



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 344 of 2010

JAMES THIONGO GITHIRI.....PLAINTIFF

VERSUS

NDUATI NJUGUNA NGUGI.....DEFENDANT

JUDGMENT

The Plaintiff sued the Defendant for -

- (a) *general damages,***
- (b) *damages for loss of earnings and earning capacity,***
- (c) *special damages,***
- (d) *costs and interest,***
- (e) *interest on (a), (b), (c), & (d),***
- (f) *other relief the court may deem fit to grant.***

Though the Defendants were duly served (*and there are two affidavits sworn on 23rd February 2011 and 28th July 2011*), none of the Defendants filed either a Memorandum of Appearance or any Defence. Upon request for judgment dated 23rd March 2011, judgment was entered on 28th July 2011 and the suit was fixed for formal proof on a date to be fixed by the plaintiff's counsel.

When the matter came up for formal proof on 23rd January 2012, only the plaintiff and the Plaintiff's Doctor testified. Their evidence being formal proof was uncontroverted.

The Plaintiff was a fare paying passenger in a motor vehicle registration Number KAY 978X travelling from Gilgil to Nakuru. While at a place called Mbaruk, there was a lorry in front of them which the pick-up Registration Number KAM 404M overtook, and in the process collided with the matatu. The plaintiff sustained serious injuries a fracture of his right leg in three places, and the left leg was also

broken in one place.

For these injuries the plaintiff was admitted at Kijabe Mission Hospital from 3.08.2010 to 30.10.2010 when he was discharged. The plaintiff produced the discharge voucher as PExh.1.

While admitted at the Hospital, the Plaintiff was operated upon and two steel rods were inserted in both his right and left legs and continued out-patient treatment even after discharge from the hospital.

The plaintiff was only able to make a Report to the Police, after his discharge from the Police, and was issued with a Police Abstract Report (*P.Exh. 2*). He testified that the Pick-up was to blame. It was beneficially owned by one Samuel Mungai but the records at the Registrar of Motor Vehicles (KRA) showed the registered owner was Nduati Njuguna Ngugi - both Defendants in this suit.

For the treatment of his injuries, the Plaintiff paid Shs. 410,315/= to Kijabe Mission Hospital. He produced a bunch of receipts (*PExh.3*). He also consulted a private Doctor twice, and paid Shs 5,000/= for the Doctor's review of his injuries and Report thereon.

The Plaintiff's principal occupation was that of a hawker, he bought clothes in the major markets of Nakuru and hawked them in Gilgil. It involves walking with a load of clothes on your shoulder(s). He is unable to do that now. He limps. He was educated up to Form IV and used to earn between Ksh 10,000 - 15,000/= per month from his business.

For those reasons the plaintiff prayed for damages. He has to walk with the steel rods for another 2 years after which the rods will be removed. It will cost him shs 150,000/=, and therefore prays for future medical expenses. He continues to suffer. He prays for costs.

The Plaintiff also called, in aid of his case, the evidence of Dr. Kiamba who testified as to the Plaintiff's injuries, and produced his two Reports dated respectively 7th December 2010, and 16th November 2011, that is about one year apart.

He was of the expert opinion that the plaintiff sustained multiple fractures of all the limbs during the accident, and that open reduction and internal fixation of the unilateral fractures of the humerus and femur was done. The plates and the intermedullar rods were still in place and will require removal in future, at the cost of Ksh 150,000/=, and that the function of the left leg would improve.

The Doctor also reported that the fracture of the right tibia and fibula mal-united resulting into a prominent deformity in the right leg, and that function of the right lower limb is reduced and he also limps, and suffers from pain in both hip joints and weakness of the upper limbs.

The Doctor classified the degree of injury as "**grievous harm**", and recommended that the Plaintiff should be awarded a temporary disability of 15 months and a permanent disability of fifty per cent (50%).

In addition to the plaintiff's and the Doctor's evidence, Mr. Gekong'a learned counsel for the plaintiff also filed written submissions and attached the judgment of Hon. Lady Justice Martha Koome (*now Justice of Appeal*) in the case of **EDWARD MZAMILI KATANA VS. CMC MOTORS LTD and SHAH PUNJA HIRA** (*Mombasa HCCC No. 70 of 1997*) decided on March 2006, and finally claimed Ksh 12,490,000/= made up as follows -

(1) Pain and Suffering	Ksh. 4,000,000.00
(2) Loss of Earnings and Earning Capacity	Ksh. 7,920,000.00
(3) Future Medical Expenses	Ksh 150,000.00
(4) Special Damages	Ksh <u>420,315.00</u>

ANALYSIS AND CONCLUSION

I have considered counsel's submissions which are based upon the plaintiff's and his Doctor's evidence as well as precedent by way of the case of **Edward Mzamili Katana vs. C.M.C. Motors Group Ltd. & Shah Pruja Hira** (*supra*) in which the learned judge awarded a sum of Ksh 2 million for pain and suffering. But as the learned judge added quickly, that not two cases can have the same injuries and disability effects, and each case must depend on its peculiar facts. Prior cases only provide but an useful guide and as cautioned by the Court of Appeal in **KIGARAARI VS. AYA (1982-88) 1KAR 768** -

"Damages must be within the limits set out by the decided cases and also within the limits of the Kenyan economy can afford. Large 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 insurance and increased fees."

The clear message in this warning is that damages must be assessed to ensure that the Insurance Companies, the geese that lay the golden eggs, remain in operation and are not cleaned out like the **Motor Pool** of the latter decades of the 20th century that led to the collapse of many a poorly capitalized insurance company. This sentiment must however be weighed against the rise in inflation as well as the fall of the Kenya currency vis-à-vis currencies in which most drugs are paid for as imports into Kenya.

As I said in the case of **Jesca Kaari Mutwiri Mwangi vs. Fari Said Hassan & Another (Meru HCCC No. 170 of 2001)** decided on 31st July 2009, these are all relevant factors in assessing general damages. The principle of the common law is that the damages due for a tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act.

In this case, the Defendants and in particular the driver of the Pick-Up KAM 404M overtook a lorry without proper care and attention and caused it to collide with the matatu - KAM 978X in which the plaintiff was a passenger. The injuries suffered by the Plaintiff were a direct and natural consequences of the negligence of the 2nd Defendant, the driver of KAY 978X, in causing it to collide with motor vehicle number KAM 404M, owned by the 3rd Defendant.

Taking the above factors into account, I would award the Plaintiff Ksh 1,800,000/= in general damages.

SPECIAL DAMAGES

Special damages are those damages which a Plaintiff is entitled to claim, but which without a special claim the law does not assume to follow from the wrongful act, as opposed to general damages which the law presumes to be the direct and natural or probable consequence of the act complained of. For instance, as in this case, if a person is knocked down by a car it will be presumed that he has been hurt, and he has thereby suffered damage.

"Special damages" on the other hand, are such as the law will not presume from the nature of the act. It will not be presumed that the injured person has to incur the expense of going to hospital. They must therefore be claimed specially and proved strictly. The term **"special damages"** denotes the actual pecuniary loss arising out of the special circumstances of the case, and is to be superadded to the general damage implied by the law as following if the plaintiff has been caused pain, suffering or wounds/injuries of any description.

A claim for special damage must be specially pleaded by the plaintiff setting out each particular item and the amount claimed in respect of it. Such damage not being presumed by the law, the plaintiff must expressly prove his special damage, and if he fails, either to plead or to prove it, he is not entitled to recover.

In an accident case such as the claim herein, special damage would include the cost of Doctors bills, Hospital expenses, special treatment, cost of repairing motor vehicle, loss of use of car, and loss of income up to the date of judgment.

In this case, the Plaintiff pleaded and proved the following special damages -

(i)	<i>1st Medical Report</i>	<i>Sh 5,000/=</i>
(ii)	<i>Doctor's Attendance in court</i>	<i>Sh 10,000/=</i>
(iii)	<i>Police Abstract Report</i>	<i>Sh 100/=</i>
(iv)	<i>Vehicle Search Certificate</i>	<i>Sh 500/=</i>
(v)	<i>P3 Form</i>	<i>Sh 1,000/=</i>
(vi)	<i>Medical Expense</i>	<i>Sh <u>410,315</u></i>
		<i>Sh 420,315</i>

I would therefore award the Plaintiff this sum of Ksh 420,315/=.

FUTURE MEDICAL EXPENSES

This is a feature of road accident cases, damages are continuing at the trial as well as after judgment. The Plaintiff may not have recovered fully from his injuries. In such circumstances, the Plaintiff will also claim general damages for continuing loss in the form of future medical expenses, hospital charges or other items of special damage.

In this case, the Plaintiff testified and his evidence was confirmed by PW2, Doctor Kiamba, that he would have the steel rods fixed to hold the bones of both of legs removed in the next two years. The estimated cost was put at Shs 150,000/=. In the light of the rocketing medical costs, I would put the figure at Shs 200,000/= for future medical expenses.

LOSS OF FUTURE INCOME/EARNING CAPACITY

The principle under this head of claim is that the court should take into account not only the present loss but also the capacity of the plaintiff to earn a future or improved income.

It was the plaintiff's evidence that he used to earn between Kshs 10,000 - 15,000/= per month of nett profit from his hawking business. The plaintiff was however unable to provide any proof of this claim by way of any Banking slips or Bank Statements to show the setting aside of that or other sum as profit. In the absence of any such evidence, I would grant the plaintiff a mean/average sum of Ksh 7,500/= per month by way of nett profit.

Counsel for the Plaintiff submitted that the Plaintiff was a robust young man of 27 years of age at the time of the accident. He would have continued working at his hawking business for another 33 years, when he would have reached the age of 60 years. It was however the evidence of PW2, Dr. Kiamba that the plaintiff would suffer total temporary disability for the next fifteen months, and 50% disability for the rest of his life due to the injuries suffered from the accident.

In monetary terms, the plaintiff would be entitled to shs 127,500/= comprised of the nett earnings of Ksh 7,500/= per month, multiplied by the fifteen months of total incapacity - $(15 \text{ months} \times 7,500/- = 127,500/=)$.

PW2 also testified that the plaintiff would suffer 50% disability for the rest of his working life. Taking

that the plaintiff was 27 years of age at the time of the accident, and would continue working upto the age of 60, the average retirement age, the plaintiff would have 33 years of active working life. Allowing therefore that multiplier, per month at the rate of Ksh 7,500/=, the figure would be comprised of the number of working years, multiplied by the months in the year, and the average monthly nett earnings *i.e.* 33 x 12 x 7,500 making a total of Ksh 2,970,000/=. However as the plaintiff would only be incapacitated to the extent of 50%, the said sum would be reduced by that 50% as follows -

(i)	$33 \times 12 \times 7,500/=$	2,970,000
	<i>Less 50%</i>	<u>1,485,000</u>
		1,485,000
	<i>Add 15 months incapacity</i>	<u>127,500</u>
	Total	Shs <u>1,612,500</u>

I would therefore award the plaintiff the total sum of Ksh 4,032,875/= comprised of -

(1)	Pain & Suffering	Ksh 1,800,000/=
(2)	Loss of Earning/Earning Capacity	Ksh 1,612,500/=
(3)	Special damages	Ksh 420,315/=
(4)	Future medical expenses	Ksh <u>200,000/=</u>
	Grand Total	Ksh 4,032,815/=

The Plaintiff shall also have interest on the above sum from the date of judgment till payment in full, and also have the costs of this suit.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 4th day of May, 2012

M. J. ANYARA EMUKULE
JUDGE