



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 2079 OF 1998

JONATHAN PANCHRAS MBINDAH.....PLAINTIFF

Versus

PETER MWAURA NJUGUNA.....1ST DEFENDANT

NJOROGE MWATHI.....2ND DEFENDANT

JUDGMENT

On 17th May 2000 Jonathan Panchras Mbindah, obtained interlocutory judgment against Peter Mwaura Njuguna who though served with the summons and plaint failed to enter appearance. The suit was then set down for formal proof.

Mbindah's case against Njuguna as per his plaint which was filed on 16th September 1998, is that on 26th October 1995 a Matatu motor vehicle in which he was traveling, was involved in an accident with motor vehicle registration number KTK 036. The registration number of the Matatu, which was owned by Njuguna, was KAC 966 K. The second vehicle was owned by Njoroge Mwathi, the 2nd defendant.

Mbindah claims that both the defendants who were also the drivers of their vehicles, drove or managed and controlled their vehicles negligently and recklessly and as a result of which they were involved in an accident in which he sustained severe injuries. He blames the accident on the negligence of both the defendants. The particulars of the defendants' negligence are that they drove at an excessive speed and failed to keep any proper look out and to see the other vehicle in sufficient time to avoid the said collision. In the circumstances, they failed to stop or slow down, or in any way to avoid the collision. He blames Njuguna for failing to apply brakes sufficiently or in time and for permitting vehicle to go on the wrong side of the road and thereby to collide with KTK 036.

The 2nd defendant filed his defence, and while admitting that the accident did occur as aforementioned, he however denies that he was the contributor. He avers that the accident was caused and or substantially contributed by the 1st defendant.

Mbindah therefore prays for special and general damages costs of the suit. He also prays for interest on the award.

The plaintiff adduced evidence in support of his claim. He testified that on the material day, he was traveling in the said Matatu on his way from Ngong to the City Center, Nairobi. He had paid a fare of Shs.15.00 for the journey, and was seated on the right hand side of the matatu. Before reaching Karen, the accident between the two vehicles occurred and he remembers everyone rushing out, but he couldn't

move his leg, which he according to his testimony, was severed from the rest of his body at the knee. He suffered serious injuries to his leg.

He was evacuated and taken to the Nairobi Hospital where he was admitted, and where he remained for two months. At that time he was a student at the United States International University but his studies were disrupted due to his disability, and it was not until two years later that he was able to resume his studies. He claims that he is no longer able to enjoy an active life, as he can no longer enjoy games of football and rugby. It was also his evidence that prior to the accident, he had been selected to join his University Rugby team, which he now cannot.

Based on the above, and also on the fact that there was no rebuttal evidence, the plaintiff has been able to establish on a balance of probability that there was an accident on the material day involving the vehicles, and that Njuguna was fully liable for it.

The plaintiff's evidence on the injuries sustained and his disability was corroborated by Dr Gakuu an orthopedic and trauma surgeon. Although he testified on injuries sustained on the right leg, his report, which he produced, however indicated that the plaintiff had sustained injuries on the left leg, which supports the contents in the plaint. I shall accept his evidence and shall take the liberty to attribute the confusion on the time lag between when he reconstructed the leg and the date when he testified.

He testified that the plaintiff had sustained compound comminuted fractures of the left femur, the tibia and the ankle and that he had also fractured his patella and left knee. Further that some of his bones were also missing. According to Dr. Gakuu who undertook the reconstruction works, the plaintiff still needs further surgery for removal of the metal plates. It was Dr Gakuu's opinion, that Mbindah's long term prognosis would be poor with recurrence of infection and further sinus formation and that the knee was permanently destroyed with a permanent incapacity of 60%. However, all the fractures had healed leaving him with a stiff knee joint and a limb shortening deformity of 5 centimeters, and that the deformities were causing him severe limping which put abnormal strains and stresses in the hip, spinal and the left lower limb joints.

It was also his opinion that the plaintiff would soon develop osteoarthritis of the affected joints with progressive pains and disability that would severely limit him in work activities and functions on the lower limbs and the spine.

I shall however have to disregard the evidence of Professor Mbindyo, which contradicts that of Dr. Gakuu, and the contents of the plaint. His evidence and his report were both based on the right leg, while the plaintiff claims damages for injuries sustained to various sections of his left leg. The two cannot be said to refer to the same limb.

Be that as it may be, I shall proceed to determine the quantum on the basis of the fact that the details of the accident are not disputed. Further, an award of damages for the injuries sustained to the right leg would not materially differ from that sustained on the left leg. I can safely assume that the surgeon's report had a typographical error. Needless to say, I see no prejudice that the 1st defendant stands to suffer should I award damages on the basis of the above.

The rule in law is that special damages must not only be specially pleaded but that they must be specifically proven.

The plaintiff claims Shs.2,600.00 in special damages, of which shs.100.00 was for the Police Abstract Form, the balance being for medical report. I do award a sum of shs.100.00 for the Police Abstract form, which was produced in exhibit. I have taken judicial notice of the fact that no receipts are usually issued for the payment. I am however unable to award the balance of the claim as no receipts were produced. Nor did the plaintiff adduce any evidence to support thereof. All the other claims under this heading which were included in the submissions of counsel cannot be awarded as they were neither specially pleaded in the plaint, did the plaintiff attempt to adduce evidence to support such a claim.

I have perused the cases that were cited by the plaintiff's counsel in support of his submission that a sum of Shs.2,200,000.00 should be awarded for general damages for pain and suffering and loss of amenities. I have taken into account that in one of the cases that he cited, namely, Peter Kingori and Bertha Kingori v Fabian Kagiri and Another HCCC 2916 of 1993, Bertha who had sustained a comminuted fracture of the right femur, with posterior right head dislocation, multiple cuts on the lower region of both legs and whose left arm had obvious tenderness and weakness and could not hold objects with most movements involving the right hip joint being quite painful, was awarded a sum of shs.500,000. As a result of the accident, she had to leave her job as a Field Officer.

In the more recent case of Julius Kirimi v James M. M'Ikiara HCCC No. 96 of 1996, the plaintiff permanent disability was assessed at 65%. He had sustained spinal injuries which had affected the use of both hands and legs and had persistent burning pains in both hand and feet, with a loss of libido which had greatly affected his sexual activities. He was awarded Shs.1,500,000.00 general damages for pain and suffering and loss of amenities.

In my humble opinion the injuries sustained by Bertha in the earlier case were of a less serious nature than Mbindah's, while the injuries sustained by Julius Kirimi, which were more serious than his.

I have also taken into account the age of the plaintiff, and the fact that with a permanent disability of 60% he will not be able to enjoy a normal active life like most men of his age. His scars will be a cause for social cosmetic embarrassment not to mention that he now walks with a limp not to mention that he would develop osteoarthritis and would remain on life long medication. I have also taken into consideration that he lost two years of his university academic life which has meant that he would be delayed by at least two years in going to work force. I shall have to take into consideration the fact that Kirimi's award was made in 1999, that was two years ago. One can not ignore the fact that inflation has taken its toll. I do therefore award him Shs.2,000,000 as general damages for pain and suffering, and loss of amenities, and for future treatment. I also award him costs of this suit. Interest shall accrue thereon at court rates from the date of this judgment until payment in full. Interest on the award of special damages shall also accrue at court rates, from date of filing suit until payment in full.

Dated and delivered this 30th day of May 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of :