



REPUBLIC OF KENYA

HIGH COURT AT ELDORET

Civil Case 142 of 1986

**JACKSON MOGAKA TONGI.....PLAINTIFF**

**- versus -**

**MOSES MABELS & DANIEL SOKONYI MASIBO.....DEFENDANTS**

### **JUDGEMENT**

The plaintiff sued the defendants jointly and severally seeking damages for injuries sustained in an accident involving the defendants motor vehicle in which he was travelling as a fare paying passenger which accident occurred along the Kitale-Webuye road and which accident was due to the negligence of the defendants, their servants and or agents whose particulars are given.

The plaintiff suffered injuries also particularized in the plaint for which he claims both special and general damages.

The defendants were served and they entered appearance and filed a defence avering that save that an accident occurred on or about the 9<sup>th</sup> day of October 1983 along Kitale-Webuye road to vehicle registration number KSG 714 owned by the first defendant and driven by the second defendant the defendants deny that the said accident was caused by the negligence of the second defendant as alleged in the plaint and all singular particulars of negligence are denied as if the same were set out and traversed- I -seriatim that they shall contend that the said accident arose from inevitable accident in that suddenly and without any warning at all one of the vehicle's tyres burst and the vehicle lost control and eventually overturned without any negligence at all on the part of the vehicle's driver. They did not admit the particulars of injuries, special damages pleaded and put the plaintiff to strict proof and then prayed for the suit to be dismissed with costs;

The defendants were served for the hearing but they failed to turn up and the court being satisfied that they had due notice allowed the plaintiff to proceed by way of formal proof.

The plaintiff's evidence is that he boarded the said matatu heading to Kisumu. It was speeding and on hearing the scene of accident started descending a steep hill while the vehicle was speeding with passengers full inside and others hanging outside . He heard a sound and the next thing he realized was that he woke up in hospital. He does not know what else happened but learned later that the vehicle rolled after a tyre burst.

He was admitted at Misikhu Mission Hospital and later transferred to Kenyatta National Hospital by air with the help of a flying doctor. He produced medical documents to show that he was admitted at Misikhu, Mount Elgon and then Kenyatta National Hospital; He also produced documents showing that he incurred expenses both for drugs and travelling to and from Nairobi for check ups.

The plaintiff's counsel filed written submissions and the sum total of the same is that:-

1. The plaintiff's evidence that the vehicle was going at a high speed while descending a steep hill and was carrying excess passengers should be believed.
- 2 There is nothing to show that the accident was inevitable and could not be avoided.
- 3 . The plaintiff was a passenger and he cannot be blamed for the accident and no contribution can be alleged and proved against him\*
4. The plaintiff sustained very severe injuries as he was admitted at Misikhu hospital for only two days and then flown to Kenyatta National hospital where he was from 11<sup>th</sup> to 19th October 1983 and thereafter attended Kenyatta National Hospital and Kitale District Hospital as an out patient and also for physiotherapy for several years and still undergoes treatment, he requires to undergo an operation of the spinal cord which will cost kshs 50,000/= to Kshs.100,000/=, the left ankle is not healed as he walks with a limping gait. As a result of the injuries the plaintiff has never resumed his work and he has solely become dependant on to his father for support both for his family and himself. He cannot do any job especially one requiring standing while working, he experiences headaches and has to use pain killers. They suggest that the plaintiff be paid Kshs 1,207,248/= plus costs and interest.

They referred the court to the case of JAPHETH LUSULI LUHOMBO -V- D.T. DOBIE COMPANY LIMITED AND ANOTHER NAIROBI HCCC. NQ.2316/82 where the plaintiff substantially incapacitated in an industrial accident involving burns. The plaintiff was earning Kshs 1,500/= per month, he could not take up another job due to injuries. The court awarded Kshs.200,000/= for loss of earning capacity.

The case of SAMWEL HURE MURAGE -V- MOSES KIIRU KAMAU AND ANOTHER NAIROBI HCCC NO.6779/91 where the plaintiff suffered cuts on the shoulders, loss of consciousness, subdural haematoma, severe head injury, diminished earning capacity. The court awarded him Kshs.450,000/= as general damages.

The case of PAUL OJINGO -V- KENYA RAILWAYS CORPORATION NAIROBI HCCC.NO,1113/94 where the plaintiff suffered severe injuries involving the knee, ankle, sensory loss, contractures of muscles and disability of 40%. The court awarded Kshs.60,000/ or cost of future operation and Kshs.250,000/= for pain, suffering and loss of amenities.

The case of IRENE EGIRA NTHIGA -V- NAIROBI BUS UNION NAIROBI HCCC.NO2425/90 where the plaintiff suffered closed head injury and dislocation of the right knee joint resulting in the following disabilities - pain in the right hip; inability to lift heavy objects; frequent headaches; scars, amongst other disabilities. The plaintiff was aged 25 years at the time of accidents The monthly salary was Kshs.3,000/= per month. The court applied a multiplier of 20 years in assessing loss of earning capacity.

On the court's assessment on liability I find that there is no dispute that an accident occurred involving the defendants. vehicle in which the plaintiff was travelling as a fare paying passenger. The plaintiff suffered injuries as a result of the said accident and he seeks damages . He relies on negligence as particularised and also relies on the doctrine of Res Ipsa Loquitur.

The defendants plead inevitability of the accident. All that the plaintiff remembers is that they were descending a steep down hill when the driver was speeding and the vehicle was overloaded as it had passengers inside while some were hanging outside. It is the rear tyre which burst This evidence is unchallenged. If the driver had driven in a careful manner he should have been able to control the vehicle in time and to bring it to a safe stand still and to avoid it losing control. as submitted it was up to the defendant to show that the accident was inevitable. They have not done so and so they have not discharged the burden shifted on to them I agree with the submission that the plaintiff as a passenger had no control over the manner of driving of the said motor vehicle The defendants are 100% liable to make good his suffering

Having established liability I now come to the assessment of damages. On special damages the plaintiff produced receipts (exhibits 6a-f, 7,8,9 and IOa-d) which total Kshs.7,213/= which I allow.

On general damages the counsel has asked the court to award the plaintiff damages for loss of earning capacity which was not pleaded secondly no document was produced to show that the plaintiff was in salaried employment with anybody The general rule is that the party is bound by his pleadings. The plaintiff cannot be awarded what he did not ask for in his pleadings. The claim for loss of earning capacity is disallowed for the reasons given.

On damages for pain, suffering and loss of amenities the plaintiff tendered in evidence three medical reports. The first report is dated 8th June 1987 by Dr. Angelo D'Cunha On examination the Doctor found that the plaintiff walked with a slight "high stepping" gait on the left. Deformity. Gibbus present at lumbar II spinous process level. On the left lower limb on the fore he noted slight flaccidity present of the left calf peroneal and extensor muscles of the left foot. Grade III power present in the left quadriceps calf and peroneal groups of muscles Paresis Grade II of flexors and extensors of the toes Muscular wasting - observed of the left quadriceps, left calf muscles, left extensor of the foot and peroneal group of muscles. There is loss of sensation to light touch, pin-prick and cotton wool sensation over the dorsum of the left foot and distal part of the plantar aspect of the left foot.

X-rays taken showed compression fracture of the lumbar spine with posterior displacement of lumbar II vertebral body There is a diminution in the posterior aspect of the disc space between L1-L2 vertebral bodies

In his opinion the plaintiff sustained serious injuries classified as grievous harm And he awarded a temporary disability-of eighteen months, six months of which would be total and the rest partial The particulars of injuries were listed as:-

1. Head injury - cerebral contusion, had multiple and extensive lacerated wounds over the scalp
2. compression fracture of Lumbar II with posterior displacement of the vertebral body\* Has paresis of the muscles of the left thigh, left leg and left foot
- 3 Traumatic disc prolapse between L1 and L2 vertebral bodies.

Taking all the overall picture into consideration he awarded a permanent disability of 35% a

The second report is dated 6th January 1989 by Dr. J.A.O. Mulimba. On examination the Doctor made the following findings:-

- 1 Head - Had multiple cuts scars whole head. No residual evidence of brain damage as there were no cranial nerve deficits He had no memory lapses
2. Back had a palpable gibbus at L1-2 area. Not tender now. He stands straight the left lower limb is wasted At 23cm from anterior superior iliac spine, the left thigh muscle bulk is dragging the left foot slightly sensation on the dorsum of the left foot is very poor i.e. very much reduced so that patient has hypoaesthesia. Extensor hallucis longus on the same side is very weak
3. Left Leg - Had cut scar over lateral malleolus. The scar measures 3cm long. Had other problems as described under back\*
4. x-rays Show compression fracture of L2 vertebra No new bone formation is occurring to cause fusion There is sharp kyphosis at this level, the spinal canal is compromised

In the Doctor's opinion the multiple cuts on the scalp over the whole head have healed with multiple ugly scars He also had concussion of the brain, but this has healed well with no residual disability from that end. He had compression fracture of the lumbar 2 vertebral body. This has caused marked kyphosis at this

level nerve supply to the left lower limb This is going to get worse and without intervention, the patient has a good chance of getting more and more disabled as the left lower limb is wasting and he is finding it increasingly difficult to walk. Two operations have to be done to avert this:

1. Laminectomy to relieve the pressure on the Cauda equina
2. Anterior fusion of L1-L2 and L2-L3- These are both major operations and the total cost will be above Kshs100,000/=

The left leg had a cut there which has healed with only a *scar* left behind as permanent feature, Disability was assessed at 35%-40%.

The third report is dated 5th February 1991 by Doctor Z. Gaya. The findings of the Doctors are that there is evidence of multiple scars on the face and limbs The general condition is good without any evidence of mental deficit. Locally at the back, there is a palpable gibbus at L1-L2 area He stands straight but walks with a slight limp of the left leg. There is uniform wasting of the left lower limb from the buttock area downwards up to the foot; The muscular wasting evidently shows on the fact that the left leg is two to three centimeters smaller in circumference in its entirety *as* compared to the right leg The straight leg raising is equivocal bilaterally There is evidence of sensory loss on the dorsum of the left foot The x-rays taken on 31<sup>st</sup> January 1991 show an old compression fracture of the body of L2 vertebra

In his opinion the patient has been left with a permanent compressed fracture of the body of L2 vertebra which has caused a clinically visible kyphosis at this level with pressure effects on the Cauda equina with its attendance result of compromised nerve supply to the left lower limb. This is evident from the permanent uniformly wasted left lower limb with diminished sensation at the back of the foot.

He will need surgical intervention to try and arrest this degeneration otherwise he will progressively become lame on his left leg in time he will also develop early post traumatic osteoarthritis of the lumbar vertebrae

The rest of the injuries have left permanent visible body scars There is however, no evidence of permanent brain damage as a result of the closed head injury.

In a letter dated 28th May 1991 the same doctor stated that the cost of operation will be between Kshs 50,000/= and Kshs4100,000/=

The plaintiff's complaints as at the time of trial are:-

- 1 He feels backache because of the spinal cord injury and cannot carry anything heavy.
- 2 the left leg limps.
3. Headaches are frequent forcing him to use pain killers.
4. He has no mental problems or epilepsy but requires an operation.

On future medical treatment this has been recommended by two doctors who indicate that if the same is not carried out the plaintiff will become lame. The estimates were given in 1989 and 1991 Since then the shilling has depreciated and the cost has definitely gone up, I will therefore allow an element of inflation when assessing the same and I will therefore make an allowance of KshS4280,000/= as cost of future operation\*;

As for damages for pain suffering and loss of amenities I take into consideration the following factors: Effects on the life of the plaintiff who is now virtually lame and cannot do anything namely he is unable to follow employment and he has to depend on his father for support, one side of his body suffers from muscle wastage and he is lame. I have also considered the age of the authorities referred me and the fact

that the injury to the spinal cord is now permanent and taking all the relevant circumstances into consideration I make the following assessment:-

1. Head injury leading to concussion - Kshs.30,000/=
2. injury to the spinal cord needing an operation kshs450,000/=
3. Other soft tissue injuries which have healed leaving only scars - Kshs 40,000/=

Total Kshs. 520,000/=

In the premises I enter judgement for the plaintiff on the following terms:-

1. Special damages of Kshs7,213/= with interest at court rates from the date of filing until payment in full
2. Damages for cost of future operation - Kshs.280,000/ with interest at court rates from the date of judgement until payment in full
3. General damages for pain, suffering and loss of amenities -
  - (a) Head concussion - Kshs30,000/=
  - (b) Soft tissue injuries - Kshs.,40 000/
  - (c) Serious injury to the spinal cord - Kshs 450,000/=

Total Kshs 520,000/= with interest at court rates from the date of judgement until payment in full costs of the suit.

Dated at Eldoret this 20<sup>th</sup> day of August 1999.

Read and delivered at Eldoret this 4<sup>th</sup> day of OCTOBER 1999 •

NAMBUYE,

JUDGE