



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 336 OF 2014

JAMES WAMBUA KIMILA.....PLAINTIFF

VERSUS

SINOHYDRO CORPORATION LTD.....1ST DEFENDANT

JAMES NJUHO.....2ND DEFENDANT

JUDGEMENT

The plaintiff brought this suit against the 1st and 2nd defendants through his plaint dated 17/10/2014 seeking special damages of Kshs 817,249, general damages, costs and interest of the suit. It was the plaintiffs case that on or about 15/4/2012 he was a lawful passenger in motor vehicle KBA 531H that was being driven by the 2nd defendant's employee along Thika Road. The 1nd defendant's employee in the scope of his duties negligently parked motor vehicle KBH 718V on the road thereby causing a collision with motor vehicle registration number KBA 531H which rammed into it. At all times the 1nd defendant was the owner of lorry registration number KBH 718H and the 2nd Defendant was the owner of matatu registration No. KBA 513H. Due to the accident the plaintiff suffered the following injuries;

- a. Fracture, compound, communitated, depressed frontal bone of the skull
- b. Fracture of the left orbital bone of the skull.
- c. Fracture of the left Maxilla
- d. Extradural hemorrhage
- e. Injuries to the left eye evidenced by contusion of the optic nerve and bilateral subconjunctival hemorrhage
- f. Fracture bimalleolar of the right ankle joint

The suit was opposed by the 2nd defendant's statement of defence dated 10/12/2014. The defence denied the claims by the plaintiff and put him to strict proof. The matter proceeded to full hearing where the plaintiff relied on the testimony of two witnesses and the defendants relied on the testimony of one witness.

PW1 Dr. Antony Wandugu told the court that on 2/11/2012 he examined the Plaintiff who had a history of having been involved in an accident. After examination he prepared a comprehensive report. The plaintiff suffered severe head injuries evidenced by fracture compound communitated depressed frontal bone of the skull, fracture of the left orbital bone of the skull, fracture of the left maxilla and extradural hemorrhage. There were also injuries to the left eye as evidenced by contusion of the optic nerve and bilateral subconjunctival hemorrhage and a fracture of the right ankle joint.

PW1 in his report indicated that the injuries suffered by the plaintiff have resulted in scars which are rather uncosmetic, chronic disabling headaches, permanent weakness of the right foot, seizures (epileptic fits) and visual disturbances. The plaintiff now suffers total blindness in the left eye. He estimated potential disability at about 80%.

During Re-examination **PW1** indicated that the removal of the implants that were put in the plaintiff would cost Kshs 500,000.

PW2 James Wambua testified that on 15/4/2012 he was travelling to juja as a lawful passenger on a matatu registration number KBA 531H belonging to James Njuho. Whilst on Thika road at the Allsopps decent the driver of the matatu, Dennis Munene Mwangi, lost control of the

vehicle and rammed into the rear of a parked Lorry registration number KBH 718 belonging to the 1st defendant. The driver of the matatu died on the spot. The lorry had been dangerously parked with no warning signs or triangles. He was admitted at Agha Khan University Hospital for 13 days where he underwent multiple surgeries. As a result of the accident he sustained severe bodily injuries and has suffered loss and damage.

DW1 Faith Njeri Heho testified that on 15/4/2012 she was also a passenger in the matatu registration number KBA 531H. At 3.30PM on that rainy day as they reached Allsops the driver of the matatu dropped off passengers at a drop off point. The driver then exited the service lane to join the main road and at that point they noticed there was a lorry registration number KBH 718V that was parked carelessly on the main road. The lorry had no signal or any form of warning signs and the driver was unable to swerve crushing into the lorry. That after the accident all the passengers except her were rendered unconscious and were rushed to various hospitals. She sustained a head injury and injuries to her left foot and was given first aid at Neema Hospital before being referred to Kenyatta National hospital.

Plaintiffs Submissions

The plaintiff in his submissions states that interlocutory judgement was entered against the 1st defendant on 21/1/2015 as it failed to enter appearance despite having been served with summons. Formal proof hearing took place on 21/1/2019 against the 1st defendant where the ownership of the motor vehicle was not denied.

On liability the plaintiffs argued that the testimony by DW1 failed to rebut the testimonies and evidence produced by the plaintiff. It was argued that DW1's testimony was riddled with inconsistencies because she indicated that the matatu registration number KBA 531H was moving slowly on the service lane yet she indicated that when it rammed into the stationary lorry all passengers except herself were rendered unconscious. That DW1 indicated that from her position behind the driver of the matatu she could see the lorry KBH 718V was parked carelessly, it then follows that the driver of the said car had spotted the lorry parked on the road and as such the 2nd defendant should be found 100% liable for the occurrence of the accident.

On quantum the plaintiffs argued that it is not disputed that he sustained extensive and multiple injuries with a resultant disability and total blindness in one eye. That he suffered extreme pain and had to undergo several procedures that caused loss of amenities and emotional pain. As such they seek an award as follows;

- a. General damages for pain and suffering at Kshs. 25,000,000
- b. Special Damages Kshs. 1,339,249
- c. Costs and interest of the Suit.

Counsel for the plaintiff relies on the case of **Gabriel Mwashuma v. Mohammed Sajjas & Another [2015] eKLR** where the plaintiff suffered a segmented left femur, compound fracture left patella and femoral condyle, comminuted left distal tibia fracture, fracture right fibula and soft tissue injuries on the right knee. The court awarded Kshs. 3,000,000 in general damages.

On the eye injury the plaintiffs referred to the case of **Kenya Power and Lighting Company Limited v. Bernard Mutuku Kilonzo [2015] eKLR** where Justice Onyancha sitting on appeal awarded the plaintiff Kshs. 1,500,000 for loss of eye sight on the left eye, burns on the scalp and forehead.

Defendant Submissions

The 2nd defendant in his submissions disputed liability and indicated that there was no police officer who was called to produce the abstract blaming motor vehicle KBA 531H nor was there a sketch map produced to show the circumstances of the accident. That one cannot only decide the case on probability if there is no evidence to show it was more probable than not that the second defendant wholly or partially contributed to the accident. Counsel for the 2nd defendant referred to the case of **Mombasa Civil Appeal No. 8 of 2015 Kennedy Nyagoya v. Bash Hauliers (2016) eKLR** where Justice Njoki Mwangi stated;

“In this matter a police abstract was produced by PW1 to show DW1 was to blame for the accident. DW1 was however not charged with a traffic offence. PW1 informed the court that he was not the investigating officer. In my considered view his evidence did not assist in any way to build the plaintiffs case”

On quantum the 2nd defendant submitted that taking into account the injuries suffered a sum of Kshs. 800,000 would be adequate compensation for general damages. Reliance was placed on **Machakos Civil Appeal 198 of 2015 Joseph Kimanthi Nzau v. Johnson Macharia(2019) eKLR**.

Analysis and Determination.

On liability it is the plaintiffs case that he was a lawful passenger on matatu registration KBA 531H owner by the 2nd defendant that was recklessly driven by Dennis Munene. The matatu rammed into a lorry registration number KBA 513H owned by the 1st defendant which was parked carelessly on Thika Highway with no reflectors, signs or cautions to indicate that the lorry had broken down.

On perusal of the record this court noted that judgement was entered against the 1st defendant on 20/1/2015. Counsel for the plaintiff contend that on 8/11/2018 a default judgement was entered against the 2nd defendant at 100% in HCC 174 of 2013.

The plaint dated 17th October 2014 at paragraph 7 gives the particulars of negligence of both the 1st and 2nd defendants. For the 1st defendant it is stated that it was negligent in that it allowed a faulty motor vehicle to be driven, allowed the vehicle to be parked carelessly, dangerously without due care to other road users and thereby causing the accident. With regard to the second defendant, it is stated that the driver failed to adhere to the Highway Code, the vehicle was faulty and thereby caused the accident.

In his evidence in chief the plaintiff testified that the matatu was driven at high speed. The lorry was also dangerously parked with no reflectors. The accident occurred at the Allsopps descent along Thika road. It was drizzling. It is his evidence that the lorry was parked on the road. He blamed the owner of the lorry and the driver of the matatu for the occurrence of the accident. The road was under construction and the 1st defendant was constructing the road.

The decision of Justice L.Njuguna in HCCC 174 of 2013 was a default judgment against the 2nd defendant herein who did not enter appearance and file defence. The plaintiff blamed both vehicles in his pleadings and also in his evidence in court and should not pile blame only on one defendant in his submissions. Both the plaintiff and DW2 testified that it was drizzling that day. They also stated that the lorry was parked on the road. This was a descending area of the road and it is evident that if the lorry was not on the road the accident could not have occurred.

Given the circumstances of the case, I do find that the 1st defendant should shoulder a higher percentage of liability. The police blamed the matatu driver but there is no evidence as to how that blame was attributed to him. I do agree with the holding of Justice Njoki in the case of **Kennedy Nyagoya V Bash Hauliers** (supra) that even if the police abstract blames a party for the accident, evidence should lead to that effect. Indeed in that case a police officer testified and produced the police abstract.

Considering the fact that the lorry obstructed the road and it was drizzling at the time and noting that the road at the area is descending downwards, I do hold the 1st defendant 60% liable and the 2nd defendant 40% liable.

On quantum, the injuries that were suffered by the plaintiff are not disputed and the parties have provided several cases in support of their proposed amounts.

In **Gerald Nzoia Ndonga v Susan Mukoma & another [2019] eKLR** Kshs 1,500,000 was awarded as general damages for major head injuries leading to swelling of the brain and right eye sight progressively deteriorated leading to blindness, fracture of the condyles of the right humerus and stiffness of the elbow contributing to 75% disability.

Also in **Charles Komoso Toton v Reuben Cherutich Chebon & another [2012] eKLR** the court awarded Kshs. 1,600,000/- as general damages for severe head injury with fracture of the base skull resulting in loss of sight in the right eye, fracture of the right humerus head with dislocation of the right shoulder joint and fracture of the left humerus in the lower one third.

After taking into account all the foregoing decisions and the fact that the plaintiff herein suffered 80% disability with total blindness on the left eye, going by the recent trends set by the courts decisions delivered in the recent years; and taking into account inflation, I do award the plaintiff Kshs. 2,500,000/= as general damages for pain and suffering.

The Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

The plaintiff has sought special damages and provided receipts for the following:-

- a. Medical receipts Ksh. 817,249
- b. Doctors Report Ksh. 22,000
- c. Future Medical Expenses Ksh. 500,000

I do find that the claimed special damages were proved.

1. Special damages are awarded at Kshs 1,339,249.

2. General damages are awarded at Kshs. 2,500,000.

3. Interest on general damages shall accrue from the date of the judgement herein. Interest on special damages to accrue from the date of filing suit.

4. Cost and interest of the suit awarded to the Plaintiff.

In the end, liability is apportioned at 60% against the 1st defendant and 40% against the 2nd defendant. The plaintiff is awarded Kshs.2,500,000 as damages for pain and suffering and Kshs.1,339, 249 as special damages. The plaintiff shall have costs and interest.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE