REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 1124 OF 1983

KIMEU…….. PLAINTIFF

VERSUS

KASESE……DEFENDANT

JUDGMENT

The plaintiff filed this suit on 25/10/83 to recover damages for injuries she sustained in a road accident allegedly due to the defendant's negligence. She has set out the particulars of negligence in para 4 of the plaint and states in para 5 of the plaint that she will rely on the doctrine of *res ipsa loquitur.*

The defence was filed on 7/7/87. In the defence, the defendant denies that the accident occurred, that the plaintiff was a passenger in the defendant's vehicle, that she was injured and that the defendant was negligent.

In the alternative, the defendant avers that he has had already paid agreed compensation to the plaintiff. The plaintiff filed a reply to the defence and denied that she has received any compensation. In the alternative, she states that the money was not paid as compensation for the injuries sustained but as contribution toward the cost of medical treatment.

There are six agreed issues, thus:-

1. Was the plaintiff a passenger in motor vehicle reg No KRF 805"

2. Did the accident occur and if so, was the plaintiff injured"

3. Was the defendant negligent as alleged, if so, did his negligence cause the accident"

4. Is the defendant liable and if so what special and general damages are payable to the plaintiff"

5. Has the defendant paid mutually agreed compensation to the plaintiff in full and final settlement"

6. What is the order as to costs"

The evidence shows that the defendant owns a minibus reg No KRF 805 which operates as a

matatu and that it was hired on 1/11/83 to carry a corpse and mourners from Mombasa to Machakos. The dead body was that of the daughter of Betty Diwan Singh. The vehicle had 26 passengers its full capacity being one of them.

The vehicle left Mombasa at 3 pm being driven by the defendant and overturned near Emali at about 10 pm. Plaintiff states that she was injured on the back. The defendant admits in his evidence that the plaintiff was in fact injured. She states that she was admitted at Machakos District Hospital for one month and then transferred to Coast General Hospital where she was admitted for a further 8 months and then attended out-patient treatment for 11/2 years. The defendant admits that the plaintiff was admitted at Machakos District Hospital and later caused her to be transferred to Coast General Hospital. He claims that he used to help her children while plaintiff was admitted in hospital.

So, the defendant admits that the plaintiff was a passenger in his vehicle, that an accident occurred and that the plaintiff was injured. The first two issues have therefore been resolved. But it was put to the plaintiff that both Ali Katumbi Muia (PW 3) and the defendant asked the plaintiff not to board the defendant's vehicle but the plaintiff insisted.

PW 3, however, stated that the defendant's vehicle had been hired by a burial welfare association and that those authorised to accompany the body were called out before boarding the *matatu* and that nobody could board the *matatu* unless his name appeard in the list. Betty Diwan Singh

(DW 3) states that the plaintiff was in the company of PW3 and that it was the defendant to decide the person to accompany the body. According to her PW 3 asked the defendant why he was refusing the plaintiff to accompany the body. Plaintiff then boarded the vehicle and nobody removed her.

The defendant on the other hand, states that when he saw the plaintiff entering the vehicle he querried whether or not she was supposed to accompany the body.

PW 3 who is a relative of the defendant then told the defendant that the plaintiff was her friend. After getting that explanation the defendant states that he did not press the matter further.

The evidence of DW 3 that it was solely on the discretion of the defendant as to who should have travelled in his vehicle is not credible as he had nothing to do with burial arrangements. That was the work of the relatives of the deceased and the members of the burial welfare association to which they belonged. It is true that the plaintiff was not a relative of the deceased but she was in the company of PW3 who is also a relative of DW3. She was not stopped from boarding the vehicle or told to alight. The fact is that she boarded the vehicle with the full knowledge of those involved including the defendant and the reasonable inference is that she travelled with their tacit approval. Moreover, the lawfulness or otherwise of the presence of the plaintiff in the defendant's vehicle was not framed as an issue to be decided by the court.

There is evidence from the plaintiff and PW3 that, all along the journey the defendant was operating a radio cassette as he was driving and would with the right hand gesticulate as choir master does with the right hand while holding the steering wheel with the left hand.

Both PW 1 and PW 3 also testified that the defendant was driving at high speed while holding the steering wheel with one hand.

Indeed plaintiff states that at Mtito Andei one passenger warned the defendant but the defendant answered that he had enough experience. It is admitted that the vehicle overturned on a straight stretch

of the tarmac road.

The defendant denies that he was driving at high speed while holding the steering wheel with one hand. He accepts, however, that he was playing music and singing as he was driving but states that he was handing over the cassette tapes to another person apparently seated third from him to engage.

The evidence that the cassettes were being engaged by another lady is contradicted by DW 3 who herself was seated next to the defendant and who stated that it is the defendant who was operating the radio cassette. According to the defendant, he saw something like a pool of water glittering about 30 metres ahead and changed to gear No 3 and applied emergency brakes. The vehicle then skidded to the right, hit a stone and overturned on its right side. He explains that it is the oil which was on the tarmac which made the vehicle to skid.

DW 3 also testified that she saw something glittering about 50 metres ahead before the vehicle overturned suddenly. The defendant does not say that he established as a fact that there was oil spilled on the road. All he could say is that it appeared that oil had been spilt by oil tankers.

DW 3 could not say with any certainty that there was oil on the tarmac. She accepted that she did not know what was glittering and only suspected that it was oil after the accident when her clothes and those of others were oiled.

The defence case has not been consistent regarding the presence of oil on the tarmac.

It would appear from the cross-examination of the plaintiff by the defendant's counsel that he had instructed his counsel that there was in fact a tanker which had overturned at the scene and was present at the time of the accident. This is clear from the questions the defendant's counsel put to the plaintiff. Yet, the defendant did not mention the existence of the tanker at the scene. His witness (DW 3) denied that there was such a tanker at the scene and stated that she suspected a tanker had overturned at the scene about 3 days before.

Both PW 1 and PW 3 denied the existence of oil on the tarmac. The evidence of the defendant and DW 3 is not conclusive. In any case one can take judicial notice of the fact that the Mombasa / Nairobi road is very busy and if the oil could cause an inevitable accident, then there could have been very many accidents at the same place within the three days the oil had existed.

So, my conclusion is that there is no concrete evidence that there was oil spillage on the tarmac and that the accident was due to that oil spillage. Inspite of that finding, it should be noted that the defendant did not raise the defence of inevitable accident. In his defence. As order VI rule 4(1) of the Civil Procedure Rules provides, such a defence should be pleaded. That the defendant did not plead it is an indication that the defence now being raised is an afterthought and should be disregarded.

In this case, the accident occurred on a straight stretch of tarmac road. The headlights were working and there was no oncoming vehicle. The defendant admits that the vehicle skidded after he applied emergency brakes. I have discounted his theory that there was oil spillage on the tarmac. Even if there was and the defence of inevitable accident had been pleaded, there is no evidence that a vehicle traveling at moderate speed and being driven carefully, would inevitably skid. It is the emergency braking which caused the skidding, if any. I say, "if any" because, DW 3 stated that the vehicle left the road suddenly. Those circumstances give rise to the inference of negligence. To escape liability, the defendant would have to show that there was a probable cause of accident which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence –

Embu Public Road Services v Riimi [1968] CA 22.

I am satisfied that the defendant has shown neither of the two requirements and the plea of *res ipsa loquitur* succeeds.

It is part of the defence that the defendant has already paid agreed compensation to the plaintiff hence this suit is misconceived. The defendant had vigorously pursued this defence and gone further to say that in addition to the payment of shs 4,500/- to the plaintiff, he assisted the plaintiff's family financially. The defendant produced the agreement between him and the plaintiff. It is in Kikamba and was not translated but at my request, Mr Muthui in-charge of High Court Civil Registry, has done the translation into English. There are three transactions:- The first one was on 8/3/83 in which acknowledged receiving a total of shs 2,400/- being payment for her injuries.

The second transaction is dated 7/4/83 in which the plaintiff acknowledged receiving a further shs 500/- being payment for her injuries and also shs 40/- as ticket money.

The last and important entry is dated 7/783 which reads:-

"I, Mbula, has taken the money that was remaining to me as compensation for my injuries. I will never demand or ask for anything else because I have been paid the amount that we had agreed of shs 4,500/- ....."

The plaintiff agrees that she asked the defendant for money but she says she did so because there was nobody to help her. She states that it is the defendant who used to record the agreements and make her thump-print it assuring her that the money he had given her would be deducted from whatever damages she may be given by the court. She insists that the shs 4,500/- was medical expenses and denies that she agreed that she would not make any further claim.

It is plain that the agreement came after the plaintiff was discharged from the hospital and that this suit was filed 31/2 months after the last agreement of 7/7/83.

The plaintiff is illeterate and the agreement was recorded by the defendant. The plaintiff has had no benefit of legal advice and was not possessed of all the material facts relating to her claim. She did not have a fair estimate of the damages that she would be entitled.

What is the legal effect of such an agreement"

In effect, the agreement gives rise to the defence of accord and satisfaction. But before such a defence can succeed, it must be shown that the agreement (accord) was valid in law. The agreement cannot be valid in the instant case unless it is supported by consideration. There was no benefit that the plaintiff was getting by promising to forebear from making further claim. The following words of Win LJ in *D & C Builders Ltd v Rees*, (1966) 2 QB 617 at p 632, explains the principle:-

"In my judgment it is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law, and I do not think that any such agreement can be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance of an agreement of accord, does not provide retroactive validity to the accord, but depends for its effect upon the legal validity of the accord as a binding contract at the time when it is made."

The defendant has lost nothing.

In short, I conclude that the agreement has no legal validity. Even if I were to find that it is valid, I would hesitate to enforce it as perhaps it would be against public policy in the sense that most illiterate accident victims would be denied fair compensation by unscrupulous actions of vehicle owners or insurance companies.

Plaintiff has an Identity Card which shows that she was born in 1922. She was therefore 61 at the time of the accident and is now about 70 years old though she appears about 10 years younger and is healthy and strong.

She sustained a compression fracture of lumbar spine – L1 with paraplegia. She was kept on fracture board and given physiotherapy treatment. She was discharged from hospital after about 5 months (as per medical report). She recovered from paralysis of both lower limbs. She was re-examined during trial and it was found that paralysis persists at both ankles and has foot drop of the left leg which is wholly paralysed but the paralysis of the right foot has improved up to 50%. Both of her legs are okay only that she has left leg foot drop and partial foot drop on the right leg. She has weak muscle power and diminished sensation. She has also weakness of the bladder and cannot fully control urination. She uses a stick and is a slow walker. She limps if she is not using a stick – permanent incapacity. The lumbar spine is bent at an angle. Her condition is static.

The doctor confirms that the foot drop is due to compression fracture of lumbar spine and that her age is not a contributing factor. So, the compression fracture of the lumbar spine has caused the compute paralysis of the right foot diminished unable power and sensation and weakness of the bladder.

Miss Gidali for the plaintiff suggests an award for shs 150,000/- for fracture of lumber spine, shs 600,000/- for foot drop and shs 55,000/- for weak bladder.

Mr Kimani for the defendant did not suggest the appropriate award. I think that the injuries call for a global award because the foot drop, weakened muscles, reduced sensation and weakened bladder are incapacities resulting from compression fracture of lumber spine.

The case of *Sarah N Muciri v John T Kamau,* HCCC 325/85 (NRB) – 1988 Inamdar's Digest (supplement) p 30/31 has been referred to. In that case a 22 years old school girl who sustained fracture of lumbar vertebrae was awarded shs 140,000/- in June 1986 among other awards. The fracture caused a deformity of the thoraco-lumbar spine. When lying on back she would not raise legs with knees extended beyond 30 degrees. She would not remain on her feet for long or walk long distances. She would also develope osteo-arthritis at the lumber spine and hip joints by reason of uneven weight distribution in lumbar spine. Pregnancy would make her back condition worse and confinement more difficult. It should be noted that the plaintiff in that case was far much younger.

In *Jacob Chege Kimani v Eliud M Kinyanjui & Anor,* HCCC 462/88 (MBS) – 1990 Inamdar's Digest (2nd supplement) p 34/35, plaintiff aged 24 sustained a fracture of lumbar vertebrae L5, fracture of the pelvis and spinal shock which his urinal discharge and multiple abrasions. Catheter was inserted for 4 days during which he developed rurinary infection which was treated by antibiotics. Fracture of spine was treated by lying on fracture board. He was admitted for 2 months. Previous tenders in the pelvic and lumbar areas disappeared and gait was normal. Both legs had normal power but he suffered from permanent difficulty in passing urine. Secondary osteo-arthritis was expected at the lumbar–sacral and sacro– illiac joints. Court awarded shs 170,000/- general damages in November 1988 (2 years ago).

In *Samuel Ochoya v M/s Otrabu,* HCCC 181/89 (MBA), plaintiff, a man aged 52 sustained wedge fractures of 11th and 12th dorsal vertebrae and 5th lumbar vertebra. There was slight deformity of the

spine but the movements of the spine were not severely restricted. The injury was not very severe though plaintiff would not be able to bend or do heavy work. I awarded shs 150,000/- general damages on 1st October, 1990.

The plaintiff's condition is worse than that but she is beyond the productive age and she may not live with the handicap for long time. She has however lived with the handicap for the past 10 years.

I would assess general damages at shs 180,000/- less shs 4,500/- already paid making the award at shs 175,500/-. Special damages of shs 1000/- for medical report, shs 325/- for X-rays and shs 100/- for police abstract – total shs 1,425/- has been proved. The claim of shs 1,500/- has not been proved.

Consequently, I enter judgment for the plaintiff against the defendant for shs 175,500/- general damages and shs 1,425/- special damages – total shs 176,925/- with costs.

The award to carry interest at 12% pa from to-day until payment in full.

Dated and Delivered at Mombasa this 2nd Day of November, 1990

E.M. GITHINJI

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JUDGE