



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 393 OF 2004**

**MARY NDUKU KIMANTHI.....PLAINTIFF**

**- V E R S U S -**

**RUMITEX (K) LIMITED .....1<sup>ST</sup> DEFENDANT**

**JACOB SENTAMU .....2<sup>ND</sup> DEFENDANT**

**JASINDER SIGN ENTERPRISES LTD.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. Mary Nduku Kimanthi , the plaintiff herein filed a compensatory suit against Rumitex (K)Limited, Jacob Sentamu and Jasinder Sign Enterprises Ltd, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein respectively for damages as a result of the plaintiff sustaining injuries in a road traffic accident. It is alleged in the plaintiff's plaint dated 20<sup>th</sup> April, 2004 that on 19<sup>th</sup> August 2001 while aboard a private motor vehicle Registration number KAM 064N, a Toyota Surf, owned by the 1<sup>st</sup> defendant and driven by the second defendant, amongst other occupants who were from a funeral, the vehicle rammed into a stationary lorry registration number KAL 527K , belonging to the 3<sup>rd</sup> defendant, causing the plaintiff serious bodily injuries. Judgement was entered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in default of appearance on 23<sup>rd</sup> May 2005. The 3<sup>rd</sup> defendant entered appearance and filed its defence, however failed to appear at the hearing for formal proof.

2. The plaintiff's case had one witness. Mary Nduku Kimanthi, PW1 stated that the driver was driving along the Eldoret –Nakuru Highway. At Kiolonget, the driver attempted to overtake but realised that the course was not clear. He swerved back to his lane only to find a stationary lorry on his lane and he crashed into it. PW1 said that the driver had been speeding and tried severally to overtake and he warned him about overspeeding. She lost consciousness on impact and regained consciousness when she found herself admitted at the Moi Teaching and referral hospital. PW1 was later transferred to Nairobi Hospital and discharged after 34 weeks. Given the nature of injuries she sustained, she had to be in and out of hospitals. She was later admitted at Nairobi Hospital again, Kenyatta National Hospital and lastly at the Karen Hospital to manage the series of complications and management of the post accident injuries. PW1 stated that she had suffered multiple fractures on the limbs, broken collar bone, fracture of the acetabulum of the left hip, causing her to developed permanent disability and can only move as aided by hand crutches. She is unable to attend to her normal daily chores without the aid of a helper.

At the close of the plaintiff's case, the plaintiff was invited to file written submissions.

3. The following issues commend themselves for determination by this court are:

**i. Who is liable for the accident.**

**ii. What is the quantum of damages payable.**

On the first issue the plaintiff submits that the 2<sup>nd</sup> defendant started to overtake without ensuring that the course was clear, in that there was oncoming traffic in front of him and he was speeding as well, yet there was some fog in that area and darkness was starting to set in. When trying to get back into his lane it was not possible to get back into his lane the 2<sup>nd</sup> defendant rammed into a stationary lorry that was in his lane. It is the plaintiff's submission that there was no evidence adduced by the defendants to contradict his evidence. According to the plaintiff the driver owed the plaintiff a duty of care, in that he ought to have kept a proper lookout on other road users and ought not to have overtaken when the course was not clear. It was therefore submitted that the drivers of the two motor vehicles are to blame for the accident, and in the absence of evidence to the contrary, the particulars of negligence were proved hence the court ought to find the defendants jointly and severally liable for the accident at 100%.

The plaintiff cited the case of Kenya Bus Services Limited-vs- Humphrey 2003 KLR 665, where it was stated in a majority judgement on vicarious liability that;

***“when it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.”***

4. The only evidence on record on how the accident occurred was the plaintiff's evidence. Without any evidence to the contrary, this Court finds that the accident took place when the driver of the suit motor vehicle was overtaking. He ought to have had a proper lookout before overtaking. I find the 2<sup>nd</sup> defendant wholly liable for the accident.

5. Having determined the question relating to liability let me now deal with assessment of quantum of damages. The question is whether or not the plaintiff is entitled to damages and if so, what is the quantum. The plaintiff suffered the following injuries:

***i. Blunt chest trauma with fractures of the 7<sup>th</sup> and 8<sup>th</sup> ribs and a small pneumothorax.***

***ii. Right lung contusion.***

***iii. Cut wound on upper lip.***

***iv. Mid face injuries and right Zygomatic complex fracture (blunt trauma to the face)***

***v. Loss of right upper 5<sup>th</sup> tooth molar with 2 other molars rendered insensitive.***

***vi. Dislocation right wrist bone namely lunate.***

***vii. Blunt trauma right shoulder.***

***viii. Dislocation right sterno-clavicular joint.***

***ix. Fracture to the left acetabulum with central dislocation (require total hip replacement).***

6. The above injuries were stated in medical reports of the following doctors: Dr John E.O Ating'a stated in his medical report of 7<sup>th</sup> March 2002 that he plaintiff's total disabilities stood at 45% and suggested that the plaintiff should seek medical assistance abroad. Dr. Wambugu stated that the plaintiff's injuries were consistent with the nature of accident that occurred and awarded permanent incapacitation at 45%, on 29<sup>th</sup> May 2002. Dr. V.M Kireti of KNH further observed that the plaintiff needs a total hip replacement and gave an estimate of Ksh.227.300/- this was stated in his medical report dated 18<sup>th</sup> July 2002.

7. The plaintiff's proposal on quantum is as follows:

a. General damages for pain and suffering and loss of amenities ksh.5,000,000/- and she cited the case of **Joseph Kahinda Maina –vs- Evans Kamau Mwaura & 2 others HCCC NO.635 of 2009 (2014)Eklr** where the plaintiff had almost similar injuries with those of the plaintiff herein, and was awarded 2,400,000/-, and **Peace Kemuma Nyang'era –vs- Michael Thuo & Amnother (2014)e KLR**, where the plaintiff suffered almost similar injuries and underwent three surgeries and physiotherapy, was hospitalised for three weeks, permanent incapacity was assessed at 45% and was awarded 2,500,000/- in general damages.

b. The plaintiff pleaded special damages of ksh 1,005,639.95/-

8. Considering the circumstances of this case the plaintiff must have undergone serious pain and suffering. However, as was held in the case of **H. West And Son Ltd vs. Shephard [1964] AC 326**

**“Money cannot renew a physical frame that has been battered and shattered. 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. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”**

9. From the said case the principles which were formulated in awarding damages are: the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.

10. Taking into account the foregoing and many decided case in this court, I am of the considered view that an award of KShs 3,000,000/- in general damages for pain and suffering is reasonable in the circumstances.

11. On special damages, the plaintiff pleaded and proved Kshs.1,005,639.95/=.

In the result, I enter judgement in favour of the plaintiff and against the Defendants jointly and severally in the following

sums to the plaintiff:

<b>i. General damages for pain and suffering</b>	<b>Kshs 3,000,000/-</b>
<b>ii. Special damages</b>	<b><u>Kshs 1,005,639.95/-</u></b>
<b>Total</b>	<b>Kshs 4,005,695.95/-</b>

12. The cost of this suit is awarded to the plaintiff.

**Dated, Signed and Delivered in open court this 16<sup>th</sup> day of February, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants