



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 189 OF 2009**

**MWAURA MUIRURI.....PLAINTIFF**

**VERSUS**

**SUERA FLOWERS LIMITED.....FIRST DEFENDANT**

**BENSON MAUNDU.....SECOND DEFENDANT**

**JUDGMENT**

1. By an amended Plaint filed on 18th October 2011, the Plaintiff herein sought the following orders:-

- (a) general damages for pain and suffering, loss of expectation of life, loss of consortium and loss of amenities,
- (b) future medical expenses
- (c) special damages of Kshs 85,020/=
- (d) costs of the suit and interest
- (e) any other or further relief that the court may deem fit to grant

2. This claim relates to a road traffic accident that occurred on 22nd February 2008 along the Nyahururu/Oikalou Road at Brookside wherein the Plaintiff was hit by the First Defendant's motor vehicle registration number KAS 581J which was at the time being driven by the Second Defendant.

3. The parties recorded a consent on liability in the ratio of 75:25 in favour of the Plaintiff as against both defendants. By a subsequent consent made on 30th October 2013, the parties agreed to have their cases marked as closed after the testimony of the Plaintiff. The Plaintiff also agreed to abandon part of his claim for special damages of Kshs. 37,500/= being the taxi charges and the parties further agreed to put in written submissions on quantum.

**QUANTUM**

**General Damages**

**Pain and suffering and loss of amenities**

4. The Plaintiff testified that as a result of the accident, he sustained the following injuries-

- (a) multiple lacerations on the face
- (b) soft tissue injuries on the chest cage (mainly left subaxillary area)
- (c) comminuted fractures of the right humerus upper and lower thirds of the tibia
- (d) compound double fractures of the right leg upper and lower 1/3rd tibia fibula

5. He was taken to Ol Kalou District Hospital where x-rays were taken and was then admitted at Nyahururu District Hospital for 6 days. He was referred to North Kinangop Hospital on 28/02/2008 where he continued receiving treatment as an inpatient until 2/07/2008. The Plaintiff's present complaints were-

- (a) Inability to use the right arm
- (b) pain in the right upper arm
- (c) inability to walk without support
- (d) occasional pain in the right knee especially at night

6. Dr. Ngari W.H. examined the Plaintiff on 29/05/2009 and observed that there is permanent disability as the Plaintiff is unable to use his right hand and he requires specialized treatment for the use of the hand to improve. He also opined that the Plaintiff would require corrective surgery for the deformed leg. The Plaintiff was also examined by the Defendants' doctor Dr. Malik on 1st March 2011 who observed that the Plaintiff had suffered permanent injuries as paralysis of the right hand, deformation of the right leg which is angulated medially and reduced ankle joints. At the time of examination, the Plaintiff was using crutches. He assessed the Plaintiff's total permanent disability at 70 % computed as follows; 50% for the loss of the right arm and 20% on the left leg.

7. For pain and suffering the Plaintiff claimed for a sum of Kshs. 2,800,000/= and Kshs. 300,000/= for loss of amenities and relied on the following cases-

(a) **Edward Mzamili Katana vs. CMC Motor Group Ltd & Another [2006] eKLR**- the court awarded to a 52 year old Plaintiff Kshs. 2,000,000/= damages for pain and suffering and loss of amenities. He suffered injuries which resulted in the shortening of his leg.

(b) In **Mehari Tewoldge T/A Mehari Transporters Ltd vs. Muasya Maingi [2013] eKLR**- the plaintiff who had suffered 8% incapacity as a result of the injuries was awarded Kshs. 1,500,000/- general damages

(c) In **Ahmed Mohamud Adam vs. Jimmy Tomino & 2 Others [2006]eKLR**, the Plaintiff suffered amputation of the left lower limb below the knee joint, multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of his foot, compound fracture of the right malleolus and dislocation of the right ankle joint and stiffness of the ankle joint. He was awarded Kshs. 1,900,000/= as general damages for pain and suffering.

8. The Respondents on their part submitted that Kshs. 1,000,000/= would be sufficient compensation for the Plaintiff. Reliance was placed on the following cases-

(a) **MICHAEL MAINA GITONGA Vs. SEERAH NJUGUNA [2012] eKLR** The Plaintiff had suffered multiple fracture of the pelvis, dislocation of the right hip with displaced fracture of the right acetabulum, comminuted fractures of the right tibia and fibula of the proximal end with fracture of the tibia plateau and soft tissue injuries to the chest. He was awarded Kshs. 1,500,000/= general damages for pain and suffering.

(b) **WYCLIFF SINGANI ANALO Vs. BERNARD MUSYOKI & ANOTHER NAIROBI HCCC NO. 2115 OF 2001**

(c) **DAVID KIGOTHO IRIBE Vs. JOHN WAMBUGU NDUNG'U & ANOTHER [2008] eKLR**- the Plaintiff was awarded Kshs. 1,300,000/= for injuries which included amputation of the right lower limb and partial amputation of the right lower leg and had been awarded 75% permanent disability

(d) **LOISE NJOKI KARIUKI Vs. BENDRICON WAMBOKA WASWA & ANOTHER [2013] eKLR**- The plaintiff sustained compound fractures of humerus of the right upper arm and fractures of bones of the right forearm. She was awarded Kshs. 1,500,000/= damages for pain and suffering.

The philosophy and reasons for award of damages for pain and suffering is explained in paragraph 883 in **HALSBURY'S LAWS OF ENGLAND 4th Ed, vol. 12(1) page 348-**

**883. *Pain and suffering. Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.***

9. It follows therefore that the award for pain and suffering is intended to compensate the Plaintiff for the anguish he has endured as a result of the accident whether physical or mental. It is therefore important and relevant that the Plaintiff was aware of his suffering and a plaintiff who is in a coma or unconscious may not be awarded damages under this head.

10. I have therefore considered the nature of injuries suffered by the Plaintiff. He was hospitalised for quite a long time and has undergone a great deal of pain. In fact at the time of examination by Dr. Malik, about 3 years after the accident, he was still complaining of feeling pain in his right upper arm and occasional pain in the right knee especially at night. Taking these considerations into account as well as the awards made in the authorities cited, I find that the sum of Kshs. 1,450,000/= to be reasonable under this head.

#### **Loss of amenities**

11. The Plaintiff sought Kshs. 300,000/= as damages for loss of amenities. This claim was opposed to by the Respondents who submitted that this is not recoverable as a separate head of damages and can only be recovered under the head of pain and suffering. **HALSBURY'S LAWS OF ENGLAND (supra)** provides guidance on the claim for loss of amenities at **page 348** as follows-

#### **884. *Loss of amenities -***

***In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial***

***employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it.***

12. Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of his life as a result of the accident are diminished. Essentially the quality of life of the Plaintiff is reduced due to the inability to do the things he would otherwise have done had it not been for the injuries.

In this case, the Doctors who examined the Plaintiff were in agreement that the Plaintiff lost any use of his right hand which is paralysed and his movements are hindered as he now has to use a cane while walking due to the stiffness of his ankle. His quality of life has diminished as a result of the permanent disability. I therefore find that the Plaintiff has established his claim for loss of amenities and award him a sum of Kshs. 300,000/= as damages.

13. The Plaintiff also claimed damages for loss of consortium. Consortium was defined in the case of **BEST Vs. SAMUEL FOX & CO. LTD [1951] 2 KB 639** as cited, with approval, in **KIMOTHO & OTHERS Vs. VESTERS & ANOTHER [1988] KLR 48** as follows-

***“companionship, love affection, comfort, mutual services, sexual-intercourse- all belong to the married state.”***

14. The court further held that serious injury to any of the components that go to make consortium would seriously affect the others. This claim can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A Plaintiff who has himself suffered any injuries and as a result is unable to perform his marital duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium.

15. It was the Plaintiff's testimony that since the accident, he had been unable to perform sexual relations with his wife. However I have carefully perused the medical reports and find that the Doctors who examined the Plaintiff did not find that the injuries sustained by him hindered his ability to fulfill his marital duties in any way. In addition, the Plaintiff did not raise any such complaint at the time of examination to enable the doctors assess the same. For this reason I find that the claim of inability to perform sexual relation has not been proved. I will therefore disregard the Plaintiff's claim under this head.

### **Loss of earning capacity**

16. It was conceded that this claim was not pleaded in the plaint although the Plaintiff led evidence that he used to work as a tractor driver on contract basis. He did not provide any proof of payment as his job was seasonal but he had not been employed since the accident. He therefore sought an award of Kshs. 339,328/=. The Defendants urged the court to reject the claim under this head **firstly** because it was not pleaded and **secondly** the Plaintiff did not provide any proof of employment. In any event the Plaintiff was at the time of the accident 64 years old which was way past the retirement age in Kenya.

17. The claim for loss of earning capacity is a general damages claim as such it is deemed to flow directly from the claim and need not be pleaded. This was the holding of the Court of Appeal in the case of **MUMIAS SUGAR COMPANY LIMITED Vs. FRANCIS WANALO [2007] eKLR** where it laid down the principles for the award for loss of earning capacity as follows-

***“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”***

18. In the instant case, the Plaintiff was a tractor driver. He suffered partial paralysis of the hand and although the use of the leg had improved and at the time of the hearing the Plaintiff was able to walk using a cane, the doctor found the stiffness around his ankle joint was likely to remain. It is clear that the chances of getting employed as a tractor driver have been diminished by these injuries. The Plaintiff was however 64 years old and it is not expected that he would be in the job market much longer. Taking all these factors into account, I find that an award of Kshs. 150,000/= for loss of earning capacity to be sufficient.

### **Special damages**

19. The Plaintiff pleaded a sum of Kshs. 85,000/= special damages in his plaint. He however abandoned the claim for taxi expenses and now sought Kshs. 46,500/= as pleaded and proved. It was the defendants' submission that he should only be granted Kshs. 10,020/=. I have examined the receipts produced and find that the sum claimed and proved for special damages is shs 14360/= made up as follows -

- |     |                        |                       |
|-----|------------------------|-----------------------|
| (a) | Medical expenses ..... | Kshs. 12,760/=        |
| (b) | Official search.....   | Kshs. 500/=           |
| (c) | Police Abstract.....   | Kshs. 100/=           |
| d.  | Medical report.....    | <u>Kshs. 1,000/=</u>  |
|     | TOTAL                  | <u>Kshs. 14,360/=</u> |

I award the Plaintiff that sum.

### **Future medical expenses**

20. The Plaintiff also claimed in his plaint an award for future medical expenses although no submissions were made on it. However, from the medical report, there was no finding by the doctors that the Plaintiff would require further treatment for his injuries. It was Dr. Malik's finding that his injuries were permanent and nothing much could be made on it. Although Dr. W. H. Ngari made a recommendation of specialized treatment for the Plaintiff he was not specific on the nature of such treatment. This court cannot therefore make an award on the same and this claim therefore fails.

21. In the end, I enter judgment for the Plaintiff against the Defendants as follows-

(a) General damages

(i) pain and suffering.....Kshs. 1,450,000.00/=

(ii) Loss of amenities.....Kshs. 300,000.00/=

(iii) Loss of earning capacity.....Kshs. 150,000.00/=

Sub-total .....Kshs. 1,900,000.00/=

Less 25% contributory negligence

*i.e* 1,900,000 x <sup>25</sup>/<sub>100</sub> =Kshs. 475,000.00/=

**Kshs. 1,425,000.00/=**

**Add** Special damages-.....Kshs. 14,360.00/=


Total Kshs **1,439,360.00/=** I therefore enter judgment for the Plaintiff in the sum of Sh 1,439,360/= with interest from the date hereof until payment in full. I also award the Plaintiff costs of the suit, if not agreed to be taxed by the Taxing Officer of this court.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 28<sup>th</sup> day of February, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**

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