



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Suit 111 of 2006

UZIEL COHEN.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

JUDGMENT

Uziel Cohen, the plaintiff, was, on 21st November 2003 along Mombasa-Malindi road, riding motor cycle registration number KAQ 742E towards Mombasa when he collided with motor vehicle registration number KAD 215M. The plaintiff sustained injuries which he particularized in his plaint filed on 16th February 2005, as a compound fracture proximate left ulna, radial displacement at the elbow, extensive soft tissue destruction at the left elbow and forearm, extensive soft tissue destruction with skin loss of the left leg, multiple fractures of the mandible, maxilla and zygoma, loss of several teeth with crushed alveolar segments around the teeth, large deep tear of the lower lip extending to the chin, midline fracture of the hard palate, eye corneal abrasion and fracture of the left scapula.

The plaintiff pleaded that the said accident was due to the sole, negligence of the defendant's driver in that: he reversed into a major road without first ascertaining whether it was safe to do so and when in fact it was unsafe so to do; drove without lights at night; drove at an excessive speed; drove without due care and attention; failed to exercise or maintain any or any proper or effective control of the said vehicle and failed to stop, slow down, swerve or in any other way to so manage or control the said vehicle in a manner that could have avoided the accident. The plaintiff in the premises claimed general damages and special damages of Kshs. 1,045,850/= and NIS 90,109.00. The plaintiff also claimed costs of future medical treatment including surgery estimated at Kshs. 3,870,072.0.

The defendant denied the plaintiff's claim and in particular that its driver negligently and carelessly drove, managed or controlled the said motor vehicle registration number KAD 215M causing it to collide with motor cycle registration number KAQ 742E. The particulars of injuries and special damages were also denied. In the alternative the defendant averred that if the alleged accident occurred, then the same was wholly and or substantially occasioned by the plaintiff's own negligence in that: he rode the said motor cycle carelessly; encroached into the lane of motor vehicle registration number KAD 215M; failed to heed the hooting/warning given by the said motor vehicle; rode in a zig zag manner without due care of his own safety and failed to see the said motor vehicle in good time or at all to avoid the accident.

Pleadings closed and the plaintiff framed the following issues for the determination of the court:-

- 1) Was the defendant the registered owner of the motor vehicle registration number KAD 215M?
- 2) Was the accident caused by the negligence on the part of the defendant's driver?

- 3) If so what is the degree of negligence attributable to the defendant's driver and or agent?
- 4) To what damages is the plaintiff entitled?
- 5) What award should be made in respect of interest and cost?

The plaintiff took the witness stand on 3rd and 4th March 2009 and briefly testified as follows: - As he slowly rode his motor cycle on 21st November 2003, at about 11.30 p.m., on Mombasa-Malindi road near Indiana Hotel, a lorry reversed into the main road and knocked him. He was flung on the other side of the road. He had been hit on his left side and his helmet was broken. The left leg was broken in several places below the knee. The left arm was also broken. A piece of muscle was removed from the shoulder leaving a gaping hole. The arm was rendered immobile. His jaw was broken. He lost several teeth and bones in both jaws. A good Samaritan took him to Mombasa, Aga Khan Hospital where he was admitted for 5 days and was flown to Israel where he was admitted to Tel Hashomer Hospital for 11 months and thereafter continued as an out-patient. Six months later he was operated upon at the same hospital. At the hospital he was attended to by five doctors but still had problems with his leg which pains on walking and as a result cannot walk much. He is left handed which is compounded by the injury in the left arm which is painful in the fingers. He is an electrician and had practiced as such for between 25 and 30 years at a minimum monthly rate of 3000 USD which he can no longer earn because of the injuries he sustained in the accident. He expected to be gainfully employed upto age 67.

The accident was reported to Bamburi Police Station which issued a Police Abstract and a P3 form which was duly completed and signed by his doctor. At the Aga Khan Hospital, the plaintiff was attended to by Dr. Vaghella and Dr. Gathua. In the end he paid Kshs. 494,981.00 inclusive of Medical Reports.

The plaintiff travelled by air from Mombasa-Nairobi to Tel Aviv thereby incurring travelling expenses of Kshs. 8995.00. The plaintiff produced the medical reports by Israel doctors, and receipts from the Israel hospital, Aga Khan and for air travel.

The plaintiff blamed the driver of motor vehicle registration number KAD 215M for the accident. The driver was charged with careless driving. He admitted the offence and was fined Kshs. 3,000/=. The plaintiff reiterated the particulars of negligence given in the plaint and denied any negligence on his part. In addition to the documents stated above, the plaintiff also produced photographs of himself before and after the accident and sought judgment as prayed in his plaint. He particularly referred to the prayer for future medical treatment estimated at 221,147 shekel and pleaded that the same be awarded. He also stated at the end of his testimony that, he had lost the ability to have sexual relations as a result of the injuries sustained in the accident.

At the close of his testimony the plaintiff was not cross-examined because counsel for the defendant was absent without cause. At the resumed hearing of the case, no application was made for the recall of the plaintiff. His testimony therefore, remained unchallenged.

The plaintiff called Dr. Satish M. Vaghella. He testified that he examined the plaintiff under the name Osi Cohen when he was admitted at the Aga Khan Hospital after a road traffic accident. The plaintiff had a large tear on the lower lip which he stitched. He also had a fracture of the upper jaw and the area above it. The palate was also fractured. Four of the arterial teeth were lost and several teeth in the lower jaw were loose. He reduced the fracture of the lower jaw and repaired other tears. As the plaintiff's facial condition was not good, Dr. Vaghella recommended further treatment. He produced two medical reports he had made on the plaintiff and receipts for the reports. He opined that replacement of the upper and lower teeth would cost Kshs. 250,000/=.

In the doctor's view, because of the several metal plates and foreign bodies in the plaintiff's jaw and the surrounding area, he would not lead a normal life.

The plaintiff also called Dr. L. G. Gathua. He too examined and treated the plaintiff who had been involved in a road traffic accident. The plaintiff had fractures on the left arm and there was extensive destruction of the left leg with skin loss. He also observed jaw fractures and fractures of the facial bones

and injuries to the eye. The plaintiff was taken to theatre where the muscles and skin were repaired. The bruises were dressed and the fractures on the jaw and facial bone were managed by Dr. Vaghella. Subsequently Dr. Mnjalla treated the plaintiff's eyes. Later, the plaintiff was flown to Israel for further treatment. Dr. Gathua saw the plaintiff again after the treatment in Israel on 23rd April 2004. He observed that the plaintiff had a deformed jaw and face. The left shoulder joint and elbow were stiff. The left arm had two metal rods and was infected. He also had a foot drop and ugly scars on the left leg. In the doctor's view the plaintiff would require further treatment for the stiff and weak shoulder, left elbow, the infected left arm, the jaw and face.

When the doctor saw the plaintiff again on 17th November 2008, he had undergone a lot of surgery in Israel. He had improved but still had the stiffness of the left shoulder and elbow. The left arm appeared deformed and the left leg still had the foot drop, scars and weakness. The face was numb on the right side and the entire face was ugly. The plaintiff had dentures but he could not open his mouth freely. He also had an implement which assisted the foot drop and enabled him to walk. He could therefore continue his business on a limited scale but the incapacity would continue. Dr. Gathua produced three (3) medical reports and receipt for Kshs. 5,000/= for the same.

The plaintiff's final witness was Philip Odhiambo Makoricho. At the time of his testimony, he was an Accountant at the Aga Khan Hospital and at the time of the accident he had been an Admission Clerk at the same hospital. He testified that he admitted the plaintiff to the hospital after 2.00 a.m. after the accident. He was then discharged on 27th November 2003 and invoiced in the sum of Kshs. 437,481/= which the plaintiff paid using his Visa Card. He produced the invoice, the receipt and the Visa Card.

Before the plaintiff closed his case, counsel agreed to produce the P3 and Police Abstract in evidence by consent.

The defendant then commenced its case. Its evidence was given through Kenneth Maina Kobia who was the driver of motor vehicle registration number KAD 215M at the time of the accident. He testified as follows: - On 21st November 2003, he was on an emergency mission at a house on the Mombasa-Malindi road near Bamburi Beach Hotel. He had parked the said vehicle in the compound of the house when he heard a bang behind him. On checking, he realized that his vehicle had been hit by a motor cyclist who had fallen between 100 and 150 metres away on the other side of the road. The motor cyclist who was seriously injured was screaming in pain. A good Samaritan took the motor cyclist to hospital. According to DW 1, the place was well lit and the road was wide and clear. He blamed the motor cyclist for the accident. In his view, he was riding at a high speed and did not heed the hazard lights which he had put on. He however admitted having been charged with careless driving. He admitted the charge and was fined Kshs. 3,000/=. He further acknowledged that he could not see the rate at which the motor cyclist was riding. The defendant then closed its case.

Counsel agreed to file written submissions which they duly filed by 30th November 2009. On liability, counsel for the plaintiff submitted that the driver of motor vehicle registration number KAD 215M admitted full responsibility for the accident. In his view the defendant should bear 100% liability. On quantum, counsel submitted that the plaintiff should be awarded Kshs. 5,000,000/= for pain, suffering and loss of amenities. He relied upon the decisions of **James Onunga – v – China Jiangsu International and Anor [HCCC No. 485 of 1999 Nairobi] (UR)**, **Irene W. Gitonga – v – Kinyanjui Ngithe & 22 Others [HCCC No. 456 of 1996 Nakuru] (UR)** and **Lydia Otieno Okwari – v – Mwaura Waitiki [HCCC No. 21 of 1997 Mombasa] (UR)**. In those decisions awards of between Kshs. 1,000,000/= and Kshs. 3,000,000/= were made for plaintiffs who had sustained multiple fractures.

On special damages, counsel was of the view that the same had been specifically pleaded and proved while on loss of future earnings, he submitted that the same had been demonstrated. He therefore sought a global award of Kshs. 7,096,110.00 under that head.

Counsel for the defendant on the other hand submitted on liability that both drivers were equally to blame. He emphasized that the plaintiff must have been riding his motor cycle at a high speed because he could not stop immediately he collided with the motor vehicle. Instead he landed about 100 metres away from the point of impact.

On quantum, counsel submitted that two medical reports produced were in the name of one Osi Cohen who is not the plaintiff and that there was no evidence that the special damages had in fact been paid. Counsel further argued that there was no basis upon which any award could be made for loss of earnings. Counsel also challenged the plaintiff's claim on the ground that three of the witnesses, PW 2, 3 and 4 sat in court when plaintiff testified. In his view the latter's evidence should be disregarded altogether. Counsel further submitted that the plaintiff's allegation of loss of sexual function was not supported by medical evidence.

If any award was to be made for pain, suffering and loss of amenities, it was counsel's view that a sum of Kshs. 800,000/= would suffice. In making that submission, he invoked the decisions of **Sarah N. Muiri – v – John J. Kamau [HCCC No. 325 of 1985 Mombasa] (UR)**, **Munyao Kangalu – v – Mbuni Transport Co. Ltd & 2 Others [HCCC No. 227 of 1988 Mombasa] (UR)** and **Aish Jeneby – v – Morris Charo & Another [HCCC No. 1992 of 1992 Mombasa] (UR)**. In those decisions the plaintiffs who sustained various injuries including fractures were awarded between Kshs. 440,000.00 and 730,000.00 as general damages for pain, suffering and loss of amenities.

I have now considered the pleadings, the evidence on record and the submissions of counsel. Having done so, I can now answer the issues framed by the plaintiff. It does not escape my mind that the plaintiff's entire testimony was not tested by cross-examination. His version of the accident, with respect, cannot be challenged in submissions. The testimony was that on the material date and time as he slowly rode his motor cycle along Mombasa-Malindi road on his right side of the road, the driver of motor vehicle registration number KAD 215M reversed into the said highway and knocked him on the left side. He stated that the driver of the said motor vehicle did not care about other road users like him and did not look before he reversed into the said road. His reversing was not also normal at the time. He had no reverse lights nor did he have a person to direct him as he reversed. He reversed at a high speed and knocked the plaintiff in the centre of the road. He denied any responsibility for the accident. That evidence still sticks out against the defendant. It was not displaced or shaken by DW1 Kenneth Maina Kobia who admitted driving the said motor vehicle at the material time. To my mind, DW1's attempt to shift blame to the plaintiff did not impress me because he admitted in cross-examination that he was charged with careless driving after the accident and admitted the charge. The admission buttressed the plaintiff's version of the accident that the said motor vehicle was reversed into the road and not hit as it was parked as DW1 attempted to claim.

There is also the abstract from police on a road accident which was produced by the plaintiff as EX 1B. The same confirms that DW1 was charged with careless driving and not careless parking and was fined Kshs. 3,000/=.

In the premises, I find and hold that DW1 was wholly to blame for the said accident. Ownership of motor vehicle registration number KAD 215M, although framed by the plaintiff as an issue was not addressed as such. DW1, Kenneth Maina Kobia acknowledged that he drove the said vehicle as an employee of the defendant and was at the time engaged on the defendant's business. Answers to issue numbers 1, 2 and 3 are obvious from the above analysis. Issues 1 and 2 are answered in the affirmative and the degree of negligence attributable to the defendant's driver and or agent of the defendant is 100%.

I now turn to the issue of damages. The plaintiff to my mind and on the evidence sustained severe injuries. He called two doctors, Dr. Satish M. Vaghella and Dr. Lawrence G. Gathua who testified of the injuries he sustained. The doctors produced their reports of those injuries. The plaintiff also produced medical reports prepared by doctors who examined and treated him in Israel. Dr. Vaghella's examination of the plaintiff revealed a large tear of the lower lip extending to the chin, a fracture of anterior part of the mandible, Le Fort 1 fracture maxilla with paramedial fracture of the palate on the left mid-line, 4 anterior teeth were missing, several lower teeth were loose. He stitched the lip externally and internally and tried to reduce the fracture of the mandible. Dr. Vaghella observed that the plaintiff's facial condition was not good. He therefore recommended further treatment. He produced two medical reports dated 25th November 2003 and 3rd May 2004 respectively as Exhibit 4 (a) and 4 (b). The second report revealed that the loose teeth had been lost. There were several mini plates which had been implanted to reduce the maxillary and zygomatic fractures and the plaintiff complained of loss of sensation around the right maxilla cheek area and right side lower lip region. Dr. Vaghella was of the view that further treatment

would involve replacing the upper and lower teeth with fixed bridge and chrome-cobalt denture combination.

Dr. L. G. Gathua also testified for the plaintiff. He too examined and treated him when he was admitted at Aga Khan Hospital. He observed fractures on the left arm with the radius being displaced. There was also extensive soft tissue destruction at the elbow and forearm. There was further destruction of the left leg with skin loss. He also observed multiple facial fractures and injuries to the eyes. The plaintiff was treated at the hospital's intensive care unit and was later flown to Israel for further treatment. When he saw the plaintiff again he had a deformed jaw and face. He also had stiff shoulder and elbow joints. He had infection in the left forearm. He also had a food drop and his leg had prominent scars. Dr. Gathua prepared two medical reports of the treatment which reports he produced as Ex 3 (a) and 3 (b) dated 24th April 2003 and 17th November 2008. I accept the reports of Dr. Vaghella and Dr. Gathua as having been prepared in respect of the plaintiff. The plaintiff himself identified the reports as his notwithstanding the submission of counsel for the defendant that they belonged to one Osi who is not the plaintiff. Osi is of course not the name of the plaintiff as per the plaint. However, in my view, there is no doubt that the reports were of injuries received by the plaintiff. The use of Osi on the reports is not fatal to their authenticity and so also is the fact that the doctors heard the evidence of each other.

The plaintiff also produced medical reports of the treatment he received in Israel. The reports are dated 22nd July 2005 (Dr. Alan Freedman), 11th January 2004 Chaim Sheba Medical Center (Drs. Eli Regev, Kovo Alon and Arieh Orenstein) and 19th September 2004 Dr. Mansoor. Those reports show that the plaintiff underwent several surgeries and procedures including reconstruction of the facial fractures, treatment of the fractures of the arm, shoulder and leg. As at 19th September 2004 the plaintiff still complained of pain while eating. He also complained of pain in the left elbow with limitation of movement. The left wrist and fingers were weak with no grip. The left shoulder was also weak with loss of power elevation which was also limited.

I saw the plaintiff myself and I am inclined to accept the medical reports he produced as accurate. Dr. Alan Freedman who prepared his report on 22nd July 2005 opined that as a result of the accident the plaintiff had sensory deficit in the right infraorbital region and in the left side of his lower lip. The fractures of the mid-third of his face had healed and although there was some asymmetry, the result was acceptable esthetically. He further opined that intraoral rehabilitation of his lower jaw would require extensive bone grafting from the iliac crest followed by five dental implants and a porcelain fused to metal bridge from tooth 42 to tooth 35 (7 teeth). It was also necessary to construct a bridge from tooth 14 to tooth 25. He assessed total disability at 29%. His opinion was however limited to the facial injuries. For the other injuries the report of Dr. Gathua dated 17th November 2008 was to the effect that the plaintiff would live with multiple permanent incapacities and being left handed he would have to learn how to use his right arm in place of the weakened, deformed and stiff left arm. He had prosthesis to support the left drop foot. The left leg had scarring and bulging tissues of the skin and calf. Unfortunately the doctor did not assess the degree of incapacity. Dr. Mansoor was quite comprehensive and on 19th September 2004 he opined that the plaintiff had suffered total disability of 82.4%.

Considering all relevant factors and the nature of the injuries sustained by the plaintiff as revealed in evidence and the voluminous medical reports, I am satisfied that an award of Kshs. 1,200,000/= is reasonable for pain, suffering and loss of amenities. No two cases can be the same and none of the cases cited to me by counsel could provide any useful guide on this aspect of the plaintiff's claim.

With regard to loss of earning capacity, I am not persuaded that the plaintiff has lost all the capacity to earn a living. The plaintiff alleged that he was an electrical contractor in Israel and used to earn an average of NIS 67,582 per annum. Although he was not challenged by cross examination, he did not produce any evidence of his previous earnings. No single contract was exhibited. The plaintiff expected his word to be accepted from the mere say so. However, I am inclined to accept that he made a living for himself but not at the level he seemed to suggest. I consider a monthly income of Kshs. 10,000/= as reasonable. The plaintiff was aged 45 years at the time of the accident and 51 at the time of trial. Counsel for the plaintiff suggested a global figure of Kshs. 7,096,110/= while counsel for the defendant opined

that no award be made under that head. Both opinions were extreme in my view. I find and hold that the said Kshs. 10,000/= is reasonable and a multiplier of 10 years is also reasonable in view of the plaintiff's age. I have also taken into account the finding that the plaintiff's incapacity is not total.

The plaintiff also claimed damages for loss of sexual function. That claim, with respect, was not supported by medical evidence. It appears nowhere in the numerous medical reports and records produced by the plaintiff. The claim has not been proved on a balance of probabilities. The plaintiff further claimed damages for future medical treatment and costs estimated at Kshs. 3,870,072.50. His doctors were of the view that treatment would continue and further surgery would be necessary to change implants, bridges, crowns and dentures. Dr. Alan Freedman estimated the cost to be 19340 USD. Dr. Vaghella on his part estimated the cost of replacing the upper and lower teeth with fixed bridge and chome-cobelt denture combination at Kshs. 250,000/=. Dr. Gathua did not estimate the cost of future medical treatment. He infact was of the view on 17th November 2008 that the plaintiff would continue with his business but the incapacities would restrict his activities. I assess damages for future medical treatment and costs at Kshs. 1,000,000/=.

With regard to special damages, I accept the plaintiff's testimony that he was charged Kshs. 487,481.00/= for hospitalization, treatment and doctors' fees at Aga Khan Hospital Mombasa. He produced demand (invoices) for the said sum and payment of the same through his visa credit card. I also accept the plaintiff's evidence of expenditure in Israel. He produced documentary evidence to demonstrate that he paid the equivalent of Kshs. 68,512.50 for the treatment and other hospital charges. Included in that figure is the cost of translation which I consider to have been properly incurred.

There is no dispute that the plaintiff traveled to Israel for further treatment. He was medically examined, treated and medical reports prepared and produced. He paid the equivalent of Kshs. 470,262.00. He produced documentary evidence to demonstrate that the said expenses were indeed incurred and were paid.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as hereunder:-

1) Liability:-

The defendant's driver was 100% to blame for the accident and the defendant is 100% liable to the plaintiff.

2) Quantum:-

- a. General damages for pain, suffering and loss of amenities..... Kshs. 1,200,000.00
- b. Loss of future earning capacity..... Kshs. 1,200,000.00
- c. Damages for future medical treatment and other medical costs..... Kshs. 1,000,000.00
- d. Special damages..... Kshs. 1,045,850.50

Total **Kshs. 4,445,850.50**

3) Interest on special damages shall be applied at court rates from the date of filing suit until payment in full while interest on the rest of the award shall be applied at court rates from the date of the delivery of this judgment.

4) The plaintiff shall have the costs of the suit.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY 2010.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Alwenya holding brief for Mr. Khagram for the Plaintiff and Mr. Waithera holding brief for Mr. Kamau for the Defendant.

F. AZANGALALA

JUDGE

23RD FEBRUARY 2010