



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS**

CIVIL SUIT NO. 2234 OF 1993

IDRIS KIBIRANGA PLAINTIFF

VERSUS

INCAFEX HAULIERS E.A. LIMITED DEFENDANT

JUDGMENT

The case before me is for damages on injuries sustained in a motor vehicle accident by the Plaintiff.

I say so because the circumstances are indeed most strange.

According to the Plaintiffs story, he is a Ugandan National. He is a business man. In November 1991 he was at Kampala and was making his way to travel to Nairobi when he met DW1, the driver of the motor vehicle lorry UPE 804. This driver knew his father who was also a driver. It seems he owed the Plaintiff some moneys and reassured him that he would be paid in Nairobi. He invited him to accompany him in the said vehicle to travel to Nairobi. They were three of them PW1, (plaintiff), DW1 (driver) and the turnboy.

The driver drove the whole night non stop from Busia to a place called Mai Mahiu a little town just before one reaches the Narok road turn off to go to Masai Mara from the Mount Longonot Naivasha road. This is at the bottom of the escarpment.

The reasons they stopped there at 4.30 a.m. was the drivers fear of bandits and the then poor state of the road that was full of “pot holes”.

The driver asked he go out to sleep. He, the driver slept in the cabin after giving him a bed sheet cloth.

In the morning at about 6.00 a.m. the plaintiff felt the vehicle run over him once and then back again when people began shouting to the driver to stop. He the plaintiff then fainted. The driver drove him to Kenyatta National Hospital where he was admitted.

The Plaintiff stated that it was true that the defendant had visited him a couple of times in hospital to confirm that he had not died.

The defendants driver DW1 stated that it was true he knew the plaintiffs father who was also a driver. That the plaintiff had requested him for assistance. It was then that he agreed to give him a lift to Nairobi from Kampala. He admitted that it was wrong to give lifts to passengers but that he did so as to a co-workers relatives.

Nonetheless he had been since given a warning in this matter.

It was true he said that they drove up to Mai Maihu where they had in fact stopped the vehicle. Both the plaintiff and the turn boy went out of the vehicle but he did not tell them where. It was then that he slept. In the morning the watchman woke him up and told him that a vehicle in front of him wanted to get out. If he could reverse the said vehicle. Then DW1, reversed the vehicle. He heard screams and there found that he had run over the plaintiff.

He had no ideal that the plaintiff was under the vehicle.

It was too far to go back to Longonot to make a report to the police. He drove to Nairobi. On the way he found police men who made a report to but they encouraged him to make a report at the Kenyatta National Hospital - police Post or station.

This DW1 did.

He denied that he was in any way negligent in this case

The plaintiff sustained injuries on his pelvis. It seems that he was admitted for 45 days and placed on traction. He was later referred to physiotherapy once a month.

He then made his own investigations and discovered that the accident had not been reported. He found out that the insurance of the defendants had sued the 1st defendant INCAFEX HAULIERS LTD said by the plaintiff to be a Ungadan counter part of the 2nd defendant.

The defendants No.2 filed defence and stated that the negligence was attributed to the plaintiff. He ought not to have been sleeping underneath the vehicle

The statement of agreed issues are answered as follows:-

On Issue No.3 and 4 I find that the said motor vehicle lorry was driven at times by the defendants authorised servant one Kanyima Abubakar. As a result the plaintiff sustained injuries.

The Plaintiff was not hit by the said motor vehicle on 20.1.91 of the Nairobi-Mombasa road. In fact there was no pleading or evidence mentioning this road. What the evidence discloses under issue No.7 is that the plaintiff slept under the said motor vehicle.

I find that this was without the knowledge of Kanyima Abubakar. The impression that I got from the plaintiff is that perhaps the driver, DW1, was trying to kill him due to moneys owed. I have seen DW1's demeanour and he does not appear to be such a man to intentionally run over the plaintiff. When DW1 was moving the vehicle he did so to make space for the other vehicle to go by. He was not going as if he was starting the journey. If he did so, then it would mean that the turnboy would have had to participate.

I believe that the accident was not occasioned by the negligence of the defendants driver and or servants.

If one looks at the plaint, the particulars of negligence set that the vehicle was being:-

- a) [Driven] at an excessive speed in the circumstance. b) Failing to apply brakes in time or at all or so to controll the said motor vehicle so as to avoid the said accident.
- c) Failing to have any or any proper regard for the safety of other bad users particularly the plaintiff.
- d) Failing to keep the said motor vehicles in a good proper state of repairs.

In their evidence the above particulars of the evidence was totally contrary one to the other.

The defendants driver never was speeding. He was stationary. The vehicle hardly moved.

The particulars of negligence by the defendants is more in line with the evidence on their part.

I find the particulars stated:-

“ i) Sleeping under a parked vehicle and or trailer when the same was unsafe and dangerous to do.

ii) Sleeping under a parked vehicle and or a trailer during the period from sunset and sunrise when the same was unsafe and dangerous to do so.

iii) Failing to have any or any proper regard for his own safety vehicle being present near a high way used by heavy commercial vehicles.

iv) failing to take any or any proper step so as to avoid being struck or hit by a vehicle or a trailer while being or on a highway.

v) Failing to have any or any sufficient regard for other users or the highway

vi) While bearing near or on the highway during the period from the sunset and the sunrise without a warning light and reflective“

It is not normal for a prudent man to go and sleep underneath a trailer lorry at night. A prudent man who has no where to sleep would sleep in the cabin or at the verandas of the shops.

Even if the plaintiff choose to sleep under the lorry trailer he ought to have slept in such a way that the two wheels were clear of his body.

His action most certainly show that he was negligent in sleeping under the said lorry.

On the issue of the diver instructing him to sleep under the lorry (which is denied), the plaintiff obeyed faithfully and did what he was told. If this was true, then the Defendant's driver should have first checked to see that the plaintiff was no longer there. I do not think the plaintiff would have been asked to sleep under the lorry trailer.

On the issue that the plaintiff was an unlawful passenger this does not arise as at the time of the accident the plaintiff was outside the vehicle and was not a passenger at the material time.

Issues No.1, and 2 were never mentioned or canvassed, namely whether the two defendants were the registered owners of the said motor vehicle.

Also not canvassed was para 4 of the defence on the aspect of Limitation of Actions Act whereby the Plaintiff was amended long after three years was up for bringing this action. This aspect, though pleaded, was never canvassed by the advocate for the defendant.

I hereby find that the plaintiff in this case has not proved his case on a balance of probability. I dismiss this suit with costs to the defendant.

In the event that the plaintiff ought to have been awarded damages I would hold out that he substantially contributed to his negligence at a ratio of 50% to 50%.

I would also hold that an award for Pain, Suffering and Loss of Amenities to be Kshs.400,000/- as reasonable. 50% would have been Kshs.200,000/-.

I would have awarded costs and interest of this suit from the date of judgement.

I decline to make any awards under Special Damages as this has not been specifically proved.

Dated this 9th day of June,1999 at Nairobi.

M.A. ANG'AWA

JUDGE