



REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 202 of 2009

EVA MUENI WAMBUGUPLAINTIFF

VERSUS

SIMON PETER GITHAU.....1ST DEFENDANT

FAR EAST CAR BANK2ND DEFENDANT

JUDGMENT

By an amended plaint dated 3rd November, 2010, the plaintiff sued the 2nd defendants seeking general damages for pain, suffering and loss of amenities, damages for paraplegic equipment, future medical and nursing care, hospitalization and drugs, damages for loss of earning and earning capacity, special damages of Kshs. 2,049,107/= costs and interest.

The suit arose out of a road traffic accident on 24th June, 2005 involving motor vehicle registration number KAN 415L owned by the 2nd defendant and on the material day being driven by the 1st defendant as an employee agent or servant of the 2nd defendant and the plaintiff. Apparently, on the material day, the plaintiff was lawfully travelling in the subject motor vehicle along Nairobi–Mombasa road when the said motor vehicle was carelessly and or negligently driven, managed and or controlled by the 1st defendant that he lost control of the same resulting in an accident in which the plaintiff was seriously and severally injured.

The injuries sustained by the plaintiff as a result were:-

- Fracture ribs on the left chest, 3 ribs haemopneumothorax
- Fracture tarsal bones right foot
- Compressed fracture dislocation at L₁ and L₂
- Paralysis of both limbs
- Loss of sensation from waistline downward
- Loss of urine and stool control

Following the accident and injuries sustained he was hospitalized and incurred a total sum of Kshs. 2,049,107/= as special damages made up as follows

- Police abstract Kshs. 200.00
- Medical report Kshs. 2,000.00
- Taxi expenses Kshs. 8,800.00
- Cost of treatment Kshs. 2,038,107.00

Total Kshs. 2,038,107.00

Due to the injuries, the plaintiff would require;-

- Wheel chair at a cost of Kshs. 60,000/= together with costs of annual replacement, costs of parts and maintenance at Kshs. 2,000/= per year for life
- Permanent nursing assistant per year for life at Kshs. 20,000/= per month.
- Drugs for evacuation of stool from the system at Kshs. 500/= per week for life
- Accommodation at Kshs. 5000/= per month for life
- Uridoms, urine bags, diapers, napkins and catheters at Kshs. 600/= per week.
- Future checkup and purchase of medicines at Kshs. 2000/= per month.
- Special hydrorauc electric bed at Kshs. 350,000/=
- Special mattress at Kshs. 150,000/=
- Taxi charges for outpatient follow up clinic scheduled on a monthly basis at Kshs. 3000/= per month

The plaintiff was aged 26 years and prior to the accident she was in the process of being employed as a personal assistant at AAR. She used to earn a salary of 8000/= per month whilst on probation. By reason of the injuries, the plaintiff had not been able to resume her duties and will never be able to engage in any gainful employment. She therefore claimed loss of earnings with effect from 24th June, 2005 until the hearing and determination of the suit and thereafter loss of future earning capacity.

She attributed the accident solely to the negligence of the 1st defendant for whose actions the 2nd defendant is vicariously liable. She proceeded to give particulars of negligence that she attributed to defendants.

On being served with summons to enter appearance, only the 1st defendant entered appearance and filed a defence. The defence was subsequently amended on 9th November, 2010. In his defence, the 1st defendant denied knowing the plaintiff, nor being a fair paying passenger in motor vehicle registration number KAN 415 L that he was driving. He further denied that the accident was at all caused by his negligence. He contended that the accident was wholly caused and or substantially contributed to by the negligence, carelessness and recklessness of the driver of motor vehicle registration number KAW 351S. He proceeded to give particulars of negligence that he attributed to the driver of the said motor vehicle. He further averred that he had as a result of the accident been charged with the traffic offence of careless driving in traffic case No. 4532 of 2005 before the Chief Magistrate's Court in Machakos but the fact that he was so charged or even convicted does not preclude this court from considering the issue of liability and finding that the driver of motor vehicle registration number KAN 351S was to blame and or had contributed to the occurrence of the accident. Finally, he denied the injuries sustained by the plaintiff and the particulars thereof and at that she required continued medical care and the particulars thereof. He therefore prayed for the dismissal of the suit.

However, before the suit could be set down for hearing, parties entered a consent in these terms:-

“by consent;-

- ***Judgment on liability be and is hereby entered in favour of the plaintiff against the 1st defendant at 60% only.***
- ***The matter be mentioned on 8th December, 2011 to record a further consent on the quantum of damages payable.”***

Parties however, were unable to agree on quantum. Instead, on 2nd July, 2012, they agreed on special damages payable in the sum of Kshs. 1,285,704/50. They further agreed that the plaintiff was at the time of the accident employed by AAR and earning a monthly salary of Kshs. 5,000/= for the 3 month she was on probation awaiting for confirmation.

The case then proceeded on quantum only. The plaintiff adopted the statement she had recorded and signed dated 2nd July, 2012 and filed in court. Suffice to add that following the accident, She was rushed to Athi River District Hospital by well wishers and was later transferred to Nairobi Hospital where she was admitted at the HDU for a period of 2 weeks, was operated upon and later transferred to the General Ward. She was later transferred to Kenyatta National Hospital where she underwent 2 surgeries of the lumbar spine and remained hospitalised for 5 months. After being discharged from Kenyatta National Hospital, she was referred to National spinal injury hospital for further treatment where she remained for 6 months. As a result of the injuries, she was bound to the wheelchair. She had to engage a nurse soon after her discharge from the spinal injury hospital as she could not do most of the chores on her own. She had however to discontinue the services due to financial constrains. She still needs those services though. She used to pay the nurse Kshs, 7,500/= per month. She had also to discontinue physiotherapy because her family could no longer afford to pay for the same.

Since the accident, she had used 4 wheelchair at the average cost of Kshs. 60,000/= per each. A wheelchair has a lifespan of 6 to 12 months. Because of her incontinence of urine and stool she uses a minimum of 3 diapers in a day. At the time of the accident she was aged 25 years though now she was aged 32 years. She had just landed a job with AAR with a monthly salary of Kshs. 5000/= though she was still on probation.

Since the accident her whole life had completely changed in the following ways:-

- She is now dependant on other people
- Prospects of her having a family in future had been diminished
- Cannot carry out ordinary personal household chores
- Cannot go for a walk or jog which she used to enjoy
- Cannot visit friends
- Difficulty to get employment as many employees do not want to engage disabled persons.
- Lost prospects of future earnings
- Can no longer sing in the church choir in which she was a member.

In other words, she had been deprived of many ordinary joys of life, including having a job, working and seeing her career develop, courtship, marriage, having children, playing with them and seeing them grow up under her care, socialising with family, friends, neighbours and relatives and generally dealing with

the joys and hardships of life as an “*able person*”. Though no amount of money can ever adequately compensate for such deprivation she nevertheless urged this court to do justice and award her fair compensation that can at least ease her hardship and her financially drained family.

Cross-examined, she stated that she did not have receipts for the 4 wheelchairs she had used so far. She also conceded that she did not have a letter of employment. Lastly, she confirmed that she was staying with her relatives.

That relative was PW2, **Josephine Ndonyo**. She testified that the plaintiff was her niece and stayed with her. She adopted as her evidence the statement which she had recorded and filed in court. Since the accident, their lives had changed completely with many challenges. She had to balance her life, taking care of her family and the plaintiff as well. She had gone out of her way to see that the needs of the plaintiff are met which is hectic and stressful for the entire family. She had to be counselled in order to know how to handle her. She had to close down her business and suspend her errands in order to take care of the plaintiff for a couple of years. The residential house had to be adjusted to suit the wheelchair movement. She in the course of her treatment, therapy and rehabilitation incurred huge medical expenses including sourcing and purchasing;-

- Special corset for her spine
- Physiotherapy equipment e.g. parallel bars, walking frames and calipers
- Wheelchair
- Special bed and special mattress to avoid bed sores and spinal cord complications.
- Imported spinal crews for her 2nd and 3rd surgery to stabilize her spine.
- Travelling expenses and buying medication e.g. pain killers and supplement to boost her immunity

She therefore urged the court to do justice and give the plaintiff an award that is fair that can at least ease her hardship and that of the family.

With that the plaintiff closed her case. The defence opted not to offer any evidence in rebuttal. Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

From respective submissions, it is agreed that I should consider the awards payable under the following heads.

- General damages for pain, suffering and loss of amenities
- Costs of paraplegic equipment, care and treatment
- Future medical expenses and treatment
- Loss of earning capacity
- Special damages

With regard to the 1st head, there is no doubt that the plaintiff suffered very severe injuries as a result of the accident. The medical report by both **Dr. Simiyu** for the plaintiff and **Dr. Wokabi** for the 1st defendant dated 7th May, 2007 and 30th May, 2011 respectively attest to this fact. They are all in agreement that the plaintiff sustained the following injuries

- Fractured ribs on the left chest, 3 ribs with haemopneumothorax
- Fractured tarsal bones right foot
- Compressed fracture dislocation of L₁ and L₂
- Paralysis of both lower limbs
- Loss of sensation from the waistline downwards
- Loss of urine and stool control

Both doctors opine that the plaintiff suffered 100% permanent disability. Given the severity of the injuries and the recent trends in inflation, the plaintiff feels that an award of Kshs. 6,000,000/= would be sufficient compensation. In support of the proposition, the plaintiff has relied on the following authorities;-

- *Nakuru HCC No. 221 of 2002 –Job Kenya Miranyi vs Ezekiel Tochi & another [U.R]*
- *Mombasa HCC No. 225 of 2001 - Dominic Mutua Maweu vs Bestways Plumbers Limited [UR] and*
- *Nakuru HCC No. 467 of 1995 Alexander Kipkoech Kosgey vs Fredrick Towet [UR]*

The plaintiffs in these authorities sustained comparable injuries as the plaintiff in the instant case. However, I note that those decisions were made almost 7 years ago. Indeed they were delivered on 13th May, 2005 and 9th June, 2005 respectively. Since then so much has change as the Kenyan shilling has continued to weaken due to inflation

On the other hand, the 1st defendant has proposed Kshs, 1,000,000/= as adequate general damages for pain, suffering and loss of amenities. He has relied on the following authorities.

- *Machakos HCCC No. 216 of 1996 –John Gatuma vs Mutia Mutune & Another [UR] and,*
- *Nairobi HCC No. 1301 of 2001 – Alice Ngoki Kiruka vs Francis Kariuki [UR]*

Judgments in the above cases were delivered on 5th March, 1997 and 20th March, 1997 respectively. This is a period well over 15 years. Considering incident of inflation since, I do not think that these authorities are a useful guide. I would rather be led by the authorities by the plaintiff. They are somehow recent. However I would still have to bear in mind the inflationary trends since they were made. Doing the best I can and weighing one thing against the other, I am of considered view that an award of Kshs, 3,500,000/= will suffice under this head.

With regard to the 2nd head, this will encompass costs and maintenance of the wheel of the wheelchair and nursing care. Parties are in agreement that at the time of the accident, the plaintiff was aged 25 years but at the time of the trial she was now aged 32 years old. She testified that she is permanently on a wheelchair and she will remain so for the rest of the life. The doctors too are in agreement on that fact. This evidence was not rebutted by the 1st defendant

In response the defendant has stated that the court should not rely on **Dr. Simiyu's** report which lists various equipments required by the plaintiff and gives their estimated cost. This is because the plaintiff did not produce any quotations of invoices from any shops or suppliers of such equipment to ascertain or confirm the respective prices thereof. As such indications by **Dr. Simiyu** with regard to the respective prices of the various equipments was inadequate and the court should consider the same not proved. In the premises, the best the court could do was to award a global sum for future medical care and related

expenses. In the alternative he submitted that if the court is satisfied by **Dr. Simiyu's** costing, he urged the court to award those expenses based on a multiplier of 5 years.

I choose to go by the last option. The medical report by **Dr. Simiyu** was admitted in evidence in its entirety and not portions thereof. The document must thus be read and treated as whole. The plaintiff and her witnesses testified as to the future challenges that will face the plaintiff. The defendant did not seriously challenge that evidence. It was thus not necessary for the plaintiff to ascertain or confirm the respective prices thereof. I am also hesitant to award a global sum, when the requirements have been particularised and prices attached to them. What I now need to consider is the multiplier. The plaintiff has suggested a multiplier of 33 years based on the fact that due to the complexities of life and reduced life span, the plaintiff would have lived to at least 65 years of age. However, the defendant has countered that by proposing a multiplier of 5 years and relied on *Nairobi HCCC No. 355 of 2003 – Paul Maina Gatama vs John Nganga Wanjugu & Another [U.R.]*.

In deciding the appropriate multiplier applicable to the circumstances of this case, regard must be had to the fact that the payments are being effected in lump sum and in advance. Thus the plaintiff will have a chance to invest wisely. Further due to vagaries of life, the plaintiff could as well have passed on earlier and or rendered worthless due to other natural causes. It cannot therefore be assumed that she could have led a robust life but for the accident. However, it is also possible that she could have led a fulfilling life and passed on at a ripe of age of over 70 years. Thus what the court is involved in here is a balancing act of compelling assumptions. Doing the best I can in the circumstances, I would adopt a multiplier of ten (10) years.

Though the plaintiff had pleaded in the plaint that the cost of an annual wheelchair is approximately Kshs. 60,000/= with a life span of a year, in her recorded statement which she adopted as her evidence, she indicated that such wheelchair costs about Ksh, 50,000/=. I will adopt the latter figure. I accept the cost of maintenance proposed by the plaintiff of Kshs. 2,000/= per year. The costs of the wheelchair then adds up as follows:-

- Wheelchair Kshs.50,000/= x10 years –Kshs. 500,000.00
 - Costs of maintenance 2000/= x 10 - ” 20,000.00
- 520,000.00

With regard to the nursing care, the plaintiff testified that initially she had engaged the services of a nurse and the same were terminated due to financial constrains; though she still needs one due to her immobility. Both **Dr. Simiyu** and **Dr. Wokabi** concurred on a salary of Kshs. 20,000/= per month. In her evidence, the plaintiff stated that she was paying approximately Kshs. 7000/= per month. However, that was in 2007. She has pleaded with me to apply the current minimum wage of Kshs. 15,000/=.

The defendant counters this by proposing a sum of Kshs. 3,000/= on the grounds that the plaintiff had never engaged and paid for nursing services. In any event at the time of the hearing the suit, she did not have a nurse employed to look after her.

I do not think that this claim is remote or farfetched. The plaintiff and her witnesses testified as to the need for a nurse. I saw the plaintiff in court and the need for such nurse was self evident. Reading through the evidence of the plaintiff's witnesses and even her statement, leaves one in no doubt at all that the services of a nurse are required. The plaintiff explained why she had been unable to engage those services further. This was due to financial constraints. I accept the reason. In determining what then should be payable to such nurse, I will go by the proposal by the plaintiff that I employ the minimum wage approach. This then works out as follows:-

15,000/= x 12 x 10 - Kshs. 1,800,000.00

With regard to the 3rd head, the plaintiff claims the cost of diapers and napkins. The plaintiff confirmed in

8,949,804.50

• Less 40% 3,579,921.00

Grand total **5,369,883.50**

The plaintiff shall be entitled to costs and interest. The interest on special damages shall however accrue from the date of filing suit whereas the other heads of damages will accrue interest from the date of this judgment.

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 14TH day of DECEMBER, 2012.

**GEORGE DULU
JUDGE**