



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 189 OF 2012

WYCLIFFE KISAH DIGINYI..... PLAINTIFF

- V E R S U S -

ELIJAH MUNGAI NJOROGE.....1ST DEFENDANT

JOSEPHTA K.G NDUNGO2ND DEFENDANT

JUDGEMENT

1. Wycliffe Kisah Diginyi the plaintiff herein, filed a compensatory suit against Elijah Mungai Njoroge and Josephtha K.G Ndungo, as the 1st and 2nd defendants herein for injuries he sustained in an accident.

2. It is alleged by the plaintiff via the plaint date 30th March 2012, that on 30.07.2011, along Kapiti road in Nairobi, the plaintiff was riding motorcycle registration number KMCR 683G when he was involved in an accident with motor vehicle registration number KXR 363, where the plaintiff sustained serious bodily injuries. The 1st defendant was the driver of the accident car, which was registered in the 2nd defendant's name.

3. The defendants did not enter appearance and the case proceeded for formal proof after entry of an interlocutory judgement.

4. The plaintiff's case had one witness. Wycliffe Kisah Diginyi, PW1 stated that he was a motor cycle rider at the time of the accident that happened on the 30. 07.2011 along Kapiti road in Nairobi. He was riding his motorcycle when he was hit by motor registration number KXR 363, where he sustained serious bodily injuries. He was injured on the leg and the head. He was treated at Kenyatta National Hospital and the medical report stated that he was 70% disabled. PW1 stated that he used to earn Ksh,7,500/- per month and the same was expected to rise over the years.

At the close of the plaintiff's case, the plaintiff was invited to file written submissions.

5. The issues for determination by this court are:

- i. Who is liable for the accident.
- ii. What is the quantum of damages payable.

The plaintiff submits that the 1st defendant started to overtake him without notice or warning and as a result he hit his motorcycle causing him to land on the head. It is the plaintiff's submission that there was no evidence adduced by the defendants to contradict his evidence. According to the plaintiff the driver

owed the plaintiff a duty of care, in that he ought to have kept a lookout for other road users like him and ought not to have overtaken when the course was not clear. It was therefore submitted that in the absence of evidence to the contrary, the particulars of negligence were proved hence the court ought to find the defendants jointly and severally liable for the accident at 100%.

6. The only evidence on record on how the accident occurred was the plaintiff's evidence. Without any evidence to the contrary, this Court finds that the accident took place when the driver of the suit motor vehicle was overtaking. He ought to have had a proper lookout before overtaking. I find the 1st defendant liable for the accident.

7. Having determined the question relating to liability let me now deal with assessment of quantum of damages. The question is whether or not the plaintiff is entitled to damages and if so, what is the quantum. The plaintiff suffered the following injuries:

i. Severe head injury associated with brain contusion and odema.

ii. Fracture of the right parietal bone

iii. Post traumatic occipital atrophy.

8. The above injuries is said to have caused the plaintiff the following complications: **poor memory and speech, right sided weakness with tremors making it difficult to walk and thus inability to work. The plaintiff relied on the medical report of Dr. Wambugu, case summary from Kenyatta National Hospital, the CT Scan report form Afya Centre X-Ray services and the P3 form. The doctor opined that the plaintiff had suffered 70% permanent incapacitation. The doctor further stated that the plaintiff will not be able to work and will require assistance in performing daily living activities through a persona aide estimated at ksh. 15,000/- per month for the rest of his life.**

9. The plaintiff's proposal on quantum is as follows:

i. General damages for pain and suffering and loss of amenities ksh.3,500,000/- and cited the case of **Jane Elsa Oyoo –vs- Lochab Brothers Nairobi HCCC No. 5733 of 1999** where the plaintiff had almost similar injuries with those of the plaintiff and was awarded 3,340,000/-

ii. Cost of an aide. Where the plaintiff states that he was 42 years at the time of the accident and would have lived up to 80 years giving him 38 years which he will need an aide arriving at the sum of 15,000x38= Ksh 570,000/-

iii. Loss of earning capacity.

The plaintiff was earning 7500/- per month and now that he is incapable of working is entitled to loss of earning capacity.

iv. The plaintiff pleaded special damages of 15, 940/-

x. Considering the circumstances of this case the plaintiff must have undergone serious pain and suffering. However, as was held in the case of **H. West And Son Ltd vs. Shephard [1964] AC 326**

“Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

11. From the said case the principles which were formulated in awarding damages are: the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.

12. Taking into account the foregoing and many decided case in this court, I am of the considered view that an award of KShs 3,000,000/- in general damages for pain and suffering is reasonable in the circumstances.

13. According to the medical report, the plaintiff would need aassistant/aide for the rest of his life I will allow it as proposed by the plaintiff.

14. For loss of earning capacity, I will allow it as follows: a working age of up to 60 years factoring in all the uncertainties of life. Thus $(60-42=18 \text{ years, earning } 7,500 \text{ per month})$ thus $7500 \times 12 \times 18 = \text{Ksh } 1,620,000/-$

15. On special damages, the plaintiff pleaded and proved Kshs.15,940/=.

In the result, I enter judgement in favour of the plaintiff and against the Defendants jointly and severally in the following

sums to the plaintiff:

i. General damages for pain and suffering	Kshs 3,000,000/-
ii. Loss of earning capacity	Ksh 1,620,000/-
iii. Cost of an aide Ksh. 15,000x38=	Ksh 570,000/-
iv. Special damages	<u>Kshs 15,940/-</u>
Total	Kshs 5,205,940/-

16. The cost of this suit is awarded to the plaintiff.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent