



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Civil Case 51 of 2002

DESMOND KIPRUTO (*suing thro' his father and next friend*)

DANIEL K. NG'ENO.....PLAINTIFF

VERSUS

BRAZILLE SIMARO MUSUMBA.....DEFENDANT

JUDGMENT

The plaintiff Desmond Kipruto, a minor suing through his father and next friend Daniel Kipkemoi Arap Ng'eno, has sued the defendant Brazille Simaro Musumba seeking to be paid damages, both special and general on account of the injuries he alleges to have sustained when motor vehicle registration No. KAM 832X (*herein after referred to as the said motor vehicle*) driven by the defendant hit him as he was walking along the Kericho- Nakuru road at Kedowa area on the 9th of April 2002. The plaintiff blames the defendant solely for causing the said accident which resulted in the plaintiff sustaining serious injuries which he particularized in his plaint. The plaintiff also particularized the breach of duty owed to him as a pedestrian by the defendant who is said to have negligently driven the said motor vehicle that he caused it to veer off the road and collide with the defendant who was lawfully walking along the said road.

The defendant filed a defence. He denied that he had caused the said accident. He averred that it is the plaintiff who was negligent in that he walked on the said road without due care and attention to other road users and particularly the defendant's motor vehicle. He particularized what he considered to be the negligent conduct on the part of the plaintiff. He further pleaded, in the alternative, that the said accident was inevitable or unavoidable. He put the plaintiff to strict proof on his claim that the defendant was negligent and further on the particulars of his injuries. The plaintiff joined issues with the defendant when he filed a reply to the defence.

The plaintiff and the defendant agreed by consent to settle the issue of liability. Liability was apportioned as between the plaintiff and the defendant at the ratio of 80:20 in favour of the plaintiff. After the preliminaries were concluded, this case proceeded to hearing before this court. The plaintiff called one witness, his next friend and father Danie Kipkemoi Ng'eno. The plaintiff was in court when his father testified on his behalf. He testified that the plaintiff was now aged 14 years. At the time of the accident, the plaintiff was aged 10 years. He testified that the plaintiff was hit by the defendant's motor vehicle when he was grazing cattle next to the road. He testified that the defendant's motor vehicle had lost control, veered off the road and hit the plaintiff. The plaintiff was injured on his right leg. He was first admitted at Kericho District hospital before he was transferred to Tenwek mission hospital where he was admitted for some time. Due the serious nature of the injuries that the plaintiff sustained on the said right leg, the doctors had no option but to amputate it. The discharge summary was produced as *Plaintiff's exhibit No.1*. The treatment records at Tenwek hospital were produced as *Plaintiff's exhibit No.2*. The

Witness paid Ksh.26,414/= to the hospital where the plaintiff was treated. Receipts produced as *Plaintiff's exhibit No.3*. He paid a further sum of Ksh.33,111/=, Ksh.481/=, and Ksh.300/= (*produced as plaintiff exhibit No. 4 (a) (b) and (c)*). The total sum paid was Ksh.33,899/=.

He reported the accident to the police. He was issued with a P3 form which was duly filled and produced as *Plaintiff's exhibit No.5*. Dr. Masyuki prepared a medical report on the injuries that the plaintiff had sustained (report produced as *Plaintiff's exhibit No.6*). He charged Ksh.3,000/= to prepare the report (*produced as Plaintiff's exhibit No.7*). The plaintiff was further seen by Dr. Ogango who prepared another medical report (produced as *Plaintiff's Exhibit No.8 (a)* with the receipt of Ksh.5, 000/= produced as *Plaintiff's exhibit No. 8 (b)*). He testified that it was recommended that the plaintiff be fitted with an artificial leg which would cost Ksh.80,000/= to purchase. (*Invoice produced as Plaintiff's exhibit No.9*) He asked the court to award the plaintiff compensation as prayed.

He conceded that the plaintiff was leading a normal life as a standard 7 pupil at Kipchimchim boarding primary school. He further conceded that the plaintiff had not told him what he would like to be when he grew up. He reiterated that the plaintiff's life had not been adversely affected by the accident other than the fact that his mobility had been restricted. He testified that the plaintiff had been referred to see a Dr. Malik by the defendant, who prepared a medical report on the injuries that he had sustained. The medical report was produced as *Plaintiff's exhibit No.10*. Although Dr. Malik had recommended that the plaintiff be fitted with an artificial limb by the Lions club, he testified that to date the plaintiff had not been fitted with the said artificial limb. The plaintiff then closed his case. The defendant, having no evidence to offer, also closed his case. It was agreed by consent that written submissions be filed by the parties to this suit. Both the plaintiff and the defendant filed written submissions after the close of the case.

The issue for determination by this court is one; what is the quantum as to damages that should be paid to the plaintiff? I have read the pleadings filed by the parties to this case in support of their respective positions. I have also considered the evidence that was adduced in court by the plaintiff's witness and the written submissions that were presented to the court by the plaintiff and the defendant. Liability was compromised by consent between the plaintiff and the defendant. It was agreed that the plaintiff was to bear 20% contributory negligence while the defendant was to shoulder 80% liability. The evidence adduced by the plaintiff on quantum was uncontroverted. The plaintiff's father who is also his next friend testified that while the plaintiff was herding cattle off the road along the Kericho – Nakuru road near Kedowa, the defendant who was driving along the said road, lost control of the said motor vehicle, veered off the road and hit the plaintiff thereby causing him to sustain serious injuries. The plaintiff was immediately taken to Kericho hospital and later to Tenwek Mission hospital where he was admitted. His right leg which had been crushed could not however be saved. It had to be amputated.

According to the medical report which was prepared by Dr. Sammy Masyuki, the plaintiff had sustained severe crush injury of the right lower limb at the thigh which led to an emergency amputation above the knee. The plaintiff had further sustained a simple fracture of the left femur. He opined that the plaintiff would require an artificial limb to assist him in walking. The said artificial limb would have to be changed each time the plaintiff grew up. He stated that the plaintiff suffered from phantom limb phenomenon (*paraesthesia*) to the right leg which is usually a complication in any amputation. He stated that complete healing was expected in respect of the left limb although it had some slight bowing deformity. Dr. Ogango, a consultant orthopaedic and trauma surgeon agreed with the assessment of the injuries as opined by Dr. Masyuki. Similarly, Dr. Malik agreed with the opinion of Dr. Masyuki save that he stated that the artificial limb could be supplied to the plaintiff by the Lions club.

The plaintiff submitted that he should be awarded the sum of Ksh.2,000,000/= for pain suffering and loss of amenities. He relied on the decisions of **Kericho HCCC No.56 of 2002 Charles Kipkorir Ruto vs. Fahari building and Civil Engineering & another, Kericho HCCC No.43 of 2003 Charles Kipkurui Korir vs Paul Sang, Kericho HCCC No. 32 of 2004 Francis Randiki Okaro vs Akamba Public Road Services & Another and Nairobi HCCC No.495 of 1998 Samuel Wanguru Njoroge vs Kenya Bus Services Ltd. (unreported)**. In the above authorities, the plaintiffs who had sustained amputated injuries of their legs were awarded between Ksh.1,000,000/= and Ksh.1.300,000/= as general damages for pains suffering and loss of amenities.

On the other hand, the defendant submitted that the plaintiff should be awarded Ksh.600,000/= as damages for pain suffering and loss of amenities. He relied on the following three decisions, **Ugenya Bus Service Ltd vs Gachoki [1986] KLR 567**, **Kigarigari vs Aya [1985] KLR 273** and **Kenya Bus Service Ltd. vs Samuel Wanguru Njoroge, CA Civil Appeal No. 133 of 2001 (Nairobi) (unreported)** where the plaintiffs were awarded between Ksh.200,000/= and Ksh.500, 000/=.

I have carefully considered the submissions made as regard the comparable awards made by courts of similar or higher jurisdiction. In the circumstance of this case, I have taken into account the fact that the plaintiff is a child and whose future has be circumscribed by the fact that he cannot use both his lower limbs since one of the limbs has been amputated. I have also put into account the fact that the type of profession or career that the plaintiff may choose would be restricted by the reduced mobility caused by the loss of his right leg. I have also not lost sight of the fact that the plaintiff broke the femur of his left leg which has healed but is now bowed. Doing the best that I can in the circumstances of this case, I assess the general damages payable to the plaintiff for pain, suffering and loss of amenities to be Ksh.1,500,000/=.

As regard special damages, although the plaintiff testified that he had incurred special damages when he was attended to by the hospitals when he was admitted after the accident, and although he produced receipts which confirmed that he actually paid the medical bills amounting to a total of Ksh.86,727/= and further, although the plaintiff proved that he paid a total sum of Ksh.8,000/= for the medical reports to be prepared by the doctors who saw him with a view of testifying in this case, unfortunately the plaintiff only pleaded the sum of Ksh.80,000/= as medical expenses and the sum of Ksh.3,000/= as the cost of preparing the medical report. I will thus award him Ksh.83,000/= special damages which was pleaded. It is trite law that where a party fails to plead the particulars of special damages and quantifies it, he cannot be heard to adduce evidence to prove or establish what he did not plead. The plaintiff is thus awarded Ksh.83,000/= special damages.

The plaintiff did establish that he would require an artificial leg to use in the place of the leg which was amputated. Dr. Masyuki in his report stated that the artificial leg would have to be changed each time the plaintiff outgrew the old artificial leg. I would thus award the plaintiff the sum of Ksh.60,000/= which the plaintiff pleaded in his plaint as the cost of the artificial leg. Although the plaintiff proved that the artificial leg would cost

Ksh.80,000/=, this court would only adopt the amount which the plaintiff pleaded in his plaint.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as hereunder;

(i) On liability

Liability was apportioned between the plaintiff and the defendant at the ratio of 80:20. The defendant shall bear 80% liability whilst the plaintiff shall assume 20% contributory negligence.

(ii) On quantum

(a). General damages for pain,

suffering and loss of amenities ... Ksh. 1,500,000

(b). Special damages Ksh. 83,000

(c). Cost of the artificial leg Ksh. 60,000

SUB- TOTAL Ksh. 1,643,000

Less 20% contribution Ksh. 336,600

TOTAL Ksh. 1,346,400

(d) The plaintiff shall have the cost of the suit.

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

DATED at KERICHO this 2nd day of November, 2006.

L. KIMARU

JUDGE