



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 255 OF 2009

HUSSEIN HASSAN ALI.....1ST PLAINTIFF

SHUKRI MOHAMUD ALI.....2ND PLAINTIFF

VERSUS

WILSON MWONGERA VUTA.....1ST DEFENDANT

ALEXANDER NGURUNGU NGARI.....2ND DEFENDANT

JUDGEMENT

The plaintiffs were passengers in motor vehicle registration No. KAT 901M when it was involved in a road traffic accident on 6th September, 2008. The said motor vehicle collided with motor vehicle registration No. KAQ 442U. As a result of the said accident both plaintiffs sustained serious injuries for which they blamed the 1st defendant who was the driver of motor vehicle registration No. KAT 901M. The said motor vehicle was owned and or registered in the name of the 2nd defendant who the plaintiffs plead is vicariously liable for the acts and omissions of the 1st defendants. It was pleaded in the plaint that the 1st defendant drove at an excessive and dangerous speed and failed to keep any or proper look out or to have any sufficient regard to other traffic. He was also blamed for failing to stop, slow down, or swerve or in any other way manage or control the said motor vehicle to avoid the collision. The 1st defendant was also blamed for driving without care and attention to other road users.

Both plaintiffs gave evidence and said that they were seated in the cabin of the motor vehicle alongside the driver. It was their evidence that the driver was driving at a high speed and failed to control the motor vehicle.

In the words of the 1st plaintiff Hussein Hassan Ali,

“I was with my friend Shukri Mohamed Ali the driver was over speeding all the way. Mr. Shukri reminded the driver to slow down. My colleague saw the speedometer and said the speed was kilometres 120 per hour. Past Makuyu another vehicle appeared and our driver rammed into this vehicle.”

P.W. 2 PC John Mugo gave evidence and produced the Police Accident Abstract. He told the court that, from the information in the abstract, the driver of motor vehicle registration No. KAT 901 M was to blame. His name was Wilson Mwangera the 1st defendant herein. He was charged with the offence of careless driving but this witness was not aware of the outcome.

The 2nd plaintiff Shukri Mohamed Ali also gave evidence and told the court that he and the 1st plaintiff were in the said motor vehicle in the front cabin. He gave evidence as to the speed of the motor vehicle in the following words.

“At Makuyu the driver was very fast and reckless. Personally I told him to slow down severally. He did not adhere to my request. At about 3 p.m. at Keno junction we had a head on collision with another matatu registration No. KAQ 442U which made a u- turn.”

He was cross-examined by counsel for the defendants and reiterated that their driver was over speeding and drove carelessly. There was a head collision and although the other driver made a U turn, he blamed their driver for driving at more than 120 Km per hour and looked drunk. The driver was beyond the margin of the speed indicated on the road and smelled of alcohol. He said the maximum speed for PSV is 80 kilometres per hour. Although the defendants filed a statement of defence in which they denied the plaintiffs' claim, at the close of the plaintiff's case counsel informed the court that they did not wish to call any witness and relied on their statement of defence on record.

Where a party files a pleading, evidence is required to support the same and in the event that is not done, such a pleading remains a mere

statement of facts. In that case therefore, any evidence adduced by the plaintiffs remains uncontroverted. That does not absolve the plaintiffs from proving their case as required under Sections 107 and 109 of the Evidence Act Cap 80 Laws of Kenya.

It is true that there was a collision between two motor vehicles. Particulars of negligence were set out in the plaint which required the 1st defendant, who was the driver of motor vehicle registration No. KAT 901M, to testify and counter the same. Public Service Vehicles have a speed limit of 80 KPH on our highways. Both plaintiffs testified the motor vehicle was being driven fast. The 2nd plaintiff in particular testified the driver was driving at more than 120 kilometres per hour. He did not slow down despite request by the 2nd plaintiff. The evidence of the two plaintiffs remains uncontroverted. If the other motor vehicle was to blame or contributed to the accident, the defendants had the opportunity to issue 3rd party notices for indemnity purposes. They did not do so.

The 1st defendant had the duty of care upon the two plaintiffs. He breached that duty by driving carelessly and causing the accident. I find that he was liable in the manner he drove the motor vehicle leading to the accident and injuries sustained by the plaintiffs. The 2nd defendant as owner of the motor vehicle is vicariously liable for the acts and omissions of his driver, the 1st defendant.

Dr. Cyprianus Okoth Okere examined both plaintiffs and produced their medical reports as exhibits 5 and 6 respectively. The 1st plaintiff sustained fracture of the left femur comminuted fractures of left tibia plateau, fractures of the 3rd 4th and 5th metatarsals, multiple soft injuries on the left knee and deep cut on the right index figure. He was first treated at Thika District Hospital and then transferred to Nairobi hospital where he was admitted for two weeks. Thereafter he was confined to a wheel chair for six months. He cannot walk long distances and during cold seasons, he experiences some pain. According to the doctor however, he has no permanent incapacities.

The cited cases in terms of quantum include **NAKURU HCCC NO. 456 OF 1996 IRENE WANJIKU GITONGA VS. KINYANJUI NGETHE & 2 OTHERS. ELDORET HCCC NO. 32 OF 1998 EDWARD NJOROGE GICHOMO VS. SIMIYU WEKESA & ANOTHER**

The 1st plaintiff produced documents relating to special damages amounting to Kshs. 801,191/=.

The 2nd plaintiff sustained a displaced fracture of the 3rd of the left tibia and fibula, fractures of the left 5th metatarsals and bruises on the left lower leg. He was initially treated at Thika District Hospital and transferred to Nairobi Hospital for specialised treatment. He was admitted for a total of 3 weeks and walked with the aid of crutches for 6 months after being discharged. Dr. Okore assessed his permanent incapacity at 5%.

The 2nd plaintiff produced receipts amounting to Kshs. 880,000/= as reflected in the amended plaint as proof of special damages.

Guided by the authorities cited and the injuries sustained by the two plaintiffs, bearing in mind that comparable cases should attract comparable awards, but believing no two cases are the same, and doing the best with the material placed before me, I make an award of Kshs. 1,800, 000/= general damages for pain and suffering for the 1st plaintiff Hussein Hassan Ali plus Kshs. 801,191/= proved special damages. For the 2nd plaintiff Shukri Mohamed Ali I make an award of Kshs. 1,200,000/= general damages. He also proved special damages by production of receipts amounting to Kshs. 880,000/=.

In the end there shall be judgment for the 1st plaintiff against the defendants jointly and severally in the sum of Kshs 1,800,000/= general damages for pain and suffering plus Kshs. 801,191/= special damages and in favour of the 2nd plaintiff in the sum of Kshs. 1.200,000/= general damages for pain and suffering plus Kshs. 880,000/= special damages.

The plaintiffs are also entitled to Kshs. 7,000/= being the cost of medicinal reports and attendance fee for the doctor. The two plaintiffs are also entitled to costs of the suit plus interest at court rates.

Dated, signed and delivered at Nairobi this 14th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE