



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1384 OF 97

GEORGE NDICHU KAMAU PLAINTIFF

VERSUS

EUSTACE MWANGI GATHUKU & ANO. DEFENDANTS

JUDGMENT

George Ndichu Kamau filed this suit on the 9th of June 1997, through his advocate for negligence in a running down case, against the two defendants.

He stated in evidence that whilst at the Matasia shopping centre, which is along the Ngong - Kiserian road he noticed the defendants vehicle moving in a zig zag fashion. He ran away and entered a kiosk. The vehicle hit the kiosk and in the process knocked him. The plaintiff felt a considerable amount of pain and found himself in hospital.

He later discovered that his foot and ankle had been amputated.

He admitted that he did not know the driver of the said vehicle. He nonetheless made a report to the police whereby he was notified by them that he had been knocked down by the defendants vehicle.

He recorded his statement and obtained his P 3 Form and abstract report which he produced to court as exhibits.

The defendants filed a defence through their advocates. This defence stated that it was the plaintiff who was :-

- “ a) Negligent and who failed to look properly,
- b) Crossing the road without ensuring it was safe.
- c) Jumping into the path of the on coming vehicle without due regard to his safety.
- d) Walking across a busy road in an area not marked for pedestrian crossing.
- e) Negligently in a state of fear, retreating from the middle of the road on the path of the defendants vehicle.
- f) Walking into the road in a clear underestimation of the speed of the defendants vehicle and

without any warning or at all.”

The evidence by the plaintiff was that he was never on any road. He was in fact off the road and at the time the vehicle knocked him he was inside the kiosk.

The advocate for the defendant in cross examination of the plaintiff led evidence to wit the plaintiff disclosed that he had been informed that the driver of the said vehicle was attacked by robbers who wanted to steal his vehicle.

The advocate for the defendant at this point in the evidence notified the court that he discovered, after investigations, that the 1st defendant had been attacked by robbers thus leading him to the loss of control of his vehicle.

When asked why he did not amend his defence to reflect this, the advocate was unable to explain. He nonetheless attempted to make this fact part of his submission.

He further disclosed very late into the proceedings that the 1st defendant was deceased. He made no attempt to have the 1st defendant substituted by his legal representative under the Civil Procedure Rules.

Once a case has been filed and parties have filed their pleadings it is important that pleadings reflect the exact circumstances of the case.

The Plaintiff in this case was never any where near the road. The defendant is thus bound by his pleadings and as a result they cannot claim that the 1st defendant on being attacked by robbers or car jackers that he was not able to control the vehicle.

It thus means that the defendants cannot rely on these facts if they had not pleaded it in their defence. From the evidence before the court an accident did occur on the 9.7.97 involving the motor vehicle Reg KAA 455 C. This is supported by the abstract report produced.

The accident was occasioned by the 1st defendants negligence and as such the 2nd defendant is vicariously liable.

The plaintiff did not contribute to this accident.

The plaintiff sustained injury as a result of the accident that included an amputated right foot - above the ankle joint.

The defendant are liable to compensate the plaintiff.

The two advocates did not have full texts of authorities to rely on.

The plaintiffs advocate nonetheless prayed for a compensation of Kshs.600,000/= for general damages whilst the defendants advocate prayed for Kshs.350,000/-.

I note that defendants advocate sought for a 50% liability. I find that the plaintiff are 100% liable for the cause of the said accident.

As to quantum I find that the plaintiff now walks with an artificial foot.

This had been provided to him free of charge. He is unable to pursue his former employment as a free lance photographer. He has now become a hawker.

I would award General Damages for Pain Suffering & Loss of Amenities at Kshs. 450,000/-

I made no award for Special Damages as this was never pleaded nor proved, neither for loss of earning

as the same has not been proved.

I award the costs of this suit to the plaintiff together with interest from today date.

Dated this 15th day of April, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE