



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT CIVIL CASE NO. 5 OF 2013

MARY NJOKI MACHARIA.....PLAINTIFF

-VERSUS-

JAMES OYUGI Alias

JAMES NYARANGA.....DEFENDANT

JUDGMENT

By a plaint dated 30th April, 2010 and filed in court on 14th May, 2010 the plaintiff sued for, *inter alia*, special and general damages as a result of the injuries she sustained from a road traffic accident involving the defendant's motor vehicle which was registered and identified as **KAL 828V**(hereinafter "the motor vehicle"). This plaint was amended on 25th August, 2011 to include future expenses and enhanced special damages.

It was the plaintiff's case that on or about the 11th October, 2009 the defendant either by himself, his servant or agent drove the motor vehicle so carelessly and/ or negligently that he knocked down the plaintiff who was walking off Murang'a Kahuro road near Gitaro shopping centre. As a result of this accident the plaintiff is said to have sustained severe bodily injuries which were particularised in the plaint as paralysis to both legs and a fracture of two of her spinal cord vertebrae. The plaintiff was also said to have sustained injuries on her head, ribs and the anterior part of the chest.

In the defence filed in court on 1st July, 2010 and amended on 6th September, 2011 the defendant denied the plaintiff's claim and more particularly all the allegations and particulars thereof as set out therein seriatim.

This case was partly heard before my brother, Hon Justice Sergon in the High Court at Nyeri; the records indicate that it commenced on 17th May, 2012 and by the time the case was transferred to Murang'a in January, 2013, two of the plaintiff's witnesses had already testified. When the matter came up in court at Murang'a for the first time, the court directed that the case proceeds from where it had reached as the judge's handwriting was legible enough and easy to read.

In her testimony, the plaintiff told the court that on 11th October, 2009, she was on her way to church at Gitaro. She was walking in the company of two other people one of whom she identified as Jorum Nyaga while the other was his uncle; according to her evidence they were all on the left side of the road. As they were going uphill, they saw a vehicle coming from the opposite driving on the left side of the road where the plaintiff was. As the vehicle was moving towards her she attempted to escape towards an embankment to avoid it. The vehicle is said to have hit the embankment and also hit the plaintiff from behind. She was injured and taken to Murang'a district hospital where she was admitted for more than one month.

The plaintiff told the court that the driver of the motor-vehicle was charged with the offence of careless driving in **Murang'a Senior Principle Magistrate's court Traffic Case No. 936 of 2009**. The charge sheet and the record of the proceedings in that case were received in evidence as part of the plaintiff's exhibits. Those records show that the driver one **Bernard Nyumu Maina** was convicted on his own plea of guilty and fined Kshs. 4,000/= or six months in prison in default thereof.

Police constable Tom Onyango produced a police abstract in court giving the details of the road traffic accident involving the defendant's vehicle. He confirmed that the accident occurred on 11th October, 2009 at 9.30 am along Kahuro-Murang'a road. This officer investigated the case and in his investigations he established that the driver of the motor vehicle veered off the road after he lost its control; consequently he hit the plaintiff. He took a statement from an eye witness, Joram Mugo Nyaga and also drew a sketch which indicated that the point of impact was three metres from the road. He concluded that the driver was to blame for the accident and therefore he charged him with the offence of careless driving. The witness confirmed that the driver was convicted on his own plea of guilty.

As a result of the accident the plaintiff can neither walk nor stand; she is confined to a wheel chair. The plaintiff is also unable to control her stool or urine. A specialist has to visit her twice a month to wrap her with particular instruments to control the urine and the stool. A helper has been specifically employed to take care of the plaintiff and in her evidence she said that the helper is paid Kshs. 10,000/= every month. A doctor attends to her periodically to treat her wounds. The plaintiff's movement on the wheel chair was said to be restricted, she has to be wheeled even with her house. To mitigate her pains arising from resting on her back and buttocks for long hours the appellant will require a special wheelchair and a mattress.

The plaintiff's husband testified that on the 11th October, 2009, he was in Nairobi when he received a report that his wife had been involved in a road traffic accident; he rushed to Murang'a district hospital where he found the plaintiff admitted in the casualty. He was given the registration number of the vehicle involved in the accident by **Joram Mugo Nyaga** who was walking along with the plaintiff when she was hit. He found the vehicle at Kahuro police station. The witness testified that since the accident the plaintiff's life changed to the extent that it has affected his own life. Due to the wife's condition, the two cannot sleep together. More so, she requires specialised care and a special diet. The plaintiff, according to this witness is unable to do what she used to do in helping her husband manage and run their family home. The plaintiff's husband testified that he was forced to sell his land in order to meet his wife's ever growing expenses which include monthly payments of 10,000/= for a helper's services. This helper, Loice Wanjiru testified that she is paid Kshs. 10,000/= every month although she could not explain why she indicated in her statement that she used to be paid Kshs. 5000/= every month. She later told the court that she was being paid Kshs. 20,000/= monthly.

Dr Julius Kimani whom the plaintiff called to testify on her behalf confirmed that he examined the plaintiff and made a report of his findings. He produced this report in court as part of the plaintiff's evidence. In his opinion, the plaintiff was completely paraplegic and therefore needed special care as she was unable to do most of the tasks a normal human being would do by herself. The doctor opined that the plaintiff would require a caretaker whose services would include changing her diapers as the plaintiff could not control the passing of urine and stool. The cost of services of such a care taker were estimated at Kshs. 10,000/= a month. To help the plaintiff move around the doctor recommend a motorised wheel chair. The doctor also recommended regular physiotherapy and a special ripple mattress. In the doctor's view it would cost about Kshs. 3,000,000/= to meet these requirements. The doctor assessed the costs involved on a multiplier of 10 years because he gave the plaintiff a life expectancy of 75 years.

The only witness that the defendant called to testify was doctor Washington Wokabi. He said that he was a consultant surgeon. In his testimony he produced a report dated 3rd April, 2012 in which he made his medical findings after he examined the plaintiff. According to the doctor, the plaintiff sustained a major injury to the back as a result of the road traffic accident. The doctor confirmed that the plaintiff was paralysed and had lost power in her lower part of the body the effect of which was that she could neither control her urine or stool. The plaintiff could not move and because of long confinement to the bed and wheel chair she suffers from bed sores. The doctor confirmed that the plaintiff had fractures on the 6th

and 7th column of her vertebrae and so her spinal cord was damaged and this damage was irreversible. This witness also made references to a medical report from Dr Mwago who had also examined the plaintiff. He agreed that the appellant will need the services of a helper whose cost on monthly basis was estimated at Kshs. 10,000/= plus other expenditures which would cost averagely Kshs. 600 per week. The doctor told the court a special wheel chair would cost Kshs. 60,000/= and treatment of recurrent bed sores would require a one off payment off Kshs. 35,000/=and yearly payments of Kshs. 8,000/=

I have considered the evidence on record and the submissions by both counsel for the plaintiff and the defendant. There three main issues to be determined this case; the first issue is the issue is the determination of liability between the plaintiff and the defendant. The second issue is the extent of the injuries that the plaintiff suffered and finally, the last issue is determination of the damages payable.

On the issue of liability there was evidence that at the time material to this suit, the vehicle in question belonged to the defendant and that it was being driven by his driver or authorised agent. The plaintiff's evidence was consistent that the driver of the motor vehicle was to blame for the accident. The plaintiff related that she was walking off the left side of the road when the plaintiff's vehicle came from the opposite direction being driven on the left side of the road; this would mean that the vehicle was being driven on the right lane instead of the left lane and therefore on the wrong side of the road. The evidence of the investigating officer was to the effect that the motor vehicle was being carelessly driven and therefore veered off the road and overturned hitting the plaintiff in the process. Based on his investigations, he charged the defendant's driver with the offence of careless driving in **Murang'a Senior Principal Magistrates Court Traffic Case No. 936 of 2009**. The proceedings in this case show that the driver pleaded guilty and was sentenced accordingly. The driver admitted as true the statement of facts which was read in court by the prosecutor; this statement was consistent with the evidence of the plaintiff of how this accident happened. The driver himself was not called to testify and the only inference that can be drawn from his failure to testify is that his testimony would have been adverse to the defendant's case. All these facts add up to one conclusion; that the defendant's driver or agent was solely responsible for the accident and since he was driving the vehicle with the defendant's authority the defendant is responsible for his driver's actions. In other words the plaintiff proved to the required standard that the defendant was negligent as pleaded.

The next issue for determination is the extent of the injuries suffered by the plaintiff. In her plaint the plaintiff particularised the injuries she sustained. She pleaded that she suffered head injury, injury to the anterior chest, fractured ribs, fractured spinal column more particularly T6 and T7 vertebrae, paralysis in both arms. The evidence of whether indeed she suffered these injuries was adduced by two doctors respectively called by each party to the suit; in their respective reports which were admitted in evidence the doctors were largely in agreement that the plaintiff suffered a back injury that caused injury to the spinal cord. As a result, the plaintiff was paralysed from the lower thoracic region downwards. It was established that she suffered fractures of the T6 and T7 vertebrae. In the doctors' opinion the plaintiff is will forever remain completely paralysed in the lower part of the body and will not be able to control the urine and stool flow. The plaintiff will be confined to a wheel chair for the rest of her life and as the time the doctor's testified she was suffering bed sores which needed regular treatment. None of the reports shows that the plaintiff sustained any injury to her head or to the ribs or on the anterior part of the chest as alleged by the plaintiff.

As a result of the plaintiff's injuries, she is totally dependent and therefore she will require an helper for the rest of her life. The doctors opined that she will need an orthopaedic bed with mattress and wheel chair; disposable items like diaper catheters and urine bags will be required on a weekly basis and regular treatment of her bed sores.

Having established the extent of the plaintiff's injuries, the next issue is the determination of the damages payable; these damages are made up of special and general damages. Under the head of special damages the evidence of the plaintiff's doctor and that of her husband showed that as at the time she testified, she had incurred a total Kshs. 52,000 as the amounts spent for her treatment.

On general damages for pain and suffering, considering the extent of injuries and their effect on the

plaintiff's future, and having considered several court decisions where similar issues have arisen more particularly the case of **Joseph Magana Kasha versus Kenya Power and Lighting Ltd(Mombasa High Court Civil Case No. 188 of 2005)**, cited by the plaintiff's counsel where an award of **Kshs. 3,000,000** general damages was awarded for pain and suffering for the injuries the plaintiff paraplegic waist down just like in the present case; the decisions cited by the defendant in the case of **Julian Anyango Kuni versus United Millers Ltd (Kisumu High Court Civil Case. No 35 of 2004)** where the plaintiff was paralysed and could not control her stool or urine, the court awarded her Kshs. 1,500,000/= as general damages for pain and suffering and that of **Patrick Mwangi Irungu versus Charles Macharia Irungu & Another (Nakuru High Court Civil Case No. 188 of 2005)** in which the plaintiff was also awarded Kshs. 1,500,000 for pain and suffering for paralysis due to fracture on T12 and L1 vertebrae, I would award the plaintiff the sum of Kshs. 2,200, 000/= as general damages for pain and suffering.

The plaintiff and her husband testified that the plaintiff needs an helper. Such an helper has been employed; however, what was not clear is the amount of money she is paid for her services. The defendant's doctor estimated the cost of the helper's services at Kshs. 10,000/=. This figure appears to me to be reasonable and I will adopt it and award it to the plaintiff to cater for her nursing services.

For disposable items, the defendant's doctor was of opinion that a sum of Kshs. 600 per week would suffice; again in my view this appears to be a more acceptable figure and I will award to the plaintiff accordingly.

The cost of a special mattress was estimated at Kshs. 350,000/= by Dr Wokabi but the plaintiff prayed for Kshs. 300,000/= for this particular item. The plaintiff will only get what she prayed for in this regard.

For future medical expenses, there was a variance of opinion between the plaintiff's and the defendant's doctor. While the Plaintiff's doctor estimates the costs under this head as Kshs. 1,000,000/= the defendant's doctor was of the view that a one off payment of Kshs. 35,000/= and a yearly payment of Kshs. 8,000/= would suffice. Considering the evidence of both the doctors that the plaintiff is not completely healed and she will certainly require regular medical attention, I would think that Dr. Wokabi's estimates are far much on the lower side. In my view a figure of Kshs. 250,000/= would be reasonable in the circumstances.

The plaintiff prayed for loss of future income; however, there was no evidence that prior to the accident the plaintiff was engaged in any gainful employment and more so how much she earned. I would therefore not make any award on this head.

The purposes of calculation of future expenses the plaintiff's doctor gave the plaintiff a multiplier of ten years while the defendant insisted on two years' multiplier. There is no doubt that it is not within human power to put an accurate estimate of how long one will live; however for purposes of cases such as the one herein, the court can only estimate based on the data given by the experts in that area. As noted the estimate given are opposite extreme; this court will adopt the of five years as the multiplier which appear to me to be the middle ground between the plaintiff's and the defendant's doctors' respective estimates.

In conclusion therefore the plaintiff's suit succeeds and judgment is entered in her favour as follows:-

a. General damages	Kshs. 2,200,000/=
b. Special damages	Kshs. 52,000/=
c. Costs of an helper/nursing care for	
Five years Kshs (10x12x5)	Kshs. 600,000/=
d. Future medical expenses	Kshs. 250,000/=
e. Disposable items and equipment	

Kshs (1200 x 12 x5)

Kshs. 300,000/=

f. Orthopaedic bed/ripple mattress

Kshs. 300,000/=

g. Wheel chair

Kshs. 60,000/=

h. Total

Kshs. 3,760,000/=

The plaintiff is also awarded costs of the suit and interest thereof.

Signed, dated and delivered in open court this 21st day of March 2014

Ngaah Jairus

JUDGE