



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 123 of 2002

NANCY WAMAITHA KAMAU.....PLAINTIFF

VERSUS

JOHN MUKRISTO.....1ST DEFENDANT

SIMON KURIA.....2ND DEFENDANT

JUDGMENT

On the 13th day of January 2007 at about 9.00 p.m. the plaintiff Nancy Wamaitha Kamau testified that she was travelling as a fare paying passenger aboard motor vehicle registration no. KAM 269F along Naivasha-Nairobi road. Vehicle registration No. KAJ 390D belonged to the 2nd defendant and was driven by the 1st defendant. The 2nd defendant while driving the said motor vehicle suddenly swerved into the wrong lane thereby causing a collision with motor vehicle KAM 296F. As a result of the accident, the plaintiff sustained injuries as follows:

- (a) Cut wounds on the scalp.
- (b) Compound fractures of the tibia and fibula on both legs.

Following this accident, the plaintiff was given first aid treatment at the Naivasha District Hospital and later she was transferred to the Provincial General Hospital. She was operated on the legs and fixed with metal plates. She was discharged from the hospital on 19th January 2001 on a wheelchair and after about 8 months of using a wheelchair, she was weaned to walk with the aid of crutches and eventually after one year she started walking with the aid of a cane. It was not until February 2002 when she fully recovered and was able to resume normal duties.

The plaintiff produced the discharge summaries of the treatment prepared by the Provincial General Hospital, Nakuru and the medical report by Dr. Ombito the Medical Superintendent Nakuru Provincial General Hospital. The plaintiff reported the accident at the Nakuru Traffic Division and was issued with the police abstract form that showed vehicle registration number KAJ 390D was driven by the 1st defendant. The 1st defendant was charged with the offence of careless driving before the Senior Principal Magistrate court at Naivahsha, he was convicted and sentenced to pay a fine of Kshs 3,000/= or 4 months imprisonment.

The plaintiff testified that she incurred medical expenses and produced several receipts totalling to Kshs 64,193/=. The plaintiff will also require future medical treatment to remove the metal plates at the cost of

Kshs 50,000/=. This amount is recommended in the medical report by Dr. Ombito. The plaintiff blamed the driver of motor vehicle KAJ 390D for the cause of the accident and sought for general and special damages.

The defendants did not enter appearance and default judgment was entered and the plaintiff proceeded to prove her claim. Counsel for the plaintiff submitted that the plaintiff should be awarded Kshs 800,000/= for pain and suffering. He relied on the decision in the case of Victor Mbongo vs. Watito Kariuki Nairobi HCCC No. 2797 of 1997 where the plaintiff who suffered similar injuries and was awarded Kshs 800,000/=. He also urged this court to consider the decision in the case of David Kiplangat Sang vs. Richard Kipkoech Langat & Another Kericho HCCC No. 91 of 2004 where the plaintiff was awarded Kshs 550,000/- for general damages for pain, suffering and loss of amenities for similar injuries.

From the plaintiff's evidence, she was a fare paying passenger and the vehicle she was travelling in was involved in a head on collision, the driver of KAJ 390 was found guilty of careless driving and was convicted and sentenced. According to section 47A of the Evidence Act, where a person is convicted of a traffic offence, this is prima facie evidence of negligence on the part of the driver. The 2nd respondent who was the driver of the vehicle occupied by the plaintiff should have tried to avoid the accident by swerving or slowing down and I attribute liability 70% to the driver of KAJ 390D and 30% to the driver of KAM 296F.

The plaintiff's evidence was not controverted and as it was held in the case of Kenya Bus Service Ltd. vs. Kawira EA Law Report [2003] 2 EA 519, where the court of appeal cited with approval the case of Pritoo vs. West Nile District Administration [1968] EA 428 at 435E-F .

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard Vs. Sully [1931] 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver”

I find that both defendants liable for the accident jointly and severally, on quantum, I find that the plaintiff suffered pain and was confined to a wheelchair, crutches and walking cane for about one year. The plaintiff also incurred medical expenses as per the receipts and will require future medical expenses which was estimated at Kshs 50,000/-.

The upshot of the above is that judgment is entered for the plaintiff against the defendant jointly and severally as hereunder:

(I) On Liability:

The defendants to bear 70%

(ii) On quantum:

General damages Kshs 600,000/=

Special damages Kshs 64,193/=

Future medical expenses Kshs 50,000/=

714,193

Less 30% 214,258/=

Total award; 499,935/=

The plaintiff shall also have the costs of this suit.

It is so ordered.

Judgment read and signed on 9th day of May 2008

M. KOOME

JUDGE