



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 1216 OF 2004

LOISE NJOKI KARIUKI.....PLAINTIFF

VERSUS

1. BENDRICON WAMBOKA WASWA
2. SAMUEL GIKERA KARINGA.....DEFENDANTS

J U D G E M E N T

1. The Plaintiff's suit as pleaded in her **amended plaint dated 18th April 2011** is for general damages on account of injuries she received in an accident which occurred on or about 16th October 2002. Special damages of KShs 1,152,498/00 are also claimed. The accident involved motor-vehicle registration number **KAE 897 Y**, a Nissan matatu in which she was travelling as a lawful passenger and motor-vehicle registration number **KWN 996**, a lorry, driven by the 1st Defendant along Ngong' Road near Ring Road, Kilimani in Nairobi. She has pleaded that the 1st Defendant was negligent in driving, controlling and managing the said motor-vehicle. Her further case is that the 1st Defendant was the agent or servant of the 2nd Defendant who is therefore vicariously liable, and that the accident was caused by the sole negligence of the 1st Defendant.
2. The Defendants filed a **joint statement of defence dated 11th October 2005**. The accident as pleaded by the Plaintiff is denied. It is also pleaded that if an accident occurred between the two vehicles, the same was caused by the negligence of the driver of motor-vehicle KAE 897 Y. Particulars of that negligence are given. The injuries and loss pleaded by the Plaintiff are all denied.
3. In a reply to defence the Plaintiff joined issue with the Defendants upon their statement of defence.
4. The Plaintiff testified as PW1 and called three witnesses, **Dr. Rajnikant Prabhulal Shah** (PW2), **Dr. Zephania Mwangi Kamau** (PW3) and **PC Cosmas Kiema** (PW4). The Defendants did not lead or call any evidence.
5. The Plaintiff's testimony was as follows. On 16th October 2002 she was lawfully travelling in a matatu registration number KAE 897Y from Kikuyu to Nairobi as a fare paying passenger. On reaching Ngong' Road near **Uchumi Hyper** she saw a lorry registration number KWN 996 coming from the opposite direction towards them. She noticed it was moving rather fast. The driver of motor-vehicle she was in tried to swerve to the left side of the road in order to avoid the lorry but it was too late and she heard a loud bang. Their vehicle was hit on the right hand side. She became unconscious and the next thing she realized was that she was at **Masaba Hospital** two days later. It was then that she came to know that she had suffered injuries in her right hand and

- arm. She was right-handed. She also noted injuries to her upper and lower teeth.
6. The Plaintiff further testified that she later learned that the driver of the lorry that caused the accident was the 1st Defendant and that its owner was the 2nd Defendant. The accident was reported to the police. She produced the following documents in support of her case -
 - **Exhibit P1** - A police abstract on the accident
 - **Exhibit P2** - Certified copy of Kibera Chief Magistrate's Traffic Case No. 3453 of 2002 against the 1st Defendant
 - **Exhibit P3** - Letter of termination from employment
 - **Exhibit P4** - Certificate of employment dated 14/1/2003
 - **Exhibit P5** - Certificate of employment dated 27/2/2009
 - **Exhibit P6** - Ultra sound report dated 19/10/2002
 - **Exhibit P7** - Ultra sound report dated 22/10/2002
 - **Exhibit P8** - Case summary dated 28/10/2002 Masaba Hospital
 - **Exhibit P9** - Orthopaedic Rehabilitation Centre (PCEA Kikuyu Hospital) report
 - **Exhibit P10** - Medical Report from PCEA Kikuyu Hospital dated 1/4/2005
 - **Exhibit P11** - Police medical report (P3) dated 20/11/2002
 - **Exhibit P12** - Medical report by dental surgeon dated 10/9/2003
 - **Exhibit P13** - Medical report by Dr. Shah
 - **Exhibit P14** - Statement and receipts from Masaba Hospital
 - **Exhibit P15** - Receipts from PCEA Kikuyu Orthopaedic Centre
 - **Exhibit P16** - Invoices from PCEA Kikuyu Orthopaedic Centre
 - **Exhibit P17** - Receipt for Dr. Shah's medical report
 - **Exhibit P18** - Receipts from the Dental Surgeon
 - **Exhibit P19** - Ultra sounds Receipts
 - **Exhibit 20** - Demand Letter to the Defendants
 - **Exhibit P21** - Copy of records from the Registrar of motor-vehicles dated 24/6/2003
 - **Exhibit P22** - Application dated 12/5/2003
 - **Exhibit 23** - Receipt for KShs. 500/- from Registrar of motor-vehicles
 - **Exhibit P24** - Certified copy of proceedings in Kibera Chief Magistrate's Traffic Case No. 3453 of 2002
 - **Exhibit P25** - Certified copy of the Judgment in Nairobi CMCC No. 8781 of 2003 filed by a fellow passenger during the accident.
 7. Before the accident, the Plaintiff was an accountant/clerk at Ndumberi Primary School earning KShs. 5,000/00 per month. After the accident, her employment was terminated on medical grounds.
 8. In cross-examination the Plaintiff stated that she was sitting in the back seat on the extreme right hand side, and that she could see the road in front of the vehicle through the clear window beside her; and that she saw the lorry approaching; that she could not understand why the lorry had come to their side of the road. She denied seeing a third vehicle at the scene. She became unconscious immediately after she heard the bang and only came to at the hospital.
 9. The Plaintiff also testified that her terminal benefits were paid after Ndumberi Primary School retired her on medical grounds; that she was 48 years old at the time of the accident and as she was not employed by the Government; and she was not due to retire for another 15 years. She now supervises labourers in cultivating her shamba.
 10. PW2 (Dr. Rajnikant) was a consultant general surgeon in private practise. He consulted at various hospitals in Nairobi. He had practiced medicine for 35 years. He testified that on 4th October 2006 he examined the Plaintiff who was referred to him by her Advocate. Following evaluation (Exhibit P13), he confirmed that the Plaintiff had sustained compound fractures of her humerus of the right upper arm and fractures of the right upper limb. At the time of examination she had a 1.75 inch long scar on the right cheek and did not have her right hand and half of her forearm. In his opinion, the scar on the face was a small cosmetic matter. The injury of the arm however to him must have caused pain for a few weeks and discomfort for a few months. He recommended a

prosthesis with a hook device at a cost of KShs. 10,000/00. He doubted the claim by the Plaintiff that she had sustained severe dental injuries in the accident as he could not find proof of the same from the discharge summary from Masaba Hospital.

11. PW3 (**Dr. Kamau**) stated that he was a police surgeon in Nairobi area. He produced in evidence the medical examination report (P3) dated 20th November 2002 which he had prepared and signed (Exhibit P11). He confirmed that the Plaintiff's right forearm was amputated below the elbow joint. She also had a fracture of the right humerus. He assessed her degree of injury as grievous harm.
12. PW4 was a police constable attached to Kilimani Police Station at the time he testified. He produced in evidence the police abstract relating to the accident (Exhibits P1) which he stated agreed with the details recorded in the Occurrence Book.
13. In cross-examination the witness asserted that he did not prepare the police abstract and was not involved in the investigation of the accident. He only entered details of the accident in the Occurrence Book. In re-examination, he noted that the police abstract was prepared from the details contained in the Occurrence Book.
14. That was the totality of the evidence placed before the court as the Defendants did not lead or call evidence.

ISSUES:

- I. **Was there an accident involving motor vehicle registration number KAE 897Y and KWN 996 as pleaded?**
- II. **Was the accident caused by the negligence of the 1st Defendant?**
- III. **Was the accident caused by the sole or contributory negligence of the driver of KAE 897Y?**
- IV. **Was motor vehicle KWN 996 owned by the 2nd Defendant, and is he vicariously liable?**
- V. **What injuries did the Plaintiff suffer in the accident?**
- VI. **What damages are due to the Plaintiff?**

Issue No I: The Accident

15. The fact of the accident cannot be in serious contention based on the testimony of the Plaintiff as well as the evidence brought before the court by PW4, the police constable. I am satisfied that indeed an accident occurred between the two motor vehicles as pleaded by the Plaintiff.

Issues Nos. II and III: Was the accident caused by the negligence of the 1st Defendant and did the driver of KAE 897 Y contribute in any way to the accident?

16. There is only the uncontroverted testimony of the Plaintiff as to how the accident occurred. She testified that the 1st Defendant was driving at high speed. The 1st Defendant who was the driver of the lorry (KWN 996) that is alleged to have caused the accident did not testify. He failed to take the opportunity to explain how the accident might have occurred. No reasons were given to court as to why he did not testify.

