



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 210 OF 2012

DAVID KAHAHI STEPHEN MUTHUTHERI.....PLAINTIFF

VERSUS

MIDLAND EMPORIUM LTD.....1ST DEFENDANT

G. TATIUS MICHAEL.....2ND DEFENDANT

FRED MARIKO AGWATA.....3RD DEFENDANT

JEREMIAH OTARA MAANGI.....4TH DEFENDANT

JUDGMENT

1. Background and pleadings

On the 6th March 2011 at about 11.00a.m. two vehicles travelling from Eldoret direction towards Nakuru were involved in an accident. A Toyota “*matatu*” Registration number KBM 651L with passengers was ahead while a Lorry– Prime Mover KAU 990F was behind it. At around Sachangwan trading centre, the lorry knocked the *matatu* from the rear. The driver of the lorry died upon impact while some of the passengers in the *matatu* also died and others seriously injured.

2. The plaintiff was one of the passengers in the *matatu*. He sued the owner of the lorry for negligence of its driver blaming him for the causation of the accident that left him with a mild paralysis of his lower limbs.

Motor vehicle records showed the registered owner of the lorry on the material date as the 1st Defendant Midland Emporium Limited while the *matatu* was registered in the names of the 2nd defendant and being driven by the 4th Defendant.

3. In his plaint dated the 15th June 2012, the plaintiff blamed the 1st defendants driver for driving without due care and attention, failure to swerve or control the vehicle so as to avoid the accident, driving in an excessive speed in the circumstancing and authorising a defective vehicle to be driven on the road, among other particulars of negligence. He also particularized the injuries he sustained.

4. In their joint statement of defence dated 22nd November 2013 and filed on the 27th November 2014 the 3rd and 4th defendants denied the plaintiffs claim in its totality but in the alternative blamed the lorry vehicle as the cause of accident. Particulars of negligence are stated.

The 1st defendant's defence was filed on the 25th July 2012. All allegations of negligence and injury are denied, and contributory negligence on the part of the 4th defendant alleged as driver of motor vehicle KBM 651L and particulars stated thereon.

5. Plaintiff's Case

In his evidence, the plaintiff who testified as PW1 adopted his statement dated 15th June 2012 and filed on 19th July 2017.

His evidence was that he was a farepaying passenger in the *matatu*, that the said *matatu* was hit from behind by the lorry which then lost control, and from which he and other passengers sustained injuries and others died.

He blamed both vehicles but placed a higher degree of blame on the lorry driver on the grounds that it knocked the *matatu* from behind due to excessive speed and driving without due care and attention of other road users.

He was treated at the Nakuru Provincial General Hospital. He produced the P3 form, discharge summaries from the hospital and police abstract as exhibits.

On intense cross examination, the plaintiff stated that the driver of the lorry was being driven fast, and that he only heard a loud bang from behind, saw the lorry bypass the *matatu* before he lost consciousness.

6. **P.C. David Rotich based at Molo Post traffic base** produced the investigation file. He was not the investigation officer who had been transferred. From the report, it was stated that the lorry hit and pushed the *matatu* to the left side of the road and onto the river bank, that five passengers died and others including the plaintiff were injured. The lorry driver was not charged with any offence as he died in the accident. The police file **No. IR/Fatal 10 of 2011** was produced as PExt 12.

Dr. Obed Omuyoma produced a medical report he prepared on the plaintiffs injuries. It was dated the 5th June 2012.

7. The Defendants did not call any evidence despite their denials of blame and liability in their respective pleadings. Their Advocates however filed written submissions.

8. Analysis of Evidence and findings

I have considered the parties evidence, pleadings and the written submissions.

From the onset, it is my view and hold it strongly that no negligence can be attributed to a passenger in a vehicle who has no control of the manner of the driving or control of a vehicle. Such a passenger could be sleeping or not concerned on the manner such vehicle is being driven. Negligence may be attributed to a passenger only if it is demonstrably proved that the passenger did something that could have contributed to the driving, control of the vehicle or failed to do something like not belting a seat belt.

Once a passenger pays the fare to the agents of the owner of the vehicle, there is a silent contract that he is expected to be driven safely to his destination. Failure therefore constitutes a breach of such contract and damages would ordinarily ensue for both breach of contract and the tort of negligence. See **Wilter Chemutai Torongei -vs- W.W. Tilley Muthaiga Ltd & Another (2017) e KLR**. In the above case, I duly expressed myself as such. In the **Court of Appeal Case No. 140 of 2010 (2013) e KLR Ben Menengesa -vs- Edith Makungu Lande**, the Learned Judge held the same view.

9. The defendants did not call any evidence in support of their respective defences. The plaintiffs evidence thus was unchallenged and uncontroverted. Section **107 and 108 of Evidence Act** is categorical that he who asserts must prove. Both defendants blamed each other for the causation of the accident but none testified to prove their allegations.

It is trite that mere statements in a defence, unless supported by evidence remains as such. Unchallenged defence stands unsubstantiated.

See **Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others HCCC NO. 1243 of 2001 (Milimani)**.

See also **Chrispine Otieno Caleb -vs- A.G (2014) e KLR**.

10. The plaintiff was categorical that the *matatu* was knocked from the rear by the lorry. It is my view that it is not always the case that when a vehicle knocks another from behind, it is always the one to blame.

Circumstances before ought to be considered. The vehicle in front may have stopped suddenly without indicating its intention to stop.

There could be an emergency in front that may force the vehicle in front to stop suddenly forcing the one behind to ram onto its rear. The vehicle behind too may be driven too close without keeping a safe distance and too fast in the circumstances thus ramming the rear of the vehicle in front.

11. The circumstances of the present accident are well explained by the plaintiff and supported in the investigation report. That the lorry was being driven at a very high and fast speed. If it was to the contrary, the driver could not have died from the impact nor would the lorry have lost control as it did. The impact too is a factor for consideration. Five passengers in the *matatu* died while others sustained serious injuries. The only explanation from the circumstances and in my view is that the lorry was being driven too fast in the circumstances, and did not keep a safe and reasonable distance to the vehicle in front, contrary to the provisions of the Traffic Act.

There being no other or contrary evidence by the 1st and 2nd defendants to contradict the plaintiffs evidence, is my finding that the lorry driver, the deceased was the sole cause of the fatal accident. I therefore find the 1st defendant vicariously wholly to blame for the negligence of its duly authorised driver and agent, and therefore liable in the consequential loss and damages to the plaintiff.

12. *Quantum of damages*

The medical report dated the 5th June 2012 prepared and produced by Dr. Obed Omuyoma states the plaintiffs injuries that were compiled by reference to the Hospital Discharge Summary and P3 Form.

These are stated as follows:

- Severe head injury with loss of consciousness for 3 weeks
- Fracture of 4th, 5th, 6th and 7th ribs bilaterally
- Fracture distal end of left Clavicle
- Fracture right clavicle
- Severe soft tissue injuries of the anterior chest wall and anterior abdominal wall
- Paralysis of both lower limbs

- Severe soft tissue injuries of the left ankle joint
- blunt injury to the right knee joint.
- Due to lumber sores with exposed vertebrae, the plaintiff was put to daily dressing of the sores.
- Head scan revealed acute frontal left side subdural haematoma due to blood haematocrit level right frontal lobes constriction with subacute perilesion as oedema.
- On the lower limbs, movement is restricted due to pain and the fracture. There is mild paralysis of both lower limbs, and was on physiotherapy, twice a week at a cost of Kshs.1,000/=.
- The doctor assessed permanent incapacitation and disability at 40%.

13. Special Damages

In his plaint dated 15th June 2012, a sum of Kshs.1,000/= was pleaded as cost of obtaining two motor vehicle searches. The two payment receipts were produced PExt 8 and 9. That sum is proved, and allowed.

It is further pleaded that:

“The plaintiff is still under medical treatment and will produce the payment receipts during the hearing hereof.”

During the hearing, no medical treatment payment receipts or costs were produced. The plaintiff's submissions that a sum of Kshs.2,017,500/= was proved cannot be sustained. That claim is dismissed.

It is trite that a claim for special damages must be pleaded and proved – **Civil Appeal No. 152 of 2011 Equity Bank Ltd -vs- Gerald Wang'ombe (2015) e KLR.**

I therefore allow special damages in the sum of Kshs.1000/= only.

14. General Damages.

(a) Pain and Suffering

The 1st defendant submits that a sum of Kshs.400,000/= is reasonable while the 3rd and 4th defendants propose Kshs.500,000/= and cited one authority in support, thus **Nairobi HCCC No.513 of 2003 Wendy Martin -vs- Ngwesi Co. Ltd & 2 Others (2008) e KLR.**

I have perused the said authority. The judgment was delivered on 28th November 2008 (Hon. M.A. Ang'awa). She awarded Kshs.1.5 Million for pain and suffering. The injuries sustained by the plaintiff thereof were serious and quite comparable to the plaintiff's. The rest of the awards went to special damages in terms of medical expenses, future and past care loss of earnings.

15. Going back to the plaintiff's claim as pleaded, no claim for future medical costs or loss of earnings or future earnings are pleaded.

A party is bound by its pleadings. A court cannot award that which is not pleaded or proved. **C.A No 132/2015 Kinyanjui Kamau -vs- George Kamau Njoroge (2015) e KLR.**

16. There is no doubt that the plaintiff sustained serious injuries.

Dr. Amuyoma's opinion and conclusion was that as a result of the injuries, the plaintiff had developed paralysis of both lower limbs and was on physiotherapy and that would continue for two years, and assessed permanent disability of 40%. The report was prepared in 2012, June. The plaintiff had retired from employment before the accident on the 6th March 2011.

In the case **C.A. No. 113 of 2013 John Kamore & Another -vs- Simon Irungu Ngugi (2014) e KLR.**

The court held that:

“----- the court is alive to the relevant factors considered in making awards. Normally courts will consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual in capacity if any, the inconvenience or deprivation encountered by the plaintiff, inflationary trends, cost of living and lapse of time from the time of any availed decided authorities. The plaintiff is entitled to only what is fair, just and reasonable cannot review a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the plaintiff. It is not also the aim to punish the defendant.”

I have considered other authorities with comparable injuries.

In **Rosemary Wanjiku Kungu -vs- Elijah Macharia Githinji & Another (2014) e KLR** the plaintiff sustained serious injuries to the pelvis, chest, abdomen arms, fracture of clavicle, pelvis, dislocation right knee, and was unable to walk, fracture of T.O. & TII, total paralysis. The court awarded Kshs.3,000,000/= damages for pain and suffering (July 2014).

In **Michael Murigi Karanja -vs- Mohamed Salim Kassam (2015) e KLR**, the court awarded Kshs.3,500,000/= for blunt lower back injury leading to numbness of the lower back and legs with 75% partial paralysis of the body from the lower back downwards. (April 2015).

17. The plaintiffs permanent incapacitation was assessed at 40%. There can be no exact and similar injuries and after effects to a person involved in an accident. What we can get is comparable injuries and decisions.

Bearing that in mind, and having considered the above authorities and others, and the principles stated in the **Court of Appeal Case No. 113 of 2013 – John Kamore & Another(Supra)**

I am persuaded that a sum of Kshs.1,900,000/= damages for pain and suffering and loss of amenities is reasonable compensation to the plaintiff.

18. Consequently, I enter judgment for the plaintiff against the 1st Defendant, Midland Emporium Limited as follows:

1. **Liability** - 100%
2. **Special damages** - Kshs.1,000/=
3. **General damages** - Kshs.1,900,000/=
4. **Interest at court's rates on (2) above shall accrue from the date of filing the suit while interest on (3)above shall commence from the date of this judgment.**
5. **The plaintiff shall have costs of the suit payable by the 1st Defendant.**
6. **The 2nd, 3rd and 4th defendants shall not be awarded costs of the suit, due regard to circumstances of the case pursuant to Section 27 of the Civil Procedure Act, Chapter 21 Laws**

of Kenya.

Dated, Signed and Delivered this 20th Day of July 2017.

J.N.MULWA

JUDGE