



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 78 OF 2016

BRENDA NYABOKE MICHIRA.....PLAINTIFF

-VERSUS-

GERMAN INTERNATIONAL CO-OPERATION GIZ.....DEFENDANT

JUDGMENT

1. BACKGROUND AND PLEADINGS

The plaintiff, a 22 year old Nairobi University Student Brenda Nyaboke Michira was on the 27th August 2015 involved in a road traffic accident while a lawful passenger in motor vehicle registration number 1DX 293 A registered in the Defendant's name of German International Co-operation GIZ along the Banita-Kadwomoi murram road within Nakuru County. The vehicle was being driven by one Paul Kawega the duly authorised driver at the material time. The vehicle hit a pot hole, lost control and overturned causing the plaintiff to sustain serious injuries from which she became paraplegic.

2. By her plaint dated 11th August 2016 the plaintiff blamed the defendant for the negligence of its driver, and stated the following particulars of negligence, among others:

- Driving at an excessive speed in the circumstances
- Driving without due care and attention to other road users
- Failure to apply brakes and to ascertain that the road was clear
- *Res Ipsa Loquitur*

3. She also stated the particulars of injuries, among them:

- Fracture of cervical vertebrae C5, C6 with cord compression resulting to paraplegia and severe weakness of the lower limbs, incontinent to urine and stool.

4. She pleaded particulars of **special damages to the tune of Kshs.1,416,287/=** and in addition pleaded:

- **General damages for pain and suffering**
- **Loss of earnings and earning capacity**
- **Future medical expenses including costs of related services, and costs of the suit.**

5. The defendant in his defence dated 8th September 2016 and filed on the 15th September 2016 admitted occurrence of the accident but denied that the plaintiff was a lawful passenger therein, and further denied all particulars of negligence of its driver, particulars of injuries to the plaintiff and all the claims thereof.

The plaintiff and her witnesses filed witness statements. The defendant's driver too filed his witness statement and documents.

6. PLAINTIFF'S CASE

The plaintiff was wheeled into the court room on the 15th May 2017. She testified as PW2. Her evidence was that she was lawfully travelling in the defendant's vehicle on the material date as an employee of Kenya Red Cross with others going to do community work at Majani Mingi. She did not know the arrangements the defendant had with Kenya Red Cross but had used the said vehicle several times while on duty.

7. Her evidence was that the driver was over speeding on the murrum road and did not slow down when he was requested to, that the vehicle hit a pot hole, lost control and overturned from which she sustained the serious injuries to her spine. She was rushed to Bahati Health Centre, then later to Valley Hospital, Kenyatta National Hospital and lastly to the National Spinal Hospital, Nairobi where she was hospitalised and later discharged on a wheel chair.

She produced Discharge summaries from the above hospitals as PExt 10 (a), (b) and (c).

8. She testified that she is now paraplegic and cannot move or do anything on her own, that she had to terminate her studies as a 4th year law student at the University of Nairobi, Kisumu campus.

She produced letters from the said University, her student id card and academic transcripts - PExt 8 and 9. She further testified that as a result of the injuries, she will never finish her law degree course nor actualize her desires to become a lawyer, join the Judiciary or legal private practice and will for the rest of her life depend on other people including a nurse, physiotherapist, doctors nor will she ever earn a living for herself.

She blamed the driver of the vehicle for driving carelessly and on high speed in the circumstances.

She told the court that she will be on medication for the rest of her life and produced some receipts for medical treatment for the period 2016 after discharge on the 24th March 2016 upto March 2017, and continues with treatment.

She urged the court to find that the driver of the defendant's vehicle was to blame and order compensation to her.

9. **PW1 was Dr. Naptali Nyangara**, the father of the plaintiff. He produced the plaintiff's birth certificate to confirm that she was 22 years old.

His testimony was that the medical hospitalization expenses of Kshs.1,500,000/= for the daughter was paid by his employer Laikipia University where he was a lecturer and that he claims the balance of Kshs.184,000/= which he paid from his pocket. He produced a bundle of receipts to prove the payments - PExt 1. He further testified that as a paraplegic, he had to hire a nurse at the rate of Kshs.15,000/= per month, a physiotherapist – PExt 2 and 3, to take care of the plaintiff who would forever rely on others.

