



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 358 OF 2014

FRED ONYONI NYABUTO.....PLAINTIFF

VERSUS

KIMANI WALTER alias

WALTER NGUGI KIMANI.....DEFENDANT

JUDGMENT

1. Vide a plaint dated 29th October, 2014 the Plaintiff sued the Defendant for damages which he attributed to a road traffic accident in which he pleaded he was injured on 26th October 2012. The Plaintiff's contention is that the accident was caused by the negligence of motor vehicle registration No. KAA 889C owned by the Defendant at the material time.
2. The claim was denied as per the statement of defence dated 30th January, 2015. In the alternative, the Defendant blamed the accident as solely or substantially contributed to by the Plaintiff.
3. The Plaintiff filed a reply to the defence, reiterated the contents of his plaint and joined issues with the Defendant.
4. The Plaintiff testified herein (PW1 Fred Onyoni Nyabuto). His evidence was that on the material date he was in Kiangome area near City Canabass walking along the Mombasa road at around 11.00 a.m. That he came across a lorry that was being loaded with building stones and he got casual work to load the stones. That after the loading the lorry failed to move and the driver requested him to move under the lorry and check why it was not moving. That upon checking he found some stones under the lorry and he picked a spade and started removing the stones that were blocking the rear tyre. That when the stones were removed the lorry moved from on top of the stones and pressed his back down. That he screamed then fell unconscious.
5. When the Plaintiff came to he found himself at Kenyatta National Hospital where he had been admitted with a spinal cord injury, hip joint and leg injury. The accident was reported at Embakasi Police Station and a P3 form and a police abstract issued.
6. The Defendant in his evidence stated that he was the owner of the motor vehicle in question. He adopted his witness statement as his evidence and stated that the motor vehicle was not involved in an accident on the alleged date. That on 8th June, 2014 he was informed that his motor vehicle had been detained by the police on allegations of having injured the Plaintiff herein. The Defendant stated that his motor vehicle was grounded on the material date herein as the motor vehicle had been involved a self-involved accident in September, 2012 in Machakos and the accident reported at Machakos Police Station. That on 26th October, 2012 (material date) the motor vehicle was in the garage. That on 25th November, 2012 the motor vehicle was involved in a fatal accident in Kariobangi area and the accident was reported at BuruBuru police station.
7. The Plaintiff's contention during cross-examination was that the motor vehicle's ignition was on with the driver standing next to the motor vehicle then the driver went back onto motor vehicle when it moved off the stones and injured him. The Plaintiff further contended that he had previously done casual work with the said lorry in Sabaki, Kenchick and Syokimau area with the same driver who he knew as Mwangi.
8. On the other hand, DW1 the Defendant was not in the motor vehicle or at the scene of the accident at the material time. The driver who was with the motor vehicle or any other person who was at the scene at the material time were not called to testify. The Defendant cannot therefore be able to say exactly what transpired. The Defendant conceded in his evidence during cross-examination that he could not therefore tell exactly where the driver and the motor vehicle were at any given time. The mechanic where the motor vehicle was said to be grounded at a garage in Kariobangi area at the material time was also not called to testify. Although the Defendant produced Mpesa statements and receipts in a bid to establish the purchase of spare parts for the said grounded motor vehicle, this cannot confirm where the motor vehicle was at the material time.

9. The evidence of PW3 PC Hussein Mohamed from Embakasi Police Post reflects that the report of the accident was made on 26th February, 2014 almost 1 ½ years after the accident. That the matter was referred to Embakasi Police Station for investigations. That the accident is still pending under investigations and that the driver is still at large. PW3 was however not the Investigating Officer and could only rely on the report made.

10. After considering the evidence from both the Plaintiff's side and the Defendant's side as analyzed above, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. I would however apportion 30% liability to the Plaintiff for embarking on a dangerous mission without any protection. It was probably foreseeable that after the stones were removed from under the tyres the motor vehicle's clearance from the ground would be lower. On the other hand, the driver of the motor vehicle was inside the motor vehicle with the ignition on. Without the driver's evidence, the Plaintiff's evidence that the driver instructed him to remove the stones and that the motor vehicle moved remains un rebutted. The driver therefore bore the greater responsibility for the accident. I apportion 70% liability to the driver.

11. The doctor called by the Plaintiff's side to testify, PW2 Dr. Theophilus Wangata produced a medical report as an exhibit. According to the said medical report dated 9th September, 2014, the then 24 years old Plaintiff sustained the following injuries:

- Spinal injury fracture at T11, T12, L 1 with paraplegia.
- Stool and urine incontinence
- Fracture of the right femur with loss of femoral head.

12. That treatment included admission at Kenyatta National Hospital from 26th October, 2012 to 14th April, 2014 where x-rays, MRI, open reduction and internal fixation surgery, surgical debridement and skin grating. Physiotherapy followed then the Plaintiff was ambulated using a wheelchair. On examination the doctor's findings were as follows:

“- He is wheelchair bound and uses a condom catheter and diapers for urine and stool incontinence.

- **All muscles of both lower limbs are wasted. Both feet have foot drop as a result of the spinal injury.**
- **He also has complete paralysis of both lower limbs (muscle power grade 0).**
- **Both upper limbs have normal muscle power and sensory function.**
- **There is a 20 cm midline surgical scar on the lower back at the site of spinal surgery 14x10 cm scar on the lateral part of the left thigh at the site of skin grafting.**
- **18 cm x 15 cm scar on the medical part of the left thigh at the site of skin graft removal.**
- **There are 2 scars on the right thigh measuring 10cm x 7cm each.**
- **5cm x 5cm scar on the left gluted each region from healed bed sores.**
- **There is a 20cm surgical scar lateral part of right leg.**
- **There is a 25cm surgical scar lateral part of left leg.”**

13. The doctor's opinion was that:

“The Plaintiff suffered spinal injury with paraplegia in this accident. He also suffered fracture of the right femur. This caused a lot of physical, psychological pain, blood loss and suffering. The injuries are consistent with the mode and mechanism of injury. The extent of injury is classified as grievous harm.

He was hospitalized on two different occasions and stayed in hospital for a very long period of one year and nine months. He is completely paralysed and is not able to use the legs. As a result, he will be confined to a wheel chair for the rest of his life. He requires a reclining wheel chair which will need to be changed from time to time due to wear and tear. A wheel chair costs about Ksh.60,000/= and has a lifespan of approximately one year.

He also requires to employ a helper for life since he requires to be assisted from time to time. On average such a person will require to be paid approximately Ksh.10,000/= per month. He will require frequent use of drugs to evacuate stool weekly. Occasionally, if the stools are hard, the assistant may require evacuating them manually.

Due to his inability to control urine for life, he will require urine catheters, urine bag diapers and napkins for life. These will cost him approximately Ksh.600/= per week. As a result of his condition, he is not able to have normal sexual relationships as he has erectile dysfunction. He therefore may never be able to father any more children in his life.

He is predisposed to recurrent chest, urinary tract and skin infections due to the nature of his injuries and the state in which he is in i.e wheelchair bound. He therefore requires frequent and regular checkups. The checkups and purchase of medicines prescribed may cost him approximately Ksh.4,000/= per month. He requires regular follow ups as an outpatient for life. This will require that he hires a taxi at every visit. Outpatient follow up clinics are scheduled on a three months basis. Every visit will cost him approximately Ksh.3,000/= taxi charges.

As a paraplegic patient, he requires a special bed which can be turned by a hydraulic or electric system to ease pressure at pressure points. Such a bed costs approximately Ksh.350,000/=. He also requires a special anti-decubitus Mattress (Ripple Mattress). This is an air filled mattress, which helps also in easing pressure at pressure points. Such mattress will cost him approximately Ksh.150,000/=. Because of the injury suffered to the right femur with loss of the femoral head, he requires

total hip replacement surgery which is estimated to cost approximately Ksh.400,000/=.

Because of being paraplegic, he has no income as he is not able to do any work. The extent of permanent and functional incapacity as a result of injuries sustained in this accident is therefore estimated at one hundred percent (100%).”

14. The Defendant produced a medical report by Dr. Wasena Angira which describes the Plaintiff’s injuries as follows:

“1. Fracture of right neck of femur”

2. Fracture T11, T12 and L1

The fracture of the spine made him paraplegic with sensory level T10 (around umbilicus area). He is unable to control both urine and stool.”

15. That the treatment included admission at Kenyatta National Hospital on 21st October, 2012 to 14th April, 2014 where the following was done:

“1. ORIF with pedicle screws placement which was later removed.

2. Series of debridement of the left trochanter pressure sore with skin graft done.

At spinal injury hospital, the patient was admitted from 14th May, 2014 to 30th August, 2014 where physiotherapy and rehabilitation were done.”

16. The disabilities were described as follows:

“Paraplegic at sensory level T10. This means he has no function of the muscles of the lower limb and has no sensation from below the umbilicus.

1. Stool or urine incontinence: He is unable to control urine flow. He therefore needs to be on catheter throughout and needs diaper as he cannot tell when stool is coming out.

2. He has a vascular necrosis at the head of femur which means he cannot stand on his leg, however because he has no motor and sensory function of the lower limb and he is on wheelchair bound. I don’t see need for total hip replacement.

For cases of hip replacement, we need intact motor function. In case hip replacement is done, there is high chances of continuous dislocation.

The patient is completely dependent on others for assistance, due to his paraplegic status.”

17. The two medical reports are essentially in agreement on the injuries sustained by the Plaintiff. However, the medical report by Dr. Wasena Angira does not give the details of the Plaintiff’s future medical expenses. The evidence by Dr. Theophilus Wangata in that regard therefore remains uncontroverted.

18. The Plaintiff’s counsel submitted for an award of damages as follows:

- Ksh.15,000,000/= general damages
- Ksh.6,000,000/= for loss of consortium.
- Ksh.6,000,000/= for erectile dysfunction.
- Ksh.6,000,000/= for psychological trauma
- Ksh.4,320,000/= for wheelchair.
- Ksh.12,960/= for a nurse aid at Ksh.30,000/= per month for 36 years.
- Ksh.1,872,000/= for catheters urine bags, diapers napkins, etc. at Ksh.1,000/= per week for 36 years.
- Stool evacuation and drugs at Ksh.864,000/= at Ksh.2,000/= for 36 years.
- Recurrent chest, urine tracts and skin infections management at Ksh.4,000/= per month for 36 years which comes to Ksh.1,728,000/=.
- Quarterly checkups at Ksh.4,000/= comes to Ksh.600,000/=.
- Loss of future earnings at Ksh.6,231,362 at Ksh.14,424.45 for 36 years.
- The grand total comes to Ksh. 73,743,729/=

19. The following authorities were relied on:

(a) **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR** where the Plaintiff was awarded Ksh.28,925,844/=

for similar injuries, close to five years ago.

(b) Ngure Edward Karega v Yusuf Doran Nassir [2014] eKLR where the appellant was awarded Ksh.22,795,000/= for injuries comparable than the Plaintiff's in the instant case, close to five years ago.

(c) Jackson Wahome Ngatia v Agridutt (Kenya) Limited & 2 others, HCCC 531of 2004- Nbi where the Plaintiff was awarded ksh.11,611,700/= for similar injuries, eight years ago.

20. The Defendant's counsel submitted for an award of Ksh.3,000,000/= as general damages and argued that the same would be in line with the provisions of Section 5 Cap 405 Motor Vehicle Third Party Risks. He relied on the following authorities:

(a) Joseph Maganga Kasha v Kenya Power and Lighting Company Ltd [2012] eKLR where the plaintiff who was 22 years old suffered 100% disability, was paralyzed from the waist downwards and was awarded Ksh.3,000,000/= as general damages in the year 2012.

(b) William Wagura Maigua v Elbur Flora Limited [2012] ekLR where the plaintiff suffered paralysis from the waist downwards, and was awarded Ksh.3,000,000/=.

(c) Rosemary Wanjiku Kungu v Elijah Macharia Githinji & another, HCC 145 of 2010 and Nancy Aseko v Board of Governors Masai Girls High School [2011] where awards in the sum of Ksh.3,000,000/= were made for general damages.

(d) Isaiah Oduor Ochanda v the Attorney General [2011] eKLR where a soldier who suffered among other injuries paraplegia was awarded Ksh.1,000,000/=. It was submitted that taking into account inflation over the past 6 years, Ksh.1,500,000/= suffices as general damages herein.

(e) David Muriungi Daniel & another v Martine Githongo Nderva alis Martin Githingo Ndereva, where the Court of Appeal declined to set aside an award of general Damages of Ksh.1,400,000/= as had been awarded by the trial court where the plaintiff had suffered multiple injuries including Subluxation of the cervical spine at C3 to C5.

21. I have on my part considered the following other cases:

(a) Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another [2014] eKLR where the Plaintiff sustained a fracture of spine thoracic vertebrae T10 and T12 became a complete paraplegia. There was also a dislocation of the right shoulder. The award was Ksh.15,042,157.32 in total.

(b) Naftaly Muiruri Macharia v Samuel Maina & another [2018] eKLR where the Plaintiff suffered post traumatic T9 compressed fractures resulting in paraplegia, Urinary incontinence, Loss of urine and stool control, permanently on wheelchair and needed someone to move him around. He was awarded Ksh.21,999,802/= in total.

22. Taking into consideration the foregoing, I award the sum of Ksh.5,000,000/= as general damages.

23. The future medical expenses claim is stated in paragraph No. 5 of the plaint as follows:

“Future Medical expenses:

(i) Wheelchair for 37 years of life expectancy	Ksh.2,220,000/=
(ii) Helper (employing help @ Ksh.10,000 per Month for 37 years)	Ksh.4,440,000/=
(iii) Costs for catheters, bags, diapers and napkins	Ksh.1,154,400/=
(iv) Cost of future medicine for recumbent chest, Urinary tract and skin infections for 37 years	Ksh.1,776,600/=
(v) Hiring Taxi 4 times in a year to attend clinics for 37 years (3,000x 4 x 37)	Ksh. 444,000/=
(vi) Paraplegic patient bed	Ksh.350,000/=
(vii) Ripple Mattress	Ksh.150,000/=
(viii) Hip replacement surgery	<u>Ksh.400,000/=</u>
TOTAL	<u>Ksh.10,935,000/=</u>

24. The submissions by the Plaintiff's counsel on the future medical expenses are not supported by the pleadings. The claim for loss of

future earnings is also not pleaded. I also take into account the imponderables of life. I adopt a multiplier of 12 years. I find the following proved as per the medical report by Dr. Theophilus Wangata:

1. Ksh.60,000/= costs of wheelchair per year therefore $\text{Ksh.60,000} \times 12 \times 12 = 8,640,000/=$

2. Helper at $\text{Ksh.10,000} \times 12 \times 12 = 1,440,000/=$

3. Catheters, urine bag, diapers and napkins at $\text{Ksh.600}/=$ per week which translates to $2,400/=$ ($\text{Ksh.600} \times 4$) per month

Therefore $2400 \times 12 \times 12 = 345,600/=$

4. Medical checkups and purchase of medicines at $\text{Ksh.4,000}/=$ per month

Therefore $4,000 \times 12 \times 12 = 576,000/=$

5. Transport to and from hospital at $\text{Ksh.3,000}/=$ every three months.

Therefore $3000 \times 4 \times 12 = 144,000/=$

6. Special bed at $\text{Ksh.350,000}/=$ plus mattress at $\text{Ksh.150,000}/=$

Therefore Total $\text{Ksh.500,000}/=$

7. Hip replacement surgery at $\text{Ksh.400,000}/=$

25. The medical expenses claimed of $\text{Ksh.1,500,115}/=$ have been proved by the documents produced as exhibits. The same are as follows:

(a) $\text{Ksh.649,473}/=$ per receipt from Kenyatta National Hospital dated 16th April, 2014.

(b) $\text{Ksh} 650,894/=$ as per the receipt dated 23rd April, 2014 from Kenyatta National Hospital.

(c) $\text{Ksh.115,000}/=$ as per the receipt from Health care Services Ltd dated 29th August, 2014.

(d) $\text{Ksh.200,000}/=$ as per the receipt from Health Care Service dated 28th August, 2014.

(e) $\text{Ksh.8,000}/=$ as per the receipt Seventh Heaven dated 21st November, 2012.

Total Ksh.1,623,367/=

The claim of $\text{Ksh.1,500,115}/=$ is therefore allowed.

26. Medical report fee of $\text{Ksh.2,500}/=$ was specifically claimed and proved by way of the receipts of $\text{Ksh.2,500}/=$ produced by Dr. Theophilus Wangata. The claiming $\text{Ksh.500}/=$ for the motor vehicle search was proved as per the receipt of $\text{Ksh.500}/=$ from Kenya Revenue Authority which was produced by the Plaintiff. This totals up to $\text{Ksh.3,000}/=$.

27. The total award of Special comes to $\text{Ksh.13,548,715}/=$ General damages is $\text{Ksh.5,000,000}/=$

Total is $\text{Ksh.18,548,715}/=$

Less 30% contribution. **Total Ksh.12,984,101/=**

28. Judgment is entered for the Plaintiff against the Defendant for the sum of $\text{Ksh.12,984,101}/=$ interest and costs.

Date, signed and delivered at Nairobi this 26th day of June, 2019

B. THURANIRA JADEN

JUDGE