



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 232 OF 2011

LILIAN WANGUI MUHUYU.....1ST PLAINTIFF

ANTHONY MUHUYU GITAU.....2ND PLAINTIFF

-VERSUS-

SISTERS OF MERCY (Sued as the registered trustees of

THE MATER HOSPITAL).....DEFENDANT

JUDGEMENT

1. By way of a plaint dated 20th May, 2010 and amended on 30th June, 2010 the plaintiffs herein instituted a suit against the defendant. The plaintiffs pleaded that on or about the 8th of January, 2009 the 2nd plaintiff took the 1st plaintiff who is his wife to the defendant's hospital on complaints of feeling unwell.

2. It is pleaded that one of the defendant's doctors attended to the 1st plaintiff, carried out medical tests and thereafter prescribed a drug called 'Centrum,' following which the 2nd plaintiff raised concerns regarding the 1st plaintiff's speech which had become slurred and requested that she be admitted overnight for observation purposes but that the doctor reassured the plaintiffs and advised that the 1st plaintiff take the prescribed medication.

3. The plaintiffs pleaded that by the following day, the 1st plaintiff's condition had worsened, thereby causing them to return to the defendant's hospital for further check-up, adding that the performance of the necessary tests and interpretation thereof were delayed, the 1st plaintiff had suffered a stroke.

4. The plaintiffs in their plaint blame the defendant for inter alia, the misdiagnosis and delay in attending to and determining the 1st plaintiff's medical condition in good time, thereby doing little to prevent the stroke eventually suffered. The particulars of negligence were set out in the plaint.

5. Further to the above, it is the plaintiffs' averment that the stroke left the 1st plaintiff paralyzed on the right side of her body, which has gravely interfered with her ability to work as she previously did and perform her daily duties normally, adding that the 1st plaintiff had to undergo speech, physical and occupational therapy. It is as well pleaded that the plaintiffs have incurred costs in seeking treatment for the 1st plaintiff's condition. The particulars of loss and damage have equally been pleaded.

6. Ultimately, the plaintiffs are praying that judgment be entered in their favour in the following manner:

- a) *Special damages* *Kshs.2,105,693/*
- b) *Cost of future medical expenses* *Kshs.10,000,000/*
- c) *General damages*
- d) *Costs of the suit plus interest thereon*

7. Upon entering appearance, the defendant filed its defence dated 25th June, 2010 and amended on 14th July, 2010 essentially stating that while it admitted that tests were carried out upon the 1st plaintiff as pleaded, the same did not disclose any abnormalities. The defendant further denied that the 2nd plaintiff had requested to have his wife admitted overnight for observation as pleaded in the plaint.

8. Moreover, the defendant denied that there was a delay in attending to the 1st plaintiff upon her return to hospital for further tests, adding that the stroke suffered by the 1st plaintiff could not have been attributed to either negligence or breach of duty of care on its part or on the part of its employees.
9. In rejoinder, the plaintiffs filed a reply to defence reiterating the contents of their amended pleadings.
10. When the matter came up in court on 19th May, 2014, the parties recorded a consent on liability in the ratio of 80%:20% in favour of the plaintiffs. Consequently, the hearing proceeded solely on assessment of quantum of damages.
11. The plaintiffs called four (4) witnesses whereas the defendant relied on the evidence of one (1) witness. *Eddy Ndeto Kitemu* who was PW1 stated that he at all material times worked for Ceragem East Africa Ltd, which company sold a thermal massager to the plaintiffs at the cost of Kshs.240,000/-. He produced as evidence a copy of the receipt to that effect.
12. During cross examination, the witness testified that he is not a medical doctor but received training in treatment of the spine and nerves as well as oriental medicine. PW1 also admitted that not only is the company he worked for at all material times not recognized by the Kenya Medical Practitioners and Dentists Board but the thermal massager purchased by the plaintiffs does not constitute part of conventional treatment.
13. PW2 who was *Judy Wambui Maina* stated in her oral evidence that she is a nurse at all material times working with Health Management Agency and that certain receipts forming part of the plaintiffs' list and bundle of documents were issued by her employer to the 1st plaintiff together with invoices. She went ahead to produce the same as exhibits in court.
14. On being cross examined, Judy Wambui testified inter alia, that she provided home based care to the 1st plaintiff for about 3 to 4 years, thereby making reference to various receipts and invoices indicating the same.
15. The 2nd plaintiff who gave evidence as PW3 essentially identified and produced various other receipts and salary documentation forming part of the filed list of documents. This witness went further to state that the 1st plaintiff required physiotherapy, occupational therapy as well as speech therapy, which she undergoes twice a week and for which he pays between Kshs.2,000/ and Kshs.4,000/ for each session. He also gave evidence that ordinarily, he drops her off for her therapy sessions or alternatively hires taxi services, spending approximately between Kshs.600/ and Kshs.1000/ a week on transport.
16. On cross examination, the 2nd plaintiff clarified that whereas he paid a majority of the 1st plaintiff's medical bills, a few others were paid by the 1st plaintiff's employer, International Committee for the Red Cross (ICRC). Upon re-examination, PW3 made reference to the medical report by Dr. Moses Kinuthia assessing permanent incapacity for the 1st plaintiff at 70%.
17. *Dr. Moses Kinuthia* vide his evidence as PW4 stated that he examined the 1st plaintiff on 25th June, 2013 and prepared a medical report to that effect, which he produced as evidence before this court. The doctor testified that he essentially relied on the history given to him by the 2nd plaintiff alongside the relevant documentary evidence availed to him.
18. During cross examination, it was PW4's evidence that the 1st plaintiff's condition had improved though he noted weakness in her lower limb, adding that her degree of incapacity was 70% as per his findings at the time of preparing his report, further stating that the same may have since reduced. Subsequently, the plaintiffs closed their case.
19. In support of the defence case, *Doctor Karen Mbaabu* in her oral testimony as DW1 stated that she was at all material times an employee at the defendant's hospital. The witness clarified the averments made in the defence, stating that the 1st plaintiff was adequately examined on the basis of the symptoms presented at the hospital, including the fact that prior to the hospital visit, the 1st plaintiff had indicated that he had undertaken a three (3)-day fast which could have presumably contributed to her sense of feeling weak/lethargic.
20. During cross examination, the witness testified that depending on the underlying cause of her medical condition, the 1st plaintiff may continue to receive treatment for life; though the duration of treatment varies from one case to another. The defendant thereafter closed its case.
21. It followed that parties exchanged written submissions in respect to quantum and which submissions were later highlighted in court.
22. The plaintiffs in their submissions filed on 24th August, 2018 proposed the sum of Kshs.10,500,000/ as general damages for pain and suffering, and loss of amenities, citing the cases of *Buchan v Ortho Pharmaceutical (Canada) Ltd 1984 CanLII 1938 (ON SC)* where the Canadian High Court awarded general damages in the sum of \$110,000/ (approximately Kshs.8,457,145/) for a plaintiff who suffered a partial stroke; *Earl Wilson & Others v Dr. Alan J. Byrne & Another 2004 CanLII 20532* where a plaintiff who had suffered multiple strokes was awarded \$75,000/ (approximately Kshs.5,766,235/) and *Corinne Nicola Scholtz v Road Accident Fund Case No. 2001/21401* where the High Court in South Africa awarded general damages of R 800,000/ (approximately Kshs.5,722,757/) to a plaintiff who had suffered medical complications which led to paralysis.
23. In respect to loss of earnings and future earnings, the plaintiffs proposed an award of Kshs.17,932,080/ arrived at by taking into consideration her diminished earnings of Kshs.74,717/ and her estimated number of earning years approximating 20.
24. The plaintiffs also sought for damages for loss of consortium at Kshs.400,000/ for the 1st plaintiff and Kshs.350,000/ for the 2nd plaintiff, citing *Gibson Kimani v Dr. Angelo P.J. Ogunha & 2 Others [2002] eKLR* where an award of Kshs.300,000/ was made under this head.

25. On special damages, the plaintiffs prayed for a total award of *Kshs.3,824,149/* entailing cost of treatment, cost of medication, transport costs and costs for the search at the Medical Practitioners and Dentists Board. The plaintiffs are also seeking for the sum of *Kshs.43,200,000/* as the cost of future professional care/treatment and therapy.

26. On its part, the defendant through its submissions filed on 14th September, 2018 took the view that the sums being sought in the plaintiffs' submissions are higher than what was pleaded in their plaint. That notwithstanding, the defendant proposed the sum of *Kshs.511,000/* for cost of treatment and *Kshs.34,246/* for cost of medication respectively. The defendant further urged this court to reject the awards claimed under the heads of cost of transport; cost of search and cost of future professional care, treatment and therapy, save to add that if at all this court finds that the plaintiff is entitled to cost of treatment and therapy, then an award of *Kshs.1,281,931/* would be reasonable.

27. In respect to general damages, it was the defendant's submission that an award of *Kshs.1,300,000/* would suffice under the head of pain, suffering and loss of amenities. Various local authorities were cited in support thereof.

28. As relates to loss of earnings and future earnings, the defendant took the position that the plaintiffs are not entitled to any awards under this head, submitting in the alternative that should this court choose to award damages, then a multiplier of 7 years should be used together with a discount ratio of 1/3 and a multiplicand of *Kshs.12,082.91/*, resulting in an award of *Kshs.676,642.96/*.

29. For loss of consortium, the defendant proposed an award of *Kshs.50,000/*, citing the case of ***Rose Adisa Odari v Wilberforce Egesa Magoba [2009] eKLR***.

30. In rejoinder, the plaintiffs filed further submissions by and large maintained that the special damages sought have been properly pleaded and proved save to add that since it has been established that the 1st plaintiff will require additional therapy and treatment in the future, then the prayer for future medical care and treatment is justified.

31. I have duly considered the evidence tendered before this court, both oral and documentary. I have likewise taken into consideration the rival submissions alongside the respective authorities cited. It is well established that the issue of liability was previously settled by the parties, which leaves me to determine the issue of quantum.

32. Going by the medical reports tendered before this court, I am able to ascertain that the 1st plaintiff developed a stroke, also referred to as a cerebrovascular event (CVE), resulting from a transient ischaemic attack which majorly affected the right side of her body. The medical records also show that the 1st plaintiff received extensive treatment, including speech therapy.

33. Suffice it to say that the position on permanent incapacity varied between the two (2) medical reports produced. In the report by Dr. Moses Kinuthia dated 24th July, 2013, permanent incapacity was assessed at 70%. Dr. Paul Wangai on the other hand vide his report dated 27th November, 2013 communicated his hesitance in concluding any permanent incapacity on the basis that as per his observations, the 1st plaintiff had already made tremendous progress over time.

34. I have noted that the plaintiffs have opted to rely largely on awards made in other jurisdictions. The defendant has on its part cited local authorities. The foreign authorities cited by the plaintiffs entail medical conditions more or less similar to those applicable in the present case. Nevertheless, it is worth mentioning that those cases are of a merely persuasive nature. I also appreciate that the authorities cited by the defendant are both local and equally comparable to the facts of this case. Having done so, I am more inclined to draw guidance from the local authorities that have offered comparable awards in respect to medical conditions as close as possible to those presently before me.

35. In the premises, I will address the relevant heads of damages as follows:

a) General damages

(i) Pain, suffering and loss of amenities

36. An award under this head is essentially aimed at compensating the plaintiffs, more especially the 1st plaintiff, for physical, mental and emotional anguish resulting from the medical condition and the necessary treatment applied in relieving the effects of the said condition.

37. In ***Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR*** cited by the defendant, the relevant plaintiff suffered partial paralysis of his hand and had to walk with the assistance of a walking stick. His permanent incapacity was assessed at 70%. The court upon considering the same moved to award the sum of *Kshs.1,450,000/* under the head of pain and suffering, and *Kshs.300,000/* for loss of amenities. It is evident that the court in that instance opted to award the sums separately.

38. I also make reference to ***Sarah Wanjiku N Ng'aari, Grace Waithira N Ng'aari, Mary Waithira Mburu & Jeanette Wangui Mburu v Wangiki Wangare & Christopher [2014] eKLR*** where the 2nd plaintiff in that instance was awarded *Kshs.2,200,000/* for pain, suffering and loss of amenities in respect to various injuries, among them partial paralysis of the right hand-side of the body.

39. Further to the above, I have also considered the case of ***Martin Waiharo Waweru v Cecily Nyaguthii Kariuki [2017] eKLR*** concerning a plaintiff who had suffered total paralysis of the lower limbs and partial paralysis of the upper limbs and whose medical condition was indicated as having not improved in the last three (3) years since the accident that resulted in the same. The court in the aforesaid case awarded the sum of *Kshs.5,000,000/* as general damages for pain, suffering and loss of amenities.

40. Similarly, the court in ***Emmanuel Kombe Nzai also known as Kombe Emmanuel v Basari Company Limited & another [2017] eKLR***

awarded the sum of Kshs.6,000,000/ as general damages for pain and suffering to a plaintiff who had sustained multiple injuries, including paralysis to the lower limbs with 80% disability.

41. It is worth noting that the awards in the last two (2) authorities cited hereinabove are on the higher side and expectedly so, given the severity of the injuries sustained in both instances.

42. In that case and having regard to the comparable awards made, the passage of time as well as the unique circumstances of the present case, I find an award of Kshs.3,000,000/ to be reasonable under this head.

(ii) Loss of future earnings

43. The plaintiffs are claiming damages for both loss of earnings and future earnings.

44. I have perused the pleadings filed by the plaintiffs and noted that a prayer for an award of damages under the head of loss of earnings was not pleaded. In the premises, I have no basis on which to grant the same.

45. As concerns loss of future earnings and gathering from the evidence presented before this court, the 1st plaintiff was at all material times an employee of ICRC, working as a secretary. Following the stroke, her terms of employment were modified and her salary reduced. It is thus clear the 1st plaintiff's earnings diminished but her earning capacity was not entirely lost. That being the case, the 1st plaintiff would be entitled to the difference in her earnings.

46. From the copies of her salary statements tendered in evidence, I have observed that the 1st plaintiff's net salary fluctuated from one month to another, thereby leaving me with the only option of applying her consolidated salary. Initially, the 1st plaintiff earned a consolidated monthly salary of approximately Kshs. 122,460/ later on increased to Kshs.128,583/. The plaintiffs submitted that following her inability to perform her usual contractual duties fully as a result her medical condition, the 1st plaintiff's monthly salary was reduced to Kshs.53,866/. However, save for the salary statement for January, 2015 found on page 231 of the plaintiffs' list and bundle of documents, no further statements were availed to indicate the 1st plaintiff's varied salary; the aforesaid salary statement reflects that the 1st plaintiff earned Kshs.78,025/ which I will rely on in view of the circumstances. In calculating the difference between the two (2) salaries i.e. Kshs.128,583/ and Kshs.78,025/ I have arrived at a multiplicand of Kshs.50,558/.

47. In respect to her age, the 1st plaintiff was said to have been 42 years old at the time of suffering the stroke. The plaintiffs urged that I apply a multiplier of 20 years while the defendant proposed a multiplier of 7 years. In view of the fact that the average retirement age applicable is 60 years and given the vagaries of life, I will apply a reasonable multiplier of 13 years which was a similar multiplier applied in *Lydia Kerubo Otworu v Kipkebe Limited [2010] eKLR* and *Esther Wambura Wamgugu V Joseph Mwangi Muhia [2009] eKLR* respectively, thus:

$$Kshs.50,558/ = x 12 \times 13 = Kshs.7,887,048/$$

(iii) Loss of consortium

48. A concise definition of the term 'consortium' was offered in *Silas Shakava Tuli v Ezekiel K Chirchir [2019] eKLR* thus:

“The Court of Appeal in Chege Kimotho & Others v Maria Vesters & Another [1988] KLR 48, defined consortium as, “companionship, love, affection, comfort, mutual services, sexual intercourse-all belong to the married state.” ”

49. Equally, the courts have rendered that damages under this head can only be granted to the spouse of the person afflicted with any medical condition which renders it impossible or extremely difficult for him or her to offer consortium.

50. Upon evaluating the two (2) medical reports adduced in evidence, I noted that neither of them addressed the subject of consortium with regards to the 1st plaintiff's paralysis/stroke, thereby giving me no basis on which to grant damages under this head.

b) Special damages

51. Under this head, I have duly taken into account the various costs pleaded by the plaintiffs alongside the evidence tendered before this court. It is noteworthy that the plaintiffs adduced a copy of a receipt from Ceragem East Africa Ltd as an indication that they had purchased the thermal massager from the said company at the sum of Kshs.240,000/. The plaintiffs also produced a copy of the receipt dated 13th March, 2010 issued by the said company bearing the sum of Kshs.78,000/. However, PW1 admitted that the aforementioned company is not recognized by the Kenya Medical Practitioners and Dentists Board as well as the fact that the thermal massager purchased by the plaintiffs does not form part of conventional treatment. On this basis, I am unable to grant the special damages claimed in this respect.

52. Moreover, the plaintiffs tendered evidence by way of receipts disclosing that the plaintiffs purchased herbal medication from Real Aliko totaling approximately Kshs.194,300/. There is no way of telling whether the treatments purchased are either conventional treatments or approved by the relevant body. There is thus no basis on which I can award the same.

53. Equally, the plaintiffs adduced receipts from Healthy U Ltd totaling an approximate sum of Kshs.34,557/ but failed to show whether the same is a recognized pharmacy or chemist under the Kenya Medical Practitioners and Dentists Board, thereby giving me no basis on which to grant the amounts being sought.

