



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 73 OF 1997

PETER NDUMU.....PLAINTIFF

VERSUS

TELKOM (K) LIMITED.....DEFENDANT

J U D G E M E N T

This suit was filed by Musembi Ndumu an uncle to Peter Ndumu a minor, against the defendant Kenya post and Telecommunication Co-operation by an amended plaint filed on 18.10.2002. By it, he claimed that on 23.12.1996 the defendant's driver drove motor vehicle reg. No. KUV 628 at an excessive speed, on the wrong side of the road and failed to keep a proper look out, stop, slow down or swerve to avoid the accident that he knocked down the plaintiff who was travelling as a pillion passenger on a bicycle. The plaintiff suffered a fracture of the left tibia and fibular bones which later resulted in amputation above the knee, dislocation of the left shoulder joint, bruises on chest and iliac fosse region and cut wound on occipital area. The plaintiff claims general damages special damages of 1,100/= costs and interest.

In their amended defence filed on 4.9.1998, the defendants admitted occurrence of the accident but denied that the driver was negligent as alleged in the plaint and blamed the accident on the plaintiff solely or that he substantially contributed to it by riding in the path of the vehicle KUV 628, failing to take care of his own safety riding on an overloaded bicycle.

This case came up for hearing on 17.12.2003 the defence counsel and the representative of the defendant did not attend court. The counsel sent somebody to hold his brief who applied for adjournment which the court considered and declined to grant. The case proceeded to an hearing ex parte. The plaintiff who testified as PW3 and who was about 8 years at the time of accident only recalled that they were riding on the left side of the road and he came to 3 days when in hospital.

The only eye witness to the accident PW4 Alexander Kiio recalled the bicycle on which PW3 was carried as a pillion passenger. The boys were riding towards Thika direction and the vehicle KUV 628 came from the opposite direction i.e. from Thika and that the vehicle was being driven right in the middle of the road and that it is the vehicles mirror that hit the cyclist on the face and they fell. The defence has not offered any evidence in support of their defence to show that the plaintiff contributed to the accident in any way.

The plaintiff made a reply to defendants defence denying any negligence on part of plaintiff and put the defendants to strict proof. The court is satisfied that the defendants are totally to blame for the said accident. On damages a total sum of Kshs.6,640,000 was proposed, broken down as follows:-

1. Pain and suffering - Kshs.1,500,000.00
2. Loss of earning capacity - Kshs.1,980,000.00

3. Refashioning of growing Femur Kshs. 160,000.00

4. Cutting of Artificial Limbs - Kshs.3,000,000.00

PW 2 the next friend, PW3 the plaintiff himself and Dr. Wambugu PW1 testified as to the injuries suffered by plaintiff. PW3 was first taken to Matuu Nursing Home, where PW2 found him bleeding on the back of the head, leg was broken, left shoulder, abdomen and face head were bleeding, and he was unconscious. He was transferred to Thika General Hospital where the leg was amputated and he stayed for 2 months. He produced a P3 filled by the police Doctor who examined him in 1997 (Ex 4). A discharge summary from the hospital (Ex 3) also shows the injuries that were suffered. PW1 Dr. Wambugu who examined the plaintiff on 20.3.1997 confirmed the injuries as indicated in the P3 form and the hospital summary. He assessed degree of incapacity of 70% and he recommended that the plaintiff be fitted with an artificial limb because of the amputation which should be changed after 2-3 years to cost 60,000/= to 100,000/=. He also testified that the plaintiff will require refashioning of the leg as he grows tall as the bone will protrude which operation will cost 80,000/= and this procedure may be done once or twice in the plaintiffs life.

The relevant cases cited by plaintiff were Amin Ali Nasser versus Dominic Mwaura MSA HCCC 182/90

- (a) Kshs.650,000.00 for pain suffering and loss of amenities.
- (b) 360,000.00 loss of earning capacity.
- (c) 100,000 costs of artificial leg.
- (d) 100,000.00 domestic help.

2. Mohamed Mzee Mwinyi versus Coast Bus MSA HCCC 33/94

- (a) Kshs.900,000.00 pain suffering and loss of amenities.
- (b) Kshs.200,000.00 loss of earning capacity.
- (c) 100,000.00 cost of artificial leg.
- (d) 100,000.00 cost of domestic help.

The defendants filed submissions but did not make any proposal save that they cited the cases of **Mgwe Mwalili award Kshs.250,000.00 (HCC 3217/89); HCCC 4134/90 Bemta Omega versus Kebirigo General Stores award 200,000.00; HCCC 589/98 Stephen Karanja versus Rioki Estate award – Kshs.200,000/=**

The defendants blame the amputation of plaintiffs leg on then negligence of the hospital. However there is no evidence to support that contention. All there is in the hospital summary is that the leg got gangrene which resulted in amputation. In their proposals for an award, the defendants have not considered issue of amputation but only cited cases where ordinary fractures occurred and hence not very relevant to the present case.

I have considered the two authorities cited by plaintiffs counsel in respect to pain suffering and loss of amenities. The plaintiff was a child of tender age when he suffered the injuries i.e. 8 years. The complete text of the authorities was not however availed to court for the court to be able to appreciate of what the parties in these cases suffered. The authorities were made about 10 years ago and the court considered the issue of inflation.

- 1. For pain and suffering the court makes an award of Kshs.1,200,000.00. (One million, two hundred thousand only)

2. Degree of incapacity was estimated at 70%. The parents of the plaintiff have not mitigated their loss by ensuring that the plaintiff attends school. For loss of earnings and earning capacity the court will make an award as follows: Kshs.3,000 x 12 months x 25 = 900,000/=

3. Refashioning of growing femur should be done in a public hospital in stead of private. The court draws Kshs.100,000.00 on this claim.

4. The Doctor estimates that the prosthesis will cost 200,000/= and will be replaced every 2 – 3 years. In the cases cited, an award was only made for one artificial leg. No proformas were produced from different makers of the artificial legs save for Doctor Wambugu's word. So far plaintiff has never used an artificial leg. The court will allow an amount of Kshs.150,000.00 for one artificial leg to be fitted 4 times in plaintiffs lifetime (150,000x4) =

Dr. Wambugu agreed that he had been paid 6,000/= as court attendance costs. The plaintiff is also entitled to these. A police abstract costing 100/= and medical report costing 1,000/= were produced. The plaintiff has proved these as special damages.

The plaintiff will have judgement in the sum of Kshs.2,800,000/= (Two million, eight hundred and six thousand) in general damages and special damages of kshs.1,100/=. The plaintiff will also have costs of the suit.

Dated, read and delivered at Machakos this 11th day of March, 2004.

R. WENDOH

JUDGE