



REPUBLIC OF KENYA

HIGH COURT AT KISUMU

civ suit 68 of 01

LEONARD KIARIE GICHUKI.....PLAINTIFF

VERSUS

RICHARD KIPLANGAT1st DEFENDANT

SWAN INDUSTRIES LTD.....2ND DEFENDANT

SWAN CARRIERS LTD.....3RD DEFENDANT

JUDGMENT

This is a claim for damages arising from injuries sustained as a result of a road accident.

On 28th February 2001, Leonard Kiarie Gichuki the plaintiff brought this against Richard Kiplang'at , Swan Industries Ltd and Swan Carriers Ltd, the defendants, seeking against them general damages and special damages amounting to Kshs. 107,888/- , costs and interest. He averred that on 9th November 1998, he was travelling in a motor vehicle reg No. KAG 443D along Nairobi – Naivasha road and at a place known as Rungiri another vehicle reg. No. KAG 807Y Iveco Lorry which was driven by the 1st defendant violently rammed into the vehicle in which the plaintiff was traveling. As a result of that accident he sustained severe injuries. The plaintiff averred that the said accident was solely caused by the negligence of the 1st defendant who was thereafter charged in the court with the offence of careless driving and was convicted and fined shs. 2,000/- in default to serve 4 months imprisonment. It was the plaintiff's averment that the first defendant was an employee of the 2nd and / or the 3rd defendant hence both the 2nd and the 3rd defendants are vicariously liable to the plaintiff for the torts committed by the 1st defendant. In the alternative the plaintiff averred that the 2nd and 3rd defendants are a consortium of companies. The plaintiff gave particulars of injuries he had sustained as –

(i) Fracture of left tibia

(ii) Fracture of left femur (iii) Fracture of the right ulna

(iv) Fracture of the left ring finger

(v) Fracture of the middle finger

(vi) Fracture of the phalnx

The plaintiff also gave the particulars of the special damages he incurred after the said accident.

Both the 2nd and 3rd defendants filed their defences separately. In its defence the 2nd defendant denied all the allegations attributed to it by the plaintiff and added that it was not the proper party in these proceedings. It denied that the 1st defendant was its employee and that it owned the motor vehicle reg. No. KAG 807 Y with the 3rd defendant as alleged. The 2nd defendant added that it was a stranger to the other claims made by the plaintiff relating to his alleged traveling in a motor vehicle reg. No. KAK 443 D, and also how and when the said accident took place, the injuries sustained by the plaintiff and the damages. The 2nd defendant denied in toto negligence attributed to it and the liability. In alternative the 2nd defendant averred that the accident was solely caused and / or substantially contributed to by the plaintiff. The 2nd defendant gave particulars of negligence it attributed to the plaintiff.

The 3rd defendant in its defence also denied that it was a proper and right party in the case and further that the 1st defendant was its employee. The 3rd defendant averred that the 2nd and 3rd defendants were not a consortium of companies and that at the material time it owned the motor vehicle reg. No. KAG 807Y with the 2nd defendant as claimed. It claimed that it is a stranger to the claim that on 9/11/98 the plaintiff was traveling in a motor vehicle reg. No. KAK 443 D along Nairobi-Naivasha road and it had an accident involving a motor vehicle reg. No. KAG 807Y and his vehicle and that the plaintiff sustained serious injuries at that accident. The 3rd defendant denied the alleged negligence attributed to it and the liability.

When the case came up for hearing the plaintiff testified and called three witnesses who included a doctor who had examined him and prepared a medical report which he put in as exhibit. In his testimony the plaintiff told the court that on 9th November 1998 he traveled from Kikuyu in Nissan pick-up reg no. KAK 443D on his way to Nairobi for duty and that when he reached the Highway there was a jam ahead. PW1 said that he stopped behind a canter and that while he was still waiting a lorry came from behind and rammed into his Pick up motor vehicle as a result his vehicle was squeezed between the said lorry and the Canter. The plaintiff claimed that he was seriously injured and he was taken to PCA Hospital Kikuyu where he was admitted and that while there a policeman visited him and recorded his statement. He added that he learned from the policeman known as P.C. Kathogo that the vehicle which had hit him was reg no. KAG 807 Y and that it belonged to M/S Swan Millers and that its driver was one Richard Kiplangat who was charged with careless driving in Traffic Case No. 4602 of 1998 and was convicted and fined shs. 2,000/- . The plaintiff said that he paid for his treatment Kshs. 15,000/- on 19th November 1998, Kshs. 20,000/- on 3rd December 1998, and Kshs. 10,000/- on 16th November 1998. He added that he has not fully recovered and that the left leg is now shorter than the right leg. It was plaintiff's contention that the defendant's driver who hit him from behind was to blame for the accident as was found by the Traffic Court which convicted him of careless driving. He added that he consulted both Dr. Onyimbi and Dr. Raburn who each prepared a report after examining him. When he was cross examined he admitted that he prepared the plaint in person and that he did not state in it the injury to his stomach. He added that one finger was cut off and another cannot now move and that all the injuries he stated were to his upper and lower limbs as can be seen from the record. PW1 claimed that he was in hospital for one month and that the fact that a pin is still in his hand he cannot lift up anything. The plaintiff also admitted that he had not served the 1st defendant with summons to enter appearance as he was not able to get his address. The plaintiff also admitted in his cross- examination that he does not know the difference between M/S Swan Industries Ltd and Swan Carriers Ltd but he said he sued both in this case as he did not know who was the owner of the said motor vehicle.

In his testimony P.C. Zachary Kadogo PW4 said that he was the investigating officer for the accident

and that he went to the scene immediately after the accident and found the vehicles which had been involved in the accident. This witness said that he formed an opinion that the driver of the Iveco Lorry reg no. KAG 807Y belonging to Swan Carriers Ltd was to blame for the accident. The witness further testified that he charged the driver with the offence of careless driving and that he was convicted and fined shs. 2,000/- . He claimed that the lorry was released to M/S Swan Carriers Ltd the owners. He said that 5 vehicles were affected by the accident.

Although PW4 did not have any document in support of his evidence he clearly stated that the Iveco Lorry reg. No. KAG 807Y which was driven by one Richard Kiplangat was released to M/S Swan Carriers Ltd 3rd defendant which was sued by the plaintiff . The driver of the said vehicle was found guilty of carelessness by the traffic court. The decision of the traffic court has not been upset or set aside. I would therefore hold that the said accident was caused by negligence of the said driver and M/S Swan Carriers Ltd the Owners of the lorry are vicariously liable to the plaintiff in damages for the injuries he suffered.

Dr. Manasseh Onyimbi who had examined the plaintiff testified as PW2 and produced a report which he had prepared as an exhibit., He confirmed that the plaintiff had sustained the following injuries:-

- (i) Compound fractures of right humerus and ulna;
- (ii) Fracture of the mid 1/3 of the right radius;
- (iii) Complete fracture of the left shaft femur;
- (iv) Compound fractures of the distal left tibia and fibula;
- (v) Multiple fractures of the left middle finger;
- (vi) Fracture of the proximal phalanx left ring finger;
- (vii) Lacerations and bruises on both right and left lower limbs;
- (viii) An extensive post skin-graft wound on the left lower abdominal region.

When the plaintiff was further examined by the same doctor he found –

(a) That the left lower limb is now shorter than the other limb and that that causes him wobble and limp in walking;

(b) That the plaintiff is unable to clasp / fold the stiff middle and ring fingers of the left hand and hence has lost power of grip of objects

(c) The plaintiff is unable to lift or move any object of reasonable weight during normal activities using his right upper limb,

(d) The plaintiff has to use specially modified and raised shoes for his left lower limb in an attempt to make for the shortness of it.

It was also a view of DR. Onyimbi that complete recovery may never be achieved by the plaintiff unless he was referred super specialists arthopaedic surgeons at Kenyatta National Hospital or Nairobi .

However Dr. Onyimbi does not suggest the estimate costs which will have to meet for such references.

For the plaintiff M/S Mwamu & NYANGA advocates suggested that their client would be adequately compensated if he is awarded Kshs. 2,000,000/- as general damages and Kshs. 107,888/- as special damages but the advocates for the defendant suggested that an award of Kshs. 590,000/- was adequate for the injuries he suffered as a result of the said accident.

As indicated above the plaintiff has sustained very severe injuries and that one as a result is that his left leg is now shorter than the right leg. It was indicated that he cannot clasp anything with his left hand as the middle and the ring fingers are now stiff and that may have contributed to his claim of inability to lift objects of reasonable weight.

Although a number of cases were relied on by the parties those cases are not very useful because no two cases are the same. However having considered all those cases cited to me and those cases in the MS Khan's guide on assessment of damages 1988 to 1994 , I would award the plaintiff a global sum of Kshs. 950,000/- as general damages for pain suffering and loss of amenities.

On special damages I note that a sum of Kshs. 107,888/- was pleaded and the same was strictly proved. The amount is therefore awarded.

There will therefore be judgment for the plaintiff against M/S Swan Carriers Ltd the 3rd defendant in the sum of Kshs. 950,000/- as general damages and Kshs. 107,888/- special damages with costs and interest.

Dated and delivered this 11th December 2003.

B.K. Tanui

JUDGE



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