

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 192 OF 2001

SAMWEL MWANGI KAMAU.....PLAINTIFF

VERSUS

JOSEPH M. KIMEMIA.....1ST DEFENDANT

GERALD MAINA NGARI.....2ND DEFENDANT

JUDGMENT

The Plaintiff, Samuel Mwangi Kamau, filed suit against the Defendants praying for judgment to be entered against the Defendants jointly and severally for special and general damages arising out of a road traffic accident that occurred on the 13th of February 2000. In his Complaint, the Plaintiff stated that whilst he was riding his bicycle along Nyeri-Nyahururu road, the 2nd Defendant, who was the driver of motor vehicle registration number KAC 368 B Toyota Hilux, which was owned by the 1st Defendant, drove the said motor vehicle in such a negligent manner that he caused the same to violently veer off the road and hit the Plaintiff as a result of which the Plaintiff sustained severe injuries. The Defendants filed a defence denying the Plaintiff's claim. When this suit came up for hearing the Plaintiff and the Defendants agreed to compromise the Plaintiff's claim on liability. The parties agreed that liability in negligence was to be apportioned at the ratio of 80:20 as against the Defendant and in favour of the Plaintiff. The effect of the said consent on liability is that the Defendant was to bear 80% liability whilst the Plaintiff was to bear 20% liability.

This Court took the Plaintiff's evidence for the purposes of assessing the damages to be paid to the Plaintiff. The Plaintiff called one witness, himself. The Plaintiff testified that as a result of the accident, he was injured on his left hand. The hand was posteriorly dislocated. The Plaintiff as a consequence was unable to lift his hand, neither could he use the said hand to do any manual work. The Plaintiff further testified that his left leg was fractured in two places. His right hand was bruised and further his head was injured. After the accident, it was the Plaintiff's testimony that he lost consciousness and only came to when he was admitted at the Nakuru Provincial General Hospital. The Plaintiff was admitted at the said hospital for a period of nearly two months. At the hospital the Plaintiff's leg was put on traction and plaster. The Plaintiff remained with the plaster from the month of February to the month of November.

The Plaintiff further testified that his left hand was put on traction and he was required to put the said hand on a sling. The Plaintiff later attended physiotherapy sessions to enable him use his left hand again. The Plaintiff produced the discharge summary as Plaintiff's Exhibit No. 1. The P3 form issued by the Police and duly filled by the Doctor at Nakuru Provincial General Hospital was admitted in evidence as Plaintiff's Exhibit No. 2. A medical report prepared by Dr. Kiamba was admitted in evidence as Plaintiff's Exhibit No. 3. The Plaintiff further testified that when he was injured, he was aged 17 years. He was then a form three student at Pondo Secondary School. It was his further testimony that he stopped schooling as he was forced to undergo treatment for a very long time. The Plaintiff testified that for now his leg had properly healed. He also testified that he could use his right hand without any problem. He also admitted that he could still go back to school and complete his studies.

The issue for determination by this Court is the quantum of damages that should be paid to the Plaintiff as a result of the injuries that he sustained in the road traffic accident. As stated at the beginning of this judgment the parties to this suit have agreed to apportion liability at the ratio of 80% and 20% in favour of the Plaintiff and as against the Defendant. According to the discharge summary issued to the Plaintiff by the Nakuru Provincial General Hospital, the Plaintiff sustained depressed fracture of the skull

(on the right temporal region), fracture of the right tibia and fibula. The Plaintiff was in a confused state when he was admitted at the said hospital but was in a good general condition when he was discharged. The Plaintiff also sustained bruises on both upper arms. Dr Kiamba, who prepared the medical report assessed the injuries sustained by the Plaintiff as hereunder:

(i) Head injury – As a result of the head injury the Plaintiff has a paralysis of the left upper limb due to intra cranial haemorrhage and depressed fracture of the left temporal bone. It in the assessment of the Doctor this was a permanent disability.

(ii) Fracture of the right tibia and fibula which had malunited resulting in a permanent deformity. According to his prognosis the Plaintiff would be unable to walk for long distances.

(iii) Laceration and bruises on the forehead and right hand which had healed but left prominent scars.

The degree of permanent disability was assessed at 50%. In his submission on the general damages to be awarded, the Plaintiff proposed the sum of Kshs 2,000,000/=. He relied on the decision of **Milicent Wangui Wamutegi & Others –versus- Stephen Njuguna Gatuhi Nairobi HCCC No. 2357 of 1990** (unreported) which was delivered on the 26th of July 1991 and an award of Kshs 100,000/= General damages for pain suffering and loss of amenities made. According to the Plaintiff, the injuries sustained by the Plaintiff in the said case were comparable to the injuries that he has sustained in the instant case.

On their part, the Defendants submitted that the Plaintiff ought to be paid Kshs 300,000/= General damages. The Defendants relied on the case of **Wilfred Ndumba Kirimi –versus- James Kiogora HCCC No. 147 of 1993 (unreported) and Jane Wambui Gacihl –versus- Peter Mwangi Kiriki & Anor HCCC No. 1719 of 1995 (unreported)**. I have considered the submissions on quantum made by the parties to this suit. The duty of this Court in assessing the damages payable to the Plaintiff for pain, suffering and loss of amenities is to, in so far as possible, compensate the Plaintiff for the injuries that he suffered. This Court is aware that an award of General damages may not restore the Plaintiff's health to what it was prior to the accident but it would to some extent ameliorate the pain and distress suffered by the Plaintiff as a result of losing his bodily functions. In the instant case the Plaintiff sustained a depressed fracture of the skull that resulted in the Plaintiff's left hand being permanently disabled. According to his evidence the Plaintiff was unable to lift up the said hand or use it to undertake any manual work. The Plaintiff also fractured his tibia and fibula which had reunited but had resulted in the Plaintiff having deformity of the said leg due to the malunion of the said fracture. The Plaintiff also sustained soft tissue injuries on his upper limbs.

I have considered the comparable decisions that were availed to me by the Counsel for the Plaintiff and Counsel for the Defendant. It is my finding that the decision of **Milicent Wangui Wamutegi (supra)** is to some extent applicable in this case. In the said case, the Plaintiff sustained more severe injuries than the Plaintiff in this case. Doing the best that I can, and considering the injuries that the Plaintiff sustained especially the fact that the Plaintiff may not use his left hand again, I assess the general damages to be awarded to the Plaintiff for pain, suffering and loss of amenities to be Kshs 1,000,000/=. The Plaintiff did not prove any special damages. He shall be paid the costs of this suit. Interest shall be payable from the date of this judgment. The said award of Kshs 1,000,000/= shall be reduced by 20% being the liability that the parties agreed was to be borne by the Plaintiff. The Plaintiff shall therefore be awarded the sum of Kshs 800,000/= General damages for pain suffering and loss of amenities. The costs shall also be paid on the basis of the consent on liability that was agreed upon by the parties to this suit.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE

