



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 1694 OF 1993**

SIMON MWANGI KAMBO.....PLAINITFF

-VERSUS

JOSEPH MBURU NJIHIA.....1ST DEFENDANT

PETRUS MUIGAI.....2ND DEFENDANT

EUNICE N. MUNJUGA.....3RD DEFENDANT

JUDGEMENT

The plaintiff was a passenger in the vehicle registration No. KSB 079 which was owed by one Samuel Njuguna (deceased) and whose estate is being administered by the 3rd Defendant. The plaintiff was at the back seat while PW2 Ngoma was Mwaura was in the passenger seat next to the deceased. PW2 Ngoma was Mwaura gave evidence that they left Limuru on 20.12.1990 at about 10.30 p.m. they argued as to who should drive as between the plaintiff and deceased. This was because it was thought that the deceased was drunk and he would not able to drive. At Kawangware after the BP Petrol Station they saw a vehicle joining the main road. The 1st defendant drove on and a collision occurred. The other vehicle was driven by the 2nd defendant and is owed by the 1st defendant. The plaintiff suffered injuries as a result of the accident as per the report produced by Dr. Wokabi.

It was the view of the Doctor that the plaintiff will need Shs.120,000 to remove the metallic plate, which is still on site. The plaintiff is asking for the sum of Shs.650,000 as general damages. He relied on the following authorities.\

- 1) James Macharia Mureithi V. Geoffrey Gateri Nakuru HCCC No. 209 of 1996.
- 2) Wilfred Ndumba Kirima V. James Kiogora Mbogori & Another Nairobi HCCC No. 147 of 1993.

These cases were in support of the claim for loss of earning which the plaintiff is putting at Shs.500,000/- The defendants, although did not call evidence to contradict the evidence called by the plaintiff raised in their submission the question of apportionment of liability. The 3rd defendants position is that, the 3rd defendant had right of way and that the 2nd defendant who was on a minor road going into the major road caused the accident and should bear the blame.

The witness PW3 said that the accident occurred in the middle of the road, that the 2nd defendant had almost completed the turn as he turned right towards Uthiru and furthermore the point of impact was more to the offside of the deceased side. From the evidence by the two witnesses who gave evidence it

would appear that the 3rd defendant was on the high way and so had the right of way as compared to the 2nd defendant who was getting into the main road. Although according to the two witnesses the 3rd defendant (the deceased) was to blame for the accident. The 2nd defendant could have avoided the accident if he had waited enough for the 3rd defendant to pass before entering into the main road. The 2nd defendant must bear the bigger proportion of the blame for this accident.

I would apportion the blame of 80% for the 2nd Defendant and 20% for the 3rd Defendant. The 1st Defendant being the owner of the vehicle shall be vicariously liable.

As to the quantum of damages the Learned Counsel, Mr. Githara for the 3rd plaintiff urged the court to consider the sum of Shs.350,000 as adequate compensation for the fracture to the femur and the other injuries. He relied on the cases.

1) HCCC No. 5094 of 1989 – Henry Mwaura Thiongo v. Securicor (K) Ltd. & Another

2) HCCC No. 434 of 1987 Philip Nicholas Okaka V. Anderson Ngiire & others.

I have considered the cases cited by both counsels and taking into account that the plaintiff had been incapacitated for a period of about one year, I would award the sum of Shs.450,000/- as general damages.

The plaintiff has also claimed special damages and for this I award the sum of Shs.135,345/- as special damages the plaintiff having produced supporting evidence. I also accept the sum of Shs.120,000/- for future medical expenses as recommended by the doctor.

The plaintiff has claimed loss of future earning, an issue being contested by the 3rd defendant on the grounds that the plaintiff did not provide particulars of the loss. I have considered this claim and I have taken into account that the plaintiff in the plaint said that proof for loss of earning shall be given during the hearing of the case.

During the hearing he said that he had been working for an Italian Company for the last 20 years on commission of 3 1/3 % so that his annual income was US \$38,000 per year which is Shs.990,000/- In 1998 he did not make any earning. He takes care of his children paying school fees. He says that in Jua Kali they do not pay taxes as they do not keep books of account. For loss of earning, the plaintiff is asking for sum of Shs.500,000/- While I agree that the plaintiff was incapacitated for a period of one year, I found it difficult to assess the loss of earning without any evidence. I will accept that he was making some earnings before the accident but he onus is on him to prove.

I do not find enough proof to justify the sum of Shs.500,000 and in the absence of such proof I shall award a sum of Shs.200,000/-

There will be Judgement for the plaintiff as follows:

1) General damages	Shs. 450,000/-
2) Special damages	Shs.119,947/-
3) Future medical treatment	Shs.120, 000/-
4) Loss of earning	Shs.200,000/-
Total	<u>Shs.889,947/-</u>

80% for the 1st & 2nd Defendants

20% for 3rd Defendants.

The plaintiff shall have the costs for the suit and interest.

Delievered and dated this 3rd day of April, 2000.

KASANGA MULWA

JUDGE