



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 378 OF 2011

EZEKIEL NZUKI MUMO PLAINTIFF

VERSUS

JOHN KINUTHIA 1ST DEFENDANT

BEATRICE W. NGARI 2ND DEFENDANT

JUDGMENT

The plaintiff was injured in a road traffic accident that took place on 2nd September, 2008 along Kasarani-Mwiki road involving motor vehicle registration No. KAP 469D owned by the 2nd defendant and driven by the 1st defendant at the time of the accident.

The plaintiff blamed the accident on the negligence of the 2nd defendant's authorized driver, servant and or agent. He brought this suit against both defendants jointly and severally for the injuries that he sustained. Having blamed the driver of the 2nd defendant he pleaded that the 2nd defendant was vicariously liable for the acts and or omissions of her authorized driver, servant and or agent.

From the record it is only the 2nd defendant who filed a defence to the plaintiff's claim and stated that, except that the motor vehicle registration NO. KAP 469D was being driven on the date, place and time cited in the plaint, any allegations of negligence, and careless or reckless driving were denied and called for strict proof thereof. It was also pleaded that the collision was solely and or substantially caused by the negligent manner in which the plaintiff conducted himself as a handcart pusher/puller.

It is also alleged in the defence that the plaintiff had earlier filed proceedings against the 2nd defendant in the lower court which particulars have been cited in paragraph 8 of the 2nd defendant's defence, but that as at the date of filing the instant suit he had not paid costs to the 2nd defendant.

The case was heard by Onyancha J, who is now retired but after receiving evidence from the plaintiff, his witnesses and also from the defence. Thereafter he made orders that parties do file submissions. Order 18 Rule 8 of the Civil Procedure Rules provides for situations whereby a Judge is prevented from concluding the trial of a suit. In that case his successor may deal with any evidence taken down and proceed with the suit from the stage at which his predecessor left it.

Based on the said rule, jurisdiction is conferred upon this court to conclude the trial by writing the judgment based on the evidence on record. Both parties subsequently complied with the order to file submissions as directed by Onyancha J. Several authorities have also been cited by both counsel.

In his testimony the plaintiff told the court that the accident took place between 6 and 6.30 p.m. when he was pulling a hand cart made of wood and metal. He told the court that his handcart was empty and had reflectors fitted thereon. Before the collision, two cars passed him from behind but he was knocked by the motor vehicle registration No. KAP 469D which was speeding at the time of the accident. He lost consciousness and when he came to he found himself at St Francis Community Hospital, after which he was transferred to Kenyatta National Hospital where he was admitted. Considering the injuries he sustained he was advised to go to the spinal injury hospital for rehabilitation but attended only 3 times because the costs were prohibitive. That being the case, he preferred to go to nearest hospital known as St Francis Community Hospital.

On the other hand, the 1st defendant who was the driver of the motor vehicle testified that he was driving at a low speed as there were potholes along this road. He saw an object that obstructed him which caused him to swerve to the left of the road to avoid a head on collision with an oncoming "matatu". His headlights were on and put the time of the accident at 7.30 p.m.

From the evidence on record, it is clear that it is the plaintiff's evidence against that of the 1st defendant as relates to the occurrence. The plaintiff said that there were security lights at the bus stage. If that is true then the time he gave as 6 and 6.30 p.m. may not be the correct time when the accident took place. On the other hand, the 1st defendant may well be saying the truth that the accident took place at 7.30 p.m. as he was using the lights of his motor vehicle.

It has been submitted by the counsel for the plaintiff that the 1st defendant should be held 100% liable to the plaintiff. There is no evidence that the 1st defendant hooted, braked or swerved to avoid knocking the plaintiff's handcart. If he had done so, he would have told this to the court. At the same time, the plaintiff's evidence that his handcart had reflectors or that he had a reflective jacket has not found support from any independent evidence. In the absence of any independent evidence from either the plaintiff or the defendants, I apportion liability equally to both the plaintiff and the defendants. The 2nd defendant as owner of the motor vehicle is vicariously liable for the negligence of the 1st defendant.

As a result of the accident, the plaintiff sustained injuries set out in the amended plaint dated 23rd April, 2013. These were;

- a) Spinal injury at T12 and L1
- b) Complete paraplegia with stool and urine incontinence
- c) Bladder and urethral injury.
- d) Blood loss, physical and psychological pain.

Special damages were pleaded at Kshs. 127,952/= . The plaintiff therefore claimed special damages, general damages, future medical care, costs of the suit and interest.

The plaintiff called Dr. Theofilus Wangata who examined him on his injuries. At the time he examined him the doctor used the various documents presented to him by the plaintiff from Kenyatta National Hospital and St. Francis Community hospital. The plaintiff then was on a wheel chair and both the lower limbs were paralyzed. He was completely paraplegic with no motor or sensory activities to the lower limbs. He had no feelings in both legs and wore a urine catheter.

The doctor then went ahead to classify all the injuries sustained by the plaintiff, the costs of future medical care and assessed his permanent disability at 100%. . He produced the medical report among other documents in evidence. He concluded that the plaintiff was unlikely to recover from his present condition. The doctor was cross-examined at length on the condition of the plaintiff but remained firm in his assessment.

Dr. Wambugu Mwangi gave evidence for the defence. He had examined the plaintiff at the request of the defence. The doctor noted that the plaintiff had sustained spinal cord injury resulting in paraplegia. This was confirmed at Kenyatta National Hospital where he had been admitted up to 2nd December, 2008. He was mobilized on a wheel chair and discharged through spinal injury hospital for rehabilitation purposes.

He complained of weakness and total paralysis of both lower limbs and was incontinent in both stool and urine. After examination the doctor made the conclusion that the injuries were caused by blunt trauma and that the plaintiff had sustained spinal cord lesion resulting in total paralysis of both lower limbs. He assessed the degree of permanent incapacity at 100%.

Under cross-examination, the doctor affirmed that the plaintiff could manage incontinence of stool and urine using diapers, collecting bags, urine bags and drugs. He would need about Kshs. 10,000/= worth of materials inclusive of drugs per month. A special hydraulic bed with a ripple mattress would cost about Kshs. 450,000/= and the patient was on a wheel chair costing 45,000/=. The plaintiff would also have sexual dysfunction.

I note that doctor Theofilus Wangata also gave some figures relating to the cost of future medical care on the plaintiff. It is instructive that both doctors are in agreement that the plaintiff sustained 100% incapacity. I have noted the figures presented by both counsel relating to damages payable to the plaintiff. In the absence of any evidence presented relating to the costs other than the doctors evidence, the court can only go by the doctors' reports and evidence to arrive at a just conclusion in this matter.

When the plaintiff was involved in the accident he was about 21 years old. He was admitted to hospital for about 3 and ½ months after which he was discharged. The injuries were no doubt serious. He shall remain paralyzed and use a wheel chair for the rest of his life. The receipts for special damages have been produced. I have no reason to doubt their authenticity and therefore he is entitled to special Kshs.127,952/= damages.

Cases cited by the defence include **Nakuru HCCC No. 358 of 2001** where an award of Kshs. 2 million was made to the plaintiff who was paraplegic. **In Nairobi HCCC no. 457 of 2009 Tracisio Maina Mwangi Vs. Evans Mweha and Another**, Waweru J, made an award of Kshs. 2,500,000/= for pain, suffering and loss of amenities.

The plaintiff's counsel cited the case of **Ngure Edward Karega Vs. Yusuf Doran Nassir {2014 e KLR}** where the court is said to have awarded Kshs. 5 Million for similar injuries for pain and suffering. The full facts of the case however are not cited. In that case, the plaintiff sustained a spinal injury, fracture on the 6th cervical bone, fracture on the right leg, bruises on the head and palms, partial paralysis on the right hand and incontinence.

Doing the best I can going by the medical reports, I make an award of Kshs. 6 Million general damages for pain, suffering and loss of amenities. The plaintiff's counsel had submitted that a multiplier of 50 years should be used in this particular case. One has to consider the vicissitudes of life and also the fact that if paid, the award would not be stretched over a period of time. In that case a litigant would benefit by investing whatever has been paid to him.

All these facts mitigate against a higher multiplier in the circumstances. Considering the material before me I believe a multiplier of 30 years will meet the ends of justice in this matter.

The doctor assessed the cost of wheel chair at Kshs.60,000 /= and Kshs. 45,000/= respectively. I will take the average of Kshs. 50,000/= to be the reasonable costs. It is said that the said wheel chair would have a span of one year before replacement. And therefore using the multiplier of 30 years I make an award of Kshs. 1.5 Million.

The plaintiff shall require regular follow ups and this will necessitate the hiring of a taxi at every visit which are quarterly, that is after every 3 months. According to the doctor this will cost him Kshs. 3,000/= per visit. He will need Kshs. 12,000/= to meet that expense which adds up to Kshs. 360,000/=.

He will need pain killers at the cost of Kshs. 200/= per day per month which comes to Kshs. 2,160,000/=

In his condition the plaintiff cannot be able to manage himself independently. He will require a nurse and a salary of Kshs. 20,000/= has been claimed. Considering the condition of the plaintiff such a figure is not unreasonable. The cost for nursing care comes of Kshs. 7,200,000/=. Regular checkups for his condition have been assessed at Kshs. 2,000/= per month. The doctor however, is not specific as to what these checkups are or what medicines may be prescribed in view of the fact that there are prescribed means in his report meant to manage the plaintiff's condition. If these checkups are related to the quarterly visits then this cost will be pegged to the visits which will be Kshs. 16,000/= per annum times the multiplier of 30 years which adds up to Kshs. 480,000/=

The plaintiff will need a special bed whose cost has been placed at Kshs. 350,000/=. The special mattress is also required and its cost is said to be Kshs. 150,000/=. The two doctors are almost in agreement because one quoted Ksh. 500,000/= for both the bed and the mattress and the other quoted Kshs. 450,000/=. There is no expert evidence that this bed and mattress have to be replaced after every 5 years. In my judgment, I limit this cost to a replacement only twice over a period of 30 years bringing the total to Kshs. 1 Million.

The plaintiff will also need drugs for evacuation of stool from his system which the doctor assessed to be kshs. 500/= per month. This is a minimal cost which is allowed. The total comes to Ksh. 180,000/=. The plaintiff also will require catheter, urine bags, diapers. The cost is estimated to be Kshs. 600/= per week which adds to Kshs. 2400/= per month. The total cost would be Kshs. 864,000/= The total cost for future medical expenses and attendant costs will therefore add up to ksh.13,574,000/=

The plaintiff is said to have just completed his education at Form Four level and passed with a C grade. This is to be found in his evidence before the court. Although he said he wanted to join a law school that grade could not easily lead him to such a school. I agree with the counsel for the plaintiff that in the absence of any proof of employment, the minimum government wage would be a reasonable multiplier. Having been 21 years old at the time of the accident and although the government retirement age is 60 years I shall use the same multiplier to calculate loss of earning capacity.

The minimum wage is Kshs. 8,000/= which is not subject to taxation. The award under this head is therefore Kshs. 1,908,000/=.

The summary of all the awards above is as follows,

a) General damages for Pain and suffering	Kshs. 6,000,000/=
b) Cost of future medical care and attendant costs.....	Kshs. 13,574,000/=
c) Loss of earning capacity	<u>Kshs. 1,908,000/=</u>
TOTAL	<u>Kshs. 21,482,000/=</u>
Less 50%	Kshs. 10,741,000/=

There shall be judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs. 10,741,000/= general damages plus Kshs. 63,976/= special damages. He shall also be entitled to costs of the suit and interest at court rates which shall also be reduced by 50% contributory negligence.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of July, 2016

A.MBOGHOLI A. MSAGHA

JUDGE