REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 220 of 2001

PIUS KIPKARERE K. MITEI:…….……..PLAINTIFF

VERSUS

LEONARD KISSONGOCHI:…….....….1ST DEFENDANT

BENARD MAHUNGU KAMAU:…… 2ND DEFENDANT

JUDGEMENT

The plaintiff herein was on 19th January 200 a passenger in motor vehicle ***Reg. No. EX – 33KA47*** a Mercedes Benz lorry which was traveling along ***KAKUMA – LOKICHOGIO*** road. On the way, the driver of the vehicle ***LEONARD KISSONGOCHI*** the 1st defendant, lost control of the vehicle and it overturned. The vehicle belonged to ***BENARD MAHUGU KAMAU*** the 2nd defendant. Plaintiff sustained serious injuries and he was rushed to a local hospital then to Kenyatta National Hospital. As a result of the accident he got completely paralyzed in the lower limb and is now confined to wheel chair. On 16th October 2001 he filed this suit claiming for:-

" ***a) General damages for pain, loss and suffering.***

b) Special damages as per paragraph 6 above.

c) Costs of this suit

d) ***Interest on (a), (b) and (c) at courts rate***."

The two defendants were served by way of substituted service. They did not enter appearance or file their defences and on 22nd July 2002 the plaintiff requested for judgment against them. Exparte judgment was entered on 22nd July 2002. On 7th August 2002 the plaintiff filed an amended plaint without seeking leave of the court. He amended his claim for special damages to include cost of hiriring a house help for Shs.5000/= a month and loss of future earnings capacity.

On 19th September 2002 both parties recorded a consent order setting aside the ex-parte judgment and allowing the defendants to file their defence. In the defence which was filed on the same 19th September 2002 the defendants denied liability. They also stated that the accident occurred due to a tyre bust a fact beyond the driver's control.

The plaintiff gave evidence and called three other witnesses' one of them a ***DR. ALUDA (PW1).*** He told the court that he paid Shs.600/= as fare. He was not the only passenger in the lorry. He said that at the time of the accident the driver was overspending and was driving at a speed of over 100 KPH. He said as a result of the accident he suffered spinal injuries and was paralyzed in the lower limb and he now cannot control urine or stool. He suffered total loss of libido. He now uses urine bags and condom tapes to bind it and he will use them for life. He uses a wheel chair which needs to be replaced. He has employed a house help whom he pays Shs.5000/= per month.

The plaintiff had a master Degree in Management and implantation of development from Manchester University and a Bsc Degree in Agricultural sience from University of Nairobi. In 1996 he was earning Shs.26,000/= at Reformed Church and he was about to get a job with World Food Programme. His salary would have been Shs.70,000/= plus. He did not get the job due to the injuries. At the time of the accident he was 46 years old.

The defendant did not call any evidence but in submissions their counsels submitted that the plaintiff had not proved his case. He did knot prove that the defendant was negligent and that he took risks in riding in the lorry. He did not prove his salary as he was not employed at the time. Further it was said that the amended plaint was filed without leave of the court.

I have considered the evidence and submission by both counsels together with the authorities cited. The first issue is that of the amended plaint which was filed without leave of the court. By the time it was filed no defence had been filed. Order 6A Rule 1 (1) CPR allows any party to amend his pleadings once without leave of the court before pleadings are closed. Order 6 rule 11 CPR provides that pleadings are closed fourteen days after service of reply to defence or to counterclaim or if none is served 14 days after service of the defence. No defence had been filed by the time the plaint was amended and plaintiff believed he was entitled to do so vide provisions of Order 6A rule 1(1). The defendant however submitted that he had already applied for and obtained judgment. In such case the amendment may look unprocedural but the defendant did not make any application under order 6A rule 2(1) CPR asking court to disallow the amendment. Instead they went ahead and filed a defence based on that amended defence. I am therefore satisfied that the amended plaint is in order. Even if the plaintiff had made an application to be allowed to amend, the court would certainly have allowed him to do so.

The defendant in his submission filed stated that the plaintiff did not file a reply to the defence as such he is deemed to have admitted what was pleaded. He cited several cases among them ***MOUNT ELGON HARDWARE VS. UNITED MILLERS LTD CA.NO.19 of 1996*** where the court of appeal made such a holding. However in this case a reply to the defence was filed on 26th September 2002 barely 7 days after the defence was filed. Plaintiff denied all the allegations in the defence and put the defendant to strict proof. The defendant did not prove any allegations in the defence more so that there was a tyre burst. He sought to rely on the plaintiff's reply in cross-examination that he was told there was a tyre burst. That was no prove of the particulars in the defence. Defendant should have called proper evidence.

