



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

Civil Case 100 of 2006

H.K.N (A child suing through her next friend L. N).....PLAINTIFF

VERSUS

**KENAFRIC BAKERY LTD1ST DEFENDANT
ELIPHAS MUGAMBI2ND DEFENDANT**

JUDGMENT

The plaintiff has sued through her next friend for general damages for pain and suffering and for special damages. The plaintiff was knocked down by the defendant's motor vehicle on 16th September 2005. She was in the company of her sister as they were going to school. Her sister died as a result of the injuries she got from that accident. After this case was filed on 13th December 2008, parties entered into a consent on liability whereby it was agreed that the defendant's liability was 85% and the plaintiff was 15%. When this case came for hearing before me, the only issue for determination was the damages payable to the plaintiff. Doctor Gakuya gave very detailed and thorough evidence of his examination of the plaintiff. He said that the plaintiff was 16 years old at the time of the accident. Following the accident, she was admitted at Nkubu hospital and 3 days later was transferred to Kenyatta National Hospital. She was admitted at Kenyatta Hospital on 20th September 2005 up to 26th January 2006. On examining the plaintiff, the doctor found that she suffered the following injuries:-

1. ***Severe brain concussion leading to edema and loss of consciousness.***
2. ***Fracture of left mandible (chewing bone).***
3. ***Fracture of left fore-arm bones (ulna and radius) at distal third zone.***
4. ***Fracture of left collar bone (clavicle) between middle and outer third.***
5. ***Traction injury of left brachial plexus.***
6. ***Laceration wound on the left cheek.***
7. ***Severe contusion of right thigh quadriceps muscles (upper third).***
8. ***De-gloving injury of the skin that covered the right thigh muscle.***
9. ***Laceration of right saphenous and anterior cutaneous vein of the thigh compromising the***

venous return of lower limb.

The doctor further said that the brain concussion that the plaintiff suffered had led to the plaintiff losing consciousness. Amongst the injuries that the plaintiff suffered was an injury to the blood vessel that takes blood to the heart. The C.T. scan reviewed that the plaintiff's brain was swollen. After the first initial examination, this doctor reviewed the plaintiff on 28th August 2009. On making that review, he found the following:-

1. ***Weakness left upper limb.***
2. ***Swollen right lower limb***
3. ***Unappealing scar on the face and right thigh.***
4. ***Pain left upper arm.***
5. ***Long standing wound on the left dorsum of the hand.***
6. ***Deformity of the upper limb.***

The review also reviewed the following:-

SKIN

Scar approximately 2cm in length on the left cheek

Left hand dorsum

Scar right thigh anterior upper third

Cerebral function

Through interview the following was established

- Ø ***Can solve simple mathematical problems***
- Ø ***Read and write***
- Ø ***Relate well with people***
- Ø ***No apparent behavior disorder is noted***
- Ø ***No obvious oculo-pupillary signs***

Peripheral nerves system

- Ø ***Motor and sensory deficit of left brachial plexus (C5-T1) distribution characterized by complete lack of sensation of lateral upper arm and whole of fore-arm.***

Musculo-skeletal

- Ø ***Abnormal gait***
- Ø ***Left clavicle deformity***
- Ø ***Wasted upper limb muscles***
- Ø ***Claw deformity of the left hand***

Shoulder joint

- Ø ***Rhomboid muscles that which retract the shoulder are wasted***
- Ø ***No apparent winging of the scapulae***
- Ø ***Range of movements***
- Ø ***Fixed at adduction and medial rotation of left shoulder***
- Ø ***Loss of 10-15 extension of left elbow***
- Ø ***Left wrist and hand joints are all in fixed state.***

Right lower limb

- Ø ***Large deforming scar on the upper anterior third***

- Ø *Swollen lower limb, with non-pitting edema*
- Ø *No tenderness elected but sensation loss of L3/4 cord level dermatome distribution*
- Ø *Power limb raising extension and flexion is reduced due to loss and scarring of proximal quadriceps muscle group.*
- Ø *The cause of long saphenous vein that drains the limb is interrupted.*

In layman's language this witness assisted the court by explaining what his review found. The doctor said that he found the plaintiff had an abnormal gait that is, her ability to walk was abnormal. She had a scar measuring approximately 2cm in length on her skin. She also had a scar on the left side of her hand and right thigh. Due to nerve damage, the plaintiff had lost sensation and power of the whole left upper limb. The collar bone was deformed because it had healed abnormally. Her muscles were very wasted. Her hand was clawed. In other words, her hand was deformed. As a result of that abnormally, he was of the opinion that the plaintiff may in future need removal of some of her fingers. The muscle on her shoulder had weakened. The elbow joint of her upper limb had lost extension of 15%. That joint was fixed and could not allow any movement. This was because the bone was poorly united. He also found that she had an infection of the bone. Her lower limb, that is, her leg was swollen because the large vessel draining the blood to the heart was interrupted. She had permanent nerve damage. He concluded in the report as follows:-

CONCLUSION

Hellen suffered the following

1. ***Psychological trauma***
2. ***Cosmetic disorder***
3. ***Permanent left brachial plexus injury, with attend complications***
4. ***Chronic osteomyelitis of left middle metacarpus***
5. ***Poor right limb venous drain system***

Conclusion

The major debilitating lesion Hellen suffered is left brachial plexus injury as a result of traction forces of applied on arm, shoulder and neck from the road traffic accident she was involved in as she walked to her primary school.

