1. Running Down Cause
Driver
2. Male adult driver aged 39 years old in 1997
3. Head on collision between motor vehicle and lorry
4. Injuries:-
Fracture:-
a) Body of mandible
b) Right occipital bone
c) Lateral wall of right orbit
d) Roof of the sphenoid sinus
e) Zygomatic complex
f) Left subcandytar fractural
g) Porptosis with chemosis periorbital oedema
h) Subconjuctival haemorrhage
i) Laceration to right lower lid
j) Fracture of ethmiod
k) Fracture of right anterior cranial fossa
5. Liability 100% against the 1st and 2nd defendant jointly and severally
6. Quantum:
I: General Damages
a) Pain and suffering and loss of amenities Ksh.400,000/-
II: Special Damages
a) Medical expenses and treatment Nil
b) Police abstract Nil
c) Loss of earning capacity Nil_____
Total Ksh.400,000/-
7. Case by defendant
a) Anastasia w. Kamau v Baringo farmers Company Limited
Hccc 3406/83 (unreported) Juma,J.
b) Nathaniel Kitololo v Nairobi Deluxe Services Limited
Hccc No.6817 of 1991
c) David Bagine v Martin Bundi
CA 283/96 Gicheru,Shah,Pall JJA
d) Catherine A. Emmali v Mau Narok bus Service & Another
Hccc 1974/92
8. Advocates:
D.W. Mwaura for Kamotho,Maiyo & Mbatia advocate for the plaintiff
J.N. Waweru for K. Mwaura & Co. Advocates for the defendant

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 3007 of 1997

WORLD CONCERN INTERNATIONAL …….1ST PLAINTIFF

ALPHONSE NJIRU KABUI ……2ND PLAINTIFF

VERSUS

LIVINGSTONE T RAGIRA MOGAKA ……..1ST DEFENDANT

RICHARD OMENYA OKWAKO ……2ND DEFENDANT

JUDGMENT

1: PROCEDURE

1. The delay of hearing and determining this case appears to be due to the original court case file missing. The file was reconstructed thereafter the original file was found. Between 1997 and 2004 no substantial action had been taken of this file save an amended plaint filed in 2001. When the suit came for hearing on 26.1.05, the plaintiff adjourned it on the grounds that the advocate handling this suit was out of the country. The next hearing date was 7.4.05 when the court was not sitting as it was court vacation perhaps unknown to the parties. The next hearing date was 4.7.05 when this suit was heard.

II 2. The parties

a) World Concern International …….. Plaintiff No.1 The employer of the 2nd plaintiff

b) Alphonse Njari Kabui ……. Plaintiff No.2 The employee to plaintiff No.1 - a driver of a motor vehicle owned by the plaintiff No.1

Both were represented by M/s George M. Muthu and company advocates. The plaintiff later changed advocates to M/s Kamotho Maiyo & Mbatia advocates on the 17.8.2004.

The defendants are:-

a) Livingstone T.Ragira Mogaka ----------1st defendant The registered owner of a motor vehicle lorry

b) Richard Omenya Okwaro ……. 2nd defendant

The driver to the motor vehicle lorry

The parties are represented by M/s K. Mwaura & Co. Advocates.

II Back ground of case

3. Alphonse Njiru Kabui was driving a motor vehicle registration KAA 688R assigned to him by his employer. On the 11.3.97, whilst driving along the Langata road a motor vehicle lorry owned by the 1st defendant and driven by 2nd defendant was travelling at a high speed. It left its side of the lane and came onto the lane in which the second plaintiff was driving. There was no time to avoid the accident. A head on collision occurred. The 2nd plaintiff sustained injuries and was rushed to the hospital for treatment. He and his employer sued the 1st and 2nd defendants for the personal injuries sustained by the 2nd defendant.

II: LIABILITY

4. Who is to blame for this accident?

The plaintiffs blame the defendants on the grounds that the vehicle belonging to the defendant was negligently driven. The defendant's advocate was able to prove that the plaintiff No.2 was driving the vehicle at 60 KPH. This was according to him, contrary to the requied speed limit of 50 KPH. The plaintiff, he claims was over speeding and as such was liable for the accident.

5. From the evidence before me it is without a doubt that the defendants vehicle which was travelling on the opposite side left its lane and collided into the plaintiff vehicle whilst on the wrong side of its lane. The fact that the plaintiff was driving at 60 KPH had to be supported with the evidence that the plaintiff were within the municipality limits on outside of the city centre that requires 50 KPH.

I would find that the defendants are liable for this accident. I compute liability at 100% jointly and severally with the 1st defendnt being vicariously liable for the acts of his agent and or servant.

IV: QUANTUM

6. a) General Damages

i) Pain and suffering

I was presented with three medical reports for the plaintiff.

The amended plaint pleaded injuries being

a) Facture of body madible

b) Fracture of right occipital bone

c) Fracture of roof of sphenoid sinus

d) Fracture of zygomatic compelx

e) Left subcandytar fractural

f) Porptosis with chemosis and periorbital oedema

g) Subcojuctival hamorrhage

h) Laceration right lower lid

i) Fracture of ethmiod

j) Fracture of floor of right anterior cranial fossa

A: J. BODO Mb ChB (EA) FRCS

Consultant Orthopeadic Surgeon

Date of report 16.10.99

7. Confirmed the above injuries as shown in the CT scan and x-rays. He confirmed that the plaintiff had a diminished hearing problem and a sight diminished vision to the right eye. He assessed the permanent disability at 10%. 7.

B: DR Patrick Akuku Okoth

BSc MB Ch.B Med (Surg)

Neurosurgeon (GLW & EH.UK)

Date of reports 18.3.97

29.5.95

The doctor also confirmed the said injuries as above and recommended aggressive physiotherapy. The fracture sustained was to the facial orbital and maxillary bone fracture that required evaluation. After 8 years from the accident the plaintiff complains that he is not able to perform as he used to. Growing old, I believe, must be taken into account. 8. I nonetheless find that the plaintiff sustained injuries and as such find that an award for pain and suffering be awarded.

9. The advocate for defendant prays I award ksh.200,000/- (see case law on Catherine A. Emmali vs Mau Narok Bus service & Another Hccc 1974 of 1992, Juma,J.

This would have been in order as earlier pleaded that the plaintiffs had sustained injuries. On the plaint being amended and the medical report produced it is noted that the plaintiff sustained serious fractures to his face. I note that there seems to be no neurological deficit to his injury and that he has recovered well. I would accordingly award Ksh.400,000/-.

IV: Special Damages Ksh.462,89.95

10. The claim for special damages was made for medical expenses and transport a lump sum figure of Ksh.462,849.95 was claimed. The plaintiff admitted his employer paid this. He himself cannot claim this as it is double enrichment. The employer is permitted to claim this if he brings in a subrogation claim. As such, the plaintiff No.1 employer should not have been a party to the suit unless they were claiming material damage loss to the vehicle they owe. They cannot claim a personal injury claim for and on behalf of the plaintiff.

11. The employers comes to court as a witness and prays to be refunded expenses incurred. The special damage claim must be pleaded, and particularized. In this case, this was never done. A lump sum claim should not be made. I would agree with the defence on the issue of proof of special damages as outlined in the case of:-

David Bagine vs

Martin Bundi

CA 283/96

J.E. Gicheru, A.B. Shah,G.S. Pall,JJA

I accordingly dismiss this claim for Ksh.462,849/85 12. Police abstract Ksh.100/-

No one spoke of this claim. I accordingly dismiss it as not being proved.

V: Loss of earning capacity

13. The plaintiff gave evidence to say that he is unable to put in as much work as he had before. He informed the court that he is still in the employment he was in when the accident occurred. There was no evidence to show that he had lost his earning capacity apart from occasionally being provided a driver, there seems to be no such loss.

The plaint prayed for “loss of earning capacity” but this claim was never pleaded. I would agree with the case law of:-

Nathanial Kitololo

V

Nairobi Deluxe services Ltd

Hccc No.6817 of 1991, Ringera,J.

That this is a special damage claim and ought to be pleaded. I accordingly dismiss this claim for not having been specifically pleaded.

I enter judgment for the plaintiff on the proved claim.

14. In Summary 1

4.1 Driver male adult aged 39 years old in 1997

14.2. Head on collision between two vehicles – motor vehicle and lorry

14.3 Injuries

Fracture:-

a) body of mandible

b) Right occipital bone

c) Lateral wall right orbit

d) Roof of sphenoid sinus

e) Zygomatic complex

f) Left subconjuctival haermorrhage

g) Porpotisis with chemosis periorbital oedema

h) Subconjuctival haenorrhage

i) Laceration of right lower lid

j) Fracture of ethmiod

k) Fracture right anterior cranial fossa

14.4. Liability 100% against the 1st and 2nd defendant jointly and severally with 1st defendant being vicariously liable.

14.5 QUANTUM

I: General Damages

a) Pain and suffering and loss of amenities Ksh.400,000/-

II: Special Damages

a) Medical expenses and hospital Nil

b) Police abstract Nil

c) Loss of earning capacity Nil Total Ksh.400,000/-

I award the costs of this suit to the plaintiff. I award interest of the award from the date of this judgment.

Dated this 6th day of July 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Kamotho & Co. Advocates for the Plaintiff

K. Mwaura & Co. Advocates for the Defendant