



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Case 53 of 1995**

**MARGARET ACHIENG OPIYO.....PLAINTIFF**

**VERSUS**

**MATIKU KYENGO T/A TAITA EXPRESS.....1<sup>ST</sup> DEFENDANT**

**SIMON GIKUNGU NJOROGE.....2<sup>ND</sup> DEFENDANT**

**Coram: J.W. Mwera J.**

**Mr. Mulu Advocate for Plaintiff**

**Mr. Gichigi Advocate for Defendant**

**Court Clerk Muli**

**JUDGEMENT**

On 16th February 1995 the Plaintiff sued the 2 Defendants herein jointly and severally in damages that arose from a road accident which took place on 14th September 1994. The 1st Defendant is the owner and the 2nd Defendant the driver of motor vehicle KAD 783 Q in which the Plaintiff claimed she was lawfully traveling on the said day along MOMBASA-NAIROBI ROAD.

She pleaded that the 2nd Defendant drove that motor vehicle at such a high speed in the circumstances and with such lack of proper control and management of thereof that he did not swerve, brake or in any way avoid ramming into another motor vehicle no. KMB 989/7944. As a result of this accident the Plaintiff suffered concussion of the brain with severe head injury, fracture of 2 ribs (right side) dislocation of the right shoulder, bruises and abrasions and a compound fracture of the left tibia and fibula that necessitated above-the-knee amputation. She prayed also for costs and interest.

On 16th May 1995 Messrs Mungai & Gakuru Advocates, Nairobi entered appearance for the Defendants. They managed so set aside the default judgment that had been entered and filed a defence. The Defendants averred that the other motorist (in No. KMB 989/7944) wholly or substantially caused this accident. It was also denied that the Plaintiff was a fair paying passenger on the 1st Defendant's bus. Then a 3rd party notice was issued on or about 26th October 1998 to one Blue Pandora Shantilal Panchal quite presumably the owner/driver of motor vehicle KMB 989. It is not on record that that 3rd party was served or he/she entered appearance. It appears that over the period the hearing date was fixed and 24th April 1997 confirmed. But it is not clear when summons for directions were taken out. There are no issues either. But come 24th April 1997 both sides appeared. Mr. Ndonye for the Defendant was not ready. Mr. Mulu had his witnesses from as far as Lunga Lunga and Kisumu. He was ready to go on. The court however granted an adjournment to the defence being condemned to pay the day's costs assessed at Sh. 1,500/-. The

court similarly ordered that the defence pays agreed /taxed witness expenses as well as Sh, 1,000/- court adjournment fee before the next hearing date.

There were other adjournments and a hearing date of 29th January 1998 was taken. Again the hearing could not take off because the defence desired a 3rd party to be joined. The court observed that that ought to have been done earlier and that such reasons necessitating adjournments were causing hardship and expense to the Plaintiff who with her witness had come from Lunga Lunga and Kisumu. The court however granted yet another adjournment directing that the Defendants do pay Sh. 20,000/- to cover Plaintiff's expenses when she came again for hearing in future. This had to be done within the next 2 weeks of 29th January 1998. This was not done. The Plaintiff then fixed a hearing on 16th September 1998 but she was unwell then.

On 5th November 1998 Miss Mbindyo for the Defendants got leave to file and serve a 3rd party notice. The defence in a sort of playing on and off game was ordered to meet costs and expenses to the Plaintiff again. It appeared that even earlier orders in this regard were not complied with. So on the same 5th November 1998 a date of trial, 3rd February 1999 was given in court in presence of both sides. Come that day the Plaintiff was ready with 2 witnesses while the Defendants were nowhere and an ex parte hearing proceeded.

Dr. Onyango (PW1) examined and treated the Plaintiff on 14th September 1994. She was injured and unconscious. He observed head cuts and bruises. She was bleeding and breathing with difficulty. X-rays showed fractured 6th & 7th ribs and a comminuted fracture of the left tibia and fibula. A P3 form (Exh.P 1) was filled by Dr. Obago, a workmate at the hospital where the Plaintiff was admitted. The left leg had to be and was amputated. The good doctor produced his report (Exh, P2) opining that the Plaintiff required an artificial leg whose costs he did not say. The next witness was Japheth Dianga (PW2) an auditor from Kisumu with Messrs Satya Sairam and Company. He prepared the Plaintiff's accounts for the years 1993 and 1994 regarding her shop, saloon and tailoring shop at Lunga Lunga town. That she desired these to enable her assess her position with the income tax department which had introduced personal identification numbers (PIN).

For 1993 PW2 found that the Plaintiff made a profit of Sh. 183,624/-. This worked down to Sh. 15,600/- per month, and deduction of tax put at Sh.2384/- left her with net profit of Sh, 12,918/- per month (Exh.P2), Working on a similar basis 1994 fell the Plaintiff with a net profit of Sh.21.895/- per month (Exh.P3). This witness placed before the court sources of his audit exercise: receipt books, invoices records analysis books, licenses and expenditure lists (Exh.P5A,B&C for 1993 and Exh.P6A,B&C for 1994). He also placed before the court his working sheets (Exh.P7AB).

The Plaintiff, on crutches, took the witness stand. She had come from Kisumu. She was once a businesswoman at Lunga Lunga before the accident. She no longer did that after her leg was amputated after the accident. On the fateful day she sat behind the Defendant's driver in the bus aforesaid going to Nairobi by night. Apparently she was awake. The bus was being driven at a high speed. She could see well ahead of her. She noticed a trailer. Their driver did not slow down. He rammed into it (trailer KMB 989 FLAT). She suffered a crushed left leg that was later amputated, a dislocated right shoulder, broken ribs with cuts and bruises. She produced a police abstract as well as a bundle of receipts for hospital expenses and related ones amounting to Sh.70,879A (Exh.P9).

After submission from the Plaintiff a date for judgment was given on 17th March 1999. On 4th March 1993, the Defendants had filed an application to *set aside* the proceedings of the ex parte hearing of 3rd February 1999. It was dated 2nd March 1999. The court granted the hearing of this application on 17th March 1999. Come that day and Mr. Mulu stated that the previous payments ordered by the court to be made by the Defendants before any trial date had not been made. He put this at Sh.41, 500/- that is expenses and costs. Mr. Gichigi for the Defendants conceded that and still asked for his application dated 2nd March 1999 proceed, He desired that his clients be given more time in which to make the payment. A week could do. All this time judgement was withheld in this case. So on 24th March 1999 Mr. Gichigi returned to tell the court that he had not managed to get his clients to pay up as earlier ordered. The court noted that the defence not being keen to comply with court orders was not desirous of being heard on

any matter and so proceeded to consider the pleadings, the evidence, the law and the circumstances of the case - all incorporated in the determination to follow. Because no issues were formally filed, from the pleadings and the evidence three or so issues lie to be determined: Liability, who bears it and the quantum of damages.

Liability; this court is satisfied that the Defendants, jointly and severally shoulder this. In evidence not rebutted the Plaintiff was a passenger in the Defendant's bus that night. It was being driven at a high speed. Near Konza she noticed a trailer ahead of them. The bus driver neither slowed down nor in any way tried to avoid hitting that trailer from the rear. He hit it and the accident in issue took place. It left the Plaintiff injured as pleaded and put in evidence.

There was an attempt by the Defendants to bring in a 3rd party - the owner of that trailer, But even with leave being granted on that account, the 3rd party notice does not appear to have been served. Accordingly all liability in this suit remains with the Defendants.

By so finding the issue as to who to bear the liability is resolved: The Defendants jointly and severally.

The next is quantum of damages. We begin with special damages. It was pleaded that Sh.82.100/- had been incurred for medical and related expenses, a medical report and a police abstract. Before court receipts were produced (Exh.P9) totaling Sh.70,879/- and this is awarded.

General damages: It was pleaded and evidence showed that in the accident the Plaintiff suffered concussion of the brain. When she got to Dr. Onyango (PW1) she was unconscious. She bled much and had cuts and bruises. The more serious injury was the crushed left leg that had to be amputated (EX.P2). A sum of Sh.1.2 million was proposed. The 2 cases of SILAS NJAGI VS. MUSYOKI NRI HCCC 4092/88 and Hezekiah KIBAGA & ANR VS. KBS LTD NR1 HCCC 3509/89 was cited to guide the court. General damages in those cases were Sh.450.000/- and Sh.700.000/- respectively. On considering this case and in doing its best this court awards the Plaintiff Sh. 600,000/- for pain and suffering.

Loss of Earning Capacity: The Plaintiff told this court that she could no longer run the business she had with her present disability. No doubt she left Lunga Lunga and now lives at Kisumu, The Plaintiff is said to have been aged 34 at time of the accident. That by the last audited report in 1994, she earned Sh.21, 890/- per month from her business. With a multiplier of 21 the award here was worked at Sh.5, 516,280/-.

The Plaintiff did not tell the court her age at the time of the accident or indeed at the time of trial. But P3 form (Exh.P1) and medical report (Exh.P2) put the Plaintiff's age at 34 years at the time of the accident. This court was satisfied that adequate proof was put before it by PW2 the auditor that the Plaintiff made a monthly income of Sh.21, 890/- in 1994 from her tailoring, shop and saloon business at Lunga Lunga. This sum was given as net even after allowing for tax. Working on this basis with a multiplier of 14 gives the Plaintiff Sh.3, 677,520/-. (21890 x 12 x 14)

The total award is:

General Damages        Sh. 600,000/-

Special Damages        Sh. 70,870/-

Loss of Earning Capacity    Sh. 3,677,520/-

TOTAL:    Sh.4,348,399/- (Four Million, Three Hundred Forty Eight Thousand, Three Hundred Ninety Nine Shillings only)

The Plaintiff also gets costs and interest.

Judgement accordingly.

Delivered on 21st April 1999

**J.W. MWERA**

**JUDGE.**