



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 392 OF 2009

PETER MWAI MUREITHI..... PLAINTIFF

V E R S U S –

KIMAMA MBUGUA1ST DEFENDANT

BEDAN KIARIE NGIGE..... 2ND DEFENDANT

TIMOTHY KARIUKI NJOROGE..... 3RD DEFENDANT

JUDGMENT

1) Peter Mwai Muriithi, the Plaintiff herein filed a compensatory suit vide the plaint dated 16.07.2009 whereof he sought for judgement against Kimama Mbugua, Bedan Kiarie Ngigi and Timothy Kariuki Njoroge the 1st, 2nd and 3rd Defendants respectively in the following terms interalia:

- a) General damages***
- b) Special damages at kshs.611,730/20***
- c) Cost of future operation at ksh.70,000/=***
- d) Loss of earnings at ksh.7,698,000/=***
- e) Costs***
- f) Interest at court rates on a, b, c and d above.***

2. When served, the 2nd and 3rd Defendants entered appearance and filed a defence to deny the Plaintiff's claim. The case as against the 1st Defendant was withdrawn before the hearing of this suit commenced.

3. When this suit came up for hearing, the Plaintiff was the only party who turned up. At the close of the Plaintiff's evidence, the Plaintiff's advocate successfully applied for the 2nd and 3rd Defendant's case to be closed. Peter Mwai Muriithi (PW1) appeared before this court and adopted the contents of his witness statement executed on 2nd April 2012 together with the documents accompanying the witness statement as his evidence. PW1 informed this court that he is a businessman who is engaged in the trade of supplying building materials to construction sites under the name and style of Pemwamu Suppliers. He stated that on 1st August 2006, he hired lorries registration nos. KAH 676H and KWC 051 from Dagoretti corner, Nairobi to ferry stones from Ngong to Spring valley where he had an order to supply. PW1 stated

that he boarded lorry registration no. KWC 051 and lorry registration KAH 676H was ahead of the one boarded by the Plaintiff. The Plaintiff sat in front of KWC 051 and witnessed KAH 676H get stalled ahead of them. PW1 further stated that it appeared to have been defeated to climb the small hill. The Plaintiff stated that the driver of the lorry he was boarding increased his speed to enable him overtake. When he came near the stalled lorry it is said the driver overtook it and suddenly a prado emerged from the opposite direction forcing the lorry driver to swerve to the left thereby knocking lorry KAH 676H which by then was stationary. PW1 said he was trapped in the wreckage and people had to use saws and a mallet to remove him. He was taken to Kenyatta National Hospital where he was admitted for a month. PW1 said as a result of the accident he suffered the following injuries:

- i. Fracture of the neck.
- ii. Fracture of the left femur
- iii. Multiple fractures of the shaft of the left femur
- iv. Fracture of the left tibia
- iv. Abrasions on the right side of the abdomen

4. The Plaintiff had to undergo a major surgical procedures on the left leg. Upon discharge from Kenyatta National Hospital, the Plaintiff continued seek for further treatment at P.C.E.A Kikuyu, Orthopaedic and Rehabilitation centre where he also attended physiotherapy. PW1 also sought for treatment at Nembu Medical centre and labs where he also saw Dr. H. O. Ong'ango, a consultant orthopaedic and trauma surgeon. PW1 produced documents also showing he used to hire a taxi at ksh.3,000/= per trip to take him to and from hospital due to his condition. The Plaintiff also stated that he was bed-ridden for the entire of 2007 and the period between April and May 2008. He stated that his line of business required that he travels from his home at Kikuyu to Juja where he sourced for building stones and back to various construction sites, but was unable to carry out those tasks due to the accident for a period of two years.

5. It is the evidence of PW1 that before the accident, he used to get a monthly income of ksh.32,750/= and on the basis of this figure, the Plaintiff now claims ksh.7,698,800/= as loss of earnings. The Plaintiff also claimed that he spent about ksh.611,730/= on medical treatment, physiotherapy, transport to and from various hospitals. On the basis of his evidence and the documents tendered, the Plaintiff urged this court to pronounce judgment in his favour as prayed in the plaint. At the close of evidence this court invited the Plaintiff to file written submissions which he did.

6. After considering the evidence tendered plus the submissions two issues have arisen to be determined by this court. First is the question of liability and the other is quantum.

7. On liability, the Plaintiff personally testified and presented documentary evidence. The evidence show that the Plaintiff boarded lorry registration number KWC 051. He stated that the same was driven at very high speed. The driver attempted to overtake lorry KAH 676H which was stalled in the middle of the road but swerve when he saw an oncoming prado thus knocking the stationary lorry. As a result of the crash the Plaintiff suffered serious injuries shown in the medical reports produced before this court. The Plaintiff sustained multiple fractures of the bones of the left leg including the neck and shaft of the left femur bone and communitated fractures of the upper end left tibia and abrasions on the abdomen. The Plaintiff later reported the accident at Kilimani Police station where he was issued with a police abstract form and a P3 form. The police blamed the driver of the lorry registration KWC 051 and charged him with careless driving. The driver (3rd Defendant) was convicted on his own plea of guilty before Kibera Traffic Court. He was sentenced to pay a fine of ksh.8,000/=. The aforesaid motor vehicle was at the material time registered in the name of Kimama Mbugua but evidence was tendered to show that the lorry had actually been sold of to Bedan Kiarie Ngige. The 2nd and 3rd Defendants filed a defence to deny the Plaintiff's claim but they did not attend court to defend the suit thus the Plaintiff was permitted to proceed exparte. I am satisfied that on the basis of the evidence tendered that the Plaintiff has proved to the required standard in civil cases that the 2nd and 3rd Defendants are wholly to blame for the accident. I find

them jointly and severally liable.

8. The question of quantum has been addressed in detail by the Plaintiff. I have already identified the kind of injuries the Plaintiff suffered as a result of the road traffic accident. On the head of general damages for pain and suffering, the Plaintiff has proposed to be awarded kshs.3,000,000/=. I have considered the authorities supplied namely

i. Mombasa H.C.C.C no. 79 of 2012 Gabriel Mwashuma =vs= Mohamed Sajjad & Another (unreported)

ii. Nairobi H.C.C.C. No. 728 of 2007, Regina Mwikali Wilson =vs= Stephen Gichuhi & Another

iii. Nakuru H.C.C.C. no. 68 of 2005, Charles Wanyoike Githuka =vs= Joseph Mwangi Thuo & others.

The above cases are in respect to near similar injuries to the instant case.

9. In the aforesaid cases, this court awarded between ksh.2,000,000/= and ksh.3,000,000/=.

10. Upon taking into account the nature of injuries and comparable awards I am convinced an award of ksh.3,000,000/= is reasonable

11. On the second head the Plaintiff claims ksh.250,000/= for future medical expenses. The Plaintiff has stated that the doctor recommended that he will be required to undergo surgery to remove the metal implant at a cost of ksh.70,000/= ten (10) years ago. He has asked this court to take into account the inflation that has taken place since then and proceed to award him ksh.250,000/=. The claim is in the form of special damage. The Plaintiff can only be awarded what he pleaded for in the plaint which is ksh.70,000/=. I find the claim proved and reasonable. I award his kshs.70,000/= for costs of future operation.

12. The Plaintiff has also beseeched this court to award him ksh.7,698,000/= for loss of earnings for 24 months. The Plaintiff said that he used to operate under the business name Pemwamu suppliers which posted huge profits before he was involved in the accident. He presented documents giving the details of its existence and profits. He said during the period of his recuperation his business suffered great losses and was forced to close down. He claimed he used to get ksh.320,750/= as profit per month. He said he did not work for 24 months hence he should be compensated as proposed herein.

13. I have carefully considered this prayer and I am unable to make such an award. To begin with, the kind of work the Plaintiff cannot be said to require his personal attention. It was incumbent upon him to minimise his losses by hiring someone to supply the materials. I also doubt whether the business was going to be as regular as it is shown. It is possible for the Plaintiff to earn ks.320,750/= per month as profit. It is the evidence of the Plaintiff that he was admitted to Kenyatta National Hospital for one month after which he was discharged and he had to seek for further medical treatment at P.C.E.A Kikuyu which is near the Plaintiff's home. In my humble assessment I am convinced that the Plaintiff though bed-ridden would have been in a position to coordinate his activities from his bed using a third party say after three months. I cannot tell how much he used to pay himself as salary per month hence it is difficult to discount that amount. In the circumstances I instead award the Plaintiff ksh.962,250/= damages for loss of earnings for three months calculated as follows:

$$320,750 \times 3 = 962,250/=$$

14. The Plaintiff has also prayed for special damages in the sum of kshs.611,730. I have examined the receipts and I am satisfied that the Plaintiff has tendered credible evidence to prove that he spent ksh.291,130/20 on medical expenses and kshs,2,000 on medical report plus ksh.100/= on police abstract. The Plaintiff has also produced receipts showing he spent ksh.320,600/= on hiring a taxi to take him to

hospital for physiotherapy. He claimed he used to pay ksh.3,000/= per trip. It is the evidence of the Plaintiff that P.C.E.A Kikuyu was not far from his home. I find that amount charged by the taxi operator of ksh.3,000/= per trip to be exorbitant and exaggerated. In my assessment and in the circumstances of this case I think an award of ksh.1,500/= per trip will represent a reasonable estimate. Consequently I award the Plaintiff ksh.160,300/= as transport.

15. In the end I enter judgment in favour of the Plaintiff and against the 2nd and 3rd Defendants as follows:

i. General damages for pain and suffering ksh.3,000,000/=

ii. Cost of operation ksh. 70,000/=

iii. Loss of earnings ksh. 962,250/=

iv. Special damages

a) Medical expenses ksh. 291,130/20

b) Medical report ksh. 2,000/=

c) Police abstract ksh. 200/=

d) Transport (taxi) ksh. 160,300/=

v. Grand total of (i), (ii), (iii), (iv) and

(v) above **ksh.4,485,880/20**

vi. Costs of the suit.

vii. Interest at court rates of (i), (ii), (iii), (iv) and (v) from the date of judgement until full payment.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant