



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

Civil Case 35 of 2004

JULIAN ANYANGO KUNI PLAINTIFF

-VERSUS-

UNITED MILLERS LTD & 3 OTHERS DEFENDANTS

J U D G M E N T

Coram

Mwera J.

Mrs Obat for the plaintiff

Yogo for the defendants

Raymond Court Clerk.

The suit herein was instituted by one Esther Atieno Kuni, next friend of Julian Anyango Kuni alias Julian Okello who at the conclusion of the trial the said Julian had attained the age of majority and thus replaced Esther. It was a claim for damages which arose following a road accident that took place on 10.9.2003 when the plaintiff was said to have been a passenger in the 3rd defendant's motor vehicle reg. no. KAP 887 N Mini bus, which the 4th defendant was driving. It collided with the 1st defendant's motor vehicle reg. no. KAL 620 Z which was, being driven by the 2nd defendant. The accident took place along Ahero – Katito Rd and the defendants were said to be liable, directly or vicariously as the case was, as a result of negligent driving. The usual particulars of negligence were ranged against the defendants: driving at excessive speed; lack of look – out and proper control of the motor vehicles etc. There was a consent judgment on liability on the following lines:

10% - to the plaintiff

60% - to the 1st and 2nd defendants

30% - to the 3rd and 4th defendants.

The trial opened before Mugo J. when Dr. Luis Were Okombo (PW1) testified. The rest of the witnesses were heard by the undersigned, in what in essence was to determine the quantum of damages.

Dr. Okombo examined the plaintiff on 30.9.2004 following the accident of 10.9.2003 (the correct date).

She had injuries on the chest, head, the pelvic region, the left hand the neck and on both knees and the right eye. At time of examination the plaintiff complained of headaches, occasional loss of memory, pain in the chest, left hand and the pelvic region. That she was unable to read or articulate her speech. She also complained of urine and stool incontinence. PW1 noted a scar at the outer angle of the right eye, stiffness in the neck, unclear speech plus inability to express herself properly. There were contractures of the left elbow joint, the left and right knee joints. The plaintiff had wasting muscles of both legs and could not stand on her own. PW1 classified all the above as soft and bone tissue injuries. The 29 – year old plaintiff had not fully healed and for the noted symptoms to be treated, some Ksh 500,000/= would be needed (Exh. P1).

In cross – examination the court heard that PW1 had not seen the plaintiff again since he examined her and no doubt some of the injuries could have healed or after 3 years, if she had improved. It was added that the estimated costs of Ksh 500,000/= for future medical treatment would go into orthopedic surgery for the contractures, spinal surgery to rectify the lumbar spinal nerves and to deal with the speech defect. PW1 assessed/observed as he did, as a general physician – not a neural or orthopaedic surgeon. He was not a neurologist either.

The plaintiff herself testified (PW2) about of the subject accident. She was traveling in the said mini bus with her 2 children when all that happened – a big bang and she passed out. Her body was paralyzed and she could not control her calls of nature. PW2, who was in a wheel chair, demonstrated how her left arm could not stretch out and she could not stand due to paralysis in her lower limbs. She produced medical notes of her admission at New Nyanza Provincial General Hospital (Exh P1, it ought to be P2) a police abstract (Exh P2) etc adding that she paid Ksh 30,680/= (Exh. P4) at the above hospital where she was admitted for 8 months. Due to her condition PW2 had hired one Mnila Achieng at Ksh 4,500/= pm to assist her. Before the accident, PW2 ran a shop at Omuya Trading centre, earning Ksh 1,000/= per day. She lost all the trading papers. She had 3 children and attended Eldoret Moi Referral Hospital for physiotherapy sessions. There were no medical documents for this.

Mnila Achieng (PW3) told the court how she got into the service of PW2 after the accident - to wash her, feed her, change her clothes etc, earning Ksh 4,500/= per month paid by PW2's brother, Julian. The defence did not call evidence and each side submitted.

Liability having been settled, focus was on the quantum of damages. After reviewing the evidence and the plaintiff's current state of health, her side proposed that Ksh 8M be awarded for pain and suffering citing the case of Magdalene Chebet Segei -VS- Joseph Mwamu - NKU HCCC 183/99, where for more or less similar injuries Rimita J. awarded Ksh 2 m.

For loss of “future past and present” earnings (not quite clear) the court was urged to accept that the plaintiff who was 29 years at time of the accident, earned between Ksh 500 – 1000/= per day and so she was entitled to Ksh 9.3 m.

Nursing Care attracted a total of Ksh 1.4 m while special damages were put at Ksh 30,680/= plus Ksh 2.5 m for future medical expenses.

On the defence side Ksh 1 m was considered reasonable for pain suffering and loss of amenities, citing the case of Tahir Sheikh Said –VS- Charles Mugabo – C. A. 273/98 (C.A.).

Regarding loss of future earning capacity it was submitted that no award should issue because PW2's pleadings that she earned Ksh 500/= per day and evidence that that sum was in fact Ksh 1,000/= per day was not supported with any evidence i.e licences or daily sales turnover.

On cost of prosthesis, no award should issue because with 80% permanent disability such an item was not necessary. The defence however considered employing a nurse/helper as more practical and a global figure of Ksh 100,000/= was proposed, plus Ksh 30,680/= in special damages.

Having considered the evidence, authorities, submissions and particularly that the plaintiff is seemingly a

wheel-chair case for the rest of her life, this court does award her Ksh 1,500,000/= for pain suffering and loss of amenities.

There was no proof that she was in business earning Ksh 500/= per day (as per plaint) or Ksh 1,000/= (in evidence). This shifting of positions and with no licences or other evidence that the plaintiff was actually doing business before the subject accident, leaves this court in doubt as to whether it should make an award. It makes none.

For nursing care, the position was also confusing. The plaint spoke of Ksh 4000/= per month salary while the evidence by claimant herself and the helper put it at Ksh 4,500/=. There was anyway proof to some extent of this claim and this court can do no better than` award a global sum of Ksh 200,000/=.

Regarding future medical expenses, although the plaintiff did not tender evidence that she was indeed being attended to, her state of health is such that that may be inevitable. Dr. Okombo did not appear quite certain about the estimate of Ksh 500,000/= he put forth. This court considers it reasonable to award Ksh 250,000/=.

And special damages stand at Ksh 30,680/=.

The total award is:

Pain & Suffering	-	Ksh 1,500,000/=
Nursing Care	-	Ksh 200,000/=
Future Medical Costs	-	Ksh 250,000/=
Special Damage	-	Ksh 30,680/=

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KSH 1, 980,680.00

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(One Million, Nine Hundred and Eighty Thousand Shillings and Six Hundred and Eighty). However, this award is subject to the apportionment of liability as noted above. The plaintiff also gets costs and interest.

Judgment accordingly.

Delivered on 5.2.2009.

J. W. MWERA

JUDGE

JWM/hao