I now turn to the issue of liability. There is no dispute that the accident did occur and the plaintiff suffered serious injuries. The vehicle was being driven by the first defendant and as shown in the police abstract it was owned by the 2nd defendant. The plaintiff said at the time the vehicle traveling at a very high speed. Though he said he did not see the speedometer as he was sitting in the back he said he is a qualified driver and could tell that the vehicle was traveling at over 100 KPH. His evidence was not controverted. The Defendants did not call any evidence in rebuttal and I accept the fact that the vehicle was at a high speed. Even if a tryre bursted, a fact not proved by any evidence, the driver failed to control the vehicle due to the high speed. If it was at a reasonable speed even if the tryre bursted then he would have been able to control the vehicle and bring it to a stop safely. He was negligent in his driving and solely caused the accident. He is liable at 100% and so the 2nd defendant who was his principal is equally vicariously liable.

In submissions counsel for defendant raised the defence of *Volenti non fit injuria* against the plaint. With respect there was no evidence that the plaintiff exposed himself to risk. He had paid fare for the journey and he said in those areas Lorries are the only mode of transport both for passengers and goods.

The plaintiff though he said the vehicle was speeding cannot be said to have been negligent. The facts in the case of ***MURGIAN TRANSPORT (K) LTD VS. JOHN KATOGA MULOZI & ANOTHER CA.NO.192 OF 1997*** referred to by the counsel for defendant were totally different. In that case court found that the braked had failed and the respondent had noticed it. The vehicle had been properly serviced before. Those are not the same facts in this case. The plaintiff was at the back and the 1st defendant was openly negligent for driving at high speed. That defence therefore fails. I therefore make a finding that both defendants are fully liable.

The last issue is for quantum. Counsel for the plaintiff submitted for a sum of shs.3 million for pain and suffering whereas counsel for the defendant submitted for a figure of shs.1million. It is not in doubt that the injuries were extremely serious. They left the plaintiff a paraplegic confined to a wheelchair. He cannot control his urine and stool.. He has total loss of libido meaning he lost sexual functions. In the case of ***DR. PAUL MUBIA MATHIU VS. IBRAHIM KARIUKI GACHIMO NRU HC.CC.NO.60 OF 2001 Lessit J***. in the year 2003 awarded Shs.1, 800,000/= for similar injuries. Those are five years ago. There are other similar cases and the award range around that amount. I therefore award the plaintiff shs.2, 000,000/= for pain and suffering.

The plaintiff certainly cannot now engage in any meaningful employment. He therefore suffered loss of capacity for future earnings. He was 46 years at the time of the accident. He could therefore have worked for a further 10 years. As for the salary there was evidence that he was employed in 1999 at a net salary of shs.29, 000/= per month though he had left employment by the time of the accident. He expected to be employed by World Food Programme and the salary would have been more than Shs.70, 000/=. He had a Bsc and Masters Degree and there is no doubt that he would have gotten employment. I will take the figure of Shs.20, 000/= as the monthly salary and use ration of 2/3 thus 20,000 X 10 X 12 X 2/3 = 1,600,000/= which I award.

Plaintiff told court that he had employed a house held at rate of Shs.5000/= per month. The house help gave evidence and confirmed that. I will award him Shs.200, 000/= under that head.

Further plaintiff told court that he uses urine bags and condoms costing about shs.200/= per month and that he will need a wheel chair at costs of Shs.80, 000/= per month. I award him shs.300, 000/= as future medical expenses.

Thus I enter judgment for the plaintiff against the two defendants jointly and severally as follows:-

1. Pain and suffering - Shs.2, 000,000.00

2. Loss of future earnings - Shs.1, 600.000.00

3. House Help - Shs. 200,000.00

4. Future medical expenses - Shs. 300,000.00

Total Shs.4,100,000.00

I also award the plaintiff costs of the suit and interest

at courts rates form the date of this judgment.

Dated and Delivered at Eldoret this 12th day of March, 2008.

KABURU BAUNI

JUDGE

IN THE PRESENCE OF:-

C/C - David

Mr. Nabasenge for Kitiwa for plaintiff

Mr. Kamur for Mwinamo for Defendant

MR. KAMUR: I pray for 30 days of stay of execution.

ORDER: 30 days stay of execution granted

KABURU BAUNI

JUDGE