



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 171 OF 2001

CHARLES NDUNGU NDERITU.....PLAINTIFF

VERSUS

PATRICK NYANGERI PAUL.....1ST DEFENDANT
AKAMBA BUS SERVICES LTD.....2ND DEFENDANT
WILSON KINYANJUI KAMAU.....3RD DEFENDANT

JUDGMENT

Charles Ndungu Nderitu the plaintiff herein filed this suit by way of plaint on 17/5/2001. The defendants are Patrick Paul, Akamba Bus Services Ltd and Wilson Kinyanjui Kamau (1st, 2nd & 3rd defendants respectively). In the plaint, the plaintiff prays for general damages for pain suffering and loss of amenities and general damages of Kshs.71,870/- and costs, arising from a road traffic accident which occurred on 31/7/1998, along the Naivasha/Nairobi road, while he was travelling as a passenger in motor vehicle registration number KAB 252L, a Mitsubish Canter. The said vehicle was driven by the 3rd defendant when it collided with motor vehicle registration number KAA 057Z which was being driven by the 1st defendant. The plaintiff blamed the occurrence of the accident on the negligence of the 3rd defendant or the 1st defendant or that both of them were negligent in the manner that they drove the vehicles that collided as a result of which he sustained serious injuries. In the alternative, he pleaded the doctrine of res ipsa loquitor.

The 1st and 2nd defendants filed a joint defence on 18/7/2011 denying the allegations of negligence levelled against them and in the alternative, pleaded that even if an accident occurred, it was due to the negligence of the 3rd defendant or that the 3rd defendant substantially contributed to the accident. The defendants also denied the particulars of injuries and loss suffered. The 3rd defendant filed his statement of defence on 9/7/2001 and denied that motor vehicle KAB 252L was driven negligently, that it was driven by James Kariuki Ndungu and denied that the plaintiff was a lawful passenger in the said vehicle as alleged.

The plaintiff testified before J. Apondi on 11/11/2002. He recalled that on 30/7/1998 at about 11.30 a.m. he was a passenger in Mitsubishi Canter registration number KAB 252L while traveling from Gilgil to Nairobi to deliver his potatoes. He had hired the vehicle from the 3rd defendant and it was driven by James Kariuki. They left for Nairobi about midnight and since the road was under repair they used a diversion on the right side of the road. He saw some strong lights and heard a loud bang. He came to 5 days later while at Kijabe Mission Hospital while undergoing treatment. It is then he learnt that there had been an accident between KAB 252L and an Akamba Bus registration number KAA 057Z. He was first admitted at Naivasha District Hospital and transferred to Kijabe AIC Hospital. He sustained the following

injuries:-

- 1. Fracture of both legs;**
- 2. Bruises on the head and around the stomach;**
- 3. Chest pains.**

He was admitted at Kijabe Mission Hospital for over a month with both legs in plaster. While in hospital his leg was amputated below the knee but later it was amputated above the knee and was discharged on 24/8/1998 but continued to attend the clinic. He was discharged on a walker but after a month started to use crutches for 1½ months and in December 1998, was fitted with an artificial leg. He said that he is healed though using the artificial leg is tiresome, he cannot walk long distances and at times has to use crutches or a walking stick. The plaintiff called as a witness PC Paul Omondi (PW3), who arrived at the scene of accident where the vehicles KAB 252L and a bus KAA 057Z had collided. He confirmed that the road was under repair and the vehicles were traveling in opposite directions with the bus coming from Nairobi and the canter was traveling towards Nairobi. He also said that the accident occurred at a diversion in the middle of the road, 2 passengers in the canter died including the driver. He carried out investigations into the occurrences of the accidents, and a report was done as Inquest No 48/9 where the court apportioned blame on the two drivers. He produced the proceedings in Inquest No.48/1999 as PEx.6 and the abstract form issued to the plaintiff as Ex.1.

The plaintiff was examined by Dr. Francis Karabu, (PW2) who prepared a report – PEx.3 – in which he found that the plaintiff suffered the following injuries:-

- 1. Multiple soft tissue injuries to the head, face, cuts, bruises and lacerations of the scalp;**
- 2. Injury to upper chest;**
- 3. Fractures of both right and left clavicular bones;**
- 4. Injuries to right and left legs including fracture of the lateral malleolus and compound fracture of the right tibia and fibula.**
- 5. Confused.**

On 4/11/09 after evidence of 3 witnesses had been taken, the plaintiff closed his case and the parties recorded a consent to the effect that:-

“1.The plaintiff do close his case at this stage;

- 2. The case as against the 1st defendant who has since passed away be and is hereby withdrawn;**
- 3. Judgment on liability is hereby entered for the plaintiff against the 2nd and 3rd defendants at 50/50 basis;**
- 4. Parties to negotiate quantum of damages and the matter be mentioned within 30 days, to record consent on quantum.”**

The parties failed to agree on quantum and on 10/11/2010, they agreed that the medical reports by the 2nd defendant and any other be filed. The counsel then filed submissions on quantum.

Counsel for the plaintiff, Kariuki Mwangi submitted that Dr. Karania, who examined the plaintiff on 22/6/2005 assessed the degree of permanent disability at 30%. The injuries sustained were severe and will forever impair his movement and earning capacity. He was injured at the age of 27 years old and his productive life has been adversely affected. Counsel suggested an award of Kshs.3,000,000/- as being fair and reasonable. He made reliance at the following authorities:-

- 1. NKU HCCC 83 OF 2005, FRIDAH MERCY CHEBII KIPLAGAT (Minor suing thro’ her father and next friend) JULIUS KIPLAGAT TUITOEK V. KIPCHUMBA CHELIMO CHEBET & ANOTHER – J. Kimaru made an award of Kshs.2,800,000/- for the following injuries:-**

(i) Scar of an incision over the left lateral surface of the chest. A tube was inserted to drain blood from the lungs;

(ii) A 16 cm long, vertical, midline seen on the abdomen;

(iii) Both legs were amputated at a level 10 cm below the tubercles (below the knee) traverse scars 13 cm and 14 cm fitted with prostheses;

(iv) The left lung was partially expanded with a tube inserted;

(v) Fracture of the right iliac being broken superior pubic rami and subluxation of the left sacro-iliac joint (pelvis).

2. MACHAKOS HCCC 73 OF 1997 – PETER NDUMU V. TELCOM (K) LTD – On 12/2/04 J. Wendoh awarded the plaintiff a total of Kshs.2,800,000/- for the following injuries:-

(i) Fracture of left tibia and fibula which resulted in amputation above the knee;

(ii) Dislocation of the left shoulder joint, bruises on the chest and iliac fosse region;

(iii) Cut wound on the occipital area.

Degree of incapacity was assessed at 70%

3. NKU HCCC 244 OF 1998 – AHAMED MOHAMUD ADAM V. JIMMY TOMINO & ANOTHER, an award of Kshs.2,400,000/- was made on 13/10/06 where the degree of incapacity was assessed at 70% and plaintiff had suffered the following injuries:-

(i) Amputation of the left lower limb below knee joint;

(ii) Multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of the foot;

(iii) Compound fracture of the right malleolus and dislocation of the right ankle joint;

(iv) Burns of the planter aspect of the right foot.

Counsel also urged that the plaintiff had proved special damages of Kshs.71,470/-.

Counsel for the 2nd respondent, Majanja Luseno & Company Advocates, filed submissions on 7/3/2011. It was submitted that the alleged injuries set out in the plaint were more severe than what was adduced in evidence; That the amputated leg is healed and there was no need for further treatment. Counsel also observed that Dr. Karabu had also testified that the amputation was largely due to compartment syndrome, a collection of pus in the tissues which is evidence of medical negligence. Dr. Karania who re-examined the plaintiff on 22/6/05 found that he no longer experienced pain when walking, had scars on the left leg, had amputation above the knee of his right leg and scar on the right lateral side of the scalp. Counsel urged the court to adopt the principle in **OSSUMAN MOHAMED V SALURU BUNDIT MOHAMED, CA 30/1997**, that in awarding damages, the court should look at comparable cases. Counsel therefore urged the court to consider the fact that at the time of his examination by the doctor, the plaintiff was still carrying out his business of a kiosk, that the permanent disability was assessed at 30% and there was no prayer for lost earnings. Counsel relied on the following decisions:-

1. NRB HCCC 5108/92 – MUTHONI KABUGUA V. CATHOLIC DIOCESE OF KIRINYAGA & 2 OTHERS, where a plaintiff sustained a fractured right femur in middle and third compound, committed fracture of the left tibia and fibula and amputation. An award of Kshs.500,000/- was made.

2. HCCC 504/1999 JOSEPH MURIGI NGUGI & ANOTHER V. COACHLINE LTD, an award of

Kshs.550,000/- was made in April 2001 for amputation of one lower limb.

Njuguna Kamanga Advocate for the 3rd defendant filed his submissions on 7/3/2011. He suggested an award of Kshs.1,600,000/- as general damages based on the 2 medical reports. He relied on the case of **MSA HCCC 204/2003 – JUSTUS NGETA MUSYOKA V. ELDORET EXPRESS CO. LTD**, where the plaintiff sustained severe crush injury of the lower leg, deep wound to the groin and injury resulting in the amputation of the leg and J. Khaminwa made an award of Kshs.1,600,000/- in general damages in June 2005.

Having considered all the submissions on quantum and the medical reports, this court in assessing damages is guided by the principles adopted by the courts in comparable cases. The court should award what is reasonable compensation in the circumstances but not award damages that will be punitive to the defendant. In **WEST & SON LTD V. SHEPHERD (1964) AC 226** the court said **“But money cannot renew a physical frame that has been battered and shattered. All that the judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the evidence to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Further more, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”** In **FRIDAH CHEBII**'s case (supra) it was also observed that the court in awarding damages, should be guided by comparable awards for comparable injuries. In the above cited case, I find that the injuries suffered by the plaintiff therein are not comparable with the injuries suffered in the instant case. Fridah suffered more serious injuries and had both limbs amputated. In **PETER NDUMU**'s case, the court made an award of Kshs.1,200,000/- for pain and suffering, though there were other awards that were pleaded like further medical treatment which is not sought herein. The degree of injury was assessed at 70%, more serious than in this case. In **Ahamed Mohamed Adam** case, the degree of injury was more severe, 70% as compared to 30% herein. I do find that the case of **JUSTUS NGAWA** (supra) does compare well with the instant case. I take into account the fact that the plaintiff suffered 30% total disability, even though he is no longer on treatment, his walking capacity has been impaired permanently. He can not run and has to walk with a prosthesis which is not comfortable. He also suffered pain and loss. I also take into account incidence of inflation. In my assessment, I find that an award of this Kshs.1,800,000/- as general damages is reasonable.

The special damages that were pleaded were Kshs.48,370/- as hospital fees; cost of the prosthesis, the sum Kshs.22,000/-. Police abstract Kshs.500 and Kshs.1,000/- cost of medical report. The plaintiff's counsel conceded that the police abstract, only costs Kshs.100/- not Kshs.500/-. The 2nd respondent urged that the cost of the prosthesis was not proved. PW1 testified that he lost the receipt of the prosthesis and that one Ndungu wrote for him a note to that effect but it was not produced in evidence. Even though that receipt was not pleaded in evidence it is a fact, not denied and which both Doctor Karabu and Karania confirmed that the plaintiff now has a prosthesis fitted on his leg and he must have purchased it. In my discretion, I allow the claim for Kshs.22,000/- for the prosthesis and I find that the proved special damages amount to Kshs.71,470/-.

In the end, I enter judgment for the plaintiff against the 2nd and 3rd defendants for the sum of Kshs.1,800,000/-, general damages and Kshs.71,470/- special damages. Each defendant to bear 50% as agreed in the consent, costs and interest at court rates from the date of judgment. It is so ordered.

DATED and DELIVERED this 30th day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Plaintiff - present.

Mr. Kipkoech holding brief for Mr. Mwangi for the defendants.

Kennedy – Court Clerk.