



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

HCCC 28 OF 2007

DAUGLAS ERICK NYAKUNDI MASIRA PLAINTIFF

VERSUS

1. RONGAI WORKSHOP LTD..... 1ST DEFENDANT

2. PETER KARENGE MUNGAI 2ND DEFENDANT

JUDGMENT

I: Background

1. Douglas Erick Nyakundi Masira, a male businessman who is not able to recall whether he was 17 years old or 18 years old in the year 2007. He informed the court he was born in 1990. He left school in standard six because of lack of school fees. To sustain himself he entered into a business trade of selling chickens in town.
2. On the 3rd of June, 2007 as he was walking along the Nakuru – Kericho road near the Kericho Teachers College (formally a school (primary), there was a lorry vehicle that suddenly came and knocked him down. This vehicle was identified as motor vehicle lorry registration number KVP 367 and its trailer Z9569 that belonged to M/S Rongai Workshop Ltd, the 1st defendant herein. It was driven by Peter Karengi Mungai (the 2nd defendant herein) who was an employee/servant of the 1st defendant.
3. The said Douglas Erick Nyakundi Masira (and plaintiff herein) was rushed to the Kericho District Hospital where he was found to have compound fractures of the right foot/leg. He was thereafter taken to the Tenwek Hospital on 18th June, 2007. He was then unable to walk and had bruises and laceration to the right leg. This leg was later amputated.
4. The plaintiff filed this suit on 1st August, 2007 in TORT and sought for damages.
5. The defendant 1 and 2 entered appearance and filed defence. Before the trial of the case the parties held a pre trial conference as required by law and came to the following agreement, thus partially compromising the suit.

II: Liability

6. On 18th February, 2009 the parties conceded to a judgment on liability being in favour of the plaintiff against the defendant but apportioned the liability at

30% against the plaintiff

70 % against the defendant

III: Quantum

a) Special damages

7. The claim for special damages was

- i) Police abstract Kshs. 100/=
- ii) Medical report Kshs. 6,500/=
- iii) Treatment expenses Kshs. 104,000/=
- iv) Costs of artificial hip Kshs. 75,000/=

Total Kshs 185,600/=

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The parties conceded to this claim prior to the trial and judgment in favour of the plaintiff was entered by the Deputy Registrar under ministerial orders so given to the Registrar under **Order 48 Civil Procedure Rules**.

8. The issue that was therefore left for determination are two. One, general damages, for pain suffering and loss of amenities and the other is that of incapacity.

A) General Damages

i) Pain suffering and loss of amenities.

9. The plaintiff as stated earlier had been taken to the Government District Hospital at Kericho presumably on the 3.6.07. On the 18.6.07 he was then taken to Tenwek hospital where it was discovered that the bruise and laceration to the right leg was in fact a leg having necrotic tissue, fascia and tendons sepsis and degloving injury.

10. This leg was further found to have been infected and thus led to the amputation of the said right leg above the knee.

i) Injuries

a) amputation to the right leg above the knee.

11. In evidence the plaintiff stated he was in pain at the stump. One could understand this as being “phantom pain” because of the missing amputated leg.

12. I am satisfied that the plaintiff underwent considerable pain during the 15 days he may have been at the District hospital at Kericho. He had a fracture of that leg. I would say here that this leg became septic and infected. To some extent the Government District hospital at Kericho should have been made liable for the loss of this leg due to poor or no treatment. It was at the private hospital that necessitated the said leg to be amputated.

13. The work the plaintiff undertook was that of walking to town to sell his chicken. At one time he bought a bicycle. It seems that he is or may not be able to comfortably walk to do his business.

14. The advocate for the plaintiff relied on two case law seeking for this court to award damages of Kshs. 1.5. Million.

15. The first case law is that of

A) Muthoni Kabugua

V

Catholic Diocese of Kirinyaga and 2 others

HCCC. 5108/92 (Nairobi)

(Ang'awa J)

Where a female adult aged 27 years, a passenger, sustained injuries as a result of a road accident and her left leg was amputated. An award of Kshs. 500,000/= was made by the court.

B) Peter Ndimi

V

Telkom (k) Ltd

HCCC. 73/97 (Machakos)

(Wendoh J)

16. A minor was involved in a road traffic accident. The minor was a pillion passenger when he was knocked down and sustained injuries resulting to the amputation of the left fractured tibia and fibula bones. The Hon. Judge awarded a sum of Kshs 1.2. million. The plaintiff herein prayed for Kshs. 1.5 million as an adequate award.

17. The defendants on the other hand relied on the law of

Nancy Wanjiku Mwangi

V

Peter Njoroge Ngata

HCCC. 1296/2001 Nairobi

(Ang'awa J)

18. In which a female adult passenger aged 46 years in 1999 sustained injuries that included an amputation of the right leg below the knee level. The court award Kshs. 800,000/=.

19. In this case the defendants sought an award of Kshs. 800, 000/= as an adequate compensation.

20. My finding herein is that indeed the plaintiff did suffer pain and suffering. I am satisfied that he now has lost amenities being the use of this right leg. He is now 20 years old and has been incapacitated by his loss.

21. I would accordingly find as a fair award herein of Kshs. 800,000/=.

22. I now turn to the issue described by the advocate for the plaintiff as **incapacity**. This claim I believe must mean loss of earning capacity? Or loss of future earning capacity? The advocate relying on the some authorities indeed was referring to a multiplicand of Kshs. 4,000/= agreed to by both parties and a multiplier of 30 years and not 45 years referred to by the plaintiff. If this is so then a sum of Kshs. 1,440,000/= Million would be asked for.

23. I have looked and the pleadings before this court and found that the same does not plead this head of damages. This is a claim that must not only be pleaded but must be strictly proved. I declined to make an award herein and would accordingly dismiss this claim.

24. If in the event I am requested to give the probable award to be made I would have not exceeded a sum of Kshs. 900,000/=. The claim stands dismissed.

25. I accordingly enter judgment for the plaintiff on the proved claim.

25. In summary

25:1 Pedestrian/motor vehicle lorry accident.

25.2. Injuries

i) Amputation to the right leg above the knee

ii) **Quantum**

A) General Damages

a) Pain suffering and loss of amenities.

Kshs. 800,000/=

B) Special Damages

a) Agreed Kshs. 185,600/=

i) Police abstract 100/=

ii) Medical report 6,500/=

iii) Treatment expenses 104,000/=

iv) Cost of artificial hip Kshs. 75,000/=

Total Kshs. 185,600/=

(Judgment DR 3.2.09)

C) Loss of incapacity agreed multiplicand 4,000/=

Suggested multiplier 30 years.

NIL not pleaded now particularized.

TOTAL KSHS. 985,600/=

LESS 30% 295,680/=

Award to plaintiff 70% **689,920/=**

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26. I award the costs of this suit to the plaintiff. I award interest on General damages from the date of this judgments and interest on Special damages from the date of filing suit.

DATED this 18th day of March, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocate

I.O. Meroka advocate from the firm of M/S Meroka & Co. advocates for the Plaintiff – present

E.M. Orina advocate from M/S E.M. Orina & Co. advocates instructed

to hold brief for Siganga & Co. advocates for the Defendant.