



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.87 OF 2002

JOSEPH O. OKELLO.....PLAINTIFF

VERSUS

MOHAMMED ABDALLA.....1ST DEFENDANT

NYALI TYRE SALES.....2ND DEFENDANT

JUDGMENT

By way of undated Amended plaint filed in court on the 18th July 2006, the plaintiff has claimed special and general damages against the defendants, following an accident that occurred on the 6th January, 1999 along Taras-Garsen road.

It is pleaded that on the aforesaid date, the plaintiff was lawfully riding motor cycle registration number KAE 737G when the first defendant so negligently managed and/or controlled motor vehicle registration number KAC 227K that, it violently hit the plaintiff's motor cycle KAE 737G as a consequence of which, he sustained serious injuries.

The particulars of the first defendant's negligence are set out in paragraph 5 of the plaint and so are the particulars of injuries and special damages. He has prayed for prayers sought in the Amended plaint.

The first defendant who is alleged to have been driving motor vehicle KAC 227K as the 2nd defendant's authorized driver and/or agent, filed a defence to the amended plaint on the 24th August 2006, in which, he has denied the plaintiff's claim and in particular that he was the 2nd defendant's driver and put the plaintiff to strict proof. The 2nd defendant did not file a defence to the plaintiff's claim.

When the matter came up for hearing on the 16th April 2018, the defendants did not attend court and the matter proceeded ex parte. In his evidence, the plaintiff testified that, on 6th January 1999 he was cycling the aforesaid motor cycle along Tarasa-Garsen road, when he saw an oncoming vehicle from the opposite direction. That, the vehicle encroached on his lane and hit his motorbike as a result of which, he sustained injuries to the left leg, left shoulder and the ribs. He was taken to Ngao Hospital and was later transferred to Kilifi hospital where he was admitted for a day but was referred to Mombasa and later Kenyatta National Hospital where he was admitted for two months. He produced documents in support of his claim which included the medical report, copy of records for motor vehicle registration number KAC 227K, the police abstract, P3 form and treatment cards.

After the close of the plaintiff's case, counsel filed submissions on the 17th day of May 2018 which the court has duly considered. The evidence on record is that the plaintiff was riding his motor cycle registration number KAE 737G along Tarasa-Garsen road, when the driver of motor vehicle KAC 227K approached from the opposite direction and swerved on his side of the road and caused a head on collision. As a result, he sustained serious injuries and was hospitalized in several hospitals for 2 months.

As submitted by counsel for the plaintiff, the defendants did not tender any evidence and the evidence of the plaintiff is uncontroverted. Going by the evidence on record, the driver of motor vehicle KAC 227K left his path of travel and collided with the plaintiff's motor bike on his side of the road. I find the driver of the motor vehicle fully liable for the accident for having swerved from his side of the road to that of the plaintiff. The first defendant is said to have been driving the vehicle as an authorized agent of the 2nd defendant and therefore the 2nd defendant is vicariously liable for the accident.

Having found the defendants liable, I now turn to the quantum of damages to be awarded to the plaintiff. The injuries sustained by the plaintiff are captured in his medical report by Doctor Wokabi dated the 16th day of May 2000 which are;

- a. Injuries to the left shoulder.
- b. Injuries to the left leg.

The doctor found him to have a painful left shoulder and he was treated for a sprain of this joint. He also had a swollen deformed left leg and the X-rays which were taken revealed segmental (double) fracture of the left femur. He underwent surgery and internal fixation with a metallic implant was carried out as he was mobilizing the broken plate. As at the time he was seen, he was walking with the aid of crutches and was advised to undergo surgery to re-fix the fracture.

In the opinion of the doctor, he has fully recovered from the sprain to the left shoulder. Internal fixation with a metallic plate did not produce the desired results in that the plates broke. The fractures have remained un-united to date. This non union prevents him from walking without external support. He will require a surgery to remove the broken plates and insert bigger and more robust plate. Bone grafting will also be carried out and this way, the bone union will be highly enhanced. The procedure is likely to cost Kshs.120,000/- to carry out. Presently, he is quite disabled. The surgery will have to be carried out one way or the other if he is ever going to walk unaided.

In the submissions, Counsel for the plaintiff urged the court to award a total of Kshs.10,023,000 being Kshs.5,832,000/- for loss of earning capacity, 4,000,000 for pain and suffering, Kshs.170,000 for medical expenses and Kshs.21,000 as special damages.

Before I embark on the quantum of damages, I wish to note that in the Amended plaint, there is no claim for loss of earning capacity, medical expenses, and the special damages claimed are in the sum of Kshs.2,100 only. It is trite law that parties are bound by their pleadings and further that special damages have to be specifically pleaded and strictly proved.

On general damages, the plaintiff relied on the cases of **James Thiong'o Gitiri Vs. Nduati Njuguna Ngugi (HCCC at Nakuru Civil Case No. 344/2010)** and that of **Millicent Atieno Ochuonyo Vs. Katola Richard, Civil Appeal No. 38/2012**.

The court has considered the plaintiff's submissions which are based on the plaintiff's medical report and evidence. As rightly observed by the learned Judge in the case of **Kigaraari Vs. Aya (1982-88) 1KAR 768**.

“Damages must be within the limits set out by the decided cases and also within the limits of what the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees”. In the case of West (H) Con Limited Vs. Shepherd (1964) AC 326, the principles in the assessment of damages are set out. In the said case, the court stated that the award of damages must be regarded as reasonable compensation and comparable injuries should be compensated by comparable awards.

I have perused the two authorities cited by the plaintiff in his submissions. There is no doubt that the injuries sustained by the plaintiff were serious and as at the time he was seen by Dr. Wokabi, he had not recovered. He shall still undergo further treatment and surgery, though as observed above, no claim was made for future medical expenses. Of the two authorities cited, the case of James Thiongo Githiri is more relevant in terms of the injuries sustained by the plaintiff. I hereby award a sum of Ksh.1,800,000 as general damages. As for the special damages a total of Kshs.2,100 was claimed. Receipts of Kshs.2,200 were produced. I therefore award Kshs.2,100/- as proved.

In the end, judgment is entered for the plaintiff against the defendants jointly and severally for Kshs.1,802,100 plus costs of the suit. The special damages shall earn interest from the date of filing of the plaint and the general damages from the date of judgment.

It is so ordered.

Dated, signed and delivered at NAIROBI this 13th day of December, 2018.

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L. NJUGUNA

JUDGE

In the presence of

..... For the Plaintiff/Respondent

..... For the Defendant/Applicant