



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 155 OF 2010

PATRICK MBATHA KYENGOPlaintiff

Versus

BAYUSUF FREIGHTERS LTD.....Defendant S

JUDGMENT

1. By a plaint dated 4th November 2010 the Plaintiff sued the Defendant in respect of a road traffic accident on 2nd June 2010 involving the Defendant's motor vehicle registration No. KBH 437H.
2. The Plaintiff claims that the said accident wherein he sustained serious injuries was as a result of the negligence of the Defendant's driver particulars whereof are indicated in paragraph 6 of the plaint.
3. The Plaintiff pleaded that by reason of the said negligence he suffered injuries particulars of which were given as follows:

Particulars of injuries

- a) *Crush injury with traumatic amputation of the leg.*
- b) *Fracture right radius and ulna.*
- c) *Degloving injuries to the right forearm*
- d) *Laceration wound right gluteal region*

Particulars of special damage

- a) *Medical expense to be finished*
 - b) *Medical Report* - 2000/=
 - c) *Police abstract* - 200/=
 - d) *Motor vehicle search* - 500/=
- Total** - 2700/=

4. It was further pleaded that due to the serious injuries sustained by the Plaintiff in which his permanent incapacity has been placed at 85% he is unable to engage in employment and work and the Plaintiff therefore claim loss of earning and future earning capacity.
5. The Defendant filed a defence in which it denied the occurrence of the alleged accident and further denied that its agent or driver is guilty of the alleged or any negligence and further averred that if the accident occurred then the same was wholly caused or substantially contributed to by the Plaintiff's own negligence particulars where of were set out as follows:

a) Being an unauthorized passenger in a motor vehicle.

b) Failing to wear a seat belt.

c) Agreeing to ride in a motor vehicle that was allegedly being driven in excessive speed.

d) Failing to ask the driver of the motor vehicle he was allegedly a passenger to stop and alight as she knew the same was being driven in a careless and without due care.

6. This matter proceeded for hearing before me when the Plaintiff testified that he was employed by the Defendant as turn boy and while in the course of his duties transporting goods from Mombasa to Meru when they reached Kambiti the motor vehicle was moving with speed and the driver was unable to control the same thereby causing it to overturn.
7. The Plaintiff stated that he had his safety belts on and blames the driver of the said motor vehicle for the accident and under cross examination by Mr. Opondo for the Defendant confirmed that he had an amputation of the left leg, fracture of the right radius and ulna.
8. In support of his case the Plaintiff produced the discharge summary issued by Bishop Kioko, P3 form, police abstract, evidence of salary and the two medical reports by Dr. Moses Kinuthia and Dr. Wambugu were produced by consent.
9. The Defendant did not call any evidence at the close of the Plaintiff's case and the Advocates for the parties agreed to put in written submissions.

SUBMISSIONS

10. It was submitted on behalf of the Plaintiff on liability that the Defendant did not challenge the evidence of the Plaintiff and therefore the Defendant should be found 100% vicariously liable for the negligence of its driver.
11. On general damages the Plaintiff submitted that the same sustained very serious and life threatening injuries as confirmed by both Dr. Moses Kinuthia and Dr. Wambugu P.M. With Doctor Kinuthia assessing total incapacitation at 85%. It was further submitted that the Plaintiff sustained the following injuries.

a) Crush injury with traumatic amputation of the leg.

b) Fracture right radius/ulna.

c) Severe degloving injuries to the right forearm and hand

d) Laceration wound to right gluteal and hand.

12. An award of Kshs. 3 million was proposed based on the case of IDD MUBARAK VS RASHID AMIR TRANSPORTERS MACHAKOS HCCC NO. 105 OF 2007 wherein Ksh. 1.5 million was awarded.
13. The Plaintiff further submitted that as per the two medical reports the Plaintiff would require to be fitted with a versatile prosthesis on the amputated leg which Dr. Kinuthia opine would cost Ksh. 250,000/- and therefore urge this court to award the same.

14. On loss of earning capacity it was submitted that the Plaintiff was aged 26 years at the time of the accident and was employed by the Defendant company as a turn boy earning Ksh. 8121/- per month. He therefore proposes a multiplier of 34 years taking retirement age to be 60 years thus $8121 \times 12 \times 34 = 3,508,272$.
15. On behalf of the Defendant it was submitted that no charges were preferred against the driver of the motor vehicle registration number KBH 437Z and that the Plaintiff was unable to affirm whether in his report to the police he stated that the accident was caused as result of carelessness on the part of the Defendants driver.
16. On general damages the Defendant proposes an award of the sum of Ksh. 900,000/- based upon the case of MOMBASA HCCC NO. 47 OF 2003 JANE OTIENO VS MOMBASA LINERS LTD AND & another(2005) eKLR wherein the Plaintiff who sustained a below the knee amputation of the left leg was awarded Ksh. 800,000/-.
17. On loss of future earning capacity the Defendant submitted that the Plaintiff was not fully incapacitated as a result of the accident and therefore proposes half of the monthly salary with a multiplier of 12 years though I note that the Defendants Advocate has not given any justification for this. He proposes $4060 \times 12 \times 12 = 584,648/=$.
18. On the issue of cost of prosthesis the Defendant submitted that Dr. Wambugu had proposed the cost as ranging between the sum of Ksh. 50,000 and 150,000/- inclusive cost of fitting and therefore proposes Kshs. 70,000/-.

DETERMINATION

Liability

19. I have noted that the Plaintiffs evidence on the occurrence of the accident was not challenged by the Defendant and that the plaintiff was able to prove his case on a balance of probability and therefore find that the the Defendant is liable at 100% on liability.

QUANTUM

20. The injuries sustained by the Plaintiff are not disputed. The two medical reports herein were produced by consent and according to Dr. Moses Kinuthia the Plaintiff sustained amputation of the left leg below the knee, fractured right radius/ulna resulting into no functional flexion/extension movement on the right wrist and all finger. He assessed permanent incapacity at 85% while Dr. Wambugu assessed the same at 80%.
21. I have looked at the following cases:

i) JUSTUS NGETA MUSYOKA vs ELDOROT EXPRESS CO. LTD. (2005) eKLR wherein Lady Justice J Khaminwa assessed general damages in respect of similar injuries at Kshs. 1,600,000/-

ii) ESTHER INGOLO vs SWALEH SAID HAMED BILEL & 2 OTHERS (2005)eKLR where Khaminwa J assessed general damages at Ksh. 1,200,000/=

22. Taking this cases against those submitted by the Plaintiff and the Defendant I am of the considered opinion that an award of Ksh. 1,600,000/- would be an adequate compensation to the Plaintiff herein.

FUTURE MEDICAL EXPENSES

23. Dr. Moses Kinuthia proposes versatile prosthesis with a durable one assessed at Ksh. 250,000/- while Dr. Wambugu proposes a functional light weight leg prosthesis at between KSh. 50,000/- to Ksh. 150,000. He further noted that the Jaipur type fitted on the Plaintiff was Ksh. 20,000/- and has noted that a provision should be made to replace the leg prosthesis every 4-6 years due to wear and tear. I would therefore award the Plaintiff Ksh. 250,000/- as pleaded.

LOSS OF EARNING/FUTURE EARNING

24. It is not disputed that the Plaintiff was earning Ksh. 8121/- from the Plaintiff's company and the evidence placed before me confirms that since the date of the accident the Plaintiff has never worked. Dr. Wambugu puts his permanent incapacitation at 80% while Dr. Kinuthia puts his at 85%.
25. It is also not disputed that the Plaintiff was 26 years at the time of the accident taking the contingencies of life into account would have worked up to the age of 60 years. I would however put a multiplier of 30 years.
26. Having confirmed that his total incapacitation is 80% as assessed by Dr. Wambugu I award the Plaintiff 80% of his salary as a multiplicand thus his loss of earning capacity is: $6496 \times 12 \times 30 = 2,338,560$ which I award.

SUMMARY

27. I therefore make final judgment for the Plaintiff against the Defendant as follows:

1. Liability 100%.

2. General damages = 1,600,000/=

3. Future medical expenses = 250,000/=

4. Loss of earning capacity = 2,338,560/=

Total = 4,188,560/=

5. Interest on general damages from the date of judgment

6. Cost of the suit.

Dated and delivered at Nyeri this 6th day of June 2013.

J. WAKIAGA

JUDGE

Mr. Githinji for Mr. Muchuki for the Defendant.

No appearance for the plaintiff.

Court: Judgment read in open court in the presence of Mr. Githinji for Mr. Muchuki

J. WAKIAGA

JUDGE