



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 15 of 2006

DAVID KIGOTHO IRIBEPLAINTIFF

VERSUS

JOHN WAMBUGU NDUNGU.....1ST DEFENDANT

DOLPHIN COACHES LTD.2ND DEFENDANT

JUDGMENT

David Kigotho Iribe, the plaintiff in this suit, instituted this suit against the 1st and 2nd defendants being the driver and registered owner of motor vehicle registration no. KAR 303H respectively. The plaintiff alleged that on or about the 18/9/2005, he was in the company of a turn boy by the name Joseph Mburu Njuguna PW3. They had parked motor vehicle registration no. KAD 102J (*hereinafter referred to as the canter*) which the plaintiff was driving on the side of the road, along Nakuru Nairobi Road.

The plaintiff testified that he was employed by Macharia Ndungu and Naftalis Ayanda to transport potatoes from Elburgon to Nairobi using the canter. Along the way, the canter developed a mechanical problem. The plaintiff parked it by the roadside and started inspecting the mechanical problem. It was about 10.30 p.m. The plaintiff testified that he had placed the warning signs on both sides of the road as well as tree branches to warn other motorists. While he was bending, behind the canter, motor vehicle registration no KAR 303H (*hereinafter referred to as the bus*) suddenly knocked the canter. The canter fell on him, and a result of the collision he sustained serious bodily injuries.

The plaintiff was injured on the legs, he lost consciousness and he was rushed to Naivasha District Hospital. He was thereafter transferred to the Provincial General Hospital Nakuru, where he was admitted for a period of seven (7) days. Thereafter he was admitted at the A.I.C. Kijabe Hospital for three (3) weeks, he was fitted with an artificial limb. The plaintiff produced the discharge summary notes regarding the hospitalization. The plaintiff testified that he suffered traumatic amputation of the right lower leg, and degloving injury of the left foot. The plaintiff blamed the accident on the driver of the bus who after the investigations was charged with the offence of caress driving, convicted and sentenced to a fine of ksh 1000/= or three months imprisonment.

The plaintiff was further examined by Dr Kiamba. The medical report that was produced in evidence shows the plaintiff suffered severe haemorrhage, the amputation of the right lower limb and partial amputation of the left foot which are permanent disabilities. The wounds on the abdominal wall, left thigh had knee healed with prominent scars. Although the plaintiff was fitted with an artificial limb, he is to continue to use crutches due to the other amputation of the left foot. Dr. Kiamba classified the degree of injury as grievous harm and in his opinion; the plaintiff should be awarded 75% permanent disability, The plaintiff also conducted a search at the Registrar of Motor vehicles and established that the motor vehicle registration No. KAR 303H was owned by the 2nd defendant.

The matter was also reported at Naivasha Police Station. The plaintiff was issued with a P3 form which was duly completed and produced as an exhibit. The plaintiff was also issued with a police abstract form which showed that the 1st defendant driver of the motor vehicle registration No. KAR 303H Nissan Bus was charged with caress driving before the Naivasha Principal Magistrate. He pleaded guilty and was fined Kshs.1000/- . The police file contained the sketch drawings showing where the accident occurred. The file was produced in court as an exhibit by PC Ruth Chacha based at the Naivasha Police Station.

The plaintiff seeks for general damages and special damages for the medical treatment and the expenses he incurred towards the treatment and to purchase the prosthesis. The plaintiff incurred several expenses at the Provincial General Hospital and Kijabe Hospital. He produced receipts for Kshs.77, 855/- for medical expenses incurred at Kijabe Hospital. He paid Kshs.41, 000/- to the Nairobi Prosthetic Service. He also paid Kshs.8, 000/- to AIC Bethany Centre and other sums of money to the Provincial General Hospital as per the bundle of receipts produced.

The plaintiff contended that prior to the accident he was employed as a driver and was earning Kshs.12, 000/- per month. He also relied on the evidence of Naftali Rukenya Kinyambi who had employed him at the material time when the accident occurred. This witness confirmed he used to pay the plaintiff Kshs.12, 000/- per month.

Although the defendant filed a defence denying liability, they did not call any witness. They however filed written submissions in which they urged the court to award the plaintiff Kshs.300,000/- while relying on the case of **Nyambura Kigaragari –vs.- Angerina Mary Aya civil Appeal No. 85/83 Nakuru.** In that case the plaintiff was awarded 250,000/- for pain suffering and loss of amenities. The defendant also filed extensive submissions denying liability. I will ignore this line of submissions for reasons that there was no evidence by the defendant. It is also an attempt to bring evidence from the bar which is not admissible.

Counsel for the plaintiff also filed submissions and urged the court to find the defendant liable for the accident, after all the 1st defendant was convicted of the offence of careless driving. Under the provisions of **section 47 (A)**, of the Evidence Act, a final judgment of a competent court in any criminal case is conclusive evidence. It is prove of negligence on the part of the defendant who was found guilty. The plaintiff also pleaded the doctrine of the **res ipsa loquitor**. Moreover in this case the defendant did not call any evidence to controvert the inference that flows from the above principle that accidents do not just occur, as it was held in the case of **Kenya Bus Service Ltd. vs. Kawira EA Law Report [2003] 2 EA 519,** the court of appeal cited with approval the case of **Pritoo vs. West Nile District Administration [1968] EA 428 at 435E-F)** where it was held as follows:-_

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard Vs. Sully [1931] 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver”

In this case I find the defendant totally liable for the negligence that occasioned the injuries suffered by the plaintiff. On quantum, the plaintiff suffered amputation of the right lower limb, amputation of the left foot toes, degloving injury of the left foot. The degree of disability was assessed at 75%. Counsel for the plaintiff urged the court to award Kshs.2,000,000 while relying on the authority in the case of **Samson Omari –vs- Simon Kamau & another Nakuru HCC No. 157 of 2001** where the plaintiff was awarded Kshs.1.5 million for general damages, for pain suffering and loss of amenities and Kshs.360,000/- for loss of future earnings.

I have taken into consideration the injuries suffered by the plaintiff, the degree of disability in light of decided cases I award the plaintiff Kshs.1.3 million as general damages, for pain and suffering and loss of amenities. When assessing loss of earning and capacity, the principles to bear in mind under this heading were articulated by the court of Appeal in **Mumias Sugar Company Ltd –vs.- Francis Wanalo CA Civil Appeal No. 91 of 2003 (unreported).** At page 4 of its judgment, the Court stated as follows:-

“As is important to realize that there is a difference between an awards for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings is awarded from real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages”

The characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more comprehensively in **Moeliker –vs.- Reynolle & Co. Ltd [1977] 1 WLR 132.** In that case Browne L.J said at page 140, paragraph B:

“This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earning which can already be proved at the time of the trial”.

The claim for loss of future earning as Brown L. J. said later at page 140 paragraph G is assessed on the ordinary ***“multiplier/multiplicand basis.”***

According he is not able to be engaged in gainful employment, more so, as a driver because of the injuries. The plaintiff was aged 27 years when this accident occurred. He was earning Kshs.12, 000/- This was also supported by his then employer. Considering that the plaintiff can still use his hands to do some work, I will award the plaintiff a permanent disability of 50%. Considering that the plaintiff was aged 27 years and other vicissitudes of life and the general life expectancy in Kenya today, I will assess the loss of his future earning using the multiplier of 20 years *i.e.*

Kshs 12, 000 x 20 x 12 less 50% = Kshs.1, 440,000

The plaintiff was also able to prove medical expenses of Kshs.133, 155/-.

Judgment is therefore entered for the plaintiff as follows:

(i) General damages for pain and suffering

and loss of amenities.Kshs.1, 300,000/-

(ii) Damages for loss future earnings..... Kshs. 1, 440,000/-

(iii) Special damages for medical expenses...Kshs 133,155/-

Total..... Kshs.2, 873,155/-

The plaintiff will also have the cost of this suit.

Interest of general damages awarded shall be paid from the date of the delivery of this judgement.

Judgement read and signed this 6th day of June, 2008

M. KOOME

JUDGE

6/6/08

Before Koome – Judge

Kihara – Court clerk

Kurgat holding brief for Mutonyi for plaintiff

N/A for Jones & Jones

Judgment read and signed on 6th June, 2008

M. KOOME

JUDGE