



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 550 OF 2002

FRANSICA MBITHE NZIU.....1<sup>ST</sup> PLAINTIFF

STEPHEN MAINGI NZIU.....2<sup>ND</sup> PLAINTIFF

VERSUS

DAVID THAIRU MUIRURI.....DEFENDANT

## J U D G M E N T

### **The Pleadings**

1. The Plaintiffs claim arises out of a road traffic accident which occurred on 26/06/2000 along the Nairobi – Thika highway at a place called Juja. Liability for the accident is not denied and consequently interlocutory judgment was entered in favour of the Plaintiff's as against the Defendants on 9/05/2003. The only issue before me is the assessment of damages.

### **The Plaintiffs' Case**

2.The two Plaintiffs testified and said that the accident occurred as a result of the negligent and/or careless manner in which the Defendant his driver and/or agent drove motor vehicle registration No. KAL 073Y along the Nairobi – Thika highway as a result of which the vehicle lost control, rolled four times before hitting a tree; and as a result thereof the two Plaintiffs suffered severe injuries.

### **Injuries of the 1<sup>st</sup> Plaintiff**

3. Medical reports on the injuries sustained by both Plaintiffs were produced by consent of the parties. The 1<sup>st</sup> Plaintiff is a paraplegic after sustaining an injury to her spinal cord. On the day of the hearing, she appeared in a wheelchair. She told the court that she was unable to control her urine and was thus confined to the use of a catheter on a 24 hour basis. She also said that because of the injuries she had to open her bowels manually and needs the help of an aid all the time.

4. The 1<sup>st</sup> Plaintiff testified that before the accident, she was a businesswoman and farmer. That she used to buy and sell clothes and that she used to make Kshs.50,000/= p.m. in profit from that business while she used to make about Kshs.30,000/= from sale of milk and about Kshs.25,000/= from the sale of maize, making a total of Kshs.105,000/= per month. The 1<sup>st</sup> Plaintiff could however not produce any documents to support her alleged earnings. She also stated that she pays the sum of Kshs.10,000/= p.m. to her nurse aid, but again there was no documentary evidence to support this claim. The 1<sup>st</sup> Plaintiff was said to be

47 years old in the year 2006 when the accident that eventually paralyzed her occurred.

## **2<sup>nd</sup> Plaintiff's Injuries**

5. The 2<sup>nd</sup> Plaintiff testified that he had suffered injuries on the head and back and that as a result thereof, he still suffers headaches and backaches. This oral testimony by the 2<sup>nd</sup> Plaintiff was at variance with what was pleaded in the plaint where he averred he had suffered injuries on the chest and other parts of the body. The doctor's evidence (Dr. Mulingwa) shows that the 2<sup>nd</sup> Plaintiff sustained chest soft tissue injuries; the 2<sup>nd</sup> Plaintiff was said to be.

## **Submissions on Quantum**

### **1<sup>st</sup> Plaintiff**

6. Counsel for the Plaintiffs has quantified damages for the 1<sup>st</sup> Plaintiff at Kshs.5 360 000.00 made up as follows:-

(i) General damages for pain - Kshs.3,500,000.00

and suffering and loss of amenities

(ii) Loss of earnings - Kshs. 900,000.00

(iii) Domestic Help - Kshs. 960,000.00

The 1<sup>st</sup> Plaintiff relied on a number of authorities among them –

**(a) Nkr HCCC No. 85 of 1996 – Humprey Muigana & Another vs Robert Kibibiri Gichuki & Another**

**(b) Nkr Nicholas Wahuho Ngamau –vs- Musa Sirma – HCCC No. 177 of 1998 cited in Kibibiri's case.**

7. In the **Ngamau** case, the deceased was 46 years old at time of the accident. A multiplier of 12 was taken while in the **Kibibiri** case, the deceased was 43 years old at time of accident. A multiplier of 10 was used. Counsel for the Plaintiffs urged the court to use a multiplier of 10 years for the 1<sup>st</sup> Plaintiff and to find and hold that the 1<sup>st</sup> Plaintiff did business from which she made Kshs.50,000/= p.m., practised dairy farming from which she made Kshs.30,000/= p.m. and maize farming from which she made Kshs.25,000/= p.m. Counsel relied on Nkr HCCC No. 183 of 1999 **Magdalen Chebet Sigei –vs- Joseph Njogu Mwaura** and especially so since the Defendant has not disputed that the 1<sup>st</sup> Plaintiff was engaged in these activities. In the **Sigei** case, the Plaintiff had no documentary proof of her business earnings, but the court believed that she did business and assessed her profits at Kshs.3,000/= p.m. and applied the multiplier of 10. Counsel for the Plaintiffs in the instant case made a similar submission in respect of the nurse aid expenses; and asked the court to find and to hold that the fact of the 1<sup>st</sup> Plaintiff being bound to a wheelchair necessitated housekeeping help. Counsel also relied on **Nkr HCCC No.333 of 1999 – Joel Kipruto Chepkwony –vs- Aser Kipkosgei Philomen** in which the Plaintiff who suffered less severe injuries than the 1<sup>st</sup> Plaintiff herein was awarded Kshs.2 500 000/= in general damages.

8. The Defendant submitted that a sum of Kshs.1600000/= would reasonably compensate the 1<sup>st</sup> Plaintiff in general damages for pain, suffering and loss of amenities; based on the following authorities:-

**(a) Msa HCCC No. 198 of 2003 – Simon Mwangi Mureithi –vs- Martin O. Shikuku** in which the Plaintiff suffered complete paraplegia and had to use a wheelchair for the rest of his life. An award of Kshs.1 500 000/= in general damages for pain, suffering and loss of amenities was made.

(b) **Nrb. HCCC No. 1728 of 1999 – Rueben Memo Werunga –vs- Michael Odindo.** The Plaintiff suffered a fracture of cervical spine C6 and the lumbar spine fracture L4 resulting in paralysis. He was awarded 1,500,000/= in general damages for pain, suffering and loss of amenities.

### **The 2<sup>nd</sup> Plaintiff**

9. Counsel for the Plaintiffs proposed a figure of Kshs.80,000/= in general damages for pain suffering and loss of amenities. Counsel relied on **Johnstone M. Ochieng & Others –vs- C.C.L. Limited & Another (HCCC No. 309 of 1998)**. The 3<sup>rd</sup> Plaintiff therein, who suffered injuries similar to those suffered by the 2<sup>nd</sup> Plaintiff herein was awarded Kshs.80,000/= for pain suffering and loss of amenities.

10. The Defendant submitted that the 2<sup>nd</sup> Plaintiff has not made out a case for the reliefs sought; mainly because, the Defendant contends, the 2<sup>nd</sup> Plaintiff's testimony is a variance with the medical report made by Dr. Mulingwa. According to the doctor the 2<sup>nd</sup> Plaintiff suffered soft tissue chest injuries. During cross examination, the 2<sup>nd</sup> Plaintiff stated that he had complained of chest pains as well when he went to the hospital. The Defendant has urged the court to consider only the injuries shown in the medical report and to award the sum of Kshs.50,000/- in general damages for pain suffering and loss of amenities. Counsel for the Defendant relied on the following authorities –

(i) *Nrb HCCC No. 3944 of 1990 – Kenneth Onyango & 4 Others –vs- Hassan Genya Juma & Another (Mwera J on 5/11/92) gave Kshs.40,000/= in general damages for pain suffering and loss of amenities.*

(ii) *Nrb HCCC No.2001 of 1992 – John Otieno Ojwok –vs- Samuel Onyango Abunga & Another. The Plaintiff sustained soft tissue injuries to the chest, cut wound on the left leg and sprain of metacarpal phalangeal joint. The injuries healed fully. An award of Kshs.30,000/= in general damages for pain suffering and loss of amenities was made.*

### **Findings and Awards**

#### **1<sup>st</sup> Plaintiff**

11. There is no dispute on the injuries sustained by the 1<sup>st</sup> Plaintiff and the fact that she is a complete paraplegic confined to a wheel chair for the rest of her life. She has a permanent catheter for removal of urine and because her bowels do not open naturally, she has to use her hand to empty her bowels. According to PExhibit 3 – Dr. Mulingwa's medical report dated 25/06/2003, the 1<sup>st</sup> Plaintiff suffered compression fracture T12 plus soft tissue injuries of the chest. According to the medical report by Prof. Mbindyo, the 1<sup>st</sup> Plaintiff will need constant following and physiotherapy management throughout her life and will be permanently put on a wheel chair.

12. The 1<sup>st</sup> Plaintiff testified and told the court that she became unconscious on impact and came to a day later at the Thika General hospital, casualty ward. She also said that thereafter she was admitted to ward 2 of the same hospital for two months. The medical report by Prof. Mbindyo shows that the injuries sustained by the 1<sup>st</sup> Plaintiff were very serious injuries and that because of the paraplegia, she will have to use a wheelchair for the rest of her life and will also require the services of a nurse aid. In the circumstances, I think that a sum of Kshs.3,000,000/= (Kenya Shillings Three Million) will be reasonable compensation for pain suffering and loss of amenities.

13. With regard to lost earnings, the 1<sup>st</sup> Plaintiff testified that she was engaged in both business and farming and that she used to make a total of Kshs.105,000/= per month from business and farming. The 1<sup>st</sup> Plaintiff did not however produce documentary proof of these earnings, but the Defendant does not dispute or deny the fact that the 1<sup>st</sup> Plaintiff was engaged in these activities. Mr. Kisebu for the Plaintiff has proposed an average income of Kshs.7500/= for these activities and a multiplier of 10. In my estimation, an average figure of Kshs.7,000/= would be reasonable in the circumstances:-

700 x 12 x 10 = Kshs.840,000/=.

14. The Plaintiff also testified concerning the need for a nurse aid. The Plaintiff is unable to do anything for herself – not even moving from the wheelchair into bed. She said she pays the nurse aid Kshs.10,000/= per month but again had no documentary proof of the same. Both doctors are in agreement that the 1<sup>st</sup> Plaintiff must have this help. Counsel for the Plaintiff proposes a sum of Kshs.8,000/= per month. I think that in a rural setting such an amount would be on the higher side. In my estimation, a figure of Kshs.5,000/= per month would be reasonable and a multiplier of 10 –

5000 x 12 x 10 = Kshs.600,000/=.

15. On future expenses, I would agree with Mrs. Njuguna for the Defendant that though the two medical reports point to these, the same are not pleaded in the plaint nor did the 1<sup>st</sup> Plaintiff say during her testimony that she wanted the same paid. In the circumstances, I make no award under this head. I also make no award under special damages, which though pleaded, were not specifically proved. Infact the Plaintiff abandoned the claim in the matter submissions.

**The 2<sup>nd</sup> Plaintiff**

16. The 2<sup>nd</sup> Plaintiff suffered only minor injuries for which the Defendant proposes a figure of Kshs.30,000/= in general damages for pain, suffering and loss of amenities. It is to be noted that there was some discrepancy in the description of the injuries sustained by the 2<sup>nd</sup> Plaintiff. In the plaint, it is averred that he suffered soft tissue injuries on the chest and “*other parts of the body*” but the other parts of the body were not identified. When he gave evidence, he said he suffered injuries on the head and back. Counsel for the Plaintiff’s concedes that there are these discrepancies but asks for Kshs.80,000/= in damages for pain suffering and loss of amenities. I have considered the authorities cited to me by both counsel and I am of the view that Kshs.50,000/= as proposed by the Defendant in general damages for pain suffering and loss of amenities would adequately compensate the 2<sup>nd</sup> Plaintiff. I make no award of special damages as none were strictly proved.

**Conclusion**

17. In conclusion I enter judgment for the Plaintiffs against the Defendants, jointly and severally as follows:-

**1<sup>st</sup> Plaintiff**

(a) General damages for pain, and

suffering and loss of amenities.....Kshs.3,000,000.00

(b) Loss of Earnings.....Kshs. 840,000.00

(c) Domestic Help.....Kshs. 600,000.00

Total                    **Kshs.4,440,000.00**

**2<sup>nd</sup> Plaintiff**

General damages for pain and

Suffering and loss of amenities.....Kshs. 50,000.00

18 The Plaintiffs will also have the costs of the suit and interest on general damages from the date of judgment.

It is so ordered.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of September, 2008**

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:**

Mr. Kisebu (present) for the Plaintiff

Mrs. Githenga holding brief for the Defendant