



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 167 OF 2015

PETER MWAURA MUGERE.....PLAINTIFF

VERSUS

GLADYS MUCHIRI.....DEFENDANT

JUDGMENT

1. Peter Mwaura Mugere (the plaintiff) filed a plaint dated 6th September, 2013. The same was amended pursuant to an order issued on 4th October, 2016.

2. The plaintiff sued Gladys Muchiri (the defendant) seeking the following prayers:

- a) General damages for pain and suffering.
- b) General damages for lost opportunity.
- c) Special damages Ksh. 18,462,100/=
- d) Costs of the suit.
- e) Interest on a), b), and (c) at court states.

3. In her amended defence the defendant denied the claim blaming the accident on the plaintiff and the driver of the motor vehicle registration No. KAM 372 T. After the preliminaries, Judgement on liability was entered by consent in the ratio of 90:10 in favour of the plaintiff.

4. Counsel for both parties further consented to the following:

- i) The issue of quantum to be argued by written submission.
- ii) The plaintiff's medical report dated 28th August 2013 to be admitted without calling the maker.
- iii) The defendant at liberty to file a medical report alongside her submissions.

5. The firm of Mwangi and Partners for the plaintiff filed submissions dated 27th April 2021, outlining the plaintiff's case.

6. On quantum it was submitted that the plaintiff is entitled to compensation for the injuries he sustained as a result of the accident. According to the medical report by Dr. W.M. Wokabi dated 28th August 2013 the plaintiff suffered the following injuries:

- a) degloving injuries on the left ankle joint.
- b) stiffness on the left ankle joint and toes hampering mobility
- c) occasional pains left foot associated with injuries sustained.

7. Counsel also submitted that the plaintiff was admitted for 4 ½ months at Memorial Forces Hospital to be attended to. That as a result of the injuries he suffered blood loss and immense pain which left him with 35% disability. His leg was immobilized and thereafter a skin graft was applied. He also underwent physiotherapy to enhance his mobility. In spite of all this the plaintiff walks with a limping gait due to stiffness at the left ankle. He is unable to tiptoe, stand on the forefoot, wear or walk fast, do any drills on parades and/or drive a manual car. He referred to the police abstract which termed the injuries as "grievous harm."

8. Referring to the plaintiff's witness statement he submits that the plaintiff was at the time of accident training as a pilot in the Air Force, and, due to the injuries suffered, he could not continue with the training and so lost an opportunity to ascend to the highest ranks in the Air Force.

9. On general damages for pain and suffering, counsel submitted that a sum of Ksh. 2,000,000/= would be adequate. She relied on the following authorities to support this:

i) Barchia Leonard Mbaabu and another Vs Angeline Ngesa Rambim {2019} eKLR.

ii) Samson Omari Vs Simon Kamau and another {2007} eKLR.

In each of the two cases an award of Ksh. 1,500,000/= was made for pain and suffering in the year 2019 and 2007 respectively.

iii) Tononoka Rolling Mills Vs James Boso Were {2015} eKLR where an award of ksh 850,000/= for pain and suffering in the year 2015 was made.

iv) Mohammed Juma Salaa and another Vs B.A.O {2010} eKLR where an award of Ksh 950,000/= was made for pain and suffering in the year 2010.

10. Further while relying on the case of **Jackson Mutuku Ndeti Vs A.O Bayusuf and sons Ltd {2007} eKLR** counsel submitted that the plaintiff is entitled to an award that is closely similar to the ones cited above since the injuries are similar.

11. Counsel also submitted on general damages for loss of capacity to earn/lost opportunity. He referred to the plaintiff's big dream of being a pilot and Dr. Wokabi's report. The report shows that the plaintiff's dream can't be fulfilled due to the injuries he suffered. Further that the Ministry of Medical Services has already classified him as a person with disability, meaning he can never be a pilot or a person doing any normal military job. He relied heavily on the case of **Samson Omari Vs Simon Kamau and another (Supra)** to argue a case for payment of damages for loss of earning capacity.

12. He submitted that the retirement age in the military is 62 years and the plaintiff would have qualified as a pilot earning a monthly allowance of ksh 45,000/= at the age of 32 years. He therefore calculated the damages on this head as below:

$$45,000 \times 12 \times 30 = \text{Ksh. } 16,200,000/=$$

He finally submitted that the special damages of Ksh. 18,100/= are not contested. He also prayed for costs for the plaintiff.

13. S.M Chege and company advocates appearing for the defendant filed submissions dated 17th May, 2021. Counsel contends that following the findings by Dr. Wokabi on the injuries suffered plus a permanent incapacity of 35% an award of Ksh. 500,000/- is sufficient to compensate the plaintiff for pain and suffering. To support this, he cited the following cases:

i) Hannah Nyawira Maina Vs James Karanja {2016} eKLR where the plaintiff suffered similar injuries and was awarded Ksh 500,000/= in the year 2016.

ii) City Engineering works (K) Ltd Vs. Venatsio Mutua Wambua {2016} eKLR where a plaintiff who suffered permanent incapacity was awarded Ksh. 600,000/= in the year 2016.

14. On general damages for loss of earning capacity counsel cited the case of **Cecilia W. Mwangi and another Vs Ruth W. Mwangi Civil Appeal No 251 of 1996[1997] eKLR** where the Court of Appeal stated as follows:

"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 these have also to be proved on a balance of probability"

15. Counsel has submitted that the plaintiff did not provide any documentation to confirm that he is a member of the Kenya Air Force. That he did not confirm his entitlement of the sums of moneys claimed. This he submits follows the fact that the plaintiff pleaded the amount of Ksh. 18,462,100/= calculated based on an amount of Ksh. 45,000/= for 30 years. On this he referred to the case of **Douglas Kalafa Ombeva Vs David Ngama {2013} eKLR** where the court of Appeal held:

"Loss of earnings is special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding damages, the court will not act in a vacuum or whimsically"

16. Counsel also cited the case of **Kimatu Mbuvi Vs Augustine Munyao Kioko {2001} eKLR** where the Court of Appeal stated inter alia:

“But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult..... we do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

17. Without prejudice to his earlier submissions counsel submitted that damages under this head should be based on the minimum wages of the year 2010 when the accident occurred. The calculation would therefore be as below.:

$$36 \times 12 \times 6,743 = \text{Kshs. } 2,912,976/=$$

He however submitted that the award for loss earning capacity had not been proved. The defendant did not challenge the claim for special damages in the sum of Ksh. 18,100/=

Analysis and determination

18. I have considered the pleadings plus the submissions and authorities filed by both parties. There is a Judgement on liability in the ratio of 90:10 in favour of the plaintiff. The same was entered into by consent. The only issue for determination is whether the plaintiff is entitled to the award sought in the pleadings. In this case no witness testified. The injuries suffered by the plaintiff are as stated in Dr. Wokabi's medical report dated 28th August 2013 which was produced by consent. The injuries are as captured at paragraph 6 of this Judgement. This report by Dr. Wokabi was done on 28th August 2013 while the accident occurred on 10th September 2010.

19. There is no evidence of a second opinion having been sought for by either the plaintiff or defendant. There is also no evidence of a recent medical report having been conducted on the plaintiff. The court has also not had the privilege of seeing the plaintiff to satisfy itself that eleven (11) years after the accident he still has challenges walking and moving his left foot.

20. The plaintiff was hospitalized for 4 ½ months at Memorial Forces Hospital. This in itself confirms the seriousness of the injuries suffered.

21. I have considered the authorities cited by Counsel for the plaintiff (as stated at paragraphs 9 and 10 of this Judgement) in his claim for kshs. 2,000,000 on the head general damages for pain and suffering. I have equally considered the authorities cited by the defendant's counsel on this head. He has asked for ksh. 500,000/=, which I find to be low considering the nature of injury, stay in hospital and 35% permanent incapacity.

22. In the case of **Samson Omari (supra)** where an award of ksh. 1,500,000/= the plaintiff had his left leg crushed and amputated at the knee level. In the case of **Mohammed Juma Salaa (supra)** an award of kshs 950,000/= was confirmed in the year 2010. The plaintiff therein suffered permanent disability of the right arm by completely losing triceps and biceps, sustaining severe de gloving injury of the right elbows and proximal 1/3 lower arm as well as extensive skin loss of the dorsum of the right hand. In a nutshell the victim in the cases cited by the plaintiff suffered more serious injuries than the plaintiff herein.

23. After due consideration of all the material before this court alongside the authorities I find that the plaintiff is entitled to general damages for pain and suffering. The award should as far as possible not violently depart from the awards made by the courts in cognate cases. Considering the years that have lapsed since the cited awards were made, and the present value of the shilling I find an award of ksh. 2,000,000 to be reasonable, on this head.

24. The plaintiff has further made a claim of ksh 18,444,000/= as a special damage for loss of earning/lost opportunity. The figure above was arrived at after considering that the plaintiff would have become a pilot in the Air Force at age 32 years earning an allowance of ksh 45,000/= per month and worked for 30 years before retirement.

25. Section 107 of the Evidence Act provides as follows:

SECTION 107

“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

26. The Law is that he who pleads a fact must prove it to the required standard. Any special damage must not only be pleaded but must be strictly proved. The duty to prove this fell on the plaintiff in this case.

27. In the case of **Mumias Sugar Company Ltd Vs Francis Wanalo {2007} eKLR** (the Court of Appeal sitting in Kisumu) cited the case of **Fairley Vs John Thompson Ltd {1973} 2 Lloyd's Rep 40** where Lord Denning explained the difference between loss of earning capacity and loss of earning saying:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss

of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

28. In the same case of **Mumias Sugar Company (Supra)** the Court of Appeal stated that:

“The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

29. The plaintiff herein had a duty to prove the following:

- i) He works for the Armed Forces.
- ii) He was at the time of accident training as a pilot.

30. A look at the paragraph 6 of his witness statement shows he was training as a pilot and were it not for the accident he would have completed his training and become one. He says nothing more on this. It is at paragraph 7 of the amended plaint that he states that he was training as a pilot in the Armed Forces.

31. He has in the same paragraph 7 and 7B of the amended plaint tabulated some figures, What is the source of all these? There is nothing on record to support these figures. Asking for ksh. 18,444,000 is no mean thing and it was the duty of the plaintiff to lay the basis for his claim. The schedules stated at paragraph 7 are not supported at all, as to their origin.

32. Assuming for a minute that indeed he works in the Armed Forces its clear that his salary and future earning as such an officer has not been affected since it is not pleaded. This means he is still undertaking his other duties quite well and earning a salary. He was in training to be a pilot and it is not 100% guaranteed that he would have been the Pilot he had desired to be at age 32 years for the court to make an order for payment of kshs. 45,000 per month for 30 years. Such payments can only be made on a clear case which has been proved to the required standard and not based on speculation and/or assumptions.

33. Having said that much and being guided by the case of **Mumias Sugar Company Limited (supra)** I find that the plaintiff should be compensated for the risk he has been exposed to by the stated disability as a result of this accident. For this I will award him Ksh. 2,500,000/=. The same will still fall under general damages. The plaintiff is also entitled to the undisputed special damages of ksh. 18,100/= The awards are therefore broken down as follows:

a) General damages for pain, suffering and loss of amenities

2,000,000/= + 2,500,000/= = Ksh 4,500,000/=

b) Special damages 18,100/=

TOTAL = Ksh 4,518,100/=

Less 10% contribution 45,810/=

Balance Ksh. 4,472,290/=

34. I therefore enter Judgement for the plaintiff in the sum of ksh. 4,472,290/= (Four Million, four hundred and seventy-two thousand, two hundred and ninety shillings) plus costs and interest at court rates.

35. Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF JULY, 2021 AT NAIROBI.

H. I. ONG'UDI

JUDGE