



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2865 of 1993

M.M. KISOSO.....PLAINTIFF

VERSUS

EXPRESS (K) LIMITED..... DEFENDANT

JUDGMENT

By a plaint dated 26-7-93 the Plaintiff sued the two defendants for damages in negligence for personal injuries occasioned to him when his car Motor Vehicle Reg. No. KZW 550 Mercedes Benz rammed into defendant's motor vehicle a lorry Reg. KZM 879 along Nairobi/Mombasa road at about 8.30 p.m. on 4-8-90. In his evidence the Plaintiff stated that he was driving his said vehicle at the said time with one passenger on board the vehicle. He said he was driving at a speed of about 70-80 kph. The car lights were on and he had safety belts. At about 20 metres away as he was driving along the portion of the road near J.K.A. Resort Club, he saw ahead of him a stationery Motor vehicle which looked like a black thing. He said: - "I saw a black thing on the road about 20 metres away on the left side covering a portion of the right hand side of the broken lines in the middle of the road part of it occupying middle of the road, when I saw this, I swerved on the right but there was another car coming towards me from Nairobi side. The car had full lights. To avoid colliding with the oncoming car I swung on the left then I rammed into the rear of the stationery vehicle. I applied full brakes but the car did not stop as I was too close. I reduced the speed, I hit the right hand side of the lorry with the right hand side of the Mercedes". He said the lorry had no indicators or signs to show that it was parked there. There were no warning signs on the ground. No hazard lights, behind it, not even cut branches thrown down on the approaches of the vehicle. He was severely injured on the spine. He became paralysed on both left leg and hand. His passenger was also injured. The Plaintiff was taken to I.C.U. Nairobi Hospital for six days, then in the ward for 3 months. After discharge he continued to suffer severe pains and his hand remained permanently paralysed. He went for treatment to Queen Mother Hospital London with two doctors in April 1991. He underwent an operation on the rear bones, then another operation on the neck at the Aga Khan Hospital Nairobi. The pain in the right leg persisted and he was taken to India for neurological treatment in March 1992 in Bombay Hospital. In May 1992 he returned to Bombay for further medication, but the pain persisted and he had to go to South Africa with his wife for specialised treatment in February 1994, the pain persisted and he went back again to the same doctor in October, 1995 once more with his wife and a nurse at the Link field Hospital Cape Town where he was admitted for a period of 3 months. The pain has persisted and Plaintiff continues to be under medication. The Plaintiff has several reports from

many medical specialists from the many places he attended for treatment. I have read reports from Dr. B. Singhal from Bombay Hospital dated 26-5-92. He is a professor and Head of Department of Neurology in that <file:///C:/LAW> AFRICA High Court cases 1993/M.M Kisoso -vs- Express (K) Ltd.htm4/24/01

lawafrica.com - Pioneering Electronic Legal Research In Africa Page 2 of 10 hospital. Another dated 6-10-95 from Dr. Nimrod of J.M. Mwangombe Associates, Neuro Surgeons and Medical Consultants in Nairobi; another dated 12-11-96 from Professor A.M. Adam Consultant Physician and Neurologist Nairobi; another dated 4-6-97 from Mr. S.R. Sankay Consultant Neurologist Surgeon. There were others that were produced but perhaps the general consensus from these medical opinions is that as a result of this accident the Plaintiff suffered head injury and on cervical spine. He was hospitalised and underwent surgery but the disabilities persisted.

I produce herein the opinion given by Professor A. M. Adam dated 12-11-96 as one among many that were produced. He is a consultant Physician and Neurologist at the Aga Khan Hospital Nairobi. I find it rather representative, he said: -

MEDICAL REPORT IN CONFIDENCE

MR. MANASSEH KISOSO D.O. B. 1942

Mr. Kisoso was admitted at 2.55 a.m. on 5.8.90 after a road traffic accident. He did not lose consciousness but he tells me he was confused and amnesic for 24 hours. He has bruise on the forehead, his neck was very stiff and painful and he could move slightly the lower limb but the other limbs were very weak and he could not move them on admission. He was unable to pass urine and therefore he was catheterized. Two days later he started to have painful dysesthesia all over the body with restless nights. He was discharged on 31-8-90.

