



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 4816 OF 1986**

**JACINTA WANJIRU.....PLAINTIFF**

**VERSUS**

**FESTUS NDERITU NDIANGUI & 10 OTHERS..... DEFENDANT**

**JUDGMENT**

Plaintiff claims general and special damages from the three defendants as a result of injuries she sustained in a road traffic accident on 15.8.84.

At the time of the accident she was traveling as fare paying passenger in Motor vehicle registration No. KJX 221 owned and driven by the first defendant. The facts which are not disputed (in fact admitted) show that the first defendant's motor vehicle collided with motor vehicle reg. No KQW 389 owned by the 2nd and 3rd defendants. That motor vehicle reg. no KQW 389 is owned by the 2nd and 3rd defendants is confirmed by a copy of the records dated 18.11.86 from the Registrar of motor vehicles (Ex 4(a)). The third defendant is a partnership having nine partners although 3rd defendant pleads that 2nd, 3rd and 7th partners are deceased.

The 2nd defendant did not enter appearance.

On 8.12.93 a consent judgment was entered as follows:

“By consent judgment for plaintiff against 1st and 3rd defendants on liability subject to the apportionment of liability as between the first and 3rd defendant...”

The suit was adjourned so that the 1st defendant and 3rd defendant would agree on the apportionment of liability but they never did.

First defendant in his defence filed on 15.7.87 pleads in para 5 that the accident was substantially contributed to by the negligence of the servants or agents of 2nd and 3rd defendant. He has given the particulars of 2nd and 3rd defendants negligence.

Mr. Njihia in his written submissions contends that the accident was solely caused by negligence of the driver of motor vehicle reg. no. KQW 389 and first defendant should be exonerated from blame. He

submits further that should court decide to apportion liability first defendant should shoulder 10% liability.

On the other hand, third defendant in para 4 of the Defence pleads that the accident was wholly caused solely or substantially contributed to by the negligence of the first defendant and plaintiff. Third defendant has pleaded the particulars of negligence of the first defendant.

Mr. Munyalo for the plaintiff submitted in his written submissions that the first defendant was substantially to blame for the accident. He submits further that the driver of Motor vehicle Reg No. KQW 389 was also to blame but left the issue of apportionment of liability to court.

The first defendant admits that he was charged with offence of careless driving in Nyahururu Traffic case no. 296/86 but was acquitted. The proceedings and judgment was produced as exhibit in this suit.

The evidence of plaintiff (PW1) shows that she was a passenger in first defendants motor vehicle. According to her evidence first defendants motor vehicle was traveling from Ngarua to Nyahururu along Ngarua/Rumuruti Nyahururu Road. The Ngarua Road joins Nyahururu Rumuruti Road at Mairo Mugwanja. There is a stop sign at the junction Ngarua Road as the minor Road while Nyahururu /Rumuruti Road is the major Road. She testified that first defendant failed to stop at the junction and entered into the Road thereby colliding with 3rd defendants motor vehicle.

But first defendant (DW1) testified that he stopped at the junction and noticed that there was no passing motor vehicle. He then entered into the Road and turned left towards Nyahururu. He stated that after traveling for about 100 metres up the road the vehicle of the 3rd defendant came zig zagging from Nyahururu road and collided with his vehicle.

First defendants counsel heavily relied on the evidence adduced in the traffic case and the findings of fact by the learned magistrate.

But all the witnesses who gave evidence in the traffic case testified that first defendant failed to stop at the junction and that his vehicle collided with another motor vehicle when he entered into the road without stopping at the junction.

PC Peter Kavoi (PWV) who investigated the case testified that the point of impact was almost at the entry of the road to Ngarua near the junction.

The learned magistrate made a finding of fact that

“The court finds from the evidence of the prosecution witnesses accused did not stop at the junction”.

I do not find that finding to be inconsistent with the earlier finding of the learned Magistrate that the accident occurred a distance from the junction after first defendant had already turned towards Nyahururu direction.

The finding of the learned Magistrate that first defendant did not stop at the junction still remains valid as there was no appeal. That is a judicial finding of fact and I have to rely on it.

In any case, I believe the evidence that, it due to the first defendants failure to stop at the junction and entering into the main road and turning to Nyahururu direction which caused his vehicle to collide with the oncoming vehicle of the 3rd defendant. The learned Magistrate also found as a fact that the

brake system of the 3rd defendant's motor vehicle was not working and that had the brakes been working the driver of the third defendant's motor vehicle would have avoided the accident. That finding is again a judicial finding of fact which has not been disturbed by a superior court. To that extent the 3rd defendant contributed to the accident.

In the circumstances of the case, I find that the first defendant substantially caused the accident by failing to stop at the junction and I would find him to blame to the extent of 90%. I also find that the 3rd defendant contributed to the accident to the extent of 10%. Consequently, I apportion liability at 90% against the first defendant and 10% against the 3rd defendant.

The medical report from Nyahururu District Hospital dated 6.7.87 shows that the plaintiff sustained a fracture of the pubic bone with a right displacement of the ischial bone. She was put on traction for one month and then discharged through the physiotherapy clinic. Professor Mbindyo in his report dated 6.8.86 noted that the plaintiff sustained a

- (i) Fracture of right superior pubic ramus
- (ii) Fracture of inferior pubic ramus and
- (iii) Displacement of the fracture fragment.

## 2. Closed injury to left side of the chest

X-ray done 2.8.86 showed healed fractures of the right ischio pubic ramii

The plaintiff testified that after discharge from hospital she attended physiotherapy for six months and that the fracture healed with not much problems with the hip.

So the opinion of Prof. Mbindyo that early osteoarthritis at sacro iliac joints may develop and result in considerable disability and that she may have difficulties in child birth necessitating caesarean section has not been proved true by the time.

The plaintiff's counsel recommends shs 500,000 as general damages. He cited several authorities where awards of shs 250,000 - 3,000,000 have been made for similar injuries. The first defendant's counsel recommends shs 150,000 as general damages. He referred to previous awards ranging from shs 120,000 to shs 200,000.

It appears from the medical reports that the plaintiff was about 26 years old at the time of the accident. Although there was displacement of fracture fragments, the fractures healed well, leaving minimal permanent disability.

Most of the awards relied on by both counsels were given over 5 years ago. In the circumstances of this case, I award shs 300,000 as general damages and shs 1000 as special damages.

Consequently I enter judgment for plaintiff against first defendant and 3rd defendant for shs 300,000 as general damages and shs 1000 as special damages plus the costs of the suit.

The first defendant shall pay 90% of the damages and costs while 3rd defendant shall pay 10% of the damages and costs.

E.M. Githinji

Judge

25.11.99

Mr. Munyalo present

Mr. Njihia absent

Order: Mr. Munyalo to inform Mr. Njihia of the delivery of the judgment forthwith.

E. M. Githinji

Judge



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