



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.1 OF 2016**

**CHRISTOPHER MUNGAI THIMBA.....PLAINTIFF**

**VERSUS**

**MOHAMED YASIN YUSUF.....1<sup>ST</sup> DEFENDANT**

**HIBO YASIN.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff herein filed the plaint dated the 16<sup>th</sup> December, 2015 against the defendants claiming general damages for pain and suffering, special damages in the sum of Kshs.2,829,611/-, damages for lost income/employment, future medical expenses and reconstructive surgery and the costs of the suit.

It is pleaded that at all material times relevant to the case herein, the 2<sup>nd</sup> defendant was the registered and/or beneficial owner of motor vehicle registration number KBT 980P, Toyota Runx while the first defendant was the driver and/or authorized agent of the 2<sup>nd</sup> defendant.

The plaintiff averred that on or about the 4<sup>th</sup> day of June 2013, along Waiyaki way, at Brookside Drive junction, the 1<sup>st</sup> defendant or the 2<sup>nd</sup> defendants authorized driver, servant or agent negligently managed, controlled and/or drove the aforesaid motor vehicle that it knocked down the plaintiff who was a lawful pedestrian on the footpath along the said road thereby occasioning him serious injuries. The particulars of negligence on the part of the Defendants, those of injuries and special damages are particularized in paragraphs 4, 5 and 6 of the defence respectively.

The plaintiff avers that at the material time of the accident, the first defendant was acting in the course of his authorized duties thereby rendering the 2<sup>nd</sup> defendant vicariously liable for the aforesaid negligent acts and/or omissions. The plaintiff further avers that the 2<sup>nd</sup> defendant was charged and convicted of the offence of careless and/or reckless driving in Makadara Court in a Traffic Case.

That as a result of the injuries suffered, the plaintiff lost his employment as a driver cum electrician and further lost any chances of being employed in future as he was diagnosed with post traumatic epilepsy and has thus sought for damages for lost employment. It is averred that he was earning a total of Kshs.18,000/- per month which sum he lost as a result of the defendants' actions and for which they should be liable.

The plaintiff further avers that, as a result of the injuries suffered, he will be required to partake medical drugs for life to control the medical condition he suffered (post traumatic epilepsy) as a result of the accident and shall pray that the same be determined and awarded at the hearing hereof. He prays that he be awarded the costs of buying the said medicines which currently stands at Kshs.5,000/- per month but which is subject to change due to increased cost based on inflationary trends. That as a result of the injuries suffered he will be required to undergo reconstructive surgery to restore the lost teeth and he prays that he be awarded the cost of the said treatment which is approximated at Kshs.146,500/-. He relied on the doctrine of *Res Ipsa Loquitur*.

The defendants did not enter appearance or defence and interlocutory judgment was entered on the 27<sup>th</sup> day of February, 2017. The matter proceeded as a formal proof on the 28<sup>th</sup> September 2017 when the plaintiff testified and called two witnesses in support of his case.

The plaintiff adopted his witness statement dated the 16<sup>th</sup> December 2015 and filed in court on 6<sup>th</sup> November, 2016, as his evidence in chief. In the said statement, he stated that on the 4<sup>th</sup> June, 2013 he was walking on the footpath, off the road, along Waiyaki way at Brookside junction, when motor vehicle KBT 980P hit him after it was negligently and recklessly driven.

As a result of the accident, he suffered very serious head and other injuries. He was rushed to M.P. Shah Hospital for treatment where he was admitted in the intensive care unit and was subsequently discharged on the 4<sup>th</sup> July 2013. That, due to the injuries, he suffers from weakness of the limbs and post traumatic epilepsy for which, he shall require medication for life. In addition to post-traumatic epilepsy, he

cannot work. He stated that he was informed by Sgt. Muhindi that the driver of the aforesaid vehicle was charged in court and convicted on his own plea of guilty for the offence of reckless and dangerous driving. He produced the treatment cards, the police abstract, the demand letter and receipts for medical expenses as exhibits in the case. He has asked the court to grant him the orders sought in the plaint.

Hiram Thumba, gave evidence as PW2. He adopted his witness statement dated the 25<sup>th</sup> September 2017 and filed in court on the 26<sup>th</sup> September 2017, as his evidence in chief. It was his evidence that on the 4<sup>th</sup> June, 2013 he received a call from a family friend namely Mr. Njenga who informed him about the accident. He was told that his brother was walking on the footpath off the road along Waiyaki way at the Brookside junction, when he was knocked down by motor vehicle registration number KBT 980P and that he had sustained serious injuries. He was further informed that his brother had been rushed to M.P. Shah hospital and was admitted at the intensive care unit. He stated that due to the injuries, his brother suffers weakness of the limbs and post traumatic epilepsy for which, he will require medication for life. That in addition to post traumatic epilepsy, he cannot walk and that due to his medical condition, he was relieved from work at Fairmead Limited and he (PW 2) has been forced to support him financially by buying medicine for him at Kshs.5,000/- every month. He also assists him in paying school fees for the children.

He stated that he went to Parklands police station where the accident was reported and took photographs of the vehicle. He is the elder brother to the plaintiff and he told the court that he was involved in paying the hospital bill which amounted to Kshs.2,666,300/- and not the Kshs.2,829,611 as pleaded in the plaint. He produced receipts in support of the same which were marked as exhibits 13(a) and (b). He also produced the photographs of motor vehicle KBT 980P that he took at Parklands police station and were marked as exhibit 14. He told the court that his brother continues to attend clinics and since he is not able to work, he assists him with money.

Doctor George Kungu Mwaura testified as PW3. He examined the plaintiff on the 15<sup>th</sup> November, 2015 and prepared a medical report for him which he produced as exhibit 8(A). According to the Doctor, the plaintiff sustained the following injuries;

- (1) Loss of 2 upper incisor teeth and loose upper incisor tooth.
- (2) Multiple deep wounds – scalp
- (3) Loss of consciousness
- (4) Left sided subdural haematoma
- (5) Brain contusion (bruises)
- (6) Post head injury convulsions.
- (7) Pain, swelling and blood loss.

He was admitted for one month, X-rays and CT scan (head) were done. He was taken to theater and brain haematoma was evacuated (craniotomy done). He was put on antibiotics, analgesics and anti-epileptic. In his opinion, healing is fair but with the following complications:-

- a) Multiple large disfiguring scalp scars.
- b) Deformity (depression) left temple
- c) Partial paralysis – left upper and lower limbs – limping gait
- d) Has a denture – upper 3 incisors.
- e) He developed epilepsy and is on continuous anti-epileptic drug.
- f) He can perform light duties only.
- g) Permanent degree of incapacity is assessed at 50%
- h) He sustained grievous harm injuries (severe head injury)

He stated that he was paid Kshs.3,000 to prepare the medical report and Kshs. 10,000 for court attendance. He produced both receipts which were marked as exhibits 8(c) and 8 (d)

Counsel for the plaintiff filed written submissions in which he has addressed both liability and quantum which the court has duly considered. On liability, the evidence on record is that the plaintiff was knocked down by the 2<sup>nd</sup> defendant's motor vehicle which lost control and hit him when he was off the road on the pavement. The occurrence of the accident is confirmed by the plaintiff in his testimony and the documents that he produced as exhibits which include the police abstract. According to the official records from the Registrar of motor vehicles, the subject vehicle was owned by the 2<sup>nd</sup> defendant at the time of the accident. The official search was produced as exhibit 5(A). The evidence of PW1 on how the accident occurred was not controverted as the defendants failed to enter appearance and file a defence. The court finds the first defendant 100% liable for the accident as he veered off the road and hit the plaintiff while he was walking off the road.

The first defendant was driving the vehicle as the authorized driver of the 2<sup>nd</sup> defendant and therefore the 2<sup>nd</sup> defendant is vicariously liable for the acts of omission or commission on the part of the 1<sup>st</sup> defendant.

On the quantum of damages, the court has set out in details, the injuries sustained by the plaintiff. There is no doubt that the same were serious and they resulted in 50% permanent incapacity to the plaintiff. He will not be able to work the rest of his life and will have to take medication for life. Prior to the accident, he was a healthy man with bright future prospects but due to the accident, he has to depend on others as he can only perform light duties. He lost his employment and hopes of getting another job were dashed by the accident that left him semi-paralysed.

In his submissions, counsel for the plaintiff has asked the court to award Kshs.5,000,000 as general damages and has relied on the cases of **Bernard Mutisya Wambua Vs. Swaleh Hashil, Naivasha HCCC No. 28 of 2015, John Nkunja Mbatia Vs. Esther Muthoni Mbiri, Mombasa Civil Appeal No. 66 of 2015** and that of **James Njau Kariuki Vs. Mary Goretti Wakwibibi & Joseph Wafula Ndieyira, Eldoret High Court Number 2 of 2005** where sums of Kshs.6,500,000, 5,115,312 and 3,000,000/- were awarded as general damages respectively.

The court has perused the authorities provided by Counsel for the plaintiff and in particular, the injuries sustained by the plaintiff in those cases, and I find the case of James Goretti Kariuki (supra) to be more comparable in terms of the injuries sustained by the plaintiff in that case and the one herein. The degree of total incapacity is also the same at 50%. The case was decided more than 10 years ago. Taking into account the inflation, it is my considered view that a sum of Kshs.6,000,000 will be reasonable as general damages.

On loss of earnings capacity, the plaintiff testified that he was earning a basic pay of Kshs.18,000 leaving a sum of Kshs.16,481/- after statutory deductions. The plaintiff was aged 39 years at the time of the accident and taking into account the civil service retirement age of 60 years, he has a working life of 21 years remaining. General damages for loss of earning capacity will therefore be 16,481x12x21 making a total of Kshs.4,154,472/-. Cost of buying anti-epileptic drugs at a cost of Kshs.5,000 per month for 12 years making a total of Kshs.5,000x12x21=1,260,000/-

The plaintiff also testified that he requires a sum of Kshs.147,500 as costs for replacement of the lost teeth. Though he referred to an invoice of Ksh.147,000, the same was not produced but among the list of documents filed on the 6<sup>th</sup> January, 2016, there is an invoice from Dr. Minesh Shah Dental Surgeon for Kshs.107,500 which I hereby award.

As for the special damages the amount pleaded in the plaint is Kshs.2,829,611/-. The receipts produced by PW2 amounts to much more than what is claimed. In his evidence, he stated that some money was refunded to them because they had overpaid. In the premises, the court can only award what is claimed which is a total of Kshs.2,829,611/-.

In the end, judgment is hereby entered for the plaintiff against the defendants jointly and severally as follows;

- a) Liability – 100% against the defendants
- b) General damages  
for pain and suffering. – Kshs.6,000,000/-
- c) Loss of earning capacity - Kshs.4,154,472/-
- d) Cost of buying epileptic drugs – Kshs.1,260,000/-
- e) Cost of dentures – Kshs. 107,500/-
- f) Special damages – Kshs.2,829,611/-
- Total – **Kshs.14,351,583/-**

The plaintiff shall also get the costs of the suit.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of November, 2018**

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**L. NJUGUNA**

**JUDGE**

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**