



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 102 OF 2003

TITUS MUSEMBI NDISO.....PLAINTIFF

VERSUS

- 1. RURERI WAHOME**
- 2. C. MURINGU**
- 3. JULIUS M. NKANATA T/A ZEBRA SAFARIS LTD**
- 4. ALI AHMAD AL AL-AHDAIDEFENDANTS**

J U D G M E N T

Introduction

1. The plaintiff, TITUS MUSEMBI NDISO, sued the three defendants and sought judgment against them, jointly and severally, for General and Special damages as well as costs and interest on such damages and costs.

2. That plaint was re-amended on 17/8/2015 to specifically plead special damages in the sum of Kshs.32,750.00 and further re-amended on 13/11/2008 to join the fourth defendant. Pursuant to that Re-amended plaint, summons dated 14/11/2008 were issued and serviced upon the 1st, 2nd and 4th defendants as evidenced by the affidavit of service sworn by RANDOLPH M. TINDIKA to the effect that the same were served by substituted service on the 12/1/2009 pursuant to court orders allegedly issued on 20/8/2008 the record does not show any orders issued on 20/8/2008. The record shows that on 24/6/2008, one Mr Kobe attended the registry and took a date for hearing of the summons dated 5/5/2008 and had it fixed for hearing on the 20/8/2008. Come 20/8/2008 nobody appeared before Warsame J, and the matter was marked as stood-over generally. It was subsequently heard on the 5/12/2008 before Njagi J, when the application was allowed as prayed. The effect of the order of 5/12/2008 was that the plaintiff was granted leave to amend the plaint to introduce the 4th defendant and the draft amended plaint deemed duly filed. I have decided it necessary to set-out the foregoing record because I note that there exist on record a default judgment entered on the 17/6/2009 pursuant to a request dated 7/5/2009 itself grounded on an affidavit by Mr. Tindika Advocate and headed **Affidavit in support** where the advocate depones that substituted service was effected pursuant to a court order dated 20/8/2008. It is at this juncture confirmed that no such order exists and therefore I will come to the question of the validity of that service later on in this ruling.

3. The result of the request of judgment aforesaid is that the matter was then only defended by the 3rd defendant who filed a defence to the claim and dated 19/11/2004 in which the occurrence of the accident, the ownership of motor vehicle Registration No. KAA 584C together with the presence of the plaintiff in the alleged motor vehicle and his injury were all denied. It was then pleaded in the alternative that if any accident occurred then it was occasioned by the negligence of the 1st and 2nd defendant with particulars of negligence being pleaded and set out.

The dispute

4. The plaintiff holds the said four defendants liable for an accident alleged to have occurred on the 10/12/2001 along Mombasa Mikindani road because he, the plaintiff, was travelling as a fare paying passenger in motor vehicle Regulations No. KAL 022H allegedly owned by the 1st, 2nd & 4th defendants, when that motor vehicle KAL 022H collided with the motor vehicle Registration No. KAA 584G. While the plaintiff blames all the defendants for the accident, the 3rd defendant blame the 1st and 2nd defendants for the same accident. Even though the 3rd defendant denied the occurrence of the accident in the statement of defence, in evidence he did admit the occurrence hence whether or not the accident occurred is not an issue here. The only issue is which of the motor vehicle contributed to the accident and to what extent

5. The issue for determination based on the pleadings filed and the evidence led are as follows:-

- i. Who was the registered owner of the motor vehicle KAL 022H?
- ii. Who between the 1st and 2nd defendants on one hand and the 3rd defendant on the other is liable for the accident and if so to what extent.
- iii. What injuries did the plaintiff sustain as a result of the accident?
- iv. Is the plaintiff entitled to be awarded any damages and what is the quantum of such damages?

Evidence by the plaintiff

6. The evidence by the plaintiff was that on the material day he was a

a passenger in motor vehicle Registration No. KAL 022H travelling

from town towards Changamwe and that the said motorvehicle was using the left side of the road as one faces Changamwe. He said there was jam and vehicles were not moving hence the driver of KAL 022H, swerved to the right and in the process collided with motor vehicle KAA 584G. He then produced a copy of the Records to show that KAA 584G belonged to the 3rd defendant. No evidence was led by PW 1 on the ownership of KAL 022H. He then enumerated his injuries as fracture of the left leg, leading to amputation, compound fracture of the right leg as well as injury to the left arm and chest. He added that his left leg was amputated while the right leg was reduced by *plaster of paris*. The parties then produced the plaintiffs list of documents filed in court on 13/6/2011 by consent.

7. The plaintiff said that he spent Kshs.26,180 on treatment. He said that at the time of the accident he was running the business of letting out houses at Mikindani earning about 40,000/= per month which business he would not proceed with after the accident due to the resultant incapacity.

8. In cross examination, the plaintiff denied knowing the owner of KAL 022G but stated that all vehicles were using the lane ordinarily used by vehicles from Changamwe to town and that the vehicle he was in was full to capacity but was being driven slowly. On his earnings he said he did not have any town council papers nor books of accounts to evidence earnings.

9. The next witness was Dr. Ndegwa who gave evidence as having examined the plaintiff and confirmed the plaintiff to have suffered traumatic amputation of the left leg, segmented fracture of the right tibia and fibula, contused bruise to the left elbow, lacerations to the left leg and blunt trauma to the chest and abdomen. By the time of the examination, the plaintiff was using an ill-fitted prosthesis which made walking difficult and there was evident, clinically healed fractured right leg and slight stiffness of the elbow joint. He formed an opinion and assessed permanent disability at 50% he recommended an appropriate prosthesis at an approximated cost of Kshs.300,000/= with a yearly maintenance expense of Kshs.10,000/=.

10. PW 3, who was called to produce the police file, turned up with the incorrect file and was stood down never to be called again. Instead parties attended before Judge Kasango and recorded a consent that the filed documents be deemed as produced by consent and marked in the following order:-

- i. P3 form EXH P1
- ii. Police Abstract EXH P4
- iii. Bundle of receipts 5
- iv. Medical report by Dr. Rask Patel EXH. P6
- v. Medical report by Dr. Ajoni Aded EXH.P7
- vi. Receipts for medical report EXH. P8

11. Upon that consent being recorded the plaintiff closed his case. On their side only the 3rd defendant attended court to give evidence while there was no attendance by the 1st and 2nd even though the two were duly served.

12. As said before although the 3rd defendant filed a defence denying the occurrence of the accident, when he attended court to give evidence, he conceded the occurrence of the accident but blamed it on the owner of the motor vehicle KAL 022H. His evidence was that on the material day, he was aboard the motor vehicle from the Changamwe towards town on the road which was then under construction. He said that at Kibarani, a motor vehicle Registration No. KAL 022h which was being driven from town towards Kibarani left its lane and swerved onto their lane and collided with their motor vehicle head on. Immediately after the accident, the crew of motor vehicle KAL 022H ran away and abandoned the motor vehicle. He went on to say that his driver was never charged and that his motor vehicle was not at a high speed as the road was then under construction. He however said that at the time there was no island separating the two lanes. In his evidence, the 3rd defendant told the court that on the material day he was in his motor vehicle Registration No. KAA 584G when at the

railway crossing at Kibarani he saw a motor vehicle KAL 022H which crossed the road and knocked their motor vehicle head on. He said he was able to observe everything clearly because he was seated on the first seat at the door on the left side.

13. He was however unable to remember the name of his driver but was able to remember that upon being hit the driver and conductor of the other vehicle took off and abandoned the motor vehicle on the road. He denied that his motor vehicle was being driven at a high speed and that it was the driver of the Nissan to blame. In cross examination he confirmed being the owner of the motor vehicle KAA 584G as at 10/12/2001 and that the same was employed in the business of passenger transport. He reiterated that his driver was never at fault and that had he been at fault he would have been charged. He denied the suggestions of having been absent from the scene and said that his driver did apply the brakes but did not go off the road. He added that nobody was injured in his motor vehicle but that in the Nissan people were injured.

14. Based on that evidence, the defence case was equally closed and Parties then sought time to file and exchange submissions which were then highlighted orally.

Analysis and findings

15. I have said that there was entered a default judgment against the 4th defendant on the 17/6/2009. When that became evident to court, I brought the same to the attention of the parties by the ruling dated 2/4/2016. Pursuant to that development, the plaintiff filed an application dated 5/6/2017 seeking leave to serve by summons to enter appearance by substituted service but that application was dismissed on the date fix for hearing on account of want of attendance. Upon that dismissal the parties consented to the suit against the 4th defendant being withdrawn wholly and thereafter parties reverted to the previous status by which they had filed written submission. That development leaves the suit pending only against the 1st 2nd and 3rd defendants. Of the three, only the 3rd defendant offered evidence while the other two did not after filling a statement of defense

16. I have had the benefit of reading the submissions filed and related same to the pleadings and evidence offered by the plaintiff and the 3rd defendant. The totality of that corpus of evidence is that indeed an accident occurred when the two disclosed motor vehicles collided. The evidence by both PW 1 and DW 1 was in agreement that it was the motor vehicle KAL 022H pleaded to have been owned by the 1st and 2nd defendant that swerved to the right and collided with the motor vehicle KAA 584G. There was no evidence of any wrong doing by the driver of KAR 584G. Accordingly, I do find that the accident was solely and wholly occasioned by the driver of motor vehicle KAL 022H wholly. Those defendants did in fact file a defence which denied all the allegations by the plaintiff but come the date of hearing no attendance was made on their behalf and no evidence was led on the defence filed with the consequence that the defence filed remained mere allegation without an iota of proof. I would to that extent and at this juncture absolve the 3rd defendant wholly from any liability based on evidence on record particularly the evidence of the plaintiff PW 1.

19. On quantum of damages, I have taken regard of the fact that the plaintiffs suffered extensive injuries which PW 2 assessed to have left him with 50% permanent disability. I have equally taken note that in the re-amended plaint the plaintiff just pleaded general damages without specifics together with special damages and costs of prosthesis. I choose to award to the plaintiff a global sum for general damages for pains and suffering and loss of amenities that would take into account reduced earning capacity besides the proved special damages.

Special damages

20. The plaint pleaded and prayed for a sum of Kshs.32,750/= being the costs of medical treatment, medical reports and completing P3 form and completing police abstract. At trial the parties produced receipts by consent among them a receipt for medical reports in the sum of Kshs.3500 as opposed to the pleaded Kshs.5,000/=. Accordingly, the special damages proved was Kshs.31,250/= which is the sum award to the plaintiff. The sum of Kshs.4000 paid to Dr. Ndegwa for court attendance was not pleaded and is thus not awardable.

21. For prosthesis, there was evidence by Dr. Ndegwa that the plaintiff would need a fitting gadget at a cost of Kshs.300,000.00 with a yearly refitting costs of Kshs.10,000/=. That evidence was not rebutted nor shaken at cross examination. I hence find that evidence to be believable and reliable and I do find that the plaintiff is entitled to that cost to procure the prosthesis and its yearly maintenance. I do rely more on the evidence of Dr. Ndegwa because it was more recent than that by DR. RASIK PATEL and DR. ADEDE.

22. By the time the Doctor gave evidence in March 2013, the plaintiff was aged 40 years. I would give him a life expectancy of 65 years from that date to yield a period of 25 years during which he would need renewal of the prosthesis at Kshs.10,000 per year. That gives me a sum of Kshs.250,000.00 which when added to the cost of purchase gives Kshs.550,000/=. This sum I award to the plaintiff as cost of procuring and maintenance of the prosthesis.

General damages

22. The uncontroverted evidence is that the plaintiff suffered disabling severe and extensive bodily injuries which left him 50% incapacitated. While I do give regard to the submissions by the parties and the authorities cited by both sides, I am equally aware of the dictate of the law that damages should be compensatory and not intended to enrich, should be kept at levels the economy can absorb and sustain and that comparable injuries need to attract comparable awards.

23. Being guided by the law in *stare decisis* when related to the injuries proved to have been suffered while bearing mind the residual effects of such injuries and further bearing in mind the fact that there is always the erosion of the value of money by effects of inflation, I do award to the plaintiff the sum of Kshs.2,500,000/= for general damages for pains, suffering and loss of amenities of life.

24. In coming to this figure, I have taken note that I have declined to award to the plaintiff loss of earning capacity for I take the view that this sum if paid in lump sum and in advance can be invested to earn own yields hence I consider it sufficient compensation to the plaintiff.

The second reason I have declined to consider an award for loss of earning capacity is that the same was vaguely pleaded and no evidence credible evidence was led on the plaintiffs earnings at the time to enable court assess how much had been lost. Accordingly, I have come to the conclusion that the sum awarded for pains and suffering if invested can yield a monthly sum equivalent or comparable to the basic minimum wage the plaintiffs would earn in his station in life.

24. In conclusion, I do entered judgment for the plaintiff against the 1st and 2nd defendants, jointly and severally, as follows:-

Special damages - Kshs. 31,250.00

Costs of prosthesis and maintained - Kshs. 550,000.00

General damages for pains, suffering

and loss of amenities - Kshs.2,500,000.00

TOTAL Kshs.3,081,250.00

26. The plaintiff also gets the costs of the suit as well as interests on the sums awarded and on such costs. Interests on special damages will accrue from the date of filing the suit till payment in full while interests on general damages shall attract interest from the date of this judgment.

Dated and delivered at Mombasa this 12th day of April 2019.

P.J.O. OTIENO

JUDGE