REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO 1624 OF 1979

MARTINE APIYO WAINDI …………. …………………………...……….. PLAINTIFF

VERSUS

PHARMACEUTICAL MANUFACTURING CO LTD & ANOTHER …....……DEFENDANT

JUDGMENT

The plaintiff's evidence is that on January 9, 1978 in the morning she had been sent from her place of work in the Ministry of Water Development, Industrial Area, by her superior to the Central Bank behind the Extelcoms Building. Having finished with her errand she crossed the Haile Selassie Avenue from the Extelcoms House at about 10.30 am in order to catch a bus on the other side of the Haile Selassie Avenue to take her back to her place of work. After crossing the nearer half of the road she reached the middle yellow line. She stopped at the yellow line to allow a lorry coming from her left, that is, the Railway Station roundabout and travelling towards Uhuru Highway direction to pass. After that she did not know what happened because she had lost consciousness and when she regained consciousness (according to Dr Abille's report on January 17, 1978, with which she agreed) she found herself in the hospital tied to the bed with her right wrist, left leg below the knee and her right collar bone area in plaster, and a bandage all over and round her head and forehead. She was sure that she had not seen any motor vehicle behind her.

What had happened to the plaintiff is explained by the 2nd defendant, an employee of the 1st defendant, who at the time was driving the 1st defendant's Combi along the Haile Selassie Avenue at a speed of 30-35 Kph from Uhuru Highway direction towards the Railway Station roundabout at the junction of Haile Selassie Avenue and Moi Avenue. Haile Selassie Avenue was made up of four lanes – two for traffic travelling towards Railway Station roundabout and two for traffic travelling in the opposite direction. He was travelling in the extreme left side lane that is the lane running along the stone kerb and a lorry was travelling in his offside lane that is the lane running along the middle yellow line. Beyond the kerb was a wire fence with flowers growing there.

Both the vehicles were travelling in the same direction towards the Railway Station roundabout. The lorry was a little faster than the Combi and was not travelling quite along side his Combi but slightly ahead of it. As they were travelling in that position the lorry slowed down and his Combi came along side it. Suddenly someone crossed in front of the lorry and entered the lane he was travelling in when his Combi was still just behind the cabin of the lorry. He just saw the pedestrian in front of his Combi in the middle of his lane. He could only brake. He could not turn to either side because of the presence of the lorry and the stone kerb. The distance between the Combi and the pedestrian was so short that despite his braking the near side front of the Combi hit the pedestrian who fell in front of the Combi which was now at a standstill. The lorry had moved on. The only damage to the Combi was a slight dent in the front part near the rear side front light. The windscreen had come out (in re-examination) and was hanging down with

the rubber fitting. He took it off completely and put it down on the road. It was not broken.

After the accident when the 2nd defendant came out of the Combi an ambulance which was following them came. He stopped it. The ambulance took the pedestrian (the plaintiff) to Kenyatta National Hospital. A few minutes after the ambulance left the police came. While the police were still there the director of the 1st defendant Co (DW 1) who happened to be passing along that road also came. Up to that time the Combi had not been moved at all from where it had stopped (which position the 2nd defendant showed in the sketch he drew as being near the stone kerb).The Combi was examined by the police and nothing was found wrong with it. He said that the accident had taken place near the Central Bank but denied categorically that the pedestrian was crossing from the Bank's direction towards the other side. He was not charged with any traffic offence.

The plaintiff has no recollection of what had happened to her. The only account before the court is that of the 2nd defendant as to how the accident happened. There is no evidence to show that the accident had happened in a manner different from that described by the 2nd defendant except that the plaintiff claims that she was crossing the road from the Central Bank side to the other side and was standing on the yellow line in themiddle of the road when she lost consciousness while the 2nd defendant's account is that she was crossing the road towards the Central Bank from the other direction and was in the lane next to the kerb side in which hewas travelling when the accident happened.

The 2nd defendant's evidence as to the most likely point of impact is supported by the evidence of his employer (DW 1) who had happened to pass on that road after the accident and was at the scene while the police were still there. He said that with his brother-in-law he had entered Haile Selassie Avenue from Uhuru Highway and found traffic hold-up around the Central Bank area. He found their own Combi stationery near the kerb of the road facing Railway Station roundabout. The police were there.

Time was between 10.30 am and 11.00 am. He found broken glass in the lane in front of the Combi which was also damaged at the front but he could not remember on which side at the front. He did not see any brakemarks. He also said that he had no reason to believe that the Combi had been moved after the accident. He also confirmed the 2nd defendant's evidence that he had left with goods meant for one Dr R B Shah in Ronald Ngala Street and explained that the nearest route for the driver to reach city centre from Industrial Area was from Uhuru Highway and then either via Haile Selassie Avenue or the Kenyatta Avenue. He said that their drivers usually left to make deliveries sometimes between 9.30 am to 10.00 am. The 2nd defendant had said that he had left Industrial area a few minutes before 10.00 am.

DW 1's evidence, therefore, corroborates the evidence of the 2nd defendant on the following issues:

1)That the Combi was travelling towards the Railway Station roundabout from Uhuru Highway direction;

2)That it was travelling in the outer of the two lanes meant for traffic going towards the Railway Station roundabout;

3)That the accident happened in this outer lane which was the nearest to road kerb.

DW 1 had mentioned seeing broken pieces of the windscreen on the road in that lane. The 2nd defendant on the other hand said that the only damage to the Combi was a slight dent near the front near side head lamp and the coming out of the front windscreen which the 2nd defendant then pulled off and placed it on the road. It was not broken. The Combi, it is not disputed had no bonnet – its engine being located at the back. I do not consider this discrepancy of any significance. The accident happened in January, 1978 and DW 1 gave evidence 7 years and 8 months later on October 1, 1985. After such a length of period it is not surprising that he could not exactly recall whether it was the windscreen or windscreen pieces that he had seen on that road.

During his cross-examination the 2nd defendant had strongly denied the suggestion made to him that the lorry was coming from the Railway Station roundabout direction and that it was coming from the direction opposite to his direction of travel. If that had been the case, and there is not a speck of evidence

to support that suggestion from the plaintiff's advocate, then the accident would have happened only if the 2nd defendant had been travelling in the lane next to the yellow line in the middle. In that position of travel the plaintiff would have been in his clear view standing on the yellow line in the middle. How could his Combi– a vehicle without a bonnet, have hit the plaintiff in that case? Further even if he had hit her then the plaintiff would have been either flung into the path of the oncoming lorry, which the plaintiff was waiting to pass, or against the body of that lorry. But if she had not been hit by the Combi until the lorry had passed here then there was not much likelihood of her being hit at all by the Combi because she would have immediately started crossing the other half of the road away from the path of the Combi. Although he plaintiff herself had said that there was no vehicle behind her when she stopped on the yellow line in the middle clearly meaning the two lanes she had crossed and left behind her, I do not attach any value to that. But the dent in the region of the front near side head light of the Combi shows that the plaintiff was hit by that part of the Combi. This part of the evidence of the 2nd defendant was not challenged. The Combi was examined by the police and a report could have been obtained to show if the Combi had been damaged at any other part of its body. That was not done. And I see no reason why I should not accept the evidence of the 2nd defendant.

I would also observe that the police were at the scene. They could haveprovided valuable evidence at least as to the point of impact. Yet the police were not called to give evidence. Further on the question of the credibility of the plaintiff's evidence particularly in relation to events immediately preceding the accident, I cannot ignore Dr Abila's reference and comments on plaintiff's proneness to forgetfulness in his report of October 17, 1985. In this report he has recorded on page 2 some of the plaintiff's present complains as follows:-

> "Forgetfulness: After the accident she has been forgetting important things so often that on many occasions she has lost valuable personal properties eg money, watches and other valuable items. She even forgets issues related to family matters."

Then on page 3 following his examination Dr Abila has recorded as follows:

> "Forgetfulness: All people forget to varying degrees but the so called "pathological forgetfulness" is a feature of head injury particularly in cases of concussion. This affects people's efficiency, safety at work and their relationships with others'…"

The plaintiff's proneness to forgetfulness after the accident becomes significant in view of the fact that she is unable to recall what happened to her when she claims she stopped on the yellow line in the middle of the road to let the lorry pass. She clearly has suffered a loss of memory in respect of the incident on account of the trauma and shock of the accident. It is more than likely that she also suffered a loss of memory in respect of events immediately preceding the accident. The account given by the 2nd defendant appears on balance to be the only plausible one as to how the accident could have happened. I am unable to place any reliance on the evidence of the plaintiff on events immediately preceding the accident particularly as regards her own actions and position before she was hit by the defendant's Combi. Being mindful of all the evidence before me and all the material factors I am on balance satisfied that the accident happened in the manner described by the 2nd defendant. I accept his account.

Mr Otieno for the plaintiff stressed that even if the 2nd defendant's account as to the cause of accident is accepted it still displayed a certain amount of negligence on his part. He said that if the lorry happened to stop to let the plaintiff pass then as a conscientious driver the 2nd defendant also should have stopped at that time. I have given a very careful consideration to this aspect. In the first place it is clear that the 2nd defendant was not travelling at all at an unsafe speed in the circumstances. The absence of brake marks and the light damage to the Combi are evidence of the fact that he was driving at a speed of about 30-35 Kph as he has claimed. The lorry was a little faster and that is why it was a little ahead of him. In that position I accept the 2nd defendant's explanation that because of the presence of the lorry on his off-side he could not see if there was any one crossing the road from the off-side.

I accept the evidence of the 2nd defendant that beyond the stone kerb on his near side there was a barbed wire fence with flowers growing there. Further evidence was produced on behalf of the defence to prove

that on May 28, 1975 a foot bridge going over Haile Selassie Avenue had been opened for the use of pedestrians. At the time of the accident the footbridge had been in use for over 2 1/2 years. To my mind in these circumstances a driver of ordinary common sense, reason or prudence would not expect pedestrians normally to be on this road crossing it.

The 2nd defendant said that he had not seen any pedestrian crossing this road. Further the lorry on the off-side had obstructed his view of the road on that side (in re-examination). I have already said that as a driver of ordinary common sense, reason or prudence he would not under normal circumstances have expected to be suddenly confronted with a pedestrian in his lane in front of him. He was travelling at a safe speed of about 30- 35 Kmph. To my mind in these circumstances where the drivers were used to the idea of not expecting pedestrians to be crossing this road, when the lorry slowed down (it did not stop) and the 2nd defendant's Combi started catching up even at that speed, it is hardly likely that the presence of a pedestrian on the road would immediately have occurred to him. In fact it is hardly likely that a driver in the position of the 2nd defendant would have even thought about the reason for the slowing of the lorry in the adjoining lane. The Combi was near the cab of the lorry when the plaintiff appeared in its lane and in front of it. The 2nd defendant braked. I accept the 2nd defendant's explanation that the distance was too short for the Combi to stop in time.

After considering the cause of accident from all its angles in my view there was no negligence at all on the part of the 2nd defendant. The accident had been made inevitable by the action of the plaintiff herself. In view of this finding I do not propose to go into the question of injuries and the extent thereof suffered by the plaintiff with a view of assessment of damages. The suit is dismissed with costs awarded to both the defendants against the plaintiff.

A.M.COCKAR

JUDGE

25/4/86