



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Suit 36 of 2008

LOISE AWUOR MASENO PLAINTIFF

VERSUS

DEASONS (K) LIMITED t/a SUN-CITY BUS SERVICES DEFENDANT

JUDGMENT

By a plaint filed on 22nd May, 2008, the plaintiff averred that on 6th August, 2007, she was a fare paying passenger in the defendant's bus registration No. KAM 420 Z and she was travelling from Kisii to Nairobi. At Ngobeni area along Kisii-Narok road the driver of the said bus controlled the same so negligently that he lost its control and it overturned. The plaintiff alleged that the said accident was caused by the negligence of the bus driver and cited particulars of negligence which included driving at an excessive speed in the circumstances and driving without due care and attention.

As a result of the said accident the plaintiff suffered the following injuries:

- (a) Traumatic amputation of the left arm.
- (b) Head injury leading to loss of consciousness.
- (c) Scalp lacerations.
- (d) Facial lacerations.
- (e) Contusion of the chest.
- (f) Open injury and cut wound to the left shoulder joint.
- (g) Crush injury and compound communitated fracture of the radius/ulna.
- (h) Restriction in mobility of the left shoulder.

The plaintiff claimed special damages as hereunder:

- (i) **Police abstract Kshs. 200/=**
- (ii) **Medical report Kshs. 8,500/=**

(iii) Medical expenses Kshs. 145,000/=

(iv) Costs of prosthesisKshs. 120,000/=.

At the time of the accident the plaintiff was an active, healthy young lady aged 21 years. As a result of the said accident she has suffered loss of earning capacity and she prayed for damages on that account as well as damages for future medical expenses and domestic help. For the domestic help, she quoted a monthly salary of Kshs. 5,195/= as the minimum wage stipulated in **Legal Notice No. 38, the Regulations of Wages and Conditions of Employment Act (Cap 229), the Regulation of Wages (General) (Amendment Act) 2006.**

The defendant denied that the said accident did occur as pleaded and further denied that it was the owner of bus registration No. KAM 420 Z as alleged. In the alternative, the defendant averred that if the said accident occurred, the plaintiff wholly or substantially contributed to the injuries she allegedly sustained in that she failed to observe traffic rules and regulations. The defendant denied any knowledge of the injuries, loss and damages pleaded by the plaintiff and urged the court to dismiss the suit.

In her evidence, the plaintiff testified that on the material day she was travelling from Kisii to Nairobi in the defendant's bus registration No. KAM 420 Z. She produced a copy of records issued by the Registrar of Motor Vehicles to prove that the defendant was indeed the registered owner of the same. The plaintiff further stated that the bus was being driven at a high speed along a bumpy road. The driver of the bus lost control of the same and it overturned on its own. The accident occurred at about 12.30 p.m. Following the accident, the plaintiff was taken to Narok District Hospital where her left hand was amputated at the elbow joint. She was in that hospital for one day before her referral to Kenyatta National Hospital where she remained for three weeks. She paid Kshs. 144,845/= and produced receipts in support of her claim.

The plaintiff claimed that at Kenyatta National Hospital she was being treated by one Dr. Mogire and she paid him Kshs. 5,000/= for a medical report. However, no evidence of such payment was tendered and neither was the alleged medical report produced. Thereafter the plaintiff was examined by **Dr. P.M. Ajuoga, PW2**, a Consultant Surgeon who prepared a medical report at a cost of Kshs. 3,500/=. Dr. Ajuoga testified in court and produced the medical report and confirmed that he was paid Kshs. 3,500/= for preparation of the same. The Doctor produced a receipt in support of that payment. The report by Dr. Ajuoga confirms the injuries as stated in the plaint. The Doctor's conclusion in the medical report was that the plaintiff suffered serious injuries on her left fore arm which led to amputation of the left hand. As a result of the amputation of the left hand, the plaintiff suffers psychologically and keeps hiding the hand. He further stated that she would need an artificial hand to solve her psychological problem. In his view, the cost of the prosthesis is Kshs. 120,000/=

The plaintiff went to P.C.E.A. Kikuyu Orthopaedic Rehabilitation centre for fitting of a prosthesis and she was given a quotation of Kshs. 120,000/= for the same. She produced an invoice (exhibit 7) in support of her claim. She paid that sum and the prosthesis was ordered but when she went for fitting it could not fit and was told that the hand had to be amputated again by some centimetres. She did not agree to that and decided to seek further opinion. She still requires the artificial limb.

The plaintiff further testified that at the time of the accident, she was a student at St. Paul's Teachers' Training College at Nyaburu in Kisii. As a result of the accident she lost one academic term and was not able to prepare for teaching practice. She did not therefore pass her final examinations. She had been affected psychologically due the loss of her left arm, being a young lady aged 21. If she had qualified as a teacher, her salary would have been Kshs. 20,000/= or more, she stated. At the time of the hearing she was employed as unqualified teacher at East End Junior Academy in Nairobi at a monthly salary of Kshs. 8,000/=.

