



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.101 OF 2011

JOSEPH KIMANI KARURU.....PLAINTIFF

VERSUS

MOSES KIMANI.....DEFENDANT

JUDGMENT

FACTS

1. The Plaintiff whilst travelling as a passenger in motor vehicle registration No.KAH 145N/ZBI 1255 lorry sustained serious injuries occasioned by a road traffic accident which occurred whilst the vehicle was being driven along the Kisii-Kericho Road.
2. The Plaintiff's claim was for:
 - i) General damages
 - ii) Special damages in the sum of Kshs.262,233/=
 - iii) Costs and interest.
3. Liability was recorded **"BY CONSENT"** on a ratio of 75:25% in favour of the defendant and Plaintiff respectively.
4. The Medical reports were put in **"BY CONSENT"** and the issues of assessment of damages were left to be canvassed by way of written submissions.

PLAINTIFF'S SUBMISSIONS

5. The accident occurred on 30th June, 2014 along Kisii-Kericho Road.
6. The Medical Report prepared by Dr. Omuyoma dated 21/2/2011, the Discharge Summary from Provincial General Hospital and St. Elizabeth Medical Centre show that the Plaintiff sustained the following injuries:
 - i) Dislocation of the left elbow joint leading to gangrene of the left forearm
 - ii) Brachial artery damage
 - iii) Dislocation of the left shoulder joint
 - iv) Dislocation of the sterno clavicle joint

7. The disability of the Plaintiff was assessed at 40% by Dr. Omuyuoma.
8. The Plaintiff sets his claim for general damages for pain and suffering and loss of amenities at Kshs.3,000,000/= and relies on the case of **Simon Mua V. Kioga Muwano t/a Kioga Muwano Transporters & 2 others**, [2013] eKLR.
9. Special Damages in the sum of Kshs.262,233/= are supported with annexed bundles of copies of receipts.
10. That the Plaintiff requires an artificial limb costing Kshs.300,000/= and a quotation in support is annexed.
11. The Plaintiff's claim was in the total sum of Kshs.3,736,233/= and this court was urged to enter judgment in favour of the Plaintiff in the said sum together with costs and interest.

DEFENDANTS SUBMISSIONS:

12. It is not disputed that Plaintiff occasioned injuries from a Road Traffic Accident whilst a passenger in motor vehicle Registration No. KAH 145N ZBI
13. Consent on liability recorded was on 75%:25% in favour of the Plaintiff.
14. The injuries set out are similar to those set out by Plaintiff in his submissions. The Plaintiff has fully healed as he had not sought further treatment from the date of his discharge from hospital.
15. The court is urged to award general damages for the injuries sustained in the sum of Kshs.500,000/=. Reliance is placed on several authorities the highest award in the sum of Kshs.800,000/= set out on the case of **Wycliffe Sugani Awalo V. Bernard Musyoki & Another**, HCCC No.2115 of 2001 (NRB).

ISSUES FOR DETERMINATION:

16. Upon perusal of the written submissions, pleadings, medical reports and other related documents, I find the following issues for determination:

- i. General damages
 - ii) Loss of earning capacity
- iii. Future medical expenses
- iv. Special damages
- iv. Costs

ANALYSIS:

17. Liability is an issue that was settled so I shall proceed to assess damages
18. The injuries are really not in dispute as both Medical Reports prepared by Dr. Obed Omuyoma and Dr. Mugenya show that the Plaintiff did indeed sustain injuries that resulted in the amputation of the left arm above the elbow.
19. Dr. Obed Omuyoma in his reports observes that the Plaintiff suffered 40% permanent disability whereas Dr. Mugenya puts permanent disability at 70%. Both doctors nevertheless concur that the Plaintiff is in good general condition.
20. The Plaintiff's advocate prayed for general damages in the sum of Kshs.3,000,000/= and place reliance on the authority of **Simon Mua V. Kioga Muwano t/a Kioga Muwano Transporters & 2 others**, [2013] eKLR.
21. The Plaintiff in the above case suffered a below the knee amputation occasioned by an accident and his degree of incapacity was 35%. An award for General Damages was made in the sum of Kshs.2,000,000/=.
22. I am not persuaded by this authority and shall disregard it as an amputation of the leg is not comparable to that of an arm.
23. The Defendant's proposal of Kshs.500,000/= is also supported by various authorities annexed to the submissions.

24. Based on the evidence given and guided by the Defendant's authorities and also adding the element of inflationary trends, this court awards the Plaintiff the sum of Kshs.1,200,000/= as general damages for pain and suffering, which I find to be reasonable in the circumstances. Refer to **Geoffrey Otieno Ongondo V. KBS & another**, [2008] eKLR – Sitati, J. made an award for Kshs.1,200,000/= for amputation of the left arm.
25. Loss of earning capacity was not pleaded in the plaint. The Plaintiff nevertheless made submissions under this head and submitted that the Plaintiff was a driver, aged 45 years and having not exhibited any payslip the court ought to adopt the minimum government wage of Kshs.7000/=. A multiplier of 11 years was proposed.
26. This court was urged to award an amount of Kshs.924,000/=, calculated as hereunder:

$$7000 \times 12 \times 11 = 924,000/=$$

27. It is interesting to note that no dependancy ratio was proposed.
28. I reiterate that the issue of loss of amenities was not pleaded but it has been held that this is part and parcel of general damaged and as much need not be pleaded. Refer to the case of **Butler V. Butlers** [1984] KLR. Where it was held:

“.....compensation for diminution of earning capacity is awarded as part of general damages.....”

29. The Defendant did not make any submissions under this head to challenge the Plaintiff's submissions.
30. I shall therefore address this issue as part and parcel of general damages. The Plaintiff produced no evidence to support the fact that the Plaintiff was a driver and no payslip was also exhibited in support of earnings.
31. This court shall therefore treat him as an unskilled general labourer and will apply the Government minimum wage of Kshs.3,597/= rounded to Kshs.3,600/=. The Plaintiff was aged 49 years and a multiplier of 9 years is reasonable. Refer to the case of **Patricia Mona & Another V. Samuel Opot Omondi & Another**, [2014] Eklr. Therein a multiplier of 9 years was found to be reasonable for a 47 year old person. The Plaintiff would have spent money on his family therefore the dependancy ratio is pegged at 2/3.
32. General damages under this head is calculated as hereunder:

$$3,600 \times 9 \times 12 \times 2/3 = \text{Kshs.259,200/=}$$

33. Future medical expenses were not pleaded in the plaint under the head special damages. It is trite law that special damages must be pleaded and proved. It was not pleaded and therefore I shall not make an award for it.
34. As for Special Damages, the plaintiff pleaded for Kshs.262,233/= and receipts in support are annexed to the plaint. The same is allowed.

DETERMINATION:

35. For the reasons set out hereinabove, judgment is entered in favour of the Plaintiff in the sum of Kshs.1,291,075/= as summarised hereunder.:

i) Liability – 75%;25% with the Defendant bearing the larger portion.

ii) General damages:

a) pain and suffering – Kshs.1,200,000.00

b) loss of earning capacity – Kshs.259,200.00

iii) Future medicals - Nil

iv) Special damages	– Kshs. <u>262,233.00</u>
Sub total	- Kshs. <u>1,721,433.00</u>
c) less 25% contributory negligence -	Kshs. <u>430,358.00</u>
Total	- Kshs. <u>1,291,075.00</u>
v) The Plaintiff shall have costs and interest at court rates.	

It is so orders.

Dated, Signed and Delivered at Nakuru this 15th day of September, 2014.

A. MSHILA

JUDGE