



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 193 OF 2007**

**LUCY NYAMBURA MUNGAI.....PLAINTIFF**

**VERSUS**

**THOMAS GIKONYO MUNDIA.....1<sup>ST</sup> DEFENDANT**  
**ZACHARY MUNDIA NYAGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By her amended plaint filed in this matter on 19<sup>th</sup> November, 2009, the plaintiff claims from the defendants general and special damages for the injuries sustained as a result of road accident on 8<sup>th</sup> November, 2004 involving her and the 1<sup>st</sup> defendant's motor vehicle No.KAQ 119H Toyota Starlet driven at the time of the accident by the 2<sup>nd</sup> defendant. As a result of the accident, the plaintiff sustained fairly serious injuries from which she has not fully recovered. She blames the 2<sup>nd</sup> defendant for the cause of the accident and the 1<sup>st</sup> defendant for being vicariously liable for the negligent driving of the 1<sup>st</sup> defendant. The defendants for their part have denied any blameworthiness for the accident and instead have blamed the plaintiff for contributing to the accident.

The plaintiff testified that on the day in question (8<sup>th</sup> November, 2004) at about 4.30p.m., as she walked home, some 20m from the main Ol Kalou – Nyahururu road, she notice an on-coming motor vehicle KAQ 119H travelling at a high speed and in a zigzag manner. As it approached, she began to run away, but it was too late as the motor vehicle caught up with her hitting her from the back and throwing her in a ditch. She lost consciousness, suffered fairly serious injuries and spend considerable amount of time and funds. The plaintiff, through her counsel has prayed for an award of Kshs.2,500,000.00 in general damages, Kshs.1,620,000.00 for further medical expenses and Kshs.297,998.00 for special damages relating to costs of treatment and travelling.

The defendants' counsel submitted that the plaintiff was to blame for the accident and therefore ought to be held 50% liable. On quantum, the defendant' counsel suggested Kshs.250,000.00 representing 50% liability.

I have duly considered the evidence presented by the plaintiff. The defendants did not call evidence in

support of their defence. I have also considered the written submissions filed herein by both sides as well as the authorities relied upon.

Starting with liability, the plaintiff pleaded in the amended plaint, *inter alia*, that the 2<sup>nd</sup> defendant drove the motor vehicle in question at a high speed; that he failed to have due regard to the safety of the plaintiff; that he drove without due care and attention.

In her testimony, the plaintiff related to the court how she noticed the motor vehicle travelling at a high speed. It was moving in a zigzag manner and left its lane to the lane of on-coming traffic, got off the road and hit the plaintiff some 20m where she was walking. In their defence, the defendants contended that the plaintiff walked into the path of the motor vehicle by crossing the road without ascertaining that it was safe to do so. As I have stated, no evidence was called in support of this contention.

The plaintiff's version of how the accident occurred was buttressed by the police record in respect of the accident which was produced by P.C. (W) Ency Chesula (P.W.2). It is clear from that record (statements of the witnesses and the sketch plans) that the motor vehicle lost control and landed on the wrong side of the road. Without evidence in rebuttal of the plaintiff's testimony, there is no explanation as to how a car normally travelling at an acceptable speed would suddenly begin to move in a zigzag manner before losing control, hit a pedestrian and roll several meters off the road. The only explanation I see is that the car was being driven at a high speed without due regard to other road users.

For that reason, I find the defendants 100% liable in negligence. Regarding quantum, it must be pointed out that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases. In seeking an award of Kshs.2,500,000.00 in general damages, the plaintiff relied on the following decisions of the High Court:

1. **Dr. Paul Mubia Mathu** Vs. **Ibrahim Kariouki Gichimu** Nkr. HCCC No.60/2001
2. **Irene Wanjiku Gitonga** Vs. **Kinyanjui Ngethe & 2 others**, Nkr. HCCC No.456 of 1996
3. **Samuel Kibet Ngetich** Vs. **Robert Nandwa Sunguti and Another**, Eld. HCCC No.73 of 2007.
4. **Isa Swadi Yusuf** Vs. **Peter Njoroge**, Nbi HCCC No.173 of 1993

The general damages awarded in the three cases ranged between Kshs.980,000.00 and Kshs.1,800,000.00

Considering only the highest and the lowest of these awards, I will start with **Dr. Paul Mubia Mathu** (supra) where in 2003, the plaintiff was awarded Kshs.1,800,000.00 for the following injuries and complications:

- Injuries to the back
- Multiple bruises
- Fracture of the 5<sup>th</sup> thoracic vertebra
- Total inability to use his legs, walk, stand or sit

- Unable to control his urinary bladder and bowels
- Lost sexual functions
- Has to induce urine and fecal evacuation through massage
- Confined to a wheel chair

In **Samuel Kibet** (supra), the plaintiff suffered:

- Multiple cut wounds on the face and both knees
- Fracture of the right temporal bone of the skull with accompanying scalp haematoma on the same side.
- Posterior dislocation of the hip joint with fracture of the iliac and inferior parts of the acetabulum
- Fracture of the lateral condyle of the right knee joint.
- Fracture of lateral condyle of the right ankle joint

For these injuries, the plaintiff was awarded Kshs.980,000.00 in 2007.

The plaintiff in the present case suffered:

- Blunt abdominal trauma associated with intraperitoneal bleeding due to torn mesentry and liver laceration
- Undisplaced fracture of the right acetabulum
- Blunt trauma left knee joint associated with ligamentous injury
- Subluxation left sacro-iliac joint

According to Dr. P.M. Wambugu who examined her last in September, 2009, the plaintiff complained of:

- Weakness of the left lower limb
- Swelling left lower limb, and
- Abdominal scars

In conclusion the doctor stated that due to the injuries listed above the plaintiff suffered;

**“.....pain, blood loss and ongoing morbidity. Nyambura’s left leg is weak due to possible nerve injury and not much progress is expected. Further, she has developed recurrent chronic deep venous thrombosis.”**

He awarded the plaintiff 60% permanent incapacity as compared to Dr. M. S. Malik’s 40% in 2006. Comparing the injuries suffered by the plaintiff and their effects with those suffered by the plaintiffs in the cases cited by both sides, clearly the injuries suffered by the plaintiff in **The Catholic Diocese of Meru Vs. Obadiah Mwangi Kariuki**, H.C. Civil Appeal No.50 of 2003 (fracture of left clavicles, chest pains and bruises) cited by counsel for the defendant for which Kshs.300,000/= was awarded as general damages are clearly less serious than those suffered by plaintiff in this action. Those suffered by the plaintiff in **Dr. Paul Mubia Mathu** (supra), are, on the other hand more severe than those suffered by the plaintiff herein.

I find the injuries suffered by the plaintiff only comparable to those in **Samuel Kibet Ngetich** (supra) and **Isaa Swadi Yusuf** (supra) where the two courts awarded Kshs.980,000.00 and Kshs.1,275,000.00 respectively. In the latter, the plaintiff suffered:

- a fracture of the right superior and inferior pubic ramii
  
- fracture dislocation of the right sacro-iliac joint
  
- a fracture of the neck of the right femur and abrasion over the right lower abdomen

For the reasons stated, I will and do hereby award to the plaintiff general damages for pain, suffering and loss of amenities in the sum of Kshs.1,000,000.00. Regarding special damages, the plaintiff produced by consent in evidence a bundle of receipts. The receipts relate to medical treatment expenses (A.I.C. Kijabe and Aga-Khan Hospitals), travelling expenses, doctors’ fees, cost of police abstract and for search at the Registrar of Motor vehicles – all amounting to Kshs.297,998/=. That was the amount pleaded in the amended plaint and proved by the receipts which were not challenged during the hearing. It is awarded to the plaintiff.

The plaintiff also sought an award on the head, future medical expenses at Kshs.1,285.00 per month for the next 27 years. It must be noted that in the amended plaint, that (Kshs.1,285.00) is the sum sought. However, when she testified, she gave the figure of Kshs.10,000.00 per month while her advocate in the written submissions has suggested Kshs.5,000/= per month for 27 years translating to Kshs.1,620,000.00. It is well established that future medical expenses must be pleaded and evidence presented to prove it. The Court of Appeal reiterated this position in **Kenya Bus Service Limited Vs. Jane Karambu Gituma**, Civil Appeal No.241 of 2000 as follows:

**“As regards future medication.....,..... the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.”**

No basis was laid for the claims of Kshs.1,275.00, Kshs,5,000.00 or Kshs.10,000.00 per month. Both medical reports by Drs. Wambugu and Malik are silent on the nature of the treatment that the plaintiff

will require, the length of treatment and more importantly the cost.

For the reasons stated, this claim must fail and is hereby rejected. There will be judgment for the plaintiff against the defendants, jointly and severally as follows:

- i) General damages – Kshs.1,000,000.00
- ii) Special damages - Kshs.297,998.00

Total - **Kshs.1,297,998.00** plus costs and interest.

**Dated, Delivered and Signed at Nakuru this 20<sup>th</sup> day of May, 2011.**

**W. OUKO**

**JUDGE**