



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.436 OF 1995

HENRY MORIASI OSIEMO.....PLAINTIFF

V E R S U S

1.QUID J. MOHAMED.....1ST DEFENDANT

2.MERALI MFADHUL.....2ND DEFENDANT

J U D G M E N T

Liability was compromised in this Running Down matter and apportioned by consent recorded on 11.5.1999 as to 30% against the Plaintiff and 70% against the Defendants jointly and severally. The matter was then placed before me for Assessment of General Damages.

At about 2.30 p.m. on 18.2.1995, the Plaintiff had stopped his motor cycle outside the gate of Waa Secondary School along the Mombasa/Lunga Lunga road when motor vehicle Registration No.KAB 281M, a Nissan Matatu owned by the 2nd Defendant and driven by the 1st Defendant rammed into him. He suffered serious injuries which are summarized in three Medical Reports produced in evidence by his Doctor Mr. Hemant Patel as follows:-

(1)Report dated 19.6.95:

“INJURIES AND TREATMENT

: 1.Head injury – concussion.

2.Multiple lacerations on head.

3.Fracture humerus (left arm).

4.Fracture femur (right thigh).

5.Fracture ribs 4 th & 5th right side.

6.Fracture trochanter right hip.

7.Fractures pelvis (pubis and right sacro -iliac joint).

He was unconscious on admission at Pandya Memorial Hospital. After initial treatment, he underwent operations of “Open reduction – K Nail” on right leg and “plating” on left humerus. He was discharged after two weeks to attend as an out - patient. He is still under treatment and remains offwork.

PRESENT POSITION :

- 1. Inability to walk without crutches.**
- 2. Inability to use left arm.**
- 3. Pain and stiffness right leg.”**

On examination the Doctor found the Plaintiff was walking on crutches and the fracture of the left humerus may end in non-union. The fracture of the femur was healed in fair alignment with stiffness of knee. He expressed the opinion that another examination be made after recovery as the Plaintiff remained off work. (2)Report dated 11.2.98:-

“PRESENT POSITION : _

The ‘K’ Nail from left thigh was removed in December, 1996.

He complains of: -

- 1. Inability to walk without crutch.**
- 2. Inability to use left arm (fracture not healed).**
- 3. Stiffness and pain left thigh and knee.**

ON EXAMINATION :

I find that fracture of left humerus (arm) has resulted in non union. He has wood splints on left thigh and walks slowly with support of a crutch on right hand. The left knee movements are 20 o – 25o range only. Rest of the physical examination is normal”.

The Doctor expressed the opinion that the Plaintiff was still greatly handicapped with flail left arm with non-united fracture of humerus and painful left thigh and still knee. He was unfit to work and needed further management for the unhealed fractures.

(3)Report dated 15.05.01:-

“PRESENT POSITION

- (1) Inability to fully use left arm and leg due to movements at both fractures.***

ON EXAMINATION

I find healed operation scars on left upper arm and left thigh. Both fractures remain un -united and hence he walks slowly with a limp and is unable to use left arm fully. Rest of the examination is normal.

OPINION :

Mr. Henry Osiemo sustained above named injury on 18.2.95. He had inadequate treatment which resulted in non -union of both fractures. Hence he was retired on Medical ground. However, bot h these fractures can be treated by operations of ‘open reduction -bone graft and internal fixation’. The cost of this entire treatment would be Kshs.300,000/ -. The outcome depends on success or complication treatment”.

In his oral testimony the Doctor stated that the Plaintiff had recovered fully from the head, hip and

pelvis injuries. Complications however arise from the fractures of the left arm and leg which never healed and remained un-united. He recommends further treatment by way of graft and internal fixation which is not easy and does not guarantee positive outcome after such a long time. It will cost in region of Kshs.300,000/- in a medium cost hospital.

The Plaintiff himself testified before me and was cross-examined. He was 38 years old when the accident occurred and 42 when he testified. He said he was working as an employee of M/s Bixa Kenya Ltd., as a Machine Operator but had no employment records to show for it or his salary which he stated as Kshs.5000/- per month. His explanation was that his documents were burned in his house during the Likoni Clashes. Six months after the accident – on 8.8.1995 – he was retired from his employment on medical grounds and does not engage in any gainful employment. He prayed for general damages for pain suffering and loss of amenities, cost of future treatment, and special damages.

The special damages pleaded in the Plaint are as follows:-

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|---|------------------------------|
| <i>“a) Paid for Police Abstract report</i> | <i>Kshs.100.00</i> |
| <i>b) Paid for X -rays examinations</i> | <i>Kshs.1,200.00</i> |
| <i>c) Cost of repairing motor cycle Reg. No.KYL 792 make Yamaha</i> | <i>Kshs.36,900.00</i> |
| <i>d) Pandya Memorial Hospital for Treatment</i> | <i>Ksh.158,080.00</i> |
| <i>e) Cost for transporting the motor cycle</i> | |
| <i>Reg. No.KYL 792 make Yamaha fr om Diani Police Station to Likoni</i> | <i>Kshs. 1,000.00</i> |
| <i>f) Loss of income from 18.2.95 to 31st May, 1995</i> | <i>Kshs.20,000.00</i> |
| <i>g) Loss of future earnings and/or future earning capacity. To be stated by the court.</i> | |

It is trite law that special damages must be specifically pleaded and strictly proved. The evidence tendered on item (c) of the Amended Plaint was grossly inadequate. It was in form of a plain receipt issued by an unnamed person or persons for Kshs.36,900/- being payment of “spares & repairs of Motor Cycle”. What Motor Cycle or nature of spares or repairs made remains mysterious. The item is not strictly proved and is therefore not granted.

Item (f) loss of future earnings and/or future earning capacity is not pleaded specifically. As the Court of Appeal said in CA.251/96 **Cecilia Mwangi & Anor. –vs- Ruth W. Mwangi (UR):-**

“Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but those have also to be proved on a balance of probability. The plaintiff cannot just “throw figures” at the judge and ask him to assess such damages. See the case of Kenya Bus Services Ltd. Vs. Mayende (1991) 2 KAR 232 at page 235 where this court referred to the cases of Ali vs. Nyambu t/a Sesera Store , Civil Appeal No.5 of 1990 (unreported), and Shabani v. City Council of Nairobi (1985) 1 KAR 684; the statement by Lord Goddard C.J. in the case of Bonham Carter vs. Park Ltd . [1948] T.L.R. 177 was approved.”

The pleading is made in the nature of general damages for “loss of earning capacity” and it will be considered as such. The court, as stated in Clerk & Lindsell on Torts 18th Edition 2000 at page 1575 (Para.29-30), “will make an educated impressionistic guess at the overall loss of prospective earnings rather than adopting a multiplier approach”.

It is item (f) of the Amended Plaint that pleads loss of income at Kshs.20,000/-. No strict evidence

was led on that claim nor were the cut off dates of 18.2.95 and 31.5.95 explained. The first date would appear to be the date of accident but the Plaintiff said nothing about it. He merely referred to his monthly salary whose particulars he did not produce and stated that he was retired on medical grounds on 8.8.95. Whether he was paid before his retirement or not he did not say. As for the date 31.5.95 it does not appear to correspond with the date of filing of the suit which was in June 1995. All in all I consider that the item was not proved by cogent or consistent evidence and it is therefore not granted.

Item (a) of the special damages pleaded was proved and I grant it. Item (b) is pleaded at Kshs.1,200/- but the receipts produced in evidence as Exhibit 5 amount to Kshs.1,400/-. I allow Kshs.1,200/-.

Item (d) is proved through the secondary document produced from Pandya Memorial Hospital which I admitted in evidence after being satisfied with the explanation for non-production of the originals. I allow the claim for Kshs.158,000/- in medical expenses. No document was produced in support of the claim of Kshs.1,000/- under item (e) and it is therefore disallowed. I will further allow the expense of Kshs.3,500/-, proved in evidence towards obtaining Medical Reports from Mr. Hemant Patel after the filing of the suit. Special damages awarded therefore amount to Kshs.162,880/-.

For pain suffering and loss of amenities learned counsel Mr. Marende proposed an award of kshs.1.5 million relying on the following authorities:-

1) **Nbi. HCCC.2797/79 Victor Musoga v. Linus Watito Kariuki**, where Osiemo, J. on 24.11.00 awarded Kshs.800,000/- on that head to a Plaintiff who suffered a fracture dislocation of the right elbow, fracture of the distal third left femur, compound comminuted fracture of the right tibia, comminuted fracture of the right fibula, multiple leg and heel lacerations and chest injuries. He was treated for 5 months.

A further sum of Kshs.300,000/- was awarded in general damages for cost of future treatment.

2) Msa. HCCC.8/97 **Juliana Mumo Kisimbi vs. Mohamed Dahman & Anor (UR)** where Hayanga, J. on 13.11.98 awarded Kshs.1.3 million to a young girl of 18 whose injuries were listed as:

“1. Comminuted fracture of the right femur.

2. Fracture of the left femur.

a. Fracture of the left fibula.

b. Avulsion fracture of the right tibial spines.

c. Fracture of the right mandible.

d. Fracture of the left mandible.

e. One broken upper canine tooth.

f. Lacerations on the face and all the limbs.

g. Haemorrhagic shock.”

A further sum of Kshs.200,000/- was awarded for cost of future treatment.

There were no counter-submissions on the assessment of general damages for the reason that the Defendant's counsel was absent. I have considered the material laid before me both on the facts and the law.

Clearly the Plaintiff suffered multiple injuries of considerable gravity and as stated by his Doctor he

has yet to recover. I saw him in court as he testified. He will continue to suffer from that disability for sometime.

The injuries suffered by the Plaintiffs in the authorities cited are fairly comparable although no two cases are alike. I would award Kshs.900,000/- (Nine hundred thousand Kenya Shillings) for pain suffering and loss of amenities. As I have no reason to doubt the assessment of the Doctor, PW.2, that it will require a sum of Kshs.300,000/- treatment on the Plaintiff I award him that further sum in general damages.

Finally loss of earning capacity. As stated above this is claimed in the nature of general damages. The Plaintiff was a Machine Operator by occupation and would be earning a minimum wage of Kshs.4,128/- under LN.61/2000. He is aged 45 years. Due to the imponderables appertenant to the assessment under this head, I would set my “educated impressionistic guess” at Kshs.300,000/-, which I now award. The upshot is that the Plaintiff is awarded Kshs.1.5 million in general damages. To this shall be added the special damages and both shall be discounted on the basis of agreed apportionment of liability.

The Plaintiff shall also have costs of the suit and interest.

Dated this 10th day of September, 2001.

P.N. WAKI

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