



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1904 OF 1982

JULIUS M'MWANIKIPLAINTIFF

AND

MRS AGNES WANJIRU MAGENE & ANOTHER.....DEFENDANT

JUDGMENT.

This case was fixed for hearing on 26th December, 1984. Both counsels for the parties were present when the hearing date was fixed. On the hearing date counsel for the defendant withdrew from the case as he had not met his clients the previous day as agreed. The case, therefore, proceeded exparte.

The plaintiff, sole witness in the case, told the court that on 12th May, 1981 he was a passenger in a vehicle registration number KSY 513. He was traveling from Nairobi to Othaya. That the vehicle was owned by the first defendant and was being driven by the second defendant. After passing Kabati there was an army lorry in from which was being driven in the same direction. Before going over a hill, the driver of vehicle registration No KSY 513 decided to overtake the lorry but he could not see the other side of the road. Before overtaking the lorry completely, the witness saw flashes of a vehicle from the front. The driver of KSY 513 decided to turn left and go behind the lorry but his vehicle lost control and overturned. The plaintiff lost consciousness and did not know what happened therefore. When he regained consciousness he found himself at Thika District Hospital.

The plaintiff told the court that as a result of that accident he sustained two injuries on the head, a cut wound on the last finger of the left hand, a broken right hand, two broken ribs two teeth lost, a dislocation at the hip joint of the left leg and so on and so forth. He was examined by a doctor on 12th November, 1981 who in his opinion found that although some of the injuries he had sustained but healed well others until persisted; for instance the laceration of the tip of the left little finger involved a cut extensor tendon and had developed a permanent drop in the tip of the left little finger giving rise to mallet finger with 30% flexion drop, this is irreversible. The two broken ribs although united well, the plaintiff still complained of some pain in the right forearm when lifting anything heavy. He had developed an avascular necrosis in the head of the femur and osteoarthritic changes in the flow of the acetabulum. There is a permanent shortening of the left leg by 1 cm. This will lead to early osteoarthritic changes in the peripheral joints of the lower extremities of the small inter-vertebral joints of the lower spine. The head injuries have developed headaches, dizziness, ringing sensations in the left ear and heaviness in the left temporal region in the form of post concussional syndrome and this is likely to continue for sometime or even may deteriorate in future with a passage.

The plaintiff repeated all these injuries in his evidence. He was hospitalized for six weeks and attended as an out-patient for one year. He is approaching 42 years and is a teacher at Starehe Boys Centre. For 16 years he has taught at the school he has never been reprimanded for coming to school late or doing his work badly. But because of the hip joint injury which looks sometimes, thus making him

unable to wake up and walk, he has started receiving letters of reprimand for being late for work. He paid Kshs.400 for medical report and prays for general damages.

There can be no doubt that the plaintiff suffered serious and multiple injuries and must have undergone a lot of pain, suffering and loss of amenities and that he would still have to do so in future. I accept all the pain and handicaps described and I am satisfied he has not exaggerated his predicament.

According to Dr. Shashi Patel.

“This man sustained cerebral concussion, laceration of the forehead, loss of two central incisor teeth from the upper jaw, laceration of the tip of left little finger, fracture of two ribs of the right side of the chest; undisplaced fracture of the lower end of ulna and dislocation of the left hip joint with fracture of the acetabulum. He was admitted to Kenyatta National Hospital after being unconscious for sometime and he remained there for 6 weeks. He was kept under head injury observation for cerebral concussions as there was no fracture of the skull or any localizing neurology...”

and so on and so forth.

In these circumstances, what would be a reasonable amount of damages for the court to award the plaintiff? It has been a normal practice to award damages under 2 heads these days; firstly pain, suffering and loss of amenities and secondly loss of earning capacity. As far as I can find from the evidence, there has been no loss of earnings in the present case or at least none has been claimed, and the claim as far as I can see it is for pain, suffering and loss of amenities.

High Court Civil Case Number 1856 of 1977 *Lenox Amalemba v H L K Mungai* was cited to me where general damages of Kshs125,000 was awarded to the plaintiff in an accident case where injuries suffered were comparable to those in the present case. And though there should be as much uniformity as possible in award of damages, yet with inflation these awards have tended to increase. (See *Francis v Creasy* (1971) C A 113.

One cannot get hold of exact figures of inflation but there is no doubt that it has been much worse in the past few years than 1979 when judgment in *Amelemba's* case was pronounced.

The case was not contested and as to where liability falls is not in question. The driver of vehicle KSY 513 overtook an army lorry without first being sure that it was clear ahead for him to do so. He, second defendant was therefore wholly to blame for the accident in which the plaintiff suffered these serious injuries. And as he was driver of the first defendant's wrongs.

In all the circumstances of the case and doing the best I can, I award the plaintiff Kshs.180,000 against the defendants jointly and severally, as general damages. There will also be judgment for the plaintiff for special damages of Kshs.400 being medical report fees; making in total Kshs.180,400 from the date hereon. The plaintiff will also get costs of this suit from the defendants jointly and severally.

Order accordingly.

Delivered this 2nd day of October, 1984.

D K S AGANYANYA

2/10/84