However, he was readmitted into the Aga Khan on 1-91 because of worsening pains and weakness of the left side under Prof. Sane. He had undergone a cervical laminectomy. I saw him on 8-3-91 when he had a lot of pains in the right leg and the left limb weakness persisted. Thereafter in 1991 he went to London, where he underwent a spinal operation. He underwent another similar operation in Nairobi Hospital soon after that. Between 1991 and 1995 he had gone to India and South Africa on several occasions to relieve his above symptoms. Review today 12-11-96 shows that he has still marked of his left limbs, persisting pain in the right leg, impotence and persisting urinary problems, mainly difficulty in initiating micturition and he can't empty his bladder completely. Therefore his current disabilities are: -

1. Moderately severe weakening of the left limbs, that he can walk only very slowly with a stick and has to be helped in his food when eating. He cannot dress himself.
2. Difficulty with urination.
3. Impotence.
4. Severe and persisting pains in right leg.
5. Lack of sleep because of (4) above.
6. Being drowsy from the medication - Tegretal 200 mg. t.d.s. Thyptizal notice, lionesal, 10 mg t.d.s. and Rhepol 11 mg which he was given for his pain. Therefore he is unable to work with the above

medication (He tells me he spends shilling 25,000/- every month on the medication.

7. He probably will be on most of the above medication for the rest of his life as his handicap is permanent".

The questions to answer is who is liable to the Plaintiff for the injuries he received"

PW.2 Priscilla Kisoso spoke of how she took the Plaintiff to India and changed homes. But the evidence of the Plaintiff regarding the accident was corroborated by that PW.3 Mohamed Said who was with the Plaintiff at that time and PW.4 Daniel Muiya presented the accounts involved in this case showing loss in the business the Plaintiff was said to have. In opposing this case the Defendant called DW.1 Joab Aburebe Washiani a turnboy with the Defendant's company. I was traveling in the accident lorry when he says there was a mechanical breakdown of the trailer. They stopped and he went to the cabin to investigate. He said he put green grass on the road to warn oncoming motorists and life saver as well on both sides of the vehicle and it was as they were looking into their vehicle that he saw a Mercedes benz under a trailer. Police came and recovered the lorry.

The first issue here is the one of liability. Mrs. Maina for the Defendant has argued that the Plaintiff caused the accident by going too fast in the circumstances and being unable to brake at the material time. Alternatively she has suggested contribution in a liability at 8 to 20% in favors of the Defendant, but Mr. Masika learned counsel for the Plaintiff states that mere ramming on a vehicle from behind does not make the driver from behind negligent and that driver of the stationery vehicle to be held 100% negligent. It is agreed on the evidence from both sides that the accident happened at night. That it was dark but clear night. That the Plaintiff was driving at a speed of about 70-80 kph. Both Plaintiff and his passenger PW.2 saw the stationery vehicle about 20 ft ahead of them and although he tried to turn right there were other vehicles coming forcing him to turn left and there to inevitably ram on to the lorry. It is agreed further on the evidence that Defendant's lorry developed a mechanical problem which caused breakdown and was therefore stationery on the road. DW. 1 as an eye witness did not estimate the position their trailer occupied on the road but it was stated by both PW.1 and PW.3 that the trailer lay on the road occupying part of the right portion of it. From this evidence I accept that the trailer had no lights to show its position from behind and I do not accept that the life savers were standing where they were placed if at all, I hold that the Defendant was the major cause of the accident by leaving an unlit lorry on the road without adequate warning. Both the turnboy DW.1 and his driver cared so little about the danger they had posed to other motorists that were just in the cabin and not even aware that an accident had occurred behind them. Had they taken time to flash their torch from behind or keep someone flashing such accident might not have occurred.

Did the Plaintiff contribute to this accident" There is evidence that his speed was 70-80 kph and that may depending on circumstances be excessive speed on a highway Mombasa/Nairobi road is. Mrs. Maina argued that because he failed to stop when he braked then his speed was excessive, but Plaintiff said he was doing avoiding action first he turned right to find but another vehicle approaching then turned left when he rammmed into the trailer. That person cannot be said to be the cause of the accident but I tend to agree with Mrs. Maina in one respect, that if the Plaintiffs speed was appropriate enough, it should have left him a reasonable vision within which he would have avoided this accident within 20 metres. I agree that the lorry did not have bright enough colours to reflect light easily. But the Plaintiff was driving on dimmed light and I believe if he was taking proper look out he should have been able to stop within range of 20 metres or of a safer distance. More if he drove with beam light he would have been able to see the object before him in time to avoid it. I think in the circumstances, I would apportion some blame against the Plaintiff but there is no doubt that the Defendant was the main author of this accident by parking a stationery lorry on the road without warning light. In my view and doing the best I can place

Plaintiff's contribution to 10%. As for Damages, there are items of special damages that are agreed and these are set out under agreed damages:

Agreed Damages: -

- i. Medical expenses paid to Nairobi Hospital - Kshs. 220, 300.00
 - ii) Payment to Dr. Hede - Kshs. 59, 500.00
 - iii) Payment to Dr. Charles Kaplan Randal 435 at Kshs. 196/- KShs. 8, 526.00
 - i. Pay to Dr. Van Drimweleas Randal 48 at Kshs. 196/- Kshs. 940.80
 - ii. Pay to Dr. F. Spiros Randal 4423 at Kshs. 196/-Kshs. 86, 690.80
 - iii. Pay to South African Doctors: -
 - iv. (a) Dr. Mauff- Randal 253 at Kshs. Kshs. 3, 820.00
 - v. (b) Dr. Gallagher Randal 313 at 15.1 Kshs. 47, 396.90
 - vi. (c) Dr. Percy Millers Randal 10,684 at 15 Kshs. 161,328.40
 - vii. (d) Dr. Percy Miller Randal 1200 at 15.1 Kshs. 181.20
 - xi) Dr. Illes Randal 8438.40 at 15.1 Kshs.127, 420.00 Physiotherapy Kshs.201, 600.00 Walking machine Kshs. 54, 000.00
- Total..... Kshs. 971,704.10

But there are some expenses not agreed. I term and put them under -

Disputed Expenses (Special Damages)i. Air Travel Expenses To London for Plaintiff and his wife produced as Exh. 4(a) to (d) Kshs. 225, 350.00ii. 5 Air tickets to India for Plaintiffhis doctor and his wife - 2 trips Exh. No. 5(a) to (e) Kshs. 152, 451.00 iii. Air tickets to South Africa for Plaintiffand wife Kshs. 201,955.50 iv) Bundle of Receipts for accommodationSouth Africa for Plaintiff, his wife and doctor - Kshs. 656, 457.95i. Money spent in buying pain killers. Prescribed by Prof. Adam Dr. Desai Kshs. 979, 594.00

vi) Money spend on physiotherapy Kshs. 695, 600.00vii) Medical expenses to:-

- (a) Dr. Adam Kshs. 11, 000.00
- (b) Dr. Sande Kshs. 3, 000.00
- (c) Dr. Hede Kshs. 1,500.00viii) Dr. Adam Kshs. 60, 000.00ix) Cost of Domestic Help -
- ix) Stimulation Kshs. 258, 314.00
- x) Payment of Link field park clinic Kshs. 605, 407.90

xi) Pay to Dr. Gallagher and Percy Miller Kshs. 625, 570.00

Total..... Kshs.4,476,200.35

I have looked at these disputed damages but I am not ready to support their rejection, for one thing, although they were not agreed they were however admitted by consent in evidence and I find them to have been caused as a consequence of the accident and are also proximate to the accident. I hold that they were proved as pleaded and constitute proper award of special damages as expenses flowing directly from the accident. There are some claims that are also objectionable and were objected to by Mrs. Maina. First there is the claim for the domestic help which is calculated against the income wife was obtaining before she liquated the job to cater for the husband and calculated at Kshs. 10,000/- per month w.e.f. August, 1990 to May, 1999. This I find to be fairly hypothetical as this wife's income is not brought out in evidence. The claim to be acceptable as special claim must have been pleaded and proved. It has not been so proved so the claim of Kshs. 1,180,000/- is refused.

Secondly motor vehicle: Claim of Kshs. 6,000,000/- is claimed because the Plaintiff had to buy a new car an automatic Range Rover to suit his driving condition so as to be able to drive himself. He claims Kshs. 600,000/-. Is this too remote to be awarded" I think the court has to use its discretion sparingly here and to be certain that the vehicle was necessary and proximate to the accident. Usually he should employ a driver to use a normal car or merely recondition the old one, and not buy a new car. However generally increased living expenses are recoverable in personal injury cases, but they must be increased living expenses resulting from the injury and not those expenses that would generally be incurred in normal life. They would include appliances and equipment to aid and assist the disabled "especially adapted vehicles for the disabled. "See Mc. Gregor on Damages" 16 Ed. Para 1659 - but there is a need to mitigate, appropriately the old car ought to be sold so that if a new one is to be bought then only a difference of the price of the old one and that of the new one should be paid and not the price of a newcar. This amount of Kshs. 6,000,000/- would be recoverable as special damages but alas it has not specifically been pleaded although the Plaintiff has placed it generally as "cost of adaptation to suit his new state". I think I may allow it. Thirdly, renovation of the house. It was claimed that Kshs. 8, 540,000 was recoverable for the renovation of the house to fit his conditions. This kind of claims is also recoverable. In the case of GEORGE VS PINNOCK (1973) 1 WLR 118 it was held that a severely disabled claimant could successfully claim damages for additional cost of providing special or altered accommodation renovated to suit his new disability. In this case here the medical evidence proved that the plaintiff's condition necessitated the renovation. But how does one establish this claim" The method of calculating damages under this head is to give the interest on the difference between the value of the new renovated house over the value of the old home for the full period of use normally Plaintiff's lifetime. See also 16th Vol. of (Mc Gregor on Damages para 1662 pp. 1082) It seems the interest rate applicable is not reasoned out. Even in England where the rules operate the Court of Appeal there has arbitrarily imposed 2% see THOMAS V. BRIGHTON HEALTH AUTHORITY (1997) PIOR QI but again Mrs. Maina argued that even if the amount had been correctly assessed still it would not be payable because it is special damages and the house is not in Plaintiffs name but in a company name. How then can a Court admit that they are incurred by Plaintiff" She asked. This was not argued fully except of Mrs. Maina's protestation in saying that the house did not belong to the Plaintiff. Can this court regard it as a benefit gratuitously conferred on the Plaintiff or should I deduct it" The Courts do not normally take this as a bar to award of damages.

In PARRY V. CLEAVER (1970) A.C. 1 Lord Reid L.J. said: -

"It would be revolting to the ordinary man's sense of Justice and therefore contrary to public policy that the sufferer should have his damages reduced so he could gain nothing from the benevolence of his

friends or relations or of the public at large, and that the onlygainer would be the wrongdoer"

Under this principle I do not think it would be right to deny the Plaintiff the money spent on improving a third party's house if it was to accommodate his disadvantaged circumstances. Whether the company owning the house gave it gratuitously or in whatever way. I think this money should be awarded. But the award is not proved according to the principle set out in Mc Gregor on Damages quoted above i.e. giving the interest on difference between the value for the new renovated house over the value of the old home for full proof of use. I therefore reject it. I have considered these items severally as argued.

Domestic help, special motor vehicle, specially renovated house and in my view claims under these heads ought to have been pleaded and proved specially and the law has now been firmly stated by the Court of Appeal that any claim on special damages must not only be pleaded; but must be proved strictly as pleaded. According to the pleadings, they are not pleaded specifically in my view.

From the three successive amended complaints there was no special damages pleaded in the first two previous complaints except for medical expenses.

The Complaints as drafted showed-

1st Complaint dated 26-7-93 under special damages-

- i. Medical Abstract.
- ii. Medical report, and medical expenses to be stated at the hearing.

On second amendment of 23.5.94 under special damages. Amount of Kshs. 1,982,605/30 was pleaded as Medical Report and Medical Expenses "to be stated at the actual hearing".

On third amendment (the further amended complaint dated 17-3-99 amendment introduced for the first time an amount of Kshs. 14,500,000/- as Cost of Adaptation to suit Plaintiff's disabled condition. It is under this head of special damages that plaintiff has sought to prove the Cost of renovating the house, the cost of buying an automatic Range Rover and the small issue is whether it is enough and proper pleading to prove these heading of special damages under the phrase "cost of the Plaintiff's adaptation to suit his disabled condition". I think not. The Court of Appeal has stated it very firmly and it is now our law that special damages must be specifically pleaded and proved strictly as pleaded. This kind of pleading can fail that requirement but on considering it, I however although grudgingly, allow them since the amount was given and indeed the two items fall in as expenses intended for adaptation to suit the Plaintiff's condition, but in my view the pleader ought to have pleaded each such individual heading. Loss made to the business and farm activities from time of accident to date of judgment is another big claim. This really ought to be loss of income because the evidence which was led showed that of the two parallel activities, farming on the one hand and shop, slaughter-house and posh mill on the other hand the incomes from them were as follows:

Income from farming: -

1990 -Net profit Kshs. 358, 914.00

1991-1992-nill.

1993-Net profit Kshs. 195, 106.00

1994 - Net profit Kshs. 129, 782.00

Total Net income..... Kshs. 683. 802.00

1993-1994-Net profit Kshs. 103, 350.00

The witness gave evidence about income from sale of wheat in 1989 showing gross profit of Kshs. 9,607, 365/- which after deductions left net profit of Kshs. 5, 017, 806 and after 35% Tax left net profit after tax Kshs. 3,3,200,484/- PW.4 compared this to the Net Profit of 1990 of Kshs. 358,914/-.

As for the slaughter-house, shop and flour mill in 1989 net profit after tax was Kshs. 98, 317/-

The loss from this was claimed under "General Damages" in the further amended plaint. In the submitted written submissions. However the Learned Counsel for the Plaintiff argued that the plaintiff was the manager of the activities which included farming and when he was hospitalised he was unable to attend to those businesses. He said this was a direct loss connected to the accident and quoted Kshs. 11,000, 318/= as money lost to the business as a result of the injury. In other words he regarded them as special damages.

PW.4 Daniel Muiya who was an accountant for the Plaintiff presented detailed accounts report and balance sheets covering 1989 to 1994 involving farm sales, wheat production and others. He showed that after the accident business was unattended and production and income went down. There were other accounts relating to a shop, a posho mill, and a slaughter-house, and proved that between 1990 to 1992 total loss for all activities was for Kshs. 11,030, 257/=. This to me is arbitrary as not all the causes of this loss can be attributed to the accident only. But in his submissions Plaintiff's counsel he referred to it under "special damages" yet it was not pleaded. This pleading irregular. The law is that special damages must be proved as pleaded. The Court of appeal has said so strongly incase of R.R. SHREE & A.G. vs. LAKE TURKANA EL MOLO LODGES CIVIL APPEAL No. 229 OF 1998.

I would like to exclaim with the Court of Appeal per Platt JA in Court of Appeal Civil Appeal No. 52 of 1984 Idi Ayub Omar Shabani vs. City Council of Nairobi & Another when he said that - "It is a misfortune to find that the basis on which an award such as this should be made was not presented in evidence"

But here I would say "was not pleaded" although evidence was present. Why was it not pleaded" Against what was this evidence led"" Under special damages and the particulars given in the plaint loss made to business and farming activities is not particularised but it appears under prayer (ii) as General Damages for injuries sustained and Future medical expenses and Kshs. 11,000,318/- being special damages for loss he made to the business and farming activities from the time of the accident to the date of judgment totaling to Kshs. 11,000,318/-. I am regrettably unable to construe properly from this pleading that the Plaintiff has claimed these expenses as special damages or as General Damages or as both. In my view they ought to have been pleaded specifically and they were _not. There was an attempt to proof but without pleading. I have no option but to reject it.

In Coast Bus Services Limited vs. Sisco E. Murunga Danyi & 2 others Civil Appeal No. 192 of 1992 the Court of Appeal said: -

"We would restate the position special damages must be pleaded with as much particularly as circumstances permit, and, in this connection, it is not enough to simply aver in the plaint as was done in

case.

It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars".

If this loss of business profit was properly pleaded, it should be loss claimed under Loss of Earnings and Earning Power.

Even if I had to accept evidence of PW.4 had the matter been properly pleaded to award damages for loss of earnings as a claim under Special Damages which it must be since the loss has already crystallised and is certainable then the damages would be the figure of annual earnings at the time of injury 1989 net income less the amount he can now earn annually 1990-91 net income to date of judgment and for full loss to multiply same with loss of years earning power would have lasted being the multiplier (suggested to be 10 years taking imponderables and change of climate this being farming activity I would have reduced that period for future loss

GENERAL DAMAGES

The Plaintiff has suggested itemized award of general damages as follows : -

i. Pain and suffering, loss of amenities

Sexual impotence Kshs. 4,000,000/-

ii) Future medical expenses Kshs. 2,966,440/-

iii) Physiotherapy, pain killers and

domestic help Kshs. 1.200,000/-

Total..... Kshs. 8.166,440/-

but the Defendant suggests a global figure of Kshs. 650,000/- but I feel that would very low in view of these glaring injuries.

In my view the Plaintiff remains disabled as a result of this accident. He still feels a lot of pain on the foot and abdomen. He has been rendered impotent, he is unable to take care of himself, dress or bath, he walks with the aid of a stick. He has several scars, lacks sleep at night and has difficulty in urination. I have considered High Court's previous decisions by Juma J in Nairobi H.C.C.C. No. 4210 of 1988 WILLIAM SIGLAI VS. BA.A. BARGERO & ANN. I have considered the recent award of Mwera J in HCCC No. 1460 OF 1990 FRANCIS KAGUTA MUMU VS. JOHN SIMIYU MALABA where he awarded Kshs. 900,000/- for pain and suffering on 18-3-93. I have also noted that our currency value has been affected by a high rate of inflation. As regards future domestic help the Plaintiff has asked for 1.2 million shillings basing his calculations on the wife's loss of Kshs. 10,000/- p.m. income

and on the Plaintiff's age of 58 years. But this is not realistic as the Plaintiff can employ a more less expensive nurse and by our standards of wages in Kenya a month salary of KShs. 5,000/- can be adequate and was given by Aganyanya, J in HCCC No. 58 of 1997 ALEX JUMA OCHIENG VS. KOSHORE CONSTRUCTION CO. LTD. The court supposes that he may need it until 68 years that is 10 years from now as the Plaintiff's counsel has suggested 10 years herein elsewhere I shall accept that as

prospective life span and use it as a multiplier in which case when I think Kshs. 600,000/- would roughly be adequate. I would award damages as follows: -

Pain and suffering and loss of amenities of life and earning capacity Kshs. 3,500,000.00

Domestic help Kshs. 600,000.00

Future Medical Expenses (not proved) Kshs. 1,000,000.00 Special Damages

1. Police abstract Kshs. 100.00

1. Medical expenses from accident

date to Judgment Kshs. 5,548,221.35

3. Cost of Adaptation in buying a car Kshs. 6,000,000.00

Total awards therefore Kshs. 16,648,321.35

Less 10% Kshs. 1,664,832.14

Net..... Kshs. 14,183,489.21

This is together with costs and interest.

Delivered at Nairobi this 21st Day of December 1999

A.I. HAYANGA

JUDGE

Read to: Mr. Masika for the Plaintiff Mr. Maina for the Defendant

4/24/01