REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 725 OF 1984

SHIAMALLA …….PLAINTIFF

VERSUS

MWANGI & ANOTHER……..……DEFENDANT

JUDGMENT

September 23, 1987, Mbaluto J delivered the following Judgment.

On October 24, 1982 the plaintiff, an employee of the 2nd defendant was injured following an accident involving motor vehicle registration number KRR 066 the property of the 2nd defendant which at the material time was being driven by the 1st defendant. The accident occurred along the Keokork – Itong road in Narok District and the plaintiff claims that it was caused by the negligence of the 1st defendant in the course of his employment with the 2nd defendant. In the event he has filed this suit to recover special and general damages from both defendants jointly and severally.

The defendant admits that the accident took place but denies the alleged negligence. They contend that the plaintiff was an unlawful passenger in the motor vehicle at the time of the accident, he having forced himself into the said vehicle. In the circumstances they aver that the plaintiffs not entitled to recover any damages. It was also claimed in the written statement of defence that motor vehicle number KRR 066 was at the material time on loan (presumably from the 2nd defendant) to Mara Fig Tree Camp and consequently the second defendant could not under those circumstances be held liable for the loss and damage arising from the accident. No evidence was however led, at the trial of this one, to support these assertions, the only evidence on the matter being an admission by the 1st defendant (DW 1) hat he was an employee of the 2nd defendant at the material time. I therefore accept the plaintiff's claim that the 1st defendant was acting as a servant of the 2nd defendant at the time of the accident and reject the assertion to the contrary made in the written statement of defence, the said assertion having been controverted by evidence tendered during the trial by the defendants' own witness.

As regards the question whether the plaintiff was a lawful passenger the evidence was that the plaintiff had travelled in the defendant's said motor vehicle from the Fig Tree Camp where he worked for the 2nd defendant to Keekorok to buy food for himself as well as for other employees. On the journey back to the camp, the four employees including the driver (1st defendant) were all seated in the cabin of the pick-up when it overturned.Both the plaintiff and the 1st defendant in their testimony agreed that they were squeezed in the cabin. The plaintiff's evidence was that he was lawfully in the pick-up but the defendant contends that he was there unlawfully. However, the only witness to testify on behalf of the defendants

(DW 1) did not say anything about the plaintiff having forced himself on to the pick-up. He only mentioned the matter in cross-examination when explaining why the four employees including DW 1were squeezed in the driver's cabin of the pick-up. This is what he stated:-

> ***"In the driver's cabin we were four because the plaintiff forced himself in the vehicle. We were so squeezed I could not manage the vehicle properly. Since it was not far from the camp and the plaintiff insisted, I decided to drive back to the camp."***

Even if I were to accept DW1's evidence as true, it still remains clear from the above evidence that the 1st defendant accepted the plaintiff as a passenger in the vehicle. Whether the plaintiff's presence in the vehicle was by reason of his insistence as claimed by the 1st defendant or by reason of other considerations, the fact remains that he was allowed in the vehicle. The 1st defendant testified that he thought that he could safely drive back to the camp with the four employees including himself squeezed up in the cabin. He said he could not drive properly in the circumstances but he nevertheless took the chance. Having done so, he cannot turn back and claim that the plaintiff was an unlawful passenger. If the plaintiff had forced himself in the vehicle in circumstances which made it impossible for the 1st defendant to drive safely the 1st defendant should have refused to drive the motor vehicle or in the alternative he should have driven the vehicle to the nearest police station and report the plaintiff therein. That he did neither clearly shows that the claim that the plaintiff was an unlawful passenger is an afterthought. I reject it and find that the plaintiff was a lawful passenger in the motor vehicle. The plaintiff claims that the accident occurred because the 1st defendant was driving carelessly and at an excessive speed. By his own admission the 1st defendant could not drive properly because he and the other persons amongst whom was the plaintiff were squeezed up in the pickup's cabin.

The road between Keekork and the Fig Tree Camp is a rough earth road full of pot-holes and rocks. All these conditions of the road were or ought to have been known to the 1st defendant who was familiar with the road he having driven hereon many times prior to the accident. And yet he claimed that when on this occasion he came a cross a County Council trailer parked on the side of the road, he was forced into a pot-hole which caused the pick-up to skid on the heavy sand on the road and eventually to overturn. The 1st defendant did not explain to my satisfaction why he could not avoid the pot-hole or why he could not control the motor vehicle after hitting the vehicle. Having regard to the evidence of the plaintiff and the 1st defendants admission that he was so squeezed in the cabin that he was unable to drive properly, I find that the 1st defendant drove carelessly in the circumstances and was solely responsible for the accident. He and his employer the 2nd defendant are therefore liable to the plaintiff for the injuries he sustained as a result of the accident.

At the time of the accident the plaintiff was aged 44 years. His injuries have been described by Mr Shashi Patel in a report dated May 27, 1987.The injuries included cerebral concussion, fracture of the body of right scapula, bruising of the right chest and of the right leg. There were no fractures of the skull but according to Mr Shashi Patel, the abduction of the right shoulder is only 70 degrees and is unlikely to improve any further.

Several authorities were cited by both counsel. Counsel for the plaintiff ***Mr Mativo cited the cases of Fatuma Nyambura v John Warui Wanyoike*** (HCCC No 391 of 1987)***, Hellen Njeri Mugo v John Warui Wanyoike*** (HCCC No 380 of 1987)***, Grace Wanjiku Mureithi v Benjamin Totela*** (HCCC 2936 of 1984)***, David Maua v Sister Ngina Totela (HCCC No 1894 of 1979) and Bhaichan K Shah v Damisi Sackan & another (***HCCC No 3541 of 1980). ***For the defendants Mr Kamaara cited the cases of Kanabai v The Attorney General (***HCCC No 1022 of 1979***) Elizabeth Wairimu Mirau v Emmy Mwathia*** (HCCC No 2938 of 1979) a***nd Amiray Haji v Hassan Batried (HCVCC*** No 856 of 1979). I have considered all the authorities cited by both counsel. Having regard to the extent of the injuries sustained by the plaintiff and the awards made in the cases cited herein and doing the best can in the circumstances of his case I would assess general damages for pain and suffering and loss of amenities at Kshs 60,000.

As for the special damages I accept that the plaintiff has established the claim for Kshs 400 paid for the medical report and Kshs 100 for the police abstract. The defendant dispute the plaintiff's claim for Kshs

1,000 for expenses incurred in traveling between Nairobi and Kakamega but though no supporting document was produced to authenticate the claim, I accept it as a legitimate expense incurred as a result of the accident and I award the plaintiff the said sum of Kshs 1,000 as claimed.

In the event there will be judgment for the plaintiff against the defendants jointly and severally for Kshs 60,000 general damages and Kshs 1,500 special damages with costs plus interest thereon at court rate from the usual appropriate date.

September 23, 1987

MBALUTO

JUDGE

Cases

1. Fatuma Nyambura v John Warui Wanyoike (HCCC No 391 of 1987)

2. Hellen Njeri Mugo v John Warui Wanyoike (HCCC No 380 of 1987)

3. Grace Wanjiku Mureithi v Benjamin Totela (HCCC 2936 of 1984)

4. David Maua v Sister Ngina Totela (HCCC No 1894 of 1979)

5. Bhaichan K Shah v Damisi Sackan & another (HCCC No 3541 of 1980)

6. Kanabai v The Attorney General (HCCC No 1022 of 1979)

7. Elizabeth Wairimu Mirau v Emmy Mwathia (HCCC No 2938 of 1979)

8. Amiray Haji v Hassan Batried (HCVCC No 856 of 1979)

Statutes

No statute referred to.