



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

Civil Suit 767 of 2004

GEOFFREY OTIENO ONGONDO.....PLAINTIFF

VERSUS

KENYA BUS SERVICE LIMITED.....1ST DEFENDANT

JOHN MWANGI MACHARIA.....2ND DEFENDANT

JUDGMENT OF THE COURT

1. The Plaintiff herein commenced suit by way of plaint filed in court on 15/07/2004. The Plaintiff alleges that he was injured in a road traffic accident on or about 18/08/2003 along the Nairobi – Naivasha Road near Muguga area at around 10.30 p.m. while he was traveling as a lawful fare-paying passenger in the 1st Defendants’ motor vehicle registration No. KAN 821Z. He also alleges that the 2nd Defendant who was the driver, agent, servant and/or employee of the 1st Defendant drove managed and/or controlled the said motor vehicle in a negligent and careless manner thereby causing it to run into another motor vehicle registration No. KWP 412/ZA 9390 as a consequence of which the Plaintiff was injured. The 2nd Defendant is alleged to have been negligent in

- (a) *Driving at a speed which was excessive in the circumstances.*
- (b) *Failing to keep any or any proper look out or to have any or any sufficient regard for other road users.*
- (c) *Driving too close to the lorry.*
- (d) *Running into the lorry.*
- (e) *Driving at night without due regard the extent of visibility (sic)*
- (f) *Failing to stop, slow down, swerve or in any way so as to manage or control the said motor vehicle registration number KAN 821Z as to prevent the collision.*

2. The Plaintiff who says he was aged 29 years at the time of the accident alleges that he suffered the following injuries:-

- (a) *Crushed left arm leading to amputation of the left arm above elbow, (below shoulder).*

- (b) *Abrasions on the forehead and right cheek*
- (c) *Superficial lacerations of the right hand.*

and that as a result of the said injuries, the Plaintiff sustained a permanent body disability of 70% and cannot engage in gainful employment as a Telecommunications Engineering Diploma Graduate. The Plaintiff prays for judgment against the Defendant for:-

- (a) *General damage for pain suffering, loss of amenity and loss of future earnings.*
- (b) *Special damages of Kshs.83,821/=.*
- (c) *Cost of this suit.*
- (d) *Interest on (a), (b) and (c) above.*
- (e) *Any other relief that this Honourable Court may deem fit and just to grant.*

3. By their defence filed in court on 24/08/2004, the 1st Defendant denies ownership of motor vehicle registration no. KAN 821Z while the 2nd Defendant denies being the driver thereof. The two Defendants allege that if the alleged accident occurred at all, a fact which they deny then it was the driver of motor vehicle KWP 412 and trailer registration No. ZA 9390 who was responsible for the same. The driver of motor vehicle KWP 412 and trailer registration No. ZA 9390 is accused of:-

- (a) *Driving a slow moving vehicle on the right lane of the highway contrary to traffic rules.*
- (b) *Suddenly changing lanes without due regard to other lawful road users and in particular motor vehicle registration No. KAN 821Z.*
- (c) *Failing to warn other lawful road users of his intention to change lanes.*
- (d) *Failing to heed the warning (hooting, flashing lights) issued by the driver of motor vehicle registration No. KAN 821Z.*
- (e) *Failing to observe provisions of the Traffic Act and Highway Code.*
- (f) *Colliding into motor vehicle registration No. KAN 821Z.*

In his reply to defence, the Plaintiff denies that the accident in which he was injured occurred in the manner alleged by the Defendants.

4. The Plaintiff testified and also called Dr. Peter Kamau Njoroge as his PW1. Dr. Njoroge testified that he examined the Plaintiff on 11/03/2004 for purposes of compiling a medical report. He said that the Plaintiff had a history of having been injured in a road traffic accident and had initially been admitted to Kikuyu PCEA Hospital on 18/08/2003. The doctor said the Plaintiff had a badly injured and non-viable upper limb that was already amputated. PW1 said that on examination, he found that the left hand stump at the shoulder was infected and emitting a lot of pus. He also said that there was hypersensitivity on the stump and further that the Plaintiff found the phantom left hand quite disturbing to him. PW1 also testified that the stump was too short to allow for the fitting of an artificial limb. He assessed the Plaintiff's disability at 70%. PW1 also testified that he charged the Plaintiff the sum of Kshs.3,000/= for the examination and preparation of a medical report and a further Kshs.5,000/= being court attendance fees. The medical report dated 11/03/2004 was produced as PExhibit 1 while its payment attendant receipt was produced as PExhibit 1A. The receipt for the court attendance fee of Kshs.5,000/= was produced as PExhibit 1B.

5. In his testimony the Plaintiff recalled the events of 18/08/2003 when he said he boarded the 1st Defendant's motor vehicle registration number KAN 821Z from the Kenya Bus Station in Nairobi heading for Homa Bay. He testified that as they drove along Waiyaki Way, he noticed that the driver was driving very fast and in a dangerous manner and that when they got to Muguga at around 10.00 p.m. he heard a loud bang and only came to three days later at the Kikuyu PCEA Mission Hospital. The Plaintiff stated that when he came to, he discovered that he was injured on the left hand at the shoulder and that he also had bruises on the face, around the neck, the chin and the head. He said that because his left hand was so badly injured at the shoulder it had to be amputated. He also said that he suffered superficial cuts on the right hand. He received treatment first at the Kikuyu Hospital and been at the Kenyatta National Hospital (KNH).

