



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI

CIVIL DIVISION

CIVIL CASE 1662 OF 2002

SUDHAKARAN KALLINGAL PRABHAKARAU
.....PLAINTIFF

VERSUS

ASHMAT MOHAMED AHMED GAVURAT

T/A SCADIVAVIA BUS SERVICEDEFENDANT

JUDGMENT

1: PROCEDURE

1. Sudhakara Kallingal Prabhkarau a resident of Kenya from India was involved in a road traffic self accident whilst travelling in a bus that belonged to Ashmat Mohamed Ahmed Gavurat t/a Scandivavia Bus Services. He sued in damages on the 5.11.02 for the negligence occasioned by the agent and or servant of the bus service.

2. At first, the said defendant was not able to be located necessitating the plaintiff to apply for fresh summons to enter appearances. This was duly granted by the then duty Judge Rawal J on the 30.10.03. A memorandum of appearance was filed by M/s A.N. Ngunjiri and Company Advocates on the 24.8.04 (dated the 20.8.04). The said advocates gave their address Portal place 3rd floor Banda/Muindi Mbigu street, P.O. Box 61747 –00200 Nairobi. No further action was taken by the said defendants.

3. Interlocutory Judgment was duly entered on the 28.9.04 by the Deputy Registrar whereby judgment against the defendants being and should for one of failing to file defence. The interlocutory judgment being ministerial powers given to the Deputy Registrar under order 49 CPR.

4. The plaintiff set this suit for hearing on assessment of damages on both General and Special damages. In a case where the defendant has failed to file defence and indeed enter appearance, the plaintiff really need not give any further notice to the defendant and may proceed to trial. Unfortunately in the Kenyan situation many times defendants would turn up to state that they had never been served. The court of appeal has stated that a hearing notice should issue. The plaintiff served upon the advocates for the defendant who is rightly still on record with a hearing notice. He also served a notice to admit fact, a notice to admit documents and filed the authorities required in this suit under order 12 CPR. Once a notice has been served on admission upon the other party – the plaintiff need not call any witness when there has been no notice of non-admission of facts and of documents. It is as a result of these notices that the plaintiff was able to produce the documents relied on without calling the marker thereon.

5. He did call a medical doctor to confirm his injuries

II: LIABILITY

6. The plaintiff informed the court that he was a passenger in the defendants motor vehicle bus travelling to Nairobi on 6.11.99. He stated that the bus was travelling at such a high speed that on reaching Limuru it lost control. The effect of this being a self accident. By an interlocutory judgment having been entered on the 28.9.04, the liability against the defendant is a 100% being so liable vicariously for the acts of his agent and or servant.

III: QUANTUM

7. a) General Damages

i) Pain and Suffering

The plaintiff sustained a fracture to his left femur. He was admitted to Kenyatta Hospital then transferred to the Aga Khan Hospital on 8.11.1999. whilst at the Aga Khan he had fat embolism 3 days later and was in the ICU. He was discharged on the 22.11.99 but due to his financial circumstances he was advised to go for physiotherapy to India where he went for 4 months. In total he was indisposed for a period of 8 months.

8. The plaintiff produced the following medical reports from various medical doctors. The registrar in the department of surgeries on orthopaedic attend court to confirm the above injuries.

i) Prof Dr. Mbindyo

mb chb EA

Date of report 12.6.02

The Prof stated that the fracture to the [left] femur healed in a fair anatomical position but will remain a cause off and on pains due to fibrosis.

The removal of plates and screws was estimated at sh.100,000/-.

“The fat embolism healed leaving no demonstrable permanent disability.”

ii) Dr. S.S Samani

mb chb

Date of report 3.1.01

Confirmed the injury fracture to the left femur.

Fat embolism and stay in the ICU. Stated

there requires removal of plate but failed to

state how much it will cost.

iii) Dr. Maranj Krishnan

Orthopaedic Registrar

Department of surgery

Date of report 22.11.99

Confirmed the injuries of a fracture left femur and fat embolism. It was he who advised the plaintiff to seek treatment in India as it would be less expensive for him. He attend court to give evidence.

The plaintiff went to India. There the plaintiff attended to the Palarkkad Health case Centre, Parlakkad.

iv) Dr P. Gopinath confirmed that he underwent physiotherapy

iv) Dr. T. Rajgopal

Bsc MBS MS Mch (Neno)

Consultant neuro surgeon and neurologist

Confirmed that he attended to the plaintiff

9. The advocate for the plaintiff ask I make award of ksh.200,000/- for pain and suffering. He does this basing on a case law which pages are missing. This may have been an error.

10. I would agree that this amount is fair due to the fact that plaintiff had to be taken to ICU to deal with the fat embolism that was almost life threatening.

I accordingly award Ksh.200,000/- for the head of pain and suffering under general damages.

12. B) Special Damages

Before the trial commenced the plaintiff abandoned some claims on Special damages which will be indicated below. He claims a total of Ksh.663,046.90 and not the original Ksh.883,309.90 that was specified in the interlocutory judgment. Special damages reflected in the interlocutory judgment is not final but is subject to formal proof. The amount pleaded is as follows:-

12.i) Medical Expenses

Aga Khan Hospital Ksh.398,552.90

The plaintiff incurred hospital bills at the Aga Khan hospital. He was able to only prove Ksh.160,000/- being payment made by him on 7.11.99, for Ksh.10,000/-; Ksh.50,000/- made on 12.11.99 and Ksh.100,000/- , made on 21.11.99. The receipts produced are duly in compliance with the stamp duty Act Cap 480 Laws of Kenya and admissisable in evidence to court. I make an award of ksh.160,000/-.

12.ii) Medication IR 7,300/-

Abandoned by the plaintiff Nil

12.iii) Physiotherapy and JR. 100,000

This sum is subject to compliance of the stamp duty act on section 20.

12.iv) Costs of left femur brace IR 6,700 Nil

Abandoned and not proved by the plaintiff

The same is dismissed

12.(v) Dr. Ragagopal

Consultant fee IR 5,100/-

Not proved Nil

12.(vi) Dr.Samani Ksh. 500/-

Claim abandoned by plaintiff

12.(viii) Air ticket to India \$832

The plaintiff claimed that though he lived in Nanyuki, actually working in Nakuru, at the time the accident, he sort the assistance of air travel agent in Kisumu. He did so because they were able to give him credit for the ticket as he had no funds. When he produced his ticket to court, it was quite clear that the only used the air ticket Nairobi-Mumbai. The section of Chumnai – Mumbai - Nairobi was left open. He did not use this portion of the ticket. The total costs came to \$800,000 plus \$32 in taxes that is \$832. He told the court he borrowed money to pay off this ticket. I would award \$432 being the one way ticket. He is able to prove he went to India. I accordingly award \$432.

12.viii) Air ticket via jet airways JR9.130

No evidence was tendered for this air ticket that is said to have totaled about Ksh.15,000/-. I hereby dismiss the same as having not been proved.

12.ix) Cash at hand at time of accident Ksh.104,600/-

At no time did the plaintiff in his evidence mention he had lost Ksh.104,600/-. This fact was never led in evidence by him and that he infact had this amount of funds. I hereby dismiss this amount of claim as having not been proved.

12.x) Police abstract fee Ksh.100/-

This claim was abandoned by the plaintiff and is dismissed.

12.xi) Medical report prepared by Dr. Prof Mbindiyo Ksh.3000/-

This claim was abandoned by the plaintiff and is hereby dismissed

12. c) Future medical treatment ksh.100,000/-

Dr. Mbindyo stated in his report that a cost of Ksh.100,000/- would be incurred for the removal of the plate to the femur. I would accordingly award this sum as being reasonable.

12.d) Mental Anguish

The plaintiff stated that in the month of January 2000, he was to meet his bride. Due to the accident he was not able to do this until April 2000. I do not see this claim prayed for in the plaint although mentioned to the plaint – a prayer of what a litigant seeks from the court must be prayed for. He has now married his bride and I do not see how this court can make award – on the grounds that the same had not been prayed for.

12. E) Loss of income or earning

The advocate for the plaintiff states I award Ksh.660,000/- for loss of earning. The plaintiff said he had received a job offer to be employed by a another company from the one he was currently being employed. He had a sum of ksh.60,000/- salary offered to him and additional sum of Ksh.18,000/- as house allowance.

The plaintiff is a resident of Kenya and certificate of no objection for his release to work for another company was issued (has certificate being no. R722866). I am satisfied that in the 8 months he was indisposed he lost this income. Taking the salary of ksh.60,000/- as a multiplicand and 8 months as a multiplier I award Ksh.480,000/-.

I accordingly enter judgment for the plaintiff on the proved heads.

13. In Summary

13(a) Male adult passenger aged 33 years old in 1999

13(b) Motor vehicle self accident

13(c) Liability 100% against the defendant

i) Defendant entered appearance through A.N. Ngunjiri & Co. Advocates on 24.8.0 who failed to file defence

ii) Interlocutory judgment entered by Deputy Registrar under order 48 CPR on 28.9.04

13(d) Injuries: Fracture of left femur

13(e) Quantum

i) General Damages

i) Pain and suffering Ksh.200,000/-

Fat embolism and stay in ICU taken into account

iii) Special Damages

13 (a) Medical expenses

Aga Khan Ksh.160,000/-

13(b) Medication IR 73000 Abandoned

13(c) Physiotherapy JR 100,000

Subject to stamp duty compliance

13(d) Costs of left femur brace IR 6,700 Nil

Not proved.

13(e) Dr. Rajagopal consultant fee

IR 5,100 Nil

Not proved dismissed

13(f) Dr. Samani 500/- - abandoned

and dismissed.

13(g) Air ticket to India \$432

13(h) Air ticket via jet airways JR 9.130 Nil

Not proved and dismissed

13(i) Cash in and at time of accident Ksh.104,600/-

Nil not proved and dismissed.

13(j) Police abstract Ksh.100/- Nil

Abandoned and dismissed

13(k) Medical report fee prepared by

Dr. Mbindiyo Ksh.3,000/-

Abandoned and dismissed

Ksh.160,000/- + \$432

13(iv) Future medical treatment Ksh.100,000/-

13(v) Mental anguish Nil

Not proved and dismissed

13(vi) Loss of income Ksh.480,000/-

Ksh.60,000/- x 8 months Ksh.940,000/-

I wish to state that in pleading where a claim is made in foreign currency it is not to be converted into the local currency. The total paid to the plaintiff is therefore ksh.940,000/- and \$432 (IR 100,000/- subject to stamp duty in India).

I award the costs of this suit to the plaintiff. I award interest on general damages from the date of this judgment interest on Special damages from the date of filing suit. The exchange rate to be from the date of this judgment. Save IR 100,000 that is subjected to proof of stamp duty.

I thank the advocate for the plaintiff for preparing his documentary evidence well.

Dated this 13th day of July 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Waweru Gatonye & Co. Advocates for the plaintiff

A.N. Ngunjiri & Co. Advocates for the defendant