



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 278 OF 2015

LYDIA MORAA MOKAYA.....APPELLANT

VERSUS

PATRICK KIARIE.....1ST DEFENDANT

SIMON GITHINJI WANJIKU.....2ND DEFENDANT

JUDGMENT

On 22nd January, 2014 the plaintiff was involved in a road traffic accident along Magadi road while travelling as a passenger in motor vehicle registration number KBE 451Y, matatu. The vehicle collided with a lorry registration number KAN 527V. At the time of the accident the plaintiff was 21 years old and a student at the University of Nairobi undertaking a Bachelors of education degree.

Two witnesses testified for the plaintiff's case. It is the Plaintiff's evidence that it was the lorry which hit the matatu. The matatu rolled several times and she sustained spinal injuries and injuries on the upper limbs. She is paralysed and on a wheelchair. She is still on medication and takes supplements. She requires a motorised wheelchair for her movement. She is required to undergo physiotherapy but due to lack of finances she can't. She is seeking future medical expenses. According to her, it is the lorry which caused the accident.

In her witness statement dated 27th July 2015, it is indicated that as a result of the accident her life took a turn for the worst. She had to defer her studies at the university. She has lost the use of her lower limbs. Her spinal cord requires permanent medical check-up and she is completely dependent on other people for her basic needs. She is required to undergo physiotherapy four times a week.

PW2 ABEL OYUGI MOKAYA is PW1's father. He is a health worker at Umoja health centre. It is his evidence that the plaintiff was admitted at Kenyatta Hospital where she spent 11 days. Her condition worsened and he moved her to Nairobi Hospital where she was admitted for 25 days and her condition stabilised. She was moved to the spinal injury hospital for rehabilitation where she stayed for a further six months until September, 2014 when she was discharged. It is PW2's further evidence that his family has spent over Kshs. Six (6) million in medical expenses. She is on special diet, requires a special bed and due to her condition he has hired a full time nurse who takes care of her. The nurse is paid Kshs.1,500 per day. They have to hire taxis whenever she requires to travel.

The defendants entered appearance and filed defence. The case proceeded *ex-parte* as counsel for the defendants did not attend the hearing.

Counsel for the plaintiff in his written submissions states that the plaintiff suffered serious injuries as per the medical report by Dr. P.K. Wanyoike dated 25th September, 2014. The plaintiff also incurred medical expenses totalling Kshs.1,360,999/26 which are pleaded as follows:-

- a) Kenyatta National Hospital Bill Kshs 190,500**
- b) Nairobi Hospital Bill Kshs 313,000**
- c) Doctor's Fees Kshs 707,000**
- d) General Expenses (Bundle of receipts) Kshs 124,999.26**
- e) Medical report Kshs 5,000**
- f) Official search Kshs 500**

g) National Spinal injury Hospital Kshs 20,000

Total Kshs 1,360,999.26

It was further submitted that the plaintiff requires future medical expenses. The plaintiff was 21 years old and a multiplier of 35 years has to be applied to compute the future medical expenses. The future medical expenses are:-

a) A motorized wheel chair at a cost of Kshs 400,000 together with costs of annual replacement of parts and maintenance at Kshs 5000 per year - Kshs 575,000.

b) Permanent nursing assistant at a cost of Kshs 15,000 per month for life - Kshs 6,300,000.

c) Drugs for evacuation of stool from the system at Kshs 1000 per week. Kshs 1,680,000.

d) Urinoms, urine bags, bed under pads, adult diapers and catheters at Kshs 4,000 per month Kshs 1,680,000.

e) Future checkups and purchase of medicines Kshs 5.000 per month totaling to Kshs 2,100,000.

f) Special hydraulic electric bed at Kshs 400,000.

g) Special mattress at Kshs 150,000.

h) Transportation costs for outpatient monthly follow up clinics at Kshs 2500 per month-Kshs 1,050,000.

It was additionally submitted that the plaintiff's life has been affected. She has been rendered 100% dependent on other people. No monetary compensation can adequately reinstate her to her original position before the accident. Counsel urged the court to award Kshs. Six million (6,000,000) as special damages.

Counsel for the plaintiff also urged the court to award damages for loss of future earnings and earning capacity. The plaintiff would have earned a monthly salary of Kshs.30,000 and worked upto the age of sixty. It is submitted that an award of Kshs.12,600,000 is reasonable compensation for loss of future earnings.

Counsel referred to the case of **WEST(H) and sons LTD –V- SHEPHERD (1964) A.C 326** where Lord Morris stated as follows:-

"All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

Counsel for the plaintiff contend that the injuries suffered are quite severe and were caused by the lorry driver. Counsel urged the court to find the defendants 100% liable. Counsel urged the court to award Kshs.40 million as general damages. Counsel relies on the case of **NGURE EDWARD KAREGA –V- YUSUF DORAN NASSIR (2014) eKLR** where the plaintiff suffered similar spinal injuries and permanent incapacity was assessed at 100%. The plaintiff was awarded Kshs.5 million as general damages, Kshs. 9,576,000 for loss of future earnings, Kshs. 2,164,974 for medical expenses, Kshs. 3,091,200 for a nurse aide, Kshs. 5,133,600 for specialised needs such as bed pads, diapers and catheter and Kshs. 361,340 for future purchase of motorised wheel chair. The total award was Kshs. 25,327,114.

Reference was also made to the case of **BEATRICE ANYANGO OKOTH –V- RIFT VALLEY RAILWAYS (Kenya) Ltd & KENYA PORTS AUTHORITY (2018) eKLR**. In that case the plaintiff lost the use of her lower limbs and permanent incapacity was assessed at 80%. The court made a total award of Kshs. 18,522,657.

The defendants filed defence through the firm of Mbigi Njuguna & Co. Advocates. The said advocates were served with a hearing notice but did not attend the hearing and the cases proceeded ex-parte. There is an affidavit of service by Jones Ogembo Benecha sworn on 22nd June, 2021 indicating that the defendant's advocates were served on 22nd June, 2021. The hearing notice dated 15/6/2021 bears the stamp of the defendants' advocates.

The defence is to the effect that the accident was caused by the owner or driver of motor vehicle registration number KBQ 474Q which obstructed the rightful path of motor vehicle registration number KAN 527V. The plaintiff was travelling in motor vehicle registration number KBE 451Y. The vehicle did not cause the accident. The defendant did not enjoin the owner or driver of motor vehicle registration number KBQ 474Q as a third party. The witness statement of the 2nd defendant who was the driver of motor vehicle number KAN 527N is that he was on his rightful path when a canter suddenly obstructed him. He hit the canter at the back and the canter went to hit other vehicles including the matatu where the plaintiff was a passenger.

The police abstract indicates that Simon Githinji Wanjiku, the 2nd defendant, was charged with the offence of careless driving and the case was pending in court. The abstract does not mention motor vehicle number KBQ 474Q. It is PW1's evidence that that matatu was hit by the lorry from behind and it rolled several times. I am satisfied that the accident was caused by the driver of the lorry number KAN 527V and hold the defendants 100% liable.

On the issue of quantum there are medical reports detailing the plaintiff's injuries. Dr P.K. Wanyoike's medical report dated 26th September 2014 indicated that the plaintiff suffered spinal injury (Burst compression fracture LI with cord transection) and fracture of the left humerus. She is paralysed on the lower limbs. She did undergo Laminectomy and decompression of LI with pedicle screw fusion from T11 and T12 to L2 and L3. She uses a wheelchair and requires long term psychological and physical support and a motorised wheelchair. The doctor concludes "that the loss of function of both her lower limbs due to paralysis bladders and bowel control, sexual function, stress of surgery and long term care is estimated at 90%"

The case summary from Kenyatta National Hospital dated 3rd February 2014 indicate that the plaintiff suffered fracture of the spinal code and fracture of the left humerus. There is also a discharge summary from the National Spinal Injury referral hospital dated 22nd September 2014. The plaintiff was also examined by professor Lule who did a report on 6th February 2014. The report indicate that the plaintiff suffered fracture proximal, left humerus, desloughing injury of left hand and spinal injury leading to paralysis. She was admitted at Kenyatta Hospital but her condition worsened and was transferred to Nairobi Hospital. Professor Lule was attending to her at Nairobi Hospital when the report was made and sent to the Chief Medical Officer, University of Nairobi.

In the case of **ALEX OTIENO AMOLO –V- HELLEN AKINYI OTIENO (2016) eKLR** the claimant was hospitalised for one year. She suffered complete spinal transection with paraplegia, multiple fractures of both side ribs plus other soft tissue injuries. She also suffered comminuted fracture of the left tibia. Justice Majanja awarded Kshs. 6,000,000 as general damages and Kshs. 1,036,800 as loss of earning capacity. The claimant used to earn Kshs.800 daily.

In the case of **SIMON TAVETA –V- MERCY MUTITU NJERU (2014) eKLR** the claimant suffered complete paralysis of the limbs. She was completely paralysed from the waist downwards. The accident occurred on 10th December, 2009. The High Court awarded her Kshs. Four million (Kshs. 4,000,000) as general damages. The award was reduced to Kshs. 3,500,000 by the Court of Appeal in Nyeri on 5th February, 2014.

Similarly, in the case of **NELSON MCHADI –V- RARICK OBUBA (2021) eKLR** the plaintiff suffered fracture of the spine leading to complete paralysis. The court (P.J. Otieno J) awarded Kshs. Six Million (Kshs.6,000,000) as general damages, Kshs.3,000,000 as costs of a helper, Kshs.2,500,000 for future medical treatment, Kshs.600,000 as costs of a motorised wheel chair and Kshs.12,500 as costs of annual maintenance of the wheelchair. This made a total award of Kshs.12,271,355.

From the above authorities, I do find that comparable injuries have attracted an award of between Kshs. 3,500,000 to Kshs.6,000,000. The decision of the Court of Appeal that reduced an award to Kshs.4,000,000 to Kshs.3,500,000 involved a 2009 accident. Recent decisions have awarded a sum of Kshs.6 million. I would also wish to indicate that the plaintiff herein was 21 years old. She would have to remain in a wheel chair for the rest of her life. In the above authorities, the claimants were adults who were already working. I do find that an award of Kshs. Seven Million (Kshs.7,000,000) will be reasonable compensation as general damages for pain and suffering.

The next claim involves loss of earning capacity and future earnings. The plaintiff was not working and therefore what the court can award is loss of earning capacity as opposed to loss of known future earnings. However, the award of loss of earning capacity can as well be based on an estimated income. The plaintiff was undertaking a bachelor's degree in Arts (education) and would have become a teacher. I do appreciate that even in her present condition she can take up a teaching job but that requires a lot of effort. A prudent employer would have to come by and agree to employ a staff who is paralysed and on a wheel chair. I do find that the plaintiff is entitled to an award of loss of earning capacity.

Counsel for the plaintiff submitted that she would have earned Kshs.30,000 monthly and a multiplier of 35 years would be ideal. This would give her a total sum of Kshs.12,600,000. Although the proposal is reasonable, I do find it to be a bit excessive. I do appreciate the fact that the proposed salary of Kshs.30,000 is to be applied throughout the multiplier period. However, the expected salary is being awarded as a lump sum. There is also the possibility of not getting employed. I do find that the salary of Kshs.30,000 monthly for a graduate teacher or worker is quite reasonable. I will however reduce the multiplier of 35 years to 25 years. This makes the following award Kshs.30,000 x12 x25= Kshs.9,000,000.

The plaintiff is also seeking future medical expenses. This will cater for permanent nursing care, drugs for evacuation of stool at Kshs.1,000 per week, urine bags, bed under pads, adult diapers and catheters. In the case of **Ngure Edward Karega (supra)** Justice H. A. Omondi awarded Kshs.5,133,600 for specialised needs including diapers, catheter, bed pads, and urine bag. The plaintiff is seeking Kshs.1,680,000 at the rate of Kshs.1,000 per week for specialised drugs and Kshs.1,680,000 for diapers, bed pads, catheter and urine bags at the rate of Kshs.4,000 per week. The above computation is based on a multiplier of 35 years. Having adopted 25 years as the multiplier, I will make a joint award for the two items as follows: Kshs.1,000 + 4,000 =5,000 4x12x25=6,000,000.

There is a claim for nursing assistant. The plaintiff's claim is for Kshs.6,300,000 at a monthly rate of Kshs.15,000 for life. I do award the proposed salary of Kshs.15,000 monthly for a period of 25 years. This will lead to the following award:

Kshs.15,000x12x25=4,500,000.

In the case of **Nelson Mchadi (supra)**, Kshs.600,000 was awarded for a motorised wheelchair. The plaintiff is seeking Kshs.400,000 for a motorised wheel chair. In my view, the plaintiff will require to repair the wheel chair and the proposed repair costs of Kshs.5,000 per year is quite fair. This translates to Kshs. 125,000 for a period of 25 years (5,000x25). The plaintiff is awarded Kshs.400,000 for a motorised wheelchair plus annual repair costs of Kshs.125,000 for 25 years making a total of Kshs.525,000.

A bundle of receipts and other documents were produced to establish the claim for special damages. The plaintiff did undergo several processes and was attended to by several doctors. I am satisfied that the claim for Kshs.1,360,999/26 as special damages has been proved.

I do therefore enter judgment for the plaintiff against the defendants as follows:

- i. General damages – Kshs. 7,000,000
- ii. Loss of earning capacity – Kshs. 9,000,000
- iii. Future medical expenses – Kshs. 6,000,000
- iv. Nursing aide – Kshs.4,500,000
- v. Motorised wheel chair – Kshs. 400,000
- vi. Repairs to the motorised wheelchair – Kshs. 125,000
- vii. Special damages – Kshs.1,360,999

Total award - **Kshs.28,385,999**

The plaintiff shall have costs of the suit and interest at 14% per year on the awarded damages. Interest on the special damages shall accrue from the date of filing suit while interest on the other award shall accrue from the date of judgment.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE