



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO.33 OF 2017

NAFTALY MUIRURI MACHARIA.....PLAINTIFF

- V E R S U S -

SAMUEL MAINA.....1ST DEFENDANT

FRANCIS KANINI MWANGI.....2ND DEFENDANT

J U D G M E N T

By this suit, the plaintiff **Naftaly Muiruri Macharia** claim special and general damages from the defendants, **Samuel Maina** and **Francis Kanini Mwangi** on account of a Road Traffic Accident which occurred on 3/9/2010 along Rumuruti – Nyahururu Road. The accident involved motor vehicle KAZ 462C. It was a self involving accident whereby the vehicle rolled and no other vehicle was involved.

The plaintiff was a lawful fare paying passenger in the subject vehicle which was owned by the 2nd defendant and was driven by his driver, the 1st defendant.

The plaintiff attributes the occurrence of the accident to the negligence of the 1st defendant. The particulars of negligence are listed at paragraph 6 of the plaint which are inter alia,

- i. That the motor vehicle was driven at an excessive speed in the circumstances causing it to roll;**
- ii. Driving without due care and attention;**
- iii. Driving a defective motor vehicle;**
- iv. Driving recklessly and dangerously;**
- v. Failure to slow down, stop, brake swerve or act in any other reasonable way to avert the said accident;**
- vi. Failure to keep a proper look out when driving.”**

The issues for determination will be whether the 1st defendant was negligent in the manner of driving and controlling of the subject vehicle and if so, to what extent. If the first defendant is found to have been negligent; can the 2nd defendant be found to be vicariously liable? The other issue will be, whether the plaintiff will be entitled to damages and if so, how much?

The defendants filed a joint defence in which the 2nd defendant denied being the registered owner of the subject motor vehicle while the 1st defendant denied being the driver or agent of the 2nd defendant; the defendants also denied the occurrence of the accident and all the particulars of negligence attributed to the 1st defendant. In the alternative, the defendants averred that if there was an accident, then the same was caused by or substantially contributed to by the plaintiff in that, inter alia, he failed to wear a safety belt, attempted to alight when the vehicle was in motion or remained standing when the vehicle was in motion. The defendants pleaded further in the alternative that if the accident occurred, it was inevitable and cannot be blamed on the driver. The defendants further denied that the plaintiff suffered any injuries or damages.

On the issue of liability, only the plaintiff, **Naftaly Muiruri testified as PW2.**

PW2 recalled that on 3/9/2010 at about 12.30 p.m., he was travelling as a fare paying passenger in motor vehicle Toyota Matatu KAZ 462C, coming from Marmanet to Rumuruti. He sat behind the driver and wore a safety belt; that the driver started competing with the driver of

another matatu to get first slot at the stage. About 500 metres to Rumuruti when the vehicle was speeding, one of the rear tyres burst and the vehicle rolled severally and he came to when undergoing treatment at Rumuruti District Hospital. He was later referred to Nyahururu County Hospital, then MP Shah Hospital in Nairobi where he was admitted for about 9 months, Good Hope Hospital Nyahururu then later Kenyatta National Hospital from 3/11/2010 to 8/2/2011.

Neither the 1st nor the 2nd defendants testified. The defence failed to adduce any evidence to controvert the testimony of the plaintiff.

First of all, the defendants denied that an accident ever occurred that involved the said vehicle but the plaintiff produced in evidence a Police Abstract (D.Ex.17) issued by Ng'arua Patrol Base on 23/5/2012 which indicates that Motor Vehicle KAZ 462C Toyota Townace was involved in an accident which was self involving and which occurred on 3/9/2010. The 1st defendant, who was the driver was charged with the offence of Causing Death by Dangerous Driving in Traffic Case NO.1220/20 and fined Kshs.41,000/= in default 4 years imprisonment and the report was booked in O.B.22 of 3/9/2010. The plaintiff Naftaly Muriuki was named as one of the passengers who was seriously injured. The allegations that no accident occurred involving the subject motor vehicle are untrue. The abstract showed the driver to be 1st defendant.

In the defence, it was also denied that the vehicle belonged to the 2nd defendant but the plaintiff produced in evidence a receipt (P.Exh.20) from Kenya Revenue Authority for a search of the records (P.Exh.19) which indicates that motor vehicle KAZ 462C is owned by Mwangi Francis – the 2nd defendant.

The defendants had pleaded in the alternative that if at all the plaintiff was a passenger, and was injured, he contributed to the accident in that he did not wear a safety belt and was standing when the vehicle was in motion. PW2 testified that he was seated and wore a safety belt. The plaintiff's evidence has not been controverted in any way as no evidence was offered by the defence.

As to how the accident occurred, PW2 said that the driver had been competing with another to get to the stage and was therefore over speeding when the tyre burst. Had the driver been driving at the maximum speed of 80KM/H or below and the tyre burst, I doubt that the vehicle would have rolled severally as did happen in this instance.

Having considered the evidence on record and submissions of both parties, I am satisfied that the defence remains mere unsubstantiated allegations. PW2 was a fare paying passenger who expected to be driven to his destination safely. He had no part or role in managing the vehicle nor is there evidence that he was not belted or was standing in the vehicle. Contributory negligence cannot be attributable to him. I find that the 1st defendant was wholly to blame for the occurrence of the accident, and he will bear full liability of 100% and the 2nd defendant is therefore vicariously liable for the negligence of the 1st defendant.

Of damages:

In the plaint, it is pleaded that the plaintiff suffered:

- 1. Post traumatic T9 compressed fractures resulting in paraplegia**
- 2. Urinary incontinence**
- 3. Loss of urine and stool control**
- 4. Permanently on wheelchair and needs someone to move him around**
- 5. Loss of power in both lower limbs.**

In his testimony, PW2 stated that he was first attended to at Rumuruti District Hospital, was transferred to Nyahururu, then MP Shah Hospital in Nairobi. He was discharged and came back to Nyahururu but developed complications and was admitted at Good Hope Hospital in Nyahururu, was sent back to Kenyatta National Hospital; that after the accident, he was completely immobilized and he is now confined to a wheelchair. He reiterated the injuries that he sustained as listed in the plaint. He produced the P3 form that was issued to him as P.Exh.No.11 which indicates that the plaintiff had a surgical scar at the palm, scar at level T8-10; surgical scar at left clavicle, flaccid paralysis of both lower limbs and Dr. Mumelo assessed the degree of injury as a grievous harm.

Dr. Obed Omuyoma (PW1) conducted a physical examination of the plaintiff. He also took the history from PW2 which included treatment card from Rumuruti Hospital dated 3/9/2010, discharge summary from Kenyatta National Hospital dated 8/2/2011, a discharge summary from MP Shah Hospital dated 2/10/2010 and X-Ray films from the said hospital. PW1 found that PW2 suffered a T9 compressed fracture which was done open reduction and internal fixation (ORIF); that he was discharged on a wheelchair; that PW2 later developed bed sores, deep vein thrombosis (blood clots); he suffered urethral structures – meaning the urethra blocked and he could not pass urine and it had to be managed at Kenyatta National Hospital where a pubic catheter was inserted and sores were managed. The Doctor's opinion was that PW2 will be in a wheelchair for the rest of his life because he developed a permanent paraplegic condition and will need a helper to assist him all his life; that he will require a change of wheelchairs from time to time due to wear and tear at a cost of Kshs.60,000/= per chair with a lifespan of 10-12 months; that he will require a special bed worth Kshs.350,000/= and a special mattress worth Kshs.150,000/=; he will require regular follow up on outpatient; will require to hire a taxi at every outpatient follow-up every 3 months at a cost of Kshs.3,000/=.

The plaintiff has claimed different kinds of damages as follows:

- i. General damages for pain suffering and loss of amenities;**

ii. General damages for future medical expenses, equipment and costs of hiring a helper at Kshs.15,000/= per month;

iii. Special damages of Kshs.3,106,103/=;

iv. Loss of prospective earnings.

Pain, Suffering and Loss of Amenities:

The plaintiff is a paraplegic who is confined to a wheelchair for the rest of his life. He will need a helper attached to him for the rest of his life. PW2 told the court that sitting for too long causes sores; PW2 was only 20 years old at the time of the accident and will require frequent medical consultation to make his life more comfortable.

From PW2's testimony and the Doctor's report, PW2 suffered a long painful treatment from 3/9/2010 to 2012 when he was able to re-join university although under difficult conditions.

I have considered the rival submissions on the issue of damages and the case law relied upon. The plaintiff's counsel was of the view that an award of Kshs.8,000,000/= would be adequate compensation for pain and suffering. Counsel relied on the following decisions:

1. HCC.4/2015 (Naivasha) Clefphone Chimwani Shikote v Njuguna Samwel Gathogo & others – where an award of Kshs.14,481,136/= was made.

2.HCC.32/2015 JKM v Jacob Lemasikia Kipaa & Odhiambo Collins where an award of Kshs.12,098,667/= was made.

3. HCC.351/2011 Jackson Watume Ngatia v Agriduti (K) Ltd and others, an award of Kshs.4,500,000/= was made in 2011.

On the other hand, counsel for the defence submitted that an award of Kshs.2,500,000/= would be adequate compensation under that head and relied on following decision;

1. David Chege Ndungu v Robert Macharia & other 2015 where a plaintiff who sustained a fracture of C6 and C7 was awarded Kshs.4,000,000/= in 2015.

2. Samwel Njoroge Mburu v Nganga Kamau (2006) KLR where an award of Kshs.2,000,000/= was made, for a paraplegia.

The court had the opportunity to see PW2 in court. At the time of this hearing, he was now turning 25 years. He is confined to a wheelchair. He was able to complete his University Degree amidst all the inconvenience of being confined to a wheelchair with the attendant injuries.

In considering the damages awardable, this court has to take into account the injuries suffered by PW2 together with previous decisions with comparable injuries and of course, the inflationary trends. In the decision of **Jackson Wahome Ngatia and Brian Muchuru Waihenya v Jubilee Hambers Ltd and 2 others (2017) KLR**, the plaintiff suffered 100% permanent disability unlike the plaintiff herein who suffered grievous harm.

The court is aware that the court can never put the plaintiff back in the shoes that he was before the accident.

In doing my best, I do consider that some time has lapsed since the awards made in the cases cited and the injuries were not exactly similar to PW2's. I am persuaded that an award of Kshs.5,000,000/= would be adequate compensation for the plaintiff.

Future Medical Expenses:

Under this head, the plaintiff claims a total of Kshs.20,300,000/= broken down as follows:

1. Colostomy bags; Kshs.4,000 x 12 x 50years = 2,400,000/=

2. Catheters, urine bags; Kshs.34,000 x 12 x 50years = 1,800,000/=

3. Doctor's consultation; Kshs.3,000 x 12 x 50years = 1,800,000/=

4. Transport to attend clinic; Kshs.3,000 x 12 x 50years = 1,800,000/=

5. Equipment costs:

i. Wheelchair to be changed 10 to 12 months at Kshs.60,000/= x 50years = 3,000,000/=

ii. Special bed Kshs.350,000/=

iii. Special mattress Kshs.150,000/=

6. Helper; Kshs.15,000/= per month for 50 years

$$15,000 \times 12 \times 50 = 9,000,000/=$$

The plaintiff's counsel urged that PW2 was aged 20 years at the time of accident as evidenced by the National Identity Card, and he suggested a multiplier of 50 years because PW2 might live for another 50 years.

To the contrary, counsel for the defence urged that costs of future medication cannot be awarded because future medical expenses are special damages which must be pleaded and proved and PW2 having failed to plead them, cannot be awarded the same. Counsel relied on the decision of **Esther Wanjiru Kiarie v Joseph Kiarie Mugo (Nku) HCC.384/2000** where the court held that cost of future medication is a special damage.

I do agree that costs of future medical expenses must be specifically pleaded and proved. The plaintiff at paragraph 12(d) of the plaint clearly prays for future medical costs and enumerated them. In my view, the future medical costs are specifically pleaded and the plaintiff is entitled to them. I will therefore consider each of the claims under the head of future medical costs.

The plaintiff was aged 20 as evidenced by the P3 form and the medical report of Dr. Omuyoma. At the time he testified, PW2 said he was 25 years turning 26 in April, 2018. His Identity Card shows that he was born on 6/4/1992. Actually, he was 18 at the time of the accident. However, I will adopt the age indicated in the documents. Taking into account the vagaries and uncertainties of life, I would allow a multiplier of 40 years as his life expectancy.

The doctor testified that the plaintiff would need a special bed costing Kshs.350,000/= but no quotation was availed. I will allow cost of special bed at a cost of Kshs.200,000/=.

For the claim of a special mattress of Kshs.150,000/= since there was no quotation availed, I will allow cost of special mattress at Kshs.75,000/=.

The plaintiff needs to consult a doctor every month. The cost of consultation is already the sum claimed and it will work out as follows:

$$3,000 \times 12 \times 40 = 1,440,000.00$$

This court notes that doctor's consultation will not remain constant but is likely to go up. However, since the money will be paid lumpsum, the court will allow what is claimed.

Transport by taxi to attend the doctor also works out as:

$$3,000 \times 12 \times 40 = 1,440,000.00$$

Replacement of the wheelchair was said to be required for every year. However, PW2 had not changed his wheelchair since he got the first one. Although he attributed it to lack of funds, I believe 10 to 12 months change is too frequent a change. I would put it at 2 years. Again there was no quotation. I will estimate the cost of a wheelchair at Kshs.50,000/=. So the cost of wheelchairs would be as follows:

$$\text{Kshs.50,000/=} \times 20 = 1,000,000/=.$$

The plaintiff's evidence is that he will require a helper throughout his life and that he had been paying one at Kshs.15,000/= per month. In my view, a full time helper for Kshs.10,000/= is reasonable. The plaintiff will therefore have judgment under that head as follows:

$$\text{Kshs.10,000/=} \times 12 \times 40 = 4,800,000.00$$

The plaintiff also claimed costs related to stool retention at Kshs.4,000/= per month or colostomy bags. Again no quotation was availed but he will need them anyway.

It will work out as follows:

$$\text{Kshs.4,000.00} \times 12 \times 40 = 1,920,000.00$$

Costs related to urine retention or catheters bags at Kshs.3,000/=. works out as:

$$\text{Kshs.3,000/=} \times 12 \times 40 = 1,440,000.00$$

The plaintiff will be entitled to damages for future medical costs of Kshs.12,315,000.00.

Future Earnings:

The other claim is for loss of **prospective** or **future earnings** from 2016 when the plaintiff completed University. According to the plaintiff's counsel, the plaintiff would have worked till retirement at 60 years. Counsel suggested a multiplier of 35 years at a salary scale of

Kshs.34,000/= per month which worked out at Kshs.14,280,000/=.

The defence counsel submitted that loss of future earnings is a special damage claim that must be pleaded and specifically proved.

He cited the case of *Tahir Sheikh Transporters Ltd v Charles Mugambo Civil of Appeal 273/1998* and suggested a multiplier of 20 years taking into account the vicissitudes of life. According to counsel, the plaintiff hoped to be an accountant and guided by the implementation of *Job Evaluation Phase I, Salary Review for Civil Servants* effective 1/7/2017, the plaintiff would be in Job Group H earning Kshs.22,380/= per month.

In my view, and taking into account the vicissitudes of life, I will allow a multiplier of 25 years that the plaintiff may have worked from 2016 when he graduated from University. So far, he has not got a job and because of his condition, it may take long to get one if at all he does. As to the scale under which the plaintiff would start as a Civil Servant, it is not clear how the counsel arrived at the said scale. This court will apply the middle scale that is Job Group J which starts with a salary of Kshs.27,680/= and will apply the sum of Kshs.27,000/=. The court would also take into account a dependency ratio of 1/3 as the plaintiff would not use the money alone.

The damages for loss of future earnings works out as $Kshs.27,000 \times 25 \times 12 \times 1/3 = Kshs.2,700,000/=$.

Of Special damages:

Under this head, the plaintiff claims of Kshs.6,000/= for the medical report prepared by Dr. Omuyoma and Kshs.3,100,103/= as medical expenses.

1. PW1 Dr. Omuyoma confirmed that he was paid Kshs.6,000/= for the medical report which was supported by a receipt P.Ex.No.3 and Kshs.30,000/= for court attendance for which he issued a receipt (P.Ex.2). The sum of Kshs.36,000/= claimed by Dr. Omuyoma is proved.

2. The plaintiff claims further special damages for medical expenses as follows:

Medical expenses for MP Shah Hospital of Kshs.725,246/=. In support, he produced in evidence a discharge summary from the said hospital 7 receipts (P.Ex.7 & 8 respectively). The receipts bear the head of Aga Khan Hospital. The receipts total to a sum of Kshs.725,245/= which I hereby allow.

3. The plaintiff claims medical expenses incurred at Kenyatta National Hospital of Kshs.1,769,008/=. The plaintiff produced a bunch of 49 receipts issued by Kenyatta National Hospital as P.Ex.12. I have perused them and they total Kshs.850,379/=. The sum of Kshs.850,379/= claim is proved by the said receipts.

4. Dr. Gichuru Mwangi a neurosurgeon, was paid Kshs.303,000/= for treating PW2. The said sum was proved by production of 2 receipts Ex.(1)a & b.

5. In regard to Good Hope Medical Centre, the plaintiff produced a bundle of receipts P.Ex.No.10 which total Kshs.20,000/=. The said claim is proved and I allow it.

6. The plaintiff produced as P.Ex.No.13, a bundle of receipts from Nairobi Hospital for drugs which total Kshs.40,499/=. and the said claim is proved.

7. Transchem Pharmaceuticals Ltd sold drugs to the plaintiff worth Kshs.8,678.85. The claim is supported by receipts P.Ex.14.

8. The plaintiff paid Kshs.500/= to Kenya Revenue Authority to search for the owner of the motor vehicle. That too is proved.

In the end, I enter judgment for the plaintiff as follows:

- | | |
|--|----------------------------------|
| 1. Damages for pain and suffering: | Kshs.5,000,000/=; |
| 2. Damages for future medical expenses,
equipment and costs of a helper at: | Kshs.12,315,000/=; |
| 3. Loss of future earnings: | Kshs.2,700,000/=; |
| 4. Proved special damages of: | <u>Kshs.1,984,802/=;</u> |
| Total: | <u>Kshs.21,999,802/=;</u> |
| 5. Costs of the suit to the plaintiff. | |

Dated, Signed and Delivered at NYAHURURU this 28th day of September, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Omariba for plaintiff

Ms. Wanjiru holding brief for Ms. Ayuma for defendants

Soi - Court Assistant