



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 495 OF 2011

DEEPAK PANDIT. PLAINTIFF

VERSUS

KENNEDY OTIONO OBARA. 1ST DEFENDANT

SAFARICOM LIMITED. 2ND DEFENDANT

J U D G M E N T

The Plaintiff herein, filed this suit on the 11th day of November, 2011 claiming both special and general damages against the Defendants herein. He has also claimed costs and interest at court rates. It is pleaded that on or about the 12th day of November, 2008, the Plaintiff was lawfully travelling in motor vehicle registration number KAP 732Y along University Way in Nairobi when the 2nd Defendant's agent, servant and/or driver so negligently, recklessly and carelessly drove, managed and/or controlled motor vehicle registration number KAV 575M causing it to lose control and veer off its lane and collide with motor vehicle registration Number KAP 732Y as a consequence of which the Plaintiff was seriously injured and has suffered loss and damage.

The particulars of negligence of the 1st and 2nd Defendants are set out in paragraph 5 of the plaint while those of injuries and special damages are set out in paragraph 6 of the plaint.

The 2nd Defendant is described as the registered owner of motor vehicle registration number KAV 575M while the 1st Defendant was its driver at the material time.

The parties herein filed a consent on liability dated the 6th day of December, 2012 wherein liability was apportioned in the ratio of 85%:15% with the Plaintiff conceding 15% thereof. In view of the aforesaid consent, the only issue left for this court to determine is the quantum of damages payable to the Plaintiff. The Plaintiff in his evidence adduced on the 18th November, 2015 testified that he sustained some injuries following the accident. He was taken to Aga Khan Hospital where he was treated for the injuries sustained. He produced two medical reports by Doctors Modi M Y and Timothy Kagoda Byakika dated 18th November, 2009 and 25th July, 2015 respectively.

According to the medical report by Dr. Modi, the Plaintiff sustained the following injuries: -

- a) Fracture dislocation of the left hip.
- b) Fracture left humerus.

c) Radial nerve palsy left side.

He was operated on thrice and the following was done

- a) Close reduction of fracture dislocation left hip on the 13th November, 2008.
- b) Close K-wire fixation and plaster fracture left humerus on the 13th November, 2008.
- c) Left hip acetabulum fracture fixation with plate and screws on 15th November.

He was initially mobilized on wheelchair and eventually mobilized with help of two auxiliary crutches non weight bearing over the left leg. He was advised on physiotherapy and nursing care at home and not to put any weight on his left leg and left hand. Several x-rays were done which showed good healing at left hip acetabular fracture but left humerus fracture was not healing satisfactorily, his last x-ray showed non union of the fracture left humerus. Several nerve conduction tests for the radial nerve palsy were done which showed severe axonotemesis injury and had persistent radial nerve palsy with minimal recovery.

In his conclusion, Dr. Modi observed that the Plaintiff sustained severe injuries (grievous harm) following the accident and at the time he prepared the medical report, the Plaintiff was still under treatment. Surgeries for nerve repair and plate fixation of fracture humerus were still pending. Plate over left hip joint is in situ and it will require removal in future. He noted that osteoarthritis of left hip joint which is a known complication after fracture dislocation of hip joint may develop after few years in which case the Plaintiff will need total hip replacement.

On his part, Dr. Timothy in his medical report confirms the injuries that the Plaintiff sustained. Similarly, he confirmed the surgical procedures that he underwent as noted in Dr. Modi's medical report and given in his opinion and prognosis save for the cost of future medical expenses.

Parties filed submissions to assist the court in assessment of general damages. On his part, the Plaintiff has proposed an award of Ksh.3,000,000/- (Ksh.3 Million) and has relied on the following authorities: -

- a) HCCC No. 70 of 2000 – **Phillip K Cheruiyot Vs Nebco K. Ltd** where the Plaintiff was awarded Ksh.600,000/-.
- b) HCCC No. 9 of 2008 **Samuel Makumi Githambo Vs South Firms Ltd & Others** – where an award of Ksh.2,000,000/- was made.
- c) HCCC No 86 of 2008 **Joseph Musee Mua Vs Julius Mbogo Mugi & 3 Others** where the Plaintiff was awarded a sum of Ksh.1,500,000/- as general damages.

The Defendants in their submissions have relied on the following cases: -

- a) **Mary Wanjiru Muraguri Vs Broadcasting Corporation (2009) eKLR**, where an award of Ksh.500,000/- as general damages was made.
- b) **John Kiriru Njoroge Vs David Njiru (2008) eKLR** where the Plaintiff was awarded Ksh.450,000/- as general damages.
- c) **David Kiplangat Sang Vs Richard Kipkoech Langat & Another (HCCC No. 91 of 2004 (Kericho))** in which a sum of Ksh.550,000/- was awarded and lastly,
- d) **Philip Kipkorir Cheruiyot Vs Nebco (K) Ltd & Another [2006] eKLR** where a sum of Ksh.600,000/- was awarded.

I have considered the authorities cited by the respective parties on the proposed award on general damages and all considered and in my view, a sum of Ksh.2,000,000/- is reasonable compensation for the injuries sustained.

I now turn to the claim of special damages. The Plaintiff by way of an amended plaint has claimed a sum of Kshs.3,358,106.67cts. He sought to amend the plaint by a Notice of Motion dated the 11th day of May, 2016 which application was allowed by consent of the parties when it came up for hearing on 6th July, 2016. The said sum is hereby awarded.

In the end, judgment is hereby entered for the Plaintiff against the Defendants as follows: -

- a) General Damages **Ksh.2,000,000/-**
- b) Special Damages **Ksh.3,358,106.67cts**

Less Contribution of 15%

Leaving a total of Kshs.4,554,390.67cts

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- c) The Plaintiff is awarded the costs of the suit.

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **for the Plaintiff**

..... **for the Defendant**