At her age, prognosis is poor and has to live with permanent disability. Post traumatic osteromyelitis if the left middle metacarpus, is life long and may necessary middle ray amputation in future, apart from the on and off antibiotic requirement and dressing in future. She may develop mal seizures as a sequel to the sever brain conclusion she suffered at the time of accident. Deep venous thrombosis is a real risk due to poor flow of venous blood in the right lower limb secondary to damage of major saphenous venous drainage system. Death of her sister on the spot has left a permanent psychological mark in her life.

On being cross examined, this doctor stated that he observed the plaintiff as she walked into court and

noted that she was walking with difficulty. He noted her lower limb was swollen and there was nothing medically that could be done to correct that because it was due to blood vessels that were permanently destroyed. He further stated that the injuries which cause the swelling of the leg can cause blood clot and such blood clot can lead to death. Such blood clot can be prevented if detected early. He explained that he did not give a percentage on disability because the one given by Ministry of Labour did not cover injuries suffered by the plaintiff. The parties by consent submitted another medical report by doctor Ruga. That doctor in his report found that the plaintiff suffered the same injuries that had been identified by Doctor Gakuya. Doctor Ruga in his opinion found as follows:-

OPINION

This girl sustained head injury with brain contusion and oedema, fractures of left clavicle, left ulna and left mandible, degloving injury right thigh and other soft tissue injuries. She has recovered well from the head injury and has normal brain functions. She has weakness on left arm associated with muscle wasting, sensory loss and absent or weak tendon reflexes. This is likely to be due to nerve injuries of the brachial plexus, which supplies the upper limb. The weakness is likely to remain a permanent feature and I would assess her level of disability at 60% (sixty percent).

As can be seen from Doctor Ruga's assessment, the plaintiff suffered 60% disability. Considering those two medical reports and considering the evidence submitted before court, it is without a doubt that the plaintiff suffered very severe injuries. Those injuries drastically changed her life. Following the accident, she could no longer attend a normal school and had to be admitted into a school for physical challenged. The plaintiff, in her own evidence, stated that as recent as the year 2010, she again had been re admitted at Meru General Hospital for treatment because her leg had been swollen. The plaintiff was hospitalized following the accident for more than 4 months. I have considered the case of **Absolom Ongany Anyilla Vs. Mount Elgon Orchards Ltd & Ano.** Civil Case No. 1545 of 2002. The plaintiff in this case suffered severe head injury with concussion and loss of consciousness for 3 weeks. He also suffered loss of weakness to the lower limbs and right upper limbs. That case was decided in the year 2004. The court awarded the plaintiff Kshs. 250,000/=. The defendant relied on the case **Mushambi Ondegona Vs. Associated Vehicle Assemblers Ltd and Another** MBSA HCC No. 919 of 1991. The plaintiff in that case was hospitalized for 3 weeks. He complained of pain and stiffness of the right elbow and weakness in the right hand and poor grip. The court awarded the plaintiff in that case Kshs. 380,000/=. Defendant further relied on the case of **Jane Munguti Vs. Simon Peter Mwangi & Another**

MBSA HCCC No. 910 of 1991. The plaintiff was hospitalized for 2 ½ months. She suffered various injuries which left her with deformity of the shoulder due to dislocation acromioclavicular joint which made the shoulder movement painful. There was also a slight deformity of the middle of forearm due to malunion of the radio-ulna fragments. She was awarded Kshs. 380,000/=. Although those cases that the defendant relied upon were filed in 1990's, it was not clear when they were decided since the defendant did not supply to the court the full text of those decisions. In the case of **John Maseno Ngala & Ano. Vrs. General Motors Limited** Civil Appeal No. 320 of 2002, the High Court gave an award of Kshs. 2million. That award was the subject of an appeal in the Court of Appeal but the Court of Appeal declined to disturb that award. The injuries suffered in that case were, severe injuries to the head and neck, fractures of the base of the scalp. The fractures to the base of the scalp resulted in brain damage. The plaintiff also suffered severe damage to the root nerves of the left shoulder and the left arm. The damage to the left shoulder and left arm and in the neck resulted in complete paralysis and there was sensory loss of the left shoulder and the left arm muscle. The plaintiff in this case in her submissions sought an award of Kshs. 2million. In my view, considering the severe injuries the plaintiff suffered and considering that Doctor Ruga assessed her incapacity to be 60%, the amount that would fairly compensate the plaintiff who is still very young and still in great need of help from her members of family would be, Kshs. 2.5 million. In making that award, I am aware that, "*money cannot indeed renew physical frame.*" That statement was made in the case of **West (H) & Son Ltd V. Shepherd** [1964] A.C. 326 at page 345. However, bearing in mind the injuries the plaintiff suffered, I am of the view that such an award would fairly compensate her for the pain and disability she suffered. The plaintiff under the heading of special damages only prayed for police abstract, Kshs. 200/=, medical report, Kshs. 5,000/= medical treatment, Kshs. 52,500/= and transport, Kshs. 30,800/=. In evidence, the plaintiff produced receipts for items not claimed for and in some instances the receipts represented a higher claim than that which was prayed for. Accordingly, I find the plaintiff only proved the special damages of police abstract, Kshs. 200/=, medical report, 5,000/=, medical treatment, Kshs. 52,500/= and transport, Kshs. 9,040/=. There shall therefore be judgment for the plaintiff as follows:-

1. **General damages of Kshs. 2.5 million less 15% = Kshs. 2.125 million.**
2. **Special damages of Kshs. 66,740/=.**

3. *Plaintiff is awarded costs of this suit.*

Dated and delivered at Meru this 21st day of May 2010.

**MARY KASANGO
JUDGE**