



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1427 OF 1996

CHIMANLAL HIRALAL SHAH PLAINTIFF

VERSUS

ASGAR MAHMOOD KHAN PATHAN & ANOTHER .. DEFENDANT

JUDGMENT

The plaintiff in this case is named Chimanlal Hiralal Shah. He is now 86 years of age. He sues Asgar Mahmood Khan Pathan and Hussein Kalimudin Jivaji who are trading as “Buy and Fly Company” for negligence occasioned by their servant and or agent. This was one Joseph Njoroge their driver.

Before I give a brief back ground of this case I would like to put down on record that the hearing of this case commenced on the 9th of May 2000. Both the plaintiff and two defendants were in court. The advocate for the plaintiff Mr. Gautama stated that he was to call the plaintiff and the doctor whilst the advocate for the defendant stated he will call two witnesses. Due to his commitment at the court of appeal we scheduled the hearing to start in the afternoon of the 9.5.2000.

The evidence of the plaintiff and the doctor was taken down. The advocate for the defendant prayed for adjournment as he had other pressing domestic commitments. This court granted him the adjournment until the 10.5.2000 at 10.00 a.m.

When the case came up for hearing, the two defendants were absent. They had been notified that their case would proceed on 10.5.2000 at 10.00 a.m. by advocate. The advocate was given time to look for them of almost one hour. By 11.00 a.m. they had still not appeared and hearing proceeded in their absence.

The advocate then claimed that there was a police officer and the driver to be called. The police officer was notified or meant to have been notified but failed to attend court. The driver was not traced and is believed to have died. After sometime the advocate for the defendant claimed that the defendant driver was not authorised to drive the said vehicle yet in his defence it clearly stated that one Joseph Njoroge Kirumba was an authorised driver.

The brief facts of this case is as follows. On the 13.11.95 the plaintiff was aged 81 years old. He runs his own accounting firm off Moi Avenue. To access his office he had made arrangement with the Moi Primary School to park his vehicle within their compound at a fee. He then would cross the road to his office.

On the material day he parked his vehicle, came out of the school gate. There he passed in order to cross the road. A van belonging to the defendants reversed and knocked him down on his left side. He fell down. He was in considerable pain. The driver of the vehicle and member of the public then helped him

into the vehicle. He admitted there was a police officer at the scene who asked him first go to the police station. He then refused until he was first taken to hospital as he was in great pain.

He was taken to M.P. Shah hospital where he underwent treatment under the guidance of PW2- a orthopaedic consultant.

The doctor is now retired. Prior to this, he was a Professor at the Nairobi University Medical school and head of the orthopaedic Department. He also had consultancy status in all the said hospitals in Nairobi.

In his evidence he stated that after routine investigations he was operated on the 29.11.95.

He was discharged on 7.12.95 but remained in bed and underwent physiotherapy.

He still has plates scars and wires implanted at the site of the fracture. This was to be removed after 2 years. This had not been done.

The plaintiff stated that after he left hospital he was forced to work at home. Although he still drives his motor vehicle he did not wish to take a risk to drive in the traffic because of quick reaction at times requires in traffic.

He also saw himself unable to walk as he used to. For instance for the last 60 days he has been walking one hour per day. He is unable to do so now. Not more than ten minutes.

He said he was not able to stand for long but when I observed the victims in the witness box he stood through out his evidence which took more than 10 minutes.

The defence on the other hand as earlier stated did not attend court when it adjourned. The advocate was expecting them and indeed gave his opening address stating that the defence was going to prove to court that the accident occurred as a result of the plaintiffs negligence and not the defendants.

Indeed the defence implied that the plaintiff had leaned against the van. The van moved and the plaintiff fell down.

Unfortunately no evidence to this effect was in a matter of fact proved by the defendant. Secondly the advocate said the plaintiff failed to prove lost earnings.

He had this case law to rely on. The first was an extract and the full text of the judgement was not available. It is a case of P.K. Mwangi vs Nairobi City Council & Another unreported.

The advocate stated an award of Ksh.140,000/- be given. This is for a 46 years old male with similar injuries.

The other case is of P. Njuguna Joseph vs E.A. Road services To prove that special damages must be proved strictly.

Mr. Gautama said that it is trite law that Special Damages had to be proved and agreed with the latter authority.

It is after waiting for the defendant who failed to attend court that Mr. Otiende said that the witness he really now wish to call was the police and the driver.

He then said the driver had a paralysis of the spinal code and left employment in 1996 a year later after the accident. This is the first time that this information was being disclosed.

In his further submission - he said he would have liked to prove that the said driver was not an employee of the defendants. This was one of the issue to decide.

Mr. Gautama brought it to his attention that the defence actually admitted he was an authorised driver/employee of the defendants who had full control of the vehicle.

On the issue of liability I hereby hold that the defendants are 100% liable both jointly and severally for the said accident caused by their agent and or servant.

As to Quantum, there are only two claims

1) General Damages for

pain ,suffering and loss of amenities

2) Special Damages

i) Medical expenses incurred

ii) Loss of income 27.11.96 - 31.5.96 (should have read 1997)

Interest and costs was also claimed.

As to General Damages

I hereby hold that the plaintiff did suffer injuries as a result of the negligence on the part of the driver and or servant or agent.

I would hold the plaintiff suffered damages and loss.

I would award Ksh.100,000/-.

The plaintiff is old and it takes a longer time to heal than when one is young.

As to Special Damages this has to be strictly proved. The advocate for the plaintiff filed a notice to admit documents on 18.11.98 and dated the 3.11.98. This means that any specified copies be admitted as the copies. If served, sent or delivered - say all just exceptions to the admissibility of all such documents as evidence in the suit.

A 14 days notice was given that if they do not specify the document which they do not admit they would have been deemed to have admitted the authority of all the documents No notice was filed but the advocate for the defendant was able to inform the court that there was a notice whereby they denied the authenticity of all documents and that they wished the maker be called. The actual document was not specified. It is as a result of this that I permitted the plaintiff to admit his evidence on the documents proved. I hereby hold that the special claim on damages has been proved by the plaintiff. I hereby enter judgement on this head of damages at Ksh.694,970/-. As to future medical expenses, namely to remove the plates from the hips the advocate for the defendant suggested Ksh.80,000/- be granted. I hereby allow this claim as having been proved. The defendant did not have their own independent doctor to examine the plaintiff on a second opinion.

In conclusion

1) Pedestrian

Accident hit by reversing vehicle

2) Liability

100% against the two defendants jointly and severally.

3) Injuries

Communuted trochateric fracture right femur

4) Quantum

a) General Damages

Pain,suffering and loss of amenities Ksh.100,000/-

b) Special Damages

Medical expenses Ksh.294,970

Loss of Income Ksh.400,000/-

c) Future medical expenses Ksh. 80,000/-

I award cost of this suit to the plaintiff. I award on Special Damages and interest from the date of filing of this suit and on General damages interest from the date of this judgement.

Dated this 11th day of May 2000 at Nairobi.

M.A. ANGA'WA

JUDGE