6. Regarding his work, the Plaintiff told the court that at the time of the accident, he was working as a part-time technician with GJ Creations involved in telephone and computer installation and networking at the initial monthly salary of Kshs.25,000/= which was increased to Kshs.35,000/= after probation. He said that since he was unable to work with one hand, his services were terminated. The letters of appointment and termination were tendered in evidence as PExhibit 3 and 4 respectively while the Plaintiff's academic testimonials were tendered as PExhibit 2. The Plaintiff stated that because of the great disability he suffered as a result of the accident, he now works as a volunteer social worker for his church who pay rent for his home. He produced the Police Abstract issued by Kikuyu Police Station and the P3 form as PExhibits 5 and 6 respectively while the Discharge Summary from Kikuyu Hospital was tendered in evidence as PExhibit 7.

7. The Plaintiff further testified that he was treated at the Kenyatta National Hospital. The treatment Discharge Summary and the hospital card dated 9/11/2003 were tendered in evidence as PExhibit 8. A letter from Kikuyu Hospital confirming payment of Kshs.6257/= was tendered in evidence as PExhibit 9. The Plaintiff also produced payment receipts for KNH as PExhibits 10 and two receipts being payment for the purchase of drugs from Dr. Ndegwa's clinic as PExhibit 11. It was also the Plaintiff's evidence that he carried out a search at the Registrar of Motor Vehicles to establish the ownership of the motor vehicle in which he was injured and paid Kshs.500/= to the Kenya Revenue Authority (KRA) as per PExhibits 12 and 12A respectively.

Concerning his current medical condition, the Plaintiff stated that he cannot sleep on the left side of his body due to much pain at the point of amputation. He also said that he feels tingles in his phantom left hand especially in the fingers and that because of the injury he cannot and does not even hope to work as an engineer.

8. M/s Mereka & Co. Advocates for the Defendant did not appear at the hearing though they were duly served with the hearing notice dated 28/01/2008 on the 29/01/2008. The Defendants did not therefore adduce any evidence nor did they file any written submissions on the issue of quantum.

9. The Plaintiff's advocate (M/s Rachuonyo & Rachuonyo) filed written submissions on behalf of the Plaintiff on the following issues:

(1) Liability

10. The court was urged to find and hold that the Defendants were 100% liable in negligence based on the fact that the 1st Defendant's driver was charged with careless driving and was fined Kshs.5000/= on his own plea of guilty. I have considered all the evidence that has been placed before me on this issue and find that the 1st Defendant's driver, servant and/or agent drove the motor vehicle in a reckless and dangerous manner just prior to the accident. This evidence has not been rebutted by the Defendants. On the basis of this evidence, I do find and hold that the 1st Defendant is vicariously liable in negligence for the manner that the 2nd Defendant drove, managed and or controlled the motor vehicle. I also find and hold that as a passenger in the said motor vehicle, the Plaintiff was at the mercy of the said driver who owed the Plaintiff a duty of care to take him safely from Nairobi to Homa Bay. The Defendants were jointly and severally in breach of that duty of care and I find them 100% liable in negligence.

(2) Quantum

(i) Pain Suffering

11. PW1 confirmed that the Plaintiff suffered serious injuries on the left hand at the shoulder, abrasion on the forehead, abrasion on the right cheek and superficial lacerations over the right hand. The wound on the Plaintiff's head was stitched. Relying on *HCCC No. 721 of 1992 David Tarus Samwel –vs- Tana River Express & 3 Others (Msa)* the Plaintiff's counsel proposed a figure of Kshs.1,200,000. In the Tarus case, the Plaintiff who was aged 23 years at the time of the trial sustained injuries that led to the amputation of his right arm. Prior to the accident the Plaintiff was employed as a junior surveyor with the National Housing Corporation but after the accident he was deployed as a computer operator.

In the instant case, the Plaintiff is asking for Kshs.1,200,000/=. After considering the circumstances of this case, I am satisfied that an award of Kshs.1,200,000/= would be reasonable in the circumstances. The award in the Tarus case was made some fifteen (15) years ago. The shilling has lost its value almost tenfold, but I find an award of Kshs.1,200,000/= to be reasonable in the circumstances.

(ii) Loss of Earning Capacity

12. The Plaintiff is asking for Kshs.8,820,000. The evidence on record is that the Plaintiff was aged 29 years at the time of the accident. That he was employed as an engineering technician with GJ Creations Limited at a monthly salary of Kshs.35,000/=. That his employment was terminated after the accident and currently the Plaintiff works as a Volunteer Social Worker. The Defendant did not dispute any of these facts. On the basis of these facts, the Plaintiff proposes a multiplicand of 21 years at the monthly salary of Kshs.35,000/=. In this case, I think that the Plaintiff would have spent some of the money on his family and I would accordingly apply the 2/3 ratio. Telecommunications engineering is a highly lucrative job and I am convinced that the Plaintiff would have worked up to age 50 and beyond doing private jobs. I agree that a multiplicand of 21 years would be reasonable in the circumstances. Accordingly I would award the following amount:

$$\text{Kshs.35000} \times \frac{2}{3} \times 4 \times 21 = \text{Kshs.5,880,000.00}$$

(3) Special Damages

13. The Plaintiff has proved that he spent a total of Kshs.83821/= on treatment. I award the said sum of Kshs.83,821.00 under this head.

In the result I enter judgment for the Plaintiff as against the Defendants jointly and severally as follows:-

A. Liability = 100%

B. Quantum

(i) Pain suffering and

Loss of amenities - Kshs.1, 200,000.00

(ii) Loss of Earning capacity - Kshs.5,880,000.00

(iii) Special damages - Kshs. 83,821.00

Total - Kshs.7,163,831.00

The Plaintiff shall also have costs of the suit and interest on both general and special damages and on costs at court rates.

It is so ordered.

Dated and delivered at Nairobi this 24th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff

.....For the Defendant