



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

Civil Suit 11 of 2006

MADINA GATHONI.....PLAINTIFF

=VERSUS=

1. ALI SHALO SHOSI

2. ALWI SHARIFF ALI.....DEFENDANTS

JUDGEMENT

Madina Gathoni(the plaintiff) has filed this suit against Ali Shalo Shosi(2nd Defendant) and Alwi Shariff Ali(2nd defendant). This is a claim which arises from a road traffic accident in which the Plaintiff(being a passenger in a matatu registration No.KAT 343M along Mombasa-Kilifi road) was injured, following a collision between the said vehicle and motor vehicle registration number KAE 651R. The first defendant was registered owner of motor vehicle KAT 343M whilst 2nd Defendant was the registered owner of motor vehicle registered KAE 651R.

A consent judgment was entered on liability apportioned at 20% against the Plaintiff and 80% against the 2nd Defendant while the case against 1st Defendant was withdrawn with no orders as to costs – this was by a letterdated 26th February 2008 and signed by the respective advocates of all the parties involved in this matter. She seeks General damages for pain and suffering and loss of amenities.

(b) Damages for loss of earnings and earning capacity and cost of future medical care.

(c) Specials are broken down thus Kshs.644,016 – Bill for Jocham Hospital

Kshs.3,000 for medical report

Kshs.200/- for police abstract

These are to be awarded less 20% contribution. She also seeks costs and interest of the suit.

The matter then proceeded for assessment of damages. The Plaintiff testified that she suffered fractured hips and thigh, her heels were crashed and dislodged from their position. She was rushed to Jocham Hospital where metal plates were inserted and she underwent surgery twice and skin grafting was done. She was in hospital for 8 months and was on painkillers and also underwent physio therapy. She was put in plaster, then transferred to Kenyatta National Hospital(KNH) where the plates were removed and others inserted, so she had to undergo another surgery – this was necessary because hospital personnel at Kenyatta National Hospital said the plates were not properly fixed.

At Jocham Hospital, she incurred a bill of Kshs.644016/-(six hundred and forty four thousand and sixteen shillings only) –the receipts in support were produced as Exhibit 1. Plaintiff is still undergoing treatment at Kenyatta National Hospital so she does not have a complete bill, but so far Kenyatta National Hospital demands from her Kshs.300,000/- and at the time of testifying before this court on 20/5/09, she was due for the next clinic on 12/6/09 as was reflected in her attendance record/appointment card produced as Exhibit 2 and which confirmed that she had last attended clinic on 8/5/09.

A discharge summary from Kenyatta National Hospital was produced as exhibit 4 which indicated that she had undergone multiple surgery, and was discharged on a wheelchair. She was then examined by Doctor Ochieng whose medical report Exhibit 5 showed that Plaintiff had sustained the following injuries as a result of the accident.

- (1) Fracture of right femur distal 1/3
- (2) Fracture of the right tibia/fibular
- (3) Fracture of right femur proximal
- (4) Fracture of right femur supracondylar
- (5) Fracture of left tibia/fibula

She also had bruises and soft tissue injuries in all the extremities K-nails were inserted in both the left and right femur and a DHS was fixed to reduce the supracondylar fracture of the right femur. The bilateral tibia/fibular fractures were both immobilized in plaster of paris.

The report confirms removal and re-insertion of K-nails as the earlier fixations were not acceptable and she underwent three major surgeries at different times, and in fact she even developed infection at the fracture sites with pus and all the metal implants had to be removed and irrigation done, then she was placed on antibiotics and the infection eventually reduced slowly. She was mobilized on a wheel chair but was not able to move about on her own nor could she support her weight on her limbs. She was eventually discharged from hospital on 22/12/06. She remains confined to a wheelchair and the doctor noted that she has stiffness and ankylosis of her joints and gross malunion of the fracture.

She has had disuse atrophy and wasting of all her quadriceps muscles, hamstrings and is not able to use both lower limbs which have also become paraparetic. The progress was that she will not be able to improve on the use of her lower limbs and will be confined to a wheel chair for the rest of her living days. The Doctor assessed that she has had an incapacity at approximately 60%(Sixty).

It was her testimony that her life has completely changed – she was a poultry farmer in Mtwapa keeping chicken which earned her Kshs.50,000/- per month, and she also operated a salon at Mtwapa earning Kshs.30,000/-, 40,000/- per month. She had a spray pump for livestock as well. Now she is totally unable to run her business as she is immobilized and totally bedridden and she complains of being very stressed. She had to abandon her business as she could not trust anyone to run them and used all the money she had towards her treatment.

