



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 232 of 2008**

**MARGARET MNYASI KARISA**

**(Suing through Friend and next of kin Husband)**

**MILIKAU WABUTI FREDRICK.....PLAINTIFF**

**VERSUS**

**MOHAMED H. JERAH.....DEFENDANT**

**JUDGMENT**

On 7<sup>th</sup> August 2007, the plaintiff was traveling as a lawful passenger in motor vehicle registration number KAW 503C, when it was involved in an accident along Kilifi-Mombasa road at Shauri Moyo as a result of which the plaintiff sustained serious injuries. She then instituted this suit against the defendant who was at the material time the registered/beneficial owner of the said vehicle.

At the trial, liability was, by consent, apportioned at 15% against the plaintiff and 85% against the defendant. The following documents were also produced by consent:-

- 1) Treatment notes
- 2) A medical Report by Dr. Ndegwa
- 3) Police Abstract
- 4) A copy of a P3
- 5) Employment Card of the plaintiff
- 6) Payslips of the plaintiff
- 7) A receipt issued by Dr. Ndegwa
- 8) Various other receipts.

In view of the production of the above documents, the plaintiff saw no need to testify and closed her case. The defendant did not testify and called no witness. Counsel then agreed to file written submissions which they duly filed by 30<sup>th</sup> November 2009.

The plaintiff's counsel submitted that the plaintiff be awarded Kshs. 3,000,000/= for pain, suffering and loss of amenities. He relied upon the case of **Magdaline Chebet Sigei – v – Joseph Njogu Mwaura: [HCCC No. 183 of 1999 Nakuru] (UR)** in which an award of Kshs. 2,000,000/= was made to the plaintiff who suffered, among other injuries, a fracture dislocation of the thoracic spine resulting in total and complete paraplegia.

With regard to loss of earning capacity, counsel submitted that the plaintiff had suffered total permanent disability and cannot resume work. In counsel's view the plaintiff's previous gross salary of Kshs. 14,534 would have been earned for another 24 years when she would have been expected to retire. The resultant figure, according to counsel, should be awarded for loss of earning capacity.

Counsel further submitted that the plaintiff would require medical and nursing care for the rest of her life. He therefore opined that Kshs. 8,000/= per month for 30 years be awarded for the services of a nursing aid and Kshs. 2,000/= per month for physiotherapy.

On his part, counsel for the defendant submitted that an award of Kshs. 1,200,000/= be made to the plaintiff for pain, suffering and loss of amenities. He invoked the decisions of **Lucy Wanja – v – Peter Ng'ang'a Njenga: [HCCC No. 634 of 2001] (UR)** and **Magdaline Chebet Sigei – v – Joseph Njogu Mwaura (supra)** in which awards of Kshs. 1,500,000/= and Kshs. 2,000,000/= respectively were made for plaintiffs who sustained comparable injuries.

With regard to loss of Earning Capacity, counsel for the defendant submitted that the figure to be applied should be the plaintiff's net pay of Kshs. 5,500/= per month for a period of 10 years. In the counsel's view considerations such as other life contingencies should be taken into account.

I have now considered the evidence placed before me and the submissions of counsel. There is no gain saying that the plaintiff sustained very severe injuries. Dr. Ndegwa said so in his report. The plaintiff had total paralysis from the neck downwards. She also had septic bed sores on both gluteal regions. The doctor concluded that the plaintiff suffered severe and debilitating injuries of the spinal cord, bone and other soft tissue injuries resulting in 100% permanent disability. He

opined that the plaintiff would never be able to resume work and would be permanently bedridden. In that condition, she would need a nurse aid and regular physiotherapy for life.

On the basis of that evidence, I find that the plaintiff's incapacity is permanent. I have considered all the authorities relied upon by counsel in support of their respective client's positions on what is a reasonable award for pain, suffering and loss of amenities. Taking into account all other relevant factors, I am satisfied that an award of Kshs. 2,000,000/= is reasonable for pain, suffering and loss of amenities.

It is clear that the plaintiff has lost capacity to earn any income. At the time of the accident, she was a school teacher earning a gross salary of Kshs. 14,534/=. That figure was however subject to statutory deductions which included P.A.Y.E. (Kshs. 511.00), Health (Kshs. 220/=) and KNUT contribution (Kshs. 211/=). There was also no evidence that the plaintiff was living in rented premises where she was paying Kshs. 2,300/=. Since she was no longer in employment, she could not be entitled to transport allowance of Kshs. 802.00. In the premises, I find and hold that the take-home salary of the plaintiff would be Kshs. 10,488/= per month. In view of the plaintiff's age and life expectancy, I consider a multiplier of 10 years reasonable.

With regard to the claim for nursing care, Dr. Ndegwa suggested a figure of Kshs. 8,000/= per month and an additional Kshs. 2,000/= per month for physiotherapy. I agree with counsel for the defendant that those figures are not cast in stone. The plaintiff did not adduce evidence of what she is currently paying for those services. I find and hold that Kshs. 5,000/= per month would be reasonable for nursing care and physiotherapy. I have already applied a multiplier of 10. I consider the same reasonable.

With regard to special damages, Dr. Ndegwa's recount for Kshs. 1,000/= and various receipts for Kshs. 434,569.00 were produced by consent. The sum of Kshs. 435,269/= was however the figure prayed for in the plaint. I will award special damages in that sum.

The upshot of the above is that judgment is entered for the plaintiff against the defendant as hereunder:-

1) Liability

Liability was by consent apportioned between the plaintiff and the defendant at 15% against the plaintiff and 85% against the defendant.

2) Quantum

(a) General damages for pain, suffering and loss of amenities.....	Ksh. 2,000,000.00
(b) Loss of future earning capacity.....	Ksh. 1,258,560.00
(c) Nursing care/physiotherapy.....	Ksh. 600,000.00
(d) Special damages.....	<u>Ksh. 435,269.00</u>
Ksh. 4,293,829.00	

Less 15% contribution Ksh. 644,074.35

**Ksh. 3,649,754.65**

(e) Interest on special damages shall be applied at court rates from the date of filing suit until payment in full while interest on the rest of the award shall be applied at court rates from the date of the delivery of this judgment.

3) The plaintiff shall have the costs of this suit.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Wanjeri holding brief for Tarus for the Plaintiff.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> FEBRUARY 2010**