



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 233 OF 2012**

**CLEMENT THADEO MFASHE..... 1<sup>ST</sup> PLAINTIFF**

**DAVID KIPRONO ARAP NGETICH.....2<sup>ND</sup> PLAINTIF**

**-VERSUS-**

**SPARTA FOODS LIMITED.....1<sup>ST</sup> DEFENDANT**

**DAVIS KIBANDE VOYL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiffs herein moved this court by way of a plaint dated the 25<sup>th</sup> August, 2011 and filed in court on the 18<sup>th</sup> May, 2012, in which they have claimed general and special damages arising out of the road traffic accident that occurred on the 19<sup>th</sup> November, 2010 at the Kenol Filling Station along Mombasa road here in Nairobi.

They averred that on the material date, the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant by themselves, their authorized driver, agent, servant and/or employee so negligently managed, controlled and/or drove motor vehicle registration number KBK 574Y Toyota Dyna Pick-up truck that they lost control of the same and allowed it to knock down the plaintiffs as a result of which they sustained serious body injuries. The particulars of negligence on the part of the defendants are set out in paragraph 4 of the plaint while those of injuries are set out in paragraph 5 thereof.

They contended that they have suffered and continues to suffer as a result of the said accident for which they hold the defendants jointly and/or severally liable. They have claimed general damages for pain and suffering, diminished earning capacity and loss of earning capacity. They have also claimed loss of earnings from the date of the accident till the date of recovery.

The defendants filed a defence on the 20<sup>th</sup> June, 2012 in which they have denied the plaintiffs' claim. They denied that the accident occurred due to negligence on their part and have denied the particulars of negligence attributed to them. Without prejudice, and in the alternative, they averred that the accident was wholly caused and/or substantially contributed to by the plaintiffs. The particulars of such negligence are set out in paragraph 5 of the plaint. The defendants further denied the alleged injuries, loss and damages pleaded by the plaintiffs in paragraph 5 of the plaint and put them to strict proof. They urged the court to dismiss the suit with costs.

On the 23<sup>rd</sup> September, 2015, parties recorded a consent on liability in the ratio of 70%:30% in favour of the plaintiffs and thereafter agreed to put in written submissions to assist the court in assessment of damages payable to the plaintiffs.

The 1<sup>st</sup> plaintiff filed his submissions on the 31<sup>st</sup> August, 2020 and urged the court to award general damages of Kshs. 3,000,000/= . He relied on the cases of *Wycliffe Kisaah Diginyi vs. Elijah Mungai Njoroge & Anothr civil suit no. 189/2012 (nrb)* in which Kshs. 3,000,000 was awarded. He also cited the case of *Real Tilak Enterprises Limited vs. Paul Muia Kilonzo (2019) eKLR* where the court awarded KSHS. 2,500,000 as general damages.

On their part, the defendants submitted Kshs. 800,000 would be sufficient compensation for the injuries sustained. They relied on the cases of *Victor Ramogi Raburu vs. Eldoret Express Company Limited & Benson Githinji (2004)* that of *Peter Gicharu Ngige vs. Charles Daudi Onderi (2012) eKLR*, *Rwaken Investments Limited vs. Isaac Kiprop Chelunyeyi & Another (2018) eKLR* where Kshs. 600,000 and Kshs. 800,000 for the last two cases respectively, were awarded.

On special damages, the 1<sup>st</sup> plaintiff urged the court to award kshs. 2,149,160 as the same was proved by way of receipts that were produced as exhibits. He has also prayed for interest on both general and special damages and the cost of the suit and have relied on the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1970) E. A. 469*.

On their part, the defendants submitted that the 1<sup>st</sup> plaintiff in the list of documents dated 9<sup>th</sup> July, 2020 has attached invoices as proof of payments made but no receipts were produced. They have argued that the production of invoices is not proof of payment as this does not meet the test of proof of special damages. They have urged the court not to award special damages. On interest, they have blamed the plaintiffs for the delay that led to the dismissal of the suit at some point, but which the parties reinstated by consent. They have urged the court to deny the plaintiffs interest for their delay in prosecuting the matter.

The court has considered the submissions on quantum as filed by the respective parties. The injuries sustained by the 1<sup>st</sup> plaintiff are set out in the report dated 15<sup>th</sup> August, 2011 by Doctor S. K. Ndegwa as follows;

1. Severe head injuries associated with
  - i. Bilateral fracture of mandibles
  - ii. Extensive friction burns on the left side of the head.
  - iii. Traumatic amputation of the external part of the left ear.
2. Misplaced mid-shaft fracture of the right clavicle
3. Extensive friction burns on the left hand, forearm and shoulder.
4. Extensive friction burns over the entire right shoulder and right side of the chest.
5. Friction burns on the left side of the chest.
6. Friction burns on the entire dorsum of the right hand
7. Blunt trauma to the right ankle joint.
8. Bruises on the left knee.
9. Neck contusion with loss of normal lordosis due to muscle spasms.

In his conclusion, the doctor stated that the injuries were very severe, multiple bone and extensive soft tissue injuries leading to loss of key facial components. He recommended for assessment after six (6) months where he was to determine the level of permanent disability.

From the 1<sup>st</sup> plaintiff's medical report, it is clear that he suffered severe injuries. Though the doctor recommended another assessment after 6 months, there is no indication if it was ever done. The court has perused the authorities relied on, in the submissions. I find the case of **Victor Ramogi Raburu** a better reflection of the injuries sustained by the 1<sup>st</sup> plaintiff. I also note that the same was decided more than 10 years ago. Taking into account the inflation, I find a sum of Kshs. 2,000,000 reasonable as general damages.

On special damages, the law is clear that special damages must not only be specifically pleaded but also strictly proved. See the case of **Hahn vs. Sigh, court of appeal no. 42 of 1983 (85) KLR**. On behalf of the 1<sup>st</sup> plaintiff a total of Kshs. 1,976,106.82 was pleaded. The 1<sup>st</sup> plaintiff filed a further supplementary list of documents on the 4<sup>th</sup> July, 2020 for the receipts for payment of medical expenses. The same were pleaded. The receipts add to a total of Kshs. 2, 149,46/- but only Kshs. 1,976,106.82 was pleaded. I award Kshs. 1,976,106.82cts.

On the interest, the general principle is that the award of interest is a matter of discretion but generally interest on general damages is awarded from the date of judgment being the date when the principal obligation to pay is established. See the case of **Kenya Commercial Bank Limited vs. Sheikh Osman Mohammed (2013) eKLR (Civil appeal no. 179 of 2010)**. I have no reason to depart from this long time principle. I hereby award interest on both general and special damages. General damages to earn interest from the date of the judgment whilst special damages shall attract interest from the date of filing the suit. The awarded amount is subject to contribution as per the consent recorded by the parties.

The 1<sup>st</sup> plaintiff is also awarded the costs of the suit.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of October, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant