



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 6 OF 2012
(FORMELY THIKA CMCC 804 OF 2009)

GEOFFREY NJOGU MWANGI.....PLAINTIFF

VERSUS

1. FRANCIS MBUGUA GICHIA

2. EVANS ONG'ONDI.....DEFENDANTS

J U D G M E N T

1. Plaintiff's suit is a claim in negligence. He seeks general and special damages on account of injuries suffered in a road accident on 31st August 2008 along Thika-Matuu road. The accident involved motor vehicles registration numbers **KAP 568P** and **KAZ 612J**. The 1st Defendant is sued as the owner of KAP 568 P while the 2nd Defendant is sued as the 1st Defendant's authorized driver, agent or servant.

2. The Plaintiff's case as pleaded in the plaint dated 8th September 2009 is that he was travelling in KAP 568P, a matatu, when the 2nd Defendant so negligently drove, managed or controlled the said motor vehicle that he caused it to lose control and collide with KAZ 612J. Particulars of negligence are pleaded. He attributes the accident wholly to the negligence of the 2nd Defendant.

3. The Defendants filed defence and denied liability. they blamed the driver of KAZ 612J for the accident.

4. At the start of the trial, the Plaintiff's list and bundle of documents dated 27th June, 2011 (except a medical report by Dr. Wokabi) were admitted in evidence and marked as **Exhibit P1**. Similarly, a charge sheet in respect to a traffic case against the 2nd Defendant arising out of the accident in this suit was also admitted in evidence and marked as **Exhibit P2**. The Plaintiff testified and called one witness. The Defendants did not testify but called one witness. Both witnesses were doctors.

5. The Plaintiff (PW1) testified that he is not in any gainful employment and is sustained by his brother. He said that as at 31/08/2008, he was working as a casual labourer with the **Ministry of Roads**

and Public Works earning KShs 250/00 per day. He testified that on 31/08/2008, he was lawfully travelling in KAP 568P driven by the 2nd Defendant who so negligently controlled it that he caused it to collide with KAZ 612J. He was sitting at the front near the door and that the 2nd Defendant was over speeding and dangerously overtaking when the accident occurred. He (Plaintiff) was critically injured in the accident and was admitted to various hospitals for treatment. He testified further that he was still undergoing treatment and was still unable to work. The accident was reported at **Thika Police Station** where he was subsequently issued with a police abstract and a P3 form.

6. Dr Washington Wokabi (PW2) testified that he was a consultant general surgeon who has practised as such since 2008. He examined the Plaintiff on 19/06/2009 and prepared and signed a medical report on 22/06/2009. He produced the same in evidence. As well as examining the Plaintiff, he also relied upon the Plaintiff's treatment notes and discharge summaries from various hospitals.

7. PW2 further testified that the Plaintiff had a history of a road traffic accident in which he suffered the following injuries -

- **major head injuries which led to loss of consciousness for a few days.**
- **multiple deep lacerations on the left side of the neck**
- **loss of teeth**
- **fracture of the left femur that required insertion of a metal plate**
- **injury to the urethral passage that required catheterization for some time, and would require further treatment**

8. The doctor opined that the Plaintiff sustained major injuries which will have far reaching effects on his life. he stated further that the Plaintiff had scars on the left side of the neck which could be surgically removed at a cost of KShs 150,000/00. He recommended that the plate in the Plaintiff's left lower limb be removed at a cost of about KShs 100,000/00. The further urethral operations would require about KShs 150,000/00. He approximated the costs of all these future treatments at public hospitals to be around KShs 400,000/00 at the time he examined the Plaintiff; but he clarified that the costs would have risen by about 15 to 20% a year since then. The costs would also be significantly higher at private hospitals.

9. The Defendants' witness, **Dr Isaac Nderitu Theuri (DW1)** testified that he was a general physician and that he had practised for 7 years. He examined the Plaintiff on 20/05/2011 and prepared and signed a medical report which he produced in evidence. As well as examining the Plaintiff he also relied upon the Plaintiff's P3 form, discharge summaries from various hospitals and an X-rays. He also read the medical report prepared by PW2 and had issues with it. He stated that while PW2 prepared his report on 22/6/2009, he prepared his own on 15/05/2011 and was thus better placed to assess the Plaintiff's healing and future prospects. He disputed PW2's estimates of future medical expenses and said that they appeared to have been rates for private hospitals. He assessed the future medical expenses at a total of KShs 130,000/00 - that is KShs 80,000/00 for the urethral operations and KShs 50,000/00 for removal of the metal implant in the femur. But he acknowledged that PW2 was much more senior than him in the profession; he also conceded that at the time he examined the Plaintiff he had practised medicine for only 4 years.

10. The parties requested to file written submissions. The Defendants never filed any. The Plaintiff filed his on 18/07/2014. This fact was brought to the attention of the court on 23/07/2014 and judgment was reserved for 07/11/2014. In the meantime I was transferred to another (very busy one-Judge) station; hence the delay in the preparation and delivery of this judgment. The delay is regretted.

11. I have considered the testimonies of the witnesses, as well as the submissions filed (including the cases cited). I consider the following to be the main issues for determination -

- (i) Whether the accident was caused by the 2nd Defendant's negligence.
- (ii) If so, whether the 1st Defendant is vicariously liable for the 2nd Defendant's negligence.
- (iii) What injuries did the Plaintiff suffer (including the residual effects thereof)?
- (iv) What damages, if any, is the Plaintiff entitled to (including quantum thereof)?

Was the accident caused by the 2nd Defendant's negligence?

12. As for liability we have only the uncontroverted testimony of the Plaintiff how the accident occurred. He was sitting at the front with the driver of KAP 568P (the 2nd Defendant). He testified that the 2nd Defendant was not only over speeding, but was also carelessly and recklessly overtaking other motor vehicles. The accident occurred when the 2nd Defendant was recklessly overtaking another vehicle and collided with KAZ 612J.

13. No reasons were given why the 2nd Defendant did not testify and give his own version of how the accident occurred. Although it is the Plaintiff's burden to prove on a balance of probabilities that the accident was caused by the 2nd Defendant's negligence, nevertheless it behoved the Defendants to call the 2nd Defendant and/or any other witness to give their own version as to how the accident might have occurred. It was not sufficient merely to blame the driver of KAZ 612J without offering any evidence. As already pointed out, the testimony of the Plaintiff as to how the accident occurred is uncontroverted. I believe that testimony. I am satisfied on a balance of probabilities that the accident in which the Plaintiff was injured was caused by the sole negligence of the 2nd Defendant.

Is the 1st Defendant vicariously liable for the 2nd Defendant's negligence?

14. The Plaintiff pleaded that the 1st Defendant was the owner of KAP 568P driven by the 2nd Defendant as his servant or agent. The Defendants in their joint statement of defence dated 12/10/2009 generally denied the contents of paragraph 4 of the plaint that pleaded the above. There was no specific denial that the 1st Defendant was the owner of KAP 568P, or that the 2nd Defendant was driving it as his servant or agent in the course of his duties.

15. It is true that the Plaintiff produced no copy of records from the *Registrar of Motor Vehicles* in proof of the 1st Defendant's ownership of KAP 568P. But he did produce a police abstract of the accident that gave particulars of the motor vehicle, including the 1st Defendant's ownership thereof. In the circumstances of this case, including the fact that the Defendants pleaded that the accident was caused by the driver of the other motor vehicle involved and substantially contributed to by the Plaintiff's own negligence, and also the fact that the Defendants offered no evidence at all, I am satisfied on a balance of probabilities that KAP 568P was at the time of the accident owned by the 1st Defendant, and was being driven by the 2nd Defendant in the course of his duties as the servant or agent of the 1st Defendant. I therefore hold that the 1st Defendant is vicariously liable for the negligence of the 2nd Defendant.

16. On liability I find for the Plaintiff at 100%.

What injuries did the Plaintiff suffer (including the residual effects thereof)?

17. The available medical evidence discloses that the Plaintiff suffered the following injuries-

- i. **Head injuries leading to loss of consciousness for a few days.**

- ii. **Loss of 1st and 2nd RHS molars.**
- iii. **Multiple lacerations on the neck leaving ugly keloids after healing.**
- iv. **Fracture of the left femur that required insertion of a metal plate.**
- v. **Injury to the urethra leading to obstructive narrowing of the passage.**

18. The head injury will predispose the Plaintiff to the possibility of developing epilepsy later in life. The keloids will require surgical excision. The fracture of the femur has clinically united in good position, and functionally he will have very slight disability on its account. But the plate will need to be removed after 3 years from the time of healing.

19. The injury to the urethral passage will require at least two more repair surgeries (he underwent one). He had to use a catheter for a long time in order to pass urine. It is common medical ground that repair of damaged urethral passages is usually a lengthy, problematic and costly undertaking whose successful outcome is not always guaranteed. In the meantime the Plaintiff, who was at a sexually active stage in his life, could not enjoy sex while he used the catheter. He is also psychologically affected by the uncertain outcome of the management and repair of the damage to his urethra.

20. Apart from the residual problems outlined above, the medical opinion available to court is that the Plaintiff otherwise healed well and should be able to perform his usual manual labour.

What damages is the Plaintiff entitled to?

21. The Plaintiff is entitled to general damages for **pain, suffering and loss of amenities**. I have considered the nature and extent of his injuries, and also the period of his hospitalization (a total of about a month) and the painful course of treatment. He was unconscious for a number of days and for quite some time could not enjoy sexual intercourse.

22. I have also considered the comparative cases cited by the Plaintiff in his submissions. Balancing this against that and doing the best that I can, I will award the Plaintiff KShs 2,000,000/00 for pain, suffering and loss of amenities.

23. The Plaintiff will need to have the metal plate in his femur removed, the keloids cosmetically repaired and his urethra repaired in at least two further surgeries. Dr Wokabi (PW2) stated that the estimates that he gave for the costs of those future medical procedures were quite conservative in June 2009 and would rise by about 15 - 20% every year. They were costs in public hospitals like **Kenyatta National Hospital** and **Nairobi Women's Hospital**. Dr Nderitu (DW1) gave no convincing reason why he thought Dr Wokabi's estimates were for private hospitals. I note that he deferred to Dr Wokabi on account of his much longer experience in the profession and seniority.

24. I am satisfied that Dr Wokabi's estimates were realistic, both in terms of the figures he gave and the expected annual escalation. I will award the Plaintiff a global sum of KShs 600,000/00 for **future medical treatment**.

25. The Plaintiff has claimed **loss of earnings** at the rate of KShs 500/00 per day from the date of the accident. This sum comprised his daily earnings as a labourer of KShs 250/00 and overtime of a similar amount. No proof of these earnings was tendered. But I accept that the Plaintiff was earning a livelihood as a labourer in August 2008 as he was able-bodied. The daily wage for a casual labourer in 2008 of KShs 250/00 is quite modest and realistic. I will award him that sum. But I will not award him overtime which is quite unlikely for a casual labourer.

26. I have now to consider how long the Plaintiff was reasonably out of work. He was in hospitals for treatment for about a month. A convalescence of a further period of say, two more months, would have been reasonable. He would then have been up and about and able to work and earn his living. I will

therefore award him KShs 250/00 per day for 90 days (KShs 22,500/00) for lost earnings during his treatment and convalescence.

27. As for loss of **future earning capacity**, I find none. As already observed the Plaintiff has healed well except for the further urethral repair required. Dr Wokabi was of the opinion that he should be able to perform his usual manual labour. I will disallow that claim.

28. The Plaintiff claimed at paragraph 6 of the plaint **special damages** amounting to KShs 133,710/00. I am satisfied that the same have been proved by production of receipts. I will award that sum.

29. In summary, there will be judgement for the Plaintiff against the Defendants jointly and severally as follows -

- i. General damages for pain,suffering & loss of amenities.....KShs 2,000,000/00
- ii. Future medical expenses.....600.000/00
- iii. Lost earnings.....22,500/00
- iv. Special damages.....133,710/00

The damages in items (i) and (ii) will carry interest at court rates from the date of judgment. Those in items (iii) and (iv) will carry similar interest from the date of filing suit. The Plaintiff will also have costs of this suit plus interest thereon at court rates from the date of filing suit. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT MURANG'A THIS 24TH DAY OF APRIL 2015

H. P. G. WAWERU

JUDGE