



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 244 OF 1998

PETER MWANGI KANENE PLAINTIFF

VERSUS

BERNARD K. NJENGA DEFENDANT

JUDGMENT

Interlocutory judgment was entered against the defendants on the 3rd of December, 1998 for having failed to enter appearance in this case. This was ... entered by the Principal deputy registrar.

The plaintiff amended his plaint on the 8.11.99 through an application dated the 4.6.99 that came before the Principal Deputy registrar Mr. Bhatt. He ordered that the amended plaint be served. This was done according to the advocate for the plaintiff. When the case came for hearing on the formal proof the advocate kindly notified the court that a memorandum for appearance and defence had been filed. I noted that these documents were not on the court record. The advocate asked that these documents be ignored as they were already on record in an interlocutory judgment. He admitted that he did not serve the defendant with a hearing notice of this case. Efforts to trace the purported advocate for the defendant (not on record in this file) proved fruitless.

I went according to my records, namely that there was no advocate on record for the defendant. Further that the purported advocate if recently engaged should have read the court file before filing any documents on payment of the requisite fees.

I have before me a motor vehicle accident case. The plaintiff, aged 23 years old at the time, boarded a motor vehicle as a fare paying passenger on the 30.5.97. The vehicle which picked him up at the Gigiri bus stop traveled along Limuru Road. When it neared Rosylin area he saw flashes of light. The vehicles collided and he lost his consciousness. The time was 7.00 p.m. or thereafter. It was then dark.

He was rushed to the Nazereth hospital where upon gaining consciousness he was treated. He sustained

a) injuries on the left leg

A fracture of the left femur on the lower third. This leg was operated on and a metallic plate was inserted.

b) Right hip

A fracture and dislocation of the right hip was sustained.

c) Chest

The chest injury consisted of a right sided haemothorax

(blood collection). There was no fractured rib.

The plaintiff was admitted at the Nazareth hospital for 4 months. He was then discharged on crutches. He was examined by Mr. W.M. Wokabi a consultant Surgeon with MB,ChB M MED – for his qualification.

His findings were that there was a complete fracture of the left leg together with a metallic plate having been inserted. This fracture had been badly united. There was gross angulation at the fracture site. This requires to be corrected at a cost of Ksh.100,000/-.

The right hip was fractured and dislocated from the socket. The right superior and inferior pubic rami were also fractured. This injury is the cause of the shortening of the leg. The plaintiff requires to have a partial dislocation of the hip joint to be operated at a cost of Ksh.150,000/-. If not done the plaintiff would be permanently disabled.

The chest had bleeding in the chest. The blood was drained. He would not suffer any problem as a result of this.

As a result of all these injuries the doctor estimated that the plaintiff would not be able to work for another five years.

Mr. Gichaha for the plaintiff prayed that this court award Ksh.250,000/- for the pelvic injury and Ksh.250,000/- for the hip injury., this he prayed marked a total of Ksh.500,000/- for General Damages of Pain, suffering and loss of amenities..

I asked the doctor what he had meant by the words in his report stating “poor outcome of [the] treatment” he replied that due to poor treatment [and no medical care] it caused the outcome for the bones to knit poorly. I believe this meant that the future medical expenses would be incurred to rectify his situation.

The advocate did not make comments on this head of damages in his submission and prayed for Ksh.250,000 for.

I must state that when one claims General Damages for Pain, suffering and loss of amenities, the injuries sustained are not assessed separately but as a whole. The advocate in his case is therefore not correct when he prays for this court to award Ksh.250,000 for a fracture of a leg and Ksh.250,000/- for a hip injury.

As to the award for General damages on the above heading the advocate relied on the authorities of

Humphrey L. Kangethe Vs Paul M. Njuguna

Hccc2279/87 and

Joseph Mugani Gituba v Luka M. Warui

Hccc 2942/88 both decisions of Mbogholi Msagha J.

Who awarded Ksh.200,000/- for an injury to the left thigh and Ksh.250,000/- in the second case for an injury to the fracture of the pelvis.

I would in this instance award Ksh.2000/- for General damages of pain, suffering and loss of amenities.

As to the future medical care I am inclined to say that it was caused partially by the poor medical care. The metallic plate in the leg requires to be removed but the injuries did not heal properly due to the negligence of poor medical treatment as opposed to the said accident. I would award Ksh.150,000/- only.

As to the Special damages I hold that the medical report had been proved of Ksh.2000/- being the doctor's fee.

I decline to make award on the medical expenses of Ksh.45,000/- as the same had not been proved to this court.

On the prayer for loss of future earning, the plaintiff called his former employer PW3. He gave evidence to the effect that he ran a business (He produced the certificate of business name) whereby he stated that he had employed the plaintiff as a Marson from 1994. His wages were Ksh.300/- per day or Ksh.1,800/- per week. He the plaintiff had since been in an accident and had not returned to work.

As the doctor said the plaintiff would be incapacitated for 5 years - that he be accordingly awarded.

I would hold that loss of earning has been proved by the plaintiff. It would have assisted the court tremendously if supported documents of the payments of Ksh.300 per day had been produced.

In the absence of any challenge to this evidence I would place the incapacity at 2 years instead of five. This is due to the possible attribution of poor hospital care that may have nothing to do with the accident.

Thus $7,200 \times 2 \times 12 = \text{Ksh.172,800/-}$.

In summary

Injuries sustained

- a) Fracture of the right leg lower 3rd
- b) Fracture of the right hip joint
- c) Dislocation of the right hip bone and pelvis. Liability

Interlocutory judgment against the defendant and in favour of the plaintiff entered on 3rd December, 1998 for failure to enter appearance.

Quantum

Judgment be and is hereby entered for the plaintiff as follows:-

General damages

- | | |
|---|---------------|
| a) pain suffering and loss of amenities | Ksh.200,000/- |
| b) Loss of future earning | Ksh.172,800/- |
| c) Future medical care | Ksh.150,000/- |
| d) Special Damages (Proved) | Ksh. 2,000/- |
| Total | Ksh.528,800/- |

I award costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment and on Special Damages from the date of filing suit.

Dated this 1st day of February, 2000 at Nairobi.

M. A. Ang'awa

Judge

31.1.2000