



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1098 OF 2000

MOSES OCHIENG' OWILI PLAINTIFF

Versus

BENARD G ITHATA KAMAU DEFENDANT

JUDGEMENT

On the 16th day of June 1999, the plaintiff, one Moses Ocheing' Owili was travelling in a motor vehicle bus as a fare paying passenger. He was travelling from his home area to Nairobi when the said bus ran into the back of the trailer near the Limuru town. The said bus was owned by the defendant M/s Benard Githaka Kamau.

As a result of the said collision the plaintiff sustained injuries to his leg whereby both his legs were and had a loss of limbs at the ankle.

The plaintiff later sued the defendant in tort and claimed damages for the injuries sustained.

A) LIABILITY

The defendant on being served with the plaint and summons to enter appearance failed to file defence and to enter appearance in this case. On the 8.10.2003 an Interlocutory Judgment was entered against him.

The effect of the interlocutory Judgments is that liability against the defendant is final and at 100%. This judgment is minuted in the court file by the deputy registrar from the ministerial powers given to him/her under order 48 of the Civil Procedure Rules.

B) QUANTUM

1) General Damages

a) Pain and suffering and loss amenities

The plaintiff sustained injuries to both of his legs by way of an amputation. The plaint has pleaded particulars of pleading as:-

“Loss of both legs,

Painful stumps,

Headaches and

Facial scars”.

It would perhaps have been correct to have pleaded.

“amputation of both legs

10 cm above the knee”

Nonetheless the plaintiff was examined by:-

1) Dr. Mungai Ngugi

MB.ChB., M.Med.

Surg.Cert in Urology R.C.S (England).

The doctor qualifies in urology and I note that it would have been of assistance if an orthopedic surgeon would have been invited to also examine the plaintiff instead of the one who deals with the urine glands specialist.

The doctor found that the plaintiff had sustained the amputation of both legs at the ankles. Later both legs were amputated 10 cm above the knees. He also sustained injuries to his head and scars to his face.

The advocate relied on one case law. This is purported to be a judgment of the high court. I wish to state that if one relied on case law it must be in compliance with section 90 of the Evidence Act where the case law is described and reported text book are recognized. Where there is no reported decision, then the judgment of the court can be relied on, on condition that it has been signed by the judge pronouncing it. Order 20 r3 Civil Procedure Rules. The authority relied on does not comply. I accordingly rejected it.

What should be the award for injuries sustained by the plaintiff?

I note that both legs have been amputated. He walks with the assistance of prosthesis and a crutch.

In evidence he says he is still in pain.

I would note that the two legs were amputated. The advocate for the plaintiff prayed I award Ksh.600,000/- for the one leg. It seems that he wished an award of Ksh.1.2 million be given.

I must bring it to the attention of the advocate and this court that pain is one and indivisible – awards are not made to the leg, the eye, the nose, the arm etc. An award is made as one and should not be divided.

As a fair award I find that a sum of Ksh.500,000/- be awarded for the head of damage of pain, suffering and loss of amenities.

b) Special Damages

The plaintiff claimed the following expenses under this head:-

a) Police abstract Ksh. 100/-

b) Medical report Ksh. 2,000/-

c) Medical treatment expenses Ksh.16,899/-

a) Police abstract 100/-

The author of this document under section 35 of the evidence act was not called to give evidence in court. I reject this claim as not proved.

b) Medical report Ksh.2000/=.

The doctor produced a receipt for Ksh.2,000/- being his medical fee. It seems that the said receipt was issued without a revenue stamp as required under the Stamp Duty Act Cap 480. Section 19 of the said act that such documents are inadmissible in evidence. The said document seems to have had a revenue stamp placed over a rubber stamp of the doctor. This law requires that section 20 of the stamp duty act be complied with, namely, pay the penalty to the collector of stamp duty who is situated in the lands office. As there has been no compliance, no award is to be made until compliance is done.

b) The Medical Treatment Exp. Ksh.16,899/-

I believe this is meant to be medical treatment expenses with "exp" meaning expenses.

The law requires that special damages must not only be pleaded, it must also be particularised and proved strictly, thus to have medical treatment expenses without particularizing what each individual expenses are is not correct.

The particulars should be for example:-

a) Doctor's consultation fee

b) Pharmacy medicine

c) Hospital bed

Etc

The documents require to be produced by the maker, failure to, a notice prior to the trial under order 12 CPR is to be issued.

The claim herein is dismissed as having failed to be particularized.

I enter judgment for the plaintiff on the proved claim. In Summary:

1) Passenger male adult age unknown in 1999

2) Injury:

Amputaiton of both legs

3) Liability

Interlocutory Judgment

Deputy Registrar 8.10.2003 100% against the defendant

4) Quantum

1) General Damages

a) Pain suffering and loss of amenities Ksh.500,000

II) Special Damages

a) Police abstract Nil

b) Medical report Ksh.2,000/- subject to stamp duty compliance

c) Medical expenses Nil _____

Total Ksh.500,000/-

I award the costs of his suit to the plaintiff. I award interest on General Damages from the date of this judgment. Interest on Special Damages of any Special Damage claim, namely, Ksh.2000/-, to await compliance of section 20 of the Stamp Duty Act.

Dated this 3rd day of February, 2004 at Nairobi.

MA. ANG'AWA

JUDGE

Omware & Co. Advocates for the plaintiff

Benard Githata kamau the defendant in person