17. Moreover, the 1st Defendant was charged and convicted on his own plea of guilt in **Nairobi CM Traffic Case No. 3453 of 2002**. Section 47A of the Evidence Act, Cap 80 states as follows:-

“A final judgment of a competent court in any criminal proceedings which declares any person to be 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, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

18. In the case of **Robinson v Oluoch [1971] EA 376** the Court of Appeal considering section 47A of the Evidence Act stated as follows -

“The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident the subject of this suit. Careless driving necessarily connotes some degree of negligence and we think, without deciding the point, that in those circumstances it may not be open to the Respondent to deny that his driving in relation to the accident was negligent.”

19. The alleged contributory negligence of the driver of KAE 897Y to the happening of the accident was not supported by any evidence. I am satisfied that the accident was caused by the sole negligence of the 1st Defendant.

Issue No IV: Was motor vehicle KWN 996 owned by the 2nd Defendant, and is he vicariously liable?

20. The copy of records of the accident motor vehicle from the *Registrar of Motor Vehicles (Exhibit P21)* proves that the vehicle was owned by 2nd Defendant. It has not been controverted that the 1st Defendant was driving the motor vehicle with the 2nd Defendant’s authority or consent. He is vicariously liable for the accident.

Issues Nos. V and VI: What injuries did the Plaintiff suffer in the accident, and damages are due to her?

21. According to the first medical report (Exhibit P13) the Plaintiff suffered compound fractures of humerus of right upper arm and fractures of the bones of the right forearm. The medical report also sets out the treatment the Plaintiff underwent -

- (i) Operation of amputation of right upper limb through forearm.
- (ii) Second operation on the amputated limb.
- (iii) Third operation for plating of the right humerus.
- (iv) Fourth operation for removal of broken glass pieces from the face.

The report also set out the present complaints as loss of her job and the handicap of having the use of only one hand.

22. The prognosis and opinion of PW2 in Exhibit P13 was that the Plaintiff sustained severe injuries in the accident which needed four hospital admissions totalling to 45 days and four operations. This caused her pain for a few weeks and discomfort for a few months. He further noted that the fracture of the shaft of the humerus had been reduced with internal fixation and there is good bony union.

23. The case cited in the submissions on behalf of the Plaintiff on the issue of damages is an award to the tune of **KShs. 1,970,000/00** for serious soft tissue injuries, loss of 10 teeth and loss of right upper hand. The amount was awarded in 2008. The Defendants did not recommend any amount to the court.

24. In **Joseph Ibrahim Alasau v Steering Ship Contractors & another [2008]eKLR**, the Court of Appeal sitting in Mombasa declined to alter an award amounting to Kshs. 1,300,000/00 granted to the appellant whose right arm had been amputated from the shoulder together with the shoulder blade following an industrial accident attributed to the negligence of the Defendants with respect to damages for pain, suffering and loss of amenities.

25. Doing the best that I can and balancing this against that I will award the Plaintiff **general damages for pain, suffering and loss of amenities in the sum of KShs 1.5 million.**

26. As for loss of earning capacity, the Plaintiff testified that she was retired on medical grounds by her

former employer (Exhibit P3) and has not engaged in gainful employment since the accident. She was a school accountant/clerk. Exhibit P5 confirms that her salary was Kshs. 5,000/00 per month. It should not be too difficult a task to train herself to write with her left hand sufficient to perform the hand writing necessary to carry out the duties of an accounts clerk. Her loss of earning capacity therefore ought to be temporary, and I will assess it at 5 years. Given her monthly income of KShs 5,000/00, that loss will be quantified at KShs 300,000/00 made up as follows –

$$\text{KShs } 5,000/00 \times 12 \times 5 = \text{KShs } 300,000/00$$

27. Regarding future medical treatment, there is no reason to doubt the estimates given by PW2 on the cost of a suitable prosthesis, replaceable every five years. That estimate was KShs 10,000/00. The Defendants did not bother to bring before the court their own estimates. As the Plaintiff was 48 years old at the time of the accident, she will probably need to replace the prosthesis about three times in the course of the rest of her life. I will therefore award **KShs 40,000/00 for future medical treatment.**

28. As for **special damages, KShs. 178,715/00 was strictly proved, and I will award the same.**

29. In summary I will enter judgment for the Plaintiff against the Defendants jointly and severally as follows –

- (i) For pain, suffering and loss of amenities: KShs 1.5 million.
- (ii) For loss of earning capacity: KShs 300,000/00.
- (iii) For future medical treatment: KShs 40,000/00.
- (iv) Special damages: KShs 178,715/00.

30. The general damages (except the loss of earning capacity) will carry interest at court rates from the date of judgment until payment in full. The special damages will carry similar interest from the date of filing suit. The Plaintiff will have costs of the suit.

31. That will be the judgment of the Court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS

30TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE