



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 257 of 2011**

**EVERLYNE SHIVACHI.....PLAINTIFF**

**VERSUS**

**THARA TRADING CO. LTD.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff sued the Defendant for **special** and **general damages** owing to injuries she received in an accident which occurred on or about 10<sup>th</sup> November 2010 while walking along Outer Ring Road, Nairobi when motor vehicle registration number **KAM 194 P** which was pulling trailer number **ZA 2664** veered off the road into the Plaintiff's path, hence knocking her down and crushing her lower body.
2. The motor vehicle was driven by the Defendant's agent or servant. It is the Plaintiffs' case that the accident was caused by the sole negligence of the Defendant's driver and that the Defendant is vicariously liable.
3. The Defendant in its **statement of defence dated 23rd August 2011** denied that the accident was caused by any negligence of the Defendant's driver and put the Plaintiff to strict proof. It also claimed that in the alternative the accident was solely caused and/or substantially contributed to by the negligence of the Plaintiff.
4. In a reply to defence, the Plaintiff reiterated the contents of the plaint, in particular that the Defendant's driver was charged and convicted of dangerous driving on his own plea of guilty in **Makadara CM Traffic Case No 3456 of 2011**.
5. At the hearing of the case the Plaintiff's bundle of documents dated 8th June 2011 and a medical report dated 9th November 2011 were admitted in evidence as **Exhibit A** and **B** respectively.
6. The Plaintiff testified as **PW1**. She recalled the events of 10<sup>th</sup> November 2010 while she was walking along the Outer Ring Road accompanied by her mother, **Dorica Shivachi**. They were on the left side of the road facing towards the Kariobangi roundabout. She testified that as she walked ahead of her mother she suddenly heard a loud bang and saw her mother tossed towards the river by the lorry and trailer which were coming from behind them. She was also hit and tossed underneath the lorry where she was trapped.
7. The Plaintiff was later taken to **Kenyatta National Hospital** where both her legs were amputated above the knees. She also suffered a fracture of the left forearm and a de-gloving injury to the same hand. She further testified that she stayed in hospital from 10th November 2010 to 21st April 2011 when she was discharged. Before the accident she was in gainful employment; now she was incapacitated and she

has to be carried around unable to fend for herself.

8. On cross-examination the Plaintiff stated that she had worked for 15 years as a nurse before the accident and lived in Kariobangi South at the time. She further stated that the accident occurred near Kariobangi North Estate on Outer Ring Road at about 6.30 am. It had rained earlier then stopped. The accident occurred at a bridge which had footpaths on both sides. She and her mother were walking on the footpath on their side which was about a meter wide. There were metal rails protecting pedestrians from the river but there was no protection from the road itself. She asserted that she heard her mother scream from behind her and when she turned she was hit by the same motor-vehicle that had hit her mother who had fallen onto the bank of the river. The Plaintiff fell on her back and her legs were trapped under the tires of the lorry. They were walking towards Kariobangi North round-about to board a matatu to Mathare.

9. The medical reports confirmed that the Plaintiff suffered the following injuries-

(i) **Extensive cuts and abrasions on the left forearm followed by extensive skin and muscle loss.**

(ii) **Fracture of the bones of the left forearm, close to the wrist joint.**

(iii) **Severe crush injuries to both legs leading to amputation of both legs.**

10. She was hospitalized for five and a half months. Her treatment included **amputation of her mangled legs above the knee**. Due to the attendant infections of the wounds she had to stay for a relatively prolonged period in hospital during which daily cleaning and dressing of the wounds was done. On 25th January 2011, she underwent a second operation during which skin harvested from her right thigh was grafted onto the wounds on the left forearm and remnant stumps of both lower limbs.

11. At the time of the medical examinations, the doctors observed that she was a cripple and used a wheel chair for movement. They further observed that she would always require an assistant to see her through some of her core needs like personal hygiene. The scars in the arms had healed though a flexion contracture was noted on the front of the left elbow joint, but with a good range of movements. The scars in the thighs were also noted to have healed well. In conclusion, the doctors observed that if fitted with artificial limbs, her mobility would be greatly enhanced, thus enabling her to fend for herself. However, the Plaintiff suffered **permanent functional disability of 80%**.

12. The Defendant did not lead or call any evidence to challenge the Plaintiff's version of events despite having indicated it would do so. The Plaintiff's evidence as to the circumstances of the accident that led to her injuries was therefore uncontroverted.

13. The parties filed written submissions. On behalf of the Plaintiff, it was submitted that she went through considerable anguish and pain following the accident when her limbs were trapped under the lorry when she was still conscious until she was admitted in hospital where she became unconscious. Seven days later she discovered that her limbs had been amputated and her left hand had sustained a de-gloving injury and a fracture.

14. It was further submitted that the Defendant's driver was imprisoned for 6 months on his own plea of guilty. The Defendant pleaded contributory negligence but did not bring any evidence to prove the same. **Section 107(1)** of the Evidence Act, Cap 80 was quoted to buttress the position that pleadings alone are not enough to prove allegations without calling evidence.

15. The Plaintiff's advocates submitted that damages should be in the region of a consolidated figure of **KShs 12,762,220/00** and cited several cases with similar injuries.

16. In the submissions on behalf of the Defendant, it was argued that despite the fact that the Defendant's driver was convicted in Traffic Case No. 3456 of 2011, the circumstances leading to the accident and the

general scenario as narrated by the Plaintiff during the hearing cannot be ignored. These circumstances were that the accident happened on a bridge with limited space to manoeuvre when the road surface was wet, and that it was upon the Plaintiff to take care when using such a road at 6.30 am bearing in mind that there were lorries passing along the road. It was further submitted that the traffic court never had the advantage of hearing the circumstances leading to the accident.

17. The court was thus urged to apportion liability at 60% on the part of the Defendant and 40% on the part of the Plaintiff.

18. As for damages, it was argued for the Defendant that based on the authorities quoted by the Plaintiff ought to be awarded KShs 2,500,000/00 for pain and suffering. It was also submitted that under the head of lost earnings it would be speculative to award the same from the date of the accident until judgment is delivered as it is not certain. Moreover, the Plaintiff was not employed in a permanent and pensionable job, and that therefore it cannot be determined that she would have worked for a definite period.

19. The Defendant has also submitted that the court should not award for the cost of future care as the doctor does not state how he came about the figure of Kshs. 15,000/00 a month and is only giving unsolicited opinion.

20. On liability, I find that the Defendant's driver was solely to blame for the accident and attendant injuries of the Plaintiff. **Section 47A** of the Evidence Act reads –

**"A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."**

The Defendant's driver was convicted on his own plea of the offence of dangerous driving. That conviction is conclusive evidence that he was solely to blame for the accident, particularly because the Defendant tendered no evidence to the contrary. On liability therefore I find for the Plaintiff at 100%.

21. Regarding damages, the Plaintiff suffered serious injuries. She was admitted in hospital for a period of five and a half months. Upon her discharge she was confined to a wheel chair and might continue to be thus confined if not fitted with prostheses.

22. I have noted the awards made in the cases cited. I have considered the injuries suffered by the Plaintiff, her period of hospitalization, the kind of treatment she had to endure and her obvious pain and discomfort on the road to recovery. I agree that

**"...money cannot renew a frame that has been battered and shattered..."**.

See **West & Son Ltd v Shephard [1964] AC 326**.

But a proper award of damages will go a long way to make the Plaintiff's life bearable.

23. Having considered all that has been placed before the court, and balancing this against that while doing the best I can, I will award the Plaintiff general damages for pain, suffering and loss of amenities in the sum of **KShs. 5,000,000/00**.

24. As regards the motorized wheelchair and prosthesis, the medical report and evidence of Dr. Kamau clearly show that in light of the injuries suffered by the Plaintiff, these are a necessity. A sum of **Kshs. 1,000,000/00** is therefore allowed for the wheelchairs and prostheses.

25. The Plaintiff has lost earning capacity and is entitled to damages for future earnings. I will adopt **KShs 10,000/00** as monthly income which I consider proved. I will award a multiplier of 15 years, thus adding up to the sum of **KShs 1,800,000/00**.

26. The Plaintiff claimed the cost of future care and a helper which could be termed as duplication taking into account the fact that with a motorized wheelchair and prostheses, the Plaintiff will not be as helpless as she currently is and would not therefore require as much assistance. But I will award **KShs 1,000,000/00** for the cost of domestic help and nursing care before acquisition of the prostheses and wheel chair and her learning the use thereof.

27. The Plaintiff also claimed special damages of **Kshs. 172,220/00** which is allowed based on the receipts produced in court showing she had paid the amounts.

28. In summary the Plaintiff is awarded general damages in the total sum of **KShs 8,800,000/00** and special damages of **KShs 172,220/00**.

29. The general damages will attract interest at court rates from the date of delivery of the judgment until payment in full. The special damages will attract interest at court rates from the date of filing suit. The Plaintiff will also have costs of the suit and interest thereon at court rates. There will be judgement accordingly.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI**

**THIS 18<sup>TH</sup> DAY OF JANUARY 2013**

**H.P.G. WAWERU**  
**JUDGE**