



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

Civil Case 96 of 2007

JANE MUTHONI NYAGA.....PLAINTIFF

VERSUS

NICHOLAS WANJOHI THUO.....1ST DEFENDANT

FOUR BY FOUR ADVENTURES LTD.....2ND DEFENDANT

J U D G M E N T

The Plaintiff herein through Njeru Ithiga & Co. Advocates has sued the 2 defendants jointly and severally for;

- (a) ***General damages for pain, suffering and loss of amenities.***
- (b) ***Special damages of 20,030/=***
- (c) ***Costs of the suit and interest.***

The defendants were the driver and owner of motor vehicle Registration No. KAV 910S Toyota Land Cruiser respectively. The cause of action as stated in paragraph 5 of her plaint was an accident along the Thika- Nairobi Highway at the place called Ndarugo which took place on 6/10/2006.

According to her, the 1st defendant drove the said motor vehicle in a reckless and negligent manner causing it to veer off the road and he knocked her down causing her serious bodily injuries. The particulars of negligence are enumerated at paragraph 5 of her plaint. These particulars are nonetheless controverted by the defendants in paragraph 5 of the statement of defence. They attribute the accident to the plaintiff's negligence.

In her plaint, the plaintiff stated that she was lawfully standing off the main road when the motor vehicle which was being driven by the 1st defendant veered off the road and knocked her down. She said that she sustained the following injuries.

- (a) ***Cut 6 cm long on the right side on the head (temporal region).***
- (b) ***Bruises behind the right ear.***
- (c) ***huge bruise on the right flank***
- (d) ***Fracture of the right superior and inferior remi of the pelvic bone***
- (e) ***Fracture and dislocation of the right hip joint.***

(f) ***A big cut behind the right knee cut approximately 10 cm long.***

These are the injuries which are reflected in her Doctor's medical report dated 7/7/2007 about 1 year after the accident. When she was examined by Dr. R.P Shah 1½ years later, he found the following injuries:-

- (1) ***Fracture of the right superior and inferior pubic Rami of pelvis.***
- (2) ***A cut on the right leg***
- (3) ***Central dislocation of the hip (which he said was claimed but could not be seen from the X-rays taken).***

According to Dr. Shah, the injuries had healed well. Permanent disability was assessed at 5%. While Dr. Maina Wambugu had opined that the plaintiff would be ***“unable to deliver vaginally and can only deliver through a Caesarian Section and this constitutes a permanent disability.”*** Dr. Shah was of the opinion that;

“It is well established medical knowledge that such distortion of the pelvis as seen on X-rays of 18/12/2008 is very unlikely to cause any significant difficulty in vaginal delivery of baby during her future pregnancies. So the distortion of pelvis caused by her accident in (sic) very unlikely indeed to cause her need Caesarian Section operation in any future deliveries of babies.”

Since this report reflects the more recent assessment of the plaintiff's condition, in my view it should reflect the correct position as far as the extent of the plaintiff's recovery or disability is concerned.

There is no dispute that she sustained the said injuries following the accident in question. It is nonetheless important for the court to examine the circumstances that led to the accident in order to decide on liability. According to the plaintiff she was standing at the bus stage on the side of the dual carriage way road that goes to Nairobi. The bus stage would therefore be on the left side of that road. She said that there were many vehicles going towards Nairobi she just said in her evidence in chief that ***“I was hit and found myself in hospital”*** On X-examination however, she said that she had already crossed the highway that goes towards Nairobi. She said that the motor vehicle in question was actually being driven from Nairobi direction. This therefore corroborates the 1st defendant's evidence that he was driving from Nairobi to Mount Kenya. There was therefore no variance in the evidence of the plaintiff and that of the 1st defendant although the plaintiff had said something different in her examination in chief. From the evidence on record therefore, the accident happened on the Highway as one faces Thika or Embu direction and not the other way round.

According to 1st defendant, he was driving at 80 K.P.H. He started overtaking some matatus which had stopped on the left side of the road. He said that the plaintiff crossed the road from left to right while the motor vehicle was about 10 meters away. He applied his brakes but unfortunately the plaintiff was hit by the front right side of the vehicle. This would therefore mean that the plaintiff had almost crossed the road given that the defendant was driving on the right lane. It would also mean that the plaintiff was not actually standing off the road as she stated because the defendant was on the outer lane, the stage was on the left side of the road and there is no way she could have been hit by the right side of the motor vehicle.

When I compare her evidence to that of the 1st defendant, I must say I find the 1st defendant evidence more logical and credible than the plaintiff's. From the evidence, it is clear that she did not keep a proper look out for oncoming motor vehicle before she decided to cross the road. One of the basic lessons of life that one is given by his/her parents and teachers at a very early age is how to cross the road. We were all told that before you cross the road, look left, look right and look left again. If it is clear, then cross. Evidently, the plaintiff ignored that wise counsel and that is why she leapt onto the road without confirming that the road was clear. It was even easier for her because, this being a one way road, all she needed to do was look towards one direction. She did therefore contribute to a large extent to that accident.

On the other hand, I note that indeed, if the 1st defendant was speeding, he could not have been able to brake at such short notice and avoid causing more serious injuries. If the plaintiff was hit by a motor vehicle which was being driven at over 80 K.P.H, chances of her surviving with only a fractured pelvic bone and other minor injuries would be nill. The court was not told that the part of the road where the accident happened was a speed restricted area. The 1st defendant was on his side of the road; there is no evidence that he was driving at over 80 K.P.H. His only fault was that he saw matatus stopped beside the road and there were people standing there and there was a possibility, however remote that one of them could dash across the road like the plaintiff herein did. The two of them in my view equally contributed to the occurrence of the accident in which the plaintiff was injured. I therefore find both of them liable and apportion the liability at 50-50.

On the issue of the quantum of damages, I have considered the authorities cited by both counsel in their submissions. The only problem I have relying on High Court decisions is that they could well have been overturned on Appeal and the quantum reduced. I would actually not be surprised if the award given in Civil Case No.2732/1998 was reduced on Appeal.

In the Court of Appeal Case No.251/1996 (CECILIA MWANGI and Another –V- Ruth W. Mwangi), the Respondent had suffered the following injuries.

1. **Head injury (cerebral concussion)**
2. **Cut would over the vertex of the scalp.**
3. **Cut wounds over the right lower leg.**
4. **Injury to the pelvis resulting in fractures of the right superior and inferior pubic Rami**

Injury No.4 was exactly the same as the main injury sustained by the plaintiff herein. Her other injuries were actually less severe than those of the Respondent in that case which included a cerebral concussion. An award of 450,000 was found to be excessive and the amount was reduced to 280,000/=

In this case, I find that the plaintiff has almost fully recovered from the said injuries- with a disability of only 5%. In my view, an award of 300,000/= is fair and just compensation for the plaintiff as general damages for pain, suffering and loss of amenities.

On special damages, the law is well established. Special damages must be specifically pleaded and strictly proved. The plaintiff claimed 20,030/= as special damages. When I look at her receipts however she only managed to prove the following items:-

1. Police Abstract	– 200/=
2. Medical Report	- 1500/-
3. Money paid vide P Exh 2A	- 300/=
4. Money paid vide PExh 2B	- 200/=
5. Exh 2c and 2D	<u>-6,000/=</u>
Total	<u>8,200/=</u>

In sum, I find and hold that the plaintiff has proved her case against both defendants jointly and severally on a balance of probabilities. I enter Judgment for her in the following terms.

1. **“(a) General damages for pain, suffering and loss of**

amenities **- Ksh. 300,000**

(b) Special damages **-Ksh. 8,200**

Total **Ksh. 308,200**

Less 50% Liability Ksh 154,100

(c) *50% costs of the suit plus interest thereon at
Court rates.*

W. KARANJA
JUDGE

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Delivered, Signed and dated at Embu this 7th day of June 2010. In the presence of Mr. Ithiga for Plaintiff and Mr. Ngigi for Defendants.

W. KARANJA

JUDGE