



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 651 of 1993

HAMISI GUNGA BAYA..... PLAINTIFF

=VERSUS=

SALT MANUFACTURERS LTD.

ISMAEL SUMRA & GAFOOR T/A SUMRA TRANSPORTERS.....DEFENDANTS

JUDGMENT

This action arises out of a road traffic accident which occurred on the 13th June 1993 in the early hours of the morning. It is not in dispute that the 1st defendant's vehicle- Peugeot Saloon car driven by its servant rammed into the stationary lorry of the 2nd defendant. The plaintiff who was a passenger in the Saloon car received injuries as a result of the collision and seeks to recover general and special damages from the defendants.

Each defendant denies liability and seeks to blame the other for the negligence which culminated in the accident. It is therefore necessary to highlight and adjudicate the facts.

According to both D.W.2 and D.W.3 the lorry developed a mechanical defect which rendered it immobile at 11 p.m. while they were en route to Malindi. D.W.2 is the turnboy. He says that after they realised that their vehicle could not go further the turnboy fixed a triangle reflector at the rear of the road. He also fixed twigs on the road. The lorry itself has rear reflectors (as can be seen from the photographs taken and produced in these proceedings).

All these efforts were intended to warn other drivers of the obstructing presence of the lorry on a portion of the lane on which the vehicle heading to Malindi would travel. According to D.W.2 & D.W.3 nothing eventful happened from 11 p.m. when the lorry had become defective and was parked on that part of the road to about 3 a.m. when the 1st defendant's saloon car rammed into the lorry.

Fredrick Kunyungu Mbonzi (D.W.1) was the driver of the saloon car in which (it must be remembered) the plaintiff was travelling. He testified that whilst he was driving at a speed of between 70 kph and 80 kph an on-coming vehicle suddenly emerged from the opposite direction at the time when he was already too close to the lorry; and that despite having applied the emergency brakes, which are evidenced by the presence of skid or tyre marks behind the lorry (see the photographs produced in the proceedings), he rammed into the lorry. He denies that he saw the triangular reflector or twigs which are alleged to have been fixed behind the lorry by D.W.2 and D.W.3. By this denial D.W.1 sought to create an impression that D.W.2 and D.W.3 are not honest and reliable when they allege that they marked the road immediately behind the vehicle in such a manner that, other road users would have noticed the stationary lorry in their way and avoided colliding with it.

He thus seeks to blame them for the accident. But a clear scrutiny of the photographs which were produced in the proceedings - and particularly photograph B and G reveals that some twigs were run over by the Saloon car before it rammed into the lorry; other twigs are even underneath the saloon after the accident. By his evidence D.W.I suggests that the twigs had been fixed after the accident. But evidence manifested by the photographs is that some of the twigs were there prior to the accident. With regard to the evidently fresher twigs D.W.2 said that these were fixed after the accident, when the earlier markings had virtually been destroyed by the saloon. That is why the triangular reflector is standing erect - and appears to have remained intact after the accident. D.W.2 says that he had to repair and straighten it after the accident. He says that he had to do so in order to warn other motorists - and to avoid another accident.

In my opinion the evidence of D.W.2 and D.W.3 is cogent and relevant. These witnesses impressed me as more credible and honest. Consequently, I reject the evidence of D.W.I where it is at variance with those of the other witnesses. I, therefore, find as a fact that the triangular reflector and twigs had been fixed by D.W.I as soon as the lorry ceased to move on, and that these marks were there for 3 to 4 hours prior to the accident caused by D.W.I.

The questions which now arise are as follows:

- (1) What factor prevented D.W.I from noticing the twigs, the triangular reflector and even the reflector on the back of the lorry?
- (2) Can negligence be ascribed to D.W.I which would be deduced from his failure to notice the features in question (1)?

D.W.I's own evidence must be put in clear perspective. He was driving at the wee hours of the morning. He refused to be candid to the court as to the business he had been transacting for the greater part of the night. All he said was this:

"I had been with Fisheries Officers. I had had some commitments in a relative's home."

Had he been drinking alcohol - and was he mentally affected by alcohol so as to be rendered incapable of giving due attention and care to the operation of the vehicle at the material time? All the matters must be considered in relation to the fact that visibility was poor and the road surface was wet and slippery due to rain. A driver had to be quite careful. Even if D.W.I had not been drunk, fatigue arising from lack of rest and sleep can not be ruled out. Added to these aspects is the fact that he admits that he was driving the vehicle at a speed of 70 to 80 kph which in all the prevailing circumstances of the case must be considered to be excessive speed.

After considering the totality of the circumstances of this case I can not say that this was an inevitable accident in the sense that it could not be prevented. Since visibility was poor the speed of 70 k.p.h. was excessive; he must not have had a proper look-out for obstacles as required of a prudent driver; otherwise he should not have failed to notice the lorry - given that it was on a very straight stretch of the road he should have not driven the vehicle unless he felt physically and mentally fit to do so.

For these reasons that I find that the D.W.I was reprehensibly negligent: he did not exercise all the reasonable care required of a prudent driver. Consequently, I find the 1st Defendant liable. There is no evidence upon which I can find the 2nd defendant, i.e. the owner of the lorry liable in negligence. In my opinion the acts of driver and the turn-boy namely, of removing the lorry as much as possible away from the tarmac road and thereby were able to leave ample road space for vehicles going towards Malindi to pass and that of placing a reflector and twigs on the road, constituted sufficient compliance with conduct and standard of care required of them in the circumstances in which they found themselves.

I now move on to deal with the issue of quantum of damage to which the plaintiff is entitled. To do so, I must consider the nature of injuries suffered, the amount and length of pain and suffering endured, the level of healing achieved and the residual disabilities suffered and any loss of amenities suffered. It is a

truism to say that in case of loss of expectation of life and pain and suffering no true compensation can be given by any amount of money, no matter how an elaborate arithmetical computation is employed. But the courts are obliged to do the best they can. In a case such as the instant one the plaintiff is obviously entitled to fair and reasonable compensation assessed in the light of previous awards in respect of comparable damage.

The starting point is the medical report dated 25th August 1993 by the consultant surgeon Mr. Hemant Patel F.R.C.S. It lists the injuries suffered as follows:

1. Laceration of left maxillary area;
2. Laceration of forehead;
3. Fracture of mandible;
4. Injury of lower front teeth;
5. Fracture of surgical neck of humerus;
6. Chest, injury;
7. Laceration of the chin.

According to the medical report the plaintiff was admitted at Galana Hospital for three days. He resumed work on 31st August 1993.

Mr. Patel then wrote the following opinion:

"Mr. Hamisi sustained above named multiple injuries at the road accident on the 13th June 1993. He was hospitalised for three days and remains off work till 31st August 1993.

He has visible scars on the face. His symptoms of pain and stiffness of the right shoulder, difficulty of eating hard food are due to after effects of injury but are of temporary nature. He should fully recover without any permanent incapacity. The flow of tears, is due to damage of lacrimal duct at the laceration point on the cheek. He needs to see the doctor and sort this complication out."

It is instructive to note that in his evidence the plaintiff did not highlight any residual disability. I am thus entitled to the view that complete healing was achieved within less than 3 months.

I peg my award on the case of LESIKAR OLE MURINDO -V- RAYBINDER SINGH H.C.C.C. No. 1772 of 1985. In that case the facts are that the plaintiff suffered a major head injury, fracture of the mandible multiple injury to the left forearm and fracture of the right ankle joint. He was unconscious for three and half weeks; the mandible was fixed with interdental wiring for 5 and a half months. The forearm was extensively swollen while the fractures of the ankle were manipulated and plaster applied for two months. Due to prolonged period of unconscious the head injury would predispose him to developing epilepsy late in life. There was need for further hospitalisation and proper management of the fractures but malunited mandible. The ankle had healed well but with some moderate stiffness. General damages for pain, suffering and loss of amenities were assessed at KShs. 250,000/= in judgment delivered on 3rd October 1989.

The case had more much gruesome aspects than the present one where full hearing was achieved within a relatively shorter period. The factor, of inflation has to be taken into account;

But nevertheless I consider that fair and reasonable compensation will be achieved with an award of Shs. 240,000/= on the head of pain, suffering and loss of amenities.

Special damages are awarded at Kshs. 7,390/=.

Accordingly judgment is entered for the plaintiff for those figures plus interest and costs against the 1st defendant. The suit against the 2nd defendant is dismissed with costs to be paid by the 1st Defendant.

Dated and Delivered on the 14th March 1995.

I.CC. WAMBILYANGAH

JUDGE