



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 145 OF 2009

ANTHONY MUNENE NYAGA.....PLAINTIFF

VERSUS

OKECH MOSES.....DEFENDANT

JUDGEMENT

1. The plaintiff **Anthony Munene Nyaga** sued the defendant, **Okech Moses**, for injuries suffered when he allegedly negligently drove the motor vehicle registration number KAM 419E knocking the plaintiff down while he was riding his motor cycle registration number KAW 288P on the road. The plaintiff prays for general damages, future medical expenses and special damages amounting to kshs 591,174/=.
2. The plaintiff called two witnesses to testify. PW1, Doctor **Washington Wokabi**, testified that he examined the plaintiff following the subject accident and established that the injuries suffered included Open fracture of Right Humerus and Traumatic Amputation of 3 right foot toes. He added that the plaintiff had been treated at Kenyatta National Hospital and admitted thrice. He stated further that in November 2008, the plaintiff was admitted to Kikuyu hospital to remove a metal plate to control infection and the toes finally healed well. He averred that the plaintiff complained of weakness and stiffness of his entire right limb hence not being able to use it to perform any duties. He also stated that the plaintiff could not wear shoes on his right leg and he confirmed that all the muscles of right upper limb were wasted and were smaller. He added that there was a pus discharge from the right arm, stiffness of the right shoulder, right elbow and right forearm with a weak grip. He also asserted that the plaintiff was lacking 3 outer toes and the remaining 2 were stiff. He concluded that the plaintiff will have difficulty walking due to the missing toes and that the condition of the right upper limb was unlikely to improve much, he opined that the plaintiff will require further surgical procedures for about kshs 120,000/= and assessed disability at 35%.
3. The plaintiff testified as PW2, where he stated that due to the accident he incurred huge expenses and spent most of the year 2008 in hospital. He produced the hospital receipts in evidence which included receipts of Kenyatta National Hospital, PCEA Kikuyu hospital, Ongata Rongai x-ray service medical and diagnostic centre, Karen Hospital, Fatima Health Centre Ongata Rongai, Aga Khan University Hospital and Diadems pharmacy. He claimed that he also visited **Doctor Kabuga** for treatment. He added that he is unable to use his right hand because it was completely fractured.
4. There was no appearance from the Defendant.
5. The plaintiff filed his written submissions, which I have taken into consideration. He averred that the defendant was served with the demand notice and a statutory notice was served on Blue Shield Insurance Company Limited and he was thereafter served with the plaint and summons to enter appearance but he failed to enter appearance consequently, an interlocutory judgement was entered against the defendant on 21st July 2011.

6. According to the court record, an interlocutory judgement was indeed entered on 21st July 2011 against the defendant and it was ordered that costs would await judgement after the matter is fixed for formal proof. The Plaintiff prayed for special damages amounting to kshs 591,174/=. He has attached receipts from various hospital and pharmacies amounting to kshs 829,179/=. He however pleaded medical expenses under special damages amounting to Kshs 582,774/=. He also pleaded doctors fees of kshs 8,000/= being the charges of the doctors report and attached a receipt of kshs 2,000/= and the doctor appeared to adduce evidence in court and categorically stated that he charges kshs 5,000/= for court attendance. The plaintiff further annexed two police abstracts and pleaded that each costs kshs 200/= though he did not attach the receipts, it is common knowledge that the same is usually obtained at a fee. It is trite law that the special damages must be specifically pleaded and strictly proved. The plaintiff pleaded a sum of kshs 591,174/=:, as I have stated above, the receipts annexed suggest that the sum was more than the pleaded amount, however, since he pleaded a total of kshs 582,774/= under medical expenses, I will award that sum plus kshs 7,000/= for doctor's attendance fee and for the medical report, kshs 500 for the copy of records and finally ksh 400/= being the amount incurred in obtaining the police abstract bringing it to a total of kshs 590,674/=
7. On the head of general damages, it was the doctor's evidence as adduced in court and set out in his report, that the plaintiff suffered compound (open) fractures of right humerus and Traumatic Amputation of 3 right foot toes. It is also clear that the plaintiff was in pain since he had to endure procedures that included the fixing of the fracture with metal plate twice and its removal. It is also evident that the plaintiff suffered weakness of the right limb and the right elbow that he is not able to carry out heavy work or lifting with the limb. Moreover, he is not able to walk in closed shoes or stand for long hours. The doctor further estimated permanent disability at 35% and opined that the plaintiff will require kshs 120,000/= for future surgeries.
8. The plaintiff on this head referred to the case of **Michael Njagi Karimi vs Gideon Ndungu Nguribu and Paul Kariuki Wanjohi HCCC 889 of 2004**, where the plaintiff suffered various fractured and underwent several surgeries and was awarded kshs 2,000,000/=. He further referred to the case of **Mwaura Muiruri vs Suera Flowers Limited & another HCCC 189 of 2009** where the plaintiff suffered injury to the right arm, the court granted him a sum of kshs 1,450,000/= and further granted damages for pain and suffering and loss of amenities. The plaintiff sought loss of amenities though he correctly pointed out the same is not pleaded. He also sought loss of earning capacity of kshs 500,000/=
9. I have perused the cases cited by the plaintiff, the first case of **Michael Njagi Karimi vs Gideon Ndungu Nguribu nd Paul Kariuki Wanjohi HCCC 889 of 2004**, the plaintiff suffered numerous injuries that included fracture of the arm, right humerus, swelling of the right forearm and fractures of the right radius ulna, injury of the lower limb involving the right leg that was tender and swollen and deformed as well as right tibia and fibular, deformity of the left thigh with apparent shortening causing fracture of the left femur. It is clear that the injuries suffered in that case were excessive to those suffered by the plaintiff in this case hence justifying the sum of kshs 2,000,000/= awarded. In the case of **Mwaura Muiruri supra**, the injuries suffered are not similar to the current case, they included, multiple lacerations on the face, soft tissue injuries on the chest cage, communicated fractures of the right humerus upper and lower thirds of the tibia and compound fractures of the right leg and upper lower 1/3 rd tibia fibula, which injuries were also excessive. In the circumstances, I will rely on the Court of Appeal case of **Paul N.Njoroge v Abdul Sabuni Sabonyo [2015] eKLR**, where the plaintiff suffered similar injuries to the plaintiff in this case. Here, the plaintiff suffered *Multiple communicated fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 cm, displaced fracture of the left shoulder blade, Swelling and stiffened knee and was awarded a sum of kshs 500,000/= for the general damages for pain suffering and loss of amenities*. In view of the injuries suffered, I award a sum of kshs 500,000/= for pain and suffering, I note that the plaintiff lost three toes and has problem wearing shoes and walking. It is evident therefore that he suffered loss of amenities since he will not be in position to walk with stability. Therefore, I will rely on the quoted case of **Mwaura Muiruri supra** and award the sum of kshs 300,000/= under this head.
10. On the head of loss of earning capacity, it was the evidence of the plaintiff that he is reverend. It was not clear how he would lose his earning capacity since the same was not submitted on. The plaintiff did not show how he will lose his earning capacity. I will therefore not grant any award

under this head.

11. On the head of future medical expenses, the doctor in his professional assessment opined that future medical surgery would be required that would cost the plaintiff kshs 120,000/=. Therefore it is only fair that I award the figure of **Kshs.120,000/= under this head.**

12. In summary, I enter judgment on quantum of Kshs. **1,510,674/=** made up as follows:-

- a. *General damages for pain and suffering*.....Kshs 500,000/=
- b. *General damages loss of amenities*.....Kshs. 300,000/=
- c. Future medical expenses.....Kshs 120,000/=
- d. *Special damages*Kshs 590,674/=

Total	<u>Ksh.1,510,674/=</u>
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28. I hereby award damages amounting to kshs **Ksh.1,510,674/=**. which sum shall carry interest at court rates from the date hereof till payment in full. The plaintiff shall also have the costs of the suit.

Dated, Signed and Delivered in open court this 20th day of May, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant