



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 1 of 2008

KAJUNA IDD NOOR PLAINTIFF

VERSUS

RAPID KATE SERVICES LTD 1ST DEFENDANT

SIMON ISENDE 2ND DEFENDANT

JOSEPH WAITE MACHARIA 3RD DEFENDANT

AKAMBA PUBLIC ROAD SERVICES LTD 4TH DEFENDANT

DANSON KARANJA KIMANI 5TH DEFENDANT

JUDGMENT

By an amended plaint dated 9th December 2010, the plaintiff filed this suit against the defendants in which he claims damages for injuries that he sustained in a road traffic accident involving motor vehicle registration number KAN 901Z in which the plaintiff was traveling as a fare paying passenger, driven by Danson Karanja Kimani, the 5th defendant and owned by the 4th defendant and motor vehicle registration number KZJ 182, which was driven by the 3rd defendant and owned by the 1st defendant. The plaintiff avers that the accident occurred on 8/1/2005 along Eldoret-Nakuru road near Mukinyai slopes. As a result, the plaintiff sustained the following injuries:-

- a) **Comminuted fracture of the right tibia and fibula;**
- b) **Crush injury to the right foot leading to below knee amputation;**
- c) **Abrasions to the left hand.**

The plaintiff alleged that the accident was caused by the negligence of the 3rd and 5th defendants who were the drivers of the two motor vehicles. The plaintiff set out the particulars of negligence of the 3rd defendant, at paragraph 10 of the amended plaint which are *inter alia*, that he failed to display warning signs to other road users after his motor vehicle registration number KZJ 182 stalled in the lawful path of motor vehicle registration number KAN 901Z. He also alleged that the 5th defendant drove motor vehicle registration number KAN 901Z at a speed which was excessive in the circumstances and without due care to other traffic and in particular to the stalled motor vehicle driven by the 3rd defendant. The 2nd

defendant is vicariously liable for the negligence of the 3rd defendant whilst the 4th defendant is vicariously liable for the negligence of and 5th defendant.

The plaintiff claimed loss of earnings, general and special damages as a result of the injuries which he sustained due to the aforesaid accident. The special damages claimed is made up as follows:-

I) Treatment expenses and transportation (a) Tzshs. 8,000,000

(b) Kshs. 23,940

(c) USD 179

ii) Medical report Kshs. 5,000

iii) Official search Kshs. 1,000

The plaintiff pleaded that at time of the accident he was 34 years old and was employed as a field officer, earning a monthly salary of Tzshs 416,835. He was rendered unable to work as a result of the accident. He thus claims for damages for loss of earnings and earning capacity.

On 13/12/2011, before the hearing commenced, a consent was recorded to the effect that the suit against the 1st defendant was withdrawn.

The 2nd and 3rd defendants filed their amended statement of defence on 26/1/2011. They blamed the accident to the negligence of the 4th & 5th defendants and the plaintiff. They set out the particulars of negligence of the 5th defendant, which are *inter alia* that he failed to keep proper look-out of other vehicles and to observe prominent warning signs of the presence of vehicle registration number KZJ 182. They also blamed the the 4th defendant who is the registered owner of the vehicle registration number KAN 901Z for failing to maintain the vehicle in a roadworthy state and fit it with adequate and functional safety belts. They contended that the plaintiff was negligent for failing to wear a safety belt and take adequate precautions of his own safety whilst traveling.

The 4th and 5th defendants filed their statement of defence on 7/2/2008. They claimed that the suit is an abuse of the court's process; that the plaintiff had filed another suit which arose out of the same cause of action. In their defence, they denied that the plaintiff was traveling as a lawful passenger in motor vehicle registration number KAN 901Z at the material time. They further denied any allegation of negligence on their part and blamed the accident solely on the negligence of the 3rd defendant for leaving a stationery motor vehicle registration number KZJ 182 on the road. The 4th defendant further denied being the registered owner of motor vehicle registration number KAN 901Z at the material time. The plaintiff testified in support of the plaint and called two witnesses, the Doctor and Police Officer from Salgaa Police Station (PW1 to 3). The defence did not call any evidence. The testimony of PW1-3 therefore remains uncontroverted.

The plaintiff was working with RSR Tanzania Limited as a field manager. On 8/1/2005, he left his work station at Mwanza, Tanzania and boarded an Akamba bus, registration number KAN 901Z, headed for Dar er Salaam via Nairobi. He further testified that the bus was being driven very fast and when near Nakuru Town, along Eldoret/ Nakuru Road, the driver was unable to control the bus and it hit a stationery lorry which was parked on the left side of the road. The plaintiff was rushed to Provincial General Hospital, Nakuru. Thereafter he was admitted at Muhimbili Orthopaedic Institute in Tanzania for 1 ½ months.

A medical report was prepared by Dr. A. Kasera Ochieng (PW2) on 10/12/2007. The report indicated that the plaintiff sustained comminuted fractures of the right tibia and fibula and crush wound of the right foot leading to a below the knee amputation of the right leg. He also sustained abrasions on the left hand. The plaintiff was left with the following residual effects:-

- 1. Below the knee amputation of the right leg with artificial leg in situ;**
- 2. surgical scar running the right distal thigh to amputation stand;**
- 3. 4 cm linear scar on the left hand;**

4. x-rays on the left leg shows comminuted fracture of the right tibia-fibula and a crushed right foot show plates in situ.

The doctor found the degree of injury to be grievous harm. Police Constable Eric Omwenga of Salgaa Traffic Base produced a police abstract report. He said that according to police records, motor vehicle registration number KAN 901Z belonged to Akamba Bus Limited (4th defendant herein) whilst motor vehicle registration number KZJ 182 belonged to Simon Isendi (2nd defendant herein). The accident was caused by the driver of motor vehicle registration number KZJ 182 who was subsequently charged at Senior Resident Magistrate's Court at Molo in criminal case no. 75/2005 for causing the accident by obstruction. He was convicted and fined Kshs. 1,000/-.

In his submissions, Mr. Mbago, counsel for the plaintiff urged the court to apportion liability between the 3rd and 5th defendants. He argued that the 3rd defendant was liable for driving motor vehicle registration number KAN 901Z dangerously and failure to keep proper look out while the 5th defendant was liable for obstruction and failure to put up warning signs after motor vehicle registration number KZJ 182 stalled on the road.

On general damages, the plaintiff's counsel urged that a sum of 1,500,000/- was reasonable compensation for pain suffering and loss of amenities. He cited **Charles Kipkorir Ruto vs Fahari Building & Civil Engineering & Another** Kericho HCCC No. 56 of 2002 where the plaintiff sustained fractures of the tibia and fibula on the left leg which was later amputated below the knee. He was assessed to have suffered 85% disability. He was awarded Kshs. 1,200,000/- for pain suffering and loss of amenities. Counsel also cited **Francis Randiki Okaro vs Akamba Public Road Services Limited & Another** Kericho HCCC No. 32 of 2004 where the plaintiff sustained a crush to his left leg that led to a below the knee amputation of the same. He was assessed to have suffered 80% disability. The court awarded him 1,300,000/-. Counsel further urged the court to award damages for loss of earning because the plaintiff was no longer able to perform his duties as a field officer which involved walking in vast terrain. He said that the plaintiff's salary was Tshs. 416,835/= (approximately Kshs. 20,842/= at the exchange rate of Kshs. 20/=) and urged the court to adopt a multiplier of 18 years and award a sum of Kshs. 4,501,872/= made up as hereunder:-

20,842 x 12 x 18 = 4,501,872_

Liability:

I have taken into account the evidence of the plaintiff as to how the accident occurred. The plaintiff did not call the investigating officer in this case, However Police Constable Eric Omwenga testified and produced a police file regarding the said accident in which the 5th defendant was convicted and sentenced to a fine. Although the defendants alleged that the plaintiff contributed to the injuries he sustained, no evidence has been led to the effect. The averments in the defence remain mere allegations. I am satisfied that the plaintiff has on a balance of probabilities proved that the said accident was entirely caused by the 3rd and 5th defendants as the drivers, agent and or servants of the 2nd and 4th defendants respectively.

Taking into account the fact that the 3rd defendant was convicted for careless driving, I will find that he will bear the most blame. The 5th defendant cannot be completely absolved from blame. It was alleged that the bus was in high speed. Had the 5th defendant been driving in a low speed, he might have seen the vehicle which had obstructed the road and avoided the accident. He did not tell court what he did to avoid the collision.

The plaintiff testified that the lorry was partially parked on the let side of the road. **Section 53(2) of the Traffic Act Cap 403** provides that:-

“The driver of any vehicle shall, in case of a break down, remove the vehicle from the road as soon as possible and until so removed the vehicle shall be placed as close to the side of the road as possible; and as the vehicle remains on the road between the hours of 6.45 p.m. and 6.15 a.m., its position shall be clearly indicated by a light or lights visible to drivers of vehicles approaching from either direction.”

Since the defendant did not testify, there was no explanation as to how long the lorry had remained parked on the road or whether or not there were indicators or lights to show that the vehicle had broken down at the spot. It was the duty of the 3rd defendant to explain.

The 3rd defendant was charged in **Molo Traffic Case No.75/2005, R v. Joseph Waite Macharia**. He was convicted and fined. There is no evidence that an appeal was ever preferred from the said conviction. **Section 47A** of the **Evidence Act** provides that such decision where a person is convicted, that is taken as a conclusive evidence that the person is guilty of the offence. The **Section** provides as follows:- **47A “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.**

There being no appeal against the said decision, it is conclusive proof of the 3rd defendant's guilt. However, the question is whether that means that the 3rd defendant was fully to blame for the occurrence of the accident? **Section 68 (3)** of the **Traffic Act** then provides as follows:-

S.68(3) “A failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings”.

It seems that even if a person is found guilty of a traffic offence, it does not mean full liability in a criminal case. This being a civil case, proof is on a balance of probability but not beyond reasonable doubt. There is no evidence that any warning lights had been placed at the spot to warn oncoming vehicles of the broken down vehicle. On the other hand PW1 testified that he was awake just before the accident occurred and the bus was in high speed and he also blamed the bus driver for driving the vehicle at such a speed so that he was not able to control the vehicle. Had he been driving at 80 k.p.h., it is likely that the driver of the bus would have avoided the collision with the stationary vehicle. In my considered view, though the 3rd defendant was convicted of the offence of careless driving, the 5th defendant did contribute to the occurrence of the accident and will bear some of the blame. I attribute 15% liability as against the 5th defendant while the 3rd defendant will bear 85% liability.

Damages:

On quantum, the plaintiff sustained a comminuted fracture of the right tibia and fibula, crush injury to the right foot leading to a below the knee amputation of the right leg which had developed gangrene and abrasions of the left hand. Dr. Ochieng assessed the degree of disability at 50%. The plaintiffs suggested an award of Kshs.1,500,000/- as general damages for pain suffering and loss of amenities. Counsel relied on the case of **Charles Kipkorir Ruto v Fahari Building and Civil Engineering & Another, HCC 56/02**. In that case, the plaintiff was 24 years, sustained fractures of the tibia and fibula of the left leg which was amputated below the knee, and an award of Kshs.1,200,000/- was made in 2003. In **Francis Randiki Okaro v Akamba Public Road Services Ltd, Kericho HCC 32/2004**, who suffered nearly similar injuries an award of Kshs.1,300,000/- in 2005.

Counsel for the 2nd and 3rd defendants suggested an award of Kshs.800,000/- and relied on the decision in **Munyao Kangeli v Mburu Transport Company Ltd, HCC 227/1988**, where the plaintiff suffered nearly similar injuries and an award of Kshs.730,000/- was made in 1994. The 4th and 5th suggested an award of Ksh.500,000/- and relied on the decisions of **Wilson Kuria v Tibi Githiora, HCC 986/998** and **Loise Wangeci Mwangi v Njoroje Ngige, HCC 6374/1990** where awards of Kshs.450,000/- were made in 1994 and 1992 respectively.

When considering what an award to make the court bears in mind the decision in **Cecilia W. Mwangi & Another v Ruth W. Wangui (1977) CA 251/96**, where the Court of Appeal said as follows:-

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on the members of the public, the most majority of whom cannot afford the burden in the form of increased costs for insurance cover or increase on fees.”

Bearing in mind the fact that an award of damages is not supposed to be punitive but fair compensation for injuries suffered and having considered all the above cited authorities, I find that the most relevant authorities are those cited by the plaintiff which were decided about 10 years ago. The decisions relied upon by the defendants were made about 20 years ago and the court has taken into account incidents of inflations and depreciation of the shilling. I will make an award of Kshs.1,500,000 as damages for loss, pain and suffering.

Loss of Earning Capacity:

Turning to the plaintiff's claim for loss of earning, Dr. Ochieng assessed the degree of disability at 50%. The plaintiff testified that his employment contract with RSR Tanzania Limited was terminated after the accident and he has not obtained another gainful employment since then. His work involved walking a lot and he is not able to perform such duties again. There is however no evidence that the Plaintiff may never obtain gainful employment in future. He is a skilled man and can obtain gainful employment elsewhere. In **Butler v Butler (1984) KLR 225**, the Court of Appeal considered what the court considers before an award of loss of earning capacity:-

“the factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can”.

I will be guided by the observation made in the above case. The plaintiff's counsel suggested that the plaintiff may have worked for another 26 years at a salary of about Kshs. 20,842 and urged that the court apply a multiplier of 18 and urged the court to make an award of Kshs.4,501,872/- (20,842 x 12 x 18) for loss of future earning capacity. The 2nd and 3rd defendants urged that court to dismiss that claim because the plaintiff has not shown that he cannot get gainful employment.

The 4th and 5th defendants urged the court to adopt a multiplicand to be the basic pay less the statutory deductions to be worked out as Tshs.342,573 x 5 x 12 = Tshs.6,166,314/- (308,310/-).

Contrary to the 2nd and 3rd defendants submissions that the award should not be made because the plaintiff is not invalid but can be gainfully employed, in the case of **Mumias Sugar Co. Ltd v Francis Wanalo CA 911/2003**, the Court of Appeal held that:-

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future.”

In this case apart from the amputated leg, the complainant looks like a healthy strong man and should be able to look for some gainful employment because though he may not be able to be engaged for what he was trained, he is skilled and should either get other employment or do business. He is however still entitled to be compensated for the reason that he will not get employment and suitable employment for work he was trained. In that regard, he may have lived for another 20 years and I will adopt a multiplier of 10 years. The plaintiff's salary was TSh.416,835/- which was subject to statutory deductions of 74,262/-. The multiplicand will therefore be Tsh.416,835 – TSh74,262/- which works out at TSh 342,573/- and if converted to Kenya currency at Kshs.20/- it works out as Kshs.17,129/-. The plaintiff will be entitled as follows:-

$Kshs.17,129 \times 10 \times 12 \times 50/100 = Kshs.1,027,740/=$

Special Damages:

The plaintiff also prays for special damages. The defendants argued that the costs incurred at Muhimbili Orthopaedic Institute were paid by the plaintiff's employer and would amount to unjust enrichment if awarded to the plaintiff. I do agree with that position. Furthermore, the letter of appointment dated 1/1/2001 indicates that the employer provided medical allowance at cost. This means that any medical costs incurred by the employee was to be paid by the employer. I disallow the claim on costs incurred at Muhimbili Orthopedic Insititute. However, I will allow the following pleaded and proved special damages:-

- 1. Treatment at Nakuru Provincial Hospital** **Kshs. 16,670/=**
- 2. Air transport (USD 179 at rate of Kshs. 80)** **Kshs. 14,320/=**

3. **Search at K.R.A.**

Kshs. 500/=

There were other sums, which were pleaded but not proved. It is trite law that special damages must be specifically pleaded and strictly proved. The plaintiff will therefore have judgment as follows:-

| | |
|-----------------------------------|----------------------------------|
| 1. Damages for pain and suffering | Kshs.1,500,000.00 |
| 2. Loss of earning capacity | Kshs.1,027,740.00 |
| 3. Special Damages | <u>Kshs. 31,490.00</u> |
| Total | <u>Kshs. 2,559,230.00</u> |

Costs:

At paragraph 5 of the 2nd and 3rd defendants' defence, it was denied that any demand or notice of intention to sue was ever served. Similarly, the 4th and 5th defendants denied having been served with any demand notice. The plaintiff did not demonstrate that a demand notice was served on the defendants. Consequently, pursuant to paragraph 53 of the **Advocates Remuneration Order**, the plaintiff is not entitled to costs. Interest on the special damages shall accrue from the date of filing this suit while interest on general damages shall be from the date of judgment until payment in full.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Ndeda holding brief for Mr. Ochieng for the plaintiff

Mr. Kariuki holding brief for Jones & Jones for the 2nd and 3rd defendants

Mr. Kamau holding brief for Wangai Nyuthe for the 4th and 5th defendants

Kennedy – Court Clerk