



IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 109 of 2005

VINCENT CHERUIYOT RONO.....
.....PLAINTIFF

VERSUS

MOMBASA MAIZE MILLERS LTD.....
DEFENDANT

JUDGMENT

On or about the 27th October 2004, at about 2 p.m., the plaintiff was driving motor vehicle registration number KAR 799M, a bus owned by Eldoret Express Services Limited, along Nakuru-Nairobi road. He was involved in an accident with another vehicle motor vehicle registration number KAM 623A which was owned by the defendant. The defendant's motor vehicle was at the material time overtaking another vehicle registration number KAC 370B, a Peugeot 405 pick up. The defendant's motor vehicle collided head on with the vehicle which was driven by the plaintiff and as a result the defendant's driver suffered fatal injuries and the plaintiff sustained the following injuries :-

- (a) A deep cut on the face.
- (b) Multiple pain on both legs, arms and both shoulders.
- (c) An abrasion on the right lower chin.
- (d) Backache and chest pain.
- (e) A painful right shoulder.

The plaintiff alleged that the said accident was caused by the negligence of the defendant's driver and set out the particulars of negligence, *inter alia* that he drove the said motor vehicle at a speed which was excessive in the circumstances and that he overtook motor vehicle registration number KAC 370B without checking whether there was an oncoming other vehicle on the opposite side of the road and in particular the vehicle which was being driven by the plaintiff.

The plaintiff claimed general and special damages as a result of the injuries which he sustained due to the aforesaid accident. The special damages claimed amounted to Kshs.29,200/- made up as hereunder:-

- (i) Police abstract..... Kshs. 200/-
- (ii) Medical expenses Kshs.27,500/-

(iii) Medical report Kshs. 2,000/-

The defendant was served with summons to enter appearance but did not enter appearance nor file any defence and as a result interlocutory judgment was entered against the defendant and the matter was set down for formal proof.

The plaintiff gave a detailed account of how the accident occurred. He explained that on the material day along the Nairobi-Nakuru road near the Pipeline area within Nakuru Municipality, the defendant's driver attempted to overtake motor vehicle registration number KAC 370B and a head on collision occurred involving the defendant's motor vehicle and the bus which he was driving. The plaintiff was admitted at Pine Breeze Hospital for three days. He produced two receipts for payments which he made to the said hospital and they showed that he paid a total of Kshs.21,115/- and not Kshs.27,500 which he had claimed. He also produced a police abstract but did not produce any receipt for purchase of the same but I will assume that he purchased it for Kshs.200 as claimed in the plaint.

The plaintiff was examined by Dr. James K. Mogire on 20th July 2005 and at the time of the said examination the doctor's findings were that the plaintiff had:-

- (a) Pain over the chest without rib fractures.
- (b) Tenderness over the cervical spine without any fractures.
- (c) Laceration over the left elbow.
- (d) Painful swollen right knee with markedly reduced range of motion.

The Doctor further observed that the chest pains would require medication from time to time and that the left elbow laceration had healed with a painful residual scar 4 cm long. He also stated that the right knee had pain with synovitis and residual limitation in range of motion and fixed flexion deformity. His conclusion was that the plaintiff had made good progress in recovery but had residual pain in his chest and the right knee requiring pain control medication from time to time. The plaintiff's right knee joint had residual functional deficit that could progress. He assessed the plaintiff's permanent loss of function at 20%.

The plaintiff was also examined by the defendant's doctor, Dr. Modi M. Y., a Consultant Orthopaedic Surgeon on 11th June 2006. The said doctor stated in his medical report which was produced in court that the plaintiff sustained the following injuries:-

- (a) Soft tissue injury cervical and lumbosacral spine.
- (b) Soft tissue injury right elbow and right knee.
- (c) Soft tissue injury chest.

The plaintiff's complaints that were noted by the doctor as at 11th June 2006 were that he had difficulty in driving due to pain on his right elbow, pain on his neck and back which was on and off and occasional pain on his right knee. Dr. Modi's conclusion was that the plaintiff's complaints of difficulty in driving and pain of neck and back would settle with time as there was no abnormality detected during examination except the scar over the right elbow.

The plaintiff paid Kshs.2000/- to Dr. James Mogire for the medical report. The plaintiff told the court that he still experiences pain on the chest and the back. He further testified that his employer had terminated his services as a driver because according to his employer the plaintiff was unsuitable as a driver. However, no evidence was tendered to that effect. The plaintiff further told the court that he was 43 years old and was earning Kshs.10,000/- per month and used to be given an allowance of Kshs.500/- per trip from Nairobi to Western Kenya and used to do two trips per day thus earning a total of

Kshs.1,000/- per day. He said that he was no longer able to drive.

In his submissions, Mr. Oira for the plaintiff urged the court to find that the defendant was wholly liable for the said accident in that its driver was overtaking blindly. With regard to general damages, counsel submitted that a sum of Kshs.500,000/- was reasonable for pain suffering and loss of amenities. He sought to rely on the case of **YUNIS MALIK V ELIUD MURIITHI HCC No. 355 of 2000** at Nakuru (unreported) where the plaintiff sustained serious head and chest injuries, communitated fracture of the right femur and soft tissue injuries. He was admitted in hospital for two weeks and after discharge he walked with a limp. The court awarded him Kshs.400,000/- as general damages for pain suffering and loss of amenities. Mr. Oira also cited the Court of Appeal decision of **SAMUEL GIKURU NDUNGU V COAST BUS COMPANY LIMITED Civil Appeal No. 177 of 1999 (unreported)** where the appellatnt suffered a fracture of the right ulna and radius and a bruised back. He was awarded general damages amounting to Kshs.300,000/- for pain suffering and loss of amenities.

Counsel further urged the court to award damages for loss of earning because the plaintiff was no longer able to drive. He said that the plaintiff's salary was Kshs.10,000/- per month and urged the court to adopt a multiplier of 15 and award a sum of Kshs.1,756,000/- made up as hereunder:-

$$10 \times 12 \times 15 = 1,756,000$$

I have taken into account the evidence that was given by the plaintiff as to how the accident occurred. The plaintiff also called as a witness, Police Constable Alfred Koech who testified and produced the police file regarding the said accident. From the evidence on record it is clear that the defendant's driver was totally to blame for the occurrence of the accident because he chose to overtake a motor vehicle which was ahead of him when it was not safe to do so given that the bus that was being driven by the plaintiff was approaching from the opposite direction. The defendant's driver caused the head on collision which occurred on the lane of the plaintiff's bus. I therefore hold the defendant fully liable for the said accident.

Turning to the plaintiff's claim for general damages, I note that the plaintiff did not call any of the two doctors who examined him to produce the medical reports that were prepared upon his examination. None of the two doctors stated that the plaintiff was unable to drive. The plaintiff was examined by Dr. Modi eight days before the formal proof was conducted and the plaintiff did not tell the doctor that he was unable to drive. He merely indicated that he had difficult in driving due to pain on his left elbow. The concluding remarks of Dr. Modi in his medical report were that:-

“His complaints of difficult in driving and pain over neck and back should settle with time as there is no abnormality detected during examination except the scar over right elbow”.

The Doctor further observed that the plaintiff did not have any disability arising from his injuries.

When the plaintiff was examined by Dr. James Mogire on 20th July 2005, the doctor remarked that the plaintiff had made good progress in recovery and he quantified his permanent loss of function of the plaintiff's right knee joint at 20%. The plaintiff was not examined by the said doctor thereafter. In light of the contents of the two medical reports and the court's observation of the plaintiff, I did not believe him when he testified that he was now completely unable to drive. There was also no proof that his employer had terminated his services because he was unsuitable as a driver. If that was the case, I would have expected the plaintiff to produce a termination letter to that effect. I therefore hold that the plaintiff has not made out any case for award of general damages for loss of earnings. I award a sum of Kshs.400,000/- as general damages for pain suffering and loss of amenities. I also award special damages of Kshs.23,315/- made up as hereunder:-

Medical expenses..... Kshs.21,115

Medical report.....Kshs. 2,000

Police abstract.....Kshs. 200

TOTAL.....Kshs.23,315

The plaintiff will also have costs of the suit as well as interest thereon on. The interest on special damages will accrue from the date of filing the suit until payment in full but interest on general damages will accrue from the date hereof.

DATED, SIGNED and DELIVERED at Nakuru this 4th day of July, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Oira for the plaintiff.

D. MUSINGA

JUDGE