



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.151 OF 2009

DUNCAN MWANGI KIORIA.....PLAINTIFF

VERSUS

VALLEY BAKERY LIMITED1ST DEFENDANT

TITO KIPSANG RONO.....2ND DEFENDANT

NATHAN KIPKOECH CHEMIS.....3RD DEFENDANT

JUDGMENT

1. The plaintiff Duncan Mwangi Kioria by his plaint dated 4th February 2009 and filed in court on 26th March 2009 and as amended on 1st April 2014 with leave of court, instituted this suit against the three original defendants Valley Bakery Limited, Tito Kipsang Rono and Nathan Kipkoech Chemis seeking for general and special damages arising from an alleged road traffic accident which occurred on or about 28th April 2007 wherein the plaintiff was seriously injured.

2. The plaintiff claimed that the accident was solely caused by the negligence and or carelessness of the defendants. The plaintiff claimed that the 2nd defendant was the driver of the accident motor vehicle registration number KAJ 476 L and that he drove the said vehicle on behalf of or for the benefit of the 1st defendant registered owner thereof and that the 3rd defendant was the actual or beneficial owner of the said motor vehicle. Further, that the 2nd defendant driver was negligent in that:

a. He drove the lorry registration no. KAJ 476 L in such high speed in the circumstances.

b. He failed to control the said lorry to avoid it from knocking down the plaintiff.

c. He drove a defective motor vehicle.

d. He failed to check and ascertain himself as to the efficiency of the motor vehicle before commencing his journey.

e. Driving a motor vehicle which had no or no proper brakes.

f. He caused the accident.

3. The plaintiff claimed that he was lawfully riding a bicycle along Naivasha Road at the material time of the accident and that by the matters aforesaid, he sustained serious bodily injuries and suffered loss and damage.

4. Particulars of injuries sustained as pleaded are:

a. Segmental fracture of the left femur.

b. Fracture mid shaft right femur.

c. Fracture right inferior pubic ramus.

d. Fracture of the left 5th, 6th and 7th ribs.

e. Degloving injury groin and scrotum.

5. The plaintiff also claimed that as a result of the aforesaid injuries, he was admitted at Kenyatta National Hospital for four(4) months; received open reduction and internal fixation of the left femoral fracture; and skeletal traction for right femoral fracture.

6. The plaintiff also claimed for special damages of shs 179,385 made up of:

a. Medical charges shs 176,885

b. Medical report shs 2,000

c. Copy of records shs 500

Total shs 179,385

7. The plaintiff further claimed for future medical expenses and loss of earning capacity and general damages; costs of the suit and interest.

8. On 21st July 2011 the plaintiff sought for extension of validity of the summons to enter appearance and Honourable Dulu J by his ruling granted the prayers sought. The plaintiff later did withdraw the suit against the 1st and 2nd defendants, leaving only the suit against the 3rd defendant. On 21st January 2015, interlocutory judgment against the 3rd defendant Nathan Kipkoech Chemis was entered in default of appearance and defence.

9. On 1st October 2014, the suit proceeded to hearing as formal proof on the understanding that interlocutory judgment had been entered as requested. However, upon discovery that no such judgment was entered, the court recalled the proceedings and were only validated on 7th March 2016 after judgment was validly entered.

10. The plaintiff testified as PW2 and called PW1 Dr George Kungu Mwaura who testified on oath that he was a registered medical practitioner. That he practices in Kikuyu, T/a Kinoo Medical Clinic. That he qualified for Bachelor of Medicine and Bachelor of Surgery and had post graduate qualifications from the University of Nairobi. PW1 stated that he knew the plaintiff Duncan Mwangi. That he examined the plaintiff on 29th September 2014 after the latter's involvement in a road traffic accident on 28th April 2007.

11. PW1 stated that the plaintiff sustained injuries involving

i. 2 Fractures to his left thigh bone

ii. I fracture right thigh bone

iii. Fracture to the right pelvic bone.

iv. Fracture to the left 5th, 6th, 7th ribs.

v. Degloving (open wounds) on the lower part of his abdomen and private parts.

12. That the plaintiff suffered pain, swelling and bleeding. He was treated at Kenyatta National Hospital where he was admitted for 4 months and metal implants inserted in the fracture sites.

13. On being examined by Dr. George Kungu Mwaura, the plaintiff was found to have had a fair recovery of the injuries but with the following complications:

i. Left lower limb was shortened by 1¼” and he has a limping gait;

ii. He experiences pain in the left thigh and knee on exertion and has stiffness on his left knee.

iii. There are residual scars on the left thigh and pelvis

iv. He has pain in these hips and back on exertion.

v. The metal implants inserted in his left thigh bone in situ and future surgery to remove it will cost him shs 100,000 at Kenyatta National Hospital.

14. The Doctor also found that the plaintiff had suffered both soft and grievous harm injuries and that the plaintiff has 15% permanent incapacity of his left lower limb. The doctor relied on the patient's history from the plaintiff himself and two discharge summaries from Kenyatta National Hospital; a P3 Form; 3 Hospital attendance cards from Kenyatta National Hospital and a previous medical report prepared by Doctor Moses Kinuthia. Dr Mwaura charged shs 3000/- for the medical report and kshs 5,000/- for court attendance. The Doctor produced his signed medical report and his two receipts for the charges as exhibit Pex1 for the plaintiff.

15. The plaintiff Duncan Mwangi Kiora testified as PW2 and adopted his witness statement recorded and signed and filed in court on 25th March 2013 as his evidence in chief, after correcting the error on the date of accident to read 28th April 2007 and not 27th April 2007 as erroneously typed.

16. Mr Mwangi testified that he was on the material date of the pleaded accident riding his bicycle along Naivasha road towards Waithaka when the motor vehicle Isuzu Lorry registration No. KAJ 476 L coming from the opposite direction lost control, veered off the road and hit him. That he was riding on his left lane and side of the road facing Waithaka direction whereas the lorry was on his right side coming from the opposite direction.

17. That the lorry trapped the plaintiff pulled him then dropped him on the road. The lorry proceeded and overturned.

18. That the plaintiff never lost consciousness. Many people gathered at the scene of accident and a good Samaritan offered to get assistance and the plaintiff was taken to Kenyatta National Hospital where he was admitted for 4 months and operated on severally owing to the multiple fractures that he sustained in the accident which included fractures on the left leg, ribs, deep wounds on the stomach, testis bruised. Metal implants were inserted in the fracture sites. He confirmed the injuries as narrated by his doctor who had testified as PW1. After he was discharged from hospital, the plaintiff continued with physiotherapy and clinic checks up. In 2009 he was operated on for the second time to remove the metal implants and another metal inserted. He could not walk alone. He used crutches. Later, he was operated on the right leg which had also fractured. He testified that he still had the metal implants in situ the fracture sites at the time of the hearing of the suit, which will require removal.

19. The plaintiff testified that he reported to Kabete Police Station the occurrence of the material accident although the police had followed him at the Kenya National Hospital a day after the said accident. The police issued him with a police abstract whom he produced as P ex 2 and P3 form produced as PEx 3.

20. The plaintiff also produced a demand notice issued to the defendant as PEx 12. He also produced a medical report by Dr Kinuthia and receipt for shs 2000 as P Ex 4a and 4b. He produced receipts for medical expenses paid to the Kenyatta National Hospital for shs 50,000 as P ex 5. He produced another bundle of receipts from Kenyatta National Hospital amounting to shs 176,685 as P ex 6 and a credit agreement with Kenyatta National Hospital before being discharged from hospital, with a promise to pay the balance of shs 72,505 which he produced as P ex 7.

21. The plaintiff also produced photographs taken of the scene of the accident by his brother Julius Githaiga the same day of accident as PEx 8. He stated that the accident occurred between 1pm and 2pm.

22. The plaintiff further testified that prior to the material accident; he worked as a contractor in metal construction. He produced a photograph PW 9 showing him at work. That he used to earn kshs 450/- per day as a foreman at various construction sites but that since the accident he has never gone back to work. He now sells sweets. He was married with 3 children who are school going. He used to pay their school fees but now he is unable to do so and has to be assisted by well wishers. He testified that he still went to hospitals for he had not healed. He still had metals in his body and walked with difficulties limping.

23. The plaintiff blamed the driver and owner of the accident motor vehicle because the driver crushed him after losing control of the lorry from the opposite direction after it avoided crushing into other vehicles at a bus stage and that since he was in the opposite direction, he could not avoid being hit.

24. The plaintiff stated that he had sued the 3rd defendant alone because the 3rd defendant was the actual owner of the accident motor vehicle, having purchased it from the first defendant registered owner. He produced P ex 10 letter showing change of ownership of the accident motor vehicle at the material time of the accident. He also produced P ex 11 a Sale Agreement for the said motor vehicle by **Valley Bakery Ltd to Nathan Kipkoech Chemis**.

25. The plaintiff also produced PEx 13 copy of search which he had done at Kenya Revenue Authority showing who the registered owner of the accident motor vehicle was.

26. The plaintiff prayed for compensation for the injuries he sustained, special damages, costs and interest.

27. In his written submissions, the plaintiff urged the court to consider two issues.

1. Liability

2. Quantum of damages

28. On liability, it was submitted that the evidence on record was clear that the plaintiff was knocked by the subject motor vehicle when he was riding a bicycle on his side of the road and that the defendant's motor vehicle came from the opposite direction and crushed him hence the driver was negligent and therefore the owner of the motor vehicle was vicariously liable for the negligent acts of the driver at 100% and that the court should find so.

29. On damages, the plaintiff's counsel submitted that on the basis of the pleadings and testimony of the plaintiff and that of this doctor PW1 and medical reports produced, and the resultant complications following the accident, the court should award him shs 150,000 for future surgical removal of the implant and on general damages for pain, suffering and loss of amenities, the plaintiff's counsel prayed for shs 2,000,000 based on the case of **Jane Bashu Shah V Albert Kibura Kibui & Another**

Nairobi HCC 3654/89.

30. The plaintiff's counsel also prayed for future earning capacity estimated at kshs 20,000 per month for 27 years since he was 43 years and multiply it by 15% decree of permanent incapacity as assessed by his doctor.

31. On special damages, the plaintiff prayed for shs 184,385. He also prayed for costs and interest. The total damages prayed for was as follows.

<i>i. General damages</i>	<i>shs 2,000,000</i>
<i>ii. Loss of earning capacity</i>	<i>shs 972,000</i>
<i>iii. Future medical expenses</i>	<i>shs 150,000</i>
<i>iv. Special damages</i>	<i>shs 184,385</i>
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	<i>Total 3,306,385</i>

Determination

32. I have carefully considered the plaintiff's claim as pleaded. I have also considered his testimony on oath and the testimony of Dr George Mwaura. I have given equal consideration to all the exhibits produced by the plaintiff and his witness which include medical reports medical notes, P3 form, police abstract, evidence of ownership of the accident motor vehicle and photographs taken at the scene of the accident. I have also considered the submissions filed by the plaintiff's advocate together with the authorities cited on quantum of damages payable.

33. In my humble view the issues for determination in this case are:

- i. Who was to blame for the accident?*
- ii. Was the plaintiff injured?*
- iii. How much quantum is payable*
- iv. What orders should this court make?*
- v. Who should bear cost of this suit?*

34. On the first issue of who was to blame for the material accident, the law is clear that he who alleges must prove(see Sections 107 -109 of the Evidence Act). In the instant case, the plaintiff testified on oath that on 28th April 2007 he was lawfully riding a bicycle along Naivasha Road and was on his left side of the road when the defendant's lorry registration No. KAJ 476L came from the opposite direction, after avoiding to ram into vehicles at a stage, lost control and went and crushed into the plaintiff. It then overturned.

35. The only person who can tell this court why the lorry KAJ 476L lost control left its side of the road and went onto the opposite lane where the plaintiff was riding a bicycle, crushing him and then overturning is the driver of the accident motor vehicle. However, despite the owner of the accident motor vehicle being served with summons to enter appearance, he neither entered appearance nor filed any defence to this suit therefore interlocutory judgment in default of defence was entered and the plaintiff allowed to formally prove his case.

36. It is now trite law that motor vehicles which are properly maintained/managed and carefully driven do not just lose control and crush into others/people. There must be a cause. In my view, the plaintiff has,

on a balance of probabilities discharged the burden of proving that the defendant's driver was negligent in the manner in which he drove, managed and controlled the accident motor vehicle thereby losing control and crushing the plaintiff who was on his correct side of the road and in the opposite direction. The plaintiff's evidence is unrebutted.

37. Under Section 112 of the Evidence Act, "*when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*"

38. In this case, the act of losing control of the lorry was within the defendant's driver's knowledge. The defendant failed to enter appearance and or file a defence or testify as to why the driver lost control of the motor vehicle and knocked an innocent road user- the plaintiff.

39. In the premise, I am satisfied that the plaintiff has on a balance of probabilities discharged the burden of proving negligence on the part of the defendant who is vicariously liable for the acts and omissions of his driver, servant/agent then in control, and or management of the accident motor vehicle KAJ 476L. I find the defendant 100% liable for the accident.

40. On whether the plaintiff was injured following the material accident, the plaintiff pleaded and adduced uncontroverted evidence on oath concerning the injuries that he sustained. He also produced two medical reports one by Dr George Mwaura and the other by Dr Moses Kinuthia as well as medical discharge summaries from Kenyatta National Hospital which all corroborate his testimony that he was indeed injured.

41. The court had the opportunity to see the plaintiff in court as he testified and I have no doubt in mind that the plaintiff sustained the serious injuries that he pleaded and as confirmed by the two medical reports produced as exhibits.

42. The latest medical report by Dr George Mwaura of Kinoo Medical Clinic prepared on 29th September 2014 which was a few days to the hearing of this case show and compare well with the medical treatment notes from Kenyatta National Hospital, the P3 and the medical report of Dr Moses Kinuthia prepared on 29th May 2008. The injuries sustained by the plaintiff were consistent with the accident as confirmed by the P3 form. They were classified as grievous harm. Those injuries included:

1. *Segmental fracture -left femur*
2. *Fracture -right femur mid ?*
3. *Fracture -right inferior pubic ramus*
4. *Fracture left 5,6,7 ribs*
5. *Degloving injury groin and scrotum*
6. *Pain, swelling and bleeding*

43. The plaintiff as at the time of the hearing had healed scars with a shortened limb, stiff knee and had metal implants insitu which will require removal at a later stage at a cost of shs 100,000. He had undergone two operations on the fractured legs. The doctor assessed the permanent degree of incapacity at 15% of the left lower limb.

44. Accordingly, on the evidence adduced in court, I find that the plaintiff sustained injuries as a result of the accident in question as pleaded.

45. On what damages are awardable to the plaintiff, having found that the plaintiff was involved in the material accident, that the defendant is 100% liable and that the plaintiff sustained serious injuries

that have left him with a permanent disability of a shortened left leg by 1.25 inches, I find that he is entitled to damages.

46. Commencing with general damages, the principles applicable in the assessment of general damages, are first, that the trial court in assessing damages exercises its discretion. In exercising such discretion, the trial court must nonetheless be fair, reasonable, be moderate and ensure that similar cases where similar awards were made are applied, having regard to the lapse of time and inflationary trends.

47. In this case, the plaintiff's counsel urged the court to award the plaintiff shs 2,000,000 general damages for pain and suffering relying on the case of **Jane Bashu Shah**(supra) where the plaintiff aged 41 years sustained injuries involving:

i. fractures of the left patella, left upper pubic ramus, left ischium of the pelvis, left clavicle, lacerations of the scalp and face and injury to the left eye resulting into total blindness that eye.

ii. Fracture of the left mandible

iii. Unconscious for some time and was hospitalized for 33 days. She recovered well from the injuries (fractures) and had plastic surgery done to her face. Her total physical disability was assessed at 40%. The plaintiff in that case lost her employment and a new manager was employed to replace her. She was awarded kshs 800,000 general damages for pain and suffering and shs 1,710,000 loss of earnings using a multiplier of 15 years. The above case was a 1991 decision.

48. In the instant case, comparing the injuries sustained by the plaintiff with those sustained in the cited authority, albeit the two plaintiffs sustained serious multiple injuries, but it is clear to me from the facts of that case that the plaintiff in the **Jane Bashu Shah** (supra) case sustained more serious injuries which not only involved multiple injuries but total loss of the ability to see in the left eye. Further, her face was disfigured and she required plastic surgery. Her total disability was assessed at 40% unlike the plaintiff's which was assessed at 15% in the left limb only.

49. Further, in the instant case the plaintiff has not shown by way of any documentation that he was employed and lost his job following the accident and the injuries he sustained. This is not to say that the plaintiff was not engaged in any gainful employment but that for him to do the kind of jobs that he alleges to have been doing, he needed to produce some evidence that he was trained for that job which in my view, not everyone can do, since it is some kind of specialized job- that of fixing steel in the construction industry.

50. Accordingly, doing the best I can, I would, in the circumstances of this case, taking into account the serious injuries sustained by the plaintiff which left him with a limping gait and multiple operation awaiting him, award him kshs 1,500,000 general damages for pain and suffering and loss of amenities.

51. The plaintiff also pleaded damages for loss of future earning capacity. He testified that he used to earn kshs 450/- per day from his work. He however did not produce any evidence of any contract that he was ever assigned and paid that much per day. His advocate prayed for shs 20,000 per month.

52. I have examined the plaint and filed and as amended orally on 1st October 2014 with leave of the court. The plaintiff only added in his prayers, prayer **(d) "Loss of earning capacity and future medical expenses."**

53. He did not, on the body of the plaint set the basis for seeking for loss of earning capacity. The law is clear that a party is bound by his or her pleadings. The plaintiff in my humble view failed to sufficiently plead in his plaint, the claim for loss of future earning capacity. It was not sufficient for him to pray for it and give evidence on it, which evidence I have found, is not even sufficient to found a claim for loss of future earning capacity. That being the case, I decline to award him that damage as it was not properly pleaded and or proved to the required standard, on a balance of probabilities.

54. On the prayer for special damages, the law is that they must not only be specifically pleaded but they must be strictly proved. The plaintiff pleaded special damages as follows:

1. Medical charges shs 176,885

2. Medical report shs 2,000

3. Copy of records shs 5,000

Total shs 179,385

55. I have examined the receipts for medical expenses. They all amount to kshs 60,050 and not kshs 176,885 pleaded. Accordingly, I only award the plaintiff kshs 60,050 for medical expenses as proven. To this figure, add shs 2,000 for medical report and kshs 500/- for copy of records. The total comes to kshs 62,550/- which I award the plaintiff.

Total special damages shs 62,550

56. There was also the prayer for future medical expenses which the doctor confirmed to be in the range of kshs 100,000 – 150,000/- at Kenyatta National Hospital for removal of the metal implant. I would award him kshs 150,000/- taking into account inflation on the cost of operation.

57. In addition, the plaintiff in his testimony and submissions also prayed for a sum of shs 72,505 which is the credit given to him to pay at a later date before he could be discharged from Kenyatta National Hospital. In my view, that figure is not awardable because it was not specifically pleaded and or strictly proved. The document P EX 7 is no more than an invoice for the plaintiff to settle outstanding medical bill. It is not evidence of payment and therefore not a special damage incurred capable of being awarded by the court. I reject it.

58. In the end, I enter judgment for the plaintiff against the defendant Nathan Kipkoech Chemis on liability at 100%.

59. On damages:

a. Special damages

i. Medical expenses shs 62,550

ii. Cost of future medical expenses shs 150,000

b. General damages:

i. Pain and suffering shs 1,500,000

Total damages shs 1,712,550 One million, seven hundred and twelve thousand, five hundred and fifty only.

60. I also award to the plaintiff costs of this suit and interest at court rates. On general damages, interest to accrue from the date of this judgment until payment in full. On special damages of shs 62,500, interest will accrue from the date of filing suit until payment in full.

61. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of July 2016.

R.E. ABURILI

JUDGE