REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 3452 OF 1984

JOSEPH MUTUNGA WAMBUA.....PLAINTIFF

VERSUS

KANTILAL KHIMJI PATEL & ANOTHER.....DEFENDANT

JUDGMENT

The plaintiff, who I should judge to be in his middle fifty, lives at Masii. I understand it is a village near Machakos. He is a cattle dealer. He buys and sells cattle to the Kenya Meat Commission. And for this purpose, he comes to Nairobi quite often. He struck me as a man of enterprise. For a while, he combined this with running a mini bus called “matatu” for gain. That business came to an end before the event which gave rise to this action.

On or about March 29 or 30, 1983, he met with an accident. It was on Ring Road, Westland here in Nairobi. The time of the accident was variously put at between 1 and 2. He was knocked down and seriously injured by a Peugeot pickup driven by the 1st defendant. The latter is a young Kenyan citizen of Asian descent. That vehicle belonged to the 2nd defendant firm. It was admitted in these proceedings that at the time of the accident, the 1st defendant was driving that vehicle in the ordinary course of the firm’s business.

The plaintiff was run in the firm’s vehicle to Kenyatta National Hospital shortly after the accident. He was there and then admitted. Because of the severity of the injuries, he remained on admission until July 6, 1983 when he was discharged. He still attends the hospital fairly frequently as an outpatient. The plaintiff underwent surgery when he was in hospital and a metal was inserted in his right thigh. With luck, this may be removed by another surgical operation scheduled for next September. Nobody who sees the plaintiff, can feel any doubt that he suffered serious debilitating injuries from this accident.

As a result of the accident, the plaintiff has been disabled from earning his livelihood as a cattle dealer and lost his earnings thereby. So on December 18, 1984, he brought this plant against the defendants to recover damages for his injuries and the financial loss he sustained by reason of his inability to carry on his calling as a stock dealer. The plaintiff based his claim on the 1st defendant’s negligence for which the 2nd defendant firm is vicariously responsible.

The defendants, for their part denied negligence. They say, the accident was caused or substantially contributed to by the plaintiff’s negligence in that he failed to keep a proper look out and suddenly emerged on the road without first ascertaining that it was safe to do so. So they ask that the suit against them be dismissed.

The first and most important question I feel called upon to decide, is whether or not the accident was caused by or substantially contributed to by the plaintiff's negligence or as the latter assert, the 1st defendant was solely to blame for the accident.

I must now answer the question; who caused the accident and who was to blame or if both parties were blameable, the degree of fault that can properly be attributed to each party? A very important factual issue which was debated before me with some depth of feeling, is whether the collusion occurred on the zebra crossing or outside it. If it occurred on the pedestrian crossing, then *prima facie,* the driver must be negligent unless he shows that it occurred in circumstances in which he is wholly free from blame.

On this issue, the plaintiff gave evidence and was positive that the 1st defendant knocked him down on the zebra crossing. For this evidence, he found some support from the evidence of Constable John Murunji. He accompanied the parties to the hospital and returned with the 1st defendant to take measurement at the scene of accident. He said from his own observation, he formed the opinion that the impact took place on the zebra crossing. But his own personal judgment was, according to him, confirmed by the defendant on the spot. The one independent and real evidence that would seem to clinch this story is bloodstain which the constable said, he observed and which he put in the zebra crossing in his sketch plan.

When he was cross-examined about the quality of the blood, he said it was dried blood. Asked about its size, the constable said it measured in diameter, the size of the wrist watch worn by the court. The plaintiff swore that he was fully conscious and if he then bled from the injuries he sustained, this fact would spring from his lips unasked. He did not testify to bleeding. The defendant was certain that there was no blood of any sort either on the zebra crossing or where, according to him, the collision occurred. I think the evidence of dried blood of the size deposed to by the constable is too tenuous to justify a conclusion that the collision occurred on the zebra crossing.

On this aspect of the case, I prefer the 1st defendant's story to that of the plaintiff and Constable Muranji. Although the police told me in the witness box, that the defendant himself pointed the point of impact to him, when I asked him to show this at the *locus in quo*, he then retracted that story and said the point of impact was something he discovered in his own personal observation. On this issue, I think his testimony is unreliable.

I have reason to distrust the plaintiff also when he swore positively that he was knocked down on the zebra crossing and not near it. This was his evidence before me on June 3, 1986. Yet when he made a statement to Constable Garibue on April 19, 1983, he said he was knocked down near a zebra crossing. It was only three weeks after the accident when the facts were fresh in his mind. If he was knocked down on the zebra crossing itself, it completely passes my understanding why he did not say so then.

And his statement in 1983 would tend to support the 1st defendant's story that the impact took place near the zebra crossing. I think the collision took place shortly after the zebra crossing. At the *locus in quo,* I stepped from the end of the zebra crossing towards the roundabout where the defendant was driving to. It measured 7 paces. It was there that the debris was scattered, that is, the broken headlamp. In my opinion, that is where the collision occurred and I so find.

I ask myself; why did the 1st defendant knock down a pedestrian a few feet from a pedestrian crossing? The 1st defendant's evidence is that the plaintiff emerged on the road suddenly behind a telephone pole which obstructed his view and although he tried to avoid him, he did not succeed. The plaintiff's version on this aspect of the case, is that having looked left and right and satisfied himself that there was no oncoming traffic, he began to cross the road. When he was almost midway in the left lane, he was knocked down by a vehicle which was driven with speed.

On this part of the case, I think the plaintiff told me what is substantially true. I reject the lst defendant's evidence that the plaintiff emerged suddenly on the road. I cannot accept that a matured man of the plaintiff's age would court death in that way. Having been to the spot, I cannot accept that a driver's view on the road could be obstructed by the thin telegraph pole shown to me. I think the lst defendant drove at

such great speed that when he came upon the plant who was in his lane, he was unable to stop and avoid a collision.

The lst defendant himself said he maintained the same speed. He had just emerged from the Sarit Centre, where there was a warning about pedestrian crossing. The area was built up and it was at a time when the 1st defendant well knew, there would be some amount of human traffic. His breakmarks which measured 20 ft, testifies to his unreasonable speed in the circumstances.

That the lst defendant owed a greater duty of care than the plaintiff, is plain to me. In Washington *Malele v Karanju* CA 50/1981, Chesoni JA put it this way:

> "Isabella (meaning the driver) had under her control a lethal machine when Washington (the pedestrian) had none and all things being equal, she was under an obligation to keep a greater look-out for other road users than Washington's".

In *Baker v Willoughby* 1970 AC 483 as 490 Lord Reid in rather different terminology conceived the duty in the same way. He said:

"A pedestrian has to look to both sides as well as forwards. He is going at perhaps three miles an hour and at that speed, he is rarely a danger to anyone else. The motorist has not got to look sideways though he may have to observe over a wide angle ahead, and if he is going at a considerable speed, he must not relax his observation for the consequences may be disastrous. And it sometimes happens .. he sees that the pedestrian is not looking his way and takes a chance that the pedestrian will not stop and that he can safely pass behind him…. It is quite possible that the motorist may be very much to blame than the pedestrian."

I feel no doubt that if the 1st defendant had been driving at a reasonable speed knowing full well that he was traversing a road sandwiched between two pedestrian crossings, he would easily have brought his vehicle to a stop when he sighted the plaintiff. I find that the plaintiff took three steps towards the opposite side of the road. That street was rather narrow. I think its whole width is 22 ft and being a double lane street, the yellow dividing line left eleven feet for each lane. When I took 3 paces from the edge of the nearside kerb towards the other lane, I was only 2 paces away from the yellow lane. I therefore accept the plaintiff's evidence that he was midway on the left part of the road when the defendant's vehicle brought him down with speed. In driving at the speed he did and in a built up area where there are two zebra crossing within 100 ft of each other. I think the lst defendant was negligent and that his negligence was the substantial cause of the accident.

I use the word "substantial" advisedly because, I cannot acquit the plaintiff of all blame. He said he knew the area well and that vehicular traffic on it was normally heavy. He swore that before crossing from left to right, he looked left and right but saw no approaching traffic. That was why he thought it was safe to cross at that time. He may well have looked left but from the evidence, I believe he cannot have looked right. Had he done so, he cannot have failed to notice a Peugeot pick up which was approaching with speed and which was to knock him down in minutes. The plaintiff himself admitted that it was a clear day and visibility presented no problem. I am satisfied that if he had looked right, he would have found it unsafe in view of the 1st defendant's speed to venture on to any part of the street.

I accordingly hold that the plaintiff was, in part, to blame for the accident. But his error of omission was not great, nor was it, in my judgment, the decisive cause of the accident. Tragic consequences light up small errors. I have come to the conclusion that the plaintiff ought not to have been unmindful of other road users especially, motorists. I assess his degree of blameworthiness at twenty percent. That means that the 1st defendant is to blame for the accident to the extent of eighty-percent.

As I said, the plaintiff claims damages for the injuries he suffered and for his loss of earnings since the accident. The general rubric under which the first head of damages is awarded is pain and suffering and loss of amenities of life. What I have to determine under this head of damage is a fair and reasonable compensation for the plaintiff. Before doing this, I must state briefly the injuries he suffered. He himself

told me that he was truck on the right part of his body and suffered injuries to his right arm and leg.

He was treated at the Kenyatta National Hospital and underwent surgery. I would have considered it more helpful if it had been possible to listen to the evidence of the doctor who treated him and to learn what he considers to be his prognosis. That was apparently not possible. But I have had, put in by consent, two medical reports, one by a physician and the other by a surgeon. While I have no wish to devalue the report of the physician, I think the plaintiff's treatment fell in the area of a surgeon's expertise than a physician's. he was examined by the physician in September 1984 while the surgeon examined him almost a year later, that is in August 1985. I think the latter report more reflects the plaintiff's latest condition and seems to me the more thorough of the two. According to that report, that is Dr Stuart's, the plaintiff sustained a fracture to his right thigh bone, fracture of right arm bone and sustained injuries to his right wrist and right leg. At the date he examined him, the Dr thought the treatment he received from the hospital was successful in obtaining union of the fractures.

The doctor found that the fracture of the upper right limb has fully healed although there is a slight angulation. He considered the injury to the leg was rather serious. He said it was a complicated injury to treat because of the extensive fracturing. He said the bone had united but it left the plaintiff with slight bowing and shortening of the leg. In the opinion of the doctor, the plaintiff must also have damaged what he described as "the cruciate ligaments in the knee joint" and he has to the date of the examination, not regained full movements in the knee.

According to Dr Stuart, the extensive injuries to the leg and that of the knee are associated with considerable disablement and the doctor thinks that the plaintiff would find it difficult to run and look after cattle again. Having myself seen the plaintiff walk, I have no doubt that this is the case. There is also the steel plate which was inserted in the thigh in the course of the operation. It is still in position. This will have to be removed and this removal, in the words of the doctor will involve further major operation.

The doctor was somewhat pessimistic about recovery of the injury to the knee. He said:

"At the time of the operation, it would be possible by manipulation to obtain more movement for the knee joint so that he could become in theory less disabled. However, in the view of osteoarthritic changes in the knee joint and the likelihood of progressive changes in course of time, there is no likely to be significant improvement over all".

In the opinion of the doctor, the plaintiff is disabled to the extent of 5% from the upper limb injury and 20% in regard to the lower limb injury. The plaintiff also sustained some superficial injuries to the chest and back. These have healed leaving scars. As seems plain, the doctors considered that this serious fractures must have caused many weeks of pain and discomfort. It is for these injuries, that I have been invited to provide reparation in terms of money. I have not reproduced in extenso, Dr Stuart's finding, but, I have, I think, drawn a fair picture of the plaintiff's injuries and the doctor's prognosis.

There is also the head of damages known as the loss of amenities of life. It is obvious to me that the serious accident the plaintiff suffered would disable him from enjoying life as he used to. But he has not told me of any particular pleasures that he enjoyed and which the accident disabled him from pursuing. He seems a simple village folk who is content with the pleasures that rural life provides perhaps, occasional drumming and dancing. There is for him, nothing like swimming, golf, tennis, hunting or the other pastime now associated with what one may call, the genteel of society.

He did not say in evidence that the injuries he sustained, rendered him impotent. That would have been a disaster for a rural dweller with hardly any avenues for relaxation and pleasure but he seems to have told Dr Odhiambo that his urge for sex has diminished. The doctor put this down as "poor libido". It is possible his diminished libido is attributable to the injuries he sustained, although in middle age, one can hardly expect him to be as sexually active as he used to be when he was much younger.

I must now answer the not-too-easy question; what will be a fair and reasonable compensation to award the plaintiff for his pain and suffering and loss of amenities? On this, counsel for both sides have not been

economical in furnishing me with awards made by the courts of this and neighbouring countries and in England in comparable cases. Each side has given me a bulky file containing these and relevant decisions of negligence. I am grateful for this and find myself greatly helped by the joint industry of both advocates. I have read through these various decisions and looked at the injuries suffered and the awards made in *Washington Malebe v Karangu,* HCC 1574 and its enhancement in the Court of Appeal *Mativo Mutunga v Mbaka,* August 1982, *Opaka v Akamba Public Road Services, Shabani v Nairobi* March 1985, *Mariga v Musila,* Court of Appeal, May 1984, *Gakere v Ngigi,* Court of Appeal January 1981 and a few others.

These awards vary widely, depending of course, on the nature and severity of the injuries and the judge's own subjective judgment of what is fair and reasonable. But in so far as these varying awards can be said to provide any pattern it appears to be (1) that the present tendency in this country is to look more to Kenyan awards in comparable cases than the hitherto practice of resorting to English awards, and (2) that account should be taken of the considerable decline to in the value of money since some of the earlier awards were made. And (3) awards should, as far as possible, not violently depart from awards made by the courts in cognate cases. But in as there is no yardstick for making awards with anything like scientific precision, in the end, what should be awarded in any individual case under this head must be a matter of impression and commonsense. Having looked at all the previous awards and what I see as the emerging pattern of awards in this country, I think the lump sum figure which I should award to the plaintiff for his pain and suffering and loss of amenities is Kshs 350,000.

Before dealing with special damages, I must now consider his loss of earnings or earning capacity. I am not sure that there is any difference between these two concepts, at least not in this case. The plaintiff has been severely injured and cannot now commute between Masii and Nairobi to carry on his trade as a cattle dealer. He has not been able to do so since the accident and lost his earnings. He must be compensated for this, the quantum of this, of course, depends on what he satisfied me that he was earning.

As compensation for this must not only be limited to what he has lost from the day of accident to date, but also his future earnings, I must determine his age and his probable working life.

In the witness box, the plaintiff gave his age as 45 years. That seems to have been his constant age for some time now. When Dr Odhiambo examined him in September 1984, he gave him his age as 45 years. When Dr Stuart examined him a year later in August 1983, he gave his age as 45 years. In 1986, he still said he was 45 years. The truth seems to be he does not know his age. He said his parents were illiterate and that his date of birth which was put on his identity card as 1939, was just an estimate made by public officers. But he gave evidence of certain matters from which it is possible to arrive at a more reliable estimate at his true age. He said he joined the army in 1952. he reckoned that he must be 18 years of age then. Unless he joined the boys brigade, he should be older. He said he joined the infantry. I think he must be at least 21 years then. In matters of this sort infinite speculation is possible, accuracy is not. So he joined the army 34 years ago at the age of 21. So he must be 55 years old this year. Even allowing for deterioration in his physical appearance engendered by the accident, he looks to me to be in his mid fifties. If he is 55 now, he must be 52 in 1983 when he met the accident.

I ask myself, how many years working life did he have at the date of the accident? He must be a fit man physically to engage in the cattle trade. There is no reason to suppose otherwise. And as he was self-employed, he could not be obliged to retire on attaining a prescribed age, as many employees are. Barring accidents and other unforeseen events, I think he should have continued in his trade as cattle dealer until he attained the age of 62 years. That gives him a working life of ten years from the date of the accident. If he had been in a sedentary job, I would imagine he would have a slightly longer working life. So I would take a multiplier of ten years for computing his loss of earnings.

I am bound to say that the evidence he led of his earnings, is of very poor account. Although he appeared to be a man of enterprise and was somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 year cattle trade. It should require no ingenuity to see that figures he gave as his

earnings supplied from his memory bank, may well be exaggerated. I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his likelihood from that business. A wrongdoer must take his victim as he finds him. The defendants ought not to he heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business methods.

If I get the evidence on this aspect of the matter aright, the plaintiff buys cow at an average price of Kshs 2,600. He sells it to the Kenya Meat Commission at 2,780. That gives him a profit of Kshs 180 per cow. He normally delivers to the commission a load of 20 cattle and makes a gross profit of Kshs 3,600. He says, he does this between 5 to 6 times a month. I would take the lesser figure. Transport per load to Athi River, the venue of delivery, is Kshs 600 per trip. So he spends Kshs 3,000 on transportation and this brings down his gross profit to Kshs 15,000. He employs a cattle hand whom he pays a monthly wage of Kshs 800. He is therefore left with a monthly net income of just over Kshs 14,000 or thereabouts. His own claim is Kshs 10,000 profit per month. I accept that as reasonable. Counsel for the defendants has drawn my attention to *Ashroft v Curtin* 1971 3 All ER 1208 in which it was held that damages for loss of earnings must be established by satisfactory evidence and that the evidence should appreciate that I should approach the considerations of the plaintiff's evidence with caution and must not allow him to "pluck a figure from the air". But a victim does not lose his remedy in damages merely because its quantification is difficult. I have done my best to quantify it and having approached that evidence with caution, find it eminently reasonable. I find therefore that the plaintiff lost his income of Kshs 10,000 per month since the accident and will continue to do so for the rest of his working life of 10 years.

The plaintiff said he also ran a matatu but that business collapsed before the accident and I do not take his alleged earning of Kshs 2,000 a month into account in the quantification of his income. He also has a "shamba" in which he cultivates beans and maize. He employs hired labour to do this. So I do not see that the accident has anything to do with his discontinuance of that business. At all events, I am not satisfied that it is a commercial enterprise. I think his "shamba" is for his own domestic use only.

So I must now compute his loss of earnings from his cattle trade. I first deal with the earnings he lost from the day of the accident that is, approximately April1, 1983 to June 30, last, a period of 39 months. At Kshs 10,000 per month, the total earnings come to Kshs 390,000. The rest of his working life, on my reckoning, is 6 years, 9 months or 81 months. At Kshs 10,000 per month, the total loss of future earnings, works at Kshs 810,000. This sum to be reduced by his living expenses for that period. The guidance I received from the decided cases, is that 1/3 of the total earnings will be reasonable to attribute to living expenses. That works out at Kshs 27,000. That sum subtracted from Kshs 810,000 leaves a balance of Kshs 540,000. As this sum is being received nearly 7 years in advance and may well be invented at a profit, it has to be taxed down by what, in all the circumstances, seems reasonable. I think the Kshs 40,000 shillings on top of the Kshs 500,000 should be topped off, leaving a balance of Kshs 500,000. If my arithmetic is reliable, the plaintiff's loss of earnings both past and future, is as follows:

Loss of earnings from date of accident

to date of judgment Kshs 390,000

Loss of future earnings Kshs 500,000

That brings me to the last head of damages, namely, special damages. In this context, this is the sum which the plaintiff himself expended out of his own pocket as a result of the accident or which he lost by it. The orthodox statement of the law, is that special damages must be strictly proved. I bear this in mind but I cannot see how a virtually illiterate plaintiff of Masii village can strictly prove that he lost cash of Kshs 4,000 or the loss of his wrist watch or the expenditure he incurred on his many trips to hospital. It would be unrealistic to expect him to produce receipts for these. I find the following items proved to my satisfaction:

Actual cash lost in the accident Kshs 4,000

Suit ripped of	Kshs 800
Lost wrist watch	Kshs 400
Medical Certificate	Kshs 500
Transport to and from Masii to hospital	Kshs 4,000
Abstract from police accident record	Kshs 100
	Kshs 9,800
	=========

The plaintiff also claims under the head, the sum of Kshs 1,700 which he said was spent on transport by his relatives who visited him on many occasions while he was on admission. Although the evidence of the visits rings true, I regret I cannot feel satisfied that this sum was xxxx himself. He said his relatives did so and told him of the expenditure. He did not put any of them in the witness box. So his whole case on this head, is heard on hearsay evidence. That item of expenditure has not been proved and I am unable to allow it.

In view of the plaintiffs contributory negligence which I assessed at 20%, the net sum to which the plaintiff is entitled under various heads works out as follows:

	Gross	Net
(a) Pain and suffering loss of amenities	350,000	280,000
(b) Loss of earnings date of accident to the date of judgment	390,000	312,000
(c) Loss of future earnings	500,000	400,000
(d) Special damages	800,000	7,840
	1,249,800	999,840
	=======	======

Having decided the issue of liability and assessed damages as best I can, I should end this somewhat long judgment. But before he opened his lips to make his final submissions Mr Kilonzo for the plaintiff, invited me to enter judgment against the defendant firm. He claimed his authority for this submission on Order 9B rule 6 of the Civil Procedure Rules. I declined to do this but said I would give my reasons for this in my judgment. The rule on which reliance was placed is in these terms.

> "If some only of the defendants attend, the court shall proceed with the suit and shall give such judgment as is just in respect of the defendants who have not attended."

The rule does not oblige me to give judgment against absent defendant even if it would be unjust to do so. Here the 2nd defendant is a firm. As a firm it, was not the tortfeasor. Its liability is only vicarious. The firm incur liability only if judgment is recovered against the tortbearer. One of the partners in the firm

was tortfeasor and he appeared and contested the suit strongly on his own behalf. If he is absolved from liability, the firm's contingent liability goes with it. If he is held liable on the principle of "respondent superior". It would, to my way of thinking, be wrong and unjust to enter judgment against it before the liability of the actual tortbearer is determined. It was for this reason, that I declined to accept counsel's invitation.

Before expressing my final judgment, I must express my appreciation to both advocates for the invaluable assistance they gave me. They both put me in their debt. That fact that I have not felt the need to deal with the many cases they brought to my attention in the judgment, is no evidence of my wantof appreciation of their admirable contribution to the resolution of the issues which confronted me.

In view of what I have said in the foregoing paragraphs, give judgment for the plaintiff agaisnt the defendants jointly and severally for Kshs 999,840 with interest at court rates, as to the special damages from the date of suit and as to general damages from today. The plaintiff will also have his costs with interest.

Dated and Delivered in Nairobi this 7th day of July 1986

F.K.APALLO

JUDGE