



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Case 3684 of 1991**

**FRANCIS NJENGA MBUGUA..... PLAINTIFF**

**VERSUS**

**PRISCILLA WANJIRU KAMUNYA..... DEFENDANT**

**JUDGEMENT**

The case before me is a running down matter. It took a twist of event when the advocate for the plaintiff and the advocate for the defendant entered into a consent judgment on the 14th of December 1994 before Hon. Justice A. Ringera. This consent was for judgement for the plaintiff on liability and for Special Damages.

That General damages would be assessed by this High Court.

It transpired later after the consent had been entered that the insurance company for the defendant notified the advocate for the defendant that he had no instruction or authority to enter into such consent. The reasons being that the insurance policy did not cover such accident.

What had occurred is that the defendant took out a commercial insurance Policy from her Insurance Company M/S Alico (K) Ltd AmericanLife Insurance Company Ltd. This policy was one that did not bear liability for persons who died or were injured to:-

"... any person in the employment of the insured among out of and in the course of such employment"(Exceptions to section 11 Clause

(ii) The defendant traveled to Yatta area where she went to buy some chiondo baskets for sale at her business in Nairobi. She engaged the services of the plaintiff - who was a fellow tradesman but engaged him to be a loader at their point of destination. When she would buy the baskets he would assist in loading the baskets in the vehicle and further offloading the same.

The plaintiff was to be paid Kshs.300/- for this work.

On the way back the defendant was involved in an accident in that said vehicle. They were taken to hospital and treated.

The plaintiff sued the defendant. The defendant approached M/s Muchui & Company advocates for assistance. The advocate rang the legal office of the Alico (K) Ltd and brought to her attention the said case. In the mean time to protect the defendant's interest; he filed a Notice of Memorandum of appearance.

The advocate for Alico knew that M/S Muchui was not on their list of advocates. She nonetheless gave

authority for the advocate to proceed with the case.

The advocate for defendant read the above quoted clause but saw that the plaintiff did not fall under the category of an employee. He saw that the clause iii of the Exception Section II would apply namely: "The company shall not be liable in respect of

(i).....

(ii).....

(iii) death or bodily injury to any person (other than a passenger caused by reason of or in pursuance of a contract of employment,) being carried in or upon entering or getting on to or alighting from the motor vehicle at the time of occurrence of the event are of which any claim arises." As a result of this the advocate saw he was correct in entering into negotiations of the said matter. These negotiations failed. When it finally reached an agreement the advocate (legal officer) for the Insurance company notified the advocate for the defendant to wait on any agreement that may have been reached whilst she made consultations. If he did not hear from her then he should just proceed.

Unfortunately the said advocate (legal officer) was never called to give evidence to verify this point.

The advocate for the defendant not hearing any further from the advocate for the Insurance Company (legal officer) proceeded to have the consent recorded.

It is then that he was notified that the consent would not be honoured by the Insurance Company.

The defendants then joined Alico (K) Ltd as a party to this suit. Mr. Muchui of M/s Muchiu & Co. Advocate allowed another advocate to conduct his brief as he foresaw that he would be called a witness.

He indeed came in as DW2 and gave evidence to the effect that he was not amongst the Panel of usual advocates to give legal advice, he was indeed given instruction by the legal officer and the legal officer's company - namely Alico was bound to what he did. They can be therefore estopped from going back on the consent.

The advocate also agreed and stated that it is the defendant who, on being sued takes the memorandum of appearance to the Insurance Company. That thereafter an advocate is instructed.

He also stated that he made no notes of consultation between himself and the legal officer of the 3rd party company as the usual business has always been conducted over the phone and there was no need to minute anything.

He then proceeded to produce his correspondence with the advocate for the plaintiff and the advocate for the 3rd party legal officer.

Amongst the letter was a letter from the Claims Manager who on the 21.12.94 and also stated that-

"There are certain aspects of the matter on which we are seeking legal advice but you may wish to know at this stage that we do not consider that there is liability under our policy." Claims Manager signed. The advice received from M/s Guram & Co. advocates is that there is no liability under the policy.

It is not doubted that the legal officer did instruct and give the advocate for the defendant a go-ahead to represent the defendant. This was however after appearance had been entered by the defendant.

The issue in question at this stage is whether the 3rd party - Alico (K) Ltd. are liable under the said policy?

The plaintiff had been employed for the day by the defendant to work for her for 300/=. An accident

occurred and he was injured under clause (ii) of exception to section II he is not liable to claim.

The advocate for the defendant argued that it is clause (iii) that applied namely that the agreement between the plaintiff and defendant was a contract of employment.

The clause (iii) that reads, inter alia,:-

"..... (other than a passenger caused by reason of or in pursuance of a contract of employment)."

I believe that the plaintiff was not a passenger in the said vehicle but was in fact being carried in the course of his employment.

It thus means that the said insurance companies are not liable to the plaintiff under the said policy.

As to the main suit it is not disputed that the plaintiff was traveling in the defendant's vehicle. That he was under employment. That he then sustained injuries due to an accident that occurred. That the defendant being the driver of the vehicle was liable to the plaintiff in full.

As to the quantum of assessment of damages the plaintiff sustained injuries that the advocate for the defendant stated consisted of a fracture of the left femur cut wounds on left clavicular region deep cut wound on the left lower leg. He recommended that an award of Kshs.130, 000/= as given in the case of Samuel Aguta Angasa v Samuel Kingori Gathri HCCC 4741/91 (unreported)

Given for a compound fracture Kshs.160,000 awarded in case Sadiya Mohammed thro' Mohamed Omar v East African Portland Cement Co. Ltd. HCCC 5833/90 For fracture of femur, head injury deafness in the ear Kshs. 145,000/= awarded. In the case of Elizabeth Nyambura Kibunja v Wilson Wachira HCC 26/10/88 unreported.

For compound fracture of the tibia and fibula. The plaintiff submitted authorities of minors in the case of Winnie Njambi Ndungu & Another v Stella Kagendo Ngera & Another Where the award out of pain suffering and loss of amenities was given at Kshs.400,000/- for injury on the right knee - fracture. Peter Waweru Njuguna v Kenya Breweries Ltd & Another Kshs.450,000 was awarded Hccc No.3933 of 1990 for a fractured left ankle, malar tilt and arthritis of the joint. In Elias Muraga Njau v B.A.T K Ltd & Another. An award of Ksh300,000/= was made to the plaintiff for laceration wounds, disbarred left shoulder joint, fracture left front metal capal bone fracture left femur bone lower one third.

I find that the injuries sustained by the plaintiff was not as extensive as quoted in the above authorities tended.

I would compute as a fair award - taking into consideration that the plaintiff recovered and was discharged on 30.10.90 to be Kshs. 100,000/=.

As to special damages there was none that was pleaded or was proved. The words "Special damages (to be proved at the time of hearing thereof)" has been held many times not to consist proper pleadings.

I therefore make no findings as to this save that the parties agreed that it be Kshs.34,052/=

Thus the suit against the 3rd party insurance company is dismissed with costs.

The suit against the defendant be and is hereby assessed for the plaintiff on General damages for pain, suffering and loss of amenities at Kshs.100,000/=.

Costs of this suit and interest.

Special Damages was agreed by consent at Kshs.34,052/= (though not proved). The defendant is bound personally for this award.

Dated this 26<sup>th</sup> day of October 1998 at Nairobi.

M.A. ANG'AWA

JUDGE