



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Madan, Potter JJA & Kneller Ag JA)

CIVIL APPEAL NO 66 OF 1981

BETWEEN

UGENYA BUS SERVICES.....APPELLANT

AND

GACHOKI.....RESPONDENT

(Appeal from the High Court at Nakuru, Mead J)

JUDGMENT BY MADAN JA.

This appeal arises out of a collision which happened on the evening of November 30, 1974 when the respondent (plaintiff) was driving motor vehicle registration number KGC 266 out of Naivasha to go home at an agricultural station where he was employed as a field officer instructor. To do so he had to get into a turnoff which was on the right side of the main road when facing Nairobi about 1 1/2 Kilometres to 2 kilometres out of Naivasha. The main road was tarmac and the weather dry.

It is dreadful that the suit the subject matter of the appeal which was instituted in the High Court's registry at Nakuru on October 1, 1975 for whatever reasons, was not heard until October 8, 1981.

The plaintiff turned on his indicators to signal his intention to turn right. He did so slightly and stopped to let pass an on-coming vehicle which passed. The plaintiff saw by lights that a vehicle was coming up from behind him. As he was preparing to turn into the side road he heard a heavy bang from the rear of his car. He was rendered unconscious. He regained consciousness in Naivasha Hospital from where he was transferred to Nakuru General Hospital the following day. His car was damaged beyond repair.

The plaintiff was struck from behind by the appellant's (defendant) omnibus registration number KPK 395 which was travelling in the same direction as the plaintiff on the main road. It was being driven by the defendant's driver Dominic Ochindo at the time.

The bang was heard by Stephen Wanjoku Wanjohi who lived on a nearby farm. He immediately rushed to the scene of the accident. He saw the plaintiff's car and the defendant's bus. The bus was leaning against the bonnet of the plaintiff's car which was extensively damaged from the middle of the rear on the right-hand side down to the bonnet, also its roof. The plaintiff was trapped inside his car. He was unconscious when pulled out. The police arrived at the scene shortly after Wanjohi reached there.

The defendant did not call the driver of the bus to give evidence although his whereabouts were known. The only witness for the defendant was Mark Onyango the conductor on the defendant's bus. He gave contradictory evidence in his examination-in-chief and cross examination which the learned judge examined carefully where it was in conflict with Wanjohi's evidence. The judge rejected Onyango's evidence that the weather conditions were very wet and it was raining heavily. The abstract of the police report confirmed Wanjohi's evidence that the road surface was dry. The judge calling Wanjohi is a very intelligent and discerning witness also accepted his statement that the police arrived at the scene very shortly after he himself had arrived there as against Onyango's assertion that the police did not arrive until the following morning. The judge further rejected Onyango's evidence that the plaintiff was driving his car on the main road in the path of the bus and he suddenly turned to his right in front of the bus without any warning by traffic indicators or otherwise. The judge said Onyango did not impress him as a truthful witness and he also disbelieved his evidence that the plaintiff's car had no rear lights.

There was good reason to believe that the plaintiff maintained his car in a good condition because he had to pass a police check point daily. If his car was not in a good condition, particularly the lights at night time, he would have been liable to prosecution under the Traffic Act. One of the particulars of negligence set out in the plaint was that the defendant's driver failed to observe and heed the signals given by the plaintiff. Only the defendant's driver could speak about it. He did not speak.

Another story that Onyango told the judge was that he warned the driver of the bus about the plaintiff's car. Why did a warning become necessary by the conductor?

The judge was right to hold on the evidence before him that the plaintiff's car was stationary on its correct side, and he turned by flashing his traffic indicators. That the plaintiff was hit at the rear by the defendant's bus travelling at an excessive speed and the defendant's driver was solely responsible for the accident. I would agree the plaintiff did not contribute in any way.

The plaintiff had purchased the car some three months before for Kshs 5,000. At the time of the accident he had paid Kshs 3,000 towards the purchase price leaving a balance of Kshs 2,000 out standing. It was argued before the judge, it is a ground of appeal before us also, that the car never belonged to the plaintiff and he should not have been awarded Kshs 5,000 the agreed special damages in respect of it. The property in the car had passed to the plaintiff by the delivery thereof. In any event the plaintiff suffered the loss, he would have to make it good to any other owner, wouldn't he?

The plaintiff was 28 years old at the time of the accident, married with four children. What happened to him in the accident was this. His right leg and ankle were fractured, a fracture over the right clavicle and a lacerated wound over his right hand. His right leg was amputated on December 16, 1974, leaving a stump about six inches from the tibial tubercle. He suffered considerable but gradually reducing pain while in hospital where he was for two months and five days.

A part of the plaintiff's duties as an employee of the Ministry of Agriculture was to visit farms, advise and teach farmers. He was obliged to give up his work as a result of the accident. He is now employed as a teacher only. He took part in athletics at provincial level, played football and danced. All these activities have left him now. Their joy and the physical pleasures from them are also gone. He cannot walk about freely, and sitting, he is restricted in position. In his previous job he would have had the opportunity of advancement, wherever he may have reached. Not any more. His salary in 1974 was Kshs 665 p.m, now Kshs 1950 p.m. There was no evidence about loss of earning capacity. The judge 'taking account of inflation' awarded Kshs 200,000 general damages. The defendant's memorandum of appeal states that the judge's assessment of damages was excessive and entirely erroneous.

Originally *ex parte* judgment was entered for the plaintiff in this suit on March 10, 1976 in the sum of Kshs 130,000 general damages. The *ex parte* judgment was set aside on June 24, 1976 on the appellant's application. The judge said he found no reason to differ from that award of Kshs 130,000 at that date. Mr Owuor for the appellant has complained that having expressed agreement the judge erred in increasing it by about 55% to Kshs 200,000. The judge made it clear that he was expressing his opinion about an award which went back about five years. He was entitled to make his own assessment, be it more or less,

on the date of his decision.

General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When I ponderingly struggle to seek a reasonable award I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.

I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for the loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them.

We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.

The plaintiff is no longer the man he was, he is a reduced man in which condition he has been living for about eight years, and, say the normal span of life for him is 58 years, he will live with it for another 22 years with only ugly, unsightly stumped knee and undergo the painful exercise of wearing an artificial limb daily.

In August, 1982 Kneller, J sitting at Mombasa awarded Kshs 250,000 for a left arm so badly damaged as if there was no left hand and forearm and better if the left forearm were amputated, *Mutuya v Mbika and another* Msa CC No 442 of 1980 (unreported). I do not consider the award of Kshs 200,000 excessive for the plaintiff's serious injuries, pain and suffering and loss of amenities.

I would dismiss the appeal with costs. As Potter, JA and Kneller AG JA agree it is so ordered.

Potter JA I have had the advantage of reading in draft the judgment herein prepared by Madan JA. I agree with it and the order prepared by him and have nothing to add.

Kneller JA. I agree.

Dated and delivered at Nakuru this 2nd day of October 1982.

C.B.MADAN

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR