



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 91 of 2004

DAVID KIPLANGAT SANG PLAINTIFF

VERSUS

RICHARD KIPKOECH LANGAT 1ST DEFENDANT

SAMUEL KIPLANGAT SOIMO 2ND DEFENDANT

JUDGMENT

The Plaintiff, David Kiplangat Sang filed suit against the defendants seeking to be paid damages on account of injuries he alleges to have sustained on the 19th October, 2002 when he was traveling in motor vehicle registration No. KAP 872W, Toyota Matatu as a fare paying passenger, when the said motor vehicle was involved in an accident with two other motor vehicles along the Litein-Sotik road near Siriat Trading Centre. The plaintiff averred in his plaint that the said accident was caused due to the negligence of the defendant's driver who drove the said motor vehicle in such a negligent manner that he caused it to collide with motor vehicle registration No. KAJ 226Y Isuzu Canter and motor vehicle registration No. KV – 4407D Mercedes Benz Lorry. The plaintiff further averred that as a result of the said accident, he sustained serious injuries which he particularized in his plaint and claimed the said injuries had made him suffer loss and damage. He therefore sought to be compensated by being paid damages as pleaded in his plaint. The plaintiff served the defendants with summons to enter appearance. However they failed to enter appearance within the requisite period. Interlocutory judgment was therefore entered against the defendants hence this suit was heard by way of formal proof.

During the hearing of the case, the plaintiff testified that he was employed by the Kenya Army. He recalled that on the 19th October, 2002 he was traveling from Londiani to Bomet in motor vehicle registration No. KAP 872W, a public service vehicle. He testified that he was seated on the front seat of the vehicle next to the driver. At about 8.00pm, the said motor vehicle hit another motor vehicle at its rear resulting in his sustaining serious injuries. He testified that he fractured his left leg during the accident; he also fractured his hip joint and his knee. He also injured the left side of his chest. Immediately after the accident he lost consciousness and was admitted at the Tenwek Mission Hospital where he was at the ICU for four days.

He regained his consciousness after four days. He produced the discharge summary which was issued by the Tenwek Hospital as plaintiff's exhibit number 2. It was his testimony that he was admitted at the said Tenwek Mission Hospital for a period of six weeks after which he was transferred to the Forces Memorial Hospital where he was admitted for a further period of one month. He paid a sum of Kshs.61,721/- to

Tenwek Hospital as medical fees. The invoice was produced as plaintiff's exhibit no. 3. At the Forces Memorial Hospital, a plate was inserted in his foot. After the bones had united, the said plate will require to be removed. According to the plaintiff, it would cost about Kshs.30,000/- to remove the said plate. The treatment papers from the Forces Memorial Hospital were produced as plaintiff's exhibit no. 4(a) and 4(b). He testified that he had not fully recovered from the injuries that he had sustained during the accident. On the 29th November, 2005, he was seen by Dr. Oketch who prepared a medical report showing the injuries that he had sustained. The medical report was produced as plaintiff's exhibit no. 5. He paid the sum of Kshs.2,000/- for the preparation of the said report. Receipt produced as plaintiff's exhibit no. 6.

The plaintiff later went to the police station and was issued with a P3 form which was duly filled by the doctor and produced as plaintiff's exhibit no. 7. He was also issued with a police abstract report of the said accident. It was produced as plaintiff's exhibit no. 8. He testified that the driver of the said motor vehicle was charged with the offence of careless driving and was found guilty. He recalled that prior to filing the suit, he undertook a search at the Registrar of Motor Vehicles which confirmed that the said motor vehicle was owned by the 2nd defendant. The copy of records of the said motor vehicle was produced as plaintiff's exhibit no. 1. The plaintiff urged this court to grant his prayers to be paid compensation for the injuries that he sustained during the accident.

I have read the pleadings filed by the plaintiff in this case. I have also carefully considered the evidence that he adduced in support of his case. I have further considered the written submissions that were presented to this court by the plaintiff. The issue for determination by this court is whether the plaintiff has established that he was a lawful passenger in the said motor vehicle belonging to the 2nd defendant when it was involved in the accident. The other issue for determination is what damages should be paid to the plaintiff if he establishes that he was injured in the said accident.

On the first issue, the plaintiff testified that he was a passenger on the 19th of October, 2002 in motor vehicle registration No. KAP 872W owned by the 2nd defendant and driven by the 1st defendant. He testified that he was traveling from Londiani to Bomet when the said motor vehicle rammed into vehicles which were ahead of them. He produced a police abstract report as plaintiff's exhibit no. 8 which established that indeed the said accident took place and was reported to the police. The said police abstract also establishes that the plaintiff was a passenger in the said motor vehicle and was seriously injured. The plaintiff testified that upon investigations by the police, the driver of the said motor vehicle was found to be culpable and was charged with the offence of careless driving for which he was convicted and fined. It was his testimony that the said accident was caused by the negligence of the driver of the said motor vehicle who rammed into other motor vehicles which were ahead of them.

I have evaluated this evidence. It is uncontroverted. I hold that the plaintiff has established on a balance of probabilities that he was a passenger in the said motor vehicle when it was involved in an accident due to the negligence of the driver of the said motor vehicle. According to **section 47A of the Evidence Act**, where a person is convicted on a traffic offence related to an accident on a charge of careless driving, prima facie, when a civil case is filed, then he cannot deny that he was careless in his driving of the said motor vehicle and therefore caused the accident. I therefore find the plaintiff has proved to the required standard that the defendants are 100% liable to him in damages.

The plaintiff was examined by Dr. Oketch who established that the plaintiff had sustained the following injuries; Severe head injuries with loss of consciousness for four days, blunt chest injury with fracture of two ribs, fracture of the tibia fibula, upper tibia (tibial plate) and left acetabulum, with hip dislocation. The plaintiff further sustained a fracture of the left medial malleolus. His examination revealed that the plaintiff had a limping gait and used a walking stick to reduce the weight on the injured limbs. The plaintiff had a laceration wound scar on the lower left leg and surgical scarp on the left knee and lower thigh. There was tenderness of the left knee joint and the left hip joint in the leg rolling test. He also had some tenderness in the chest. Dr. Oketch formed an opinion that the injuries the plaintiff sustained during the accident had left him with a permanent disability from post traumatic arthritic that would give him persistent pain and inability to tolerate strain. He assessed the degree of permanent injury to be 30%.

In his submissions before court, the plaintiff has asked this court to award him general damages of Kshs.800,000/- for pain, suffering and loss of amenities. He has relied on two decisions, **Nairobi HCCC No. 287 of 1987, Charles Amusoda & anor vs Michael Ndungu Mbugua & anor (unreported) and Mombasa HCCC 718 of 1990 Teresa Nyambura Kimaru vs Michael Kyalo Kiilu (unreported)**. I have considered the said submissions and also the injuries that the plaintiff sustained. In my considered view, the authorities quoted are relevant to this case in so far as the plaintiff sustained some of the injuries that the plaintiffs suffered in the said two cases, which were of a more serious nature. In the circumstances of this case, doing the best that I can, I award the plaintiff the sum of Kshs.550,000/- as general damages for pain, suffering and loss of amenities.

On special damages, I hold that the plaintiff shall be paid the sum of Kshs.30,000/- as the cost of future medical expenses which will be the surgical cost of removing the plate which was inserted on his leg to stabilize the fracture of his tibia. I will however, award the plaintiff the sum of Kshs.2,500/- only as special damages which he pleaded in his plaint. Although he proved special damages of Kshs.61,721/-, this court will not award him the said amount because the law requires all special damages to be specifically pleaded and specifically proved (see **Ali vs Nyambu t/a Sisera Store [1990] KLR 534**).

The upshot of the above is that judgment is entered for the plaintiff against the defendants both jointly and severally as hereunder;

(a) ON LIABILITY

The defendants are found to be 100% liable

(b) ON QUANTUM

(i) General damages..... Kshs.550,000/-

(ii) Special damages Kshs. 32,500/-

TOTAL Kshs.582,500/-

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

(d) Interest on special damages shall be paid from the date of filing suit whereas interest on general damages shall be paid from the date of the delivery of this judgment.

DATED AT KERICHO THIS 7TH DAY OF JUNE, 2006

L. KIMARU

JUDGE