



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 452 OF 2010

ELIJAH PAKETURE KANAKE...PLAINTIFF/RESPONDENT

VERSUS

MARGARET WANGARI WANYOIKE.....1ST DEFENDANT

GEORGE MWAI KIMONDO.....2ND DEFENDANT

K. B. SANGHANI.....3RD DEFENDANT

JOSPHAT KIMANI.....4TH DEFENDANT

JUDGEMENT

1) Elijah Kanake Paketure, the plaintiff herein filed this compensatory suit against Margaret Wangari Wanyoike, George Mwai Kimondo, K. B. Sanghani and sons and Josephat Kimani the 1st, 2nd, 3rd and 4th defendants respectively vide the plaint dated 7th October 2010. The plaintiff sought for both special and general damages for the injuries he sustained in a road traffic accident involving motor vehicles registration numbers KBA 617W and KAS 524W & ZC 5062.

2) The plaintiff stated that on 22nd July 2009, he was a fare paying passenger aboard motor vehicle KBA 617W which at the time was registered in the name of the 1st defendant and driven by the 2nd defendant.

3) It is said that the aforesaid motor vehicle collided with motor vehicle registration no. KAS 524W ZC 5062 registered in the name of the 3rd defendant and driven by the 4th defendant along Malili Nairobi road. Judgment in default of appearance was entered against the 1st and 2nd defendants on 2nd July 2013. The 3rd and 4th defendant's case was closed without evidence when they and their advocates failed to attend court for the hearing. Of the substantive suit on 16th July 2015.

4) Elijah Kanake Paketure (PW 1) was the only witness who testified in support of the plaintiff's case. He told this court that on 22nd June 2009 at around 10.00am, he boarded motor vehicle registration no. KBA 617W Nissan matatu along Mombasa to Emali road. He said that on the material day he sat in the driver's cabin and that the driver kept on stopping to pick passengers along the way.

5) PW 1 also stated that there were a number of trailers using both sides of the highway which had three unmarked lanes with the middle lane being the climbing lane. PW 1 described the road as being hilly on the left, descending towards Mombasa and on the right, ascending to Nairobi.

6) The plaintiff stated that at Malili, the 2nd defendant who was driving motor vehicle registration no. KBA 617W, matatu, overtook other trailers and in a few minutes he saw motor vehicle registration no. KAS 524W with an attached trailer registration no. ZC 5062 on full speed while flashing its lights signaling the 2nd defendant to move back to his lane.

7) PW 1 stated that since there were other vehicles on the extreme left, the 2nd defendant was left with no option but to stop forcing motor vehicle registration KAS 524W & ZC 5062 to swerve to the right side thus causing trailer no. ZC 5062 to ram on the left side of the 2nd defendant's motor vehicle registration no. KBA 617W, killing two passengers on the spot.

8) The plaintiff said he was trapped in the driver's cabin and that he could not be immediately removed. He said that he was taken for first aid to Machakos District Hospital where he was later admitted before being transferred to Kenyatta National Hospital for specialized treatment. He said his left leg was later amputated above the knee.

9) PW 1 produced a bundle of medical receipts and a request for x-ray form as exhibits in evidence. He also produced the police abstract and

the P3 forms as exhibits. PW 1 further stated that the 2nd defendant was convicted and sentenced to a fine of ksh.30,000/= and in default to serve a year in prison in **Kilungu R.M. Traffic Case no. 303 of 2009**. He produced the proceedings as an exhibit in evidence. The 3rd and 4th defendants did not deem it necessary to attend court at the hearing of this suit prompting this court to close their case without the benefit of evidence.

10) The plaintiff stated that as a result of the accident he sustained the following injuries;

i. Deep cut wounds on the forehead.

ii. Deep cut wounds in the left shoulder

iii. Deep cut wounds on the left arm

iv. Compound fracture of the left tibia/fibula

v. An amputation of the left lower limb

vi. Soft tissue injuries and blood loss

11) PW 1 said that he was admitted for a day at Machakos District Hospital before being transferred to Kenyatta National Hospital where he was admitted for 11 days. He complained of his inability to walk without support and suffering pain after his leg was amputated.

12) At the close of the evidence, the plaintiff was invited to file written submissions which he did.

13) Having considered the evidence and the written submissions plus the authorities cited the twin issues namely: **liability** and **quantum** arose for determination.

14) On the first issue for determination, it is the submission of the plaintiff that the 3rd and the 4th defendants are to blame for the accident while the 1st and 3rd defendants are vicariously liable for the 2nd and 4th defendants acts of negligence. It is the evidence of the plaintiff that the 2nd defendant who was the driver of motor vehicle registration no. KBA 617W drove at a very high speed thus failing to control the aforesaid motor vehicle.

15) The 2nd defendant is also accused of driving without due care and attention. He is further accused of driving recklessly, carelessly and dangerously. The 4th defendant on his part is accused of driving motor vehicle registration no. KAS 524W & ZC 5062 at a very high speed without due care and attention. The 4th defendant was also accused of driving the aforesaid motor vehicle recklessly and dangerously.

16) I have already stated that the evidence tendered by the plaintiff were not controverted by the defendants. It is clear from the evidence before this court that the 2nd and 4th defendants were the drivers of the motor vehicles registration nos. KBA 617W and KAS 524W & ZC 5062 respectively. The duo were employees and or agents of the 1st and 3rd defendants respectively.

17) The plaintiff presented evidence showing that the 2nd and 4th defendants drove their respective motor vehicles without due attention and care. The 2nd defendant overtook other motor vehicles without paying attention to the oncoming motor vehicles. It is also evident that the 4th defendant drove his motor vehicle at such a speed that he was unable to control and avoid colliding with the 2nd defendant's motor vehicle. I hold and find the two defendants (i.e 2nd and 4th defendants) to be both wholly liable for the accident.

18) On quantum, the plaintiff sought for both special and general damages. The plaintiff pleaded to be paid kshs.5,700/= as special damages. PW 1 tendered evidence proving the aforesaid claim. I grant him the amount.

19) On general damages, the plaintiff urged this court to award him kshs.4,000,000/= for pain and suffering and ksh.1,500,000/= for loss of amenities. There is no doubt from the evidence that as a result of the accident the plaintiff suffered the injuries particularised in the plaint. His left leg was amputated. He must have suffered great pain. I am convinced that an award of ksh.3,000,000/= is reasonable for pain and suffering while a sum of ksh.1,000,000/= is a reasonable award for loss of amenities.

20) The plaintiff has also urged this court to award him a sum of kshs.6,240,000/= as damages for loss of earning capacity. The plaintiff presented evidence showing that he was aged 32 years at the time of the accident. He was also able to show that he was a driver by profession earning a monthly sum of ksh.80,000/=.

21) The plaintiff stated that at the material time he was employed to transport meat from Emali to Nairobi for four days in a week at a wage of ksh.4,000/= per trip. He said that he was rendered unemployable as a driver having lost his left leg due to amputation. He proposed a multiplier of 26 years at a rate of ksh.80,000/= per month.

22) Having considered the proposals I find the same to be on the higher side. The plaintiff did not offer any documentary evidence showing he was earning a sum of ksh.4000/= per trip. I think a figure of ksh.1,000/= per trip is sufficient remuneration. Consequently, the plaintiff would earn a cumulative sum of ksh.16000/= per month. I am convinced that the plaintiff would have worked upto the age of 65 years. A multiplier of 32 years in the circumstances would be reasonable. On this head I award the plaintiff ksh.6,144,000/= which is tabulated as follows:

16,000x12x32=6,144,000/=

23) The plaintiff further sought for future medical expenses. He stated that there will be need to change the prosthesis on a yearly basis at ksh.5,000/= plus orthopaedic follow ups and medication on regular basis to monitor his condition. I am convinced that the plaintiff is entitled to the claim. Consequently, I award him a sum of ksh.350,000/= on this head.

24) In the end, judgment is entered in favour of the plaintiff and against the defendants jointly and severally as follows:

i. General damages for pain and

for loss of amenities ksh.4,000,000/=

ii. General damage for loss

of earning ksh.6,144,000/=

iii. Future medical expenses ksh. 350,000/=

iv. Special damages ksh. 5,700/=

Total ksh.10,499,700/=

v. Interest on (i), (ii) and (iii) at court rates from the date of judgment until the date of full payment.

vi. Interest on (iv) at court rates from the date of filing suit until the date of full payment.

vii. Costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the defendant