



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 444 of 2007

STEPHEN NYAKUMBE NDERA

(A minor suing thro' his mother

LYDIA ARONYA NDERA as his next friend.....PLAINTIFF

VERSUS

AMINA ABUD IKIROR.....1ST DEFENDANT

ANDREW KARIMI.....2ND DEFENDANT

SIMON KINGORI.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiff herein **Stephen Nyakumbe Ndera** is a minor and has brought this action through his mother and next friend **Lydia Aronya Ndera** seeking the following reliefs jointly and severally against the Defendants:-

- (a) Special damages Kshs.560,000/=**
- (b) General damages for pain, suffering and loss of amenities**
- (c) Costs of this suit**
- (d) Interest on (a), (b) and Cc) above at court rates.**

2. The Plaintiff's case is that on or about 4/04/2005, the Plaintiff, who was walking from school along the Naivasha-Kongaru road at Karagita area was violently knocked down by motor vehicle Registration Number KAS 318M a Toyota Matatu; that the accident occurred as a result of the negligent careless and/or reckless driving of the said motor vehicle by the 3rd Defendant; that the 3rd Defendant was driving the said motor vehicle as a driver, servant, agent and/or employee of the 1st Defendant and or of the 2nd Defendant; that as a result of the said accident, the Plaintiff sustained severe injuries for which he holds the Defendants jointly and severally liable.

3. The Plaintiff claims that the 3rd Defendant, as driver of the subject motor vehicle was negligent by reason of:-

- (a) ***Driving at a speed which was excessive in the circumstances.***
- (b) ***Failing to keep any or any proper look out or to have any or any sufficient regard for pedestrians that were or might reasonably be expected to be walking along the Naivasha-Kongaru Road.***
- (c) ***Failing to see the minor Plaintiff in sufficient time to avoid hitting him or at all.***
- (d) ***Driving off the road and there colliding with the minor Plaintiff.***
- (e) ***Failing to give any or any adequate warning to the minor Plaintiff of his approach or at all.***
- (f) ***Failing to stop, to slow down, to swerve or in any other way so to manage and/or control the vehicle so as to avoid hitting the Plaintiff minor.***

4. The Plaintiff also claims that as a result of the accident, he suffered the following injuries:-

- (a) ***crushed foot with loss of skin and septic wound and exposed tarsal bones***
- (b) ***on and off bone pain***
- (c) ***Post traumatic stress associated with loss of limbs.***

The Plaintiff also avers that as a result of the injuries, his left leg had to be amputated and that he will have a re-amputation of the stump after age 12 and have a new prosthetic limb fitted every 2 years, subject to repairs.

5. The 2nd and 3rd Defendants filed their joint defence on 3/08/2007. The said Defendants admit that the 2nd Defendant owned the subject motor vehicle and that the 3rd Defendant was driver thereof but they attribute the accident to the negligence of the Plaintiff herein who is accused of:-

- a. Failing to keep any proper lookout or to have any or any sufficient regard for his own safety whilst crossing the said road.***
- b. Failing to pay any or any sufficient heed to the presence of the said motor vehicle on the said road;***
- c. Suddenly entering into the said road without first ascertaining that it was safe to do so and when it was unsafe and dangerous so to do;***
- d. Failing to see the said motor vehicle in sufficient time to avoid the said accident or at all;***
- e. Suddenly entering into the path of the said motor vehicle without giving the Third Defendant any or any reasonable opportunity of avoiding the said accident.***

The said 2nd and 3rd Defendants also deny the particulars of injury allegedly sustained by the Plaintiff and urge the court to dismiss the Plaintiff's suit with costs.

6. In his reply to the defence of the 2nd and 3rd Defendants, the Plaintiff denies the particulars of negligence attributed to him. He also says that he complied with the provisions of Order XXXI rule 1(2) of the Civil Procedure Rules by having Mrs. Lydia Aronya Ndera execute an authority to act on behalf of the minor Plaintiff.

7. The Plaintiff called evidence. PW1 was Lydia Aronya Ndera, the mother to the minor Plaintiff. Her testimony is that she got information about the accident from her neighbours. She accompanied the minor

Plaintiff to the hospital through Naivasha Police Station. After two days at Naivasha District Hospital, they were referred to Kikuyu Hospital and then transferred to Kenya National Hospital (KNH) on 8/04/2005 from where they were discharged on 27/04/2005. She produced the Discharge Summary from KNH as PExhibit 1. She said that while the minor Plaintiff was at KNH, his left leg was amputated. The minor plaintiff remained at the hospital until he was healed and then discharged. According to PW1, she incurred the following expenses while at the KNH:-

- ***Kshs.32,875/= as per Invoice No. 728315 dated 26/05/2005 (PExhibit 2).***

She said that instead of paying the above amount, she was issued with a Credit Agreement Form – Pexhibit 3 – No.044162 dated 27/05/2005. PW1 also produced the Police Abstract dated 21/10/2005 as PExhibit 4 while the P3 form dated 15/10/2005 was produced as PExhibit 5. A letter dated 23/11/2005 from Faith Pre School in Naivasha confirming that the minor was a pupil at the said school was produced as PExhibit 6. PExhibit 8 was the Copy of Records dated 13/10/2006 in respect of motor vehicle registration No. KAS 318M a Toyota Matatu registered in the name of Amina Abud Ikiror. PExhibit 9 was the Kenya Revenue Authority (KRA) Receipt dated 6/10/2006 for Kshs.500/=.

8. The Plaintiff also produced a Report by Dr. Joab Bodo dated 7/08/2006 upon further examination of the minor Plaintiff. Dr. Bodo confirms that the minor plaintiff suffered a crushed foot with loss of skin and septic wound and exposed tarsal bones. While noting the minor plaintiff's amputation of the left leg just below the knee Dr. Bodo opined that the minor plaintiff would need re-amputation of stump after the age of 12 (Twelve) years due to an overgrowth of the soft tissue over the stump. Dr. Bodo also opined that the minor plaintiff would need frequent renewals of artificial limbs after 3 to 4 (Three to Four) years until he gets to about age 18 or 19 years when he can be fitted with a more durable prosthesis. Such a prosthesis may last up to 5 (Five) years with repairs.

9. During cross examination, PW1 explained that though the Police Abstract – Pexhibit 4 gave time of the accident as 12.00 p.m., she said that the accident occurred in the evening at about 6.00 p.m.

10. PW2 was Dr. George Samuel Adari, a trained orthopedic surgeon. He said he was also a lower limb fracture specialist having received relevant training in that field from South Africa in the year 2003. He testified that on 20/02/2006, he was requested to assess the minor plaintiff's residual disability after the alleged traffic accident. He said he did so and found the minor plaintiff to be not only fearful but also timid and withdrawn. He said that from the result of the assessment, he put the minor plaintiff's disability at 50% with a further 30% awarded for traumatic stress. He testified that his assessment of the disability was based on activities that a 7 year old child was unable to do.

11. Dr. Adari also testified that the bone growth of a 7 year child was quite rapid and that such rapid growth would necessitate change of prosthesis at 2 yearly intervals at a cost of Kshs.8,000/= until about age 18 when bone growth slows down. Dr. Adari also testified that if the minor plaintiff lives up to age 70, he would need to change the prosthesis every 3 or so years at a cost of Kshs.240,000/= for every change, which would translate to Kshs.1,217,926/= for prosthesis replacement only. Dr. Adari produced as Exhibits his medical report dated 20/02/2006. He also produced in evidence a receipt dated 31/10/2008 for Kshs.5000/= being court attendance costs paid to him by the Plaintiff.

12. During cross examination, Dr. Adari stated that he was able to detect that the minor plaintiff suffered from post-traumatic stress because of the way the said minor plaintiff kept running to the mother. Dr. Adari also testified that due to the HIV and AIDS Scourge, the life expectancy in Kenya had gone down to about 55 years, but hastened to add that the use of ARV's had helped to improve the situation somewhat.

13. PW3 was Mary Khatenje Ingosi, a neighbour to PW1. She said she witnessed the accident which involved the minor plaintiff and the Defendant's motor vehicle. She stated that on the material day, she saw the Defendant's motor vehicle veer slightly towards where the minor plaintiff was walking and then colliding with the minor plaintiff. She stated further that the minor plaintiff was off the road at the time of the collision. She said she raised an alarm and ran to call the minor/plaintiff's mother. She said she

did not accompany PW1 to the hospital.

14. During cross examination, PW3 stated that before the collision, the vehicle was driving at high speed and that it hit the child with the left front tyre. She denied a suggestion by learned counsel for the Defendant that she never witnessed the accident. She also denied another suggestion that at the time of collision; the child was running about as he played with his friends. Her testimony was that the child was walking alone off the road but on the same side of the road where she was seated selling her wares. She also said that she saw the motor vehicle from a distance of 50 metres from where she was before the collision took place.

15. The Defendant called 2 witnesses. DW1 was Simon Kingori Mbataru, the driver of the subject motor vehicle. While admitting that the collision took place, DW1 denied that he was driving at high speed. He said that he was doing about 10 kph. He also said that the stretch of road where the accident took place was rough and greatly potholed. He said the minor plaintiff emerged from the rear of the motor vehicle and collided with the vehicle at the driver's side between the rear and front wheels. He also said that when he stopped to see what had happened, he noticed the minor plaintiff lying off the road while the vehicle had stopped in the middle of the road. He denied the allegation by PW3, that he swerved the vehicle towards the minor plaintiff or at all.

16. DW1 also stated that because of the potholes, he could not have driven faster than 5-10 kph. He also said that there was no way he could have avoided hitting the minor plaintiff; that he did not even see the minor plaintiff before the collision. DW1 maintained that it was the minor plaintiff who collided with the vehicle. In his further testimony during cross examination, DW1 stated that the minor plaintiff was crushed by the rear right tyre. DW1 denied any wrongdoing and maintained that if it was not for the fact that the minor plaintiff emerged from the rear of the motor vehicle, the accident would not have occurred. He also said that he had woken up at around 5.00 a.m. on the fateful day and driven from Thika to Naivasha, but denied that he was tired. DW1 also stated that there were many people at the accident spot, walking to and from the estate.

17. DW2 was Samuel Wambugu Ndirangu a metal fabricator in Nyeri town. He stated that at all times material to this suit, he was the conductor to motor vehicle KAS 318M. He said that after he and DW1 dropped their passengers at Karagita, the vehicle was involved in an accident as they drove towards Naivasha town in search of accommodation for the night. He also said that he never saw the minor plaintiff before the collision. DW2 agreed with both PW3 and DW1 that the minor plaintiff was lying off the road – about 2 meters off the road-after the accident. He however denied that the motor vehicle was being driven at an excessive speed. According to DW2, DW1 was driving about 10-20 kph. He denied that the vehicle excessive speed. He denied that the vehicle veered off the road at any one moment before the collision.

18. At the close of both the Plaintiff's and the Defendant's cases, the parties filed written submissions. Learned counsel for the Plaintiff submitted that since the minor plaintiff was hit while off the road, the Defendants should bear 100% liability in negligence for the accident. Regarding damages, learned counsel for the Plaintiff proposed the following amounts:-

(i) Pain and suffering – Kshs.1,200,000/=

Based on HCCC No.1616 of 1992 –

Pius Kinuthia Njuguna –vs- John

Musembe and another

(ii) Cost of 30 new Prosthesis

@Kshs.8000/= each – Kshs.240,000/=

- (iii) Re-amputation of stump – Kshs. 200,000/=
- (iv) Annual repair of Prosthesis
per year for 60 years @ Kshs.2000/= – Kshs.120,000/=
- (v) Police abstract – Kshs.200/=
- (vi) Medical Experts’ report’s records
Between 4/04/2005 to 20/02/2006 – Kshs.35325/=
- (vii) Registrar of M/V – Kshs.500.00

Learned counsel urged the court to make the above awards.

20. On the part of the 2nd and 3rd Defendants, it was contended by learned counsel that no evidence has been placed before the court to prove negligence on the part of the Defendants. Learned counsel also argued that the driver of the motor vehicle was quite alert to the goings on just prior to the accident and that the allegation that he failed to keep a proper look out is therefore unfounded. Further, learned counsel for the 2nd and 3rd Defendants contended that it was unlikely that PW3 witnessed the accident particularly, when her name does not appear on the police abstract. Learned counsel urged the court to consider the observations of the Court of Appeal in **Livingstone Otundo –vs- Naima Mohamed** (A minor who had sued through her next Friend Mohamoud) Ali) – **Nairobi Civil Appeal No. 110 of 1986:-**

“In the circumstances of the case before the learned Judge, the Appellants duty of care should have been judged by what he ought reasonably to have anticipated in this regard and then consider what course of action he would have taken to ensure that no accident occurred. In other words, the degree of his obligation in connection therewith was that of a reasonable man. That was the standard by which negligence ought to have been adjudged. An obligation greater than this would mean imposing an impossible burden on him, see the case of Moore (on light) –vs- Payner, (1975 RTR 127.”

21. I may pause here a little and consider what the driver of the subject motor vehicle ought to have anticipated in this case. It is in evidence that the road was quite busy at the time with people walking to and from either direction. It is also in evidence that the minor plaintiff was walking along the road in the opposite direction. There is also evidence that there were many potholes on the road, so that the possibility of swerving to avoid a pothole here and a pothole there was not completely remote. The driver of the motor vehicle was thus expected to have anticipated that the minor plaintiff walking on the roadside could suddenly jump or walk into the road, and to plan on what course of action he could take to avoid the accident.

22. Learned counsel for the Defendants argued that the driver of the motor vehicle could not have anticipated that the minor plaintiff would knock into his vehicle from the side as he (DW1) had not seen him before and as such, learned counsel contended the driver could not have taken evasive action. In my mind however, I think that the circumstances of this case dictated that the driver should have anticipated that the minor plaintiff could have run into the road, if indeed he did so as alleged by the defence. I have considered the evidence of PW3, and the admission by both DW1 and DW2 that after the collision the minor plaintiff was lying 2 metres off the road, and concluded that DW1 swerved somewhat to avoid a pothole and in so doing hit the child who was walking by the side of the road. The theory put forth by the defence, namely that the minor plaintiff knocked himself into the car is not supported by the nature of the injuries sustained by the minor plaintiff. Those injuries are consistent with the vehicle having run over the child’s leg and not a mere knocking into the vehicle as the defence would have the court believe. I therefore find the Defendants 100% liable in negligence.

23. On quantum, the Defendants proposed the following:-

- **15 prosthesis at Kshs. 8,000 each = 120,000/=**
- **Pain suffering and loss of amenities = 900,000/=**

Learned counsel for the Defendant's urged the court to disallow special damages in the sum of Kshs.35,325/= as no receipts were produced to support the same.

24. I have now considered the authorities cited by both counsel on quantum and in light of those decisions, I would enter judgment for the Plaintiff on quantum as follows:-

§ Pain and suffering and loss of amenities -	Kshs.1,000,000.00
§ Cost of Prosthesis	- Kshs. 120,000.00
§ Cost for repairs of prosthesis @Kshs2000	- Kshs. 120,000.00
§ for 60 years	-
§ Specials	- <u>Kshs. 5,700.00</u>
Total	- <u>Kshs.1,245,700.00</u>

25. The Plaintiff shall also have costs of this suit and interest on the sums awarded at court rates.

It is so ordered.

Dated and delivered at Nairobi this 8th day of May 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Nganyi holding brief for Rachuonyo for the Plaintiffs

Miss Mutuku holding brief for Mrs. Njuguna for the Defendants

Court clerk - Njoroge