



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 55 OF 2008

PAUL GACHINA.....PLAINTIFF

- V E R S U S -

MOHAMMED G. AWALE.....1ST DEFENDANT

BAJABER HAULIERS LTD.....2ND DEFENDANT

JUDGEMENT

1) **Paul Gachina Mwaua**, the plaintiff herein, was involved in a road traffic accident on 22.8.2003 along Nairobi-Mombasa Road while he was driving motor vehicle registration no. KAQ 232E and as a result he sustained serious injuries to wit:

- *Traumatic amputation of the right leg.*
- *Compound commuted fracture of the right tibia*
- *Blunt head injury*

2) The plaintiff filed this suit claiming for both general and special damages against **Mohamed J. Awale** and **Bajaber Hauliers Ltd**, the 1st and 2nd defendants respectively. The defendants filed their respective defences to deny the plaintiff's claim. When this suit came up for hearing, the plaintiff tendered the evidence of two witnesses in support of his case. The 1st defendant testified in support of his defence while the 2nd defendant closed its case without summoning any witness in support of its case.

3) Paul Gachina Mwaura (PW1) told this court that the accident occurred as a result of the negligence of the 1st and 2nd defendants. PW1 said that on the fateful day he was driving his lorry registration no. KAQ 232E at a speed of 40km/hr when he suddenly heard a loud bang at the rear of his lorry. It turned out that the 1st defendant's motor vehicle registration no. KAM 991N had rammed into the left hand side of the Plaintiff's lorry and as a result his lorry veered off his correct lane onto the oncoming traffic thus colliding with the 2nd defendant's motor vehicle registration no. KAQ 610D.

4) The plaintiff said that the 2nd defendant's motor vehicle was being driven at high speed. PW1 produced a police abstract form which indicated that the 1st defendant's motor vehicle was solely to blame. PW1 is of the opinion that had the 2nd defendant's motor vehicle been driven at a moderate speed, the vehicle would have been manoeuvred to avoid a collision.

5) Mohamed Awale (PW1) stated that at the time of the accident he had sold motor vehicle registration no. KAM 991N, therefore he was a stranger to the accident. In cross-examination, DW1 admitted that he did not bring to court the transfer documents he signed to convey the aforesaid motor vehicle to a third party who was not named by DW1.

6) At the close of evidence learned counsels, were invited to file and exchange written submissions. Having considered the evidence and the rival submissions, two issues commend themselves for consideration. **First** is the question of **liability** and the **second** issue is in respect of **quantum**.

7) On liability, the plaintiff is emphatic that the 1st and 2nd defendants are jointly to blame. The 1st defendant denied being the owner nor being in possession of motor vehicle registration no. KAM 991N at the time of the accident. He however failed to present any credible evidence to show that he had sold the aforesaid motor vehicle to a third party.

8) In fact DW1 failed to name the person he allegedly sold the motor vehicle. This court is of the opinion that having failed to prove

otherwise, I am satisfied that the 1st defendant was the owner and was in possession of motor vehicle registration no. KAM 991N at the time of the accident. The evidence of the plaintiff was therefore not controverted by the defendants.

9) The plaintiff was able to also show that the 1st defendant's motor vehicle registration KAM 991N rammed into the left rear of the plaintiff's lorry registration KAQ 232 forcing it to veer off his lane onto that of oncoming motor vehicles thus colliding with the 2nd defendant's motor vehicle registration no. KAQ 610D.

10) The plaintiff stated that the 2nd defendant's motor vehicle was moving at high speed hence it was unable to manage the motor vehicle to avoid a collision. The 2nd defendant did not controvert this piece of evidence. I am convinced that the 1st defendant should shoulder the greatest responsibility for the accident. I find the 1st defendant 90% liable while the 2nd defendant should shoulder 10% liability.

11) On quantum, the plaintiff asked this court to award him ksh.4,000,000/= as general damages. The plaintiff cited three authorities. The first case is that of **Patrick Kyengo vs= Bayusuf Freighters Ltd (2013) eKLR** where the claimant was awarded ksh.1,600,000/=.

The second case is that of **Simon Ano Mua vs= Kioga Mukwano & 2 others (2013) eKLR** in which this court awarded kshs.2,000,000/= and the third case is that of **Cosmas Mutiso Muema vs= Kenya Road Transporters Ltd and another (2014) eKLR** in which the claimant was awarded ksh.2,500,000/=.

12) The 1st defendant did not propose any figures on quantum but simply urged this court to dismiss the suit. The 2nd defendant proposed that the plaintiff be awarded on this head ksh.1,000,000/=. The 2nd defendant cited the case of **Bayusuf Freighters Ltd = vs= Patrick Kyengo (2014) eKLR** where the Court of Appeal awarded ksh.1,600,000/=.

The other case cited is that of **Salome Wakarnde Wachira vs= Signon Freight & 3 others (2007) eKLR** where the claimant was awarded ksh.1,200,000/=.

13) Having considered the rival submissions and the authorities, I am convinced that the nature of injuries sustained appear to be near to the authorities cited by the plaintiff. Considering the inflationary trends, I find an award of kshs.3,000,000 on this head to be reasonable and within comparable awards.

14) The plaintiff also sought for special damages in the sum of ksh.116,656/=. The 2nd defendant stated that the plaintiff was only able to prove ksh.90,656/=. I agree with the 2nd defendant. The amount of ksh.90,656/= was specifically proved. I award the same.

15) The plaintiff has also asked to be given ksh.900,000/= for future medical expenses. The plaintiff tendered medical evidence of Dr. Kinuthia showing that he required an orthopaedic boot for his left leg at a cost of ksh.100,000/= and an artificial leg estimated at ksh.800,000/=. I am satisfied that the plaintiff is entitled to the above awards. Therefore on future medical expenses, the plaintiff is awarded ksh.900,000/=.

16) In the end, judgement is entered in favour of the plaintiff and against the defendant as follows:

a) **General damages for pain & suffering** ksh.3,000,000/=

b) **Special damages** ksh. 90,656/=

c) **Future medical expenses**

i. **Cost of artificial limb** ksh. 800,000/=

ii. **Cost of orthopaedic boot** ksh. 100,000/=

Total ksh.3,990,656/=

d) **Costs of the suit.**

e) **Interest at court rates on (a) and (b) from the date of judgement until the date of full payment.**

Dated, Signed and Delivered in open court this 30th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendants