



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 34 OF 2014

BRIAN MUCHIRI WAIHENYA..... PLAINTIFF

VERSUS

JUBILEE HAULIERS LTD.....1ST DEFENDANT

VIPUL PATEL.....2ND DEFENDANT

DAVID KIMOSBEI KEMAI.....3RD DEFENDANT

JUDGMENT

1. The plaintiff was seriously injured following a road accident on the 8th February 2014 along the Nakuru-Eldoret road while a passenger in motor vehicle Registration No. KAU 325B that collided with motor vehicle KBR 566N ZD 5367.

2. In his Amended plaint dated 4th April 2014 and filed on the same date, the plaintiff blamed the owner and driver of the said vehicle and stated particulars of negligence. The 1st Defendant is described as the registered owner while the 2nd defendant was as the co-owner, beneficial and/or insured of the said motor vehicle. The 3rd defendant is described as the duly authorised driver at the material time of the accident. He seeks compensation for the injuries he sustained in the accident in terms of general and special damages and costs of the suit.

3. The defendants filed their joint amended defence on the 1st September 2014. The defendants not only denied ownership of the vehicle but also the occurrence of the accident involving their vehicle and further denied that the plaintiff was a passenger in motor vehicle Registration No. KAU 325B nor admitted the alleged injuries and denied all particulars of negligence attributed to their driver, whom they also deny was driving at the material time.

4. In the alternative, the defendants blamed the driver of motor vehicle KAU 325B for the causation of the accident, and urged that the suit be dismissed with costs.

5. Together with the plaint and thereafter, the plaintiff filed its list of documents and witness statements. The defendants too filed their documents and witness statements.

6. **Plaintiff's Case**

The plaintiff testified as PW1 before me on the 5th May 2016. He was sitting on a wheel chair and was pushed into the court.

He testified that at the date of accident he was 19 years old and a third year student at the Jomo Kenyatta University of Science and Technology, taking a degree course in Procurement Sciences. He produced his academic documents as Pext. 1 and a Letter from the said University to certify that he was indeed a finalist student at the said University Pext 2.

7. It was his testimony that he boarded vehicle KAU 325B at Nakuru town on the 8th February 2014 and sat at the back and that he could see the front as it was in the morning, that while near the Mustard School, he saw an oncoming trailer being driven in a zig-zag manner, then it moved on their vehicle's lane and collided with the vehicle on the driver's side, that there were three lanes, and their vehicle was on the far left lane when it was hit.

After the accident, he was taken to Valley Hospital Nakuru thereafter to Agakhan Hospital Nairobi and Kenyatta National Hospital. He testified that he sustained serious spinal injuries and after all the treatment in the various hospitals, he is paralysed and unable to walk and is confined to a wheel chair. He testified that he had to drop out of University due to the serious injuries that left him in a paraplegic state.

8. The plaintiff produced as exhibits the discharge summaries from the various hospitals – PExt.4 and medical bills and bundle of payment receipts in the sum of Kshs.885,844/= as PExt 5.

It was his evidence that his father had to hire a helper for him as he cannot do anything on his own.

He further testified that his doctor advised him that a motorised wheel chair and an electric bed would assist him in movement and turning around respectively at a cost of Kshs.400,000/= and Kshs.250,000/= respectively and produced a quotation for the said items as PExt 6.

9. He blamed the trailer driver for the accident for driving carelessly. He produced the motor vehicle records from KRA – PExt 7 – as the basis of suing the 1st Defendant. He further testified that Dr. Wellington Kiamba prepared a report on his injuries. His further testimony was that as a result of the accident and the serious injuries, he will never be able to live to his expectations of finishing his University education and to do a masters degree in purchasing and procurement, and even be able to work as a Procurement Officer whose starting salary he stated is about Kshs.100,000,000/=per month. He further stated that he shall be on treatment and medication for the rest of his life hence his plea for damages for future medical expenses together with loss of future earning capacity.

On cross examination, the plaintiff stated he would not know whether the driver of the vehicle he was in was drunk or not.

10. **PW2 was Dr. Wellington Kiamba**, a medical practitioner at Nakuru Town. He prepared a report on the plaintiffs injuries on the 15th March 2014. He produced the medical report and payments fees receipt for Kshs.7,000/= and Kshs.20,000/= being court attendance fees as Pext 11(a), 11(b) and 11(c) respectively.

He explained to the court the necessity of an electric wheel chair, bed and electric belt as they would ease the plaintiff's movement alongside being therapeutic. He emphasized on the need of constant supply of diapers and permanent catheters for the rest of the plaintiff's life. He further excluded any chance of improvement to the lower limbs. He assessed permanent disability at 100%.

11. **PW3 Stephen Wiahenya Muchiri is the plaintiff's father**. He testified that since the plaintiff was paralysed, he has been struggling to pay hospital and medical bills including a salary of Kshs.12,000/= per month for a helper for the plaintiff, and that has to continue for the rest of the plaintiff's life. He further testified that a physiotherapist attends to the plaintiff three times a week at a fee of Kshs.100,000/= per session that in total he spends Kshs.11,500/= per month towards medication and physiotherapy. He further testified that the doctor advised the purchase of an electric wheelchair and bed for Kshs.400,000/= and Kshs.250,000/= respectively and such items would require replacements due to wear and tear.

He confirmed that he had spent Kshs.885,844/= and will spend more on the medical expenses on the plaintiff.

12. **Samuel Muchiri testified as PW4**

He is the plaintiff's caretaker. He adopted his statement recorded on the 15th April 2015.

The above two witnesses were not cross examined.

13. **PW5 Mary Wiathera** recorded her witness statement on the 23rd July 2015. She reiterated that the vehicle she was travelling in together with the plaintiff was being driven on the left lane and that she saw the trailer ahead moving in a zig-zag way and blamed the accident on the driver of the trailer. Upon cross examination she stated that the driver of their vehicle was not drunk nor did she know whether there were alcohol bottles in the vehicle.

14. **PW6 is Aggrey Oure**, the Executive Officer in the Chief Magistrate's Court registry (Nakuru) He produced a file **Nakuru CMCC No. 435 of 2014**. he confirmed upon perusal that the original police file in respect of the accident was produced in the said case as PExt 12.

15. **PW7 a police officer from Nakuru police station Corporal Jackson Kombo produced the Police abstract (PExt 14)**. From the police file No. IAR(F) he confirmed the occurrence of the accident on the 8th February 2014 involving the two vehicles. He confirmed there being two sketch plans the file a rough one and a fair one. He pointed out that the point of impact in the rough sketch plan was at the left side lane as one faces Nakuru-Eldoret direction, the lane used by KAU 325B. He confirmed that the scene was well marked. He stated that motor vehicle KBR 566 N ZD 5367 encroached onto the lane of KAU 325B which veered off its lane. He stated that the covering report was not dated or signed, but had the name of Corporal Esther who was the investigating officer.

On cross examination, he stated that the investigation was complete.

He reiterated that a rough sketch is drawn at the scene of accident and the fair one after leaving the scene, and that conclusions by the investigating officer were that the deceased driver of motor vehicle KAU 325B was blamed for the accident.

Upon re-examination by Mr. Gekong'a Advocate for the plaintiff, he agreed that the rough sketch drawn at the scene of accident should not change and further that on the final fair sketch plan, the point of impact was not shown. He produced the police file also.

16. At the close of the plaintiff's case, the defendant called no evidence, and both parties filed written submissions which they later highlighted.

Upon the evidence of the plaintiff and his witnesses together with the pleadings, the Issues that comment to me for determination are:

1. **Liability:**

Which of the two vehicles registration No. KAU 325B and KBR 566 N ZD 5367 is to blame for the accident.

2. Whether motor vehicle Registration No. KAU 325B contributed to the occurrence of the accident.

3. Whether the plaintiff was injured and if so whether he is entitled to compensation in terms of general and special damages as prayed in the plaint.

4. Costs.

17. **Analysis of Evidence, Submissions and Findings undisputed facts**

The following facts are not in dispute. That there was an accident between the two vehicles on the date and time stated, that the plaintiff was a passenger in motor vehicle registration No. KAU 325B and that he was seriously injured, that the 1st defendant was the registered owner of motor vehicle Registration NO. KBR 566N ZD 5367 Trailer and that the 3rd Defendant, was the driver of the said vehicle and was an employee of the 1st defendant, that he was driving the trailer towards Nakuru direction while the other KAU 325B was traveling towards Eldoret direction.

What is in dispute is which of the two vehicles was the cause of accident and whether both contributed to the occurrence of the said accident. That the plaintiff's evidence is uncontraverted, and unchallenged.

18. From the onset, it is noted that the owner and driver of motor vehicle registration No. KAU 325B are not enjoined in the case. In their joint statement of defence, the defendant's alleged contributory negligence against the driver of the said vehicle but did not enjoin it as a co-defendant by way of 3rd party proceedings or otherwise. It is further to be noted that the defendants failed to call any evidence to support their allegations in their defence, that the vehicle KAU 325B contributed to the occurrence of the accident in which accident its driver died.

As stated in the case **Simba Commodities Ltd -vs- Citibank N.A (2013) e KLR**, failure for a party to call and avail its witnesses with knowledge, concerning facts to a party's case gives rise to an interference that the testimony of such witness could not sustain the contention of such party.

The defendants however participated in the proceedings by its advocates by cross examination and filing of submissions.

19. The police file (PW7) in respect of the accident together with the police abstract (PExt 12) and the covering report prepared by the investigating officer corporal Esther was neither dated nor signed. He produced the rough and fair sketch plans of the accident scene. The documents were produced and admitted without objection from the defendants. It is submitted by the defendant that as there was no clear point of impact, the rough sketch showing point of impact on the left side of the road on the side of motor vehicle KAU 325B and the fair sketch showing none, then it is of no probative value.

20. A document that is not dated nor signed by the maker has no legal value. I consider the investigation report and its findings to be of no probative value to the case. I shall disregard them save the police abstract which is signed from the Nakuru Police Station where the accident was reported. It is trite that a police abstract is a public document and its contents when produced and admitted without objection ought to be taken as the truth. The plaintiff and PW5 who was in the vehicle (KAU 325B) stated that it was the trailer that was being driven in a zig-zag manner and that it veered from its lane onto the lane on the far left and collided with the other vehicle on the driver's side. This evidence was not challenged or controverted. Admittedly whenever a collision of two vehicles occur, one or both must be at fault See **Baker -vs- Market Marlborough Industrial Co-operative Society Ltd (1953) IWL 1497 Lord Denning(as he then was) observed:**

“Everyday proof of collusion is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both.”

Justice Vishram(as he then was) in the case **Amalgamated Saw Mills Ltd**

-vs- Stephen Murutinguru HCCC 75 of 2005, stated:

“that the burden of proof of any fact or allegation is on the plaintiff and a casual link

between someone's negligence and his injury, and that the evidence adduced must on a balance of probability connect the two.”

21. I have stated above that the plaintiff's evidence is uncontroverted, **Section 107 and 108 of the Evidence Act, Chapter 80 Laws of Kenya** is clear that the burden of proof of particular facts lies with the person who wishes the court to believe in the said facts. In this case the defendants allegations remain as mere denials. See also **Order 2 Rule 11 of Civil Procedure Rules and Trust Bank Limited -vs- Paramount Universal Bank Limited** and quoted in my judgment in **James Kiarie Kimemia -vs- Mary Wangari Mwangi (2016) e KLR.**

22. The defendants failed to enjoin the party it blamed for the accident as a third party or a co-defendant. They did not blame the plaintiff at all, and in any event, being a passenger the plaintiff who had no control of the vehicle he was travelling in can not be held to have contributed to the collision of the two vehicles.

It is not enough for the defendants to submit that the plaintiff chose to sue the available party as the party to blame. They too were at liberty to enjoin any other party they deemed was liable.

I am satisfied that enough evidence was lead to persuade me to come to the findings that the accident was caused by the negligence of the 3rd defendant by veering from his vehicle's lane onto the lane the vehicle where the plaintiff was travelling and and colliding thereon, and thus caused the accident.

I agree with the holding in **Kiema Muthungu -vs- Kenya Cargo Handling Service, Ltd (1991) 2** that:

“there can be no liability without fault and a plaintiff must prove some negligence on the part of the Defendant where the claim is based on negligence.”

23. I am satisfied that the 3rd defendant drove his vehicle in an excessive speed in the circumstances and without due care and attention for other road users in that had he been driving on normal and acceptable speed in the circumstances, and had he been in full control of the vehicle it would not have left its lane and veered to the left side of the road, to the oncoming vehicle and caused the collision.

24. The totality of the evidence adduced by the plaintiff and his witnesses is sufficient to persuade me to come to a finding that the plaintiff has proved his case against the defendants jointly and severally on a balance of probabilities. They are wholly liable, negligence and consequential damages.

25. Quantum of Damages

I now proceed to assess damages awardable to the plaintiff.

The medical report prepared by Dr. Wellington Kiamba dated the 15th March 2014 stated the injuries as hereunder:

- Severe spinal injury at the neck and cut wound on the head.
- Treatment at Valley Hospital Nakuru, Agakhan Hospital Nairobi, Kenyatta National Hospital, then discharge home to continue with physiotherapy on home based care.
- Pain at the neck.
- Complete loss of sensation from the chest upto the lower limbs extremities.
- Incontinent of urine and stool.
- Weakness of right upper limb.

- Loss of power in the left upper limb.

Observations

- C5 complete spinal cord injury.
- C6/C7 extension distractory injury.
- Cut wound of the occipital region of the scalp.
- Has wasting of muscles on the upper limbs.
- Has complete loss of muscle power and tone on the lower limb.
- Has incontinent of stool and has pampers applied.
- Has an indwelling catheter applied with urine bag.
- Loss of muscle power and tone in lower limb is permanent
- He is paraplegic.
- As a result, he requires constant attention to change positions as he is likely to develop bed sores.
- Will develop urinary tract infections due to indwelling catheter, will require medication for the rest of his life.
- Requires a nurse aid.
- Permanent disability assessed at 100%.

The medical report was a summary of Discharge Summaries from the hospitals I have stated above.

26. **Damages for pain and suffering and loss of Amenities.**

There is no dispute that the plaintiff sustained very serious injuries, and was classified as paraplegic on a 100% permanent disability.

The plaintiff will require medication nursing care of the rest of his life. He lost all his dreams to finish his University degree course and his aspirations to be employed and even further his education. He will be bed ridden and on wheel chair all through his life. Dr. Kiamba recommended purchase of an electric wheel chair and bed and belt to ease the plaintiff's movement and at a cost as stated above.

I shall endeavour to asses damages under the various sub-heads, being alive to the fact that:

“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”

The above was observed in the **A.A. M.V Justus Gisairo Ndarera & Another (2010) e KLR in Nbi HCCC No. 1015 of 2003.**

27. The plaintiff has proposed a sum of Kshs.8,000,000/= as reasonable. He cited two authorities **Ngure Edward Karega -Vs. Yusuf Dorab Bassur (2014) e KLR** where the injuries are quite close to the plaintiffs. A sum of Kshs.5,000,000/= was awarded in May 2014.

In **Alex Otieno Amolo & Another -vs- Hayer Bisham Sing & Another (2016)** e KLR, the plaintiff was declared a complete paraplegic, with total loss of mobility and permanent incapacity. He was awarded Kshs.6,000,000/=.

The defendant has suggested an award of Kshs.1,500,000/= and relied on five authorities all very old for the years – 2004, 2008, 2009 and 2011. Damages ranged between Kshs.1,500,000/= to Kshs.2,000,000/=.

I have considered the seriousness in pain and suffering of the plaintiff, a young man now 22 years old must be undergoing together with relevant authorities. I have in particular considered **Alex Otieno Amolo case (Supra)**. The plaintiff is a complete paraplegic with a 100% permanent incapacitation.

I shall award Kshs.8,000,000/= damages under this subhead.

28. **Damages for loss of earning capacity**

The Defendants submit that the future prospects of the 19 year University student was not known and therefore no basis to speculate that he would be employed, and therefore no award ought to be given.

The University by its letter confirmed that the plaintiff was a final year student. He aspired to go upto Masters level and upon employment, would earn a sum Kshs.100,000/= as monthly salary. He will no doubt never engage in any work or anything in life with his disability though he was hopeful that he could do online studies to complete his degree course. I have no doubt that the plaintiff would have obtained his degree and at some point get employment or do some business for income. There is no evidence that one is able to adduce on this aspect.

I have looked at graduate salaries in **Public Service Scales 2014-2015 period – Ministry of Finance**. It is indicated as a **Civil Service Pay Scale Order – 2014**. It is an average of Kshs.80,000/= gross. The plaintiff would have worked and improved his grades and salary or even venture into private enterprises upto the age of retirement, at 60, save for uncertainties of life.

Taking the above factors into account, a multiplier of 32 years is reasonable. He would have as expected for majority of people in the country, married and sire children.

Becoming a family man for the plaintiff is now a dream. The plaintiff suggested a salary of Kshs.100,000/= upon a multiplier of 40 years.

Considering the above factors I shall adopt a multiplier of 30 years and a salary of Kshs.40,000/= and a multiplicand of ½.

$$\text{Thus } 30 \times 12 \times 40,000 \times \frac{1}{2} = \text{Kshs.7,200,000/=}$$

I award the above sum of damages for loss of earning capacity.

29. **Nurse aid**

The plaintiff's father testified that he has been paying for an assistant/helper at the rate of Kshs.12,000/= per month. Though no evidence of the payment was provided, that expense is a direct consequence of the injury and the doctor too recommended for an aide.

Going by the Government Wages Guidelines for House Servants for the year 2015 a sum of Kshs.10,954/= (say 11,000/=) is indicated.

This amount will increase with time. I shall adopt the sum of Kshs.11,000/= thus for 30 years, it would be

$$30 \times 12 \times 11.000 = \text{Kshs.3,960,000/=}$$

30. Future Medical Expenses

(a) Physiotherapy

This was recommended by Dr. Kiamba, the plaintiff's doctor. The plaintiff's father stated that he spends Kshs.1,000/= per session, three times a week thus Kshs.3,000/=, making a monthly expense of Kshs.12,000/=.

For 30 years, the total sum would be:

$$\text{Kshs.12,000} \times 30 \times 12 = \text{Kshs.4,320,000/=}$$

(b) Medical Equipment and Supplies

These include diapers, catheters, urine bags, medicines and all other accessories. The plaintiff's father evidence was that he spends a sum of Kshs.11,000/= monthly to buy these necessary items.

There is no question as to their necessity.

I shall therefore allow the same amount, recognising that the cost of such items will with time increase, thus

$$\text{Kshs.11,000} \times 30 \times 12 = \text{Kshs.3,960,000/=}$$

(c) Electric Bed and Wheel Chair

It was recommended by the doctor that the electric items would improve and facilitate the plaintiff's easier movement. Quotations were referred to but not provided.

The defendant's submit that the above expenses are in the nature of special damages and therefore ought not only to be pleaded but must be proved.

31. Being a future expense and pleaded in the Amended Complaint, Dr. Kiamba alluded to the cost at Kshs.400,000/= for the electric bed and Kshs.250,000/= for the electric chair.

Without a quotation from a medical supplies institution, I have considered the case of the Case of **Ngure Edward Karega -vs- Yusuf Devan Nassir (2014) e KLR**. In the case, the court allowed future purchase of an electric chair that would require regular maintenance, and relying on a quotation by a physical therapy services allowed Kshs.361,340/= for the electric chair. A sum of Kshs.250,000/= had been suggested by Dr. Kiamba. I will allow the said sum of Kshs.250,000/=.

For the Electric Bed, no quotation was presented to the court. I have considered quotation given from the National Spinal Injury Hospital in the case **Japheth Ngula Matingi -vs- AG(2016) e KLR, Dr. Atwori** presented the quotation from the said spinal injury hospital for Kshs.350,000/= and the court allowed the same.

I have no reason to enhance or reduce the cost.

I therefore award future cost of an electric Bed for Kshs.350,000/=.

32. Special Damages

The plaintiff pleaded a sum of Kshs.426,389/= in the Amended Complaint filed on the 4th August 2014. However, a bundle of payment receipts in the sum of Kshs.885,844/= were produced by PW2, the

plaintiff's father. He explained that as at the date of filing the case, the medical expenses were at Kshs.426,389/= and that the additional sum of Kshs.459,455/= were incurred between the 4th August 2014 and at the date of hearing of the case on the 5th May 2016. This in my view is because the plaintiff continues to receive treatment and will so continue for the rest of his life.

33. It is not practical that every time during the pendency of the suit the plaintiff would keep on amending the plaint to add further medical expenses. The defendant did not object to the production and admission of the documents (receipts) in support of the Kshs.885,844/= incurred as medical expenses.

I shall therefore allow the same as strictly proved.

34. In summary, the final award shall be as follow:

(a) Damages for pain and suffering	- Kshs.8,000,000/=
(b) Loss of earning capacity	- Kshs.7,200,000/=
(c) Nurse/Aid	- Kshs.3,960,000/=
(d) Physiotherapy	- Kshs.4,320,000/=
(e) Medical Supplies	- Kshs.3,960,000/=
(f) Electric chair	- Kshs. 250,000/=
(g) Electric bed	- Kshs. 350,000/=
(h) Special Damages	- <u>Kshs. 885,844/=</u>
Total	- Kshs.28,925,844/=

=====

35. Consequently judgment is entered for the plaintiff against the defendants jointly and severally in the sum of Kshs.28,925,844/=. However, a sum of Kshs.459,455/= being a portion of special damages shall attract interest at court rates from the date of filing suit while the balance of special damages together with the other awards stated above shall accrue interest at court rates from the date of this judgment.

The plaintiff is awarded costs of the suit.

Dated, Signed and Delivered this 4th Day of May 2017

J.N. MULWA

JUDGE