



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Suit 86 of 2012

ROY

MACKENZIE.....PLAINTIFF

VERSUS

1. CARTRACK KENYA LIMITED

2. 911 SECURITY LIMITED (T/A CARTRACK GROUP).....DEFENDANTS

JUDGMENT

1. This suit is for formal proof. It emanates from injuries suffered by the Plaintiff in a motor vehicle accident. On 30th November, 2011, the Plaintiff was a passenger in a Toyota Hilux registration Number KBK 996 J. It was being driven by the Defendant's driver along Kinango/Mjaa Road, South Coast, when it lost control and overturned. The Plaintiff suffered, *inter alia*, serious injuries on his left shoulder leaving him disabled and with restricted movement of his shoulder and arm.

2. The Plaintiff filed this suit on 3rd May, 2012. He seeks special damages of Shs. 3,363,311/= as particularised in the plaint, general damages, interest on special damages at court rates from the date of filing suit, interest on general damages at court rates from the date of filing suit, interest on general damages at court rates from the date of judgment, and costs of and incidental to the suit plus interest at 14% per annum from the date of judgment. Summons to enter appearance was issued on 3rd May, 2012.

3. 4 summons together with the Plaint, verifying affidavit of the Plaintiff, list of Plaintiff's witnesses, and witness statements of Roy McKenzie, Marguerite Mckenzi and Nyae Tsuma, and List of Documents to be relied on at trial were served on the Defendants. By an affidavit of service sworn by Alfred Kingi, Process Server, on 7th June 2012, he depones that he served the suit documents on Cartrack Kenya Limited, the Defendants on 17th May, 2012. One Mr. Maina of Cartrack Kenya Limited accepted service and stamped, signed and dated the summons at the rear, and returned it to the process server. It was later filed in court.

4. Upon failure of the Defendants to enter appearance, the Plaintiff, on 7th June, 2012, filed a Request for judgment under Order 10 Rule 4(2) seeking interlocutory judgment of Shs. 3,263,311.00 with interest as prayed in the plaint. This was for special damages. Judgment was entered by the court on 7th June, 2012 for the said amount together with interest at court rates from the date of filing suit until payment in full.

5. Where judgment has been entered for a liquidated demand and interest under Order 10 Rule 4(2), as was the case here, the award of costs and award on any other claim shall await judgment. The judgment

herein, therefore concerns only proof of the outstanding claims in the plaint for general damages, interest thereon and costs of the suit and interest thereon as shown in prayers (b) (d) and (e) of the plaint.

6. At the hearing on 18th July, 2012, the Plaintiff and Dr. Ronald Franco Kaale testified. The Plaintiff testified that on 30th November, 2011 about 11.30 a.m he was conducting a recce for KCB Mtaani Rally as Clerk of the Course. The rally is part of Kenya National Rally Championship. It was sponsored by the Defendants. He was seated in the rear seat the Defendant's Toyota Hilux twin cab pick-up. He could not wear the seat belt because it was unreachable. The seat had been covered with a canvas fitting and the belt-gap was misaligned such that the seat belt could not be accessed and brought out for use. As a motor sport enthusiast and rally driver, the Plaintiff was very aware of the dangers of motorsport.

7. On that day, the road was very clear, and dry, and there were no obstructions. The accident, however, occurred when the vehicle, driven by the Defendant's driver, swerved around a corner and rolled landing driver-side down facing backwards, about twenty feet off the road. Plaintiff suffered injuries on his shoulder, his left arm was immobile, and he had to be helped to exit the vehicle. He was in general pain on the head, shoulder and rib area. He was taken to Bomu Hospital, Miritini, X rayed, and given general treatment, then referred to Mombasa Hospital. He was admitted there on 1st December, 2011 and discharged on 5th December, 2011.

8. Dr. Ronald Kaale gave evidence for the Plaintiff. He is an Orthopaedic and trauma surgeon. He examined the Plaintiff on 17th April, 2012, and wrote a report on the same day. In addition to examining the Plaintiff, he also perused and relied on the discharge summary from Mombasa Hospital, and medical reports written by Doctors J.M. Muthuuri, Orthopaedic and MH Varwani, Resident Doctor at Bomu Hospital.

9. On examination of the Plaintiff, he was found to have wasting of the deltoid muscle left shoulder; healed operation scar about 8cm on left shoulder, abduction power was reduced to grade 3; extension power reduced to grade 2, and internal and external rotation power grade 3. The left shoulder motions are reduced at all ranges and painful, and recent X-ray of 12th January, 2012 shows Osteoporosis of the proximal humerus with three screws *in situ*. There was evidence of acromioclavicular impingement (block) on abduction of the shoulder, but the fracture had healed. Dr. Kaale produced his report as PEXB 2, and a receipt for Shs. 5,000/= for court attendance as PEXB 1.

