REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 1698 OF 1980

MUGO.....PLAINTIFF

VERSUS

ATTORNEY GENERAL & 2 OTHERS.....DEFENDANT

JUDGMENT

November 10, 1982, **Hancox J** delivered the folowing Judgment.

In this very tragic case the Plaintiff, who was a school boy of approximately 14 years at the material time, and who was being carried in lorry No GK 121U together with other children returning from participating in a singing competition at Embu, was seriously injured as a result of a collision between that vehicle and an Izuzu lorry KRY 702 on the Embu Siakago road. Accordingly he sues through his mother and next friend Shelmith Mugo Wanjiru for general and special damages against the three named defendants. They are the Attorney-General on behalf of the Government as employer of the second defendant who was driving the Government vehicle at the time, the second defendant Martin Gichovi, and one Alfax Njeru a revenue officer with Embu Council the employer of the driver of the other vehicle, who was said to be driving it negligently according to the particulars set out as (a) to (f) in paragraph 5 of the plaint, and as paragraphs (a) to (d) of the first and the second defendants' defence.

The first and second defendants deny negignce on the part of the second defendant and, as I said, alleged that the accident was caused wholly or partly by the driver of KRY 702. Neither the plaint nor the first and second defendants' defence state specifically that the driver of KRY 702 was at the time acting within the scope of his employment, though they do allege that he was the servant or agent of the third defendant. At all events this was not disputed in the end.

It is accepted, I think, by all parties that the plaintiff was being lawfully carried in the GK lorry at the material time, and he was standing (there being no seats) with other pupils in the back of the vehicle on the right hand side. Unfortunately he had to have his right arm amputated as a result of the accident and could remember little of the facts, except that which I have already stated, and that it was dark at the time of the accident, it being alleged in the plaint to have occurred at about 7 pm. Accordingly his evidence dealt mainly with his capabilities before this tragedy, and his attempts to adjust to life with only his left arm subsequently. He was right handed before the accident. His mother gave evidence generally in support of what he said, and in particular said that he was gifted in handwork, and apparently used to make toy vehicles out of tin and was good at drawing. Since the accident he cannot play games and is selfconscious as regards the other pupils. However he cannot even though he is learning to use his left hand for all things, help her in the house. The plaintiff's father, formerly employed by the Mombasa Council is now unemployed though fortunately they have land of 71/2 acres. The plaintiff's disposition

has changed for the worse since the accident.

The case was adjourned for inspector Nyaga, who drew the plans Ex 2 and Ex 3 to give evidence. The former shows that each vehicle ended up on its correct side of the road respectively 98 and 192 feet each side of the bridge over the Matakari stream. The private vehicle was moved on Police instructions so as not to obstract traffic, but markers were left to show where it had been. According to Exhibit 3 the bridge, which is no more than an arch over the stream topped by the murram road, is at an angle to the road as inspector Nyaga said. State Counsel, perfectly correctly, served notice under Order 1 rule 21 of the Civil Procedure Rules on behalf of his clients on the third defendant, specifying that the issue between them is that the accident was caused by the third defendant's driver, and seeking contribution or indemnity. I would also add that the hearing proceeded as regards the first three witnesses in ignorance that Mr Njiru from Embu, of counsel was not on the record. The position was regularized and although Mr Nagilah again perfectly correctly, took this point, both he and Mr Kimani for the Plaintiff have agreed that they will not raise any objection as regards that matter.

The medical report of the plaintiff was put in by consent as Ex 1. Some difficulty is caused in cases of this kind as regards the course to be taken when there is another driver who is not a party to the case. In *Abedinego Odhiambo v Bama* Civil Appeal 45 of 1977, the motor scooter driver, who inferentially was mostly to blame for the accident, was killed, and the trial judge assessed the degree of negligence of the remaining defendant, who was driving along the main dual carriage way, at 20%. There was an appeal on the basis that the trial judge should have given judgment against the surviving defendant for the full amount of the damages. There was a cross appeal that the trial judge should have held the motor scooter driver to be solely responsible for the accident. This was rejected by Law and Wambuzi JJ A on the merits. The appeal itself was not opposed and therefore allowed, so that the result was that the judge's finding that the respondent was 20% to blame for the accident stood, but he was none the less held liable for the full damages. However, although he agreed with the two judgments on the cross appeal, Wicks CJ sounded a note of caution as regards a finding against the motor-scooter driver on negligence, since, because he was dead, he had no opportunity of appearing before the Court. He also queried the proposition that an employer could be held vicariously liable for the negligence of an employee who was not represented before the court. He referred to *Maxfield v Lleweyn* [1961] 1WLR 1119, where also the driver of the motorcycle, and his pillion passenger, were killed. After quoting section 6(2) of the Law Reform Act 1935 which accords with our Law Reform Act Cap 26, Ormerod LJ said:

> "It appears to me that the court must have regard to a person's responsibility for the damage, having regard to the parties who are before the court, whose share of the damage can be taken into account and who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action. In those circumstances, for my part, I would reject Mr King-Hamilton's interesting submission and say that it is the duty of the court on finding more than one defendant liable to make an assessment of the contribution which each defendant should make according to his share of blameworthiness."

It follows from this that the only persons whose negligence the court may consider are those actually before the court, who have an opportunity of calling evidence, giving explanations and generally putting forward submissions on their own behalf. Accordingly the conduct of a person who is not before the court cannot normally be considered.

In this case, it was said originally that the driver of the second vehicle absconded, but he was duly called in evidence and said he was present when the police arrived, and the following morning when measurements were taken. He initialed the sketch plan Ex 2. Unfortunately the amended plaint naming Lazaru Ndwiga as a party was never served and was thus not proceeded with. The original plaint had said that they could specify the driver of the second vehicle only after discovery.

In this case I consider it is permissible for the court to assess his evidence and reach a finding on the conduct of both drivers. Though Ndwiga is not named as a party to the case, his employer was and he himself had full opportunity of putting forward his explanation to the court. This does no violence to the

above principle, expressed in a different way by Upjohn LJ in the same case at p1123

> "It seems fundamentally contrary to the ideas of justice as administered in these courts, that this court should have to assess liability for an alleged negligence which has never been alleged against the party responsible"

As the court there said, in deciding the quantum of damages all sorts of factors have to be taken into account with almost infinite variety, and that the court always has to come back to the facts of the particular case.

Assessing damages in a case of this kind, the court must not to be guided by pity or emotion at the dreadful loss to the plaintiff and his family. But I do take into account his evidence, and that of his mother, as to his capabilities before the accident. Admittedly he was not intellectually brilliant, but at the same time he was clever with his hands and used to make toys and do other things. He cannot now play games, either at all, or certainly without embarrassment. Taking into account the figure of Kshs 120,000/- general damages submitted to me by Mr Nagillah together with the authorities submitted by Mr Kimani, who has shown great industry in this respect, I consider doing the best I can and taking all the circumstances into account that a fair figure to award the plaintiff by way of general damages in this case would be Kshs 180,000/- and I give judgment for him for this sum for general damages accordingly.

As regards the special damages, I do not think these were seriously disputed, and I give judgment for the plaintiff also for the special damages set out in the plaint namely 800/-. There will therefore be judgment against both defendants in the sum of Kshs 180,800/- plus costs.

November 10, 1982

HANCOX J