



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Suit 452 of 1995**

**JAMES GITAU NGUGI..... PLAINTIFF**

**VERSUS**

- 1. BOBMILL CO. LTD..... 1<sup>st</sup> DEFENDANT**
- 2. GEORGE NDUNGU..... 2<sup>ND</sup> DEFENDANT**
- 3. MULTIPLE HAULERS LTD..... 3<sup>rd</sup> DEFENDANT**
- 4. SAMMY KIOKO MAKEI.....4<sup>th</sup> DEFENDANT**

**JUDGMENT**

The plaintiff filed this suit against the four defendants claiming special and general damages for injuries suffered by him in a road traffic accident on the 23<sup>rd</sup> July 1993 involving motor vehicle number KZL 275 belonging to the 1<sup>st</sup> defendant and at the material time driven by the 2<sup>nd</sup> defendant, and motor vehicle registration number KQA 692 ZA 6250 Mercedes Benz lorry with trailer belonging to the 3<sup>rd</sup> defendant and at the material time driven by the 4<sup>n</sup> defendant acting in the course of duty. The 2<sup>nd</sup> defendant drove motor vehicle KZL 275 in the course of duty as an employee of the 1<sup>st</sup> defendant.

It is the plaintiff's case that on 23/7/93, he was travelling in the 1<sup>st</sup> defendant's motor vehicle KZL 275 from Nairobi to Kisumu. He was a conductor/turnboy on that motor vehicle which was transporting mattresses to Kisumu. He sat in the driver's cabin with another man and the driver (2<sup>nd</sup> defendant). Plaintiff said that they left Nairobi at about 6.30 p.m. although he did not have a watch. He said the motor vehicle was very fast. On reaching "Soilo" near the Njoro junction their motor vehicle rammed into motor vehicle KQA 692/ ZA 650 belonging to the 3<sup>rd</sup> defendant. That motor vehicle was stationary on the left hand side of the road facing Eldoret. There was no sign on the road to warn other motorists of the presence of the 3<sup>rd</sup> defendant's motor vehicle on the road. He said he had been dozing on and off when the collision took place. He passed out for 3-4 minutes after the collision and on regaining consciousness, he found that he had the following injuries:-

- (a) Injury at the back of neck
- (b) Chest injury
- (c) Three fractures on the left, leg i.e. on the knee, thigh and hip. The plaintiff, paragraph 8, gives the injuries suffered as :-

- (a) Head injury with possibility of post traumatic epilepsy
- (b) Fracture of the upper and the neck of left femur
- (c) Compound fractures of tibia and fibula.

He was admitted in hospital at Nakuru for a period of six (6) months. He received blood transfusion and was put on drip. He then passed out, and remained unconscious for a period of two weeks. Two medical reports were produced by consent of the three counsel appearing for the parties (Exh.2 & 3).

The wound on the left leg was sutured and the leg was immobilized in traction for a period of about 5 (five) months but the report of Dr. Malik dated 15-12-95 puts the period at 4 months. During this time the leg was pulled through a system of pulleys and weights. After the traction was removed, a plaster cast extending from his abdomen down the entire leg (left) was applied. He was then discharged in plaster and on crutches. The medical report of Dr. Malik (Ex.3) gives the date of discharge as 20-12-93. The plaster was removed about April, 1994, after four months. Another plaster cast was applied extending from the upper thigh to the left foot and he remained in it for six weeks when it was removed. He however continued on crutches up to May, 1994 when he now started using a walking stick up to August, 1994. He complained of pain in the back of the neck and inability to work as the fractured leg was very weak.

In cross examination, he said that at the time of the collision, the motor vehicle was going downhill and much as he was sleepy and dozing on and off, he could feel that the motor vehicle was moving very fast. In the plaint, the accident time is put at 11 p.m. Since the two medical reports were produced by consent of both counsel, this is evidence that each report represents the correct assessment of the injuries at the time when each report was made. I shall therefore rely on the latest of the two reports, as giving the latest position on the condition of the plaintiff, and that is the report by Dr. Malik (Ex.3) dated 15/12/95 .

On examination by Dr. Malik, the doctor found the following:-

- (a) There was visible wasting of the muscles of the left leg especially noticeable in the thigh.
- (b) There was a knee long scar over the anterior aspect of the mid thigh
- (c) There was a Y shaped scar over the upper anterior aspect of the lower leg (10cm x 7cm)
- (d) Movements at the left hip joint were all restricted by about 10%
- (e) Flexion and extension were more restricted than abduction and adduction which were almost full. Extremes of movement were a bit painful
- (f) Flexion at the left knee was restricted by about 10% while extension was full and pain free
- (g) Muscle power both around the hip joint and the knee joint was Slightly reduced
- (h) There was no shortening of the left leg
- (i) The fracture of the tibia and fibula had healed with complete radiological union of both the tibia and fibula
- (j) The fracture of the femur had healed with complete union of the

Shaft with no overlap Dr. Malik summarized the plaintiff's injuries as:-

- Undisplaced fracture of the neck of the left femur
- Comminuted fracture of the upper third of the left femur with free fragments
- Oblique fractures of the left tibia and fibula

The doctor noted no appreciable change in the line of weight bearing of the bones. He also noted that none of the above fractures involved joint surfaces and so, these two will minimize any chances of post traumatic osteoarthritis starting in the hip or knee joints. Dr. Malik found that the plaintiff did not suffer any head injuries and he was of the opinion that the loss of consciousness for about five minutes may have been as a result of shock trauma rather than concussion of the brain. He found that the possibility of posttraumatic epilepsy does not really arise.

He assessed the period of total incapacity at six (6) months and partial incapacity at 8 (eight) months. He assessed the disability in the left leg at 10% and was of the opinion that the plaintiff would continue to improve.

It was the evidence of the 2<sup>nd</sup> defendant, that on the material date he was driving motor vehicle KZL 275, which motor vehicle belonged to the 1<sup>st</sup> defendant. He was with the plaintiff and another man in that motor vehicle. The other man died in the collision. They left Nairobi for Kisumu at 6 p.m. The plaintiff was the turnboy to that motor vehicle. They passed the railway bridge near Ngata Farm at 11.30 p.m. The motor vehicle was going uphill at about 45 k.p.h. As he approached Ngata Farm he saw an oncoming vehicle with full lights on. That vehicle was about 500 meters away. He deemed the lights of his vehicle but the oncoming vehicle would not deem its lights. The 2<sup>nd</sup> defendant did not stop and did not apply brakes when the oncoming vehicle continued coming with full lights on. As soon as the oncoming vehicle by passed his, the 2<sup>nd</sup> defendant said he just saw darkness and rammed into a stationary trailer. He said the darkness he saw was the stationary trailer. He said the full light of the oncoming vehicle had been so powerful that it became difficult for him to see the stationary trailer in good time in order to avoid the collision. The trailer he said did not have lights on neither did he see any triangles on the road to warn other motorists of the presence of the stationary trailer which he said was parked on the road in the same lane which his motor vehicle was riding in. The road had the normal two lanes and therefore the trailer had taken up all the space for other vehicles travelling in the same direction. He denied that he was going downhill at the time of the collision. He blamed the collision on the oncoming motor vehicle, which failed to deem its lights as the two vehicles approached each other. He did not know the registration of that motor vehicle because it did not stop.

The 4<sup>th</sup> defendant testified and said, that on this day 23/7/93, he was driving motor vehicle KQA 692/ZA 6250 from Nairobi to Kampala in Uganda. This trailer belonged to the 3<sup>rd</sup> defendant. He spent the night in Nakuru and left Nakuru on 23/7/93 at 5.45 a.m. On reaching somewhere near Ngata Farm, the motor vehicle cum trailer developed engine problems and suffered an engine knock. The trailer stopped on the road and would not be moved off the road because the engine was hydraulic. He placed the lifesaver triangles ahead and behind the motor vehicle at a distance of 50 meters each. He then went to Nakuru to telephone his employer, 3<sup>rd</sup> defendant in Nairobi. 4 defendants came back to the scene at 8 a.m. and stayed there the whole day. He agreed with the 2<sup>nd</sup> defendant that as one approaches the scene from Nakuru, it is uphill. He said in addition to the triangles he had put twigs on the road to warn other motorists of the presence of his motor vehicle on the road. It was 11.30 p.m. that the motor vehicle of the 2<sup>nd</sup> defendant rammed into his stationary vehicle. He said prior to this he kept adding more twigs on the road as the wind blew them away and he also checked on the triangles just to ensure that they were

still in place.

After the collision, he saw that one of the triangles had been destroyed by the motor vehicle of the 2<sup>nd</sup> defendant but he did not pick it up. He conceded that with his vehicle stationary on the road, it blocked the other vehicles driving the same direction. He also said that the road had only two lanes.

He was charged vide NKU Traffic Case 5251/93, with offence of causing death by obstruction and was acquitted. The case file was produced as exhibit (D-Ex.3). His employer arrived at the scene with the replacement engine just after the accident had taken place.

The sketch plan of this accident was produced as exhibit during the hearing of the traffic case (Ex.1). That plan shows some twigs and stones placed on the left hand side of the road facing Eldoret direction. The sketch plan is therefore in agreement with the evidence of the 4<sup>th</sup> defendant who said that he had placed some twigs on the road just behind the broken down vehicle/trailer. No reflecting triangles are shown on the plan.

From the evidence of the plaintiff and that of the 2<sup>nd</sup> and 4<sup>th</sup> defendants, I find that the following is not in dispute:-

(a) That there was an accident which occurred on 23/7/93 along Nakuru Eldoret Road involving motor vehicle KZL 275 AND KQA 692/ZA 6250.

(b) That the plaintiff was a passenger on motor vehicle KZL 275 driven by the 2<sup>nd</sup> defendant at the material time.

(c) That he was a passenger on that motor vehicle in his capacity as turnboy of that motor vehicle and was therefore a lawful passenger.

(d) The 2<sup>nd</sup> defendant was employed by the 1<sup>st</sup> defendant as a driver, and the said motor vehicle, in the absence of evidence from the 1<sup>st</sup> defendant to deny ownership, belongs to the 1<sup>st</sup> defendant.

(e) The 2<sup>nd</sup> defendant, in the absence of evidence from the 1<sup>st</sup> defendant, to the contrary drove that motor vehicle in the course of duty and was therefore an agent of the 1<sup>st</sup> defendant.

With regard to motor vehicle/trailer KQA 692/ZA 6250, it is not in dispute that the 4<sup>th</sup> defendant was employed by the 3<sup>rd</sup> defendant as a driver. He had been driving that motor vehicle from Nairobi to Kampala when it broke down and at the time of the accident, was sitting in the vehicle. He said he was in the course of duty and that the motor vehicle belonged to the 3<sup>rd</sup> defendant. In the absence of evidence from the 3<sup>rd</sup> defendant to the contrary, I am satisfied and I find that motor vehicle KQA 692/ZA 6250 belonged to the 3<sup>rd</sup> defendant, and at the time of the accident, the 4<sup>th</sup> defendant was acting in the course of duty.

I now proceed to address the issue of negligence. In the plaint, the plaintiff accuses the 2<sup>nd</sup> and 4<sup>th</sup> defendants of negligence and has set out the particulars of negligence against each one of them. In their respective defences the 2<sup>nd</sup> and 4<sup>th</sup> defendants accuse each other of negligence. It was the 2<sup>nd</sup> defendant's evidence that he was going uphill and there was a motor vehicle, which was oncoming with its full lights on. He saw this motor vehicle when he was 500 metres away and although he deemed his lights, that motor vehicle did not deem its lights. The light of the oncoming motor vehicle was so intense that it prevented him from seeing the 4<sup>th</sup> defendant's motor vehicle. He just saw it when he was ramming into it. The evidence of the 2<sup>nd</sup> defendant relating to the oncoming motor vehicle must be an afterthought.

because there is no mention of it in the defence, which the 2<sup>nd</sup> defendant filed. That notwithstanding, assuming that indeed there was such a motor vehicle then, it is the 2<sup>nd</sup> defendant's own evidence that he first saw it when he was 500 meters away yet he did not slow down or stop when the motor vehicle continued approaching with full lights on. The fact that he took no steps to stop, or slow down, to let that motor vehicle pass so that he could see the road ahead clearly, is evidence that he was reckless and negligent and he contributed to the collision.

The 4<sup>th</sup> defendant relies on the acquittal in the traffic case to say that he was not negligent. This motor vehicle broke down at 6 a.m. and stopped on the road. The accident took place at 11.30 p.m., 17 1/2 hours later. The 4<sup>th</sup> defendant said he telephoned his employers in Nairobi and informed them of the problem. He then came back to the scene at 8 a.m. and remained there until 11.30 p.m. when the accident took place. The 3<sup>rd</sup> defendant did not come to the scene until sometime after 11.30 p.m. This motor vehicle, much as it had broken down, remained on the road for too long a period. Section 53 of the Traffic Act provides for removal from the road, as soon as possible, of any motor vehicle which has broken down so that the same does not obstruct or prove dangerous to other road users." S.53(2).

The driver of any vehicle shall, in case of a break down, remove the vehicle from the road as soon as possible and until so removed, the vehicle shall be placed as close to the side of the road as possible and as the vehicle remains on the road between the hours of 6.45 p.m. and 6.15 a.m., its position shall be clearly indicated by a light or lights visible to drivers of vehicles approaching from either direction."

From the evidence of the 4<sup>th</sup> defendant the engine stalled and this being a big motor vehicle/trailer, moving it off the road was not possible. The vehicle therefore obstructed other motor vehicles travelling in the same direction. For this trailer to remain at the scene for 17 1/2 hours was contrary to the provisions of S.53 (2) of the Traffic Act. A replacement engine came from Nairobi and the 3<sup>rd</sup> defendant failed to come to court to explain why it took them 17 1/2 hours to come to the scene, if they came at all. The 4<sup>th</sup> defendant contributed to the accident by failing to remove the vehicle from the road as soon as possible as it posed a danger to other road users.

Section 53(3) of the Traffic Act provides for the placing of two red reflecting triangles one in front and one at the rear of the broken down motor vehicle.

"S.53 (3) If any part of the vehicle remains on or near the road..... the driver shall place on the road not less than fifty meters from the vehicle two red reflecting triangles of such construction and dimensions as may be prescribed, one ahead of the vehicle and one behind it so that each is clearly visible to drivers of vehicles approaching from ahead or behind as the case may be."

Although the 4<sup>th</sup> defendant said he placed the reflecting triangles on the road as is required, the plan which was produced in the traffic court as Exh. I and which now forms part of defence exhibit 1, does not show any such triangle. Instead it shows some stones and branches/twigs behind the vehicle. If the 4<sup>th</sup> defendant had placed the triangles, then placing twigs on the road could not have been necessary, and such triangles could have been seen by the officer who drew the sketch plan. This court is aware of the fact that some motorists are in a habit of placing branches or twigs on the road when their motor vehicles break down. There is no provision in the Traffic Act for this. Section 53(3) is specific and mandatory, a driver must place two red reflecting triangles on the road, one in front and the other behind a broken down vehicle.

The evidence of the plaintiff and that of the 2<sup>nd</sup> defendant together with that of the sketch plan is in agreement, and that is that, there were no triangles on the road. The 4<sup>th</sup> defendant in failing to comply

with S.53(3) with regard to the red-reflecting triangles, was negligent and contributed to the accident. I am satisfied and I find that the 2<sup>nd</sup> and 4<sup>th</sup> defendants through negligence were the cause of this collision and each one of them is 50% liable to compensate the plaintiff. They were acting in the course of duty and therefore their actions bind their respective employers the 1<sup>st</sup> and 3<sup>rd</sup> defendants whom I find vicariously liable to pay compensation to the plaintiff for the injuries he suffered.

I now turn to the injuries, which the plaintiff suffered during this accident. The same are summarized by Dr. Malik in his report as is outlined elsewhere in this judgment. As a result of those injuries the plaintiff was totally incapacitated for a period of six months, followed by a partial incapacity period of eight (8) months. For a period of 14 months therefore, the plaintiff did not lead a normal life. The doctor further assessed a total disability on the left leg at 10%. It is obvious that the plaintiff suffered a lot of pain, discomfort and inconvenience.

The fractures of the tibia and fibula healed with no malunion of the bones. The fracture of the femur has also healed satisfactorily. However, there is wasting of the muscles of the left leg, especially noticeable in the thigh. Movements in the left hip joint were restricted by 10% while flexion at the knee joint (left) was restricted by about 10%. Extension of this joint is however full and pain free.

I have considered the submissions by all the three learned counsel for the parties herein as well as the various High Court judgments they have relied upon. These being judgments of the High Court of Kenya, by different judges, they can only be of persuasive guidance.

I have further considered the injuries which the plaintiff suffered and the long period of both permanent and partial incapacity. I am satisfied and I find that an award of Kshs.450,000 is adequate compensation.

The plaintiff prays for special damages as well (paragraph 8). This, the plaintiff did not specifically plead. The amounts claimed for medical fees, police abstract and transport and subsistence while undergoing treatment are not stated and as such the claim relating to special damages cannot succeed, and the same is dismissed.

It is conceded that the 1<sup>st</sup> defendant paid to the plaintiff a total of Kshs.85,800 through the labour officer, as workman's compensation. I have earlier found that the 1<sup>st</sup> and 2<sup>nd</sup> defendants on one part, and the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the other part are equally liable to compensate the plaintiff for the injuries he suffered. The amount payable by the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally shall be less the Kshs.85,800 already paid by the 1<sup>st</sup> defendant.

I therefore enter judgment for the plaintiff against the four defendants in the sum of Kshs.450,000 general damages (four hundred and fifty thousand only) with costs and interest, to be paid as follows:-

(a) A sum of Kshs.225,000 (two hundred and twenty five thousand only), to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally, less Kshs.85,800 already paid. (b) A sum of Kshs.225,000 (two hundred and twenty five thousand only) to be paid by the 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally, (c) Once the costs payable to the plaintiff have been taxed and ascertained, the parties shall bear liability in the same proportions.

S. C. ONDEYO

JUDGE

17/6/99

delivered this 7th day of July 1999



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