



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 452 OF 2014

ANDERSON NYAGA WACHIRA.....PLAINTIFF

V E R S U S

SIMON NJUGUNA WAMBUGU.....DEFENDANT

JUDGEMENT

1. The plaintiff vide a plaint dated 22nd December 2014 instituted this suit where he claimed that the defendant illegally and violently mismanaged a firearm hence shooting at him. He subsequently sustained a gunshot wound on his right shoulder with the bullet exiting his body on the left side of his neck causing him serious injuries. He therefore prays for general damages, special damages, costs and interest.

2. The defendant did not defend the suit. Efforts to serve him proved futile as a result of which the plaintiff sought the leave of court to effect substituted service. Hon. Aburili Judge granted leave for the plaintiff to serve in at least one daily newspaper of nationwide circulation and she gave the defendant 21 days within which to enter appearance. The defendant failed to enter appearance and interlocutory judgment against him was entered on 26th October 2015.

3. The matter thereafter came up for formal proof before this court on 4th July 2016. The plaintiff adopted his witness statement as his evidence. He further produced certain documents in evidence in support of his case. They included: the discharge summary from Kenyatta National Hospital dated 10th October 2012 which was marked as Pexh 1, medical assessment from Kiambu District Hospital marked as Pecxh 2, P3 form issued by Kasarani Police Station marked as Pexh 3. A copy of the judgment delivered by Makadara Chief magistrate dated 16th November 2014 marked as Pexh 4, two medical reports prepared by Dr. Wambugu dated 21st April 2016 and the other dated 22nd June 2016 and produced as Pexh 5(a) and Pexh 5(b). He further testified that he is completely dependent on caretakers since he is confined to a wheel chair because he is paralysed from the chest downwards. He stated that he has lost control of passage of urine and stool and is connected to a catheter. He claims that he requires physiotherapy three times a week where he is charged ksh.1,000 per session. He also averred that he uses diapers and has regular check-up where he pays kshs.500/= per visit. He further asserted that he uses antibiotics and an electric wheel chair and special mattress that costs kshs.60,000/=. He avers that he relies on well wishers and that he used personal savings and donations from his friends to settle his hospital bills which went into millions. He testified that he pays his care takers ksh.18,000/= per month which costs keep rising and further that he sees counsellors to help him cope.

4. The plaintiff also filed his written submissions where in addition to the evidence submitted that defendant did not deny shooting the plaintiff even during the hearing of the traffic case number 6262 of 2011. He argued that the recklessness of the defendant in handling his firearm caused him to sustain

injuries of the spinal cord causing the plaintiff to spend close to one year in different hospitals, paralysed and confined to a wheel chair for the rest of his life and unable to take care of his family. He stated that the defendant was found guilty of the offence of assault and causing grievous harm and convicted which conviction was neither appealed from or quashed. He therefore sought damages on various headings.

5. The issue for determination here are the twin issues of liability and quantum. The question arising hereof is whether the defendant was liable. It is the plaintiff's case that on 26th December 2011, he was travelling home with his friend Brian Kuria along Kasarani-Mwiki road aboard a private motor vehicle when they came upon a traffic accident scene involving two motor vehicles. According to the plaintiff one of the motor vehicle registration number KAJ 702P belonged to the defendant. He stated that they parked their motor vehicle and proceeded to the scene to establish what had happened. Upon gathering from the crowd that the defendant was to blame for the accident, they decided to continue with their journey. It was at that time that they were heading back to their motor vehicle that the defendant recklessly and without any provocation fired his fire arm aimlessly and shot the plaintiff.

I note from the plaintiff's list of documents following the incident, the defendant was subsequently charged with the offence of grievous harm under Section 234 of the Penal Code and he was tried in the Chief Magistrates court at Makadara. Hon. E. Nyongesa SRM heard the case no. 6262 of 2011 and found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict the defendant.

The defendant during those proceedings admitted to shooting the plaintiff and only claimed that he had no intention to do so though the plaintiff had attacked him. I am therefore convinced that the defendant through his admission is solely liable for the shooting that caused the plaintiff the severe injuries and I hereby hold him wholly liable.

6. On quantum, under the head of special damages the plaintiff sought a sum of ksh.6,000,000/= being the amount spent on medical expenses. To be specific, he claimed that the sum was used to cater for hospital bills, purchase of medicine, paying for therapy, counselling sessions and also acquisition of a wheelchair, catheters, uridoms, adult diapers and a hydraulic mattress. It is trite law that special damages must not only be specifically pleaded but must be strictly proved. That was not the case in the present case. The plaintiff is claiming kshs.6,000,000/= but he did not plead any monies but only claimed in his plaint that he will give the particulars. In addition to that, he failed to adduce any receipts to prove the cost of the wheel chair, hospital bills, purchase of medicine, payments made for therapy, counselling sessions, hydraulic mattress, catheters and uridoms adult diapers. I am therefore not able to award any sum under this head.

7. Loss of earning capacity On this head the plaintiff submitted that he worked in the informal sector as an information technology technician earning a minimum of ksh.150,000 per month. He however did not adduce any evidence to prove this claim. It is therefore not clear whether the plaintiff was earning sum of ksh.150,000/= per month as an IT expert. Without such proof, I am inclined to use a multiplicand of ksh.10,000, being the minimum wage payable under minimum wage legislation.

On the aspect of the multiplier the plaintiff was 33 years old at the time that he suffered the injuries. He proposed that a multiplier of 22 years be used. Indeed the plaintiff would have worked for another 22 years to the age of 55 years. I am of the view therefore that a multiplier of 22 years is fair. I will therefore award the sum of $kshs.10,000 \times 22 \times 12 = 2,640,000/=$

8. General damages on pain and suffering Under this head the plaintiff submitted that he be awarded a sum of kshs.5,000,000/=. He did not cite any authorities and only claimed that he had endured a lot of pain, suffering and mental anguish. I wish to rely on the case of **Ngure Edward Kurega vs Yusuf Doran Nassir (2014) eKLR** where the plaintiff who suffered similar injuries was awarded a sum of ksh. 5,000,000. I therefore award the sum of ksh.5,000,000/= as prayed by the plaintiff.

9. The plaintiff sought future medical relief under the following sub- headings:-

(i) Catheters, uridoms, urine bags and specialised adult diapers.

He prayed for a sum of 1,056,000/= at the cost of ksh.4,000 per month. I have perused the evidence adduced by the plaintiff. According to Dr. Wambugu's report, he opined that the plaintiff will require specialised catheters uridoms attached to a urine bag to held collect the urine and that the stool incontinence will necessitate use of specialised adult diapers. He estimated the cost of all the above at kshs4,000/= per month. In the circumstances thereof, I think the figure proposed by the plaintiff appears to be reasonable. I therefore on this subhead award sum of kshs.1,056,000 i.e. $4,000 \times 12 \times 22$

(ii) Nursing care

The plaintiff asked to be paid kshs7,920,000/=. He argued that he needs to employ two assistants one for care-giving/moving the plaintiff from one place to another and the other for nursing duties @15,000/= per month each. He therefore used a multiplicand of ksh.30,000/=. On my part, I think one nurse will be sufficient. As proposed by the doctor, one nurse will be paid a total of kshs15,000/= I will therefore award a total sum of ksh.3,960,000 i.e. $15,000 \times 12 \times 22$

(iii) Medical checkups and treatment.

The plaintiff avers that he will at least have to seek medical treatment twice in a year at a cost of ksh.3,000/= per visit. These sentiments have been seconded by Dr. Wambugu in his report. I will therefore award a sum of ksh.132,000/= i.e $3,000 \times 2 \times 22$

(iv) Transport to the medical facility

The plaintiff seeks kshs.132,000/= to cover his transport to hospital. I believe a sum of ksh.3,000 for transport is adequate. I therefore award a sum of kshs.132,000/= being $3000 \times 2 \times 22$

(v) Physiotherapy session

The plaintiff has asked to be paid ksh.1000 to ksh.264,000/= . there is no doubt that the plaintiff has to undergo physiotherapy for the rest of his life. Though he did not tender any evidence of payment per session, I am satisfied that his proposal to be paid ksh.12,000/= per month is excessive. I am however guided by the case of **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Another** where the court opined that a sum of ksh.4,500/= is adequate following the submissions of the parties, I am of the view that of kshs.792,000 i.e $3000 \times 12 \times 22$ is sufficient

(vi) Laxatives

The plaintiff submitted that he will have to use laxatives and antibiotics for the rest of his life. @kshs 900 per month. I am of the view that indeed people suffering from paralysis suffer from infections and would require medicines. I will therefore award a sum of kshs.237,600/= i.e $900 \times 12 \times 22$

(vii) Hydraulic mattress and bed

The doctor in his report advised that the plaintiff will require a hydraulic mattress valued at kshs.150,000/= I therefore award the sum of sksh.150,000/= for the mattress and kshs.450,000 for the bed as prayed.

(vii) Surgery

The plaintiff avers that he will need surgery for his knees which are locked at ksh.1,000,000/=. I note that the doctor in his report did not give this recommendation. The plaintiff has not adduced any evidence that proves that he will need surgery as such I decline to give any award under this

subhead.

(viii) Splints to stabilize the spine

On this subhead the plaintiff sought a sum of ksh.330,000/= since he claims he will use 15,000/= per month. I therefore award kshs.330,000/= i.e 15,000x22

10)In the end I enter judgement in favour of the plaintiff and against the defendant as follows:

i. General damages for pain & suffering ksh.5,000,000

ii. Damages for loss of earnings ksh.2,640,000

iii. Future medical & other related costs

a) Catheters uridoms & diapers ksh.1,056,000

b) Nursing care ksh.3,960,000

c) Medical treatment ksh. 132,000

d) Transport ksh. 132,000

e) Physiotherapy ksh. 792,000

f) Laxatives ksh. 237,000

g) Splints ksh. 330,000

h) Surgery Nil

i) Hydraulic mattress & bed ksh. 350,000

iv. Special damages nil

Net total ksh.10,669,600

The plaintiff is also awarded costs of the suit.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant