



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 157 of 2001

SAMSON OMARI (*a minor suing through his father & next friend*

PETER LOKUPE LOWOTON).....PLAINTIFF

VERSUS

SIMON KAMAU.....1ST DEFENDANT

JULIUS CHESARO.....2ND DEFENDANT

JUDGMENT

The plaintiff, Samson Omari through his next friend Peter Lokupe Lowoton, sued the defendants Simon Kamau (*1st defendant*) and Julius Chesaro (*2nd defendant*) seeking to be paid damages on account of injuries he alleged to have sustained while he was lawfully traveling in the 2nd defendant's unregistered Ford tractor. The plaintiff averred that on the 5th March, 2000, while the said tractor was being driven by the 1st defendant, along the Solian-Murum road, the said tractor was involving in an accident result in the plaintiff sustaining serious injuries. The plaintiff attributes the said accident to the negligence of the 1st defendant who, *inter alia*, drove the said tractor at an excessive speed in the circumstances and further failed to take the requisite precautionary measures so as to avoid the said accident. The plaintiff prayed to be paid damages, including damages for loss of salary, loss of earnings and loss of future earning capacity. The defendants were duly served with summons to enter appearance together with a copy of the plaint. The defendants failed to enter appearance with the requisite period. Interlocutory judgment was entered against the defendants on the 25th of July 2001. Subsequently thereafter, the plaintiff listed the case for hearing on formal proof.

By the time the case was heard by this court on the 31st May 2007, the plaintiff had become an adult and duly applied to the court to be allowed take over the proceedings in this case. His application was allowed. The plaintiff testified as PW1. He testified that he was 22 years old. He recalled that at the material time he was employed by the 2nd defendant at his timber saw mills. He testified that on the material day, he had been instructed by his employer to carry logs from Sabatia to the Saw mill at Solian. The said logs were ferried on a trailer which was towed by a tractor. The plaintiff recalled that he was sitted on the mudguard of the tractor. He testified that as the tractor was being driving along a slope, it lost control and started moving zigzag. The erratic movement of the tractor threw the plaintiff off the mudguard and on to the road. The rear wheel of the tractor then crushed his left leg.

The plaintiff recalled that he was rushed to Mercy Hospital, Eldama Ravine where the said leg was amputated at the knee level. He was admitted at the said hospital for a period of 19 days before he was transferred to Eldama Ravine District Hospital where he was admitted for a further three months. Upon

being discharged, the plaintiff attended the Outpatient clinic at Kabarak Health Centre. He testified that his right leg was also injured necessitating skin grafting to be done. He testified that when he was sufficiently healed, he was fitted with an artificial Jaipur leg. He produced his treatment card from Kabarak Health Centre as an exhibit. He produced the police abstract report of the accident as *plaintiff's exhibit No.3*. He testified that he was examined by Dr. Kiamba on the 6th February 2002, who prepared a medical report. The said medical report was produced as *plaintiff's exhibit No.4*. The plaintiff testified that he paid Ksh.2000/= for the said medical report to be prepared. (*Receipt produced as plaintiff's exhibit No.5*). He recalled that at the time of the accident he was being paid a salary of Ksh.1800/=. He testified that since the accident, he had been unable to secure employment due to his disability. He asked the court to award him damages and costs of the suit. The plaintiff did not call any other witness.

After the close of the case, Mr. Mutonyi, learned counsel for the appellant filed written submissions in respect of liability and quantum of damages. As stated earlier at the beginning of this judgment, the defendants were served with summons to enter appearance but they failed to do so. Interlocutory judgment was entered against them. The plaintiff's suit is therefore unopposed. According to the plaintiff, he was injured when he fell from the mudguard of a tractor on which he was traveling in the course of his employment. According to the plaintiff, the said tractor lost control when it was being driven down a slope as a result of which the plaintiff was thrown out of the said tractor to the ground. While he was on the ground, the rear wheel of the tractor crashed his left leg and also inflicted serious injuries on his right leg.

I have evaluated the circumstances which the said tractor had an accident and which caused the plaintiff to sustain serious injuries. It was evident that the 2nd defendant, as the owner of the said tractor, should have provided a place where his employees, who included the plaintiff, would safely be seated while traveling from the forest where the logs were collected to the saw mill. It was apparent that the 2nd defendant gave the plaintiff no option but to travel on the tractor while seated on the mudguard.

I find the 2nd defendant vicariously liable for the acts of the 1st defendant, who, from the evidence adduced by the plaintiff, drove the said tractor in such a reckless and careless manner, that he caused it to lose control as a result of which the plaintiff was thrown out of the tractor. The evidence adduced points to no other conclusion than that the said tractor was being driven at an excessive and dangerous speed in the circumstances. The defendants did not offer any evidence to controvert the cogent evidence adduced by the plaintiff. In the premises therefore, I hold that the plaintiff established, to the required standard of proof on a balance of probabilities, that the defendants were jointly and severally solely liable in damages to him. I therefore hold the defendants 100% liable.

On quantum, the plaintiff pleaded that as a result of the injuries he sustained in the said accident, his left leg was amputated below the knee. He also sustained a fracture and dislocation of his right ankle joint. According to the medical report prepared by Dr. Kiamba, the plaintiff sustained amputation below the knee joint. He noted that the amputation wound had healed well. He noted that there was an extensive wound in the right lower limb which was discharging pus. He stated that there was loss of tissue along the wound which had caused a prominent deformity. He observed that the movement of the right foot was restricted. Dr. Kiamba's prognosis of the injuries sustained by the plaintiff was as follows;

“The amputation of the left lower limb below the knee joint is a permanent disability. The degloving injury to the right foot has also resulted into reduction of the function of this foot.”

He assessed the degree of disability at 50%. In his submission, the plaintiff urged the court to award him Ksh.1,800,000/= general damages for pain suffering and loss of amenities. He relied on the case of **Samuel Waruguru Njoroge vs Kenya Bus Services Ltd Nairobi HCCC No.495 of 1998 (unreported)**. The plaintiff in that case was awarded general damages of Ksh.1.3 million in a case where he had sustained an amputation of the right leg. The degree of permanent disability was assessed at 35%. In the present case, doing the best that I can in the circumstances, and not forgetting that the plaintiff sustained more serious than the plaintiff in the above quoted case, I will award the plaintiff Ksh.1,500,000/= general damages for pain suffering and loss of amenities. I will award the plaintiff the proven special damages of Ksh.2000/=.

The plaintiff also pleaded that he should be paid damages for loss of salary, loss of earnings and loss of future earning capacity. In his testimony before court, the plaintiff testified that at the material time, he was employed as a general labourer at the saw mill. He used to earn Ksh.1,500/= per month. At the time of the accident, he was 15 years old. The plaintiff did not go to school. He can only therefore earn a living by doing manual work. Since the accident, his capacity to undertake such manual work has drastically been curtailed. The injuries the plaintiff sustained on his lower limbs reduced his capacity to perform any manual work. I therefore hold that the plaintiff established that he is entitled to be awarded damages for loss of future earning capacity.

In assessing loss of earning and loss of earning capacity, the principles to be considered by this court were set out 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 Lord Denning Mr. Saidin Fairly vs John Thompson Ltd [1973] 2Lloyd’s rep.40 at page 41;

‘It is important to realize that there is a difference between an award 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.”

As stated earlier in this judgment, the plaintiff established, to the required standard of proof on a balance of probabilities, that he would not be able to obtain gainful manual employment due to his disability. He submitted that the court should apply a multiplicand of 20 years in assessing the damages that should be paid under this head. The plaintiff supplied no authority in support of his submission on this point. On my own research, I came across the case of **Charles Kipkurui Korir vs Paul Sang Kericho HCCC No.43 of 2003 (unreported)** where Musinga J, considered various decision of the High Court regarding awards in damages made under the head of loss of future earning capacity. In the said cases, generally, the period in which the plaintiff would have retired from employment is an important consideration.

In the present case, the plaintiff is 22 years old. He submitted that this court should use a multiplier of 20 to calculate the damages to be paid under the head of loss of future earning capacity. It is the view of this court that the said suggested multiplier is reasonable. This court adopts the said multiplier of 20. The plaintiff is therefore awarded general damages for loss of future earning capacity as hereunder;

Ksh.1,500/= x 20 x 12 = **Ksh.360,000/=.**

(being his last monthly salary) (the years) (months)

Judgment is therefore entered for the plaintiff against the defendants, jointly and severally, as hereunder;

(1) On liability;

The defendants are held 100% liable.

(2) **On quantum;**

- (a) General damages for pain suffering and loss of amenities.....Ksh.1,500,000/=.
- (b) General damages for loss of future earning capacity.....Ksh.360,000/=.
- (c) Special damages.....Ksh.2000/=.

TOTAL Ksh.1,862,000/=.

- (3) Costs of the suit.
- (4) Interest on the general damages awarded shall be paid from the date of the delivery of this judgment.

DATED at NAKURU this 14th day of November 2007

L. KIMARU

JUDGE