



**IN THE HIGH COURT**

**AT NYERI**

**CIVIL CASE 92 OF 2008**

**ALEX WACHIRA NJAGUA.....PLAINTIFF**

**Versus**

**GATHUTHI TEA FACTORY.....1<sup>ST</sup> DEFENDANT**

**JOHN MUKIRA GATHURI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Alex Wachira Njagua through his mother and next friend, Mary Mukira Njagua, the plaintiff herein, sued Gathuthi Tea Factory Ltd and John Mukira Gathuri being the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein by way of the plaint dated 6<sup>th</sup> February 2007. In the aforesaid plaint the plaintiff is seeking for judgment as follows:

- (a) General damages for pain, suffering and loss of amenities**
- (b) Special damages Kshs. 502,100.00**
- (c) Loss of earning capacity**
- (d) Cost of future medical expenses Kshs. 95,000.00**
- (e) Cost of nursing care and employment of a personal attendant**
- (f) Costs and interest.**

The defendants filed a joint statement of defence to deny the plaintiff's claim.

The plaintiff tendered the evidence of four witnesses in support of his case. In short, it is the evidence of the plaintiff that on 11<sup>th</sup> December 2005, he was lawfully walking along Othaya-Gatugi road when John Mukira Gathuri, the 2<sup>nd</sup> defendant herein, hit and knocked him down with motor cycle registration No. KAQ 766X the property of Gathuthi Tea Factory Ltd, the 1<sup>st</sup> Defendant. It is the averment of the plaintiff that the 2<sup>nd</sup> defendant negligently rode, managed and or controlled the aforesaid motor cycle that he caused it to knock the plaintiff. There was evidence from the 2<sup>nd</sup> defendant that he rode the motor cycle at a speed of 90 KM/H on a road with loose chippings since the road was under construction. Richard Kariuki (P.W.3) said that on 11<sup>th</sup> December 2005 at about 8.00 p.m. he walked along Othaya-Karima road where he saw a motor cycle pass him while moving at a high speed. Shortly, P.W.1 said, he heard a bang. He was about 100 metres a head of the plaintiff. He went back only to find him having been hit. He was lying in the middle of the road. Julia Wanjiru (P.W.4) said she arrived at the scene almost immediately after the accident where he found the appellant being assisted by good Samaritans to be moved out of the road. As far the evidence is concerned there was no eye witness. It is not in dispute that motor cycle registration No. KAQ 766X was found at the scene of the accident where the plaintiff was found lying injured. P.W.3 was a 100 Metres a head of the plaintiff. He was passed by the motorcycle and shortly he heard a bang. P.W.3 rushed to the scene and found the plaintiff lying down in the middle of the road having been knocked by the motor cycle which was also lying on the right hand side of the road. The 2<sup>nd</sup> defendant (D.W.1) stated in his evidence that he rode motor cycle registration No. KAQ 766X along Karima –Othaya road on 11<sup>th</sup> December 2005 at 7.30 p.m. He said he hooted at three people who walking in the middle of the road a head of him to give way. When he was just about to overtake, D.W.1, said, one of them jumped on his side. As a result, he knocked him. He said he tried to brake but the brakes failed him due to the loose chippings. D.W.1 said he was rushing to reach home early as it was about to rain. I have carefully considered the evidence from both sides. There is evidence that the 2<sup>nd</sup> defendant rode motor cycle registration No. KAQ 766X at high speed. P.W.3 said he saw the motor cycle move at high speed. This evidence was confirmed by the evidence of D.W.1 who said he was rushing home at a speed of 90 KPM/H to avoid being rained on. He was in such a high speed that he was unable to control the motorcycle. He was riding on a road which had loose chippings hence he should have been more careful. I find the 2<sup>nd</sup> defendant wholly to blame for the accident. The 2<sup>nd</sup> defendant was the employee of the 1<sup>st</sup> Defendant hence

it is vicariously liable for the actions and omissions of its employee.

On quantum, the plaintiff tendered the evidence of Dr Macharia Peter Mwangi (P.W.1). P.W.1 said he examined the plaintiff after he was involved in the road traffic accident . He produced the medical report he had prepared in evidence which showed that the plaintiff suffered the following injuries:

- **Blunt injury of the head with a contusion**
- **Fracture of the left tibia**
- **Fracture of the right fibula**
- **Cut wound of the forehead**
- **Bruised elbow.**
- **Bruised knee.**

The Plaintiff beseeched this court to make an award of Kshs. 3,000,000 as damages for pain and suffering in view of the fact that the plaintiff was said to be 100% incapacitated. I have carefully considered the plea. There is evidence that the plaintiff became mentally ill due to the injuries he sustained in the accident. I have considered the case of **Duncan Maina VS Anthony Macharia Mburugu NBI H.C.C.C. No. 2289 of 1996** in which this court awarded Kshs. 3,000,000/= for pain and suffering for near similar injuries. This court also in **Nakuru H.C.C.C. NO. 64 of 2001 Susan Wanjiru Njuguna =vs= Keringet flowers Ltd & 2 others** awarded a sum of Kshs. 3,000,000/= as general damages for pain and suffering for similar injuries. I am convinced I should not depart from those awards. I award the plaintiff Kshs. 3,000,000/= on this head. The plaintiff pleaded to be paid Kshs. 502,000/= as special damage. I have perused the documentary evidence produced by the plaintiff and I am convinced that the plaintiff has proved the special damages. I award him the sum as prayed in the plaint. The plaintiff has also asked to be paid Kshs. 992,880/= for loss of earnings. There is no doubt that the plaintiff was a driver with K.C.C.C. He did not however submit the evidence of the monthly salary he was earning. I have examined the copy of the Kenya subsidiary legislation 2009 as evidence of the salary of a driver of the plaintiff's category. The salary is fixed at Kshs. 8,274/= per month. At the time of the accident the plaintiff was aged 45 years. I have been urged to calculate the sum using a multiplier of 10 years. I am convinced by the powerful plea made by the plaintiff. I will however give him a multiplier of 5 years in view of the unpredictable permanency in employment at the moment the world over. The plaintiff is likely to be retired at the age of 50 years. Consequently I will award him on account of loss of earning capacity as calculated as follows:

$8,274 \times 12 \times 5 = 496,440/=$ . The plaintiff further asked for nursing care at Kshs. 3,270/= per month for 10 years. The evidence of P.W.1 show that the plaintiff is 100% incapacitated, therefore he needs nursing care. I am prepared to accede to the amount prayed by the plaintiff i.e.  $3,270 \times 12 \times 10 = 392,400$ .

In the end, judgment is entered for the plaintiff as against the defendant in the following terms:

**i General damages for pain and suffering Kshs. 3,000,000/=**

**ii Special damage Kshs. 502,100/=**

**iii Loss of earning capacity Kshs. 392,400/=**

**iv Nursing care Kshs. 496,440/=**

**Kshs. 4,390,940/=.**

**v. Costs of the suit**

Dated and delivered this 23<sup>rd</sup> day of February 2010.

**J.K. SERGON**

**JUDGE**

In open court in the presence of

Miss Mwai h/b Muchiri for the

defendant and Miss Meenye for

the plaintiff.

**J.K. SERGON**

**JUDGE**