



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 364 of 2001

HARRISON CHENGO KATANA DANDIO PLAINTIFF

- Versus -

GABRIEL NYANJE & ANOTHER DEFENDANT

Coram: Before Hon. Justice L. Njagi

Maungu for the Plaintiff

Court clerk – Kinyua

J U D G M E N T

By a plaint filed in court on 23rd July, 2001, the plaintiff claims against the two defendants, jointly and severally, special and general damages, interest thereon at court rates, costs, and such further or other relief that the court may deem just and fit to grant. The claim arises out of a road traffic accident involving motor vehicle Registration No. KAK 675Q, a matatu in which the plaintiff was traveling. The vehicle was registered in the name of the 1st defendant as the owner, while the 2nd defendant was employed as a driver by the 1st defendant.

The plaintiff's case against the defendants is that on 8th April, 2001, while he was lawfully travelling as a fare paying passenger in the above vehicle, the 2nd defendant so negligently drove the said vehicle at a high speed that he lost control thereof and the vehicle overturned. As a result of the accident, the plaintiff sustained injuries, loss and damage, for which he holds the 2nd defendant liable and the 1st defendant vicariously liable.

Although the defendants were duly served by registered post on orders of the court, they did not enter appearance or file defence within the prescribed period of time. At the request of the plaintiff's counsel, an interlocutory judgment was entered against them on 2nd July, 2002. Thereafter, the matter came before this court for formal proof.

In his sworn testimony, the plaintiff narrated how he was travelling from Kilifi to Mombasa in the defendants' ill fated matatu. After travelling about 10 kilometres, the vehicle rolled off the road as a result of which the plaintiff sustained injuries. He was injured on the left shoulder, lips, jaws, and the nose got cut and was broken. Blood was also oozing from the left ear. He further got a fracture at the back of the head, and broke a rib. He was thereupon taken to the Aga Khan Hospital, Mombasa, where

he was admitted on 8th April, 2000, and was discharged on 19th April, 2000. He produced a copy of the discharge summary as his exhibit No.1. He also produced exhibit No.2, comprising receipts in respect of money spent on the purchase of drugs which amounted to Kshs. 3,720/=. Exhibit Nos. 3, 4, 5 and 6 were for sums of money paid by way of doctors' fees, showing that Dr Maranya was paid Kshs. 13,300/=; Dr Waweru Kshs. 2,000/=; Dr Mwaringa Kshs. 1,600/=; and Dr Shah Kshs. 27,500/=, respectively. The Aga Khan Hospital, Mombasa, was paid the total sum of Kshs. 150,700/= as evidenced in the bundle of documents in exhibit 7. A further sum of Kshs. 74,700/= was paid to Dr J.W.O. Radol as per exhibit 8. Finally, the accident was reported at Kijipwa police station from where a police abstract, exhibit No.9, was issued. Even though the plaintiff says that he paid the sum of Kshs. 200/= for that abstract, the receipt in respect of that money has not been produced. That sum will therefore not be allowed.

The plaintiff also produced a Medical Examination Report which was completed at the Coast General Hospital. In addition thereto, he also produced a medical report from a Dr Patel dated 21/05/2001. It was produced as exhibit No. 11, for which the plaintiff paid Kshs. 2,000/=. The official receipt for that sum was produced as exhibit No.12.

Arising out of the above, the plaintiff said that he was claiming the sum of Kshs. 242,578/= by way of special damages, and in addition thereto he was also claiming general damages. He finally claimed costs of the suit.

In the absence of the other side, the plaintiff's evidence was not controverted in any way. He testified in a relaxed manner and I believed him. I therefore find that he has proved his case on a balance of probability. I further find that the 2nd defendant is liable and the 1st defendant vicariously liable for the injuries sustained by the plaintiff.

The medical report produced as exhibit 11 shows that the plaintiff underwent a thorough medical examination at the hands of Mr. Hemant R. Patel on 21st May, 2001. That examination discloses that as a result of the road accident, the plaintiff suffered a fracture of the 7th rib with pneumothorax (chest); multiple facio-maxillary fractures; a head injury – fracture at base of skull with leak of CSF (brain fluid) through right ear; and that he sustained a head injury concussion. Following these injuries, he underwent emergency operation of "Underwater seal Drainage" of right chest to remove air and had facio-maxillary treatment of reduction of fractures and wiring of both jaws which remained for two months. He was discharged on 19th April, 2000 and thereafter attended as an outpatient. He was off work for 4 months.

At the time of this examination, he felt pain in the left side jaw in cold weather and at times had headaches. On examination, sealed scars were found; mouth occlusion was normal but painful in extreme open mouth. Everything else was normal.

In the doctor's opinion, following the accident of 8th April, 2000, the plaintiff sustained severe injuries of the head, facial fractures and chest injury complicated by pneumothorax. By the time the plaintiff underwent the examination in May, 2001, he had made good recovery after adequate treatment. His symptoms at that time were mild to moderate and periodic in cold weather. Otherwise he suffered no other permanent incapacity. As the plaintiff does not seem to have submitted himself to another examination thereafter, his award for damages will be governed by his medical condition as at the date of that examination. Considering the amount of damages which the courts have awarded in similar circumstances, and taking into account the inflation that has set in, I accordingly assess his general damages for pain, suffering and loss of amenities at Kshs. 750,000/=.

Special damages must be specifically pleaded and strictly proved. The plaintiff's claim for special damages is the sum of Kshs. 242,578/=. The receipts produced add up to a figure which is slightly more than that pleaded. In the circumstances, the plaintiff will be awarded special damages at the figure pleaded as he cannot now be awarded the higher figure without an amendment to the plaint which is too late to effect.

For the above reasons, I enter judgment for the plaintiff as follows:

- (a) Special damages in the sum of Kshs. 242,578/=**
- (b) Interest thereon at court rates from the date of the filing of the suit until payment in full.**
- (c) General damages for pain, suffering and loss of amenities assessed at Kshs. 750,000/=.**
- (d) Interest thereon at courts rates from the date of judgment until payment in full.**
- (e) Costs of the suit.**

Dated and delivered at Mombasa this 29th day of September, 2006.

L. NJAGI

JUDGE