



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

**AT MOMBASA**

**CIVIL SUIT 255 OF 2001**

**DOMINIC MUTUA MAWEU.....PLAINTIFF**

**VERSUS**

**BESTWAYS PLUMBERS LTD .....DEFENDANT**

**J U D G E M E N T**

The plaintiff filed a plaint on 18.5.2001. He claims damages arising out of injuries suffered in an accident which occurred while he was traveling in the Defendant's motor vehicle KAM 280L headings Kilaguni Lodge where construction was being carried out. The said accident was caused wholly and solely by reason of negligence of the driver who carelessly and recklessly drove, managed and controlled the said motor vehicle thereby causing the accident. The vehicle was registered in the name of Defendant and the driver was an employee/agent/servant of the Defendant.

The Defendant filed a statement of defence admitting the accident but denied negligence alleged. They claimed that an animal crossed the driver's path as he was driving and in taking emergency steps to avoid hitting the animal the vehicle swerved and overturned and thereby the accident occurred while the driver exercised reasonable care at all times. The collision therefore occurred without negligence. Injury and special damages are denied. Plaintiff:

On 19.8.03 the trial of this suit commenced. Plaintiff proceeded without the Defendant who did not turn up by 10.45 a.m. on that day though served. The Plaintiff testified that he was a painter and woodcarver. He works at Mtito Andei where the Defendant's people had found him and requested him to paint some timber handcrafts they had. They therefore knew his quality of work. On 16.6.2000 the Defendants sent the driver and the vehicle to collect him and transport to the Defendant's place for him to collect the pay he had already done at Kilaguni Serena Lodge. The vehicle sent was KAM 280L. he boarded the vehicle. The driver crossed the gate into the National Park. Plaintiff was sitting in front cab with driver. There was another person sitting in the middle between the Plaintiff and the driver. Plaintiff testified that he saw the man in the middle take out a can with beer and as he was unable to open the driver assisted him to open. It is when the driver was struggling to open the can that he lost control of the vehicle. Plaintiff passed out and he later came to and found himself in an ambulance at Voi Hospital to be transported to Coast General Hospital where he was treated.

He exhibited a P3 form. The police abstract is also exhibited. The confirmation of the owner of the vehicle was confirmed by the production of Exhibit 5. He was treated by Doctor to whom he paid Sh. 11,700/- as in Exhibit 6. He purchased a wheel chair for Sh. 3,000/=. The work he was to do for Defendant was to paint 30 pieces at Sh. 100 each. He testified as to his earnings on woodcarvings and

produced receipts. He blamed the Defendant's driver for allowing himself to be distracted by the opening of a can of beer while he was driving and this was negligence. It was not an animal which came on driver's path.

He has a family of two children who rely on him wholly though his wife takes on casual jobs.

He claimed damages for injury and loss of earning capacity and costs. He added that he is now impotent and his two hands are very weak. He later produced his work records and said his earnings were Sh. 28,000/= per month on average.

By this time on 17/6/04 the Defendant was being represented by Mr Abeid Advocate. On cross examination he said he had worked for Defendant for one week before the accident and was being paid per piece done. The person who had a can of beer was called Maurice Oyumbe. He said that the passenger and the driver were already drunk.

The time the accident occurred, was beginning of high season and he took the job to advertise his work to the Defendant so as to improve his business.

Further evidence was given by PW3 John Mwanzia Ngobai who said he was an employee of Plaintiff helping with the sanding of carvings. He saw Plaintiff enter the vehicle KAM 280L pick-up and next he heard of him he was injured.

The police traffic file and the police abstract form were produced by PC Joseph Munyao. On cross-examination he said he was not the investigating officer in that case. The Plaintiff also called the doctor (as PW2) who gave medical evidence. The defence was given time to present its defence but after some time Mr Abeid closed defence case saying that he has to trace his clients.

Submissions by Mr Tindika for Plaintiff. It will be remembered that the accident, ownership of vehicle and the presence of the Plaintiff in the vehicle are not denied. The issue therefore is whether accident was caused by negligence or by a passing animal.. from the evidence of Plaintiff it is very clear that the Defendant's driver was distracted by his passenger who wanted to take a drink of beer from a can.

The driver was opening the can while at the same time the vehicle was moving. He was drunk. The animal alleged is non existent. The driver did not want to face the police so the traffic file is still open. There was no evidence to contradict the Plaintiff and I find that the liability rests squarely on the driver and vicariously on the Defendant on 100% basis.

On the issue of quantum the Doctor's report shows that the Plaintiff was aged 32 years at the time of accident. The injuries received are:

1) Compression fracture of Thoracic Vertebra T6 resulting in paraplegia. He was in hospital up to 11.10.2000 when he was discharged with catheter.

The opinion of the doctor (Hermet Patel) was that the injuries reduced the Plaintiff to a total paraplegic with no sensation below the waist and no grip on right hand. He has condom fitted and urine bag. He is incontinent of urine and faeces. He is impotent. The injury is very grave. The Plaintiff has to depend on his family a great deal. The Doctor who gave sworn testimony confirmed that the Plaintiff is likely to suffer complications of bladder infection and sores as he has to sit most times. He relies on helpers. Doctor's fee was 3000/= for report and Sh. 2500 for attending court.

Mr Tindika referred to several authorities on the issue of the damages payable. In Nichodemus Owour Ongongo - V - Chemelil Sugar Co Ltd HCC 3217 of 1997 at Nairobi the Plaintiff was injured while carrying out his duties. Bags of sugar fell on him from a high stack. His injuries were almost similar to the present ones. In that case the general damages awarded were Sh. 2 Million plus loss of future earnings and special damages.

During the course of that case the court was referred to an earlier case Muchoki Gakubo & Another – Vs – Joseph Kamau Mere Nairobi HCC 664 of 1991 where an award in the sum of Sh. 1.5 Million general damages was awarded to the Plaintiff who had sustained severe injuries of cervical spinal cord. He had to wear condom to collect urine, he was in a wheel chair.

2) Jael K Chepkwony – Vs – Aser K Philemon Nakuru HCC No. 333 of 1999. The injuries suffered also resulted in the paralysis of the Plaintiff making him unable to control his bladder and bowels. The award was Sh. 2.5 Million made in October 2001.

For Defendant Mr Abeid submitted that the Plaintiff was not an authorized passenger in the vehicle therefore his case is not proved. This is only an allegation. The pleading in the defence does not raise this defence but admits the Plaintiff was involved. The Defendant did not offer any evidence to support such a submission. On quantum Mr Abeid proposed Sh. 1.5. Million award and cited several authorities in support. On multiplier he proposed 10 years. He also proposed house help at he rate of Sh. 1000/= per month for 10 years and loss of consortium At Sh. 20,000/=

In reply Mr Tindika indicated the Doctor's report has an age fixed. He asked for damages at 4 Million and multiplier of 20 years.

I have considered the issue of damages to be paid to compensate the Plaintiff. I have considered his pre-accident state. He was a woodcarver and painter at Mtito Andei town where there is a main road for all transport from Mombasa to Nairobi and vice versa. He was a married man with two children. He is now impotent and is not likely to father any more children. He can no longer perform his artistic work of wood carving and painting. He has become completely and permanently incapacitated and has to rely on help of others as the Doctor testified. He stayed in hospital for a long period from 16.7.00 to 11.10.2000. He is likely to suffer future infections of bladder. He has sores for sitting regularly, as the Doctor remarked he suffered grave permanent incapacity at the young age of 32 years. I award for general damages a sum of Shillings Two Million, Five Hundred Thousand (2,500,000/=) for pain and suffering and loss of amenities.

For future medication, physiotherapy these claims are not quantified but considering that the Plaintiff has been surviving since the accident without any complaints up to the trial I award a sum of Sh. 50,000/= (Fifty Thousand). On the other hand his wife needs to be released to attend to the other necessary family needs. This can be done by awarding a sum to enable the Plaintiff to pay nursing aid at home. I assess the same at Sh. 2000/= (Two Thousand) per month for 10 years totaling Sh. 240,000/= (Two Hundred and Forty Thousand.). The loss of consortium is normally awarded on death of the wife. Here the wife is not affected and from what Plaintiff says she seems willing rendering her services to the Plaintiff. No award is made on this claim.

The other claim is for loss of earning capacity. The Plaintiff said that the Defendants came with 30 pieces of wood they wanted worked on. The charge was Sh. 100/- for each item. There is also evidence that this was beginning of tourist high season and the Plaintiff was earning between Sh. 5000/= - 8000/= per day while during low season he earned between 500/= - 1000/= per day. Plaintiff did produce a book purporting to be a record of his business for the year 2000 Exhibit 10 but his evidence is not audited. The court cannot tell the profits, the cost of manufacture, the cost of material and any taxes paid if any. In the circumstances it can be said that the Plaintiff did lose his capacity to carry on his business and a global award in the sum of Sh. 300,000/= (Three Hundred Thousand) is sufficient on this item.

In all I find for Plaintiff pain and suffering, Sh. 2,500,000/=

Future medication Sh. 50,000/=

Nursing care Sh. 240,000/=

Loss of capacity to earn Sh. 300,000/=

Special damages proven

Dr Hermet Patel (receipts shown) Sh. 5,500/=

Mobility Aid Sh. 8,000/=

Abstract report Sh. 100/=

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Total Sh.3,103,600/=

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Judgement is entered against the Defendant in the sum of Sh. 3,103,600/=.

Judgement is entered against Defendant for interest in the decretal sum at the court rates. General damages to attract court rates from judgement day but special damages from the date of filing suit. The Defendant shall also pay costs of the suit to the Plaintiff.

**Delivered and dated at Mombasa this 9th day of June 2005.**

**J. KHAMINWA**

**J U D G E**