



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 26 OF 2009**

**FATUMA DIYAY FARAH.....PLAINTIFF**

**-VERSUS-**

**ABDIRAHMAN ALI GALGALO.....1<sup>ST</sup> DEFENDANT**

**MANDERA COUNTY COUNCIL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff herein filed a suit by way of the plaint on 21<sup>st</sup> January 2009 and later filed an Amended one dated on 18<sup>th</sup> March 2015 and filed on 13<sup>th</sup> August 2015 and sought for judgment against the defendant in the following manner:

- a) General damages*
- b) Special damages for emotional distress and anguish*
- c) Special damages of Kshs.51,240/=*
- d) Special damages for the loss of the child*
- e) Costs of this suit*
- f) Interest on a,b and c at court rates until full and final settlement.*

2. The plaintiff pleaded in his plaint that on or about June 1, 2006, at approximately 11:20 a.m., she was lawfully walking around the Mandera/Rhamu Road near Fino stage when the 1st defendant carelessly negligently and recklessly drove motor vehicle KAH 086Y, causing it to veer off the road and hit her while she was seven months pregnant, causing her serious bodily harm.

3. The plaintiff further pleaded in her plaint that the 2<sup>nd</sup> defendant is vicariously responsible for the 1<sup>st</sup> defendant's carelessness, negligence, and recklessness as the registered owner of the vehicle operated by the 1st defendant as its agent, driver, and or employee. The plaintiff in paragraph 5 of the plaint listed the particulars of the negligence of the 1<sup>st</sup> defendant as follows:

- a) Driving at an excessive speed in the circumstances.*
- b) Driving carelessly and/or without any due care and attention.*
- c) Failing to stop, slow down or swerve any in order to avoid the occurrence of the said accident.*
- d) Failing to exercise and/or maintain any sufficient or adequate control of the said motor vehicle.*
- e) Ramming into the plaintiff*
- f) Failing to hoot, flash or otherwise warn the Plaintiff of his presence.*

4. It was also pleaded by the plaintiff in her plaint that she believed that the stillbirth was caused by the accident, which occurred as a consequence of the 1<sup>st</sup> defendant's carelessness and caused her irreparable suffering, loss, and damages.

5. Upon service of summons, the 1<sup>st</sup> defendant entered appearance and filed his statement of defence on 18<sup>th</sup> October 2018 and the 2<sup>nd</sup> defendant filed their statement of defence on 1<sup>st</sup> March 2018 to refute the plaintiff's claim.

6. At the hearing of the suit, the plaintiff testified and called one (1) additional witness, while the defendant closed its case without summoning any witnesses.

7. Fatuma Diyah Farah (PW1) adopted her signed witness statement as evidence and stated that she filed documents which she produced as PEXH1-14. She also relied on the medical report and receipt in the supplementary list marked for identification which her advocate produced and were marked as PMFI 13 and 14.

8. In cross examination, the witness stated that she was pregnant at the time of the tragedy 10 years ago and gave birth to a stillborn child. She further stated that all of her injuries were documented in the medical report. She further stated that she did not attend any meetings with the 1st defendant's council of elders, and that she has never been compensated.

9. In re-examination, it is the evidence of the aforesaid plaintiff that the car hit her from behind hence she could not see the number plate but her relatives made inquiries about the motor vehicle registration number. She further stated that she blames the accident for the loss of her pregnancy.

10. Kiarie Wangai (PW2) also adopted his signed witness statement as evidence and stated that he is a medical practitioner and presented a medical report dated 15<sup>th</sup> December 2017 in respect to the plaintiff who suffered the injuries specified in the said report as follows:

*i. Fracture of fibula and tibia*

*ii. Delgoris injury on the right leg*

*iii. Blunt injury to her pelvis*

*iv. Blunt injury to her chest*

*v. Blood loss*

*vi. Physical and psychological trauma.*

11. It was his evidence that the plaintiff was treated at Mandera hospital then later referred to St. Mary's Mission Hospital in Nairobi where she was admitted and later discharged while on crutches.

12. The witness also stated that the plaintiff had a still birth at the Mandera Hospital and that she had difficulties in walking since her right ankle is stiff due to suffering from arthritis. He further formed the opinion that the plaintiff suffered grievous harm, developed arthritis on the right ankle joint and also suffered 35% permanent disability.

13. In cross examination, the witness stated that he referred to the medical report of Dr. Theophylus which stated that the pregnancy loss may not have been as a direct result of the accident but it may have weakened the pregnancy since her pelvis was injured.

14. In re-examination, the witness stated that the accident would have an impact on the pregnancy because she had previously had pregnancies and had no history of miscarriages.

15. At the close of the hearing, this court invited the parties to file and exchange written submissions. At the time of writing this judgment, only the plaintiff had filed her submissions.

16. On their part, the plaintiffs through her submissions gave brief facts of the matter and identified two issues for determination to be as follows:

**i. Liability**

**ii. Quantum damages payable.**

17. On the issue of liability, the plaintiff submitted that she had proven her case beyond reasonable doubt and that the defendant had failed to produce any witnesses before court nor provide any proof before this court.

18. The plaintiff submitted that the 1<sup>st</sup> defendant being the driver was blamed for causing the accident by the police and had intended to prefer charges of careless driving against him and for that they urge the court to find the 1<sup>st</sup> defendant 100% liable for the said accident.

19. On the issue of quantum of damages and in particular special damages, the plaintiff submitted that she had successfully proved the same

and should be awarded the expenses incurred as follows:

- a) The Motor Vehicle search – Kshs.500/=
- b) The Police Abstract -Kshs.100/=
- c) Medical report -Kshs.1,500/=
- d) Medical expenses -Kshs.49,140/=

**Total -Kshs.51,240/=**

20. On the issue of general damages, the plaintiff argued that she has suffered and continues to suffer from back pains and emotional problems in her marriage as a result of the loss of her 7-month pregnancy, and she believes that a settlement of Kshs.5,000,000/= would be sufficient to compensate her for her pain, injuries, and loss of quality of life, given that she was at an advanced stage of her pregnancy.

21. On this argument the plaintiff relied on the case of **P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR**

**“On the claim for damages for loss of full term unborn baby, the plaintiff urged the court to award him kshs 5,000,000. His submissions, though not acknowledging the source of the material there under, can be found at [www.ambridelaw.com](http://www.ambridelaw.com) in an article titled “How much compensation is awarded for a loss of an unborn baby in a car accident?” The above article can be found from Google search engine. It acknowledges that there is no question that the death of a child is one of the most traumatic events one can experience; and so is the case with the death of a foetus, whether it be a miscarriage or still birth. Further, that in especially unfortunate circumstances the loss of a foetus can be caused by either intentional or negligent acts of the third party: as with medical negligence and motor vehicle accidents. In such cases, the article concludes, those suffering this devastating loss may seek compensation for their pain and suffering.”**

22. She further relied on the case of **Mrs. Joyce Muturi Sidiki v Paul Wambua & Another (HCCC.No.762 of 1985 Mombasa)** where the victim was 4 months pregnant at the time was awarded Kshs.60,000/= to compensate the Plaintiff for loss pain and suffering occasioned by the accident and resulting loss of pregnancy.

23. On the issue of loss of consortium the plaintiff urged the court to award the sum of Kshs.800,000/= due to the loss of the an unborn child, and it has been previously stated that life begins at conception; therefore, the plaintiff urges the court to consider this fact and award the plaintiff the said sum due to the loss of the child.

24. It is the plaintiff’s submissions that for the fracture on her right ankle, blunt trauma to the chest and pelvis and she therefore urges the court to grant an award of Kshs.500,000/=. On this she relied on the case of **Jitan Nagra v Abidnego Nyandusi Oigo (2018) eKLR** where the respondent was awarded a sum of Kshs.450,000/= in general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region ,blunt trauma to the chest, bruises on the left elbow compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.

25. Upon considering the evidence on record, the submissions and authorities relied upon by the parties, I established that the twin issues for determination are liability and quantum.

26. On the *first* limb to do with liability, following my examination of the evidence on record, both oral and documentary, I am satisfied that the plaintiff has on a balance of probability, proved liability against the defendants jointly and severally. The 1<sup>st</sup> defendant, driver of the accident motor vehicle was blamed for causing the accident by the police. He carelessly negligently and recklessly drove motor vehicle KAH 086Y, causing it to veer off the road and hit her while she was seven months pregnant, causing her serious bodily harm. Her evidence on how the accident took place has not been controverted. I therefore find the 1<sup>st</sup> defendant liable in negligence for the accident which caused the plaintiff serious injuries, pain and suffering.

27. I also find the 2<sup>nd</sup> defendant, being the owner of the accident motor vehicle registration No. KAH 086Y vicariously liable for acts and omissions of the driver/agent/servant, the 1<sup>st</sup> defendant. The plaintiff tendered a copy of records dated 12<sup>th</sup> February, 2008 as PEXH-5 indicating that the 2<sup>nd</sup> defendant was the registered owner of the subject vehicle at all material times.

28. The aforesaid evidence was not at all challenged by the defendants through evidence. In the absence of evidence to the contrary, I am of the view that the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of **Section 8 of the Traffic Act, Cap. 403 Laws of Kenya** which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

29. Furthermore, the plaintiff tendered the police abstract relating to the accident as PEXH-1, the contents of which I also considered. According to the police abstract, the 2<sup>nd</sup> defendant was indicated as being the owner of the subject motor vehicle while the 1<sup>st</sup> defendant was the driver.

30. The defendants on their part did not challenge the contents of the police abstract by way of evidence or at all during the trial. In the absence of contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in the case of **Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another (2010) eKLR** as referenced in the

case of **Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki [2016] eKLR** that:

**“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”**

31. The accident was reported to the police who issued her with a P3 form and a police abstract. There is also evidence that the owner of the motor vehicle and her insurer Kenya Orient Insurance Company Ltd were in communication and very much aware of this suit.

32. From the foregoing, I am satisfied that the plaintiff has proved on a balance of probabilities that the 2<sup>nd</sup> defendant was at all material times the registered owner of the subject vehicle.

33. Having settled the first issue, I turn my attention to the *second* issue on quantum and which I shall address under the following heads.

**a) General damages**

34. The plaintiff narrated to court the injuries she sustained following the accident. She was seven (7) months pregnant at the time of the accident and had a still birth. She further stated that she went to two (2) Hospitals that is in Mandera and Nairobi Hospitals where she was receiving treatments for the accident.

35. She developed arthritis and that the doctor assessed her permanent incapacity at 35%. She produced medical report and receipts to confirm the injuries.

36. This court has given due consideration to the findings in the doctor’s opinion as per his testimony, in court and the medical report produced. That the plaintiff suffered serious injuries which might have led to her losing of the baby. She has difficulties in walking since her right ankle is stiff due to arthritis.

37. The Plaintiff had suggested a sum of Kshs.5,000,000/= for the pain and injuries she suffered and loss of quality of life considering she was at an advanced stage in her pregnancy. She relied on the case of **P B S & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others(supra)** where the loss of a full term unborn baby ,the plaintiff urged the court to award the sum of Kshs.5,000,000/= . His submissions, though not acknowledging the source of the material there under, can be found at [www.ambridelaw.com](http://www.ambridelaw.com) in an article titled “ *How much compensation is awarded for a loss of an unborn baby in a car accident?*” In such cases, the article concludes, those suffering this devastating loss may seek compensation for their pain and suffering.”

38. I take cognizance of the fact that an award of general damages is an exercise of judicial discretion which is based on injuries sustained and comparable award for comparable injuries as was held in the case of **Simon Taveta – Vs – Mercy Mutitu Njeri [2014] eKLR**.

39. Taking into consideration inflation factors, I assess the plaintiff’s general damages for pain, suffering and loss of amenities to be ksh. 3,500,000/=.

40. I am guided by the case of **Florence Hare Mkaha – Vs – Pwani Tawakal Muni coach & Another (2012) eKLR Mwongo J** where the plaintiff fractured her right superior and inferior ramus of pubis fracture of ischium, fracture of right acetabulum, fracture lateral condyle of femur, dislocation of left knee with torn collateral ligament, skin graft surgery on left leg, shortened left leg by 4 cm. The court awarded her Ksh. 2,400,000/- general damages for pain, suffering and loss of amenities.

41. It is trite law that special damages must be both specifically pleaded and strictly proved. Having considered the pleading and having examined the evidence tendered by the plaintiff, I find that the plaintiff pleaded that she incurred special damages in the sum of Kshs. 51,240/- made up of:

Motor Vehicle Search	Kshs.500/=
Police Abstract	Kshs.100/=
Medical Report	Kshs.1,500/=
Medical Expenses	<u>Kshs.49,140/=</u>
<b>Total</b>	<b>Kshs.51,240/=</b>

42. The plaintiff produced receipts to prove the special damages incurred. Accordingly, I award her Sh. 51,240/- special damages as pleaded and proved.

43. In summary, I enter final judgment in favour of the plaintiff and against the defendants jointly and severally as follows:-

**i. General damages Kshs.3,500,000/=**

**ii. Special damages Kshs.51,240/=**

**iii. Interest on general damages at court rates from the date of this judgment until payment in full**

**iv. Interest on special damages from the date of filing suit**

**v. Costs of this suit**

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 30<sup>th</sup> day of December, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant