



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.263 OF 2009

JONATHAN MALINDAPLAINTIFF

VERSUS

LOTA MOTORS LIMITED1ST DEFENDANT

WENDY JANET HETNIER2ND DEFENDANT

ANTI-PEST (K) LIMITED.....3RD DEFENDANT

JUDGMENT

The Plaintiff herein has sued the defendants vide an amended plaint amended on the 25th November, 2013 seeking judgment against the Defendants jointly and severally for:-

- a. Special damages in the sum of Kshs.394,190/-
- b. Diminished earning capacity
- c. Future medical care
- d. General damages for pain, suffering and loss of amenities
- e. Costs and interests of all items pleaded
- f. Any other and/or further relief that this Honourable court deems fit to grant.

The cause of action arose from a Road Traffic Accident that occurred on the 13/4/2008 along Karen Road in Nairobi, when the Plaintiff was cycling along the said road but was hit by motor vehicle registration number KAS 933L. It is alleged that the accident was caused by negligence on the part of the driver of the aforesaid motor vehicle, and the particulars of negligence are set out in paragraph 5 of the Amended Plaint while those of injuries and of special damages are set out in paragraph 6.

There is already an interlocutory judgment against the first defendant for failure to file an appearance and/or defence.

Though the 3rd defendant filed a defence to the claim, a consent on liability as against them was entered vide a written consent dated 9/2/2016 in the ratio of 80:20% in favour of the plaintiff. That consent was adopted as the order of the court.

A further consent was recorded by the parties on the 26/11/2010 in the following terms;

- a. Parties to file written submissions for the court to determine the issue of quantum.
- b. The Plaintiff to attach his claim supporting documents to his submissions.
- c. Each party to take 21 days to file and serve submissions with the Plaintiff filing first and the matter be mentioned on the 15/2/2016.

In the intervening period, the defendants filed an application to compromise the suit on the basis of an alleged agreement reached between the parties to settle the matter at a global sum of Kshs.3,500,000/- subject to contribution of 20% and costs of the suit. The said application was heard but was dismissed by this Honourable Court vide its ruling dated 27/4/2017.

Parties filed submissions on quantum and this court is only tasked with determining the quantum payable to the plaintiff. I will look at the submissions under the various heads as itemized by the parties in their submissions as follows:-

a. General damages for pain, suffering and loss of amenities

The injuries suffered by the plaintiff are well captured in the medical report dated the 16/4/2009 wherein the doctor set out the following injuries.

- a. Severe head injury with loss of consciousness with GCS of 9/15.
- b. Skull fracture.
- c. Brain injury with para-basal infarcts.

He was admitted at KNH from the 13/4/2008 to 1/8/2008 and managed as follows:-

- i. Was in the intensive care unit on ventilator support.
- ii. Tracheotomy
- iii. Analgesics
- iv. Head injury chart
- v. Brain CT scan – showed para-basal infarct.
- vi. Skull c-ray confirmed above fracture.

In the doctor's opinion, the plaintiff suffered life threatening injuries with a lot of pain and blood loss. He suffered obvious brain damage in the RTA which has transformed his life to permanent incapacitation since he needs to be taken care of. He is not able to work and would require occupational therapy to help him adjust and to earn a living. Psycho-sexual hiccups mentioned are a source of concern and will require counseling to help improve his ability to sexually perform.

Permanent brain cell damage has rendered him to have left hemi-paresis and will require physiotherapy to aid in improving his muscle power.

In conclusion, the doctor states that the patient is now permanently incapacitated and his life style has been completely changed. Complete recovery will never be achieved and head injury complications like convulsive disorder should be anticipated.

I note that the medical examination was done way back in the year 2008 and none of the lawyers deemed it necessary to undertake another examination close to the hearing to assist the court in ascertaining the current medical status of the plaintiff which was necessary as the only medical report availed to the court is not conclusive in some aspects like the status of his eyes, sexual performance and the muscle power. However, this court will make do with what was availed.

On general damages, the plaintiff has suggested a total of Kshs.6 million and has made reliance on the cases of **Martin Kidaka Vs Wilson Simiyu HCCC No. 557/2005** and that of **Alex Wachira Njagua Vs Gathuthi Tea Factory & Ano HCCC No. 92 of 2008** where a sum of Kshs.3,500,000/- and 3,000,000/- respectively were awarded.

On the part of the defendants, a sum of Kshs.2,500,000/- was suggested. They relied on the case of **Mbaka Nguru & Anor Vs James George Rakwa (1998) eKLR** where an award of Kshs.2,500,000/- was made and that of **Nancy Oseko Vs Board of Governors Masai Girls High School (2011) eKLR** where a sum of Kshs.2,500,000/- was awarded.

Reference was also made to the case of **Joseph Maganga Kasha Vs Kenya Power and Lighting Co. Ltd (2012) eKLR** and that of **William Wagura Mague Vs Elbur Flora Limited (2012) eKLR** where a sum of 3 million was awarded in both cases.

The court has considered the submissions under this head vis-à-vis the injuries sustained by the Plaintiff and I find a sum of Kshs.4 million reasonable.

b. Diminished earning capacity

Under this head the plaintiff pleaded that he was working as a watchman in Nairobi before the accident. He was earning a total of Kshs.7000 per month. A sum of Kshs.2,436,000/- is suggested based on the aforesaid salary and a multiplier of 29 years. The case of **Ndoro Kaka Kakondo Vs Sale Manufacturers Ltd (2016) eKLR** and that of **Nyamira Tea Farmers Sacco Vs Wilfred Nyambati Keraite** are relied on.

The defendants have suggested a figure of Kshs.780,000/- based on a salary of 3,250/- and a multiplier of 20 years. They have relied on the case of **Buttler Vs Butler (1984) KLR 225**.

Damages for loss of future earning capacity and/or diminished earning capacity unlike damages for loss of earnings, is a type of remedy based on the claimants potential earning power. It focuses on the plaintiff's ability to earn income. The remedy is granted based on the difference in potential earning power, not on what the claimant actually earned in the past.

This court notes that though the plaintiff has pleaded that he was a watchman earning Kshs.7,000/- no evidence was availed to court to prove the said employment. In absence of that evidence, the court shall apply the minimum wage applicable as at that date which was Kshs.6,500/- for a watchman.

In the medical report, the doctor opines that he will require occupational therapy to help him adjust and earn a living. This therefore means that he is not completely incapable of earning a living. In the circumstances, I find a sum of Kshs.5,000/- reasonable as the multiplicand.

On the multiplier, the plaintiff suggested 29 years while the defendant suggested 20 years. I note that the plaintiff's age is not pleaded in the amended plaint but going by the medical report, he was aged 29 years at the material time. Assuming that he could have worked up to the age of 60 years, he had a balance of 31 years to work. However, taking into account the nature of the job of a watchman and the vagaries of life, a multiplier of 25 years is reasonable.

c. Future medical expenses

Under this head the plaintiff has suggested a total of Kshs.3,480,000/- being Kshs.10,000/- minimum

wage of a care nurse and a multiplier of 29 years.

In their submissions, the defendants have averred that no evidence has been adduced to show that the plaintiff shall require future specialized or specified medical care. The case of **Kenya Bus Services Ltd Vs Gituma (2004) 1 EA 91** was cited in which the court noted that future medical care in itself is special damages and is a fact that must be pleaded, if evidence thereon is to be led and if the court is to make an award in respect thereof. They also relied on the case of **Job Kenyase Miranyi vs Ezekiel Tochi & Another (2005) eKLR** where the Judge refused to award damages for future nursing care because it was not pleaded.

In this case, though the same was pleaded, it was not proved. No evidence was adduced to guide the court on the medical expenses required by the Plaintiff in future and the quantum thereof, so that the court can make a provision for it. I therefore decline to make an award under this head.

d. Loss of consortium

The plaintiff has submitted that a sum of Kshs.1,500,000/- be awarded under this head. He has relied on the case of **Mwaura Muiriri Vs Suera Flowers Ltd & Anor (2014) eKLR** and that of **Kimotho & others Vs Vesters & Anor (1988) KLR**.

On their part, the defendants have urged the court not to award damages under this head and have argued that the claim can only be made to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. They have relied on the case of **Edwin Otieno Japaso Vs Easy Coach Bus Company Limited (2016) eKLR**.

In the case of **Best Vs Samuel Fox & Co. Ltd (1951) 2KB639** as cited with approval in the case of **Kimotho & others Vs Vetsers & anor (supra)** loss of consortium is defined as:-

“Companionship, love, affection, comfort, mutual services, sexual intercourse – all belonging to the married state.”

The court went on further to state that:-

“Serious injury to any of the components that go to make consortium would seriously affect others. This claim can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A plaintiff who has himself suffered any injuries and as a result is unable to perform his marital duties would be properly compensated under the claim for loss of amenities and not loss of a claim for loss of consortium.”

e. Special damages

The plaintiff pleaded a total sum of Kshs.394,190/-. It is trite law that special damages have to be specifically pleaded and proved. See the cases of **National Social Security Fund Board of Trustees Vs Sifa International Ltd (2016) eKLR** which was cited in the case of **Coast Bus Service Ltd Vs Murunga Danyi & 2 others Civil Appeal No. 192/1992(UR)**. Special damages proved and pleaded in this case amounts to Kshs.388,990/- which I hereby award.

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

- a. Liability 80:20% in favour of the Plaintiff
- b. General damages – Kshs.4,000,000/-
- c. Damages for diminished earnings – Kshs.1,500,000/-

- d. Future medical expenses – nil
 - e. Loss of consortium – nil
 - f. Special damages – Kshs.399,900/-
- Subtotal – Kshs.5,888,990/-
- Less 20% - Kshs.1,177,798/-
- Grand total – Kshs.4,711,192/-**

The plaintiff shall get the costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 18th day of October, 2017

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L. NJUGUNA

JUDGE

In the presence of:-

.....*for the plaintiff*

.....*for the defendant*