



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Suit 56 of 2005

PIUS OMBWERA ONCHORE PLAINTIFF

VERSUS

**1. J. MBIYU MWANGI)
2. JOHN MAONCHA MAGEMBE) DEFENDANTS**

JUDGMENT

By an amended plaint filed on 3rd May, 2006, the plaintiff alleged that on 22nd April, 2002 he was lawfully travelling as a passenger in motor vehicle registration number KAN 419 S along Eldoret-Nakuru Road. The said motor vehicle was said to have been owned by the second defendant. At around 7.30 p.m., the said motor vehicle hit from behind motor vehicle registration number KYV 742 whose registered owner and/or owner in user and actual possession was said to be the first defendant. The plaintiff alleged that the drivers of the two motor vehicles were negligent and sought judgment against them jointly and severally.

As a result of the said accident, the plaintiff suffered the following injuries:

- (a) **Erectile Disfunction**
- (b) **Dislocation of both hip joints**
- (c) **Fracture of acetabulum**
- (d) **Dislocation of the right knee joint**
- (e) **Fracture of the right tibia fibula**
- (f) **Foot drop on the right side – 2 cm**
- (g) **Engine burns on the left lower limb**
- (h) **Lacerations**
- (i) **Soft tissue injuries to the lower limbs**
- (j) **Contusion of the lower anterior chest wall**
- (k) **Contusion of the lower back and pelvis**

He claimed special damages as hereunder:

- (i) **Police abstract report Kshs. 100.00**
- (ii) **Medical report Kshs. 5,000.00**
- (iii) **Medical expenses Kshs. 49,700.00**

The plaintiff, who is a retired police officer, further claimed that prior to the said accident he was doing business and farming and had a monthly income of approximately Kshs. 15,000/= but after the accident he was unable to continue with his business and farming activities. In his testimony before the court he prayed for damages for loss of earning capacity.

The first defendant filed a statement of defence and denied that he was the registered owner of motor vehicle registration number KYV 742. He further alleged that the accident was caused by the negligence of the second defendant or his authorized driver, who allegedly drove motor vehicle registration number KAN 419 S at a very high speed in the circumstances and attempted to overtake motor vehicle

registration number KYV 742 in the face of oncoming traffic.

All the other averments in the plaint were denied.

The second defendant neither entered appearance nor filed defence.

During the hearing, only the plaintiff and his one witness, **Dr. Zoga, PW2**, testified. The first defendant did not attend court nor adduce any evidence but his advocate cross examined the plaintiff and his witness. On the date of the hearing, the plaintiff withdrew his case against the second defendant.

The plaintiff testified that the first defendant was the owner of motor vehicle registration number KYV 742 and referred to a Police Abstract Report – (**P. Exhibit 10**) that was issued to him by the Officer incharge, Rongai Police Base, whose officers investigated the accident. He alleged that the two vehicles were heading towards Nakuru and that motor vehicle registration number KYV 742 stopped in the middle of the road without any warning and as a result the second defendant's motor vehicle rammed into it. He said that the accident occurred between 7.30 and 8.00 p.m. It was drizzling and visibility was poor. He alleged that he was seated next to the driver and he clearly saw how the accident occurred.

In cross examination, the plaintiff said that he could not tell whether at the time of the collision the first defendant's motor vehicle was stationary or not.

Following the accident, the plaintiff sustained the injuries as stated hereinabove. He was admitted at Nakuru GeneralHospital where he remained for about two months. He paid Kshs. 13,350/=. A receipt was produced in proof of the same. He was later treated at HemaHospital and paid Kshs. 26,350/=. Thereafter he was treated at Kisii GeneralHospital where he paid Kshs. 1,120/=. Dr. Ezekiel Zoga examined him and prepared a medical report. He was paid Kshs. 5,000/= for the same.

At the time of testifying, the plaintiff complained of loss of Libido, high blood pressure, shortening of his right leg, inability to walk for long distances and pain on his right hip joint.

Regarding his claim for loss of earning capacity, the plaintiff did not produce any documents to prove that he was earning Kshs. 15,000/= per month.

Counsel for the plaintiff and the first defendant filed

Their respectively submissions. I have perused and considered the same.

Liability

The two vehicles collided in the middle of the road. They were moving in the same direction. In the plaint, the plaintiff blamed the drivers of the two vehicles for occurrence of the accident but in his testimony he shifted blame to the driver of the first defendant's motor vehicle. Although the plaintiff alleged that he was able to see clearly, he conceded that it was not only dark but it was also drizzling and rather foggy. No doubt visibility was poor. In such conditions, a driver ought to be extra careful and drive slowly. Even assuming the first defendant's motor vehicle had stopped in the middle of the road, a careful driver with lit head lights would have been able to see such a vehicle and avoid colliding with it, unless the vehicle ahead stopped suddenly.

In the absence of evidence from any of the two drivers and considering the manner in which the accident occurred, I hold that both drivers were equally to blame and I apportion liability accordingly (50:50).

As regards ownership of motor vehicle registration number KYV 742, the Police Abstract Report showed that it was owned by the first defendant. The plaintiff also testified that when he was admitted at Nakuru GeneralHospital the first defendant visited him to console him. He told the plaintiff that he was the owner of the said motor vehicle. No evidence was adduced by the first defendant to contravene

that. Where a party does not adduce any evidence as regards ownership of a motor vehicle as would be sufficient to counter that in a police abstract report, the court must accept the information in the police abstract report regarding ownership as correct. After all, the standard of proof in civil cases is on a balance of probabilities. See the Court of Appeal decision in **LAKEFLOWERS –VS- CILA FRANKLYN ONYANGO NGOGA**, Civil Appeal No. 210 of 2006 at Nakuru. The decision distinguishes that court’s earlier holding in **THURANIRA KARAURI –VS- AGNES NCHECHE**, Civil Appeal No. 192 of 1996 at Nyeri.

General damages

No doubt the plaintiff sustained serious injuries and the residual effects thereof are quite pronounced. In **JECINTA WANJIKU –VS- SAMSON MWANGI**, HCC No.166 of 2004 at Nakuru, the plaintiff sustained head injury with cerebral concussion and a wound on the left forehead, fracture of the acetabular rim right hip, fracture of the right knee and Post traumatic osteoarthritis of the right knee. The court awarded general damages in the sum of Kshs. 1,000,000/=.

I am of the view that a sum of Kshs. 1,200,000/= is reasonable as general damages for pain suffering and loss of amenities.

Loss of future earning capacity.

In **SOPHINAF CO. LTD. & ANOTHER –VS- DANIEL NGANGA KANYI**, Civil Appeal No. 315 of 2007 the Court of Appeal held that loss of earning capacity is a prospective financial loss which is awarded as part of general damages which does not have to be pleaded.

On 27th April, 2005 when Dr. Zoga examined the plaintiff, he was 52 years old. In 2002 when the accident occurred he was 49 years old. A multiplier of 6 is reasonable. The plaintiff had no documentary evidence to prove that his monthly earnings were Kshs. 15,000/= as alleged. In the absence of such proof, I will reduce that figure by one half which comes to Kshs. 7,500/=.

I will therefore assess loss of future earning capacity as hereunder:

Kshs. 7,500x12x6= 540,000/=

Special damages

Those which were pleaded and proved were as follows:

(a) Police Abstract Report	Kshs. 100.00
(b) Medical Report	Kshs.5000.00
(c) Medical expenses	Kshs.40,820.00
TOTAL	<u>Kshs. 45,920.00</u>

As the defendant has been found to be only 50% liable, he will be liable to pay one half of all the assessed sums.

I now enter judgment for the plaintiff against the defendant as hereunder:

(a) General damages for pain, suffering and loss of amenities	Kshs. 600,000/=
(b) Loss of future earning capacity	Kshs. 270,000/=
(c) Special damages	Kshs. 24,960/=
Total	<u>Kshs. 894,960/=</u>

The plaintiff shall also be entitled to half of the costs of the suit plus interest on the judgment sum at court rates.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF DECEMBER, 2009.

D. MUSINGA
JUDGE.

10/12/2009

Before D. Musinga, J.

Mobisa – cc

Ms Obaga for the Plaintiff

Mr. Oguttu HB for Mr. Murage for the Defendant

Court: Judgment delivered in open court on 10th December, 2009.

**D. MUSINGA
JUDGE.**