



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 381 OF 2010

ELIZABETH WAMUYU WANJOHI.....SUBSTITUTED PLAINTIFF

(*CLEMENT MBATIA KABUGI.....ORIGINAL PLAINTIFF*)

VERSUS

- 1. JOHN MURIITHI MBANYA**
- 2. SIMON KINOTI IKUNDA**
- 3. VERA ADHIAMBO ODERA.....DEFENDANTS**

J U D G M E N T

1. The Plaintiff's claim in this suit is in negligence. He sought special and general damages on account of injuries he sustained in a road traffic accident which occurred in or about 27th June 2008 at around 6.20 pm along *Kinaisha Street* within *Ongata Rongai* Township. The accident involved motor vehicle registration number *KAT 470L* registered in the name of the 3rd Defendant but beneficially owned by the 2nd Defendant. It was driven by the 1st Defendant as authorized driver or servant or agent of the 2nd Defendant. It is the Plaintiff's case that the 2nd and 3rd Defendants are liable for the 1st Defendant's negligence. That negligence is pleaded as careless and negligent driving of the motor vehicle resulting in the 1st Defendant losing control of it and thereby knocking down the Plaintiff who was walking beside the road. Particulars of negligence are pleaded.

2. As a result of the accident the Plaintiff suffered serious injuries,

pleaded as -

- i. Fracture of the right femur.
- ii. Deformed right knee.

3. Special damages totaling KShs 158,200/00 have been particularly pleaded.

4. The Plaintiff further pleaded that as a result of the accident the 1st Defendant was charged with the offence of careless driving vide *Kibera Civil Traffic Case No. 3543 of 2008*, and convicted and fined KShs 3,000/00.

5. Interlocutory Judgement was entered against all the Defendants on 8th June 2010 for failure to enter appearance or file defence after due service upon them of summons to enter appearance and copy of the plaint.

6. The Plaintiff subsequently died on 26th July 2011 before hearing

on quantum. **Elizabeth Wamuyu Wanjohi** was substituted in his place by an order entered on 03/10/2012.

7. The case on quantum was heard on 18/06/2014 and on 22/07/2014. The Substituted Plaintiff and a doctor testified (PW2 and PW1 respectively). The Plaintiff then filed written submissions on 19/09/2014.

Judgement was reserved for 07/11/2014, but by then I had already been transferred to another station (a very busy one-judge station), hence the delay in preparation and delivery of this judgement. The delay is regretted.

8. The Substituted Plaintiff was the deceased Plaintiff's widow. She testified that the Plaintiff was admitted at **Kenyatta National Hospital** on the evening of the day of the accident (27/05/2008). He remained in hospital until 08/07/2008 when he was discharged. But he continued treatment as an out-patient. He was unable to walk for a long time, and when he finally was able to walk, he used crutches until he passed on. There is nothing in the Substituted Plaintiff's testimony, or indeed in her application for substitution, to suggest that the Plaintiff's death had anything to do with the injuries he suffered in the accident.

9. The Substituted Plaintiff further testified that after his initial discharge the Plaintiff was re-admitted to hospital several times "due to complications that arose after the accident".

10. PW2 also produced many receipts in proof of special damages totaling KShs 210,228/00. The claim was not amended, and the special damage claim remained at KShs 158,200/00.

11. **Dr. Okemwa Minda** (PW1) had examined the Plaintiff on 08/07/2011. He prepared and signed a medical report which he produced in evidence. He found that the Plaintiff had suffered the following injuries -

- i. **Distal femur fracture in the right supracondylar region of the knee.**
- ii. **Right elbow dislocation and deformity.**
- iii. **Soft tissue injuries in the right lower Para spinal region and lower limbs.**

He had been admitted in hospital for 4 weeks for management of the injuries. The fractured leg was put on **skeletal traction** and later operated on for insertion of **K-nails**. Then an above knee **plaster-of-paris** cast was applied to enable him to walk with the aid of crutches. He was discharged for follow-up orthopedic clinics. He subsequently developed **psoriasis** (a skin ailment), **peptic ulcer disease** and **anemia**. As a result he was re-admitted to hospital three times, the last admission being for one month.

12. When PW1 examined the Plaintiff he found him to be -

"...moribund with severe debilitation, unable to walk without support, and then only with limited motion, due to severe back and knee pains...."

13. Clearly the Plaintiff suffered serious and debilitating injuries as

a result of the accident. He underwent a long and painful course of treatment. He never fully recovered and was in constant pain, apparently until he died. I hasten to add that it has not been claimed that his death was a direct result of the injuries he suffered in the accident.

14. I have read the submissions filed on behalf of the Plaintiff, including the cases cited. I have noted the awards made therein for similar injuries. Doing the best that I can, and balancing this against that, I will award general damages for **pain, suffering and loss of amenities** of **KShs 1.5 million**. I will also award special damages of KShs 158,200/00.

15. In summary there shall be judgement on liability at 100% for the Substituted Plaintiff against the Defendants jointly and severally, and also for general damages (KShs 1.5 million) and special damages (KShs 158,200/00). The general damages shall carry interest at court rates from the date of judgement, and the special damages from the date of filing suit. The Substituted Plaintiff shall also have costs of this suit plus interest thereon at court rates from the date of suit. There will be orders accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT MURANG'A THIS 24TH DAY OF APRIL 2015

HPG WAWERU

JUDGE