



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 2 of 2005

JAMES NJAU KARIUKI PLAINTIFF

VERSUS

MARY GORETI WAKWIBUBI 1ST DEFENDANT

JOSEPH WAFULA NDIEYIRA 2ND DEFENDANT

JUDGEMENT

The Plaintiff filed this suit on 3rd August, 2005 against the two Defendants herein for general damages, special damages, future medical expenses and loss of earnings arising from a motor accident he was involved in on 3rd October, 2003. In the Plaint dated 3rd August, 2005 the Plaintiff averred that he was the owner of motor vehicle registration number KAM 155P while the First Defendant was the owner of motor vehicle registration number KAK 862 S while the Second Defendant was the driver of the said motor at all material times.

It was pleaded that on or about 3rd October, 2003, the Plaintiff was driving his motor vehicle registration number KAM 155P, Toyota corolla toward Nakuru along the Eldoret – Nakuru road when the Second Defendant so negligently drove motor vehicle registration number KAK 862 S, a Peugeot 405 belonging to the First Defendant thereby causing it to collide with the Plaintiff's motor vehicle registration No. KAM 155 P near the Moi University Annex along the Nakuru – Eldoret Road. Further that the said accident was solely caused and/or occasioned by the 2nd Defendant's negligence in his manner of driving managing and/or otherwise controlling motor vehicle registration number KAK 862 S Peugeot 405 Saloon.

The Plaintiff pleaded that as a result of the said accident, the Plaintiff suffered severe injuries as follows:-

- (i) Fracture dislocation of the left hip involving fracture of the femur.
- (ii) Fracture of the femoral head.
- (iii) Total replacement of the left hip.
- (iv) Laceration on the forehead of 7 cm.
- (v) Cut wound over the right nostril.

- (vi) Deep cut wound on the left knee.
- (vii) Soft tissue injuries on the left side of the chest.
- (viii) Loss of libido and inability to perform conjugal rights.

The Plaintiff further claimed in the Plaint that as a result of the said accident and the injuries sustained, the Plaintiff's left hip was totally replaced as a result of which fact:-

- (i) The Plaintiff is not likely to do any strenuous physical activities.
- (ii) The Plaintiff is likely to have early osteoarthritis of the left knee.
- (iii) The total hip replacement will undergo wear and tear and will need repeated replacements at least twice during the Plaintiff's lifetime.
- (iv) The Plaintiff will need medication frequently for pain.
- (v) The Plaintiff has permanent partial disability of fifty percent (50%).

The Plaintiff averred that he would require a total of kshs. 1,000,000/= for the two hip replacements and a sum of Kshs. 200,000/= for purchasing frequent medication to treat the injuries and ease the pain. The Plaintiff also claimed the cost of future replacement of the hip and future medical expenses and special damages in the sum of Kshs. 421,834/= particulars of which were pleaded.

The Plaintiff who is a Senior Motor Vehicle Inspector employed by the Government of Kenya

the Police Department averred that in the course of his duties he was required to personally, physically examine any motor vehicle that was submitted to him in the performance of his professional duties. He pleaded that he cannot now be able to perform physical examination of motor vehicles in line with his profession and performance of his duties have been greatly curtailed and he has lost earning capacity as a result. That at the time of the accident he was 45 years old and earning Shs. 19,175/= per month.

The Plaintiff prayed for judgement against the Defendant, jointly and severally for:-

- (a) General damages for injuries suffered as a result of the said accident.
- (b) The sum of kshs. 421,384/= being special damages on account of expenses incurred as treatment, transport and cost of purchasing drugs, a traction kit and X-ray.
- (c) The sum of Kshs. 1,000,000/= and Kshs. 200,000/= being cost of future hip replacement and future medical expenses respectively.
- (d) Loss of earning capacity at the rate of Kshs. 19,175/= per month.
- (e) Costs of the suit.
- (f) Interest.

LIABILITY

The Plaintiff and the Defendants entered into a consent judgement on liability on 5th April, 20066 when the suit came for hearing wherefore Judgement on liability was entered for the Plaintiff against the Defendants jointly and severally at the ratio of 90%:10% in favour of the Plaintiff. The only outstanding issue for the Court's determination therefore when the matter came before me was that of quantum of damages payable to the Plaintiff by the Defendants pursuant to the consent judgement on liability.

