/-

From the evidence before the court the insurance company called their representative (PW6) an assistant accountant. She came to inform the court that she paid the plaintiff for the loss of his vehicle (which is said to have been comprehensively covered) less the excess charges. The vehicle was later sold and they were paid these money.

She produced in evidence a copy of receipt for Ksh.120,000/- being the salvage paid to her. Unfortunately she did not have the original document to this nor could she give proof that this amount was in fact received.

She stated orally that the payment of ksh.400,000/- or thereabout was paid to the plaintiff. There was no supporting proof of document to this.

I believe this witness was claiming under the subjugation rights of the insurance company. There requires therefore to be proof on such special damages. A witness cannot just come to court and orally say I paid. The insurance company case must be supported by documents. That the said proof of payment can be obtained from the witnesses payment vouchers prepared and processed by them to the witness. See the case of Victor Musoga Vs Linus Watito Kariuki Hccc 2797/97 (Nairobi unreported).

This was not done, as a result I will disallow this claim as having not been proved.

Claim No.3 Assessors fee.

PW 6 – the assistant accountant for the insurance company stated that she paid Ksh.3,619/- as the assessors fees. By so doing she identified the fee note produced by the assessor being his fee.

A hand written note “pd 29.1.99” is endorsed in red.

This evidence is not proof of payment. What amounts to a proof of payment is the production of an invoice by the claimant to the Insurance company.

Once payment was made to the claimant in this case, the assessor must issue a receipt of the payment made to him to the Insurance Company. This would have been adequate proof of payment. As it now stands, no such proof has been tendered. I would reject this claim.

The advocate for the plaintiff surprisingly submitted to court that as there was mentioned by another witness a claim for assessors fee of Ksh.7000/- or thereabouts this court should in fact award and have paid such claim. He was aware that such claim had not been pleaded. He was also aware that unless the Special damages is pleaded and proved it cannot be awarded I would therefore reject this claim.

Claim No.2

The medical doctors bill of Ksh.100,000/-.

The doctor/consultant who attended o the plaintiff put in a claim of ksh.100,000/- by way of an invoice. He said orally that he was paid. He should have issued an official receipt as proof of payment. As this was not done, this claim be and is hereby disallowed.

On the aspect of Special damages I dismiss the claims as not having been proved.

I enter judgment for the plaintiff on general damages to enter with costs.

On the aspect of interest this will be at courts rates from the date of this judgment.

In Summary

- 1) Motor vehicle collision between two vehicle.
- 2) Male adult aged not mentioned
- 3) Injuries:
 - a) Laceration on forehead.
 - b) Tear of eyelids (Right)
- 4) Liability 100%
- 5) Quantum:
 - a) General damages
 - i) Pain suffering and loss of amenities Ksh.200,000/-
- 6) Subjugation claim

not proved –	Nil
Special damages	

Total	Ksh.200,000/-

I enter judgment as above.

Dated this 15th day of November, 2001 at Nairobi.

M.A. ANG'AWA

JUDGE