



Republic of Kenya

High Court, at Mombasa

Civil Case No 42 of 1978

Isomi

versus

Ali

Negligence – incidence of in road traffic accidents – vicarious liability– – driver driving in he course of employment – special damage s- evidence of must be produced.

The plaintiff sued the defendant as a result of a road traffic accident involving the motor vehicle he was driving and a Kenya army lorry which was being driven by the first defendant.

The plaintiff in his plaint alleged that the first defendant rove so negligently that he caused he lorry to collide with the Land Rover that the plaintiff was driving.

The plaintiff further alleged that the first defendant who was an employee of the Kenya Army was driving in the course of employment or within his scope of authority thus making the Attorney general representing the army vicariously liable.

Held:

1. The court is satisfied on all the evidence placed before it that the sole cause of the accident was careless and negligent driving by the Army lorry driver.
2. The army lorry driver was driving in the course of his employment which makes the Attorney General vicariously liable.
3. Although the plaint included a claim of Kshs 642 as special damages, no evidence was had in respect thereof and the court is unable to give judgment for this amount.

Judgment for the plaintiff in the sum of Kshs 100,000 together with costs and interest.

Cases

1. Hansa A Amin v Girado Othiambo Owuor and Another(MSA) HCCC.591/81
2. David Maina Wakalitu v Sister Maria Iloa (NRB) HCCC 1849/79

Statutes

No statute referred to.

October 31, 1985, Bhandari J delivered the following Judgment.

This suit arises out of a road accident between a Land Rover registration No KJY 523 and an Army lorry registration No 35 KA 42 on or about August 18, 1977 at about 9.00 pm along Lunga Lunga /Mombasa Road. The plaintiff in his plaint alleges that the first defendant who was the Army lorry's driver so negligently drove, managed and controlled that lorry that the same collided with Land Rover travelling from the opposite direction and which was being driven by the plaintiff. As a result the plaintiff suffered serious injuries, loss and damage. The plaint further alleges that the first defendant was an employee of the Kenya Army and was driving the lorry in the course of his employment or within the scope of his authority, thus making the Attorney General representing the Army vicariously liable to the plaintiff. The plaintiff therefore claims special damages of Kshs 642 being the cost of obtaining accident abstract and medical report and he also claims general damages, costs and interest. The written statement of defence of the two defences admits the collision but denies that its cause was the negligence of the lorry driver. The defendants in their counter-claim allege that the sole cause of the collision was that the plaintiff negligently drove, managed and controlled the Land rover. The defendants then proceed to claim Kshs 51,082.30 being the cost of repairs to the Army lorry and pray that the plaintiff's suit be dismissed with costs. The plaintiff in his defence to counter-claim has denied that he was negligent in driving the Land Rover and further denies any knowledge of damages to lorry or liability to pay the repair charges. The plaintiff (PW 1) is employed by Kenya Ports Authority (KPA for short) and the Land Rover he was driving belonged to his employers. He and two other vehicles were on their way back to Mombasa carrying officers to KPA from Lunga Lunga where they had all gone for a seminar. The plaintiff was in the lead. He had ten passengers, two of whom were sitting beside him on the front seat. His speed was 45 KPH and the time was around 9.00 pm.

He described to the court how the accident happened. On reaching Waa he saw full head-lights from the opposite direction. His own head-lights were at dim position and he flickered his head-lights as a signal to the oncoming vehicle to dim its lights, but with no effect. He was blinded by the full lights. The plaintiff slowed down and moved to the left till his left wheels went off the road and his vehicle was then hit on the right front side. He lost consciousness as the Land Rover overturned and he came to three days later in Pandya hospital. He had an injury on the left wrist, cuts on both cheeks, upper lip, right side of the throat and right shoulder. He remained in the hospital for 14 days. He denied that he had got drunk during lunch at Lunga Lunga that day and added that throughout his life he had never touched any hard drink. He further denied that he was driving on the center of the road at the time of the accident.

One of the two passengers beside the plaintiff in the front seat was Philip Ogola (PW 5). Apart from saying that the time of the accident was 7.00 pm he fully corroborated the plaintiff. The headlights of the oncoming vehicle were full on and remained so inspite of the plaintiff flickering his lights. The plaintiff was not driving fast and had reduced the speed to very slow and had moved to the left. He then heard the band and went unconscious. He later found himself in hospital.

Benson Omoture (PW 2), an Information Officer employed by KPA was also one of those returning from attending the seminar at Lunga Lunga and he along with some other officers was in the second vehicle. According to him the three vehicles were not proceeding in a 'convoy' as the word is normally understood. The second vehicle was ten minutes travelling time behind the lead vehicle. When they reached Was he found the Land Rover off the road on the left side with plaintiff still inside lying unconscious. The right door had been ripped off. The Army lorry was facing towards Lunga Lunga but was on the wrong side, that is on the same side as the Land Rover. Later this witness photographed the Land Rover (photo Ex 1) but an Army officer on the scene refused him to photograph the Army lorry.

IP Cyrus Muriuki (PW 3) of Diani Police Station proceeded to the scene of the accident at about 7.00 pm. He thus supports Ogola (PW 5) as to the time of the accident. When he arrived at the scene he found both the vehicles on the left side of the road as one faces Mombasa. Land Rover was upside down. Both vehicles were off the road. According to his observation the point of impact was on the left side near the center of the road. He prepared a sketch plan and a legend (Ex 2 & 2A). He stated that the road is straight and the sketch plan shows that it is 20 metres wide there. The width of the two vehicles involved is – Land Rover 1.75 metres and Army lorry 2.40 metres. According to the skid marks appearing on the

sketch plan the Army lorry had started going towards its right before it hit the Land Rover which by going on to the right of the crown of the road.

IP Muriuki had prepared a report (Ex 1A) as a result of his investigations. The last paragraph of his report reads:

“According to the investigations the driver of the motor vehicle reg KJY 523 was travelling at very high speed and again he failed to keep to the near side or to the proper traffic lane. Although the driver of the motor vehicle KJY 523 claims that he was obstructed by the lights of the oncoming vehicle he is still to blame.”

IP Muriuki had recommended that the driver of KJY 523 (Land Rover) be prosecuted; but he could not say why he was not prosecuted. Finally, there is the evidence of Dr Homunt Patel (PW 4) a surgeon practicing in Mombasa. He had examined the plaintiff on three occasions and had prepared three reports (EX 3, 4 & 5). Dr Patel is the one who had treated the plaintiff whom he was brought to the hospital unconscious.

The plaintiff had the following injuries:

1. Head injury
2. Multiple lacerations, face.
3. Bruises right shoulder with multiple lacerations.
4. Laceration right ear and right side neck
5. Colles fracture (left wrist).

When he regained consciousness after two days he received treatment. His wrist was manipulated and placed in plaster. Lacerations were sutured. He remained in hospital for 15 days. He fully recovered the use of his left wrist but ugly keloid scars remained on his face and shoulders. The final examination on October 26, 1983 further revealed that the plaintiff has developed calcification in the top of right shoulder and atherosclerosis at greater lumberosity. These two areas according to the report (EX 5) are responsible for periodic pain and stiffness of right shoulder. He needs pain relieving drugs and injections and will have to spend about Kshs 600 a year on drugs, etc. The swelling of the lip and inability to drink or eat hot food is due to after-effects and keloid scars on upper lip. The inner lining of upper lip tends to break down off and on causing these symptoms. There is permanent incapacity.

That is the close of the prosecution case.

At the close of the plaintiff's case Mr Motho the learned senior state counsel (as he then was) applied for adjournment because, as he explained, Major Gathiora of Army's Legal Department had not had time to inform the witnesses (Army personnel) the hearing date because of his preoccupation with the hearing of court martial appeals. The court reluctantly granted adjournment. The suit finally came up for hearing on May 13, 1985 which date had been fixed at the annual callover. Miss Khina the learned state counsel who appeared for the Attorney General, again applied for adjournment on the ground that the defence witnesses have not come. The court refused adjournment and no evidence was therefore forthcoming from defence.

Now the findings of the court. According to the plaintiff, in the face of full dazzling lights of the oncoming Army Lorry he slowed down and moved to his extreme left so much so that the left wheels of his Land Rover were off the tarmac. The Army lorry coming from the opposite direction nonetheless came on his side and hit the Land Rover. This account of the plaintiff is supported by Ogola (PW 5) a front seat passenger in the Land Rover and Omuturo (PW 2) who arrived at the scene ten minutes after the accident and who found both the vehicles on the left side of the road as one faces Mombasa which

denotes that the Land Rover was on its correct side whilst the Army lorry was on its wrong side. IP Muriuki (PW 3) also found the vehicle on that position but nonetheless he came to the conclusion that the driver of the Land Rover (the plaintiff) was at fault. He came to this conclusion because according to his investigations he had formed the opinion that the Land Rover must have been travelling at a high speed at that time, and had failed to keep to his proper side. On the evidence produced by him there appears to be no basis for these conclusions. Having found the Land Rover on its correct side it is difficult to understand how he concluded that it had failed to keep to its side especially when the point of impact was also on the left side. On the other hand he should have come to the conclusion that the Army lorry was travelling at a high speed and had gone on to its right side. He found skid marks by the lorry much longer as compared to those made by the Land Rover. The lorry's skid marks according to him were as a result of applying brakes. The only conclusion one can draw is that in spite of applying brakes the lorry could not be stopped within a very short distance and veered towards right. These factors show that the lorry must have been travelling at a considerable speed. Even after hitting the Land Rover it travelled for about 50 meters (about 160 ft) before it came to rest. How did he come to the conclusion that the Land Rover was travelling fast? He came to this conclusion because the driver of the Army lorry told him so. IP Muriuki thus let the cat out. He based his recommendation not as a result of his independent investigations but as a result of what the Army lorry driver told him. No wonder the police decided not to prosecute the plaintiff. The court is satisfied on all the evidence placed before it that the sole cause of accident was the careless and negligent driving by the Army lorry driver, and the court so finds. It is not denied by the defence that the first defendant, the lorry driver, was driving the lorry in the course of his employment which makes the Attorney General vicariously liable. Both the defendants are therefore liable to the plaintiff in damages.

As to the quantum of damages Mr Gor for the plaintiff has quoted the case of (MSA) HCCC.591/81, Hansa A Amin v Girado Othiambo Owuor and Another, a decision of this court. In that case a 40 years old nursing sister employed by Pandya Memorial Hospital had received injuries on the head, fracture of the left shoulder, laceration of left knee and injuries on the chest and left ribs. She was hospitalized for ten days and thereafter attended as an outpatient for two years. She fully recovered from her head and chest injuries and knee laceration. She however continued to have pain and stiffness in her left shoulder in spite of manipulation. She developed osteo-arthritis in that shoulder joint. This court awarded her a sum of Kshs 130,000 as general damages and that was in August 1984.

The other case quoted is (NRB) HCCC 1849/79 —David Maina Wakalitu v Sister Maria Ilota. The plaintiff in that case had received multiple lacerations over the face, soft tissue injuries to the neck and thoracic spine, and to the chest. Although he had fully recovered the scars resulting from facial injuries were permanent. He was awarded Kshs 70,000 general damages by A H Simpson, C J in July 1982. It should be noted that there was no injury to the shoulder or wrists.

The court having considered these cases, taking into account the seriousness of the plaintiff's injuries coupled with the fact that he will be spending about Kshs 600 per annum on drugs, and keeping note of the incidence of inflation, the court assess general damages at Kshs 100,000. Although the plaintiff includes a claim of Kshs 642 as special damages, no evidence was led in respect thereof and the court is unable to give judgment for this amount. There shall therefore be judgment for the plaintiff in the sum of Kshs 100,000 plus costs and interest. As the defendants did not prove the counterclaim, the sum is dismissed with costs.

Delivered on the October 31, 1985

Bhandari J