



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 2224 OF 1992**

**BERNARD MUSYOKI .....PLAINTIFF**

**VERSUS**

**MERU TRANSPORTERS & 3 OTHERS.....DEFENDANTS**

**JUDGMENT**

The plaintiff Bernard Musyoka Kanali was an employee with the Kenya cement as a prison officer. On the material day of the 28.7.89 he was lawfully traveling in a G.K. Motor vehicle registration 414 M. He was on Official duties. The vehicles was driven by the driver DW1. It was somewhere along the Nairobi/Mombasa road and near the general / motors /the stone area as one heads towards Nairobi that a vehicle belonging to the 1st defendant and driven by the 2nd defendant over took the G.K. vehicle at a high speed.

This is what would be described as racing. The vehicle came in past of the GK from the dual carriage way land on the right. The two vehicles collided. The GK vehicle hutting the 1st defendants vehicle from heard.

A collision occurred. The plaintiff sustained injuries and was rushed to hospital for treatment.

These injuries were a claim to the plant.

1. A fractured dishcloth of left lips
2. Malunited – fainted of the third tare
3. Fracture of left femmal condyle Inta mail
4. Fracture shaft of left hemus placed
5. fracture of right palette
6. Left side goodish

There was a medical report put in by consent of all the parties. This report disclosed the injuries as

1. Brain injuries and loss of consciousness
2. Fracture of neck of left femur

3. Fracture of left tibia
4. Fracture of left Patelle
5. Fracture of right tibia
6. Fracture of left humerous
7. Loss of four teeth

There is most relatively a discrepancy in some of the injuries.

The plaintiff did not speak of a fracture to the condyle left arm Brain injury. I believe that his injuries was mainly to the left tibia, left Patella fracture to the left brain (& loss of four teeth's but this was never pleaded in the plaint)

The plaintiff did not immediately file suit. He said he was unwell. The medical report stated that the plaintiff after undergoing surgical operations in 1989 he was discharged from hospital on 20.4.1990 He resumed work on 21.6.90 on light duties Two years later he under went operation on 25.9.92, 22.10.92 and 18.12.92. He was discharged from Hospital on 2.2.93

The suit before this court was not filed until 27th April, 1992. this was out of time but with leave of the court ( sitting in Misc application 152/92 this application was granted on 13.3.92 on the grounds that the plaintiff was not aware of the extent of his injuries and this delayed in filing suit. The plaintiff himself stated he had no funds to go for further operation. He was also awaiting negotiations of his compensation from the government. This was not forthcoming.

It is this issue in dispute that the advocate for the 3rd and 4th defendant ( for the state raised).

The issue being:-

“So the suit herein had in law and that it been properly instituted?”

- (1) The advocate for the state tried to point out that as a civil servant the plaintiff must first give notice to the attorney general of his intention to sue. There after he must apply for leave to file out of the Three prerequisite must be established.
- (2) That the plaintiff had knowledge of the personal injuries resulting from the negligence
- (3) The nature and extent of such injuries are attainable to the negligence of the lost feared

The advocate for the state said that the plaintiff had knowledge of his injuries one year before the expiry of the limitation of actions that the said Hon. Judge Githinji should never have granted the exparte leave to allow the plaintiff file a suit out of time.

I have had the opportunity to look at Misc application 152/92 I noted the findings of Githinji J he stated in his ruling that he was allowing the application for leave to file suit out of time on the grounds that the injuries were not in the knowledge of the said plaintiff.

It is only during the trial that the advocate for the 3rd and 4th defendant law raise the issue of jurisdiction. I note the various statute law she thought up. These concerns the consent proceedings act the public proceedings act that requires a notice to be given to the grant motion one year This the plaintiff could not do so unless she obtained leave to file a suit out of time.

As soon as he obtained such leave he then served a notice against the attorney general I would hold on the suit issue before me that the suit is properly instituted and therefore not had in law. On the second

issue it states

“ On the second and further defendants grilling of any of the particulars of negligence alleged and specifically set out in the plaintiff.

The particulars of negligence for the second and third defendant respectively are

- (1) Driving at an excessive speed in the consistence
- (2) Fairly to begs any or any proper look out or it have sufficient regard for other road users along the road For second defendant
- (3) Overtaking vehicles registration GK 414 while intending to stop thereafter suddenly obstructing the way of the driver of GK 414 inconveniencing many.
- (4) Stopping without hearing.
- (5) Failing to motor vehicle KWH 091 properly so as to avoid colliding GK 414M
- (6) Failing to swerve or in any way so as to manage or control the said accident

For the third defendant:

3. Failing to apply breaks
4. Failing to steer motor vehicle reg No. GK No. 414
5. Failing to stop, slow down to swerve
- 7 6. Having no regard to safety of the passengers
7. Colliding motor vehicle No. KWN 091

I had the opportunity to hear the plaintiffs evidence and the evidence of the driver of the G.K. Motor vehicle 414 on where the plaintiff was a passenger.

The evidence given was that the G.K. vehicle overtook the motor vehicle KWH 091. That vehicle raced the G.K. vehicle I overtook it. It suddenly left its land on the right of the dual carriage way I went to the G.K. vehicles lane on the left. It stopped and become the G.K. was also traveling at a high speed the vehicles collided.

Both the advocate for the defendant admitted that they did not comply with order 1 rule 21 Civil Procedure Rule . this is where “a defendant decides to claim against another person who is already a party to the suit.

- (a) that he is entitled to contribution indemnity or
- (b).....
- (c).....

The defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue. Such notice was never issued. I find from the evidence before me that the particulars of evidence in the plaint had been perused that in fact the two defendants were negligent as no notice was issued I hereby hold the two defendants liable for this accident jointly and severally at 100% Issue No 3 has therefore been dealt with on the apportionment of liability As to Quantum in issue

no. 4

“Most injuries did the plaintiff sustain I meet further of damages thereof.

I find that the plaintiff did sustain injuries. More as stated above on the fracture of the left femur, tibia  
Paletta hermus and right tibia

The injuries as to the loss of teeth was never pleaded.

The advocate for the plaintiff gave me comparable authorities on award of damages in the case of agries  
Dachge versus George Kiani Wajiri & another Joseph Mitar Mlim versus Peter Ijahi Ngaruo Mijue versus  
Ramesh Nai 1164/96 HCCC NO. 5287/90 Benson Ndite versus Patson on Muli HCCC NO. 4025/82 The  
award therein was between 500,000/= and that 4500,000 the advocate prayed for Kshs 1.2 million

The advocate for the 1st and 2nd defendant relied on comparable authorities of Benson verus Mutu Ha  
4025/92 Dundo Rohett versus Namesa HCCC NO 240/91 Mom Walter versus David Magu and another  
Where she describes that the injuries were more serious than these of the plaintiffs

Advocates fro the 3rd and 4th defendant Justice Baln versus KBS Eliud Kieyo HCC NO 3149/90 where  
an award between 250,000 and 3000, 000 was made. The advocate demanded an award of shs 350,000

I see no justification through the comparable authorities submitted by the advocate for the plaintiff stating  
that an award of Kshs 2 million be given all the advocates authority are between Kshs 500,000 There  
cannot be any guess work when it comes to recommending awards. This must be done using past case law  
as precedents having comparables of those authorities and assessing the court to come up with a fair  
award I find is fair in the circumstances of the fractures being awarded Kshs 300,000/= I enter judgment  
accordingly for this amount. The sum for special damages of Kshs 238,019 has not been proved the same  
in dismissed.

In summary

1. Motor vehicle collition
2. Passenger male adult aged 46 years in 1989
3. Injuries received Fracture of left femur

Fracture of left tibia

Fracture of left patella

Fracture left humerus

#### 4. QUONTUM

Several damages pain and suffering 300,000/=

Special damages nil not proved

Kshs 300,000 I award interest from the date of this suit I amend cash of this suit to the plaintiff.

Dated this 1st day of March 2000 at

M. Angawa

Judge

1.3.2001

Coram: Hon. Lady Justice Anga'wa

Court clerk – Andanje

Mr. T. Makori Advocate for the plaintiff – present

Mr. W. Nyaga advocate for 1st and 2nd defendant – present

Miss A.A. Odingo state counsel for 3rd and 4th Defendants present

Judgment /Ruling read and delivered in open court and signed by

Judge of the High court, Nairobi

Dated at Nairobi this 1st day of March 2001

Signed by Hon. Justice Angawa Judge

26.7.2001

Pay out the sum of shs 154,945.00 deposited to this court vide receipt No. B111303 date 13.7.2001 to Mwaura & Mwaura advocate P.O. Box 75642 Nairobi

Signed  
Deputy Registrar

26.7.2001

Pay out the sum of Kshs 14,915 /= deposited to this court vide receipt No. 111 303 dated 13.7.2001 to Registrar High Court of Kenya P.O. Box 30041 NAIROBI

signed  
Principal Deputy Registrar

29.3.2000 Mr. Omulindi please bring up the file Signed 29.3.20

Mr. Oluoch

Effects to trace the original have been fruitless

Signed  
Principal Deputy Registrar,

29/3/2000

The efforts to trace the original case file has been unsuccessful and in the circumstances would like the file be reconstituted while further search to trace the original continues

Signed  
29.3.2000

29.3.2000

Mrs Nyamorata for Mwaura and Mwaura for applicant. Notice of motion dated 28.3.2000 fixed for 11th April, 2000

Signed

Executive Officer

11.4.00

Coram: C.K. Njai PDR

Court clerk Susan Kariuki

No appearance for applicant

Mr. Imbamba for respondent

Court: The original file is traced. The application dated 28.3.00 is marked as with drawn with no order as to costs

C.K. Njai

PDR