



REPUBLIC OF KENYA



KENYA LAW

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Jackton v East Africa Institute of Certified Studies Limited & another (Civil Suit E074 of 2022) [2023] KEMC 320 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEMC 320 (KLR)

**REPUBLIC OF KENYA
IN THE VOI LAW COURTS
CIVIL SUIT E074 OF 2022
AM OBURA, CM
APRIL 20, 2023**

BETWEEN

ELIAS MBEU JACKTON PLAINTIFF

AND

**EAST AFRICA INSTITUTE OF CERTIFIED STUDIES
LIMITED 1ST DEFENDANT**

SMART COACH LIMITED 2ND DEFENDANT

JUDGMENT

1. This is a claim for compensation for personal injuries allegedly sustained by the Plaintiff following a road traffic accident on 22nd December 2021. The Plaintiff seeks judgment against the Defendants as per prayers in the Plaint dated 11th March 2022 as hereunder:
 - a. General and special damages
 - b. Future medical costs for painkillers and joint / bone care medication, physiotherapy sessions and audiometry testing
 - c. Costs of this suit plus interest.
2. Plaintiff's case.

In brief, it is alleged that on the material date, the Plaintiff was lawfully travelling as a fare paying passenger aboard the Defendants' motor vehicle registration no. KCV 850M Make Toyota Hiace, from Nairobi direction towards Mombasa.
3. It is alleged that on reaching Maungu Township, the Defendants' driver and or agent negligently managed and controlled the said vehicle thereby causing it to abruptly swerve to the opposite lane while trying to overtake a motor vehicle registration no. KCD 079E. It is further alleged that the Defendants'



- driver then noticed an oncoming motor vehicle and abruptly swerved back to his proper lane. In the process, he allegedly rammed on to the rear of the motor vehicle registration no. KDC 079E.
4. The Plaintiff contends that as a result of the collision, he suffered serious injuries, loss and damage. He holds the Defendants vicariously liable for the accident hence this suit.
 5. Defendant's Case
The Defendants filed a joint Statement of Defence dated 14th April 2022. They deny ownership of the motor vehicle registration no. KCV 850 M as alleged. They also deny the occurrence of the alleged accident and the circumstances as stated by the Plaintiff.
 6. The Defendants further deny the particulars of negligence attributed to the driver of the motor vehicle registration no. KCV 850 M, the particulars of injuries, loss and damage allegedly suffered by the Plaintiff and any liability.
 7. It is alleged that if at all the accident occurred, then it was solely caused or substantially contributed to by the negligence of the Plaintiff, the driver of the motor vehicle registration no. KDD 528 P and the driver of the motor vehicle registration no. KDC 079E as per the particulars in the Defence.
 8. The Defendants pray that the suit be dismissed with costs.
 9. The Plaintiff filed the Reply to Defence dated 26th April 2022, denying the allegations in the Defence and reiterating the averments in his Pleint.
 10. Evidence Adduced
When the matter came up for hearing of the main suit on 3rd October 2022, the Plaintiff, Elias Mbeu Jackton testified as PW1. He adopted his witness statement dated 11th March 2022 and produced documentary evidence as contained in the List of Documents dated 11th March 2022 as PEXTS 3, 4,5,6, 9 10 ,11 and PEXT 12 to fortify the case.
 11. He also called Doctor Darius Wambua Kiema (PW2). He produced his Medical Report dated 3rd March 2022 as PEXT1 and the receipt for Kshs. 2,000/= for preparation of the said report as PEXT 2.
 12. PW 3 was Corporal Dayib Yusuf, a Police Officer based at Maungu Police Station. He confirmed that the accident was reported at their station and produced the P 3 form and the Police Abstract issued to the Plaintiff as PEXT 7 and PEXT 8 respectively.
 13. The Defendants case was closed on 26th January 2023 with an agreement that the Medical Report dated 29th July 2022 prepared by Doctor Jenipher Kahuthu, be produced by consent without calling the maker. It is DEXT1.
 14. Court's determination
The Court has duly considered the pleadings as well as the oral and documentary evidence on record. I have equally considered the written submissions filed by M/s Njoroge Mwangi & Company Advocates on record for the Plaintiff. I note that M/s Kimondo Gachoka & Company Advocates for the Defendants did not file any submissions.
 15. The issues for consideration are two- fold:
 - a. Liability
 - b. Quantum.
 16. On liability



17. The Plaintiff (PW1) testified that he realized that the driver was driving in a zig zag manner and warned him to be alert and not to fall asleep on the steering wheel. He told the Court that other passengers also warned the driver.
18. He also explained that when they reached Maungu area, the driver started overtaking a lorry and was confronted by an oncoming vehicle. PW1 stated that their driver moved back to their correct lane and hit the lorry ahead of him. It is alleged that the said lorry had slowed down as it was approaching a bump. PW1 testified that had their driver slowed down he would have avoided the collision.
19. During cross-examination, PW1 confirmed that he was a passenger in the Defendants' motor vehicle and said that he was seated near the driver. He said that he could clearly see ahead. He also said that he narrated to the Police what had transpired.
20. However, he was never bonded to testify in a traffic case in relation to this accident. PW1 was unaware if their driver was ever charged with a traffic offence.
21. The Plaintiff produced a copy of the certificate of motor vehicle search in respect of the motor vehicle registration no. KCV 850 M Toyota Hiace as PEXT 5. It shows that the subject vehicle was registered in the name of the Cooperative Bank of Kenya Limited and East African Institute of Certified Studies Limited (the 1st Defendant herein) as at 18th January 2022.
22. Further, the P3 form (PEXT 7) and the Police Abstract (PEXT 8) prove on a balance of probability that the accident was reported at the Maungu Police Station and that the Plaintiff was a passenger who was injured in the said accident. The Police Abstract also indicates the name of the owner of the motor vehicle registration no. KCV 850M under paragraph 1 as Smart Coach Sacco Shuttle, which was being driven by one Simon Mwangi at the material time.
23. The Plaintiff also produced a copy of the Smart Coach Limited Bus Ticket which corroborates his testimony that he was lawfully travelling as a passenger in the said vehicle.
24. The Defendants did not adduce any evidence to rebut the Plaintiff's claim. No evidence was tendered to explain why they blamed the Plaintiff or the driver of the motor vehicle registration no. KDC 079E Mitsubishi Fuso as pleaded in their defence. Their claims remain mere allegations in the circumstances.
25. I note that the Police Abstract confirms the testimony of the Plaintiff and PW3 that the driver of the motor vehicle registration no. KCV 850 M was blamed for the accident. It is alleged that he failed to keep a safe distance for unknown reasons and rammed into the rear of the lorry. It was also PW3's testimony that the said driver was arrested and released on cash bail of Kshs. 20,000/= and is at large. None of these facts were challenged or controverted by the Defendants. There was also no evidence to disprove the claim that the said driver was the Defendants' authorized driver and or agent at the material time.
26. In the premises, I find that the Plaintiff proved his case on a balance of probabilities. I find and hold the Defendants 100% vicariously liable for the accident.
27. On Quantum
The Plaintiff's claim is that he sustained injuries involving:
 - a. Fracture right radius /ulna bone
 - b. Post traumatic deformity, stiffness and arthritis right wrist with reduced grip right hand
 - c. Bruises and abrasions both legs



- d. Blunt object trauma soft tissue injuries to the head /left ear with loss of hearing.
28. Doctor Darius Wambua Kiema (PW2) testified that he examined the Plaintiff following history of a road traffic accident. He saw the Plaintiff about 2 months and 9 days after the accident. He prepared the Medical report dated 3rd March 2022 which he produced before the Court as PEXT1, with the accompanying receipt for Kshs. 2,000/= as PEXT 2.
29. PW2 concluded that the Plaintiff sustained the said injuries and that he was predisposed to the following:
- a. post traumatic deformity, arthritis and stiffness adjacent right wrist,
 - b. post traumatic stiffness fingers of right hand with effect on grip;
 - c. reduced /loss of hearing left ear
 - d. a lifetime of recurring post traumatic pains right forearm especially during cold seasons and when working
 - e. fracture sites area points of weakness and easily fracture in future;
 - f. diminished capacity to work and undertake other activities of daily living
30. He also opined that the Plaintiff will require future medical costs for painkillers and joint /bone care, physiotherapy sessions and evaluation of hearing capability by way of pure audiometry as estimated in his report. He assessed the Plaintiff's partial permanent incapacity at 15%.
31. On the other hand, Doctor Jennipher Kahuthu examined the Plaintiff on 29th July 2022 according to her Medical Report of even date (DEXT1).
32. In her report, she observed that the Plaintiff the notable injuries were distal radius fracture, blunt injury with bruises to both lower limbs with 5% permanent disability due to stiffness of the fingers.
33. She disputes claims that the loss of hearing is attributed to the said accident. She also disputes the claim that the Plaintiff suffered a head injury as it was not captured in the initial treatment notes from St. Joseph Shelter of Hope hospital.
34. Doctor Kahuthu also found that the Plaintiff had no chronic pains hence did not require continuous use of painkillers. In her view, he only needs physiotherapy for the stiffness of his fingers. She estimates the cost of the sessions at Kshs. 10,000/=.
35. I have gone through the Treatment notes from St. Joseph Shelter of Hope (PEXT3), the P3 form filled in on 3rd March 2022 (PEXT 7) and considered both expert reports.
36. I am inclined to agree with the Defendants that there was no mention of any head injury and the loss of hearing or any ear injury in the initial treatment notes.
37. As pointed out by Doctor Kahuthu in her report, the P3 form was filled in months after the Plaintiff received initial treatment. There is no medical evidence linking the alleged injury to the head and the alleged loss of hearing to the accident herein. There is nothing to show that he went for review soon after the initial treatment and the said disputed injuries were identified. The burden of proving that he sustained blunt trauma to the head and left ear with loss of hearing.
38. I have considered the evidence on record in its entirety. I find that the Plaintiff only sustained:
- a. Fracture right distal radius /ulna bones



- b. Bruises and abrasions both legs.
39. I also find that the Plaintiff has permanent incapacity which Doctor Kiema assessed at 15% while Doctor Kahuthu assessed at only 5%. The stiffness on his fingers still subsist over one year since the accident. There is also uncontroverted evidence that the fracture united with time. However, the Plaintiff is still predisposed to post traumatic deformity, arthritis and stiffness adjacent right wrist, and post traumatic stiffness fingers of right hand with effect on grip.
40. The Plaintiff proposed an award of general damages of Kshs. 800,000/= while relying on the authority of Machakos HCCA No. 31 of 2017; Joseph Njuguna Gachie –vs- Jacinta Kavuu Kyengo (2019) eKLR. In that case, the Plaintiff suffered more or less comparable injuries.
41. There were no submissions by the Defendants. It is trite that comparable injuries should attract comparable awards.
42. In Rose Makombo Masanju –vs- Night Flora alias Nightie Flora & another [2016] eKLR the Plaintiff sustained injuries to the eyes, fracture of the left wrist, deep cut wound on the forehead with fracture of the frontal bone. She complained of pain on the left wrist and reduced movement of the fingers. There was no permanent disability. The Appellate Court enhanced the award to Kshs. 500,000/= from Kshs. 300,000/=. The case was also more or less comparable save that permanent disability was not assessed.
43. In Francis Nzivo Munguti & another v Jotham Wanyonyi Nakasana & another [2020] eKLR the Court found that the only injuries sustained by the Plaintiff was fracture of the right radius/ulna and multiple cuts on the forehead, right leg and foot which were stitched. The Court awarded Kshs. 600,000/= as general damages.
44. Having considered the severity of the Plaintiff's injuries, the above comparable case laws, the passage of time, and the inflation factor, I find that a sum of Kshs. 700,000/= should be fair and reasonable. I award general damages of Kshs. 700,000/= (seven hundred thousand shillings).
45. Special Damages: The Plaintiff claims Kshs. 12,600/= for the Medical Report (Kshs. 2,000/=), Kshs. 10,050/= for treatment and drugs and Kshs. 550/= for the motor vehicle search.
46. I find that he specifically pleaded and proved entitlement to Kshs. 11,500/= only by production of receipts PEXT 2, 4 and 6 respectively. I award the sum of Kshs. 11,500/=.
47. Future medical costs: I award Kshs. 24,000/= as recommended by Doctor Kiema for physiotherapy sessions only. I find that sum more reasonable than the sum of Kshs. 10,000/= stated by the Defendants' Doctor. The claim for costs of painkillers and audiometry is declined based on Doctor Kahuthu's findings.

In view of the foregoing, I hereby enter judgment for the Plaintiff as against the Defendants in those terms, plus costs of this suit and interest thereon at court rates.

It is so ordered.

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HON. A.M. OBURA (MRS), CM

Before HON. A.M. OBURA, (MRS), CM

Court Assistant:

Parties:

.....for the Plaintiff



.....for the 1st and 2nd Defendants.

**CT: JUDGMENT DELIVERED IN COURT VIA MICROSOFT TEAMS PLATFORM AT VOI
THIS 20TH DAY OF APRIL 2023.**

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HON. A.M. OBURA (MRS), CM

