



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 3502 OF 1990**

**JOHN KINYANJUI & ANOTHER.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL & ANOTHER.....RESPONDENT**

**JUDGMENT**

Nderitu sued the Attorney General and another in this matter on 16/7/90. He did so on behalf of his infant son.

It was pleaded that the 2nd defendant was driving motor vehicle GK 335 lorry with the plaintiff travelling in it as a passenger. On that day, so evidence reinforced the pleadings, the lorry was carrying desks but that these were so carelessly arranged that when the lorry was on its course to a destination being driven at a high speed, the plaintiff fell from it and was injured. The minor injuries were bruises but the most serious one was a permanent brain injury which resulted in psychiatric problems including epileptic fits. The plaintiff ceased to attend school and is given to disappearing from home and even getting lost for days or weeks on end. So damages were claimed along with costs and interest.

The Attorney General entered appearance, filed defence and even signed the agreed issues. He was served for the hearing dates but he did not show up. The hearing went on *ex parte*. Submissions were filed on behalf of the plaintiff. The exhibits included 2 medical reports by Dr Karanja (25/11/85) and Dr Omondi (26/5/92). There was also a certified copy of proceedings and judgment from Siaya Resident Magistrate's Trial Case No 109/1986.

From the Siaya traffic case the Court was noted from the evidence of the witness there and from that Court's finding that the 2nd defendant was not liable and responsible for the accident; he was acquitted under section 210 CPC. The evidence is interesting. The plaintiff himself gave evidence in the traffic case. He said that they had helped the 2nd defendant load his lorry with benches. He was taking them to a county hall. After the loading the driver asked these children to get into his lorry and to go help him unload them. They got into the lorry and the driver took off. The plaintiff Tabu, does not say anything of high speed but he stated;

“When we reached near Banana, I noticed that I had passed our home. The benches were pushing me and I fell out of the vehicle but was held back by a shutter of the vehicle. I hang on for sometime before falling...The pupils shouted but the driver did not stop.”

After off loading the benches the driver returned to the spot where the plaintiff had fallen. He had been taken to hospital. The 2nd witness George Oloo who was on the lorry testified in the Traffic Court. He said in cross examination.

“John had told the driver that he would drop at Banana where his home was and it is there he fell down. John fell down because the vehicle was going fast and the chairs were pushing him behind.”

Another witness there Joseph Ong’ong’a also spoke of the plaintiff telling the driver, 2nd defendant that he would alight at Banana. He also testified that the lorry was going at a speed. The plaintiff dropped from the lorry at this point - Banana.

Odhiambo who also gave evidence at Siaya was on this road at the time and place in issue. The lorry had passed him when he got to the spot ahead he found a woman shouting. It was all to draw attention to the incident:

“I saw the rear doors of the lorry open and a white thing hanging on the door; soon that thing dropped. Then I noticed that it was a boy as he was running away.”

The boy was chased, caught and taken to hospital.

Two things emerge from the traffic case proceedings. The lorry was loaded with chairs or benches. It was going at a speed. From the evidence of the pupils the chairs pushed the plaintiff out. If all stopped here it could easily be concluded that the 2nd defendant had not ensured that the chairs were securely tied as not to move about and push his passengers at all. He was driving at a speed. But the other picture that emerges is that the plaintiff told the 2nd defendant that he would alight at Banana - near his home. When he saw the lorry passing that point without stopping he must have thought of coming off. He hang on the rear of the lorry for a while then jumped onto the ground. Then he began running away from where he fell. This would in this Court’s view be consistent with the thinking of a boy aged 7 years. When he felt that the lorry was passing his home, he thought of the way to get down even if the driver had not heard his shouts - shouts for the falling off boy or for the driver to stop. So there we are. At the end of the day the fall has seriously injured the boy and the issue of liability and damages must be determined.

In this state of affairs the Court is of the view that despite the age and that no evidence was called to rebut the burden of liability, the traffic case proceedings persuade this Court to award liability at 80:20 rate. The lorry was going at a speed. But even young as he was the plaintiff could be expected to realise what risk he exposed himself to by jumping from the moving lorry in order not to pass home.

This is not placing too much on a minor in such a situation.

As for the quantum. Dr Karanja’s report referred to the bruises and injuries and then to the serious head injury.

“The injuries to the head were associated with concussion and abnormal behaviour. This has persisted despite healing of the wounds. It is therefore apparent that the boy suffered brain injury which may become a permanent disability. He runs the risk of developing epilepsy in future..... Permanent incapacity limited to about 22%.”

Later Dr Omondi said of the plaintiff.

“... the patient has been exhibiting inappropriate behaviours namely lapses of memory, truanting from school, personality changes and general apathy. These features are consistent with temporal lobe epilepsy.”

It was added that the plaintiff was on drugs to control his problem as well as attending psychiatric clinic.

All these coupled with the evidence of his father ie plaintiff’s disappearing from home for long then it can be said that young Tabu suffered really serious brain injury.

In *Moniqu Seka vs Kasira and KCC HCCC 2098/78*, the plaintiff was totally incapacitated - in brain and

body, after an accident. Shs 2.75M was awarded.

In *Charles Kinyanjui vs Bizone Ltd & another* HCC (not given) - the plaintiff had sustained 100% incapacity -Shs 1M was awarded in 1982. Then in *John Okello vs Otieno & another* HCCC 109/83, the plaintiff suffered broken limbs and developed epileptic fits Shs 2.89 million.

In *Rahima vs Kinanu* CA NRI No 29/82 general damages were reduced to Shs 300,000/= and with 10% contributory negligence for the plaintiff aged 9 years. She finally got Shs 270,000/=. Finally in *Bashir Butt vs Khan* Civ Appeal No 40/77, the Court reduced an award of Shs 400,000/= for general damages to Shs 300,000/=. The plaintiff had a fractured skull, lost 2 permanent teeth and bled from the nose. He had been hospitalized. The case of *Hadija Olesa vs Hakai & another* HCCC 1870/84 was also cited.

After considering all the foregoing the Court was minded and it awarded plaintiff general damages of Shs 600,000/=. This to be reduced by 20% ie 480,000/= plus special damages Shs 450/=. In all Shs 480,450/= with costs and interest.

**Dated and delivered at Nairobi this 4th day of November 1992.**

**J.W MWERA**

**JUDGE**