

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA
CIVIL SUIT NO. 189 OF 2002

DOMINIC PETER KOKO MBAI PLAINTIFF

- VERSUS -

1. YUSUF SADIK IBRAHIM AKABHA)

2. YUSURI SADIK IBRAHIM AKASHA) DEFENDANT

J U D G E M E N T

The plaintiff was on the 7.9.2001 at around 4.00 p.m. walking along the Pedestrian path along the kengeleni – Nyali road when he was hit by motor vehicle Registration number KAN 147Q owned by the 1st Defendant and driven by the 2nd Defendant.

As a result of the accident he suffered injuries and was admitted to Coast General Hospital for 2 months. The injuries were confirmed by Dr. Hemant Patel who examined and prepared a medical report as follows:

1. *Multiple wounds on head and face with head -injury (Concussion),*
2. *Chest – injury with fracture ribs on right side,*
3. *Fracture Olecranon of Ulna (right elbow),*
4. *Comminuted fractures tibia – fibula (both legs).*

And although he was no longer on treatment, he cannot walk as the fractures did not unit and his right hand is also weak and deformed. He filed the claim for Damages for injuries suffered and attributed the accident to negligence on the part of the Defendants. The said Defendants though served, failed to enter appearance and interlocutory judgement was entered. The matter therefore is before me on Formal proof.

The plaintiff testified that he has since the accident not resumed his teaching duties at Khamis High School where he worked as a graduate trained teacher earning a basic salary of Kshs.25,333/=. He is unable to continue with the said job and had requested his employer the TSC to consider putting him on light duties but his request was yet to be considered. At the time of the accident he was aged 53 years and would have retired at the normal age of 55 years. In the circumstances he claims loss of earnings totaling to Kshs.253,000/=. I have considered the claim but I note that the same is not pleaded for. At the start of the hearing Mr. Sifuna Counsel for the plaintiff had applied to be allowed to orally amend the plaint to include the said claim but the same was refused and he was advised to amend the same either by making a formal application or following any other laid down procedure as the intended amendment was to incorporate a whole new claim. He however opted not and proceeded to prosecute the plaintiff's case. In the circumstances I am not position to grant the said claim which if the amendment had been effected I would have granted at Kshs.253,000/=.

As for Damages for pain and suffering, Mr. Sifuna submitted that an award of Kshs.1,500,000/= would be adequate and sought to rely on the judgement in MESHAK MOHAMED –VS- NAHASON M. MUTWANGI & ANOTHER. HCC 85/1997 (RD) UR, MOMBASA IN WHICH justice Ouna had made an award of Ksh.800,000/= for fractures of both femurs and the hip. In the case under consideration, I appreciate the plaintiff suffered much serious injuries and is now unable to continue working. Doing the

best I can, I make an award of Kshs.1,200,000/=.

As for Special Damages, the same were pleaded at Kshs.2,100/= but no evidence was lead towards proving the same and therefore I shall make no award. The plaintiff shall however have costs of the suit.

Dated and Delivered at Mombasa this 2nd day of May, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE