



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 261 of 2005

JAMES MURIITHI MUGO.....PLAINTIFF

VERSUS

FRANCIS KIMANI MUNI1ST DEFENDANT

BERNARD MACHARIA MAHUNGU2ND DEFENDANT

JUDGMENT

By way of an amended plaint, **James Mureithi Mugo** instituted this suit against the first and second defendants being driver and owner of motor vehicle registration **No. KAN 160C Mercedes Benz lorry** respectively. The plaintiff alleged that on 25th January 2005 he was lawfully traveling under a contract of employment as a Turn man in motor vehicle reg. No. KAN 160C from Nakuru with the intention of traveling to Mombasa to deliver goods. The vehicle was being driven by the first defendant and when they reached Mai Mahiu area, the first defendant was driving the vehicle fast. He lost control of the vehicle and caused a collision with another vehicle. The plaintiff who was sitting next to the first defendant sustained injuries for which he was hospitalized at the Kijabe mission hospital. The injuries included;

- (a) Bilateral below knee traumatic amputation.
- (b) Both legs were severely mangled and were not salvageable.

The plaintiff holds the second defendant vicariously liable for the negligence and also the consequent accident caused by the first defendant.

In support of this case, the plaintiff produced a medical report by **Dr. Kenneth Mbat**, a consultant surgeon who examined him on the 18th October 2005. He assessed the permanent disability suffered by the plaintiff at **100%** which is in accordance with the **Workman's Compensation Act**. He also relied on a medical report by **Dr. Wellington Kiamba**, who also assessed the degree of disability at **100%** and classified the degree of injury as grievous harm. The plaintiff also relied on a discharge summary notes from AIC Kijabe hospital which shows that he was admitted in hospital on 25th January 2005 and he was discharged on 1st February 2005 on a wheelchair. The report by **Dr. McCluskey** of AIC Kijabe hospital shows that the plaintiff returned to the hospital on 9th February 2005 and was instructed to continue with **ace wrapping both AKA stumps**. On 31st March 2005, both AKA stumps were healed and he was referred to Bethany for measuring of **AKA prosthesis**. He assessed the permanent disability suffered by plaintiff at **70%** in relation to the whole body. The plaintiff also relied on the police abstract form which showed that the driver of the motor vehicle KAN 160C was charged with the offence of careless driving,

convicted and fined KShs.1,000/= and in default, to serve one month imprisonment.

The plaintiff further testified that the second defendant completed the workman's compensation form to notify of the plaintiff's injury. It is indicated that the plaintiff used to earn a total of KShs 10,000/= per month. The plaintiff also conducted a search at the registrar of motor vehicles and established that the subject vehicle is registered in the name of the second defendant.

Counsel for the plaintiff submitted that the plaintiff has been able to prove his case to the required standard and since the defendants did not offer any evidence, they should be held wholly responsible for the accident. The plaintiff also pleaded the doctrine of *res ipsa loquitur*. He had nothing to do with the accident and it is clear that the plaintiff was employed as a turn man. The Workman's Compensation form was duly completed and signed by the second defendant and it was admitted by consent.

On quantum, counsel submitted that the plaintiff's feet were crushed at the knee joint. He suffered pain and he cannot continue with his work as a Turn man. Counsel made reference to the case of **Ahmed Mohammed Adam vs. Jimmy Tomino & Anor. Nakuru HCCC No. 244 of 1998** where this court awarded KShs. 1,900,000/= to a plaintiff who had sustained an amputation of one leg at the knee joint and the doctor had assessed permanent disability at **70%**.

In the case of **Ondema James Achola vs. Peter Otieno Opiyo & Anor. Nakuru HCCC No. 351 of 2000** where this court awarded a sum of KShs 1,800,000/= under circumstances where the plaintiff had suffered 50% disability. Counsel therefore urged this court to award 3,000,000/= as reasonable compensation for pain and suffering. For the loss of earning capacity it was admitted that the plaintiff who was aged 21 years as at the time of the accident could have worked up to the age of 55 years but considering the other contingencies and dangers in life, counsel proposed a multiplier of 25 years and proposed a sum of KShs. 3,000,000/= under this heading. The plaintiff will also need the help of a house help and a salary of KShs. 4,000/= for a period of 20 years was proposed.

On the part of the defendant, they did not provide any evidence during the hearing although they filed a defence denying in total the plaintiff's claim. Counsel for the defendant filed written submissions in which he urged the court to find that the plaintiff had failed to prove his claim against the defendants. Further more the plaintiff testified in cross examination that he was employed by **Sabina supplies Co. Ltd** which is a distinct entity from the second defendant. Further counsel submitted that when the accident occurred, it was dark and the driver (1st defendant) was on his lane when a head on collision occurred involving another vehicle from the opposite direction.

Counsel submitted that the plaintiff needed to call evidence to prove the point of impact and the cause of accident, failure to do so, was fatal to the plaintiff's case. For that proposition counsel relied on the case of **Lakamshi vs. Attorney General [1971] EA Law Report 118.**

On the issue of quantum, counsel submitted that the plaintiff should be awarded a global sum of KShs. 300,000/= as was in the case of **Apollo Malika vs. Kenya Railways Corporation Nairobi HCCC No. 770 of 1984** where a plaintiff sustained similar injuries and was awarded Kshs. 350,000/=.

I have considered all the submission and all the decided case law that were cited by both counsel for the plaintiff and the defendant. On the issue of liability, I disregard the submission by counsel for the defendant which I consider inappropriate and tantamount to giving evidence from the bar, on the cause of the accident when they did not take the opportunity to bring their witnesses in court to controvert the plaintiff's evidence.

From the plaintiff's evidence, and the documents produced in support, he has been able to prove that the accident occurred on 25th January 2005 involving motor vehicle reg. No. KAN 160C which was driven by the first defendant. The evidence by the plaintiff that he was an employee of the second defendant was similarly not controverted. The first 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 proceedings is conclusive evidence. The first defendant was charged under traffic case

No. 266 of 2005, Naivasha and convicted and sentenced to a fine of KShs. 1,000/=. This in itself is prove of negligence on the part of the first defendant. The plaintiff also pleaded the doctrine of *res ipsa loquitor* and the defendant did not call any evidence to controvert the inference that flows from the above principle that accidents do not just occur. 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 the plaintiff’s evidence proved that the accident occurred in the vehicle in which he was traveling under a contract of employment. The plaintiff had nothing to do with the accident and I attribute the negligence fully to the defendant.

On quantum, the plaintiff suffered amputation of both legs. Both legs were crushed beyond salvage. The degree of disability was assessed by two doctors at **100%** under the **Workman’s Compensation Act** and **Dr. Mccluskey** assessed the disability in relation to the body at **70%**.

I have considered the decided cases which the parties relied on while bearing in mind that there are no two cases that are similar as I note in each case the injuries suffered and the degree of disability vary. I would award the plaintiff KShs. 2,000,000/= for pain and suffering for the injuries sustained. The plaintiff also lost his earning capacity. The courts in Kenya are almost unanimous that a person’s loss of earning capacity should be considered if it has been lost as a result of an accident. The plaintiff was earning an average of KShs. 10,000/= per month. He will not be able to carry on his work as a Turn man again due to the injuries. I have also taken into consideration the principles to be considered under this heading as articulated in the case of **Buttler vs. Buttler [1984]**;

“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 21 years at the time of the accident, he was not trained in any vocational career but perhaps there could be a possibility of the plaintiff doing something for himself while in the wheelchair and factoring other contingencies in life I would award him a multiplier of 20 years that is Kshs. 10,000 x 20 x 12 = 2,400,000/=. I decline to award the plaintiff anything for house help which can be taken from the sum under loss of earning.

Judgment is therefore entered for the plaintiff as follows:

- (a) Liability at 100%
- (b) General damages for pain and suffering and loss of future earning Kshs 2,400,000/=.

The plaintiff shall also have the costs of the suit.

Judgment read and signed on 9th day of November, 2007

M. KOOME

JUDGE