On cross examination, he stated that he spends about Kshs.185,000/= per month on the monthly expenses for his daughter, and that the expenses and medical treatment will continue for the rest of the plaintiff's life, and urged the court to order compensation to cater for such future expenses.

10. The plaintiff's medical report was prepared and produced in court by **Dr. Wellington Kiamba a medical practitioner at Nakuru. He testified as PW3. It is dated 21st June 2016.**

It was his testimony that he referred to the discharge summaries from all the hospitals stated by the plaintiff and his own physical examination of the plaintiff. The detailed medical report was produced as PExt 14. He assessed permanent disability of the plaintiff as 100%. He termed her as a complete paraplegia, with complete paralysis on her lower limbs with loss of movement. He stated that she will depend on a nurse and physiotherapy for the rest of her life, including medication. He testified that the plaintiff requires an electrical wheel chair at a cost of Kshs.300,000/= being the price from any medical store including Nakuru medical stores, and that it will require a change every ten (10) years.

He further testified that the plaintiff requires daily nursing at a cost of Kshs.300/=.

He stated that the indwelling catheter is a permanent item as she had no bladder control, and that the patient requires rehabilitation and counseling.

11. **PW5 was PC Morris Muchiri attached** to Banita police station where the accident was reported. He produced the police abstract and the police file including the sketch plan of the accident scene. He visited the scene of accident and saw the skid marks and drew the sketch plan. He stated that the point of impact was from the point of the pothole before the vehicle lost control and rolled twice.

His opinion was that the vehicle was on very high speed as it rolled twice after hitting the pothole and losing control. He further stated that the tyre burst was after the vehicle hit the pothole and that the driver was not charged. He confirmed from the police file that the plaintiff was a passenger in the accident vehicle.

The sketch plan, rough and fair copies were produced as PExt 16 (a) and (b).

He blamed the driver of the vehicle for the accident.

12. **DEFENCE CASE**

The driver of the accident vehicle Paul Kawega testified for the defendant.

He confirmed that the plaintiff was lawfully travelling in the vehicle. He attributed the accident to a tyre burst but denied having been driving at a high speed.

He testified that the vehicle was in good condition having been bought in 2015 and the tyres changed to match local conditions from off road tyres. He produced the vehicle documents DExt 2. He therefore testified that he could have done nothing to avoid the accident in the circumstances but was remorseful that the plaintiff and other passengers sustained injuries.

13. ISSUES FOR DETERMINATION:

Parties proceeded to file their respective submissions which they highlighted.

From the above evidence the issues that commend to me for determination and being re-edition of the parties framed issues are:

- (1) Whether the defendants duly authorised driver was to blame for the accident.*
- (2) Whether the plaintiff was a lawful passenger in the defendants motor vehicle, and if so whether she was injured*
- (3) If the answer to (1)and (2) above is in the affirmative, whether the plaintiff is entitled to the damages pleaded in her plaint.*
- (4) Quantum of damages.*

I have analysed the evidence before me together with the submissions by both parties.

The following material facts are not in dispute:

- (1) That the accident motor vehicle belonged to the defendant and was being driven by its duly authorised driver, DW1.*
- (2) That the plaintiff was lawfully travelling as passenger there in when the accident occurred and that she was injured.*
- (3) That the accident was self-involving after it hit a pothole followed by a tyre burst that caused it to overturn and roll several times.*

14. LIABILITY

I will briefly touch on the issue of whether the defendants driver DW1 was to blame for the accident.

The driver (DW1) attempted to exonerate himself from blame and pleaded inevitable accident without any negligence on his part. His evidence was that he was driving at a speed of 60-65 KPH. He could not however explain why he could not see the pothole that precipitated the events that lead the vehicle to loose control and overturn.

The investigating officer's opinion, though not legally binding to the court, in my view was credible. If indeed the driver was carefully and driving at the acceptable speeds on murrum road as he said, 60-65 KPH, he would have seen the pothole and tried to avoid hitting it. He did not tell the court what evasive action he took.

15. The defence of inevitable accident was pleaded (paragraph 4 of defence). This defence is based on the presumption that the defendant could have done nothing, that he had no control of what happened despite exercise of reasonable care and caution. It is akin to an act of God.

See **Civil Case No. 751 of 2005 Joash Musikhi Vuranje -vs- Wanjiru Mwangi & Another (2016) e KLR and Civil Appeal No. 74 of 2010 Beatrice Wambui Nginga -vs- Samuel Gichuru Kariuki & 3 Others (2016) e KLR.**

The thread running across the above authorities among others is that **where a party pleads inevitable accident, the burden of proof shifts to such party to give particulars of the alleged inevitable accident, and then to prove the same.(emphasis mine).**

16. In my view a tyre burst that the defendant blames for the accident can not be regarded as "inevitable accident." See **Hussein Omar Farah -vs- Lento Agencies (2006) e KLR and Rahab Micere Mujrage -vs- Ag & 2 Others (2012) e KLR.**

In the above cases, it was held that:

“(i) A driver of any vehicle owes a duty to those in his vehicle to drive carefully and not recklessly or at a high speed under circumstances in which slow speed was required.

(ii) Where a party pleads inevitable accident, he has an obligation to first give particulars of the alleged inevitable accident and adduce evidence in support of the same.

(iii) Show that something happened over which he had no control or could not have been avoided by the greatest care and skill.

(iv) Has to show that there was probable cause of the accident which does not connote negligence or that the explanation of the accident give rise to the inference of negligence then the defendant, in order to escape liability has to show probable cause of the accident was consistent only with a n absence of negligence.”

17. A tyre burst, and more so in this case was preceded by hitting of a pothole. Further a tyre burst must be caused by some failure on behalf of the owner of a vehicle to do something, say checking the pressure and condition of the said tyres.

It is trite that if an owner of a vehicle lets it on a road when it is defective and that defect causes an accident; he is liable for the same. I agree that tyres of a vehicle may have been recently purchased. However no evidence was tendered that the said tyres were fitted on the accident vehicle and that even if they were so fitted, they had been properly maintained, say by putting adequate pressure, among others.

In any event, evidence adduced by the plaintiff and observations made by the investigating officer at the scene clearly indicate that the vehicle first hit the pothole and the driver tried to break as shown by the skid marks, after which the vehicle lost control and overturned.

18. That being the only reasonable sequence of events, the driver of the vehicle cannot reasonably blame the tyre burst for the accident but himself for driving too fast in the circumstances shown by his inability to adequately break and avoid hitting the pothole, and carelessly driving without due regard of his passengers.

It is therefore my finding that the defendant must be held vicariously liable for the negligence of its driver, and therefore the sequential damages.

Issues No. 1, 2, and 3 are therefore answered in the affirmative. The plaintiff is therefore entitled to the prayers sought in the plaint, but subject to prove on the required standards, upon a balance of probability.

19. QUANTUM OF DAMAGES

(a) Damages for pain and suffering and loss of amenities.

According to the medical report dated 21st June 2016, the detailed injuries to the plaintiff are stated as follows:

(1) Complete loss of sensation to the lower limbs

(2) Inconsistent to urine and stool and indwelling catheter and use of diapers.

(3) Severe weakness and wasting of the upper limb

(4) Fractures of cervical vertebrae C5, C6 with cord compression resulting to paraplegia and severe weakness of the lower limbs incontinent to urine and stool, and upper limbs (muscle power) and laceration on the right hand.

(5) Six months in hospital rehabilitation, discharge to be dependent on an aide.

(6) She is bedridden,

(7) 100% permanent disability.

20. The defendants submission is that a sum of Kshs.4,000,000/= is sufficient under the subhead. The plaintiff on her part a sum of Kshs.15,000,000/= was proposed. I have looked at the various authorities cited by both parties. A common authority is the case of **Brian Muchiri Waihenya -vs- Jubilee Haulers Ltd & 2 Others**, a judgment I delivered in **Nakuru HCCC No. 34 of 2014**. In very similar circumstances, a 22 years old University student, paraplegic, I awarded Kshs.8,000,000/= damages for pain and suffering.

21. In an attempt to assess damages for an accident victim, I am minded that

“money cannot renew a physical frame that has been battered and shattered and all the court can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”

These observations were held in **A.A. M.V. Justus Gisairo Ndarera & Another (2010) e KLR in Nbi HCCC No. 1015 of 2003**.

I have also considered the case **Alex Otieno Amolo & Another -vs- Hayer Bisham Singh & Another (2016) e KLR**. The plaintiff, a compete paraplegia, with loss of mobility, was awarded of Kshs.6,000,000/= .

I shall therefore make an award of Kshs.8,000,000/= under this sub head as being fair and reasonable compensation.

22. DAMAGES FOR LOSS OF EARNINGS AND EARNING CAPACITY

The plaintiff was a 4th year law student at University of Nairobi, Kisumu Campus. She aspired to join the Judiciary. I have looked at her academic transcripts. Her performance was starling. She would have no doubt joined the judiciary or the private sector upon completion of her studies, had the accident not happened and all things being equal.

Like in the **Brian Waihenya** case (Supra) I have looked at average earnings of a fresh graduate in the Public Service Salary Scales 2014 - 2015.

The plaintiff's submissions are that the plaintiff has lost all earning capacity. It is proposed a multiplier of 44 years against a lost income of **Kshs.123,750/=** per month which is the minimum salary of a resident magistrate at entry point. (**As seen from Judicial Service Commission Advertisement for vacancies for the post of Resident magistrate on 10th February 2017**). The defendant however is of the opinion that the plaintiff would have fallen under Public Service Job Group K with a starting salary of Kshs.30,000/= per month.

23. I have considered that the plaintiff was on the path of a Judicial Job. It would not be far fetched that she would have gone towards that path as opposed to joining public service. Uncertainties of life have been considered too. If she earned an income, she would have used half ($\frac{1}{2}$) on herself.

I am therefore persuaded to find that **a multiplier of 30 years**, against lost income of Kshs.50,000/= per month and multiplicand of $\frac{1}{2}$ would be more reasonable. Thus:

$$30 \times 12 \times 50,000 \times \frac{1}{2} = \text{Kshs.9,000,000/=}$$

24. FUTURE MEDICAL EXPENSES, NURSE AID & CARETAKER

The plaintiff's father stated that he pays to the nurse as well as a caretaker Kshs.15,000/= per month, thus Kshs.30,000/= monthly.

I agree the plaintiff's life is made easier by the assistance.

However, I think this is a duplication of roles. The nurse aid or caretaker can possibly do the dual duties, in my opinion, both being one and the same.

The current wages for house helps (2016) Government Wages Guidelines in the various towns and counties range between Kshs.10,000/= to Kshs.12,000/= per month in major towns. I am guided by the scales. I find a sum of Kshs.11,000/= per month for the nurse aid cum caretaker to be reasonable.

I have seen the schedules of payment made by the plaintiff's father to the nurse aid and caretaker. Though they may be true, they are not supported by any acceptable documentation. It is but a tabulation on a piece of paper.

I shall adopt the sums I have stated, thus:

$$\text{Kshs.11,000} \times 12 \times 30 = \text{Kshs.3,960,000/=}$$

25. PHYSIOTHERAPY SERVICES

This was recommended by the doctor. The Physiotherapist Mr. Koech stated that he charges a daily sum of Kshs.2,000/=. I am not convinced that this is done daily.

Though PW2 was heard stating that he pays the said sums, no evidence was tendered. I shall allow a reasonable sum of Kshs.1,000/= per day for 3 days in a week, thus 12 days in a month at a sum of Kshs.1,000/= thus a monthly expense of **Kshs: 12,000/= X 12 X 30 = Kshs.4,320,000/=**.

26. FUTURE MEDICATION AND TREATMENT

There is no doubt that the plaintiff will continue to purchase medicines, catheters, urine bags, diapers, medication and other items. Her father stated that on these items, he spends Kshs.185,960/= on a monthly basis. They were recommended by the doctor too. The prices of medication and medical supplies will keep rising. Admittedly the plaintiff's witness PW2 produced a schedule of this monthly expenditure from the date the plaintiff was discharged from hospital in April 2015 to April 2017. No challenge was mounted on this expenditure.

He produced the receipts (PExt1) in the sum of Kshs.184,497/=. They are receipts for purchased medication. Going by that it would mean that he spends Kshs.184,497/= in a year. I think a sum of Kshs.150,000/= per year on these items would be reasonable.

$$\text{Thus Kshs. 150,000} \times 30 = \text{Kshs.4,500,000/=}$$

27. MEDICAL EQUIPMENT(ELECTRIC WHEEL CHAIR)

An electric chair was recommended by the doctor at a cost of Kshs.300,000/=, with a life span of ten years. He however did not give quotation from the medical stores, but stated that to be the purchase price in most medical stores.

In the **Brian Muchiri Waihenya** Case (Supra), I found that the electric gadgets being a wheel chair and a bed would ease the paraplegia's movement and comfort, and the same amounts were allowed.

Though the costs were stated, no proof was tendered save that any medical stores would sell the same at the prices the doctor quoted.

28. The defendant in objection to the awards stated that being special damages, they ought to be pleaded and strictly proved. I do not think a future cost of an item can possibly be precisely attached to these items as prices of the items vary from time to time, from store to store.

He gave approximate costs. They could cost the Kshs.300,000/= or more or less. Suffice to state that a reasonable sum is sufficient. In the case **Ngure Edward Karega -vs- Yusuf Devan Nassir (2014) e KLR** the court allowed future purchase of an electric chair that would require regular maintenance and relied on a quotation by a physical therapist and allowed Kshs.361,340/= for the electric chair.

Further in the Case **Japheth Ngula Matingi -vs- AG (2016) e KLR**, Dr. Awori presented a quotation from the spinal injury hospital for Kshs.350,000/= for an electric bed; and the court allowed the said costs.

29. As a necessary equipment, though no quotations were tendered, in my view and in exercise of my discretion, and being a necessary item for a paraplegic patient, I will allow reasonable cost of an electric chair at Kshs.300, 000/=.

It was stated by Dr. Kiamba that the electric chair has a lifespan of ten years. Having awarded a multiplier of 30 years, it follows that three changes of the chair will be necessary thus Kshs.900,000/=. I allow the said future cost of Kshs.900,000/=.

30. SPECIAL DAMAGES

A claim for special damages towards medical expenses is claimed for the period April 2016 to April 2017 at Kshs.1,416,287(See plaint).

In his evidence PW1 testified that after exhausting his medical cover of Kshs.1.5 Million, he continued to buy medicines from his pocket , and for the one year period he spent Kshs.184,487(PExt 1). I have seen the receipts. They relate to purchases of medical items and drugs. I shall allow the item as a special damages as having been pleaded and strictly proved.

31. Accordingly and in summary, there shall be judgment for the plaintiff against the defendant on 100% basis on liability. The court awards flowing therefrom are as hereunder:

a) Damages for pain and suffering - Kshs.8,000,000/=

b) Loss of earning Capacity - Kshs.9,000,000/=

c) Nurse aid/caretaker - Kshs.3,960,000/=

d) Physiotherapy services - Kshs.4,320,000/=

e) Future medical treatment - Kshs.4,500,000/=

f) Three electric chairs - Kshs. 900,000/=

g) Special damages (including

Kshs.20,000/= medical report fees) -Kshs. 204,487/=

Total Kshs.30,884,487/=

32. Special damages in the sum of Kshs.204,487/= shall attract interest at court rates from the date of filing suit until payment in full.

The rest of the awards shall accrue interest at court rates from the date of this judgment.

33. The plaintiff is awarded costs of the suit.

Dated and Signed this 3rd Day of November 2017.

J.N. MULWA

JUDGE

Delivered this 15th Day of November 2017.

R. LAGAT KORIR

JUDGE