



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 38 OF 2012.

MILICENT ATIENO OCHUONYO.....PLAINTIFF

VERSUS

KATOLA RICHARD.....DEFENDANT

J U D G M E N T

The Plaintiff, Milicent Atieno Ochuonyo , was crossing Kiambu Road on 12th February 2011 when she was knocked down by a motor vehicle registration number KBA 142T and owned and driven by the Defendant, Katola Richard.

Through a plaint dated 31st January 2012, the Plaintiff pleaded the following particulars of negligence:

- a. *Driving in excessive high speed in the circumstances.*
- b. *Driving without due care and attention.*
- c. *Driving to dangerously and/or negligently and without regard to other road users and particularly the Plaintiff.*
- d. *Driving recklessly and in total violation of the traffic rules.*
- e. *Failure to slow down, stop, brake, swerve and /or take any other reasonable step to avoid the said accident.*
- f. *Causing the accident.*

The Plaintiff also claims to have sustained severe bodily injuries and complained of complex pelvic fracture of the right pubic bone and separation of the pubic symphysis.

On the 10th February 2014, the parties entered consent and agreed to share liability at the ratio of 85% in favour of the Plaintiff and 15% in favour of the Defendant. The case was only tried on the issue of Quantum during the hearing.

The Plaintiff who testified as PW1 told the court that at the time of the accident she worked for Diani Flowers in Nairobi from 1996 to 2013 as a gardener earning a salary of Kshs.13,624/- per month. She produced a letter from her employer dated 20th January 2012 marked as **PEX 1**. She also stated that she was married and has four children. Joseph Oduor Otieno age 26 years, Drusila Awuor Otieno age 22 years, Michael Omondi 20 years, Lawrence Eric Otieno 18 years. At the time of the accident the Plaintiff was 53 years old as shown by her National Identity Card which was also produced and marked as **PEXH**

P2. After the accident she was taken to Kiambu Hospital by the Defendant and later transferred to Avenue Hospital where she was admitted for 11 days.

To support her case the Plaintiff also produced a P3 form which was marked as **EXH P4**, a discharge summary from Avenue Hospital marked as **PEXH 3**, a Police Abstract marked as **PEXH 5**. A copy of the motor vehicle search showing the Defendant as the owner of the motor vehicle which hit the Plaintiff, as **PEXHP6**.

The Plaintiff was examined by Dr. Cyprenus Okoth Okore on 25/10/2014 and the medical report produced as **PEXH P8**. She was also examined by the Defendant Dr. Maina Ruga who wrote a report and produced it as **EXH P11**. She also claimed medical expenses amounting to Kshs.412,634/=.

During cross examination by the Ms Otieno, she told the court that her employer paid the medical expenses. She also stated that the Defendant doctor found her incapacity to perform her duties to be 20%.

She also told the court in re-examination that her employers demanded the medical expenses they paid for her. She further claimed to have been retired since she could not work. At the time of her retirement her salary was Kshs.12,800/-.

The Defendant did not adduce any evidence in support of their defence case. The parties agreed to file written submissions and the same were filled and exchanged.

The Plaintiff submitted that the injuries sustained by the Plaintiff were very severe in nature; they suggested Kshs.3,000,000/- as compensation. Counsel relied on the case of **Daniel Kosgei Ngelechi Vs Catholic Trustee Registered Diocese of Eldoret and Another, Civil Case No. 111 of 2006** where the Plaintiff was added Kshs.2.1 Million in general damages for amputation of left lower limb above the knee. The Plaintiff also cited the case of **John Maseno & Ngala & Another Vs Dan Nyanamba Omare** where the court also awarded 2 million as general damages of the left shoulders and left arm muscle in 2006. Also in **Charles Mathenge Wahome and Another Vs Fina Bank Ltd, Civil Case No. 87 2005** where the Plaintiff with broken right upper leg was awarded Kshs.1,500,000/-.

On special damages the Plaintiff submitted that they pleaded for the same under paragraph 5 of the plaint and the same was proved by the production of receipts. The Plaintiff further submitted that though the employer paid for the medical expenses the same was not a gift as it was given a loan for the medicals to be later refunded.

The Plaintiff also submitted that she is entitled to Kshs.1,689,600/- as loss of future earning capacity. She submitted that she was doing manual jobs prior to the accidents and used to earn a gross salary of Kshs.13,624/- and net of Kshs.12,800/=. She stated that her employment was terminated on 20th January, 2012 due to her inability to execute her duties. The a Plaintiff submitted that being a manual laborer and the only source of livelihood for her 4 children, she would have worked until 65 years hence a multipliers of 11 years should be adopted to calculate loss of earning capacity to be computed as follows: **Kshs.12,800 X 12 months X 11 years = Kshs.1,689,600/-**.

When concluding the submissions, the Plaintiff urged the court to enter judgment for the Plaintiff against the Defendant in the sum of Kshs.4,548,794/-.

The Defendant also submitted that according to the evidence before the court, the Plaintiff sustained a pelvic fracture and separation of the symphysis pubic. The Defendant submitted that the suggested award of Kshs.3,000,000/= does not apply in this case. The Defendant stated that the authorities cited by the Plaintiff refer to injuries that were severe in nature including amputation of lower limb, paralysis of the left shoulder and arm and broken right upper leg which injuries are not similar and comparable to the injuries sustained by the Plaintiff herein.

The Defendant submitted that the principles in the assessment of damages are those set out in cases of **West (H) & Son Ltd Vs Shepherd (1964) AC 326**. In which the court stated that the award of injuries

must be regarded as reasonable compensation and comparable injuries should be compensated by comparable awarded awards. The Defendant submitted that in this case an award of Kshs.400,000/= would suffice as adequate compensation. The Defendant was guided by the case of **Chebutut Tea Factory Vs Amos N. Mukokha H.C.C No. 49 of 2008 at Eldoret** where the Plaintiff sustained blunt trauma to the pelvic, fracture of the left superior pubic ramus and fracture of the left inferior public ramus. The court awarded Kshs.350,000/= as general damages. Also in **Mathew O. Nyakolita & Another Vs. Sipra Akoth Aboka, HCCC No. 31 of 2009 at Kisumu**, the court upheld an award of Kshs.400,000/= to the Plaintiff who sustained fracture of the pelvis, injury to the left arm, and injury to the chest and lumber region.

On special damages, the Defendant submitted that the Plaintiff stated in cross examination that the employer paid all her medical bills and any other money spent as indicated in **PEXH 9 and 10**. The Defendant also stated that the Plaintiff averred in re-examination that she had an agreement with the employer to repay the aforementioned amount of Kshs.412,634. The Defendant stated that there was no documentary evidence to prove the same.

On the loss of earnings, the Defendant submitted that the said was not specifically pleaded in the plaint. The Defendant further submitted that the **PEXH 1** clearly shows that she went back to work after the accident. The Defendant also stated that PEXH8 and PEXH 11 the Plaintiff permanent incapacitation was assessed between 20%-40% and indication that the Plaintiff could continue working in other income generating activities as she was not 100% incapacitated. On this issue the Defendant relied on the case of **Cecilia W. Mwangi Vs Ruth W. Mwangi, Nyeri Civil Appeal No. 251 of 1996** where the court held that damages under this title of loss of earning capacity can be classified as general damages but these have also to be proved on the balance of probability. The Defendant submitted that the Plaintiff ought to have pleaded diminished earning capacity since she was not 100% incapacitated instead of loss of future earning capacity. He further submitted that had the Plaintiff pleaded diminished earning capacity, the court could have adopted the following;

$Kshs.12,800 \times 12 \text{ months} \times 3 \times 30/100 = 138,240/=$.

In conclusion the Defendant submitted that Kshs.340,000/= will adequately compensate the Plaintiff.

The parties having agreed by consent in the ratio of 85% in favour of the Plaintiff as against the Defendant and 15% in favour of the Defendant what is left for the court to determine is quantum payable.

The Plaintiff in her plaint is seeking general damages, special damages, loss of future earnings capacity, cost and interest. In determining the quantum, the courts have held that 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. See generally, **Rosemary Wanjiru Kungu Vs Elijah Macharia Githinji & another [2014] eKLR**, **West (H) & Son Ltd Vs Shepherd, Simon Taveta Vs Mercy Mutitu Njeru [2014] eKLR**

In the instant case the Plaintiff submitted that Kshs.3,000,000/= will commensurate the injuries sustained by the Plaintiff. On the other hand the Defendant maintained that Kshs.400,000/= will be adequate compensation. According to Dr. Maina Ruga the Plaintiff sustained pelvic injuries with fracture of right pubic ramus and diastasis of the symphysis pubis. The report also stated that she had a small abdominal wall haematoma and minimal haemoperitoneum. It is the opinion of the doctor that the Plaintiff suffered severe harm. She sustained soft tissue injuries with minimal bleeding. He stated that diastasis was reduced through fixation with a plate. The Doctor also observed that the Plaintiff gets pain on the fracture site and she walks with slight limp. He assessed her level of permanent incapacity at 20%. Dr. Cyprianus Okoth Okere also stated in his report that the Plaintiff sustained complex pelvic fracture with a fracture of the right pubic bone and separation of the pubic symphysis. The Doctor also stated that the pain in the right

pelvic region, caused difficulty in walking and running and she complained of inability to lift a heavy load. In his opinion the injuries can be classified as grievous harm. The degree of permanent incapacity is about 40%.

In **PEACE KEMUMA NYANG'ERA Vs MICHAEL THUO & ANOTHER**, Civil Suit No. 209 of 2013 [2014] eKLR, Aburili J, awarded the Plaintiff Kshs.2,500,000/= where the Plaintiff sustained a Fracture of the sacrum bone (transforaminal fracture), Fracture of the right superior pubic ramus of the public bone, Fracture of the right ischium/inferior pubic ramus of the pelvic bone, Haematoma on both thighs and Lumbo-sacral haematoma.

In **FLORENCE HARE MKAHA Vs PWANI TAWAKAL MINI COACH & ANOTHER**, Civil Suit 85 of 2010 [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 condyl 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 Sh. 2,400,000/- general damages for pain, suffering and loss of amenities.

Doing the best I can, I assess the Plaintiff's general damages at Kshs.2,000,000/=.

On special damages, the Plaintiff pleaded Kshs.412,634/=. The Defendant disputed the claim stating that it was not proven. During the hearing the Plaintiff produced a bundle of receipts of payments made towards the medical bill. She also produced a schedule of all expenses she incurred during treatment. The Plaintiff during cross examination told the court that her employer paid for the expenses. She later clarified during re-examination that the money was given to her as a loan by his employer. I find the assertion by the Plaintiff not credible. The Plaintiff did not support the claim in any way. She did not produce any document to support the claim that the employer granted her a loan. She did not even call someone from the employer's organization to testify in support of the loan claim. As much as the court would want to believe the Plaintiff, the court cannot do so since the claim has not been proved satisfactorily. Special damages are particular damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. In this case I am not inclined to grant the damages, since the Plaintiff failed to sufficiently support with evidence, the claim that the employer demands back what was paid as a medical bill settlement.

On loss of future earnings, the principles to be considered in determining whether an injured person is entitled to damages under this head was settled in the Court of Appeal in **Butler Vs Butler [1984] KLR 225**. It was held there as follows -

“1. A Person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.

2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.

5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.

6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

In applying the above laid principles, the Plaintiff at the time of the accident was 53 years old. She should have been able to fully work at least to the general retirement age of 60 years if not longer. But due allowance must be given for the uncertainties of life. I will therefore award her a multiplier of 7 years. I will award damages for loss of earning capacity in the sum of Kshs.1,075,200/=. Calculated as follows:

Kshs. 12800 X 12 months X 7 years= 1,075,200.

The Plaintiff is also awarded costs and interest until full payment from the date of delivery of this judgment.

The Plaintiff compensation is therefore as follows:

General Damages	Kshs.2,000,000.00
Loss of Future earning	<u>Kshs.1,075,200.00</u>
Special Damages	N I L
Sub Total	Kshs.3,075,200.00
Less 15% contribution	<u>Kshs. 461,280.00</u>
Total	<u>Kshs.2,613,920.00</u>

Dated and delivered at Nairobi this 25th day of May, 2015.

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D A ONYANCHA

JUDGE