



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 37 OF 1990**

FRANCIS KIMANI KARIUKI.....PLAINTIFF

VERSUS

HUDSON WANAMBIRI KAMULAMBA.....DEFENDANT

JUDGMENT

The plaintiff, Francis Kimani Kariuki, filed suit against Hudson Wanambiri Kamulamba, the defendant, seeking to be awarded damages for the injuries that he alleged to have sustained in a motor traffic accident which allegedly occurred on the 11th of June 1987 involving motor vehicles registration numbers KXU 197 and KWN 619. The said accident is said to have occurred along Nakuru-Gilgil road. According to the plaint, the plaintiff avers that as he was driving motor vehicle registration number KWN 619 along the said road, the defendant or his agent negligently drove motor vehicle registration number KXU 197 causing the same to violently collide with the plaintiff's motor vehicle. The plaintiff averred that the said accident occurred because the defendant's motor vehicle was being driven on the wrong side of the road and at an excessive speed in the circumstances. He further averred that the defendant or his agent failed to take any necessary evasive action to avoid the accident. As a result of the said accident the plaintiff averred that he sustained serious injuries which he prayed that this court orders that he be compensated.

The defendant filed a defence. He denied that he was the author of the said accident. The defendant averred that the said accident was solely caused and or substantially contributed by the negligence of the plaintiff. The defendant denied that the plaintiff sustained the injuries as pleaded in the plaint. The plaintiff was put to strict proof. The pleadings having been closed, this case was fixed for hearing by the plaintiff. The plaintiff served the defendant's counsel Mssrs R. N. Sitati & Company Advocates with the hearing notice. When this matter was listed for hearing before this court, this court noted that the then R. N. Sitati advocate had since been appointed a Puisne Judge of the High Court of Kenya. Her Ladyship, Justice R. N. Sitati informed this court that her former firm had been taken over by a firm of advocates known as Kulecho & Company Advocates. This court ordered the plaintiff to serve the said firm of advocates with the hearing notice of the date that the case was fixed for hearing.

When this case was again listed for hearing before me, I was satisfied that the defendant had been properly served and ordered that the plaintiff proceeds with his case, the absence of the defendant notwithstanding. The plaintiff testified that he was employed as a driver. On the 11th of June 1987, he was driving motor vehicle registration number KWM 619 from Nairobi to Nakuru. It was about 12.30 pm. When he reached near Gilgil, as he was driving behind a Toyota Corolla, he suddenly saw the said motor vehicle veer off the road. He was then confronted by a lorry which was being driven on his side of the road. He flashed the headlights of his car to warn the driver of the lorry in vain. The distance between the two motor vehicles was too close. The two motor vehicles collided. The plaintiff lost consciousness. He regained consciousness when he was already admitted in hospital. He attributed the accident to the

fact that the driver of the lorry (KXU 197) was driving on his lane (*i.e the wrong lane*). After the accident the owner of the lorry disappeared. The defendant, as the owner of the lorry, was charged with permitting an unroadworthy motor vehicle to be used on the road (*proceedings produced as plaintiff's exhibit No. 1*). The defendant was however acquitted. The plaintiff testified that he sustained injuries to his right hand and right eye. His right arm got amputated at the scene of the accident. The plaintiff was treated at the Nakuru Provincial General Hospital. He was admitted for a period of about three weeks. Dr. Masiira Mukasa wrote the medical report (*produced as plaintiff's exhibit No. 2*). The plaintiff paid Kshs 500/= for the preparation of the medical report (*receipt produced as plaintiff's exhibit No. 3*). He was issued with an abstract report by the police (*produced as plaintiff's exhibit No. 4*). He was issued with a P3 form which was duly filled (*produced as plaintiff's exhibit No. 5*). The photocopies of the treatment chits were produced as plaintiff's exhibit No. 6. It was the plaintiff's testimony that since the accident, he was forced to change his profession as he could no longer drive a motor vehicle. The plaintiff is now a land agent. He blamed the driver of motor vehicle registration number KXU 197 for overtaking another motor vehicle when it was not safe to so overtake. He prayed that he be awarded damages and costs of the suit.

At the conclusion of the case, the plaintiff tendered his written submissions on liability and quantum. I have considered the pleading filed in this case. I have also considered the evidence adduced by the plaintiff and the submissions made by the plaintiff. The issue for determination by this court is whether the plaintiff has established that an accident took place, caused by the negligence of the defendant, whereby he sustained injuries pleaded in his plaint. The other issue for determination is what quantum as to damages that should be awarded to the plaintiff if liability is found in his favour. The plaintiff adduced evidence that as he was driving motor vehicle registration number KWM 619 Isuzu Pickup along Nakuru-Gilgil road, the said motor vehicle collided with a lorry registration number KXU 197. The accident occurred at about 12.30 p.m. It was the plaintiff's testimony that the said accident occurred when the driver of the said motor vehicle (KXU 197) attempted to overtake another motor vehicle when it was dangerous so to do. As a consequence the driver of the said motor vehicle entered into the lane which the plaintiff was driving on and caused the accident. The defendant, who is owner of motor vehicle registration KXU 197 was charged with the offence of permitting an unroadworthy motor vehicle to be driven on the road. He was however acquitted. Proceeding of the traffic case were produced as plaintiff's exhibit No. 1. The police abstract report was produced as plaintiff's exhibit No. 4.

Having evaluated the evidence adduced by the plaintiff, I am satisfied that the said accident did indeed take place. I also find that the evidence by the plaintiff, which was uncontroverted, explaining the circumstances of the accident clearly points to the fact that it was indeed the driver of motor vehicle registration number KXU 197 who was negligent and thus caused the said accident. The said driver overtook another motor vehicle when it was not safe to so overtake. He did not put into mind the safety of other road users especially the oncoming motor vehicles. I hold that the defendant is solely liable in tort to the plaintiff as a result of the said accident. Liability is thus found in favour of the plaintiff and as against the defendant at 100%.

On quantum, the plaintiff pleaded that he sustained the following injuries;

(a) Complete loss of the right arm.

(b) Extensive soft tissue laceration on the humerus.

(c) A cut wound on the inner aspect of the right eye brow.

In the medical report prepared by Dr. N. Masiira Mukasa (which was produced as plaintiff's exhibit No. 2), the said Doctor established that the right arm of the plaintiff had been surgically amputated (*i.e. disarticulated*) at the shoulder joint. The surgical scar was fully healed and was non-tender. He also established that there was an old fully healed scar on the inner aspect of the right eye-brow (of approximately ¼ cm x 1 cm). In his opinion, the plaintiff had sustained a complete loss of his right arm. The cut wound the plaintiff had sustained to the inner aspect of the right eye-brow had fully healed. He assessed the degree of disability at 60%. In his evidence before court, the plaintiff stated that he now worked as a land agent having ceased to work as a driver when he lost his arm. In his submission the

plaintiff has stated that he should be paid damages for pain suffering and loss of amenities and damages for the loss of earning capacity.

I have considered the evidence adduced in this case and the submission made by the plaintiff. While it is not doubted that the plaintiff is entitled to be paid damages for pain suffering and loss of amenities, the plaintiff has not established that he is entitled to be paid damages for loss of earning capacity. In the first place, the plaintiff did not plead loss of earning capacity. A party is bound by his pleadings. The plaintiff can only be awarded what he pleaded in his statement of claim. In any event, no material was placed before this court where it could make an award of damages under the head of loss of earning capacity.

In this respect, the decision of **Butler versus Butler [1984]KLR 225** is inapplicable in this case. I will therefore disregard the plaintiff's submission on this aspect.

The plaintiff has submitted that the damages that should be paid to him for pain suffering and loss of amenities should be Kshs 2,000,000/=. He has relied on the decision of **Florence Kaiyu Nyamai – versus- Coast Bus Co & Anor Mombasa HCCC No. 401 of 1993 (unreported)**. I have considered the said submissions made. While I agree that the injuries suffered by the plaintiff in **Florence Kaiyu Nyamai case (supra)** more or less approximates the injuries sustained by the plaintiff in this case, I am not persuaded that the plaintiff should be awarded Kshs 2,000,000/= general damages. Putting into consideration all the circumstances of this case, including the fact that the plaintiff has adjusted his profession to take into account the injuries that he sustained in the said accident and also in light of the above decision, I will assess the general damages to be paid to the plaintiff to be Kshs 1,000,000/=. The plaintiff proved special damages of Kshs 600/=. He is awarded the same.

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

(i) On Liability

The defendant shall bear 100% liability

(ii) On Quantum

(a) General damages for pain suffering and loss of amenities is assessed at Kshs 1,000,000.00

(b) Special damages Kshs 600.00 TOTAL Kshs 1,000,600.00

(iii) Costs of the suit.

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

DATED at NAKURU this 14th day of June 2005.

L. KIMARU

JUDGE