REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 118 of 1997

MARIET NYAMBURA ATELU.. ..PLAINTIFF

VERSUS

K.KIPTOO

JOHN KEMOVI……………..…...........................…....……DEFENDANTS

JUDGMENT

MARIET NYAMBURA ATELU is the plaintiff. She is representedin these proceedings by M/S ODHIAMBO & ODHIAMBO, Advocates.KOMEN KIPTOO is the first defendant and is also the registered owner of Motor vehicle Registration No.KRN- 295 a Peugeot 504Station Wagon Matatu. JOHN KEMONI is the 2nd defendant andwas the driver of the said vehicle under employment of the 1stdefendant; th*e* two defendants are represented in these proceedingsby Mr. MAGETO j of M/S M'NJAU & HAGETO Advocates.

The plaintiff gave evidence and called Dr. MAURICE PETER SIMIYU as her witness. The first defendant was not called the second defendant gave evidence and called no witnesses.

Both Counsels have also made oral submissions.

The plaintiff's claim against the defendants is for generaland special (damages she incurred in a road traffic accidenton the 13th December, 1996 involving the said vehicle KRN 295.It is the plaintiff's case that the 2nd defendant negligentlydrove the said vehicle and caused the accident and that, uponthat negligence, the 1st defendant is vicariously liable asthe 2nd defendant's employer. Although the defendants had deniedin the statement of defence filed on 8.4.1997 that there wasan accident, the 2nd defendant conceded that there was indeedan accident involving the vehicle which he was driving namelyKRN 295 on 13.12.96 that left the only issues for determinationto be these:(a) Whether the plaintiff was a fare paying passenger in motor Vehicle Reg. No. KRN 295

(b) Whether the 2nd defendant was liable for the accident.

(c) Whether the 1st defendant was vicariously liable for thenegligent acts of the 2nd defendant.

(d) Quantum of damages to be awarded to the plaintiff.

FARE. PAYING PASSENGER: The plaintiff gave evidence that sheis staying at Elburgon where she does business of selling timber.On the 13th December, 1996 she boarded a motor vehicle Reg.No.KRN

293 in Nakuru intending to go to Eldama Ravine for business.That vehicle was a Peugeot 504 Station Wagon. It was public service vehicle. She did not reach Eldama Ravine because thevehicle was involved in an accident at a place called Kiamunyiwhen it his a stone, veered off the road and overturned. Shesaid, in cross-examination, that she was' a fare paying passenger, had not been issued with a ticket because tickets are usuallynot issued in matatus, that she sat at the rear with two otherpassengers. She also told the court that she was issued witha Police Abstract (Exhibit 3) and P3 form (exhibit 4.) Shesaid that she was taken from the scene of the accident to MenengaiNursing Home by her brother-in-law Peter Githae.

The 2nd defendant, on the other hand, told the court thatthe plaintiff was not in his vehicle. He however conceded thaton 13th December, 1996 he was driving motor vehicle Reg. No.KRN295 along Nakuru/Eldama Ravine Road; that he had passengersin the- said vehicle who had paid fare; that there were two womenpassengers in that vehicle; that when he reached a place calledKIAMUNYI he accidentally stepped on a stone and the vehicleveered off the road and he lost control and it landed in a ditch;that traffic policemen from Menengai Police Station attendedthe scene of accident and carried out investigations that hecould not tell whether the contents of the Police Abstract werecorrect or not; that normally matatu touts are the ones responsible- 3- for the filling up of vehicles at the matatu stage, using ticketsand collecting money from intending passengers; that he would only know the number of passengers in his vehicle from moneyhanded to him by the touts; he however said that he did not seethe plaintiff in his vehicle at all. He said he knew the twowomen passengers but that the plaintiff was not one of theHe did not, however give names of those women passengers.

It is true, as stated by the plaintiff, that usually matatuoperators do not give tickets to their passengers on paymentof fares. This is a practice Kenyans seem to have accepted.It is a bad practice which should be discouraged. I will acceptthe plaintiff's evidence that no ticket was issued to her after she paid her fare.

The plaintiff's account of this accident is confirmed bythe 2nd defendant, more particularly as to the place of accidentand the manner it happened. This essentially was that; theaccident took place along Nakuru/Eldama Ravine Road, at Kiamunyiand it happened when the vehicle stepped on a stone and veeredoff the road. Such details could only have been given by apassenger who was there. But this is not all. Policemen fromMenengai Police Station attended the scene; the OCS later issueda Police Abstract and a P3 form to the plaintiff in which heshowed that the plaintiff was a passenger in that vehicle.Both the Police Abstract and the P3 form were produced as exhibitswithout objection. It is worth noting that Mr. Mageto, actingfor the defendants objected to the production of *the* MedicalReport and requested to have Dr. Siminyu called for cross-examination. He did not do the same for the OCS Menengai, theauthor of the Police Abstract Form.

For these reasons I hold that the plaintiff was a farepaying passenger traveling in Motor Vehicle Reg. No.KRN 295at the martial time of this accident.<u>LIABILITY:</u> The particulars of negligence of the 2nd defendant arepleaded in paragraph 4 of the plaint, where the plaintiff pleadedthat 2nd defendant was negligent in controlling and or managingmotor vehicle Reg. KRN 295 and caused the same to veer off the roadand fall into a ditch. These particulars are: driving at a speedwhich was excessive in the circumstances, driving a defective motorvehicle; failing to keep any proper look out or have any sufficientregard to his passengers; driving without due attention and care;failing to exercise any sufficient control of the said motorvehicle; res ipsa loquitor (facts speak for themselves). Noevidence was adduced by the plaintiff to prove that this vehiclewas defective prior to the accident. I will straightaway disregardthat plea. I will now consider the other particulars ofnegligence.

According to the plaintiff, the 2nd defendant was driving thesaid vehicle at a very high speed just before the accident, to theextent that passengers began to complain about it. She said thatthe vehicle, while in that high speed, stepped on a stone andveered off the road. The driver lost control and the vehicleoverturned or rolled over.

In cross examination she told the court that she could not.estimate the speed but it was a high speed, that the vehicle wasoverloaded as the 2nd defendant had three passengers in front, fourin the middle seat and three at the rear, making a total of tenpassengers; she blamed the 2nd defendant for over speeding, over-loading and not being careful.

The 2nd defendant explained how the accident happened. He said that the road was straight at the scene; that he had overtaken a lorry and had completed a descent; he was driving along a gradual rise and could not have been at speed as he was climbing; that he could see far along the road and there were no other vehicles onthe road; that he suddenly came to a pot hole and stone; that he did not apply emergency brakes because he did not want to alarmhis passengers; that they stepped on that stone and the vehicleveered off the road to his left side and heading for a ditch; thathe avoided that ditch and was able to bring the vehicle back to theroad; that the vehicle still veered off to the right and landedinto a ditch; that it did not go over the embankments of the roadbut it landed on its side but it did not overturn. He denied thatthe vehicle was overloaded. He said he had one passenger in thefront, three in the middle and three at the rear. In total he saidhe had seven passengers. He was the eighth. He said he wasdriving between 70/80 K.P.H. He also denied that any passengerswere complaining about the manner he was driving.

In Cross examination he said that when he first noticed the pot hole and the stone he was only three metres away from them; he denied not keeping a proper look out or being inattentive. He said if he had seen the stone earlier he would have braked. He said both the pothole and the stone were on his side (left) but he did not swerve.

Taking that evidence in its correct perspective, the 2nddefendant was driving along a fairly straight road and he could see far. Assuming that he was driving at a moderately slow speed of 70/80 K.P.H., if he came suddenly upon that pot hole and stone, he ought to have braked so as to avoid hitting both of them and swerving to his right, as there was no other vehicle on that road at that time. But he did not brake. The impact of stepping on the stone or of hitting a pot hole sent his vehicle off the road. The result was that his vehicle veered off and headed for a ditch, which he avoided and he brought back the vehicle to the road. From thereon, if he was at a moderate speed, he would be able to continue with his journey. But the vehicle did not follow the road. It again veered off the right and landed into a ditch proper and landed on its side. The only reasonable and strong inference which I can draw is that the 2nd defendant was driving this vehicle at high speed, he was unable to control it because he had extra passengers in the front seat who made his driving at that point in time difficult and dangerous. Failure to brake and swerve so as to avoid an object are classic cases of negligent driving.

I therefore hold the 2nd defendant negligent in the manner he drove the said vehicle, caused this accident and apportion hisliability at 100% VICARIOUS LIABILITY: In his evidence the 2nd defendant told the court that he had been employed by the 1st defendant as his driver, to drive motor vehicle KRN 295 between Nakuru and Eldama Ravine,and that this accident occurred during one of his trips to Eldama Ravine. He was therefore performing his duties as a driver. The accident occurred in the course of his employment and within the scope of his duties. The 1st defendant is therefore vicariously liable for his negligent acts. I so hold.QUANTUM OF DAMAGES

The plaintiff produced in evidence medical notes from MenengaiNursing Home as Exhibit 1, the P3 exhibit 3 and the Medical ReportExhibit 2 which showed that she sustained the following injuries:simple fracture superior pubic ramus left, segmental fractureinferior pubic ramus left, simple fracture of the superior edge ofthe body of the left public bone; bruises on the left forehead;soft tissue injury to the left knee; and bruises over the left gluteal region and the thigh posterior; she was confined to bedfor three weeks but was actually discharged on 3rd January, 1997.Dr.Siminyu told the court that the plaintiff's movements at theleft hip joint are restricted on extension/flexion and abduction.He explained that "Abduction" means a movement outwards of the leftleg. The effect of this is that the plaintiff will relate sexuallyto her spouse. She cannot spread her legs or open them for satisfactory sexual Intercourse. She was also having difficultiesin squatting due to pain, and hence cannot attend normally to her calls of nature. Both situations will persist for long. He alsosaid that due to the fracture of the pelvis she may not be able tosubsequently deliver her children normally by the vaginal route andhence may have no option but to undergo elective Caesarian Sectionas the only delivery method. The plaintiff was aged *37* years at'the time of accident. She is now 39 years. According to Mrs.Odhiambo, and she knows better as an African Woman herself, theplaintiff is still young for continued procuration.

The plaintiff did not deal in her evidence with her sexualproblems. But there is the medical evidence on

record, most of which was not seriously contested. I cannot ignore it. I willtake it into account when assessing damages for loss of amenities.

Mrs. Odhiambo has submitted that the plaintiff should be awarded shs.800, 000/. She has relied on the cases in the list of authorities filed by her (Nos.2 to 6). Mr. Mageto has submitted that the plaintiff should be awarded shs.180, 000/ and relied on the case of JAMES OKWENA VS GRAIN MILLS LTD & ANOTHER HCCC No.1786 of 1989 where James Okwena, a male adult, had fractured the left superior and inferior ramii of the pelvis and was awarded

-shs.180, 000/ by Justice R.S.C. Omollo (as he then was) on 1.7.1993. the deference between that case from the present one is that;

James Okwena was a male, will never suffer what Dr. Siminyu described as "Abduction" of his legs during a sexual act, will never have any problem with child bearing. MARIEJ ATELU, being a woman has a different anatomy and her delicate anatomy was crashed.

Taking the above facts into account I am of the view that an award of shs.500, 000/ will be adequate for pain, suffering and loss of amenities suffered by the plaintiff.

I award her special damages pleaded and proved namely shs. 1,500/ for medical examination, medical report and filling of the P3 by Dr.Siminyu vide receipt produced as exhibit 5.

In this final Judgment I therefore award the plaintiff shs.501, 500/ against the defendants, jointly and severally. I heard costs of this suit and interest at court rates *from* the date of this Judgment.

It is so ordered.

Dated this 5th February, 1999.

A.G.A. ETYANG JUDGE.

Delivered this 5th February, 1999 in the presence of Mrs. Ruth Odhiambo for the plaintiff, Mariet Nyambura Atelu the plaintiff and

Mr. Mageto for the defendant, John Kemoi (2nd defendant) and Mr. Maroro court/clerk.

A.G.A.ETYANG

JUDGE

5.2.1999

Mr. Mageto: I apply for stay for two weeks pending making of a formal application for stay. The defendants intend to file a declatory suit against the insurance Company. I also apply for certified copies of proceedings and Judgment.

A.G.A. ETYANG

<u>JUDGE</u>

5.2.1999

Mr. Odhiambo: No objection

A.G.A. ETYANGJUDGE

5:2.1999

Ruling:

The plaintiff has been awarded shs.501, 500/ for damages she suffered and continues to suffer since 1996. She has now avalid Judgment which she ought to execute so as to earn the fruits of it. If the defendants wish to file a declaratory suit againstthe Insurance Company to indemnify them against the decree to beextracted, that is a matter between them and the Insurance Company. No good reason has been put forward for stay of execution. The

Application is refused. The proceedings and Judgment in this case may be typed and

Supplied to the defendant's Counsel on payment of the necessary fees.

It is so ordered.

5.2.1999

A.G.A. ETYANG

JUDGE