



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**OF KENYA**

**HIGH COURT CIVIL NO 171 B OF2009**

NANCY OSEKO .....PLAINTIFF

**VERSUS**

BOARD OF GOVERNORS MASAI GIRLS HIGH SCHOOL.....DEFENDANT

**JUDGEMENT**

The plaintiff herein, Nancy Oseko , filed this suit against the Board of Governors, Masai High School, the defendant, seeking general and special damages arising from an accident which occurred on 5/7/2006, when she was traveling in motor vehicle KAL 750U lorry, along the Kericho-Kisumu Road. The plaintiff was at the time was a student of Masai Girls High School and the registered owner of the vehicle was the defendant. The said vehicle was driven by the defendant’s driver. The plaintiff was going in to perform in the music festival on behalf of the school. In the amended plaint dated 11/2/2010, the plaintiff blamed the occurrence of the accident on the defendant’s driver, for driving at an excessive speed, failing to take a proper look out , failing to have due regard to the safety of those in the vehicle. The defendant filed a defence on 14/10/2009 in which it was denied that the defendant was the owner of the vehicle KAL 750U and that the plaintiff was a passenger in the said vehicle on 5/7/2006. The defendant totally denied the allegations of negligence implied on this agenda on that if such accident occurred, it was due to reasons beyond human control for which the driver or the defendant could not be held liable. The defendant also denied that the plaintiff suffered any injuries as a result of the accident.

In her testimony the plaintiff recalled that she was on their school bus, along Kericho –Kisumu Road heading for Nandi Hills for the music festival in Eldoret. She was seated near the back seat and could not see the front. Suddenly, the vehicle suddenly started swaying in the road and rolled. She found herself thrown out of the bus and could not move. She was taken to Sihoam Hospital in Kericho and was transferred to Nairobi the next day. After test she was found to have a fractured spine, could not move and had bleeding in the chest. She was started on treatment. was The defendant did not call any evidence in support of that defence.

From the record, I noted that the plaintiff’s counsel filed the issues for determination . They were however, not signed by the defence Counsel. The issues are as herein below:-

- 1. Whether the defendant was the registered owner and user of Motor vehicle KAL750U and at the material times driven by its servant driver or agent;**
- 2. Whether the plaintiff was a passenger in the motor vehicle KAL 750U on the material date;**

- 3. Whether the accident was caused by negligence of the defendant's driver servants or agents;**
- 4. Whether the accident was caused by inevitable circumstances beyond the control of the defendant's driver servants or agents;**
- 5. Whether the plaintiff has as a consequence of the accident sustained injuries and the extent thereof;**
- 6. Whether the plaintiff as a consequence of the accident suffered loss and damage, and if so, what is the quantum of loss and damages both special and general;**
- 7. Whether the plaintiff is entitled to damages for loss of earning capacity and /or diminished earnings;**
- 8. Whether the plaintiff sustained 100% permanent incapacity and therefore requires permanent nursing care;**
- 9. Whether the plaintiff's suit is fatally defective;**
- 10. Who should bear the costs of this suit;**

Though not agreed upon, all the issues seemed to have been captured by the plaintiff's counsel and the court will be guided by them. The parties filed submissions and the defendant contends that since the plaintiff merely suggested that the driver of the vehicle was speeding, the vehicle lost control, and the overturned, she was not able to cogently testify as to the circumstances that led to the accident and evidence did not discharge the burden placed on the plaintiff to prove the allegations of negligence on a balance of probability. Mr Mogeni, counsel for the plaintiff argued that the vehicle was driven at a high speed as alleged because if it had been doing reasonable speed, the driver could have controlled the vehicle. Since the defendant did not offer any evidence, the plaintiff's evidence stands uncontroverted. In the defence, the defendant had pleaded that the accident was caused by factors beyond the driver's control but no evidence was adduced to support that allegation. Vehicles do not just start swaying in the road or roll. There must have been an explanation for it. There was none offered and the court can only conclude that the driver was negligent, as a result of which the vehicle lost control, overturned and the plaintiff was injured. The defendant suggested that the plaintiff be held 50% liable but there is no basis for that. The plaintiff was not in any way in control of the vehicle in order to shoulder some of the blame The defendant's driver was wholly to blame and liability will be assessed at 100 %.

Whether the accident vehicle belonged to the defendant, the plaintiff produced as an Exhibit, a copy of Records from Kenya Revenue Authority as PEX (a&b) dated 21/1/2010 which confirm that motor vehicle KAL 750U belongs to Masai Girls Secondary School.

The plaintiff narrated at length what injuries she sustained and what treatment she has undergone since the accident. She was treated at Siloam Hospital in Kericho, Nairobi Hospital, Mater Hospital and the Spinal Injuries Hospital. She was examined by Doctor Siminyu (PW2) who was then the in charge of the Spinal Injury Hospital in Nairobi. Upon examining the plaintiff, the Doctor found that she had been treated for :-

- 1. Chest injury with accumulation of blood in the chest;**
- 2. Head compression fracture of the thoracic spine no 12;**
- 3. Loss of sensation from the level T-12 downwards;**
- 4. Loss of motor function from same level downwards;**
- 5. Loss of control of urine and stool.**

She underwent an operation of the spine where metals were fixed to stabilize the spine, an open chest operation to remove blood; under went physiotherapy, occupational therapy; ambulating

her on a wheelchair. The plaintiff developed bed sores which were healed, has to use medication to evacuate stool. The Doctor opined that she had permanent loss of the following functions;

1. Inability to walk. She has been confined to a wheel chair for life and a paraplegic and need confined to a wheelchair for life and was a lapel all her life.
2. Inability to control stool.
3. Inability to control urine, she was fitted with a catheter rundown, and urine bag, uses diapers or napkins.
4. Ability to engage in sexual life in future is medical. Though she can conceive, delivery would be by caesarian section.
5. Is affected psychologically- if she does not adjust she may never engage in any gainful employment.
6. Predisposed to recurrent chest and urinary tract infections and infections due to the nature of her injuries, she requires frequent check-ups.
7. She requires a special bed that can be turned by hydraulic or electronic system and a special mattress.
8. Regular follow up as an outpatient for life on a three Monthly basis.

The plaintiff testified that she now has a permanent nurse to attend to her and that the wheelchair has affected her hands which are wasting away. Doctor Musau Performed an open surgery on the chest and prepared a report ( PEX 20) . He also made similar findings as Doctor Siminyu . He opined that she suffered 100% disability.

The plaintiff was 19 years old when the accident occurred. As observed by the doctors, her life has completely changed and she has to adjust . The plaintiff said that she hopes to go back to school one day and to be engaged in gainful employment. For the time being and to realize that , this court will need to order some compensation which we know, cannot put her back in the shoes she would have been if she had not been injured. This court has to bear in mind the principles that guide assessment of damages as espoused in **West (HI) and Sons LTD VRS SHEPHERD (1964) AC 326** which was adopted in the case of **CECILIA MWANGI & Another Vr RUTH MWANGI CA 251 /1996** Lord Morris said: -

***“But money cannot renew a physical frame that has been battered and shuttered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional”***

I am also guided by Lord Denning’s decision in **KIM PHO CHOO Vrs CAMDEN & ISLINGTON AREA HEALTH AUTHORITY(1979) 1 ,ALLER 332** The court said that in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. Guided by the above principles, the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.

In respect of general damages for pain and suffering, Mr Mogeni counsel for the plaintiff submitted an award of Ksh 2,500,000/= He relied on the case of **DOMINIC MUTUA MAWEU VRS**

**BESTWAYS PLUMBERS LTD (2005)**, an award of Ksh2,500,000 for similar injuries was made. The said authority was not availed. On the other hand, Mr Musangi submitted that an award for Ksh2,000,000/= be made for loss and suffering, Mr Musangi relied on the case of **Nairobi HCA 634/2001 LUCY WANJA VRS PETER NGANGA NJENGA** where the plaintiff sustained the following injuries;

***Burst fracture of 5<sup>th</sup> thoracic vertebrae with paraplegia; deep, cut frontal area; compound fracture 1/3 of the right femur and fracture distal 1/3 of the right ulna styloid process.***

The plaintiff was permanently injured and confined to a wheelchair and an award of ksh1,500,000/= was made. In **HCCA 3217/97 NICHODEMUS OWOUR ONGONDO vr CHEMELIL SUGAR COMPANY LIMITED**, the plaintiff was injured on the spine resulting in paraplegia, urine and stool incontinence and the court assessed damages at Ksh2,000,000/= in 2001. Again in **Nairobi HC1728/99 REUBEN MEMO WERUNGA Vrs MICHAEL ODINDO** the plaintiff suffered 100% disability, required an orthopedic bed, wheelchair, nursing care and physiotherapy. The court awarded ksh1,500,000/= as general damages in the year 2000. In my considered view, the above cited case do compare well with the instant case, save that they were made about 10 years ago. Taking into account the incidence of inflation, I will make an award of Ksh 2,500,000/= as general damages for pain and suffering.

As respects loss of future earnings, the defendant submitted that it is a special damage claim that needed to be specifically pleaded and proved. In the case of **MWANGI & ANOR V MWANGI (1996) KLR 2859**, the court said ,

***“loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability . The plaintiff can not just throw figures at the judge and ask him to assess such damages”***

In the instant case, loss of future earnings was pleaded at paragraph (e) of the Amended plaint. The plaintiff testified that she had hoped to be a doctor upon completion of her studies but it seems those aspirations will never be realized. Mr Mogeni submitted an award of loss of earning capacity at Ksh17,500/= p.m for the rest of her life and that a multiplier of 35 years be used in determining the diminished or loss of earnings which would be reasonable employment not based on manual work. The sum totaled Ksh7,350,000/=. Counsel relied on the case of **PIUS KIPKARERE MITE vrs LEONARD KISONGOCHI HCC220/2001** where a 46 years old man was involved in an accident, he earned 29,000/= per month and the court used a multiplier of 20,000/= and multiplicand of 10 years. On the other hand, Mr Musangi urged the court to consider a net wage of Ksh5,000/= for quantifying the plaintiff's loss . In the case of **TRACOM LTD & JOSEPH MACHARIA V HASSAN MUHAMMED ADAM, NKU HCC 192/06**, it was held that the court adopted the minimum wages earned by the low wage earners as the multiplier. Counsel also urged the court to consider the fact that the sum would be paid in lump sum, it would be invested and would yield returns of an income nature for the plaintiff's use. In **BEATRICE WANGUI THAIRU Vs HON EZEKIEL BARNGETUNY HCA 1638/1988** the court said:-

***“ In determing the multiplicand, the important figures is the net earning of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier , the court must bear in mind in expectation of earning life of the deceased”***

Counsel said that the multiplier of 35 years adopted by the plaintiff is excessive, unfounded and instead suggested a multiplier of 15 years. In doing my best to assess what is a reasonable sum in the circumstances, I will also consider the decision in **IRERI MUGO Vrs GITHINJI NGARI HCA 5087/1990**, the court said;

***“ As regards the multiplier, I am of the considered view that when due regard is paid to the expectation of working life and dependency by the named dependants as well as the contingencies of life including the fact that the deceased could have died prematurely of a cause other than the accident that took him”***

Apart from taking into account the fact that the money is payable in lump sum and will be invested, the court must also consider the contingencies of life. The plaintiff is now 23 years old and taking into account contingencies of life, I will adopt a multiplier of 20 years. The plaintiff had not completed school. Her performance in school was not disclosed for the court to consider whether she would have made it to become a Doctor. She still hopes to go back to school and do something useful with her life. Taking into account the incidents of inflation, I would apply a multiplicand of 10,000/= The loss of earnings would therefore work out to Ksh2,400,000/= (10,000.00 X 20 X 12)

As regards the special damages on the actual medical expenses, Mr Mogeni put the expenses already incurred at 3,409,036/80. Mr Musangi had no issue with the following expenses;

Siloam hospital (EX2 )	Ks	81,500.00
Nairobi Hospital (Ex5)	Ksh	605,079.00
Mater Hospital (Ex7)	Ksh	460,842.00
National Spinal Injury Hospital ( ex 11)	Ksh.	5,550.00
Nairobi West Hosp(Ex13)		6,930.00
Dr Musau for review	Ksh	<u>1,000.00</u>
<b>TOTAL</b>		<b><u>1,660,911.00</u></b>

Counsel did not dispute the claim for an orthopedic bed and Reppo mattress which is a one off expense ,estimated at 400,000.00 . The defendant disputed the claim for Ksh2,000,000.00/= for allegedly incurred at the Spinal Injury Hospital, as not proved. The defendant also disputed the sums allegedly paid to the following Doctors , that is;

Dr Esther Munyoro	Ksh	85,000.00
Dr J C Munene	Ksh	70,000.00
Dr C K Musau	<u>Ksh</u>	<u>70,000.00</u>
<b>TOTAL</b>		<b><u>Ksh 225,000.00</u></b>

The plaintiff produced copies of receipts purportedly issued by Dr Munyoro, Dr Musau and Dr Munene for Ksh 225,000/=, but they were not original receipts nor were they certified. There was no proof of payments of the said sums. As regards the payment of Ksh2,000,000/= at Spinal Injury Hospital, the same was not proved. The law is that special damages must be specifically pleaded and strictly proved. In this case, the payments to the Doctors and the Spinal Injury Hospital were not strictly proved. The plaintiff has only proved special damaged of Ksh1,660.911.00.

In the evidence of Dr Siminyu, he made estimates of what the plaintiff would incur in future-;The yearly cost would be as follows: -

1. Physiotherapy twice weekly at 200.00 Per session (200x2x52)	Ksh 20,800.00
2. Check ups and purchases of medicine 20,000 p.m (20,000x12)	Ksh240,000.00
3. stool and bowl evacuation Ksh 500p.m (500x12)	Ksh6,000.00
4. Wheel chair at Ksh 60,000/=	
Ksh60,000.00	
5. Nursing care at Ksh20,000 p.m (20,000x12 )	Ksh240,000.00
6. Provision for hospital visit Ksh3000 per visit (taxi 1) (3000x12x2)	<u>Ksh 72,000.00</u>

**TOTAL COSTS**

**Ksh**

**422,800.00**

If it is multiplied by 20 years it comes to  
**8,448,000.00/=**

Mr Musangi argued that if the annual sum is invested, it can bring in income to sustain the medical expenses and therefore submitted an award of Ksh 4,000.00/= for future medical expenses. I do agree with the defence counsel's view that since the sum awarded will be paid lumpsum, if invested, it will earn some income to help sustain the medical expenses. I would consider an award of Ksh 6,000,000.00/= for future medical expenses.

In the case of **KENYA BUS SERVICES LTD vrs GITUMA (2004) EA 91**, the court of appeal held that ;

***“And as regards future medication ( Physiotherapy ) 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. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded”.***

All the damages that have been awarded under this head have pleaded and proved.  
In the end ,I find that the plaintiff will be entitled to judgment as hereunder.

1. General damages	Ksh 2,500,000.00
2. Loss of future earnings	Ksh 2,400,000.00
3. Costs of future medication & care	Ksh6,000,000.00
4. Actual medical expenses	Ksh 1,160,911.00
5. Reppo bed and mattress	<u>Ksh 400,000.00</u>
<b>TOTAL</b>	<b><u>Ksh.12,460,911.00</u></b>

The plaintiff will also have costs and interest .  
It is so ordered.

**DATED AND DELIVERED THIS 24<sup>th</sup> DAY OF JUNE 2011**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT**

Mr Nyaribo holding brief for Mr Mogeni for plaintiff  
Mr Muchela holding brief for Mr Musangi for defendant  
CC: Kennedy Oguma