



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 494 OF 2011

DEVNA PANDIT. PLAINTIFF

VERSUS

KENNEDY OTIENO OBARA. 1ST DEFENDANT

SAFARICOM LIMITED. 2ND DEFENDANT

J U D G M E N T

The Plaintiff herein filed this suit on the 11th day of November, 2011 against the Defendants claiming the following reliefs.

- a. Special damages of Ksh.2,010,398/-
- b. General damages for pain suffering and loss of amenities.
- c. Costs of the suit.
- d. Interest on a, b, and c at court Rates from the date hereof until payment in full.

The Plaintiff pleads that on or about the 12th day of November, 2008, he was lawfully travelling in motor vehicle Registration Number KAP 732Y along University Way in Nairobi when the 2nd Defendant's agent, servant and/or driver (being the first Defendant) so negligently, recklessly and carelessly drove, managed and/or controlled motor vehicle registration No. KAV 575M causing it to loose control and veer off its lane and collide with motor vehicle registration number KAP 732Y as a direct consequence of which the Plaintiff was seriously injured and has suffered loss and damage.

The Defendant filed a Memorandum of appearance on the 16th December, 2011 but did not file a defence to the claim. By a consent dated 6th December, 2012, parties agreed on a consent on liability at 85%:15%.

The matter came up before me on the 19th November, 2015 for assessment of damages and on the said date, parties agreed to put in the medical reports by Dr. Modi dated 18th November, 2009 and that of Dr. Timothy Kagonda dated 25th July, 2012 by consent without calling their makers.

The Plaintiff testified and told the court how he was involved in an accident on the 12th day of November, 2008 as a consequence of which he suffered the following injuries: -

- Multiple fractures on the left leg, hip, injuries to the face, right cheek was crushed and broken jaw.

He was examined by Doctor Modi who prepared a medical report for him which he produced as exhibit 1. He was also examined by Doctor Timothy Kagoda who prepared a second medical report dated 25th Day

of July, 2012 and which was produced as exhibit 2.

He was treated at various hospitals and he went through several procedures which costed him a lot of money. He also needed the assistance of a nurse because he was completely immobile. All that expenditure which is pleaded under special damages costed him a total of Ksh.1,338,698.81. He also pleaded future medical expenses of Ksh.670,000/- which he said is for the removal of the plates in his left leg, plastic surgery to remove the scars, physiotherapy for the dislocated limb and the fractured leg and for dental repair work because of the pain and the nerve that suffered.

He told the court that he experiences regular pain on his upper moral teeth, numbness in the right cheek, slight and impaired vision on the right eye. He is also not able to use his left leg and cannot do some postures. He urged the court to order that he be paid general and special damages as pleaded plus the costs of the suit.

I have carefully considered the evidence that was adduced by the Plaintiff and the submissions filed by the learned counsels. I have also perused the medical reports produced in evidence. According to Doctor Modi who first examined the Plaintiff, he sustained the following injuries.

- a. Fracture dislocation left hip with fracture head of femur.
- b. Fracture left tibia comminuted.
- c. Fracture right face/maxilla.

Dr. Modi examined the Plaintiff an year after the accident and in his report he observed that as at 1st August, 2009 the fractured tibia had not healed. He was admitted on 23rd September, 2009 for surgery that included removal of proximal locking screw (Dynamisation) but was discharged the same day with oral medications.

In his opinion fracture dislocation left hip may give post traumatic arthritis of the left hip joint in few years and when he develop an arthritis of the left hip joint, she will need total hip replacement. When he saw him, he was still under treatment and fracture left tibia had not yet healed completely. The interlocking nail left tibia will need removal when the fracture heals.

Regarding the future medical expenses, Dr. Modi states that the x-rays, physiotherapy will cost approximately Ksh.50,000/-, future surgery for the removal of the metal plate from the left tibia will cost approximately Ksh.200,000/- while surgery for total hip replacement will cost approximately one Million One Hundred Thousand Only.

Dr. Timothy Kagoda Byakika's medical report agrees with that of Mr. Modi on the injuries sustained by the Plaintiff and in his opinion and prognosis he states that the left hip injury was severe and destroyed the congruity of the joint in particular. Damage to the femoral head means interference with lining of the joint. As a result of this damage the Plaintiff has over 80% likelihood of developing post traumatic osteoarthritis of that hip joint. This will necessitate total hip replacement surgery as a remedy. The cost of such a procedure at a private hospital in Nairobi is about Ksh.650,000/- but he advises that to remove metal from the lower limb bones once the fractures have healed may cost Ksh.150,000/- at a private hospital. The maxillofacial injuries resulted in a mastication problems that are permanent and the facial scars are source of cosmetic embarrassment.

On the quantum of damages, I have perused the authorities submitted by both the Plaintiff and the Defendant. The Plaintiff has proposed a sum of Ksh.2,500,000/- and has cited the case of **Philip K Cheruiyot Vs Nebco K. Ltd HCCC No. 70/2000** where a sum of Ksh.600,000/- was awarded. He has also quoted the case of **Samuel Makumi Githambo Vs South Firms Ltd & Others NRB HCC No. 9 of 2008** where a sum of Ksh.2 million was awarded and lastly the case of **Joseph Musee Mua Vs Julius Mbogo Mugi & 3 Others HCCC No. 86 of 2008** when an Award of Ksh.1,500,000/- was made.

On their part, the Defendant has proposed a sum of Ksh.900,000/- and in so doing they have relied on the case of **Simon Githiomo Vs Peter Wachira, Nakuru, HCCC No. 91 of 1993** cited in the case of **The**

Power Lighting Company Ltd & Anor . Vs Zakayo Saitoti Naingola & Another [2008] eKLR, where the court awarded a sum of Ksh.350,000/-, the case **Margaret Muthoni Vs David Namu Muthoni & Henry Kirimi Nyagah Nairobi HCCC No. 148/2000** cited in the case of the **Power Lighting Company Ltd & Another Vs Zakayo Saitoti Naingola & Another [2008] eKLR** where s sum of Ksh.150,000/- was awarded and lastly the case of **Gibson Kariithi Kairu & another Vs Joseph Mutio Peter [2009] eKLR** where an award of Ksh.400,000/- was made.

Upon perusal of the authorities cited by the Plaintiff, the injuries cited in those authorities are more severer than the ones suffered by the Plaintiff herein while those of the Defendants cites injuries that are less severe than the ones sustained by the Plaintiff in the instant case.

In the circumstances of this case and taking into account the injuries sustained by the Plaintiff an award of Ksh. Two Million (2,000,000) is reasonable.

On special damages, the Plaintiff produced receipts of medical expenses totaling to Ksh.1,396,605/- and for future medical expenses a sum of Ksh.670,000/- was pleaded. I will not have any difficulty in awarding the same being the same figure that Dr. Timothy Kagoda Byakika who prepared the Plaintiff's second medical report at the request of the defendant has quoted. Special damages of Ksh.200/- and Ksh.1,500/- for the police abstract and for the medical report respectively were not proved and therefore the same are not awarded.

In the end, I enter judgment for the plaintiff against the Defendant as follows: -

- a. ***Special damages in the sum of Ksh.2,008,698/-***
- b. ***General damages for pain and suffering awarded in the sum of Ksh.2,000,000/- (Two Million Only).***
- c. ***Costs of the suit***

Dated, signed and delivered at Nairobi this 25th day of February, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff***

..... ***for the Defendant***