



REPUBLIC OF KENYA

Losiamuro v Lochab Brothers & another

High Court, at Mombasa
December 30, 1991

Wambilyangah J

Civil Case No 48 of 1988

JUDGEMENT

December 30, 1991, **Wambilyangah J** delivered the following Judgment.

On the 29th November 1986 there was a collision between the 1st defendant's lorry Reg No KTK 586 tugging trailer ZA 296 and another lorry KXN 864 along Eldoret-Nakuru road. The plaintiff herein was a passenger on the latter lorry. He was seriously injured. The defendants have accepted their full liability for the negligence which resulted in the collision and so this case comes to me solely for assessment of damages to be paid to the plaintiff as compensation for the injuries which he sustained.

The plaintiff was examined by 3 surgeons, namely Dr Gathua whose 2 reports are dated 24th July 1987 and 12/6/90 respectively, Mr Hemant R Patel whose report is dated 25th May 1991, and by Mr Rasik Patel whose report is dated 20th May 1991. There are virtually no differences between the reports in their basic findings. They agree on almost all points which are that the plaintiff suffered:

- (1) Head injury
- (2) Laceration on the right forehead to the frontal area
- (3) Crush injury right leg

He was admitted in Nakuru Provincial Hospital while he was in a coma, a state in which he so remained for 2 weeks. He continued to remain in that hospital for a total of five weeks before he was later referred to Ortum Hospital for follow up treatment. While he was in Nakuru General Hospital the major scalp laceration were cleaned up and sutured. The amputated right leg was re-fashioned by an operation of the above-knee amputation. At Ortum hospital he was hospitalised for one year. Later on he returned to Nakuru General Hospital for one month's admission apparently for physiotherapy training.

At present the plaintiff has got a permanent loss of the right leg at above knee level, he also has got a paralysed arm without much gainful movements, and has got a slow speech. It was the unanimous

opinion of the 3 surgeons that the severe injuries which he sustained have almost utterly destroyed his opportunities in the employment market and have permanently consigned him as a dependant of another able bodied person. He is 36 years of age. To Dr Gathua who filled the 2 reports Exh 1 and 2 the plaintiff said that he was a farmer. But to Mr Hemant Patel he said that his previous occupation was that of livestock trader. To the Court his evidence was that he was a livestock trader which entailed buying cattle from markets in his home district and taking them for sale in Nairobi. As a matter of fact he met with this accident whilst enroute to Nairobi for that purpose. It is in evidence herein that on the material date he was taking 7 head of cattle for sale in Dagoretti in Nairobi. In order to minimise the cost of transportation of the animals, and hence enhance the profits, the transportation of the animals is done as a shared joint venture between 3 or 4 traders. But each trader has his own stock to sell when they eventually arrived in Nairobi. In the absence of rebuttal evidence from the defence I am constrained to find, that the plaintiff was a livestock trader before he sustained the injuries which are the subject matter of this case.

In their submissions both counsel have referred me to various cases as guide for damages. But there can be no denying that each case must be decided on its particular and peculiar facts. Mrs Adogo has asked me to award Shs 500,000/= as general damages for pain, suffering and loss of amenities. She has cited to me the case of *Benson Macharia Karanja* HCCC No 1162/84 (Nairobi) which, according to her, has a comparable feature to the present case in the sense that both plaintiffs remained in a coma for a considerable period after the trauma. But she even argued that the figure under this head should be less than the one which was awarded in the cited case on the ground that the period of the coma in the cited case was 6 months whereas the one in the instant case was only 2 weeks. The case which she has cited is digested at page 12 paragraph 2-2-06 in the second supplement to a Digest 1975-1985 by IT Inamdar (1990). The digested facts are as follows:

“The plaintiff who was at the time of the accident 24 and employed as manager of a car hire firm suffered a severe head injury with brain injury and other multiple injuries. He was in a coma for six months and his right arm and hand and right leg were rendered almost useless. As a result of permanent brain damage, he was unable to do useful job to support himself. His speech was difficult to understand and he required continuing support both day and night for the rest of his life, though the level of assistance required was relatively small. Since his general health and understanding had not suffered, he was mentally frustrated and poorly motivated. He was about to marry at the time of the accident but this did not come about due to the injuries. He could no longer take part in sports and out door life for which he had great love. His life was now ruined. General damages for pain, suffering and loss of amenities were assessed at Shs 1,000,000/-”

I agree with Mrs Adogo that the injuries suffered by the plaintiff in the cited case were far graver though somewhat comparable to the ones in the instant case. I further accept her contention that for this reason the award in the instant case should be less than the one in the cited case.

On this aspect it also instructive to consider the following passage from the judgment of Nyarangi JA in the case of *Janet Ndiare (minor by her next friend Joshua) v Kenya Bus Service (Mombasa) Ltd and another* Civil Appeal of 1987 (unreported):

“A person is not compensated for physical injury; he is compensated for the loss which he suffers as a result of the injury. The plaintiff will not be compensated for having serious injuries but for her inability to lead a full life *Jobling v Associated Dairies Ltd* [1983] 3 WLR 1972.”

In *West v Shephard* [1964] AC 326 at p 346 Lord Morris said: "Money can not renew a physical frame that has been battered and shattered. All that judges and courts do is to award sums which must be regarded as giving reasonable compensation. In the process there must be an endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that as far as possible comparable injuries should be compensated awards. When all this is said it is still a must that amounts which are awarded are to a considerable extent conventional."

Another relevant principle is found in the judgment of Denning NR in *Fletcher v Antocar & Transporters Ltd* [1968] 2 WLR 743 where at p 750 he said:

"And at the end we must look at the overall figure to see that it is fair compensation."

After reflecting on the severity of the injuries suffered in relation to the deprivations, discomfort and inconveniences to be suffered for the rest of this plaintiff's long span of life as a result of permanent disabilities arising from those injuries and put all these aspects in relation to the award in the case of *Benson Macharia Karanja (ibid)* I award Shs 600,000/- for pain, suffering and loss of amenities. I award Shs 80,000/- to cover the cost of procuring and fitting prosthesis in place of the amputated leg.

With regard to lost earning there are two observations to be made in this case. The first is the undisputed fact the plaintiff was involved in trading in cattle when he met with this accident whose adverse impact on that occupation or any other income generating activity is a far-reaching one. The other aspect is the absence of any records or clear concrete evidence to provide the Court with a guide as to the income which was being earned, and which is hence lost. There is no adequate evidence as to his life-style to help the Court in determining that the business was a lucrative one. I do not find the evidence of PW3 to the effect that the plaintiff's average monthly profit was Shs 3,500/- to be of significant probative value on this aspect. It is a largely imagined figure. However, in *SF Muka v Vibhran Ramji Halai and another* HCCC 1870 of 1984 Apaloo J said:

"But in a case of this sort (where actual evidence is not possible) justice can not be done without some sort amount of speculation."

I have no choice here but to engage myself in a great deal of speculation. I observed the plaintiff and deduced that his life-style is equivalent to that of a messenger in Mombasa Law Courts whose salary is about Shs 1000/ =. I, therefore work his earnings on this basis. Lost income is one which should have been available after his allowing for statutory deductions such as income tax, service charge, NSSF, NHIF, etc etc. I come up with a figure of Shs 800/= as his net income. To this amount I give a multiplier

of 15 years. In so doing I make an allowance for the fact that there would be many contingencies which would have upset his earning prospects. Such imponderables as illness, accident, bad trade would have affected his income. I have also taken into account the fact that the compensation which I will award him herein will be paid to him in a lump sum so that it can be invested and interest thereon is what he can live on. Therefore, on this head I award him shs 144,000/-, I will not make an award for a helper in view of the fact the ultimate award is large enough to take care of this aspect.

In the upshot the amounts which I have awarded are as follows:

General damages -	Shs 600,000
Posthesis -	Shs 60,000
Loss of future income -	<u>Shs 144,000</u>
Total -	Shs 824,000

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Accordingly judgment is given to the plaintiff for Shs 824,000/= with costs and interest.



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