



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil case 1728 of 99

REUBEN MEMO WERUNGA PLAINTIFFS

VERSUS

MICHAEL ODINDO DEFENDANTS

JUDGEMENT

It is not disputed that an accident occurred on the 23rd January, 1999 along Waiyaki way. According to Reuben Memo Werunga, the plaintiff in this case he was walking along Waiyaki way on the side of the pavement when a motor vehicle registration number KQX 666 came and knocked him down. He was able to see the vehicle which stopped. A young man and a young lady came out. A third person disappeared. The young man was asked to take him to hospital. A vehicle registration number KPK 273 took him to hospital in the company of young man.

The plaintiff stated that at all times he was unable to stand. He was then admitted to the Kenyatta National Hospital for a small operation. On being discharged from the Spinal Unit he went home. The injuries sustained by the plaintiff said that of paralysis from the waist. He is a paraplegic. In his defence, the defendant stated that he had gone out for the night. He had slept, before leaving the house with his sister, at perhaps midnight. As he was the driver he never drank any alcohol. He then went dancing. On the way home there was a stone along the highway.

He was at the time heading home along Waiyaki way to mountain view. In the process of trying to miss the stone he lost control and landed in a ditch. A crowd gathered and accused him of actually knocking down the plaintiff. This he denied doing. The crowd gathered and became rowdy. He was forced to hire a taxi and take the plaintiff to hospital, which he did. Whilst travelling to the Kenyatta National hospital a report was made to the police officer manning a road block. Thereafter whilst at the Kenyatta National hospital some police officers came and interviewed them. The plaintiff is said to say to have been hit by a matatu.

His sister called his parents who sorted the matters out for him. The vehicle was released to them as being a none injury accident. Later he was charged for dangerous driving giving false information and not having a driving license. He denied that he went underground and could not be traced. That he was available at all times. The accident occurred at 6.00 a.m. and he was driving at 50 Kph. The plaintiff, called as his witness PW4 a police officer who was formerly attached to the Parklands police station and instructed to investigate the case. According to his evidence, the defendant reported an accident on the police station. He never at any stage mentioned there to be anyone being injured. The vehicle was released to him.

On the 2.2.99, the wife for the plaintiff came to make a report that vehicle registration. No. KQK 666 was involved in an accident and in fact knocked her husband. He made further investigation and interviewed the plaintiff. He proceeded to arrest the defendant and charged him for giving false information. He had confirmed from the hospital register that it was indeed the defendant and another who had brought the plaintiff to hospital; yet the plaintiff made no mention of this fact to the police station. According to the agreed issues signed by the parties and dated the 10th of April, 2000 it sort to know:-

“1) Whether the accident was caused by the sole negligence of the defendant and or of the plaintiff and if both parties contributed to it what is the extent of each party’s contribution?” To answer this issue I would note that both parties do not deny that an accident occurred on 23.1.99. That the defendant in his defence denied that he was negligent. In his amended defence he denied that the plaintiff was actually injured. From the evidence before court, the defendant, if he believes that he never at any time knocked the plaintiff but in fact took him to hospital should have disclosed this to the police on 23.1.99. Instead he kept quite. The police in turn were therefore not able to follow the matter of the plaintiffs injuries as they did not know about it. If they did, the defendant should have called them to give evidence as it is he who later pleaded to this effect.

The agreed issue is not stating that the defendant did not knock the plaintiff but that the defendant was not negligent in the said accident. As to negligence, the defendant stated there was a stone on the road which caused him to lose control. At no time did the defendant plead this in his defence and this seems to be an afterthought. I hereby find, as a fact that the defendant knocked the plaintiff and caused him injuries. That this accident occurred along Waiyaki way. The plaintiff was knocked off that road. I hereby hold that the defendant is liable in negligence at 100%. As to quantum, PW2 produced the doctors report under section 33 (b) of the evidence act cap.80 Laws of Kenya. He is a medical officer (senior) and stated that the plaintiff sustained injuries that amounted to paralysis.

There was a fracture of cervical spine C6 and the Lumbar spine fracture L4. He was incontinent in both urine and faecal. The disability was assessed at 100%. The plaintiff is said to require an orthopaedic bed, wheel chair, nursing care, physiotherapy antibiotics and silicore urethral catheter. The home also required modifcaiton and toilet condoms. A nurse working with the Spinal injury unit (PW3) attends to him at an agreed costs of Ksh.10,000/- (She is in employment and ought not to have in fact charged for her services).

Nonetheless I find that the Doctor who ought to have examined the plaintiff should have been a consultant. It is imperative that a consultant give his opinion on the injury which should be independent. A P3 Form was also produced. I nonetheless find that the plaintiff did sustain the injuries as stated. He appeared in court and was seen.

The advocate for the plaintiff relied on the following authorities on paraligics. 1) Slyvia Atieno Vs Barrack Owour Otieno Hccc 46/97 Wambiliangah J. An award of Ksh.2 million was made for pain and suffering. 2) Protas Shikanga Shumila Vs Justus Buliva Hccc 57/98 Wambilyangah J. Ksh 2 million 42 year old male. 3) Peter Mwanthili Sing vs Ilajash Metsa Hccc 168/96 Mwera J. Ksh.1.2 million 4. Alex Juma Ochieng Vs Kishore Construction Ltd. Nairobi Hcc.82.97, Aganyanya, J. Ksh.1.4 million was award for General Damages for pain suffering and loss of amenities.

The defendant in his suit relied on no case law. I therefore have only the above case laws to guide me. Considering the injuries herein are grave, I hereby award for General Damages of pained suffering and losses of amenities a sum of Kshs. 1.5 million. As to the heads of damages the plaintiff prayed in his plaint he be awarded loss of earning at a cost of Ksh.6,000/- per month. This is from the date of filing suit to July 1999, at of ksh.36,000/-. In his evidence the plaintiff told the court that he worked as a shamba boy earning Ksh.6,000/- a month. He worked for an Asian family who were very generous to him. Unfortunatly the family were all killed by robbers. The wife and daughter have since left the country. It therefore means that there is no formal letter that he can produce of his employment and hence his income.

I am surprised that the advocate for the plaintiff chose to calculate loss of income by 6 months at a rate of

6,000/- per month. The proper calculation ought to be the age and the number of year of work he would have completed. The plaintiff was 44 years old at the time of the accident. However since there is no proof of employment nor an income from an employer (the plaintiff would have called a witness to prove he was employed as a shamba boy but did not) I hereby dismiss this head of damages. The other prayer sought for was for the cost of a detachable wheel chair at a cost of Ksh.80,000/-. This is the price recommended to him. I would make such award. The medical report was said to costs Ksh.5,000/- no proof of receipt for the same was made. I reject this claim. No receipt was produced for the abstract report at a cost of 100/- I reject this. The plaintiff is bound by his pleadings. Apart from pleading the above special damages nothing in the plaintiff shows that he has pleaded for an orthopaedic bed, modification of his house etc. As such I make no awards for these items. In conclusion, I enter judgement for the plaintiff on liability at 100%. I award General Damages for Pain & Suffering and loss of amenities Ksh.1.5 million. Special Damages Ksh.80,000/- Costs of a wheel chair Total Ksh1,580,00/-. I award costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgement. Interest on special Damages from the date of filing suit.

Dated this 14th day of February, 2000 at Nairobi.

M. A. ANG'AWA

JUDGE