



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 550 OF 2000

HUSSEIN ABDI HASHI.....PLAINTIFF

=V E R S U S=

HASSAN NOOR.....DEFENDANT

J U D G M E N T

The Plaintiff claims damages arising out of an accident which occurred at Malongo wa Papa Road. The Plaintiff was a pedestrian and the Defendant's vehicle KAJ 904X was so negligently driven that it hit the Plaintiff thereby causing him injuries as particularized by the medical report of Dr. Muthuri. The Defendant filed a defence denying the negligence alleged and alleging that the Plaintiff was solely to blame and/or contributed to the accident.

On the issue of liability the evidence laid before the court shows that the Plaintiff was walking on the said road when the Defendant's vehicle crushed his leg at the ankle joint. X-Ray showed that there was fracture of the lateral malleolus and fractures of metatarsals (2nd to 5th). He also suffered a large laceration anterior to the ankle. He was on crutches. He was admitted for 18 days and attended treatment as out-patient. Permanent incapacity was assessed at 20%. This examination was on 5/9/2000.

On 21/5/01 at the request of the Defendant's counsel the Plaintiff was examined by Dr. H. Patel. He was found to have healed scars on the left foot with loss of movement and he was walking with a stick and a limp. The doctor certified temporary incapacity for a period of one year and permanent incapacity at 20%.

After crushing the foot of the Plaintiff, the Defendant allowed the vehicle to hit the wall and both Plaintiff and Defendant were injured and were taken to hospital. The road on which the accident happened was narrow in a closely populated residential area. The road was not straight but with a curve. It was not a tarmac road. The vehicle hit the Plaintiff from the back. It was driving fast. PW.2 with police records said that the vehicle was coming from the Old Town towards Mackinon Market. According to the police records the vehicle hit two pedestrians on that road, the Plaintiff and a Mr. George Omondi. The area being in town was speed restricted to 50 k.p.h. It was the driver who indicated that he was driving at 10 k.p.h. However, the Plaintiff said he was speeding and this is believable because the driver failed to control the vehicle and hit the building by the roadside. The driver of the vehicle admitted having been driving the vehicle with consent and knowledge of the owner of the vehicle. He admitted the road was narrow. There was a small space before the house. He now said he was driving at 20 k.p.h. He admits seeing the Plaintiff coming towards him. If so he had ample time to avoid him, even if he had emerged from a side way. He also admitted that he was injured on the face. He admitted also that the other person was injured on the road he fell down. *"I lost control of the vehicle. I hit the wall. I was unconscious. I was taken to hospital."*

In his cross-examination he identified the other person he hit as a Luo by his features. This is the man called Omondi in the police report.

In view of the above it is clear the Defendant's evidence is not reliable. If it was true he was driving at 10 k.p.h. he should have been able to control the vehicle to avoid crushing the Plaintiff. He should not have hit the wall as he did and get himself injured on the face by the windscreen so as to get unconscious.

I find the blame of the accident lies squarely on him. There is no blame that can be attributed to the Plaintiff at all. The police evidence on record was not subjected to cross-examination and cannot be relied on.

On liability therefore I find the Defendant 100% liable. He said he had borrowed the vehicle from his sister so he was an authorized driver and no question of vicarious liability comes in.

On issue of quantum the Plaintiff was a teacher before the accident. He became 20% permanently disabled because of the crash. He cannot stand for long periods to teach in class now. He used to earn US \$300 p.m. at the age of 38 years. He was working for a Non Government Organization in the country near Somalia border. At the time of trial his advocate converted US \$100 to Kshs.7,600/-, therefore per month it was Kshs.22,800/-. This was not permanent employment. In fact at the time of trial the Plaintiff was not in employment.

For pain suffering and loss of amenities the counsel proposed 2 Million compensation and cited the authority where Wambilyanga, J., awarded kshs.800,000/- for similar injuries in HCCC.931/1998 because of continued suffering 6 years from the time of injury. Also cited was HCCC. No.15/1987 where an award was made in the sum of Kshs.700,000/-.

The Defendant submitted that the case was not proved and should be dismissed with costs.

On my part I find Defendant 100% liable in negligence. I also find that there is no basis for reaching a calculated amount of loss of earnings.

However, it cannot be said that there was no loss of earning capacity. For a teacher, ability to stand and face the blackboard is important. However, the Plaintiff is an educated man and should be able to obtain some work to earn a living though not in his profession.

For this reason I find that a general sum of Kshs.250,000/- will compensate this part of General Damages. Since the pain has continued for long, it is my view that General Damages of Kshs.800,000/- is sufficient compensation. Special Damages are not disputed and I award kshs.107,700/-.

Judgment is entered against the Defendant in the sum of Kshs.1,157,700/- in total together with costs and interest.

Dated this 2nd day of July, 2004.

JOYCE KHAMINWA

J U D G E

2/7/04

Khaminwa, J.

Chege – Court Clerk

Mrs. Tutui – for Defendant

Mr. Songoro – H/B – for Plaintiff

Judgment read in their present in Open Court.

JOYCE KHAMINWA, J.