



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NUMBER 138 OF 2012

FLORENCE NGINA NYALANDO ACHACHA. PLAINTIFF

VERSUS

DANIEL MUNYUA NJATHI. 1ST DEFENDANT

BUZEKI ENTERPRISES LTD. 2ND DEFENDANT

J U D G M E N T

The Plaintiff herein filed this suit on the 21st March, 2012 against the Defendants claiming the following reliefs.

- a) Special damages of Ksh.596,991.00.
- b) Future medical expenses and loss of earning capacity
- c) General damages for pain, suffering and injuries.
- d) Costs of the suit plus interest on (a), (b) and (c) above.

The Plaintiff pleads that on the 12th day of July, 2010, she was travelling in motor vehicle registration Number KAQ 574V Suzuki Escudo along Nairobi-Mombasa road when an accident occurred involving motors vehicle registration numbers KAQ 574V, KBF 502A and KAP 684W.

The matter came up for hearing on the 21st September, 2015 when the same proceeded. On the said date the second Defendant was not present in court though the firm of Advocates on record for it, M/s P I Shamba & Co. Advocates had been duly served with the hearing Notice and had acknowledged receipt by stamping a copy of the same on the 13th May, 2015. The matter was mentioned on 12th October, 2015 to confirm if parties had filed their respective submissions and present in court on behalf of the 2nd Defendant was Mr. Samba Advocate who confirmed having filed the submissions on behalf of the 2nd Defendant.

During the hearing on 21st September, 2015 the Plaintiff Florence Ngina testified as PW 1. She told the court that on the 12th July, 2010, she was travelling as a lawful passenger in motor vehicle registration Number KAQ 574V along Nairobi-Machakos road on her way to Machakos. In the same vehicle was her late husband (who was driving the vehicle) and her daughter.

As they proceeded with the journey and on reaching Astrol Petrol station near Master Mind, there appeared a trailer from the left side of the road which failed to stop but instead joined the road as a consequence of which the motor vehicle KAQ 574V hit the trailer's middle tyres.

It was her evidence that her husband applied emergency brakes and tried all he could to avoid the accident but it was too late in the day. She gave the registration number of the trailer as KBF 502A. None of them was injured, they came out of their motor vehicle and her husband ran after the driver of the trailer who did not stop, until he caught up with him.

The Plaintiff and her daughter stood at the island between the dual lanes. Her husband and the driver of the trailer came to where they were standing, he put a life Saver behind their vehicle and they started negotiating with the driver of the trailer.

As they were negotiating, she heard a bang after which she lost consciousness and only regained the same while at Mater Hospital. It was at that point that she was told she was involved in another accident and that their vehicle had been hit by a lorry and that her husband had died in that second accident. She was admitted in hospital between 12th July, 2010 to 27th July, 2010 when she was discharged.

She produced several documents as exhibits as follows: -

- 1) Police Abstract – Exhibit 1.
- 2) Medical report
 - a) Dated 17th February, 2012 – Exhibit 2 (a).
 - b) Dated 20th February, 2012 – Exhibit 2(b).
 - c) Dated 12th March, 2012 – Exhibit 2(c).
 - d) Dated 1st December, 2012 – Exhibit 2(d).
- 3) Invoice dated 27th July, 2010 – Exhibit 3.
- 4) Bundle of receipts – Exhibit 4.
- 5) Receipts for Abstract – Exhibit 5.
- 6) Towing Charges – Exhibit 6.

From the medical reports produced in court, it is apparent that she sustained the following injuries.

- a) Fracture of the left clavicle.
- b) Head injuries and fracture base of the skull.

The CT –Scan of the brain revealed: -

- a) Sub-arachnoid haemorrhage.
- b) Fluid levels in the maxillary and sphenoid air sinuses.

She was admitted in the High Dependency Unit but was transferred to the general ward.

Following the injury, the Plaintiff has continued to suffer repeated occipital and temporal headaches

despite adequate treatment. There is a manifestation of post concussion syndrome that developed as a complication from the injury. The reduced concentration and dizzy spells she experiences are a manifestation of the same. The post-traumatic epilepsy as a complication is a distinct possibility.

On the 15th July, 2010, she was taken to theatre and open reduction and internal fixation, plate and screw were done. Though post operative recovery was uneventful, the fracture was completely healed.

The CT Scan showed leakage of the paranasal sinuses with bleeding from the left ear. This sinus problem has since healed and on follow up she has mixed sensory normal hearing loss of the left ear.

The plate at the clavicle bone is still intact and it's supposed to have been removed according to the doctor's report, at a cost of Ksh.100,000/-. She told the court she incurred medical expenses of Ksh.569,991.00. The expenses were supported by receipts which she produced as a bundle.

In addition to the medical expenses, the Plaintiff incurred other special damages to wit cost of towing the motor vehicle at Ksh.9,500/-, Police Abstract Ksh.100/-. She did not, however, produce receipts for the excess and the medical reports.

She told the court that she experiences constant headaches, instances of dizziness, numbness on the left side of the face, her right eye waters and gets red. She testified that it is hard to concentrate and if she does so, she gets headaches. The Doctor assessed her degree of incapacity at 30%. She blamed the accident on the motor vehicle KAP 684W owned by the 1st Defendant.

The Plaintiff's daughter (Cynthia Akinyi) testified as PW 2. She told the court how on the 12th July, 2010, they were travelling in motor vehicle registration Number KAQ 574V along Nairobi-Mombasa Road towards Machakos. She gave an account similar to that of PW 1 and told the court how on reaching Astrol Petrol station, a trailer cut across the road without stopping as a result of which the vehicle they were travelling in, hit the middle tyres of the trailer.

After the impact, her father got out of the vehicle and followed the driver of the trailer who had failed to stop. Her father and the driver of the trailer came to where PW 2 and PW 1 were standing on the island and as her father and the driver of the trailer were negotiating on the damage caused to motor vehicle KAQ 574V, another trailer came from behind their vehicle, served on to the island where her late father and mother were standing and hit them. The driver did not stop but was stopped by members of the public. She assisted in taking her mother to hospital as she had been seriously injured and her late father succumbed to the injuries.

She told the court that her father had put a life saver behind their vehicle and had put hazards on. She blamed the driver of motor vehicle KAP 684W for causing the accident.

The 1st Defendant did not call any witnesses.

The issues for determination by the court are: -

- 1) Did any accident occur on 12th July, 2010 involving motor vehicle registration Nos. KBF 502A, KAQ 574V and KAP 684W?
- 2) Was the Plaintiff travelling as a passenger in motor vehicle registration Number KAQ 574V at the material time of the accident i.e. on 12th July, 2010?
- 3) Did the Plaintiff sustain any injuries as a result of the accident that occurred on 12th July, 2010?
- 4) Did the Plaintiff suffer any loss and/or damage as a result of the accident and if so what is the quantum.

5) Who was to blame for the accident? And if both the Defendants are to blame, to what extent is each liable.

6) Was the second Defendant the registered owner of motor vehicle KBF 502A.

7) Who should bear the costs of the suit?

On the first issue, the evidence of the Plaintiff is very clear that an accident occurred on the 12th July, 2010 involving motor vehicle registration Nos. KAP 684W, KBF 502A and KAQ 574V. The Plaintiff produced a police abstract to that effect and no evidence to the contrary was offered by the defence.

On the second issue, the Plaintiff in her evidence testified that she was travelling as a passenger in motor vehicle KAQ 574V on 12th July, 2010 when the accident occurred. This evidence was corroborated by that of PW 2 who was in the same vehicle with her at the time.

Following the accident, the Plaintiff sustained serious injuries and was hospitalized at Mater Hospital. Three medical reports were produced as exhibits during the hearing which are sufficient to prove that she was injured in the accident. Receipts were also produced in support of medical expenses following the treatment that she received after the accident.

As to who was to blame for the accident, the evidence on record is clear. The first impact involving motor vehicle KAQ 574V and KBF 502A was a minor accident and the Plaintiff did not sustain any injuries following the same. The major accident was caused by the driver of motor vehicle KAP 684W. In her evidence, the Plaintiff testified that after the first accident, her husband placed life savers behind motor vehicle KAQ 574V and the hazards of the vehicle were on. It was during the day and if the driver of motor vehicle KAP 684W had been careful, he ought to have noticed motor vehicle KAQ 574V on time and could have avoided it. From the evidence on record, he was negligent in the way he drove, controlled and/or handled the aforesaid motor vehicle hence causing the accident pursuant to which the Plaintiff was injured. I hold him fully responsible for the accident.

As to whether the 2nd Defendant was the registered owner of motor vehicle registration number KBF 502A, there is no evidence that was tendered to that effect by way of official search from the Registrar of Motor Vehicles. The Plaintiff produced a police abstract which shows that the said motor vehicle was owned by one Walter Bii. My take on this is that the only conclusive way to prove ownership of a motor vehicle is by production of an official search from the Registrar of Motor Vehicles and not by way of a Police Abstract, and for that reason, I find that the ownership of the said motor vehicle was not proved at the hearing.

Having determined the issue of liability, I now turn to the quantum of damages payable to the Plaintiff as compensation, and in so doing, I am aware that the assessment of general damages is not an exact science and the court in doing the best it can, take into account the nature and extent of the injuries in relation to awards made by the court in similar cases. This ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

I have perused the authorities submitted by the Plaintiff with regard to the quantum and I note that the injuries therein are much more severe than in the instant case. In the case of **Ngure Edward Karega Vs Yusuf Doraz Nashir** HCCC No. 157 of 2012 relied on by the Plaintiff, the permanent physical disability was assessed at 100%.

On the other hand, the authorities cited by the first Defendant reflect injuries that are less severe than the ones sustained by the Plaintiff in the instant case.

As I observed earlier in this judgment, the cost of removing the plate implant in the sum of Ksh.100,000/- has been provided for by Dr. Owinga in the Plaintiff's medical report dated the 12th day of March, 2012. The Defendants did not challenge the same.

On the claim of loss of earning capacity, no evidence was led to prove the same. In her evidence, the Plaintiff told the court that she is a teacher and she is still working. The medical reports produced in court did not support this claim.

I, therefore, enter judgment as follows: -

- a) The case against the second Defendant is dismissed.**
- b) I enter judgment on liability against the first defendant at 100%.**
- c) On quantum of damages, the following orders are made.**
 - (i) Special damages are awarded in the sum of Ksh.569,991.00.**
 - (ii) Future medical expenses (Cost of removing the plate implant) in the sum of Ksh.100,000/- is awarded.**
 - (iii) General damages for pain and suffering awarded in the sum of Ksh.2 million.**
 - (iv) Loss of earning capacity – NIL.**
 - (v) The Plaintiff is awarded the cost of the suit plus interest.**

Dated and delivered at Nairobi this 12th day of November, 2015.

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L NJUGUNA

JUDGE

In the Presence of

.....for the Plaintiff.

..... for the Defendants.