



INTERLOCUTORY JUDGMENT
FORMAL PROOF ONLY ON QUONTUM

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.191 OF 2010

DAVID MAINA NJOROGE.....PLAINTIFF

VERSUS

GINGALILI FARM LIMITED.....DEFENDANT

JUDGMENT

The plaintiff has brought this action for damages in respect of serious injuries he suffered on 25th June, 2009 while working for the defendant as a casual labourer. Judgment was entered against the defendant in default of appearance and defence and matter proceeded by way of formal proof.

In the plaint, the plaintiff claims that as an employee of the defendant he was an invitee on the latter's premises who was liable under the Occupiers Liability Act. He also claims that by virtue of his employment with the defendant, the latter had a duty to protect and/or forewarn him of dangers which were inherent and/or reasonably foreseeable from the nature of work assigned to him.

Testifying on a wheel chair, the plaintiff recalled the 25th June, 2009 when he reported on duty to excavate some special soil used in the flower farming, he noticed the weakness of the quarry wall and drew the attention of the defendant's manager of the potential danger posed by it. The manager dismissed him and directed that he either proceeds with the excavation or leaves. Being desperate for income, the plaintiff embarked, with others on the works, after lowering himself some 15 feet in the pit.

All of a sudden, the walls of the pit collapsed burying the plaintiff. When he was eventually retrieved, he had suffered severe spinal injury resulting in a fracture of lumber vertebra L4 with bone fragment and soft tissue protruding posteriorly and pressing on sac/spinal cord. He was rushed to the Rift Valley General Hospital, Nakuru where he was hospitalized for three days before being transferred to Kenyatta National Hospital where he underwent intensive examination and treatment with six plates being inserted to the injured back after an operation. He was discharged after about one month but continued to attend as an out-patient.

On 7th June, 2010, one year after the accident, he was examined by Dr. Wellington K. Kiamba who noted that his general state of health was poor. He observed a prominent incision scar with suture marks along the lumbar spine. The X-ray revealed a fracture of L4 of the lumbar spine. The doctor also noted that there was complete loss of sensation on the left lower limb from the knee to the foot, muscle power in both lower limbs was zero, as a result of which he was found to be incontinent of both his stool and

urine. The plaintiff, it was further noted, had been on physiotherapy for almost one year without improvement; confined to a wheelchair without any likelihood of improvement. Permanent disability of 100% was awarded.

The plaintiff produced receipts for payments to the hospitals, to the doctors and for transport amounting to Kshs.209,800/=. The plaintiff also testified that due to his injuries, he is unable to engage in any gainful employment. The plaintiff sought in the plaint damages for pain, suffering and loss of amenities, damages for loss of earning capacity, damages for future medical expenses, special damages and costs.

His counsel submitted that by dint of **Order 10 rules 6** of the **Civil Procedure Rules**, the issue of liability is not available for trial, the defendant having failed to enter appearance or file defence and interlocutory judgment having been entered; that the only question to be determined is that of quantum of damages. **Order 10 rule 6** aforesaid provides that:

“6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall on request in Form No.13 of Appendix A, enter interlocutory judgment against such defendant and the plaintiff shall set down the suit for assessment by the court of the damages or the value of goods and damages as the case may be.

(Emphasis supplied)

The plaintiff has laid the basis of his claim by his testimony. The role of this court in terms of **Order 10 rule 6** aforesaid after judgment was entered was succinctly explained in the case of **Kavindu & Another V. Mbaya & Another** (1976) KLR 164, which was cited with approval in the case of **Felix Mathenge V. Kenya Power & Lighting Company Limited**, Civil Appeal No.215 of 2002.

In the latter the court stated that:

“The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to quantum of damages.”

The plaintiff has submitted for Kshs.4,000,000/= for pain, suffering and loss of amenities, Kshs.1,680,000/= for loss of earning capacity Kshs.3,000,000/= for future medical expenses and Kshs.209,800/= in special damages – total Kshs.8,889,800/=. Starting with pain, suffering and loss of amenities, there is no doubt that the plaintiff suffered severe injuries that have confined him to a wheelchair since the occurrence of the accident, two years ago. He is not capable of controlling stool and urine. It is now settled that in assessing damages, the court must be guided by such factors as the previous awards for similar injuries and the principles developed by the court, for instance, that the awards must be reasonable and assessed with moderation. See **Rahina Tayab & Another V. Anna Mary Kinaru**, (1987-88) 1 KAR 90. Parties and counsel have also been advised not to simply throw figures at the judge.

