



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 4511 of 1990

JACKSON MARINGU KIMANI PLAINTIFF

VERSUS

RICHARD GITHENYA GICHURUDEFENDANT

JUDGMENT

The Plaintiff JACKSON MIRUNGU KIMANI filed this suit against Richard Githenya Gichiru vide a plaint dated 28th August, 1990 and filed on 4th September, 1990. The course of action is set out in paragraph 4,5 and 6 of the plaint. It is to the effect that on or about the 26th day of March 1988 at about 4.00 p.m. along Nairobi Kiambu Road the Plaintiff was lawfully travelling as a passenger in motor vehicle registration KRG 784 a Matatu when the Defendant drove motor vehicle registration number KNR 047 in such a negligent manner that he caused the same to violently collide with vehicle KRG 784 causing bodily injury particularized in paragraph 6 of the plaint namely:

- (i) Fracture of the right leg(ii) Fracture of the right arm
- (iii) Injuries to the left leg.

It is the plaintiff's contention that the said accident was caused due to the negligence of the defendant particularized in paragraph 5 of the plaint. In consequence thereof suffered loss and damage for which he seeks special damages to the tune of Ksh 6,000.00, general damages, costs of the suit, interest on (a) and (b), such further or other orders as this Honourable Court may deem fit to grant.

The defendant vide this Courts orders made on 29th June 2006 made in pursuance of a chamber summons brought under order V rule (2), rule 17(1) and 2 Civil Procedure Rules dated 1st day of March 2006 and filed on 10th March 2006 was served by way of substituted service. No appearance was entered by him and vide a request for judgment dated 29th April, 2006 and filed on 1st September, 2006, made under order 1 X A rules 3, 4, 5 and 6 of the Civil Procedure Rules (Amendment) rules interlocutory judgment in default of appearance was entered on 26th September, 2006. Thereafter the matter proceeded by way of formal proof.

Three witnesses gave evidence. P.W.1 the Plaintiff recalled that on the material day he was traveling in a Nissan matatu KRG 784 heading to Nairobi when it collided with lorry KMR 047. He lost consciousness and found himself two days later at Kiambu District Hospital when he was informed that he had been involved in an accident. As a result of the said accident he sustained the following injuries:-

- (a) Fractured right leg and he was put on the traction.
- (b) Fractured the right fore arm at the wrist joint and it was plastered.
- (c) He had a cut on the fore head which was stitched
- (d) He suffered a dislocation of the left hip.

These injuries were pointed out to the court at the time of trial and the Court made the following observations.

- (a) noted visible scars on the lower leg
- (b) noted fractured right leg
- (c) the wrist is bend with a protruding bone
- (d) There is a healed scar on the right side of the head.
- (e) Several scars on the fore head
- (f) There is a visible operation scar on the left hip which is visible and it is lengthwise.
- (g) While the injury to right leg is not visible to the naked eye as the same was internal.

The current complaints are that:-

- (i) He does not see properly.
- (ii) The left leg is very painful.
- (iii) The accident rendered him an invalid and as such he cannot fend for himself and his family.

He recalls that his lawyer issued a demand notice to the defendant exhibit 1. The defendant responded by advising that him plaintiff should be compensated by the insurance company vide exhibit 2. The Police abstract exhibit 3 lists him as one of the accident victims. It also shows that the defendant was prosecuted and found guilty and punished.

P.W.2 is the father of the plaintiff who confirm the involvement of the plaintiff in the accident, injuries sustained, state of in validity, length of hospitalization. He met all the medical bills but misplaced the documents. P.W.3 is the Doctor who assessed the injuries. The evidence is based on the report exhibit 4 to which the Court will turn at a later state. He charged Kshs 2,000/= for the report as per exhibit 5 and attendance fee of 5,000/= as per exhibit 6.

In his submissions, Counsel for the plaintiff reiterated the evidence on the record and then submitted that liability has been settled by revelation in the police abstract to the effect that the accident driver was prosecuted in traffic case No.3332 of 1988, found guilty of offence committed and sentenced to 6 months imprisonment. The plaintiff was unable to secure a copy of the proceedings.

The Court was referred to the case of ALBERT KARANJA VERSUS STEPHEN KARIGITHE, NAIROBI HCCC NO.3053 OF 1994 by Osiemo J. decided on 25th day of January, 2000. The Plaintiff suffered a fracture of the left of the ulna bone of the right fore arm, compound fracture of the right lower leg (Tibia and Fibula bones). It is noted at page 2 of the judgment that the Plaintiff had been an in patient at Matheri Hospital for 2 ½ months. He was discharged on crutches with plaster the right arm and plaster on the right leg. The right arm was in plaster for 15 weeks. The right leg was in plaster for 19 weeks. The victim was 56 years at the time of trial, a driver by occupation with tropical trading company (K) Ltd

but was unable to resume his employment as a result of the injuries sustained. The complaints at the trial were pain at the fracture sites especially during cold weather, the hand, had healed but it was useless as it was strength less as he cannot lift heavy objects using the right arm, the leg was deformed as it was twisted and ugly and was still oozing pus and the metal plates inserted had not been removed and were over due. According to the medical reports produced to the judge the fracture of the right ulna had healed with malunion. That bony deformity still persists to date. But the injury to the right lower leg has not healed. There were 2 discharging sinuses over the middle third of the right lower leg on its anterior aspects which signifies infection of the metal plate at the fracture site. The leg fracture had malunited and the malunion still persists. The metal plates require removal and the discharging sinuses need to be treated to prevent development of osteomyelitis. All the dermatomes of the right lower leg distal to the fractured site are numb. This will persist and it will be a permanent disability. Treatment costs for removal of plates and treatment of the discharging sinuses is estimated to cost 250,000.00/=. After due consideration the learned judge awarded Kshs.400,000.00 for pain suffering and loss of amenities, for further medical care Kshs.250,000.00, loss of earnings Kshs.50,000.00, 30,000.00 for diminished earning capacity and special damages of kshs 28,253/=.

Total award Kshs 758,253/=.

The case of HENRY MANGWALI VERSUS GEOGREY H. KAMANDA AND JOSEPH KAMAU NAIROBI HCCC NO. 2601 OF 1990, by Rawal Judge dated 12th day of November, 2001. The injuries are noted at page 2 of the said judgment. It was noted that the victim has suffered multiple fractures on his left foot and other soft tissue injuries on chest and left hand. The Court observed the deformed and ugly looking left foot of the plaintiff. He was still on the treatment as at the time of trial. He had to wear special orthopedic shoes to be able to walk and it was noted that he had not healed even after 12 years since injuries were suffered. After due consideration of case law referred to the learned judge, the Court awarded Kshs 700,000.00 for pain, suffering and loss of amenities.

On the assessment by this Court, on liability, the Court, makes findings that the plaintiff laid blame on the defendant. There is no controverting pleading to that effect. Interlocutory judgment is in place. Although traffic proceedings are not exhibited, the abstract exhibit 3 lists the plaintiff as No.4 and it is indicated that the had suffered serious injuries. It is also noted from the same abstract that the driver who is the defendant herein and driver of KNR 047 Bedford lorry had been charged with the offence of causing death by dangerous driving in criminal case No. 3332/88 and sentenced to 6 months imprisonment and licence cancelled.

Further evidence is to the effect that when a demand notice was served vide exhibit 1, the defendant replied vide exhibit 2 directing him to seek damages from the insurance company for the vehicle. On the basis of the foregoing assessment, the Court, makes a finding that liability has been established at 100% because the Plaintiff as a passenger had no control over the manner the two colliding vehicles were being driven.

On the injuries it is undisputed that the Plaintiff was in hospital for 3 months. The accident was on 26th March 1988 almost 20 years later, the Plaintiff has not recovered. He cannot fend for himself and his family. He has to depend on his father P.w.2 for support.

The Plaintiff pointed out the injuries to the Court and has also pointed out his disability. There is a medical report exhibit 4 by Doctor Wokabi. At page of the said report the Doctor took note of the current conditions namely:

- (a) He had weakness of the right hand. The right wrist also aches.
- (b) The left hip aches all the time.
- (c) He has difficulty walking. The left hip is such that he limps. He cannot walk for long distances.
- (d) He also has difficulty when squatting.

The findings on examination on the same page are that the Doctor observed:-

- (i) A small scar on the right mid fore head.
- (ii) Deformity of the right wrist joint due to malunited fractures of the distal right radius and ulna near the wrist joint.
- (iii) Full extension and flexion movements of the right wrist are restricted.
- (iv) The fracture of the right femur has clinically united well without any apparent deformity.
- (v) The left hip joint is clinically partially dislocated.
- (vi) The movements of the left hip joint are restricted.
- (vii) The left thigh muscles are also smaller due to wasting caused by long period of disuse.

In the Doctors' opinion:

- (i) The injuries he sustained following the road accident were indeed of major category
- (ii) Despite the length of the past, the presence of the injuries and effects are still demonstrated at that day's examination conducted on 15th June 2007.
- (iii) The injuries are a source of considerable pain and disablement for a long time.
- (iv) The fracture of the distal radius and ulna near the wrist joint have healed with a deformity and hence the restriction of movement.
- (v) The effectiveness of the limb will be reduced to a great extent by the deformity.
- (vi) The fracture of the shaft of the right femur has united well without leaving any apparent disability.
- (vii) The dislocation of the left hip was never reduced to the socket despite the surgery he under went and it still persist.
- (viii) He has had a profound limp all these years because of the persisting dislocation.
- (ix) Osteo-osthritis has possibility set in
- (x) Hip replacement surgery would be beneficial to alleviate the pain and possibly improve his walking. Total hip replacement would cost approximately Kshs.300,000.00 if done at the Kenyatta National Hospital or medium sized nursing home. If not remedied he will live with 25% disability.
- (xi) He is blind but this is for reasons not related to the accident.

In assessing damages the Court has to bear in mind the following guiding principles.

- (1) Damages are not meant to enrich a party but to compensate the victim for the injuries sustained to restore him as much as possible to the condition in which he was in before the accident.
- (2) The damages must not be too high or too low.
- (3) Past awards are just mere guides and each case depends on its own peculiar facts where authorities are old an element of inflation to be taken into consideration.

The above principles have been taken into consideration, the nature and extend of the injuries sustained, its effects on the life of the plaintiff. The fact that it is almost 20 years since the accident, the plaintiff is not yet fit to fend for himself. He has to rely on his father P.W.2 FOR SUSTAINANCE. The Court has taken into account all the relevant factors and doing the best it can the court makes the following assessment.

- (a) On special damages the Court allows the amount in exhibit 5 and 6 to the tune of Kshs 7,000.00.
- (b) Cost of hip replacement Kshs 300,000.00.
- (c) General damages for pain suffering and loss of amenities Kshs.850,000.00 eight hundred fifty thousand shilling only. Total Kenya shillings 1,057.000.00.
- (d) Costs of the suit.
- (e) Interest on special damages from the date of payment on 05.07.07 and on general damages from the date of judgment until payment in full. Interest to be at court rates.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE