



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL SUIT NO. 13 OF 2013

ABUKAR AROW AHMED PLAINTIFF

VERSUS

ABDIA MOHAMMED DEFENDANT

JUDGMENT

1. The plaintiff Abukar Arow Ahmed filed this case through a plaint dated 24th May, 2014 claiming to have been injured in an accident involving motor vehicle registration No. KBN 001F on 14th July 2011, belonging to the defendant Abdia Mohamed in which the plaintiff was a passenger on the Meru – Wajir road.
2. He claimed that the plaintiff or his servant was negligent in driving or controlling the motor vehicle causing it to overturn and roll several times, resulting in serious injuries to his left arm, and consequent suffered loss and damages and list particulars of special damages of Kshs. 710,715/= for medical treatment, transport and accommodation and other costs to be supplied at the hearing of the case.
3. He prayed in the plaint for judgment against the defendant for general damages for pain, suffering, mental anguish, loss of usage of left hand and amenities; cost of further surgery, special damages of Kshs.710,715/=, further special damages to be presented at the hearing, costs of the suit; interest on the above, further or other relief as the court may deem fit.
4. The defendant though served neither entered appearance nor filed defence, and on 27th July 2016 interlocutory judgment was entered by the Deputy Registrar of this court against the defendant.
5. The case came up for hearing on 5th June 2018 and only the plaintiff testified. He did not call any other witness.
6. The plaintiff testified as PW1 and stated that he was born in 1963 and on 14/6/2011 he was a passenger in a Land Cruiser vehicle KBN 001F as a miraa agent of the owner from Meru – Wajir when at 5 am between Habaswein and Modogashe the vehicle, which was carrying miraa overturned. According to him there were three (3) people in the vehicle; himself, a turn boy and driver.
7. The vehicle rolled a number of times and when he got to his senses the vehicle rested on his left hand. A miraa motor vehicle from Habaswein hurriedly arrived and he was taken to Wajir Hospital, while a lorry took the miraa.
8. He was initially x-rayed at the government hospital at Wajir, and then referred to Nairobi as the medical personnel at Wajir did not have the expertise to treat his injuries. Though he was referred to Kijabe Hospital, he was taken to Coptic Hospital.
9. It was his evidence that he was airlifted from Wajir accompanied by two brothers and was not treated at Kijabe Hospital because of lack of bed space.
10. He described his injuries as serious deformation and fracture of the left arm from the arm to the elbow. He was initially admitted in hospital for 8 days when flesh grafting and metal fixation was done. Later he spent two days in a lodging at Eastleigh, and after 15 days he was again airlifted to Wajir.
11. Later on 3/9/2011 doctors went to Wajir and removed the protruding metal pieces, when it was found that the metal pieces had created ulcers and he was advised that it was an infection, and he was again airlifted with a brother Ibrahim Barrow to Nairobi where he saw the doctor who had fixed the metal pieces at Mariakani Hospital where the doctor gave him medicine to clear the infection and told him to go back after 10 - 15 days which he did.
12. He stayed in the hotel with his brother, then saw the doctor who gave him further drugs. Though the sores were cured he became weak and in 2013 he approached a lawyer to file this case.

13. In summary he said that he underwent three (3) surgeries, and was advised to go to India to remove the metal pieces in the upper arm.
14. He said he paid for doctors, consultations, treatment, operations and hospital charges, as well as fare and accommodation for himself and his brother.
15. He had a wife who was now straining to take care of his family, with 7 children, some in school and college. He said that his forearm could not fully bend and fingers were immobilised. He said he did not ask the doctor about permanent disability because he did not have money to travel to Nairobi.
16. He said he relied on documents filed with the plaint for special damages. As stated above, the defendant did not attend the hearing of the case.
17. After the close of the plaintiff's case, counsel for the plaintiff Mr. Onyimbo made brief oral submissions. Counsel did not cite any court case. Counsel did not give an estimate of general damages. He asked the court to decide the case in favour the plaintiff.
18. I have considered the pleadings and the evidence on record. The case proceeded to hearing by way of formal proof. I have to remind myself that plaintiff has to prove his/her case in a civil case like the present on the balance of probabilities, even if the case proceeds for hearing by way of formal proof. See the case of **Kirugi & Another vs Kabiya & 3 Others [1987] KLR 347**.
19. In my view, the plaintiff has proved the special damages of Kshs.710,715/= on the balance of probabilities. Though counsel for the plaintiff suggested that there might be other expenses, and plaintiff has said he needs to go for further treatment in India, no reasonable estimate or quotation for the same has been provided. Special damages have to be pleaded and proved. See the case of **Kenya Commercial Bank vs Katiba Ya Odongo Katiba Valuers [2002] 2KLR 419** at page 423 where **Ringera J** as he then was stated –

“While on this statement of general principles, I might also state that the court will not award special damages unless the same are pleaded with particularity and then strictly proved. Even if evidence of special damages is led, the same will be ignored if the particulars thereof were not pleaded.”

20. As no additional special damages were proved above the Kshs.710,715/= I will not award any amount above that figure.
21. With regard to general damages, counsel has not relied on any case authority. I however saw the plaintiff in court. I saw the injuries, and he demonstrated his limitations arising from the injuries to the court. His left hand is almost useless now though no part of it has been amputated, and he has not testified to permanent disability. In assessing general damages, I am guided by the case of **Southern Engineering Co. Ltd vs Musingi Mutia Court of Appeal Civil Appeal No. 46 of 1985**, wherein the Court of Appeal awarded Kshs.160,000/= as general damages for pain, suffering and loss of amenities, for an injury to the arm.
22. The injuries to the arm are serious and having seen the plaintiff's injured arm, I find that there is some permanent disability. Doing the best I can, and taking into account depreciation of the Kenya Shilling and inflation, I award Kshs.400,000/= as general damages for pain, suffering and loss of amenities.
23. The costs of the case are awarded to the plaintiff against the defendant.
24. Consequently, I enter judgment for the plaintiff and order as follows –

(1) I award the plaintiff Kshs.710,715/= as special damages.

(2) I award the plaintiff Kshs.400,000/= as general damages for pain, suffering and loss of amenities.

(3) I award interest at court rates on (1) and (2) above, from the date of filing suit for special damages, and from the date of this judgment for general damages.

(4) Also I award costs of the suit to the plaintiff, against the defendant.

25. It is so ordered.

Read, signed and delivered in open court at Garissa this 3rd day of July, 2018.

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George Dulu

JUDGE