Before the accident, the plaintiff used to play basket ball but is now unable to play her favourite game. As a teacher she is required to participate in games but because of her present condition she is unable to engage in various games. The plaintiff further testified that she is not able to do many

household duties like cooking, washing clothes or utensils. Presently she lives with her aunt who has to employ a house help to assist her in doing the household chores. In future the plaintiff intends to stay on her own and she will have to employ a house help. She urged the court to take that into consideration in assessing general damages payable.

In cross examination, the plaintiff stated that although she had failed in the primary teachers' examinations held in July and August, 2008, she intended to re-sit the same sometimes in 2009. As regards amputation of her left hand, the plaintiff testified that she is right handed but as a teacher she is expected to use both hands in games.

Regarding the necessity to employ a house help, the plaintiff stated that if it were not for the said accident she would not require the services of a house help since she is single lady.

The defendant did not adduce any evidence but the advocates for both parties filed written submissions.

The plaintiff's advocate urged the court to find that the defendant was fully liable for the occurrence of the said accident and award:

(a) General damages for pains suffering and

loss of amenities at Kshs. 1,500,000/=

(b) Costs of prosthesis Kshs. 120,000/=

(c) Loss of future earning capacity

Kshs. 1,080,000/= calculated as

hereunder:

A multiplier of 15 years and a multiplicand of Kshs. 12,000/= being the expected salary of a P1 teacher discounted by 50% being the degree of incapacitation as per the medical report.

(d) Costs of domestic help Kshs. 467,550/=

calculated as hereunder:

A multiplier of 15 years and a multiplicand of Kshs. 5,195/= based on a minimum wage for a house worker in terms of Legal Notice No. 38 of 2006.

(e) Special damages Kshs. 279, 410/= made

up as hereunder:

- **Police abstract Kshs. 200/=**
- **Medical report Kshs. 8,500/=**
- **Medical expenses Kshs. 147,710/=**
- **Costs of prosthesis Kshs. 120,000/=**

The defendant submitted that the accident occurred as a result of tyre burst. However, no evidence was adduced in support of that assertion. The defendant urged the court to apportion liability equally between the parties.

On quantum of damages, the defendant submitted that an award of Kshs. 400,000/= less 50% is reasonable. The defendant's counsel urged the court to dismiss the claim for loss of future earning capacity.

As regards special damages the defendant submitted that the receipts produced in support thereof were without Revenue stamps and urged the court to disallow the same.

The claim for damages for hiring a domestic help was also said to have been unsupported by the evidence that was tendered. The court was urged to disregard the same.

Having carefully considered the evidence on record and the submissions by counsels, I proceed to determine the relevant issues as hereunder:

1. Liability

The plaintiff was a fare paying passenger in the defendant's bus registration No. KAM 420 Z. She produced a copy of records of the said vehicle from the Registrar of Motor Vehicles. There is no dispute that the said bus was owned by the defendant. The plaintiff's evidence as to how the accident occurred was unchallenged. The driver of the defendant's bus was driving at a high speed on a bumpy stretch of the Kisii-Narok road. The bus overturned without having collided with any other vehicle. On the basis of that evidence I find that the defendant was wholly liable for the occurrence of the said accident.

2. The plaintiff's injuries

The injuries sustained by the plaintiff were fully set out in the plaint and certified by the medical report produced in court by Dr. Ajuoga. The degree of permanent disability was assessed at 50%. The most outstanding injury is the plaintiff's amputation of her left hand at the elbow joint. She suffers psychologically due to that injury and it cannot be denied that an artificial limb will be of great assistance.

3. General damages for pain, suffering and loss of

amenities.

In **JOSEPH IBRAHIM ALASAU –VS- STEERING SHIP CONTRACTORS & ANOTHER**, Civil Appeal No. 170 of 2004, the appellant suffered a crush injury on his right hand leading to amputation of the same from the shoulder. The Court of Appeal awarded general damages for pain, suffering and loss of amenities at Kshs. 1,300,000/=.

In **NAOMI WANJIRU ROMANO –VS- ALICE WANJIKU ROMANO & ANOTHER**, HCCC No. 223 of 1996 at Nairobi (unreported) the plaintiff suffered a crush injury to her right arm leading to above elbow amputation. The court awarded general damages for pain, suffering and loss of amenities assessed at Kshs. 1,350,000/=.

In view of the aforesaid authorities, the plaintiff's prayer for general damages in the sum of Kshs.

1,500,000/= is reasonable and I award the same.

3. Damages for loss of earning capacity.

In **BUTLER –VS- BUTLER** [1984] KLR 225, the Court of Appeal stated that a person's loss of earning capacity occurs where as a result of an injury, his chances in the future of getting any work in the labour market or work, as well paid as before the accident, are lessened by his injury. Loss of earning capacity is different from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages. The Court of Appeal went on to say that loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity. The factors to be taken into account in considering damages under the head of loss of earning capacity vary with the circumstances of the case and they include such factors as the age and qualifications of the claimant, his remaining length of working life, his disabilities and any other relevant factor.

In this case, the plaintiff had not been employed before the accident occurred. She was a student in a Teachers' Training College. As a result of the accident, she failed in her final examinations. There was unchallenged evidence that at the time of the hearing she was employed as an unqualified teacher, earning much less than what a P1 teacher gets. However, the plaintiff did not adduce any evidence to prove what her present salary was and neither did she prove what a P1 teacher earns. She merely asserted that if she had qualified as a P1 teacher, her salary would have been Kshs. 20,000/= or more.

The plaintiff said that she was going to re-sit the examinations that she failed and hopefully qualify as a P1 teacher. That notwithstanding, it cannot be denied that the plaintiff's loss of the left arm will cause her to be less marketable as a teacher compared to a teacher with both arms. She will not be able to participate in many games and other physical activities that require the use of two hands. Some schools may even be unwilling to employ her because of her partial disability.

In **SOSPINA COMPANY LIMITED & ANOTHER –VS- DANIEL NG'ANG'A KANYI** [2006] e KLR, the respondent suffered serious injuries as a result of a road traffic accident. Prior to the accident he was a farmer. After the accident he was no longer able to do any hard labour. He was however able to engage in light farming activities. His earning capacity had been reduced as a result of the accident. The court assessed his monthly income at Kshs. 3,500/=. A multiplier of 15 years was used and the awardable sum was reduced by $\frac{1}{3}$ because of farm inputs. His loss of earning capacity was calculated as hereunder:

$3,500 \times 12 \times 15 \times \frac{2}{3} = 420,000/=$. The Court of Appeal upheld that award. It held that:

“The loss of earning capacity was a direct consequence of the accident which justified an award in the form of general damages.”

In this case, the plaintiff's counsel urged the court to adopt a multiplier of 15 years and a multiplicand of 12,000/= being the expected earning of a P1 teacher and discount the sum by 50% being the degree of incapacitation.

As earlier stated, the plaintiff did not produce any documentary evidence to prove the salary of a P1 teacher. But assuming that the same is Kshs. 20,000/= as stated in her evidence and that her present salary as an unqualified teacher is Kshs.8,000/=: the difference is Kshs. 12,000/=. However the plaintiff indicated that she was going to re-sit the examinations and hopefully qualify as a P1 teacher. If that happens, there is likelihood that she would be employed as a P1 teacher and earn the appropriate salary. She however suffers some disadvantage because of her incapacitation.

Taking all the above into consideration, I will adopt a multiplier of 15 years but reduce the multiplicand to Kshs.6,000/= per month to represent the diminution of her earning capacity compared to that of a qualified teacher who has both arms. The aggregate sum shall be discounted by 50% being the degree of incapacitation as per the evidence of Dr. Ajuoga. I will calculate the same as hereunder:

$$15 \times 12 \times 6,000 \times \frac{1}{2} = 540,000.$$

4. Domestic Help

It cannot be denied that the plaintiff requires domestic help because she is incapable of undertaking many household duties on her own. As per **Legal Notice No. 38 of 2006, The Regulations of Wages (General) (Amendment) Order, 2006**, the minimum salary for a house servant was fixed at Kshs. 5,195/=per month. It matters not that the plaintiff is currently paying her domestic help Kshs. 2,000/= per month. She may be committing an offence by so doing and this court has a duty to ensure that the Laws of this country are obeyed by its citizens and all residents. Adopting a multiplier of 15 as urged by the plaintiff's counsel, I will compute the damages payable under this heading as follows:

$$15 \text{ years} \times 12 \times \text{Kshs. } 5,195/- = \text{Kshs. } 935,100/-. \text{ The above sum shall be discounted by 50\% to Kshs.} 467,550/=.$$

5. Special damages

The following sums were pleaded and proved and I award the same.

- (a) **Police abstract Kshs. 200/=**
- (b) **Medical report Kshs. 3,500/=**
- (c) **Medical expenses Kshs. 144,845/=**
- (d) **Costs of prosthesis Kshs. 120,000/=**

- Total Kshs. 268,545/=**

Kenyatta National Hospital, being a Government Institution, is not liable to pay stamp duty to the Government and therefore the receipts on account of medical expenses from that institution are admissible even without Revenue stamps.

I now enter judgment for the plaintiff as hereunder:

- (a) **General damages for pain, suffering and loss of amenities Kshs. 1,500,000/-**
- (b) **Damages for loss of earning capacity Kshs. 540,000/-**
- (c) **Domestic help Kshs. 467, 550/-**
- (d) **Special damages Kshs. 268,545/-**

- Total Kshs. 2,776,095/-.**

The plaintiff shall also have costs of the suit as well as interest at court rates on the judgment sum. The interest on special damages shall accrue from the date of filing this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF NOVEMBER, 2009.

D. MUSINGA

JUDGE.

20/11/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kisera for the Plaintiff for Ms Obaga

Mr. Bosire HB for Mr. Ochoki for the Defendant

Court: Judgment delivered in open court on 20th November, 2009.

D. MUSINGA

JUDGE.

Mr. Bosire: I pray for 30 days stay of execution.

D. MUSINGA

JUDGE.

Mr. Kisera: I have no objection.

D. MUSINGA

JUDGE.

Court: There shall be stay of execution for a period of 30 days from the day hereof.

D. MUSINGA

JUDGE.