



**ROBERT GITAU KANYIRI.....PLAINTIFF**

**VERSUS**

**CHARLES R. KAHIGA & 2 OTHERS.....DEFENDANT**

**JUDGMENT**

This decision relates to an accident which occurred on 9<sup>th</sup> January, 2005 along Nairobi-Nakuru road near Naivasha involving two motor vehicles, KAB 957V driven by the Plaintiff and KAH 113K driven by the 1<sup>st</sup> defendant and alleged to belong to 2<sup>nd</sup> defendant while the 3<sup>rd</sup> defendant is described as beneficial owner or insured.

Following the accident, the plaintiff sustained the injuries which are the subject of this judgment. His wife died in the accident and the other passengers sustained varying degrees of injuries.

The plaintiff blamed the 1<sup>st</sup> defendant for the accident and has particularized his (1<sup>st</sup> defendant's) negligence, to include;

- excessive speed
- driving without care and attention
- failing to keep proper look out for other road users

*H.C.C.C.NO.22/2009*

- swerving onto the path of the motor vehicle driven by the plaintiff.

The plaintiff further relies on the doctrine of *Res Ipsa Loquitor*. The plaintiff seeks general and special damages as well as costs of the suit and interest. In addition he seeks the cost of future medical expenses. The 1<sup>st</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence in which they denied the particulars of negligence attributed to the 1<sup>st</sup> defendant. They have also denied the application of *Res Ipsa Loquitor* in the circumstances of the accident.

Instead, the defendants aver that the accident was wholly or substantially caused by the negligent driving of the plaintiff. They allege that the plaintiff

- drove without due care and attention
- drove too fast in the circumstances
- failed to swerve, stop, slow down so as to avoid the collision

- failed to properly manage his vehicle to avoid collision.

The plaintiff testified that while traveling from the direction of Nakuru towards Nairobi direction and upon reaching a place called KCC near the Delamere Farm he noticed an on-coming motor vehicle swerving to his (the plaintiff's) lane and returning to its correct lane. As the two vehicles came close, the on-

*H.C.C.C.NO.22/2009*

coming vehicle swerved towards the lane the plaintiff was driving and the two vehicles collided. The plaintiff lapse into state of unconsciousness. One passenger from the plaintiff's motor vehicle testified. **Paul Mungai Kamitha** was seated at the back left of the car from where he was able to see ahead.

According to him, the accident was caused by the 1<sup>st</sup> defendant's overspeeding on the rough road as he swerved on their path.

The 1<sup>st</sup> defendant gave a brief testimony that after a meal at the Delamere's Farm he commenced his journey towards Nakuru direction. One (1) kilometer later he was involved in an accident which todate he is unable to explain how it happened. He lost consciousness immediately.

I have considered this evidence. I have also had the opportunity to study the well written submissions and useful authorities cited.

Parties have framed the issues – but the two broad issues for determination is whether the 1<sup>st</sup> defendant caused the accident due to his negligent driving and secondly whether the plaintiff is entitled to damages as claimed in the plaint.

There will be consideration also on the liability of the 3<sup>rd</sup> defendant, the suit against the 2<sup>nd</sup> defendant having been withdrawn.

*H.C.C.C.NO.22/2009*

Every driver on a public road owes the other road users a duty of care to ensure that he does not expose any such user to any danger. As was held by the Court of Appeal in **Alfarus Muli Vs. Lucy M. Lavuta & Another** Civil Appeal No.47 of 1997, vehicles when properly driven on the road do not run into each other. The first issue framed by myself is on apportionment of liability, which is a question fact depending on the evidence.

Both the plaintiff and the 1<sup>st</sup> defendant lay the blame on each other for the accident and each rely on a set of facts as a basis of the blame. The plaintiff contends that he noticed a swerving on-going vehicle. It was 100m ahead. Shortly before the impact, the on-coming vehicle swerved to the plaintiff's lane hence the accident, involving the front parts of the two vehicles, making it a head-on accident. The plaintiff stated as follows on the impact both in his evidence in-chief and in cross examination:

**“My motor vehicle was on my side of the road but was hit in the middle of the lane.....I never swerved. I was driving straight ..... I tried to swerve to the left but it was so sudden..... We were hit while on our lane but at the centre”**

The plaintiff's other witness, Paul Mungai Kamitha said:

**“We were driving normally but the oncoming motor vehicle was overspeeding. I do not know what happened but the other motor vehicle came to our side and hit our motor vehicle on the driver’s side - in front. The collision was on our lane. It is the other motor vehicle that lost control and came to our side. The car was too close. The plaintiff couldn’t do anything..... Our motor vehicle stopped on its lane but the other motor vehicle was mostly on our lane. The point of impact was on our side of the road.”**

**P.C. Pius Otieno** was called by the plaintiff and his evidence was confined to the production of the traffic police file, police abstract form and P.3 form. Making reference to the police file he told the court that the point of impact was right at the centre of the road. But it was also his testimony that the 1<sup>st</sup> defendant’s motor vehicle rested on the plaintiff’s side of the road after the impact. He confirmed that the investigating officer concluded that neither of the two drivers was to blame for the accident and an inquest was ordered. I attach no value to the witness’s testimony on the point of impact and on the position of the motor vehicles after the impact for the sole reason that he did not attend the scene and did not draw the sketch plan and was indeed at pains to explain various aspects

of the plan. That leaves the evidence of the plaintiff and Paul Mungai Kamitha on liability against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant on the other hand, as I have noted, was not able to say how the accident occurred. The court is at a loss whether to attribute his state of mind to a spiked meal which he had just had or to sleep following a meal. There is really no evidence about that and the court can only rely on the evidence presented before it.

The 1<sup>st</sup> defendant on cross-examination regarding his statement to the police said the following:

**“I recorded a statement with the police in which I stated that I hit a pothole, swerved to the right. I recorded that. I remember hitting a pothole. I swerved to the right but remained on my lane. I did not go to the other side of the road. .... I hit a pothole and the accident happened..... Because of the numerous potholes, I was avoiding to hit them and hitting others.”**

From the evidence, the accident occurred on a clear day (3p.m.) on a straight but rough potholed road. None of the particulars of negligence attributed to the plaintiff by the defendants have been proved. The 1<sup>st</sup> defendant only recalled hitting a pothole, an accident and lost consciousness. He has not blamed the plaintiff's manner of driving in any way.

*H.C.C.C.NO.22/2009*

The defendant's evidence taken together with those of the plaintiff and Paul Mungai, place the blame squarely on the 1<sup>st</sup> defendant. Noting the condition of the road and bearing in mind the presence of other road users, it was negligent of the 1<sup>st</sup> defendant to swerve to the right in order to avoid potholes when the on-coming vehicle was close. He is found 100% liable for the accident.

I turn to consider the quantum of damages. The plaintiff's counsel has submitted that in view of the injuries sustained by the plaintiff, an award of Kshs.2,000,000/= would be adequate compensation under the head of pain, suffering and loss of amenities. He cited the case of **David Thanju Karanja Vs. Samuel Kimani** (2002) e KLR where the plaintiff was awarded Kshs.1,000,000/= and **Jacinta Wanjiku Vs. Samson Mwangi** (2006) e KLR where the plaintiff was also awarded Kshs.1,000,000/=.

He submitted for kshs.1,730.830/= for special damages, Kshs.165,000/= as cost of future medical expense and Kshs.720,000/= being loss of earning capacity.

The defendants on the other hand through counsel submitted for Kshs.170,000/= in general damages relying on the cases of **Mwangi Muchina Vs. Francis Kimani Mbugua** HCCC No.2637 of 1994 and **Martin Ngugi Gathenya** Vs.

*H.C.C.C.NO.22/2009*

**Sospeter Asanga Munavyi & Another**, HCCC No.2246 of 1999.

On cost of future medical expenses, counsel for the defendants urged the court to disregard the claim as it was not backed by a doctor's opinion. Regarding lost earnings and loss of earning capacity counsel submitted that no evidence was offered in support thereof.

The plaintiff suffered the following injuries:

- fractures of the right radius
- fracture of the right ulna
- fracture of the left humerous with subsequent infection
- fracture of the right femur with subsequent infection and malunion

- blunt head injury
- multiple soft tissue injuries

The reports by Dr. Kiama and Wairioko, which were produced by consent, confirm that the plaintiff has not healed and is 60% permanently disabled. The court noted that the plaintiff was using a crutch and had a stiff right leg. He confirmed as did the medical reports that he suffers persistent infection of both the right femur and the left humerus, which have not healed, five years after the accident. He still

*H.C.C.C.NO.22/2009*

undergoes treatment. Due to his condition, the plaintiff cannot work.

It is now settled that the general method of approach in assessment of damages is that, comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases.

See **Stanley Maore Vs. Geoffrey Mwenda**, Civil Appeal No.147 of 2002. In asking for Kshs.2m on the head of general damages, the plaintiff's counsel relied on two authorities **David Thanju** and **Jacinta Wanjiku** (supra) in which the court awarded Kshs.1m. In the former, the plaintiff sustained a fracture of

- the right tibia (common fracture)
- the right femur (open reduction and fixation with a K-nail)
- the left femur open reduction and fixation
- fracture of the mandible IMF wiring
- fractures of metatarsals.

The plaintiff had malunion of the right tibia.

In **Jacinta's** case, the plaintiff suffered:

- head injury with cerebral concussion and a wound on the left forehead and scalp
  - fracture of the acetabular rim right hip
- H.C.C.C.NO.22/2009*
- fracture of the right knee
  - post traumatic osteoarthritis right knee

I find the injuries in the **Thanju** case more comparable to the injuries suffered by the plaintiff in this case. The plaintiff in **Jacinta** case had more severe injuries.

On the other hand the authorities cited by counsel for the defendants, apart from relating to decisions of 2001 and 1999 periods respectively, involved injuries which were less serious. For instance in **Francis Mwangi Muchina Vs. Francis Kimani Mbugua**, HCCC No.2637 of 1994, the plaintiff suffered fractures of the left humerus, tibia and fibula. The plaintiff in **Martin Ngugi Gathenya Vs. Sospeter Asanga Munavyi & Another** (supra) sustained fractures of the distal segment of the right femur, right medial femoral condyle with no displacement, left femur (commuted) and a gloving injury to the left leg.

Striking a balance between the authorities cited by both sides and bearing in mind the injuries suffered by the plaintiff and the condition the court saw him in, I award Kshs.1,000,000/= in general damages. The plaintiff has pleaded for an award of Kshs.165,000/= for future medical expenses which will involve the removal of the metal implants and physiotherapy. The report prepared by Dr. Kiama is the

H.C.C.C.NO.22/2009

basis of this claim. I award Kshs.165,000/= for expense on future medical treatment as it was pleaded and proof offered.

The plaintiff also prayed for loss of earning capacity and lost earnings. His counsel submitted for Kshs.720,000/= for loss of earnings made up of a monthly earning of 4000/- as a taxi operator and a multiplier of 15 years as the plaintiff is 36 years old. Counsel for the defendants objected to this claim on the ground that there was no “concrete evidence.” The distinct between the two heads was considered in **Mwangi and Another** Vs. **Mwangi** (1996) LLR 2859 (CAK) in the following words:

**“In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”**

The plaintiff states in the plaint as follows:

**“6..... For that reason he has lost the ability to work and has as a result suffered loss of income and earning capacity and lost income.”**

H.C.C.C.NO.22/2009

In his evidence he testified that:

**“Before the accident, I was operating a taxi – earning an average of**

**Kshs.2000 per day. I was staying at Langat. I have a family. I was with my family – my wife and child .....I now depend on my brother.”**

The plaintiff’s counsel submitted for a monthly income of Kshs.4,000/= down from Kshs.10,000/= (i.e. Kshs.2,000/= per day assuming also that he did not work over the weekends). There are many Kenyans who eke out a living in the informal sector where no papers are issued or received. The “concrete evidence” demanded by the defendants’ counsel may not be available to an ordinary taxi operator.

See **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros** Vs. **Augustine Munyao Kioko**, Civil Appeal No.203 of 2001. The plaintiff’s evidence that he was a family man, living in Langata with his late wife and child, has not been challenged. I am persuaded that he was engaged in a taxi business which earned him Kshs2,000/= per month. The loss of earning capacity was direct consequence of the accident hence I make the following award under this head, bearing in mind the plaintiff’s age (36 years) incapacity (60%) and the overheads of

H.C.C.C.NO.22/2009

running a taxi business ( $\frac{2}{3}$ ), Kshs.2000 x 12 x 15 years x  $\frac{2}{3}$  = 240,000/=.

Before I conclude, the liability of the 3<sup>rd</sup> defendant was denied. The plaintiff testified that the police gave him the name of the 3<sup>rd</sup> defendant as the owner of the motor vehicle in question.

The police abstract forms give different names as the owner of motor vehicle KAH 113K. Abstract No.A762548 shows the owner as Charles Rigii Kahiga – the 1<sup>st</sup> defendant, No.A617368 the owner is shown as Hilum Kinyuru. That is also the name in Abstract No.A951049. That evidence does not meet the threshold of balance of probability. The liability of the 3<sup>rd</sup> defendant has not been proved. Special damages at Kshs.1,490,090/= based on receipts produced was agreed. The sum of Kshs.239,840/= representing invoices is not recoverable.

Judgment is entered for the plaintiff against the 1<sup>st</sup> defendant as follows:

- i) General damages for pain and suffering and loss of amenities –  
Kshs.1,000,000/=
- ii) Special damages Kshs.1,490,090/=
- iii) Loss of capacity to earn Kshs.240,000/=

H.C.C.C.NO.22/2009

- iv) Future medical treatment – Kshs.165,000/=

Total

Kshs.2,895,090/=

I award costs of the suit and interest.

**Dated, Signed and Delivered at Nakuru this 1<sup>st</sup> day of March, 2010.**

**W. OUKO**

**JUDGE**