



-amputation of arm
-head injury
-loss of earnings

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 46 OF 2009

ABUBAKAR BODA GALANO.....PLAINTIFF

VERSUS

T.S.S. TRANSPORTERS LTD.....DEFENDANT

JUDGEMENTS

ABUBAKAR BODA GALANO(the Plaintiff) has filed this suit against **T.S.S TRANSPORTERS LTD**(the defendant) seeking for judgement to be entered jointly and severally for general damages for loss of a limb, pain and suffering, special damages, loss of earning, costs of the suit and interest.

The background to this claim is that the Defendant was the registered owner of motor vehicle registration number **KAV 190V** Nissan Bus and the Plaintiff was the employee. On 12th October 2007 at about 12.30Pm, the Plaintiff was travelling in motor vehicle registration number **KAN 190V** along Mombasa-Malindi Road, as a conductor of the Defendant when they got to **MUSUMARINI**, the motor vehicle was involved in an accident where the bus slid and fell on its side. The Plaintiff suffered head injuries with loss of consciousness amputation of the left upper limb, deep cuts along the left eye and right cheek and massive blood loss.

The accident is blamed on the negligence of the Defendant, its driver, servant, and/or agent and the particulars of negligence are pleaded as;-

- (1) Driving the motor vehicle without due care and attention to other passengers, workers and or employees in the said motor vehicle
- (2) Failing to have sufficient regard for the safety of the Plaintiff who was a conductor and employee of

the Defendant in the motor vehicle

- (3) Driving carelessly, negligently and recklessly thus causing the said vehicle to fall(sic) thereby injuring the Plaintiff
- (4) Driving too fast and at a speed which was excessive in the circumstances
- (5) Failing to stop, apply brakes and/or swerve so as to avoid the motor vehicle from falling on its side
- (6) Driving on the road reserve/pavement and trying to overtake another motor vehicle on the wrong side

There was a consent entered on liability on 1st November 2010 at 20% against Plaintiff and 80% against the Defendant. The matter proceeded to hearing for assessment of damages. Plaintiff testified that he worked for the Defendant as a conductor and produced a copy of his payslip as exhibit 2. This showed that he earned a gross pay of Kshs.15,000/- but with deductions he earned Kshs.10,000/- and after he took a loan, it was scaled down to Kshs.7900(a round figure of 8000/-). His evidence was that the bus was being driven very fast because the driver was rushing for Friday prayers as a result the bus veered off the road and crashed, landing on its left side. This resulted in the bus laying on him – so he was under the motor vehicle weight which was pressing on his left hand. A crane was used to lift the vehicle and Plaintiff was rushed to hospital in Mombasa.

His treatment records produced as exhibited 3 show that Plaintiff had suffered;-

- (1) **POLYTRAUMA**
- (2) **FACIAL LACERATIONS**
- (3) **DEEP CUT ON THE LEFT KNEE**
- (4) **CHEST CONTUSION**
- (5) **BLOOD LOSS**
- (6) **MANGLED LUL (Left upper Limb)**

The management shows that the left upper limb was amputated from shoulder joint and he underwent seven pints of blood transfusion and suturing. He was admitted in hospital for one month. He resumed duty but it was a strain on him, although he had now been reassigned to office work in Lamu. Eventually his services were terminated. The P3 form produced as Exhibit 4 confirm that Plaintiff`s injuries were as noted in the treatment notes and assessed as grievous harm. The medical report prepared by **DOCTOR AJONI ADEDE** and produced as exhibit 7 confirm that Plaintiff suffered massive blood loss and had amputation disarticulation of the left upper limb plus the head injuries. He also underwent stitching of his wounds. Upon examination on 27/04/09, the Plaintiff complained of pain in the left shoulder and difficulty in using the left eye. He also had difficulty in personal hygiene and self care. His mental functions were satisfactory although he appeared depressed. The left upper limb was missing and what remained was a skin flap with an 8x6 cm scar.

The left side of the face had a scar measuring 10.4m involving the left eye upper eyelid and interfering with eyeball mobility and vision. The scar on the knee measured 10cm. There was permanent disability to the total amputation disarticulation of upper limb 2) post amputation arthritis and pain 3) cosmetic embarrassment 4) loss of self esteemed with increased depending and decreased capacity for work.

The immediate consequence of the head injury was impaired consciousness but long term effects were unpredictable. The massive emergency blood transfusion increased the risk of transmissible infections. Plaintiff paid Kshs.2000/- for the report, as per the receipt produced as exhibit 7. Plaintiff then travelled to **NAMIBIA** by road, for further treatment and was fitted with an artificial limb at the **VAN AS HOSPITAL**. He produced tickets for his travel totaling to Kshs.52, 000/-.

I only received written submissions filed by the defence counsel, Plaintiff's counsel failed to file written submissions. Defence counsel proposes a global sum of Kshs.1 million for pain and suffering and loss of amenities – all the decisions he has cited are over ten years ago – the Kenyan economy, value of the shilling and rate of inflation has changed to adversely affect the general populace, and these factors must be borne in assessing damages.

Certainly the cited decisions especially that of **FREDRICK OTIENO KOMBO v TANA EXPRESS BUS & 3 OTHERS** HCC No.177 of 1994 is very useful, but even then, the injuries suffered by the Plaintiff herein are more extensive, involving massive blood loss, wounds which had to be stitched and the residual effect is not just the missing limb, but even movement of the eyeball. My assessment is that General damages of Kshs.1.2million (i.e. 12,000,000/-) is appropriate and I so award (one million two hundred thousands). This is after apportioning at 80:20% to give a sum of Kshs.1.2million (1,200,000). The cost of prosthesis is a special damage which was pleaded in paragraphs (d) with an indication that expresses would be supplied at the hearing, the Plaintiff did not produce any documents to support what he expended on the artificial limb – did he buy it or was it donated by some kind hearted soul? He had documents from **VAN AS HOSPITAL** in Windhoek but these were not produced as exhibit and were merely marked for identification.

At the time of accident Plaintiff was 35 years old and earning Kshs.15, 000/-. He is unable to work now. Under the head loss of future earnings, the defence counsel submits that there is no certainty that Plaintiff could have worked until the age of 60 and due to the uncertainties of life he urges the court to adopt a multiple of 15 years, citing the decision in **ABDALLA BATES V DAVID MAINGI AND ANOTHER. HCCC no. 498 of 1994(Mombasa)** where the court used a multiplier of 10 years. I take into account the vagaries of life, the life expectancy of the average Kenyan adult male given various inhibiting and interfering contributory factors is now 50 years, which means a multiples of 15 is reasonable and that works out to:-

1. $12 \times 15 \times 15000 = 2,700,000$ /- (Two million seven hundred thousand less the 20% liability 2,160,000)
2. **Medical report kshs.2000/- (Two thousands only)**
3. **I award costs of the suit to Plaintiff plus interest at court rates for date of judgement until payment in full.**

28 days of appeal.

Delivered and dated this 15 June 2011 at Malindi

H A OMONDI

JUDGE

Mr K`Onyango holding brief for Ngaira for Plaintiff
Mr Matini holding brief for Aboo for Defendant