



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Case 118 of 2006**

JACQUELINE SYOMBUA.....APPLICANT

VERSUS

B.O.G. EKALAKALA SEC. SCHOOL.....RESPONDENT

J U D G M E N T

On the morning of 2nd of August 2006, Jacqueline Syombua hereinafter referred to as the plaintiff, then a Form 3 student at Ekalakala Secondary School boarded the school bus along with other students for a school tour to the Rift Valley. They never got to their destination and instead, the school bus got involved in an accident which left the hitherto healthy girl with serious injuries that have consigned her to a life on a wheelchair as a Quadra plegic/tetraplegic. She suffered 100% disability. She filed this suit through the firm of Musyoka – Annan and Co. Advocates claiming the following reliefs:-

- (a) ***General damages***
- (b) ***Loss of earning capacity***
- (c) ***Lost years***

Costs and interest at court rates and “***any other relief this court may deem fit to grant.***”

A defence was filed in the usual manner denying liability but in a ruling dated 25/5/2007, **Hon Justice Khaminwa** entered Judgment against the defendant on liability on 100% basis. The issue of liability was therefore determined then and the matter proceeded to hearing only for purposes of assessment of quantum of damages. Counsel for the plaintiff called a total of ten witnesses. Other than the plaintiff and her mother PW7 the others were all at professionals in their various fields who came to tender expert evidence in their respective fields.

One witness, Dr. Bodo testified for the defence and produced 2 medical reports in support of the defence case. A total of 4 medical reports were produced as exhibits on the plaintiff's side. These reports were by Dr. Mwangi Njoroge, Teddy Mutisya Chacke a psychologist, Dr. Andrew Hicks, Dr. John Oluoch Atinga and a report by Dr. Siminyu. I do not need to delve into the nitty gritty of these medical reports. They are all in agreement that the plaintiff suffered between 95 -100% disability following the accident. I have nonetheless keenly considered the contents of the said reports and have been well informed by the same. It is important to highlight some of the contents especially where the plaintiff and the defence Doctor's differ.

The plaintiff's Doctors seem to agree that although the spinal injury hospital in Nairobi where Syombua was admitted and underwent intensive rehabilitation did improve her condition from one of total helplessness even from unwelcome intrusion to her body by flies to the state where she can now use fly whisk, they are of the opinion that the spinal injury hospital cannot offer her any more rehabilitative help. They have therefore strongly recommended that she be taken to Stoke Mandeville Hospital in the United Kingdom for further rehabilitation. According to these Doctors, such rehabilitation would further improve her condition to make her "***less dependent on others***". She would also be in a position to receive more specialized treatment which would reduce her dependency from the present 70% and improve her life expectancy significantly. This proposal has nonetheless been strongly objected to by the defence. In his testimony, Dr. Bodo who was the Chairman of the spinal injury hospital told the court that in the case of Syombua, the reconstructive surgery proposed by the plaintiff's Dr. at Stoke Mandeville would not achieve much unless there is substantial improvement of the muscle movement especially in the hands. He went further to state that the plaintiff could not use a motorized wheelchair unless she had muscle movement. According to Dr. Bodo, what the plaintiff needs is adapted equipment to feed herself, adapted furniture, adapted house and also get support from the spinal injury hospital and District hospitals which he said have trained physiotherapists. On the stated that the spinal injury hospital has capacity to handle cases like Syombuas and that the facilities at Stoke Mandeville are comparable to those at the spinal injury hospital. He also supports the rehabilitation at the spinal injury saying it would be more psychologically conducive to the plaintiff because she will remain in familiar grounds and close to family members who will give her support.

