REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 165 OF 1990

KATANA MGAO ……....……..PLAINTIFF

VERSUS

ANDREW KAMAU WOKABI

KBS (MSA) LTD ……DEFENDANTS

JUDGMENT

The plaintiff who was an intending passenger on KBS vehicle seeks, by this action, to recover damages for the personal injury which resulted from the alleged negligent act of the KBS driver.

In the plaint it was pleaded that the plaintiff was in the process of boarding the bus Reg No KUZ 807 owned by the 2nd defendant and driven by the 1st defendant when the 1st defendant negligently, suddenly and violently put the same in motion thus causing the said bus to run into a ditch, and causing the plaintiff to be thrown out of the same as a result of which it ran over his left foot.

In his evidence the plaintiff said that the bus was suddenly driven off when his one foot was on the first step and the other (the left) one was still on the ground. As the vehicle gathered momentum the left foot got into a ditch while he was still clinging on the hand rails and attempting to get into the bus. The scenario of getting into a moving bus or *matatu* by a passenger is very common in this country. Be that as it may, the force of the moving bus together with the hole into which the foot suddenly entered prevented the plaintiff from making the appropriate leap into the bus. Instead, the foot was injured. In those circumstances, it is unreasonable to expect the plaintiff to know exactly how he got injured; whether by the fact that the foot was trapped in the hole or whether it was crushed by the lower part of the step of the bus or by both. In my view the important questions are whether he was injured in the course of attempting to get into the bus, and whether therefore its driver should be blamed for the accident. The defendants by their evidence show that they do not know whether the plaintiff was injured when he was trying to board the bus driven by the 1st defendant. It is true that 1st defendant was not alerted about the accident until he had gone a long distance of not less than 5 to 6 kilometres from the alleged scene: That was when he was overtaken and stopped by a *matatu* which was carrying the injured plaintiff and was told that he (the 1st defendant) was responsible for the injuries (of the injured man). He says that although he remembers having routinely stopped at the alleged scene for the purpose of allowing his passengers to alight from the vehicle or to board it, he could not recall having seen the ditch in the plaintiff's foot allegedly got trapped and sustained the injury complained of nor could he remember having heard any lower part of the vehicle touch the ground so as to have brought about the injury. But the plaintiff asserts that after the accident he was immediately picked by the *matatu* which consistently pursued the bus until it caught up with it and ended up stopping it. This is positive evidence of an eye witness who was fully conscious of the relevant

events despite the pain. However, I find it more pertinent to deal with this issue by giving weighty consideration to the following question which the defendant's advocate posed in the course of the plaintiff's cross-examination.

> Question "I put it to you that you tried to get into a bus which was in motion and that is how you injured yourself."

In my opinion that question must logically have emanated from instructions of the advocate's clients (the defendants) and it thus follows that the issue as to whether or not their bus was the one which was involved in the accident was not all pursued from any alleged factual standpoint. Thus, in those circumstances I am impelled to hold that the 2nd defendant's bus which was at the time being driven by the 1st defendant was the culprit in this case. Further, the plaintiff has clearly proved that the bus did not allow him sufficient time to get into the bus. I entertain no doubt that the 1st defendant owed the intending passengers a duty of care. A prudent driver of a public vehicle should easily foresee that some passengers may be hampered by all sorts of factors, whether personal or otherwise from speedily jumping into the vehicle; and so it behooves him to be patient and allow them enough time to safely get into the vehicle. He should ensure that all his passengers are safely aboard or have safely alighted before he drives from that stage. I find as a fact that the driver in the present case failed to observe those fundamental rules.

Instead he hastely and negligently drove off from the stage without checking that more of the passengers was still struggling to get in: and that is how or why the plaintiff was injured. So I assess the 1st defendant's liability at 100%; and the 2nd defendant as his employer is vicariously liable.

The injury which was sustained was a "crush of toes of the left foot." The plaintiff was on the same day admitted at the Coast General Hospital where he underwent an operation of amputations of metatarsal-phalangeal levels of all toes. He was discharged on the 27th of November 1989 but continued to receive treatment as an outpatient and in fact the medical report dated the 6th of February was compiled when there was a small ulcer on the stump that had not yet healed and he was still going to the hospital for dressings.

The following is the surgeon opinion in the report:

> "Mr Ngao sustained crushed injuries to all toes of the left foot due to a road traffic accident on 2nd November, 1989. He was hospitalised for 25 days and has not yet resumed work. There is a small area of unhealed wound on the stump. It will take another 4 to 6 weeks before it heals. There is loss of five toes of the left foot. This is permanent incapacity."

At the trial of the case it was clear that the plaintiff walked with a limp although he had no wound on the left foot. I saw the stump. It was undoubtedly hideous. But there is no evidence as to the effects of the accident on his life. The medical report however shows that he was 32 years and worked as a mason. Thus it can not be gainsaid that the injuries have curtailed (in some way) the enjoyment derived from easy and steady walking of long distances, and have restricted him somewhat in his work as a mason.

Mr Mburu, on behalf of the plaintiff, equated the injury to loss of a leg. That is why he cited to me the case of *Hadi Abed v Abdul Ranzan Noormohammed* HCCC 1269 of 1978 (Msa). In that case the plaintiff sustained a compound fracture of tibia and fibula of the left leg, a crushed left foot and lacerations. The forepart of the left foot was amputated. The fracture of the left leg healed well but there was no base or support of the left leg as it rested on the stump. As a result the plaintiff was unsteady and slow in walking, needing a stick for support for the rest of his life. It was even proposed that an amputation higher up in the left below the knee would enable him to have an artificial leg and would thus improve his mobility. In a judgment which was delivered in October, 1982 Kneller J treated the case as equivalent to one involving a below knee amputation. and awarded a sum of Shs 220,000/- as damages for pain, suffering and loss of amenities. I find this case relevant to the present case although I hasten to observe that the present case is clearly one of loss of toes, and not of the forefoot as in the cited case. And so it would be wrong to treat this case as equivalent to one involving an amputation of the leg. But the element of

inflation has to be taken into account given the fact that the award in the cited case was made more than a decade ago.

For all the reasons in the case I fix the award for pain, suffering and loss of damages at Shs 300,000/=.

Dated and Delivered at Mombasa this 28th day of September, 1993

I.C.C. WAMBILYANGAH

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JUDGE