



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 347 OF 2010

ZACHARY SAMITA

LUKORITO.....PLAINTIFF

VERSUS

**1. ENVIRONMENTAL COMBUSTION & CONSULTANTS LTD.....1ST
DEFENDANT**

**2. MOMBASAMAIZE MILLERS
LTD.....1STTHIRD PARTY**

**3. RUBY HARDWARE.....2ND
THIRD PARTY**

JUDGMENT

1. The plaintiff was at all times an employee of Mombasa Maize Millers Limited the first-third party. He was a turn boy/loader in motor vehicle registration Number KBE 252L the property of the first-third party on the 3rd November 2009 when, while being driven along the Naivasha–Mai Mahiu road by its authorised driver one Wilfred Omari it was involved in a collision with other two vehicles, Registration Number KBC 508Y, property of the defendant and motor vehicle Registration Number KBB 806X property of the second-third party. During the said accident, the plaintiff sustained serious injuries and blamed the Defendants and second-third party vehicles for the accident and consequential injuries from which he seeks compensation for the injuries he sustained.

2. In his statement of claim the plaintiff stated the particulars of negligence against the defendant and also invoked the doctrine of *res ipsa loquitor*. Particulars of injuries and special damages are itemised.

The plaintiff recorded a statement and in a nutshell stated that he was asleep when the accident happened and could not recollect what transpired and found himself in hospital.

The defendant denied that its driver was negligent, and issued third party notice upon the plaintiffs employer and driver of motor vehicle Registration Number KBE 252L. Second-third party proceedings were also issued against the owner of motor vehicle registration Number KBB 806X who never entered appearance.

3. The plaintiff's case as stated above was that he was a lawful passenger and was asleep when the accident occurred. He stated in his evidence that he was told by the police that the defendants driver was to blame for the accident. He did not call any witnesses.

The defendant's driver of Motor vehicle Registration Number KBC 508Y did not testify nor did the driver of the first-third party. A passenger in the defendant's vehicle testified as DW1, and adopted his statement dated 23rd August 2012. It was his testimony that while travelling to Naivasha in motor vehicle Registration Number KBC 508Y at around Mai-Mahiu and between two vehicles, the one ahead slowed down but the one behind attempted to overtake and while avoiding it, the oncoming vehicle (KBE 252L) collided with that vehicle, veered off the road and overturned, that this vehicle was then hit by the one behind KBB 806X causing it to overturn. It was his evidence that the defendant's vehicle did not cause the accident, nor collide with the vehicle where the plaintiff was travelling in, motor vehicle Registration Number, KBE 252L.

The first-third party participated in the proceedings by its advocates but did not testify or file written submissions.

4. In his written submission by counsel, the plaintiff conceded that he was asleep and could not testify as to how the accident occurred, but a police abstract report that he was issued with and produced as an exhibit blamed the defendant's driver one Mutua Kisilu for the accident.

It was further submitted that the defendant did not blame the plaintiff in any way, either by way of contributory negligence or otherwise as a lawful passenger, and therefore no causation link could be attributed to him. He relied on the case **Boniface Waiti and Another -vs- Michael Kairuki Kamau (2007) @ KLR** where Justice Nambuye observed:

“It is now trite law that passengers have no control over the manner of driving of a vehicle in which they are conveyed and cannot be penalised for the poor workmanship of the control of the vehicle. The explanation on causation of the accident in such circumstances lies with the driver---”

It was further submitted that the police abstract report was produced by the plaintiff without objection by the defendant and the first-third party and as such its contents, that the defendant's driver was to blame, and having not been disapproved by the driver of the defendant ought to be taken as true. The plaintiff submitted that failure for the defence to call its driver to testify could only be interpreted to mean that his evidence was unfavourable to its case and sought guidance from **Simba Commodities Ltd -vs- Citibank N.A. (2013) KLR** where such observations were made.

5. The defendant's written submissions were to the effect that the plaintiff did not tender evidence to prove negligence on the part of the defendant, and relied on its witness evidence that its vehicle Registration No. KBC 508Y never came into contact with any of the other two vehicles and therefore could not be blamed. It however proposed contributory negligence, between the first-third party motor vehicle and the second-third party at the ratio 20:80 basis respectively. On the cases **Abbey Abubakar Haji and Another -vs- Mariar Freight Agencies C.A No. 67 of 1983, and Waindi -vs- Pharmaceutical Manufacturers Co. Ltd (1986)** the respective courts held that where there was lack of evidence on how the accident occurred, no negligence could be attributed to any party. The court was urged to dismiss the plaintiff's case.

6. The court has considered the scanty evidence tendered by the plaintiff and the defendant's and only alleged eye witness on the causation of the accident. Alleged witness because he never recorded a statement with the police or indicated as witness in the police abstract.

There is no dispute that the plaintiff was a passenger in the first-third party motor vehicle registration Number KBE 252L, and that he was injured in the accident. Ownership of the three vehicles involved in the collision is not in dispute.

The only issue that this court is called upon to determine is, between the said three vehicles, which was to blame wholly or partially for the accident, and thus liable in negligence and consequential compensatory damages.

7. The plaintiff, in the court's considered view, cannot be held to have caused or contributed to the accident at all as he was not in control of any of the vehicles. I fully agree with the observations of Justice Nambuye-Judge (as he then was) in **Boniface Waiti case** (supra) that a passenger being not in control of the manner of driving motor vehicle cannot be penalised for the negligence of the driver. It is the driver of such vehicle who should explain a possible causation of the accident.

In the present case, the plaintiff was asleep. He could not explain how or which of the three vehicles caused the accident from which he sustained bodily injuries.

The driver of motor vehicle Registration Number KBE 252L in which he was a passenger did not testify. The defendant's driver of vehicle Registration Number KBC 508Y did not testify nor did the driver of motor vehicle Registration Number KBB 806X. The investigating officer too did not testify but police abstract blaming the defendant's driver was produced without objection by the defendant or the third parties. The court has considered evidence tendered by the defendant's witness, who claimed to have been a passenger in the Defendant's motor vehicle. It is curious that the said witness was not indicated as a witness in the police abstract that blamed the defendant's driver for the accident. I agree with the plaintiff's submissions that this witness evidence ought to be viewed with caution. He blamed the first-third party driver for causing the accident. The defendant in its submissions by counsel blame the first-third party and the second-third party, and completely absorbs itself from blame, yet the police abstract placed all the blame on the defendant's driver, who it is alleged to have been charged and convicted in a traffic court for the offence of careless driving.

8. The Traffic court proceedings were not availed to court. No explanation as to why the three drivers of the three vehicles were not called to testify. As stated in the case **Simba Commodities Ltd -vs- Citibank N.a. (2013)KLR**, failure for a party to call available witness with knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such witness could not sustain the contention of such party.

9. The police abstract dated 12th January 2010 confirmed the occurrence of the accident, parties involved and stated that the defendant's driver was to blame. As stated above, no objection was raised to its production. In **Dorcas Wangithi Nderi -vs-Samuel Kiburu Mwaura & Another (2015) KLR** the court held that if a police abstract is produced without any objection, its contents cannot be denied. The Traffic court proceedings were not availed to the court. The court would have had no difficulty holding the defendant's driver to blame – in terms of **Section 47A of the Evidence Act** if such proceedings and judgment were availed.

However, it is this court's view that a statement appearing on a police abstract, despite the abstract having not been objected to, ought to be interrogated and should not be taken at face value.

It was not explained to the court why the investigating officer did not testify, at least to shed light as to the point of impact, produce sketch maps as to the final resting places of the three vehicles and whether or not signs of evasive actions of either drivers were evident on the scene. In line with the court's views in **Kagogi M'Mugaa & Others -vs- Peterson Muthaura Kagaji (2012) KLR**, it is not clear as to which driver was to blame and the extent of such blame in view of the scanty evidence.

10. To that extent this court finds that the three vehicles involved in the accident were all to blame for the accident at various levels, and doing the best I can, I apportion liability in the following ratios: The defendant 40%, the first-third party 30% and the second-third party 30%.

11. The plaintiff sustained serious injuries in the accident.

A medical report prepared by Doctor G.K. Mwaura dated 18th September 2010 and another by Doctor George W.O. Mugenya dated 24th July 2012 were produced by the plaintiff by consent of parties advocates.

Both Reports agree on the salient injuries save for degree of permanent incapacitation and whether or not

the plaintiff became impotent. Interestingly, none of the doctors were called to testify and justify their clinical findings and their decrees of incapacitation.

The injuries as summarised are:

- Fracture of the pelvic and lumber spine
- Dislocation of left hip joint
- Multiple bruises and small cuts from broken glasses
- Impotence.

Treatment given at Kijabe Mission Hospital:

- X-rays , MRI of spine
- Operation to fuse together 10th thoracic vertebra, first, second and third lumber vertebrae.
- Operation to fix Harrington rods to stabilise the spine
- Physiotherapy and follow up orthopaedist clinic as out patients.

Clinical findings:

- Stiff back not able to bend easily
- chronic back pains and stiffness of the spine
- has no wasting of muscles of the lower limbs – has essential normal sensation and muscle power
- Two rods in place along the spinal code.
- No paralysis of lower limbs and walks without support(as at 24th July 2012) and lower limbs functions normal; erectile function initially normal but reports of impotence – but doctors observation that it is rare to have impotence following spinal injury to co-exist with preservation of lower limb functions, but can be attributed to psychological efforts of his back injuries.

Dr. George Mugenya assessed permanent disability at 50% while Dr.G.K. Mwaura assessed the same at 70%.

12. The plaintiff testified on the 30th June 2014. On the injuries, he stated that he was injured on the spinal cord and ribs, that he had metal rods in the body, he gets pains in the left hip and unable to bend and had pains at the back when he sits for long. The plaintiff quantified general damages for pain and suffering at Kshs.2,500,000/= and relied on several authorities among them:

1. Agatha Wanjiru Njuguna -vs- Mary Wanjiku Ikiki (2006) KLR where the court awarded a sum of Kshs.2.500,000/= to the plaintiff for fracture of both legs leading to amputation.

2. Edward Mzamili Katana -vs- CMC Motor Group Ltd

The court awarded Kshs.2,000,000/= for failure of the fifth, sixth and seventh ribs, fracture of the scapula and compound fracture of left elbow.

3. Alphonse Mwatsuma Mwagamchi -vs- Joseph Mwanzia Mwanzu and Another (2005) KLR a sum of Kshs.1,200,000/= was awarded to the plaintiff for severe back injuries and weakness in the legs.

On the other hand, the defendants proposed a sum of Kshs.1,200,000/= for general damages and relied on several authorities among them:

1. Kiongora -vs- V.U. Mbulwa Gichu Nairobi HCCC No. 4350 of 1989,

2. Solomon Waiganjo Njoroge -vs- Ann Wambui Mwangi Nairobi HCCC No. 4935 of 1991

3. Auto Selection Kenya Limited & Another -vs- Charity Wanja Kakagiri (2015) KLR

4. Michael Maina Gitonga -vs- Serah Njuguna (2012) KLR.

In all the above, general damages for pain and suffering ranged between Kshs.500,000/= to Kshs.1,500,000/=.

The court has considered the propositions by both the plaintiff and the defendant, and considered more recent and comparable decisions.

12. In the case **Rosemary Wanjiru Kung'u -vs- Elijah Macharia Githinji and Another(2014) KLR**, the plaintiff had sustained compressed fractures of the T12 and L1 causing irreparable spinal cord injury leading to complete paralysis. The court awarded a sum of Kshs.3,000,000/= in July 2014 damages for pain and suffering.

In December 2014, the court in **HCCC No. 209 of 2013 Peace Kemuma Nyangera -vs- Michael Thuo & Another (2014) KLR**, for fractures of the sacrum bone, eight superior ramus and the pelvic bone and right inferior pubic ramus of the pelvic bone, the court awarded Kshs.2,500,000/= in general damages for pain and suffering.

As expressed by Justice Nambuye (as she then was)in **Samuel Kibet Ngetich -vs- Robert Nadwa Sunguti (2007) KLR** each case must be decided on its facts, and that decided cases are meant to be mere guidelines. The court is also minded that awards are not made to enrich a party but to simply restore the person to the position they would have been before the accident.

In the circumstances, and doing the best I can, I shall award to the plaintiff a sum of Kshs.1,600,000/= in general damages for pain and suffering.

Special damages:

The plaintiff pleaded a sum of Kshs.12,700/= but proved a sum of Kshs.2,000/= only being charges for the medical report. The said sum of Kshs.2000/= is allowed.

14. A claim for damages for loss of future earning capacity and loss of consortium were made.

During his evidence in chief, no evidence was lead by the plaintiff as to the employment or his salary then. Indeed no proof of income or the said employment was tendered, nor proof of loss of amenities, loss of future earnings or earning capacity or loss of consortium.

The defence did not delve into the said allegations on the various losses as it had denied the same.

The plaintiff in his submissions by counsel urged the court to award a sum of Kshs.1,896,960/= being loss of future earnings based at the age of 31 years as at date of accident, with a a salary of Kshs.8,320/= for a period of 19 years as the multiplier.

A claim for loss of future earnings is a special damage claim. It must be specifically pleaded and strictly proved. A claim under the head “loss of earning capacity” can be classified as a general damage but has to be proved too. See **Mbaka Nguru & Another -vs- James George Rakwar (1998) KLR.**

15. As stated above, the plaintiff did not even attempt to prove the claim for damages under the subheads as pleaded in the plaint. The court will therefore award no damages under the said sub-heads. See also **Daniel Kosgei Ngelechi -vs- Catholic Trustee Registered Diocese of Eldoret and Anthrax (2013) KLR.**

There is a difference between an award for loss of earnings as distinct from compensation for loss of future earning capacity. Compensation for loss of future earning capacity are awardable for real assessible loss proved by evidence whereas compensation for diminution in earning capacity is awarded as part of general damages. For those reasons, the claims are disallowed as not having been proved.

16. In summary, there shall be judgment for the plaintiff against the defendants in the following manner:

1. The defendant shall shoulder 40% contributory negligence for the accident.
2. The first-third party and the second-third party shall each bear 30% contributory negligence to the accident.
3. The court makes an award of Kshs.1,600,000/= in general damages for pain and suffering to the plaintiff.
4. The plaintiff is awarded Kshs.2,000/= in special damages.
5. The costs of the suit shall be borne by the defendant, the first and second-third parties in the ratios of contributory negligence as has been attributed to each by the court.

Dated, signed and delivered in open court this 10th day of March 2016.

JANET MULWA

JUDGE