



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 89 OF 1998

DAVID WAWERU KAMAU PLAINTIFF

VERSUS

PAUL NGUGI MWAURA & ANOTHER DEFENDANTS

JUDGEMENT

The plaintiff PW I JOHN NGUGI MWAURA a 25 years old working as a turn boy in motor vehicle owned by the defendant AK Transporters Ltd on 15th October 1997 was working as such in the said defendants Motor vehicle registration No. KAH 698U Isuzu Canter and was travelling Loitokitok to Mombasa when his employer's said motor vehicle collided with motor vehicle No. UPR 495/424 UDE a Lorry Mercedes Benz.

He said that when they reached near MAZERAS his driver lost control and collided with the other vehicle coming from Mombasa side he said:-

“The cabin of our vehicle hit the body of the other vehicle. The impact was on the right hand side of our vehicle. The other vehicle was blameworthy for coming with full lights. Our driver dies on the spot.

He got injuries on the head. He broke his leg. His right hand became paralyzed and he cannot do any work with the right hand. He exhibited a medical report, Ex. 2A a P3 Form Ex. In cross examination he said the other driver had full lights and dazzled the complainants driver. DWI the employer of PWI confirmed that the accident occurred and involved his motor vehicle KAH 098U and that the plaintiff was his turn boy earning Kshs. 6,000/- per month. When he visited the place he only saw broken glass at the scene of the accident. He said there was a sharp corner where the accident occurred and it was not a flat place but on a gradient sloppy downward. The plaintiff used to work as a turn boy.

Second defendant did not call evidence. The learned counsel representing the parties Mr. Tindika for plaintiff and Mr. Muraya for defendant addressed me on liability and damages payable. For plaintiff Mr. Tindika suggested for liability:- That it was driver of the 1st defendant who was negligent. He should have swerved. He conceded 60% liability as against 1st defendant. For pain and suffering and loss of amenities. He suggested Kshs. 1,600,000/-. Future earnings – Kshs. 1,800,000/-. Special damages – Kshs. 1,600,000/-. Total – Kshs. 3,401,600/-/

Mr. Muraya for the defendants suggests:-

On liability:- As against second defendant to be totally liable 100% but if first defendant is liable then:-

quantum should be:-

(i) Pain and suffering - Kshs. 400,000.00

(ii) Future earnings - Kshs. 720,000.00

Total earnings - Kshs. 1,120,000.00

He did not comment on special damages. In my view I believe Motor vehicle KAH 098U was negligent because he hit the second vehicle the Mercedes truck UPR 495 on its right hand side. The driver of KAH 098U ought to have swerved particularly as PWI says that he could see the coming Mercedes truck about 50 yards away. That would have given the driver enough room. However, the driver of the second defendant vehicle also helped to cause the accident by coming with full lights and failing to dim its lights. It also had opportunity to swerve therefore as for apportionment.

I agree with Mr. Tindika that it be 60% leaving 40% as against the other although Mr. Muraya has argued strongly that the evidence does not point at his client, I think on balance of probabilities the liability is as I have found it to be. On damages I agree with Mr. Muraya that blanket awards are better and are more applicable.

According to the medical report by RASIK PATEL dated 19th May 1998 found:-

(i) Fracture of the right superior and inferior pubic rami.

(ii) Separation of left sacroiliac joint.

(iii) Paralyzed right upper arm.

He was discharged on 14th November, 1997 after one month. He now has complete paralysis of right upper extremity and that would remain permanent. He cannot any longer work as a turn boy and as the doctor has remarked in his report thus: for a young person to have this sort of disability shall be a great handicap for him to have any work in future. There is no further treatment for this.

Pain and suffering and loss of amenities:-

In the case of MILLICENT WANGUI WAMUTEHI & OTHERS VS STEPHEN NJUGUNA GATUHI HCCC NO. 2357 of 1990 (NBI): Victim aged 24 years.

Injuries: Tear of plexus of left arm causing paralysis of left shoulder and fore – arm. Crack fracture of the right iliac bone of the pelvis and extensive laceration left leg. Left hand.

75% assessed disability. Judge Mbogholi Msaga awarded Kshs. 1 million.

Fracture of right tibia and fibra.

Fracture of Pelvis

Rapture of Pelvis

Rapture of urinary bladder

Injury to virginal wall.

I have considered also other cases cited HCCC NO. 145 of 1995 (MSA) – GITONGA VS KIMOTI AND ANOTHER HCCC NO. R38 of 1992 – CHARO VS TANA RIVER BUS SERVICES.

HCCC NO. 4641 of 1987 – MACHARIA VS MUGO

I would in this case give Kshs. 850,000/-.

Loss of future earnings - the plaintiff earned Kshs. 6,000/- per month.

He was 25 years of age and it is possible he would have worked until 55 years like Civil Servants retirement but again this would depend on life expectancy and other contingencies like prevalent early mortality due to Aids impact on the youth which this court does take Judicial Notice of and of course other imponderable of life.

I would give life expectancy of 15 years with a multiplier of Kshs. 6,000/- - $15 \times 6,000/- =$ Kshs. 540,000/-. Special damages must be pleaded and proved as pleaded. Here Kshs. 1,600/- was claimed as special damages and was proved. 1. Payment to doctor Kshs. 1,500/- 2. Police Abstract Kshs. 100/- Total Kshs. 1,600/- Total Award therefore is:-

1. Pain and suffering Kshs. 850,000/-

2. Future earnings Kshs. 540,000/-

3. Special damages Kshs. 1,600/-

TOTAL Kshs. 1,391,600/-

Less 40% as against the 2nd defendant.

So 1st defendant to pay Kshs. 834,930/-

Plus cost and interest.

2nd defendant to pay Kshs. 556,670,000/- plus interest and cost.

Dated this 31st day of May 2002.

A. I. HAYANGA

JUDGE

Read to Mr. Njoroge for plaintiff.

A. I. HAYANGA

JUDGE

31/5/2002