



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Civil Case 38 of 1996

RICHARD OTILA MBARARI.....PLAINTIFF

VERSUS

AKAMBA PUBLIC ROAD SERVICES LTD.....DEFENDANT

JUDGMENT

This is a claim for both general and special damages for the injuries the plaintiff suffered in a road traffic accident on or about 6th December, 1993 along Nakuru-Eldoret road involving the defendant's vehicle and another. Liability has been apportioned by the consent of the parties at 20% against the defendant and 80% against the third party.

The proceedings against the third party were abandoned. When I pointed to the parties that I will, in the circumstances, not award any damages against the third party, they concurred and requested me to assess damages against the defendant only. So my task here is to assess the 20% damages against the defendant.

Dr. J.K Gichimo examined the plaintiff on or about 8th November, 1996. Dr. Ashwin Madhiwala also examined the plaintiff and gave a second opinion. Except for the heady injury which he listed but made no mention of thereafter, his report corroborates that of Dr. Gichimo in the other aspects of the plaintiff's injuries.

According to Dr. Gichimo the plaintiff sustained the following injuries:-

1. Injury to the mouth with broken incisor,
2. Blunt head injury with brain concussion,
3. Fracture of left ulna,
4. Compound fracture of the left femur leading to the amputation of the left limb above the knee.

The fractured femur was completely fragmented with profused bleeding. An emergency operation was carried out and the limb was amputated above the knee. The left arm was manipulated and immobilized in slab plaster of paris and arm sling support. The plaintiff stayed in hospital for two months and was discharged on crutches.

Citing several authorities, in their written submissions, counsel for the plaintiff suggested an award for every injury and come up with a figure of Kshs. 1350,000/= for pain and suffering and Kshs. 500,000/= for loss of the earning capacity as well as special damages.

Also citing several authorities, counsel for the defendant on their part think and award of Kshs. 300,000/= will adequately compensate the plaintiff for these injuries. They contended that as the P3 form only indicated that the plaintiff suffered "shock and concussion", and Dr. Madhiwala only listed the head injury and did not describe it, I should ignore the head injury altogether.

I have considered these submissions. To start with, I cannot ignore the head injury as contended by counsel for the defendant. If they wanted to contest that injury, they should have had the plaintiff and the doctors testify and challenged them in cross examination. Having not done that, I cannot accept their submissions as a basis for ignoring that injury. Moreover one cannot suffer concussion without head injury and Dr. Madhiwala could not have listed it as one of the injuries the plaintiff suffered if that was not the case.

The amputation of the left limb is a permanent loss of the lower left limb which has had and will continue having psychological effect on the plaintiff for the rest of his life. Dr. Gichimo said he would need an artificial limb which would at that time have cost at least Kshs. 500,000/=. The left ulna united with slight angulation causing pressure on the ulna nerve. He recommended continuous physiotherapy to improve the status of the malunioned fractured ulna. To prevent frequent pains and discomfort, he also recommended the removal of the cracked incisor and replacement with artificial dentures. There is no evidence that either of these recommendations was carried out.

I have not found any of the authorities cited by counsel for both the parties useful as none of them had an amputation. Taking into account the injuries the plaintiff suffered and in particular the loss of the left limb, I award him a sum of Kshs. 1,500,000/= for pain and suffering and loss of amenities. Although the plaintiff's church donated an artificial leg to him, I cannot not ignore his claim in this respect as contended by counsel for the defendant. This is because that leg may require to be replaced after some time. I therefore award the plaintiff the sum of Kshs. 500,000/= recommended by Dr Gichimo for the artificial leg. I also award the plaintiff Kshs. 2,100/= special damages claimed in the plaint as the fees for the medical and police abstract reports. I am, however, unable to make any award for loss of earning capacity as there is no evidence to support counsel's submissions that prior to the accident, the plaintiff was a matatu conductor.

In the upshot I award the plaintiff a sum of Kshs. 400,420/= made out as follows:-

1. Paining and suffering and loss of amenities -Kshs. 1,500,000.00	
2. Artificial leg.....Kshs. 500,000.00	
3. Special damages..... <u>Kshs. 2,100.00</u>	
Total.....Kshs. 2,002,100.00	
Less 80% "contribution"..... <u>Kshs. 1,601,680.00</u>	
Net award..... <u>Kshs. 400,420.00</u>	

The plaintiff shall also have interest out this award at court rates from the date of filing until payment in full and final settlement is made as well as costs and interest thereon at court rates from the date of taxation.

DATED and delivered this 13th day of October, 2009.

D. K. MARAGA

JUDGE.