



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 111 OF 2006

DANIEL KOSGEI NGELECHEIPLAINTIFF

VERSUS

CATHOLIC TRUSTEE REGISTERED DIOCESE OF ELDORET.....1ST DEFENDANT

SIMON MONYARI ORACHI2ND DEFENDANT

JUDGMENT

Vide an amended plaint, amended on 3rd December, 2008, the Plaintiff has sued the Defendants jointly and severally for the following reliefs:-

- (a) General damages.**
- (b) Special damages of Ksh. 459,100/=.**
- (c) Costs of the suit.**
- (d) Future medical expenses.**
- (e) Damages for loss of income and loss of future earnings.**
- (f) Interests on (a), (b), (c), (d) and (e) above.**

The claim arises from injuries the Plaintiff sustained on 24th September, 2005. He was lawfully unloading goods on top of his motor vehicle Peugeot 504 Pick Up matatu near the Eldoret Iten Junction to Moiben when motor vehicle registration No. KAL 677S Ford Tipper Lorry owned by the 1st Defendant and driven by the 2nd Defendant hit and cut off the Plaintiff's left leg as a result of which the Plaintiff sustained the following injuries:-

- (i) Traumatic amputation of left lower limb above knee.**
- (ii) Loss of two central incisors with lacerations of lower lip.**
- (iii) Multiple abrasion dorsum of both hands.**

- (iv) Bruises and abrasions right leg.
- (v) Laceration right leg above ankle 15 cm long.

The Plaintiff attributed the accident to the sole negligence of the 2nd Defendant and particularized the negligence in paragraph 5 of the amended Plaintiff as follows:-

- (a) Driving at excessive speed in the circumstance.
- (b) Failing to steer the said motor vehicle properly.
- (c) Failing to apply brakes, slow down, swerve, stop and or otherwise control the said motor vehicle in any other way so as to avoid the said accident.
- (d) Failing to observe traffic rules.
- (e) Failing to have any proper regard for the safety of other road users.
- (f) Allowing or causing the said motor vehicle registration number KAL 677S Ford Tipper Lorry to violently hit and amputate off the Plaintiff's left lower limb above knee which was never recovered. The Plaintiff as far as is applicable will rely on the doctrine of res ipsa loquitur.

Special damages claimed are in respect of the following:-

- (a) Medical Report Ksh. 3,000/=
- (b) Police Abstract Ksh. 100/=
- (c) Medical Expenses Kshs. 456,100/=
- (d) Future medical expenses

In respect of the claim under paragraph (d), the Plaintiff avers that as a result of the leg amputation, he was fitted with an artificial leg which requires replacement after every three years.

He also claims damages for loss of future earnings attributable to the disability he suffered that has left him unable to perform his duties as a driver and a businessman.

An amended defence was filed on 2nd March, 2009. The Defendants have strictly denied that motor vehicle registration number KAL 677S was owned by the 1st Defendant and driven by the 2nd Defendant at the material time of the accident. They deny that it was the said motor vehicle that hit the Plaintiff and caused the accident and more particularly hit the Plaintiff and cut off his left leg. They deny particulars of negligence attributed to them by the Plaintiff and that they are entitled to pay any damages to the Plaintiff.

In the alternative and without prejudice, they aver that the accident was caused or contributed to by the sole negligence of the Plaintiff and/or his agents. Particulars of such negligence are outlined in paragraph 8 of the amended defence as follows:-

Particulars of the Plaintiff's negligence

- (a) Stopping motor vehicle registration number KAE 276 Q Peugeot 504 in the middle of the road.
- (b) Hanging dangerously on top of motor vehicle Peugeot 504.

- (c) Placing himself in dangerous position for which he knew or ought to have known.
- (d) Being so careless and/or reckless in the circumstances.
- (e) Failing to jump, warn and/or act in any manner to avoid the said accident.
- (f) Placing himself so negligently on top of motor vehicle registration No. KAE 276 Q Peugeot 504 as a result of which he fell off and blocked the way of motor vehicle registration number KAL 677S Ford Tipper Lorry.
- (g) Failing to heed the warning by the driver of motor vehicle Registration number KAL 677S Ford Tipper Lorry.
- (h) Climbing on top of motor vehicle registration number KAE 276Q Peugeot 504 while under the influence of alcohol or drugs.
- (i) Failing to observe and/or have regard to the Highway Code and the Traffic Rules.

Particulars of the Plaintiff's Driver

- (a) Drove motor vehicle registration number KAE 276Q at an excessive speed in the circumstances.
- (b) Drove in a zigzag manner.
- (c) Drove without regard to other road users more particularly motor vehicle registration No. KAL 677 S.
- (d) Allowed passengers to hang dangerously on the carrier of motor vehicle registration number KAE 276Q
- (e) Drove without due regard of his passengers.
- (f) Drove on the wrong side of the road hence obstructing motor vehicle registration number KAL 677 S.
- (g) Allowed motor vehicle registration number KAE 276Q to hit, knock or crash motor vehicle registration number KAL 677 S.
- (h) Drove motor vehicle registration number KAE 276Q knowing that the Plaintiff and other passengers were dangerously hanging on the carrier.
- (i) Failed to stop, swerve or otherwise manage or control motor vehicle registration number KAE 267 Q to avoid the accident.

Vide a Reply to the Amended Defence dated 27th March, 2009 the Plaintiff denies particulars of negligence attributed to him and/or his driver/agent under paragraph 8 of the amended defence and puts the Defendants to strict proof thereof. He also avers that the defence is a sham and a mere denial.

The hearing herein proceeded strictly for purposes of assessing damages after parties recorded liability on 5th December, 2012. The said consent was in the following terms:-

“By consent, Judgment on liability be and is hereby entered for the Plaintiff in the ratio of 80:20% (percent). Plaintiff to shoulder 20% liability and Defendant 80% liability.

Hearing to proceed on assessment of damages only.”

The damages awardable fall under two heads:-

- (a) General damages
- (b) Special damages

GENERAL DAMAGES

Only the Plaintiff testified in his case. He stated that on the material day he stopped his vehicle KAE 276 Q at the Moiben Junction along Iten Road to offload some luggage of a passenger who was alighting. That motor vehicle KAL 677 S was being driven from the opposite direction towards Eldoret Town. That its driver hit him with the side mirror as a result of which he sustained the aforementioned injuries.

He said he was admitted at the Moi Teaching & Referral Hospital for two weeks where the left leg was amputated above the knee. He said he also lost two teeth and his right leg sustained bruises. He also lost consciousness and when he came to found himself at the Moi Teaching & Referral Hospital.

The discharge summary produced as P. Exhibit 3 shows he was admitted in the hospital on 24th September, 2005 and discharged on 11th October, 2005.

Two medical reports were produced. One is by Doctor L. K. Lelei dated 6th July, 2006 as P. Exhibit 6. It shows the injuries suffered as:-

- (i) Traumatic amputation of left lower limb above knee.
- (ii) Loss of two central incisors with lacerations of lower lip.
- (iii) Multiple abrasion dorsum of both hands.
- (iv) Bruises and abrasions right leg.
- (v) Laceration right leg above ankle 15 cm long.

Dr. Lelei noted that the wounds had healed but with the following permanent disabilities:-

- (i) Above knee amputation of the left lower limb.
- (ii) Healed scars both hand and right leg.
- (iii) Permanent loss of the 2 central incisors teeth.
- (iv) Psychological complication due to amputation.

He assessed the degree of permanent disability at 80% (percent).

The other medical report was produced as defence exhibit 1. It was prepared by Dr. V. V. Lodhia and is dated 25th June, 2008. He indicates the Plaintiff suffered the following injuries:-

1. Injury to the left leg.
2. Injury to upper teeth.

3. Bruises on both hands.
4. Injury to right leg – posterior.

And particularizes the treatment given as follows:-

- Amputation of right leg above knee joint
- Stitching of cuts and lacerations
- Antibiotics and analgesics
- Regular dressings
- X-ray done

He noted that the Plaintiff walks with the help of prosthetic leg but that other injuries had healed. He assessed the degree of Plaintiff's permanent disability at 72%.

A copy of P3 form produced as P. Exhibit 8 assessed the degree of injury as grievous.

The foregoing no doubts demonstrates that the Plaintiff suffered serious injuries.

Under the head for injuries for pain, suffering and loss of amenities the Plaintiff's urged the court to find for the Plaintiff in the sum of Ksh. 4,000,000/=. He relied on the following authorities:-

1. SALVANO N. NYAGA AND ANOTHER -VS- JOSEPH KOGI NGOTHO & 2 OTHERS – HCCC. NO. 95 OF 2003 - (NYERI) (UNREPORTED)

In which the Plaintiff was awarded Ksh. 2,000,000/= for a server closed head injury resulting in unconsciousness for 5 days and confusion for 12 days, a closed fracture of the right radius and ulna dislocation of the elbow joint for which he underwent two operations and diffusely swollen brain with contusion of the cerebellum.

2. ISABEL NYAMBURA -VS- SANRIC SUPPLIERS LIMITED, HCCC. 349 OF 1996 – (NYERI) (UNREPORTED)

The Plaintiff suffered 70% incapacity in crushed compound fracture of the left tibia and fibula bones, a closed fracture of the right tibia and amputation of the left leg above the knee. Kshs. 1,250,000/= was awarded as general damages for pain, suffering and loss of amenities.

Under this head, the defence submitted for an award of Ksh. 800,000/= and relied on the following authorities:-

1. WAMWERE KYALO AND ANOTHER -VS- THOMAS MUTUKU KILONZO & ANO. - MOMBASA HCCC. NO. 163 OF 1996

The Plaintiff was awarded Ksh. 600,000/= for amputation of the left leg below the knee.

2. MUTHONIA KABUGUA -VS- CATHOLIC DIOCESE AND 2 OTHERS – NAIROBI HCCC. NO. 5108 OF 1992

A sum of Ksh. 500,000/= was awarded to the Plaintiff for amputation of the left leg above the knee fracture of the femur in the middle third, compound comminuted fracture of the left tibia and fibula.

3. SILVANUS ONDIEK OCHOLA -VS- DELTA HAULIAGE SERVICES & ANOTHER KERICHO HCCC. NO. 92 OF 2007

Ksh. 800,000/= was awarded to the Plaintiff for amputation of the left leg above the knee, severe injury of the left eye and blunt injuries to the chest.

In assessing general damages for pain, suffering and loss of amenities, courts are guided by decided cases but also give regard to what is affordable within the limits of the economy. In this regard court must exercise its discretion judiciously. See **KIGARAGARI -VS- AYA (1982-88) 1 KAR 768** and **CHEGE -VS- VESTERS (1982-88) 1 KAR, 1021.**

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee”

I find the case of **ISABEL NYAMBURA -VS- SANRIC SUPPLIERS LIMITED (Supra)** were relevant to the instant case. Thus, giving regard to the nature of injuries the Plaintiff and the inflationary trends since the time of the accident, I hereby award the Plaintiff a sum of Ksh. 2,100,000/= for pain, suffering and loss of amenities.

SPECIAL DAMAGES

The Plaintiff claims three categories of damages under this head.

- (a) Special damages of Ksh. 459,100/=
- (b) Future medical expenses
- (c) Loss of future earnings/Lost income

(a) Expended Special damages of Ksh. 459,100/=

In prove of the above figure the plaintiff produced the following documents:-

- (i) P.Exhibit.2– receipt for Police Abstract dated 15/11/2005 – Ksh. 250/=
- (ii) P.Exhibit. 4 – inpatient invoice dated 11/10/2005 – Ksh. 42,880/= of which only Ksh. 23,000.00 was paid.
- (iii) P. Exhibit. 5 (a) - (m) – bundle of receipts for purchase of medicines - Ksh. 25,595/=
- (iv) P. Exhibit. 7 – Receipt dated 7th July, 2006 for Dr. Lelei's medical report - Ksh. 2,000/=
- (v) P. Exhibit. 9 – Receipt dated 26/6/2006 from AIC Cure International Children's Hospital for Ksh. 126,000/=
- (vi) P. Exhibit. 10 – Cost for repair of artificial leg vide receipt dated 20th March, 2007 – Ksh. 15,000/=
- (viii) P. Exhibit. 11 – Receipt dated 20th June, 2008 for purchase of Artificial leg - Ksh. 250,000/=

T O T A L = KSH. 441,845/=

It is trite law that special damages must be strictly pleaded and proved. Although a sum of Ksh. 459,100/= was pleaded, only a sum of Ksh. 441,845/= was proved. I will accordingly only award the sum the Plaintiff has proved of Ksh. 441,845/=.

(b) Future Medical Expenses

Those damages being special in nature ought to have been specifically pleaded. Unfortunately, the Plaintiff did not specifically plead them save to state in the prayers sought “**Future Medical Expenses**”. In principle, therefore, the Plaintiff would not be entitled to a claim of damages for future medical expenses.

However, I will assess them on ground only, in principle, that the defence is not opposed to the Plaintiff being awarded such damages. What is in dispute is the amount awardable.

The Plaintiff has largely relied on the medical report dated 13th November, 2012 by Doctor Andrew Munialo of Moi Teaching & Referral Hospital produced as P. Exhibit 12. He is specialized as a Prosthetist Senior Orthopaedic Technologist. His observation was that the Plaintiff had been on an artificial limb for three (3) years which required immediate replacement. He then outlined the approximate cost of a prosthetic (Artificial) limb at Ksh. 205,000/= plus a 24% professional fee based on the total cost of the new limb. Although he did not give the cost of the professional fee, the same would be tabulated at $24 \div 100 \times 205,000/- = \text{Ksh. } 49,200/=$.

The testimony of the Plaintiff was that he required a replacement of the prosthetic limb every three years.

The Plaintiff counsel submits that Dr. Munialo recommended that a replacement should be done every three years; and that given that the Plaintiff may live up to the age of 80 years, would require 16 replacements. At the time of his testimony, the Plaintiff was aged 32 years, hence the balance of 48 years is divided by 3 to give 16.

The Plaintiff's counsel thus submits that Ksh. 4,067,200/= is awardable under this head. It is arrived as follows:-

Costs of the artificial limb	-	Ksh. 205,000/=
Professional fee	-	<u>Ksh. 49,200/=</u>
Sub-total	-	Ksh. 254,200/=
Ksh. 254,200 x 16	=	<u>Ksh. 4,027,000/=</u>

The defence on the other hand submits that the Plaintiff is only entitled to a single replacement. The defence counsel submits that Dr. Munialo did not recommend a limb replacement after every three (3) years and that such suggestion by the Plaintiff is based on no evidence.

I have carefully looked at Dr. Munialo's medical report. It has not made any reference to the requirement of the artificial limb replacement every three (3) years. He noted as follows:-

“He's been on the above knee left prosthesis – modular (artificial limb) for three (3) years now. His artificial limb currently is completely worn out and therefore requires immediate replacement.”

I also note that, neither the medical report of Dr. V. V. Lodhia (D.Exhibit 1) nor of Doctor L. K. Lelei (P.Exhibit 6) recommend replacement of the artificial limb every three (3) years.

I do accordingly find that the Plaintiff's submissions and his evidence that he requires the

replacement of the prosthetic limb every three (3) years as based on no evidence or proven history. And as rightly submitted by counsel of the defence, he probably changed the first limb so soon because it did not suit him. This court is not an expert in this field of medicine and would only be guided by expert evidence in arriving at a finding in favour of the Plaintiff.

Such expert evidence is not available. I will therefore only award the Plaintiff such a sum as is equivalent to a single replacement. And such sum is Ksh. 254,200/= as tabulated herein above.

(c) Loss of Future Earnings/Loss of Income

These damages are in the nature of special damages and must therefore be specifically pleaded and proved. What this means is that a party cannot prove them during the hearing through production of documents/evidence. It also means that a party is bound by his/her pleadings and short of what is not specifically referred to in the plaint cannot be granted by the court. Moreso, special damages are determined by what is real and can be assessed based on determinable loss or expenditure.

In this respect, the Plaintiff failed to meet this noble and cardinal criteria set out in aiding the court in determining what loss of future earnings and loss of income he suffered. Although he produced documents showing what his earnings were prior to the accident, such figures were not pleaded. He did not also seize an opportunity to amend the plaint even when he knew he had the documents that would aid him in specifying and assessing such loss.

In KISUMU CIVIL APPEAL NO. 91 OF 2003, MUMIUS SUGAR COMPANY LIMITED - VS- FRANCIS WANALO – (Bosire, O'Kubasu & Githinji, JJA, as they then were, cited the case of FAIRLEY -VS- JOHN THOMSON LIMITED (1973) 2 LLOYDS REP. 40 AT 41 in an attempt of defining what is required in proving damages for loss of earnings, thus;

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for future earnings are awardable for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

Further, as rightly put by the defence, the Plaintiff must prove that the loss is as a result of direct consequence of the accident. So then, was the loss of earnings and or future earnings as a result of the direct consequence of the accident? The answer is NO.

Prior to the accident the Plaintiff was running a matatu business in which he employed himself as the driver and had a conductor. His income ranged between Ksh. 1,500/= and 2,000/= daily as demonstrated by the daily work sheet produced as P. Exhibit 15.

On cross-examination, he testified that after he was discharged from hospital, he employed a driver but the income reduced. He said that the vehicle (matatu) was not damaged during the accident and he therefore continued to earn an income from it, save that the income reduced. He said that when the income reduced he decided to sell the matatu. He however failed to disclose how much he earned from the matatu when it was operated by someone else other than himself.

The Plaintiff made voluntary decision to sell the matatu. It is my view that, had he retained it, he would have continued to earn an income from it. His loss was thus occasioned by a voluntary decision. It would, in the circumstances, be grossly unjust to pass on that loss to the Defendants who had nothing to do with the loss of income.

Moreover, the Plaintiff continues to earn an income from small-scale farming and business of buying and selling livestock, albeit diminished income. He is therefore not totally helpless.

My greatest concern is his failure to specifically plead the damages under this head. Court empathizes with his condition, but it is also its duty to adhere to the rule of law to the letter. That is

the cardinal calling of a court. Unfortunately therefore, no amount shall be awarded to the Plaintiff for loss of income or loss of future earnings.

Finally, the defence counsel has urged court that interest on both general and special damages be payable from the date of the Judgment. He argues that a substantial claim of special damages was pleaded mid-way upon amendment of the plaint and that the delay in disposal of the matter was due to circumstances beyond the control of the defence.

By dint of Section 26 of the Civil Procedure Act, Cap 21, Laws of Kenya, court has discretion to award interest from such date as it deems it fit. However, such discretion must be exercised judiciously – See MAHAMEDI -VS- ATHMANI SHAMTE (1960) E.A. 1062. **“That exercise of discretion should however not be exercised in a vacuum. It must be exercised judiciously. The court must also consider the special circumstances of the case in order to determine from which of the three levels it should order interest.”** The three levels referred to in MOHAMEDI -VS- ATHMANI SHAMTE case are enunciated in SANSORA WIRE & NAIL WORKS LTD -VS- SHREEJI ENTERPRISES KENYA LTD (2005) e KLR by Hon. Justice Ochieng as:-

“From the foregoing working, it is evident that the court has discretion to order for the payment of interest at such rate as it deems reasonable. The said discretion of the court enables it to order interest be payable; (a) from a date before the institution of the suit (b) from the date of the suit (c) from the date of the decree. The interest that is ordered to be paid, may be directed to be payable either to the date of the payment or until such earlier date as the court thinks fit.”

Pursuant to the above observation Hon. Lesiit, J. had this to say in PANTHION LTD -VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION (2008) e KLR:-

“Considering Section 26 (1) of the Civil Procedure Act (Cap 21) Laws of Kenya provides that This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely (1) the period before the suit is filed (2) the period from the date when the court gives its judgment, and (3) from the date of judgment to the date of payment of sum adjudged due or such earlier date as the court may, in its discretion fix.”

The NEW TYRES ENTERPRISES LIMITED -VS- KENYA ALLIANCE INSURANCE COMPANY LTD (1987) KLR, 380 the Court of Appeal said as follows:-

“The court, under section 26 (1) of the Civil Procedure Act (Cap 21) has a wide measure of discretion on the question of interest The award of interest for the period prior to the filing of the suit is a matter of substantive law where a party has been deprived of his property and receives monetary award in compensation for the loss, the usual practice is to award interest from the date of deprivation.”

From the foregoing and exercising the discretion conferred on me by Section 26 of the Civil Procedure Act, I will order that special damages be payable from the date the Plaintiff was amended while interest on general damages be payable from the date of the Judgment. In respect of the former, I note that the amount of special damages was substantially increased upon amendment of the plaint and it may not be fair to condemn payment of their interests from the date of institution of the suit.

In the result, I enter Judgment for the Plaintiff against the Defendants jointly and severally as follows:-

- (a) General damages for pain, suffering and loss of amenities

- Ksh. 2,100,000/=
- (b) Expended special damages - Ksh. 441,845/=
- (c) Special damages for future replacement of prosthetic limb
- Ksh. 254,200/=
- Sub-Total - Ksh. 2,796,045/=
- Less 20% contributory negligence - Ksh. 559,209/=
- Balance payable - **Ksh. 2,236,836/=**
- (d) Plus costs of the suit and interest payable as ordered herein above.

DATED and DELIVERED at ELDORET this 26th day of June, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Omboto holding brief for Mrs. Chumba for the Plaintiff

Mr. Maritim for the Defendants