



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 207 of 2004

JULIUS KIPROTICH.....PLAINTIFF

VERSUS

ELIUD MWANGI KIHOSHIA.....DEFENDANT

JUDGMENT

The plaintiff Julius Kiprotich sued the defendant Eliud Mwangi Kihoshia seeking to be paid damages on account of the injuries he alleges to have sustained when motor vehicle registration number KAK 407B Nissan (*hereinafter referred to as the said motor vehicle*), wherein he was traveling as fare paying passenger on the 3rd of December 2002, was involved in an accident along Nyeri-Kiganjo road. The plaintiff averred that the said accident occurred when the driver of the said motor vehicle, negligently drove the same that he caused it to lose control and overturn as a result of which the plaintiff sustained serious injuries. The plaintiff served the defendant with summons to enter appearance together with a copy of the plaint. The defendant entered appearance and filed a defence. He denied that the driver of the said motor vehicle was negligent or that he caused the accident. He denied that the plaintiff was a passenger in the said motor vehicle or that he sustained the injuries that he pleaded in his plaint. He averred that if the said accident occurred, then the same was caused by circumstances which were beyond the control of the driver of the said motor vehicle.

At the hearing of the case, the plaintiff testified that he is a police officer who was previously working as an instructor at the Kiganjo Police College. He recalled that on the 3rd of December 2002 as he was traveling in motor vehicle registration number KAK 407B Nissan Matatu from Kiganjo to Nyeri, the said motor vehicle while attempting to negotiate a corner lost control, overturned and landed in a steep ditch. Immediately after the accident, the plaintiff became unconscious. He regained his consciousness on the 4th of December 2002 when he found himself admitted at the Consolata Hospital, Nyeri. He testified that he was admitted from the 3rd of December 2002 to the 7th of January 2003 when he was discharged from the hospital. He produced the discharge summary as plaintiff's exhibit No. 1.

He testified that he sustained a fracture of the pelvic bone, internal abdominal injuries and head injuries. He was issued with a police abstract of the said accident which he produced as plaintiff's exhibit No. 2. He was further issued with a P3 form which was duly filled by a Doctor at the Nyeri Provincial General Hospital. The P3 form was produced as plaintiff's exhibit No. 3. He saw Dr. Kiamba on the 18th of September 2003 who prepared a medical report of his injuries. The medical report was produced as plaintiff's exhibit No. 4. He paid Kshs 2,000/= for the preparation of the said report and was issued a receipt (*receipt produced as exhibit No. 5*). He testified that he had not fully recovered from the injuries that he sustained during the accident because he could no longer carry any heavy load as he used to. He testified that he has been attending physiotherapy at the Provincial General Hospital Nakuru. He urged this court to award him damages and the costs of the suit. The defendant did not offer any evidence and duly closed his case.

I have considered the pleadings that were filed by the parties to this suit. I have also considered the evidence adduced by the plaintiff, which is uncontroverted. He testifies that while he was traveling in the suit motor vehicle as a fare paying passenger, the said motor vehicle lost control and overturned as a result thereof the plaintiff sustained serious injuries. He became unconscious after the accident and only came into consciousness when he was already admitted at Consolata Hospital Nyeri. He produced the police abstract report which established that the said accident was self involved. There was no other motor vehicle which was involved in the accident with the said motor vehicle.

From the evidence adduced it is clear that the said accident was caused by the negligence of the driver of the defendant's motor vehicle who negotiated a corner at a high speed that caused the said motor vehicle to lose control and consequently overturn. The evidence of the plaintiff in this respect is uncontroverted. The defendant offered no evidence to contradict the plaintiff's narration of the events that took place on the material day. I therefore find that the plaintiff has established on a balance of probabilities that the defendant was solely liable for the said accident. I think the maxim *res ipsa loquitur* applies in this case. I therefore hold the defendant to be 100% liable in damages to the plaintiff for the injuries that he sustained during the said accident.

On quantum, according to the P3 form the plaintiff sustained an injury on his head. He had a scar on the right side of his head measuring 4cm x ¼cm. His abdomen was distended as a result of bleeding into the peritoneum. He fractured his pelvis at the pubic ramus. He had bruises on both of his knees. He was admitted in hospital for a total of thirty seven days. Dr. Kiamba, who prepared a medical report on the 18th of September 2003, noted that the plaintiff had sustained a fracture of the pelvis, severe injury to the abdomen resulting into peritoneal haematoma and a deep cut wound on the right parietal region of the scalp. He observed that there was a prominent scar measuring 4cm x ¼cm on the right parietal region. He also noted that there were three scars on the plaintiff's abdomen which resulted from the said injuries sustained. He observed that the x-rays taken on the 3rd of December 2002 revealed that the plaintiff had fractured his pelvis at the right inferior and superior ramus. At the time of examination the pelvis had united. He formed the opinion that the degree of injuries which the plaintiff had sustained to be grievous harm.

The plaintiff in his submission to court has stated that he should be awarded the sum of Kshs 800,000/= as general damages for pain suffering and loss of amenities. He has relied on the decision of **Johnstone Okumu –vs- John Munyeke Matolo & Anor Mombasa HCCC No. 142 of 1991 (unreported)** where the plaintiff sustained more or less similar injuries to the one sustained by the plaintiff in this case. I however noted that the plaintiff in that case also sustained dislocation of the right central hip and fracture of the right iliac bone. He was awarded general damages of Kshs 480,000/=. He has also relied on the decision of **Mary Wambui Gatara –vs- Penel Mwangi Kimani Nairobi HCCC No. 2798 of 1991 (unreported)** where the plaintiff was awarded a sum of Kshs 300,000/= in general damages. The defendant on his part has submitted that the plaintiff should be awarded the sum of Kshs 150,000/=. He has relied on the decision of **Joseph Magothe –vs- Wingkim Technical Agencies & Anor Nairobi HCCC No. 3155 of 1998 (unreported)**.

I have considered the said submissions made. I have noted that the said decisions were made more than ten years ago. In some instances they were made more than fifteen years ago. I have taken into account the fact that the assessment of the general damages for injuries sustained by plaintiffs in accident cases is not a scientific or mathematical process but is based on what a judge assesses to be the best compensation to such a plaintiff in the circumstances of each case. In this case I have taken into account the decided cases referred to me herein above, and also inflation. In the circumstances of this case, doing the best that I can, I assess the general damages to be paid to the plaintiff for pain suffering and loss of amenities at Kshs 450,000/=. The plaintiff proved special damages of Kshs 2,000/= being the costs of preparation of the medical report and Kshs 100/= being the costs of the police abstract report.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as hereunder:

(i) On Liability

The defendant is found 100% liable

(ii) On Quantum

(a) The plaintiff is awarded Kshs 2,100 special damages

(b) The plaintiff is awarded Kshs 450,000 general damages for pain suffering and loss of amenities.

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest on special damages shall be assessed from the date of filing suit while interest on general damages shall be payable from the date of this judgment.

DATED at NAKURU this 31st day of May 2006.

L. KIMARU

JUDGE