



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 51 of 1996

RACHEL MOHAMED.....PLAINTIFF

versus

1. FLORENCE FURAHA MKADI

2. VENCELOUS WANJE

3. SHARIFF ALI MUDIR.....DEFENDANTS

JUDGMENT

The Plaintiff sued the three Defendants for damages arising out of a motor traffic accident on 26/8/1995 between motor vehicle registered Number KAE 332L owned by 3rd Defendant and KYS 445 owned by 2nd Defendant and driven by 1st Defendant along Malindi/Kilifi Road at a place called Gede. Interlocutory judgment has already been entered against 1st and 2nd Defendants who failed to enter appearance to the suit.

On 2/11/99 the suit came up for hearing between the Plaintiff and the 3rd Defendant and formal proof against the 1st and 2nd Defendants. The Plaintiff's evidence is that on 26/8/95 she was travelling to Gede from Mombasa in a Nissan Matatu registration No.KAE 332L towards Malindi. At Gede Forest before Watamu junction she saw a red saloon car overtaking. She heard a bang. She lost her consciousness and when she regained the same she noticed people were being removed from the vehicle. She was taken to hospital in2

Malindi and later to Mombasa. In support of her evidence she produced a police Abstract report Exhibit 4 which shows that the accident occurred on 26/8/95 along Malindi-Kilifi road between KYS 445 and motor vehicle KAE 332L and that Florence Furaha Mkadi, 1st Defendant was identified for prosecution for causing death by dangerous driving.

The Plaintiff also produced as exhibit a medical report Exhibit 3 by Dr. Muthuuri describing her injuries and treatment. The report shows that she was hospitalized on 26.8.95. She suffered head injury, severe back injury. X-rays showed cortical fractures of the bodies of thoracic lumbar vertebrae, fracture of proximal phalanx of left thumb. The opinion of the doctor is that the Plaintiff will suffer chronic back pain requiring intermittent medication. She has also a stiff left thumb which should improve with exercise.

The Plaintiff is a nurse by profession and she works for Kenya Ports Authority. She also claimed special damages being doctors medical bill of Kshs.2, 000/- and Police Abstract - Kshs.100/-.

No questions were put to her by Mr. Mwangi Njenga for 3rd Defendant. Therefore her evidence is uncontroverted.

In her submissions Mrs. Okata for the Plaintiff urged the court to award a global sum of Kshs.550,000/- as General damages plus Kshs.2,000/- special damages. She referred to her list of authorities to support her claim. The authorities put forward by Plaintiff are:-

a) HCCC.No.2340 of 1987 (Nairobi) S.W.MACHARIA -vs- E.J.K.Gathoni in which injuries were:-

Unconsciousness at time of accident, abrasion over right side of head, major contusion and bruises over right shoulder, a scar on the head.

General damages were awarded in the sum of Kshs.100, 000/

b) V. MUNYWGKI -vs- MOHAMED A. KADAURA, Nairobi HCCC.NO.481 of 1992. In that case injuries suffered were:-

Compound fracture of proximal phalanx of right thumb cut wound on the palm, scars and soft tissue injuries of pelvis and neck, permanent disability of thumb was assessed at 20%.

General damages awarded was Kshs. 60,000/-.

c) MARGARET ANYANGO -vs- CM. BIGOGO, Nairobi HCCC. NO. 325of 1987 where the Plaintiff was rendered unconscious for 6 hours, she sustained comminuted fracture of lumbar vertebrae with subluxation of thoracic vertebrae, sprain of the base of the right thumb.

General damages for pain was Kshs.350,000/-.

For the 3rd Plaintiff Mr. Mwangi Njenga submitted that the case against his client, 3rd Defendant had not been proved. Evidence adduced does not show any negligence on the part of the 3rd Defendant. The evidence was that there was a vehicle from behind which caused the accident. No particulars of negligence alleged against the 3rd Defendant, no issue was framed relating to determination of negligence against this Defendant. He relied on authorities of JOSEPHINE MAKAU NGEKI -vs- MOKAMED S.O. bin DAHMAN, HCCC. No.312 of 1995 where the court found that the Plaintiff had not produced any evidence of negligence on the part of the Defendant and the case was dismissed. He also relied on the authority of FATUMA KATWA MARTIN -vs- SHAMASH BROTHERS LTD., HCCC. NO.536 OF 1996 at Mombasa. And KIEMA MUTHUKU -vs- KENYA CARGO HANDLING SERVICES LTD., to support his submission that the Plaintiff had not proved her case.

I have examined the pleadings and I notice that the 3rd Defendant was brought into the suit by way of amendment of Plaintiff made on 28/5/1997. The amended Plaintiff makes no allegations of negligence against the 3rd Defendant. In the defence the 3rd Defendant denies any negligence but in the alternative pleads that the accident was caused solely or wholly contributed to by the negligence of 1st Defendant driving KYS 445 and sets out particulars of negligence of this Defendant in the defence para.5

(a) - (i) inclusive. Issues were also agreed between Plaintiff and 3rd Party which I shall shortly answer. It is important to point out here that issue numbered 2 is set out in the following words:-

"Was the accident referred to in paragraph 6 of the Plaintiff and paragraph 2 of the Defence caused by the negligence of the Defendant as alleged in paragraph 6 of the Plaintiff or was the said accident caused or contributed by the negligence of the 1st Defendant as alleged in paragraph 6 of the Defence."

The evidence led by the Plaintiff is to the effect that she was sitting in vehicle KAE 332L as a passenger when she saw a red car overtaking the vehicle she was in and she heard a loud bang and she sunk into unconsciousness. The next time she came to people were being taken out of the vehicle KAE 332L and she was taken to Malindi Hospital. She was therefore not able to tell whether the vehicle KAE 332L was in any way to blame. The Abstract report showed that the driver to be charged was Florence Furaha Mkadi driver of KYS 445. No other evidence was produced by the Plaintiff.

I therefore find that there was no evidence of negligence by the 3rd Defendant or his driver or agent.

I will now answer the issues framed as follows:-Issue No.1: The accident occurred as pleaded in the Plaintiff. Issue No.2: The accident was caused solely by the negligence of the 1st Defendant. Issue No.3: The Plaintiff did not contribute to the accident in any way. Issue No.4: Yes, the Plaintiff suffered injuries. Issue No.5: The Plaintiff did incur the expenses pleaded. Issue No.6: The Plaintiff is entitled to damages for pain and suffering. The Plaintiff is entitled to costs. From the above and in view of the case of KIEMA MUTHUKU -vs- KENYA CARGO HANDLING SERVICES LTD., 1991, 2 KAR, 258 I find that the 3rd Defendant is not liable in negligence in this case as no evidence of negligence was proved and I dismiss the case against him.

In the circumstances interlocutory judgment is already entered for Plaintiff against the 1st and 2nd Defendants. I find these Defendants are jointly and severally liable on a 100% liability.

As for quantum I find the authorities cited by the Plaintiff to be a good guide in assessment of the various aspects of the injuries suffered in this case. The awards are for the period prior to 1993 and I think a global sum of Kshs. 500,000/- is a reasonable figure in the circumstances.

I therefore award General damages for pain and suffering at Kshs.500,000/-.

Proved special damages include kshs.100/- paid as printed in Police Abstract and Kshs.2,000/- as per Exhibit 3A.

The award is therefore: Kshs.500,000/- General Damages.

Kshs.2,100/- Special Damages. Kshs.502,100/-

The award will carry interest at court rates and the costs of the Plaintiff and the 3rd Defendant shall be paid by 1st and 2nd Defendant jointly and severally.

Dated at Mombasa this 1st day of December, 1999.

J. KHAMINWA
COMMISSIONER OF ASSIZE

Delivered in presence of:

Mrs. Okata

Mr. Munyithia

Mr. Munyithia: I apply for a copy of Judgment.

Court: Let the same be supplied upon judgement of court fees

COMMISSOINER OF ASSIZE