



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Civil Suit 105 of 2001

RICHARD CHEPKWONY KIPNGETICH PLAINTIFF

VERSUS

GUSII DULEXE LTD

T/A TRANSLUXE BUS COMPANY.....} 1ST DEFENDANT

JOHN MORI OTWORI} 2ND DEFENDANT

JUDGMENT

I: Procedure

1. In this running down cause, the plaintiff herein, Richard Chepkwony filed suit against M/S Gusii Duluxe Ltd T/A Transluxe Service Ltd and John Mori Otworu and 1st and 2nd defendant respectively for injuries sustained as a result of a road traffic accident between two vehicles.
2. The two defendants having been duly served failed to enter appearance nor file defence. Service upon them was entered by way of alternative service through an advertisement in the local newspapers with leave of court.
3. Interlocutory judgment was duly entered by the Deputy Registrar of the High Court of Kenya at Kericho (**order XLXIII Civil Procedure Rules**). On 31st May, 2005 and 11th August, 2005. From the years 2006 to 2007 the case either not reached (*27th July, 2006 Kimaru J*) nor set down for hearing. Substitutive services was asked for once again (*Ang'awa J*) and the hearing date set for 12th May, 2009.
4. The effect of the interlocutory judgment being entered under **order Ixa r 6** Civil Procedure Rules is that judgment is final on the issue of liability but provisional on quantum with the case being set down for formal proof.

II: Background

5. A brief background of this running down cause is as follows:-

The plaintiff was a passenger in the back of a pick up motor vehicle registration No. KZE 490. This vehicle was built up with a door to the rear. The plaintiffs stated in evidence that a motor vehicle has registration KAH 883 (b) approached from the opposite side. It overtook a lorry motor vehicle in front of

it and collided head on with the motor vehicle that the plaintiff was traveling in.

6. According to the police abstract produce to court, the motor vehicle has was “*scania*” in make and was owned by Translux Bus Services P.O. Box 7311 Nairobi. The driver to the bus was one John Mori Otworu (*the 3rd defendant herein*).

7. The vehicle was insured by M/S Lakestar Insurance Co. Ltd Policy No. 08/081/52892/98/7, certificate No. A869317 commencing on 15th December, 1998 expiry 14th January, 1999.

8. The accident occurred on the 22nd December, 1998. Seven others persons died. There seems to have been a traffic court case against the 2nd defendant (*traffic case No. 423/01*) but this court was not informed of its outcome.

II: Liability

9. From the evidence before me the driver of the bus (*2nd defendant*) overtook a lorry vehicle and collided into the on coming vehicle which was vehicle registration KZE 494 Peugeot 504 matatu. The driver sustained fatal injuries in that vehicle.

10. The defendant No. 2 is said to have driven at an excessive speed without due care and attention to other road user. Failed to prevent colliding into the motor vehicle registration KZE 494, overtook another vehicle before ascertaining that it was safe to do so thereby driving onto the lawful path of motor vehicle registration KZE 494.

11. The 1st and 2nd defendant by not filing a defence to the plaint herein and by having interlocutory judgment so entered against them are accordingly found liable by this court at 100% jointly and severally.

III: Quantum

a) Injuries.

12. The Plaintiff sustained injuries as a result of the motor vehicle collision. He lost consciousness for three (3) days and was admitted at the Kericho District Hospital and thereafter moved to the Green View Nursing Home from December, 22nd, 1998 to 22nd April, 1999 a period of four (4) months.

13. In the year 2001 he was examined by :-

DR Sammy Masyuki

MBch. B (Nrb)

medical officer Kericho.

He established that the following injuries was sustained

- a) Spinal injury with fracture of cervical spine and thoracolumbas spine leading to quadriplegia and quadriporsis
- b) Three days loss of consciousness, brain concussion.
- c) dislocation of left shoulder
- d) Cut wound, right hand between 2nd and 3rd finger.

14. In the year 2009 the Plaintiff was re-examined by

DR. Stephne Oketch

MBch.B(Moi)

Medical Officer

He established the following improved injuries was subsisting:-

- a) Cervical spine and lumbar spine injury leading to partial paralysis of upper and lower limbs
- b) X-ray:- fracture of the C4 vertebrae
- c) Cerebral concussion with loss of consciousness whilst at hospital
- d) Deep cut wound on right palm.
- e) Deep cut wound of scalp.

15. In 2001, the medical officer stated in his report that the plaintiff was a complete quadriplegia. He was nursed in bed and had use of a urethral catheter. His lower motion were alimeted by use of enemas. He underwent physiotherapy but was unable to stand nor walk on his own. He would lose balance even when seated. Both upper limbs were weak and having thin clawing hands. He had a poor stream of urine.

16. As to his central nervous system, the plaintiff was fully oriented in time and place. He had no sign of cranial nerve pulsies. His speech and sight, his memory and intelligence was normal. He has signs of neurone disease with reduced muscle bulk and incised reflexes and reduced power. The doctor was of the opinion that the plaintiff would need due to his stricture, further specialized treatment. A urethral got injured when the plaintiff was being catheterized at the hospital and he needed a wheel chair.

17. In 2009, eight (8) years later when the plaintiff aged 36 years old was re-examined again to ascertain his latest condition.

18. The 2nd medical officer noted the plaintiff complained of weak limbs and loss of sensation to the right lower limb. The plaintiff has been maimed for six years and is unable to sire a child. There is difficulty in passing urine and at times it takes 15 minutes to empty is bladder.

19. He now has a loss of hearing in his right ear and is unable to hold objects in his hands. There is loss of muscle bulk Though the plaintiffs walks he does so with the use of crutches due to the paralysis on the lower limb having grade 0 right lower limb and grade 3, left lower limb with loss of sensation. There were injury to the palm, scalp causing loss of hearing to the right ear and injury to the shoulder.

20. This doctor found that the degree of injury is grievous harm. The extent of incapacity being 100%.

IV: Opinion

21. Both the medical officers who examined the plaintiff's are regrettably not neurosurgeons. It would have been of most help to court if the plaintiff had been examined by a specialized consultant. The evidence before court will now be considered as to the injury.

22. This court had an opportunity to see the plaintiff walk with difficulties using crutches. He was not able to stand for long during the time he was giving his evidence and as a result gave evidence whilst seated.

23. There is most certainly a marked improvement to the plaintiff's medical status. He was at first described as a quadriplegia and quadriparesis eleven (11) years after the accident the plaintiff is able to walk on crutches. He in fact had a fracture to the C4 vertebrae and was described as having partial paralysis of both upper and lower limbs.

24. The advocate for the plaintiff asked that this court awards a sum of Kshs. 2.7million for the head of damage of pain, suffering and loss of amenities. He relied on the case law of

Dominic Mutua Maweu

v

Bestways Plumbers Ltd

HCCC.255/01 Mombasa

(2005) eKLR Khaminwa J

a motor vehicle that carried the plaintiff as a passenger tried to avoid an animal that had crossed the vehicles path. It overturned on applying emergency brakes. The plaintiff story is that case was the driver was trying to open a can of beer and lost control as a result of plaintiff sustained injuries being a compressed fracture of Thoracic Vertiluer T6 resulting to paraplegic. The injuries sustained was total paraplegic with no sensation below the wrist.

V: Findings

25. The plaintiff is not a total paraplegic. The latest report describes him as being a partial paraplegic with the ability to walk on crutches though with difficulties. I find that in this case a reasonable sum to be awarded for a partial paraplegic be Kshs. 1.5.million for pain, suffering and loss of amenities.

VI: Other Claims

26. The plaintiff unfortunately did not plead or ask to be awarded a claim for a wheel chair, specialized equipment such as a bed, future medication or nursing care.

27. What was pleaded was a claim for

a) medical expenses Kshs. 50,000/=

b) medical report Kshs. 4,000/=

a) Medical expenses – Kshs. 50,000/=

28. No evidence was deduced for this sum nor did the plaintiff speak of this claim. It is accordingly dismissed.

b) Medical report Kshs. 4,000/=

29. A claim for a medical report file was proved and supporting document issued. This claim is allowed.

30. I enter judgment for the plaintiff as proved.

31. In summary

31.1. Passenger male adult in 1998 aged

Advocates

S. Munyao advocate from the firm of M/S S. Munyao & Co. advocates for the plaintiff – present

N/A for the defendant