



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 33 of 2005

CHRISTINE NANDOKA LUSWETI.....PLAINTIFF

-VS-

KENYA BUS SERVICES LIMITED..... DEFENDANT

JUDGMENT

Christine Nandako Lusweti was said to have been on board the Defendant's motor vehicle registration number KAM 289 Z travelling from Nairobi to Webuye on the night of 26th October 2012. The motor vehicle ("the bus") was involved in an accident in which the Plaintiff suffered serious injuries.

The matter came up for hearing on 22nd November 2006 and several witnesses testified on behalf of the Plaintiff. The Plaintiff, PW1, was the first to give her evidence. She testified that she was 31 year old, making her 27 years of age at the date of the accident.

It was her testimony that she left Nairobi for Webuye aboard the bus at 10.00 p.m. in the company of her two sisters, Grace and Mary. She sat with one of the sisters. The elder sister sat at the back. Along the way, she exchanged seats with other people so that she could sit with Grace. She stated that the bus stopped in Nakuru but it did not in Eldoret. It went through the stage at Eldoret without stopping.

She further stated that the driver was in a hurry and drove through bumps and potholes without slowing down. She explained that near Tumbo Shopping Centre, there is a river and a bend. They passed the bend and the driver started losing control. The bus swayed. People screamed. Then there was a bang and she did not know what happened next. She found herself at Aga Khan Hospital 4 days later. She had a Catheter and a diaper on, and could not sit up. She only learnt that she was involved in an accident.

She testified that she was told by the doctors that she had an operation to ease her pain. In her words:

"I had a catheter on. I had diapers. I was in a lot of pain. I was told by the doctors that I had to have an operation to ease the pain. It was a major operation on my back. I had a fracture of my backbone and a compression fracture. I had an injury to my head and a cut. I have a scar. I can feel it (touches her head)."

The Plaintiff did not know how she got there but was told that she was airlifted from Eldoret to Aga Khan Hospital Nairobi by Flying Doctors Service. She produced several invoices to show the expenses, the amount paid and the amount still unpaid.

She was at Aga Khan Hospital from 27th October 2002 to 23rd December, 2002. She testified that her relatives gave sureties and Rebecca Namalwa deposited her title deed.

She went to the National Spinal Injury for rehabilitation after being discharged from Aga Khan Hospital on 23rd December 2021 for 5 months to be taught how to move from the wheelchair to the bed and transfers. She underwent physiotherapy and continued as an out-patient at Kshs. 10,000.00 per session.

The Plaintiff would also go to St. Mary's Mission Hospital in Langata for change of catheter and treatment of urine infection. She also testified that she was told that she was taken to Moi Teaching and Referral Hospital, Eldoret after the accident. She saw the invoice, the drugs and cash receipt that refer to her.

She went home, Webuye in July 2005. She was attended to by Dr. Gaya in Eldoret on 25th July 2005 and Dr. Kimani who both made medical reports. In a typical day, she would be cleaned, washed and is wheeled around by a helper who was employed because of her conditions. The helper is paid Kshs. 3,000.00/= per month. She testified that the helper has threatened to leave her if she is not paid her monthly salary.

She reiterated that she cannot control urine and is in diaper. She cannot stool either and suffers constant urinary infection. The drugs are very expensive. She needs depressants due to depression, pain killers and muscle relaxers. She requires orthopedic bed, which she does not have and special mattresses.

The Plaintiff was supposed to do exams to qualify her as a programmer and has lost the capacity to earn.

In cross-examination by Mr. Cheruiyot for the Defendant, the Plaintiff reiterated that the driver was over-speeding and did not care about the bumps. There were no police road blocks. They stopped at a petrol station for refurbishments. She wished that it was a day time. She would have looked for an alternative means.

PW2, Dr. Moses Mwangi Kimani testified that he was the primary doctor for the Plaintiff at the National Spinal Injury Hospital. He produced a medical report and testified that the Plaintiff's injuries were 100% disability (paraplegic), complete loss of urinary contingents. Dr. Kimani explained that there was hardly any possibility of the Plaintiff's condition improving.

He further explained that the operation at Aga Khan Hospital was for two purposes:

- a) To reduce the pressure on the spinal cord. This helps recovery if at all and;
- b) To stabilize the spine. This helps in faster rehabilitation.

He recommended nursing care for life, medication for life and physiotherapy for life. PW3, Mary Joseck, narrated how they boarded the bus on 25th October, 2002, from Nairobi to Webuye to attend a funeral. They all had tickets, with Grace assigned to seat No. 57, Caroline No. 60 and the Plaintiff No. 58. She explained that the Plaintiff requested other people to exchange seats, so that they could seat together. They also swapped the tickets. PW3 explained how the accident happened and how they attended to her sister, the Plaintiff's conditions after the accident and the transfers between hospitals. PW4, Rebecca Namalwa Chemwende, 72 years old grandmother of the Plaintiff testified on how she was home and received a call and went to Eldoret to see the Plaintiff in Moi Teaching and Referral Hospital. She gave her title deed to cover the medical expenses which title deed is still held by the hospital.

PW5, Jeremiah Ongai is a physiotherapist with sub-district Hospital, Webuye. He testified how he has treated the Plaintiff and explained her medical conditions. PW6, Richard Muse Warasakami is a brother in law of the Plaintiff. He testified that he hired Amref aircraft to airlift the Plaintiff from Eldoret to Nairobi. He received a call from Mary Joseck about the accident. He is married to Grace. He travelled to Eldoret and found the Plaintiff in hospital unconscious. He was informed by the doctors at Moi Teaching and Referral Hospital that the Plaintiff had broken her backbone and she could not be taken by road. They spent US \$ 2,287 to airlift the Plaintiff. Amref had agreed to be paid in installments. He has not finished paying Amref to and has even received a demand letter from Kabiru & Co. Advocates for the balance.

From the medical reports, the Plaintiff sustained the following injuries:

- i) Compression fracture of Vertebrae L1 with subsequent complete paralysis both lower limbs.
- ii) Loss of faecal and urinary continence
- iii) Multiple soft tissue injuries
- iv) Loss of sexual function
- v) Loss of consciousness for prolonged period associated with head injury.

A. General Damages

The Plaintiff has been incapacitated by the injuries, and will be on wheelchair and would depend on the assistance of other persons for mobilization for the rest of life.

For these reasons, the Plaintiff asks for general damages of Kshs. 2,000,000.00/=.

It is the Defendant's case that the Plaintiff should have taken reasonable steps if as she alleged the bus was driven recklessly from Nairobi. It submitted that the evidence was not consistent with the reasonable steps they ought to have taken to avoid putting their lives in danger. The Plaintiff and PW3 admitted that the bus stopped in Nakuru.

The Defendant further contends that the Plaintiff or other passengers ought to have reported the matter to the police or even discontinue the journey. They made no effort on their part to demand the driver to drive the bus more carefully. It asserts that the accident was a result of unavoidable circumstances beyond the control of the driver.

In the circumstance, the Defendant proposes that the court should award the Plaintiff a sum of Kshs. 1,000,000.00 in general damages. The Defendant relied on the case of **Francis Kaguta Mumu vs John Simiyu Malaba & Others Nairobi HCCC No. 1460** of 1990, in which the Plaintiff suffered total paralysis which rendered him paraplegic. The Court in this case awarded the Plaintiff the sum of Kshs. 900,000.00/= as general damages for pain and suffering and loss of amenities.

The injuries the Plaintiff sustained is not in dispute and I will consider the injuries as pleaded in the Plaintiff. Dr. Z. Gaya, a Consultant Surgeon described the complaint of the Plaintiff:

1. Recurrent low back ache all the times
2. Urinary incontinence. Uses catheters which cause infections.
3. Depressed and emotional. Sometimes cries at night.
4. Complete paralysis of the lower limbs.
5. Confined to wheelchair.
6. Chest pains especially when depressed.
7. Inability to open bowels. Uses laxatives permanently. Sometimes has to do manual removal of faeces.
8. Spasms of the lower limbs.
9. Dyspeptic symptoms Indigestion and diarrhoea on and off.
10. Headaches.
11. Surgical/wound pains when it is cold.

Dr. Gaya further reported that he had examined the Plaintiff and states that the Plaintiff has complete spastic paralysis of both lower limbs from the waist downwards. This, he explained, is a permanent disability. He stated that there was evidence of muscle wasting in the lower limbs due to disuse atrophy.

In his conclusion, Dr. Gaya reports that the Plaintiff suffered severe spine injury at T12 that has resulted into complete permanent paralysis of the lower limb from the waist downwards. The Plaintiff is left with problems with bladder, bowel and skin to avert bed sores. She will be confined to a wheelchair permanently.

She has longitudinal surgical scar on the lower back and a bed sore scar on the right buttock. There are also scars on right head, right side of face and left side head. These are permanent features from the injury.

In terms of accident compensation scale the degree of permanent disability is assessed at 100%, according to Dr. Gaya.

I had the opportunity of physically seeing the Plaintiff in Court. I find that the Plaintiff did sustain the injury as described in the Plaintiff and in the medical report.

The injuries are permanent, the disability is permanent and so is the lifelong dependence of Christine Nandako Lusweti on others to make her life more bearable.

I have also considered the evidence of Dr. Mwangi and the Plaintiff's in Court. I find them both truthful.

The Plaintiff is asking for Kshs. 2,000,000.00/= and the Defendant is proposing Kshs. 1,000,000.00/= in general damages.

In 1994, the Court in **William Sigilai Vs B. A. Bagero, Francis Kiprotich HCCC No. 1463 of 1988**, the Court awarded the sum of Kshs. 1,500,000.00/= for damages of pain, suffering and loss of amenities. The Plaintiff in that case was 25 years old, who was on crutches and later in life became a medical doctor (*cited in one of the authorities produced*).

The Plaintiff in the above case was awarded Kshs. 1.5 Million 18 years ago and I believe it is reasonable to award Kshs. 2 Million to the Plaintiff herein. I do award the said sum in general damages.

B. Special Damages

In regards to special damages, the Plaintiff seeks special damages totaling the sum of Kshs. 1,609,515.50/=.

Learned Counsel for the Defendant submitted that special damages must be pleaded and must be proved.

i) Hospitalization at the Aga Khan Hospital

The Defendant alleged that invoice produced in Court was in respect of two patients namely, Grace Nekesa Wanasami and the Plaintiff.

The Defendant asserts that Grace Wanasami was also injured in the same accident and was treated at the Aga Khan Hospital like the Plaintiff. It is the Defendant's contention that the Invoice amounts was for both Grace Wanasami and the Plaintiff, and thus the Court should award half of the invoice. The invoice amount is Kshs. 693,603.75/=. The Defendant contends that the award should be reduced by the NHIF contribution of Kshs. 167,000/=. It therefore proposes that the final award to the Plaintiff should be Kshs. 526,603.75/=.

I respectfully disagree with the learned counsel for the Defendant. The invoices are in the name of the Plaintiff and no evidence was tendered to indicate that Grace Nekesa Wanasami was hospitalized or was an in-patient at Aga Khan Hospital during the period the Plaintiff was receiving treatment there. I thus award the sum of Kshs. 693,603.75 to the Plaintiff as claimed.

Counsel for the Defendant further submits that the two patients were airlifted at the cost of Kshs.

186,330.00/=. The patients were Grace Nekesa Wanasami and the Plaintiff. It is therefore suggested the bill be shared equally between the two patients, which translate to Kshs. 93,165.00/= for the Plaintiff.

I agree with the learned counsel for the Defendant that the Amref invoice is for airlifting Grace Nekesa and the Plaintiff. I therefore award the sum of Kshs. 93,165.00/=.

C. Nursing Care

The Plaintiff prays for costs of nursing care to the date of judgment and the future and physiotherapy for now and future. The Plaintiff is 100% incapacitated and requires assistance of other people to get around in her daily life.

She would require a helper for the rest of her life who is paid Kshs. 3,000.00/= per month by her sisters. The Plaintiff proposes a multiplier of 18 and thus.

i) Amount to date April 2004 – 2007 August at Kshs. 3000/- per month.

= Ksh. 123,000/-

ii) Provision for future nursing care at the nominal sum of Kshs. 3000/- per month i.e. $3000 \times 12 \times 18 =$ Kshs. 648,000/=. Counsel made an error in his submission stating 17 as multiplier yet he had asked for 18.

The Defendant contented that the Plaintiff is 31 years old and has tendered no evidence to show that she has any life threatening condition. It suggests that the Court should take cognizance of the following:

(a) The payment will be lump sum and the Plaintiff has the opportunity to invest the money and pay the helper as and when the salary becomes due.

(b) The Plaintiff has admitted that over the time she had learnt to handle herself better. It can be hoped that she will acquire more experience on handling herself and her dependency on the helper will go down and will only need her/him for things she can never do.

Counsel for the Defendant cited the case of **Nairobi HCCC No. 1055 of 2000, Gladys Nyaboke vs Modern Transporters Limited** in which the Court used a multiplier of fifteen (15) years in respect of a twenty five (25) year old paraplegic.

The Defendant proposes that the Court takes a multiplier of nine (9) years and to award the Plaintiff the sum of Kshs. 324,000.00/= worked out as follows:-

$3,000 \times 9 \times 12 =$ Kshs. 324,000.00/=

I would find that a multiplier of 15 years would be reasonable in all circumstance. I award the Plaintiff the sum of Kshs. 540,000.00 worked as $Sh. 3000 \times 12 \times 15 =$ **KSh. 540,000.00.**

D. Physiotherapy

The Plaintiff would require continued physiotherapy for life due to loss of feeling and motion to the lower body. The Plaintiff testified that she would receive 2 sessions of physiotherapy per week at a cost of Kshs. 400/= per session.

Under this limb, the Plaintiff prays for

a) Cost so far incurred up to date of judgment at Kshs. 1,200/= per week from September 2005.

b) Provisions for cost of physiotherapy for life i.e. $Kshs. 1,200/= \times 4 \text{ weeks} \times 12 \text{ months} \times 17$ (multiplies

= Kshs. 979,200/=.

I award the Plaintiff Sh. 3,200 per month x 12 months x 15 = **Kshs. 576,000.00/=**.

E. Cost of Wheelchair

By nature of her injuries, the Plaintiff is wheelchair bound for the rest of her life. She was in a wheelchair when she testified. It costs Kshs. 60,000/=. The Plaintiff asked to allow for the sum of Kshs. 30,000/= replaceable biannually inclusive of maintenance costs. i.e. Kshs. 240,000.00/=.

The Defendant states that the expert witness had allegedly testified that the Plaintiff can get a good wheel chair at the sum of Kshs. 25,000.00/= and which can be replaced every two years. It proposes the use of the nine multiplier noting that the wheelchair would be changed four times. It proposes an award of Kshs. 100,000.00/= stating that the Plaintiff can invest the balance of the award.

I accept the Defendant's argument that the wheel chair is replaceable every two years. The wheel chair would be changed seven times in 15 years. Accordingly, I award the Plaintiff the sum of Kshs. 175,000.00/=.

G. Costs of Regular Check ups

The Plaintiff requires regular hospital checks for the rest of her life due to various infections caused by her injuries. This will cost about Kshs. 2,000/= due to hire of transport: 2,000/= x 12 x 17 = Kshs. 408,000/=.

The claim under this heading has been taken care of elsewhere.

H. Urine Bags & Catheters

The Plaintiff claims provisions for costs of such items as urine bag and catheters at Kshs. 500.00/= per week i.e. Kshs. 500 x 4 x 12 x 17 = 408,000/=.

The Defendant stated that the cost of a Catheter is Kshs. 1,170/= and a urine bag goes for Kshs. 85/=. The urine bag requires to be changed twice every month but that no evidence was tendered to show how frequently the catheter needs to be changed. It proposes an award of Kshs. 18,360.00/= worked as follows:

170 x 9 x 12 = Kshs. 18,360.00/= with suggestion that the Plaintiff can invest as the payment is in lump sum.

I award the sum of Kshs. 18,000.00/= which is worked as Shs. 500 x 2 x 15 = Kshs. 180,000.00.

I. Cost of Medication (Drugs)

The Plaintiff would require medication for the rest of her life and claims provision for costs of medicine at Kshs. 3,000/= per month, i.e. Kshs. 3,000 x 12 x 17 = 612,000/=.

The Defendant claims that the Plaintiff's evidence is that she uses approximately Kshs. 300.00/= per month to purchase drugs. It is alleged that the Plaintiff has spent about Kshs. 15,444.00/= for the last (4) years on drugs.

The Defendant proposes an award of Kshs. 32,400.00/= worked out as follows:

$$300 \times 12 \times 9 = 32,400.00/=$$

I agree with the Defendant and award the sum of Kshs. 54,000.00. The difference is in the multiplier.

J. Specialized Bed and Mattresses

By nature of her injuries, the Plaintiff requires specialized bed and mattress. She claims a sum of Kshs. 120,000.00/= to purchase these items. The Defendant did not contest the Plaintiff claim under this head and accordingly, I award the sum of Kshs. 120,000.00.

K. Stool Control

The Plaintiff suffers constant constipation and has to use laxatives to relieve her bowels or to do manual evacuation. Claims for Kshs. 500.00/= per month x 12 x 17 = Kshs. 102,000.00/=

The Defendant submits that the Plaintiff claim under this head is a duplication of the claims under general damages and the head under cost of medication. It is the Defendant's submission that the Court should not make any award under the head.

I accept the Defendant's argument and make no award.

L. Loss of Earning and Earning Capacity

Under the head, the Plaintiff Claims:

a) Loss of earnings to date – Kshs. 15,000 x 12 x 4 = Kshs. 720,000/=

b) Loss of earning capacity – at ½ rate i.e. 7,500.00 = Kshs. 1,620,000/=

The Defendant contends that the Court should not allow this claim on the basis that the Plaintiff had demonstrated in Court that she was naturally fit and very intelligent girl. She is still able to pursue her education and like so many other disabled people earn a living.

The Defendant submits that the Court, if minded to award, should grant a global award of Kshs. 500,000/=.

The Defendant submits that the Plaintiff was not working at the time of the accident and thus cannot be argued that she has lost earnings as a result of the accident.

The Defendant relies on the case of **James Otiende Majiwa, Nairobi HCCC No. 1987 of 1981**, a young man of 31 years who had sustained a total paralysis of both lower limbs with a result of complete loss of bladder control, movement and penile erection, and confined to a wheelchair, was able to obtain a bachelor's degree in education and was employed as a teacher.

The Plaintiff had obtained a Diploma Part I Business Information Systems in May 2002 and testified had planned to study the same to the level of degree. She would have worked, earned a living, and probably raise a family. I award her the sum of Kshs. 800,000.00/=.

M. Witness Expenses

Dr. Mwangi charged Kshs. 10,000/= to attend Court. He had travelled by air from Nairobi and paid Kshs. 12,998.00/= (Ksh. 23,000/=) for air ticket. The Defendant did not contest and I award the sum of Kshs. 23,000.000/=.

In summary, the court enters judgment for the Plaintiff and makes the following award:

- 1) General damages for pain and suffering - Kshs. 2,000,000/=
- 2) Special damages - Kshs. 786,768.75/=
- 3) Nursing - Kshs. 540,000.00/=

4) Physiotherapy	- Kshs. 576,000.00/=
5) Cost of Wheel Chair	- Kshs. 175,000.00/=
6) Urine Bags and Catheter	- Kshs. 180,000.00/=
7) Cost of drugs	- Kshs. 54,000.00/=
8) Special Mattress and bed	- Kshs. 120,000.00/=
9) Witness expenses	- Kshs. 23,000.00/=
Grand Total of - <u>Kshs. 4,454,768.75/=</u>	

I award interest on the damages from the date of this judgment. I award the Plaintiff the cost of the suit to be agreed or taxed.

DATED AND SIGNED AT NAIROBI ON THIS 14TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Wanyonyi for Defendant