



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 164 OF 2009

BHAVEN HARJIVAN KURJI.....PLAINTIFF

-VERSUS-

TRIVEDI SUSHIL LILADHAR.....DEFENDANT

JUDGMENT

1. By way of the plaint dated 26th March, 2009, amended on 26th February, 2010 and further amended on 29th June, 2017 the plaintiff herein instituted a suit against the defendant. The defendant is sued in his capacity as the insured and/or beneficial owner of motor vehicle registration number KAT 914J (“the subject vehicle”) at all material times.

2. The plaintiff pleaded that sometime on or about the 31st day of December, 2006 while he was lawfully walking on the pedestrian track along Kolobar Road in Ngara area, the defendant recklessly and/or negligently caused the subject vehicle to hit him, causing him to sustain serious injuries. The particulars of negligence and the injuries sustained were set out under paragraphs 4 and 5 of the further amended plaint.

3. The plaintiff further pleaded that at the time, he was aged 34 years and worked as a Marketing Manager but that he could not perform his duties effectively following the accident and was therefore discharged by his employer, remaining out of employment between January, 2006 and December, 2008.

4. The plaintiff therefore prays for judgment in his favour and against the defendant in the following manner:

- a) General damages
- b) Special damages in the sum of Kshs. 2,565,406.20
- c) Loss of earnings
- d) Costs of the suit
- e) Interest on a), b), c) and d) at court rates until payment in full.
- f) Any other or further relief which this Honourable Court may deem fit and just.

5. Upon entering appearance, the defendant filed his statement of defence dated 24th April, 2009 and amended on 8th March, 2010 to deny the plaintiff’s claim.

6. At the hearing of the suit, the plaintiff testified and called three (3) other witnesses, while the defendant summoned one (1) witness.

7. PC Justus Chimbevo who was PW1 gave evidence that he was at the time attached to Gigiri Police Station, Traffic Department and that on the material date his station received a report of the accident involving the subject vehicle and the plaintiff.

8. The witness testified that the police officer who investigated the matter has since left the station. The witness then produced a copy of the police abstract as P. Exh 1 and an extract of the Occurrence Book (OB) records as P. Exh 2.

9. In cross-examination, the witness read the contents of the OB records and stated that the subject vehicle had no visible damage to it and that he is not aware whether the driver was ever charged in court in relation to the accident, though it is noted that he did not report the accident as required.

10. In re-examination, it was the evidence of PW1 that a driver is required to report an accident within 24 hours of its occurrence and yet the driver of the subject vehicle did not report the same until three (3) months later.
11. The plaintiff who was PW2 adopted his signed witness statement and produced his various list and bundle of documents as exhibits. He went on to testify that he works as a salesman and that on the material date he was returning home from the temple at about 11.30 am while in the company of two (2) of his friends when the subject vehicle being driven by the defendant hit him from behind.
12. The plaintiff stated that he sustained injuries to his right leg and that the defendant and his friends took him to Avenue Hospital where he remained for three (3) months before being discharged. The plaintiff testified that subsequently, he was informed that his leg would have to be amputated and it is at this point that he decided to seek specialized treatment in India, where he was admitted at Aashna Orthopaedic Hospital where he stayed for 7-8 months and incurred various expenses, including operation costs.
13. It was the evidence of the plaintiff that he did not incur the hospital expenses himself but that the same were paid by one Rajneesh Sankhli under the agreement that the plaintiff would refund him the costs incurred, at a later date.
14. It was also the evidence of the plaintiff that on returning to Kenya, he was okay briefly before the pain resumed and he was forced to seek medical attention, thereafter returning to India for further treatment.
15. The plaintiff stated that various medical reports were prepared by the doctors who had examined him and the same were produced as exhibits.
16. The plaintiff further stated that at the time of the accident, he was employed but that he could not continue working after the accident and was subsequently terminated from employment. Both the employment letter and the letter of termination were tendered as exhibits. It was the evidence of the plaintiff that at the time he was earning a salary of Kshs. 56,154/ upon deductions.
17. In cross-examination, the plaintiff gave evidence *inter alia*, that on the date of the accident, he was engaged in conversation with a friend and that he was not on the road when the subject vehicle knocked him. He also gave evidence that he did not see the subject vehicle approaching when it hit him.
18. According to the plaintiff, it is the defendant and his two (2) friends who took him to hospital following the accident and that he was not working when he chose to go to India for medical treatment.
19. The plaintiff stated that at the time of giving his evidence, he was not under any medication for his leg but that he continues to receive medical attention, and that he managed to get a job with Boshni Distributors as a salesman.
20. Rajubhai Kantilal Patel who was PW3 adopted his signed witness statement as evidence and testified that he was standing with the plaintiff when the accident took place and echoed the averments of the plaintiff that he could not see the subject vehicle approaching. The witness also testified that the subject vehicle was not moving fast.
21. In cross-examination, it was the evidence of the witness that he was standing on the road when the subject vehicle approached and that he does not have a loan agreement with the plaintiff regarding the costs incurred in his medical treatment.
22. In re-examination, the witness reverted by stating that he was standing on a footpath on the road on the material date.
23. Dr. Neeraj Krishna in his evidence as PW4 made reference to his medical report dated 21st July, 2016 produced as P. Exh 45 and testified that he examined the plaintiff. The doctor stated that the injuries of the plaintiff were quite severe and that he required surgery. According to the doctor, the plaintiff underwent a surgical procedure known as a fasciotomy, and that he underwent various surgeries thereafter, due to recurring infections.
24. It was the evidence of the doctor that eventually, the plaintiff was advised to seek specialized treatment in India since his injuries were not healing properly, and that he underwent three (3) surgeries there and stayed in India for six (6) months before returning to Kenya.
25. It was also the evidence of the doctor that when he saw the plaintiff again, he had a permanent limp and had lost complete sensation of the lower part of his injured leg. The doctor assessed his permanent incapacity at 76%.
26. In cross-examination, the doctor gave his medical professional qualifications and clarified that the plaintiff was injured on his right leg between the knee and ankle and that by the time he saw him again in 2016 following the travel to India, he could not walk without support.
27. In re-examination, the doctor stated that the plaintiff has no movement on his right ankle joint and has no power on his ankle. The doctor further stated that the surgeries have been useful in treating the injuries. This marked the close of the plaintiff's case.
28. For the defence case, Dr. Peter Wambugu who was DW1 stated that he also examined the plaintiff and that at the time he had not fully recovered and would require further surgery. The doctor assessed the plaintiff's permanent incapacity at 48%.
29. It was the evidence of the doctor that he examined the plaintiff again in 2019 and noted that he had a non-healing wound on the heel and it was discovered that the plaintiff had poorly managed diabetes, plus loss of sensation on the right foot. The doctor therefore awarded him a similar degree of permanent incapacity as earlier on. The doctor mentioned that there is a correlation between the healing of a wound and diabetes but that x-rays did not reveal any fractures.

30. In cross-examination, the doctor stated *inter alia*, that he is a general surgeon and confirmed that the plaintiff had undergone specialized treatment in India. According to the doctor, the difficulties in walking for the plaintiff could have been related to the accident and made worse by his diabetes condition.

31. However, the doctor indicated that upon re-examining the plaintiff in 2019, he noted improvement but decided to maintain the degree of incapacity. Upon brief re-examination, the defendant closed his case.

32. It followed that parties exchanged written submissions. In his submissions dated 20th February, 2020 the plaintiff argued that his evidence on liability was not at all controverted by the defendant and that though the defendant denied the occurrence of the accident, he did not bring any evidence to support his position. The plaintiff therefore urged this court to enter a finding of 100% liability against the defendant and cited *inter alia*, the case of **Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR** where the court held that where a party does not call any evidence to support its pleadings, the same constitute mere statements of fact.

33. On quantum, the plaintiff suggested an award of Kshs. 6,000,000/ and cited *inter alia*, the following authorities:

a) In the case of **Charlene Njeri Kuria v Gitu Geoffrey & another [2016] eKLR** the court awarded a sum of Kshs. 5,000,000/ to a plaintiff with partial paralysis of the lower limbs and 60% disability

b) **Emmanuel Kombe Nzai also known as Kombe Emmanuel v Basari Company Limited & another [2017] eKLR**: in this case, a plaintiff with paralysis of the lower limbs was awarded Kshs. 6,000,000/.

34. The plaintiff further urged an award of Kshs. 2,565,406/ being special damages pleaded and proved. In addition, the plaintiff urged this court to award the sum of Kshs. 1,440,000/ on damages for loss of earning, being the salary for the 24 months during which he was out of employment.

35. Further to the foregoing, the plaintiff suggested an award for diminished earning capacity by applying his monthly salary of Kshs. 60,000/, disability of 76% and a multiplier of 30 years to be tabulated as follows:

$$76\% \text{ disability} \times 20,000 \times 34 \times 12 = \text{Kshs. } 18,604,800/$$

36. The defendant who filed submissions on 23rd July, 2020 contended that at the end of the day, the onus is on the plaintiff to prove liability against him and in the absence of such proof, his claim should automatically fail. The defendant is of the view that should this court find otherwise, then it would be appropriate to apportion liability between the parties at the rate of 70% against the plaintiff.

37. On quantum, it was the submission of the defendant that the authorities cited by the plaintiff on general damages for pain, suffering and loss of amenities are not comparable since in the present instance, the plaintiff did not have any fractures. In the view of the defendant, an award of Kshs. 800,000/ would suffice. In this respect, reliance was placed on the case of **Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR** where the court reassessed general damages for a fracture of the right femur at Kshs. 500,000/ and the case of **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** in which a plaintiff with degloving of the left leg was awarded a sum of Kshs. 250,000/.

38. In regards to special damages, it was the submission of the defendant that the plaintiff is only entitled to the damages pleaded and proved. The defendant further submitted that the claims for loss of earnings and/or diminished earning capacity should not be awarded as the same ought to have been pleaded and strictly proved.

39. The plaintiff rejoined with further submissions where he reiterated that the evidence adduced at the trial has not been challenged and hence the standard of proof has been attained in this instance.

40. The plaintiff further reiterated his entitlement to the reliefs sought, with reference to various additional authorities.

41. I have duly considered the evidence tendered before this court, both oral and documentary. I have likewise taken into consideration the rival submissions alongside the respective authorities cited. It is clear that the twin issues for determination are on liability and quantum.

42. On the subject of ownership of the subject motor vehicle, the plaintiff tendered a copy of records dated 19th January, 2009 as P. Exh 48 indicating that the defendant was the registered owner of the subject vehicle at all material times.

43. The aforesaid evidence was not at all challenged by the defendant by way of evidence. In the absence of evidence to the contrary, I am of the view that the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of **Section 8 of the Traffic Act, Cap. 403 Laws of Kenya** which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

44. From the foregoing, I am satisfied that the plaintiff has proved on a balance of probabilities that the defendant was at all material times the registered owner of the subject vehicle.

45. On the subject of negligence, the law stipulates that in order to prove negligence, a plaintiff is required to satisfy the elements associated with the tort of negligence.

46. Going by the evidence on record, it is apparent that the subject vehicle was involved in the material accident. It was the evidence of the

plaintiff that he was standing near the road on a footpath and in the company of two (2) friends, including PW3, when the accident took place. According to the plaintiff, he was knocked from behind by the defendant, while entering through a gate near the footpath, and that the defendant and his two (2) friends rushed him to hospital. It is noted that the defendant did not bring any evidence to refute this averment. Moreover, the evidence of the plaintiff was supported by that of PW3 who was an eye witness to the accident.

47. Still on negligence, upon studying the police abstract, I note that the matter was indicated as pending under investigations at the time and PW1 who produced the abstract was not the investigating officer and therefore did not have much information that would shed light on how the accident occurred.

48. Be that as it may, I note from the pleadings that the doctrine of *res ipsa loquitur* was invoked which would equally prove relevant in determining whether there was negligence on the part of the defendant.

49. The above doctrine was aptly discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the **East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the following was enunciated:

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant... The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”

50. The doctrine was further expounded in the case of **Kago v Njenga [1979] eKLR** whose holding I cited hereinabove.

51. From the foregoing, I observed that once pleaded, the *res ipsa loquitur* doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

52. In the present instance, the plaintiff having discharged the burden of proof by pleading the doctrine and this court having determined that the subject vehicle owned by the defendant was involved in the material accident, it fell upon the defendant to disprove this or to show contributory negligence on the part of the plaintiff, but he did not.

53. In the premises, I am satisfied that the plaintiff has made his case against the defendant on a balance of probabilities and I hereby enter a finding of 100% liability against the defendant.

54. Having found in favour of the plaintiff on liability, it is now for me to ascertain whether he is entitled to the reliefs sought in his claim. The same shall be addressed under the relevant heads hereunder.

a) General damages

(i) Pain, suffering and loss of amenities

55. It has been stated and restated that an award under this head is essentially aimed at compensating the plaintiff.

56. In the present instance, the particulars of the injuries sustained by the plaintiff are indicated in the further amended plaint as follows:

- a) Injury to and bleeding muscles of calf of the right leg leading to compartment syndrome and sepsis necessitating surgical intervention and skin grafting.
- b) Damage to gastrocnemius muscles of the leg.
- c) Loss of skin and infection leading to skin grafting.
- d) Osteopenia of the right forefoot.
- e) Fracture on the right lower limb.

57. Upon examining the medical evidence, including the medical reports produced as exhibits by PW4 and DW1, I note that they essentially confirm the injuries sustained; save for the fracture injuries; though I established that in the medical report by PW4, permanent incapacity was assessed at 76% while DW1 assessed the same at 48%.

58. It is apparent from the evidence that the plaintiff received treatment both in Kenya and abroad in India, and that he underwent a number of surgeries and was admitted for prolonged periods much of the time.

59. On considering the authorities cited by the parties in this respect, I find that those cited by the plaintiff entailed injuries of a more severe nature in comparison to those he sustained, whereas those cited by the defendant did not entail similar injuries per se.

60. That being said, I considered the case of **New Original Investments Co Ltd v Bernard Kimatu Muia [2019] eKLR** where a plaintiff who had suffered blunt injury of the right lower limb among other blunt injuries, plus a few fractures and who underwent three (3) different surgeries was awarded a sum of Kshs. 2,000,000/ . Also, in the case of **Teresiah Ngugi & another v Michael Masia Kimende [2018] eKLR** the court awarded general damages under this head in the sum of Kshs. 1,500,000/ to a plaintiff with injuries which led to muscle wasting on both lower limbs, healed scar with hyperpigmentation, swollen right knee joint with stiffness and tenderness, fractured bones could not bear weight, and who had to undergo reconstructive surgery.

61. Having regard to the comparable awards made, the passage of time as well as the unique circumstances of the present case such as the various surgeries undertaken and the range of incapacity assessed by the respective doctors, I find an award of Kshs. 2,500,000/ to be reasonable under this head.

(ii) Loss of earnings/Diminished earning capacity

62. Under this head, I took into account the evidence of the plaintiff that he worked as a salesman at all material times. I also examined the letter of employment dated December, 1998 and tendered as P. Exh 33 which shows that the plaintiff was at all material times employed by Vardundev Limited as a sales manager and earning a net salary of Kshs. 60,000/. However, upon examining the salary vouchers adduced, it is apparent that the plaintiff was earning a gross salary of Kshs. 30,000/ and that the net income varied from one month to another. In the circumstances, I find that the gross salary would be more reliable.

63. I note from the letter of termination dated January, 2007 that the plaintiff's employment with the aforementioned employee was terminated on medical grounds. It is the averment of the plaintiff that he was out of employment from then up to December, 2008, which averment I find to be reasonable in the circumstances and upon considering the frequent hospital visits, admissions and surgeries.

64. While relying on the last known salary of the plaintiff, that is Kshs. 30,000/ according to the salary vouchers, I will tabulate the award for loss of earnings for the two (2) years, as hereunder:

$$\text{Kshs. } 30,000 \times 12 \times 2 = \text{Kshs. } 720,000/$$

65. Concerning diminished earnings, there is nothing in the medical reports or other evidence to show that as a result of the injuries sustained, the plaintiff's earnings diminished. In the premises, I decline to award any damages under that particular head.

b) Special damages

66. Under this head, I have duly taken into account the various costs pleaded by the plaintiffs alongside the evidence tendered before this court. It is noted that some of the documents adduced constituted vouchers, invoices and/or bill numbers, as opposed to receipts which would evidence payment. It is trite law that special damages must be specifically pleaded and strictly proved.

67. Upon considering the receipts tendered, I find that the same total a sum of Kshs. 396,738/ which is what I will award under special damages.

68. In the end, I hereby enter judgment on quantum in favour of the plaintiff as follows:

a) General damages

(i) Pain, suffering and loss of amenities **Kshs. 2,500,000/**

(ii) Loss of earnings **Kshs. 720,000/**

(iii) Diminished earnings **NIL**

b) Special damages **Kshs. 396,738/**

TOTAL **Kshs. 3,616,738/**

For avoidance of doubt, the special damages shall earn interest from the date of filing of the suit while the general damages shall earn interest from the date of judgment until payment in full. The plaintiff shall also have the costs of the suit.

Dated, signed and delivered at NAIROBI this 29th day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant