



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 66 OF 2015

**DGK (a person of mental infirmity/unsound mind suing thro' his father
and next friend MKK).....PLAINTIFF**

VERSUS

JOHN MUTUA KIMEU.....DEFENDANT

JUDGMENT

1. The plaintiff, DGK, a person suffering from mental infirmity filed a suit on 25th May, 2015 through his father and next friend MKK. On 11th May, 2016, the plaint was amended. It was further amended on 15th July, 2016. In the said plaint, the plaintiff averred that he was traveling (sic) as a pedestrian along Ronald Ngala Road at Buxton area when he was violently hit by motor vehicle registration No. KBC 340R which was being negligently and carelessly driven or controlled by the defendant, John Mutua Kimeu or his agent or Driver or employee. The plaintiff averred that as a result of the accident he sustained serious injuries which led to his mental incapacity.

2. The plaint further disclosed that the plaintiff has remained bed ridden, necessitating him to be supported by close members of his family to wash and feed him. The plaint stated that prior to the accident, the plaintiff enjoyed good health and was employed as a Computer Networkers Support Specialist which occupation earned him Kshs. 42,000/= monthly. It was claimed that as a result of the accident the plaintiff who was about 28 years of age had been rendered incapable of any employment.

3. The plaintiff's claim is for:-

- (i) General damages for pain and suffering;
- (ii) Special damages at Kshs. 6,500/=;
- (iii) Costs of the suit;
- (iv) Loss of future earning capacity and diminishing of future earnings;
- (v) Future costs of employing an Assistant to nurse and care for him at proper wages as set by law.

4. The defendant filed a statement of defence on 9th May, 2016. On 25th May, 2016, he filed a statement of defence to the amended plaint. The defendant admitted that an accident occurred on the material day but denied being the owner of motor vehicle registration No. KBC 340R.

5. The defendant denied having caused the accident or being vicariously liable. He denied every other allegation in the plaint save for the description of the parties. The defendant attributed the accident to the negligence of the plaintiff.

6. On 7th December, 2017, the parties hereto filed a consent letter in which liability was apportioned at 40% as against the plaintiff and 60% as against the defendant. The plaintiff called 3 witnesses to prove his case. The defendant did not call any witnesses in support of his case.

7. PW1 was MKK, who filed the present suit as the next friend of the plaintiff. He testified that the plaintiff was his son and the last born. He explained that his son is unable to speak from the time he had the accident in issue. It was his evidence that he travelled to Mombasa after the plaintiff's neighbour called him and told him that they had not seen the plaintiff for a week. He stated that the Police called him a week after the accident and asked him if he was the plaintiff's father. He responded in the affirmative.

8. It was his evidence that he was directed to the Intensive Care Unit (ICU) of Coast Province General Hospital (CPGH) where the plaintiff was admitted. He stated that the plaintiff was admitted in the ICU for 3 weeks after the accident that happened on the night of 25th and 26th May, 2012. PW1 testified that his son was admitted to hospital from 26th May, 2012 to 4th September, 2012.

9. It was PW1's evidence that the plaintiff was injured on the right arm and right leg, on the left side of the head, he got a fracture of the cervical spine and he was put on a brace. PW1 produced the plaintiff's case summary report from CPGH as plf. exhibit 1. It showed that he was discharged from hospital on 22nd August, 2012. PW1 explained that the plaintiff stayed in hospital until 4th September, 2012 as he was looking for money for paying the hospital bill.

10. PW1 further testified that after the accident, the plaintiff had a tube inserted for feeding with. It was his evidence that although the fractures had not healed, he removed the plaintiff from CPGH to Nazareth Hospital which was nearer his home. PW1 indicated that the plaintiff was admitted from 4th September, 2012 to 22nd September, 2012 to the said hospital. He produced the discharge summary from Nazareth Hospital as plf. exhibit 2. He stated that at the said time, the plaintiff had not healed. He had bed sores and home care was recommended but he was to be taken to hospital from time to time. He indicated that he fed the plaintiff through a feeding tube for 4 months and that even at the time he testified in court, he was still feeding him.

11. PW1 was given a P3 form which he took to a Doctor at CPGH who filled it. He then took it to Makupa Police Station. PW1 stated that the vehicle that caused the accident was registration No. KBC 340R which was owned by John Mutua Kimeu. He further testified that the plaintiff was examined by Dr. Adede on 1st July, 2016. PW1 paid Kshs. 2,000 for the medical report. The court was informed by PW1 that the plaintiff was working at Tommaso Africa Limited before the accident, where he was earning Kshs. 43,000/=, PW1 produced a bundle of documents as plf. exhibit 9(a) which comprised the plaintiff's academic certificates.

12. PW1 testified that the plaintiff is unable to work and he cannot do anything on his own. He cannot stand up on his own, walk or speak. He uses diapers and is fed, and is washed by PW1. He further testified that the plaintiff uses a catheter and he has to turn him so that he does not get bed sores.

13. PW1 recounted that there was a time the plaintiff was admitted to Thika Level 5 Hospital when he got pneumonia and he was told it had arisen as a result of him lying too much on his back after the accident. PW1 produced the discharge summary from the said hospital as plf. exhibit 10.

14. PW1 stated that the plaintiff's prayer was for general damages for pain and suffering, loss of employment and special damages. He also prayed to future costs of employing a nurse to assist the plaintiff. PW1 explained that the plaintiff depends on him for everything and that his wife ran away after the accident.

15. Justus Tabu Makina testified as PW2. He recalled that on the 25th of May, 2016 at about midnight he was going to Tudor. As he neared the JCC Church along Ronald Ngala road, there was someone who was walking about 20 meters ahead of him. The person was standing on the embankment between the two roads. PW2 explained that he was on the left side and the person was on the right side. He testified that a vehicle that was being driven at a high speed hit the said person who was waiting to cross the road. PW2 further stated that the said vehicle was registration No. KBC 340R. PW2 gave evidence that the vehicle hit the person, dropped him on the left side of the road and took off. He and other people went to check on the person. The Police went to the scene and picked him. He explained to them what he had seen. He went to Makupa Police Station the following day to record a statement and he was told that he would be called. He gave the Police his telephone number. In his view, the Driver of the motor vehicle Registration No. KBC 340R was on the wrong as he hit the plaintiff when he was standing on an embankment that was between 2 roads. He added that it was wide enough for a person to stand on.

16. PW3 was No. 80567 Police Constable Joseph Kinyua from Makupa Police Station, Traffic Section. It was his evidence that on 26th May, 2012 a road traffic accident happened along Ronald Ngala Road at Buxton near the lights (traffic lights). He indicated that the accident was reported to Makupa Police Station at 12:45 a.m. PW3 testified that a pedestrian, DG was hit by motor vehicle registration No. KBC 340R and he was seriously injured. He was rushed to CPGH. PW3 could not tell who caused the accident between the plaintiff and the defendant. He produced the P3 form as plf. exh. 3 and the police abstract as plf. exh. 4.

17. The plaintiff's letter from the employer and a banking slip were produced by consent as plf. exhibits 6 and 7, respectively. The defence Counsel by consent, produced as def. exh 1 a medical examination report dated 4th May, 2007 that was prepared by Dr. Udayan R. Sheth.

ANALYSIS AND DETERMINATION

18. On 24th October, 2016 plaintiff filed list of 5 issues for determination. The defendant did not file any list of issues. The issues filed by the plaintiff for determination are:-

- (i) Whether the defendant was the owner of motor vehicle registration Number KBC 340R;
- (ii) Whether the plaintiff was on 26th May, 2016 or thereabouts hit motor vehicle registration Number KBC 340R;
- (iii) Whether the plaintiff sustained the injuries as pleaded in the plaint;
- (iv) Whether the defendant is wholly liable to the accident and to the injuries sustained by the plaintiff; and
- (v) Whether the plaintiff is entitled to the prayers as pleaded in paragraph 12 (a) to (e) of the plaint.

19. Since liability was apportioned as between the plaintiff and the defendant, issues No. 1 and 2 outlined above stand determined and conclusively point to the fact that the defendant was the owner of motor vehicle registration No. KBC 340R. The plaintiff's Counsel in his written submissions filed on 6th July, 2018 prayed for general damages to compensate the plaintiff for the injuries he sustained as per the amended plaint, which rendered him to be 100% disabled. Counsel prayed for an award of Kshs. 10,000,000/=. He relied on the decision in Nakuru HCCC No. 34 of 2014, **Brian Muchiri Waihenya vs Jubilee Hauliers**, where the court awarded damages in the sum of Kshs. 8,000,000/=.

20. It was submitted that special damages were proved as pleaded and an award for the amount of Kshs. 6,500,000/= should be made.

21. With regard to loss of earnings, Mr. Atancha, Learned Counsel for the plaintiff submitted that exhibits were produced to show that the plaintiff was earning Kshs. 43,000/= per month. He urged this court to take into account that the plaintiff was 28 years old and would have retired at 60 years of age and that at the time of the accident he had 32 years of working life left. A proposal was therefore made for payment for loss of earnings which was worked out thus – Kshs. 43,000x12x32=Kshs. 16,512,000/=. He also prayed for future costs of a Nursing Assistant as the plaintiff suffered 100% incapacity as shown in the medical report of Dr. Udayan R. Sheth. Counsel for the plaintiff urged the court to use the figures provided in the Guidelines for Minimum Wages Order, 2017 for domestic servants which he stated was Kshs. 10,000/=. He therefore prayed for an award of Kshs. 7,000,000/= as the costs of employing a servant. Counsel therefore prayed for a grand total of Kshs. 21,787,025/= to be awarded to the plaintiff.

22. Mr. Gor, Learned Counsel for the defendant filed his written submissions on 18th July, 2018. It was submitted that the report by Dr. Udayan R. Sheth stated that the plaintiff suffered no fracture to the spine. With regard to the injuries sustained by the plaintiff, the court was urged to award general damages for between Kshs. 1,500,000/= to Kshs. 1,750,000/=.

23. On special damages, it was submitted that only Kshs. 2,000/= was proved and not Kshs. 6,500,000/=.

24. On loss of future earning capacity, Counsel for the respondent submitted that no evidence was produced to prove that the plaintiff used to earn Kshs. 43,000/= monthly. With regard to the number of working years left, it was submitted that no documentary proof was adduced to prove the plaintiff's age, such as by production of his identity card. The court was urged to dismiss the claim for loss of earning capacity. The case of **John Kibicho Thirima vs Emmanuel Parsemi Mkoitiko**, Nairobi HCC No. 319 of 2013, was cited to show that the said claim should have been proved on a balance of probabilities.

25. It was submitted that if the court was to find in favour of the plaintiff in the absence of documentary evidence to prove the plaintiff's income and age as at the time of the accident, a global sum of Kshs. 500,000/= for diminution of earning capacity ought to be awarded.

26. With regard to costs of employing a Nursing Assistant, Counsel for the respondent submitted that there was no evidence led to the effect that since the date of the accident 6 years ago, the plaintiff engaged the services of a Nurse or an Assistant. It was therefore argued that the claim under the aforesaid head should fail as a suit in tort is not intended to punish a tortfeasor or to make an award to maintain the plaintiff for the rest of his life, but to make a fair compensation to him. Mr. Gor cited the case of **Tayab vs Kinanu**, Civil Appeal No. 29 of 1982 to support his position.

27. This court was urged to dismiss the prayer for costs of employing a Nursing Assistant. It was however submitted that if the court was to take a different view, it ought to award Kshs. 6,000/= for an Assistant and apply a multiplier of 7 years which would work out thus - Kshs. 6,000/=x7x12= Kshs. 504,000/=.

28. On two occasions, Counsel for the plaintiff prayed for an adjournment for purposes of calling Dr. Ajoni Adede to court to produce the medical report in respect to the plaintiff herein. The said Doctor never attended court and the said medical report was not produced in evidence, not even by consent, probably due to an oversight on the part of the plaintiff's Advocate. There was however ample evidence to shed light on the nature of the injuries sustained by the plaintiff.

29. The discharge summary from CPGH, Mombasa shows that the plaintiff was admitted to the said hospital on 26th May, 2012 and discharged on 22nd August, 2012. PW1 produced the said document as plf. exhibit 1. It shows that the plaintiff sustained the following injuries:-

- (i) Fracture of the right humerus;
- (ii) Fracture of the right tibia fibula;
- (iii) Fracture of the cervical spine; and
- (iv) Head injury.

30. After discharge from CPGH, the plaintiff was admitted to Nazareth Hospital on 4th September, 2012 and discharged on 22nd September, 2012. The injuries the plaintiff sustained are indicated to be the similar to those reflected on the discharge summary from CPGH. The said discharge summary from Nazareth Hospital was produced as plf. exh. 2. The plaintiff was on 29th March, 2013 admitted to Thika Level 5 Hospital with hyposteric pneumonia as a result of being bed ridden. He was discharged on 8th April, 2013. The discharge summary was produced as plf. exh. 10.

31. PW3 produced the P3 form from CPGH as plf. exh. 3. The said P3 form shows that the plaintiff sustained the following injuries:-

- (i) Head fracture;
- (ii) Fracture cervical spine;
- (iii) Fracture right humerus; and
- (iv) Fracture of the left tibia/fibula.

32. The degree of injuries were classified as maim. The P3 form was filled on 22nd November, 2013. The age of the injuries was 18 months. The medical report dated 4th May, 2017 produced as def. exhibit 1 that was prepared by Dr. Udayan R. Sheth states that the plaintiff suffered the following injuries:-

- (i) Head injury;
- (ii) Cervical injury (x-ray cervical spine shows no fracture);
- (iii) Fracture right humerus;
- (iv) Fracture right tibia – fibula with spastic paralysis of all 4 limbs; and
- (v) Permanent incapacity due to spastic paralysis of 100%.

33. The medical report indicates that x-rays that had been previously taken got lost and repeat x-rays were done on 29th April, 2017. Going by the medical notes, P3 form, medical report produced herein, this court believes that the plaintiff suffered cervical spine fracture as was reported in the initial medical records in CPGH and Nazareth Hospital. The examination by Dr. Udayan R. Sheth and the x-rays he relied on to write his report were done 5 years after the accident. It is the considered view of this court that the x-rays that were done soon after the road traffic accident shed more light on the fractures that the plaintiff sustained. There is therefore no doubt in my mind that the plaintiff suffered the injuries noted in the discharge summaries from CPGH and Nazareth Hospital and also as captured in the P3 form from CPGH.

34. With regard to the prayer for special damages, the claim was for the sum of Kshs. 6,500/=. The amount that was not contested by the defendant was Kshs.2,000/=. The plaintiff is therefore awarded Kshs. 2,000/= as special damages.

35. On the issue of loss of future earning capacity and diminishing future earnings, the letter from Tommaso Africa Limited produced as plf. exh. 7 was to the effect that on average, the plaintiff used to earn Kshs. 25,000/= a month. His payment for the month of March was Kshs. 43,000/=. The letter states that the plaintiff had been sub-contracted by them as an independent network support contractor to provide support for various clients in Mombasa. At the time of the accident he had left Royal Court Hotel, Mombasa where he had been assigned duties and was on his way home.

36. The said letter indicated that the plaintiff's dues had been paid to his family. It is evident from the bank deposit slip of 27th March, 2018 as read together with the letter from Tommaso that the Kshs. 43,000/= that was deposited in the plaintiff's account was his salary for the month of March, 2012. Noting that his salary was not constant, Kshs. 43,000/= cannot be considered to be his monthly earnings. This court will therefore adopt the amount of Kshs. 25,000/= as his monthly earnings, being the amount given by Tommaso as the plaintiff's average monthly earnings.

37. The age of the plaintiff was given as 28 years as indicated on his P3 form and the discharge summaries from CPGH. The discharge summary from Nazareth Hospital gave his age as 25 years and that from Thika Level 5 Hospital gave his age as 28 years. Since the plaintiff's age as stated on the said documents varies, this court will adopt the higher age of 28 years as the plaintiff's age as at the time of the accident. Failure by PW1 to produce the plaintiff's identity card in the presence of other documents that indicate his age is not fatal to the claim for loss of future earning capacity and diminishing of future earnings.

38. In the case of **Joseph Maganga Kasha vs Kenya Power and Lighting Company Ltd.** [2012] eKLR, the court applied a multiplier of 38 years in a case where the plaintiff suffered 100% disability at the age of 22 years.

39. In the present case, I will adopt a multiplier of 32 years as the plaintiff would have been expected to work until the age of 60 years. The loss of future earning capacity and diminishing of future returns therefore works out as follows - Kshs. 25,000x12x32=Kshs. 9,600,000/= .

40. On costs of a Nursing Assistant, the plaintiff has since the accident relied entirely on the assistance of his father, who feeds him, bathes him and changes his diapers. PW1 testified that the plaintiff's wife abandoned him after the accident. It is the finding of this court that had it not been for the accident, PW1 would not have had the extra burden he has had for the last 6 years of taking care of the plaintiff. I therefore hold that the plaintiff is entitled to a Nursing Assistant to take care of him. The plaintiff's Counsel prayed for Kshs.10,000/ per month to take care of the said expense. It is common knowledge that the changing of diapers, feeding and bathing an adult is a departure from the usual ordinary work that is done by House Helps and calls for better remuneration. The court also notes that the said amount will remain constant over the years but the value of the Kenya Shilling will not remain the same over the years to come. I therefore find that the amount of Kshs. 10,000/= requested for is reasonable. I therefore award the sum of Kshs.10,000/= to the plaintiff for the employment of a Nursing Assistant to help him. The award therefore works out as follows - Kshs. 10,000x12x32=3,840,000/=.

41. The plaintiff's Counsel submitted that Kshs. 10,000,000/= would be adequate compensation for pain and suffering. He relied on the case of **Brian Muchiri Waihenya vs Jubilee Hauliers** (supra) where the plaintiff who became paraplegic after an accident was awarded Kshs.

8,000,000/= on 4th May, 2017, as general damages. In the said case, the injuries the plaintiff sustained, resulted in him becoming paraplegic like the plaintiff in this case. Permanent disability was assessed at 100%.

42. In the case of **Dorothy Kanyua Mbaka and Another vs Permanent Secretary of Defence and Others** [2014] eKLR, the court awarded Kshs. 10 million to a plaintiff who suffered a pelvic fracture with paraplegia and trauma of the bladder.

43. In the case of **Alex Otieno Amolo and another vs Hayer Bishan Singh and Sons Limited** [2016] eKLR, the court awarded Kshs. 6,000,000/= general damages to a plaintiff who was rendered paraplegic following injuries sustained at a road traffic accident. The said award was made on 1st August, 2016.

44. Taking into account the injuries sustained by the plaintiff and the depreciation of the Kenya Shilling, it is my considered view that the sum of Kshs. 9,000,000/= is a fair award for general damages.

45. The total award therefore works out as follows:-

(i) Loss of future earning capacity and diminishing of future returns	Kshs. 9,600,000/=
(ii) Costs of employing a Nursing Assistant	Kshs. 3,840,000/=
(ii) General damages	Kshs. 9,000,000/=
(iii) Special damages	Kshs. 2,000/=
(iv) Gross award	Kshs. <u>22,442,000/=</u>
Less 40% contribution $Kshs. 22,442,000 \times 40/100 =$	8,976,800
Net award	<u>Kshs. 13,465,200/=</u>

46. The plaintiff is awarded the costs of the suit. He is also awarded interest at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Chala holding brief for Mr. Atancha for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant