



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

Civil Case 84 of 2007

LILLIAN GAKETHI MWORIA PLAINTIFF

VERSUS

STANLEY MWITHIMBU M'ITHIRI DEFENDANT

JUDGMENT

The plaintiff's claim is for special and general damages which resulted from an accident that occurred on 3rd April 2005 on Meru Maua road. In her plaint, the plaintiff stated that the defendant drove and uncontrolled his motor vehicle registration No. KAH 144L negligently and carelessly causing the same to violently collide with the plaintiff which resulted in serious injuries to the plaintiff. Some of the particulars of negligence stated in the plaint are that the defendant drove at high speed, drove without care and attention, failed to swerve or apply brakes and failed to exercise, maintain any sufficient or adequate control of the said motor vehicle. As it shall be seen later in this judgment, the plaintiff as a result of that accident suffered very serious injuries. The defendant denied the plaintiff's claim and pleaded that the accident occurred solely or was substantially contributed by the negligence of the plaintiff. It is pleaded in that defence particulars of negligence of the plaintiff and some of them are that she failed to exercise or maintain sufficient or any lookout or to heed her own safety. She dangerously crossed the road at unknown designated sight without ascertaining whether it is safe to do so. That she suddenly immersed from a stationery matatu and suddenly run across a busy highway without ascertaining that it was safe to do so. And finally that she failed to heed the presence of the defendant's motor vehicle. The plaintiff called 4 witnesses to support her case. PW2 and 3 gave similar evidence to the effect that on the material date the plaintiff disembarked from a matatu and after the matatu had driven off she crossed the road to the other side. On reaching the other side of the road, she begun to walk facing Meru town on a foot path. Suddenly the defendant's vehicle hit her as she walked on that foot path dragging her for some distance whilst she was on the bonnet of the vehicle and when people screamed the vehicle stopped and the plaintiff fell off the vehicle. When these witnesses were cross examined, could not give evidence on the make of the vehicle and the colour. They however were very clear on the movement of the plaintiff and of the defendant's vehicle. PW4 did not see the accident but was alerted by "thumb" noise and on looking he saw that the plaintiff had been hit by the defendant's vehicle. Plaintiff, similar to witness number 2 and 3 stated that she had traveled in a matatu on that day coming from church. When she reached Major Bar Stage at Gakuurine, she came out of the matatu, she then waited for the matatu to drive away and then looked right and left and on noticing

that there were no vehicles on the road crossed over to the other side. When she crossed over and begun to walk off the tarmac road, she was hit from behind and realized that she was lying on the bonnet of a vehicle. She heard people screaming then the vehicle came to a stop and she was dropped off the bonnet. She went into unconsciousness and recovered when she was at Kenyatta National Hospital. It was later that she was informed that she had first been taken to Meru General Hospital then transferred to Kenyatta National Hospital. She described the serious injuries that she suffered which are confirmed in the doctor's report which I shall refer to later on in this judgment. She was detained at Kenyatta National Hospital as she received treatment and thereafter was transferred to spinal injury hospital. She stated that as a result of the accident, her life has changed dramatically. She became paralyzed from the waist downwards. She is unable to control her urine and stool passage. She said that she is unable to do anything for herself and is dependant on others helping her. As a result, she has had to hire a house help to assist her. She pays the house help Kshs. 2,000/= per month. She also has to have nurses come to change the catheter and she pays the nurse Kshs. 1,000/= for every visit which is 3 times in a week. The doctor also attends her at her house to assist her with physiotherapy and she pays the doctor for 2 hour session Kshs. 500/= and these sessions are done twice a week. She was previously trained by Utalii College and had been employed by Golden Chick Restaurant until 2001. She produced the letter which confirmed her employment with that restaurant and which confirmed her salary as Kshs. 15,000/=. On leaving her employment with that restaurant, she begun to run a shop which shop was in the vicinity where the accident occurred. At the time of the accident, she had in her shop stock worth Kshs. 50,000/=. Her earnings from that shop ranged between Kshs. 5,000/= and 10,000/=. The earnings of the shop and the stock she had was not proved by any documentary evidence. Since the accident, she has been unable to run that shop. Since she was bound to the wheelchair, she said that the wheelchair needed change from time to time and she would need money for purchasing new wheelchair. The one she had as she gave evidence she had used it for two years. It was beginning to show signs of tear when she gave evidence. It cost her Kshs. 65,000/=. She had some metal implants on her left hand which she had been informed would be in due time have to be removed. She stated that the defendant's vehicle that hit her was driving from the direction of Maua towards Meru. The defendant in his defence stated that on the material date he was coming from a church in Maua where he had been preaching. As he approached the scene of the accident at a place called Gakuurine he noticed that there was a matatu on the left side of the road facing Maua. He was on the side of the road facing Meru town. He noticed that the matatu was dropping people. He saw this matatu when it was 100 metres away. The road at that point was straight. He was traveling at 40 to 50 km per hour. He was alone. As he approached near the matatu, he saw someone come from the back of the matatu running across the road. It was very near his vehicle. As a result, that person was hit by the right side of his vehicle and she fell on the other side of the road. At the time when the accident occurred, the matatu was still at the stage but immediately thereafter it drove away. The defendant said that when he saw a person run across the road he braked but the person was hit. When he stopped, he saw the plaintiff was injured. A woman came forward and said she would assist the plaintiff to go to the hospital. By then a crowd had gathered and because they begun shouting, he feared their reaction he got into his vehicle and drove to Meru Police Station where he left his vehicle. He reported the matter to the police and the vehicle was inspected later. The police also went to the scene of accident. Up to the date of giving evidence, he said that he had not been charged with any traffic offence. When asked what caused the accident, he said that it

was due to the carelessness of the plaintiff in not observing the road. He denied that his vehicle left the road to hit the plaintiff. He indeed stated that at the point where the accident occurred there is no foot path. That immediately after the tarmac, there is bush. That even after hitting the plaintiff, the vehicle remained on the tarmac. He said that the plaintiff, when she run across the road, she was running to her kiosk. On being cross examined, this witness said that his vehicle was damaged on the right side. He denied that the plaintiff on being hit was thrown into the air. He admitted that he did not check the speedometer before the accident but estimated it to be 40 – 50 km per hour. He said that as he drove he was relaxing having come from church but he all the time was driving on his right side of the road. When he approached the stage where the matatu was dropping people, he said that he did not know people were alighting. He then stated:-

“I just saw matatu stopped. I did not slow down. The point of impact was about parallel to the matatu. I just saw the plaintiff very near to the vehicle.”

He then accepted that the plaintiff on being hit she fell on the left side of the road. PW1 was a traffic police officer who came to give evidence on behalf of the investigating officer in relation to this accident. He confirmed that the accident was reported on 3rd April 2005 at 2.20pm. He also confirmed that the scene of accident was visited by police. He confirmed that the plaintiff who was a pedestrian was injured in the accident. At the time when the scene of accident was visited, the plaintiff had been taken to hospital. The defendant recorded his statement at the police station but no other statement was recorded. Because the plaintiff did not record her statement, the investigating officer ordered the subject file to be closed. In respect of liability, I had the opportunity to receive the witness evidence and to observe each witness in court. I found the defendant to be an honest witness and I believed his evidence more than the evidence of the plaintiff and her witnesses. The plaintiff and her witnesses all stated that the plaintiff was hit by the defendant when she was off the road. If that indeed is correct, it is not clear to the court why none of those eye witnesses failed to record statements with the police. As stated before, the police decided to close the traffic file for lack of evidence to prosecute the defendant. As I said before, the defendant impressed me as a witness and I believed him. I therefore find that the plaintiff contributed to this accident. I do not accept the defence which is offered by the defendant that the accident was inevitable. I accept the submissions made by the plaintiff’s counsel to the effect that the defendant owed a greater responsibility to ensure that he had a good lookout on the road and more particularly when considering that he noted that the matatu which he was approaching was dropping passengers. In this regard, I refer to the case of Karanja Vs. Malele[1983] KLR where the court held:-

“In assessing blameworthiness the distinction is that the driver had a lethal machine (car) in her control.”

I also refer to the case of Mondo Vs. Jessa [1969] E.A where the court had this to say:-

“It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping, or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty with the way of his seeing, like a fog for instance, he must go slower in consequence. In the case like this one, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma: either he was not keeping a sufficient lookout, or, he was keeping the best lookout possible then, he was going too fast for the lookout that

could be kept.”

The defendant should have been more cautious when approaching a matatu which was dropping passengers. Bearing those cases in mind, and I need to state here that I have considered the cases relied upon by the defendant, I find that the plaintiff contributed to this accident 30%. The defendant therefore will bear liability of 70%. The plaintiff was examined by three doctors whose reports are before the court. All the doctors confirmed that the plaintiff suffered 100% permanent disability. The plaintiff suffered the following injuries:-

1. **Head injury with brain concussion leading to loss of consciousness.**
2. **Compound fracture left tibia/fibula.**
3. **Compound fracture left humerus.**
4. **Compressed fracture of T12 with transection of the spinal cord.**
5. **Laceration and bruises on the right thigh extending to the leg.**
6. **Paralysis of the upper limbs.**
7. **Paralysis of the lower limbs.**
8. **Loss of urine and stool control.**
9. **Loss of sensation from T12 downwards.**

The plaintiff as a result of that accident sustained a spinal injury which the doctors have confirmed has led to permanent loss of the following functions as seen in plaintiff's exhibit No. 2 (a):-

1. Inability to walk

She is currently confirmed onto a wheelchair for the rest of her life. She will therefore require to change wheelchairs from time to time due to wear and tear. A wheelchair costs Kshs. 60,000/= (Sixty thousands only) and has a lifespan of 10 – 12 months.

She will also require to employ a helper for life, since she requires to be assisted from time to time to be able to do activities of daily living such as feeding, dressing, bathing, etc. On average, such a person will require to be paid approximately Kshs. 20,000/= (Twenty thousand only) per month.

2. Inability to control stool for life

This will require frequent use of drugs to evacuate the stool from the rectum, which may cost him Kshs. 500/= (five hundred only) weekly. Occasionally, if the stools are too hard, an assistant may require to evacuate them manually, hence the need for the salary stated above.

3. Inability to control urine for life

She therefore requires frequent usage of a character, catheters, folleys and urine bags, diapers and napkin on a weekly basis, these will cost her approximately Kshs. 600/= (six hundred only).

4. Inability to engage in active sexual life in future

She may engage in a passive sexual intercourse and be able to conceive. However, the delivery of her child would have to be by caesarean section.

5. *She is affected psychosocially, due to the state in which she has been transformed into. She requires change of the previous nature of employment. If she doesn't adjust appropriately, she may never engage in any gainful employment.*

6. *She is predisposed to recurrent chest, urinary tract and skin infections due to the nature of her injuries and the state in which she is in i.e. bedridden and wheelchair bound. She therefore requires frequent and regular medical check-ups. The check-ups and purchase of the medicines prescribed may cost her approximately Kshs. 2,000/= (two thousand only) per month.*

7. *As a paraplegic patient, she requires a special bed which can be turned by hydraulic or electric system to ease pressure at pressure points. Such a bed costs approximately Kshs. 350,000/= (three hundred and fifty thousand shillings only). She also requires a special mattress (ripple mattress) which helps easing pressure at pressure*

point. Such a mattresses will cost her approximately Kshs. 150,000/= (one hundred and fifty thousand only).

8. *Finally she requires regular follow-up as an outpatient for life, when she is eventually discharged from hospital. This will require that she hires taxi at every visit. Outpatient follow-up clinics are scheduled on a 3 monthly basis. Every visit will cost her approximately Kshs. 3,000/= (three thousand only) taxi charges.*

There is no doubt that the plaintiff suffered very serious injuries. I have considered the authorities relied on by the plaintiff.

1. **HCCC No. 95 of 2002 (Nyeri)**
Sylvano N. Nyaga & Ano. Versus Joseph Kogi Ngotho & others
2. **HCCC No. 220 of 2001 (Eldoret)**
Pius K.K. Mitei versus Leonard Kissongochi & Ano.
3. **HCCC NO. 5978 of 1993 (Nairobi)**
George Rakwar versus Nguru & Kenya Wild Life Services.
4. **HCCC No. 60 of 2001 (Nakuru)**
DR. Paul Mubia Mathu versus Ibrahim Kairuki Gichimu.

And I have also considered the cases relied upon by the defendant in his submissions:-

1. **Patrick Mwangi Irungu – Vs. Charles Macharia Mwangi & Ano. Nakuru HCC No. 188 of 2005.**
General damages for pain, suffering and loss of amenities were assessed at Kshs. 1,500,000/=.
2. **Simon Mwangi Mureithi Vs. Martin O. Shikuku & 3 others Msa HCCC No. 198 of 2003**
General damages for pain, suffering and loss of amenities were assessed at Kshs. 1,500,000/=.
3. **Nakuru HCCC No. 60 of 2001,**
The plaintiff was awarded Kshs. 1,800,000/= as general damages.

Bearing in mind those cases and the very thorough submissions presented to me by both counsel to whom am greatly indebted, I find that the plaintiff is entitled to an award of Kshs. 2million, for pain and suffering. The plaintiff categorized the other claims some of them being for payment of the maid, replacement of a wheel chair, a special bed and mattress, treatment by physiotherapist and others, but in my view, the plaintiff is entitled to a global figure to cover all these expenses of Kshs. 1 million. For the avoidance of doubt I take note of the submission of defendant on plaintiff's claim for loss of consortium. I am guided by the case of **Kimotho etal Vs. Vesters & Another** [1988] KLR 48 where the Court of Appeal stated in respect of loss of consortium and servitium:-

“Companionship, love, affection, mutual services, sexual intercourse all belong to the married state. Serious injury to any one of the components that go to make consortium, would affect all the others. The first respondent's injuries affected every ingredient of consortium, giving the second respondent a cause of action.”

In giving global compensation, I have not taken regard to the claim of the plaintiff in loss of consortium. In respect lost earnings, the plaintiff did not assist the court by providing evidence of her income at her shop. The only evidence she provided was the letter from the restaurant which she worked at lastly in the year 2001. For that reason, in order to calculate loss these earnings, I will take the

figure of Kshs. 5,000/=. The amount will therefore be Kshs. $5,000 \times \frac{2}{3} \times 12 \times 9 = 360,000/=$. In respect of loss of future earnings, I will take the earnings to be Kshs. 6,000/= and the award will be Kshs. $6,000 \times \frac{2}{3} \times 61 \text{ months} = \text{Kshs. } 244,000/=$. In making the award that I make in this matter, I am very conscious of the statement in the case **West (H) & Son Ltd Vs. Shepherd** [1964] A.C. 326 where it was stated:-

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is award sums, which must be regarded as giving reasonable compensation.”

In the end, there shall be judgment for the plaintiff as follows:-

1. ***General damages for Kshs. 2 million less 30% = Kshs. 1,400,000/=.***
2. ***Various claims of Kshs. 800,000/=.***
3. ***Loss of future earnings Kshs. 360,000/= less 30% = Kshs. 252,000/=.***
4. ***Loss of future earnings Kshs. 244,000/= less 30% = Kshs. 170.800/=.***
5. ***Special damages Kshs. 138,739/=***
6. ***The plaintiff is awarded costs of this suit.***

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE