



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 32 OF 2015

J K N (Suing as a father and Legal guardian of the Estate of E S M K.....PLAINTIFF

VERSUS

1. JACOB LEMASIKA KIPAA.....1ST DEFENDANT

2. ODHIAMBO COLLINS.....2ND DEFENDANT

JUDGEMENT

INTRODUCTION

1. This claim was brought by way of a plaint filed by the plaintiff on 9th July 2015 through their Advocates Lesinko Njoroge & Gathogo

2. In his plaint the plaintiff said that E S M K was deemed a person of unsound mind on 23/7/2014 as a result of severe head and brain injuries sustained as a result of the accident on 3/9/2011 and as a result he was suing through the father J K. The plaintiff subsequently obtained leave to file this suit out of time on 25th June, 2015.

3. The 1st and 2nd defendants were described as the registered and beneficial owners of Motor Vehicle KBJ 093M respectively.

4. The plaint averred that the plaintiff on 3/09/2011 was travelling as a fare paying passenger in the Motor Vehicle KBJ 093 M being driven along Mombasa Road by the 1st defendant who caused it to collide with Motor Vehicle registration no KBJ 907T/ZD1756 and as a result the plaintiff sustained severe and extensive head and brain injuries.

5. The plaint listed the following particulars of injuries;

- i. Severe head injury with loss of consciousness
- ii. Severe brain oedema
- iii. Intraventricular hemorrhage

6. The special damages pleaded in the plaint were to the tune of Kshs 3,477,960/= .The plaintiff went on to pray for judgment against the defendant for ;

- a) General damages for pain and suffering

- b) Special damages of Kshs 3,477,960.50/=
- c) Costs and interest of the suit
- d) Interests on (a) and (b) above at court rates Costs of the suit.

7. The Defendants filed a statement of defence on 9th December 2015 where they denied all the contents of the complaints save for paragraphs 11 and 12. They also sought leave of Court to join the owner of motor vehicle Registration No. KBJ 907 T-ZD 1756 as a Third Party in the suit.

8. The plaintiff also filed a Reply to Defence on 2nd February 2016 and they prayed that the Statement of Defence be struck off with costs and judgment be entered in favour of the Plaintiff as prayed in the Complaint.

9. The matter proceeded for trial and the parties agreed by consent to liability judgment entered on 11/5/2017 before court in the ratio of 15% to 85% in the favour of the Plaintiff against the defendant. The issue left for trial was that of quantum on assessment of damages.

10. The plaintiff had two witnesses who testified during the trial. **PW1** Dr Japheth Amukata testified that he is the one who had re-examined the plaintiff on 6/4/2013 after he had sustained a road traffic accident. He indicated that the plaintiff had sustained severe head injury with loss of consciousness and severe brain oedema and intraventricular hemorrhage.

11. He went on to state that the plaintiff was confined to a wheel chair because he was unable to stand or walk as a result of generalized stiffness of major joints. His left eye had reduced focus, his hearing had reduced and he had lost memory of all recent events. As a result he testified that he recommended that the plaintiff should undergo Physiotherapy, Psychotherapy and surgery to release the contractions of the joints so as to make the movement flexible. He confirmed that the plaintiff suffered an approximately permanent disability of 90-95%.

12. He went on to produce **P Exhibit 4(A)**-Medical report dated 6/4/2013, **P Exhibit 4(B)** Receipt of Kshs 12,000/= dated 10/5/17 and **P Exhibit 4(c)** an invoice dated 8/5/17.

13. Upon cross examination he confirmed that the plaintiff had sustained head injury and if he underwent the Physio and Psycho therapies his condition would improve to some extent.

14. **PW2** was J K N the plaintiff's father. He adopted his witness statement dated 9th July, 2015 and testified that the plaintiff is his son. He went on to produce copies of his ID and that of His son marked as **P Exhibit 5(A) and B** respectively. He said that he had filed a petition to file suit to be allowed to file suit behalf of the son and he had obtained an order of court; **P exhibit 6A and B** respectively.

15. He went on to produce the application and order for leave to file the suit out of time **P Exhibit 7A and B**. He indicated that he had delayed in filing the suit since he had spent so much money in obtaining treatment for the son.

16. Further he testified that his son had visited various hospitals and he was in ICU for 3 months at Nairobi West Hospital and later Matasia Nursing Home and Moshi in Tanzania. He produced **P exhibits 9,10A, B, C & D** as the treatment documents. He further produced a bundle of 44 receipts **P exhibit 11** where he alleged to have spent money in hospitals amounting to Kshs. 4,678,667.50/=. He confirmed that the plaintiff was at home but he cannot walk or talk.

17. **PW 2** went on to state that they had started physiotherapy and each session was Kshs 1000/= and he used to attend the sessions twice a week. But the patient had not improved so they discontinued. He further testified that having conducted a search of the motor vehicle **P Exhibit 12 A & B** and confirmed that the vehicle belonged to defendant he went on to send demand notices to the defendants **P Exhibit 13 A and B**.

18. In conclusion he prayed for compensation since his son was permanently disabled for life.

19. During cross examination PW2 testified that he could not bring the plaintiff (son) to court since he was on a wheel chair .He went on to state that Physiotherapy was expensive and hence the reason why he had also delayed in bringing the suit. He also confirmed that his son was examined by Dr Amukata. He denied having abandoned his son.

20. Upon re-examination he clarified that even if he brought his son to court, he could not speak

21. Having closed both the plaintiff's and defence case, both parties agreed to file submissions.

Submissions by the Plaintiff

22. The Plaintiff's filed their submissions on 30/5/2017.They submitted on quantum under the following heads;

a. General damages

23. Under this head they went on to outline the undisputed injuries sustained by the plaintiff, which injuries were confirmed through P3 from-P exhibit 2.Discharge Summaries from various hospitals P-exhibits 9-10(a)(b)(c) and Medical report by Dr J.L Amugunda P exhibit 4(a).

24. They went on to submit that the defendants had not produced any evidence to counter the nature of the injuries sustained by the plaintiff and the medical documents and reports produced by the plaintiff.

25. Dr Amugunda having confirmed that the plaintiff had sustained permanent incapacity to the percentage of 90-95%, the same was never challenged through any documents of during cross-examination. As a result of the injuries the plaintiff was declared of unsound mind in Machakos Misc Application 256 of 2013.

26. They prayed for an award of Kshs 8,000,000.00 /= for general damages for pain and suffering and loss of amenities of life basing this on the case law of; **Rosemary Wanjiru Kungu –Vs- Elijah Macharia Githinji(2014) eKLR** where court awarded Ksh 3,000,000.00 for fractures and general pain and suffering. **In Ngure Edward Karega –Vs-Yusuf Doran Nassir (2014) eKLR** court also went on to award Kshs 5,000,000/= for 2 fractures and bruises on the head and palms.

b. Loss of earning capacity

27. The plaintiff submitted that loss of earning capacity was in nature of general damages and he went on to quote the statement in the plaintiff's witness statement that before the accident the plaintiff was a student at Nairobi University and as a result of suffering a condition characterized by memory loss he was rendered incapable of recalling events and making decisions by himself and hence discontinued with his studies due to the said condition. The same was not disputed by the defendants.

28. They went on to rely on the principles set out on the loss of future earnings in the **Court of Appeal case Butler –Vs-Butler (1984) KLR 225.**

c. Special damages

29. The plaintiff pleaded and proved special damages as required in law. The plaintiff produced bundles of receipts for medical expenses for a total of Kshs 4,678,667 marked P exhibit 10 and further receipts for Kshs 20,000/= and Kshs 12,000/= as P exhibit 4(b) and 3 on Doctors and Police court attendances. They claimed for a total of Kshs 4,700,667.00 as pleaded.

d. Interest & Costs

30. On the issue of interests the plaintiff prayed for interest at court rates from the date of filing the suit until the settlement of the suit, at the interest of 12% from 9th July 2015 to the date of payment.

31. Further on costs they submitted that cost follow the event and therefore the plaintiff was entitled to costs of the suit including witness attendance expenses as proved by P exhibits 3,4,4(a),7(a) and (b)

32. In conclusion therefore the plaintiff submitted that when general damages, special damages ,interests and costs are considered as pleaded the plaintiff's claim totals to Kshs 33,700,667.50/=

Submissions by the Defendant's

33. The defendants filed their submissions on 29th May 2017. They submitted that the general damages be assessed at Kshs 2,000,000/= placing their reliance on the case of **Rosemary Wanjiru Kungu –Vs- Elijah Macharia Githinji & Another (2014) e KLR** in which the High Court awarded the plaintiff's Kshs 3,000,000/= for injuries that resulted to 100% permanent incapacity.

34. On the issue of special damages they submitted that they are agreeable to the plaintiff being awarded the amount proved by way of receipts only.

DETERMINATION.

35. Having considered the pleadings and the submission from both parties, the main issue for determination here is on the quantum to be awarded since liability had already been settled.

36. It is my opinion that indeed the plaintiff sustained serious injuries that have led to permanent disability, therefore the negligence of the defendants robbed the plaintiff of his life and a promising career having been a student at the Nairobi University. This has also cost the parents a lot the fruits of which might not be realized. The parents of the plaintiff will therefore be forced to nurse their son for life, because even according to the Doctors report, physiotherapy and psychotherapy are only meant to improve the condition to a certain extent but it will not lead to full recovery hence 95% disability. It was also submitted that the plaintiff had been in ICU for 3 months which greatly contributed to the high medical expenses. The plaintiff cannot talk and as a result his education has been cut short.

37. Looking at various cases ,In **Omondi Nyerere Ambala Versus Yakwengeta Bus services and Another ;Ang'awa,J** held ;A male adult aged 29 years passenger sustained brain damage that effected his slurred speech so much he was not able to speak well. An award of Ksh.500, 000/= was given noting that the doctor who prepared the medical report was not a neurosurgeon.

In **Jane Wairimu Mungai-Versus-Joseph N. Njuguna Hccc 152/95 Rawal J.**A female adult who was a fare paying passenger involved in a road traffic accident sustained injuries on the head, leg, left arms and shoulder. The injuries to the head was a closed injury with resultant hemiparesis on the right side. There was weakness on the left side of her body. An award of Ksh.600, 000/- was made.

Further in **Zacharia Nyabuti Onchiri –Vs-Tashrif Bus services Ltd. Hccc No.226/98 R. Nambuye,J.** A female African adult who was a fare paying passenger involved in a road traffic accident. The injuries sustained was:-Severe head injury with fractures of Right maxillary sinus and greater wing of the sphenoid on the right side He also had fractures to 7th clavical spine, left tibia and fibula loss of five teeth An award of Ksh.1.650.000 was made.

38. Honestly speaking, money cannot renew a physical frame that has been battered and shattered and all that courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair to both the Plaintiff and Defendants .What is summed up by all the authorities relied on is that injuries suffered must be compensated adequately by way of damages. While it is true that no amount of Damages can restore the Plaintiff to what he/she was prior to the accident, nevertheless the award of damages must try as much as possible to re-assure the Plaintiff that efforts are being made, by way of damages to restore him to what he was prior to the accident.The essence of damages is to keep on

trying to re-settle the victim to as much as possible the position he was before the accident by “repairs’ so as to be back to normal.

39. The court of Appeal in **MOHAMMED JABANE V HIGHSTONE T. OLENJA (Case No. 2 of 1986 [Vol. 1 KAR 982]** stated the principles for the correct approach in assessment of damages as follows:

- i. Each case depends on its own facts;
- ii. Awards must not be excessive and must take into account the need to avoid escalation of insurance premiums, medical fees, expenses in the body policy;
- iii. Comparable injuries should attract comparable awards;
- iv. Inflation should be taken into account.

40. Having considered all the principles set out by the court of appeal above and most importantly the inflation, medical expenses and the injuries sustained in comparison to the awards given in the cases relied on; I enter judgment for the plaintiff on the following terms: -

- a. Special damages being medical expenses as pleaded and proved by the medical receipts produced P exhibit 11 of Kshs 4,678,667.50/=, Cost of witness attendance to the tune of Kshs 20,000/= as proved by exhibit 4(a) and.
- b. General damages for: -Pain, suffering and loss of amenities Kshs. 5,000,000;
- c. Loss of future earnings, plaintiff was 21 years assuming he would be working at the age of 35years until the retirement age of 55 years at a minimum starting salary of Kshs 10,000/= per month $10,00 \times 12 \times 20 =$ Kshs. 2,400,000/=

Total Kshs.12, 098,667/= less 15% for the contribution hence Kshs 10,283,867/=

40. I award the costs of this suit to the plaintiff. I award interest on Special Damages from, the date of filing suit. Interest on General Damages from the date of this judgment.

Dated, signed and delivered at **MACHAKOS** this **31ST** day of **October 2017**.

D.KEMEI

JUDGE

In the presence of:

Mutinda for Gathogo for the Plaintiff

Kaluu for Mulwa for the Defendant

Kituva - Court Assistant