



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 270 of 2010

ROBSON NGOWA MASHA.....PLAINTIFF

VERSUS

1. SUMMIT COVE LINE LTD.....1<sup>ST</sup> DEFENDANT

2. PASKAL KILILO MWANJUMA.....2<sup>ND</sup> DEFENDANT

JUDGMENT

1. The Plaintiff was injured in a road accident on 17<sup>th</sup> September, 2009 along Mombasa - Nairobi road. He was driving a Ford Canter KAY 812 U when it collided with the 1<sup>st</sup> Defendant's lorry KBB 744X -ZC 0976, Ford Tractor, driven by the 2<sup>nd</sup> Defendant.

2. By consent liability was agreed between the parties at 20% against the Plaintiff and 80% against the Defendants. The hearing was held for assessment of damages.

3. Three witnesses gave evidence. Lucy Wanjiku Waweru PW1 gave evidence that she was a director of Ifata Engineering Services Limited which owned the vehicle the Plaintiff was driving. She said the Plaintiff was the Company's driver, that he had worked for about 5 years, and was paid a salary of Kshs. 12,000/- per month. She produced PExb 1 a letter confirming Plaintiff's employment, and PExb 2a and 2b Petty Cash Vouchers dated 31/7/2009 and 30/8/2009 each for Kshs. 12,000/- for July and August, 2009 respectively.

4. Dr. Steven Kanegani Ndegwa gave evidence as PW2. He produced PExbs 3 a Medical Report; PExb 4 Receipts for medical Report; PExb 5 Receipt for court attendance.

5. A Report by Dr. Ajoni Adede was produced by Dr. Kanegani by consent of the parties. Dr. Adede saw the Plaintiff on 17.6.2010, nine months after the accident. He stated the injures as:

***“Fractures of the right tibia and right fibula of the leg bones. Fractures of the left tibia and left fabula leg bones. Crush injury of both right and left lower limbs.***

That report says the Plaintiff was admitted for 39 days at Coast General Hospital. Plaintiff was treated by X-rays, bilateral external metal implants, dressing, wound and main care. It also included control of blood sugar. Examination revealed that Plaintiff could: **“walk slowly, both lower limbs were deformed, swollen badly scarred and disfigured. The big toe was deformed. Surgical screw, external metal implants insertion scar on both lower limbs. X-rays display fracture. X-rays display fracture.”** He concluded that the Plaintiff had suffered permanent partial disability of both lower limbs, heavy scarring; that and disfigurement will continue causing embarrassment, and that there does not seem to be undue

influence on recovery process arising from high blood sugar.

6. The Plaintiff's evidence was brief. He was 50 years at the time of the accident. He was born in 1959 and was working for Kshs. 12,000 plus Kshs. 3,000/- on top. He produced PExh 6 Medical Notes for Coast General Hospital; PExh 7 being P3 Medical Examination Report and Medical Report by Dr. Ajoni Adede, a Receipt for Dr. Ajoni Adede, and PExh 10 (a-z) a bundle of receipts.

The Plaintiff said he broke both legs, suffered a cracked skull, broke his left and right legs and nor could his left leg fold inwards. He showed the court his injuries. He said he broke his toes and his left leg is shorter than the right. He said he was admitted in hospital for five months. After the accident, he was unable to resume his job as a driver which he had carried on for 18 years. He is incontinent so walks around with a tin for relief, and stays at home. He can hardly do any work. He was married with five children.

7. Dr. Kanegeni's medical report was dated 21/1/2011, sixteen months after the accident. He identified the Plaintiff's injuries from looking at the hospital's medical notes. These were:

**“INJURY:**

**1. Crush injury of the left lower limb with:**

- **Fracture of the tibia at mid-section, malleolus and on the medial condyle.**
- **Displaced and segmented fractures of the fibula**
- **Deep 15 cm long cut wound extending from the ankle joint to the bit toe with severe tissue loss around the toe.**
- **Deep 9 cm long cut wound on the lateral aspect of the foot.**

**2. Crush injury of right lower limb with:**

- **Fractures of the tibia at mid-section and on the plateau extending into the joint margins.**
- **Fractures of the upper  $\frac{1}{3}$  of the fibula.**

**3. Severe head injuries with:**

- **Concussion and Loss of consciousness.**
- **8cm cut wound on the parietal scalp.**

**4. Massive loss of blood leading to impending shock.**

**5. Urethral structure leading to obstructive uropathy and repeated urinary tract infection in a known diabetic.”**

8. Dr. Kanegeni concluded that there were several multiple bone and soft tissue injuries. In his opinion, the Plaintiff:

**“Was treated with 40% permanent disability due to the deformities on both lower limbs massive loss of tissues and stiffness of the left knee and ankle joints.”**

9. In his amended plaint, and submissions the Plaintiff has claimed

KShs. 5,032,785 as follows:

- a) **General damages for pain and suffering - KShs. 1, 800,000**
- b) **Damages for loss of earning capacity - KShs. 2, 160,000**
- c) **Special damages of - KShs. 172,785**
- d) **Domestic help and nursing care - KShs. 900,000**

My assessment of damages is as follows:

### **General Damages for pain and suffering**

10. The Plaintiff relies on the following authorities under this head. Kibet Chelagat vs Plain International Nakuru HCCC 261 of 1995, where the award was for KShs. 1,200,000/-; Mutinda Matheka vs Gulam Yusuf Msa HCCC 752 of 1993, where the award was for KShs. 1,000,000/- in 1994; and Lucy Nyambura vs Stephen Njuguna Nbi HCCC 2418 of 1990 where the Plaintiff was awarded KShs. 1,000,000/- in 1990.

11. These cases were from a digested volume and details of the respective reports were unavailable. Nevertheless, in Kibet Chelagat's case, there was shortening of the leg by 4-5 cm and post traumatic epilepsy, which were not evident in the present case. In Mutinda Matheka's case there was fracture of pubic ramis, as was the case in Lucy Nyambura's suit, where she also suffered 4 cm shortening of the right leg.

12. The Plaintiff relied on James Thiong'o Gathuri vs Nduati Njuguna Ngugi [2012] e KLR. There, the Plaintiff suffered three fractures in the right leg, and the left leg was broken in one place. The Plaintiff healed with deformity and reduced limb functions and limping. His injuries were classified as temporary disability of 15 months and permanent disability of 50%.

13. I am inclined towards adopting the James Thiong'o holding decided last year. I, however, note the disability there was 50%, whilst in this case it is 40%. Accordingly I would reduce the award by the equivalent of roughly 10% disability. Taking inflation into account I award KShs. 1,600,000.00, and reduce from this amount the Plaintiff's agreed liability of 20% (namely KShs. 320,000). I shall therefore award KShs. 1,280,000 under this head.

### **Damages for Loss of Earning Capacity**

14. It is not disputed that the Plaintiff was unable to work after the accident. He was 50 years old then, and would have retired at 65 years, that is, 15 years later. He earned KShs. 12,000/- which is evidenced by petty cash vouchers and the testimony of his former employer. The claim is therefore for KShs. 12,000/- per month with a multiplier of 15 years amounting to  $12,000 \times 12 \times 5 = \text{KShs. } 2,160,000/-$ . The basis of the claim is laid in Butler vs Butler [1984] KLR, where the Court of Appeal held this head to be a distinct claim. The Defence has not disputed the monthly pay, but urges that it be limited to a period from the date of incapacity to the date of compensation. No authority was provided for this proposal which does not accord with common sense as the Plaintiff would have earned the amount until retirement. The benefit he gets is that it is paid in lumpsum in advance; and may be invested.

15. On this head, I would award the claimed amount of Kshs. 2,160,000/- if the Plaintiff had suffered 100% disability. Since, however, the disability actually suffered was 40%, I would reduce the awarded amount by 60% (Kshs. 1,296,000/-) following the James Thiong'o case, and do, therefore, hereby award the amount of Kshs. 864,000/- under this head.

### **Damages for Nursing care and domestic help**

16. The claim is for KShs. 900,000. In the Plaintiff's submissions, it is made up of Kshs. 5,000/- per month for a domestic helper with a multiplier of 15 years. Reliance is made on HCC 230 of 2009 Samuel

**Musinga vs Taz Freighters.** In that case, the point on nursing care was resolved through the evidence of a witness who said she was providing the Plaintiff with assistance at a consideration of Kshs. 5,000/-. The court found the figure to be reasonable.

In this case, however, the Plaintiff gave evidence that he needs help at home to prepare food, to carry water for his bath and for general assistance. This help is given by his wife, who was not called to testify. Plaintiff also said he had a nurse who he pays Kshs. 5,000/- per month. On their part, the Defendants argued that the claim for nursing care had not been specifically proved and should be disallowed.

17. I agree with the defence that the claim for nursing care has not been proved. The nurse was not called to give evidence, nor was there any documentation to evidence any payments made.

Accordingly, I am unable to make a finding in favour of the Plaintiff under this head, and award 'Nil.'

### **Special Damages**

18. The amount pleaded is KShs. 172,785/-. It is trite law that special damages must be specifically pleaded and specifically proved. I have carefully perused the receipts produced for special damages. There are twenty nine in all, twenty six of which are in a bundle marked 170,586/-. However, I found that bundle Exb 19(a-z) to amount to Kshs. 178,390/- excluding four receipts which were illegible. Exbs 4, 5 and 9 are doctors receipts amounting to Kshs. 6,500/-.

As I cannot award more than has been claimed, I award the claimed amount of Kshs. 172,785/- in special damages, which has been proved.

19. The upshot is that I give judgment for the Plaintiff as follows:

a) **General Damages for paid and suffering** - Kshs. **1,280,000.00**

b) **Damages for loss of earning capacity** - Kshs. **864,000.00**

c) **Damages for Nursing care and Domestic help** - Nil - Nil -

d) **Special Damages** - Kshs. **172,785.00**

**Total** - KShs. **2,316,785.00**

I also award the Plaintiff the costs of the suit, and interest on the aforesaid amounts from the date hereof.

Orders Accordingly.

**Dated, signed and delivered this 11<sup>th</sup> day of February, 2013**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**Coram:**

Judge: R.M. Mwongo

Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

a).....

b).....

c).....

d).....