



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 236 OF 2003**

**ANTONY MWAURA KAHONGE.....PLAINTIFF**

**VERSUS**

**WILSON MWANIA MUSUNDA.....DEFENDANT**

**JUDGMENT**

1. *Antony Mwaura Kahonge*, the plaintiff herein sued the defendant, *Wilson Mwania Musunda* seeking general damages as compensation for the pain and suffering he endured as a result of injuries sustained in a road accident on or about 24<sup>th</sup> March 2000 whose occurrence he blamed on the negligence of the defendant, his servant and/or agent. The plaintiff also sought special damages in the form of lost earnings and treatment expenses.

2. In his plaint dated 10<sup>th</sup> February 2003 filed in court on 14<sup>th</sup> March 2004, the plaintiff averred that on 24<sup>th</sup> March 2000, he was travelling along the Matuu-Embu Road as a passenger in motor vehicle registration number KAC 244T when the defendant, his driver, servant and or agent negligently caused a collision between the vehicle he was travelling in and motor vehicle registration number KAH 519K as a result of which he sustained severe injuries.

3. In paragraph 5 of the plaint, the plaintiff itemized the injuries he sustained as follows:

- i. Major head injury with loss of consciousness and resultant scar.*
- ii. Compound fracture of the left femur.*
- iii. Fracture of the neck of the left femur.*
- iv. Compound fracture of the left heel bone.*
- v. Traumatic amputation of the left big toe and left second toe.*
- vi. Substantial muscle wasting of the left thigh.*
- vii. Shortening of the left leg by 5cm.*

4. The plaintiff averred that prior to the accident, he was a healthy man earning a monthly salary of KShs.5,000 which he subsequently lost hence his claim for loss of earnings. His special damages claim was pleaded as follows:

|                                    |   |                              |
|------------------------------------|---|------------------------------|
| <i>i. Medical expenses</i>         | - | <i>KShs.339,621</i>          |
| <i>ii. Future medical expenses</i> | - | <i>KShs.400,000</i>          |
| <i>iii. Medical report</i>         | - | <i>KShs. 2,000</i>           |
| <i>iv. Police abstract</i>         | - | <i><u>KShs. .... 100</u></i> |
| <i>v. Total</i>                    | - | <i><u>KShs.741,721</u></i>   |

The plaintiff also prayed for costs of the suit and interest on both special and general damages at court rates.

5. Though served with the plaint and summons to enter appearance, the defendant failed to enter appearance within the prescribed time. Consequently, interlocutory judgment was entered against him on 5<sup>th</sup> July 2005.

6. The court record shows that though the case partly proceeded for formal proof before *Ang'awa J* on 12<sup>th</sup> October 2008, the Hon. Judge subsequently retired from the judicial service and hearing started afresh before me on 7<sup>th</sup> November 2018.

7. In his evidence before the court, the plaintiff who testified as PW2 recalled that on the material date, he was travelling along Matuu-Embu Road as a passenger when motor vehicle registration number KAH 519K which was proceeding in the opposite direction veered off the road and collided head on with the lorry he was travelling in. As a result of the impact of the accident, he was stuck in the driver's cabin which had caved in. He lost consciousness and when he regained it three days later, he found himself admitted at Kenyatta National Hospital where he remained for a month.

8. In the one month he was in hospital, his left leg was operated on and metal plates fixed to treat the fractures; some toes of the left leg were amputated as well as part of the left heel. He was discharged from hospital on crutches but he continued with daily dressing for seven months on the wound left after the left heel was partially amputated. He recalled that after two years, he underwent another operation to remove the metal plates inserted on the left leg.

9. PW2 further testified that though the injuries on the left leg healed, they led to shortening of that leg which caused him disability as he cannot now carry heavy loads or stand for long. He urged the court to award him general damages that would sufficiently compensate him for the pain and suffering he underwent as a result of the injuries sustained in the accident and the resultant disability.

10. The other witness called in support of the plaintiff's case was *Dr. Washington Wokabi*. He testified as PW1. He recalled that he examined the plaintiff on 17<sup>th</sup> October 2018 to assess injuries he said were sustained in an accident on 24<sup>th</sup> March 2000.

On examining the x-rays presented by the plaintiff, and after his clinical examination, he formed an opinion that the plaintiff had suffered multiple major fractures on his left leg; which had healed with some disability assessed at 35%.

He also noted that all the toes of the left leg had been partially amputated as well as his left heel. His left leg was shorter than the right leg by 6cms. He also noted that the left knee and hip were stiff and the plaintiff could not squat because of the stiffness. The plaintiff complained that he could not run or walk well.

He charged him KShs.2,000 for his medical report and KShs.5,000 for court attendance. He issued him with receipts for both amounts which PW2 produced in evidence as Pexhibit 2 and 3. PW1 produced his medical report at Pexhibit 1.

11. Having considered the averments in the plaint and the evidence tendered by the plaintiff and his witness which was not controverted by evidence to the contrary since the defendant chose not to defend the suit, I find that the plaintiff has proved to the required standard that he was involved in an accident on the material date which was solely caused by the negligence of the defendant, his servant and or agent. The interlocutory judgment entered on 5<sup>th</sup> July 2005 is consequently confirmed.

12. Turning to the assessment of damages, from the evidence adduced by the plaintiff taken as a whole, I find that the plaintiff sustained multiple and serious injuries including fractures on his left leg which led to partial amputation of all his toes and heel on that leg. The leg was operated on twice to treat the fractures which united eventually but the injuries caused him permanent disability as the leg was shortened by 6cms. The extent of disability was assessed at 35%.

13. Given the severity of the injuries sustained by the plaintiff as shown above and the fact that he was admitted at Kenyatta National Hospital for one month and underwent two operations, I am satisfied that the plaintiff must have endured immense pain and suffering as he was being treated for the injuries. As the plaintiff was acting in person, he was not able to make a proposal on the quantum of damages he thought were appropriate to compensate him for his pain and suffering or to provide the court with authorities to guide it in its assessment of damages.

14. However, taking everything into account, I find that a sum of KShs.3,000,000 will sufficiently compensate the plaintiff for all his pain and suffering caused by the defendant, his servant and or agents' negligent driving. I therefore award the plaintiff general damages in the sum of KShs.3,000,000.

15. Though the plaintiff had prayed for special damages in the sum of KShs.741,721, he was only able to specifically prove a sum of KShs.7,000. The law is that special damages must not only be specifically pleaded but must also be strictly proved. In the premises, the plaintiff is awarded KShs.7,000 as special damages.

16. The plaintiff had also sought special damages for loss of earnings but he did not adduce any evidence to prove that he used to earn KShs.5,000 monthly prior to the accident as alleged in the plaint. He did not also tender evidence to prove that after the accident, he was incapacitated to an extent that he was unable to continue earning the said amount. In the circumstances, I find that the plaintiff has failed to prove his claim for loss of earnings and the same is hereby dismissed.

17. In the end, I enter judgment for the plaintiff against the defendant in the sum of KShs.3,000,000 as general damages for pain and suffering and special damages in the sum of KShs.7,000. The total amount of KShs.3,007,000 shall attract interest from today's date until full payment.

18. The plaintiff is also awarded costs of the suit.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 13<sup>th</sup> day of December, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Plaintiff present in person

No appearance for the defendant

Mr. Fidel: Court Assistant