



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 162 OF 1998

REGINA NYAMBURA MBUGUA PLAINTIFF

VERSUS

KAMUNYA 1ST DEFENDANT

JORAM THUO WAIREGI 2ND DEFENDANT

JUDGMENT

on the 14th day of January 1996, Regina Nyambura Mbugua state that she was a lawful passenger in a motor vehicle registration number KAB 917L. It was a vehicle driven by Kamunya and owned by one Joram Thuo Wairegi.

It is alleged that Kamunya drove the vehicle at a high speed that he caused it to collide with a trailer. He did so negligently. As a result the passenger, Regina Nyambura Mbugua sustained injuries. The injuries sustained in summary were:-

- “1) Multiple continous abrassions laceration
- 2) Loss of tooth
- 3) Soft wound on the right mid leg.”

Regina sued the driver and owner of the vehicle. She was claiming that they were negligent. As a result she prayed that she be awarded damages both General and Special.

The parties agreed to Special Damages at Ksh.80,000/-.

In their defence ,the defendants through their first advocate denied that they were negligent. They denied that Regina was a lawful passenger and was not entitled to any loss or damages.

Unfortunately, the driver to the defendants vehicle and also the 1st defendant in this case declined to attend court despite several adjournment for him to attend. The owner of the vehicle was said to be in England undergoing some treatment. No medical report was produced to this effect nor was there any commissioned evidence deponed by him from England.

Mr. Kamonde for Regina, had stated he would provide authorities to prove his case but failed to do so. He agreed that the injuries sustained were soft tissue injuries. Mr. Akaabi submitted without calling any evidence.

He claimed that the accident actually occurred on the 4.1.98 yet the claim in the plaint was that it occurred on the 14.1.98. He did not raise this point in his defence nor during cross examination of the witness for the plaintiff. It was not also part of the agreed issue.

I would answer part of the agreed issues as follows:-

The plaintiff, Regina had produced a police abstract report dated 29.1.98 whereby it stated that the 2nd defendant was the owner of the vehicle. It seems that the plaintiff would have gone further to produce the motor vehicle registration certificate to this effect.

It is the defendant No.2 who claimed he was not the owner of the motor vehicle. Neither his advocate nor the 2nd defendant produced evidence to show the vehicle did not belong to him. The 1st and 2nd defendant required only to attend court to state this or alternatively the plaintiff to produce a report certificate from the motor vehicle registration office of this.

As it stands, I would note that I have only the evidence of the plaintiff on this point.

As to liability, only the plaintiff gave evidence as to the accident since she was a passenger when the vehicle was negligently driven. The issue at the end of the submissions case that Mr. Akaaabi has taken is the date when the accident occurred. The plaintiff's advocate was permitted to amend his pleadings before and at any stage but did not do so. As such the discrepancy in the evidence stands. Namely, whether the accident occurred on the 4.11.98 or 14.1.98. Could this have been a typographic error by the medical doctor? The police abstract form reflects that the accident occurred on 14.1.96.

Questions therefore arise as to whether the injuries sustained were so as a result of an accident that occurred on 4.1.96 or 14.1.96. Should this be taken into account as it was not part of the agreed issue? I believe as a court I am bound to answer only the agreed issues that the parties bound themselves to have entered into and agreed. This is not one of them. It is also most likely a case of typographical error.

As to the actual issues entered into I find that the plaintiff was a lawful passenger in the vehicle. That the 1st defendant caused the accident in the course of his employment so negligently that he drove it into the trailer. I find the plaintiff suffered injuries, loss and damages. The injuries suffered were determined by the doctors to be multiple concussion, abrasions, laceration, loss of tooth and soft wound on the right mid leg.

The other issue for determination is whether the defendant was given notice of intention to sue prior to filing suit? No such notice was produced by the plaintiff. It was raised in the defence and it was never referred to. I would hold that the plaintiff failed to give the defendant a notice of intention to sue. On the said grounds I would dismiss this suit.

If in the event that the plaintiff had proved her case, I would have computed liability at 100%.

The quantum for General damages was recommended by her advocate at Ksh.250,000/-. This amount was not supported by any authorities. I would nonetheless find that for injuries in the nature of soft tissue injuries a sum of ksh.80,000/- would be sufficient. In summary

Subject: Motor vehicle accident - passenger

Liability: 100% jointly and severally against two defendants.

Quantum: General damages Ksh.80,000/-

Special Damages Ksh.80,000/- (Agreed)

Total Ksh.160,000/-

As to the plaintiff failed to prove her case beyond a balance of probability I hereby dismiss this suit with costs to the defendants.

Dated this 28th day of November, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE