



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 147 OF 2012

DENNIS NYAMWENO OPENDA.....PLAINTIFF

VERSUS

ANWARALI & BROTHERS LIMITED.....1ST DEFENDANT

ANDREW NAMENGE.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein Dennis Nyamweno Openda was seriously injured on the 21st July 2011 when the vehicle he was travelling in as a fare paying passenger was involved in an accident with another along the Nakuru-Eldoret road near Ngata bridge.

On the 11th June 2014, Advocates for the Plaintiff and the Defendants recorded a consent judgment on liability and apportioned liability at the ratio of 75:25% in favour of the Plaintiff. That settled the issue of liability.

This court is called upon to determine the issue of General damages for pain and suffering and loss of amenities loss of earning capacity and future medical care if any, together with special damages awardable to the Plaintiff.

2. In his statement of claim filed on the 26th April 2012, the Plaintiff stated that he was then 37 years old, was an healthy and active gentle man and as a result of the accident he suffered loss and damage. He prayed for general damages for pain and suffering, loss of earning capacity, future medical expenses and special damages in the tune of shs 337,529/=.

3. After the accident the Plaintiff was treated in various hospitals, Nakuru Provincial Hospital, Kijabe Mission Hospital and St. Elizabeth Medical Centre in Nakuru. In total, he was admitted in the said hospitals for 41 days where he was conservatively treated, and continued with out-patient treatment and physiotherapy.

Dr. George W. O. Mugenda prepared a comprehensive medical report for the Plaintiff on the 12th April 2012. It was produced as Plaintiff Exhibit No. 8 by consent of parties. In his report, the Plaintiff was shown to have been a Public Health Officer/Part-time Engineer.

4. The following were stated as the injuries the Plaintiff sustained:

- (1) *Loss of consciousness for about two months due to severe head injury.*
- (2) *Multiple fractures -*
 - (i) *fractured left clavicle*
 - (ii) *fractured right humerus*
 - (iii) *unstable multiple fractures of the pelvic bones (open book pelvic fracture)*
- (3) *Lacerated scalp wounds*
- (4) *Right radial nerve injury leading to a right wrist drop and muscle wasting*
- (5) *Blunt chest wall injury*
- (6) *Urethral strictures complicating pelvic fracture and prolonged catheterization.*

5. The Plaintiff was admitted in the Intensive Care Unit (ICU) for over three weeks both at Nakuru Provincial Hospital and Kijabe Mission Hospital. Among treatments given, he was taken to theatre for external fixation of the fractured humerus, and conservative treatment for the fractured pelvis, and left clavicle. He was done a Direct Vision Urethrotomy (*excision of the stricture*) of the membranous urethra and posterior $\frac{1}{3}$ penile urethra at St. Elizabeth hospital in 2012.

6. Present complaints at date of examination were as follows:

1. *Episodes of urinary urgency and irritation.*
2. *Pelvic pain when walking.*
3. *Weak gripping power with right hand and wasting of the right upper limb muscle.*
4. *Difficulty in writing using right hand.*
5. *Forgetfulness and lack of concentration.*
6. *Not resumed work.*
7. *Decreased sexual desire and performance.*

The doctor noted -

1. *Multiple scars on the scalp on the healed scalp wounds.*
2. *Surgical scars and multiple healed pin marks on the right arms corresponding to the external fixator.*
3. *General wasting of muscle of the right upper limb. He noted that fracture of the right humerus appeared to have healed well.*
4. *Weakness (power grade 4) of the right upper limb with moderate wrist drop hence unable to grasp and write with his right hand.*
5. *CT-scan of the head, multiple serial x-rays and MCU films corroborated the injuries and treatment given.*

6. Discharge notes from the Provincial General Hospital – Nakuru, Kijabe and St. Elizabeth corroborated the injuries and treatment received.

7. The Police P3 form and accident abstract further corroborated the accident and injuries sustained.

7. In his conclusion, Dr. W. O. Mugenda stated that due to prolonged catheterization the Plaintiff developed two short but tight urethral strictures which required urethrotomy, and that there is potential of the stricture to reform in future requiring repeat surgeries. He further noted that the fractures had healed well but the right radial nerve injury complicated fracture of the right humerus leading to weakness and mild wrist drop that may improve with physiotherapy but is unlikely to attain full recovery.

He assessed permanent disability at 40%.

8. **Plaintiff's case and submissions**

The Plaintiff testified that at the time of the accident, he was a Public Health Officer at Ongata – Nakuru and part-time Engineer and that he was out of work for one year, though now back, but works only 3 days in a week on full pay. It was his testimony that he was on ½ pay for one year, but did not produce any evidence, to confirm his employment as a Public Health Officer or part time Engineer and his earnings. He told the court that he suffers memory loss, has reduced sexual desire as well as psychological trauma, and that he had to employ a helper at a cost of shs. 5,000/= per month to assist him in his household chores as he is not able to perform them due to the accident, but also stated that his wife performs all the household chores.

9. In his submissions, the Plaintiff's Advocates submitted that the Plaintiff is entitled to compensation in general damages for pain and suffering and loss of earning capacity in form of general damages as a direct consequence of the accident. It is his submission that though still employed as a Public Health Officer, he lost other sources of income that he estimated an income of a conservative sum of shs. 5,000/= per month, with a modest period of 10 years. No mention of his salary was made or any document produced to certify that indeed the Plaintiff was employed and his earnings.

10. For pain and suffering, a sum of Kshs. 10,000,000/= was proposed. Counsel relied on three authorities, **HCC No. 118 of 2006, Jacqueline Syombua -vs- B.O.G. Ekalakala Secondary School, Sosphinaf Co. Ltd & Another -vs- Daniel Nganga C.A. No. 315 of 2001 and Odema James -vs- Peter Otieno Opiyo & Another, Nakuru HCA No. 351 of 2000.**

11. I have looked at the three authorities. In the case of **Jacqueline Syombua** (*supra*), the doctor assessed the Plaintiff 100% percent permanent disability having sustained severe spinal injury that lead to muscle movement restriction and was confined into a wheel chair. The court awarded a sum of shs. 6,500,000/= in general damages for pain and suffering in March 2010.

In the case of **Sosphinat Company Limited** (*supra*), the Plaintiff had sustained injuries of more or less comparable. On appeal the court confirmed the award of the High Court of shs. 2,000,000/= in General Damages and a sum of shs 420,000/= under the head loss of earning capacity. This was in the year 2006.

Likewise in the case of **Odema James Achola** (*supra*) the injuries were closer to the present case under review. The court awarded a sum of shs.1,800,000/= for pain and suffering and a sum of shs.391,932/= for loss of future earnings, in May 2005. In the above quoted authorities, the courts awarded damages for loss of earning capacity as part of general damages, and stated that such loss does not have to be specifically pleaded as opposed to a claim for special damages. It is the case of the plaintiff that loss of earning capacity is a prospective financial loss as stated, in the case of **Butler -vs- Butler (1984) KLR 225**, and upheld in subsequent cases.

12. The Plaintiff's advocates submitted that the Plaintiff lost other sources of income or suitable future employment as he could not continue practicing his engineering part time work, and suggested an income

of shs.5,000/= for a period of 10 years, making a total of shs.600,000/= under this subhead.

This assertion was not supported by any evidence or documentary proof and as such it remains as an allegation.

13. **Defendant's case and submissions**

On their part, the defendants through their Advocate Mr. Mariaria submitted that the Plaintiff could not have been unconscious for the period of about two months and as stated by Dr. W. O. Mugenda in his medical report. He referred to the treatment notes/discharge summaries from both Provincial General Hospital (PGH – Nakuru) and Kijabe Mission Hospital which do not support such assertion. They however agree on the injuries sustained and the doctors prognosis – save that it was the doctors observation that as at the date of the accident the plaintiff had improved and was able to return to his previous occupation, which it is submitted, was not disclosed either in his evidence in court or in his pleadings, nor was the income/salary disclosed.

14. The occupation of the Plaintiff was only stated in Dr. Mugenya's medical report and shown as a Public Health Officer/part time Civil Engineer but no supporting documents were produced in support. No records from the employer were produced to confirm the plaintiff's income and testimony that he was on ½ pay for a year after the accident, so as to qualify to claim a loss of earnings.

As stated in the case **Thuranira Karauri -vs- Agnes Nchena, Civil Appeal No. 192 of 1996** -

“the claim for loss of earnings is a special damage. It must be pleaded and proved. That is the law. It was not pleaded. The Plaintiff gave evidence in which she said she used to operate a kiosk of some sort at Kasarani near Nairobi, from which she made shs.50,000/= per month. She produced no documentary evidence to support this claim, but even if she did, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.”

In the present case, the Plaintiff pleaded loss of earning capacity. He did not plead loss of earnings that ought to be specifically pleaded nor proved. He did not plead what occupation he was engaged in nor his then monthly income, and what he actually lost. Being a special damage, loss of earnings must not only be pleaded but also proved. The defendant therefore submits that there is no basis on which the court may make an award on this subhead. Likewise, the defendants submitted that the court ought not consider compensation for loss of income by ½ for one year as no income was proved by any documentary evidence from the plaintiff's employer.

On the issue of Reduced earning capacity and for loss of earning capacity it is the defendant's submission that once more no evidence was led to confirm that indeed the plaintiff was in any gainful employment, and urged the court to adopt the minimum wages guidelines provided in Legal Notice No. 64 of 2011, applicable to the period under review, if it was obliged to grant the prayer, and apply a multiplier of 10 years. This aspect was not adequately canvassed by either party.

15. **Future Medical Expenses.**

Though the plaintiffs Doctor alluded to such future expenses (*see paragraph 7 above*), he did not give an estimate or even the nature and extent of such future treatment or medical expenses. As stated by the defendant, the court ought not engage in a speculative exercise in a bid to assess future medical expenses.

16. The defendants hence submitted and proposed a sum of shs.700,000/= in General Damages for pain and suffering as aforementioned. I have considered the three authorities in support of their proposal.

In Nairobi **HCCC No. 152 of 1995 Jane Wairimu Mungai -vs- Joseph Njuguna**, the injuries sustained by the Plaintiff were much less severe and not comparable at all.

Injuries in the case **Nairobi HCCC No. 2404 of 1997 – Hannington Agoi Lusiola -vs- Sogea (K) Ltd** the injuries are comparable to those sustained by the Plaintiff. A sum of shs.1,203,000/= was awarded including cost of future medical expenses of shs.750,000/=. This was 1999. Injuries to the Plaintiff in **John Thuo -vs- Joseph Gichuhi Alex HCCC No. 1737 of 1996** were less severe, and again, the Judgment was delivered in 1999, in the sum of shs. 600,000/= for pain and suffering and loss of amenities.

17. Having analysed the Plaintiff's evidence and submissions by both counsel for the Plaintiff and the Defendants, it is my duty to do the best in the difficult task of assessing damages that are reasonable not extravagant or oppressive. In doing so, the court is guided by factors as previous awards for similar or comparable injuries and principles developed by the courts. Ultimately what is a reasonable award is an exercise of discretion by the trial Judge, and will invariably depend on the peculiar facts of each case, taking into account that no two cases can be similar – see **Sosphinaf Company Ltd & Another -vs- Daniel Ng'ang'a Kanyi, Nakuru C. A. No. 315 of 2001.**

18. For **general damages for pain, suffering and loss of amenities**, including **loss of earning capacity** I have considered all the authorities tendered both by the Plaintiff and the Defendant's Counsel in their submissions. As stated earlier, the Plaintiffs proposed a sum of shs.10,000,000/= while the defendants proposed a sum of shs.700,000/=.

All the authorities were decided over 10-15 years ago. I am persuaded by two cases above, **Sosphinaf Company Limited (supra)** where the court awarded general damages for pain and suffering of shs.2,000,000/= and shs.420,000/= for loss of earning capacity in the year 2006. Also the case of **Odema James Achola (supra)**, for more or less comparable injuries, the Court in May 2005 awarded a sum of shs.1,800,000/= and shs.391,932/= for loss of future earnings (15 years ago).

19. Coming to the issue of **Loss of earning capacity**, the Plaintiff herein told the court that he had gone back to his employment as a Public Health Officer, that he had only lost ½ of his salary for one year. He however did not produce any documentary prove of his salary nor did he prove the loss of ½ salary over the one year he was temporarily incapacitated. He further stated that he lost income from his part time job as a Civil Engineer but again no prove of such income or loss was produced. As stated in the case of **Butler -vs- Butler (1984) KLR 225**, loss of earning capacity is awarded as part of general damages.

I have considered the fact that the Plaintiff's disability may either expose him to lose of his job in future and his diminished chances of getting alternative employment.

20. The defendant's proposal of Kshs.700,000/= is too low to be realistic and not supported at all, even by the authorities quoted by the Defendants. As to the Plaintiff's proposal of Kshs.10,000,000/=: I find the same to be overly exaggerated and extravagant and unsupported by any authorities. Having taken into account all the circumstances including inflation and age of all the authorities above, I am persuaded that a sum of shs.1,800,000/= is more realistic and reasonable, and I award the same.

21. **Future Medical expenses**

The Plaintiff in his pleadings pleaded to future medical expenses. However in his submissions, the Plaintiff's Advocates did not submit on the issue. As stated above, and submitted by the defendants advocate, no specific sum or an estimate was given either by the Plaintiff or the Doctor who prepared his medical report – as to the likely amount that the Plaintiff may require in future. I am minded to state that the Plaintiffs Doctor W. O. Mugenda saw the need for some future repeat surgeries on the plaintiff's urethral strictures and repeated physiotherapy but he did not give an estimate of the cost of such medication and procedures. The court will therefore not go on a wild goose chase to find out what these future medical expenses could be. There being no evidence to support such an award, the same is disallowed.

23. **Special damages**

The Plaintiff pleaded a sum of shs.337,529/= as special damages, being costs of treatment after the accident. During the hearing of the case, the Plaintiff produced a bundle of receipts. I have considered the said receipts, and what I found proved amount to Kshs.264,790/=. The said sum of shs.264,790/= is therefore allowed with interest from the date of filing suit.

24. In the premises, I shall enter Judgment for the Plaintiff as hereunder:

1. **On Liability**

The defendants shall shoulder 75% liability for the accident as recorded in a consent judgment dated the 11th June, 2014.

2. **On quantum of damages**

1. General damages for pain and suffering and loss of amenities Kshs.1,800,000/=, 75% thereof.
2. General damages for loss of earning capacity ... NIL
3. Future medical expenses ... NIL
4. Special damages – Kshs.264,790/=
5. The award of Kshs.1,800,000/= in general damages shall be subjected to a 25% reduction to bring the award to Kshs.1,350,000/=.
6. Interest shall accrue on special damages from the date of filing the suit, while interest on general damages shall run from the date of this Judgment until payment in full.
7. The Plaintiff is awarded costs of the suit.

Dated, signed and delivered at Nakuru this 20th day of February, 2015

JANET MULWA

JUDGE

Judgment read and signed in open court in the presence of:

No appearance for Defendant

Mugweru holding brief for Ochoki for Plaintiff

Court clerk - Mwai