



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 176'B' of 2005

COMAS KIPKOECH SIGEL.....PLAINTIFF
VERSUS
MADRUGADA LTD.....1ST DEFENDANT
JOHNTY BACKLEY.....2ND DEFENDANT

JUDGMENT

This is a claim for damages for the injuries the plaintiff suffered at his place of work at the defendant's farm. It is not in dispute that on 7th April 2005 while crushing horse feed using an Oats Crushing Machine, the plaintiff's left hand got caught in the gear of that machine and he suffered a serious crush injury of the left hand. He was rushed to Valley Hospital in Nakuru Town where the bleeding was arrested and a traumatic amputation of that hand was done at the level of the wrist joint.

Liability has by consent been resolved at 35/65% against the defendant. My task therefore is only to assess the quantum of damages.

The plaintiff complains that as a result of that injury his left hand has been rendered useless. He therefore claims both general and special damages. In their submissions his advocates propose an award of Kshs.5,959,400/- as both general and special damages on 100% basis. On their part counsel for the defendant recommend a sum of Kshs.700,000/-.

I have considered these submissions and read the authorities cited by counsel for both the parties as well as the medical reports by Dr. Ngetich and Dr. Malik which were produced by consent.

Both doctors concur that as a result of the crush injury the plaintiff suffered, his left hand was devitalized and that he suffered a permanent disability. While Dr. Ngetich put it at 65%, Dr. Malik assessed it at 60%.

The plaintiff also suffered pain and lost a lot of blood. Dr. Ngetich who attended him at Valley Hospital says the plaintiff was, on admission, found to be anaemic and had to be transfused. He was admitted for five days. One week after discharge he returned to the hospital to have the stitches removed. Thereafter he had his wound dressed five times as an out-patient. Although the wound has healed well without any complications he complains of occasional pain at the stump.

In their submissions counsel for the plaintiff have claimed general damages under the heads of pain and suffering and loss of earning capacity. For pain and suffering they have suggested a sum of Kshs.3 million. In support of that proposal they have cited the case of **Naomi Wanjiku Rumano Vs Alice Wanjiku Rumano & Another, Nairobi HCCC No. 233 of 1999** in which Mulwa J awarded a sum of

Kshs.1,350,000/- on 25/1/2001 for pain and suffering to the plaintiff who had suffered a crush injury of the right hand leading to a below elbow amputation.

Counsel for the defendant on their part have cited the cases of **Ibin Mwati Vs Bernard M. Mutungi & Another, Nairobi HCCC No.375 of 1988** and **Joyce Otieno Owango Vs E. Andrew & Another, Civil Appeal No.55 of 1988** and suggested a sum of Kshs.300,000/- under this head. They have not availed to me copies of the judgments in those cases.

The said case of **Naomi Wangui Rumano** cited by counsel for the plaintiff with a below elbow amputation in which Kshs.1,350,000/- was decided in January 2001. Taking into account the effect of inflation since then, I award the plaintiff in this case a sum of Kshs.2,000,000/- for pain and suffering.

The defendant seriously contests any award for loss of earning capacity on the ground that the same is not pleaded. That argument has no basis. They seem to be having in mind damages for loss of earnings. A distinction must be made between loss of earnings and loss of the earning capacity. Loss of earnings is a special damages claim which must specifically pleaded and strictly proved but damages for loss of earning capacity are classified as general damages. In **Mwangi & Another Vs Mwangi [1996] LLR 2859 (CAK)** the Court of Appeal stated this principle thus:-

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. The plaintiff cannot just “throw figures” at the judge and ask him to assess such damages. See the case of Kenya Bus Service Limited Vs Mayende [1991] 2 KAR 232 at p. 285.”

In this case counsel for the plaintiff are therefore perfectly entitled to claim damages for loss of earning capacity.

The plaintiff was a general labourer without any formal training. He only went to school up to standard 5. He was a horse rider and also took care of his employer's horses. That requires the use of both his hands. Both Dr. Malik and Dr. Ngetich agree that the plaintiff has lost the use of his left hand. It follows that he cannot perform any of those functions. In the circumstances, I agree with his counsel that he is entitled to damages for loss of the earning capacity.

At the time of his injury, the plaintiff was 23 years old. His counsel suggested a multiplier of 36 years which covers the entire remaining period of his working life. That suggestion ignores the fact that the plaintiff could have lost his job or for some other reason prevented from earning. Taking those factors into account I find a multiplier of 25 years reasonable.

The plaintiff's testimony that he was employed by the plaintiff earning a salary of Kshs.2600/= per month was not contested. Using that figure and applying the said multiplier of 25, damages for loss of earning capacity work to Kshs.780,000/=.

The plaintiff also claims a sum of Kshs. 1,037,000/= being the cost of acquiring and replacing as well as maintaining a prosthesis for life. Daniel Mutithu Kairiro, PW2, an orthopedic technologist at Kenyatta National Hospital testified that in the year 2006, a functional prosthesis costs Kshs.120,000/-. That type would require to be serviced at the cost of Kshs.10,000/- per year and to be replaced after every 5 years. On the basis of that evidence and considering the plaintiff's age of 24 years Mr. Bosek for the plaintiff submitted the prosthesis will require to be replaced at least 7 times in the plaintiff's lifetime. He therefore urged me to award the plaintiff Kshs.1,037,000/- which he has claimed as a special damage item for the implement.

The defendant does not dispute the fact that, as both Dr. Malik and Dr. Ngetich found, the plaintiff has lost the use of his left hand and that he requires a functional prosthesis. What it disputes is a large award that will take care of the cost of replacements and maintenance for life that we can never be sure will be incurred. Its counsel Mr. Wamaasa thinks we should not go into the arithmetic of how much it will cost to maintain and replace the prosthesis. Instead he suggests a global sum of Kshs.400,000/= should be awarded as was done in the case of **Naomi Wangui Rumano**.

I have considered these rival submissions. Having taken into account all these factors, I agree with Mr. Wamaasa that a global award would be reasonable. Taking into account the sums of Kshs.120,000/= and Kshs.118,489/ that PW2 and DW1 respectively gave as the cost of acquiring a prosthesis, I think an award of Kshs.700,000/= would be reasonable and I accordingly award it.

Having awarded the plaintiff the cost of acquiring a prosthesis, I cannot again award to him damages for a house help. That would be double compensation. I therefore dismiss his claim under that head. In the circumstances, I award the plaintiff a total sum of Kshs.2,262,000/= made out as follows:-

1. Pain and suffering.....	Kshs. 2,000,000.00
2. Lost years.....	Kshs. 780,000.00
3. Cost of prosthesis.....	<u>Kshs. 700,000.00</u>
Total.....	Kshs. 3,480,000.00
Less 35% contribution.....	<u>Kshs. 1,218,000.00</u>
Net award.....	<u>Kshs.2,262,000.00</u>

The plaintiff will also have the costs of this suit and interest on the award and costs at court rates.

DATED and DELIVERED at Nakuru this 3rd day of June, 2010.

D. K. MARAGA
JUDGE.