



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 309 of 1999

DAVID NJOROGE MUCHIRI..... PLAINTIFF

VERSUS

BERRY FARMS LIMITED1ST DEFENDANT

PAUL KIRUI BARMEN2ND DEFENDANT

JAMES MAINA KAMAU3RD DEFENDANT

RICHARD ALLAN OKUSI4TH DEFENDANT

JUDGMENT

David Njoroge Muchiri, the plaintiff in this suit instituted this suit against Berry Farms Limited, Paul Kirui Barmen, James Maina Kamau and Richard Allan Okusi being the 1st, 2nd, 3rd and 4th defendants respectively.

The plaintiff gave evidence and relied on the evidence of five (5) other witnesses in support of his claim. It was the plaintiff's case that on 1st February 1998, he was travelling as a fare-paying passenger in motor vehicle registration number KSB O84 owned by the 3rd defendant and driven by the 4th defendant. The said motor vehicle collided with another vehicle registration number KAG 547G owned by the 1st defendant and driven by the 2nd defendant. As a result of the collision, the plaintiff was seriously injured, he was treated at the Rift Valley Province General Hospital, Pine Breeze Hospital Nakuru and the M.P Shah Hospital where he was admitted in the Intensive Care Unit and general ward for about one (1) month.

Due to the general weakness of the body, as a result of this accident the plaintiff fell again in 1999, he fractured his leg and was hospitalized at the MP Shah Hospital. The plaintiff told the court that he spent Kshs.900,858/- in hospital, doctor's fees, medicines and transport and Kshs.18,000/- on a wheelchair. The plaintiff suffered severe injuries namely;

- (a) *Severe head injury*
- (b) *Fracture of (ten) 10 ribs*
- (c) *Fracture of the upper right tibia plateau and fibula*

- (d) *Punctured lungs (haemothorax) both sides*
- (e) *Stiffened left arm*
- (f) *Fracture of the superior and inferior public ramii*
- (g) *Fracture of the left femur*

As a result of these injuries, the plaintiff has been crippled and has to walk with the aid of crutches to-date. Due to these injuries that have weakened his body, he has become proven to other accidental falls and he blamed this accident for his retrenchment from his place of work where he was working with the Coffee Research Foundation on medical grounds. The accident has also affected his performance and he claims his conjugal rights have been violated by his diminished libido as he experiences constant pain.

Five medical reports were produced in evidence prepared by Dr. Muriithi, Dr. Ngetich, Dr. Kiamba, Dr. Njenga and Dr. Shah. According to Dr. Ngetich who testified in court as (PW 4), he examined the plaintiff on 6th March 2003 and confirmed that he had sustained the above injuries. In the opinion of Dr. Ngetich, the plaintiff suffered very severe injuries but the management was appropriate however the plaintiff was left with a permanent disability for which he will need crutches and further surgery to remove the plates and screws. The plaintiff will also have some permanent deformities and chronic pain from which he will develop early osteoarthritis. This doctor awarded him 20% disability and produced a receipt of Kshs.3,000/- for the services rendered.

Further evidence in support of the plaintiff's case was led by Peter Masake and Festus Ouma Bolo both employees of the Coffee Research Foundation. Their testimony touched on the payment of Kshs.687,998/- which was made to MP Shah Hospital. According to these two witnesses, the Coffee Research foundation issued a letter of guarantee to MP Shah Hospital but the amount was paid by the plaintiff although the receipts were issued in the name of Coffee Research Foundation, this was due to the fact that the Coffee Research Foundation had guaranteed the payment.

Even the sum of Kshs.117,649/- which was paid by the Coffee Research Foundation, the same was recovered from the plaintiff's salary at Kshs.1,000/- per month and when the plaintiff was retrenched from employment, the balance was deducted from his terminal dues.

The plaintiff's wife Esther Wanjiku (PW 2) also gave evidence on how she and the family of the plaintiff organized fundraising for the plaintiff's hospital bills out of which they raised Kshs.734,764/- and used it to pay the hospital bills of Kshs.482,976/50 and Kshs.206,021/50 to the MP Shah Hospital. She also confirmed the injuries suffered by the plaintiff that he now needs a lot of care, and due to the injuries he suffers, mood swings and he is unable to perform his conjugal obligations and thus their marital relationship has been effected due to this accident.

Anthony Irungu (PW 5) was travelling with the plaintiff in the same motor vehicle. He narrated to the court how the accident occurred. When the vehicle reached the Ngata Farm, another vehicle emerged from the junction without due regard to other users and thus the collision happened. This witness blamed the driver of the other vehicle for causing the accident.

The above is the brief summary of the plaintiff's case, the 1st, 2nd and 4th defendants did not offer any evidence in defence but the 3rd defendant, James Maina Kamau the registered owner of motor vehicle KSB 084 gave evidence. He was not present when the accident occurred.

I have taken into account the written submissions by Counsel for defendants. A few issues have been raised in those submissions.

Firstly, it was argued that the plaintiff did not prove ownership of KAG 547G as alleged in paragraph 5 of the plaint. The case of Karauri -Vs- Ncheche Nyeri Civil Appeal No.92 of 1996 E.A.L.R [1995 – 1998] was put forward to support the proposition that it is incumbent upon the plaintiff to place before the

court a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the vehicle as proof ownership.

As regards the cause of the accident, Counsel urged this court to ignore the evidence of PW 5 a fellow passenger which he said was not corroborated on who was to blame for the accident. Counsel submitted that since none of the drivers was called to testify, there is no concrete evidence to determine who is to blame between the two drivers. Therefore both drivers should be held equally to blame. (See case of Jimnah Munene Macharia -vs- John Kamau Elera C.A No.218 of 1998)

On the issue of quantum, Counsel urged this court to award the plaintiff Kshs.250,000/- basing this award on the case of Joseph Chege Mwihwani –vs- J.K. Kamunge & Another H.C.C.C No. 2723 of 1988 Nairobi.

The parties agreed on the following issues for determination;

- 1) Was there an accident on 1st February 1998 involving motor vehicles registration number KAG 547G and KSB 084?
- 2) If so, who were the registered owners of the said motor vehicles?
- 3) Was the plaintiff a passenger on motor vehicle registration number KSB 084?
- 4) Who was to blame for the accident involving the said motor vehicle, or how is liability apportioned between the defendants?
- 5) Was the plaintiff injured, if so, what were this injuries?
- 6) Did the plaintiff suffer any special damage, if so, what is the amount?
- 7) Should the plaintiff be awarded any general damages?
- 8) Who should bear the costs of the suit?

Issue number 1 and number 3 have been answered by evidence, and issue number 2 is partly answered in that the 3rd defendant testified and admitted that he is the registered owner of motor vehicle registration number KSB 084.

As regards the ownership, motor vehicle registration number KAG 547G, the 1st and 2nd defendant in their statement of defence have not denied ownership of the motor vehicle KAG 547G. Moreover the 1st and 2nd defendants did not attend court to controvert the evidence that was presented by the plaintiff by way of a police abstract to disapprove ownership of the motor vehicle. The 1st and 2nd defendants defence is a general denial and in this regard, I find that the plaintiff was able on balance of probabilities to prove the ownership of the motor vehicle registration number KAG 547G.

In the present case the decision of Karauri vs Ncheche (Suppra) is distinguishable.

On the issue of liability, the drivers of the motor vehicles did not testify, the evidence of PW 5 was not cogent as to exactly how the accident occurred, save that the collision was caused by the driver of KAG 547G who emerged from the junction. In this case, there was no concrete evidence to determine who is to blame between the two drivers, I would apportion the blame on both drivers equally as it was held in the case of Baker - Vs - Market Harborough Industial Co-operatie Society Ltd [1953] 1WLR 1472 which was approved and adopted by the Court of Appeal in the case of Jimnah Munene Macharia (Suppra) it was held

“Everyday, proof of collision is held to be sufficient to call on the defendant for answer. Never do they

both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers are alive and neither chose to give evidence, the court would unhesitatingly held that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them...”

I now come to the issue of damages both general and special. The plaintiff suffered very severe injuries. Counsel for the plaintiff urged the court to award his client Kshs.1,500,000/- as general damages for pain, suffering and loss of amenities, he relied on the decision in the case of Nakuru H.C.C.C No.664 of 1992 Simon Ndungu Wairungu –vs- John Githinji Itegi & others.

The plaintiff suffered head injuries, multiple limb fractures namely; *fracture of tibia, fibula bilaterally, depressed fracture right parietal bone, long confusion respiratory distress syndrome contusion in cerebrum and brain stem.*

The plaintiff under went intensive treatment and with a result of a foot drop and he had to undergo surgery for removal of plate of the lower leg. The plaintiff in that case was awarded Kshs.1,200,000/- in general damages.

On the part of Counsel for the 1st and 2nd defendant they urged this court to award the plaintiff Kshs.250,000/- and put forward the case of William Mwaniki – vs – Edward Kariuki HCCC No. 4199 of 1993 Nairobi.

The plaintiff sustained comminuted fractures of the right tibia/fibula. He was hospitalized for seven days during which the leg was treated by open reduction and plating using a long sixteen (16) bolt DCP plate. He was discharged on crutches and non-weight bearing plates over the right leg. He walked with crutches for seven months. The injuries healed without permanent incapacity. General damages for pain, suffering and loss of amenities assessed at Kshs.200,000/-.

I am of the view that the figure of Kshs.250,000/- suggested by Counsel for 1st and 2nd defendant is on the lower side. The injuries cited in the above authority are not as severe as the injuries suffered by the plaintiff which have resulted to permanent disability. An award of Kshs.1,000,000/- is reasonable as general damages for pain suffering and loss of amenities and I hereby award the same.

With regard to the issue of special damages, Counsel for the 1st and 2nd defendant urged the court to award Kshs.85,060/- which the plaintiff sought for Kshs.753,051/-. It is trite law that special damages must not only be pleaded but must be specifically proved.

The plaintiff produced medical receipts for Aga Khan Hospital, MP Shah Hospital, doctors’ fees, purchase of wheel chair and hiring of transport. An issue was raised regarding two receipts that were issued in the name of Coffee Research foundation. The evidence of Peter Masaku and Festus Ouma Bolo gave an explanation which I accept as a satisfactory explanation that the Coffee Research Foundation guaranteed the payment and even what they paid for the plaintiff’s in terms of medical bills was recovered from his salary.

Moreover Esther Wanjiku gave evidence of how they raised money by way of an Harambee to offset the medical expenses.

I am satisfied that the plaintiff proved this claim through the evidence adduced by the officials of the Coffee Research Foundation. I will award the plaintiff Kshs.753,051/- which is represented by the receipts that were produced in evidence.

In conclusion, judgment is therefore entered for the plaintiff against the four defendants jointly and severally as hereunder;

(a) *General damages for pain suffering*

