

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 401 of 1999

GEORGE KIPTOO WILLIAMS.....PLAINTIFF

VERSUS

WILLIAM SANG.....1ST DEFENDANT

KIPKOSKEI SANG.....2ND DEFENDANT

JUDGMENT

The Plaintiff, George Kiptoo Williams, filed suit against the Defendants, William Sang and Kipkosgei Sang, seeking the orders of this Court to be paid damages as a result of the injuries that he sustained in an accident that occurred on the 1st of May 1999 involving motor vehicle registration number KSF 121 which the Plaintiff was travelling in as a lawful passenger. The Plaintiff averred in his plaint that the said accident was caused by the negligence of the 2nd Defendant who was driving the said motor vehicle at the time of the accident. In their defence, the Defendants denied that they are liable to pay the Plaintiff damages as a result of an accident which they denied ever occurred. The Defendants pleaded in the alternative that the said accident was an act of God and further that it was inevitable and could not have been prevented by the 2nd Defendant. The preliminary issues having been settled, this case was fixed for hearing on the 9th of November 2004. The hearing date was taken exparte. The Defendants who were acting in person were duly served and affidavits of service filed in Court. On the said hearing date, the Defendants did not attend Court. This Court having been satisfied that the said Defendants were properly served, ordered the case to proceed the absence of the Defendants notwithstanding.

The Plaintiff called one witness, himself. He testified that on the 1st of May 1999 he was travelling from Nakuru to Olenguruone. He travelled in motor vehicle registration number KSF 121, 504 station wagon which was a public service vehicle. He testified that he paid a fare of Kshs 150/- for the said journey and sat on the front seat next to the driver. It was his testimony that whilst the said motor vehicle was being driven by the 2nd Defendant towards Olenguruone, near Molo, the said motor vehicle was involved in an accident. The Plaintiff testified that the said motor vehicle was being driven at a high speed. When the said motor vehicle attempted to overtake a slower motor vehicle it collided with an oncoming motor vehicle. The Plaintiff testified that as a result of the accident he fractured his skull, was injured on his neck and had his seven ribs fractured. He testified that he sustained deep cuts on his left hand. After the accident he was admitted at Nakuru Provincial General Hospital for twenty one (21) days from the 1st of May 1999 to the 21st of May 1999. The Plaintiff produced the discharge summary as Plaintiff's Exhibit No. 1. X-rays which were taken were produced as Plaintiff's Exhibit No. 2(a) and (b). A P3 form was duly filled. It was produced as Plaintiff's Exhibit No. 3. The Plaintiff testified that he reported the accident to the police and was issued with a police abstract report (produced as Plaintiff's Exhibit No. 4). He was examined by Dr Obed Omuyoma who prepared a medical report (medical report produced as Plaintiff's Exhibit No. 5). He paid the sum of Kshs 2,000/- for the preparation of the said report (produced as Plaintiff's Exhibit No. 6). The Plaintiff testified that he blames the driver of motor vehicle registration number KSF 121 for the said accident as the said driver was over speeding and overtaking dangerously. It was the Plaintiff's testimony that the said motor vehicle was owned by the 1st Defendant. The Plaintiff testified that he had not fully recovered from the injuries that he suffered during the said accident as he was still suffering for chest pains. He further testified that the 2nd Defendant was charged with the offence of careless driving. The Plaintiff prayed that he be compensated for the injuries that he had sustained. He also prayed for costs of the suit.

I have considered the evidence that was adduced by the Plaintiff in favour of his case. I have also considered the written submissions filed by the Plaintiff. The issue for determination by this Court is twofold; firstly who cause the accident that led the Plaintiff to sustain the injuries that he enumerated in his evidence and secondly what damages, if any, should be paid to the Plaintiff. The Plaintiff has testified that he was travelling in motor vehicle registration number KSF 121 Peugeot 504 station wagon as a fare paying passenger. He was travelling from Nakuru to Olenguruone. He was sitting on the front seat next to the driver. It was his testimony that the said motor vehicle was being driven by the 2nd Defendant at a very high speed. When the said motor vehicle reached near Molo, the driver of the said motor vehicle attempted to overtake a slower motor vehicle. The driver did not check if it was safe to overtake as a result of which the said motor vehicle collided with an oncoming motor vehicle. According to the Plaintiff, the said accident was caused due to the negligence of the 2nd Defendant. The evidence of the Plaintiff was uncontroverted. Although the Defendants pleaded that the said accident was caused by circumstances beyond their control, the evidence of the Plaintiff is to the contrary. The 2nd Defendant was charged with the traffic offence of careless driving. From the police abstract report produced as Plaintiff's Exhibit No. 4, the said case was still pending before the Molo Senior Resident Magistrate's Court. After evaluating the evidence adduced, I do find the said accident was caused by the negligence of the 2nd Defendant. He was over speeding and decided to overtake when it was not safe to overtake and thus caused the said accident. The 1st Defendant is vicariously liable as he was the owner of the said motor vehicle. The Plaintiff, being a lawful passenger could not be said to have contributed to the said accident. The Defendants will therefore bear liability for the injuries that the Plaintiff sustained in the said accident.

According to the discharge summary, the Radiological report, the P3 form and the medical report which were produced in evidence as exhibits, the Plaintiff sustained the following injuries;-

- (i) cut wound on the occipital region with lacerations on the left temporal region of the head
- (ii) Fracture of the skull on the occipital region
- (iii) Subluxation of the cervical vertebrae C1, C3 and C4
- (iv) Fracture of the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ribs of the left side of the chest
- (v) Fracture of the body of the left scapula
- (vi) Cut wound on the left hand and left arm

The Plaintiff testified that he was admitted for twenty one days at the Nakuru Provincial General Hospital after the said accident. In his evidence before Court he testified that he had not fully recovered from the injuries that he had sustained during the accident. Dr Omuyoma who prepared a medical report which was produced as Plaintiff's Exhibit No. 5 testified that the degree of permanent incapacity that the Plaintiff has suffered was thirty percent.

In his submission before Court, the Plaintiff has urged the Court to award him Kshs 2.0 million for the injuries sustained. He has relied on the decision of **Daniel M. Githitho –versus- Crossline Safaries Ltd Mombasa HCCC No. 95 of 1996 (unreported)** and **Boniface Mwalima –versus- Isaac Mwaluwa & Anor Mombasa HCCC No. 17 of 1997 (unreported)** in support of his submissions. While I agree that the Plaintiff sustained more or less the injuries suffered by the Plaintiffs in his above cases, the submission by the Plaintiff that he should be awarded Kshs 2.0 million is speculative. The purpose of an award of damages is to compensate the Plaintiff for the injuries that he has sustained and not to give the Plaintiff a windfall as a result of his misfortune. Doing the best that I can, and considering the injuries that the Plaintiff sustained, I will award him Kshs 560,000/- as general damages for pain suffering and loss of amenities. I will award the Plaintiff the sum of Kshs 2,000/- being the proved special damages.

In the circumstances therefore the Plaintiff is awarded Kshs 562,000/=. He is also awarded the costs of

the suit. Interest on the amount awarded shall be applied from the date of this judgment.

DATED at NAKURU this 17th day of December, 2004.

L. KIMARU

JUDGE