



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1110 OF 1996**

**ANDREW MOCHE MUTHEMBA ..... PLAINTIFF**

**VERSUS**

**TEXCAL HOUSE SERVICE STATION ..... DEFENDANT**

**JUDGMENT**

On the 7th of May 1996 Andrew Moche Muthemba filed suit through his advocates M/s Oraro & Rachier against M/S Texcal House service Station the registered one of the motor vehicle number KAA 215 Y.

The Plaintiff filed is dated the 29th of April 1996.

The defendant entered a memorandum of appearance on 5th of July 1996 and filed defence on the 18th of July, 1996.

Issues were agreed and filed on the 2.10.97, whilst the bundle of agreed documents were put in during trial. Summons for direction was done on the 17.10.98.

When the suit came for hearing on the 19th and 20.5.98 the advocate for the plaintiff Mr. Aruwa prayed for leave to amend the plaintiff. This was granted by Hon. Justice Aganyanya. Leave to file and amend Plaintiff within 21 days was given.

When the suit came again for hearing on the 5 and 6.10.98 there was no amended Plaintiff on the file record but there was a copy of such filed amended Plaintiff which the advocate for the plaintiff showed to the court. It may be perhaps that the amended Plaintiff was misplaced as it often occurs in our civil registry at Nairobi.

The said amended plaintiff was filed on 15th June 1998 long past the 21 days but there was no application by the plaintiff to file such application out of time. The said amended Plaintiff was duly struck out.

The hearing proceeded in which the plaintiff stated that he normally takes a lift from his neighbour and his family. His neighbour drove an old vehicle registration KQE 149. This vehicle was on the material day of the 14th of May 1993 was travelling fairly slowly along Peponi road. The said vehicle carried the owner his wife a child and himself. The plaintiff said he sat behind driver and was able to see in front clearly.

He saw a vehicle come from the apposite side at a higher speed “in a twinkling of an eye” according to

his response to cross examination by the advocate for the defendant.

The two vehicles collided. The driver of the vehicle he was in was unable swerve in any direction. The said drivers vehicle was pushed and pushed to one side. Most certainly the other vehicle lost control. The driver of the vehicle the plaintiff was driving in died. The plaintiff stated that he sustained injuries.

The advocate for the defendant raised an objection in that the Plaintiff filed to plead the particulars of injuries as such the plaintiff is bound by his Plaintiff. This objection was upheld by this court. The Plaintiff want to show that special damages had been incurred. This was through the abstract report of Kshs.100/- and the medical expenses of 1,000/=.

The Plaintiff failed to produce a receipt of 100/= of the abstract report. The medical expenses pleaded were not proved and nor was there a receipt which had been issued.

The Plaintiff said that he was an employee of the Kenya Power & Lighting Company. That this said company paid for all his hospital bills and as such he had no bills to put in.

The plaintiff then closed its case without calling any further witnesses.

In his submission the advocate for the plaintiff sated that there was negligence. That the plaintiff suffered injuries and required to be compensated.

The plaintiff described how there was a sharp bend. The vehicle on the other side came and knocked their vehicle. The advocate prayed for Special and General Damages to be awarded.

Earlier the plaintiff had stated he only sued the defendant but not the driver of the vehicle he was in as he was a friend. This part was taken into issue by the advocate for the defendant in his reply. He said the plaintiff ought to also sue the driver now deceased but failed to do so.

The negligence said to be there was that of an excessive speed. The plaintiff failed to say what speed the other driver did. If it was very fast he would have no operation to know what had occurred. The speed was merely or open.

The advocate then relied on two civil cases.

That of G.M. Daya V. R 1964 E.A 529.

Jasanan V. R. 1969 E.A. 600

In the Daya Case.

It was held that a cyclist who had been knocked down or but by a vehicle and who had said the driver drove at a high speed ..... he but him amounted to an opinion evidence. The magistrate who relied on such evidence should not as it amounted to an opinion evidence. The appeal was allowed.

In the Jasanan Case.

Where a motorist knocked a culprit whilst trying to avoid an on coming vehicle, the court held on appeal that the appellants was convicted on the fact that he was driving excessively. The fact though is that was the only evidence of negligence relied on by the republic.

The advocate for the defendant tried to establishes that the only negligence relied on is that of speeding. This alone cannot stand especially when there was nothing to show the usual driving.

As to ..... the advocate stated that no evidence of injury sustained had been pleaded.

On Special Damages no proof of documentary evidence given. There was an accident yes that there was never proof that the defendant was negligence.

I find that Special Damages had not been proved. I make no award as to this.

As to General Damages, I find that there may be a contradicting negligence. From evidence of the plaintiff a vehicle came towards the deceased. He failed to swerve the vehicle as a result his vehicle was knocked. There was a sharp bend where the accident is said to have occurred. It would have been of assistance if there was another independent witness to the case.

As to particulars of injuries not having pleaded I am unable to make a finding as to this.

As such this suit be and is hereby dismissed with costs.

**Dated this 6th day of October 1998 at Nairobi.**

**M.A ANG'AWA**

**JUDGE**