



**DAMARIS WANTHI MUSYOKA.....PLAINTIFF**

**VERSUS**

**HUSSEIN DAIRY LTD.  
AFRICAN LINE TRANSPORT LTD.....DEFENDANTS**

**JUDGMENT**

The plaintiff presented a Complaint dated 28<sup>th</sup> October 2008 seeking the following reliefs:

- a) General damages and loss of future earnings
- b) Special damages of Kshs. 139,880.00
- c) Costs and Interest.

The suit was in respect of an accident that took place on 24<sup>th</sup> February 1999 along Mombasa-Nairobi Highway involving motor vehicles KAK 093L and Motor vehicle KAH 692X/ ZB 6477. The case was initially against two Defendants but the suit against Hussein Dairy Limited was withdrawn by consent and the suit proceeding against African Line Transport Limited as the only Defendant.

Hearing of the case commenced on 4<sup>th</sup> December 2007. PW1 was the medical doctor who examined the plaintiff. His name was Hemant Patel. He stated that he examined the Plaintiff on 10<sup>th</sup> June 1999. The plaintiff was injured on 24<sup>th</sup> February 1999. The pleaded injuries were:-

- a) Severe Back Injury-Fracture body of lumbar vertebra L1 with displacement (L1/L2) and narrow disc space.**
- b) Lumbar Fracture- subluxation of lumbar spine.**
- c) Injury on the chest.**

She was treated at Voi Hospital and then taken to Pandya. She was discharged on 6<sup>th</sup> March 1999 to attend as an out patient. She was also given complete bed rest. She complained of back pain and was unable to lift heavy objects. She could not raise her legs fully as a normal person. She suffered permanent incapacity. PW1 gave opinion that the plaintiff will not continue her work as a farmer. PW1 produced the Medical report as P Exh 1. He was paid Kshs. 1,500 for the medical report and Kshs. 3,000/= for his attendance to court. He produced the receipt as P Exh. 2. On cross examination by Counsel for the Defendant he stated that he relied on his examination and treatment notes from Voi Hospital. He stated that the plaintiff suffered some paralysis. At the time of the accident she was aged 47 years. She was still strong. Her injuries were permanent. Her incapacity would limit her ability to work. She can supervise the work.

PW2 was the plaintiff herself. She narrated how on 24<sup>th</sup> February 1999 she boarded a motor vehicle owned by Hussein Dairy to transport her vegetables from Kibwezi to Kongowea Market. On the way that

motor vehicle collided with a motor vehicle owned by Africa Line Transport Ltd. She was seated in front and she saw the motor vehicle they hit standing on the middle of the road. The driver of the motor vehicle owned by Africa Line Transport Ltd was charged in Voi Court. She managed to obtain copies of P3 Form and a police abstract. They were marked for identification as PMFI 3 and 4. She stated that before the accident she used to do farming. She produced a Chief's letter to prove that which she produces as P Exh 5. She stated that she used to come to Kongowea market three times a month. She could get Kshs. 30,000 per month as profit. She used to get vegetables from U.O.N. Research Center Kibwezi. The letter was marked as PMFI 6. She was treated at Voi and Pandya Hospital. She spent a sum of Kshs. 139,880/= on her treatment. She was in possession of receipts which she produced as P Exh. 7. She had not gone back to her farming business. She had not fully healed. She prayed for judgment as prayed in the plaint.

On cross examination she stated that the accident took place at 1.00am at night. The motor vehicle they hit was at a corner. They saw it about 20 meters away. The driver of the motor vehicle of Hussein dairy did not swerve because the other motor vehicle was too close. She did not see another vehicle in front apart from that of African Line. She used to get profit of Ksh. 30,000/=. The gross was about Kshs. 80,000 per month. She used to get licences from the relevant Council. She used to only pay Kibewzi Council and Kongowea Market. Her son Nicholas Musyoka used to pay Council rates. There was no re-examination. The case was adjourned and dates were to be taken at the registry.

On 9<sup>th</sup> April 2008 the parties recorded an order by consent to admit the P3 Form and police abstract as P Exh 3 and 4 respectively. Plaintiff closed her case. Parties then entered into negotiations on a possible out of court settlement as the proceedings were been typed since the judge had been transferred. The case was fixed for further hearing on 11<sup>th</sup> February 2010. The matter came up for hearing before me and Counsel for the defendant indicated that they did not have any witnesses. They closed case for the defendant. The court issued an order for written submissions. On 11<sup>th</sup> March 2010 parties confirmed that they had filed written submissions and I fixed the suit for judgment on 12<sup>th</sup> May 2010. I regret the delay in delivering this judgment. The delay was occasioned by factors beyond my control.

I have considered the pleadings, the written submissions of the parties and I frame the following as issues arising for determination:-

- 1. Whether the Defendant is liable for the accident that took place on 24/2/1999.**
- 2. Whether the plaintiff suffered the injuries and damages pleaded in paragraph 8 of the plaint.**
- 3. Whether the plaintiff is entitled to the relief sought**
- 4. Who should bear costs of this suit?**

#### **Issue No. 1**

The evidence adduced by the plaintiff herself supports the fact that an accident took place on 24<sup>th</sup> February 1999. The police abstract was produced by consent as P Exh 4. The occurrence of the accident is admitted by the defendant in its defence dated 20<sup>th</sup> June 2001. The plaintiff was a passenger in motor vehicle KAK 093L which collided with motor vehicle KAH 692X/ ZB 6477. She had sued both the owner of motor vehicle KAK 093L and owner of motor vehicle KAH 692X/ZB 6477. The defendant contends that the driver of motor vehicle KAK 093L was to blame for the accident or substantially contributed to it. But as pointed out by the plaintiff's counsel the defendant did not take out third party proceedings for an indemnity or contribution against the owner of motor vehicle KAK 093L. It therefore suffers the risk of shouldering the whole liability. The evidence is such that motor vehicle KAH 692X/ZB 6477 had stalled on the way. It was knocked by motor vehicle KAK 093L. The plaintiff stated that they saw the motor vehicle KAH 692X/ ZB 6477 from a distance of about 20 meters. That it was at a corner and it was too close for driver of motor vehicle KAK 093L to swerve.

In the plaint the particulars of negligence against the 2<sup>nd</sup> Defendant (present Defendant) are stated as:

- a) **Parking the motor vehicle in the middle of the road**
- b) **Leaving the motor vehicle unattended or without any indication at all of stationery motor vehicle.**
- c) **Failing to give way to motor vehicle KAK 093L**
- d) **Leaving the said motor vehicle stationery without due regard to other road users and particularly the plaintiff.**
- e) **Allowing the said motor vehicle to collide with M/V KAK 093L.**

Evidence was led by PW1 to prove that the motor vehicle was parked in the middle of the road. It could have staled but the defendant did not adduce any evidence to show why the motor vehicle was “parked” in the middle of the road. In the ordinary course of human events a motor vehicle is not supposed to be parked on the road especially a busy highway such as Mombasa-Nairobi road. PW2 stated that the driver of the defendant was charged at Voi Court. The proceedings in this case were not produced by either party. Even though counsel for the defendant has submitted through submissions that the driver was acquitted. Such evidence is not acceptable. The police abstract (P Exh. 4) indicates that the case was pending as at the date when it was issued been 28<sup>th</sup> April 1999. On balance of probability I find that the burden has not laid before this court any material to displace the fact that motor vehicle KAH 692X/ ZB 6477 was parked on the road. Issue No. 1 is answered in the affirmative.

**Issue No. 2.**

PW2 who is the plaintiff produced a P3 Form as P Exh 3 by consent. She stated that she suffered serious injuries and was treated at Voi Hospital and then Pandya, Hospital. He was hospitalized for one month and then treated as an out patient for three months. PW1 who is a doctor examined the plaintiff on 10<sup>th</sup> June 1999 and produced the Medical Report as P Exh. 1, He stated in his opinion that after examination of the plaintiff he was of the opinion that the plaintiff sustained injury on 24<sup>th</sup> February 1999. She was hospitalized for one month and remained offwork for three months. The plaintiff has not been able to return to her previous work as farmer and businesswoman due to backache. This was due to after-effects of fracture subluxation of Lumbar Spine. The injury was assessed as permanent incapacity. She can do mild supervisory work not as farmer. The plaintiffs medical bills summary were produced as P Exh. 7 comprising of the following receipts.

<b><u>Hospital/clinic</u></b>	<b><u>Date</u></b>	<b><u>Receipt No.</u></b>	<b><u>Amount</u></b>
Moi Hospital Voi	25/2/99	653657	500.00.
Prescription	24/2/99	31166	80.000.
Pandya Memorial Hospital	28/2/99	25304	14,895.00
“	31/3/99	25644	100,045.00
Dorsilla Omollo – Pandya	11/3/99	122806	3,500.00
Prescription			
Coast Imaging Clinic	3/3/99	1882	7,000.00
Magaka Medical Centre	10/4/99	15265	3,190.00
Magaka Medical Centre	24/4/99	130887	1,070.00
Magaka Medical Center	27/4/99	16287	8,000.00
Total			<b><u>Ksh.138,280.00</u></b>

I find that the special damages amount of Kshs. 138,280 has been proved. The particulars of injuries sustained have also been proved. The sum of Kshs. 3,000/= witness attendance fee cannot be recovered as special damages but as witnesses expenses during taxation of costs. The second issue is therefore answered in the affirmative.

**Issue No. 3.**

I find that the plaintiff is entitled to relief sought in the plaint. Special damages of Kshs. 138,280 were strictly proved. The plaintiff is also entitled to general damages. Issue No. 3 is answered in the affirmative.

### **Quantum of damages.**

The Defendant contends that the plaintiff was not consistent on her income. In the plaint she pleaded Kshs. 20,000 while in her evidence she stated that she earned Kshs. 30,000 per month. This is true and this casts doubt on the income earned by the plaintiff. The defendant contends that the loss of future earnings of Kshs. 1,920,000/= is on the high side. On pain and suffering and loss of amenities they contend that Kshs. 1,000,000/= is on the high side and they suggest Kshs. 400,000/=. The defendant also contends that there should be contribution on the part of the plaintiff and relied on the case of **Michael Njenga Kimani v Stephen Njoroge Kimani and Anor. HCCC No. 4495 of 1986 (Unreported)**. Having considered the submissions on quantum I am not satisfied that the plaintiff has proved an earning capacity of Kshs. 30,000/= or 20,000/= per month. But it is in not in doubt that the plaintiff was gainfully self employed. She was injured while in the course of taking her vegetables to Kongowea market. The Chief's letter produced as P Exh 5 seemed to corroborate that she was in the business of farming. It is also important to take note that the plaintiff could undertake other activities such as supervisory work. Farming was ruled out because it involves bending and the plaintiff could not bend without pain.

Taking all these into consideration I am guided by the Minimum statutory wage in settling at a sum of Kshs. 12,000/= as reasonable income per month in the absence of satisfactory documentary prove. The plaintiff was hospitalized for one month and underwent out patient treatment for a further three months. She must have undergone pain and suffering. The plaintiff has suffered permanent incapacity as a result of the accident. The incapacity is that she cannot lift heavy objects nor do farming. It is not incapacity of loss of limb, eyesight or the like. She was aged 47 years at the time of the accident. In the exercise of my discretion and taking into account cited case law I award general damages as follows:-

a) Loss of future earnings:

12,000 X 12 X 6 = Kshs. 864,000.00

b) Pain and suffering Kshs. 250,000.00

c) Loss of amenities Kshs. 250,000.00

Total **Kshs.1,364,000.00**

The upshot is that I give judgment for the Plaintiff against the Defendant as follows:-

### **Liability**

100% against the Defendant.

### **Quantum of Damages**

a) Special damages Kshs.138,280.00/- with interest at court rates from date of filing suit.

b) Witness expenses Ksh.3000/-

c) General damages Kshs.1,364,000/- with interest at court rates from date of judgment.

d) Costs of the suit.

It is so ordered.

Dated and Signed At Nairobi on ThIS 6<sup>TH</sup> Day Of AUGUST 2012.

**M. K. IBRAHIM**  
**JUDGE**

dated and Delivered At Mombasa on This 30<sup>th</sup> Day Of AUGUST 2012.

**J.W MWERA**

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**JUDGE**

Delivered in the presence of: