



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 61 OF 2003

RAZI AMIN KULATEN.....APPELLANT

V E R S U S

1.CLAUS KRUGER.....1ST RESPONDENT

2.ROSEMARY NYAKINYUA.....2ND RESPONDENT

J U D G M E N T

This is an Appeal against the assessment of damages by the lower court. At the hearing of Appeal the Respondents did not appear to oppose Appeal.

In his judgment in the lower court the Trial Magistrate found the Respondents 100% liable for the accident. There is no appeal on this issue.

On quantum he allowed Kshs.4,600/- special damages.

And Kshs.350,000/- General Damages. It is not shown how the Magistrate reached this figure. The medical report described injuries which were quite severe and resulted in permanent incapacity. Injuries were described by medical report as:-

- (1) Fracture of tibia/fibula and patella on the right leg.
- (2) Potts fracture on left ankle.
- (3) Severe strain with rupture of cruciate ligaments (left knee)
- (4) Fracture of metatarsal bone (left foot)

The Doctor recommended operation of “cruciate ligament repair”. There was continued pain on left ankle and foot. The Doctor found that the Plaintiff had prolonged treatment for 6 months and could not continue to work as a driver. He was walking in crutches at the time of trial.

For these injuries the Plaintiff had proposed Kshs.700,000/- damages and had quoted several High Court cases to back his proposal. Further, counsel proposed an award for loss of future employment proposing multiplier of 15 and a salary of Kshs.15,000/- per month. The Plaintiff was a matatu driver. For future operation it would require Kshs.250,000/-.

All these matters were not considered by Trial Magistrate in arriving at an award of Kshs.350,000/-.

In his Plaint the Plaintiff had prayed for costs for future medical operation and loss of future earning.

The grounds of appeal are three stated as follows:-

- (1) The award of Kshs.350,000/- is too low in the circumstances.
- (2) Failure to award damages for future medical treatment and loss of future income.
- (3) Failure to consider the extent of permanent incapacity suffered by the Appellant.

On considering the grounds of appeal and upon reading the judgment of Trial Magistrate, it is my finding that he did not give proper consideration to the whole case and evidence offered by the Plaintiff. The award in the sum of Kshs.350,000/- fails to cover for pain and suffering and loss of amenities, cost of future operation, and loss of earning capacity.

Regarding loss of earning capacity it has to be taken that the Plaintiff was a Matatu driver since there was no contradictory evidence. For his earning he said Kshs.800/- half day and for full day between Kshs.1,600/- - Kshs.1,800/-. It is not clear when he worked half day or full day. Matatu drivers are not guaranteed fixed employment. In any case, there was no evidence that he would obtain work every day for 15 years continually. I find this claim was not well proved. However, according to medical report the Doctor stated that the Plaintiff would not be able to driver a vehicle in future, therefore it must be found that he did lose capacity to earn a salary as a driver. In fact the Doctor said "I do not think he can get gainful employment."

For that reason, the Plaintiff is entitled to a lump-sum under this item.

For the above reasons I allow the appeal and make the following awards:-

General Damages for :

pain & suffering and loss of amenities - Kshs.600,000=

Cost of future operation

As per recommendation of Doctor - Kshs.250,000=

Loss of future earnings capacity - Kshs.300,000=

Judgment is therefore entered against Defendants jointly and severally in the sum of Kshs.1,150,000/= plus Special Damage Kshs.4,600/- totaling Kshs.1,154,600/= with costs and interest.

Dated this 30th day of July, 2004.

JOYCE KHAMINWA

J U D G E

Read in present of:-

Mr. Khatib

JOYCE KHAMINWA, J.