



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 60 of 1999

DAVID THANJU KARANJA PLAINTIFF

V E R S U S

SAMUEL KIMANI DEFENDANT

J U D G E M E N T

The plaintiff filed this suit claiming special damages and general damages together with costs and interest. The cause of action is in negligence arising out of road traffic accident.

On or about 13.8.98 the plaintiff who gave evidence as PWI, boarded a matatu from Magongo to travel to his place of work in Ukunda.

The matatu vehicle was registration no. KAH 794 S Nissan. He was sitting in front in the drivers cab. He noticed the driver of the matatu was driving very fast. There was another matatu coming from behind which was trying to overtake him but the driver of KAH 794S was speeding up so as to block him the other driver. Then KAH 794S hit a trench and a Swahili house by the roadside and rolled off he road and an accident occurred. The plaintiff sustained very serious injuries. He exhibited a medical report made by Dr. J.M. Muthuri dated 13.4.1999 almost a year after the accident. The report shows that the plaintiff was admitted in Hospital from 13.8.98 to 2.11.98 about 2 ½ months. He sustained multiple injuries namely:-

1. fracture of right tibia (comminution fracture). A plastic cast was applied.
2. fracture of right femur. (open reduction and fixation with a K-nail was done.
3. fracture of left femur open reduction and fixation of with a K-nail was done.
4. fracture of the mandible IMF wiring was done.
5. injury to the left foot-fractures of metatarsals.

The reports concludes with the doctors opinion which shows that the plaintiff was left with malunion of right tibia bone muscle wasting creating inbalance and change of gait. Major joints and especially the knees would develop. Osteoarthritis. He also had implants that would require removal at a cost of shs. 60,000/- then. Dr. Muthuuri gave evidence at the trial. He said the costs of removal would by now (2002) be about shs. 100,000/-. The plaintiff said that he was taken to hospital and given assistance by his friend who from time to time made payment on his behalf and had receipts made in his name. The total medical bill at Pandya Hospital was shs. 541,956/- out of which he has paid shs. 469196/- leaving a balance of

shs. 72749/-. This evidence was confirmed by PW3, Charles Okello Credit Controller of Pandya Hospital except that according to the records at the hospital the balance was shs. 84,00/- and not 72749/- as plaintiff stated. He also confirmed that a Mr. Fredrick Kuria paid money on behalf of the plaintiff.

The plaintiff also exhibited a receipt for shs. 5600/- for purchasing medicine and Dr. Muthuuri (PW2) confirmed being paid shs. 5000/- for appearing in court and producing the report .

He also said the metal (K-Nail) was still in situ. PW4, PC Manyara is the officer who was called to produce Police abstract report together with other evidence. He confirmed the occurrence of the accident and that the vehicle veered off the road and rammed into a house. Passengers were injured including the plaintiff who was given P3 form (exhibit 6). This witness also confirmed that the vehicle was owned by S. Kimani and the name of the driver. His charges for coming to court he claimed shs. 1500/-. This was close of plaintiff's case. The defendant applied for adjournment to call witnesses but none appeared on the hearing after adjournment. On 19.8.2002 the defendant closed his case without calling any evidence. On submissions the counsel for the plaintiff submitted that the plaintiff had proved his case on a balance of probability. Evidence was sufficient that the plaintiff was in the vehicle which had an accident as a result of which he sustained very serious injuries. The plaintiff's evidence was not controverted.

The defendant produced no evidence to support the statement of defence. I, therefore, find on liability that the defendant is liable on the basis of 100%. The plaintiff who was sitting in front could see clearly what was going on. The vehicle was being driven very fast and in a careless and dangerous manner and the driver was to blame for the accident.

On issue of quantum counsel for the plaintiff submitted that the special damages were proved. After the hearing he plaintiff sought leave to amend the plaint for future medical expense from 60,000/- to 100,000/-. This was occasioned by the evidence of Doctor at the trial. The leave was granted.

On the submissions of counsel for the defendant I have already said that no evidence was produced to contradict the plaintiff's evidence which I accept on a balance of probability. There is authority that the standard of proof is even lower where there is no evidence by the defendant in a suit. I, therefore, accept that the plaintiff was a passenger in the defendant's matatu and he sustained the injuries described by the doctor and he incurred the expenses proved.

On the issue of the quantum it is agreed by both counsel that the injuries were very serious. The plaintiff's counsel submitted that a sum of shs. 1.5. Million will reasonably compensate the plaintiff for pain and suffering and loss of amenities. He has cited the authority of **HCC. NO.1737/1996 John Thuo – vs- Joseph Gichuhi Alex by Alex Etyang J.** Where a sum of shs. 600,000/- was awarded for pain and suffering. The injuries in that case are much less serious than in the present case although it can never be said any two cases no matter how similar can be compared. In this case the plaintiff must have suffered much pain having his fractures repaired and has been moving about with metal pieces in his body. He spent 2 ½ months in hospital and he will develop osteoarthritis a crippling condition with much pain.

Although the counsel for defendant proposes an award of shs. 400,000/-. I have examined the authorities he relies on and I find they do not compare. My view is that these authorities are of 10 years ago and they are not so severe as in the present case. After taking everything in to consideration and the age of the plaintiff, I find a sum of shs. 1,000,000/- (one million) would be fair compensation for pain suffering and loss of amenities.

I also find an award for shs. 100,000/- for future medication in order. I also find special damages claimed proved this:-

Medical expenses shs.541.965

Future medical expenses shs.100.000

Medical report shs. 2.000

Police abstract 100

Total shs.644.065

Witness expenses were claimed for Doctor PW2 who confirmed receiving 5000/- for taking time to testify.

PW4 Police officer also claimed shs. 1500/-. These items form the costs of the case and are subject to taxation proceedings before the taxing master. I will leave the consideration to the taxing master on the items.

Judgment is therefore entered for plaintiff in the total sum of shs. 1,644.065. Made up as follows:-

General damages for pain suffering

and Loss of amenitiesshs.1.000.000/-

Special damagesshs. 644.065/-

TOTAL shs.1644.065/-

Costs and interest is also awarded to the plaintiff.

Dated this ...20th..... day of September, 2002.

**J. KHAMINWA
COMMISSIONER OF ASSIZE**

Read in the presence of Mr. Muraya and in the absence of Mr. Munyao.

**J. KHAMINWA
COMMISSIONER OF ASSIZE**