



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 221 OF 2002**

(Formerly Kitale HCCC No. 149 of 2000)

JOB KENYASA MIRANYI.....PLAINTIFF

VERSUS

EZEKIEL TOCHI.....1ST DEFENDANT

EAST AFRICAN BREWERIES LTD.....2ND DEFENDANT

JUDGMENT

The plaintiff, Job Kenyansa Miranyi filed this suit against the defendants, Ezekiel Tochi and Kenya Breweries Ltd seeking to be paid damages on account of injuries that he sustained on the 4th of September 1999 when motor vehicle registration number KAD 258W, which he was travelling in as a lawful passenger was involved in an accident along Molo-Kibunja road. The plaintiff stated in his plaint that as a result of the said accident he was rendered a paraplegic and could no longer undertake the normal functions of life. The defendants filed a defence denying the plaintiff's claim. However on the 21st of September 2004, the plaintiff and the defendants entered into a consent whereby they compromised the suit on liability. Judgment was entered on liability in favour of the plaintiff and as against the defendants at the ratio of 80:20 i.e. the defendants were to bear 80% liability whilst the plaintiff was to bear 20% liability. The issue in dispute that was to be determined by the court only related to issue of quantum of damages.

On the 11th of November 2004, the plaintiff and the defendants recorded a further consent with a view of reaching a conclusion of the issues in dispute in this case. The consent entered was in the following terms:-

“By consent judgment for general damages for pain and suffering be and is hereby entered for the plaintiff against the defendant in the sum of Kshs 1.5 million subject to the agreed contribution.

The following documents to be produced without calling their makers

(i) Police abstract report dated the 6th of June 2000 (plaintiff's exhibit No. 1).

(ii) P3 form dated the 6th of July 2000 (plaintiff's exhibit No. 2).

(iii) Letter written by the 2nd defendant dated the 20th of November 1996 (plaintiff's exhibit No. 3).

(iv) Letter dated the 27th of December 1989 (plaintiff's exhibit No. 4).

(v) Letter dated the 21st of June 2000 (plaintiff's exhibit No. 5).

(vi) Copy of the payslip for April 2000 (plaintiff's exhibit No. 6).

(vii) Copy of personal accident claim form dated the 12th of December 1999 (plaintiff's exhibit No. 7).

(viii) Medical report by Dr Owinga dated the 21st of December 2001 (plaintiff's exhibit No. 8).

(ix) Medical report dated the 15th of March 2004 by Dr. Z. Gaya (defendant's exhibit No. 1).

The amount of Kshs 238,014/= paid under the Workmen's Compensation Act to the plaintiff, the sum of Kshs 50,000/= being costs in Nakuru HCCC No. 33 of 2002 be deducted from the final award.

This case be fixed for hearing on the 29th of November 2004 to cover the issue of loss of earning which is disputed and or denied. Oral submissions be made on the point. Thereafter the court to determine the issue of loss of earnings. The costs to be awarded to the plaintiff."

From the foregoing consent between the parties to this suit the only issue that was left for determination by this court was the issue whether or not the plaintiff was entitled to be paid loss of future earnings. If the court found that the plaintiff is entitled to loss of future earnings, what will be the quantum of damages under the said head?

According to the plaintiff (who testified as PW1) at the time of the accident, he was employed as a Field Laboratory Technician in the department of Barley growing by the 2nd defendant. He remembered that on the 4th of September 1999 while he was travelling on official duty on motor vehicle registration number KAD 258W along Nakuru-Eldoret highway near Molo, the said motor vehicle was involved in an accident when the driver lost control as he attempted to negotiate a corner. The motor vehicle hit a tree. The plaintiff was thrown out of the motor vehicle. He lost consciousness. He regained consciousness at the War Memorial Hospital Nakuru on the following day. He was x-rayed and airlifted to Aga Khan Hospital Nairobi. He learnt that his spinal cord had been fractured leaving him paralysed from the chest downwards to his legs. As a result of the accident the plaintiff could not walk, control his urine, or bowel movement. From the Aga Khan Hospital he was moved to the Spinal Injury Hospital, Nairobi. He was admitted in the two hospitals from the 5th of September 1999 to the 28th of November 2000. He was later returned to Aga Khan hospital where he underwent an operation to insert a metal plate to stabilize his backbone. He was admitted for forty five days.

It was his testimony that he was retrenched from employment on the 30th of June 2000 while still at the hospital. Dr Owinga prepared a medical report on the health status of the plaintiff. The report was dated the 31st of December 2001 (produced as plaintiff's exhibit No. 8). The plaintiff further testified that at the time of the accident he was 37 years old. He was examined by Dr. Z. Gaya, under the instructions of the defendant. A medical report was prepared. The said report dated the 15th of March 2004 was produced in evidence as defendant's exhibit No. 1. The plaintiff testified that he was retrenched as a consequence of the accident. At the time of his retrenchment he was earning Kshs 20,995/27. The payslip for the month of April 2000 was produced as the plaintiff's exhibit No. 6. He stated that since the accident, he has not been engaged in any gainful employment. He further testified that the retirement age at the 2nd defendant company was between sixty to sixty five years. He was terminated from employment when he was aged 38 years. According to him, he had lost 22 years which he could have been in gainful employment were he not injured in the accident. The plaintiff was seeking to be awarded the following reliefs; special damages, general damages, loss of amenities, lost earning, future nursing and medical expenses and costs of the suit.

He reiterated that he was claiming lost future earnings because the accident cut off his income while he was still at a tender age. He stated that the welfare of his family (*i.e. shelter, food and education*) was not catered for. He testified that it was difficult for him to engage in any economic activity as he could not lift heavy things. In his condition, he was forced to use devices to control his urine and bowel movement. It was his further testimony that he needed someone to constantly take care of him to prevent wounds from developing. He also required to attend physiotherapy and other medical interventions. The plaintiff reiterated that he had raised the issue of special damages in his plaint as indicated at page 2 of Dr Owinga's report which stated that he would be on permanent bed life. He conceded that the fact that he would require physiotherapy was not mentioned in the said report. He admitted that he had not indicated the cost of future nursing care in his plaint.

He further did not have any document to show that he was to be in employment until he reached the age of between 60-65 years when he was to retire. He admitted that the letter of termination indicated that he was retrenched with other employees. He conceded that the 2nd defendant could retire or retrench its employees before they reached the retirement age of 60 years. He reiterated that he was employed as a laboratory field technician. His work entailed testing the suitability of seeds, analysing soils, fertilizers and so forth for barley growing. He conceded that testing of chemicals did not require someone to travel or move around. He however stated that working in a laboratory for someone of his condition would be difficult if not altogether impossible.

He testified that his salary was Kshs 20,995/27. His net pay at the time of his retrenchment was Kshs 15,498/=. He paid the Kshs 3,099 as Pay As You Earn (P.A.Y.E.). His gross salary was Kshs 26,302/30. He also paid National Hospital Insurance Fund (N.H.I.F.) and National Social Security Fund (N.S.S.F.) dues. A sum of Kshs 7,705/= was deducted from his salary on account of a loan that he had taken from his Co-operative Society. He stated that he was now being treated at home. His legs needed constant exercise. He reiterated that it would be difficult for him to work as a technician in his condition but he could do any other work. He repeated that the medical report prepared by Dr Owinga accurately portrayed the injuries that he had sustained. He stated that he was still undergoing nursing at home. The plaintiff closed his case.

DW1 Jimmy Lenjo Mwakisha testified that he was the Human Resources Manager of the 2nd defendant. He testified that the plaintiff used to work for Kenya Breweries Ltd, a subsidiary of the 2nd defendant. He stated that the plaintiff left employment in the year 2000 when he was retrenched with other employees. It was his testimony that over two thousand employees were retrenched between 1995 and 2001. He stated that the plaintiff was retrenched when the 2nd defendant made a decision to reduce its employees and not because the plaintiff had been injured. According to plaintiff's exhibit No. 5 (the termination of employment letter) the plaintiff was paid for early retirement. He was paid Kshs 554,934/40 gross. After the amount was taxed he was paid Kshs 326,386/37.

DW1 stated that the plaintiff did accept the money vide the payment voucher dated the 28th of August 2000 (produced as defendant's exhibit No. 2). DW1 produced a list of employees who were retrenched (defendants' exhibit No. 3 and 4). The other employees who were retrenched at the same time with the plaintiff received similar letters of termination of employment (letters dated 21st of June 2000 produced as defendants' exhibit No. 5(a) to (h)). He further testified that the plaintiff was paid Kshs 1,397,220/= under the Workmen's Compensation when he was injured in the accident by the 2nd defendant's insurers (Heritage Insurance Company). The 2nd defendant paid the plaintiff a further sum of Kshs 238,014/= under Workmen's Compensation. He testified that at the time of the accident the plaintiff was employed as a labourer who was supporting the research team. The plaintiff's job title was Machine Operator II. DW1 further testified that the reason why the plaintiff was retrenched was because the research portion of the company had been outsourced. The plaintiff could not therefore remain in employment.

DW1 insisted that the plaintiff was paid full payment upon being retired – He acknowledged receipt of Kshs 1.3 million (defendants' exhibit No. 6). The plaintiff's payslip for the month of August 1999 was produced as defence exhibit No. 7. DW1 reiterated that at the time the plaintiff was retrenched he was earning a basic salary of Kshs 20,995/=. He admitted that the plaintiff was retrenched when he was still undergoing treatment at the Spinal Injury Hospital. He stated that the company footed the plaintiff's

medical bill when he was still its employee. He testified that the plaintiff was trained at Egerton University and internally at the company. His salary was commensurate with a person who was trained. He stated that a normal retirement age at Kenya Breweries Ltd was sixty years.

He reiterated that the plaintiff was employed to work in barley research. In his view, the plaintiff could be employed by another company dealing with barley research. DW1 did not know if the plaintiff was incapacitated 100% by the injuries he sustained during the accident. He conceded that if the plaintiff was okay, he would have worked for a further period of twenty two years. DW1 reiterated that the plaintiff was retrenched when the barley division was outsourced. There was no position for the plaintiff at the company. He denied that the plaintiff had been retrenched on medical grounds. He reiterated that if that was the position, the plaintiff would have earned less money than a retrenchee. The defendants then closed their case.

After the close of both the plaintiffs and the defendants case, the parties to this suit agreed by consent to file written submission in support of their respective case. Both the plaintiff and the defendants filed written submissions. Upon reading the pleading filed by the parties herein, the evidence adduced before me and the submissions made by the plaintiff and the defendant and upon further considering the consent that had been entered in this suit by the parties compromising certain aspects of the suit, the issue for determination by this court is whether or not the plaintiff is entitled to be paid loss of future earnings. The plaintiff has submitted that he should be paid costs of future medical expenses although he did not specifically plead the same in his plaint.

It is not denied that the plaintiff became a paraplegic when he sustained a fracture of his spinal cord during the accident which occurred on the 4th of September 1999. Dr S. O. Owing'a whose report was produced as plaintiff's exhibit No. 8 and Dr. Z. Gaya whose report was produced as defendant's exhibit No. 1 agree on the injuries that the plaintiff sustained. Both agree that the plaintiff sustained a fracture dislocation spine of the 8th thoracic and 9th thoracic vertebrae. This fracture resulted in the plaintiff suffering a complete paralysis and sensory level at T6 level. The plaintiff also sustained a comminuted distal 1/3 clavicle fracture and closed head injury with concussion.

According to Dr. Z. Gaya the plaintiff

“suffered from permanent damage to his spinal cord at T7/T8 level as a result of the accident that he was involved in on the 4th of September 1999. He will be permanently confined to a wheel chair. As a result of the permanent paraplegia and its resultant complications as documented under complaints and physical examination above, the degree of permanent disability is one hundred percent (100%).

Dr S. O. Owinga agrees with this prognosis. He adds that the plaintiff suffered from the following long-term complications;

“1) Disuse decalcification of the bones and hence stone formation in the urinary system. This may require surgery and may lead to recurrent infections and ultimately kidney failure.

2) High blood pressure may follow from kidney failure

3) The lack of sensation leads to easy injury of the skin. Such wounds do not heal easily and may become very infected and cause blood infection. This may be fatal.

4) Social life is fully limited by his inability to control calls of nature.

5) Mental depression may be severe and result in suicidal tendencies which may be harmful.

6) General dependence over others because he is wheel chair bound”

Dr Owinga and Dr Gaya also agree that the plaintiff will be unable to have any erection let alone sexual intercourse with his wife.

The injuries sustained by the plaintiff has thus rendered him an invalid. He had become wheel-chair bound for the rest of his life. Due to the complications that are common with paraplegics, including the fact that the plaintiff cannot control his bowel motions, the chances of the plaintiff being gainfully employed is virtually nil.

According to the plaintiffs submission, he urges this court to award him damages (other than that agreed by consent) under the following heads; loss of future earnings capacity. The plaintiff has submitted that he should be paid the last salary that he was paid for a period of twenty-two years that he would have worked to his retirement at the age of sixty years. He has also submitted that he should be paid damages under the head of loss of amenities, future nursing and medical cares. The plaintiff also wants to be paid under the head of loss of future earnings.

On their part the defendants have submitted that the plaintiff is not entitled to damages under the head of nursing and medical care because the plaintiff did not specifically plead it. The defendants submitted that the plaintiff would only be entitled to be awarded damages under the head of loss of earnings which was pleaded. I have carefully considered the submissions made.

I have also carefully read the decided cases that the parties to this suit sought to rely in support of their submissions. I agree with the finding made by the Court of Appeal in **Lalji –versus- Toka [1981]KLR 325** where it was held that where a plaintiff establishes that his capacity to earn a living has been diminished or reduced, he should be awarded damages under the head of loss of future earnings. As stated earlier in this judgment, both the plaintiff and the defendant agree that the chances of the plaintiff securing employment again in the field that he has been trained in is virtually nil. Although the defendants tried to make out a case that the plaintiff had been retrenched like any other employees of the 2nd defendant, when the barley research division was outsourced, I refuse to be persuaded that the plaintiffs position was similar to that of other retrenchees.

The plaintiff was paid certain amounts on the basis of the years that he had served the 2nd defendant. Whereas the payment of compensation on retrenchment was based on the years that the plaintiff had worked, damages under the head of loss of earnings looks to the future and not to the past. In any event, the other employees who were retrenched with the plaintiff have a chance either of seeking employment elsewhere or starting their own businesses. In the case of the plaintiff, his options are severely limited. The fact that he was paid certain amounts as an early retirement package which was negotiated with the union does not bar this court from making an award to the plaintiff under the head of loss of earning capacity. The defendants have suggested that the court should use, as a basis of calculating the amount to be paid to plaintiff, the salary paid to an unskilled labour as provided by **The Regulation of Wages and Conditions of Employment Act** (Cap 229). I do not agree with the defendants suggestion.

The evidence adduced in this case clearly shows that the plaintiff had been trained to be a laboratory technician both at Egerton University and internally at the Kenya Breweries Ltd.. His job designation cannot therefore be that of unskilled labour. I am persuaded that the basis of calculating the damages to be paid to the plaintiff shall be the net salary that the plaintiff received when he was employed by the 2nd defendant. According to the payslip of April 2000 which was produced as plaintiff's exhibit No. 6 the plaintiff earned a salary of Kshs 22,318/= (less the statutory deductions but including the sums which he voluntarily had deducted from his salary to his Cooperative Society). The monthly earning of the plaintiff that shall be used to arrive at the damages payable to him under the head of loss of future earnings shall be Kshs. 22,318/=.

The plaintiff has suggested that multiplier of twenty two years be used to determine the amount to be paid under loss of earnings. On their part the plaintiff have suggested a multiplier of ten years. Having considered the evidence adduced, and the fact that the plaintiff is rendered incapacitated for life, I will apply the multiplier of fifteen years.

The plaintiff is therefore awarded damages for loss of future earnings as hereunder:

$$\text{Kshs } 22,318/= \times 12 \times 15 = 4,017,240/=$$

Both the plaintiff and the defendants laboured under the misapprehension that a dependency ratio ought to be taken into account when calculating loss of future earnings. Dependency ratios are only applicable in circumstances where the earner of the income is deceased. In the instant case, the plaintiff is very much alive and therefore will be entitled to the entire income that will be due to him for his own use as he deems fit.

I will make no award under the heading future nursing and medical care. The plaintiff did not plead this head in special damages in his plaint. In his submissions, the plaintiff has acknowledged this fact but has urged the court to give the award under general damages. Much that I sympathise with the plaintiff, having not pleaded future nursing and medical care, this court's hands are tied by the law. In **David Bagine – versus- Martin Bundi Nairobi C. A. Civil Appeal No. 283 of 1996 (unreported)** and **Texcal House Service Station Ltd & Anor –vs- Timokalevi Jappinen CA Civil Appeal No. 134 of 1998 (unreported)** it was held that the court could only make award for damages which had been specifically pleaded and specifically proved. In the present case, the plaintiff did not plead that he should be specifically awarded damages under the head of future nursing and medical care. I will therefore make no award under this head.

In his submission the plaintiff sought to be awarded general damages for loss of consortium as the plaintiff was no longer able to have sexual intercourse with his wife. However I noted that the plaintiff had earlier recorded a consent with the defendants whereby the issue of general damages for pain, suffering and loss of amenities was agreed at Kshs 1.5 million. In my view the plaintiff is attempting to have a second bite of the cherry. He cannot seek to be awarded damages under loss of consortium yet he did not plead it in his plaint. In my opinion the general damages agreed covered the loss of consortium.

In the premises therefore judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:-

(i) On Liability

Liability shall be apportioned at the ratio of 80:20 in favour of the plaintiff and as against the defendant (the defendants shall shoulder 80% liability whilst the plaintiff shall bear 20% liability).

(ii) On quantum

(a) The plaintiff is awarded the sum of Kshs 1,500,000/= general damages for pain suffering and loss of amenities (as agreed by consent of the parties).

(b) The plaintiff is awarded the sum of Kshs 4,017,240/= being damages for loss of future earning

Subtotal 5,517,240.00

Less the sum paid under

The Workmen's

Compensation Act

(Kshs 1,397,220+326,386/37) 1,723,606.30

Subtotal 3,793,633.70

Less Kshs 50,000/=

(being the costs awarded to

the defendants in Nakuru

HCCC No. 33 of 2002) 50,000.00

Subtotal 3,743,633.70

Less 20% contribution Kshs 748,726.70

TOTAL 2,994,906.90

(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