



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.157 OF 2012

NGURE EDWARD KAREGA PLAINTIFF

VERSUS

YUSUF DORAN NASSIR DEFENDANT

JUDGMENT

The plaintiff (NGURE EDWARD KAREGA) filed this suit against YUSUF DORAN NASSIR (the defendant) following injuries sustained as a result of a road traffic accident which occurred on 15th November 2010 involving the defendant's motor vehicle registration No.KV 2828 BA/OR 1479BB, and motor vehicle registration KBB 740L, in which the plaintiff was a passenger.

The parties filed a consent dated 25th March 2013, duly signed by their respective counsel. The terms of the consent was that judgment be entered in favour of the plaintiff against the defendant in the ratio of 10:90%.

The matter then proceeded to hearing for purposes of assessing quantum.

The plaintiff worked as a Finance Officer, for a company known as SMEF for a period of ten years. Following the road traffic accident and as a consequence of the injuries he sustained he stopped working. He is 40 years, married and has two children aged 8 and 6 years. He told this court that he suffered a fracture on the 6th cervical and a fracture on the right leg, bruises on the head and palms. The fractures took long to heal and the one on the spine incapacitated him and rendered him unable to work.

Immediately after the road traffic accident he was rushed to Gilgil Hospital, then transferred to Nakuru Provincial General Hospital, then to War Memorial Hospital where after being X-rayed, he was taken to the Aga Khan Hospital and admitted for 2 months.

Thereafter he was taken to Meridian Hospital in Nairobi West from 17/01/2011 to 31/01/2011 when he was discharged. However he developed serious bed sores while at home, so on 04/04/2011 he was admitted at Kiambu Hospital until 06/05/2011 when he was discharged. He continued with follow-up clinics while living with a relative in Juja, then returned to Nakuru in July 2011. Once again, he developed bed sores and was admitted at St. Mary's Hospital from 24/10/2011 to 14/12/2011, and upon discharge, he was taken to the Spinal Injury Hospital where he continued with medication for the bed sores, surgery for the bed sores, and physiotherapy. He was discharged from that Hospital in July 2012 but continued attending physiotherapy clinic in Nakuru. Whenever the need arises, he attends the Nakuru Provincial General Hospital, and recently he noticed that his right leg could not bend – the Dr. at Nakuru

Provincial General Hospital diagnosed this new condition as arthritis.

Regarding the treatment at Aga Khan, the plaintiff explained that he underwent surgery so as to stabilize the backbone and the neck – this involved fusion of the C6 bone with C5. He also underwent a tracheostomy. It is his evidence that he is unable to do anything at home, without assistance, as he is partially paralysed on the right hand and he is consigned to a wheel chair. The result is that he has to engage a paid assistant to help him move around and take him to the toilet. The nurse aide is paid Kshs.300/= per day, although currently she earns Kshs.400/= daily.

At the time of the accident, the plaintiff was earning Kshs.64,000/= and he continued receiving his pay for the next six months, as per company policy. The salaries were reviewed, so that his last pay in May 2011, was Kshs.72,079/=. He produced the relevant payslips for October 2010 – May 2011.

Thereafter he was dropped from employment and his salary was stopped. He further told this court that he used a lot of medicine, uses a wheel chair, diapers (as he is not able to control his bowels, a catheter, on a daily basis. On average he uses two diapers per day, changes the catheter every 2 weeks, and urine bags every week.

He spends Kshs.50,000/- per month to purchase diapers and bed under pads. He has given his hospital expenses as Kshs.2,300,000/= comprising :-

- a. Aga Khan Hospital – Kshs.1,150,000/= as per the receipt produced as Exhibit 6.
- b. St. Mary's Hospital - Kshs.67,020/= as per receipt marked Exhibit 7.
- c. National Spinal Injury Hospital - Kshs.20,000/= (as per receipt marked Exhibit 8).
- d. Wheel chair – Kshs.49,600/= - (Exhibit 12)
- e. Cushions – Kshs.11,350/= (Exhibit 11) and (Exhibit 13).
- f. Medicine – Kshs.26,038/= (Exhibit 9 and 10).
- g. Assorted facilities for his convenience – Kshs.690,000/= (bundle of receipts Exhibit 14)

The Dr. recommended 4 sessions of physiotherapy every week, although due to lack of funds he does not always attend as required. Initially he engaged a physiotherapist (Lucy Bayo) and by the time she left, he had paid her Kshs.52,800/= as per Exhibit 15.

Thereafter one Kareithi took over at a fee of Kshs.8000/= per month as shown in Exhibit 16 and he has so far paid him Kshs.88,000/= (see Exhibit 17).

Ideally, the plaintiff ought to continue with physiotherapy especially due to the developing arthritis.

He also points out that he needs to change the wheel chair every three years, and preferably acquire a self-driven one which would cost Kshs.361,340/= as shown in the quotation provided by Physical Therapy Services (Exhibit 18).

The report by Dr. Wellington Kiamba confirms that the plaintiff sustained fracture of the right acetabulum and the cervical vertebra C6 with narrowing of the spinal cord, resulting into paraplegia verterbractory of C6 and fusion of C5 and C6 being done from the level of T6 upto the feet.

The report confirms that the plaintiff has lost sensation from the nipples from upto the feet, and has urine incontinence, and has an indwelling catheter. He is also incontinent of stool and uses diapers, has weak muscle power on both arms, and complete loss of muscle power in the lower limb, and he has a foot drop.

The doctor describes the plaintiff as bed-ridden and will always require an assistant as he cannot do anything for himself. He concludes that nothing can be done to restore the plaintiff to his former health. He risks developing bed sores in future, and has to be on drugs for constipation. He assessed his injuries at 100% disability.

The findings of Dr. Kiamba, are echoed by Dr. M.S. Malik, whose prognosis is similar to Dr. Kiamba's

i.e. the plaintiff is unlikely to gain any further muscle power in his leg and has become a quadriplegic. He also assessed permanent physical disability at 100% according to the Workman's Compensation Act.

He laments that, the injuries have stopped his hope of pursuing further studies so as to enhance his career prospect because he can't work so as to make money to pay for college fees. He is unable to take his children to the kind of school he'd wish, due to his loss of income, and his social life has been cut because he has to remain at home. He cannot invest for his family, and at 40 years, cannot even engage in sex with his wife, whom he'd intended to have 4 children.

On cross-examination the plaintiff explained that his wife has to look for a casual job so as to contribute towards the family upkeep.

Dr. Kiamba (PW2) testified in court and on cross-examination stated:-

“For a spinal injury patient, development of oedema on the lower limb is to be expected, and is likely to develop pneumonia, urea tract infection because of indwelling catheter, stiffening of the back, and even the upper arms will waste muscles as they are no longer being used.

He is no longer sexually productive, that is a closed chapter for him. He will use diapers, bed pads and catheters for the rest of his life.”

The plaintiff's wife, Beatrice (PW2), confirmed the challenges he faces, the daily needs which include diapers, urine bags, condom urine catheter and gloves, which attracts Kshs.3000/= per week. She explains that, without all these items, the plaintiff would be exposed to bed sores. He also needs to be turned in bed every two hours so as not to develop bed sores.

She describes herself as a casual labourer, doing odd jobs to be able to meet the household expenses, saying the plaintiff was the family's sole bread winner, and with his loss of employment, the going is extremely tough for them.

I have perused the written submissions filed by respective counsel.

Pain and suffering

Mr. Gekonga, on behalf of the plaintiff suggests general damages of Kshs.6,000,000/= for pain and suffering, while defence counsel F.I. Mburu suggests Kshs.1,500,000/-. There is no denying that the plaintiff suffered lots of pain as a result of the injuries, and the residual effects have had a significant psychological and physical trauma on him. I have considered the cited decisions – with great respect for Mr. Mburu, the decision of **Wilson K. Maina V Harun Kereda Jumbi and Othieno HCCC No.17491** of 1997 is over ten years old – the value of the shilling and inflation rate has changed for the worse and I am not inclined to rely on that decision.

The case of Eva **Mueni Wambugu V Simon Peter Githae & Another HCCC No.202 of 2009** is a more recent decision and the injuries suffered and residual effects are largely similar to those suffered by the plaintiff. In my view the sum of Kshs.5,000,000/= (Five million is adequate compensation) and I so award.

Loss of Earnings and Earning capacity

At the time plaintiff sustained the injuries, he was 39 years old and earning Kshs.72,079/=. His counsel suggests a multiplier of 20, saying the plaintiff could have worked for another 21 years, as the official retirement age set by the Government of Kenya is 60 years. This would then give a figure of Kshs.17,298,960/= worked at 72,079 x 20 x 12.

The defence counsel argues that there was no evidence tendered to demonstrate that the plaintiff has been laid off his employment, and if so for what reasons. He submits that the plaintiff is not entitled to

compensation under this head, since there wasn't even any evidence regarding the expected retirement age. He nonetheless suggests a multiplier of 20 years at a sum of Kshs.35,000/=. It is not clear what informs this figure. I have taken into account the contents of the plaintiff's payslip. I must take into consideration whether the sum of Kshs.72,079 was the gross pay or net pay. I also take into account the fact that the plaintiff would be expected to pay taxes and other statutory deduction, also the period that the plaintiff would have worked is of significance.

The letter of employment produced in court, written by the Administration Officer Personnel (Tabby Njeri Karanja) clearly indicated that the plaintiff was unable to discharge his duties as a result of the permanent disability arising from the injuries and he was thus leaving the company. The letter also confirms that Kshs.72,098/= was his GROSS salary. His payslips over the years show an average net earnings of Kshs.38,000/= after various deductions. That is the figure which will guide my assessment. I take judicial notice that the retirement age for persons employed by the Government of Kenya is set at 60. Usually those in the private sector have a longer working life, but since nothing different was suggested, I consider it reasonable to use the 60 year limit set by the Government of Kenya. It is therefore not unreasonable to infer that, all things being equal, the plaintiff would have worked for another 21 years – that is the multiplier I will use as follows:

38,000/= x 21 x 12 = 9,576,000/= (Nine million, Five Hundred and seventy six thousands).

He is awarded Kshs.9,576,000/= for loss of earning capacity.

Medical Expenses (Special Damages pleaded and proved)

1. Hospital fee
2. Physiotherapy
3. Nurse Aide 2,164,976/=
4. Medicine
5. Wheel chair
6. Medical report
7. Police Abstract

Future Medical Expenses and Attendant costs

- Nurse Aide
- Physiotherapy sessions
- Wheel chair and cushion
- Catheter, urine bags, diaper and bed pads

The plaintiff, his wife, both Doctors (for plaintiff and defendant), and his own former employer confirm that the plaintiff is paraplegic and cannot perform simple daily tasks on his own. He needs the continuous presence of an assistant. He is now developing arthritis, the doctors had recommended continuous physiotherapy, this will be a lifetime engagement. To help him in his movements – even just a trip to the bathroom, he will require a wheel chair.

The wheel chair will practically be his motor vehicle and its lifespan (if it is a motorised one, in my view would be the same as any other motor vehicle in Kenya i.e. 5 years).

He will require diapers, urine bags and bed pads and use a catheter for the rest of his life – the frequency of use of these items must be taken into account. The nurse and/or whoever else assists the plaintiff will require gloves. I think the receipts he has produced to demonstrate his expenses are of great use in projecting what amount to award, and bearing in mind the Kenyan economic trends and rate of inflation.

There is certainly the element of future medical check-up and purchase of medicines.

These further needs and expenses are not far-fetched.

I will lump the daily conveniences that the plaintiff requires together i.e. (1) Adult diapers, Bed under pads, 2 way catheters, condom catheters, urine bag and gloves – which currently attract a cost of kshs.3100/= for five days. It is not unreasonable to expect these expenses to continually arise which works at $3100 \times 5 = 18,600 \times 12 \times 21$ (given the general life expectancy and his circumstances) = 5,133,600/=

(2) Nurse Aide

The individual is being paid Kshs.400/= per day, which makes a payment of Kshs.11,200/=. This figure was not contested by the defendant and I accept the same as a guide to work out as: $11,200 \times 12 \times 23 = 3,091,200/=$ (Three million and ninety one thousand, and two hundred shillings only).

(3) Future purchase of motorised wheel chair

An estimate/quotation has been given by Physical Therapy Services as Kshs.361,340/=:, and I have no reason to doubt this figure nor has the defence suggested a different amount. Recognising that just like a motor vehicle, the wheelchair may require maintenance and repair every so often. I think the quotation given is not unreasonable – 361,340/= (Three hundred and sixty one thousand, three hundred and forty only).

For purposes of clarity then judgment is entered in favour of the plaintiff as follows:-

1. General Damages for Pain and Suffering – Kshs.5,000,000/= - (Five Million only).
2. Loss of Future Earnings – Kshs.9,576,000/= (Nine Million, Five hundred and seventy six thousands only).
3. Medical Expenses (Special Damages pleaded and proved – Kshs.2,164,974/= (Two Million , one hundred and sixty four thousand, nine hundred and seventy four only).
4. Nurse Aide – Kshs.3,091,200/= (Three Million and ninety one, thousands and two hundred only).
5. Specialised needs (Diapers, Catheter, Bed Pads, Urine bags = Kshs.5,133,600/= (Five Million One hundred and thirty three thousand, six hundred only).
6. Future purchase of motorised wheelchair – Kshs.361,340/= (Three hundred and sixty one thousand, three hundred and forty only).

Gross damages awarded is:-

- a. Kshs.25,327,114/= (Twenty Five Million, Three hundred and twenty seven thousand and one hundred and fourteen only) less 10% contribution as agreed, and the net sum awarded is Kshs.22,795,000/= (Twenty Two Million seven hundred and ninety five thousands only).
- b. The costs of this suit shall be borne by the defendant. Interest on (a) shall be at court rates.

Delivered and dated this 16th day of May, 2014 at Nakuru.

H.A. OMONDI

JUDGE