

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 4550 OF 1988

MICHAEL GICHOHI MWANGI.....PLAINTIFF
V E R S U S
PETER MWANGI & ANOTHER.....DEFENDANT

J U D G M E N T

The plaintiff now aged 41 was travelling as a passenger in the second defendant's vehicle registration No.KRZ 286 driven by the 1st defendant as servant and/or agent of the 2nd defendant in the course of his duties on 12th October, 1987 along Karatina/Nyeri Road when the 1st defendant allegedly negligently managed it and caused it to be involved in an accident in which the plaintiff sustained personal injuries. The defendants denied liability and joined the third party to the suit contending that the said third party had caused or substantially contributed to the accident and the third parties liability was to be determined at the hearing of this case. By implication, the defendants admitted the ownership of the vehicle and the agency of the 1st defendant in the course of his duties as stated in paragraph 4 of the plaint as that paragraph is not specifically traversed.

The plaintiff only testified at the hearing. The defendants and the third party called no witnesses. He testified that on the material date he was a passenger in the 2nd defendants' vehicle while being driven by the 1st defendant as servant or agent of the 2nd defendant. He was travelling from Masai Mara to Samburu Lodge. When the vehicle was nearing Karatina, it started moving fast and the drive lost control. The vehicle then rolled and he and others were thrown out of the vehicle in the cause of which he suffered injuries. When he tried to stand up, he found that he had sustained a compound fracture of the right lower leg and bruises to the left lower leg.

He was taken to hospital where he was hospitalised for 2 weeks and discharged. In cross examination by the defendants counsel, the plaintiff stated that he was at the time working for the third party and had accompanied tourists who were going to Samburu Lodge where he would serve them. He also insisted that the vehicle was over speeding when it rolled.

As stated hereinbefore, the defendants did not call any evidence. In their defence they had denied negligence. They also discredited the plaintiff's evidence on speed and claimed that negligence had not been proved on the part of the 1st defendant. However as there is no evidence to show that the vehicle was not moving fast as alleged by the plaintiff and as vehicles do not normally roll when driven with due care and attention. I am satisfied that the plaintiff has discharged his burden of proof on basis of res ipsa liquotor. It was therefore for the defendants to show lack of negligence on their part on it being shown that the vehicle had rolled while being driven by their agent. As regards the third party notice, there was no evidence on which the court could hold that the third party had caused the defendants to breach the terms of their insurance policy. I therefore find that the defendants alone were responsible for the accident and that it has not been established that third party was under a duty to indemnify the defendants in any way for loss arising from the use of the defendants vehicle.

The injuries sustained by the plaintiff were a compound fracture of the right tibia and fibula lower third level. He also suffered a large laceration on the left leg with associated profuse bleeding. He was hospitalised for 2 weeks in patient and 3 months out patient. He underwent a second minor operation to connect a malunion and bone grafting. When examined in October, 1988 the plaintiff was still in crutches and walked with a limp. The fracture site was still painful and the leg become shorter by half an inch. He was unable to walk long distances. He also had several 6 inch scars on the legs. He still needed further operation for removal of the metal plates and would cost K.shs.60,000/- or K.shs.100,000/-. In the doctors opinion the plaintiff had suffered a permanent incapacity of 20%. The plaintiff also testified that he had spent K.shs.17,200/- for treatment and that after the accident he was unable to continue with his job for which he used to receive K.shs.3,000/- per month.

Mr. Nganga for the plaintiff submitted that K.shs.600,000/- should be awarded for pain, suffering and loss of amenities. He also submitted that K.shs.60,000/- be awarded for further operation, and K.shs.17,200/- for expenses and K.shs.36,000/- for lost earnings for one year as the plaintiff could not work for a whole year. He also referred the court to **NBI HCCC NO. 5287 OF 1990 MAGORIO NJUE VS. RAMESH NJERU** (unreported) and **NBI HCCC NO.5263 OF 1989** in which K.Shs.450,000/- AND K.shs.550,000/- were awarded in December, 1992 respectively. On the other hand, Mr. Njuguna submitted that the awards relied upon by the plaintiffs' counsel were for more serious injuries. He submitted that a sum of K.shs.350,000/- had been awarded recently for similar injuries. He also submitted that loss of earnings had not been pleaded nor had special damages been proved and should not be awarded.

In assessing damages, the guiding principle is that they should be reasonable having regard to the state of our economy. The damages should also be comparable and should take into account the age of the victim, the effect of inflation and accelerated payment as that will enable the victim to place the amount in an interest earning account.

Looking at the injuries in the cases cited to the court as compared to those in the instant case, it appears that they were more serious. They also involved much younger persons who would have to live with the losses for a longer period. In the case of EMILY NJERU, the victim was about 4 years only while in the case of NAGARIO NJUE both legs were fractured. The plaintiff herein is much older and the injury was to one leg only. Consequently keeping in view the principles on which damages should be assessed and guided by the awards in the cases cited to the court including inflationary trends, I would award the sum of K.shs.350,000/- for pain suffering and loss of amenities.

There was evidence that as a result of the injuries the plaintiff was unable to continue with his work for which he was being paid K.shs.3,000/-.It is also observed he had to undergo a second malunion due to inclusion of the fracture which inevitably delayed his recovery so as to enable him to resume his duties or find alternative employment. I therefore agree that he was so sick for one year as it to be able to resume his usual duties and I award to him the sum of K.shs.36,000/- being one years salary and I amend the pleadings accordingly.

According to the medical report, the metal plate which was used in joining the bones is in situ and will cost between K.shs.60,000/- to K.shs.120,000/- for removal. The learned counsel for the plaintiff asks that I award the lower figure which the defendants counsel did not address himself to this aspect. As the matter was before the court through evidence, I hereby amend the prayers to include a prayer for future medical operation and hereby award K.shs.60,000/- for that purposes.

Finally, the plaintiff had prayed for K.shs.17,200/- for special damages. He alleged that he had paid K.shs.2,800/- for medical report but did not produce any receipts for some. He did not also produce receipts for medical payments and/or transport. He however stated that the receipts had been misplaced as the case had been pending for a long time. I accept the explanation and hereby award the sum of K.shs.2,800/- for medical reports by Dr. Gikumu and Dr. Kariuki, K.shs.12,000/- for medical treatment and K.shs.100/- for police abstract. I do not agree that K.shs.2,300/- was used on transport as no details thereof were produced. The total sum for special damages is therefore K.shs.14,900/-.

Accordingly, I enter judgment for the plaintiff against the defendant for K.shs.446,000/- as general damages plus K.shs.24,900/- special damages.

The plaintiff shall also have the costs of the suit and interest at court rates. Judgment accordingly.

Dated and delivered at Nairobi this 27th day of August, 1998.

G.P. MBITO

JUDGE