In his written submissions, counsel for the plaintiff has not supported his proposal of Kshs.4m for pain, suffering and loss of amenities with any authority where in similar injuries as those suffered by the plaintiff an award in the sum of Kshs.4m or thereabout was made. None of the three cited authorities was relevant on this question.

I have, however, come by two authorities where the plaintiffs suffered more or less the same injuries. **William Siglai V. B. A. Barger Francis Rotich**, H.C.C.C.NO.1463/1988 where Shields, J

awarded Kshs.1,500,000/= for spinal injuries in 1994. The plaintiff in that case was 25 years old and a student. He went ahead and graduated as a medical doctor. He was in crutches.

In **Jackson Makau Tunga V. Star Transport Company Limited**, H.C.C.C. No.554 of 1999, Ang'awa, J also awarded Kshs.1,500,000/= for pain suffering and loss of amenities. The plaintiff in that case suffered injuries that rendered him paraplegic from the waist downwards, incontinent of stool, fractures of the femur and left humerus and several other injuries.

Looking at these two cases, the injuries in the first case (**William Siglai**) were less serious compared to the case before me. The injuries in the second case (**Jackson Makau**) were clearly more severe compared to those suffered by the plaintiff in this case. However, considering when the two cases were decided and the rate of inflation, I award to the plaintiff Kshs.2,000,000/= on the head of pain, suffering and loss of amenities.

There was a claim for loss of earning capacity. Dr. Kiamba awarded the plaintiff 100% permanent disability. In the condition I saw the plaintiff, he cannot engage in any gainful employment. He testified as much. He was born in 1983 (although he gave his age as 31 years) making him 28 years. His counsel submitted for a multiplier of 28 years and multiplicand of Kshs.5,000/=. Apart from stating that he was working for the defendant, the plaintiff did not state his income or exhibit any document to support that. However, having found that the plaintiff was employed, it follows that he earned. It has now been settled by a long line of authorities that persons in the lower echelons of the society whose earning do not require any documentation and who through misfortune find themselves in the situation the plaintiff finds himself are not disqualified for an award under this head merely for the reason of absence of documentary proof of earnings. See **Jacob Ayiga Maruja V. Simeon Obayo (suing as administrator of the estate of Thomas Ndaya Obayo)**, Civil Appeal No.167 of 2002.

I adopt a multiplier of 20 years and multiplicand of Kshs.3,000/=: translating to $Kshs.3000 \times 20 \times 12 = 720,000/=$. Regarding special damages, and damages for future medical expenses, it has been stated time without number that claims under these heads must be specifically pleaded and strictly proved. See **Kenya Bus Services Limited V. Jane Karambu Gituma**, Civil Appeal No.241 of 2000. See also **Tracom Limited & Joseph Macharia V. Hassan Mohammed Adam**, Civil Appeal No.192 of 2006.

In the former case, the court explained that:

“.....as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.”

The plaintiff simply intimated in paragraph C of the prayers that he was or would be seeking an award for future medical expenses. The court in the **Tracom Limited** (supra) case held that the amount or estimated expenses need not be stated in the plaint so long as the defendant was forewarned that there would be other claims to be made. Having so forewarned the defendant, the plaintiff was required to prove what he would require for future medication.

In this case, the figure of Kshs.3,000,000/= was not backed with evidence as to how that figure was arrived at and the options of the hospitals where the kind of medical attention required were available. This head must fail for lack of proof. Again regarding special damages, the plaint does not specify the amount. That, according to **Tracom Limited** (supra) is not fatal. Indeed special damages are bound to escalate from the time of filing the suit to the time of the trial. It would mean that each time an expense is incurred, the plaint would be amended to cater for the expense. In my view, in this case, the defendant was forewarned that there would be expenses in form of special damages that would be claimed arising from the accident. In the result, I award Kshs.209,800/= represented by the receipts produced in the trial.

In the result, I enter judgment in favour of the plaintiff against the defendant as follows:

- i) Pain, suffering and loss of amenities - Kshs.2,000,000.00
- ii) Loss of earning capacity - Kshs.720,000.00
- iii) Special damages, Kshs.209,800/= - Kshs.209,800.00
- iv) Total - Kshs.2,929,800.00

plus interest and costs.

Dated, Signed and Delivered at Nakuru this 29th day of November, 2011.

W. OUKO

JUDGE