



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3949 OF 1985

Margaret Muthoni Wachira & 7 Others Plaintiffs

versus

The Honourable Attorney General Defendant

Coram: J.W. Mwera J.

Mr Njoroge Advocate for Plaintiff

Mr Namada Advocate for Defendant

Court Clerk Muli

JUDGMENT

This is an old matter indeed which was file din court on 9th December 1985, and now coming for determination today – about 15 years down the line. It has taken embarrassingly long. However actual trial got under way on 2nd February 1993 at Nairobi before the undersigned. Then several adjournments followed, then the presiding judge moved to Machakos where the defence was eventually heard on 17th March 2000.

The plaint said that the seven plaintiffs wanted damages against the Honourable the Attorney General under Government Proceedings Act (cap 40) because the driver of motor vehicle GK 226F in which the plaintiffs were injured was owned by the Ministry of Natural Resources. That on the day of the accident – 3rd January 1985, that motor vehicle was driven along SHAMARA-MUKURWEINI ROAD at such an excessive speed in the circumstances, and without due care and attention, that without its driver braking, slowing down or otherwise he allowed the motor vehicle to be involved in the accident and the plaintiffs were injured. That the 1st plaintiff's nature of injuries could be supplied at the hearing (hardly away to plead!) while the 2nd plaintiff, it was averred, fractured metatarsals (of both feet?), hemothorax, preumothorax (whatever these are and what happened to them!) and also sustained a swollen right ankle joint together with bruises to the abdomen. Again as in the case of the 1st plaintiff, it was pleaded that the injuries the 3rd and 4th plaintiffs would be filed in court; presumably before or during the hearing. They never were, according to the record.

The 5th plaintiff however was said to have suffered wounds on the head and the left hip. She also had left arm and shoulder injuries, bruises on the head and some painful points.

The injuries 6th plaintiff suffered were promised to be filed in court, they were not, but the 7th plaintiff had injuries to the chest and lower back and fractured ribs on the left side of the chest. The 8th plaintiff suffered what was described as “brunt on left foot”; midshaft fracture of 5th metatarsal; the lumbal spine was injured. There was a prayer for costs and interest too for all the plaintiffs.

On 24th June 1986 the Attorney General filed a defence claiming that by 27th December 1984 the offending motor vehicle had been sold and transferred to one Agapius Waithanje and so the Defendant could not take liability. The 4 issues for determination were as to who was the rightful owner of motor vehicle GK 226F at all times; the nature and extent of the injuries and reliefs sought and if the Defendant's agent/servant was proved negligent.

On 18th March 1988 the Defendant sought an order to issue a 3rd party notice to the said Agapius Waithanje, but it does not appear from the first date of trial that this subject was made a party to these proceedings.

Millicent Ngige (PW1) (Plaintiff No 3) about whom no injuries were pleaded started with her evidence that on the material day she with others travelled in the offending motor vehicle to attend a burial of one Kariuki in Nyeri. Somewhere on the way the motor vehicle was unable to move forward uphill. It began rolling backwards until it fell in a coffee plantation. She said that this motor vehicle had been given to the mourners by Kariuki's son who was not named and neither was it disclosed how he came by the motor vehicle. That the 3rd Plaintiff was injured on the left side of the body and on the back. She produced a medical report by Mr Wokabi. This followed the initial medical attention PW1 received at Mukurweini Hospital. This witness said that she still experienced problems from the injury spots.

In cross examination PW1 said that although she did not know how the deceased's son gave the mourners this motor vehicle to travel in from Embu, it bore GK numbers and that the deceased had been a government servant. She did not know that at the time of the accident the motor vehicle was no longer in the ownership of the government.

Next on the witness box was Margaret Muthoni (1st Plaintiff, PW2). She gave more or less the same evidence as PW1 (similarly her injuries were not pleaded) except to add that the rolling back was up a hill when the motor vehicle GK 226F failed to climb the hill, it rolled back, fell and turned over several times. PW2 was injured on her shoulder and left side of the chest. She could no longer breathe freely or climb hills. She had simply been directed by the funeral organisers to get into this motor vehicle and travel for burial. She was sure it was a government motor vehicle. It had such number plates. But she could not if the motor vehicle was still owned by the government. She did not know its driver. PW1 & 2 said that they did not remember giving evidence in a Karatina Court case, quite probably in traffic proceedings following the accident. They did not give statements to police. PW2 produced a medical report (Exh.P2).

Wambui Kamau was PW3 but the court cannot place her among those listed in the plaint. In her case she suffered on the right leg which was placed in plaster. She also had a chest injury and could not carry heavy loads. PW3's small toe was dislocated in the accident. Looking at the Plaintiffs whose injuries were pleaded it looks like PW3 is Pauline Wangui (2nd Plaintiff). Her medical report was produced (Exh. P3). She too did not testify in the lower court.

Next was Wanjiru Esther Gathuri (PW4, 4th Plaintiff). Her injuries were not pleaded but she was in a GK Landrover from Embu to Nyeri for a burial. When the motor vehicle was unable to go uphill and rolled backwards, it fell and PW4 sustained injuries on the left side of the head, the chest and stomach. She produced (Exh.P4) a medical report. PW4 was simply told to join the funeral convoy to Nyeri. She could not know whether the motor vehicle was owned by the government or not at that time. It had GK number plates.

Mugo Mutamba (PW5, 8th Plaintiff) testified last. The journey started at a local mortuary at Embu where PW5 was told to board the landrover GK 226F of the Ministry of Natural Resources, to proceed to Nyeri for a burial. When it fell he broke the left leg toes. They were put in plaster for a month. He also suffered back injury and both were sources of persistent aches. He could not walk for long. His medical report was

Exh.P5. PW5 was firm that he noted the writings on the side of this landrover - Ministry of Natural Resources but he did not know whether the motor vehicle still belonged to the government.

The defence case opened with only Muteru Waruta (DW1) testifying. He was currently the Embu District Game Warden with the Kenya Wildlife Service since December 1994. He brought records from his office's safe custody pertaining to motor vehicle GK 226F. He told the court that that motor vehicle was boarded, sold and transferred to one Agapius Waigangi (actually Waithanje) as per Exh.D1 as per certified copy of payment for a total of Sh.10,500/- for that motor vehicle dated the 18 and 20th December 1984. That on 27th December 1984 one P.J. Agwanda then acting in the office of Wildlife Conservation Management Department (the foreunner of Kenya Wildlife Service) which was part of the Ministry of Tourism and Wildlife informed the District Supplies Office at Embu that the motor vehicle No. GK 266F had been released to the buyer Waithanje. Waithanje signed that he had taken the motor vehicle. And that on the following day, 28th December 1984, the same P.J. Agwanda wrote to the Registrar of Motor Vehicles of the transfer of the motor vehicle to Waithanje. (Exh.D3), Transfer forms dated 28th December 1984 (Exh.D4) in this regard were shown (a copy) to court. To DW1 that ended the responsibility of the government over landrover No GK 226F. It ceased to be in their records, use or even physical possession w.e.f. 27th December 1984. Thus when it was involved in the accident in issue, responsibility lay elsewhere. DW1 could not remark on any erasures that appeared in Exh.D1. He produced copies of documents where originals were handed to the buyer, Waithanje. Any erasures affected to the account number only, he concluded.

Both sides submitted with the Plaintiffs insisting that the motor vehicle all the time remained in the name of the government ministry and that failure to register the transfer to the buyer Agapius Waithanje at the time of the accident did not change that. The case of FRANCIS NGAO vs NKUNGA CIVIL APPEAL NO. 92/98 (C.A.) was cited in that regard.

For general damages, it was suggested that 1st Plaintiff gets Sh, 100,000/-. The 2nd Plaintiff Shs.250,000/-, while Shs.80,000/- would do for the 3rd Plaintiff. The 4th Plaintiff would get Shs. 180,000/- and the 8th Plaintiff Shs.250,000/-. Nothing was said of special damages and perhaps, rightly so, since no proof was laid before the court.

The defence side urged this court to dismiss the suits of the rest of the Plaintiffs for lack of proof by evidence but only consider if the 1st, 3rd, 4th and 8th Plaintiffs had proved their claims. That is so and no more need be said of the cases of the 4th Plaintiffs who did not testify in support of their cases. The suits of Annah Mugwe (5th Plaintiff), Muthoni Evan (6th Plaintiff) and Peninah Muthoni (7th Plaintiff) are dismissed with costs for want of prosecution.

The plaintiff's side submitted that the 2nd Plaintiff Pauline Wangui's case was proved by PW3 - one Wambui Kamau. One can see that save for the closeness of WANGUI and WAMBUI in the names there is much else. But when the court looked at the nature of injuries it was left with the impression that this was one and the same person. May it be so.

It was further posited that the motor vehicle was transferred to Waithanje on 27th December 1984, a matter which was not controverted and thus as at the time of the accident, the government was not liable. That the transferee, Waithanje had the duty to pay for and effect actual transfer after the motor vehicle passed to him. Thus the suit ought to fail. The argument that the reports were produced without the makers did not carry much weight bearing in mind that the counsel agreed on 2nd February 1993 to produce the medical reports without calling the makers. What baffled this court was the novel course adopted whereby medical evidence was placed before the court without pleadings about the injuries in the plaint. Evidence supports pleadings. Conversely where there is no pleading evidence cannot be adduced, as it were, to create a pleading. The defence further said that negligence was not proved on the part of the driver of GK 226F as claimed. The evidence was to the effect that as the motor vehicle attempted to go uphill for one reason or another it could not make it. It began rolling backwards until it fell and rolled severally in coffee plantation. The plaint put forth the principle of *res ipsa loquitur* as supporting their case. And this court opines that if other aspects of the claim holds, there was nothing more one could ask for except to say that: "look at this motor vehicle how it was driven. It came all along from Embu moving

properly. Then when it got to a hill at Shamara it failed to climb it. It rolled backwards and fell overturning severally. That explains the accident. The owner of the motor vehicle or his agent/servants was negligent. "In this court's view invoking *res ipsa loquitur* here is tenable and the Defendant was bound to explain how else the thing could not speak by itself.

Anyway let us first see whose motor vehicle GK 226F was when it was involved in this accident. The plaintiff's side claims that it was the government - Ministry of Natural Resources. The documents produced by the defence in respect of motor vehicle GK 266F speak of the Ministry of Tourism and Wildlife. Be that as it may, Indeed the defence told this court that it sold, transferred and gave this motor vehicle physically to the possession of its buyer, Waithanje.

This court carefully perused the case of Francis Ngao (Supra). In that case Ngao sold his motor vehicle to one Muinde on 7th January 1987 as per sale agreements, signing and handing over transfer forms to Muinde as well as the log book and the motor vehicle itself. On or about 20th June 1987 that motor vehicle was involved in a road accident and the Respondent, Nkunga was injured. He sued Ngao. In evidence Nkunga proved that the police as well as the Registrar of Motor vehicles gave documents which were produced in evidence that the subject motor vehicle still remained in the name of Ngao. The Learned Judge Githinji who heard the case in the High Court applying SS. 8, 9 of the Traffic Act (Cap. 403) concluded that Ngao was the owner of the motor vehicle in question and damages were awarded against him.

The S.8 of that Act says that a person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of that motor vehicle. The Court of Appeal in appreciating this provision of the law added that whether property in a chattel has passed to the buyer is a matter of fact to be determined by evidence. That a buyer of a motor vehicle is allowed 14 days only to put it on the road but then the transferee must register the motor vehicle in his name (S. 9 of the Act). That court also agreed with the finding of Judge Githinji to the effect that the owner of a motor vehicle who transfers the same must inform the registrar of motor vehicles within 7 days of such transfer.

In our instant case this court is unable to accept that when the accident took place on and 3rd January 1985 the motor vehicle GK 226F was still in the ownership and therefore responsibility of the Defendant, The Defendant showed that the motor vehicle was sold on or about 20th December 1984. Due transfer forms were signed and together with the motor vehicle, Waithanje the buyer took them on 27th December 1984. On 28th January 1984 the department of Wildlife Management, as it was then wrote to the Registrar of Motor Vehicles to inform that office of the transfer of motor vehicle GK 226F.

Unlike in the Ngao case, here the Plaintiffs have not proved as a fact that as at 3rd January 1985 this motor vehicle was still registered in the name of the Ministry of Tourism and Wildlife. They have not shown that the police gave them such information or that they got records from the Registrar of Motor Vehicle that the motor vehicle GK 226F was still in the name of the government ministry. Ownership of a motor vehicle under S.8 of the Traffic Act is a matter to be proved with evidence. The motor vehicle could have borne GK number plates with ministry writings on its side. But the Plaintiffs had a duty to prove, which, they failed to do that as at 3rd January 1985 the registered owner thereof was the government. He who claims or alleges must prove. That has not been done here and the rest of the suit fails.

Had it succeeded, the court would have assessed damages for Pauline Wangui 2nd Plaintiff and Mugo Mutamba (9th Plaintiff, PW5) only. Only these two endeavoured to prove by evidence injuries as pleaded. The others gave evidence that were not rooted in pleadings. Injuries were not pleaded. From the medical reports of these two damages would have been considered somewhere between Shs.80,000/- and Shs.120,000/- (i.e. for PW3 and 5 only).

However on the whole the suit is dismissed with costs.

Judgment accordingly.

Delivered on 11th May 2000.

J.W. MWERA

JUDGE