



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO 154 OF 2001
VICTORIA VENEZIANI.....PLAINTIFF
VERSUS
1. A. A. KAWIR TRANSPORTERS
2. MOHAMED R. HAMISI.....DEFENDANTS

JUDGEMENT

Vittorio Veneziani, the plaintiff, was on 12th December 2000, traveling in motor vehicle KAJ 272W along Kilifi-Malindi road when he crashed into vehicle KYR 018 ZB 5156 which was parked on the said road. The plaintiff sustained injuries, which he particularized in his plaint, filed on 28th March 2001, as large lacerated forehead, fracture of the right distal tibia/fibula, partial severance of the left calcaneus and fracture of the left scaphoid.

The plaintiff pleaded that following the severe impact, his motor vehicle was rendered a constructive total loss and its pre-accident value, less salvage value, was Kshs. 590,000.00. The plaintiff further pleaded that the said vehicle registration number KYR 018 ZB 5156 was negligently parked by the 2nd defendant who was an authorized driver of the 1st defendant, the owner thereof. The plaintiff claimed general damages and special damages in the sum of Kshs. 1,282,952.00.

Pleadings closed and the suit was subsequently listed for hearing before Onyango Otieno J, as he then was, on 6th March 2002, who heard the plaintiff's evidence. On 16th September 2005, parties consented to judgment on liability apportioned at 30% against the plaintiff and 70% against the defendants. They could not however agree on quantum and sought assessment of the same by the court. The matter was listed before me on 3rd March 2008 for further hearing on the same.

The plaintiff's evidence before Onyango Otieno J, was that he suffered a double fracture on the right leg (tibia and fibula). On the left leg, the archilles tendon was partly severed. The plaintiff further suffered a fracture of the left scaphoid, dislocation of the sternum in the middle of the chest and a deep cut on the face with loss of skin of about 1" x 2".

The plaintiff was taken to a clinic in Kilifi and later to Mombasa Hospital where several operations were done. The plaintiff then traveled to Italy where he underwent a major operation. At the time of giving evidence the plaintiff testified that he had not fully recovered. He was issued with a P3 and was later examined by Dr. J. M. Muthuuri who prepared a report on his injuries. The P3 and the Medical Report were produced as exhibits (P EX 1 and 3).

The plaintiff also produced, as P EX 4, a bundle of receipts of expenses incurred in Kenya of Kshs.

784,314/= and those incurred in Italy of Italian Lira 7,494,900. The plaintiff further testified that his vehicle was written off and he sold the same for Kshs. 50,000/=. He obtained an Assessor's report which indicated that the vehicle's pre-accident value was Kshs. 650,000/= and the salvage value was Kshs. 60,000/=.

I heard the evidence of the plaintiff's witness George Henry Matta on 3rd March 2008. He testified that he was the Principal Officer of Kibmot Loss Assessors. He gave his qualifications as a diploma in Motor Vehicle Engineering; a diploma in Business Management and a Proficiency Certificate in Insurance. He testified that he examined the plaintiff's vehicle registration number KAJ 272 W, which had been involved in an accident, and prepared an assessment report dated 18th January 2001. In his opinion, it was uneconomical to repair the vehicle. He determined the same to be a constructive total loss. Its pre-accident value was Kshs. 650,000/= and its salvage value was Kshs. 60,000/=. The loss to the plaintiff according to the assessor was Kshs. 590,000/=. He produced the assessment report as P EX 5.

When the matter was next listed for further hearing before me on 4th September 2008, counsel agreed to produce Dr. Muthuuri's medical report dated 5th January 2001 as P EX 3 (a). They further agreed to produce a further report by the same doctor dated 20th January 2003 as P EX 3(b). Also produced by consent, as P EX 3 (c), was a receipt dated 27th February 2003 issued by the said doctor.

On the production of the above documents the plaintiff closed his case.

By consent a medical report prepared by Dr. Maina dated 10th July 2007 was produced as D EX 1 and the case was fixed for mention on 16th October 2008. Come that date, counsel for the defendant closed the defendant's case and both counsel agreed to file written submissions on quantum. The submissions were in place by the 18th February 2009 when the matter was next mentioned before me.

In his written submissions, counsel for the plaintiff submitted that his client's material damage claim had been proved to the required standard and there should be judgment for Kshs. 590,000/= being the difference between the pre-accident value of the plaintiff's vehicle and the salvage value. In counsel's view, the testimony of the assessor had not been seriously challenged. With respect to the personal injury claim, counsel submitted that the same too had been satisfactorily established. He referred to the Medical Reports which showed that the plaintiff had suffered severe injuries. In his view the defendant's own medical report buttressed the plaintiff's case and those injuries called for an award of Kshs. 1,200,000/= as general damages for pain, suffering and loss of amenities. Counsel cited two High Court decisions namely; **Ahmed Mohamed – v – Abdulhafidh M. Banragah (Mombasa HCCC No. 319 of 2001) UR** where Khaminwa J awarded Kshs. 750,000/= for fracture of the left tibia and fibula that was operated on three times resulting in mal-union of the femur and shortening of the left limb. The plaintiff would also have to under go a further operation to correct the said malunion and would further develop osteoarthritis of the left lower limb joints.

The second case relied upon by counsel for the plaintiff is that of **Joseph Kitheka – v – Stephen Mathuka Pius [HCCC No. 1750 of 1999] (UR)** which is a decision of Kasanga Mulwa J. (Rtd). In that case, the plaintiff suffered fractures of the left radius and ulna and the right tibia and fibula. The Learned Judge awarded Kshs. 880,000/= for general damages for those injuries.

Counsel further submitted that the plaintiff had also proved on a balance of probabilities the rest of the special damages comprising of the assessor's fee of Kshs. 4,000/=, doctor's fees of Kshs. 2,000/= and Kshs. 100/= for police abstract.

In response to the above submissions, counsel for the defendants submitted, in respect of the material claim, that the plaintiff may be awarded such damages as have been proved. With respect to the personal injury claim, counsel submitted that an award between Kshs. 450,000/= and Kshs. 500,000/= would be reasonable compensation to the plaintiff on a 100% liability. Counsel sought reliance upon four decisions of the High Court. The first one is the case of **Erica Kahi – v – Gabriel K. Wahinya & Anor: HCCC**

No. 3789 of 1986 (UR). In that case, the plaintiff sustained a head injury with loss of consciousness for about two days, compound fracture of the left tibia and fibula. The injuries healed with a resultant shortening of the left leg. Butter-Sloss J, awarded Kshs. 220,000/= as general damages.

The second case cited by counsel for the defendant was that of **Geofrey Mitabari – v – Abdi Mohamed: [HCCC No. 68 of 1989] (UR)**. The plaintiff in that case, suffered a compound fracture of the left tibia and fibula which healed with restricted movement of the left ankle. Oguk J (Rtd), awarded Kshs. 200,000/= as general damages for pain, suffering and loss of amenities.

Counsel also cited the case of **Issa Abdalla – v – M. S. Timimi & Another** but did not give particulars thereof. The citation is therefore unhelpful and will be ignored. The last case cited by counsel for the defendant is that of **Kibe Njoroge – v – Agriquip Agencies (EA) Limited [HCCC 3942 of 1988] (UR)**. The copy of the extract filed did not have the decision of the court. The case will therefore not be taken into account in determining the appropriate award.

I have now considered the evidence on record and the submissions thereon. I am, of the opinion that the plaintiff suffered fairly serious injuries. The first Medical Report prepared by Dr. J. M. Muthuuri on 5th January 2001 indicated that the plaintiff suffered an open fracture of the right distal tibia/fibula. The fibula was plated and the tibia also had a bridge plate put with lots of home graft. Five days later skin grafting was done and PBC applied two weeks later. There was also partial severance of the left Achille's tendon which was repaired. The plaintiff also had a fracture of the left scaphoid which was immobilized with an orthotic stoup.

At the time of that report, the plaintiff was not mobile due to the nature of the injuries. According to the doctor, mobilization would occur eight (8) weeks after the injury and the plaintiff was expected to resume his duties in 3 – 4 months.

However, when the same doctor examined the plaintiff on 20th January 2003, he opined that, the plaintiff had sustained multiple injuries most of which had healed well leaving visible scars. The open fracture on the right ankle became infected with pseudomonas which was a complication that resulted into bone loss requiring multiple operations to clear the infection and prevent deformity. At the time of the second examination the plaintiff still had significant stiffness in the right ankle, swelling of the right lower limb, limb shortening and foot inversion. The doctor assessed permanent disability at 25%.

The last medical report on the plaintiff was produced by the defendants. That report was prepared by Dr. Maina Ruga of Jubilee Exchange Medical Services on 10th July 2007. The doctor noted that there was stiffness in the right ankle joint and that the right leg was shorter. He also observed that there was a slight limp and he could not walk. The X-rays taken indicated that the plaintiff's right leg and ankle joint had slight angulation of distal end fibula and osteoarthritis in the right ankle joint. The doctor assessed permanent disability at 20%.

The injuries suffered by the plaintiff were in my view far more serious than the injuries sustained by the plaintiff in the **Joseph Kitheka – v – Stephen Mathuka Pius case (supra)** where Mulwa J awarded Kshs. 880,000/=. That was 8 ½ years ago. They are also more serious than those sustained by the plaintiffs in the cases relied upon by the defendant. The cases cited by the counsel for the defendant suffered from the further defect that copies of the cases were not availed to the court. What was availed were extracts of the cases which had scanty information.

In my view the injuries suffered by the plaintiff in **Ahmed Mohammed – v – Abdulhafidh Mohamed Banragah (supra)** are comparable to those sustained by the plaintiff herein. In that case Khaminwa J. awarded Kshs. 750,000/= as general damages. The plaintiff had suffered a fracture of the left femur and a comminuted compound fracture of the left tibia and fibula which were treated by external fixation and traction. The plaintiff, as here, required skin grafting of the left tibia and was operated on three times. There was mal union of the femur and shortening of the left lower limb. There was also osteoarthritis of the lower limb joints. That decision was made on 30th July 2004 about five years ago.

Having considered the cases cited to me and all the relevant factors, I am of the opinion that the plaintiff could be fairly compensated for his pain, suffering and loss of amenities by an award of Kshs. 1,000,000/=. However, since liability was agreed at 70% against the defendant the said sum is reduced to Kshs. 700,000/=.

With regard to the material damage claim, I am persuaded that the plaintiff lost his vehicle in the accident. The pre-accident value of the vehicle was given by PW 2 George Henry Matta, a Loss Assessor, as Kshs. 650,000/=. He further valued the salvage at Kshs. 60,000/=. Indeed the plaintiff himself testified that he sold the same for Kshs. 50,000/=. I believed PW 2 and accept the values he gave. His evidence was cogent and was not shaken in cross examination. In the premises, the plaintiff has proved the material damage claim which is reduced to Kshs. 413,000/= as per the agreed apportionment.

As regards special damages relating to medical expenses, the plaintiff particularized the same in the plaint as Medical Report charge of Kshs. 2,000/= and medical expenses of Kshs. 686,852.00. Dr. Muthuuri's receipt for Kshs. 2,500/= was produced as P EX 3 (c). The plaintiff however claimed Kshs. 2,000/= which I find as having been proved.

With regard to the medical expenses of Kshs. 686,852.00 the plaintiff produced exhibit 4, which is a bundle of receipts for medical expenses incurred in Kenya and Italy. Expenses incurred in Kenya amounted to Kshs. 784,314 and those incurred in Italy amounted to 7,494,900 Italian Lira. As special damages must not only be specifically pleaded but must also be strictly proved, I find as proved medical expenses of Kshs. 686,852.00 which were the expenses particularized in the plaint.

The plaintiff further particularized the cost of obtaining an assessors report at Kshs. 4,000.00. PW 2 the assessor confirmed that he charged between Kshs. 4,000/= and Kshs. 5,000/= for his services. No receipt was however, produced to support the payment. In the premises, the plaintiff has not proved that item of special damage. As regards the police abstract fee, the plaintiff did not produce evidence of payment thereof and the claim was therefore not proved.

In the end the plaintiff proved special damages of Kshs. 688,852.00 which sum is reduced to Kshs. 482,196.40 in terms of the agreed apportionment.

The upshot is that judgment is entered for the plaintiff against the defendant as follows:-

- (a) General damages for pain, suffering and loss of amenities Kshs. 700,000.00
- (b) Pre-accident value of motor vehicle..... Kshs. 413,000.00
- (c) Special damages..... Kshs. 482,196.40

Total Kshs. 1,595,196.40

- (d) Costs
- (e) Interest on (a) at court rates from the date of this judgment until payment in full.
- (f) Interest on (b) and (c) at court rates from the date of filing suit until payment in full.
- (g) Interest on (d) from the date of taxation or agreement.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MARCH 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Omondi for the plaintiff and Muinde holding brief for Gor for the defendant.

F. AZANGALALA

JUDGE

24TH MARCH 2009