Counsel for the defendant does not seem to think much of Dr. Bodo's expert opinion. I must state however that Dr. Bodo like those Doctors who testified for the plaintiff is a highly qualified Doctor in his own right, and an expert witness who was entitled to his own opinion and assessment of the situation. I must say that I found the manner in which counsel for the plaintiff tore into Dr. Bodo's evidence repulsive and even unprofessional to an extent especially where counsel even appeared to personalize the issue. Consider this statement for example;

“ We do not doubt that as an orthopaedic surgeon, with the support of other such surgeons at minimal cost or even free and as an elderly person, Dr Bodo would like to be treated at home if he was to be in Syombua's condition....”

Dr. Bodo testified as a doctor whose credentials were not an issue here and he ought to have been spared such a tirade.

That said, I wish to come to the issue of the quantification of the damages that should be awarded to the poor girl. If I were to start with the Stoke Mandeville issue my view is that the court has to consider this with a balanced mind and balance the diverse reports by the doctors who testified. Even as the plaintiff's doctors submitted that the physiotherapy at Stoke Mandeville would improve the plaintiff's situation and make her less dependent, none of them has claimed that the same will accord her total mobility and independence from her carers. The proposed treatment at Stoke Madeville would only improve the functions of the plaintiff's upper limbs and not the lower limbs. I do not underate the importance of any prospects of an improvement in the plaintiff's condition but various other factors must also be considered. As submitted by counsel for the defendant, there was no evidence called from Stoke Mandeville to guide this court on the anticipated physiotherapy and the surgery on the tendons of the fingers, the success rate on such operations etc. There is also the issue of the costs involved. Is it reasonable to send the plaintiff for treatment to a foreign country for treatment if comparable treatment is available here for the sole reason that there is a defendant who will be condemned to foot the bill? I say so because ordinarily if there was nobody to blame for the accident, I do not see the plaintiff's parents even considering the stock Mandeville option. In my considered view a plaintiff has a duty to mitigate his or her expenses whether or not there is a defendant who is shouldering the responsibility. One must not be

seen to overreach or to seek remedies or solutions that would otherwise be out of reach if he/she was the one expected to foot the bill. As Lord Denning M.R stated in the case of *Limpoh Choo –v- CAMDEN AND ISLINGTON AREA HEALTH AUTHORITY (1979) 1 AER 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.....”

It is from the services offered at the National spinal injury hospital that Syombua has managed to reduce her level of dependency by 30%. According to Dr. Bodo, the services at the institution are comparable to those at stoke Mandeville.

We do not have a report from stoke Mandeville from a Dr. who has examined Syombua and decisively said what they can do for her at Mandeville which the Doctors here cannot do at the spinal injury. I find no justification for making provisions for the plaintiff to be sent to U.K for treatment. If on the other hand she feels strongly about being treated there, she can still go there and pay from the damages this court will eventually award her because as stated by *Lord Pearce in H. WEST & SONS LTD –VS- SHEPHERD (1964) A.C 326 at Pg 364*

“ The court has to perform the difficult task of converting into monetary damages the physical injury and deprivation and pain to give Judgment for what it considers to be a reasonable sum. It does not look beyond the Judgment to the spending of damages

The task of assessing damages in a case such as this is a difficult one. The court must nonetheless be guided by relevant precedents because there will always be decided cases with almost similar categorization of disabilities or injuries. In assessing compensatory damages the court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the plaintiff has suffered. Damages only assuage the pain or loss suffered by the plaintiff because no amount of money can replace a lost limb. No amount of money awarded in this case would set back the clock and reinstate the plaintiff to that young able bodied girl who boarded the bus on 2/8/2006 with very high expectations in life. When counsel for the plaintiff therefore invokes the doctrine of restituo in integrum, I fail to appreciate its applicability in this situation. As stated in *Lord Moris in the D. West and Sons Ltd Case*

(supra)

“ Money cannot renew a physical frame that has been battered and shattered. All that Judges can do is to award sums which must be regarded as giving reasonable compensation.

I now come to the assessment of the damages under the different heads as claimed

SPECIAL DAMAGES.

I need not repeat that the law demands that special damages be specifically pleaded and strictly proved. I will go by the summary provided by counsel at the end of his submissions. Treatment at Stoke Mandeville has already been rejected and that does not therefore count as special damages. I must agree with counsel for the plaintiff that the attendances whether by counsel, or the plaintiff or any of the witnesses are disbursements which should be included in the bill of costs at taxation level and do not amount to special damages. I will not allow any amount for the adaptation of the dwelling house because the plaintiff has been living in an ordinary residence without having to adopt the same and it appears therefore that she will easily continue in the same kind of habitation. I will not either award damages for a motorized wheel chair. On that point I am convincingly persuaded by my sister ***Justice Lesiit*** in the case of **PAUL MUBIA MATHU –V- IBRAHIM KARIUKI GICHIMU in NAKURU Civil Suit No.60 of 2001.**

I will not allow the 100,000/- claimed as actuary fees because in my considered view, his services were not necessary given the fact that the plaintiff was not earning any money as at the time of the accident. The figures given were based on sheer conjecture. It could not be said with certainty that she would have gotten employment and earned a specific amount of money to enable an actuary to play with the figures and project how much money she could have earned in future. In any event, while appreciating the need for a party to call any kind of evidence they feel can advance their case, there is sufficient case law when it comes to assessment of damages and the actuary's report cannot add or alter much to this case law. As stated by my brother Justice Ransley (Rtd) in **DUNCAN MANUEL MURIGI –V- KENYA RAILWAYS CORP (Nai HCC 2442/1999)**

“ an actuarial report cannot replace pleadings. The report is not realistic in the

economic environment which we live in Kenya and would no doubt form the basis of a claim in a country like England where different economic values apply.”

Guided by the several local cases cited to me where the plaintiff suffered almost similar injuries, I will award the following under the head of proven special damages:-

The total amount of the money supported by the bunch of several receipts as tabulated hereunder:-

| | |
|-------------------------------------|---------------------------|
| 1. Transport | - 39,000 |
| 2. Drugs | - 352,779 |
| 3. Caretaker | - 2,800 |
| 4. Counselling services | - 94,800 |
| 5. Admission to K.N.H | - 8,500 |
| 6. Health care services | - 5,480 |
| 7. Physical therapy services | - 4,436 |
| Total | Ksh <u>507,795</u> |

Medical reports - 70,000/=

Future medical expenses inclusive of nursing care,

future transport expenses, special bed, physiotherapy, wheel chairs, special bed etc.

3,000,000/=

GENERAL DAMAGES

I will consider the general damages and the damages for lost years, loss of future earnings etc together.

In the case of Syombua, she was still in secondary school when the accident happened. Her school reports defines her as an average student. She aspired to be an air hostess or a nurse but with those projected grades, she would not have been certain of getting a job of her choice given the high rate of unemployment prevailing in the country and the cut throat competition even amongst the well educated. It is therefore difficult to approximate the amount of money she could have earned and that is why I have decided to just award her a global sum for all these other heads of damages. I find a figure of 6,500,000/= fair and just in the circumstances.

In sum, I enter judgment for the plaintiff against the defendant as hereunder:-

| | |
|---|-------------------------|
| 1. General damages | - 6,500,000 |
| 2. Future medical expenses inclusive | |
| future transport, physiotherapy, | |
| wheel chairs, special bed etc | -3,000,000 |
| 3. Medical Reports | - 70,000 |
| 4. Proven specials as per receipts | |
| produced; | |
| Total | Kshs. 10,077,795 |

Although I appreciate and applaud the effort and time expended by counsel for the plaintiff in preparing the thorough and quite captivating submissions, the case at the end of the day was like any other running down matter which does not require the services of 2 counsel. I will therefore award the plaintiff costs of 1 counsel. Interest on the decretal amount and costs awarded at court rates. Special damages to attract interest from the date of filing while the general damages will earn interest from the date of this Judgment.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 4th day of March 2010.

In presence of:-Mr. Musyoka Annan for plaintiff and Mr. Ithiga for defendant