



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 336 OF 2014

JAMES WAMBUA KIMILA.....PLAINTIFF

VERSUS

SINOHYDRO CORPORATION LIMITED.....1ST DEFENDANT

JAMES NJUHO.....2ND DEFENDANT

JUDGMENT

1. *James Wambua Kimila*, the plaintiff herein, filed suit against the 1st and 2nd defendants by way of a plaint dated 17th October, 2014. The 1st defendant *Sinohydro Corporation Limited* is sued in its capacity as the registered owner of motor vehicle registration number KBH 718V (*the 1st motor vehicle*) while the 2nd defendant *James Njuho* is sued in his capacity as the registered owner of motor vehicle registration number KBA 531H (*the 2nd motor vehicle*).

2. In his plaint dated 17th October 2014, the plaintiff pleaded that sometime on or about the 15th day of April, 2012 while travelling along Thika Road aboard the 2nd motor vehicle as a lawful fare paying passenger, an accident occurred involving the 1st and 2nd motor vehicles which accident he blamed on the negligence of both defendants, their servants or agents. The particulars of negligence attributed to each of the defendants or their agents were pleaded in paragraph 7 of the plaint.

3. The plaintiff further averred that consequent to the accident, he suffered serious multiple personal injuries which he particularized as follows:

- i. Fracture, compound, comminuted, depressed frontal bone of the skull
- ii. Fracture of the left orbital bone of the skull
- iii. Fracture of the left maxilla
- iv. Extradural haemorrhage
- v. Injuries to the left eye evidenced by contusion of the optic nerve and bilateral subconjunctival haemorrhage
- vi. Fracture, bimalleolar of the right ankle joint

4. It was the plaintiff's contention that the 1st and 2nd defendants ought to be found vicariously liable for the accident and resultant injuries to his person. He therefore sought the following reliefs against both defendants jointly and severally:

- a) *Special damages in the sum of Kshs.817,249/;*
- b) *General damages for pain, suffering and loss of amenities;*
- c) *Costs of the suit and interest thereon at court rates; and*
- d) *Any other or further reliefs that this Honourable Court may deem fit and just to grant.*

5. Upon being served with summons, the 1st defendant failed to enter appearance within the stipulated time and on application by the

plaintiff, interlocutory judgment was entered against the 1st defendant on 21st January 2015.

6. On his part, the 2nd defendant entered appearance and put in a statement of defence dated 10th December 2014 in which he denied the occurrence of the accident and all allegations of negligence attributed to him or his agents in the plaint. In the alternative, he pleaded that if the accident occurred, it was solely or substantially contributed to by the plaintiff. He invited the court to dismiss the plaintiff's suit with costs.

7. At the hearing of the suit, the plaintiff testified in support of his case and called one other witness while the 2nd defendant closed his case without calling any witness.

8. *Dr. Antony Wandugu* who testified in support of the plaintiff's case as PW1 stated that he examined the plaintiff and perused treatment notes and test results from the Aga Khan Hospital and confirmed that the plaintiff had suffered multiple fractures. He also noted that the plaintiff had bleeding in his left eye which could only get worse.

He produced his medical report as Exhibit 1 and receipts issued to the plaintiff for preparation of the medical report and for his court attendance as Exhibits 1a) and 1b).

During re-examination, he testified that the implants which were inserted in the plaintiff's body to fix the fractures will require removal at an estimated cost of Kshs.500,000.

9. The plaintiff gave evidence as PW2. He testified that he worked with a Non-Governmental Organization (NGO) known as Choose Life Africa and that at the time of the accident, he was aged 28 years and was pursuing a Master's Degree in Project Management at the University of Nairobi; that previously, he had graduated with a Bachelor's Degree in Education.

10. The plaintiff adopted his witness statement and further stated that on the material day, he was a passenger in the 2nd motor vehicle when its driver who is now deceased while driving at high speed lost control of the vehicle at Allsops descent along Thika Road and rammed into the rear of the 1st motor vehicle.

11. It was the plaintiff's case that the 1st motor vehicle was at the time dangerously parked with no reflectors at the edge of the left side of the road, the same lane the 2nd vehicle was using. On cross examination, he stated that on the date of the accident, parts of the Thika Superhighway were under construction and the road was not busy; that since the 1st motor vehicle was parked on the road, if the 2nd defendant's driver was careful and was not over speeding, he would have been able to see and control the said vehicle in order to avoid the accident.

12. Upon being re-examined, the plaintiff claimed that as the 1st defendant's employees were constructing the road, they ought to have placed warning signs to alert other road users of the presence of the lorry.

13. The plaintiff further testified that following the accident, he was admitted at Aga Khan Hospital for 13 days and that he underwent four (4) surgeries, spending a total of Kshs.817,000 in medical expenses. He produced a bundle of documents as exhibits in support of his case.

14. As stated earlier, the 2nd defendant opted not to call any witness to support the defence case but he relied on the medical report dated 19th December, 2018 prepared by Dr. Geoffrey N. Nyaga which was produced as Exhibit 1 by consent of the parties.

15. At the end of the hearing, both parties consented to filing of written submissions. This notwithstanding, only the plaintiff filed his submissions. The 2nd defendant failed to file any submissions despite being given ample time and opportunity to do so.

16. On liability, the plaintiff submitted that in the absence of evidence to refute his account concerning how the accident occurred, this court ought to find the defendants 100% jointly and severally liable. In this respect, he urged the court to draw guidance from the case of ***P N M [Suing as Next Friend and Father of N W N & Another V Synohydro Co. Ltd & 2 Others, [2017] eKLR*** which arose from the same cause of action as this suit where the court found the defendants 100% liable.

17. On quantum, it was the plaintiff's contention that an award of Kshs.25,000,000 would suffice as general damages for pain and suffering and loss of amenities, citing a vast array of authorities including:

a) ***Duncan Kimathi Karagania V Ngugi David & 3 Others, [2016] eKLR*** where the court awarded general damages in the sum of Kshs.4,000,000 to a plaintiff who sustained blunt head injury with the loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fracture of the maxilla bilaterally at the Le /fort 11 level, compound fracture of the mandible, comminuted fracture of the right humerus, articular region of the elbow surface of radio carpal and multiple lacerations of the hands and forearms.

b) ***Gabriel Mwashuma V Mohammed Sajjad & Another, [2015] eKLR*** in which the court after considering the injuries sustained by the plaintiff, namely, segmental left femur fracture, compound fracture left patella and femoral condyle, comminuted left distal tibia/fibula (pilon) fracture, fracture right fibula and soft tissue injuries right knee exercised its discretion and awarded the plaintiff general damages in the sum of Kshs.3,000,000/.

18. The plaintiff also urged the court to take into account the injury sustained in his left eye which led to total blindness. He invited me to consider the authorities of ***Kenya Power And Lighting Company Limited V Bernard Mutuku Kilonzo, [2015] eKLR*** where an award of

Kshs.1,500,000 was made under general damages for pain and suffering to a plaintiff who had suffered loss of eyesight in his left eye in addition to other injuries and *Isaac Njuguna V Farmland Aviation Ltd. [2018] eKLR* in which the court awarded Kshs.4,000,000 as general damages to a plaintiff who had suffered several injuries including total blindness to the left eye.

19. It was similarly the plaintiff's submission that he is entitled to an award of Kshs.817,249 special damages for cost of medical expenses; Kshs.22,000 for preparation of the medical reports and doctor's attendance fee and Kshs.500,000 for future medical expenses.

In the end, the plaintiff urged this court to award him a total sum of Kshs.26,793,677 in both general and special damages.

20. I have carefully considered the evidence on record and the plaintiff's submissions alongside the authorities cited. Having done so, I have distilled the following as the issues arising for my determination in this case:

i. Who between the 1st and 2nd defendants is to blame for the accident and to what extent if at all?

ii. Whether the plaintiff is entitled to the reliefs sought.

iii. Who should bear the cost of the suit?

21. On liability, I have considered the plaintiff's evidence regarding how the accident in question occurred. I note from the plaintiff's witness statement and from the police abstract that the accident happened at about 5.30pm which was still during the day and had the driver of the 2nd motor vehicle been careful and alert, he would have been able to see the 1st motor vehicle in good time and avoid ramming into it.

22. The fact that the 2nd defendant's driver caused the accident by ramming into the rear of a stationary vehicle and the fact that he died on the spot corroborates the plaintiff's assertion that the driver had been over speeding and was not keeping a proper look out for other road users. It is important to note that the plaintiff's version regarding how the accident happened has not been controverted by any evidence to the contrary since neither of the defendants offered any evidence during the trial.

23. I have considered the doctrine of *res ipsa loquitur* pleaded in the plaint. The Court of Appeal in the case of *Fred Ben Okoth V Equator Bottlers Limited, [2015] eKLR* adopted the definition of the doctrine in *Black's Law Dictionary, 9th Edition* and expressed itself as follows:

"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."

24. In my view, unless there are extenuating circumstances and none were tendered by way of evidence in this case, ramming into the rear of a stationary vehicle parked on the edge of a road in broad daylight is a clear indicator that the 2nd defendant's driver was guilty of negligence.

25. I have examined a copy of records from the Registrar of motor vehicles produced as exhibit by the plaintiff in respect of the 2nd motor vehicle. The same confirms that the 2nd defendant is the owner of that vehicle since it was registered in his name. In the premises, I find that the plaintiff has proved to the required legal standard that the 2nd defendant was the owner of the 2nd vehicle and that the same was being driven by his servant or agent at the material time.

26. This now brings me to the issue of liability with respect to the 1st defendant. It is noteworthy that there is interlocutory judgment entered against the 1st defendant and hearing proceeded for formal proof against the 1st defendant and for full hearing against the 2nd defendant. Be that as it may, the plaintiff still bore the burden of proving that the 1st defendant was also to blame for the accident which occasioned his injuries. In this regard, I refer to the provision of *Section 107 of the Evidence Act, Cap. 80 Laws of Kenya* which expressly states the following:

"(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."

27. The plaintiff gave evidence that there was partial construction of the Thika Superhighway at the material time and that the 1st defendant had not given any warning signs to show that the 1st motor vehicle was stationary on the road. He however testified that despite this fact, other motorists were passing the 1st motor vehicle comfortably without causing any accidents or incidents and that though the vehicle was not completely off the road, it was parked on the extreme left lane next to a drainage tunnel meaning that there was no parking space off the road.

28. Though it is not disputed that the 1st defendant was the registered owner of the 1st vehicle, the plaintiff in my view failed to adduce any tangible evidence to establish that the 1st defendant or its agents caused the accident in any way. The fact that the 1st defendant had not placed warning signs on the road to warn other road users of the presence of the vehicle on the road is not by itself evidence of negligence

