



- 1) Running Down Cause
- 2) Part heard Ouna J (retired)
- 3) Male adult aged 23 years old –30.8.04
- 4) Motor bike cyclist/lorry accident collision
- 5) Injuries:-
 - a) Severe head injury with concussion and loss of consciousness for 3 weeks.
 - b) Loss of weakness to lower limbs and right upper limbs
 - c) Loss of left upper incisors (not proved)
 - d) Stiff elbow (not proved)
 - e) Eye sight (not proved)
- 6) Liability:
90% against the defendant
10% against the plaintiff
- 7) Quantum:-
 - I: General Damages
 - i) Pain, suffering and loss of amenities
 - II: Special Damages
 - i) Agreed Ksh.91,580/-
Hospital expenses Ksh.89,980/-
Medical report Ksh. 1,500/-
 - ii) Loss of future earning
 - iii) Loss of earning
 - iv) Future medical care
Ksh.341,580/-
Less 10% Ksh. 34,158/-
Ksh.307,322/-
- 8) Case law Nil
- 9) Advocates:-
A.J. Gulenywa advocates for the plaintiff
T.A. Ogundi advocate for the defendant
Holding brief for J. Kontiti

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1545 OF 2002

ABSOLOM ONGANY ANYILLA.....PLAINTIFF

VERSUS

MOUNT ELGON ORCHARDS LTD. & ANOTHER.....DEFENDANT

JUDGMENT

A Jurisdiction

The action before me is in tort and involves a running down matter whereby a collision occurred in a road traffic accident between the Plaintiff and a motor bike cyclist and the Defendant No.1's vehicle lorry.

The suit commenced for hearing on the 6th of October 2003 and adjourned to 14th October 2003 to hear further evidence left of one defence witness. The Judge was therefore not available to continue with the hearing of this suit. The parties went before the duty Judge who placed this file before me, as I deal with the running down case, for directions.

I directed under Order 17 rule 10 CPR, where a Judge is not available to hear his case by way of death, transfer and other good reasons, another Judge may continue with the trial from where it left off. In this case the Hon. Judge had retired from the bench and politically was unable to continue with the trial. In the circumstances for good cause I hold that I have jurisdiction to hear this case.

B. Facts of the case

The Plaintiff Absolom Onganyi Anyilla was an employee of M/S Elite B.C. Ltd. He was employed as an office messenger. He travelled on a motor bike that I believe is owned by his employer. The defendants – Mount Elgon Orchards Ltd. a limited liability company which runs a farm that supplies fruits overseas and locally.

It owed a motor vehicle lorry that was driven by Samuel Kariuki Kiarie. On the material day of the 30th of August 2003, the Plaintiff was travelling along the James Gichuru junction and along the Kingara/Gitanga Road junction where he stopped and started to ride his bike when he collided into the defendants vehicle to the side.

The defendant's driver was accompanied with the turn boy. He in fact did not appear to court to give evidence because he retired in the year 2002. The turn boy came to give evidence whereby he confirmed that their truck was to go to the airport and deliver fruits. Thereafter they were to proceed to A.B.C. shopping complex to deliver some fruits along Waiyaki way, That is the reason they took the Lavington route.

The turn boy stated he heard a bhang and came out. He found the motor cyclist on the ground next to the lorry having knocked behind the lorry to the side.

He ran to the Lavington Centre to make a call. When he returned he found the driver had ran away. He was unaware whether the driver was later charged with the offence or not.

Who then was to blame for this accident?:-

C. Liability

The defendant's driver appear to have emerged onto the road after the Respondent confirmed that the road was clear. There was a collision which indeed was due to the negligence of the Defendant herein.

I nonetheless noted that the Plaintiff as a motor cyclist failed to wear a helmet. This meant that he was in this respect was and did contribute to his personal injury. If he had a helmet on, the injuries received would have been minimal.

I therefore compute liability at 90% against the Defendant and 10% against the Respondent.

D. Quantum

i) General Damages

ii) Pain and suffering and loss of amenities.

The plaintiff gives a narration of the injuries .

It is important that the plaintiff should not give evidence but instead the plaintiff should plead the particulars of injuries. Evidence is to be given by a witness duly summoned in a witness box. (Order 6 rule 2(1) CPR)

I nonetheless note that the Respondent was examined by two medical doctors. DR. P.S. B.C. Otiato

MB, CHB, MPH (Nrb.) PNC

Consultant

Date of report 27.11.01

Injuries

- a) Severe head injury with concussion for 3 weeks.
- b) Right hemiparesis
- c) Loss of left upper incisors.

The doctor found that the Respondent had been in a coma. He found that as an inpatient for 3 months at Kenyatta National Hospital he left and had physiotherapy and required clinic attendance for 4 months.

He noted missing incisor teeth and stiff pain on pelvis hips and knee.

There was a stiff elbow. He complained of his eyesight. He required to be seen again after 6 months.

R.P. Shah

MB Ch. B. F.R.C.S.

Date of report 16.9.03

a) Injuries

- i) Serious head injuries with semi consciousness
- ii) Weakness of lower limbs and right upper limbs

The doctor confirmed that though there were complaints of an elbow and incisor tooth missing they were in fact not connected to the said accident.

He did admit in his report that there was little information he had been given of the patient. He found no proof of injury to elbow, eyes, and teeth being connected to this accident.

The advocate for the plaintiff said the main injuries were really to the head. That is where the plaintiff requests damages.

I note the plaintiff went for a "CT Scan". This showed bleeding in the surface of the brain. The fact that he was unconscious for 7 weeks and regained consciousness shows his injuries were serious. It nonetheless left no neurological deficit and the plaintiff after undergoing physiotherapy was able to talk

and walk again. He was transferred as an out patient to the Eldoret region where he bought land in Kitale.

The plaintiff said he had in fact a wife who ran away to marry someone else. She left him with the children.

I am of the opinion that the elbow, incisor tooth and eye injuries were indeed not part of the injuries sustained.

I nonetheless find that the plaintiff suffered a head injury consciousness and recovered well. The process of recovering necessitated him to sustain the loss of amenities. There was evidence from the relative PW2 that the plaintiff has a very bad temper and is uncontrollable at times. He fights a lot due to the accident. None of the doctors have in fact referred to this injuries as resulting to some mental disabilities and I would reject this contention.

I would in the circumstances award, noting that in head injuries with neurological deficit, I have in the past given Ksh.500,000/-. In this instance I find Ksh.250,000/- as fair there being no neurological deficit.

D: Special Damages

The parties agreed to:-

i) Hospital bills Ksh.89,980/-

and medical report, Ksh.1,500/-

Total Ksh.91,580/-

A consent judgment on this head was entered. I would though accordingly note that the other claims prayed for such as transportation was never proved.

I would therefore dismiss the rest of the special damages claim not proved.

ii) Loss of earning and

iii) Loss of future earning

The plaintiff was employed as a messenger with the Elite Book Centre Ltd known as Elite B.C. Ltd.

They wrote a letter dated 2.12.02 (Ex. 7) stating that they had employed the plaintiff as a casual motor cycle rider in the year 2000. The plaintiff claimed Ksh.5000/- or thereabouts as his monthly salary. From the invoices produced his pay was Ksh.130/- per day and at times Ksh.260/- per day being a casual worker.

As a casual worker, in this case the plaintiff worked for only 8 months. The contract begins at the start of the day and ends in the evening. Everyday a new contract must be entered into. The voucher clearly states that the payments have been received in:

“full and final settlement with no further claim. Against
my employer after serving as a casual employee”

There is therefore no further earning or lost earning that would have been claimed.

According to the labour rules after 3 months, a casual employee becomes a permanent employee. After 8 months, this seems not to have happened in this case.

The plaintiff nonetheless was paid his hospital expenses by his employer amounting to Ksh.50,000/- paid through the insurance company Apollo Insurance Co. Ltd.

They also paid as a kind token:-

Hospital bill advance 10,000/-

Food stuff

And a token of Ksh.25,000/-

to his family (brother and the wife).

I find that the claim under loss of earning and future earning is not available to the plaintiff and would dismiss the same.

iv) Future medical cost

Though this claim was pleaded it was never spoken of by either doctors on their report. I am satisfied that the plaintiff had no mental abnormality nor his mental function. That this was confirmed after and over 6 months by R.P. Shah.

I am satisfied that he injures to the plaintiff did not leave him with any permanent disability. I accordingly dismiss this claim.

I enter judgment for the plaintiff on the proved sum.

In Summary

Part heard Ouna J. retired (Order 17 r 10 CPR).

1) Male adult aged 23 years old on 30.8.04

2) Motor cyclist rider/lorry accident collision

3) Liability:

90% against the defendant

10% against the plaintiff

4) Quantum

I) Pain, suffering and loss of amenities Ksh.250,000/-

II) Special Damages (agreed)

a) Hospital expenses Ksh.89,980/-

b) Medical report Ksh. 1,500/- Rest of claim not -

Proved and dismissed _____

Total Ksh.91,580/-

a) Loss of future earning Nil

b) Loss of earning Nil

c) Future medical care Nil

Total Ksh.34,580/-

Final total Ksh.307,422/-

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.

Dated this 30th day of July 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Gulenywa Jonathan Advocates for the plaintiff

Milelr and Okundi Advocates for the defendant