10. In Dr. Kaale's opinion:

“Roy sustained severe injury to his left shoulder following the accident which required major surgery under general anaesthesia. Despite post operative physiotherapy, shoulder movements are grossly reduced and there is persistent pain. He has impingement and most likely a tear of the rotator cuff tendon which requires urgent arthroscopic surgical correction to prevent further deterioration of function and alleviate his pain. The cost of surgery and rehabilitation is approximately Kshs. 550,000(five hundred and fifty thousand).

In the meantime he should continue with painkillers and physiotherapy.”

In his written submissions, Mr. Khanna stated that he had searched the authorities but could not find any comparable ones for similar type of injuries. He attached some on general damages for less serious injuries ranging between Kshs. 150,000/= to Kshs. 400,000/= for pain and suffering with little or no disability of the arm or shoulder, and where Plaintiffs did not have to undergo future operations. They were also over ten years old. Counsel prays for an award of Kshs. 1,000,000/= for general damages taking into account Plaintiff's incapacity to earn in the future, plus cost of the future operation estimated at Kshs. 550,000/=, plus Dr. Kaale's court attendance at the cost of Kshs. 5,000/=. He also prays for special damages, interest and costs as prayed in the plaint.

12. I will not interfere with the special damages awarded under the interlocutory judgment, of Kshs. 3,263,311.00, and interest thereon in terms of prayers (a) and (c) of the Plaint.

The authorities provided on general damages are as follows:

- a) **Sebastian Mutuku Mbuli vs Dhanji & Wahnji & Co. HCC 3036 of 1989, Nairobi** where the Plaintiff suffered fracture of right scapula, was hospitalised for 3 days and was an outpatient for 4 months. He suffered no permanent incapacity. He was awarded Kshs. 150,000/= general damages for pain, suffering and loss of amenities on 10th February, 1993.
- b) **James Rutto vs The Hon. Attorney General.** HCCC No. 165 of 1996 Nairobi. The Plaintiff here suffered fracture of the left humerus, head injury, concussion and laceration of forehead, and soft injuries to chest and lower back. He was awarded Kshs. 250,000/= on 17th February, 1997.
- c) **James Musau Kimweli vs Benard Ndegwa Kiseu & Another** HCC No. 133 of 1997, Machakos. Here, Plaintiff had suffered fracture of right humerus and left collar bone; a metal plate had to be affixed; in the humerus. He was off work 3 months and disability was assessed at 5%. He was awarded Kshs. 250,000/= on 27th February, 2002.
- d) **Abdillahi Shee Mwachalika vs Tawfiq Bus Services** HCCC No. 67 of 999 Mombasa. The Plaintiff here sustained comminuted fractures of the left humerus, fracture of upper third of ulna (left forearm) and deep wound in lower hip. He was awarded general damages of Ksh. 390,000/= on 11th February, 2002.

13. The above authorities are all over ten years old and for somewhat, but not entirely, similar injuries. The value of the shilling, rate of inflation and the economy have all changed. The cost of living is higher today than it was ten years ago. I have taken all these into consideration.

14. I Have seen a High Court decision from Malindi **Abubakar Boda Galana vs TSS Transporters Ltd HCCC No. 46 of 2009**, where the Plaintiff suffered polytrauma, facial lacerations, deep cut on left knee, chest contusion, blood loss and mangled left (upper left limb) in an accident. The left limb was amputated, and he was later fitted with an artificial limb. Hon. Justice H. Omondi awarded him Kshs. 1,200,000/- on 15th June 2011. These injuries are far more serious, in my view, than those suffered by the Plaintiff in the present case.

15. Accordingly, I would award Kshs. 700,000/= general damages for pain, suffering and loss of amenities. In addition, Doctor Kaale estimated Shillings 550,000/= for the cost of future surgery and rehabilitation. I note that Dr. Kaale is himself a consultant in general trauma and orthopaedic surgeon, and his evidence can be taken seriously. I accept his evaluation of the cost of future surgery and do hereby award future surgical costs at Kshs. 550,000/= .

16. The upshot of my determination is that I award:

- a) General damages for pain, suffering and loss of amenities at Kshs. 700,000/= with interest thereon at court rates from the date hereof until payment in full, and
- b) Future surgery and rehabilitation costs Kshs. 550,000/=
- c) Special damages awarded to the Plaintiff by way of interlocutory judgment are payable in the amount of Kshs. 3, 263,311.00 with interest thereon at a court rates from the date of filing suit until payment in full.

Orders accordingly.

Dated, signed and delivered this 20th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)