REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 458 OF 2010

PAUL KAMAU MBUGUA.....1ST PLAINTIFF

SAMUEL WAHINYA WAWERU.....2ND PLAINTIFF

VERSUS

PAYLESS CAR HIRE & TOURS LIMITED.....1ST DEFENDANT

PIUS OJUNGA WERE.....2ND DEFENDANT

JUDGMENT

1. The 1st and 2nd plaintiffs lodged a suit against the 1st and 2nd defendants by way of the plaint dated 8th October, 2010.

2. The 1st defendant is sued in its capacity as the registered owner of motor vehicle registration number KAR 615M Isuzu Bus *("the subject motor vehicle")* while the 2nd defendant is sued as the driver of the subject motor vehicle at all material times.

3. The plaintiffs pleaded in their plaint that sometime on or about the 9th day of October, 2007 while they were lawfully travelling aboard the subject motor vehicle along North Airport Road at City Cabanas Junction at about 6.00 a.m, the 2nd defendant negligently drove and/or controlled the subject motor vehicle, causing a self-involved accident which resulted in serious injuries to the plaintiffs as particularized in the plaint.

4. The plaintiffs attributed the accident to negligence on the part of the defendants by setting out its particulars in the plaint. The plaintiffs further pleaded the doctrine of *res ipsa loquitur*.

5. Consequently, the plaintiffs sought for the following reliefs from this court:

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

b) Special damages of Kshs. 10,000/.

c) Costs of the suit.

d) Interest on a) and b) above at court rates.

e) Any other or further reliefs that this Honourable Court may deem fit and just to grant.

6. Upon being served with summons, the defendants entered appearance and filed their joint statement of defence on 18th November, 2010 to deny the plaintiffs' claim.

7. The defendants denied occurrence of the accident or ownership of the subject motor vehicle while pleading in the alternative that if at all the accident took place as alleged, then the same was either wholly or substantially the result of negligence on the part of the plaintiffs or was the result of circumstances beyond the control of the driver, the particulars of which were included in their defence.

8. The defendants further pleaded that their insurer has already made payments to the plaintiffs in the respective sums of Kshs. 713,538/ and Kshs. 691,254/ under the Workmen's Insurance Policy and that such payments constitute adequate compensation.

9. At the hearing of the suit, both plaintiffs testified while the defence closed its case without calling any witnesses.

10. The 1st plaintiff relied on the averments made in his signed witness statement and stated that following the accident, his right hand became completely disabled. The 1st plaintiff also stated that at the time of the accident, he was an employee of the 1st defendant, working as a driver and earning a monthly salary of Kshs. 40,000/.

11. In cross examination, it was the evidence of the 1st plaintiff that following the accident, the 1st defendant paid him a sum of approximately Kshs. 700,000/ via cheque but that he did not enter into any agreement with the insurer of the 1st defendant. He stated that he was not consulted before payment of the above sum was made and that he personally paid for his medical bills.

12. During re-examination, it was the evidence of the 1st plaintiff that the payment he received from the 1st defendant was purely for injury benefits.

13. The 2nd plaintiff also relied on his executed witness statement and filed documents, and testified that on the material date, he was travelling aboard the subject motor vehicle as a passenger on his way to work but that he was at all material times employed by the 1st defendant as a driver.

14. According to the 2nd plaintiff, he sustained injuries to his right hand, resulting in its amputation. He stated that consequently, he does not work but stays home and relies on family support.

15. During cross examination, the 2nd plaintiff gave evidence that at the time of the accident, he was aged 51 years and went on to state that following the accident, he received a cheque in the sum of Kshs. 650,000/ but that he had no knowledge as to its origin.

16. In re-examination, it was the testimony of the 2nd plaintiff that the retirement age for an employee of the 1st defendant was 65 years to explain that following the accident, he would have continued to work elsewhere as a driver for some time, earning a salary. This marked the close of the plaintiffs' case.

17. The parties subsequently filed and exchanged written submissions. The plaintiffs submitted that as a consequence of the accident, they both lost complete use of each of their hands and that they similarly brought evidence to show loss of earnings thereafter in their professional capacity as drivers.

18. The plaintiffs argued that to date, the 2nd plaintiff has been unable to secure any gainful employment resulting from his injuries.

19. It was the contention of the plaintiffs that in the absence of evidence from the defendants, their testimony remains uncontroverted and that it would be proper for judgment to be entered in their favour.

20. On damages, the 1st plaintiff urged this court to award a sum of Kshs. 11,382,864/ inclusive of general damages for pain and suffering and loss of amenities, and special damages.

21. The 2nd plaintiff on his part urged this court to award him a sum of Kshs. 5,705,000/ constituting general damages for pain and suffering and loss of amenities, special damages and damages for loss of enjoyment of life.

22. On their part, the defendants submitted that the plaintiffs had not discharged the burden of proof by demonstrating that the defendants were either wholly or partly liable for the accident and that there was nothing to show that the subject motor vehicle had any mechanical difficulties, further urging this court to apportion liability against the plaintiffs at 50% in the event that it arrives at a finding of negligence against the defendants.

23. On general damages, the defendants proposed awards not exceeding the sums of Kshs. 665,607.60 and Kshs. 842,431.30 for the 1st and 2nd plaintiffs respectively upon considering *inter alia*, the nature of injuries suffered; the plaintiffs' respective ages at the time of the accident vis-à-vis the standard retirement age; and payments previously made to the plaintiffs by the 2nd defendant's insurer as full and final settlement of the claim. The defendants cited the case of **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** in which the court awarded a sum of Kshs. 500,000/ for comparable injuries.

24. The defendants further contended that as concerns the 2nd plaintiff, no medical report was produced to support the injuries pleaded in the plaint or to confirm the degree of disability.

25. Finally, the defendants submitted that in view of the payments made to the plaintiffs by the 1st defendant's insurer, there was no basis for bringing the suit, and relied upon the authority of **Gilbert Mugambi v Michimikuru Tea Factory Limited [2018] eKLR** where the Employment and Labour Relations Court (ELRC) made reference to the following holding in the case of **Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR:**

> ***"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."***

26.I have considered the evidence tendered in court and the rival written submissions together with the authorities cited. It is clear that the twin issues for determination are on liability and quantum. As such, I will address the case under the two (2) limbs.

27. On liability, upon studying the pleadings and evaluating the documents and testimonies on record, I established that this being a claim for negligence, the plaintiffs would be required to demonstrate that the accident arose out of negligence on the part of the defendants, thereby resulting in liability. This is notwithstanding their position that their case was uncontroverted.

28. In their respective witness statements and testimonies, the plaintiffs cast blame on the 2nd defendant as the driver of the subject motor vehicle and the 1st defendant as its owner. I looked at the separate police abstracts on record which confirms the occurrence of the accident on the material date. I also note that the police abstracts list the 2nd defendant as the owner/driver of the subject motor vehicle on that date. The defendants did not bring any evidence to counter this position.

29. On liability, I established that the plaintiffs blame both defendants for the accident. Further, they have pleaded the doctrine of *res ipsa loquitur* which would prove relevant in this case.

30. The said doctrine was aptly discussed in the authority of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to the **East African Court of Appeal's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the following was enunciated:

> ***"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant…The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."***

31. From my understanding of the above, a mere pleading of the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

32. In the present instance, I am of the view that the plaintiffs discharged the burden of proof by pleading the doctrine and it fell upon the defendants to disprove it.

33. From my study of the record, I note that the defendants herein did not at all call any evidence to support their defence that the accident was purely the result of circumstances beyond the control of the driver or to convince this court on the need to apportion liability arising from contributory negligence by the plaintiffs.

34. Furthermore, it is admitted that the 1st defendant made payments to the plaintiffs following the accident, which payments constituted compensation for the injuries sustained. To my mind, in so doing the 1st defendant assumed vicarious liability by its conduct, otherwise it would have not taken such active steps to compensate the plaintiffs.

35. In the premises therefore, I am satisfied that the plaintiffs have proved their claim for negligence against the defendants to the required standard.

36. On the limb touching on quantum, I note the defendants' argument that the plaintiffs were adequately and fully compensated for their injuries hence there is no basis on which they can seek compensation from this court. I examined the testimonies of the plaintiffs and established that they both acknowledged receiving reasonable sums of money from the 1st defendant as injury benefits resulting from the material accident.

37. Be that as it may, there is nothing to indicate there was an agreement that the monies paid out to them do constitute full and final settlement of the claim.

38. I will now address quantum under the following heads being guided by the reliefs sought in the pleadings.

a. General damages for pain and suffering

39. As concerns the **1st plaintiff**, he testified that following the accident, his right hand suffered complete disability and that he was 33 years old at the time. However, the injuries pleaded in the plaint are misleading as they are inconsistent with those stated in the medical report.

40. Suffice it to say that, the 1st plaintiff relied on his medical report dated 5th February, 2009 by Dr. Omondi Afulo which indicated his injuries as severe fracture humerus with permanent incapacity of 70% on the right upper limb.

41. Upon considering the above injuries in the medical report, I note that the 1st plaintiff urged this court to apply a multiplier formula taking into consideration his gross salary earned at the time and the number of years he would have worked. From my examination of the record, I find that there is really no basis on which to apply a multiplier approach to the present circumstances. In any event, the 1st plaintiff did not

cite any comparable authorities to guide this court in making its award.

42. In the same manner, upon considering the case of **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** cited by the defendants, I find the same to constitute different injuries to those suffered herein.

43. In the circumstances, I drew guidance from comparable awards made for similar or comparable injuries and degrees of incapacity. In the case of **Nguku Joseph & another v Gerald Kihiu Maina [2020] eKLR** the High Court sitting on appeal awarded a sum of Kshs. 500,000/ to a plaintiff who had suffered injuries including fracture of the right humerus with permanent incapacity of 40% which is less than the degree of permanent incapacity of 70% assessed in the present instance. Taking these factors into account, I will therefore award the 1st plaintiff a sum of Kshs. 900,000/ under this head less the Kshs. 713,538/ paid under the Workmens' Compensation Act, resulting in an award of Kshs. 186,462/.

44. For the **2nd plaintiff**, I note that though he did not file an official medical report by a specific doctor, he filed the P3 form which is equally relevant in disclosing the injuries sustained. Upon considering its contents, I note that the injuries were categorized as grievous harm and entailed below elbow amputation. I might add that those were the only injuries which appeared legible in the P3 form and are less than the injuries pleaded in the plaint. I can only therefore be guided by the injuries in the documents on record. There is no evidence of any assessment made on degree of permanent disability for the 2nd plaintiff.

45. On the award, the 2nd plaintiff equally urged this court to apply the multiplier method. As with the case of the 1st plaintiff, I find this method to be inapplicable to the circumstances and will refer to comparable awards made. Upon consideration of the award of Kshs.3,000,000/ which was upheld on appeal in the case of **Joseph M. Nganga & 2 others v Lawrence Muriungi Gichunge [2019] eKLR** for similar injuries with degree of permanent incapacity being assessed at 65% and the case of **Joshua Oduor v Kibwari Limited [2019] eKLR** where the court awarded a sum of Kshs.2,000,000/ to a plaintiff who had been amputated above the elbow, I will award a sum of Kshs.2,000,000/ to the 2nd plaintiff less the amount of Kshs.691,254/ compensated under the Workmen's Compensation Act totaling Kshs.1,308,746/.

b. Special damages

46. It is trite law that special damages ought to be both specifically pleaded and strictly proved. From my evaluation of the documents, none of the plaintiffs brought any evidence by way of receipts to prove the special damages pleaded in terms of the medical and other related expenses incurred. Going by this principle, I decline to grant any damages under this head.

47. In the end therefore, I hereby enter judgment in favour of the plaintiffs and against the defendants jointly and severally as follows:

Liability **100%**

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

i. For the 1st plaintiff **Kshs. 186,462/**

ii. For the 2nd plaintiff **Kshs. 1,308,746/**

b. Special damages **NIL**

TOTAL **Kshs. 1,495,208/**

The plaintiffs shall also be awarded half of the costs of the suit and interest on the general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered at NAIROBI this 2nd day of July, 2020.

…….……

L. NJUGUNA

JUDGE

In the presence of:

……. for the 1st and 2nd Plaintiffs

……. for the 1st and 2nd Defendants