



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 2317 OF 1980

MAXILLAN JOHN KISAKA.....PLAINTIFF

VERSUS

BONDO TRANSPORTERSDEFENDANT

DALAS NDEGE.....DEFENDANT

JUDGMENT

The plaintiff Maxillan John Kisaka was a passenger in motor vehicle Reg No KNN 997 when the said motor vehicle collided with another motor vehicle Reg No KDP 744 on 20th August 1977 along Bungoma/Mumias Road. As a result he was seriously injured and brought this suit against both defendants as owner and driver and/or agent respectively for damages for the injuries so suffered.

Both defendants were served with summons to enter appearance but only the first defendant complied. The second defendant defaulted and on an application on behalf of the plaintiff an interlocutory judgment was entered against him. The first defendant entered an appearance and attended the trial.

The plaintiff told the Court that on the night of 20th August 1977 at about 8.00 pm he and the driver of the motor vehicle KNN 997 were travelling from Nambale to Nairobi. Their motor vehicle was a lorry trailer make Fiat 687 and was carrying coffee destined for Nairobi. On the way along the said road he noted a motor vehicle coming from the opposite direction. The driver (of the lorry) dipped the lights when the motor vehicles were about to by-pass one another they encountered a stationary motor vehicle, ahead of them into which their motor vehicle rammed into. This stationary motor vehicle was Reg No KDP 744.

When the plaintiff first saw motor vehicle Reg No KDP 744 the said motor vehicle was about 50 feet away. His driver was then moving at an average speed. Prior to their lorry ramming into the stationary lorry he had not seen the same, as there were no warning signs that a motor vehicle had broken down. The said stationary motor vehicle was on the left lane the same along which the plaintiff and his driver were travelling along. After the accident the plaintiff lost consciousness and found himself in hospital when he came round. I shall come back to the injuries sustained by the plaintiff later in this judgment.

The plaintiff added that when the accident took place there was another motor vehicle coming from the opposite direction and the stationary motor vehicle had no reflectors.

The plaintiff was subjected to searching cross-examination by the learned counsel for the first defendant. He stated that he was looking at the road, the road was straight and it was on a clear night. When his driver dipped his lights he reduced speed but he could not swerve to the right as the other oncoming

motor vehicle was approaching.

The plaintiff produced Exh 3A being an application for entries held by the Registrar of Motor Vehicles and Exh 3B being the details thereof. The latter shows that motor vehicle Reg No KDP 744 is owned by M/s Bondo Transporters of PO Box 1380 Kisumu. The same is dated 15th September 1978. Exhibit 2 is the police accident abstract which gives the details of the accident and the particulars of the motor vehicle Reg No KDP 744 as one Mr Dalmas Ndege of Western Garage Bungoma Township, PO Bungoma.

Mr James Atieno Ohore DW1 used to be the owner of the said motor vehicle Reg No KDP 744 but that he sold the same to the second defendant Dalmas Ndege. This was in 1975. The said Mr Ndege gave Ohore a Peugeot pick-up in exchange for the lorry and added some more money. He did not sign any transfer form but there was a written agreement before witnesses. He did not know anything about the accident in question neither was Dalmas Ndege his servant.

The first defendant or Mr Ohore who owned the first defendant firm did not call the witnesses who allegedly witnessed the sale agreement despite the fact that they were still there and alive. He also could not remember the registration number of the pick-up he exchanged with the lorry.

Mr Ohore had purchased motor vehicle reg No KDP 744 from M/s Nyanza Distributors Ltd, exhibit 4 confirmed this. This was the transfer form. The thrust of his evidence is that he had parted with ownership thereof to the second defendant hence he cannot be held responsible.

Mr Ohore is not illiterate. He could read English. When he first bought the motor vehicle he obtained a transfer form. He was aware of the procedures. He did not care to avail the alleged agreement between him and Mr Ndege or call the witnesses. In my judgment no such agreement or witnesses existed because the motor vehicle was still his and under his control. I am further fortified in this holding by exhibit 3B which confirmed that the motor vehicle was in the name of the first defendant as at 15th September 1978 more than one year after the accident. The first defendant was properly sued as a party in this suit.

The driver of the lorry Reg No KNN 997 one James Ndighila Mwakio is dead. The only evidence available therefore as to the occurrence of the accident is that of the plaintiff.

The particulars of negligence attributed to the second defendant are set out in paragraph 4 of the plaint. When related to the plaintiff's evidence the following facts are confirmed. The stationary motor vehicle Reg No KDP 744 was left on the road unattended without lights. It was a danger to the other traffic lawfully using the said road. In its position it caused an obstruction to the other said traffic. It had no chevrons and the driver did not care to warn other traffic of its presence on the road. The least he could have done was to place tree branches on the road over a distance to warn approaching traffic that the motor vehicle was on the road. In my judgment negligence has been established against the second defendant and I find him liable to the plaintiff. The denial on behalf of the first defendant on liability advanced through Mr Ohore DW1 cannot withstand the material evidence before the Court. Vicarious liability shall therefore attach on the first defendant. I note that no notice of indemnity is on record from the first defendant to the second defendant.

Some suggestion has been canvassed on the issue of contributory negligence on the part of the driver of motor vehicle Reg No KNN 997. Whereas I believe the Court may infer a state of affairs from the given facts, I note that the issue was not pleaded and further any such suggestions have been watered down by the evidence of the plaintiff. I find no evidence, given the circumstances of this accident, to attribute any degree of contributory negligence upon the driver of the lorry in which the plaintiff was a passenger.

On quantum I am guided by the medical report by Mr R P Shah dated 27th October, 1980.

As a result of the accident the plaintiff sustained a severe crush injury of the left lower leg. He was admitted to Bungoma Hospital where the leg was encased in plaster. He was transferred to Kisumu Hospital after 2 weeks where a below the knee amputation had to be done. After a few days another operation was carried out during which further amputation of the leg was done above the knee. The

amputation stump kept on discharging pus for several months so he was kept in hospital for six months and regular dressings were done. Thereafter he attended Kabete Orthopaedic Hospital Nairobi regularly for dressings for 3 months at the end of which the stump healed. Later he was fitted with an artificial leg but walks with the aid of crutches to date.

The plaintiff complains of pain in the amputation stump in the cold weather and on walking more than half (1/2) a mile. He still uses crutches and appeared in Court with the same. He finds the artificial limb very heavy. Since the accident he has not been able to return to his work as a turn boy.

Both learned counsel have cited authorities on quantum which I have noted. In Nbi HCCC No 770 of 1984 *Appollo Mariika v Kenya Railways Corporation* an award of Kshs 380, 000/= was made in terms of general damages for pain and suffering and loss of amenities to the plaintiff whose leg was amputated below the knee. See also HCCC No 299 of 1982 *Kasema Kipondo v Wilson Kihuta*, HCCC No 1576 of 1978 *Mary Komen v The Attorney General and another* and HCCC No 3425 of 1982 *Vitalis Osindo v Joseph G Asaf and another*. Awards made several years ago have been overtaken by factors associated with the fall of the value of money such that any comparison to the present shall not be realistic. I have taken all that into account and in my judgment I make an award of Kshs 450,000/= general damages for pain suffering and loss of amenities.

The plaintiff was 22 years old at the time of the accident and was earning Shs 800/= per month as a loader. He could not be employed after the accident due to the severe injuries he sustained. Loss of earnings fall under special damages. This was pleaded. I have given consideration to submissions on quantum and I believe a multiplier of 26 years is appropriate. Loss of earnings therefore add up to kshs $800 \times 12 \times 26 =$ Kshs 249,600/=.

The artificial limb cost Shs 5,000/= while transport expenses amounted to Shs 1,600/=. Special damages including loss of earnings amount to Kshs 256,200/=.

In the final analysis there shall be judgment for the plaintiff against both defendants jointly and severally in the sum of Kshs 450,000/= general damages plus Kshs 256,200/= special damages. The plaintiff shall also have the costs of the suit and interest at court rates.

Dated and delivered at Nairobi this 15th day of January 1992 .

A. MBOGHOLI-MSAGHA

JUDGE