



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE 1132 OF 2006

RAPHAEL MUTHOKA MAILU (A Minor suing through

his Uncle and Next Friend THOMAS MUOKA MUTHOKA.....PLAINTIFF

versus

EARNEST JACOB KISAKA.....DEFENDANT

JUDGMENT ON QUANTUM

The Plaintiff, a minor suing through his Uncle and Next friend **THOMAS MUOKA MUTHOKA**, brought this suit by way of Plaint filed on 6th December 2005 in which he avers that on 16th May, 2004, the Defendant negligently drove and controlled motor vehicle Registration Number KAR 598 J in such a manner that the said motor vehicle was involved in a road traffic accident and as a result, occasioned the Plaintiff Minor who was a passenger in the vehicle, serious injuries. The Plaintiff blamed the Defendant for occasioning the said accident and particularized the acts and/or omissions of the accident.

The Defendant filed his defence in which, apart from denying the occurrence of an accident and any act of negligence on his part, stated that the accident was inevitable.

It is not in dispute that the accident in question was a serious accident in which the Plaintiff's father, mother, one uncle and a sister all perished and that therefore the Plaintiff Raphael Muthoka Mailu was fortunate to have survived the accident.

The result was that more than one case were filed against the Defendant and one of those cases, HCCC No. 1453 of 2005 brought by Thomas Muoka Muthoka and Bonface Mutua Muthoka (as legal Representatives of one of the deceased persons, namely, Ruth Wajomba Muthoka vs Earnest Jacob Kisaka, was selected as a test suit to determine the issue of liability in all suits arising from the same accident. Lady Justice Angawa on 22nd June, 2006, found the Defendant in HCCC No. 1453 of 2005 wholly liable for the accident and that decision is therefore applicable and binding in this suit by the Minor Raphael Muthoka Mailu.

On that basis therefore, on 11th June 2009, parties in this suit, Mr. E.K. Mutua appearing for the Plaintiff and Mr. A.J. Ambani appearing for the Defendant recorded a consent order in the following

terms:

“By consent:

- 1) Judgment on liability be entered for the Plaintiff against the Defendant at 100% as determined in test suit HCCC No. 1453 of 2005 at the High Court Nairobi.**
- 2) Judgment on quantum be determined by way of written submissions.**
- 3) The two Medical Reports of Dr. B Ndirangu Waitara dated 25th May 2006 and Dr. Adrew Hicks dated 31st March 2008 be filed together with written submissions to be adopted by the court as evidence of the minor’s injury.**
- 4) That the matter be mentioned on 13th July 2009 for the written submissions and recording a further consent on special damages.”**

At the mention on 13th July 2009 when written submissions on quantum were filed, the parties recorded a further consent and that concerned special damages in the following terms:

“By further consent judgment be and is hereby entered for the Plaintiff against the Defendant on special damages totaling Kshs.1,667,051/=.”

Concerning the quantum therefore, it is evident from the two Medical Reports aforementioned that as a result of the injuries the minor suffered, he was in hospital for a total of 90 days and lost one year of school. He sustained the following injuries:-

- i) Substantial head injury (semicomatose) which still manifests itself in terms of left limb tremors.
- ii) Compound fracture of the left femur leading to shortening of left leg.
- iii) Fracture of the right femur.
- v) Dislocation of the left shoulder region.
- vi) Deep lacerations of the perineum and anus necessitating the opening of a temporary anal opening.
- vii) Bleeding of the pelvis and behind the intestines.
- viii) Injury to the left eye leading to a squint and rolling over (by itself) of the eye. He now uses glasses.
- ix) The unequal length of the limbs will lead to an earlier onset of the osteoarthritis than normal.
- x) The several operations of the intestine will lead to intestinal obstruction later leading to a further operation.
- xi) Abdominal injuries to the intestines with tear of peritoneum.
- xii) Multiple embarrassing scars which limit participation in activities requiring a degree of physical exposure.

Looking at those injuries, Dr. Waitara’s observation was:

“Raphael did sustain horrific and extensive near fated injuries.....”;

while observation from Dr. Hicks was:

“It was a serious accident as Raphael’s father, mother, one uncle and a sister perished in the accident..... Raphael endured very severe pain and sufferinghe is fortunate to have survived the accident.”

In the circumstances, the learned Defendant’s Counsel suggests an award of Kshs.800,000/= while the learned Counsel for the Plaintiff suggests an award of Kshs.2,000,000/=. Case law authorities relied upon by the Defendant’s Counsel are **HCCC No. 1296 of 2001 (Nairobi); Nancy Wanjiku Mwangi v Peter Njoroge Ngata** where a sum of Kshs.800,000/= was awarded to a Plaintiff who suffered a deep cut wound of the forehead with mild head injury, simple comminuted fracture of the right humerus, compound fracture of the right tibia, loss of bone segment and amputation of the right leg below the knee. The rest are:

- **HCCC NO. 43 OF 1994 (Nairobi) Antony Mwangi vs Martin Muiruri.** The Plaintiff sustained a blunt and deep cut injuries to the frontal region of the head, fracture of the left leg in the thigh region, fractures of both arms, deep cuts in the right knee region, deep cuts in the chest (lumbar, iliac and gluteal regions) and in the left head and sub-mandibula areas and cuts on the tongue and parts of the mouth. Justice H.P.G. Waweru 9th October, 2008, awarded Shs.400,000 as general damages.
- **HCCC NO. 207 OF 2004 Julius Kiprotich v Eliud Mwangi Kihohia.** The Plaintiff sustained an injury on the head, severe injury to the abdomen causing bleeding in the peritoneum resulting in a distended abdomen, fracture of the pelvis at the pubic ramus, bruises on the knees: Justice L Kimaru 31ST May, 2006, delivered an award of Shs 450,000 as general damages.
- **HCCC NO. 91 OF 2004 (Kericho) David Kiplangat Sang vs Richard Kipkoech Langat & Another.** The Plaintiff sustained severe head injuries with loss of consciousness for 4 days, blunt injuries to the chest with fracture of two ribs, fracture of the tibia & fibula, fracture of the upper tibia (tibial plate) and left acetabulum with hip dislocation, fracture of the left medial maleolus, laceration wound on the left leg and tenderness of the chest. Justice L. Kimaru on 7th June, 2006, awarded Shs.550,000 as general damages.

The Plaintiff’s Counsel relied on the case of **CATHOLIC DIOCESE OF KISUMU VS TETE C.A.C.A. NO. 284 OF 2001 (2004) 2 KLR 55** In this case the Plaintiff had suffered head injuries, fracture of both superior and inferior rami, dislocation of the limp joint, fracture of the mid-shaft (left femur) and contusion of the left knee. He was admitted in hospital for 105 days. The superior court awarded the Plaintiff Kshs.1,300,000/= general damages and the Defendant appealed to the Court of Appeal. In dismissing the Appeal the Court of Appeal held that the trial Court had not applied the wrong principles and hence could not interfere with award as it was not inordinately high.

In my opinion, I think the minor in this suit sustained more severe injuries, the poor boy had even to endure and survive by sheer miracle, **several operations** of the intestines. I emphasise this while bearing in mind observations earlier on referred to from Dr. Waitara and Dr. Hicks. Further, considering the rate of inflation to-day and the circumstances, I do hereby award the Plaintiff the sum of Kshs.1,600,000/= general damages.

The Defendant will also pay to the Plaintiff costs of this suit plus interest on the decretal sum at court rate till payment of all sums due to the Plaintiff in this suit in full.

Dated this 9th day of October 2009.

J.M. KHAMONI

JUDGE

Present:

Mr. E.K. Mutua for the Plaintiff

Mr. A.J. Ambani for the Defendant

Court Clerk: Florence Bojwony