



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 79 OF 2012

GABRIEL MWASHUMA..... PLAINTIFF

-VERSUS-

MOHAMMED SAJJAD

MILLY GLASS WORKS LIMITED..... DEFENDANTS

JUDGMENT

1. Gabriel Mwashuma, the Plaintiff, on 9th April 2010 while driving Motor Vehicle Registration No. KAX 681Y was involved in a collision with motor vehicle registration No. KAN 786N. Plaintiff suffered extensive injuries and has by this suit sued the driver and owner of motor vehicle KAN 786N, that is the 1st and 2nd Defendants respectively.
2. The Defendant filed a Defence to the claim and pleaded therein that the accident was solely caused or substantially contributed by the negligence of the Plaintiff.
3. This case came up for hearing on 16th March 2015 and on that day only the Plaintiff attended court. No evidence was tendered on behalf of the defendants. It follows that the Defendant's Defence remained mere allegation. Although the Defendant's by their submission sought to rely on their Defence they cannot so rely on it since it was not proved. In this regard I refer to the case:

INSURANCE COMPANY EAST AFRICA LTD –V- EVA VIVIAN WANJIRU MBOGORO [2014] eKLR viz:

“As earlier stated, the Defendant did not appear at the hearing of this suit. Therefore, the Plaintiff's claim is uncontroverted. In the case of Janet Kaphiphe Ouma & Another Vs Marie Stopes International Kisumu HCCC No. 68 of 2007, the Learned Judge citing the decision in Edward Muriga Vs Nathaniel D. Shulter, Civil Appeal No. 23 of 1997 said:

“In this matter, apart from filing its statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the Evidence act are clear that he who asserts or pleads must assert the same by way of evidence.”

In AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998 (UR) Mbaluto J. held

“Although the Defendant has denied liability in amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

In light of the above cases, and having in mind that the Defendant did not give evidence to substantiate its case or challenge the Plaintiff’s claim. I have no option to consider the Plaintiff’s claim as uncontroverted. In the circumstances, it is plain that the Plaintiff has proven its case on a balance of probability as to why it is entitled to avoid the policy herein.”

4. The Plaintiff’s claim is as follow:

- a. Kshs 11,602,728.69 in special damages;
- b. General damages; and
- c. Costs and interest

5. There are only three issues for consideration which are:

- a. **Did the Plaintiff prove the allegations of defendant’s negligence;**
- b. **Did the Plaintiff prove his claim in special damages; and**
- c. **What should be the quantum for general damages.**

6. On the first issue the Plaintiff’s uncontroverted evidence was that while driving vehicle registration No. KAX 681Y along Diani Road, going towards Likoni a car coming from Likoni side, was overtaking and it drove on Plaintiff’s side of the road. The Plaintiff said:

“I tried to swerve but he 1st Defendant followed me to where I swerved to Next I heard a bang. The care KAX 618Y was turned towards where I was coming from.”

Plaintiff evidence was to the effect that he saw Defendant’s vehicle suddenly overtaking before the collision. After the collision he saw that the vehicle’s registration Number was KAN 786N. After that collision he saw that the Defendant’s vehicle had overturned and was facing Likoni side.

7. The accident resulted in the Plaintiff’s vehicle’s doors jamming. Those who wanted to rescue him had to use the back door.
8. Plaintiff produced in evidence the police abstract which showed that the first Defendant was charged with the traffic offence of careless driving and was convicted and fined Kshs 5,000/=. The police abstract also showed that the 2nd Defendant was the registered owner of vehicle registration No. KAN 786N.
9. I reject Defendant’s submission that the Plaintiff failed to prove ownership of KAN 786N. The proceedings in this case clearly show that the Plaintiff produced in evidence the police abstract. Having done so the issue of ownership of that vehicle is proved. In this regard I refer to the case:

General Motors East Africa Limited v Eunice Alila Ndeswa & Another [2015]eKLR

where the High Court made reference to decisions of the court of Appeal, viz:

“The Court of Appeal in JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 OF 2010 [2013]eKLR observed that:

“In any case in our view, an exhibit is evidence and in this case, the Appellant’s evidence that the Police recorded the Respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

The same Court of Appeal in SECURICOR KENYA LTD VS KYUMBA HOLDINGS LTD CIVIL APPEAL NO. 73 OF 2002 [2005] eKLR stated that:

“We think that the Appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holdings finds support in the decision in OSAPIL VS. KADDY [2001] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The Appellant had, indeed, proved otherwise.”

10. Bearing in mind the uncontroverted evidence tendered by the Plaintiff in respect to the first issue identified above I find that Plaintiff proved on a balance of probability that the accident was wholly attributable to the negligence of the 1st Defendant who was driving the 2nd Defendant’s vehicle. The Defendants attempt to rely on the Plaintiff pleading in the Reply to Defence to show that the Plaintiff contributed to the accident is rejected. My reading of paragraph 2 of that reply to Defence shows that the Plaintiff denied the Defendants’ allegations to paragraphs No. 3, 4, 5, 6, 7 and 8 which paragraphs included Defendant’s pleading that the Plaintiff contributed in negligence.
11. The second issue calls upon me to determine whether the Plaintiff proved his claim for special damages.
12. As stated before the Plaintiff pleaded in his plaint for Judgment for Kshs 11,602,728.69 in special damages. That sum is inclusive of what the Plaintiff testified was used for his treatment; compensation for his vehicle; and other incidental costs.
13. After being rescued from the wreckage of his car, Plaintiff stated that he was first taken to palm Hospital in Diani. He received first aid then was transferred to Mombasa Hospital. Plaintiff did not produce any receipt in respect to his hospitalization at Mombasa hospital. His evidence, therefore, that he was charged Kshs 140,000 by that hospital fails and there is no proof of that claim as required. In that regard reference is made of the case CHARLES SANDE –VS- KENYA CO-OPERATIVE CREMERIES LTD Court of Appeal No 154 of 1992 where that court held:

“It is now trite Law that special damages must not only be pleaded but must also be specially proved.”

14. The Plaintiff received further treatment in Germany and his evidence was that the total cost of that treatment was Euro 83,509.45 of that amount Plaintiff stated that he personally paid Euros 6,395.70 while the balance was paid by his German Insurance, the Allianz Private Health Insurance Company.
15. The Plaintiff for the first time while testifying relied on a letter written by the Allianz Private Health Insurance dated 18th November 2011 by which letter the Insurance Company sought to be reimbursed under the principle of subrogation the amount it expended in the treatment of the Plaintiff. That subrogation right was not at all pleaded and neither was it specifically proved. For that reason that claim must and does fail. In this regard I am persuaded by a decision Kwazulu-Natal High Court in South Africa, namely NKOSI –VS- MBATHA (AR 20/10) (2010)

ZAKZPHC 38 where the court stated:

“However, the Plaintiff said it for the first time under cross-examination that she was proceeding against the Defendant on behalf of the insurer for the recovery of the costs of repairs the insurer paid to her. It does not appear from the Plaintiff’s pleadings that she was so suing. I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the Plaintiff’s pleadings that her motor vehicle was insured and that after collision the insurer fully indemnified the Plaintiff for the loss she had suffered. Nor did the Plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleadings is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See *Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ*. The party is therefore not allowed to direct the attention of the other party to one issue and at the trial attempt to canvass another *Nyandeni v Natal Motor Industries Ltd 1974 (2) SA 274 (D)*. In the request for further particulars the Plaintiff was specifically asked whether he motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The Plaintiff refused to answer the questions posed to her on grounds that the information requested was not required for pleading. In my view, the Plaintiff had thereby misled the defendant as to the time and correct state of events and as to the nature of her claim.”

16. Similarly the Plaintiff claim for an amount of Euros 6,395.70 fails for lack of proof. The only thing Plaintiff tendered in evidence as proof of his payment of that amount was a handwritten calculation. That in my view did not suffice as proof on a balance of probability. The same fate also befalls his claim for compensation for his vehicle and loss earnings.
17. The only special damages proved by production of receipts was kshs 2,500 for doctor’s report; Kshs 80,085 for translations costs, and I will take judicial notice that it costs Kshs 200 for police abstract and will allow the claim for that amount. In total therefore Plaintiff shall have judgment in special damages for kshs 82,785.
18. The third issue requires the court to determine the amount of quantum.
19. The Plaintiff in his uncontroverted evidence stated that he suffered a lot of pain following the accident and upto the time he was transferred to Mombasa Hospital. To give an idea of the initial injuries he became aware of, he stated that while he was being pulled from the wreckage of his car two people had to hold his leg to ease the pain, whilst others carried him. This was because the left leg had been completely crushed.
20. When he was admitted at Mombasa Hospital he was taken to theater for operation. Before then it seems that he went into unconsciousness and regained consciousness on the second day. He remained in that hospital for 3 ½ to 4 weeks before being evacuated to Germany for further treatment. The medical report of Dr. S.K. Noorani sets out the injuries and treatment the Plaintiff received in that report dated 5th September 2010 the doctor stated:

RE: GABRIEL N. MWASHUMA

The above named 29 years old male was involved in a motor vehicle accident near Diani on 9th April 2010. This happened after a head on collision with an overtaking motor vehicle. He was taken to the Diani Beach Hospital then transferred to the Mombasa Hospital. After resuscitation, radiographs showed the following injuries:-

1. Segmental left femur fracture
2. Compound fracture left patella and femoral condyle
3. Comminuted left distal tibia/fibula (pilon) fracture
4. Fracture right fibula
5. Soft tissue injuries right knee

He was taken to the operation room on several occasions where the fractures were

fixed and surgical debridements performed. He also developed features of fat embolism syndrome and was managed in intensive care unit. The left femur was fixed by the trigen nail (Smith & Nephew) and the pilon fracture was stabilized by an external fixator (synthes).

He stabilized and on 26th April 2010, he was repatriated by air ambulance for further management in Germany.

Yours faithfully,

Dr.S.K. Noorani

21. There is also a very detailed report prepared by a doctor in Germany which also needs to be considered in this judgments as follows:

“Lower extremities:

Distinctive limitation of mobility of the left leg, the gait pattern is connected with a protective limping, foot roll-over of left leg is limited, slight outer rotation posture of left leg, slight genua valga both sides, scars on the left leg are externally inconspicuous partly connected with a sense reduction, no trophic disorder of the skin, normal skin temperature, leg muscles almost identical, averagely developed, friction rub left knee and upper ankle joint,

In particular we found the following extent of mobility:

| | |
|--------------------------------|----------------------------------|
| Right hip | Left hip |
| Unrestricted mobility | Extension/flexion 0-0-100 |
| | Abduction/adduction free |
| | Inner/outer rotation free |
| Right knee | Left knee |
| 0-0-120 degree | 0-0-90 degrees |
| Right upper ankle joint | Left upper ankle joint |
| Raise/lower 30-0-50 | 10-0-2- |
| Right lower ankle joint | Left lower ankle joint |
| Unrestricted mobility | ½ of the norm |

We abstained from new x-ray exposures because the older brought by patient already showed signs of arthritic changes especially in the left upper ankle joint.

III. Summary and evaluation

In the cause of this accident Mr. Mwashuma acquired the following injuries:

- i. Femur shaft spiral wedge fracture left thigh,**
- ii. Pilon tibial comminuted fracture left ankle joint,**
- iii. Fibula shaft fracture,**

- iv. Abrasive fractures on left patella and femur condyle median,
- v. Soft tissue injuries on left knee,
- vi. Distinct haematoma especially on the left leg,
- vii. State of shock through polytrauma and blood loss
- viii. Psychogenic stress.

The injuries made multiple operations necessary, primarily the condition was most critical. Meanwhile the osteo synthesis materials were completely removed. The fractures are osseous consolidated. Remaining are Osseous alterations and deformations on left ankle joint, left knee joint and left femur shaft. Furthermore there are scars on the left leg with slight sense irritations. Altogether the mobility of the left leg is significantly reduced. With the accompanying pain in the left leg, the serviceability of the left leg significantly reduced. Likewise the psychic ability to withstand stress is reduced through the accident trauma. The actual arthrotic alterations in the left ankle joint will in all probability increase in the cause of the coming years.

There is a good case to believe that this will also occur in the left knee with lesser gravity.

Presently the serviceability of the left leg is estimated with 3/5 legworth. All in all the reduction of the ability to earn a livelihood at the general employment market is estimated at about 30%.

Reply to the questions asked in the expertise assignment:

1. Which disorders or injuries exist/existed in the cause of the accident from April 9, 2010?

See summary above!

2. Are limitations in daily life activities existing?

Based on the reduced serviceability of the left leg, Mr Mwashuma is handicapped in the organization of his daily and of his professional life. The ambulatory ability and bodily capacity is reduced, lifting of loads heavier than 10kg should be avoided, likewise long walking stretches over 1km. Extended standing leads to pain so that seated breaks should be made. Running, jumping and standing on ladders is almost impossible. Climbing stairs causes significant difficulties.

Weather changes causes pain. Because of the repeatedly occurring pain Mr. Mwashuma depends on the intake of medicines. Anxiety through memories of the accident is repeatedly possible.

3. How is the further progression of the accident cause injuries evaluated?

The already existing arthrosis in the area of the left ankle joint can increase in the cause of the coming years, likewise arthrosis can form in the area of the left knee joint.

4. Is a deterioration of the injuries caused by the accident expected in the near future?

A deterioration within the next months is rather not expected.

5. In due consideration of the probable development, are more future operations to be expected?

With increasing arthrosis possibly further operations might be necessary, starting with arthroscopy, endoprosthesis and ankylosis of the respective joints.

6. How severely is the ability to earn a livelihood on the common employment market restricted?

The decrease of the earning ability at the common employment market is at the time being, estimated on 30%.

7. How much more, in case of aggravation of the injuries caused by the accident, will efficiency on the common be reduced?

The deterioration of the earning ability can increase up to 60%.

Schifferstadt, Jan. 15, 2013

MD Peter Heck

(Surgeon, Orthopedist, trauma surgeon)

(Signature).”

22. There is no doubt the Plaintiff suffered extreme pain and had to undergo multiple operations. His recovery as can be seen from the two reports will not be to the healthy state he was in prior to the accident.
23. I have considered the Defendants authorities on quantum. In my view they do not at all represent the injuries suffered by the Plaintiff I am more persuaded by authorities relied upon by the Plaintiff. They are more representative of the injuries the Plaintiff suffered. Plaintiff cited the case ALEX WACHIRA NJAGUA –VS- GATHUTHI TEA FACTORY & ANOTEHR [2010]eKLR where the court awarded Kshs 3 Million where the Plaintiff suffered blunt injuries of the head with confusion, fracture of the left tibia, fracture of the right fibula, cut wound on the forehead, bruised elbow and bruised knee. In the case CHARLES WANYOIKE GITHUKA – VS- JOSEPH MWANGI THUO & 2 OTHERS [2008] eKLR the award was Kshs 2 Million. The Plaintiff in that case suffered fracture mid-shaft of the right femur, segmental fractures of the left femur, compound fracture of the right lower leg (fibia & Fibula bones), fracture of the right tibia plateau (knee joint), and fracture of the right ankle joint.
24. In view of those authorities and taking into account Plaintiff's injuries I award the Plaintiff kshs 3 Million.
25. In the end and in summary there shall be judgment against both Defendants jointly and severally for the Plaintiff as follows:
- a. **Kshs 82,785 for special damages;**
 - b. **Kshs 3 Million in general damages;**
 - c. **There shall be interest at court rate on (a) above from the date of filing suit until payment in full;**
 - d. **There shall be interest at court rate on (b) above from the date of this judgment until payment in full; and**
 - e. **The Plaintiff is awarded costs of this suit.**

DATED and DELIVERED at MOMBASA this 2ND day of JULY, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Plaintiff:

For Defendants:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE