



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 467 OF 1995

ALEXANDER KIPKOECH KOSGEY.....PLAINTIFF

VERSUS

FREDRICK TOWET.....1ST DEFENDANT

STEPHEN SOI.....2ND DEFENDANT

JACKSON MARITIM.....3RD DEFENDANT

JOSEPH KIPKORIR MUTAI

T/a NGERERIT DAIRY FARMERS.....4TH DEFENDANT

KABARAK LIMITED.....5TH DEFENDANT

JUDGMENT

The plaintiff herein filed suit against the defendants jointly and severally seeking to be compensated for the injuries that he allegedly sustained when motor vehicle registration number KWZ 586 and a Combine Harvester registration number KAA 253K were involved in an accident and collided thereby causing the plaintiff to sustain serious injuries. The plaintiff blames both the drivers of motor vehicle registration KWZ 586 and Combine Harvester registration number KAA 253K for causing the said accident. The 1st, 2nd, 3rd and 4th defendants duly entered appearance and filed a defence denying that their motor vehicle registration number KWZ 586 was to blame for the said accident. The 1st to 4th defendants blamed the driver of the Combine Harvester for causing the said accident. The 5th defendant also filed a defence. It denied that its Combine Harvester registration number KAA 253K caused the said accident. Instead the 5th defendant blamed the driver of motor vehicle registration number KWZ 586 for the said accident. The 1st, 2nd, 3rd and 4th defendants were served to attend court during the hearing of the case. However they choose not to attend court during hearing. This court was satisfied that the said defendants had been properly served. It ordered the case to proceed, the absence of the 1st to 4th defendants notwithstanding.

PW1 Dr Wellington Kiamba testified that on the 7th of July 2003 he examined the plaintiff with a view of preparing a report of the injuries that the said plaintiff had sustained. According to the history that he obtained, the plaintiff had been involved in a road traffic accident on the 19th of November 1993. PW1 also perused the medical records that were written when the plaintiff was undergoing treatment. He saw the treatment cards from Tenwek Hospital, the Physiotherapy department and the P3 form filled by Dr Sittonik on the 8th of March 1993. PW1 also physically examined the plaintiff. His examination revealed that the plaintiff had paresis of the lower limbs. The plaintiff also had claw hands. There was a reduction of the muscle power in the lower limb and muscle tone. There was tenderness on the posterior aspect of the neck. He was of the opinion that the spinal injury that the plaintiff has sustained had resulted in

paresis and atonic bladder. PW1 testified that nothing could be done to restore the full functions especially of the lower limbs. He assessed the degree of permanent disability to be 75% under the Workmen's Compensation Act. The report was produced as plaintiff's exhibit No. 1. PW1 was paid Kshs 5,000/= to prepare the report. The receipt of Kshs 3,000/= which he issued when part payment was made was produced as plaintiff's exhibit No. 2. He charged Kshs 5,000/= to attend court (receipt produced as plaintiff's exhibit No. 3).

PW1 conceded that he prepared the report from the medical records that were availed to him by the plaintiff. He admitted that from the medical records the plaintiff last saw a doctor in May 2002. He reiterated that the plaintiff was discharged from the clinic when no improvement of his condition was noted. He testified that the plaintiff was fifty nine years when the accident occurred and sixty nine years when he was examined by PW1. He conceded that the age of the plaintiff contributed to a slight degree to the slowness of the healing process. It was his testimony that the injuries in question reduced the life expectancy of the plaintiff by quickening his aging process. PW2, the plaintiff testified that on the 19th of November 1993 he was travelling in motor vehicle registration number KWZ 586 from Nakuru to Kericho. The time was between 8.15 p.m. to 8.30 p.m. when the accident occurred. The motor vehicle he was travelling in (KWZ 586) collided with the Combine Harvester at Salgaa. The plaintiff testified that he lost consciousness upon impact. It was his testimony that he had fallen down and injured his back during the accident. He was first taken to the Provincial General Hospital and later taken to Nakuru Nursing Home. He was again transferred to Tenwek Mission Hospital for further treatment. After the accident a report was made to the police. The plaintiff was issued with a P3 form. The P3 form which was duly filled by the doctor was produced as plaintiff's exhibit No. 4. The police abstract report was produced as plaintiff's exhibit No. 5.

The plaintiff testified that he paid for his medical treatment (bundle of receipts produced as plaintiff's exhibit No. 6). The total amount paid was Kshs 19,892/=. He testified that he was seeking to be paid compensation for the injuries that he had sustained as he could not do any work since the accident. He further testified that he was 70 years old. He stated that the motor vehicle he was travelling in was being driven by one Mutai and was owned by a group called Ngererit Dairy Farmers. It was his testimony that at the time of the accident he was sitting in the front cabin near the left door. He suddenly saw the combine harvester being driven on their lane and immediately thereafter the accident occurred. He said that the Combine Harvester was bigger than the road. It was his testimony that although the driver could see the Combine Harvester, he could not see its full dimensions. There were no lights on the Combine Harvester which could have given an indication to the driver of the motor vehicle he was travelling in the full dimensions of the said Combine Harvester especially as the same was being driven on the road at night. He further testified that although the driver of the said motor vehicle tried to take evasive action by driving off the road, the Combine Harvester was too close thus making the accident inevitable. The plaintiff testified that he did not know how the motor vehicle could have overtaken the Combine Harvester. Although he admitted that he did not know the driver of the Combine Harvester, he stated categorically that the said Combine Harvester was owned by the 5th defendant. He testified that he did not know if any one was charged with a traffic offence after the said accident. He blamed the driver of the Combine Harvester for the accident. He stated that he had sued the driver of the motor vehicle that he was travelling in so that he could be a witness in the case. He reiterated that the accident took place on the lane which the said motor vehicle was being driven at. He further testified that the lights of the Combine Harvester were in the middle of the Harvester.

PW3 Joseph Kipkorir Mutai testified that he was the driver of motor vehicle registration number KWZ 586. It was his testimony that on the 19th of November 1993, as he was driving the said motor vehicle along Nakuru-Kisumu road near Salgaa, the said motor vehicle was involved in an accident with a Combine Harvester registration number KAA 253K. It was at night. PW3 had switched the lights of his motor vehicle to dim as there were other motor vehicles coming from the front. He stated that he saw the Combine Harvester when he was about ten to fifteen metres to it. He tried to avoid colliding with it by driving off the road but due to the short distance, the blade of the Combine Harvester collided with the motor vehicle as a result of which he sustained injuries and lost consciousness.

He confirmed that the plaintiff was also injured during the accident. At the time the accident occurred, he

stated that he was driving on his right lane. He denied that he was driving on the wrong lane. At the time the accident occurred, he reiterated that he was driving the motor vehicle at about 40 KPH. He testified that when he saw the Combine Harvester, he tried to slow down the vehicle and go off the road but he was unsuccessful as the distance was too short. He further testified that the Combine Harvester had covered part of his lane as he was driving the said motor vehicle. He stated that he did not see the Combine Harvester at the time as he had been blinded by the lights of an on coming motor vehicle. He then decided to dim his lights and drive the said motor vehicle slowly. He denied that he was driving the said motor vehicle at a very high speed. He blamed the Combine Harvester for causing the accident. He denied that he had colluded with the plaintiff to give false testimony. He stated that he broke eight ribs during the accident. He reiterated that it was the driver of the Combine Harvester who caused the accident. The plaintiff then closed his case. The 5th defendant closed its case without offering any evidence. The plaintiff and the 5th defendant agreed by consent to file written submissions on liability and quantum. Both the plaintiff and the 6th defendant filed their submissions. I have read the pleading filed in this case. I have also carefully considered the evidence that was adduced in this case. I have also read the written submissions filed together with the decided cases that the parties have relied on. The issue for determination by this court is who between the owners of motor vehicle registration number KWZ 586 and motor vehicle registration number KAA 253K was to blame for the said accident that occurred on the 19th of November 1993? The other issue for determination is what will be the quantum as to damages payable to the plaintiff, if this court finds liability in his favour? In the pleadings filed in court, the plaintiff blames both the drivers of motor vehicle registration number KWZ 586 and motor vehicle registration number KAA 253K for the injuries that he sustained when the said motor vehicle collided. In their defences the 1st to 4th defendants (the owners of motor vehicle registration number KWZ 586) blamed the driver of the Combine Harvester registration number KAA 253K for the said accident. On its part the 5th defendant (the owner of the Combine Harvester registration number KAA 253K) blamed the driver of motor vehicle registration number KWZ 586 for causing the said accident. As stated at earlier in this judgment, although the 1st to 4th defendants were served to attend the hearing of this case, they did not attend court. The 5th defendant did not call any witnesses to support the averments made in its defence.

The only evidence that was put before this court for the purposes of determining liability was that of the plaintiff. According to the plaintiff (PW2) he was a passenger in motor vehicle registration number KWZ 586. On the material day, the said motor vehicle was being driven from Nakuru to Kericho. It was at night. When the said motor vehicle reached a place called Salгаа, it was involved in an accident with a Combine Harvester registration number KAA 253K owned by the 5th defendant. The plaintiff testified that the said accident occurred between 8.15 pm and 8.30 pm. The driver of the said motor vehicle he was travelling was driving the motor vehicle on his lane. The accident took place on their lane. He testified that the harvester was bigger than the road. He stated that although the driver of motor vehicle registration number KWZ 586 saw the Combine Harvester he could not estimate its full dimensions as the lights of the Combine Harvester were in the middle of the said Combine Harvester. He stated that it was the driver of the Combine Harvester who caused the accident as he was driving the said vehicle at night without giving any warning to other road users of its full dimensions.

PW3, the driver of motor vehicle registration number KWZ 586 testified that he was driving the said motor vehicle on its lane. Immediately before the accident occurred, he had dimmed the lights as there were many oncoming vehicles. One of the oncoming motor vehicles had temporarily blinded him. It was his testimony that he realised that the oncoming vehicle was a Combine Harvester when he was about ten to fifteen metres from it. He reduced the speed of his motor vehicle to about 40 km/h. He also attempted to drive the motor vehicle off the road in a bid to avoid the collision. He was unsuccessful because he stated that the two motor vehicles were too close. He testified that the accident did occur on his lane. He blames the driver of the Combine Harvester for the accident.

I have evaluated the evidence that was adduced in this case as regards the circumstances under which the accident took place. The evidence adduced by the plaintiff was not controverted. Certain facts emerged from the said evidence which makes the finding of this court on who was to blame for the said accident inevitable. The driver of the combine harvester was driving the said combine harvester at night on a highway. There was no indication that the said combine harvester was under escort by another motor

vehicle which could have warned the other road users of the dimensions of the said combine harvester. The plaintiff did testify that the lights of the combine harvester was in the middle of the said harvester. The blades of the combine harvester was thus not visible to other road users especially if they had dimmed their lights as was done by PW3. I think there is a traffic law that mandates owners of motor vehicles with wide dimensions to have the said motor vehicles driven under escort. Such motor vehicles are prohibited from being driven on the highway at night. In the circumstances of this case, it is evident that the driver of the combine harvester was to blame for the accident. He ought not to have been driving the said combine harvester on a highway at night. I therefore find the 5th defendant, the owner of the said combine harvester, solely liable for the said accident. Liability for the said accident attaches to it at 100%.

On quantum, according to the evidence of Dr Wellington Kiamba (PW1) the plaintiff had sustained severe cervical spine injury that resulted in the subluxation of the C5-C7 resulting into quad-paresis and atonic bladder. The injury had resulted in the plaintiff sustaining a paresis of the lower limbs. The plaintiff also had claw hands. There was reduction in the muscle power in the lower limb and muscle tone. There was tenderness on the posterior aspect of the neck. The plaintiff had undergone treatment at various hospitals. The normal functions of his lower limbs could not be restored. He assessed the degree of permanent disability to be 75% under the Workmen's Compensation. The medical report was produced as plaintiff's exhibit No. 1. In the said report, PW1 opined that the spinal injury had resulted into quad-paresis and atonic bladder. Physiotherapy was done for a prolonged period at various hospitals and muscle power and tone restored in the upper limbs. At the time of examination (on 7th of July 2003) the plaintiff still had paresis of the lower limbs and could not walk without support. Attempts to restore the full functions of the lower limbs had failed. The plaintiff has submitted that he should be awarded Kshs 3,000,000/= as general damages. He had relied on two cases in support of his submissions; Joel Kipruto Chepkwony –versus- Ager Kipkosgey Philemon Nakuru HCCC No. 333 of 1999 (unreported) and Magdaline Chebet Sigei –versus- Joseph Njogu Mwaura Nakuru HCCC No. 183 of 1999 (unreported).

On its part the 5th defendant has submitted that the plaintiff should be awarded Kshs 1,500,000/=. It has relied on the case of Nichodemus Owuor Ondondo –vs- Chemelil Sugar Co. Ltd. Nairobi HCCC No. 3217 of 1997 (unreported). I have read the said decisions. There is no doubt that the plaintiff sustained serious injuries in the said accident that resulted in his undergoing medical treatment for a very long time. His bodily functions were drastically reduced as a result of the said injuries. The plaintiff was no longer a normal human being after the said accident. He could no longer walk without support, nor could he use his limbs normally. Taking into consideration all the factors in this case, especially the age of the plaintiff, and doing the best that I can, I will assess the general damages to be paid to the plaintiff for pain, suffering and loss of amenities at Kshs 2,000,000/=.

The plaintiff produced receipts proving that he had paid Kshs 19,892.00 to be attended to at various health facilities for treatment for the injuries he sustained in the said accident. I will also award him Kshs 8,000/= that he paid to Dr Kiamba to prepare the medical report and secure his attendance in court.

In premises judgment is entered for the plaintiff against the 5th defendant as hereunder:

(i) On Liability

The 5th defendant shall bear 100% liability.

(ii) On quantum

(a) General damages for pain, suffering and loss of amenitiesKshs 2,000,000.00

(b) Special damages ... Kshs 27,892.00

TOTAL 2,027,892.00

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest shall be applied at the usual court rates.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE