



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 212 OF 2011

CLEMENT MUTURI KIGANO.....PLAINTIFF

-VERSUS-

SHENGLI ENGINEERING CONSTRUCTION GROUP LIMITED.....DEFENDANT

JUDGEMENT

1) Clement Muturi Kigano, the plaintiff herein sued Shengli Engineering Construction Group Limited, the defendant herein vide the amended plaint dated 3rd November 2015 whereof the plaintiff sought for judgment as follows:

- i. Special damages 15,008,703/-*
- ii. General damages for pain and loss of amenities.*
- iii. Costs of the suit*
- iv. Interest on (a), (b) and (c) at court rates until full payment.*

2) The plaintiff's claim arises from a road traffic accident which occurred on 8.3.2011 along Nairobi Thika Highway in which the plaintiff alleged he suffered serious bodily injuries. The plaintiff wholly blamed the defendant for the accident and set out the particulars of negligence in the amended plaint.

3) The defendant filed a further amended defence on 12th May 2016 to deny the plaintiff's claim. In the aforesaid defence, the defendant admitted the occurrence of the accident but denied liability and instead averred that the accident occurred due to the negligence of the plaintiff and stated the particulars of negligence in its further amended defence.

4) When this suit came up for hearing, the plaintiff testified and summoned four (4) witnesses to testify in support of his case. The defendant on its part summoned two (2) witnesses to testify in support of its defence. The plaintiff adopted the contents of the written witness statements dated 25.7.2011 and 24.4.2015 as his evidence in chief.

5) It is the evidence of Muturi Kigano (PW5) the plaintiff herein that he has practiced as an advocate of this court for 40 years. He stated that he practices in the name and style of Kigano & Associates. PW5 stated that he owns several properties in Nairobi and elsewhere in Kenya. He also averred that he engages himself in horticultural farming and that he derives his income from practice, rents and horticultural farming.

6) The plaintiff further told this court that he has been a licensed driver since 1970. PW1 stated that on 8th March 2011 at about 10.00pm he drove his motor vehicle registration no. KAV 412M make Toyota Lexus along Nairobi-Thika road when at a spot near Juja Township without any prior warning or road signs, the road

was suddenly blocked by heaps of murram soil debris, concrete slabs and a makeshift deviation created on the said heaps to the right at about 90 degrees turn.

7) He also stated that the main road he was driving was on to the deviation. PW5 said he braked but the deviation was so sudden that he hit the murram heaps and the concrete slabs. As a result, he lost control and the vehicle overturned several times and landed on the opposite side of the road.

8) The plaintiff stated that the car roof and other side metal frameworks crushed on him and was trapped inside the car. He said he had his seat belt on throughout and was rescued by members of the public to get out of the car. PW5 said he was taken to Jomo Kenyatta University of Agriculture clinic and to Nairobi Hospital the following day i.e on 9/3/2011 where he was admitted and discharged on 22nd March 2011.

9) The plaintiff further stated that he underwent several operations and surgical procedures under the care of Dr. Oluoch-Olunya, a consultant neurosurgeon and Dr. Khainga, a Consultant plastic and reconstruction surgeon. The plaintiff also stated that after he was discharged he attended Dr. Khainga's clinic at Aga Khan Hospital Doctors Plaza on regular basis.

10) PW5 also stated that he underwent a further surgery at the Aga Khan Hospital to further flap the head skull under the care of Dr. Khainga and that as of 25.7.2011 he was still attending the clinic for care medications and dressing. PW1 further stated that since the accident he has not been able to perform his office and other duties. He said that he has not been able to attend court and that he has incurred and continue to incur enormous resources on hospital and medical outlays and his car became a write off.

11) The plaintiff further averred that he has been a regular user of the Nairobi – Thika road since 1970 and at times he used to drive along the road twice a day hence he knew all the corners and other road features prior to the defendant's construction works.

12) PW5 further stated that at the time of the accident there were no construction warning either in writing or in lightings or physical presence of personnel to flash and give warnings, signals of any road disruptions, blockages or impediments.

13) In his evidence in cross-examination and re-examination PW5 stated that the accident affected his businesses because he could not pay personal attention. He said he had to engage other lawyers to run his law firm which nearly collapsed due to his absence. PW5 also produced as exhibits in evidence two bundles of documents as PExh. 1(a) and PExh. 1(b).

14) Atanasio Gichohi kabaire (PW1), a motor vehicle inspector by profession informed this court that he visited the scene of the accident on 11.3.2011, two days after the accident. PW1 said he saw heaps of soil and concrete blocks dumped on the road without any warning signs to alert motorists of any danger posed by the foreign material dumped on the road.

15) PW1 further stated that there was a sudden deviation but with no sign alerting motorists of the deviation. He also said there were no bumps or speed limits to slow down motorists.

16) Hebron Mbere Kabaaru (PW2) a photographer by profession, told this court that he visited the scene of the accident on 5th April 2011 and saw no bumps nor deviation signs to warn motorists.

17) Abraham Maina Gathogo (PW3) told this court that on 9.3.2011, he was on his way to Mweiga in Nyeri driving motor vehicle registration no. KAK 021M along Nairobi-Thika highway accompanied by his wife and two sons. He said that upon passing the JKUAT overfly bridge near Juja Police Station there was a sudden and unmarked road blockage by heaps of concrete blocks, slabs and assortment of murram and debris. PW3 said his car hit the blockage and lost control and landed in a ditch. PW3 averred that there was no warning to motorists. He also said that there were no bumps or speed limit signs erected along the road.

18) John Kibatha Njoroge (PW4) the plaintiff's accountant and auditor presented before this court the plaintiff's financial statement for years 2010 and 2011 he prepared. In his evidence in cross-examination, PW4 stated that the

loss and profit made by the plaintiff cannot solely be attributed to the accident the plaintiff was involved. In re-examination PW4 said he believed the loss made by the law firm is attributable to the accident. He further stated that based on his observations, information and explanations furnished by the firm, the loss of ksh.12,975,569/= is attributable to the plaintiff's absence from the law firm in the year 2011 following the said accident.

19) I have already stated that the defendant summoned two witnesses to testify in support of its case. Mcbain Matolo Kyengo (DW1) the defendant's foreman between the years 2008 and 2014 said that his work entailed ensuring the safety of the roads while under construction. DW1 said he put up good and visible road signs along Thika Superhighway as per the Highway Code. He said that he engaged full time flagmen backed by a 24 hour vehicle whose sole aim was to oversee that all signs and reflective concrete blocks are in order.

20) DW1 further stated that all construction works, deviations, closing some section of the road are supervised by government appointed consultants and approvals were only made after all safety and traffic evaluation measures have been thoroughly put in place.

21) It is the evidence of DW1 that there were various signs at certain intervals warning motorists to drive at 30km/hr. It is also said that 100 and 50 metres from any diversion there were signs with reflective material indicating a diversion ahead.

22) DW1 further said that on 9.3.2011, the morning of the accident, he visited the scene of the accident near Juja Police Station whereupon he took photographs of the road beginning at 200 metres from the scene of the accident.

23) DW1 claimed that the photographs show the 30km/hr speed limit signs at various intervals. He also said that there was a conspicuous road sign 100 to 50 metres before the scene of the accident indicating to motorists of a deviation and bumps ahead and warning motorist to slow down.

24) DW1 also said that the signs can be seen from as far as 80 metres away.

25) He further said that a stop and a no entry sign had also been placed at the scene. He claimed that the plaintiff was speeding without heeding the warning signs thus solely causing the accident.

26) The defendants second witness, Elizabeth Mbithe Kimanthi (DW2) stated that she was employed as the Assistant Human Resource and Safety Officer by the defendant. DW2 said that the defendant embarked on the work of putting in place various safety and traffic management measures along Thika Superhighway. She said the defendant set up a safety team and recruited qualified carpenters to make good and visible road signs as per the highway Code.

27) DW2 claimed that the defendant lined full time flagmen backed up by a 24hour vehicle to oversee all road signs and reflective concrete blocks are in order.

28) DW2 further stated that the deviations and closure of some sections of the road were supervised and approved by government appointed consultants. DW2 also stated that there were deviation signs placed 50 metres before the scene of the accident.

29) DW2 also claimed she was informed by a police officer who is now deceased that the plaintiff was drunk while driving his motor vehicle at high speed. She solely blamed the plaintiff for the accident.

30) The plaintiff and the defendant did not file the agreed issues but they each opted to file their separate issues. The plaintiff identified the following as the issues this court should determine:

i. Whether the accident was caused by the negligence of the defendant.

ii. Whether the accident was caused by the negligence of the plaintiff.

iii. Whether the plaintiff sustained serious bodily injuries, loss and damage as a result of the accident.

iv. What is the quantum of damages payable to the plaintiff, if any?

v. Who pays the costs of this suit.

31) The defendant on the other hand identified the following as the issues for determination:

i. Whether the road had proper signage

ii. Whether the plaintiff was speeding

iii. Whether the defendant owed a duty of care and whether the defendant breached that duty?

iv. Whether there was causation?

32) I have carefully examined the separate issues and I think the following broad issues should be treated as the main issues left for the determination of this court

i. Whether the defendant owed the plaintiff a duty of care and whether it breached that duty.

ii. Whether the defendant is wholly to blame for the accident.

iii. Whether the plaintiff sustained serious injuries, loss and damage as a result of the accident.

iv. What is the quantum of damages to the plaintiff if any

v. Who should pay for the costs of this suit.

33) On the first issue as to whether the defendant owed the plaintiff a duty of care and whether it breached that duty. It is the submission of the defendant that under both common law and statute, the duty of care owed to road users by the appropriate road's authority is absolute and non-delegable.

34) The defendant argued that where someone employs an independent contractor to do work on his behalf, he is not ordinarily responsible for any tort committed by the contractor in the course of execution of the work – except in cases where the employer is under some statutory duty which he cannot delegate or in cases involving operations on the highway which may cause danger to persons using the highway. The defendant cited inter alia the English case of **Penny vs Wimbledon UDC 1899 2QB72** in which the English

Court of Appeal upheld Bruce J's finding as follows:

“Where a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary precautions are not taken, he cannot escape liability by seeking to throw blame on the contractor.”

35) The defendant further pointed out that the Roads Act no. 2 of 2007 provided for powers and functions of Kenya National Highways Authority which includes the management, development, rehabilitation and maintenance of national roads. The defendant argued that the Roads Act contains no provision limiting or absolving an Authority from liability in constructing, maintaining or ensuring safety on any highway.

36) The defendant also cited the Canadian Supreme Court decision in the case of **Lewis vs British Columbia (1977) 3 S.C.R 1145** in which it was held inter alia **“it is the minister who authorized and empowered by statute to maintain highways. The minister may delegate the work involved in doing so, but he may not delegate the duty. That duty accompanies the power, and not the doing of the work.”**

37) In sum, the defendant argued that it is plain that both the statute and the decided cases do not impose or transfer the duties or responsibilities for road construction safety in the instant case or otherwise on the Government of Kenya nor to the independent bodies established under the Roads Act.

38) The defendant further stated that the contract document does not transfer or confer the duty to manage traffic, including safety measures on the road to the contractor and that the final authority and duty is therefore left with the Roads Engineer who is an employee of the Government.

39) It is also argued that the specifications of the signs as well as the location to place the signs is the duty of the Road Engineer. The defendant was emphatic that it did not and could not possibly owe a duty of care in the circumstances.

40) In response to the defendant's submissions, the plaintiff submitted that the defendant contends wrongly that it was the Kenya National Highways Authority which owed the plaintiff and the general public a non-delegable duty of care. The plaintiff pointed out that the defendant had previously raised the issue vide the motion dated 19th May 2016 in which the defendant sought to have this suit struck out on the basis that there was no reasonable cause of action in law, therefore the issue on non-delegable duty of care is debarred by the doctrine of estoppel and resjudicata.

41) It is not in dispute that the defendant filed a formal application dated 19th May 2016 in which it sought for inter alia an order seeking to strike out the suit on the basis that the duty of care was vested in the Ministry of Roads and the relevant authority and that the same was non-delegable.

42) The aforesaid application was heard and determined on its merits by this court vide the ruling delivered on 31st March 2017. While dismissing the application this court expressly stated that the defendant was mandated to control and routinely maintain traffic during the construction period. The ruling seem to suggest that the ministry of Roads delegated the duty of care. In other words, the court found that the duty of care was delegable.

43) With respect, I agree with the plaintiff that the defendant owed it a duty of care.

44) I have looked at the agreement executed by the plaintiff and the defendant and it is apparent that the same expressly stated that the duty of care is solely vested in the Ministry of Road and Kenya National Highways Authority. In my view both the contractor (employer) and the contractee owed a duty of care to the plaintiff and members of the public.

45) If the defendant felt the duty of care was solely on the part of the employer, it would have as well taken out third party Proceedings but the defendant failed to do so. The defendant cannot now turn around and blame a party which is not a part to the suit.

46) The relevant statute i.e The Roads Act no. 2 of 2007 does not expressly state that the duty of care bestowed upon Kenya Highways Authority is non delegable. The defendant cannot therefore avoid the duty of care.

47) Having come to the conclusion that the defendant owed the plaintiff a duty of care, I now turn to the second issue as to whether the defendant is wholly to blame for the accident? It is the submission of the plaintiff that he presented credible evidence to show that the defendant had failed to erect warning signs or speed limits, deviation and or bumps.

48) It is the submission of the defendant that there were road signages warning motorists of deviations and also showing a speed limit of 30km/hr. The defendant further pointed out that the plaintiff was overspeeding on a road under construction and at night hence he is wholly to blame.

49) Having considered the evidence tendered by both sides plus the rival submissions and the authorities cited. The plaintiff (PW5) testified by stating that he was a regular user of the road. He said that on the material date there were no warning signs to indicate there was a deviation. He stated that the road had been blocked by heaps of murram soil debris, concrete slabs and a make shift deviation.

50) He stated that the road had been blocked by heaps of murram soil debris, concrete slabs and a make shift deviation created. The plaintiff said that because there were no warning signs he only saw the heaps of murram and concrete slabs too late thus making his vehicle to hit the murram soil and concrete slab.

51) Atanasio Gichohi Kabaire (PW1) a motor vehicle inspector, visited the scene about three days after the accident. It is his evidence that he saw excavations and heaps of soil and concrete blocks dumped on the road without warning signs. He also said there were no bumps nor speed limits to slow down motorists.

52) The defendant also summoned Matolo Kyengo (DW1) to rebut

The plaintiff's evidence. He claimed he visited the scene a day after the accident and took photographs of signs showing a speed limit of 30km/hr at various intervals.

53) He also said that there were conspicuous road signs indicating to motorists of the deviation ahead and some bumps.

54) In his evidence in cross-examination, DW1 stated that though there were signs of speed limits, there were no lights showing diversions. DW1 also stated that he cannot tell whether there were interference of the scene of the accident after the accident.

55) Elizabeth Kimanthi (DW2) stated that she was told by one Richard Macharia that the accident was caused by speeding on the part of the plaintiff. Unfortunately, Richard Macharia, who entered that information into the police O.B was not summoned by the defendant to testify therefore the evidence alleging that the plaintiff was driving in high speed remain as hearsay and of little probative value.

56) DW1 stated that he took the photographs produced as exhibits in evidence. DW1 admitted that he was not a professional photographer. He also admitted that he did not personally process those photographs.

57) The weaknesses pointed out in DW1's testimony weakens the strength and reliability of such evidence.

58) After weighing the competing evidence, I am convinced that the evidence of PW1 and PW5 are more reliable than those of DW1 and DW2. I am satisfied that the defendant failed to put warning signs to motorists as stated by the plaintiff. I find that the defendant breached the duty of care to the plaintiff hence it is solely to blame for the accident.

59) The third issue is whether the plaintiff suffered severe bodily harm. The plaintiff produced the P3 form which links the injuries the plaintiff suffered to the accident that occurred on 8th March 2011. The plaintiff also produced as exhibits in evidence medical reports and discharge summaries. PW5 also stated that he underwent several surgeries and was also in and out of hospital several times.

60) Professor Ominde Khainga stated in his evidence that there were a large degloving injury on the plaintiff's left frontal area measuring approximately 8cm x 6cm diameter with exposed skull bone and visible linear fracture.

61) He was opined that the scars would remain permanent and doctor recommended future medical procedures which he estimated at between ksh.500,000/= and ksh.600,000/=.

62) Dr. J. N. Muiuru, a consultant ear, nose and throat examined the plaintiff and opined that the plaintiff has post traumatic head injury sensory neural hearing loss of both ears thus confirming the plaintiff complaint of reduced hearing.

63) It is therefore apparent that the plaintiff suffered extensive degloving head/scalp injuries, fracture of the skull and loss of frequency sensory neural hearing of both ears.

64) The fourth issue is on quantum. The plaintiff sought for both special and general damages. The plaintiff prayed to be paid ksh.15,008,703/= as special damages and gave the particulars as follows:

Medical expenses

Nairobi hospital fees ksh.454,681/=

Neuro and reconstructive surgery

Fees and further hospital and

Consultancy fees ksh.483,571/=

Medical report ksh. 2,500/=

Towing charges ksh. 17,920/=

Loss of earnings ksh.12,975,569/=

Future medical expenses

Reconstructive surgeries ksh.600,000/=

Implanting of hearing aid gadgets ksh.160,000/=

65) It is the submission of the plaintiff that the claim on special damages were pleaded and strictly proved by way of receipts.

66) The plaintiff summoned an accountant (PW4) who produced audited accounts to confirm that the plaintiff's law firm lost income to the tune of ksh.12,975,569/= directly as a consequence of the plaintiff's inability to attend to his duties as an advocate during the period he was hospitalised and recuperating due to the injuries he sustained.

67) The plaintiff also produced income tax returns for the relevant period to support his claim for loss of income. On its part the defendant countered the plaintiff's claim on special damages. It was pointed out that the plaintiff had failed to provide evidence for payment of ksh.2,500/= for the medical report and kshs.100 for police abstract.

68) With respect, I agree with the defendant that though the above amount were pleaded, no credible evidence was tendered to prove the same.

69) The defendant also contested the claim by the plaintiff for payment made by Fredrick Ndegwa and Janifer muruti. The plaintiff had stated in his evidence that those payments were made on his behalf while he was sick hence he could not personally make payments.

70) I find the defendant's objection unmerited and find that the plaintiff had given plausible explanation as to why payments were made by other people while he was sick.

71) The defendant further objected to production of receipts which has no stamp duty. I find the objection to be without merit. Such an objection should be raised before the documents are admitted. In this case learned counsels admitted the documents as exhibits by consent.

72) Under Section 19(3) of Stamp Duty Act, those documents can be admitted and parties may be directed to have them stamped thereafter.

73) The plaintiff produced statement of accounts prepared by PW4 showing that the plaintiff made a loss of ksh.12,975,569/= as a result of his absence from the office due to the injuries he sustained.

74) It is the submission of the defendant that the plaintiff failed to issue a certificate prepared by an accountant as required under Section 81 of the Advocates Act. It was also pointed out that the statement of account did not distinguish between the client and office account.

75) With respect, I am persuaded by the defendant's argument that the statement of account tendered by the plaintiff is highly speculative and did not show a true state of affairs in the plaintiff's law firm. In any case PW4 stated while under cross-examination that the loss and profit made by the plaintiff's law firm cannot solely be attributed to the accident the plaintiff was involved. Consequently, I decline to make the award.

76) In the end I award the plaintiff ksh.2,030,534/= as special damages proved.

77) The plaintiff sought to be awarded ksh.20,000,000/= as general damages for pain, suffering and loss of amenities. The plaintiff cited the case **MKK =vs= John Mutua Kimeru (2018) eKLR** in which the claimant who suffered comparable injuries was awarded 9,000,000/=. The plaintiff also relied on the case of **Ngure Edward Karega =vs= Yusuf Doram Nassir (2014) e KLR** where the claimant was awarded ksh.5,000,000/=.

78) The defendant on its part proposed an award of ksh.500,000/=.

It relied on the case of **Tirus Mburu Chege & Another =vs= J.K.N (2018) eKLR** where the plaintiff was awarded ksh.500,000/=.

79) I have considered the rival proposals and I am convinced that the authorities cited by the plaintiff appear to be in respect of near similar injuries as those suffered by the plaintiff. In the circumstances I am satisfied that an award of ksh.8,000,000/= is reasonable and within the range of comparable awards.

80) In the end, judgment is entered in favour of the plaintiff and against the defendant as follows:

- (i) **Special damages ksh.2,030,534/=**
- (ii) **General damages for pain,**
- (iii) **Suffering and loss of amenities ksh.8,000,000/=**
- (iv) **The award on (i) above to attract interest at court rates from the date filing suit until the date of full payment.**
- (v) **The award on (ii) above attract interest at court rates from the date of judgment until the date of full payment.**
- (vi) **The plaintiff is awarded costs of this suit.**

Dated, signed and delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant