



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 28 of 1996

JANE WAMBUI KAMAU..... PLAINTIFF

VERSUS

DOUGLAS NJUE KURIA DEFENDANT

CONSOLIDATED WITH

HIGH COURT OF KENYA
AT EMBU

CIVIL CASE NO.35 OF 1995

JAMLICK MATENE..... PLAINTIFF

VERSUS

DOUGLAS NJUE KURIA DEFENDANT

CONSOLIDATED WITH

HIGH COURT OF KENYA

CIVIL CASE NO. 40 OF 1995

JAMES WAITITU NG'ANG'A PLAINTIFF

VERSUS

DOUGLAS NJUE KURIA DEFENDANT

CONSOLIDATED WITH

HIGH COURT OF KENYA
AT EMBU

CIVIL CASE NO.41 OF 1995

PETER MUREITHI MUNENE PLAINTIFF

VERSUS

DOUGLAS NJUE KURIA DEFENDANT

CONSOLIDATED WITH

HIGH COURT OF KENYA
AT EMBU

CIVIL CASE NO.4 OF 1996

PETERSON WAWERU NDEGE PLAINTIFF

VERSUS

DOUGLAS NJUE KURIA DEFENDANT

JUDGMENT

These cases were all consolidated on the 4th November, 1998 when they were called out for hearing. The reason for consolidation is that they arose from one road traffic accident involving motor vehicle registration No. KAA 204 Q a Toyota Hiace in which they were traveling on 23rd April 1995 as fare paying passengers. In these proceedings all the plaintiffs were represented by Mrs. WANGARI MWANZIA Advocate while the Defendant DOUGLAS NJUE KURIA was represented by Mr. KIBIRA from the law firm of M/S MATHENGE & MUCHEMI Advocates.

JANE WAMBUI KAMAU is the plaintiff in this case No. 28 of 1995.

I will refer to her as the "First Plaintiff". She instituted this suit against the defendant through a plaint dated 23.10.1995 and filed the following day. The claim is for general and special damages for injuries she sustained in the said accident.

JAMLICK MANENE is the plaintiff in HCCC No. 35 of 1995. I will refer to him as the "Second plaintiff". He instituted this suit through a plaint also drawn up on 23.10.1995 and filed on the 24.10.95. He also claims general and special damages for injuries he sustained.

JAMES WAITITU NG'ANG'A is the plaintiff in HCCC NO. 40 of 1995. I will refer to him as the "third plaintiff". He instituted this suit for general and special damages in a plaint drawn up on 16.11.1995 and filed the following day.

PETER MUREITHI MUNENE is the plaintiff in HCCC NO. 41 of 1995. I will refer to him as the "Fourth plaintiff". He instituted this suit for general and special damages through a plaint drawn up on 16th November, 1995 and filed the following day.

PETERSON WAWERU NDEGE is the plaintiff in HCCC NO. 4 of 1996. I will refer to him as the "Fifth plaintiff". He instituted this suit for general and special damages through a plaint drawn up on 29.12.1995 and filed on 8.1.1996.

On the issue of liability, which is common to all these cases, each of the plaintiffs gave evidence.

The first plaintiff told the court that on 23.4.1995 she boarded motor vehicle Reg. No. KAA 204 Q, which I shall refer as "TOYOTA HIACE" at a place called KIMBIMBI intending to go to NGURUBANI, where she stays. She sat on the third seat from the driver's seat. She recalled that the driver then drove the Toyota Hiace very fast. As a result of that it veered off the road and landed

into a ditch on the left side of the road. It did not collide with anything. In any case there were no other vehicles on the road at that time. Due to the impact, she sustained injuries to the right of her shoulder.

In cross-examination she told the court that the accident occurred 1/2 km after Kimbimbi matatu stage after the first bump. She could not tell the cause of the accident, but added that the Toyota Hiace did not overturn.

The second plaintiff told the court that he had also boarded the Toyota Hiace at Kimbimbi stage on his way to Ngurubani. He sat at the front. He said that before the accident the Toyota Hiace was being driven very fast. There was no obstruction in front to distract the driver. Then suddenly the vehicle veered off the road and landed into a ditch. It did not overturn but hit a culvert. He sustained injuries as a result of that accident.

In cross-examination he told the court that the vehicle was being driven very fast before the accident.

The third plaintiff gave evidence of how he also had boarded the Toyota Hiace at Kimbimbi stage intending to go to Ngurubani. The time was about 8.00 p.m. but it was a bit dark. He said it was a straight road but there were bumps. Along the road the Toyota Hiace was being driven very fast, veered off the road to the left and hit a culvert. He sustained injuries.

In cross-examination he said that he was seated on the fourth seat behind the driver, could see in front properly because there were other people in front but the vehicle was being driven very fast.

The fourth plaintiff repeated the same evidence that the Toyota Hiace was being driven fast before it veered off the road. In cross-examination in particular this plaintiff had this to say: "I had the full view of the road in front. The driver was not trying to avoid any head on collision with any vehicle. There was no other vehicle along the front. As a driver I could tell the vehicle was being driven fast because even after I closed the windows I could still hear wind passing fast. I would estimate the speed to have been about 100 km per hour". The fifth plaintiff told the court that he was seated on the second seat from the driver; that the driver lost control and veered off the road to the left and hit a culvert. The vehicle traveled for about 100 meters before hitting the culvert.

The defendant called his driver JAMES WAMBUGU KURIA as his witness. This witness said that he was indeed driving the Toyota Hiace about 8 pm along Ngurubani/Kimbimbi road. After leaving Kimbimbi he met oncoming vehicles at a place called Ngurubani. One vehicle was driven directly towards him. He then swerved off to the left and accelerated to avoid being hit by that vehicle. He managed to control it but he entered into a culvert whose presence he had not known. He denied having been driving fast. He estimated the speed at which he was driving at 75 km per hour.

When cross-examined, he said that he had seen the vehicle which had come directly towards him when it was still far, about 100 meters but then it was on its lane. Then when they were about to bypass each other, the other vehicle suddenly swerved to his lane and he had to avoid a head-on collision by swerving off. He said he also did not apply brakes as this would have resulted in a head-on collision.

I have taken that evidence into account. I find the explanation of the defendant's driver not convincing. After he had seen the oncoming vehicle driving directly towards him it was required of him to slow and stop by braking and pulling aside, but not to accelerate and meet it. If that is what he did, his manner of driving was dangerous.

There is evidence from the plaintiff to the effect that the defendant's driver drove the Toyota Hiace at high speed, before the accident, that there was no oncoming vehicles at that time of night, that he lost control due to that high speed and veered off the road, driving for another 100 meters before

hitting a culvert. That kind of driving was dangerous to other road users and I hold him liable for this accident. I assess his degree of liability at 100%.

As the defendant's driver, driving the Toyota Hiace in the course of his employment and within the scope of his duty, I hold the defendant vicariously liable, liability being assessed at 100%.

I now propose to deal with quantum of damages in respect of each case.

1. HCCC NO.28 OF 1995 As I have already stated above, this is the case filed by the first plaintiff against the defendant for general and special damages. On General damages the first plaintiff told the court that she sustained fracture of the collar bone and was admitted at Kerugoya District Hospital for one week and half. She had also sustained injuries to the 1st, 2nd and 3rd ribs. She presented to court a discharge abstract (Exhibit 1) from Kerugoya District Hospital and a Medical Report dated 16th January, 1996 from Dr WOKABI (Exhibit No.2). They show essentially that the first plaintiff sustained a fracture of the right collar bones, which has united well, and injuries to the 1st, 2nd and 3rd ribs on the right side but which were not fractured. Mrs. Mwanzia proposed an award of KShs.300,000 general damages and relied on the case of HCCC NO.5 387 OF 1990 (NAIROBI) GIDEON MADEGESO & ANOTHER -V- FELISTA WANJIRU & ANOTHER. Miss Susan Ndirangu, who held a brief for Mr. Kibira, for the defendant submitted that an award of Shs.180,000 would be adequate and she relied on the decision of this court in HCCC NO.5285 OF 1992 KROMAH MUSA -VS- MAPUS PALL where an award of Shs.175,000 was made for similar injuries by Justice Ringera in 1994.

Taking inflation rates and injuries sustained, I will make an award of KShs.200, 000.

Special damages were not pleaded and proved and will not therefore be awarded. I accordingly enter judgment for the first plaintiff in the sum of KShs.200,000 general damages, interest at Court rates from the date of this judgment and costs. 2. HCCC NO.35 OF 1995 The second plaintiff presented a medical report to court which was marked as Exhibit No.7. It shows that he had sustained a deep scalp laceration, an extensive deep wound on the right heel with loss of a lot of soft tissue, and the heel bone was exposed. It could not be closed. It was dressed until it became clean enough and that skin grafted. For this he was admitted at Kerugoya District Hospital for one week, transferred to Mwea Mission Hospital where he was admitted for a further period of one month, and then transferred to JAMII NURSING home at Karatina where he was admitted for a further period of one month. It was while he was at JAMII Nursing home that the skin grafting was done. His complaints are that he experiences pain on that right heel; he is unable to walk in closed shoes, cannot be able to step flat on the right foot and cannot undertake long journeys on foot. He limps when he walks. Dr Wokabi recorded that clinically the scar is very weak. It will be prone to constant breakdown ever following minor pressure due to lack of protection by the soft tissues. The heel will be a source of pain for a long time. Ideally the 2nd plaintiff could undergo an operation to make the right foot plant grade (capable of stepping flat). Cost of this operation will be approximately Shs.60, 000, if this operation is not carried out, the second plaintiff can only be able to walk with the forefoot. Dr Wokabi thus assessed the second plaintiff's disability at 25%. For these injuries Mrs. Mwanzia proposed an award of KShs.400,000 general damages, and relied on the decisions of this court in HCCC NO.4987 OF 1992 NAIROBI GITONGA NJEU THARA -V- ALBERT GITAARI MUGERA and HCCC NO.2037 OF 1988 NAIROBI MRS LILLY BEECHER BAILEY -V- KIRIMA KAMAU.

MISS SUSAN NDIRANGU proposed an award of KShs.150,000 and she relied on HCCC NO.1664 OF 1991 NAIROBI. NEBBERT ASUDI ATONYA -V- JAVAN FRED OCHIENG & NATION NEWSPAPERS LTD (STEPHEN KIMANIKARANJA). I have taken into account these submissions. I award the 2nd plaintiff Shs.250,000 general damages.

on special damages I award the second plaintiff Shs.19,250 and Shs.60,000 for future medical treatment.

I therefore enter judgment for the second plaintiff in the sum of KShs.329,250 general and Special damages, interest at court rates and costs of this suit.

Interest on special damages of Shs.19,250 to run from date of filing suit. It is so ordered.

3. HCCC NO.40 OF 1995 The third plaintiff presented a medical report as Exhibit No.12 prepared by Dr. Wokabi which shows that he had sustained multiple scalp and facial lacerations, most of which were stitched. He had generalized backache and chest pains. He had sustained also a complete fracture of the right femur, abrasions on the left upper shin of the left leg. The right leg became shorter by approximately 5 cm and this makes him to walk with a limp in his gait.

The fracture of the right femur has united with gross malunion and this is the cause of the deformity of the right thigh. It is the cause of the shortening also. Left alone it is going to be moderately disabled. The limping is not likely to be eradicated unless an operation is done to correct the malunion. Surgery to correct this deformity will cost approximately Shs.100,000.

Upon this evidence Mrs. Mwanzia proposed an award of KShs.600,000 general damages and relied on two decided cases: HCCC NO.705 OF 1996 PETER WILFRED M KAVILU -VS- JOSEPH NJIHIA WANITO & 5 OTHERS (NAIROBI) where an award of KShs.415,000 was made. Mrs. Mwanzia also prayed for an award of KShs.100,000 for future medical treatment.

Miss Susan Ndirangu proposed an award of Shs.180,000 and relied on HCCC NO.5285/92 KROMA MUSA -VS- MAPUS PALL ANOTHER (Supra) and HCCC NO.20/1990 SUSAN OLALA -VS- DICKSON NDEGWA JAMES (Nairobi) where an award of Shs.200,000 was made for similar fracture of the femur bone. Miss Ndirangu conceded the payment of Shs.100,000 for future medical treatment.

I will award the third plaintiff Shs.250,000 general damages and Shs.100,000 for future medical treatment.

I therefore enter judgment for the third plaintiff in the sum of KShs.450,000, interest at court rates and costs of the suit.

4. HCCC NO.41 OF 1995 The fourth plaintiff presented a medical report to court, which was marked Exhibit 18. It showed that he had sustained a cut wound on the left hand which was a laceration on the back of the left thumb. He had also sustained a fracture of the left tibia, resulting in the left leg being immobilized in plaster for three months; he had also a fracture of the right tibia malleolus. His right leg was immobilized in plaster for two months. Both legs are still weak and he cannot be able to walk or stand for long hours or to walk fast or even to run. The fourth plaintiff is likely to develop osteoarthritis of the right ankle joint as a complication of this fracture of the tibial malleolus.

For these injuries, Mrs. Mwanzia proposed an award of Shs.700,000. She relies on the decision of this court in HCCC NO.1845 OF 1995 (NAIROBI) DANIEL KINGORI -VS- IBRAHIM HAJI MOHAMMED & THREE OTHERS where Shs.500,000 was awarded to a plaintiff who had sustained double fractures of left femur, fractures of 6, 7 and 8 ribs on the left side, dislocation of the right sterno-clavicular joint and lacerations on the left arm. Those injuries were obviously more than the fourth plaintiff sustained. This prompted Susan Ndirangu to propose an award of KShs.200,000.

I will award the 4th plaintiff Shs.300,000 general damages. No special damages were proved.

I therefore enter judgment for the 4th plaintiff in the sum of KShs.300,000, interest at court rates from the date of this judgment and costs.

5. HCCC NO.5 OF 1996 The fifth plaintiff presented a medical report which was marked Exhibit

21. It showed that he had sustained a fracture of the lower end of the right tibia. The right leg was immobilized in plaster for six months. After removal of the plaster he was found to have a stiff right knee joint. The fifth plaintiff had also sustained injuries to his both forearms, which were swollen and deformed, especially the fingers. X-Rays showed he had no fractures or dislocations there. He was therefore treated for multiple sprains of the fingers. He had also generalised body aches and pains with no visible wounds.

The injuries of the fifth plaintiff were therefore fracture of the right tibia and soft tissue trauma to both forearms.

Mrs Mwanzia proposed an award of KShs.500,000 but Miss Susan Ndirangu proposed Shs.150,000. I will award him shs.200,000. No special damages were proved.

I therefore enter judgment for the 5th plaintiff in the sum of Shs.200,000 general damages, interest at court rates and costs of this suit.

These are the orders of this court.

Dated this 15th July, 1999, at Nairobi.

A. G. A. ETYANG'

JUDGE

Delivered this 15.7.1999 in the presence of Mrs Wangari Mwanzia for plaintiffs Miss Susan Ndirangu for the defendant. Rose Obachi Court clerk.

A . G . A . ETYANG

JUDGE

15.7.99