



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.410 OF 2006

REBECCA MUMBUA

MUSEMBI.....PLAINTIFF

-VERSUS-

LUCY K KINYUADEFENDANT

JUDGMENT

1. The plaintiff filed this suit through a plaint dated 20th April 2006, the same was amended on 20th April 2008. The plaintiff sued the defendant for Special and General Damages arising from injuries sustained in a motor vehicle accident on 21st February 2004. The plaintiff claims that while lawfully travelling as a fare-paying passenger along Embu–Chuka road aboard the motor vehicle KAQ 517Q when the defendant either by herself, her servant or agent so carelessly and negligently drove, managed and or controlled the said motor vehicle causing the same to be involved in an accident in which the plaintiff suffered severe bodily injuries for which the plaintiff holds the defendant liable.
2. The plaintiff pleaded that she suffered the following injuries;
 - i. Loss of 12 teeth
 - ii. Compound fractures of the right tibia and fibula in the middle third
 - iii. Compound comminuted fractures in the upper third of the left tibia and fibula
 - iv. Undisplaced fracture of the right acetabulum and right pubic rami
 - v. Internal fixation of the fractures and reconstruction surgery with metal plates
 - vi. Extensive surgical scars
 - vii. The plaintiff pleads that she requires total hip replacement estimated at a cost of Kshs. 350,000/- and Kshs. 400,000/-
3. She claims the following special damages;
 - i. Medical reports – Kshs.10,000/-
 - ii. Medical expenses Kshs. 1,562,297.20/-
 - iii. Police abstract Kshs. 100/-
 - iv. Search Kshs.500/-
 - v. She also seeks further medical expenses and damages
4. The defendant filed a defence dated 15th April, 2003 and denies every allegation made by the plaintiff and further denies the particulars of negligence as pleaded in the plaint as pertaining to Motor vehicle KAQ 517Q.
5. At the hearing on the 25th November 2013 parties recorded consent on liability in the ration of

90:10 in favor of the plaintiff and agreed to proceed to assessment for damages.

EVIDENCE

6. The plaintiff testified as follows; that she was a passenger in motor vehicle KAQ 517Q which was involved in an accident and after the accident she was taken to Thika District Hospital but later transferred to Mater hospital due to the severity of the injuries sustained and was admitted from 21/2/2004 to April 2004 approximately 6 weeks. She testified that she suffered multiple fractures on both her legs, lost 5 teeth and 12 teeth were affected; that she was later admitted in 2006 to remove the metal plates in her legs and started seeing Dr. Bodo for Physiotherapy; that the cost of physiotherapy is too high as a result she is using clutches; that sitting for long causes her numbness and she has to keep walking around, that she has since developed osteoarthritis and she has been advised she may need hip replacement; that she experiences pain going up the stairs and the loss of teeth has limited her eating, that the discomfort on her front teeth gives her headaches; that her employer paid for her 2 admissions which amounts are recovered from her salary; that she underwent dental repairs that put a permanent bridge which cost Kshs. 155,000; that on her first admission she incurred Kshs.860,655/- and for her second admission she incurred Kshs. 301,625/-. She testified that from the time the accident occurred in February 2004 she returned to work in December, 2004 and that her performance at work was affected as she cannot walk up to 2nd and 3rd floor.
7. Doctor Washington Wakobi testified that he examined the plaintiff on 12/5/2010 and prepared the medical report dated 26/5/2010 indicating the injuries sustained and treatment received. He testified that his findings were based on the clinical and x-ray and his opinion and findings that the right hip had been broken and she had developed arthritis which will progress as she grows older affecting her movement. He recommended a hip replacement which he assessed might cost around Kshs. 400,000/- as this will reduce pain and improve her movement. He assessed disability at 25% and stated that the same can be reduced to between 18% to 15% after the hip replacement. He also stated that the plaintiff lost 6 teeth and as such should undergo dental procedure. He testified that if the operation is done the plaintiff will walk better and the pain will be less. On being cross examined he stated that he can only confirm the injuries indicated and that the fractures healed badly and that the Kshs. 400,000/- was the going rates for the said operation.
8. **SUBMISSIONS**

SPECIAL DAMAGES

The plaintiff submitted that the cost of medical reports have been proved to the extent of Kshs. 2,000/- ; that there is a police abstract, medical examination report, a copy of search and receipt of payment towards the same for Kshs. 500; that there is also a letter from National Cereals and Produce Board which shows the amount recoverable from the plaintiff as Kshs.858,670.85; that the first medical bill from Mater hospital running from February 2004 to April 2004 as per the attached invoice totals to Kshs. 824,751.31; that there is also a second provincial invoice for April 2006 which totals to Kshs.301, 625.14; that the plaintiff adduced 2 pay slips for each year showing amounts deducted towards the settlement of the medical bills she incurred; that the plaintiff further submitted that the evidence advanced was adequate to show the recovery method by the employer over the years. Mr. Kaburu for the plaintiff submitted that the plaintiff had proved the special damages as pleaded. On this he relied on the case of ***Coast Bus Services Ltd. -Vs- Sisco E. Murunga Ndayi & Others Civil Appeal 192 of 1992***, where it was held that;

“what amounts to strict proof must of course depend on the circumstances as was stated in the bailiff’s case...if for instance, there was evidence that following a road traffic accident the claimant was admitted in hospital, that he paid hospital charges but has lost the receipts issued to him following treatment, then it would be. “the vainest pedantry” to insist that only the production of the receipts would constitute strict proof ”

It was his submission that the plaintiff explained the circumstances of the medical bills

how they were paid and availed evidence of payment and that there was no contrary evidence disapproving payment; that the total amount was Kshs.1, 399,589.20 and the plaintiff is personally paying Kshs. 858,670.85/- he urged the Court to pay the plaintiff the proved sum of Kshs. 1,399,589.20. He referred the Court to the case of ***Carole Copeland –vs- Diani Car Hire & Safaris NBI HCCC 5562 of 1991***; He further submitted that the plaintiff is entitled to medical costs totaling to Kshs 1,402,189.20 proved as special damages.

9. The defendant submitted that it was trite law that all special damages be specifically pleaded and proved; that the plaintiff pleaded damages in the amount of Kshs. 1,572,897.20 but only proved cost for medical report of Kshs. 2,000/- and cost of search receipt for copy of records Kshs.500 and as such the other amounts should fail; that the payment voucher produced by the plaintiff bore the name of National Cereals Produce Board and there is no nexus established between the monthly deductions and payments to Mater Hospital; that although the plaintiff claimed that some amount was covered by NHIF she did not disclose the amount which he submitted was calculated to deceive the court; that if all amounts were awarded the same cannot exceed Kshs.858,670.85 which is the amount the employer acknowledged to having paid on behalf of the plaintiff and that the plaintiff should not succeed in the claim for loss she has not incurred.

GENERAL DAMAGES

10. The plaintiff relied on the medical report by Dr. Wakobi and reiterated the plaintiff's testimony on injuries sustained. Mr. Kaburu submitted that 9 years after the accident the plaintiff requires a walking stick to walk and will be disabled even after the hip replacement. He urged the court to take the approach of multiple injuries with permanent incapacity and make an award of Kshs. 3,500,000/- for pain and suffering and loss of amenities. He referred the Court to the following cases; ***Dancan Muriithi Mbiuki –vs- Amedeo Thaine Meru HCCC 79 of 2007*** where an award of Kshs. 1,500,000/- was made in 2009; ***Edward Mzamili Katana –vs- CMC Motors Group Ltd & Another MSA HCCC 70 of 1997*** where an award of Kshs. 2,000,000/- was made in 2006; ***James Katua Peter –vs- Simon Mutua Muasya MKS HCCC 135 of 2001*** where an award of Kshs. 2,000,000/- was made in 2008; ***James Njau Kariuki –vs- Mary Goreti Wakwibubi & Another Eldoret HCCC 2 of 2005*** where an award of Kshs. 3,000,000/- was made in 2007.
11. The defendant on the issue of general damages submitted that the injuries pleaded by the plaintiff and the ones listed in Dr. Wokabi's medical report do not correspond; that the doctor could not state for certain how many teeth the plaintiff lost as a result of the accident; that although the process of arthritis had fully been established no evidence in the form of x-rays was produced to prove the same. Counsel submitted that though the plaintiff claims to be in pain no evidence has been adduced to prove she is still receiving treatment from the time the plates were removed from her legs and that it is 9 years since the said accident and she has been working and even received a salary increment; that the plaintiff incapacity is said to reduce to 15-18% upon the hip replacement on this the defendant proposed an award of Kshs. 600,000/- as adequate compensation to the plaintiff for pain and suffering. On this she relied on the case of ***Soren Peterson vs Charles Muhavi Eldoret HCCCA 149 of 2003 eKLR*** which she submits is comparable to the instant case save for the plaintiff suffered 8% disability and it was his submission that Kshs.600,000/- would be adequate compensation. She also submitted that the cases relied on by the plaintiff are not comparable to the current case and sought to distinguish them as follows; that in the case of ***James Katua Peter vs Simon Mutua Muasya, (2008) Eklr Machakos HCCC 135 of 2001*** the plaintiff suffered 70% permanent disability and his leg was shortened by 10%. In the case of ***James Njau Kariuki vs Mary Goreti Wakwibubi & anor (2007) Eklr Eldoret HCCC no. 2 of 2005*** the plaintiff suffered 50% permanent disability, more severe injuries, loss of libido and inability to perform conjugal rights, plus he required two hip replacements. In the case of ***Edward Mzamili Katan vs CMC Motors and another*** not only were the injuries more severe, the plaintiff suffered shortening of the leg and the head injury leading to concussion.

FUTURE MEDICAL COSTS

The plaintiff pleaded for an award on future treatment for hip replacement in the range of Kshs.350,000/- and Kshs.400,000/-. Dr. Wambugu estimated costs at Kshs. 350,000/- while Dr. Wakobi placed the same at Kshs. 400,000/-.

DETERMINATION

12.The two doctors who examined the plaintiff confirmed that the plaintiff indeed suffered the said injuries save for Dr. Wambugu who could not for certain state how many teeth were affected. The referral note from Mater hospital indicates that the plaintiff lost 5 teeth. The two doctors concurred that the plaintiff suffered severe injuries and gave very close degrees of incapacity, Dr. Wakobi stated the plaintiff's degree of incapacity at 25% while Dr. Wambugu, the defendant's doctor placed it at 24%. In a recent case of this Court of **David Iyaka Nyongesa Vs Synergy Industrial Credit Limited & 2 Others HCCC 394 Of 2010** where the plaintiff suffered the following injuries; injury to the left sided facial nerve palsy; left temporal lobe contusion with left petrous bone fracture; fracture of right femur; severe cuts and bruises on both hands; blunt trauma to the left shoulder; left nerve disability 100%; Right lower limb disability 50%; this Court awarded general damages of Kshs. 1,000,000/-, these injuries however were not as severe as the ones suffered by the plaintiff in this case. In the case of **Dancan Muriithi Mbiuki –vs- Amedeo Thaine Meru HCCC 79 of 2007** where the plaintiff suffered the following injuries;

- i. Transverse fracture of the right tibia and fibula bones
- ii. Compound segment fractures to the left tibia and fibula bones (inclusive medial malleolus of the left ankle)
- iii. Posterior dislocation of the left hip with acetabulum fracture
- iv. Fractures of the left superior pubic ramus(pelvic fracture)

The plaintiff was awarded Kshs. 1,500,000/- in 2009 as general damages and loss of amenities and in the case of **James Njau Kariuki vs Mary Goreti Wakwibubi & anor (2007) Eklr Eldoret HCCC no. 2 of 2005** where the plaintiff suffered the following injuries;

- i. Fracture dislocation of the left hip;
- ii. Laceration on the forehead of 7 cm
- iii. Cut wound on the right nostril
- iv. Deep cut wound on the left knee
- v. Soft tissue injuries on the left side of the chest
- vi. Loss of libido and inability to perform conjugal rights

The Court awarded Kshs. 3,000,000/- in 2007 as general damages and loss of amenities;

13.Having taken into account the submissions, cases cited the authorities cited by the plaintiff's Counsel, the severe injuries sustained which have affected the plaintiff's life and will continue to affect her life as long as she lives, enduring the pain and suffering and aftereffects as stated by the doctors this Court awards the plaintiff Kshs.3,000,000/- (Three Million) for pain and suffering and loss of amenities less 10% this the plaintiff is awarded Kshs. 2,700,000/-. Kshs 600,000/- suggested by the defendant's Counsel is a meager sum for the injuries sustained by the plaintiff.

This is what i find is proved for special damages;

- i. Police abstract, it has been exhibited I can take judicial notice that it was paid for, the plaintiff is awarded the 100/- as claimed;
- ii. Medical reports there are 3 receipts exhibited of 2,000/-, Kshs. 2,000/- and 5,000/-, the plaintiff is awarded the sum of Kshs. 9,000/-
- iii. Search, there is a copy of record from KRA for payment receipt of Kshs. 500/- , the plaintiff is awarded the sum of Kshs 500/-
- iv. Future Medical, it was the two doctors' recommendation and the plaintiff's testimony that the

operation is necessary, the plaintiff pleaded for an award between Kshs.350, 000/- and Kshs.400, 000/-, Dr. Wambugu estimated costs at Kshs. 350,000/- while Dr. Wakobi placed the same at Kshs. 400,000/-, with the rate of inflation having gone up the plaintiff is awarded Kshs. 400,000/-.

v. It was the plaintiff's evidence that her employer paid the bill and she is being recovered the amount paid. The letter dated 9/6/11 from the Human Resources Manager states that the total bill settled by the National Produce Cereals Board to the Mater Hospital was Kshs. 1,399,589.20 less Kshs 540,918.20 which she was entitled to. This left a balance of Kshs. 858,670.85 recoverable from the plaintiff's salary. As at May 2011 the plaintiff has paid Kshs 658,700.45 leaving a balance of Kshs 199,970.40. In my view this letter details the amount the plaintiff settled which is Kshs. 858,670.85 which I award the plaintiff.

Total special damages is Kshs. 1,268,270.85 less 10% the plaintiff is awarded Kshs. 1,141,443.76

I therefore enter judgment for the plaintiff against the defendant as follows;

For pain and suffering and loss of amenities of life Kshs. 2,700,000/-

For special damages Kshs. 1,141,443.76/-

Total Kshs. 3,841,443.76/-

The plaintiff is also awarded costs and interest.

Orders accordingly.

Dated, signed and delivered this **28th** day of **April** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk