REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1568 OF 1982

DR SAMUEL MMBBURU……..PLAINTIFF

AND

NDERITU NJUGUNA & 3 OTHERS……DEFENDANT

JUDGMENT

The plaintiff Dr Samuel Mburu (P W 1) brings this suit against the defendants seeking special and general damages arising out of a fatal traffic accident which occurred on the 1st June 1981. Mr Mereka appeared for the plaintiff. Mr Noad appeared for the 1st and 2nd defendants while Mr Sharma appeared for the 3rd and 4th defendants. When the case came up for hearing on the 25th January 1984 the advocates for all the parties had agreed on the quotum of damages and hence the following consent order was recorded by this court.

> "By consent judgment for the plaintiff against all the defendants jointly and severally in the inclusive sum of shs 2,153,500 inclusive of costs with court disbursements to be paid by the defendants. Liability as between the defendants to proceed to hearing."

The court then proceeded to hearing evidence on how this accident occurred. There were only two witnesses – Dr Mburu who was in one of the vehicles and Inspector Lucas Kavute (P W 2) who arrived at the scene soon after the accident and then took measurements which enabled him to draw a sketch plan of the scene.

Dr Mburu (P W 1) testified that on the 1st June, 1981 at about 10.00 he was sent by the Medical Officer of Health (M O H) Nyeri to take over Karatina sub district hospital. He (P W 1) traveled as a passenger in the ambulance registration number GK 876X, a Volkswagon Kombi. Dr Mburu sat next to the driver of the ambulance. The was a student nurse sitting behind the driver in the patient's cabin and there was also another lady sitting in the same cabin behind Dr Mburu. After the ambulance (GK 876X) passed Marua and as it was going uphill Dr Mburu heard some nose from the opposite direction and he thought it was a lorry carrying empty drums. As the ambulance negotiated a sharp bend a lorry appeared from the opposite direction. According to Dr mburu (P W 1) the lorry was coming at a vey high speed and it was in the path of the ambulance GK 876X. The driver of the lorry tried to swerve but the tipper collided with the cabin of the ambulance.The tipper fell over the ambulance while the driver of the lorry continued downhill leaving the ambulance on its correct side of the road. The driver of the ambulance and the student nurse died on the spot. Dr Mburu (P W 1) and the lady who sat behind him were taken to the hospital. Inspector Lucas Kavute (P W 2) who was then the deputy officer commanding Karatina police station reached the scene of accident at about 11.30 a m and took the necessary measurements. According to Inspector Kavute (P W 2) the ambulance was on its correct side of the road as there was still a gap between the ambulance and the broken line marking the middle of the road. Inspector Kavute confirmed that the ambulance was going uphill while the lorry was going downhill and he was of the view that the

collision must have been where the ambulance was since he could not see any skid marks or soil on the road away from the ambulance.

From the evidence before the court it is not in dispute that the two vehicles collided in broad daylight. Dr Mburu (P W 1) testified that it was a clear day. Hence the issue now is to determine the degree of negligence of each driver. It is not in dispute that the lorry was driving downhill while the ambulance was going uphill. We also now know that the driver of the lorry was charged and convicted on two counts of causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap 403). The lorry driver was eventually sentenced to 21/2 years imprisonment on each count and he was disqualified from holding or obtaining a driving licence for three years.

Mr Noad very properly conceded that greater share of the blame was on the lorry driver but he went on to point out that the driver of the ambulance was also to blame as he failed to take avoiding action. In Baker v Market Nerberough Industrial Co-operative Society Ltd. (1953) W L R 1472 it was held per Denning L J):-

> "Even assuming that one of the vehicles was ever the centers line, and thus to blame the absence of any avoiding action by the other vehicle made that vehicle also to blame. Once both were to blame, and that there was no means of distinguishing between them the blame should be cast equally on each."

The above decision was followed in the case of **Lakhanmashi v Attorney General** (1971) E A 118. It is important to note that in Lakhanshi's case it was held inter alia:

> (ii) as there was no means of distinguishing between them they should be held equally to blame"

In the present ease we have evidence to the effect that the ambulance was in its correct lane when the collision took place. There is further evidence to the effect that the lorry was traveling at a very high speed. We must also of course, remember that the driver of the lorry was of convicted on two counts of causing death by dangerous driving. The learned resident magistrate in Nyeri Resident Magistrate's Traffic case No 2 of 1982 was satisfied that the driver of the lorry was driving dangerously when the accident occurred. In a case of causing death by dangerous driving the court must be satisfied that the driver charged was driving in a dangerous manner and that he was at fault in creating the dangerous situation which resulted in the accident. In Atito v R (1975) e A 278 at page 281 the court of Appeal held:-

> "What has caused us concern in this case is whether it was established, having regard to the standard of proof in criminal cases, that the appellant was guilty of the offences charged. We think the proper test is that laid down in Kitsao v Republic Msa H C E A 75 of 1975 (unreported) that to justify a conviction of the offence of causing death by dangerous driving there must no only be a situation which viewed objectively, was dangerous, but there must also be some fault on the party of the driver causing that situation. See R v Gosney (1971) 3 All E A 220."

In the present case we must bear in mind all the evidence before the court including the results of the traffic case in which the lorry driver was convicted on two counts of causing death by dangerous driving is charged with such an offence it would following that he would be found 100% negligent in a civil case arising from the same accident. However, the evidence in the present case shows that the driver of the ambulance was driving slowly uphill on his correct side of the road when the lorry from the opposite direction came at a high speed left its correct side of the road and hit the ambulance. There was evidence to the effect that there was a good verge on the www.kenyalawreports.or.ke ambulance's side and so the driver of the ambulance should have taken an avoiding action by driving to his left hand side on this verge. In my view that is the only negligence that can be attributed to the driver of the ambulance otherwise this accident occurred due to the negligence of the lorry driver. And in so saying I am not unmindful of what Travelyan J said in Queens Cleoners and Dyers Ltd v East African Community and others (1972) E A 229.

Having considered the evidence on record in its entirety I am satisfied that the driver of the ambulance was only 10% negligent while the driver of the lorry was 90% negligent. I therefore orders that there will be judgment in favour of the plaintiff in the sum of shs 2,111153,500/= inclusive of costs and court disbursements to be paid by the defendants. The Attorney General (3rd defendant) is to pay 10% of this amount (which comes to 215,350) to the plaintiff and the balance of shs 1,938,150 be paid by the 1st and 2nd defendants. Order accordingly.

Delivered at Nairobi this 10th day of February, 1984.

E O'KUBASU

JUDGE

10/2/84

Coram:E O'Kubasu J

Mr Mereka for plaintiff

Mr Noad for 1st and 2nd defendants.

Mr Sharma for 3rd and 4th defendants.

ORDER: Judgment road and delivered

E O'KUBASU

JUDGE