



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 9 OF 2012

SABINA NYAKENYA MWANGA PLAINTIFF

VERSUS

PATRICK KIGORO1ST DEFENDANT

TELCOM (KENYA) LIMITED 2ND DEFENDANT

J U D G M E N T

The plaintiff's claim against the defendant was for general damages for pain, suffering and loss of amenities plus special damages of KShs.1,961,827/=. A claim of damages for future medical expenses plus costs and interests was also included in the plaint dated 14/1/2012.

The defendants filed a joint defence denying the claim. It was denied that the 2nd defendant was the owner of motor vehicle registration number KAT 786 X and that the plaintiff was a passenger in that motor vehicle. The particulars of negligence as set out in the plaint were also denied.

The parties recorded a consent on liability at the ratio of 85:15 in favour of the plaintiff before the matter proceeded for assessment of damages.

PW1 a medical doctor testified that on 21/12/2011 he examined the plaintiff and prepared a medical report. The plaintiff had medical documents from three different hospitals. Upon examination, PW1 found that the plaintiff had a history of being involved in a road traffic accident and sustained the following injuries;

- multiple soft tissue
- fracture of the right upper arm
- fracture of distal femur right thigh bone
- fracture of the right patella knee
- fracture of the pelvis
- fracture of distal radial-wrist

The plaintiff had internal bleeding as a result of the injuries. The examination was done about 2 years after the accident. She had a metal fixation of the right upper arm and right knee. The abdomen had been opened to remove blood resulting from internal bleeding. The plaintiff had a deformity of the left distal radial-wrist. The right arm was deformed at the elbow and had a metal fixation. Post-operative scars were still visible on the injury sites. She complained of numbness of the head and pain on the knee upon walking for long distances. The fractures caused severe physical disabilities due to various fractures. The

plaintiff requires surgery for the removal of the metal fixations. The disability was assessed at 42%. The bill paid at various hospitals was about KShs.2,000,000/=. The removal of the metals is estimated at KShs.300,000/= on the lower side. Corrective surgery may cost up to KShs.2,000,000/=. He charged KShs.2,500/= for the medical report. In cross examination, he confirmed that he did not include the fractures of the right arm, distal femur and that of the knee. The pelvis fracture was not included in the doctor's report. Neither was the internal bleeding and the opening of the stomach captured.

The deformity of the left wrist joint and the right arm were left out. The cost of future medical expenses was not reflected in the report. He testified that he used the medical documents availed to him by the plaintiff to prepare his report. The witness told the court that his report was supposed to be a summary of medical diagnosis, treatment and condition of the patient.

PW2 the plaintiff herein testified that on 16/01/2009 he was traveling from Embu to Nairobi in a Telcom Vehicle KAT 786 X with one Annette Njeri. The 1st defendant was the authorized driver of the 2nd defendant. He was over speeding at the material time. Near Sagana river, the driver overtook another vehicle (a lorry) and collided with another oncoming car. She sustained very serious injuries, lost consciousness and regained it the following day in hospital. Both of her arms and right leg sustained fracture. The right knee and the pelvic joint were fractured. Some bones on the lower spine also got fractured too. She sustained blunt injuries and swellings on the forehead and multiple swellings on both legs including soft tissue injuries. She was admitted at MP Shah hospital for a period of one month.

After being discharged, PW2 said that she fainted at home and was re-admitted in hospital for one week. In 2010 she was operated on the right upper arm at Guru Nanak hospital. It was the second surgery to correct the union of the fracture. The metal plates fixed earlier were removed and replaced. PW2 told the court that she has not yet fully recovered. At the time she testified she had a plaster on the right upper arm. She said that the arm was due for another operation and it could not lift heavy objects. After the accident the plaintiff obtained a police abstract and instructed Dr. Thiongo to prepare a medical report. The plaintiff was initially admitted at Thika District Hospital before being transferred to MP Shah hospital. She produced receipts from MP Shah of KShs.1,418,257/= and KShs.238,050/=. The receipt from Guru Nanak Hospital was KShs.398,266/=.

The plaintiff told the court that she paid KShs.12,000/= at Thika Nursing Home. It was her testimony that her late husband cleared the bill after borrowing money from his employer. Dr. Thiongo was paid KShs.6,000/= as charges for the medical report and KShs.2,000/= for court attendance. The doctors have recommended future medical treatment likely to cost KShs.3,000,000/=. From time to time PW2 experiences pain in the spinal code especially when she walks. Before the accident, PW2 was running a clothes business which collapsed after she was disabled. She has employee to take care of her. The figure of KShs.3,000,000/= is based on the treatment she has received. PW2 attends physiotherapy regularly.

The plaintiff was represented by Mr. Joe Kathungu & Company while the defendants advocate was Muthega & Kariuki. The advocates for the parties filed written submissions.

It was submitted that the plaintiff had proved her case on a balance of probabilities. The plaintiff was involved in a road traffic accident when traveling in motor vehicle registration number KAT 786 X owned by the 2nd defendant and driven by the driver/servant of the 1st defendant. The issue of liability was settled at the ratio of 85:15 in favour of the plaintiff. The plaintiff sustained fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of the conyle femur, severe retroperitoneal haemorrhage, cuts on the face and multiple soft tissue injuries.

Mr. Kathungu further submitted that PW1 confirmed that the plaintiff sustained the injuries and produced a medical report. He also confirmed that the plaintiff had not healed and will require future medical expenses at a cost of KShs.3,000,000/=. The plaintiff produced documents to support her claim and stated that she had employed someone to help her with household chores. She stated that her doctors had informed her that she needed future medical expenses at a cost of KShs.3,000,000/=. Special damages of KShs.1,961,827/= were pleaded and proved. The plaintiff submitted that KShs.5,000,000/= would be sufficient for general damages. The defendant did not call any evidence to challenge the plaintiff's case.

The plaintiff relied on **HCCC NO 86 OF 2008 AT NAIROBI JOSEPH MUSEE MUA VS JULIUS MBOGO MUGI & 3 OTHERS** where the plaintiff suffered 5% degree disability. The plaintiff suffered shortening of the leg, nerves and fractures of the tibia and fibula bones. The court awarded KShs.2,500,000/=

The defendants argued that the medical report showed that the plaintiff sustained bruises to the face, fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of the candy femur, severe retros peritoneal haemorrhage and multiple soft tissue injuries. The doctor however testified of other injuries that were not reflected in the medical report. The doctor should have been treated as an incompetent witness and his evidence should have been disregarded. The said doctor confirmed that he is a clinical health trainee and health system manager.

It was further submitted that there was contradiction on what was said in evidence and what appeared in the report. There was either no examination done on the plaintiff or the report was done by an unqualified person. The plaintiff was compensated by the Postal Corporation of Kenya under their insurance scheme for her husband who was an employee. The plaintiff cannot therefore seek to be compensated twice. The plaintiff should be paid damages of KShs.800,000/=. The plaintiff indicated that the treatment was delayed due to mismanagement by MP Shah hospital. On special damages, a receipt bearing a revenue stamp should be produced as proof. The defendant further argued that an invoice is not proof of special damages. The expenses incurred at Guru Nanak hospital were not a direct consequence of the accident hence the defendant cannot be condemned to pay. On future medical expenses, the plaintiff did not plead the same and a party should be bound by their pleadings. The medical report did not indicate the estimated amount for future medical expenses. The defendant cited and attached the following authorities:-

- **MERU HCCC NO 14 OF 2001 GEORGE KIRIANKI VS MICHAEL MUTWIRI** where the court held that a medical opinion is just an expert opinion and is not binding on the court although it will be given consideration where there is no contrary opinion. The plaintiff failed to prove that the injuries emanated from the accident.
- **LESLIE JOHN WILKINS VS BASEKI ENTERPRISES LIMITED [2015] eKLR** where it was held that a person shall not benefit twice or seek double compensation
- **CAROLINE WANJIKU KARIMI VS SIMON K TUM & ANOTHER [2012] eKLR** where the court awarded KShs.1,800,000/= to a plaintiff who sustained multiple bone, joint injuries and extensive serious soft tissue injuries.
- **STANLEY NDERITU KARIAMBATI VS JOLIE NGOY MWAMBA ALIAS JOLLY WAMBUA & ANOTHER [2015] eKLR** where the court held that future medical expenses are special damages should be specifically pleaded and proved.

The defendant alleges that the plaintiff's medical bills were cleared by Postal Corporation of Kenya under the insurance scheme for their employees through her husband's till. The plaintiff should therefore not benefit twice from more than one insurance company. The plaintiff in her testimony stated that her late husband cleared the bill after borrowing money from his employer Postal Corporation of Kenya.

The issues for determination are whether the plaintiff is entitled to damages as pleaded in the plaint against the defendants and who is to bear the costs.

The defendant argued that the plaintiff's hospital bills were cleared by her husband's insurance cover with Postal Corporation of Kenya. This was denied by the plaintiff who told the court that the bills were paid with borrowed funds from her husband's employer Postal Corporation of Kenya. It is trite law that he who alleges the existence of a fact bears the burden of proof.

Section 107 of the Evidence Act provides that;

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

Section 109 of the evidence act also provides;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

The position as to proof of the existence of a fact was explained by the Court of Appeal in the case of **DANIEL TOROITICH ARAP MOI V MWANGI STEPHEN MURIITHI & ANOTHER [2014] EKL.R.**

In view of the above, the defendant had the duty of proving that the plaintiff's medical bills were paid by her late husband's employer. However, no documents were produced in support of the said allegation. The defendants failed to satisfy the burden of proof. The evidence of the plaintiff that the bill was cleared with borrowed funds remains uncontroverted.

The defendant argued that the doctor was unqualified and should have been treated as an incompetent witness. The doctor told the court that he has a Bachelors degree in medicine from Poland and Masters degree in Community Development. He also had a Diploma in Sexually Transmitted Diseases and in Health Management systems. With his Bachelors degree in medicine, PW1 said he was qualified to prepare the medical report. The defendant did not produce any documentary evidence to the contrary. I find no basis in the defendant's argument on disqualification.

The plaintiff pleaded that she sustained the following injuries; fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of the condyle femur, severe retroperitoneal haemorrhage, cuts on the face and multiple soft tissue injuries.

The injuries pleaded and appearing on the medical report are

- fracture of the humerus
- fracture of the pelvis
- fracture of the right knee
- fracture of the condyle femur
- bruises on the face
- severe retroperitoneal haemorrhage
- multiple soft tissue injuries

The plaintiff is only entitled to compensation for injuries which were included in the medical report. In assessing general damages the court must satisfy itself that the plaintiff has proved her claim. The plaintiff in this case has not proved that she suffered more injuries than shown in the medical report.

The defendants relied on three authorities in support of general damages of KShs.800,000/=. It is noted that the injuries sustained by the plaintiffs in those cases were less in comparison with the ones sustained by the plaintiff herein. The plaintiff argued that she had undergone treatment over a long period and that she was not well. She testified that she was to undergo corrective surgeries which would still cause her further suffering. She relied in the case of **JOSEPH MUSEE MUA (supra)** where the plaintiff had been treated for injuries sustained in a road traffic accident for a long time. She had sustained fractures of the left tibia and fibula which had been infected and had nerve injuries. He also had a foot deformity on the same leg. The left leg was shortened due to injury and treatment procedures undertaken. The disability was assessed at 5% and was awarded general damages of KShs.1,300,000/= in 2013. It goes without saying that the injuries sustained and proved in this case were much more and of more grief nature than the injuries in the authority relied on. The plaintiff urged the court to award general damages of KShs.5,000,000/=.

In the case of **DENNIS NYAMWENO OPENDA VS ANWARALI & BROTHERS LIMITED &**

ANOTHER [2015] eKLR the plaintiff suffered fractured left clavicle, fractured right humerus, unstable multiple fractures of the pelvic bones (open book pelvic fracture), lacerated scalp wounds, right radial nerve injury leading to a right wrist drop and muscle wasting, blunt chest wall injury and urethral strictures complicating pelvic fracture and prolonged catheterization. The plaintiff was awarded general damages of KShs.1,800,000/= in the year 2015.

All considered, the plaintiff is awarded of KShs.3,000,000/= for loss of amenities which in my view is sufficient to compensate her.

The defendant argued that the claim of KShs.398,266/= for Guru Nanak Hospital was unsustainable. The reason given was that the operation at the hospital was for correction of a metal plate wrongly fixed at MP Shah Hospital. The defendant argued that this claim ought to have been directed to MP Shah Hospital.

The plaintiff claim is against the defendants and is based on negligence which resulted in the accident where the plaintiff was injured. The parties recorded consent on liability. It was due to the negligence of the defendants that the plaintiff was injured and sought treatment at MP Shah Hospital. The defendants did not apply to have MP Shah Hospital joined in this case as a co-defendant. I find no basis in the argument that MP Shah Hospital should bear the costs incurred at Guru Nanak Hospital.

It was also argued that the invoices from various hospitals were not proof of special damages. The plaintiff produced receipts of from Thika Nursing Home, MP Shah and Guru Nanak Hospitals amounting to KShs.1,959,627/=. The defendant argued that the receipts had no revenue stamp and were not sufficient proof of the special damage claim. This issue was not raised during the hearing but only came up during the submissions. There was documentary evidence from the hospitals showing that the bills were cleared. In my considered opinion, the claim of special damages was proved. The plaintiff is awarded the special damages of KShs.1,959,627/=.

The plaintiff claimed future medical expenses of KShs.3,000,000/= for corrective and other surgeries. The defendant alleged that future medical expenses must be specifically pleaded and proved as they are special damages. The case of **STANLEY NDERITU KARIAMBATI VS JOLIE NGOY MWAMBA ALIAS JOLLY WAMBUA & ANOTHER [2015] eKLR** was cited in support.

The issue of future medical expenses was dealt with in the Court of Appeal in the case of **SIMON TAVETA V MERCY MUTITU NJERU [2014] eKLR** where the court cited the case of Kenya Bus Services Ltd. - vs Gituma [2004] EA 91. The Court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

The plaintiff did not plead future medical expenses as shown in the plaint. The law applicable to special damages applies to future medical expenses. The claim is therefore not sustainable.

The damages awarded to the plaintiff against the defendant jointly and severally are as follows:

- | | |
|---------------------|-------------------------|
| (a) General damages | KShs.3,000,000/= |
| (b) Special damages | <u>KShs.1,959,627/=</u> |
| | KShs.4,959,627/= |
| Less 15% | <u>KShs. 743,944/=</u> |

Total

KShs.4,215,683/=

The interest on general damages will run from the date of judgment while the interest on special damages will be computed from the date of filing the suit.

The plaintiff is awarded costs of the suit.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kathungu for the Plaintiff