



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil 99 of 2005

PETER WAKA TUNGANI PLAINTIFF

VERSUS

MATHAI TIMBER & HARDWARE SUPPLIES LTD DEFENDANT

JUDGMENT

The plaintiff, **Peter Waka Tungani** instituted this suit against the defendant, **M/s Mathai Timber & Hardware Supplies Ltd** the owners of tractor registration number KAC 895D. He sought for damages for injuries he claimed to have sustained when he fell off and was run over by the same tractor. According to the plaintiff, he alleged that he was employed by the defendant as a tractor loader.

On the 11th day of January 1999, he was lawfully engaged within his duties as a loader. The plaintiff had gone to the forest to collect timber along side the tractor driver and a co-loader. The tractor had a trailer and it was their duty to load the timber from the forest on the trailer. After loading the timber on the trailer, he and his co-loader, **Samuel Kinyanjui Kibe (PW 2)** sat on the mud guard of the tractor which was then driven to the saw mill where he and his co-loader were expected to unload the timber.

On this material day the mudguard broke and the plaintiff and his co-loader fell down, and the tractor crushed the plaintiff on his right hand which was amputated on the shoulder level. The defendant took him to the Provincial General Hospital Nakuru, where he was admitted from 11th January 1999 up to 1st February 1999. He produced the discharge summary as an exhibit and a medical report by **Dr. Aluba** as well as a payment receipt for Kshs.2,000/-. The plaintiff stated that he was nineteen (19) years old by the time of accident. He was right handed and thus he is not able to work. After the accident he said, the defendant retained him for one year and retained him as a guard at the gate but he was dismissed after one year.

Further evidence in support of the plaintiff's case was given by **PW 2** who supported the evidence of the plaintiff in all material aspects. The defendant did not attend court during the hearing and did not offer any defence, although they had filed a defence which generally denied the accident and the particulars of negligence. The defence filed by the defendant also seems to blame the plaintiff for unlawfully traveling in the tractor KAC 895D, engaging the driver of the tractor in idle talk and thereby distracting his concentration. And finally, sitting on the mudguard contrary to the laid down procedure.

According to the medical report, the plaintiff sustained severe injuries that have healed except for occasional pains in the chest which subside with the use of analgesics. He lost his right arm which will remain a permanent feature of disability. He has lost all useful functions of his arm and more so, because he is right handed.

From the above summary of evidence, the issues for determination are principally the issues of liability and the quantum. And since the defendant did not offer any evidence, there is no issue of contribution of

liability.

From the evidence by the plaintiff and his witness, I am satisfied that they were traveling abroad tractor number KAC 895D on the material day within the lawful course of their duties as employees of the defendant and that the plaintiff was injured and sustained the injuries complained about.

I have considered the submissions and the authorities as cited by the Counsel for the plaintiff who has requested this court to award the plaintiff a sum of **Kshs.1,550,000/-** as general damages for the injuries. He put forward the case of **Mulenge vs Deluxe Cosmetics Ltd [1990] K.L.R page 725.** The plaintiff sued the defendant for injuries he sustained in the cause of his employment by the defendant. He was awarded **Kshs.380,000/-** for pain and suffering and for loss of amenities inclusive of the elements of loss of earning. He also put forward the case of **Mariga vs Musila [1984] K.L.R page 251.**

The respondent was a passenger in the appellant's motor car when he was injured in an accident. He had been rendered unconscious for one day and admitted in hospital for six months. He was for sometime totally paralysed in all four limbs. He was awarded for damages **Kshs.600,000/-** for injuries, pain suffering and loss of amenities of life and **Kshs.500,000/-** for lost years.

The defendant having given no evidence, the evidence by the plaintiff is uncontroverted and I therefore find the defendant liable for the accident totally.

On the issue of quantum, the plaintiff sustained a severe crush on the right hand which caused the amputation of the right hand. He was hospitalized for about three weeks at the Provincial General Hospital Nakuru.

I have taken into consideration the authorities cited, the facts of this case and the injuries sustained by the plaintiff in the present case are slightly different the above authorities.

Taking all the circumstances into considerations, I award the plaintiff **Kshs.300,000/-** for pain and suffering and loss of amenities. As regards future earnings, the principles to be considered in determining whether an injured person is entitled to damages were settled in the Court of Appeal case of **Butter –vs- Butter [1984] KLR 225.**

***“A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury
.....***

The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as age. The qualifications of the claimant, his remaining length of working life, his disabilities and previous service.”

The plaintiff was working in the formal sector where he said he was earning **Kshs.1,800/-** per month. He was nineteen years old at the time thus taking a multiplier of twenty one years assuming he would remain activities up to the age of fifty years is reasonable. I would put his monthly income at

Kshs.1,800/- X 12 X 21 = Kshs. 453, 600/-

(less 40%) -181,440/- = Kshs.276,160/-.

Granted that the plaintiff capacity was reduced up to **40%**, as the plaintiff can use the other hand to engage in some work. I would award **Kshs.2,000/-** for the special damages, judgment is therefore entered for the plaintiff as follows: -

Pain and suffering and loss of amenities Kshs.300,000/-

