



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 50 of 2003

JOSEPH BARAZA JUMAPLAINTIFF

VERSUS

JOHN ODUORDEFENDANT

JUDGMENT

1) PROCEDURE

On the day set down for hearing 14.2.05 this court directed that the defendants be reserved with a fresh hearing notice as they claimed that the notices for hearing was too short (order 9b r 3(b) CPR. The plaintiff complied and on 16.5.05 the case was called out after due fresh service on the defendants advocates. They were absent and suit proceeded for trial under order 9b r 3(a) CPR. The plaintiff complied with order 12 r 2 (3) CPR on serving the defendant with a notice to admit documents.

2) BACKGROUND

The plaintiff Joseph Barasa Juma is a business man. On the material day of the 6.5.00 he had bought a substantial amount of goods for his business and hired the defendants motor vehicle Registration KAH 282 G to ferry those goods from Kisumu to Fanyula. The defendant John Oduor was the registered owner of the motor vehicle and operated a bus service business.

As the plaintiff travelled with the driver, a turn boy and his goods (there being no other passenger) the driver of the said vehicle was over speeding. No warning from the plaintiff could assist him to slow down. The said vehicle lost control and “veered off” the road along Kisumu-Busia road and self accident was caused.

The plaintiff found himself in hospital. He had lost consciousness and after 2 days was discharged.

He decided to sue the defendant in the High Court of Kenya in Nairobi instead of Kisumu as he stated that he did not trust the defendant. The defendant entered appearance and filed defence denying that the accident occurred nor that the plaintiff was a fare paying passengers.

Who then is to blame for this accident on liability?

II LIABILITY

It is noted that this suit should have actually been brought under contract as the plaintiff had privately hired the vehicle alone. Nonetheless it is a special circumstances as it falls under both contract and

TORT. Under a claim of TORT the agent and or driver of the registered owner must show that he took diligent and reasonable care to ensure that the said motor vehicle is driven well. A duty of care is owed to the passenger that are being driven in the vehicle.

The defendants agent drove in an excessive speed causing a self accident. I would in the instance find that the defendant are to blame for this accident.

I would compute liability at 100%.

III QUANTUM

a) General Damages

i) Pain and suffering

The plaintiff lost consciousness and was admitted to hospital for 2 days, when he was discharged.

He was examine by:-

Professor J.O Mulimba

MB ChB.M.Med,FRCS

Consultant Orthopaedic and trauma Surgeon

Report date 27.1.03

The said doctor found the following injuries sustained

Head:-

- i) Cut on the left parietooccipital region

- ii) Broken left

Upper incisor tooth

Pelvis i) Urethral rupture

Left shoulder - dislocated

The acromioclavicular joint

Lumbar spine - Numbness right Lower limb (but doctor unsure what injury was sustained)

The doctor states that he had no fractures to the skull. There was a fracture to the lateral end of the clavicle which had malunited. The lumbar spine had a loss of height of L4.

The pelvis was not fractured nor dislocated. The doctor was of the opinion that apart from the malunion of the clavicular fracture the plaintiff recovered well. The urethra that was ruptured was repaired well. He assess the injuries at 20% disability.

The plaint on the other hand, that was filed in the same year the report was done, indicates that the plaintiff sustained the following: injuries:-

a) deep cuts on the head

- b) abdominal pains due to broken ribs
- c) fracture on the legs

The above injuries are completely different from what the doctor found. A party is bound by their pleading. The court finds that the plaintiff has proved he sustained cuts to his head. He was in severe pain. I would award a minimal award of Ksh.50,000/-.

ii) Special Damages

The plaintiff pleaded the loss of:-

- a) Police abstract Ksh.100/-

No such receipt was produced before court.

3) Good lost in accident Ksh.140,000/-

The plaintiff tendered cash sale of Ksh.84,050/-, 27060 and 32,620/- totaling to Ksh.143,730/-. He requires to obtain a receipt and complies under the stamp duty act. I find as he pleaded Ksh.140,000/- he is not permitted to claim over and above this figure.

This claims subject to compliance of section 20 of the Stamp Duty Act.

- b) Medical expenses Ksh.20,000/-

A cash receipt totally Ksh.19,515/- was tendered.

I would notice that the plaintiff having pleaded Ksh.20,000/- but proved Ksh.19,515/- the sum of Ksh.19,515/- can only be claimed.

I would award Ksh.19,515/-.

- c) Medical report Ksh.3,500/-

I see no receipt tendered for the medical fee.

I accordingly dismiss this claim

I enter judgment for the plaintiff on the proved sum.

In Summary

- 1) Passenger male adult aged 35 years in 2000
- 2) Injuries: - conflicting

Pleaded

- i) Head injury
- ii) Abandoned pain due to broken ribs
- iii) Fractures of leg –

According to Doctor

- i) Cut left parietooccipital region
 - ii) Broken left upper incisor tooth
 - iii) Urethral rupture
 - iv) Dislocation acromioclavicular joint
 - v) Right lower limb numbness
 - 3) Liability 100% against the defendant
 - 4) Quantum:
 - A) General damages
 - i) Pain and suffering minimal award Ksh.50,000/-
 - B) Special damages
 - i) Police abstract Nil not proved
 - ii) Goods subject to stamp duty
 - iii) Medical expenses Ksh.19,515/-
 - iv) Medical report – nil not proved
- Total Ksh.19,515/-

(Ksh.140,000/- subject to stamp duty act).

I award the cost of this suit to the plaintiff.

I award interests on proved special damages from the date of filing suit. Interest on general damages from the date of this judgment.

Dated this 19th day of May 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Wetangula & Co. Advocates for the plaintiff

Madialo & Co. Advocates for the defendant