



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.229 OF 2008

HUSSEIN HASSAN MOHAMMED.....PLAINTIFF

VERSUS

STANLEY THUO GACHERU.....1ST DEFENDANT
PETER GITHINJI KIRIGA.....2ND DEFENDANT
ZACHARIA MBURU CHEGO..... 3RD DEFENDANT
FRANCIS CHEGE MWAURA.....4TH DEFENDANT
JOHN NDUNGU NJURU.....5TH DEFENDANT

JUDGMENT

It is pleaded that the plaintiff suffered personal injuries as a result of a road traffic accident which occurred on 31st October, 2006 involving the motor vehicle he was traveling in as a fare paying passenger (KAS 415D) and another, KQW 077.

The 1st defendant was the registered owner of KAS 415D and the 2nd defendant the insured (beneficial owner). The 3rd defendant was the registered owner of KQW 077 and the 4th defendant was the beneficial owner and/or insured of the said vehicle. The 5th defendant was the authorized driver of this vehicle at the time of the accident. It is pleaded that the plaintiff suffered the following injuries as a result of the accident:

- i) Fracture of left supra-orbital ridge
- ii) Severe head injury leading to loss of consciousness for 2 days
- iii) Fracture of the right ulna
- iv) Fracture of both mandible with displaced tooth
- v) Blunt injury to the anterior chest wall

Judgment on liability was entered by consent, to the extent of 60% in favour of the 4th and 5th defendants, interlocutory judgment having been entered in respect of the 1st to the 3rd defendants. All the documents relied upon in the trial were also admitted by consent.

The plaintiff, relying on the decision of **Samuel Mwangi Gatoto Vs. Patrick A. Anzaya & Another**, HCCC No.23 of 1887 (Msa), submitted for an award of general damages in the sum of Kshs.1,800,000/=, Kshs.160,000/= of future medical expenses, Kshs.73,349/= in special damages and Kshs.2,400,000/= on the head of loss of earning and earning capacity. The 4th and 5th defendants on the other hand submitted for the following award:

- i) General damages - Kshs.100,000 and
- ii) Future medical expenses - Kshs.20,000/=

I have considered these submissions and the authorities in support thereof.

Awards for personal injuries depend on the nature of the injuries suffered. That is why it is of paramount importance that the injuries be particularized in the pleadings and proved at the trial. In this claim, there are two reports by two medical practitioners that are at variance. Dr. Obed Omuyoma's report dated 6th October, 2008 gave the plaintiff's condition at the time of compiling the report as follows:

- i) Inability to chew hard food.
- ii) Loss of power in the right hand
- iii) Fracture of the left supra-orbital ridge and fracture of right mandible with displaced tooth
- iv) Fracture of right ulnar. Surgical scar on the posterior aspect of the right hand measuring 12cm by ½ cm. The plate was in situ.

In his opinion from examining the plaintiff, the plaintiff was in a fair state of health with his vital signs within normal limits. The plaintiff,

according to Dr. Omuyoma suffered a permanent disability of 40%. The plate was to be removed at a cost of Kshs.150,000/=. The degree of injury was assessed as "maim"

Compare the foregoing with Dr. M. S. Malik's finding on the plaintiff conducted on 23rd November, 2009, one year after Dr. Omuyoma's examination. Dr. Malik found that the plaintiff:

- i) was in good general health
- ii) had no abnormalities in the neck or abdomen and his vital signs were within normal limits
- iii) had his lower and upper molars missing
- iv) had an operation scar measuring 12 cm on the posterior surface of the forearm and a plate and screws could be felt under the skin. The ulna was solidly united and the arm was normal
- v) had a head fracture of the lateral border of the right orbital bone
- vi) had a healed fracture of the middle third of the ulna which was internally fixed with a metal plate and 7 screws. The doctor noted that the position was perfect.

The doctor concluded that, in his opinion, the plaintiff suffered total incapacity of a temporary nature for 6 weeks followed by partial incapacity of a temporary nature for a further period of 4 weeks. That he had suffered no permanent physical disability.

Both doctors testified before me. I can only attribute their different conclusions to the fact that the examinations were conducted one year between each other. For that reason, it is reasonable to conclude that the last report presents the plaintiff's condition at the time of the hearing.

In **Samuel Mwangi Gatoto** (supra) the plaintiff suffered:

- i) head injury
- ii) rugged laceration – right parieto – frontal scalp
- iii) bruises on the back and right arm

Skull X-ray suggested occipital fracture with a likelihood of epilepsy developing. Khaminwa, J awarded Kshs.750,000/= in general damages.

In **Benson Chero Vs. Salim Saleh**, Msa. HCCC No.536 of 1988 cited by counsel for the defendant, Omolo, J (as he then was) awarded Kshs.360,000/= for a fracture of the skull at the parieto temporal area, a fracture of the mandible and a cut lacerated wound and injury to the cornea of the right eye. He was unconscious for 8 days and remained in hospital for 2 months. The injuries healed with a post-traumatic 7th cranial nerve palsy (facial nerve) leading to paralysis of the muscle of the face on the right side. The

right eye got blind. In **John Kagio Kamau & 6 others** Vs. **Samuel Muchiri Njuguna** HCCC No.3415/1991 involving several plaintiffs, none of the injuries suffered by those plaintiffs was comparable to those suffered by the plaintiff herein.

While I find no basis or justification for counsel for the plaintiff's proposal of JKshs.1,800,000/=, I am of the considered view that the injuries suffered by the plaintiff in **Samuel Mwangi Gatoto** were more or less comparable to those suffered by the plaintiff herein, while those suffered by the plaintiff in **Benson Charo's** case were more severe.

A balance guided by the nature of injuries in the cited cases and the period they were decided must be struck. I will award to the plaintiff general damages in the sum of Kshs.650,000/=.

Regarding future medical expenses, it is now settled that this claim is in the nature of special damages which must be pleaded and proved. Future medical expenses was pleaded at Kshs.160,000/=. Dr. Omuyoma, however testified that the cost of removing the plate at a public hospital would cost Kshs.50,000/= while Dr. Malik was of the opinion that it would be between Kshs.60,000/= to kshs.70,000/- in a private hospital and Kshs.20,000/= to Kshs.30,000/= in a public hospital.

It was the plaintiff's claim and it was upon him to obtain the actual cost for removing the plate. But, since there is no dispute that the plate will have to be removed whatever the case, it is fair and just that he be awarded some money for that. I award Kshs.30,000/= for future medical expenses.

Turning to the head of loss of earnings, again it was incumbent upon the plaintiff to prove, as he alleges that his monthly income was between Kshs.150,000/= and Kshs.200,000/= and further that as a result of the accident, he could not earn that sum and is not likely to earn it. He said in his evidence that he owns a shop. That following his injuries he is unable to carry on with the business as he cannot carry goods due to weakness in his hand. However, in cross-examination, he conceded that he is still engaged in his shop business where he works from 8a.m. to 5.30p.m. or even 6p.m. throughout the week, except for the time he goes to the mosque to pray. If there was any loss, it can only be loss of earnings and only for the period the plaintiff was indisposed. The plaintiff gave his monthly income as between Kshs.150,000/= and Kshs.200,000/= without any evidence such as bank statements or books of accounts. Although in some cases, this may not be absolutely necessary, there is no evidence to suggest that indeed he is engaged in a retail business, e.g. trade licences, receipts or invoices. This claim also fails.

Judgment is entered as follows:

i)	General damages	– Kshs.650.000.00
ii)	Special damages	– Kshs.73,349.00
iii)	Future Medical Expenses	– Kshs. <u>30,000.00</u>
iv)	Total	– Kshs.753,349.00
	Less 40%	– Kshs. <u>452,010.00</u>

The difference constituting 40% i.e. Kshs.301,340/= to be borne by the 1st, 2nd, and 3rd defendants.

Costs and interest awarded to the plaintiff to be shared by the defendants in the same ratio.

Dated, Delivered and Signed at Nakuru this 14th day of February, 2011.

W. OUKO
JUDGE