



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 6 of 1995

JANEPHER ASAMI

ELIZABETH ATERO

AGNETA KWOPA

PAUL WANDERA.....PLAINTIFFS

-versus-

AKAMBA BUS SERVICES.....DEFENDANT

JUDGMENT

The plaintiffs Janepher Asami, Elizabeth Atero both adults and Agnetta Kwoba and Paul Wandera minors suing through a next friend who is their mother Elizabeth Atero filed this case against the defendant Akamba Bus Services Limited seeking both special and general damages arising from injuries sustained by them while travelling in a bus motor vehicle registration number KWZ 870 in which they were traveling as fare paying passengers. The said accident was allegedly due to the negligence of the defendant's driver, servant and or lawful agent whose particulars are given in paragraph 5 of the amended plaint. The particulars of the special damages are given. The particulars of injuries are to be supplied at the time of the hearing. It was further averred that the defendant was the owner of the accident vehicle, that the accident driver was in the course of his employment and he therefore binds the employer.

At some point the proceedings proceeded exparte but these were set aside and the defendants were allowed to file their defense out of time. The defense was filed on 11th December 1998. The averments are that answer to paragraph 4 of the plaint the defendant admits that an accident took place on the date shown involving motor vehicle registration number KWZ 870 but denies that the plaintiffs were passengers in the defendant motor vehicle and that the said accident was as a result of the defendants negligence as alleged or at all; in particular denied all the particulars of negligence of the defendant or its driver/agent and puts the plaintiff to strict proof thereof, denied that the plaintiffs were injured and suffered loss and damage as alleged in paragraph 4 and particularized in paragraph 5 of the plaint and the plaintiffs are put to strict proof thereof. The particulars of injuries and special damages set out therein are denied in toto and the plaintiffs are put to strict proof, denied that any valid demand or intention to sue was served upon it or any other interested person or any person for and on behalf of the defendant and the plaintiffs are put to strict proof thereof and in the premises the plaintiffs are not entitled to costs of the suit in any event; that the plaintiff are strangers to it and were never passengers in the accident alleged or at all; that the plaintiffs lack capacity to sue and the suit as against the defendant should be struck off.

There is no reply to defense. The sum total of the plaintiffs from PW1 and PW2 is that on the material

date they left their homes at Nzoia Sugar Company at around 5.00 a.m. and went to the road to wait for a vehicle to ferry them to Bungoma town where they were going to alight and then pick on another vehicle to take them to Mumias where they were to buy fish as they were fish mongers. PW 1 & 2 knew each other and they used to sell fish together. PW2 went with her daughter who was to hold a small child for her as she went about buying fish. It is their testimony that they were passenger in the said accident vehicle. They paid fare but they were not issued with tickets.

PW1 said she is of short stature and was at the rear. She could not see what was happening at the front. She noticed the bus she fell on the right as you face Bungoma, in a ditch. PW2 had a small child, 2 months old and sat on the conductor's seat and she could see the front clearly. She says that the accident driver was speeding. There was a tractor belonging to Nzoia Sugar Company at the front ahead of the bus. That the bus was descending going to cross a river, it tried to overtake the tractor but it failed and then it swayed and landed in a ditch on the right as you face Bungoma. That the bus driver was injured and was rushed to hospital. They (PW1 and PW2) and PW2's children were removed through the windscreen, rushed to Bungoma district hospital, PW2 and her children were treated and discharged. They went to the police station and were issued with P3s and abstracts and after treatment their injuries were medically assessed as per the exhibits produced in evidence. PW1 had a fractured wrist, which was plastered, and x-rays taken and later the same injury was medically assessed, they blame the bus driver for the accident and they seek compensation for the injuries suffered. I will revert to the details of the injuries at a later stage.

The version of the defense is that DW1 was the driver of the accident bus. He was lawfully on duty having started off his journey from Nairobi and was heading to Malaba. On reaching Bukembe he set down, a passenger or passengers and picked on others. He started off the bus and then shortly ahead of him a tractor appeared from the side and cut across him on the road. It had rained at night and the road was wet. The tractor covered the whole road. He swerved to avoid hitting it. The right front and rear tyre got off the road and was pulled off by mud and it fell on his right. He broke the windscreen and people got off. It is his evidence that none of the passengers was injured and they came out on their own. He also came out and he was given a lift to hospital where he was admitted for three months. The sugar came bus came and ferried people to Malaba. He denied speeding and he says that it is the rain which caused the accident, the mud pulled the bus when he was avoiding the tractor; that the tractor just came and turned into the road and covered the whole road. It did not stop to allow him to pass and if he had not swerved off he could have rammed into it.

When cross-examined he admitted that he was admitted in hospital for three months in connection with the injuries he sustained in the accident being a fracture right hip joint. He does not know who else was treated there. He agreed that he saw the tractor come on to the road as it was at 6.00 a.m. and daybreak. There was no sufficient light, that the tractor should have stopped but it just came on to the road. That he did not register the registration number of the tractor and in the abstract it is only his vehicle, which is noted. He denied the suggestion that the accident was caused because he was not careful, it is not true that he was not able to control the vehicle properly because if it had been so he would have rammed into the tractor. He maintains that he told his employers that the accident was because of the tractor and if they have not mentioned so in the statement, then that is their own problem, that he had no eye problem at the time of the accident and he started wearing spectacles when he left the employment of the defendant after normal retirement.

The plaintiffs counsel filed written submissions and on liability they maintained that that:-

1. The plaintiffs were innocent fare paying passengers on the defendants motor vehicle a fact which was admitted and or confirmed by the defendants driver both in his evidence in chief and cross examination.
2. That it has been proved that the plaintiffs were passengers in the said defendants motor vehicle and in no way did they contribute to the causation of the accident and they pray that judgment on liability be entered against the defendants in favour of plaintiffs at 100%.

3. That it was claimed at the time of the hearing that there was a tractor belonging to Nzoia Sugar company involved in the accident but the defendants did not bother to seek leave of court to join Nzoia Sugar Company as a third party to the proceedings.
4. From the cross-examination it is evident that the driver of the said motor vehicle was not driving with due care and attention and he was not in full control of the said vehicle hence the accident was caused by his sole negligence and the defendant must be held vicariously liable.
5. The fact that the driver was losing concentration owing to exhaustion caused by long hours of driving having driven the whole night from Nairobi was also evident. These factors and the driver's negligent ability to steer manage and or control the said motor vehicle in a skillful way led to the accident. In other words the accident occurred because he failed to steer the subject vehicle properly and he was therefore negligent in his driving.
6. All the plaintiffs were consistent that the said motor vehicle was going down hill at a very high speed before the driver lost control of the same and it overturned. All these go to show that the driver was negligent and the driver must be held vicariously liable for acts of its agent.

On quantum, counsel referred to the court to the case of MIANA KANIARU & JANE WAHITO –V- JOSEPHAT MURIUKI WANGONDU CA (Number not indicated but it is a court of appeal decision). Where the Court of Appeal held that contribution can only be awarded where the same is supported by a pleading to the effect. The cases on quantum were summarized in the submissions but the same were not enclosed for the courts perusal and so I will not take them into consideration.

The defense on the other hand just filed a list of authorities. There is an extract from the book of Charles Worth on Negligence, 3rd Edition, Sweet and Maxwell chapter 6 page 7 paragraph 171 where it is titled road junctions it is stated. When coming from a side road, the driver or rider of a vehicle should select such a moment as will allow him to enter the main road with safety. The Highway Code provides – **“At a road junction, given away to traffic on the major road, if in doubt, give way.”**

Paragraph 172 is titled signals. The driver or rider of a vehicle should give the proper signals before he moves out or overtakes and before he stops, slows down or changes his direction. All signals should be given clearly and in good time to give information to other users of the highway. Failure to do so is evidence of negligence.

There is also an extract from the book of Clerk and Lindell on Torts, 11th Edition also by Sweet and Maxwell. **Page 397 section 14 on onus of proof. Paragraph 644. There must be some evidence of negligence. The onus of proof that the defendant has been guilty of negligence falls upon the plaintiff and until he has discharged this burden, there is no case to be left to the jury ... the plaintiff must go further and show that on a balance the probabilities are that the accident was caused by the negligence of the defendant.**

The defense referred to the court to the case of SALIM S ZEIN T/A EASTERN BUS SERVICE AND MUSANGO EUULELELE –V- ROSE MULEE MUTUA Nairobi CA 147/94 where the respondent who was the plaintiff in the superior court filed an action to recover damages for personal injuries she sustained while travelling in the first appellants vehicle which was being driven by the 2nd appellant in the course of his employment the plaintiff had injuries on the head, back, right upper limb treated and discharged on examination the plaintiff was found to be in good physical condition. The movements at the lower back were satisfactory. Her chest and upper limb were normal and she had no significant scars she had symptoms of headaches pain in the right arm lower back and chest which might improve with time although the lower back pain might bother her on and off. The court assessed Kshs 50,000.00 as general damages for pain suffering and loss of amenities.

The case of MICHAEL MATU MATHAI AND OTHERS –V- THE HON. THE A.G. Nairobi HCCC No 233/87 where the plaintiff was a minor aged 11 months at the time of the plaint, sustained cut wound on the forehead, which healed leaving a scar. General damages for pain suffering and loss of amenities

assessed at Kshs 15,000.00.

The case of **KAITHOM MBARAK MOHAMMED –V- REUBEN MAGANZI AND ANOTHER** Mombasa No 531/85 where the plaintiff was a housewife aged 24 years at the time of accident, she sustained multiple bruises on her right leg, arm and shoulder. The plaintiff fully recovered without permanent disability except for two scars on the right shoulder 1 1/2 “ x 1” and right leg 1” x 1” which were not ugly. General damages for pain suffering and loss of amenities was asessed at Kshs 20,000/-.

The case of **MESHAK INGUSI –V- SYNTHETIC FIBRES (K) LTD** Nairobi HCCC No 4691/87 where the plaintiff was an electrician aged 31 years at the time of accident. He sustained soft tissue injuries to chest right leg and head. He fully recovered without any residual disability except for a scar on the right leg. General damages for pain, suffering and loss of amenities assessed at Kshs.15,000.00.

After assessing the evidence on the record the court has to deal with three issues:-

1. Establish whether from the evidence on the record the plaintiffs were passengers in the accident vehicle.
2. Whether they have proved negligence on the part of the driver.
3. If nos 1 and 2 above are answered in the positive then find out what injuries were suffered by each plaintiff.
4. If any injuries suffered then what is the appropriate quantum of damages awardable to each plaintiff.

On question no 1 the defense raised no objection to the police abstracts produced in evidence as exhibit 1 for Janepher Asami and exhibit 6 for Elizabeth Atero and her two children. The 3rd and 4th plaintiff. It has not been suggested that they are fake. They show that the plaintiffs were passengers in the accident vehicle and they were injured.

On the issue of negligence from the pleadings and evidence they were passengers and they had no control over the manner the vehicle was being driven. Even if their evidence were to be ignored, the driver DW1 said he saw a junction and stopped to set down a passenger and pick others. He saw the tractor which came on to the road straight and cut ahead of him. The road was wet and what he did was to swerve off the road and in the process the front right and rear tyres slipped in the mud causing the bus to fall and lie on his right. He lost control of the same. What a prudent driver should have done is to stop and let the reckless tractor driver pass.

In his defense they just denied negligence and put the plaintiffs on to their strict proof. However, in his evidence the driver blamed the rain and the tractor. As submitted by the plaintiffs’ counsel what a prudent driver should have done was to stop and let the tractor pass and then proceed on. The fact that DW1 saw the tractor cut in and then suddenly swerved off the road shows that he was inattentive at the time.

Further his evidence goes contrary to his pleadings as he places blame on to the tractor which was not brought into these proceedings.

It is also clear that the driver was in the course of his employment and so he binds his masters vicariously.

From the foregoing this court is satisfied that the plaintiffs have proved negligence on the part of the driver who vicariously binds the employer who is 100% liable to compensate the victims.

Having established liability I now come to assess the damages.

For Janepher Asami the medical report lists

- (a) Concussion

- (b) Cut wound on the right elbow joint
- (c) Crack fracture of the proximal end of ulnar (olecraon fossa)

On the doctors examination she had a deformed right elbow with inward curving (valgus deformity)

- (ii) The right elbow movement were limited to a range of about 60 degrees
- (iii) She cannot fully extend the right elbow joint
- (iv) She has a healed scar at the right elbow approximately 2 cm.

In the doctors opinion the old lady sustained concussion and injuries on the right elbow joint she has recovered from concussion well. She has however developed complications from the injuries she sustained on the elbow joint i.e. deformity and pain. The complaints she has are as a direct result of the elbow joint injury she will have to live with them. The accident has limited her activities as a fishmonger a house wife and peasant farmer.

In her testimony in court her complaints were that she cannot carry water on her head and she cannot prepare ugali and she demonstrated that it could not be held up straight as it is bowed (curved).

On the courts own motion I refer to the case of **JOSPH NDINGURI MURETHO –VERSUS – JUSTUS M TIGUSI AND SIMON PETER WAITHAKA** Nairobi HCCC No 1450 of 1991 where the plaintiff sustained fracture dislocation of the elbow bruises, on the left forehead laceration of the right and left knees, along laceration and abrasions of left lower leg, the elbow fracture involved two fractures of articular surface with several bone fragments in the elbow joint. The fracture was initially managed by a casting in a plaster of paris for two weeks but the elbow was found to be stiff. An operation for open reduction was done and another plaster of paris was cast for a period of one month. He was examined by two doctors who both agreed that the plaintiffs elbow was still and recommended an operation to improve the function of the arm. The court awarded Khs 410,000.00.

I have considered the injuries suffered by this plaintiff and their effect ton the activities of the plaintiff and I assess Kshs 185,000.00 as general damages for pain suffering and loss of amenities. I also allow the cost of the medical report pleaded.

For the injuries sustained by Elizabeth Nabwitikha Atero the medical report exhibit 11 lists that she had concussion, neck and muscle contusion, painful swollen shoulder.

The X-ray taken of the left shoulder showed no obvious bony lesion. In the doctors opinion the lady sustained concussion soft tissue injuries and psychological trauma. The complaints she has of dizziness was due to the head injury that she had the psychological trauma she had has not been overcome and the doctor believed that it contributed a lot to the current complaints that she has and added that she will benefit from counseling. The medical report for Agnetta Kwoba is exhibit 12. It lists that the patient had chest contusion, long contusion as indicated by coughing of blood. In the doctors opinion the girl sustained concussion and soft tissue injuries from the accident. She experienced pains and psychological sock. She appears to have recovered from both of them fairly well.

The report of Paulo Wandera is exhibit 13 lists the injuries as swelling on the left parietal region, he had contusion of neck muscle. He had difficulties in breathing. The doctors findings are that the boy sustained injuries during the accident mainly soft tissue injuries. He has recovered fairly well from them except for the occasional dyspota that he gets and the doctor expects him otherwise to get fully healed.

I have considered the injuries of these three plaintiffs and find that they were soft tissue injuries which have healed save for pain. I have considered the awards in the authorities referred to me by the defence. I have to note the age of the awards and also consider that the court has to take into account the inflationary trend and the fallen value of the Kenya shilling. I have taken into consideration all these factors and doing

the best I can I make the following assessment.

1. For Elizabeth Nabwitikha Atero

(a) special damages of Kshs.1,100.00

(b) general damages for pain and suffering Kshs 50,000.00

2. For Agnetta Kwoba

(a) special damages Kshs 1,000.00

(b) general damages for pain suffering and loss of amenities Kshs 25,000.00

3. For Paul Wandera

(a) special damages Kshs 1,100.00

(b) general damages for pain and suffering and loss of amenities Kshs 15,000.00

I therefore enter judgment for the plaintiffs against the defendants on the following terms:

1. Janepher Asami

(a) special damages Kshs 1,100.00 with interest at court rates from the date of filing until payment in full.

(b) general damages for pain suffering and loss of amenities Kshs 185,000.00 One hundred and eighty five thousand with interest at court rates from the date of judgment until payment in full.

2. Elizabeth Nabwitikha Atero

(a) special damages Kshs 1,000.00 with interest at court rates from the date of filing until payment in full.

(b) general damages for pain suffering and loss of amenities Kshs 50,000.00 (Fifty thousands) with interest at court rates from the date of judgment until payment in full.

3. Agnetta Kwoba

(a) special damages Kshs 1,000.00 with interest at court rates from the date of filing until payment in full.

(b) general damages for pain suffering and loss of amenities Kshs 25,000.00 with interest at court rates from the date of judgment until payment in full.

4. Paul Wandera

(a) special damages Kshs 1,000.00 with interest at court rates from the date of filing until payment in full.

(b) general damages for pain suffering and loss of amenities Kshs 15,000.00 fifteen thousand with interest at court rates from the date of judgment until payment in full.

5. Costs of the case.

6. The adult share of Janepher Asami, Elizabeth Ateroa and Agnetta Kwoba who is an adult now to be paid out of them.

7. The minors share of Paul Wandera to be invested in an interest earning account in any sound financial institution in the joint names of the mother and the Deputy Registrar of this Court.

a) The amount so invested not to be withdrawn without authority from the court.

b) Interest accrued on the said amount to be withdrawn from time to time whenever need arises and the same to be applied to the general and education needs of the minor.

(c) The main amount to be paid out to the minor when he attains the age of majority.

8. There will be liberty to apply.

Dated read and delivered at Kitale this 20th day of December 2001.

R Nambuye

JUDGE