



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 188 of 2005

PATRICK MWANGI IRUNGU.....PLAINTIFF

VERSUS

CHARLES MACHARIA MWANGI.....1ST DEFENDANT

JOSEPH THIONGO.....2ND DEFENDANT

JUDGMENT

On the 29th November 2003, the plaintiff Patrick Mwangi Irungu testified that he was travelling in a motor vehicle, a matatu registration number KAP 015V along Nakuru-Nyahururu road. He boarded the motor vehicle at a place called Maili Kumi. He wanted to go to a place called Kabazi but one kilometre before reaching his destination, the vehicle he was travelling in, was involved in an accident. The plaintiff blamed the 2nd defendant who was negligently driving the vehicle for failing to observe the traffic rules. As a result of the accident the plaintiff sustained severe injuries as follows:

Paraplegia secondary to fractures on the vertebrae T-12 and L1.

Following the accident, the plaintiff was admitted at the Nakuru Provincial General Hospital for 52 days. He produced a copy of the discharge summary. The plaintiff continued with treatment at the Nyahururu District hospital and at the St. Martins clinic. He produced the treatment record, he incurred costs of Kshs 8,100/= as per the receipts issued for treatment. The plaintiff was also examined by Dr. Wellington Kiamba. Dr Kiamba noted that the plaintiff suffered serious injuries. He was in a poor state of health, confined to a wheelchair and lost sensation for level T12. He also lost sensation in both lower limbs. Muscle power is zero in the lower limb. There is hypotonia and extensive muscle wasting. The plaintiff is incontinent of urine and stool and in his prognosis, the degree of injury is classified as grievous harm. The plaintiff should be awarded permanent disability of 100%.

The plaintiff reported this accident to the police. He was issued with a P3 which was duly completed at the Provincial General Hospital. He was also issued with a police abstract form which shows that the vehicle registration No. KAP 015V was at the time driven by Joseph Thiongo who was charged with the offence of dangerous driving. The plaintiff testified that he was 20 years of age at the time of the accident. He had just completed form IV and hoped to join a teacher training college. He obtained grade D in the examination which was after the accident thus he could not repeat the examination to better his grades.

The defence did not call any evidence but a consent was entered on 28th March 2006 between the plaintiffs and defendants in which the plaintiff was to shoulder 20% liability and the defendant 80%. This matter is for the assessment of damages. Counsel for the defendant filed written submissions and urged

the court to award Kshs 350,000/= as fair compensation for the injuries sustained by the plaintiff. Counsel cited the authority in the case of **Francis Kamonya Karai vs. Robinson Runo Githi HCCC No. 194 of 1992 (Nairobi)** where the plaintiff was awarded Kshs 280,000/= for the fracture of right superior pubic ramie and soft tissue injuries of the neck. He also made reference to the case of **Mary Odago vs. Justus Olang Orabo HCCC No. 83 of 1987** where the plaintiff was awarded Kshs 200,000/= for the fracture of the 1st vertebra L1 of the spine. I was not at all helped by those authorities which are not only relevant but grossly underestimated the injuries suffered by the plaintiff.

On the part of the plaintiff's counsel he submitted that the plaintiff suffered very serious injuries which included loss of future earning, future medical care and 100% disability which will also require future costs of personal attendant as well as consumables to deal with urine and stool and costs of motorised wheelchair. For the pain and suffering and loss of amenities counsel submitted that the plaintiff who was aged 20 years at the time, had just completed form four level of education and was intending to carry on with education should be awarded 3 million under this heading. He relied on the case of **Geoffrey Mutuba (minor) vs. Mania Kuria & Another Nairobi HCCC No. 821 of 1991** where the plaintiff was awarded Kshs 2 million for pain and suffering for similar injuries. Under the loss of future earning and loss of capacity to earn income counsel submitted that the plaintiff should be awarded Ksh 15,000/= per month for a period of 32 years. The plaintiff intended to become a teacher and the salary of a primary school teacher is an average of Kshs 15,000/= per month. Counsel invited the court to adopt a multiplier of 25 years while taking into account the uncertainties of life. He relied on the authority in the case of **Mathew Muliro vs. Michael Nyaoga & another HCCC No. 4483 of 1998** where Justice Mwera applied a multiplier of 25 years when determining the loss of future earning for a seventeen (17) year old who was involved in an accident. Counsel therefore suggested damages under this head at Kshs 3 million.

On future medical care, physiotherapy and drugs, counsel suggested a sum of Kshs 20,000/- per month and a total of 6 million and the total cost of a personal attendant a sum of Kshs 5,000/= for the services of a house-help making a total of 1.5 million. He relied on the case of **Margaret Wanjiku & others vs. The Honourable A. G. Nrb, HCCC Nairobi No. 5602 of 1989**. He also requested the court to award Kshs 1 million for future costs of home modification or acquisition of his own home. It was also submitted that the plaintiff should be awarded another 1 million for the maintenance of the wheelchair and a further cost of 3 million shillings being the cost of consumables to deal with incontinent. Counsel relied on the case of **Teresia Wambui Waweru vs. Stanley Njige Ndungu & Anor Nbi HCCC No. 3876 of 1990** where Justice Mwera awarded the plaintiff 300,000/= for the costs of consumables.

I have taken into consideration the submissions of both counsels as well as the decided cases. The plaintiff testified in court, he suffered very serious injuries and the degree of disability has been classified as permanent. The plaintiff is a young lad of about 20 years when the accident occurred. His life was nipped on the bud by the accident. He had just finished secondary school education with dreams of joining a teacher training college or repeating the exam to better the grades.

In the case of **Tayab v. Kinanu KLR [1983] 114 Potter**, JA recommended to trial judges the following passage from the speech of Lord Morris of Borth-J-Gest in the case of **WEST(H) & SON LTD VS SHEPHARD [1964]** AC 326 at 345:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

Having noted the above passage, and considering the permanent disability caused on the plaintiff and being guided by decided cases I award the plaintiff a sum of Kshs 1.5 million for pain suffering and loss of amenities.

On the loss of the plaintiff's earning capacity, I have taken note of the decision In the case of **Butler vs. Butler [1984]** where it was held as follows:

“A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury...”

The factors to be taken into account in considering damages under the head of loss earning capacity will vary with the circumstances of the case, and they include such factors as age. The qualifications of the claimant, his remaining length of working life, his disabilities and previous service.”

The plaintiff was aged 20 years. Assuming he was not able to pursue a vocational training and he was to assume self employment or any other informal employment earning a basic salary of Ksh 5,000/- I award him a multiplier of 25 years taking into account the uncertainties in life and for loss of future earning I would award him Kshs $5,000 \times 25 \times 12 = 1,500,000$

The plaintiff is paraplegic and completely incontinent. He will definitely need nursing care and paraplegic equipment and I award him Kshs 1,000,000/=. The plaintiff was able to prove special damages of Kshs 8,100 which I hereby award. The upshot of the above is that judgment for the plaintiff is entered as follows:

(a) Liability 20% plaintiff defendant 80%

(b) General damages for pain suffering

and loss of amenities Kshs 1,500,000

(c) Loss of future earning Kshs $5,000 \times 25 \times 12 =$ Kshs 1,500,000

(d) Costs of nursing care and disposable

items and equipment Kshs 1,000,000

(e) Special damages Kshs 8,100

Total 4,008,100

less 20 % contribution

Total Kshs 3,206,480

The plaintiff shall also have the costs of this suit with interest at court rates.

Judgment read and signed on 9th day of May 2008

M. KOOME

JUDGE