REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 3908 OF 1989

MARY WANJIKU ……..…….. APPLICANT

VERSUS

DAVID KIGOTHO & ANOTHER…….....… DEFENDANT

JUDGMENT

The plaintiff was knocked down by motor vehicle Reg No KXZ 106 on 10th October, 1987 along Meru/Nanyuki Road. She was injured as a result and brought this suit against the defendants for damages for the injuries sustained blaming the accident on the negligence of the first defendant who was the driver of the said motor vehicle. The second defendant was the owner. Negligence on the part of the first defendant has been denied. It is pleaded that the plaintiff was solely to blame for the accident or substantially contributed to the same.

At the beginning of the trial the accident abstract the medical reports on the plaintiff's injuries and two photographs taken by a private investigator were admitted by consent. Also subject to liability, special damages were agreed at Kshs 800/-.

The plaintiff testified in support of her pleadings while the defence called the first defendant. The plaintiff was then a student at Moi Equator Girls School, Nanyuki and on the morning of the day of the accident was going home for half term break, in a *matatu*. The following is what she told the Court.

> "At one point I alighted from the *matatu* near my home at a place called Checki.
>
> I waited for the *matatu* to leave and checked both sides of the road and saw no car. I then started to cross the road.
>
> From there I just found myself in hospital. I had not gone far into the road. The *matatu* from which I had alighted had not gone far."

Under cross examination the plaintiff said:

> "My home from Cheki is about 500 metres. The road at the place is straight. There are some houses near the road.
>
> Traffic is normally not very heavy at that point. The weather was sunny. Accident took place around 9.00 to 10.00 a.m. I am the only one who alighted from the *matatu* at that point. I alighted from behind (box type). One could see ahead towards, where the *matatu* was

going…….

I was hit while on the lane for motor vehicles going to Meru. When I started crossing the road the *matatu* was not where it had dropped me. When I started crossing I did not see any motor vehicle on the road. I did not see the defendants. The road was straight I looked in the direction of Naru before starting to cross the road. I did not rush into the road…… I did not hear sound of motor vehicle just before the accident. I cannot remember which part of the defendants motor vehicle collided with me or whether it was head on or by its side.

I do not remember where I landed after the impact. I did not enter the road without keeping a proper look out."

The first defendant on the other hand said he was driving from Timau towards Nanyuki. He was alone in the motor vehicle. The following is what he told the Court.

"On my way to Nanyuki I saw a stationary *matatu*. I slowed down. My speed was between 60 and 70 Kph. Weather – sunny. Road straight. Only one motor vehicle ahead coming from opposite direction.

No obstruction either by trees or buildings.

I saw the *matatu* at a distance. There was a bus stage both sides. When I first saw the *matatu* it was about 800 yards away. It was approaching the stage. It then stopped when I was about 20 feet from it. It was going to Meru.

One passenger alighted from the *matatu* and it started moving. I saw a person crossing – who had been behind. When I first saw her she had not reached the middle.

When I saw her first she was about 10 feet away from the motor vehicle. This was very near. I had not seen her earlier. I saw her when the *matatu* left. She had not seen me. I did not brake for I fear hitting her with the front of the motor vehicle. I swerved behind her and braked. My motor vehicle stopped. I then knocked her with the side of the motor vehicle – near the sliding door. She fell next to the motor vehicle, on the road."

Under cross examination the first defendant said he had lived in that area for long and used to work there. He used the Meru Nanyuki road many times and knew there was a bus stage there. The area was flat. He had seen the *matatu* before it stopped 500 metres away and when it stopped he was 20 to 30 metres away. When he first saw the plaintiff she (the plaintiff) was in the middle of the road and about 10 feet away. He added:

"I was going to Mt Kenya Safari Club Nanyuki to see clients before they left. I was not late. I was driving fast. Even if I applied emergency brakes it was going to slip for a distance I knew about its braking system.

By the time the accident happened I had not applied brakes……."

Both the plaintiff and the first defendant marked Exht 5(a) to show where the accident took place and the possible point of impact. No police evidence was called but the first defendant said he was never charged with any offence. The parties blame one another for the accident.

There are however statements made by the first defendant in his evidence that are disturbing. He first said he saw a stationery *matatu* then soon thereafter changed to say he saw it approaching the stage. One of the two cannot be true. Further he said when he first saw the *matatu* it was 800 yards away but under cross examination he said he saw the matatu 500 metres away before it stopped. Again one of the two cannot be true

There are further contradictions in relation to the stopping of the *matatu* and the plaintiff alighting. The first defendant allegedly saw the *matatu* stopping. He then saw one passenger alighting therefrom. The *matatu* started moving. That passenger started crossing. But with the same breath he said he first saw the plaintiff when she was 10 feet away and that he had not seen her earlier. He only saw her after the *matatu* had left. These contradictions are material to the whole issue of how the accident occurred.

The first defendant was aware of the bus stage along the road. If he saw the *matatu* approaching and there were no people waiting to board (he does not say so), when it stopped he must have expected, as indeed it turned out to be, that some passenger or passengers would alight. He must have seen the plaintiff alight as he says so. He did not hoot and if he did he could not have omitted to say so in his evidence in chief. He did not brake, he says so. There was no obstruction as the matatu that had dropped the plaintiff had left the stage. This finding is fortified by his own evidence that he swerved to the direction the plaintiff was moving from and that was the path of the *matatu*. Had the *matatu* been there there could have been a headon collision before he reached the plaintiff. He also added that even if he braked he could not have stopped immediately. This in itself is suggestive of a considerably high speed. In my judgments particulars of negligence have been proved on a balance of probabilities to assign liability on the part of the first defendant. He was on duty as driver, servant and / or agent of the second defendant and for the benefit of his employer. The second defendant is vicariously liable to the plaintiff.

Contributory negligence was pleaded and canvassed during the trial. The plaintiff told the court that she took the precaution of checking both sides of the road before she started to cross the road. Nevertheless she was knocked down. She had not seen the motor vehicle approaching. The road was straight and there were no obstructions. She denied dashing onto the road. She had no reason to. The first defendant also did not allege so. However, the fact that she was knocked down is suggestive of the fact that she started crossing the road and that therefore she did not exercise proper look out as she says she did not see the motor vehicle. It is also possible that she saw the motor vehicle at a distance but underestimated the speed at which it was approaching. Whatever way on looks at it she also contributed to the accident albeit minimally. In my judgment therefore both the plaintiff and the first defendant contributed to the accident. The first defendant however is more to blame and I find that he shall bear 80% liability while the plaintiff shall bear 20% contributory negligence.

As a result of the accident the plaintiff sustained cerebral concussion, abrasion on the left forehead, deep abrasion on the right shoulder, deep abrasion on the right elbow and abrasions over both knees. She lost consciousness for 12 hours and had amnesia for about one week. She suffers from headaches and dizziness. She developed psychiatric symptoms which led to admission at Mathare Mental Hospital for one week. The total period of hospitalization was one month.

The plaintiff has been left with scars where she suffered abrasions. The most prominent are on the forehead and on the right elbow. She was 17 years old at the time of the accident and the scars are a cosmetic blemish to her. The Court noted the scars where the plaintiff gave evidence in court. She said she has not healed after treatment. She still has pain from the elbow and thighs and also suffers headaches. She attends treatment for these complications to date. The scar at the elbow is itching and when she scratches it blisters appear which became wound. Dr M A Haq has recommended plastic surgery on the arm and forehead. He assessed the cost at Kshs 65,000/- in January, 1990.

Several authorities have been cited by both learned counsel in their written submissions. In MSA HCCC NO 418 OF 1987 *Anderson Kilion Vs Mbuni Transport Co*. The plaintiff sustained concussion, laceration on the right side of the head and blunt injury to the neck resulting in fixation of left vocal cord causing dyshonia. General damages were assessed at shs 75,000/- in 1989. See also Nbi Hccc No 1761 of 1987 *Jeremiah Kodia Ingache vs Modern Furniture House (1980) Ltd*.

In Nbi HCCC No 2485 of 1985 *Grace Mamkasa vs Nguri Thiringa* the plaintiff suffered shock and concussion, bruising of her chin, face and on both knees. An award of Kshs 50,000/- was made in 1990. NRB HCCC No 4037 of 1988 *Nancy Chepchirchir v Dominic Kuria* in HCCC No 38 7 of 1987 *Njeri Mwangi v John Warui Wanyoike & another*, the plaintiff suffered cerebral concussion, bruising of the chest and both shoulders laceration of right leg and bruising of the right elbow. General damages were

assessed at Shs 140,000/- in 1987. See also HCCC No 392 of 1987 *Mary Wambui Njoroge vs John Warui Wanyoike & another* and HCCC No 2116 of 1980 *Mrs Wairimu Njui vs Kaberi & another.*

In the instant case I am guided by the medical reports and the cited authorities. The plaintiff may benefit from the intended plastic surgery but she has suffered considerably from the injuries she sustained. The value of Shilling has fallen over time. In my judgment I make an award of Kshs 200,000/- general damages for pain suffereing and loss of amenities. The cost of plastic surgery was estimated at Shs 65,000/- in 1990. For the same reasons it is only just and fair that it should be enhanced. I make an award of Kshs 80,000/- therefore. Total general damages amount to Kshs 280,000/- which shall be reduced by 20% contributory negligence leaving a balance of Kshs 224,000/-. Agreed special damages shall also be reduced by 20% leaving a balance of Kshs 640/-.

In the end there shall be judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs 224,000/- general damages plus Kshs 640/- special damages. The plaintiff shall also have the costs of the suit and interest at court rates.

Dated and Delivered at Nairobi this 30th day of April, 1993

A.MBOGHOLI –MSAGHA

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JUDGE