



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 889 OF 2004

MICHAEL NJAGI KARIMI.....PLAINTIFF

VERSUS

1. GIDEON NDUNGU NGURIBU

2. PAUL KARIUKI WANJOHI.....DEFENDANTS

J U D G M E N T

1. The Plaintiff claims damages in negligence following a road accident. His case as pleaded in the **amended plaint dated 23rd June 2005** is that on or about 23rd June 2002 he was lawfully standing beside the road along **Waiyaki Way** opposite the '**N' Shopping Centre, Kabete** waiting to cross the road; that motor vehicle registration number **KAL 017 L** came along, lost control, went off the road and knocked him down as he waited to cross the road, thus causing him grievous injuries (particulars are given); that the accident was caused by the negligence of the 1st Defendant who was the driver of the motor vehicle (particulars of negligence are pleaded); that the 2nd Defendant was the registered owner of the motor vehicle, and the 1st Defendant was driving it as his servant or agent; and that the 2nd Defendant is therefore vicariously liable for the acts of the 1st Defendant. The Plaintiff therefore claims general damages for pain, suffering and loss of amenities, and cost of future treatment. He has also claimed special damages amounting to KShs 967,567/50.

2. The Defendants filed a **joint statement of defence dated 11th August 2005**. There are general denials as well as a plea that the Plaintiff's case as pleaded is "ambiguous, vague and unspecified". Without admitting that the accident occurred or that the accident motor vehicle was driven by the 1st Defendant, the Defendants have pleaded in response to the particulars of negligence set out in the amended plaint that the motor vehicle was driven with proper care and attention and at a lawful speed, and that the driver thereof exercised due care and attention in driving it.

3. It is further pleaded that if an accident occurred as pleaded it was caused by the "illegal, negligent and wrongful acts" of the Plaintiff and his agents or servants, particulars of which were, placing a tyre in the middle of the road in order to stop, slow down or ambush the 1st Defendant; approaching the 1st Defendant in his car while armed and knocking the window with an object with the intention of smashing it and attempting to hijack the motor vehicle or steal from the 1st Defendant; and standing in the path of the motor vehicle in order to prevent the 1st Defendant from escaping or driving off.

4. The injuries and loss pleaded by the Plaintiff are all denied.

5. In a reply to defence the Plaintiff joined issue with the Defendants upon their statement of defence.
6. The Plaintiff testified as PW3 and called two witnesses, **Dr. James Otieno Ochieng'** (PW1) and **PC Justin Chimbevo** (PW2). The Defendants did not lead or call any evidence.
7. The Plaintiff's testimony was as follows. He is a teacher at **Kenyatta University**. On 22nd June 2002 between 8 and 9 pm he was coming from **Kabete Technical College** heading towards the Nairobi-bound bus stage on Waiyaki Way. At the '**N**' **Shopping Centre, Kabete** he waited for vehicles to clear and he safely crossed the outward bound carriage-way on Waiyaki Way. He then stopped on the central divide of the dual carriage-way waiting for an opportunity to cross the inward bound carriage-way. While so waiting he saw a motor vehicle coming from the Nakuru direction at high speed with full lights on. The vehicle suddenly veered off the road towards where he was. It then hit him and the next thing he remembers is that he was at **Kenyatta National Hospital**. He learned it was Wednesday. The accident had happened on the previous Saturday evening.
8. The Plaintiff further testified that in hospital he noticed that his left leg was on traction and he learned that it had a fracture in the thigh bone. He also noticed that he had two fractures in the right lower leg; a fracture in the right upper arm; and two fractures in the lower right arm. He learned that he had already undergone five surgeries. Later he learned that he had been hit by motor vehicle registration number KAL 017 L, a Toyota Corolla. A police officer visited him at the hospital and told him that the driver of the vehicle that had hit him had reported the accident at **Parklands Police Station**. He also learned that the driver was the 1st Defendant and that the owner of the motor vehicle was the 2nd Defendant.
9. The Plaintiff was discharged from hospital in November 2002 after almost 6 months of treatment, he further testified. He was discharged in a wheelchair which he used for three months. He was then on double crutches for another three months and then on a single crutch for about five more months. Eventually he was able to walk without assistance.
10. The Plaintiff stated that there was a mul-union of the right lower limb and that surgery would be required to correct it as particularized in paragraph 5d of the amended plaint. He stated that he spent KShs 110,967/00 on medical treatment at Kenyatta National Hospital. He produced a receipt for it (**Exhibit P5**). He paid KShs 500/00 for motor vehicle search and he produced the receipt and copy of records of the accident vehicle as **Exhibit P6**. He paid KShs 100/00 for the police abstract which amount is reflected in the document. He also paid KShs 3,000/00 each for the two medical reports which were produced by the doctor.
11. For future medical treatment the Plaintiff testified that he would like to attend either **MP Shah Hospital** or **The Aga Khan Hospital**. For now he did not have the money for the treatment.
12. Before the accident the Plaintiff was a tutor at a college in Ruiru earning about KShs 9,600/00 per month. It was a part-time job and he lost it for the time he was undergoing treatment for about a year. At the time of the accident he was a Master's student at Kenyatta University and he had to seek leave from studies during the treatment (**Exhibit P7**). He eventually completed his Master's course in 2004.
13. The Plaintiff also produced in evidence his discharge summary from Kenyatta National Hospital (**Exhibit P8**). He was discharged on 7th November 2002. He also produced the letter of demand and statutory notice to the insurance company (**Exhibit P9 (a) and (b)**).
14. At the time of trial the Plaintiff was on contract employment as a lecturer at Kenyatta University. He

stated that his being on contract had nothing to do with the injuries he suffered in the accident.

15. The Plaintiff denied that he contributed to the happening of the accident in any way at all. He testified that the place was well lit as there were street lights along the highway; it was not raining; there was no obstruction in the central-divide; he did not place any tyre on the road, nor did he see any tyre on the road; he did not approach the Defendants vehicle at all as alleged and he never attempted to hijack it; he did not stand in the road in the path of the accident vehicle, nor was he on the road when the motor vehicle hit him. He said the Nairobi bound carriage-way was not busy and there were a number of people walking along the road.

16. In cross-examination the Plaintiff stated that he was in a hurry; that there was a bus-stage on the Nairobi bound carriage-way and a well-established crossing point on the road; that there was no wall between the two carriage-ways; that at that place the highway was fairly straight and that ordinarily a driver would have driven straight-on unless there was some distraction. He denied that he was on the road when he was hit and asserted that he was off the road. He denied that he and others had placed a tyre on the road with the intention of hijacking a motor vehicle or at all. He stated that he was aware that the driver of the motor vehicle was never prosecuted. He did not know why this was so. He stated that he had not taken any alcohol. He also stated that he had sought leave to file suit out of time against the 2nd Defendant.

17. PW1 (Dr. Ochieng') was a consultant orthopedic surgeon. He consulted at various hospitals in Nairobi. He had consulted since the year 2004 and had practiced medicine since the year 1989. He testified that on or about 23rd June 2004 he examined the Plaintiff at the general orthopedic ward of Kenyatta National Hospital. He was then the consultant on call and had seen the Plaintiff in the ordinary course of his duties as such. The patient had been transferred to Kenyatta National Hospital from **MP Shah Hospital** where he had been admitted following a road accident.

18. PW1 further testified that when he saw him the Plaintiff was quite ill though conscious. He had multiple bruises on his face which were bandaged; he had a plaster cast on the right lower limb and also on the right upper limb; and a traction system was attached to his left lower limb.

19. Following evaluation PW1 confirmed that the Plaintiff had sustained compound fractures of his right tibia and fibula, and that in the right upper limb he had closed fractures of the right *radius* and the right *ulna*. An x-ray confirmed that he had a closed fracture of the left *femur*. The Plaintiff also had a urinary catheter in place.

20. Subsequently the patient underwent a series of operations. In due course he improved and was discharged on a wheelchair on the 4th November 2002. He was instructed to continue with orthopedic clinic follow-ups and also to be attending the hospital physiotherapy department in order for him to recover mobility.

21. PW1 prepared and signed a **medical report dated 27th November 2004** on the Plaintiff. He produced it in evidence as **Exhibit P1**. On 9th May 2011 he again examined the Plaintiff and prepared a second report of the same date. He produced it as **Exhibit P2**. In his first report he had recommended a series of planned operations on the Plaintiff to remove metal implants and correct deformities. He approximated these operations at Kenyatta National Hospital at then current rates at KShs 550,000/00. He said that at a private hospital like **The Aga Khan** and MP Shah Hospital the cost would be about KShs 850,000/00. At **Nairobi Hospital** the cost would be about KShs 1.2 million.

22. PW1 also noted that the Plaintiff's right leg was shorter by 3 centimetres and that there was

also *anterior angulation* of the *tibia*. He stated that this deformity was correctable and was one of the planned surgeries he has indicated. Of the shortening of the right leg PW1 stated that the same was not correctable because the compound fracture had resulted in bone loss. He assessed the Plaintiff's **overall incapacity at 35% of the total person**.

23. Finally PW1 stated that he charged KShs 3,000/- for each of the two medical reports. He was paid and he issued receipts. He also charged KShs 3,000/00 each for attending court on 22nd February 2011 and on 26th May 2011. He was paid and issued receipts. He produced in evidence the four receipts as **Exhibits P3**.

24. In cross-examination PW1 stated that he could initially have seen the Plaintiff either on 24th or 25th June 2002. He explained the disparity in the figures for further medical treatment in the two medical reports as being caused by the 7 years difference between the two medical reports. The second medical report also considered at the Plaintiff's request treatment in more expensive private hospitals. He denied that there was any exaggeration of the costs in the second medical report.

25. PW2 was a police constable attached to Parklands Police Station at the time he testified. His duties included custody of various official documents including abstracts, occurrence books, medical examination reports, etc. He produced in evidence the occurrence book and police abstract relating to the accident (**Exhibits P4 and P5**).

26. That was the totality of the evidence placed before the court. As already noted the Defendants did not lead or call evidence.

27. Written submissions were filed on behalf of the parties. Both the Plaintiff's and Defendants' submissions were filed on 5th December 2011. I have considered those submissions, including the cases cited.

28. I consider the following to be the main issues to be determined in this trial -

- 1. Was there an accident involving motor vehicle registration number KAL 017L and the Plaintiff as pleaded"**
- 2 Was the 1st Defendant the driver of the accident motor vehicle"**
- 3. Was the motor vehicle owned by the 2nd Defendant, and is he vicariously liable"**
- 4 Was the accident caused by the negligence of the 1st Defendant"**
- 5. Was the Plaintiff guilty of contributory negligence"**
- 6. What injuries did the Plaintiff suffer in the accident"**
- 7. What damages are due to the Plaintiff"**

Issue No 1: The Accident

29. The fact of the accident cannot be in serious contention. We have the testimony of the Plaintiff as well as the evidence brought before the court by PW2, the police constable. That evidence was the occurrence book (**Exhibit P4**) where the report of the accident made by the 1st Defendant was recorded.

The report was also encapsulated in a police abstract on the accident (**Exhibit P5**).

30. I am satisfied upon the evidence before the court that indeed an accident occurred as pleaded by the Plaintiff which involved him and motor vehicle registration number KAL 017 L.

Issue No. 2: Who was the driver of the accident motor vehicle"

31. Again here there cannot be any serious contention. The 1st Defendant himself reported the accident to the police, and also the fact that he was the driver of the accident motor vehicle.

Issue No. 3: Did the 2nd Defendant own the accident motor vehicle, and is he vicariously liable.

32. The copy of records of the accident motor vehicle from the **Registrar of Motor Vehicles (Exhibit P6)** proves that the vehicle was owned by 2nd Defendant. It has not been controverted that the 1st Defendant was driving the motor vehicle with the 2nd Defendant's authority or consent. He is vicariously liable for the accident.

Issue Nos. 4 and 5: Was the accident caused by the negligence of the 1st Defendant, and did the Plaintiff contribute in any way to its happening"

33. We have only the uncontroverted testimony of the Plaintiff as to how the accident occurred. That testimony was that the accident vehicle for some reason veered off the road and found the Plaintiff standing on the central reservation dividing the dual carriage-way and there knocked him down. No reason was given to court why the 1st Defendant who was the driver of the vehicle did not testify. He had the opportunity to explain how the accident might have occurred. Vehicles do not ordinarily veer off the road without reason. The Defendants pleaded in their defence that some obstruction in the form of a tyre had been placed in the middle of the road thus forcing the 1st Defendant to swerve in order to avoid it, and presumably thereby going off the road.

34. However, this was a mere allegation that was not supported by any evidence. The Plaintiff specifically denied that there was any such obstruction placed on the road. He also testified that the 1st Defendant was driving at a high speed.

35. Upon the evidence now before the court the only irresistible conclusion to be drawn is that the 1st Defendant at the time of the accident was driving without due care and attention, thus causing his motor vehicle to veer off the road and find the Plaintiff where he was standing, and there knocking him down. I find that the accident was caused by the sole negligence of the 1st Defendant. The alleged contribution of the Plaintiff to the happening of the accident was not supported by any evidence and I reject it.

36. On liability therefore I find for the Plaintiff at 100%.

Issue No. 6: What injuries did the Plaintiff suffer in the accident"

37. I have already set out the Plaintiff's testimony of the injuries that he suffered. I have also set out in summary form those injuries as recounted by the PW1. The first medical report (**Exhibit P1**) sets out the following injuries –

(i) Bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right *humerus*.

(ii) Deformity and swelling of the right forearm and fractures of the right *radius* and *ulna* with displacement.

(iii) Injury to the right lower limb involving the right leg which was tender, swollen and deformed. X-ray examination showed a fracture of the right *tibia* and *fibular*.

(iv) Swelling and deformity of the left thigh with apparent shortening; x-ray revealed a segmental fracture of the left *femur* with marked displacement.

38. The medical report also sets out the following major operations performed on the Plaintiff -

(i) 23.6.2002 - Surgical toilet with debridement of the wounds, application of back-slab and insertion of Steinmann pin for traction of the fractured *femur*.

(ii) 24.7.2004 - Operated on to fix the fracture of his left *femur* with the insertion into the fracture bone a metal rod (K-nail) to maintain reduction and proper alignment.

(iii) 16.8.2002 – Operation of open reduction and internal fixation of fracture of the right *humerus* with seven hold broad plates and screws. Acceptable reduction achieved.

(iv) 25.9.2002 – The mis-alignment of fractures of the right *radius* and *ulna* necessitated yet another operation where re-fracture with double place-fixation on both *radius* and *ulna* was done. Due to the disruption of the muscles of the forearm and fibrosis he lost the movements of supination and pronation.

(v) 16/10/2002 – He was operated again but this time fracture of the right tibia was fixed with a broad light hole-plate and screws. There was some shortening and misalignment of the bone fragments.

39. The report also sets out a series of surgeries that the Plaintiff needs to undergo. These are -

(i) Surgery on the right *tibia*, to be plated to correct shortening and deformity of the bone.

(ii) Surgery on his left *femur* to remove the K-nail.

(iii) Surgery on his right *tibia* to remove the plate.

(iv) Surgery on his right *humerus* to remove the plate.

(v) Surgery on his right *radius* and *ulna* to remove the plates on the two bones.

40. The doctor noted that these operations cannot possibly be done in one session and that the Plaintiff will have to be in theatre on at least three distinct occasions several days apart.

41. The **prognosis** and **opinion** of the consultant in Exhibit P1 was that the Plaintiff sustained severe injuries in the accident which caused him much pain, suffering and blood loss. The prolonged period of hospitalization and follow-up was a time of financial, emotional and psychological distress for him. The wounds headed with ugly scars. Radiologically and clinically the bones at the fracture sites are well united though with angulation on the right *radius/ulna* and also on the right *tibia*. The metal implants are *in situ*. Due to the misalignment and shortening of the limb the Plaintiff is likely to suffer post-traumatic *osteoarthritis*. Because of the loss of supination and pronation movements of the right forearm he has lost the ability to perform screwing and unscrewing functions of the right hand.

42. In the second medical report dated 9th May 2011 (**Exhibit P2**) the consultant noted that the Plaintiff made tremendous improvement and was back on his feet going on with his daily activities. But he had persistent deformity in his right leg with anterior bowing. He may walk briskly but is unable to run. He also had persistent pain in the left hip joint, made worse whenever he tries to squat. Due to fibrosis following from the fracture of the right *radius* and *ulna*, he had lost permanently the movements of pronation and supination in the forearm of the right limb. The doctor also noted that the Plaintiff still needed the operations set out in the first medical report to remove the metal implants and correct deformities.

43. I have noted the very serious injuries suffered by the Plaintiff and his long hospitalization and treatment. Mercifully the injuries did not involve the head or spinal cord. That he suffered much pain and discomfort cannot be in doubt. He still needs to undergo further remedial surgeries and the prospects of the same must be daunting to him. He has **disability of the total person to the extent of 35%**.

44. I have looked at the cases cited in the submissions and have noted the awards made for various fractures, combination of fractures and related injuries. The awards range from KShs 650,000/00 for fractures to the right leg and large cut wounds on both legs (case cited for the Defendants) and from KShs 1.2 million to KShs 1.75 million (five cases cited for the Plaintiff). In at least two of the cases cited for the Plaintiff there were fractures to both lower limbs. In those cases KShs 1.65 million and KShs 1.6 million were awarded respectively in the years 2002 and 2008.

45. In the present case I note that in addition to the fracture in both lower limbs there were also fractures in the right upper limb. Doing the best that I can, and balancing this against that, I will award the Plaintiff **general damages of KShs 2 million for pain, suffering and loss of amenities**.

46. Regarding **future medical treatment**, I see no reason to depart from the estimates given by PW1. The Defendants did not bother to bring before the court their own estimates. However, I will award the estimates for future treatment at public hospitals. That will be the sum of KShs 550,000/00.

47. As for special damages, only KShs 123,567/50 was strictly proved. I will award that sum.

48. In summary I will enter judgment for the Plaintiff against the Defendants jointly and severally as follows-

(i) For pain, suffering and loss of amenities: KShs 2,000,000/00

(ii) For future medical treatment: KShs 550,000/00

(iii) Special damages: KShs 123,567/50

49. The general damages will carry interest at court rates from the date of judgment until payment in full. The special damages will carry similar interest from the date of filing suit. The Plaintiff will have costs of this suit. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 22ND DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE



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