



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Case 128 of 1989

ATHUMANI SIMIYU PLAINTIFF

- VERSUS-

LUDOVICA MWANDOE1ST DEFENDANT
ARMSTRONG CLEARING AND FORWARDING AGENCY.... 2ND DEFENDANT
MULTIPLE HAULERS.....3RD DEFENDANT

JUDGEMENT

The plaintiff herein filed this case against the defendants seeking damages for injuries sustained by him in an accident involving the defendants' motor vehicle registration number KXQ 469 pulling trailer ZB 467 when the said vehicle lost control and collided with another trailer registration number KQU 172 pulling trailer ZB 17441 The said accident was allegedly due to the negligence of the defendants, their servant and or agent whose particulars were given as a result of the said accident the plaintiff suffered injuries particularized in the plaint for which he seeks both special damages as pleaded and particularized and general damages

The defendants filed a defence after entering appearance and denied that the plaintiff was on 3rd October 1988 traveling as a passenger in motor vehicle registration no. KXQ 467 as alleged and put the plaintiff to strict proof, denied that the plaintiff sustained injuries as alleged, He denied all the particulars of negligence attributed to him, that the claim is bad in law and the same does not disclose any cause of action.

The plaint was amended at a later stage and it introduced the first and third defendant as new parties The first defendant was the accident driver The 2nd and 3rd defendants were sued in their vicarious capacity as they were the owners of motor vehicle no. KXQ 469 ZB 467 and KQU 172 ZB 1744 respectfully while the first defendant was sued as the driver and or agent of the second defendant It is the plaintiff's stand in the amended plaint that the first defendant was negligent and gave particulars of negligence relied on Also gave particulars of negligence of the second defendant Further that it is the plaintiff's case that the third defendant its agent and of driver contributed materially to the accident and the plaintiff shall seek damages in that regard* particulars of injuries were also amended

The 3rd defendant filed a defence aversing that they deny the contents of paragraphs 5 and 6 of the plaint and put the plaintiff to strict proof, made no averments in reply to paragraph 7 of the amended plaint and that it is a stranger to the particulars of negligence set there under, it has no knowledge and makes no averments in reply to the particulars of negligence attributed to the second defendant and further avers that the second defendant as a limited liability company is incapable of negligence perse, denied paragraph 8 of the plaint and further stated that in the absence of specific particulars of negligence the claim against the third defendant is misconceived, mischievous and ought to be struck out without prejudice to the foregoing averred that the third defendant will aver that the third defendant has no knowledge of the alleged accident Or at all and puts the plaintiff to strict proof

The second defendant also amended his defence and denied that the plaintiff was traveling in the said vehicle as a passenger or any how else That no admission was made as to special damages and off a any other damage at all and of for occasioning any injuries or the plaintiff and on that the plaintiff was injured at ail and he is put to strict proof

A total of 5 witnesses testified for the plaintiff including himself, a police officer who produced the investigation file and 3 Doctors who examined the plaintiff and filed medical reports The sum total of the plaintiff s evidence is what they left Mombasa en route to Kampala on a date he cannot recall The vehicle was being driven by the first defendant and on reaching Naivasha they had brake failure but they just welded them and the proceeded on with the journey and on searching the scene of the accident the road had port holes but the first defendant descended at a speed and then he told the plaintiff that the brakes had failed The vehicle hit a culvert and tolled He became unconscious at the time of the accident and regained consciousness at 6.00 pm the same day while admitted at Eldoret District Hospital He was admitted on 3ed October 1988 for a period of 4 months as he was discharged on 27th January 1989

During which time he was |treated as indicated in the medical reports and also attended physiotherapy He sustained injuries listed and incurred expenses as per documents produced He was later On medically assessed as per the medical reports produced

When cross examined he agreed that he knew the brakes were defective and the employees was aware of the defect in the brakes but he just told them to continue with the journey That as an employee he had to obey the orders of his employer That he did not anticipate any problems with the brakes Further that after repairing them at Naivasha he did not examine them till the accident scene and he maintains they were defective as the driver told him that they had failed to hold

The defence called no witness At the end of the whole case the plaintiff's counsel filed written submissions and the key points relied on by them are:

1 That the plaintiff was in the employment of the second defendant and he had authority to be in that vehicle and this has not been challenged by the second defendant as no witness was called to controvert that evidence The defendants are also precluded from saying that the plaintiff was negligent or that he was volenti non fit injurio

2 That the first defendant was served but did not appear neither did he attend the hearing but despite his failure to attend and give evidence it has been shown that he was the driver of the accident vehicle and he was in the employment of the second defendant at the material time

3 That the third defendant was joined to the proceedings by an order of the court but no evidence has been led linking third defendant to the causing of the accident and so they urge the Coust to find that the first and second defendants ate 100% liable for the accident

4 that all the medical reports produced show that the plaintiff suffered extensive injuries

They rely On the case Of STEPHEN OTANGA NANDWA -v- MUMIAS SUGAR COMPANY LIMITED ELDORET BCCC nO.38/93 where the plaintiff suffered multiple scars on the right side of the head, deformity of the right thigh, right leg was short by 3 inches, multiple scars on the right thigh, 2 septic small wounds along the operation scar tight femur is short by 4 inches, chronic osteomyelitis on the right femur which was the source of the current infections of the right thigh, broken tooth on the right upper jaw, walks dragging the left leg and limps with support of a walking stick, he has to put on a special shoe to balance the size of the legs a The court awarded Kshs600,000/ as general damages for pain, suffering and loss of amenities and Kshs100,000/ cost of future medication.

The case of CHARLES AMUSALA AND BAT (K) LIMITED -V- MICHAEL NDUNGU MBURU AND KENYA BUS SERVICE LIMITED NAIROBI HCCC.287/8 where the plaintiff suffered compound comminuted fracture of mid third left tibia and fibula, grossly comminuted and segmented fracture right tibia and fibular The court assessed Kshs600, 000/= as general damages for pain suffering and loss of

amenities and Kshs60, 000/ as loss of earning capacity on the court's assessment of the evidence On the record it is clear that although the third defendant was joined to these proceedings no evidence has been adduced against them All that the plaintiff PW5 remembers was that their vehicle went down hill or descended at a speed and the driver remarked that the brakes had failed, it hit a culvert then it rolled a day before the accident they had repaired the brakes at Naivasha They just welded them It is the driver who was discharge of the vehicles They did Not seek the services of a qualified mechanic to repairs the brakes furthest but they just welded them It has Not been said that the driver was a mechanic and what he did was and line with the approved standards of mechanical engineering it was therefore imprudent for the driver to do what he did instead of getting a properly qualified person to repair the brakes before continuing with the journey He was therefore negligent in putting the vehicle back on the road with defective brakes* The investigation file was produced by PW3 as exhibit 4 The inspection report was not in the possession of the plaintiff and so he could not produce it. These is a copy in exhibit 4 which states that the brakes were holding though not tested on the road In the absence of the brakes having been tested on the road these is nothing to controvert the plaintiff's evidence that they failed leaving that aside, if the vehicle was in good mechanical condition then the first defendant owes an explanation as to why there was an accident It was not pleaded that the same was inevitable and beyond control The plaintiff was a turn boy and was lawfully traveling in the said vehicle in his capacity as a turn boy He had no control over the first defendants manner of driving and he did not contribute to the cause of the accident He is not to blame the first defendant is to blame for putting the vehicle on the road with defective brakes and continuing with the journey before the brakes had been properly repaired He was in the cause of his duties and so he binds his employees and The employees were under duty to ensure that the vehicle was in good serviceable condition before assigning it to undertake any journey They failed to do so as a result of which the plaintiff was injured and so they are liable to compensate him for the injuries sustained The First and second defendants are liable at 100%

Having established liability, I now come to the assessment of damages' Of special damages I only have one receipt from Dr.Aluda for Kshsl,500/ which I allow The other medical claims were not proved as no receipts were produced on general damages these are 3 medical reports (exhibits 5 and 9 by Dr. Gathaiya jumbi and exhibit 1 by Dr.Aluda) The first report is dated 31st January 1989 by Dr.Gathaiya Jumbi, The injuries listed at that time were:

1 Head injury

2 Scalp out 2" long, deep*

3 Multiple superficial and deep cuts both hands with loss of two tails (index and thumb right side)*

4 Multiple superficial cuts over both knees*

5 Fracture left tibia and fibula

6 Potts fracture - right ankle

7 Large wound eight foot

8 Cut 2" long, deep foot

8 The findings on examination are that the plaintiff walked with the help of a heavy stick and he limped badly, he had a scar on the top of the head, many scars on the dorsum of hands, hip right hand index finger and thumb nails were missing, multiple scars on both knees and feet He had a deformity of the tight ankle and foot and a large septic wound The fracture site over the left leg was painful and the foot was swollen Both feet, ankles and the left leg had a lot of pain The x-rays confirmed the fractures mentioned above

The complications were osteoarthritis of left ankle, osteoarthritis of right ankle osteoarthritis of right tarsal bones, ulcer of the right foot, deformity of the right ankle and foot, malunion of tibia and fibula

(left)

Is the Doctors opinion the osteoarthritis is not likely to heal and is likely to get worse with age and it must be treated for life osteomyelitis will give a high mobility rate sometimes for life it too needs treatment for life if control fails The foot ulcer is likely to heal but it is difficult to time it accurately The fractures will heal with the complication listed above The other injuries will heal fairly well as a manual worker he will be unable to do any heavy duties either personal or on employment! His permanent incapacity was estimated at 40% and temporary incapacity was assess as equivalent to six months He was still on treatment which might cost Kshs100,000/=

The next report was by Dr. S.I. Aluda dated 26th June 1991 it lists 14 injuries:

- 1 Head injuries 4 He was unconscious immediately after the accident and regained consciousness about 9 hours later while on treatment at the hospital this means that he sustained a brain concussion during the accidents
- 2 The scalp was swollen and tender with bruises
- 3 He sustained a cut wound on the parietal region of the head about 2" long
- 4 The face was swollen and tender
- 5 Both fore arms were swollen and tender with bruises, lacerations and cut wounds
- 6 Lost two nails of the right thumb and right index finger
- 7 Both knees were swollen and tenders with superficial out Wounds
- 8 The left leg was swollen and tender with bruises and Lacerations
- 9 He sustained fractures of the left tibia and fibula
- 10 The sight ankle and light foot were swollen and tenders with bruises, lacerations and out wounds*
- 11 The sight leg was swollen and tender with bruises and lacerations
- 12 He sustained potts fracture (fracture of the tibia and fibula at the distal end) of the right foot
- 13 A dislocation of the right ankle joints
- 14 The right foot was swollen and tender with bruises, lacerations and a large deep cut wound 2" long and 2" deep

The treatment received was that all bruises and lacerations were cleaned and dressed, cut wounds were stitched and dressed, skin grafting was done on the right foot, fractures on both legs were manipulated and P.O.B.S applied a Reduction of the dislocation was done with poor results

The findings on examination were occasional headaches and dizziness, scars on the scalp, both fore arms, both knees and both legs Tenderness in both ankles and feet due to osteoarthritis, sustained fractures of the left tibia and fibula, sustained fractures of the right tibia and fibula, large depression scar on the right foot and the right ankle is deformed.

In the Doctors opinion the injuries sustained were severe and were healed but for the occasional headaches and dizziness and occasional pain in both fore arms, both knees and both legs which subside with the use of analgesics, the pains in both ankle joints are persistent due to osteoarthritis, has limited movements in the joints and this will remain a permanent disability in him He is limping when he walks

The right ankle is deformed, the fractured lower limbs have healed with some deformity and this will remain a permanent feature on his body, the scars in the above named regions will remain a permanent had a scar on the top of the head, many scars on the dorsum of hands, his right hand index finger and thumb nails were missing, he had multiple scars over both knees and feet He had a deformity of the eight ankle and foot The fracture site over the left leg was painful and the foot was swollen Both feet, ankles and the left leg had a lot of pain and the rest of the examination was normal

The complications noted were:

- 1 Osteoarthritis of left ankle
- 2 Osteoarthritis of right ankle
- 3 Osteomyelitis of right tarsal bones
- 4 Scars on right foot
- 5 Deformity of the right ankle and foots
- 6 Malusion of tibia and fibula (left)

7 Osteoarthritis of left knee in the Doctor's opinion osteoarthritis is not likely to heal It is likely to get worse with age It must be treated for life Malunion of fracture is permanent It causes permanent deformity of the bones involved a Deformity of the right foot is also permanent On disability the Doctor stated that the plaintiff as a manual worker will not be able to work as a manual worker He will be unable to do any heavy duties either personal on on employment His permanent incapacity was estimated at 40%Temporary incapacity was assessed at equivalent to six months He is still on treatment and he will require corrective surgery which may cost him Kshs350,000/a

All the three medical reports agree of The following injuries:

- 1 Head injury with brain -concussion
- 2 Multiple bruises, lacerations, cuts, deep cuts on The scalp, parietal region of the head, both hands, knees, legs aid feet
- 3 Fractures of the left tibia and fibula
- 4 Fracture of the right ankle at the distal end of The right tibia and fibula

The complaints as at the time of trial are feels dizziness and he does not work considering the injuries sustained by the plaintiff and their effect on his activities, I make the following assessment

- 1 Head injury with brain concussion Kshs30,000/=
- 2 Multiple bruises, lacerations, cuts, deep cuts on the scalp, parietal region both hands, both knees, legs and right foot KshS 60,000/=
- 3 Fracture of the left tibia and fibula Kshs295,000/=
- 4 Polls fracture of The right ankle involving The fracture of both right and left tibia at The distal end - Kshsl80,000/=•

I therefore enter judgement for the plaintiff against the first and second defendants jointly and severally on The following terms:

46 Special damages of Kshs 4,500/= with interest at court rates from the date of filing until payment in full

2 General damages for pain, suffering and loss of amenities -

(a) Head injury with brain concussion Kshs 30,000/

(b) Multiple bruises, lacerations, cuts, deep cuts on the scalp, painful region, both hands, both knees, legs and right foot Kshs60,000/

(c) Fracture of the left tibia and fibula Kshs 295,000/

(d) Polls fracture of the right ankle involving the fracture of both right and left tibia at the distal and Kshs480,000/ Total Kshs565,000/ with illness at court rates from the date of judgement until payment in full

3 Costs of the suit a

4 The claim against the third defendant is dismissed with costs to the third defendant

Dated at Eldoret this 30th day of August 1999

Read and delivered at Eldoret this unit day of 4th June 1999

R NAMBUYE,
JUDGE