QUANTUM OF DAMAGES

In his evidence, the Plaintiff gave a detailed account of the treatment he received between 3rd October, 2003 to 25th July, 2005 as a result of the accident. The Plaintiff also testified on the nature of his present complaints and the medical treatment he continues to receive to date. The Plaintiff produced treatment chits, discharge summaries, medical reports, X-ray requisition chits and other documents in support of his case. He produced treatment chits and discharge summaries from the Moi Teaching and Referral Hospital, the Nakuru Provincial Hospital, the Kenyatta National Hospital and Medical opinions prepared by Prof. J.A.O. Mulimba dated 27th February, 2004 and Dr. L. K. Lelei dated 16th June, 2005.

On the other hand, the Defendants produced medical report prepared by Dr. Z. Gaya dated 23rd January, 2006 and a letter dated 5th October, 2006 giving his opinion on future medical expenses and cost of future hip replacement.

Upon a careful perusal of the said Medical Reports, I find that the injuries established to have been sustained by the Plaintiff in the road accident were substantially, if not wholly similar and agreed upon by the doctors. The Plaintiff sustained the following injuries:-

1. Closed head injury – laceration on the forehead of 7 cm.
2. Bruises and facial cut wounds on the bridge of the nose and over the left eyebrow area. Cut left alae nasal
3. Deep cut wound left knee joint.
4. Dislocation of the left knee joint.
5. Fracture of left acetabulum with left hip dislocation.
6. Fracture of the left femur.
7. Soft tissue injuries on the left side of the chest.

The treatment the Plaintiff received were as follows:-

1. Injection tetanus toxoid.
2. Surgical toilet and stitching of the cut wounds.
3. Analgesics.
4. Antibiotics.
5. Skin traction of the left lower limb.
6. Mobilisation on crutches.
7. Total Hip Replacement at Kenyatta National Hospital on 9th February, 2004 because of non-union of fracture dislocation left hip joint.

During examination by the two doctors the Plaintiff complained of:-

1. Pains of the left knee joint.
2. Pains of the left hip joint.

3. Inability to drive vehicles hence hindering his work of vehicle inspection.
4. Inability to do any strenuous physical work.
5. Inability to have sexual intercourse as this causes severe left hip joint pains.
6. Pains of the right wrist as a result of prolonged use of crutches.

The Plaintiff was left with the following scars:-

1. Left eyebrow – 4 cm long.
2. Right alae nasal – ½ cm long.
3. Surgical scar on the left hip and upper thigh postero – laterally measuring 24 cm in length.
4. Left knee – 9 cm long.

The prognosis and opinion of Dr. L. K. Lelei concluded as follows:-

“PROGNOSIS AND PERMANENT DISABILITY

The patient is not likely to do any strenuous physical activities. He is likely to have early osteoarthritis of left knee. The total hip will undergo wear and tear and will need repeated replacements. Due to his current age the hip might need to be replaced twice. He will also need medication frequently for pain. He has permanent partial disability of fifty percent (50%).”

Dr. Gaya’s medical report and which was produced on behalf of the Defendants concluded as follows:-

“PROGNOSIS AND OPINION

The patient showed severe injuries resulting in none union of the left hip joint fracture dislocation hence necessitating total hip replacement. This has left him with a painful deformed hip that requires continued medications from time to time. He also has a permanent shortening of the left leg.

He will continue to experience early osteoarthritic pains on the left knee that will require NSAIDS.

The scars as described above are also permanent features resulting from this accident.

In terms of Accident Compensation scale the degree of permanent disability is assessed at Twenty Eight (28%) per cent.”

In his testimony in Court, the Plaintiff said that he had not fully recovered. That he cannot perform his conjugal duties as a husband. He said that he can no longer carry out his duties as a vehicle inspector. He cannot test-drive vehicles which have no seat adjustments, and carry out any inspection. He said that he cannot squat properly when he goes for a long call. He feels pain due to any squatting and when standing up.

The Plaintiff called his wife as a witness. She said that they got married in 1983 and have five (5) children. She testified that the accident has affected them. That the Plaintiff cannot sleep on the left side. He can only sleep on the right side. He has a lot of pain. She said that they no longer have any sexual relationship. When the Plaintiff tries to have sexual intercourse he feels a lot of pain and there is a “click” sound whenever he tries. They have had no other child since the accident.

Counsel for the parties filed written submissions in support of their client’s cases respectively. It was common ground in their case that the heads of damages to be considered would be:-

- (a) General damages for pain, suffering and loss of amenities.
- (b) Cost of future hip replacement.
- (c) Cost of future medical expenses.
- (d) Loss of earnings.
- (e) Special damages.

(a) General damages for pain, suffering and loss of amenities

Both Counsel relied on the Court of Appeal decision of PAOLO CAVINATO –V- VITO – ANTONIA DI FILIPPO (1957) EA 535 and I wish to be guided by the principles set out by the said Court in respect of assessment of general damages. The Court cautioned against the consideration of sets of injuries in isolation and to award a sum of general damages in respect of each injury. The Court of Appeal at page 536, said:-

“..... The danger of such method will be apparent when it is considered that in many cases the combined effects of two sets of injuries may be much more serious in its results to the person injured than either set of such injuries would have been separately and in isolation from the other. For example, the loss of one eye may be a serious matter, but it is less than half as serious as the loss of both eyes. It is also possible to imagine circumstances in which fair compensation for a number of distinct injuries would be less than the sum of the compensation for a number of distinct injuries which should be awarded for each of them separately. It is of course correct to consider the injuries as such seriatim and to assess the severity of each separately, but the assessment of general damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured. As a practical result of this, it may be said in general that the most reliable guide to a standard of general damages in cases of multiple injuries will be other cases of multiple injuries of a similar severity although no doubt it will be difficult to find cases where the multiple injuries are closely comparable in their nature. We think that to consider awards made of single and specific injuries of a similar nature to the several sets of injuries which exist together in the Plaintiff, and to arrive at general damages by a mere process of addition, can only be misleading, and that it is an error of law to do so.”

In this case, there is no doubt that the Plaintiff suffered severe multiple injuries. The doctors agreed on the nature and extent of injuries and also substantially on the consequential long term or permanent disabilities. In assessing the fair and reasonable amount payable in general damages of pain, suffering and loss of amenities, I have considered the previous awards in the authorities cited and relied upon by the Counsel for the parties. I have also considered the inflationary trends over the years from the dates of the previous awards.

In the case, NAI. HCCC. NO. 5057 OF 1992 – JANE MULENGE –V- ANTHONY MAINA NDERE & 2 OTHERS, the Plaintiff suffered various injuries including those to the hip which led to replacement of the hip. The Court awarded general damages as follows:-

- (a) General damages for pain and suffering

and loss of amenities Kshs. 950,000/=

- (b) Cost of future operation to replace the hip

Kshs. 500,000/=

In MOMBASA HCCC. NO. 451 OF 1991 - GEORGE MWASHI GADI & OTHERS –V- PAUL MUSYOKA MUTEMI & OTHERS, the Plaintiff suffered fracture dislocation of both hips and fracture of the pelvis. Movement in both hips was grossly restricted. The Plaintiff was unable to maintain an

erection, walk, squat or run. He was rendered a cripple and unemployable. He was awarded general damages for pain, suffering and loss of amenities in the sum of Shs. 680,000/=.

In NAKURU H.C.C.C. NO. 185 OF 1999 – BENARD O. OCHIENG –V- JOHN O. ADEGA & ELIZABETH ADHIAMBO, the Plaintiff suffered the following injuries in a motor accident:-

1. Fracture dislocation of the left hip joint.
2. Intracranial haemorrhage.
3. Loss of consciousness for sometime.
4. Blunt injury to the left shoulder.

As a result of the injuries the Plaintiff is confined to the use of

crutches. Those injuries also resulted in shortening of his left leg by 6 cm and loss of fluency of speech (disarrhia) due to two holes burr on the frontal area of the head. The Court assessed general damages for pain and suffering at Kshs. 900,000/=. This decision was made on 26th May, 2006.

I have perused the authorities provided by Counsel on the issue of loss of libido. The Plaintiff referred to the case of NAI. 2079 OF 1998 – JONATHAN PANCRAS MBINDAU –V- PETER MWAURA NJUGUNA & ANOTHER. I carefully perused the said decision in which the Court assessed the general damages for pain and suffering and loss of amenities and for future treatment at Shs. 3,000,000/=. While the Plaintiff in that case sustained serious injuries to his lower limbs and spine leading to a permanent incapacity of 60% and while the Court said that he would not enjoy a normal active life like most men of his age, I did not find any express reference to loss of libido. It would be unsafe therefore to consider this case as a guide for the said loss. I however noted that in the said judgement, the Court referred to the case of JULIUS KIRIMI –V- JAMES M. M’IKIARA, HCCC. NO. 96 OF 1996 in which the Plaintiff sustained spinal injuries which had affected the use of both hands and legs and had persistent burning pains in both hand and feet, with loss of libido which had greatly affected his sexual activities. He was awarded Shs. 1,500,000/= as general damages for pain and suffering and loss of amenities.

In the more recent case of JOHN MACHOKA –V- THE KENYA POWER & LIGHTING CO. LIMITED, the Plaintiff suffered inter alia, loss of libido leading to inability to perform conjugal duties. The Court assessed general damages for pain, suffering and loss of amenities at Shs. 800,000/=. The decision was reached on 6th March, 2004.

In the Defendant’s submissions, it was argued that there was no evidence of loss of libido on the part of the Plaintiff.

On the evidence, I do find that on a balance of probability that the Plaintiff is unable to perform his conjugal duties due to inability to have sexual intercourse. The Plaintiff testified to this effect and so did his wife. In Collin’s Concise Dictionary, 4th Edition 1999 – “Libido” is defined inter alia as “sexual urge or desire.” In the Plaintiff, the particulars refer to “loss of libido and inability to perform conjugal duties.”

The Plaintiff testified that he cannot have sex with his wife even after an erection. When he tries to ejaculate, his hip joint starts to make the “click” sound and feels terrible pain in the spinal cord. He is then compelled to stop. He stated that he is also unable to satisfy his wife sexually. His wife testified that he feels sexual desire but is unable to perform due to the pain.

I am satisfied that the pleadings sets out a claim of loss of enjoyment of conjugal rights or sex. Libido or desire cannot be looked into isolation. There is no glory in having desire or the urge when one cannot perform or engage in complete and unbridled sexual intercourse. This probably is a more severe injury or consequence than losing the libido in its entirety so that the Plaintiff does not have to go through the torment and frustration of a stifled and smoldered act.

Being guided by the principles the CAVINOTO case, the authorities cited, and considering the nature of and extent of all the injuries and the inflationary trends, I do hereby award the Plaintiff a sum of Kshs. 3,000,000/= as general damages for pain, suffering and loss of amenities.

(b) Cost of hip replacement

In this regard, Dr. L. K. Lelei's medical report proposed a sum of Shs. 1,000,000/= for two (2) hip replacements in the future. He said that the total hip will undergo wear and tear and will need repeated replacement. Due to his current age (45 years at the time), the doctor was of the view that he would need two replacements.

Dr. Gaya on his part opined that given the age of the Plaintiff he may require one future hip replacement in approximately 15 to 20 years time or none at all. Dr. Mulimba stated that the prosthesis "after many years may need revision."

From the evidence of the three doctors, it is clear that at the very least one hip replacement is certain. I have also to consider that no evidence was given for the actual cost of any type of hip replacement if one was to be made now. This would have assisted the Court in assessing this head of damages. Taking a leaf from the JANE MULINGE and BERNARD OCHIENG cases, and noting the amount which the Plaintiff claimed and paid for at the Kenyatta National Hospital where the total hip replacement was carried out and to Prof. Mulimba who carried out the operation and who considering that the amounts would be payable now in lump sum, I do hereby allow a sum of Kshs. 400,000/= as the cost of future hip replacement.

(c) Cost of future medical expenses

Dr. L. K. Lelei stated that it was difficult to give an estimate of future medical expenses. Dr. Gaya said that this is impossible to estimate as the cost depends on which types or brands are prescribed. One also cannot know or predict the frequency with which he will attend future consultations. In the light of the uncertainty, the figure proposed by Dr. Lelei and proposal by the Defendant's in their submissions, I do hereby award a sum of Kshs. 100,000/= for future medical expenses.

(d) Loss of earnings

The Plaintiff is still employed by the Government of Kenya in his previous capacity. The Plaintiff abandoned this head of claim in his written submissions.

(e) Special Damages

Special damages must be proven strictly. I have carefully perused the receipts produced in Court and excluded any payments to the Insurance Company, invoices etc. The Court finds that the receipts amount to Kshs. 329,922/=. I am satisfied that the Plaintiff paid for the transport. I hereby award the said sum of Kshs. 329,922/= as special damages.

There shall be judgement in favour of the Plaintiff as against the Defendants in the sum of Kshs. 3,446,929.80 made up as follows:-

(a) General damages for pain, suffering and

loss of amenities Kshs. 3,000,000/=

(b) Cost of future hip replacement Kshs. 400,000/=

(c) Cost of future medical expenses Kshs. 100,000/=

(d) Loss of earnings Nil

(e) Special damages Kshs. 329,922/=

TO TAL KSHS. 3,829,922/=

Less 10% contribution Kshs. 382,992.20

NET SUM KSHS. 3,446,929.80

Interest shall accrue at Court rates from the date of Judgement. The Defendants shall pay the costs of the suit together with interest at Court rates.

DATED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF APRIL, 2007.

M. K. IBRAHIM

JUDGE