Currently she has employed one Naomi as a house maid at a cost of Kshs.5,000/- per month. Naomi has to turn her, bathe her, take her to the toilet and massage her legs with warm water. There is also Karanja who assists in carrying her on and off the bed onto the wheel chair and also take her shopping at a salary of Kshs.4,000/- per month. Madina informed this court, that she is not able to stand, so she is unable to perform any of her farm tasks.

On cross-examination Plaintiff stated that she spent 4 months and 20 days at Jocham Hospital and was admitted at Kenyatta National Hospital for about 7 months – so that in total she spent close to one year in hospital. As regards the income generating activities she alluded to, she explained that she did not have any documentary evidence as her concern was to do business, not keeping records. She explained that her

family deserted her and she has had to hire people to assist her. Her sister who had taken her to Kenyatta National Hospital abandoned her and right now she depends on income from some rental house which she owns.

Counsel for both parties filed written submissions on damages. Mr Kariuki(Plaintiff's counsel) suggests that for the nursing care(which plaintiff will need for the rest of the live) in respect of the to aides said to be earning a total of Kshs.9,000/- he suggests that the court do use a multiple of 20 years and to consider that with the current economic situation the wages are likely to go up for the two, to a sum of Kshs.15,000/- per month, within 5 years and he has sought to rely on the case of **Susan W. Njuguna V Keringet Flowers Limited** where the court awarded Kshs.7,500/-per month for nursing care and so total suggested for nursing care and so total suggested for nursing care is 1.8million. For loss of earning and earning capacity, Mr Kariuki asks this court to consider the medical report by Doctor Ochieng which confirmed that Plaintiff was aged 45 years as at the time of the accident and suggested a multiplication of 15 years, given the fact that Plaintiff was doing business for which she would have continued even after the age of 60 and considering that the retirement age in Kenya is now 60 years,worked at $30,000 \times 12 \times 20 = 7200,000/-$.

As for general damages for pain, suffering and loss of amenities. Mr Kariuku suggests a figure of Kshs.5,000,000/- drawing from the decision in Susan Njuguna and also HCCC No. 290 of 2001, **Pius K. Mitei V Leonard Kissongochi and Another.** In submitting a figure for future medical expenses Mr Kariuki has asked he court to consider washing soaps and liquids and she sometimes spends upto 20,000/- and he suggests a total sum of Kshs.600,000/- which he terms a conventional figure.

For special damages the figure suggested is Kshs.700,000/-. In total Mr Kariuki suggests a global sum of Kshs.14070,000/- to be awarded to Plaintiff Mr Shekei for Respondent points out that the only sums pleaded and proved are a total of Kshs.647,216/- and this must be considered less her 20% contribution. Under the head of damages for loss of earnings and earning capacity, the defence counsel submits that there is nothing to prove the Plaintiff's age or that she owned a poultry farm which had a milling machine from which she was earning an income of 20,000/- per month. Further that she has not presented a single document to support the existence of the poultry farm or milling machine, and there is no licence or any bank statement or document, receipt of income tax returns or any other evidence of sale of chicken or eggs and not a single worker testified to having worked on such a farm or been engaged by Plaintiff in such related activities. The same goes for the purported salon which she claims to have been earning her Kshs.30,000/-per month.

Mr Shikeli suggests that the claim for loss of earnings and earning capacity should be rejected and instead, the Plaintiff should be awarded a modest sum of Kshs.100,000/- for loss of capacity to work. He has cited from 1989 decisions – which this court notes are 20 years old!!!

As for the continued treatment that Plaintiff is undergoing, the defence counsel submits that there is nothing more the hospital can do to reverse the injury she sustained and there is no explanation as to why she did not produce any invoice or receipt of payment from Kenyatta National Hospital and there is nothing whatsoever to suggest that she will need Kshs.600,000/- for future medical expenses.

The Defence counsel asks the court to note that ever since being discharged from Kenyatta National Hospital, she has never been re-admitted nor does Doctor Ochieng's report suggest a need for further medical attention. As for her two house helps – Mr Shekeli submits that there is no justification for having two of them and that no house help testified nor was nursing care pleaded and the sum should be limited to Kshs.5,000/- for one aide using a multiple of 8 years to make it $5,000 \times 12 \times 8 = 480,000/-$.

As regards general damages for pain, suffering and loss of amenities, the defence counsel suggests General damages Kshs.1 million citing the decision in Wilson Okohio Makucha V Teta Estate Limited HCCC No.95 of 1997(Mombasa) and Sam Okumu Bunde V Tom Kando Hccc No.47 of 2005(Kisumu).

I have considered the submission made by both counsel.

1. Special damages must be pleaded, specifically and proved - from the evidence presented to this court this amounts to Kshs.647,216/- made up of

(a) Kshs.644016/- for Jocham Hospital

(b) Kshs.3000/- for medical report

(c) Kshs.200/- for police abstract

This then is calculated less the 20% liability which was contributed to her. The sum is worked out as follows:-

$647216 \times 80\% = 517,773/-$

(Five hundred and seventeen thousand seven hundred and seventy three shillings only)

Damages for loss of earnings – although the Plaintiff claims to to have engaged in income earning generating activities there is really nothing to support that, except her word of mouth – not even a receipt to show she purchased or sold poultry, bought poultry feed, banked any money, kept any records of accounts either for the poultry business or the salon – not even a single individual testified to have been engaged by her as a worker in any of the enterprises – surely what would form the basis of awarding the figures suggested?

In assessing loss of earnings and loss of earning capacity, the general practice is to take the Plaintiff's annual earnings at the accident and multiply the same with the number of years that the loss of the power of earning is likely to subsist, taking into account relevant changes in the plaintiff's circumstances which could have taken place since the injury and which are likely to either increase or diminish the Plaintiff's loss.

The Plaintiff's claim to have been engaged in some income generating activities is not supported by a scintilla of evidence, of earnings not proved. Unfortunately alternatively the plaintiff's counsel cited certain decision – these are unreported and he failed to submit the full decision cases to this court for consideration. I will under the circumstances recognize that from the injuries, Plaintiff's capacity to earn is greatly comprised, and I would thus regard her as an unskilled labourer who would be entitled to a minimum wage of Kshs.6,000/- per month and Doctor Ochieng's report gave her age as 45 years at the time of accident and a considering life expectancy in Kenya, vaguely thereto and the retirement age which is now 60 years, I think a multiplication of 15 years would be reasonable to use in awarding loss of earning capacity to work out at $6000 \times 12 \times 15 = 1,080,000/-$ (one million and eighty thousands only) less 20% contribution = 864,000/-.

Future medical expenses was not pleaded, and no evidence was led to suggest what amounts she still requires to spend in future medical expenses was not pleaded, and no evidence was led to suggest what amounts she still requires to spend in future medical needs and there is no basis for me to make an award under this head.

For nursing care, the plaintiff has indicated she has engaged two assistants, I saw the plaintiff at court, she had to literally be carried and be assisted to sit, shift position and turn. She is not of a small body frame by any standards and her injuries make handling of her a very delicate affair the sum indicated of Kshs.9,000/- for the two named assistants in my view reasonable and she certainly needs this two the rest of her life. I will therefore worked as follows:-

$Kshs.9000 \times 12 \times 20$ (as the life expectancy) = 2,160,000 less 20% contribution to give a figure of 1,728,000/- (one million seven Hundred and twenty eight thousands only).

General damages for pain, suffering and loss of amenities Plaintiff has undergone three major surgeries, during which....healing relapsed due to severe infections with pus, the K plates had to be removed and

injection done on the site, the healing process was slow, she spent almost a year in hospital – she has suffered a lot and indeed experienced great pain. She is now totally dependant on others as her movement is restricted she has to be bathed, turned in bed, taken to the toilet, (she cannot squat) and considering all these factors and the decided cases referred to I find that an award of Kshs.4,000,000/-(Four million only) is sufficient and I so award. Less 20% contribution to give her a figure of Kshs.3,200,000/-(Three million two hundred thousands only).

For purposes of clarity I summarise the award as hereunder;-

1. Special damages – Kshs.517,773/-(Five hundred and seventeen thousands seven hundred and seventy three shillings only)
2. Loss of earning capacity 864,000/-(Eight hundred and sixty four thousands only)
3. Nursing aides-1,728,000/-(One million seven hundred and twenty eight thousands only)
4. General damages for pain, suffering and loss of amenities Kshs.3.2million shilling(Three million, two hundred thousand shillings only).

I award costs of the suit to Plaintiff. Interest on the sum is awarded at court rates from date of judgment until payment in full.

Delivered and dated this 29th day of October 2009 at Malindi

H.A.OMONDI

JUDGE

Mr Shikeli for Plaintiff

Mr Shujaa holding brief for Mr Kariuki