



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Case 31 of 1997**

**FREDRICK NABACHENJA .....PLAINTIFF**

**-versus-**

**GIAN SINGH BANDAL.....DEFENDANT**

**JUDGMENT**

The plaintiff herein has sued the defendant seeking damages both special and general arising from an accident involving him and a vehicle of the defendant which was being driven by an employee of the defendant in the course of his business. The plaintiff was also traveling in the said vehicle as an employee of the defendant in the course of his duty. It is further averred in paragraph 4 of the plaint that it was a term of the contract of employment between the plaintiff and the defendant and or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment not to expose the plaintiff to a risk to damage or to injury of which they knew and ought to have known and to provide a safe and proper system of working and effective supervision of the same and a safe system of transportation. That on or about the 1.11.94 the plaintiff was lawfully on duty traveling in a company vehicle KYN 626 along Nakuru-Eldoret road when due to the negligence of the defendant his driver and or that of the other employee the motor vehicle had a tyre burst thereby injuring the plaintiff seriously. That the said accident was caused by breach of an implied term of the contract by the defendant and gave particulars of the same.

The injuries sustain were also particularized.

In their defence the defendant denied the particulars of negligence and injury attributed to them without prejudice to the foregoing averred that motor vehicle registration No KYN 626 was in a proper mechanical condition and if an accident ever occurred as alleged in the plaint then the same was occasioned by an act of God.

In the reply to the amended plaint the defendant averred that if any injuries were suffered by the plaintiff necessitating an artificial limb then such injuries were occasioned by an Act of God and denies the particulars of an artificial limb, arrears of pay and shall put the plaintiff to strict proof thereof.

The sum total of the plaintiff's evidence is that he was in the defendants vehicle traveling from Nairobi to Kitale on reaching at Eatec near Eldoret Town the driver accelerated then a tyre burst, the vehicle hit a bridge and overturned.

According to him he was injured on duty and so he has to be compensated. He concedes that the he was paid workmans compensation. The defence evidence was adduced through the accident driver. The sum

total of his evidence is that they were on duty from Nairobi to Kitale when on reaching near CPC Eldoret had a tyre burst the vehicle hit a bridge and then overturned. The plaintiff was among the passengers and he was injured. It is his stand that the vehicle was in good order as they had put new tyres 2 weeks back. He does not know what caused the tyre burst but it could be a factory fault, that they were not speeding as it was heavily laden. When cross-examined he said that he tried to control it and that is when it hit the bridge and overturned, agrees that he was descending at a speed of less than 80 kmph.

DW2 a partner in the defendants company testified that before dispatching the accident vehicle they made sure that the tyres were in good order and the same was mechanically fit. The vehicle was inspected but they were not at fault as they were not prosecuted. That the tyres burst could be due to a factory fault.

When cross-examined he said he does not have records to show that their vehicle was being serviced regularly, he does not have the inspection report and they did not send the remains of the tyre to the factory to find out the defect, he is not aware of any traffic proceedings going on.

At the close of the whole case counsel for the plaintiff filed written submissions to the effect that the defendants driver was negligent as he was descending at a speed of 80 kmph.

2. There is no evidence that the tyre had a factory fault as they had been used for over 2 weeks.
3. Since the service documents and inspection report were not produced it shows that the same were unfavourable to the defendants case.
4. That the circumstances of this case show that the defendants are 100% to blame for the accident.

On quantum counsel for the plaintiff submitted that the plaintiff be paid 80,000.00 for the artificial leg, and 1000.00 for the medical report 1,000,000.00 for pain and suffering and Kshs 1,200,000.00 for loss of earnings using a multiplier of 20 years at a salary of 5,000.00.

The defence counsel filed submissions to the effect that the plaintiff failed to prove his case on a balance of probability as this was a case where an accident occurred or happened beyond the control of the driver.

2. That a tyre burst for no apparent reason at all as there is evidence that the tyres was hardly used and in good condition.
3. The plaintiff failed to adduce any evidence as to why the tyre should have burst.
4. That the motor vehicle was not overloaded and it was traveling at a normal speed. It was regularly serviced and the tyres were checked. The defence relies on the case of Karanja Kago v Karoki Njenga and Edward James Mungai – Nairobi C.A. No 1/79. In this case the vehicle driven by the defendant/respondent had a tyre burst causing it to collide with another oncoming vehicle in which the plaintiff appellant was travelling as a passenger. The claim was dismissed. The appeal was also dismissed because it had not been pleaded that the defendants driver overtook dangerously and that the bus was overtaking another vehicle when it was not safe to do so, it was not suggested to the driver that the accident was caused that way and that the same was an after thought.

2. That the tyre burst placing the bus off course and out of control. There was evidence that the tyre although in good order or condition had burst. The court of appeal upheld the learned trial judge finding that the accident was inevitable.

On the courts assessment of the evidence adduced there is no dispute that the plaintiff was an employee of the defendant. He was travelling on duty from Nairobi to Kitale where he had gone to collect spares. There is also no dispute that he was travelling in the defendants motor vehicle driven by the defendants employee DW1. There is no dispute that an accident occurred on the material day and the plaintiff was injured and also there is no dispute that the cause of the accident was a tyre burst. Although PW1 said that he does not know what caused the tyre burst in his evidence it is pleaded that they failed to prevent a tyre

burst. The plaintiff also relies on the doctrine of respondent ipsa luquitor. This doctrine shifts the burden of proof on to the defendant to disprove negligence. The stand of the defence is that the tyres were new and they had also services the vehicle hence the reliance on the cited authority. As noted earlier the court of appeal in the cited case upheld the finding of the learned trial judge because it had not been pleaded that the defendants driver drove dangerously, that the tyres were in good condition but still they burst that as a result of bursting the bus went of course and collided with another oncoming vehicle. The facts of the cited case are distinguishable from the facts in dispute herein.

1. Therein there was a witness who testified that the tyres were in good condition an independent witness besides the driver. While here there was no such witness, there was no documentary proof that the tyres were in good condition, that the vehicle had been serviced regularly.
2. The doctrine of respondent ipsa loquitor was pleaded. In the cited case it was found that there was some ailment of negligence and the doctrine shifted the burden on to the defendant to explain, that they were not negligent.

The court was satisfied that that burden had been discharged which finding was upheld by the court of appeal. Herein that doctrine was pleaded, it shifted the burden on to the defendant to prove that the tyres were good which they have not done. There was no inspection report to the effect that the vehicle had been serviced regularly. There was no happening before the bursting of the tyre and there is no allegation that the driver did anything to prevent the vehicle from rolling and to bring it to a safe standing. It was not suggested by the defence that that doctrine is not applicable here. I therefore find that the burden shifted on to defendant has not been discharged.

The plaintiff was a passenger and he had no control over the manner of driving and so he did not do anything to cause the accident. There is also nothing to show that the accident was a result of an Act of God as there is nothing to show that the vehicle was regularly serviced and that the tyres were new. These are not matters which can be proved orally but can only be proved by production of the relevant documents.

On the assessment of damages there is a claim of 1,200/- for the medical report which is allowed. A claim for 80,000/- for the artificial leg which was recommended by Dr Kattam assessed at Kshs 80,000/- to 120,000/-. He pleaded 80,000/- eighty thousand shillings only. The plaintiff has had his leg amputated and so he needs the artificial leg in order to move. I allow the amount pleaded.

On general damages there are two medical reports exhibit 2(a) dated 18.4.96 which notes that the right lower limb was amputated at the level of the hip and there is evidence of surgical scar of about 25 cm long and 1 cm wide that is well healed.

The injury was classified as grievous bodily harm and the degree of permanent incapability is 70%. He will require a complete artificial leg and will continue to suffer from random pains and has to adopt to the inconvenience of sleeping on one side.

The second report is exhibit 3. It lists the following injuries:

1. Blunt injury and bruises to the head in 2 places. He suffered loss of consciousness.
2. Crush injury to the right leg. Profuse pleading shock and loss of consciousness. The leg was amputated from the hip joint. The wound healed and he was discharged home on crutches.
3. He is one legged with right leg missing from the hip joint.
4. He limps on his left leg with the support of 2 crutches.
5. He had healed scars on his left legs shin and dorsum

6. Medical records show he was admitted at U.G Memorial Hospital.

In his opinion the victim suffered head injury, brain concussion and loss of consciousness, multiple crutch injury to his right leg leading to amputation, permanent disability was assessed at 70%. He was recommended to get an artificial limb.

The plaintiffs counsel referred the court to the case of Africanus Wanja Ouma v Kenya Bus Service Msa Ltd and Another MSA HCCC No 177/89 where the plaintiff aged 35 years at the time of accident sustained injury while he attempted to board the defendant bus. He fell off when the bus sped off before he could properly get onto the bus. He sustained head injury of the mild concussion type and soft tissue injury to the leg. The plaintiff was in hospital for a period of 4 days and was discharged to attend out patient treatment. The plaintiff's wounds became septic after a period of about one year. He attributed this to the lack of funds to purchase the required medicine for treatment. The leg became swollen and had developed a chronic ulcer and oedema of the foot. He was recommended for amputation of the leg if his life was to be saved. The leg was subsequently amputated (level of amputation and side of leg involved not stated).

The court awarded general damages for pain suffering and loss of amenities assessed at 550,000/-, loss of earnings capacity assessed at Kshs 250,000/- and cost of prosthesis as Kshs 100,000/- total Kshs 900,000/-.

The case of Preston Mwasaga Deche v Wilfred Mbwika & Another Msa HCC No 9 of 1992 where the plaintiff aged 30 years and employed as a cook at the hotel sustained injuries in a road accident. He suffered multiple fractures of the right leg which had to be amputated below the knee and lacerations at the lateral side of the right ankle. He was admitted in hospital for a total period of 4 months. He had been left with keloid scars at the ankle joint and walked with crutches. The plaintiff subsequently lost his employment and could not find any by the time of trial.

The court assessed Kshs 480,000/- for pain suffering and loss of amenities, cost of prosthesis, artificial leg Kshs 100,000/- and loss of earning using a multiplier of 10 years which came to Kshs 420,000/-. The total came to Kshs 1,000,000/-.

The defence counsel cited no authority but suggested a normal figure of Kshs 40,000/-. Further added that the workmans compensation paid was sufficient. This court is alive to the fact that payment of workmans compensation is no bar to subsequently proceedings. All that needs to be done is that the subsequent award has to suffer deduction of the workmans compensation award.

The plaintiff herein was a messenger at his place of work. He is now an amputee. He cannot run errands like other messengers. He was not dismissed from employment but he says that there was no need to go back as he could no longer perform that kind of work. He is now an amputee and no doubt the injury sustained has altered his lifestyle for which he seeks compensation.

There was a claim for loss of future earning added in free hand but no evidence was adduced by production of documentary proof showing how much the salary per month was. The terms of his employment his terminal benefits. It was alleged he earned 5,000/- per month but in the absence of proof or evidence to that effect there is no basis for making an assessment for loss of earnings damages. However this court takes note that had it not been for the accident the plaintiff would have continued in his employment and he may have boosted his salary or income. He would have improved his station in life for himself and his entire family. The boosting of income or earnings would have been either with the same employer or he would have gone to seek green pastures elsewhere. The accident has therefore sealed his employment chances.

Considering all the relevant factors herein, the nature of the injuries, their effect on his activities including the fact that he cannot engage in any employment and he is a liability to his family, considering the fact that his disability was assessed at 70% for pain suffering and loss of amenities.

I therefore enter judgment for the plaintiff on the following terms:

1. Special damages of Kshs 1,200/- with interest at court rates from the date of filing until payment in full.
2. Costs of prosthesis (artificial leg) Kshs 80,000/- eighty thousand with interest at court rates from the date of judgment until payment in full.
3. General damages for pain suffering and loss of amenities Kshs 750,000/- less workmans compensation of Kshs 96,000/- leaving a balance of Kshs 654,000 with interest at court rates form the date of judgment until payment in full.
4. Costs of the suit.

Dated at Eldoret this 22<sup>nd</sup> day of June, 1999.

R Nambuye

Judge.

22.6.99

Read and delivered at Kitale this 8<sup>th</sup> day of July 1999.

R Nambuye

Judge