



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 381 OF 1989

MARIAM ABDSHEIKH D/O SALIM ABDSHEIKHPLAINTIFF

VERSUS

CHARLES KENNEDY WANYA

FRANCIS ONSERICRESPONDENTS

JUDGMENT

This is the plaintiff's claim against the defendant for damages for the personal injuries which she suffered when she and the defendant. Vehicle collided on the 9th September, 1988.

Liability is denied by the defendants who, however, did not turn up to testify in the matter. At the hearing of the suit the Plaintiff's witnesses adduced evidence to the effect that c. the accident was due to the negligence of the 1st defendant who was the 2nd defendant's servant. They were duly cross-examined. The issue was whether the driver drove the vehicle in a negligent manner and thereby caused the accident. The burden of proving that there was no negligence on the part of the driver was clearly his. It was thus not sufficient to rest (as was done) a defence on suggestions which we made to the plaintiff's witnesses by the defence counsel.

In this regard it is pertinent that I refer to s 107 (1) and (2) which provide as follows:

107 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Therefore in a case where the defendants have failed to adduce any evidence in support the assertion made in their pleading the issue of liability must, *ipso facto*, be resolved in favour of the plaintiff whose evidence stands totally uncontroverted. One is even constrained to think that the cross-examination conducted by defence counsel was never based on instructions from his clients. Otherwise the subsequent failure on the part of the defendants to testify is an illogical one. So I find the defendants fully liable to pay damages to the plaintiff.

The injuries sustained by the plaintiff were concussion, lacerations on the both hip and mucosa and on the left side of the forehead. nose bleeding with laceration septum and bruises on the buttock and leg. She was hospitalised for 5 days in Pandya Memorial Hospital during which period the wounds were attended

to and she was kept under observation. The medical report dated 4th July 1989 says that she had fully healed by 31st March, 1989 when she was examined for the report.

Basically, this is a case of minor injuries from which the plaintiff fully recovered within a short time. But it must be remembered that she was in considerable pain and discomfort for the first few days.

I therefore award Shs 40,000/= on the head of pain, suffering and lost amenities. Special damages are allowed at Shs 12,480/=.

Accordingly. judgment is given to the plaintiff against the defendant jointly and severally for Shs 52,480/= with costs and interest.

Dated and Delivered at Mombasa this 8th June, 1993

I.C.C WAMBILYANGAH

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JUDGE