



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL SUIT NO. 189 OF 2010**

**BETWEEN**

**SAMWEL KEBATI OSORO.....PLAINTIFF**

**AND**

**MOHAMED ANTULY.....1<sup>ST</sup> DEFENDANT**

**MOHAMED IQBAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The suit herein is for recovery of damages arising from a motor traffic accident. According to the plaint the accident occurred on the 15<sup>th</sup> January 2008 the plaintiff was driving motor vehicle registration mark and number KAU 044L along the Kakamega/Mumias road when his car collided with tractor and trailer registration mark and number KAC 806G/ZA 2623, owned by the defendants. He blames the accident on negligence on the part of the defendants or their employee or agent. As a result of the accident the plaintiff alleged that he sustained serious bodily injuries, which he itemized as head injury with facial fractures and de-gloving injury, sever blunt injury to the abdomen resulting perisplenic haeamatoema, fracture of the left radius in the distal one third, multiple fractures of the right femur and comminuted fracture of the left patella with de-gloving injury to the medial aspect of the left knee. He claims general, damages for loss of earnings and earning capacity and future medication. He also claims special damages calculated at Kshs. 3, 507, 000.00, being in respect of expenses relating to obtaining medical report, police abstract, P3 Form and search certificate, and medical expenses.

2. The defendants filed a joint defence. They deny that they owned motor vehicle and trailer registration mark and number KAC 806G/ZA 2623, and deny the accident and that it was caused by the negligence of their agent or driver. They allege contributory negligence on the part of the plaintiff, particulars of which are set out in the defence. They equally deny the particulars of special damages and put the plaintiff to strict proof.

3. The hearing commenced on 12<sup>th</sup> November 2011. The plaintiff testified that on the material day he was driving to Kisumu along the Mumias-Kakamega road when at a place known as Kisumu Ndogo the tractor while pulling a trailer suddenly entered the road from a feeder road on the left side of the road, he applied brakes of his car, but it was too late. His car hit the trailer on its left side. He suffered the injuries detailed in his plaint. He was rushed to Mumias Mission Hospital for treatment, where he remained in admission until 9<sup>th</sup> February 2008 when he was discharged and transferred to another hospital. The accident was reported at the Mumias Police Station. He blamed the driver of the tractor for the collision, for entering the main road without warning. He alleged that he was driving at 50 kilometres per hour.

4. Dr. Joan Kemunto Osoro testified next. She treated the plaintiff at Nairobi Hospital where he had been transferred from Mumias Mission Hospital. When she attended to him, he had multiple fractures on the right thigh, left ankle joint, left patella and mandible. He also had skin de-gloving injuries and minor injuries to the head and spleen. The nature of his injuries necessitated that he had to be treated by a multi-disciplinary team of doctors. He was operated on to fix the fractures. His lower limb injuries were placed on cast. He was discharged on 9<sup>th</sup> February 2008. She produced medical bills totaling Kshs. 1, 433, 000.00 excluding doctors' fees. She also produced doctors' bills which totaled Kshs. 1, 074, 000.00. She also produced another hospital bill which totaled Kshs. 700, 000.00. During cross-examination, she stated that the documents she had produced were invoices, adding that she had no evidence that the invoices were ever settled. She also stated that she was unaware that the plaintiff was due for further treatment.

5. The defence case opened on 11<sup>th</sup> July 2018. One witness, Paul Araikha Ateya, testified. He stated that he was an employee of the 2<sup>nd</sup> defendant. He was the driver of the accident tractor/trailer. He said that he was driving along the Bungoma-Kakamega road when his trailer was hit from behind and it then hit the tractor, whose engine ceased in the middle of the road. He fell off the tractor and sustained minor injuries. The accident was reported to police who visited the scene and investigated the case. He blamed the accident on the plaintiff. He stated that there was no junction at the point where the collision happened. He testified that he was not charged with a traffic offence.

6. After the conclusion of the oral hearing the parties filed written submissions complete with the authorities that they relied on to support their respective cases.

7. The issues that I have determined relate to liability, general damages and special damages.

8. On liability, the plaintiff's case is that the tractor emerged suddenly from a side road and caught him unawares, forcing him to run into the tractor's trailer despite the fact that he was driving at the moderate speed of 50 kilometres per hour. The defence case is that it was the plaintiff who ran into and hit the tractor/trailer from behind. It is denied that the tractor was joining the road from a feeder road. Effectively both are blaming each other for the misfortune. The accident was not self-involving. Police came to the scene according to both sides, and did their usual investigations, that would have involved drawing a chart of the accident scene. Such a chart would have indicated whether or not there was a feeder road at the scene of the accident. The parties did not call the police, so the court only has the story of the plaintiff against that of the defence. None of the drivers was charged with a traffic offence. The defence produced the certificate of examination and test of the tractor/trailer to support their allegation that it was hit from the rear. The defence was that the trailer was hit first and then it hit the tractor. Looking at the certificate I do not see anything that indicates that the trailer had been hit as alleged by both sides. There is, though, a curious remark in the health passport book issued by the St Mary's Hospital, Mumias, dated 15<sup>th</sup> January 2008, which was put in as P. Ex. 1, that the plaintiff had been in a collision with a tractor while trying to overtake. However, that is neither here nor there as it was not for the medical facility to delve into such issues.

9. Faced with such a stalemate, the court should approach the matter in the manner stated in *Hussein Omar Farah vs. Lento Agencies* (2006) eKLR, where the Court of Appeal said –

*'In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also in other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of Barclay Steward Limited & another vs. Waiyaki (1982-88) 1 KAR 1118, this court said –*

*'The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottie was driving on his correct side where the Range Rover crashed.'*

*The court said further –*

*'The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame.'*

10. As it is not possible in the instant case to determine who was responsible for the collision I shall find that both drivers were equally to blame. DW1 testified that he was an employee of the 2<sup>nd</sup> defendant, yet the tractor/trailer was registered in the name of the 1<sup>st</sup> defendant. No evidence was led by the defendants on the actual state of ownership of the vehicle as between themselves. I shall therefore hold that the two are jointly and severally 50% liable for the collision.

11. On the general damages, the plaintiff testified on the injuries that he suffered. He called a doctor from Nairobi Hospital where he was admitted and received treatment. She narrated on the nature of the injuries she noted and the kind of treatment that the plaintiff received. He was also attended at the Avenue Homecare Limited. He had also been attended at the St Mary's Hospital, Mumias. I have noted from all these records that the plaintiff suffered quite severe injuries which necessitated stay in hospital for twenty-five or so days.

12. The medico-legal report that the plaintiff relies on is dated 12<sup>th</sup> November 2009, and was done by Dr. Wellington K. Kiamba. Dr. Kiamba did not testify but the medical report was put in evidence by consent. The injuries listed in his report are those set out in the plaint. The opinion is that the plaintiff did not suffer brain damage but the head injury left him with residual occasional severe headaches. The fracture of the left radius had united but he still suffered from pain at the wrist. The fractures of the right femur and left patella had united but with residual restriction of movement in the knee and hip joints. His permanent disability arising from the incident is put at 60%.

13. The plaintiff urges me to award general damages at Kshs. 10, 000, 000.00 for pain and suffering. He relied on the decision of Cherere J. in *Henry Obonyo Ogele vs. Patel VK Manubhai & 2 others* (2017) eKLR, where the court declined to interfere with a magistrate's court award of Kshs 400, 000.00 for similar injuries. There is also *Sabina Nyakenya Mwanga vs. Patrick Kagoro & another* (2015) eKLR, where the High Court awarded general damages at Kshs. 3, 000, 000.00 on 22<sup>nd</sup> January 2015, for fractures of the humerus, pelvis, right knee, condyle femur, bruises on the face, severe retroperitoneal hemorrhage and multiple soft tissue injuries. He also cited *Duncan Kimathi Karagania vs. Ngugi David & 3 others* (2016) eKLR, where, on 22<sup>nd</sup> March 2016, an award of Kshs 4, 000, 000.00 was made for blunt head injury with loss of consciousness, multiple lacerations, comminuted fractures of the maxilla and right humerus and compound fracture of the mandible.

14. The defendants urge me to award, should I find that they are liable for the accident, Kshs. 2, 000, 000.00 general damages. They cite the decision in *Dorcas Wangithi Nderi vs. Samuel Kiburu Mwaura and another* Embu HCCA No. 58 of 2013, where the court upheld the lower court's award of Kshs. 2, 000, 000.00 for multiple soft tissue injuries, blunt injury to the head, fracture of the ulna and radius, and compound fractures to both tibia and fibula.

15. I note that the injuries sustained by the plaintiff are comparable to those sustained by the plaintiffs in *Dorcas Wangithi Nderi vs. Samuel Kiburu Mwaura and another*, *Duncan Kimathi Karagania vs. Ngugi David & 3 others* and *Sabina Nyakenya Mwanga vs. Patrick Kagoro & another*. These awards were made in 2015 and 2016. Considering passage of time and the effect of inflation on the Kenya shilling, I am persuaded that an award of Kshs. 4, 000, 000.00 would be adequate compensation for the pain suffered by the plaintiff on account of the very severe injuries that he suffered.

16. The plaintiff prays for damages for loss of earnings and earning capacity and future medication. I have carefully gone through the record

of the evidence tendered by the plaintiff and his witness. I have not seen anything that suggests that he tendered evidence to support award of damages under these heads. I agree with the defence that none should be awarded.

17. On special damages, the plaintiff claims Kshs. 3, 507, 000.00. It is notorious that special damages must not only be specifically pleaded, they must also be specifically proved. There is evidence that the plaintiff paid Kshs. 5, 000.00 for medical report and Kshs. 500.00 for copy of motor vehicle records. There is nothing on record to show that he spent what he claims with regard to obtaining the police abstract and the P3 form. On medical expenses, the bulk of the documents produced to support the head were bills, invoices and fee notes. Most of them were not supported by evidence of payment or settlement. The only receipts on record relating to medical expenses total Kshs. 41, 330.00, and that is the amount awardable in the circumstances.

18. In the end, the final determination of the matter will be as follows-

- (a) Liability is settled at the ratio of 50: 50;
- (b) General damages are awarded at Kshs. Kshs. 4, 000, 000.00;
- (c) Special damages are awarded at Kshs. 41, 330.00, with interest thereon running from the date of filing suit; and
- (d) Costs of the suit go to the plaintiff.

19. It is so ordered.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>st</sup> DAY OF January, 2019**

**W. MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7<sup>th</sup> DAY OF February, 2019**

**J. NJAGI**

**JUDGE**