



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 185 of 2011

ROSEMARY TAMBA (suing as the next friend of KEVIN WALIMBWA MIKE).....PLAINTIFF

V E R S U S

FRANCIS SIKANGA SIKOLIA.....1ST DEFENDANT

NZOIA SUGAR CO. LTD.....2ND DEFENDANT

J U D G M E N T

The plaintiff **KEVIN WALIMBWA MIKE** was involved in a road accident on 29.7.2011 along the Kakamega-Webuye Road. He was walking along the said road when motor vehicle registration No. KBL 264 G Toyota Saloon knocked him. The plaintiff was 12 years by then and his mother **ROSEMARY TAMBA** filed this suit on his behalf. Parties agreed on liability whereby the same was apportioned at 80%:20% in favour of the plaintiff. Parties further agreed to produce all the relevant documents by consent and also have the issue of quantum determined by way of written submissions.

From the medical reports produced and the hospital documents the plaintiff sustained the following injuries –

- *Closed head injury leading to loss of consciousness for more than two weeks*
- *Multiple cut wounds to the scalp*
- *Facial abrasions*
- *Loosening of one tooth in the lower jaw*
- *Fracture of two ribs on the right side of the chest*
- *Trauma to the urethra leading to urethral stricture*

Counsel for the plaintiff submitted that an award of KShs.400,000/= would be reasonable compensation on 100% basis. Counsel relied on the case of **JOSEPH MUSINDE AMULABU V J.K. KAMUNGE & ANOTHER – Nairobi HCCC No.2723 of 1988** whereby an award of KShs.300,000/= was made for rapture of the urethra and other injuries. Counsel further relied on the case of **HESBON AKINYI BARASA V MOSES VUSOLO MADEGWA. Nairobi HCCC 5187 of 1992** whereby a sum of KShs.300,000/= was made for closed head injury with loss of consciousness among other injuries.

On his part counsel for the plaintiff is seeking an award of KShs.3.5 million as general damages. Counsel is relying on the case of **CHARLES KIMANI V KENYA POWER & LIGHTING COMPANY LTD. 2006 eKLR** and that of **LABAN BUYOLE MABOLEO V RIFT VALLEY TEXTILES 1998 eKLR**.

The main issue for determination is the amount of quantum liable to the plaintiff. Although the medical reports by Dr. Andai indicate that the plaintiff suffered fracture of two ribs, the P3 form did not capture that injury. However, I do find that discrepancy not to be serious as I do believe Dr. Andai was able to examine the x-rays. Further the fracture of the two ribs is not the main injury. It is unfortunate that the difference between the two proposals is almost 100%. Counsel for the plaintiff contends that the plaintiff has dropped in school and his performance dropped from position 2 to 53 out of 54 students. Counsel further submitted that the plaintiff will need future medical expenses. The authority of **CHARLES KIMANI NG'ANG'A V KENYA POWER & LIGHTING COMPANY LTD.** dealt with a head injury arising from an electric shock. Those injuries were far more serious than those sustained by the plaintiff herein. In that case the plaintiff completely dropped out of school and had to be taken for medical examination after every three to six months. The plaintiff had suffered brain damage and was not able to manage his own life. In the case of **LABAN BUYOLE MAMBOLEO V RIFT VALLEY TEXTILES** the plaintiff had a paralysis of the sixth and seventh cranial nerves left side, fracture of the right temporal and zygomatic bones and fracture of the base of the skull. Those injuries left him with a paralyzed left jaw and he could not chew using the right side. His mouth was twisted and he could not change food in his mouth. He could also not control his urine. The court awarded KShs.1,000,000/= for pain and suffering and loss of amenity.

The authority of **JOSEPH MUSINDE AMULABU V J.K. KAMUNGE & ANOTHER** relied upon by the defendant appears to be more relevant in this case. However, it is only limited to the injury on the urethra and the authority is over 15 years old. A recent authority on the injury on the urethra is the case of **ABSOLOM AGALA V IMCO BUILDING & ENGINEERING CONSTRUCTION 2012 eKLR**. In that case the plaintiff sustained a torn urethra with excessive blood loss. The plaintiff developed a urethra stricture and required surgical intervention. He was awarded a sum of KShs.350,000/=.

I do appreciate that the plaintiff's injuries herein are a bit more serious than those injuries in the authorities relied upon by the defendant. However, I do find that the assessment of damages by counsel for the plaintiff is quite on the higher side. Dr. Charles Andai saw the plaintiff on several occasions and prepared two medical reports. The first medical report was done the 1.12.2011 and the second one was done on the 22.6.2012. The Doctor in the last report summarised the injuries suffered by the plaintiff as herein above stated. The plaintiff was admitted to the Aga Khan Hospital intensive care unit for three days and was thereafter transferred to Moi Teaching and Referral hospital where he was admitted for two weeks. He was again admitted at the Kakamega Provincial hospital twice. The first admission was for four days and the second was for thirteen days. By the time the doctor made the second report on the 26.6.2012 it was a period of almost one year from the date of the accident. The doctor noted that by then the plaintiff was still using a catheter to pass on urine. He was unable to pass urine in the normal way. The doctor opined that the plaintiff would need a further surgical intervention to enable him pass urine in the normal way. In his report of 1.12.2011 the doctor estimated the cost of the operation to be KShs.300,000/=.

The accident occurred on the 29.7.2011. This suit was filed on the 27.12.2011. Although the doctor noted that the plaintiff had dropped in school, the court cannot conclude with finality that his performance was not going to improve. In any case the plaintiff has been on and off in hospital and there is no indication that his inability to remember recent events is a permanent incapacity. Given the injuries sustained by the plaintiff I do find that a sum of KShs.900,000/= will be adequate compensation. I do also award a sum of KShs.400,000/= as cost of future medical expenses. The sum of KShs.400,000/= will take care of the future operation as well as other medical costs. It is clear that even before the operation will be conducted the plaintiff will be incurring other medical expenses.

In the plaint a sum of KShs.67,970/= is pleaded as special damages. Several receipts were produced to establish that claim. Some of the receipts like the one from Moi Teaching and Referral hospital indicate a sum of KShs.75,032/= as the medical costs. It appears that the plaintiff continued to incur more medical

expenses after the suit was filed. I will award the amount of KShs.67,970/= as pleaded in the plaint. In the end the total award shall be as follows:-

(a) General damages - KShs.900,000/=

(b) Future medical expenses - KShs.400,000/=

(c) Special damages - KShs. 67,970/=

Total - **KShs.1,367,970/=**

The above amount shall be reduced by 20% leaving a net balance of **KShs.1,094,376/=**. The plaintiff shall have costs and interest.

DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2013

SAID J. CHITEMBWE
J U D G E