



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 287 OF 2007

SIMON ANO MUA..... PLAINTIFF

V E R S U S

1. KIOGA MUKWANO

(t/a KIOGA MUKWANO TRANSPORTERS)

2. ABUBAKAR ISLAM

3. KYOGA HAULIERS (U) LIMITED..... DEFENDANTS

J U D G M E N T

1. The cause of action in the present suit arose out of a road accident which occurred on 10th November 2004 along Naivasha - Gilgil Road between motor vehicle registration number KAK 322 V driven by the Plaintiff and motor vehicle registration number UAE 305 B/UPR 008. Damages are claimed by the Plaintiff for personal injuries suffered in the accident (including for future treatment). He also claims special damages.
2. The Plaintiff's case as set out in the **further amended plaint** dated **2nd December, 2008** is as follows: On or about 10th November 2004 at around 4.30 a.m., the Plaintiff was lawfully driving motor-vehicle registration number KAK 322 V, Isuzu lorry along Naivasha - Gilgil road; at Buffalo Horns Bus stage area the 2nd Defendant had negligently stopped and parked motor vehicle registration number UAE 305B/UPR, 008 Mercedes Benz tanker on the road; and that because of this the Plaintiff rammed into the parked lorry thereby sustaining serious injuries. The Plaintiff attributes the accident wholly to the negligence of the 2nd Defendant as driver of motor vehicle Registration Number UAE 305B/UPR 008. Particulars of negligence are pleaded. It is further pleaded that the 1st and 3rd Defendants are vicariously liable for the tort of the 2nd Defendant as the owners of the motor vehicle.
3. Particulars of personal injuries are given as are particulars of special damages in the sum of KShs. 247,005/00 for medical expenses.
4. The Plaintiff has also pleaded that as a result of the injuries sustained during the accident, he requires further medical care in terms of purchase of a prosthesis and its replacement at regular intervals. Costs of the suit and interest are also claimed.
5. The Defendants' defence, as set out in the **amended defence dated 3rd December 2008**, is as follows: Ownership of motor vehicle UAE 305B/ UPR 008 by the 1st Defendant at the material time is denied. Particulars of negligence, damage and injury are also denied.
6. Without prejudice the Defendants have averred that if an accident as pleaded occurred, the

- same was solely caused, or substantially contributed to, by the Plaintiff's negligence in the manner of his driving motor-vehicle KAK 322V. Particulars of such negligence are pleaded.
7. **Dr. Washington Wokabi** (PW1) is a medical doctor and a consultant surgeon practising in Nairobi. He has been a consultant since 1974. He testified that on 3rd August 2006 he examined the Plaintiff who was 42 years old then. The Plaintiff presented a history of having been involved in a road accident which occurred on 10th November 2004. He had with him medical documents from **Kijabe Mission Hospital**, which the witness perused.
 8. PW1 found that the Plaintiff had lost the left leg below the knee as a result of extensive open fractures of the left tibia and fibula and soft tissue loss in the area. He now had an artificial limb which was causing sores on the stump. He could not use the artificial limb for a long time as it was heavy, cumbersome and ill-fitting. He opined that the Plaintiff required a lighter and more versatile artificial limb; it would cost about KShs 50,000/00 and would require to be replaced every five years. In his view the Plaintiff who was a driver before the accident could not work as such again. He assessed his disability at 35% of the total person.
 9. PW1 prepared and signed a medical report on the Plaintiff. He produced it in evidence as Exhibit P1. He confirmed that he charged Kshs. 5,000/00 to prepare the report and issued a receipt.
 10. In cross-examination PW1 stated that the gangrene suffered by the Plaintiff was as a result of all the damage suffered in the tissues; such gangrene would usually result in amputation.
 11. The Plaintiff testified as PW2. He recalled the events of 10th November 2004. He recalled that while he was driving his employer's lorry at about 4 a.m. along Naivasha - Gilgil road he saw something dark on his lane, and because there was no warning sign, it was too late to swerve as there were on-coming vehicles. He ended up hitting it. He lost consciousness. When he came to he saw the vehicle he had hit and the plate numbers. He was then removed from his driver's cabin by well-wishers who took him to **Naivasha District Hospital** where he was admitted for three days. He was then transferred to Kijabe Mission Hospital where surgery was carried out on him **14 times**. His left leg was finally amputated about 4 inches below the knee. He was discharged after about one month of treatment but continued attending clinic every two weeks for a month. Eventually he was fitted with an artificial leg.
 12. The Plaintiff went on to produce in evidence the following exhibits -

Exhibit P2 - Discharge summary from Kijabe

Exhibit P3 - Medical report from Kijabe

Exhibit P4 - Termination letter by Roy Parcels

Exhibit P5 - Pay-slip for February 2005.

Exhibit P6 - Police abstract.

Exhibit P7 - Receipt for KShs 200/00 for police abstract

Exhibit P8 - Receipt for the medical report by Dr Wokabi

Exhibit P9 - Bundle of Receipts for hospital treatment

Exhibit P10 - Receipt for service of summons outside jurisdiction

Exhibit P11 - Receipt for charges by Dr Wokabi for attending court

Exhibit P12 - Receipts for transport payment to clinic

Exhibit P13 - Police medical examination report (P3 Form)

Exhibit P14 - Search certificate of motor-vehicle

Exhibit P15 - Demand letter sent before action

13. **Ali Ole Napei** testified as PW3. He recollected the events of 10th November 2004 when he worked as a security guard along the Nairobi Naivasha Highway guarding parked lorries. His evidence was more or less the same as that of the Plaintiff. In cross-examination he stated that the trailer's rear side had blocked half of the lane on the right side though there are three lanes at that point of the road.
14. The Defendants did not call any witness or lead any evidence.

ISSUES:

- i. **Was the 2nd Defendant the servant or agent of the 1st and 3rd Defendants in due performance of his duties at the material time?**
- ii. **Did an accident occur as pleaded between motor vehicle KAK 322V (driven by the Plaintiff) and motor vehicle UAE 305B/ UPR 008 (driven by the 2nd Defendant)?**
- iii. **Was the accident caused by the sole negligence of the 2nd Defendant or was it contributed to by the Plaintiff?**
- iv. **Did the Plaintiff suffer any injuries in the accident and if so, what is the extent thereof?**
- v. **What damages, if any, are due to the Plaintiff?**

Was the 2nd Defendant the servant or agent of the 1st and 3rd Defendants in due performance of his duties?

15. Motor vehicle UAE 305B/UPR 008 was registered in the name of the 3rd Defendant. No evidence was tendered that the 1st Defendant co-owned or had possession or control of the motor vehicle. I find that the 2nd Defendant was not his servant or agent. He is not liable.
16. On the other hand it is not in contention that the 3rd Defendant was the registered owner of the motor-vehicle and that the 2nd Defendant was driving it with his consent and authority. The 3rd Defendant is therefore vicariously liable.

Did an accident occur as pleaded between motor vehicle KAK 322V (driven by the Plaintiff) and motor vehicle UAE 305B/ UPR 008 (driven by the 2nd Defendant)?

17. The only evidence before the court regarding the happening of the accident is that of the Plaintiff (PW2) and PW3. The other driver involved (the 2nd Defendant) who was driving motor vehicle UAE 305 B/UPR 008) did not testify. No reasons were given why he could not testify. The evidence by PW2 and PW3 has not been challenged by any other evidence. I am satisfied that indeed the accident pleaded by the Plaintiff did occur.

Was the accident caused by the sole or contributory negligence of the 2nd Defendant or of the Plaintiff?

18. There is only the uncontroverted testimony of the Plaintiff and PW3 as to how the accident occurred. They testified that the 2nd Defendant's motor-vehicle was parked on the road without any warning sign. It was at night, about 4.30 in the morning. It was also raining. The Plaintiff ended up ramming into it to avoid hitting oncoming vehicles. He could not avoid the accident despite applying emergency brakes. Because the road was wet his motor vehicle skidded. The 2nd Defendant did not appear in court to give his version of how the accident might have occurred. The act of parking at least part of his lorry on the road was extremely negligent on the part of the 2nd Defendant in the circumstances. There is no evidence that the Plaintiff was speeding, or otherwise driving without due care and attention. I find that the accident was caused

by the sole negligence of the 2nd Defendant. **On liability therefore I find for the Plaintiff at 100%.**

What injuries, if any, did the Plaintiff suffer and what damages are due to him?

19. PW1 (Dr Wokabi) examined the Plaintiff one year seven months after the accident. He prepared and signed a medical report in that respect. He verified the injuries received by the Plaintiff in the accident. The main injury was **amputation of the left leg four inches below the knee**. It was a serious injury. The Plaintiff was in the hospital for a month and underwent surgery 14 times. He continued treatment as an outpatient. According to PW1 he must have suffered a lot of pain and blood loss. He appears to have healed well but he requires a prosthesis which has to be replaced every five years.

20. I have considered the submissions made on behalf of the parties in respect of damages for pain, suffering and loss and amenities. I have noted that the Plaintiff has been left with 35% incapacity of the total person. Doing the best that I can I will award him general damages of KShs 2 million for pain, suffering and loss of amenities.

21. PW1 was of the further opinion that the Plaintiff will never be gainfully employed again as a driver due to the loss of his leg. He was earning KShs. 8,736/15 per month according to **Exhibit 5**. He is therefore entitled to compensation for his reduced ability to earn an income.

22. The principles to be considered in determining whether an injured person is entitled to damages under this head were settled in the Court of Appeal in **Butler vs Butler [1984] KLR 225**. It was held there as follows -

- “1. A Person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.**
- 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.**
- 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.**
- 4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.**
- 5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.**
- 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”**

23. The Plaintiff was 43 years old when the accident occurred. He should have been able to work at least to the public service retirement age of 60 years if not longer. But due allowance must be given for the

vagaries and uncertainties of life. I will therefore award him a multiplier of 12 years. I will therefore award him damages for loss of earning capacity in the sum of KShs 1,258,005/60 made up as follows –

KShs 8,736/15 X 12 X 12 = KShs 1,258,005/60

24. The Plaintiff's future medical expenses will involve only purchase of a better artificial limb and replacement of the same three times for the rest of his life. I accept PW1's assessment that the replacement and each change will require about KShs. 50,000/00. I will therefore award the Plaintiff KShs 200,000/00 for future medical expenses.

25. Special damages KShs. 247,005/00 were claimed. Only KShs. 194,760/00 and \$ 715 were strictly proved. I will award those sums. The dollars shall be paid in Kenya Shillings at the prevailing rate of exchange at the time of payment.

26. In summary I will enter judgment for the Plaintiff against the 2nd and 3rd Defendants jointly and severally as follows

- (i) For pain suffering and loss of amenities: KShs 2 million.
- (ii) For loss of earning capacity: KShs 1,258,005/60
- (iii) For future medical expenses: KShs 200,000/00
- (iv) Special damages: KShs. 194,760/00 and \$ 715

There will be interest on general damages (except the amount awarded for loss of earning capacity) at court rates from the date of judgment until payment in full. There will be similar interest on special damages from the date of filing suit. Interest on the dollar award will be calculated on its Kenya Shilling equivalent.

27. The Plaintiff's suit as against the 1st Defendant is dismissed with no order to costs. The Plaintiff shall have his costs of the suit as against the 2nd and 3rd Defendants jointly and severally.

28. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS

30TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE