



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1904 OF 1991**

**JESSE NYAGAH KARUAGI ..... PLAINTIFF**

**VERSUS**

**VERMACULITE & ASSOCIATED MINES LIMITED & ANOTHER ..... DEFENDANTS**

**JUDGEMENT**

The Plaintiff sued the 1st defendant, as the owner of the vehicle and the second defendant, as the driver of a vehicle in which he was a passenger in.

The suit was filed on the 19.4.91 (the plaint dated the 16th of April 1991) after leave to file the suit out of time was granted on the 12th of April, 1991.

The defendants entered appearance, filed defence on 23.6.91 and denied that the vehicle was driven negligently. Further, the Plaintiff had embarked on the vehicle with “the clear understanding that it was at his own risk as the vehicle was not authorised to carry passengers or at all”.

Seven points were raised in the agreed issued as signed by the parties on the 16.10.91.

Issue No.1 is whether the Plaintiff was a lawful fare paying passenger in the motor vehicle registration KWK 817?

The plaintiff stated in his evidence stated that:

“I got a lift in the vehicle. I had not paid for the ride.”

From the plaintiffs own admission, that he was not a fare paying passenger but that he got a lift in the said vehicle.

Issue No.2 - whether an accident arose on 11.1.88 involving motor vehicle registration KWK 817?

I find that an accident did occur on 11.1.88 as per the evidence of the witness. The defendant went to the scene fo the accident after receiving news of it - two days later.

The plaintiff produced a P3 form from this.

Issue No.3 whether the said accident arose solely due to the negligence of the 2nd defendant?

The answer to this is Yes.

The facts as given by the plaintiff is that the motor vehicle a lorry pick up was travelling at a great

speed. It carried ten passengers who were adults and two children. As they travelled, he knocked on the cabin roof and requested that the driver slowed down. The driver stopped the vehicle and they managed to adjust some iron poles that had come loose.

Then, as they travelled again on the road that was extremely rough due to the (wash board) or corrugated like ground the driver tried to miss a ditch. He then rolled the vehicle and it overturned.

Two people died instantly. The plaintiff, who was injured, was able to get good Samaritans to ferry him to the next police Post, where he sought assistance. The plaintiff was later admitted to hospital for a month.

The defendant on this aspect of negligence, stated that he did not witness the accident but was just notified of it. He nonetheless went to the scene and site where his business was operated and spoke to the driver.

The driver unfortunately has since disappeared, (a week after the incident occurred.) That was the reason that he was not in court. The plaintiff further stated that no one was authorised to carry passengers. All the drivers were so instructed.

The driver (the 2nd defendant) was in fact quite new and had been employed for 8 days only.

On the above facts I find that the accident occurred solely on the negligence of the 2nd defendant. The defendant through their advocates did not bring the aspect of unlawful passenger.

Issue No.4 whether the plaintiff suffered any injuries?

Yes the plaintiff suffered injuries on his waist and possible concussion.

There was no proof to support this from medical evidence.

Whether the plaintiff suffered loss and damages?

Yes the plaintiff suffered loss and damages. The plaintiff advocate prayed that Ksh.350,000/- be awarded for the wrist whilst the advocate for the defendant said an award of Ksh.85,000/- be given for such injuries. He relied on the case of Z. Rabillo vs Maxwell Ocholla Okinda & Anor Hccc 2655/90.

Whether the plaintiff is entitled to the Relief sought?

I would find that the plaintiff was not a fare paying passenger.

He took the risk to ride in the said vehicle. The same overturned due to the negligence of the 2nd defendant of whom the 1st defendant is vicariously liable for.

If it is true that the 2nd defendant was warned not to carry passengers there is no evidence as to this save what the 1st defendant states. I would not award the relief sought. If I require to compute this it would be Ksh.85,000/-.

Before the trial began the advocate for the defendant applied for leave to amend the defence. This was struck out as the procedure at the said stage was improper.

The intention was to raise the issue that the amendment to the pleading was incorrectly allowed. This was not stated in the defence nor taken up for almost 7 years. I believe the attempt to raise the issue of limitation of time was incorrectly done here. This should have been done at the time of trial - but the same must be pleaded in the defence. In this case it wasn't. The application or leave to amend was brought barely hours before the trial. The 7 years delay was inordinate.

On the issue for Special Damages the advocates for the plaintiff concedes that the same had not been

proved. I hereby make no award as to this heading.

I hereby dismiss this suit with costs to the defendant.

Any award of any for General Damages for Pain, Suffering and loss of amenities would have been assessed at Ksh.85,000/- for an injured fractured wrist.

Dated this 18th day of May, 1999 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**