



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Suit 64 of 1998

NICHOLAS NJOROGI THIONG'OPLAINTIFF

VERSUS

JOSEPH N. NGERENWA.....DEFENDANT

J U D G M E N T

This matter has been pending in court for the last 10 years for one reason or another and that is in my view unfortunate given that it is a running down matter which is quite straight forward.

In his plaint dated 18/8/98, the plaintiff sued the defendant herein for general and special damages. Costs of the suit and interest thereon at court rates.

The cause of action arose on 1/7/1997 along the Kenol Makutano Road at Makuyu. According to the plaintiff, he was lawfully traveling in the defendant's motor vehicle registration number KAH 1089 Peugeot 504 when he driver lost control of the causing it to roll thereby causing him serious injuries as enumerated hereunder:-

- (i) ***Fracture of mid-right clavicle***
- (ii) ***Dislocation of the right shoulder joint***
- (iii) ***Cut wound on the head.***
- (iv) ***Tenderness of the right upper chest.***
- (v) ***Haematoma and bruise of lateral superior aspect of the right shoulder.***
- (vi) ***Tenderness of the right should at rest and on movement***

His right arm remained in a sling for 4 weeks and it remained non-functional for a total of 6 months.

From the medical report (exh 1) and his evidence in court, the plaintiff was not completely healed when he was re-examined 1 year later. The matter had proceeded ex-parte before after the defendant failed to file a defence. The ex-parte Judgment and all consequential set aside and the defendant was allowed to file his defence. In the defence, dated 12/10/2000, the defendant denied that the accident in question happened; and that if it did happen, it was because of factors beyond the driver's control. He further denied that the plaintiff was a passenger in the said motor vehicle. It is noted however that the defendant though duly served with the hearing notice as per the affidavit of service dated 22/4/2009. The matter therefore proceeded ex-parte for the second time. This time however, there is a defence on record and I will therefore consider its contents. The same was nonetheless a general denial.

At the hearing, the plaintiff testified and called the doctor as his witness. He reiterated the contents of his plaint. He produced the Police Abstract from showing that indeed the accident in question took place on 1/7/97 and that he was a passenger therein. This therefore laid to rest the defendants denial that the accident never happened. He also exhibited the p3 form which he was issued with on the date in question. In the absence of other evidence to the contrary, this court makes a finding that the accident in question did happen and that the plaintiff sustained the injuries noted in both the P3 form and the medical report.

From the evidence on record, the motor vehicle in question veered off the road on itself and rolled. There is no evidence whatsoever that the plaintiff herein contributed to the accident in anyway. I have no basis therefore on which for apportion liability. In the circumstances, I find the Defendant, 100% to blame for the accident in which the plaintiff was injured. That brings me to the issue of damages. There was no evidence that was adduced by the defendant, nor was there any submission on quantum of damages to be awarded.

I am therefore only left with the submission by the plaintiffs counsel. He annexed one authority which is nonetheless a High Court authority and which only carries persuasive status. I have considered the same i.e **SISTER MARGARET W. CHEGE** and *Loreto Institute versus Ruth Nyambura- (CIVIL APPEAL NO. 48 OF 2005 (High Court Eldoret)* where the honourable Judge awarded 650,000/= for injuries that were almost similar to the plaintiff's herein. The plaintiff herein has asked for 650,000/= as awarded in the said authority. My finding and in the absence of any submission to the contrary is that the said amount is not excessive and especially given the fact that the accident occurred over 10 years ago and the plaintiff has todate not been compensated. I award him Ksh.600,000/= general damages. The special damages claimed were also proved by way of production of the receipts to the satisfaction of this court.

Accordingly, I make a finding that the plaintiff herein has proved his case against the defendant on a balance of probability as required by law. I enter Judgment in his favour and award him the following;

1. General damages amounting to	600,000/=	
2. Special damages	-	6,770/=
Total -		<u>606,770</u>

3. Costs of the suit plus interest thereon at court rates.

Orders accordingly.

W. KARANJA

JUDGE

Delivered dated and signed in open court at Embu this 3rd day of March 2010.

In presence of:-Ms Kimani for Kathungu for plaintiff