



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 03 OF 2018

WILLIAM KITOTO ANDERE.....PLAINTIFF

VERSUS

EASY COACH LIMITEDDEFENDANT

JUDGMENT

The Plaintiff, **WILLIAM KITOTO ANDERE**, was a fare paying passenger in a motor vehicle registration number **KBR 509S** which belongs to the defendant, **EASY COACH LIMITED**.

1. On the material day, 12th July 2014, the vehicle was involved in an accident, which the Plaintiff attributed to the negligence of the Defendant's driver.
2. The Defendant filed a Defence on 18th October 2018, denying liability.
3. However, on 20th November 2018 the parties recorded a consent Judgment on the issue of liability. Accordingly, in terms of the consent, the Plaintiff bears 20% of the liability and the Defendant bears 80% of the said liability.
4. The only issue that now remains for determination is the quantum of the compensation payable to the Plaintiff.

Special Damages

In the Plaintiff, there is a claim for Kshs 46,775/= which is made up as follows:

(a) Police Abstract Kshs 200

(b) Medical Report Kshs 5,000

(c) Taxi on the date of Accident.... Kshs 300

(d) Medical Expenses &

Other Subsistence Kshs 41,275

T O T A L

Kshs 46,775

5. The Defendant conceded the fact that the Plaintiff did provide receipts to prove the Special Damages. However, the Defendant submitted that the court ought to reject the claim because the Plaintiff did not attach a Duty Stamp.

6. Pursuant to **Section 19** of the **Stamp Duty Act**;

“Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, Unless it is duly stamped.”

7. I have perused the Stamp Duty Act and verified that the Instruments in respect to which Stamp Duty is payable are listed on the Schedule to that statute.

8. The documents which the Plaintiff has produced in this case do not fall within the scope of those for which Duty is payable.

9. Therefore, I reject the Defendant’s contention that the Special Damages claim should be rejected because Stamp Duty had not been paid.

General Damages

10. A Medical Report dated 6th December 2016 was prepared by Dr. (Mr.) Kiboi Julius Githinji. The report indicates that the Plaintiff suffered;

(1) Vertebrae Spine fracture with spinal cord compression.

11. The Plaintiff had developed paraplegia with unstable spine vertebrae. He also had stool and urine incontinence.

12. After the Plaintiff suffered the said injury, he was taken to theatre and a spinal cord decompression and fusion was performed. He was then able to walk, with the help of physiotherapy.

13. Nonetheless, he was left with a foot-drop.

14. The doctor described the prognosis as poor, in relation to the return of power to the Plaintiff’s lower limbs.

15. It was the doctor’s opinion that the Plaintiff’s;

“lower limb weakness is permanent and associated urinary incontinence.”

16. Dr. Githinji prepared another report dated 11th December 2018. In that report, the doctor stated that the Plaintiff has;

“(1) Paraparesis (Weakness of Lower Limbs).

(2) Foot drop bilaterally.

(3) Urine incontinence.

(4) Back Pains.”

17. In the light of those factors, the doctor indicated that the Plaintiff would require the following, in future;

(a) Long term physiotherapy and exercise to strengthen the lower limbs;

(b) Condom urine catheter to manage urine incontinence;

(c) Frequent use of antibiotics in the long term;

(d) Bladder training procedures;

(e) Frequent use of laxatives to manage bowel movement disorders.

(f) Regeneration drugs and analgesics due to muscle spasm.

18. The Plaintiff asked the court to award him Kshs 12,000,000/= for Pain and Suffering and Loss of Amenities.

19. In support of that Claim the Plaintiff cited the cases of **SAMUEL OCHIENG MUGA Vs TRANSMARA SUGAR COMPANY, (KISUMU ELC NO. 198/2015;** and **BRIAN MUCHIRI WAIHENYA Vs JUBILEE HAULIERS LTD. & 2 OTHERS, NAKURU HCCC NO. 34/2014.**

20. I find that in the case **SAMUEL OCHIENG MUGA** the Plaintiff suffered more numerous and more serious injuries.

21. Whilst the Plaintiff herein suffered a fracture to only the Lumbar (L 1) vertebrae, Muga suffered;

“(a) Severe damage of the Spinal vertebrae and cord which involve; -

i. Damage to the nervous system;

ii. Damage of the lumber sacral spine;

iii. Paralysis of both lower limbs;

iv. Sprain of the cervical spine of neck;

v. Fracture of the pelvic frame

(b) Complete dislocation and displacement of the hip joint at the acetabulum.

(c) Dislocation of the left shoulder joint.

(d) Serious abdominal injury, which involve:-

i. Damage of the urinary system including the bladder, urethra and kidney.

ii. Damage to the digestive system, which causes faecal incontinence.

(e) Chest injury with damage of the left rib cage;

(f) Dislocation of the left knee joint.”

22. Muga ended up being paralyzed below the waist, and he lost all motor power and sensory perception in his legs.

23. After undergoing a major operation, Muga regained some muscle power and sensation in the legs, so that he was then able to walk using crutches with support.

24. Those injuries and the impact on Muga are not comparable to the injuries sustained by the Plaintiff.

25. In the case of **BRIAN MUCHIRI WAIHENYA**, the Plaintiff suffered severe spinal injury at the neck and a cut wound on his head.

26. He had a complete loss of sensation from the chest up to the lower limbs.

27. He was a paraplegic, who would be bed-ridden for life. If he had to get from one place to another, he would have to use a wheel-chair.

28. **Brian Muchiri Waihenya** was awarded Kshs 8,000,000/= damages for Pain & Suffering and Loss of Amenities.

29. Meanwhile, **Samuel Ochieng Muga** was awarded Kshs 12,000,000/= under that head.

30. As I have already demonstrated, those two cases are completely distinguishable from the Plaintiff's case.

31. On its part, the Defendant invited me to award Kshs 500,000/=, citing the award of Kshs 750,000/= in the case of **ABDI HAJI GULLEID Vs AUTO SELECTION (K) LTD & ANOTHER HCCA NO. 114/2013** (at Machakos).

32. The Plaintiff in that case had suffered a Wedge Compression fracture of the back, at L 1, and had developed osteoarthritis of the back.

33. The fracture at L 1 in that case, compares well with the Plaintiff's injury, which was also at L 1.

34. However **Abdi Haji Gulleid** did not have some of the enduring consequences that the Plaintiff herein has.

35. Having taken into account the respective submissions and the Plaintiff's need for a reasonable compensation; and whilst bearing in mind the need for courts to be fair to both parties, I award to the Plaintiff Kshs 2,000,000/= for Pain and Suffering and Loss of Amenities.

Loss of Earnings and Future Earning Capacity

36. The Plaintiff said that he had been retired from his place of work in 2016 because;

“..... he could not perform his duties as a result of the injuries sustained.”

37. He therefore asked that he be awarded Kshs 23,565,163/44 for Loss of Earnings and Future Earning Capacity.
38. As per the Medical Report dated 6th December 2016, the Plaintiff was 46 years old.
39. Whilst in the Medical Report dated 11th December 2018, Dr. Githinji stated that the Plaintiff was 49 years old.
40. The Plaintiff did not provide any other evidence which would enable the court verify his age.
41. Meanwhile, if the Plaintiff was 49 years old as at December 2018, I cannot understand how he was 46 years old, as at December 2016.
42. Although there is some inconsistency on the evidence about the Plaintiff's age, I find that that is not a basis for not awarding him reasonable compensation if he was otherwise entitled to such compensation.
43. According to the Plaintiff, he is entitled to compensation under this head because;

“..... he was declared redundant as he could not carry out his duties as a supervisor any more.”

44. It is important to emphasize the fact that the Plaintiff was not asked to retire on medical grounds, as had been alluded to by Dr. (Mr.) Kiboi J. Githinji in his Medical Report dated 6th December 2016.
45. Indeed, Dr. Githinji had expressly said that it was the Plaintiff who had claimed that he had been asked to retire on medical grounds.
46. In the Medical Report dated 11th December 2018, Dr. Githinji said the Plaintiff's;

“..... lower limb weakness interfered with his working and he Retired in 2016. The weakness will cause future physiological and physiosocial/ Economic burden that may lead to occasional depression and anxiety about his future life.”

47. The truth is that the Plaintiff was not retired.
48. He was declared redundant.
49. Secondly, the said redundancy has not been shown to have had any nexus with the Plaintiff's physical limitations, arising to the accident in issue.
50. By a letter dated 1st November 2016, **UNILEVER KENYA LIMITED** notified the Plaintiff about the termination of his contract of employment.
51. Unilever made it clear that the reason for declaring the Plaintiff redundant was that **UNILEVER AFRICA SUPPLY CHAIN STRUCTURE** was undergoing change. The said change was to have an impact on the Plaintiff's role in the company's business.
52. Therefore, I find that the Plaintiff failed to prove that he had suffered any Loss of Earnings and Future Earning Capacity, due to the accident in issue.
53. The Plaintiff's employer, when declaring him redundant, paid him compensation for “*Loss of Office.*”
54. In the circumstances, I reject the Plaintiff's claim under this head.

Loss of Consortium

55. The claim is based upon the contention that the continuous use of the Catheter condom would result in erectile dysfunction.
56. The Medical Report did not say that continuous use of the Catheter condom **WOULD** result in erectile dysfunction. Dr. Githinji said that the said use **MAY** cause urine infections and erectile dysfunction.
57. The report is dated 11th December 2018, which was more than 4 years after the accident.
58. Until that time, there is no evidence that the Plaintiff had suffered from erectile dysfunction.
59. Therefore, the court is not persuaded that it should award compensation in respect to something that remains a mere possibility.
60. I disallow the claim under this head.

Nursing Aid

61. It is the Plaintiff's case that he requires Nursing aid, who would undertake roles such as catheterization and helping him to bath.
62. According to the Plaintiff, the need for nursing aid was spelt out in the Medical Report.
63. In the report dated 6th December 2016, Dr. Githinji said that the Plaintiff would depend on the support of his wife, physically.
64. And in the Medical Report dated 11th December 2018, Dr. Githinji made no reference to the need for nursing aid.
65. Indeed, in December 2018 the doctor did not even indicate the need for the Plaintiff's wife to provide him with her physical support.
66. Therefore, whilst it appears logical that the Plaintiff could benefit from nursing aid, I find that there is no professional pronouncement that he did require the same.
67. I also find that the Plaintiff has not proved the rate at which a person would be paid, for providing him with nursing aid.
68. Once again, it is more than four years since the accident happened. If the Plaintiff required nursing care, it should have been manifest by now, and he would have provided the court with actual figures, rather than inviting the court to award an amount of Kshs 20,000/= monthly, based on the alleged Current Minimum Wage of Kshs 12,000/=.
69. I disallow the claim for compensation under the head "*Nursing Aid/Help*".

Future Medical Needs, Paraplegic Equipment and Disposals

(a) Physiotherapy and Exercise

70. Dr. Githinji stated that the Plaintiff would require Long Term physiotherapy and Exercises to strengthen his lower limbs.
71. Accordingly, the Plaintiff is entitled to a reasonable award in that respect.
72. He has asked for Kshs 3,500/= per session, and says that every week he should have three sessions.
73. However, the Plaintiff has not adduced evidence to support his claim for physiotherapy three times every week.
74. He has also not demonstrated how he arrived at the cost of Kshs 3,500/=.
75. In the event, I will allow physiotherapy once every week, at the rate of Kshs 2,000/= per session.

(b) Walking aids, clutches (sic!) knee and foot ortho

76. In the report dated 11th December 2018, Dr. Githinji said that the Plaintiff would not be able to walk without support.
77. The doctor did not specify the kind of support required.
78. And the Plaintiff has not indicated the nature of the "*walking aids*" required.
79. He has also not given the court any reason to warrant an award in respect to what he has described as "*knee and foot ortho.*"
80. I therefore allow crutches, which should be able to provide him with support when he is walking.
81. Crutches do not require to be replaced every year, in my understanding.
82. Nor is there evidence that they would cost Kshs 50,000/= annually.
83. In the event, I award a one-off sum of Kshs 50,000/= for the crutches.

(c) Catheter

84. The Plaintiff requires condom urine Catheter, to manage urine incontinence.
85. The cost of Kshs 1,000/= per month is verifiable from the receipts issued by the Nairobi Hospital.
86. However, it is not clear how regularly catheterization would need to be done.

(d) Diapers

87. The Plaintiff has failed to prove that he requires diapers.

88. It would appear to me that if the Plaintiff was using condom urine catheters, to manage urine incontinence, he would not, simultaneously utilize diapers.

89. Therefore, having allowed catheters, I disallow the claim for diapers.

(e) Hand Gloves

90. The claim for Kshs 1,000/= per month is allowed, as gloves are required when handling the catheter, urine bags etc.

(f) Muscle and Nerve Stimulating Equipment

91. Dr. Githinji said that the Plaintiff would require Regeneration Drugs and Analgesics, on a continuous basis.

92. However, there was absolutely no mention of Muscle and Nerve Stimulating Equipment.

93. I disallow the claim for the said equipment.

94. Orthopedic Mattress, Paraplegic Toilet and Moveable Adjustable Bed are all disallowed, as the Plaintiff has not provided the court with proof that they are required.

Age of the Plaintiff

95. The Plaintiff has utilized the number 14 when calculating the quantum of compensation under each of the heads.

96. As he stated that he would have worked until he was 60, I presume that the Plaintiff was inviting the court to conclude that he was 46 years old.

97. As the Plaintiff did not provide the court with documentary evidence to prove that he was 46, the court has deemed it appropriate to utilize the age specified in the Medical Report dated 6th December 2016. According to Dr. Githinji, the Plaintiff was 46 years old as at 2016.

98. But because Dr. Githinji said that the Plaintiff was 49 years old, as at 11th December 2018, the Court is obliged to assume that as at 2016 the Plaintiff was 47 years old.

99. But that is not all, as the age cited in the P3 Form dated 2nd November 2016, showed that the Plaintiff was 47 years old.

100. I therefore find that as at December 2016 the Plaintiff was 47 years old. That would mean the Plaintiff is about 5 months shy of his 50th birthday.

101. Accordingly, in calculating the compensation payable, the court will use 10 years, having allowed a small discount due to the fact that the Plaintiff would receive an accelerated payment, rather than having to wait for payment over the next 10 years.

102. In the result, the compensation awarded to the Plaintiff is as follows;

(a) Special Damages Kshs 46,775/=

(b) Pain & Suffering and Loss of Amenities..... Kshs 2,000,000/=

(c) Loss of Earning and Future Earning

Capacity Nil

(d) Loss of Consortium Nil

(e) Nursing Aid Nil

(f) Future Medical Needs, Paraplegic

Equipment and Disposables @ 2,000/=

per session, for 2 sessions per week, for

10 years Kshs 2,080,000/=

(g) Walking Aids, Crutches

Knee & foot ortho Kshs 50,000/=

(h) Catheters Kshs 120,000/=

(i) Diapers Nil

(j) Hand Gloves Kshs 120,000/=

(k) Muscle & Nerve

Stimulating Equipment Nil

(l) Orthopedic Mattress Nil

(m) Paraplegic Mattress Nil

(n) Moveable Adjustable Bed Nil

T O T A L **Kshs 4,416,775/=**

103. The said sum will attract Interest at Court rates from the date of judgment, until payment in full.

104. The costs of the suit shall be paid by the Defendant, to the Plaintiff

DATED, SIGNED and DELIVERED at KISUMU

This **16th** day of **July** 2019

FRED A. OCHIENG

JUDGE