



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 635 OF 2009

JOSEPH KAHINDA MAINA.....PLAINTIFF

VERSUS

EVANS KAMAU MWAURA.....1ST DEFENDANT

FRANCIS NGUGI NJENGA.....2ND DEFENDANT

HABIB GULAM.....3RD DEFENDANT

JUDGEMENT

The Plaintiff's Case

1. The plaintiff, **Joseph Kahinda Maina** in his plaint filed in this court claims that on or about 21st May, 2009 he was lawfully walking along Nairobi – Limuru Road at Ndenderu when the 1st Defendant who was the authorised driver of motor vehicle Reg. No. KBE 816E owned by the 3rd Defendant with the authority of and in the course of his employment with the 2nd and 3rd defendants so negligently, carelessly and/or recklessly drove, managed and/or controlled the said motor vehicle that he caused the same to lose control, veer off the road and violently knock down the plaintiff.
2. It was pleaded that as a result of the foregoing the plaintiff sustained severe bodily injuries, endured and continued to endure pain and suffered loss and damages. Apart from itemising the particulars of negligence, it was pleaded that the plaintiff sustained head injury (cerebral concussion), fracture of 6 teeth, injury to the right chest wall causing pneumothorax (air in the chest cavity), fracture of the pelvis (displaced fracture of the right superior and inferior pubic rami), diastasis of the right sacro-iliac joint, fracture of the right acetabulum (hip joint) and injury to the right knee resulting in tear of the lateral meniscus.
3. It was pleaded that in terms of special damages the plaintiff incurred Kshs 12,000/- in respect of medical report, Kshs 200/- for police abstract, Kshs 500/- being search fee and Kshs 708,808.94 being medical expenses. According to the plaintiff further medical treatment was needed in the sum of Kshs 500,000/- and Kshs 300,000/- for hip replacement and surgical removal of the metal plate inserted to fix the right sacro-iliac joint respectively.
4. The plaintiff called **Dr Nasir Banji**, a Consultant General Surgeon and a traumatologist based at Doctors Plaza, Aga Khan University Hospital, Nairobi as PW1. He testified that he had been in medical practice for 30 years. On 15th September, 2009 he examined the plaintiff and prepared a medical report. After testifying on the plaintiff's history he confirmed that on examination he found that the plaintiff had sustained a fracture of teeth, there was a scar on the chest where a tube had been inserted as well as surgical scars on the abdomen where he had been operated upon. There was also evidence of a torn cartilage in the right knee joint. Due to the severities of the

- injuries, two injuries had been missed by the Hospital these being the fracture of the hip and one on the MRI showing that he had damaged the cartilage of the right knee joint.
5. The doctor concluded that the plaintiff had head injuries which might lead to development of epileptic fits and had symptoms of post-concussion. He recommended a review by a dental surgeon for the hypersensitivity. In his view the injury to the pelvis would cause pain when there was a change in temperature while the torn cartilage required surgery in a private institution at the cost of Kshs 300,000/=. According to him the fracture of the right hip joint which was missed out would cause him to develop osteoarthritis requiring replacement of the hip joint at Kshs 500,000/= in a private hospital. The metal blades and screws on the other hand needed to be removed at the cost of Kshs 300,000/= again in a private hospital. The scars would however be permanent in nature. According to him, he charged Kshs 12,000/= for the report and Kshs 12,000/= for court attendance.
 6. According to him whereas the charges he quoted included hospital surgery and aesthetical charges, they did not include post-operation charges. His report was produced as PEx1.(a), (b) and (c).
 7. In cross-examination by **Mr Gikubu**, PW1 reiterated that he examined the plaintiff on 15th September 2009 and confirmed that the injuries emanated from the accident from the CT Scans. According to him the fracture was fresh. His estimates, according to him were based on estimates from Aga Khan Hospital though he could not state what the estimates would have been in public hospital. He however admitted having not examined the plaintiff again since then though the plaintiff informed him the blades had not been removed.
 8. The second witness for the plaintiff was **Dr Wafula Khamala** who testified as PW2. According to him, he was an orthopaedic surgeon from Aga Khan Hospital and appeared to produce the discharge summary for the plaintiff. According to him, the plaintiff was admitted at Aga Khan Hospital on 21st May, 2009 and discharged on 5th June, 2009. According to him, the plaintiff sustained unstable pelvic fractures, injuries to the right rib, chest and multiple dental injuries. He produced the said summary as PEx2(a) and (b).
 9. In answer to a question put to him by **Miss Mwangi** in cross-examination, he admitted that the torn cartilage had not been mentioned in the discharge summary.
 10. The plaintiff testified as PW3. According to him, he was a student at the University of Nairobi and was set to graduate in 2012. According to his statement which he recorded with the police and which he relied on, on 2nd May, 2009 at around 8.30pm he had just alighted from a *matatu* at Ndenderu and was walking towards his home on the left side of the road as one faces Limuru direction. According to him it was drizzling and as he passed Tipis Stage he heard an on-coming vehicle from behind with lights on. Thereafter he could not remember what happened to him and only came to in Aga Khan Hospital where he was informed by friends and relatives that he had been involved in a road traffic accident. According to him, the first 5 days he was treated for head and chest injuries. On the 6th day he was taken for a major surgery of the pelvic bone and was discharged two weeks later and continued with home nursing for about a month during which the supporting fixation was removed and he went for dental treatment. Thereafter he went on with his treatment including physiotherapy.
 11. Apart from relying on his signed statement to the police which formed part of the record, the plaintiff said that the Registration No. of the Vehicle which was involved in the accident was KBE 816E Nissan Matatu. After the accident, he said he was taken to Aga Khan Hospital and that he sustained injuries to the back of the head and shed 6 teeth. He also sustained injury to the chest cavity, broke his pelvic bone and sustained torn ligaments as well as loss of consciousness which he regained in hospital after 12 hours.
 12. In his evidence he began realising where he was after 3 days and that he was admitted on 21st May, 2009 and discharged on 5th June, 2009. The accident was reported by his parents at Karuri Police Station and he was issued with a P3 form which he produced as PEx3 as well as Police Abstract report. According to him he spent a total of Kshs 741,259/= in medical expenses and in support of that evidence produced PEx5. According to the search carried out by him, the motor vehicle was owned by **Habib Gulam** and for the same he paid Kshs 500/=. Both the certificate of search and the receipt were produced as PEx5(a) and (b) respectively. Prior to the filing of the suit his advocates sent a demand notice which was produced as PEx7.
 13. According to him, following investigations which included the inspection of the vehicle both the

- driver, one **Ernest Kamau**, and the owner were charged and the case was still pending. In his view it was the driver of the said vehicle who was to blame since he veered off the road and took off. At the time of the accident there were passengers in the vehicle as well as a bystander who witnessed the accident. He therefore sought damages resulting from the injuries he sustained in the accident.
14. In cross-examination by **Miss Mwangi**, the plaintiff said that he was on his way home from studying and was walking off the road on the left side of Limuru Road and was alone. According to him, it was drizzling when suddenly he heard a vehicle approaching from behind with its lights on. He heard loud music and saw the lights. He however did not look behind since he was off the road and there was no cause for alarm. He accordingly denied that he did nothing.
 15. In his evidence, he lost consciousness immediately after the accident but was informed of the registration number of the vehicle by witnesses. He confirmed that a traffic case was still pending and that the driver of the vehicle had not yet been convicted.
 16. The plaintiff confirmed that the metal plate had not yet been removed and that he was supposed to undergo a surgery of the knee as he could not indulge in any activity which problem he did not have before the accident. He however conceded that the injury was not in the discharge summary. Though he missed his exam he told the Court that he was now about to graduate.
 17. PW4 was No. 80994 - **Police Constable Sammy Munyicho** from Karuri Traffic Office. According to him, he was the investigating officer in respect of the accident which occurred on 21st May, 2009 at 8.30pm involving a Motor Vehicle Reg. No. KBE 816E Nissan Matatu and a pedestrian, **Joseph Kahinda Maina** which accident was reported on 22nd May, 2009 by one **John Maina Kahinda**, the plaintiff's father. According to him the investigations took 3 weeks to conclude after which they arrested and charged the driver.
 18. Following the advertisement of the accident in the media by the father, witnesses went to the police station and recorded their statements and the police managed to effect the arrest on 8th June, 2009 at 4.00pm. When they stopped the vehicle the driver ran away after parking the same and the same was driven to the police station by the conductor after which the owner of the vehicle went to the police station with the driver who was charged the following day with careless driving and failing to report an accident in Kiambu Law Courts Traffic Case No. 443 of 2009 in which judgement was still pending following the placing of the driver on his defence. The witness produced the police abstract as PEx4 and said that he had been paid attendance fee of Kshs 5,000/= and produced the voucher for the same as PEx5.
 19. In cross-examination by **Miss Mwangi**, the witness said that he visited the scene of the accident the following day and opened a police diary and continued with investigations. He however said that the reason for not producing the police file was because the same was due for use at Kiambu Law Courts. According to him, he only drew a sketch map the following day on 22nd May, 2009 and that nobody was sure of the point of impact which was only determined one week later after recording of statements. Whereas the accident occurred at 8.30pm the witness was not sure whether it was drizzling. To him the driver had not been convicted yet as the matter was still pending judgement.
 20. PW5 was **John Githunguri Mbugua**. According to him, on 21st May 2009 at about 8.30pm he was walking along Limuru road at Tipis Stage on the left side of the road when a popular matatu known as *Blister* reg. no. KBE 816E motor passed him at a high speed with loud music and thereafter heard a bang. He then heard someone groaning and on going to check he saw a bloodied body of a person. With the help of a card for the University of Nairobi. On scrolling the phone he called a number indicated as "Auntie" and explained what had happened. Thereafter a group arrived and took the person away in a vehicle. According to him, he surrendered the documents and the phone to the plaintiff's mother and went away. He later went to see the plaintiff's mother at Aga Khan Hospital and a week later he recorded his statement at Karuri Police Station.
 21. According to the statement he testified in the traffic case and in his view the plaintiff was not to blame because he was walking on the left side of the road and the driver veered off the road.
 22. In cross examination by **Mrs Ndungu**, the witness admitted that it was dark and it was drizzling slightly though it was not completely dark. He could not have remember if there was moonlight. According to him he heard loud music from the vehicle which was coming from behind and read the registration of the vehicle after it passed though he knew the vehicle before and could identify it from the graffiti through the lights inside the vehicle. According to him the vehicle was in a very

- high speed and did not stop. When he heard the loud bang the vehicle was about 30 metres away. According to him, he never saw the vehicle hit the plaintiff.
23. According to him, he had never met the plaintiff before the accident and the plaintiff's home was on the left side which he came to know after the accident. Though he testified in the traffic case, he did not know the outcome thereof.
24. PW6, **Joseph Macharia** was inside the vehicle when the same knocked the plaintiff on 21st May 2009 at about 8.30am at Ndenderu Shopping Centre. According to him just after passing the centre the vehicle swerved and he heard a loud bang. He then heard something fall in the Napier grass and the lights were switched off. The driver inquired from the conductor on what to do and the conductor told him to just proceed. They then put on loud music and proceed. On reaching Kabuku junction the witness alighted and asked the driver why they had hit a person and failed to stop but the driver became hostile. He then took the registration number of the vehicle which was KBE 816E christened "Blister".
25. After two weeks he heard an announcement in *Inooro* FM about the accident inviting witnesses to go to Karuri Police Station and record statements and he went and did so. According to him the plaintiff was not knocked while crossing the road but was off the road and the driver was to blame since he was knocked in the Napier grass.
26. On cross examination by **Mrs Kemunto** he asserted that the accident occurred at 8.30pm and that there was no serious darkness though it was still drizzling. According to him he was behind the conductor and was never given a ticket. He did not recognise anybody else in the vehicle. He insisted that the plaintiff was not crossing the road but that it was the vehicle which swerved and hit him off the road. According to him the vehicle was being driven as 75kph. In his evidence before the accident the music was not loud and he met with the plaintiff in court when he was summoned to testify. According to him, he would not have gone to record the statement if he had not heard the announcement.

Defendant's Case

27. On behalf of the Defendants, they called **John Njoroge**, the Executive Assistant from Kiambu Court as DW1 to produce the relevant Traffic proceedings in traffic Case No. 823 of 2009, **R vs. Evans Kamau Mwaura** in which there was a judgement by **Hon. D A Okundi**. The same were produced as DEx1 and thereafter the Defence case was closed.

Plaintiff's Submissions

28. It was submitted that though the defence pleaded negligence on the part of the plaintiff no evidence was called to prove this averment hence the Court was urged to find that the driver of the suit vehicle was entirely to blame for the accident hence the 2nd and 3rd Defendants ought to be vicariously liable. Based on **Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another Mombasa HCCC No. 85 of 2010**, **Paolo Cavinato vs. Vito Antonia Di Filippo [1957] EA 535** and **Tayabu vs. Kinanu [1983] KLR 114**, the plaintiff submitted that the plaintiff ought to be awarded Kshs 2,600,000/= in general damages for pain and suffering and loss of amenities.
29. It was further submitted that the Court ought to award Kshs 1,100,000/= in respect of future medical expenses and the ass of **Nzilani Ndari vs. Bonifae Musyoka Ndo & Another HCCC No. 954 of 2000** and Nyeri HCCC No. 81 of 2002 – **Geoffrey Mburu Theuri vs. Board of Trustee Arch-Diocese of Nyeri & Another**.
30. It was further submitted that the Court ought to award Kshs 17,000/= being attendance expenses as well as Kshs 741,259/= being special damages.

Defendants' Submissions

31. On behalf of the Defendants, it was submitted that though the driver of the vehicle was charged, he was acquitted. To the Defendants the plaintiff was to blame for the accident and that the criminal case found that the plaintiff might have been walking on the road to avoid the mud as it was raining.
32. It was however submitted based on **Francis Mwangi Muchine vs. Francis Kimani Nairobi**

- HCCC No. 2637 of 1994** and **Mary Wanjiru Mukuria vs. Kenya Bus Services Nairobi HCCC No. 1080 of 1995** that in the unlikely event that the Court finds the Defendants liable then they ought only to be found liable up to 30%.
33. It was submitted that since the plaintiff testified in the traffic case that the metal implants had been removed, the claim for Kshs 1,100,000/= must fail in totality. In the Defendants' view, the said sum could only be claimed as special damages.
34. With respect to general damages, the Defendants relied on **Julius Kiprotich vs. Eliud Mwangi Kihohia [2006] eKLR** and submitted that an award of Kshs 480,000/= would be adequate compensation.

Determinations

35. The first issue for determination according to the agreed issues was whether the plaintiff was a pedestrian at the time of the accident. From the evidence on record, it was clear not only from the plaintiff's evidence but also from the evidence of the eye-witnesses that the plaintiff was a pedestrian at the time of the accident. This evidence was never rebutted and on a balance of probabilities the answer to this issue is in the affirmative.
36. The second issue is whether the first defendant was the driver of motor vehicle Reg. No. KBE 816E. Again there was no rebutting evidence from the defendants to controvert the plaintiff's evidence on this issue hence the same is answered in the affirmative.
37. The third issue was whether the 2nd and 3rd defendants were the owners in possession and control of the said Vehicle. According to the copy of the records from the Registrar of Motor Vehicles produced herein the said motor vehicle was registered in the name of **Habib Gulam** while the police abstract showed that **Francis Ngugi Njenga** as the owner thereof. In the absence of any evidence to the contrary, I find that the two defendants were the owners of the said vehicle. I associate myself with the decision of **Warsame, J** (as he then was) in **Jotham Mugalo vs. Telkom (K) Ltd Kisumu HCCC No. 166 of 2001** where he held:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

38. Similarly, **Okwengu, J** (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru Nyeri HCCA No. 34 of 2002** expressed herself as follows:

“A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according to the records held by the registrar of motor vehicle, that however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended.”

39. The Court of Appeal on its part in **Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003** expressed itself as follows:

“The learned Judge did not at all make reference to the police abstract report which the

appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent.”

40. After considering the totality of the evidence on record it is my view and I hold that the suit motor vehicle was owned by the 2nd and 3rd defendants jointly.

41. On the issue whether the same was under the control of the said 2nd and 3rd defendants, it was held in **Bachu vs. Wainaina and Another [1976-1985] EA 29; [1982] KLR 108** that:

“Where a person owns a vehicle which is driven by another person, even with the permission of the owner, that owner will not be vicariously liable in tort for the negligence of the driver unless it is established that the driver was acting as a servant or agent of the owner, or was using the vehicle for the benefit of the owner or for something in which the had an interest either alone or jointly with the driver.”

42. Similarly in **Kenya Bus Services Limited vs. Humphrey [2003] KLR 665; [2003] 2 EA 519** the Court of Appeal held:

“In a case of the master’s liability for his servant’s torts, it is the existence of the relationship of master and servant which gives rise to vicarious liability. Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”

43. In the absence of any evidence to the contrary I find that the suit motor vehicle was being used for the benefit of the 2nd and 3rd defendants.

44. The next issue is whose negligence caused the accident. From the evidence on record, it came out that the plaintiff was hit by the vehicle off the road. There was no other evidence to the contrary. Whereas the Defendant relied on the traffic proceedings to contend that the accident was caused by the plaintiff, I have perused the judgement of the Traffic Court and there is no determination made that the plaintiff was walking on the road. The learned magistrate having found that there was no evidence to corroborate the plaintiff’s testimony that he was walking off the road simply posed that there was a possibility that he could have been walking on the road to avoid mud. In other words there was no proof beyond reasonable doubt as required in criminal cases. It must however be remembered that whereas a conviction in a criminal offence is conclusive as to the fact of the conviction, it is not conclusive evidence that the person convicted was solely liable for the accident. Likewise the fact of acquittal is not conclusive evidence that the person charged was not negligent since the standard of proof in civil proceedings is not on the same plane as in criminal proceedings. In the later the threshold is slightly lower and is on a balance of probabilities as opposed to beyond reasonable doubt. In **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** the Court of Appeal expressed itself as follows:

“It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party’s conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages.”

45. This was the position in **Robinson vs. Oluoch [1971] EA 376** where the East African Court of Appeal pronounced itself as follows:

“Section 47A of the Evidence Act was introduced into the Evidence Act by an amendment in the schedule to the Statute Law (Miscellaneous Amendments) Act 1969 and it states that a final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged...The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the judge was right in not striking out the defence as a whole.”

46. Accordingly I find that based on the evidence on record the accident was solely caused by the negligence of the 1st defendant since the only evidence on record placed liability on the shoulders of the 1st Defendant. As was held by **Lenaola, J** in **Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007:**

“Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations. The plaintiff, on the other hand pleaded the doctrine of *res ipsa loquitor* and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of *res ipsa loquitor* was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him.”

47. As to whether the plaintiff suffered injuries, it is clear both from the plaintiff's evidence and the medical reports produced that the plaintiff sustained serious bodily injuries. Having considered the said evidence as well as the authorities cited I am of the view that the injuries sustained by the plaintiff in the instant case were similar to those sustained by the plaintiff in the case of **Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another** (supra). Accordingly an award of Kshs 2,400,000.00 is in my view the proper award to make in respect of general damages for pain and suffering. I am also satisfied that the plaintiff has proved special damages in the sum of Kshs 741,259.00 as claimed. With respect to witness attendance fees, the same are not special damages but fall under the realm of disbursements.

48. The plaintiff also claimed future medical expenses I agree with the decisions **Nzilani Ndari vs. Bonifae Musyoka Ndoor & Another** and **Geoffrey Mburu Theuri vs. Board of Trustee Arch-Diocese of Nyeri & Another** (supra) that the plaintiff ought to be awarded such sum as would enable him attend to a specialist of his choice and that he is entitled to the best medical care and should not be relegated to a public hospital simply because he cannot afford a private hospital. Accordingly, I award the plaintiff Kshs 1,100,000.00 on this head of damages.

49. I have declined to award the special damages claimed in the submissions which were never pleaded.

50. In the result judgement is hereby entered for the plaintiff jointly and severally against the defendants in the following sums:

1. **General damages for pain and suffering -----Kshs 2,400,000.00.**
2. **Future medical expenses-----Kshs 1,100,000.00.**
3. **Special damages-----Kshs 741,259.00.**

Total award ----- Kshs. 4,241,259.00.

51.The special damages will earn interest from the date of filing of the suit while the rest of the sums will earn interest from the date of this judgement at Court rates till payment in full. The costs of this suit are awarded to the plaintiff.

Judgment read, signed and delivered in court this 12th November, 2014

GV ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangi for the Plaintiff

Miss Kuria for the Defendant

Cc Patricia