



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

**MILI
MAN
I
LAW
COURTS**

CIVIL CASE NO. 2283 OF 1995

FRANCIS MUNYUA WANYOIKE PLAINTIFF

VERSUS

SOBHAGCHAND GOSAR SHAH DEFENDANT

JUDGMENT

The Plaintiff gave evidence in which he stated that he worked in a “Jua Kali” garage where vehicles are repaired. He saw one whose name he could not recall, on the morning of 24th July, 1994 drive in with a lorry vehicle registration number KWC 098. He was requested to repair the wiring work in the vehicle as the said driver had no moneys they both agreed that they would travel together to the drivers employer to collect the funds.

The said plaintiff agreed to this. As the said motor vehicle lorry reached the Ring Road but before reaching Pangani area the vehicle, which was driven at a high speed collided with a bus from the rear. It was the Plaintiff side that got damaged and as a result he sustained injuries. He was duly admitted to the Kenyatta National Hospital whereby he sustained a compound fracture of the Tibia and Fibula, fracture of the right femur condyle and a sprain of his right shoulder.

The Plaintiff filed suit against the defendant as the owner of the said vehicle. The defendant did not appear before the court to give evidence. The defence stated that the said motor vehicle lorry had been stolen by an employee by name of Francis Maina Wanjiru. He was not authorised to drive the same and as a result the defendant was a stranger to the said allegations.

Further the defendant had intended to take out 3rd party proceedings against the said Francis Maina wanjiru and pleaded particulars of negligence against the said driver.

The said 3rd party proceedings were never taken out. Francis Maina Wanjiru was never joined to be a party to these said proceedings.

The Plaintiff denied that he had any knowledge that the vehicle was stolen. All he knew is the driver of

the said vehicle had engaged his services and was taking him to be paid before he began that work when the accident occurred.

I believe that the defendant had a good defence. Namely that a 3rd party was an unauthorised driver. But it is not enough to state this in the defence. This allegation must be proved. The defendant himself has not come to court to allege this, nor has he brought any witness to prove that negligence was attributed to a 3rd party. If the defendant was serious 3rd party notice and proceedings ought to have been taken out soon after August 1995. It is now 1999 and no such proceeding had been applied for.

Was this 3rd party charged with unlawful use of a motor vehicle? Such ought to have been the defence evidence - they raised such defence, they should prove it.

As such I would compute liability against the defendants in this case at 100%

As to quantum, the plaintiff stated that his legs were broken and he was injured on his right shoulder. The plaintiff failed to produce his medical reports through a doctor. His advocate relied on the "case summary" put in by consent of the parties from Kenyatta National Hospital. This case summary spoke of the plaintiff aged 35 years old on 4.10.94 as having a compound fracture on the left tibia and fibula. A fracture of the medial right epicondyle.

His history was that he was knocked by a vehicle.

The extent of the injuries and its consequences is unexplained.

I am satisfied that the plaintiff sustained injuries.

I would note that the plaintiff's advocates relied on the case of

1. David Mutwii Kimotho V Nelson Boaz Ayatta Otieno Hccc 345/88
2. Francis Baraza Simiyu V. Joseph Makamu Hccc 2986/86.

The advocate stated that Hon. Justice Msagha Mbogholi awarded a sum of kshs.400,000/- the two cases on two broken legs.

I note that for the former case he in fact awarded kshs.350,000/- and Kshs.400,000/- for the latter case.

I would think in this instant an award of Ksh.100,000/- for General Damages for Pain, Suffering and Loss of Amenities is sufficient in light of the evidence before me.

As to Special Damages I find that the Plaintiff has provided proof for the medical report at Ksh.1,500/-, medical expenses at 1,650/-. Total of Kshs.3,150/-.

I find there is no other expenses proved.

I hereby enter judgement for the plaintiff in the sum of Ksh.100,000/- General Damages, Ksh.3,150/- Special Damages, total Kshs.103,150/-.

I award costs of this suit to the plaintiff, interest from the date of judgement on the General Damages and interest of Special damages from the date of filing suit.

Dated this 2nd day of June 1999 at Nairobi.

M.A. ANG'AWA

JUDGE

