



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 55 OF 2005

JANE ADHIAMBO AKWIRIPLAINTIFF

VERSUS

AL HUSNAIN MOTORS1ST DEFENDANT
SCOBBY ENTERPRISES LTD2ND DEFENDANT

JUDGMENT

The plaintiff filed the amended plaint dated 18th June 2006 seeking *inter alia*:-

- (a) **General damages for pain, suffering and loss of amenities.**
- (b) **Special damages as prayed and particularized under paragraph 8 and 10 of the plaint.**
- (c) **Loss of earnings and loss of earning capacity**
- (d) **Costs of the suit and any other relief from this court.**

The 2nd defendant filed its defence denying liability on 19th January 2007. The 2nd defendant equally attributed negligence upon the 1st defendant. The 1st defendant didn't file any defence and interlocutory judgment was entered against him on 10th May 2008.

This matter proceeded before my brother Justice Karanja and my sister Justice Nambuye. At the end of the hearing the parties have filed their respective submissions.

From the evidence it's not in dispute that the plaintiff was traveling in motor vehicle Registration number **KAR 359 J** owned by the 1st defendant. This was a matatu and the plaintiff had paid the sum of Kshs. 400/=. On the fateful day (17th January 2004) along Kisii - Kisumu Highway at a place called Mosochi the said matatu collided with motor vehicle Registration number **KAP 118 A** driven by the 2nd defendant's servant and or agent and owned by the said 2nd defendant. The plaintiff sustained serious injuries and was admitted at Nangeria Hospital, Kenyatta National Hospital and later Spinal Code Hospital for specialized treatment. All these facts are not disputed by the parties.

As consequences of the said accident, the plaintiff sustained the following injuries.

- (i) **Fracture dislocation of T11 and T 12**
- (ii) **Fracture of the pedicles of T11 and T12 with postero-lateral displacement of the fragments**
- (iii) **Paralysis of both lower limbs**
- (iv) **Loss of sensation from T11 downwards**

- (v) **Loss of urine and stool control**
- (vi) **Loss of sexual function**

She further prayed for damages.

It was confirmed by the plaintiff that the accident occurred when the canter (KAP 118 A) emerged from a minor road and that the matatu hit it from behind. She further said that it was not possible for the matatu driver to have braked.

After producing several documents by consent the plaintiff closed her case.

The 2nd defendant on his part called one **P. C. Mwinyi Mohamed** a police officer who produced the police traffic file. His evidence confirmed the occurrence of the said accident.

The question for determination first of all is the issue of liability. According to the plaintiff she said in her testimony that motor vehicle KAP 118 A suddenly emerged from a small road to the main road. She said

“I was sitted behind the driver near the door. I could see the front. The canter vehicle emerged from a minor road into the main road. I first saw the canter vehicle emerged from a minor road into the main road. I first saw the canter when it was about approximately 20 metres away. It was joined the main road and immediately collided with the matatu. The matatu hit the canter from the rear”.

This was during cross examination.

DW2 stated that:-

“Looking at the findings of the investigating officer reveal that the two vehicles were heading the same direction and on reaching Mosocho area near Cardinal Otunga Secondary School within Mosocho area the driver of the motor vehicle registration number KAR 359 J, the Toyota Hiace Matatu the driver Hesibon Otieno Owiti was behind vehicle KAP 118 Tata Canter. The matatu knocked the Tata Canter from behind”

According to DW2 the investigating officer recommended that the driver of the matatu be charged. Surprising no sketch plans were available. It was therefore difficult to tell the point of impact. However from the evidence of the plaintiff and DW2 it's clear that the two vehicle collided. The 1st defendant choose not to respond to the summonses. The 2nd defendant on the other hand didn't call the driver of motor vehicle registration number KAP 118 A canter despite calling the police officer to produce the file. Perhaps if the 2nd defendant had called the driver more light would have been shone on this question of liability.

Does it therefore mean that liability cannot be found against the 2nd defendant now that the 1st defendant failed to put any defence?. The answer is to the negative. The 2nd defendant must carry some blame. Accident invariably occur as a result of negligence of somebody. Perhaps the 2nd defendant drive or eye witness would have shed some light on this. A mere recommendation by the police is not enough. The Traffic Police didn't charge the 1st defendant. It's therefore hard to say whether their report is accurate. Traffic proceedings would have been conclusive evidence. It's true that the matatu hit the canter from behind. I shall believe the plaintiff's evidence that the said canter was joining the main road. The police file doesn't contain any sketch which would have assisted this court reach a proper conclusion. Both defendants must carry blame. Therefore on a balance of probability I shall apportion blame at **60%** in favour of the 1st defendant since he didn't file any pleadings and **40%** in favour of the 2nd defendant.

The next issue for determination is the element of damages. I have seen the written submission by

the parties herein together with respective authorities.

At the time of the accident, the plaintiff was aged 43 years and was and is still employed as a clerical officer at the District Commissioner's Office Migori. I shall therefore proceed to award as follows:-

(i) General Damages

Prior to awarding damages under this head it is worthy to note that in Paola Cavinato =vs= Antonia di Filippo 1957 [E. A.] 535 the court said:- “ **That general damages must be assessed on the combined effort of all injuries on the person injured and not calculated as the sum of independent assessed from each injury**”.

Both Doctors Raburu and Siminyu found as a fact that the plaintiff had suffered a permanent disability of 100%. Putting all the factors constant and taking into account the authorities offered by the parties herein I shall award the sum of Kshs. 2,500,000 as general damages.

(ii) Loss of future earnings

The plaintiff is a clerical officer at Migori District Commissioner's office earning a salary of Kshs. 9,130. She is still in employment. She has never been sacked. No evidence was tendered of any impending retrenchment or sacking. I shall not award therefore any sum under this heading.

(iii) Future Medical costs

I have read the reports of the two able doctors. Dr. Raburu under this heading has stated that:-

- (a) A wheelchair costing Kshs. 75,000 to be replaced every one or one and half years.**
- (b) A helper costing Kshs. 15,000**
- (c) Drugs Kshs. 15,000 per month**
- (d) Special beds of upto Kshs. 500,000**
- (e) Regular visits to the doctors for examination between Kshs. 2,000 to 5,000 per month.**

On the other hand Dr. Siminyu's report states as follows:-

- (a) Wheelchair Kshs. 60,000 with a lifespan of upto 10 – 12 months**
- (b) Helper Kshs. 20,000 per month**
- (c) Drugs combine – 500 +600 + 2,000 = 3,100**
- (d) Special bed and mattress Kshs. 500,000**
- (e) Schedule clinics – taxi after every 3 months Kshs. 3,000**

Both doctors agree principally. However in the case of Ndolo =vs= Ndolo [1995] L. L. R. 390 (CAK) the Court of Appeal stated this:-

“The evidence of PW1 and the report of Munga were, we agree entitled to proper and careful examination. The evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say “ Because this is the evidence of an expert I believe it”.

The two reports materially agree in all fronts. The one of Dr. Siminyu was however made in the year 2004 while that of Dr. Raburu is 2010 and obviously the value of the shillings has materially changed. For the above reasons however I shall award the same as follows:-

- (a) Wheelchair at the costs of Kshs. 60,000. I shall adopt a multiplier of ten (10) years and therefore compute as follows:-**

60,000 x 10 years Kshs. 600,000.

(b) Catheters, uridoms, urine bags and diapers at the cost of Kshs. 600 per week at a multiplier of 10 years thus

$600 \times 4 \text{ week} \times 120 \text{ months} = 288,000.$

(c) Medical check ups, and drugs at the costs of 1500 per month

$1500 \times 12 \times 10 \text{ years} = 180,000$

(d) Cost of drugs for stool evacuation at Kshs. 500 per month, this

$500 \times 12 \times 10 = 60,000$

(e) Orthopedic bed and mattress at Kshs. 500,000

(f) Follow up with clinics at Kshs. 3,000 with three months per year

$12000 \times 10 = \text{Kshs. } 120,000$

TOTAL Kshs. 1,748,000

(iv) Cost of hire assistant

This definitely is critical given the situation the plaintiff is in. I agree with the plaintiff award that a modest sum of Kshs. 5,000 per month is acceptable. **Therefore $5,000 \times 12 \times 10 = 600,000.$**

(v) **Special damages** provided Kshs. 5,000 for the medical report and police abstract Kshs. 100 total **Kshs 5,100/=**

In awarding the above damages I am alive to the defendant's submission that the plaintiff for the last seven years has not upgraded herself anything more than she has been. The learned counsel for the 2nd defendant said "But this court must take notice of the fact that if the special bed and mattress were not available for use during the period soon after the accident when the need to use them was so obvious, then what is the need for them now, especially seven years after the accident?"

I shall in response to the same quote Lord Denning M. R. in **Limpoh Choo =vs= Camden And Islington Area Health Authority [1979] 1AER 332**

"In considering damages in personal injury cases, it is often said, the defendants are wrong doers, so make them pay in full.....they do not deserve any consideration....."

Indeed the plaintiff was a fare paying passenger. She was never negligent or at fault in the accident. The defendant must pay. She is 100% incapacitated. She is fairly young and ordinarily she would have worked for a time prior to retirement. Consequently I enter judgment as follows:

(a) General damages	Kshs.	2,500,000
(b) Future medical treatment	Kshs.	1,748,000
(c) Costs of hiring an assistant	Kshs.	60,000
(d) Special damages	<u>Kshs.</u>	<u>5,100</u>
TOTAL	<u>KSHS.</u>	<u>4,853,100</u>

The plaintiff shall have costs and interest.

Orders accordingly.

Dated, signed and delivered this 2nd day of November 2011.

H. K. CHEMITEI
JUDGE