



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
CIVIL CASE NO. 1265 OF 1997

BARRY PROUDFOOT.....PLAINTIFF

VERSUS

COAST BROADWAY COMPANY LIMITED.....1ST DEFENDANT

COAST BUS COMPANY.....2ND DEFENDANT

JUDGEMENT

Background

The Plaintiff was injured in an accident involving the bus he was travelling in from Mombasa to Kisumu on the night of 4th to 5th August, 1995. The present suit was filed on 27.5.1997 against the two defendants seeking General and Special Damages. Evidence

The Plaintiff gave evidence that he is a British National and Engineer in Motor Heavy Industry by Profession. He had come to Kenya in August, 1995. On 4th August, 1995 he left Mombasa for Kisumu by road. He bought a ticket in Coast Bus Company whose bus left Mombasa at 7 p.m. for Nairobi. On the way they found it was raining and the bus must have skidded and was swaying from side to side then fell on one side. He was sitting on the window side.

He said that taking into account that it was raining and it was at night the driver was speeding under the circumstances. The bus was overloaded with some passengers sitting in-between the seats. His hand was caught between the body of the bus and the seat. His leg was trapped and could not move. His shoulder was pierced by the broken glasses. A lorry driver used a jack to free him and by that time he was unconscious. He was taken to Nairobi Hospital in the morning and he guessed that he had been trapped in that position for about 4 hours. X-rays taken at the hospital showed that his hand had been shattered, had a punctured lung and his shoulder was bleeding.

After treatment which included removal of the glasses from the shoulder, fixing of the ribs and fixing of the shattered arm which was put on a sling, he left the hospital after seven days. His insurers in the U.K. were informed of the accident and after another 7 days in Mombasa a surgeon came to accompany him to the U.K. Once in the U.K. his doctor sent him to a specialist who successfully operated on him and separated the nerves. Thereafter, he continued with physiotherapy for 2 years. He can now move the fingers except the main one. He has to wear a special glove but the arm is without strength. Examination by a panel of doctors gave the verdict that he was incapacitated for life. He is not able to work again. His weekly salary was Stg. 240 which formed the basic salary. He produced a letter from the employers confirming this and showing that he sometimes worked overtime.

He produced medical reports by Dr. McGirvey, Mr. Wokabi and Dr. Demetriou. He produced invoices in support of the expenses he incurred in buying medicine. He also produced a letter from his neighbour who was taking care of him. He will remain alone for the rest of his life as he is not likely to get married.

Liability

The Plaintiff's evidence as to the cause of the accident is that the driver of the bus was negligent in the manner he drove the bus prior to the accident. He was speeding when it was raining and it was at night. The Defendant did not give evidence. In the absence of any other evidence I have to accept his evidence. It is not disputed that the Plaintiff was a passenger in this bus. During the hearing he produced the letter dated 17.8.95 (Exh. 2) which confirms that he was a passenger.

Taking into account the plaintiffs evidence I find no reason not to find the driver of the bus wholly responsible for the accident. The Plaintiff being a passenger bore no blame in the happening of the accident. I find and hold that the accident was caused solely by the negligent driving of the driver. The Defendant is therefore vicariously liable to the Plaintiff for damages.

Quantum of Damages

Damages

According to the medical report from the Huntley Mount Medical Centre which was produced as evidence (Exh.6), the Plaintiff as a result of the accident suffered fractured ribs and permanent paralysis of his left hand as a result of nerve damage. From the physical aspect the paralysis of his left hand had a profound effect on his lifestyle, and he still experiences chest pains as a result of the fractured ribs. The Doctor in that report adds:

“Secondly the psychological trauma which has affected him considerably considering he has not been able to work and the diverstating effects this has had on his life. He underwent psychological counselling for several weeks in the months after the accident. Despite the counselling he still requires sedation to enable him to sleep at night.....”

Although the Plaintiff has recovered from the fractured ribs, he has lost the use of his hand and has to continue using a special glove to keep his hand warm because of the damage to the nerves. I accept his evidence that he was 50 years old at the time of the accident and he was earning a weekly salary of UK'240. I shall in assessing the damages consider first the loss of earning. It is clear from the medical report that the plaintiff is not able to work again as an Engineer. He has therefore lost the income he was earning per week of U.K.'240.

Secondly, the Plaintiff suffered additional pain and suffering as a result of the disability of his left hand. To arrive at the damages payable under this item, I have considered the cases cited in support and against the claim for damages for the pain and suffering. In the case of Polycans Limited in Nyakundi's Digest at H-8-04D a sum of kshs.360,000 was awarded to a young man whose hand had to be amputated and in Street V. Direct Image Litho Services Limited (1996) 96 (1) QR5 a sum of UK'30,000 was awarded in 1995.

I have considered the five cases cited by the defence which give an average award of kshs.250,000 as General Damages. The defence further cited three cases namely:

- (1) HCCC No. 1602 of 1992 – Jackson Wamai v. Kenya Cooperative Creameries.
- (2) HCCC No. 893 of 1982 - Margaret Wanjiru Mugo v. The Attorney General.
- (3) HCCC No. 3504 of 1985 – Munene Mathenge v. The Attorney General.

In these cases the Plaintiff had her/his hand amputated. The average amount of damages awarded was

Kshs.300,000. The Plaintiff in the present case is asking for Kshs.1,200,000 as damages.

It is to be noted that although the Plaintiff has lost the use of the hand it was not amputated taking into account the observations of the doctor in the medical report. I consider a sum of Kshs.800,000 as adequate damages. In arriving at this figure I have used the awards in these cited cases as the basis for my consideration as to what would be adequate compensation. I have also taken into account the inflationary trend since those cases were decided.

Loss of Earnings

The claim for loss of earnings is being resisted by the Defendant on the ground that such claim is special damages and was not pleaded and therefore was not proved.

I do not accept that the Plaintiff has not pleaded loss of earnings as it is claimed. In paragraph 4 of the Plaintiff under the Sub heading "Particulars of Loss" the Plaintiff has clearly pleaded loss of earning giving the figures of UK'240 per week and the sum of UK' 200 p.a. for the cost of additional heating.

During the hearing, the Plaintiff gave evidence as to how much he was earning per week. He explained that he has not been able to work and he will not be able to work again in future to earn this amount. This evidence was backed by documents which showed how much he earned. This evidence stands unchallenged.

Furthermore there is the letter dated 17-2-97 which stated that the Plaintiff would have retained his job if it were not for the accident. It is therefore incorrect for the Defence to argue that this claim was not proved above the UK'2,062. Contrary to this contention I find that the claim for loss of earnings is proved and the Plaintiff is entitled to be paid damages for loss of earning.

Taking a multiplier of 12 years based on his age of 50 years and the retiring age of 65 years the damages payable shall be UK' 240 per week x 52 weeks x 12 multiplier =UK'149,760.

It was pointed out that the Plaintiff's arm was not amputated and therefore he could develop another use for the arm and therefore earn some living. There was no evidence led to show that the Plaintiff was able to earn a living through the use of the arm. The evidence before the court was that the plaintiff shall not be able to earn the money he earned before the accident. I therefore see no basis to find that the Plaintiff could adapt himself and engage in a different job and I will not therefore engage on a speculation which is not based on facts.

Additional cost of heating.

This claim is opposed on the Ground that it was not proved. This claim was based on the Plaintiff's evidence that as a result of the injury the arm felt cold and needed extra heating of the house. I find the claim to be vague and not supported by evidence. Had the Plaintiff shown that he had or he would incur extra expenses to what he was paying before the accident, I would have accepted the claim even if it was not specifically pleaded.

In a claim of this nature what is required is a proof that the expenses were incurred or would be incurred. I would not refuse a claim if proved simply because it was not specifically proved. I do not find this claim proved and I accordingly refuse it. I have accepted the amount claimed as Special Damages

Judgement

There will be judgement for Plaintiff as follows:

- (1) For Pain and Suffering Kshs.800,000
- (2) For lost income Stg.,149,760

(3) For special damages Stg. 1,064

(4) For Dr. Wokabi for testifying Kshs.5,000/-

Total

The Plaintiff shall have the cost of the suit and interest.

Delivered and dated this 23rd day of January, 2001

KASANGA MULWA

JUDGE