



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 260 OF 2009

**NAOMI WAMBUA NJIRAINI.....PLAINTIFF
VERSUS**

PROF. EZRA KIPRONO MARITIM.....DEFENDANT

JUDGMENT

The Plaintiff was involved in a road traffic accident on the 8th December 2006, between the Defendant's motor vehicle KZY 788, the Plaintiff's motor vehicle KAK 596J and a third motor vehicle KAK 520G, and as a result of which the Plaintiff suffered and sustained serious injuries, namely -

- (1) *Fracture and dislocation of the left hip joint,*
- (2) *Compound dislocation of the left knee joint,*
- (3) *Compound fracture left patella and left upper $\frac{1}{3}$ tibia, and*
- (4) *Metatarsal fracture of the left foot.*

Following the accident the Plaintiff was admitted at the Nakuru General Provincial Hospital where she remained for a period of seven weeks and 21 days during which period she underwent both surgical operation and recuperative treatment. Upon discharge from the Provincial General Hospital the plaintiff also attended outpatient treatment at the AIC Hospital, Kijabe.

The Plaintiff blames the Defendant for the accident, and by an Amended Plaint dated 29th April, 2010, the Plaintiff claims -

- (a) *General damages,*
- (b) *Special damages in the sum of Kshs 465,930/=*
- (c) *Future medical expenses in the sum of Kshs 950,000/=*
- (d) *Loss of earning capacity*
- (e) *Costs on (a) & (b) at court rates*
- (f) *Any other relief the court deems fit or just to grant*

As expected in these cases, the Defendant by an Amended Defence 5th May 2010, and filed on 14th May 2010, denied all the particulars of negligence on his part alleged in the plaint, as well also, as the particulars of special damages claimed in the Amended Plaint, and put the Plaintiff to strict proof of her claims.

When this matter was heard on 8th June 2010, the Plaintiff testified to claims as itemized above, and produced both invoices and receipts for her treatment at the Nakuru Provincial General Hospital, the AIC Kijabe Hospital as well as out-patient travelling expenses. The Plaintiff also produced medical

reports from both Dr. M. S. Malik and Dr. Obed Omuyoma, Dr. Omuyoma's report is dated 5th September 2007, and says that the Plaintiff suffered a permanent disability of thirty percent (30%) - Dr. Malik's Report a later Report, is dated 17th July 2008 and says - "*I would be inclined to award her permanent physical disability benefits amounting to "THIRTY PER CENT"*". Dr. Lutomia Mark B. Lumbasi, A Consultant Orthopaedic and Trauma Surgeon in his report of 15th April 2009 advised that "Naomi Wambui Njiraini be awarded a disability scale of 45% (*forty fiver per cent*).

The Plaintiff was the sole witness to the Plaintiff's case, and after cross-examination by Mr. Kisilah learned counsel for the Defendant, the Plaintiff's counsel, Mr. Mugambi closed the Plaintiff's case. The Defendant did not call any witness to rebut the Plaintiff's case. This must have been due to the fact that the parties had amicably arrived at a consent respecting the issue of liability. This was apportioned at 70% to the Defendant, and 30% to the Plaintiff. Both counsel however submitted written submissions for and against the Plaintiff's claims.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

As the Defendant offered no evidence as to his negligence, and was indeed charged and convicted of the offence of careless driving and fined, there is no denial that the accident did happen, and that the Plaintiff suffered the injuries she sustained, was admitted to hospital, underwent surgery in respect of the fractured limb, and other treatment for soft tissue injuries, and was thereafter subjected to prolonged outpatient treatment. There is also no denying that the Plaintiff suffered pain, arising from the accident. Her left leg was shortened by 3 cm, and thus causes imbalance in her walking gait unless she is fitted with a special shoe.

The Plaintiff used to be an active teacher at **Navigators Girls High School**. As a result of the accident she lost her job at that school, and has now to perform odd jobs as an Education Consultant. So she claims loss of earnings. Lastly the Plaintiff claims compensation for future medical treatment, and costs of the suit. I will consider each of these claims under their respective sub-titles or headings.

A. PAIN AND SUFFERING

In the case of **CECILIA W. MWANGI and JOSEPHAT MWANGI vs. MWANGI RUTH W.** (Civil Appeal No. 251 of 1996), the Court of Appeal observed inter alia that claimants' *Advocates tend to rely on more serious injury cases to try and obtain large awards whereas Defendants' counsel tend to rely on less serious injury awards, and that such practice is unhelpful to courts.*"

In this regard, I have, for lack of a better expression of my own, fallen into the temptation of "*regurgating*" as Ahmednasir Abdullahi publisher, the Nairobi Law Monthly, Vol. I, Issue 1, (October 2010) would put it, the words of Lord Morris of Borth-Y-Gest in the case of **WEST(H) & SON LTD vs. SHEPHARD [1964] AC 326** at p. 345-

"BUT money cannot renew a physical frame that has become shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with consideration. Furthermore it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it is still must be that the amounts which are awarded are to a considered extent conventional."

This approach to the matter of compensatory damages was supported by Lord Denning in the case of **LIM PHO CHOO vs. CAMDEN ISLINGTON AREA HEALTH AUTHORITY [1979]1 ALL ER. 332** at 339 where the master of the ROLL said:-

"In considering damages in personal injury claims, it is often said:- the defendants are wrong doers, so make them pay up in full. They do not deserve any consideration." That is a tedious way of putting the case. The accident like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often reported, that the Plaintiff is entitled to be

fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The Defendants are not wrongdoers. They are the people who simply foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the taxpayers who have to pay."

This approach was adopted by the Court of Appeal in the case of **TAYAB vs. KINANU [1982-88] 1 KAR 90**, and also in **Cecilia Mwangi & Another vs. Mwangi Ruth W.** (*supra*) - where in the latter case, the said Court said -

"The reason why this passage (supra), is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably, the injured party but not so as to smart the defendant."

I would with respect adopt the same approach in this case.

Thus taking into account all the injuries suffered by the Plaintiff and keeping in mind the principles of assessment of such damages, and also the fall of the value of money, I would assess damages for pain, suffering and loss of amenities at Shs. 450,000/=.

In her plaint the Plaintiff claimed "special" damages. The expression "special" is somewhat a misnomer in this context. All it means is "specific" damages that is to say the actual pecuniary loss arising out of the special circumstances of the case. In law, (*unlike general damages which are presumed to result from the defendant's acts*), special damages are not and will not be presumed, for instance loss of earnings, medical expenses. These must be stated specifically pleaded and proved.

Again to regurgitate another saying from the case of **BONHAM CALTEX vs HYDE PARK HOTEL [1948] 64 T.L.R. 177** where Lord Goddard CJ said:-

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the court saying "this is what I have lost" I ask you to give me these damages."

Again these principles were reiterated by our Court of Appeal in **KENYA BUS SERVICES LTD vs. MAYENDE (1991)2 KAR 232 at 235T** and **SHABANI vs CITY COUNCIL OF NAIROBI (1985)1 KAR 681**, at 684.

In her Amended Plaint the Plaintiff claimed special damages comprising-

| | | | |
|-----|------------------------|-----|------------|
| (a) | Police Abstract Report | Shs | 100.00 |
| (b) | Medical Report | Shs | 2,500.00 |
| (c) | Medical expenses | Shs | 470,182.00 |
| (d) | Further Medical Report | Shs | 6,930.00 |
| | TOTAL | Shs | 479,712.00 |

The principle for the award of special damages is not merely that they be pleaded, but must specifically proved.

It was submitted by Mr. Kisilah learned counsel for the Defendant that any receipt of expenditure in excess of Kshs 100/= shall not be counted as proved unless it carried a revenue stamp of at least Shs 2/=. This is in conformity with the requirements of Section 19, 86 and 88 of the Stamp Duty Act (*Cap. 480, Laws of Kenya*). Such receipts as would not be stamped are inadmissible in evidence.

I have carefully reviewed all the receipts submitted by the Plaintiff in her evidence, and I find the sum of Kshs 429,878/= as qualifying under the above principles, and I therefore award the Plaintiff special damages in the said sum of **Kshs 429,878/=**.

In paragraph 7 of her Amended Plaint the Plaintiff claimed damages for loss of earnings and not earning capacity. In her evidence the Plaintiff testified that she was incapacitated in respect of her left leg but she is otherwise *corpus mentis* and earns an average of Shs 50,000/= p.m. as a consultant, that is to say, more than Kshs 10,000/= over and above her salary as a teacher at the Navigator Girls High

School. In other words, the Plaintiff has substantially mitigated her loss of earnings by securing a more rewarding occupation. This does not however disqualify her from claiming damages for loss of earnings. The only questions are: how much loss, and for what period of time.

The Plaintiff claimed she was earning a gross sum of Kshs 40,000/= per month and a nett sum of Sh 38,480/=. Counsel for the Defendant was skeptical about the authenticity of this figure as it was carried on the letter head of her former employer Navigators Girls High School, and was undated. The Plaintiff explained in cross-examination that she used to merely sign a voucher for payment, did not have a regular salary slip as in Government Schools or other large organizations. In addition the Plaintiff called no evidence from the school to verify this figure. Counsel for the Defendant also submitted that no damages should be awarded for lost earnings as the Plaintiff was actually engaged as a consultant on education. It was not clear whether this was regular employment.

The accident herein occurred on 9th December, 2006. The Plaintiff was then 51 years age. She was 54 when she testified, that is 3 years later. She would have retired at age of 60 years. I would give her the benefit of doubt for the first twelve months she would probably be still in great pain and unable to actively look for alternative employment. I would allow loss of earnings for the first 1 year following the accident at the nett sum of Kshs 38,480/= per month for 12 months making a sum of Ksh 461,760/= for loss of earnings.

Lastly, the Plaintiff claimed costs of Shs 950,000/= for future medical expenses. These comprised

- (a) *Total knee replacement estimated costs of Shs 500,000/=*
 - (b) *Total arthroplasty at an estimated cost of Shs 300,000/=*
 - (c) *Realignment surgery and fusion of the ankle at estimated costs of* Shs 150,000/=
- Total* Shs 950,000/=

The basis of this claim were reports by Dr. Lutomia Mark B. Lumbasi dated 15th April, 2009. There was no evidence of the actual cost of any of these items from either suppliers or stockists thereof. The figures are therefore mere estimates and would be more or less. Besides, Dr Lumbasi's opinion is not conclusive as to the necessity, and whether it was imperative that the realignment surgery must be done. Given this view of the matter the court cannot award sums for costs that the Plaintiff might or might not actually incur eventually. One thing though is sure, the Plaintiff is likely to seek some if not all of the suggested further treatment. In the absence of more tangible evidence and doing the best a court can do in the circumstances is to strike a fair balance over the claim and the probable cost, I would allow and overall figure of Shs 600,000/= for future medical expenses.

In summary therefore I find for the Plaintiff in the sum of Kshs 1,359,146.60/= made up as follows -

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|-----|---|-----|-------------------------|
| (1) | <i>General damages for pain and suffering</i> | Shs | 450,000/= |
| (2) | <i>Special damages</i> | Shs | 429,878/= |
| (3) | <i>Loss of earnings</i> | Shs | 461,760/= |
| (4) | <i>Future Medical Expenses</i> | Shs | <u>600,000/=</u> |
| | <i>Total</i> | | <u>Shs 1,941,638/=</u> |
| (5) | <i>Less 30% contributory negligence</i> | Shs | <u>582,491.40</u> |
| | <i>Nett balance</i> | | <u>Shs 1,359,146.60</u> |

The above sum shall carry interest at court rates from the date hereof till payment in full. The Plaintiff shall also have the costs herein.

Dated, signed and delivered at Nakuru this 29th day of October 2010

M. J. ANYARA EMUKULE
JUDGE

