



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 211 of 1990

SAMWEL NGANGA MUTHIKE.....PLAINTIFF

-VERSUS-

PETER NZUKI.....1ST DEFENDANT

TALA/KANGUNDO URBAN COUNCIL.....2ND DEFENDANT

Coram: J.W. Mwera J.

Mr. Hassan Advocate for Plaintiff Mr. Kisebu Advocate for Defendant Court Clerk Muli

JUDGEMENT

On 19th November 1990 the Plaintiff sued the 1st Defendant, the employee with the employer, the 2nd Defendant jointly and severally in liability which, it was claimed, arose at a barrier operated by the 2nd Defendant but manned by the 1st Defendant on 21st February 1989 to regulate the entrance of motor vehicles into the premises owned and controlled by the 2nd Defendant. It was pleaded that on the material day the Plaintiff-cyclist was about to enter Tala Market, through a barrier which the 1st Defendant was manning when the 1st Defendant by negligence lowered the metal bar (the barrier) when it was not safe to do so and by that the bar caught and hit the Plaintiff knocking him off his bicycle and at the same time inflicting on him an ulcer to the right part of the lip, loosening central upper and lower incisor teeth and causing a loss of the bone around the front teeth. It was added that the Plaintiff also suffered a wound on the left side of the forehead. He claimed for damages costs and interest.

A defence was filed on 26th February 1991 denying the claim by the Plaintiff and in turn pleading that he had contributed to the injury by riding a bicycle very fast at the barrier and failing to brake or stop at it in order to allow the 1st Defendant to open the barrier for him. There was no reply to the defence but issues were agreed and filed on 6th April 1991.

The final part of the trial took place on 6th November 1996 when the Plaintiff's side completed its case, started before Osiemo J. and the defence led its evidence. The Plaintiff himself had testified earlier and for no stated reason the parties, or particularly the Plaintiff did not move to produce typed proceedings before Osiemo J. to facilitate easier perusal and understanding of the record. The same had been ordered on 24th January 1996.

However in doing its best the whole record was read i.e. the pleadings, evidence and the submissions for a considered determination.

The Plaintiff had testified more or less as reproduced in the pleadings above. He exhibited medical reports, receipts and such evidence as he considered supported his claim. His witness Joseph Nzuki (PW2) supported the Plaintiff in that as the latter had ridden close to and about to pass the barrier which the 1st Defendant had raised, he saw the 1st Defendant lower it instantly and it knocked him off his bicycle inflicting injuries. That the 1st Defendant had done that in an apparent move to stop a motor vehicle that was approaching the barrier. He wanted to collect a toll from that motorist. The incident was reported to the police as well as at the 2nd Defendant's office where, according to PW2 he with the 1st Defendant carried the injured Nga'ng'a (Plaintiff). PW2 asserted in cross examination that he had passed at this barrier many times, being a local farmer, and it was not normally closed. It was sometimes left open as it was on the material day. He denied that the Plaintiff rode into a closed barrier, hit it and fell down injured. There was no separate path for cyclists and PW2 had witnessed the accident.

The 1st Defendant said that he was on duty on the material day. The barrier was lowered and as was usual he could only raise it to allow motorists who paid a toll to drive through. He would then lower it again. When it is closed the cyclists who pay no toll ride past by a side path.

On 21st February 1989 a motor vehicle came to the barrier. The 1st Defendant stood in the barrier room window to collect the toll. The motor vehicle stopped. The Plaintiff then came cycling along, passed the waiting motorist and rode into the closed barrier. He hit the bar and fell off the bicycle. He jumped up, raised the barrier and even the waiting motorist just drove through without paying. The 1st Defendant further testified that his relief Ngotho Waweru replaced him at 1 p.m. He went for lunch. When he went to the 2nd Defendant's offices at 2 p.m. he found the Plaintiff there, having reported to the superior officers that by the act of the 1st Defendant, he had been hit with a barrier and he got injured. That a superior officer then directed the Plaintiff to report the matter to police and the 1st Defendant went along to write his statement. According to him, PW2 then showed up at the police station - never at the barrier. The 1st Defendant denied ever having failed to notice the Plaintiff cyclist as he rode to the barrier whereupon he suddenly lowered it injuring him. That all the time the barrier was down and he did not lower it suddenly to stop a motorist who had come there more or less at the same time with the Plaintiff. However when the 1st Defendant reported at the police station to write a statement in connection with the Plaintiff's complaint, he was remanded and later charged in a criminal court. He was subsequently convicted and fined. He had nonetheless maintained his defence in the criminal court as he did before this court.

When Ngotho (DW2) came to relieve the 1st Defendant he found the barrier down with a motor vehicle waiting at it. In between was a bicycle with a man standing by it. All this time the 1st Defendant was in the barrier room endeavouring to collect a toll from and issue a receipt to the waiting motorist. That the 1st Defendant then told Ngotho that the cyclist there had hit the barrier. So Ngotho advised him to report the incident at their offices. The cyclist and PW1 went accordingly. 1st Defendant did not return to the barrier. According to DW2, they usually kept the barrier closed and only opened it when a motorist came along, paid and was allowed to pass by raising the barrier. It was then lowered again,

In cross examination DW2 answered that he had not been present to see the Plaintiff riding to crash into the barrier (this differs with what DW2 told the criminal court that he had seen the Plaintiff ride up to the barrier very fast, hitting it). He did not see the Plaintiff raise the barrier.

On liability, the Plaintiff claimed that it was all due to the Defendants. The defence denied it and laid part of it at his feet.

There was no reply (see 0.6 r.9 Civil Procedure Rules). This court is of the view that the Plaintiff was partly to blame for this accident. The 1st Defendant's evidence left the impression that the accident occurred long before Ngotho (DW2) came to relieve him at 1 p.m. That the Plaintiff then went away, but actually to the 2nd Defendant's offices where the 1st Defendant discovered him later when he went there after lunch. From the evidence of Ngotho, it is apparent that he found the Plaintiff still at the scene. When 1st Defendant told him what had transpired, he advised the 1st Defendant to go and report the incident to their offices. Then he and the Plaintiff went along together. Again this court has the impression that much as that part of DW2's story looks plausible, it had some difficulty in believing this witness, DW2, on another aspect. In the criminal court he had said that he saw the Plaintiff ride fast to the barrier and crash

into it. Here he said that he had not been present at the time of the accident. He only found the motorist waiting for a receipt from the 1st Defendant while the barrier was closed and the Plaintiff's bicycle lay between the motorist and the barrier with the Plaintiff standing by. Nonetheless the story told here appears the more plausible of the two. Without denying it in pleadings but seeking to do so in evidence only and having considered the matter before it this court apportions 10% of liability to the Plaintiff while the Defendants take 90%. The 1st Defendant may have been raising and lowering the bar for motorists as was his duty but it was also incumbent on the Plaintiff to watch out as to what was likely to happen as he came to the barrier with a motorist. If the 1st Defendant was in the process of lowering the barrier as the motorist came along, the Plaintiff may have thought that he could ride past it before it came down and by such thought he was caught and hit off his bicycle which DW2 found lying between the motor vehicle and the closed barrier. The story of the Plaintiff simply and probably riding fast to crash into a lowered barrier is not quite a convincing story, given that a motorist was on the scene. But it can also be so for instance if the Plaintiff's bicycle had no effective brakes. And likewise it is unbelievable that the 1st Defendant simply and suddenly lowered the barrier as the Plaintiff alone was about to ride through it without cause, yet cyclists never paid tolls there.

The Plaintiff's side submitted that he is entitled to an outlandish sum of Sh.500,000/- general damages plus Sh.80,000/- for the cost of restoring the function of his upper and lower jaws – the sum having escalated since Dr. Obura's report. It was also submitted that he should get special damages: copying the KANGUNDO CRIMINAL CASE NO. 480/89 in which the 1st Defendant was prosecuted for his negligent act at the barrier and he was fined; medical report and treatment expenses.

Five cases were cited to guide the court:

SISCO NDANYI & ORS VS. COAST BUS SERVICE LTD NRI HCCC 4425/90 JOSEPH OUMA VS. SIGWILI & ANR NRI HCCC NO.3628/89 ANDREW THUO VS. SALIM & ANR MBA HCCC 36/89 SUSANA KANANA VS. ADAM NRI HCCC 1724/89 SIMON NGAMIONE VS. KAGUNDA NRI HCCC 1625/91

In the defence submissions a 50-50 apportionment was proposed. It too cited 5 cases:

MAINGI MAKAU VS. EMCO PLASTICS LIMITED HCCC 850/86 KENNETH KIFAFU VS. NDUNDA & ANR C.APP.NO.143/91 JEROME WANGOMBE VS. MBUTHIA HCCC 404/91 LEONARD MUTHAMA VS. GICHUBI & 3 ORS HCCC 3176/87 FREDRICK BARAE VS. CHAOTA KOONGIT HCCC NO.5634/89

A gross award of Sh.110,000/- was considered fair; the defence did not challenge the special damages but saw no basis for Sh.500,000/- general damages. Accordingly special damages of Sh.1,353/60 are awarded.

As for general damages a close look was given to the reports of Mr. Obura, dated 11th July 1990 and the later of the two, by Mr. Bodo dated 20th November 1991. Both reports however are fairly old and can hardly be relied on for whatever status the Plaintiff's health was at time of this judgement. However on looking at them both, they were made within a year of each other. Mr. Obura suggested that Sh.40,000/- be awarded to treat and manage the Plaintiff's upper and lower jaws affected in the accident. Mr. Bodo on his part, referred to an old hip joint injury that the Plaintiff had and of which he was complaining even at the time he was examined in respect of the Tala barrier accident. But that need not be reflected in the damages to be assessed here even if the Plaintiff desired to link, the pain thereat to have started after the fall. It was however not pleaded that the fall had aggravated an earlier but healed problem.

So all in all this court can but grant the Plaintiff Sh. 90,000/- for pain and suffering due to the fall at the barrier plus Sh.40,000/- for the anticipated treatment of the jaws. There was no expert revision of this sum and this court need not engage in the "escalating of costs" project. It is not suited or qualified to do so.

In sum the Plaintiff gets a gross total of Sh.131,353/60. This on being reduced by 10% contributory negligence leaves the Plaintiff with a net award of Sh.118,218/24 a round figure of Sh.118,218/25 plus

costs and interest at the lower court rates.

Judgement accordingly.

Delivered on 18th December 1996.

J.W. MWERA

JUDGE