



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Case 478 of 2007**

**SOFIA YUSUF KANYARE .....PLAINTIFF**

**VERSUS**

**ALI ABDI SABRE.....1<sup>ST</sup> DEFENDANT**

**EDWARD NTONGA MAIRABU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The plaintiff moved to this court vide a plaint dated 19<sup>th</sup> March 2007 and filed the same date. In it, she seeks both special damages arising from injuries sustained in an accident she was involved in while travelling in the defendants motor vehicle registration number KAT 041 C. The said vehicle is alleged to have been badly driven by the second defendant in the cause of his employment, and within the scope of his authority, as the employee, servant, and or agent of the 1<sup>st</sup> defendant. It is further averred that the plaintiff was a faire paying passenger in the said vehicle.

The course of the accident is blamed on the driver as particularized in paragraph 5 of the plaint. The injuries suffered by the plaintiff are set out in paragraph 6 of the plaint. In consequence thereof the plaintiff seeks special damages specified in paragraph 7 of the plaint and general damages, loss of earnings, costs of artificial limb, interest at court rates, and any other or further reliefs as this court, may deem fit to grant.

The record reveals that the defence did not respond to the summons and this earned the plaintiff interlocutory judgement entered on 7<sup>th</sup> day of February 2008 hence proceeding by way of formal proof.

The plaintiff was the sole witness. She reiterated the averments in the plaint and added the following:-

§ She was on safari on 11.10.2005 heading to Lokichogio.

§ On reaching Lokichar, she woke up to find her hand trapped in two metals. She was unable to pull it out. She was assisted but the fore hand remained in the vehicle.

§ The accident was self involving and probably due to speeding.

§ She was admitted for 2 months and latter discharged. She hired legal services and had the suit filed. Later changed counsel who conducted the trial.

Counsel filed written submissions. The salient features of the same are as follows:-

(i). That the plaintiff was a faire paying passenger in the accident vehicle.

(ii). On the day of the accident, the vehicle was over speeding and it was involved in a self involving accident.

(iii). The plaintiffs' right hand stuck in the steel rails of the seat of the vehicle which led to the loss of the forearm of her right hand when she was pulled out by rescuers.

(iv). That the accident was caused by over speeding.

(v). Police findings reveal that the accident was due to careless driving by the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant who is vicariously liable for the torts of his employee.

(vi). After the accident, the plaintiff was injured and hospitalized and has medical reports.

(vii). That demand and notice was served.

(viii). The injuries sustained by the plaintiff are listed as:-

§ Head injury,

§ Loss of now over six teeth,

§ Amputation of the right upper limb,

§ Cuts over left upper limb,

§ Stitching of a few cuts.

(ix). The plaintiff still undergoes pain and requires further medical attention.

On liability counsel submitted that this is not in dispute as the defendants never entered appearance and filed a defence.

On special damages counsel submitted that the plaintiff should be awarded the amount claimed plus the amount indicated on the receipts produced.

On general damages counsel maintained that in view of the nature of injuries sustained, the nature of the business the plaintiff was engaged in the long term effect and the trauma underwent and pain the plaintiff, underwent, upon losing her six teeth and the pain she undergoes daily, fact that she no longer functions as she used to do, and needs help on a daily basis, because of the amputation, and the fact that further medical expenses await her, and for this reason counsel suggested a figure of Kshs.5,000,000.00 as compensation.

On case law counsel referred the court to the case of **NAOMI WANGUI ROMANO VERSUS ALICE WANJIKU AND ANOTHER, NAIROBI HCCC NO. 223 OF 1996** Consolidated with the case of **ESTHER KIRIGU ROMANO VERSUS ALICE WANJIKU AND ANOTHER, NAIROBI HCCC NUMBER 230 OF 1996**. The plaintiffs in these two cases were fare paying passengers. The course of the accident was attributed to overspeeding. The defence gave no evidence. The court held the 2<sup>nd</sup> defendant who was the driver to have been grossly negligent and wholly to blame for the accident. The first defendant was found to have been the owner of the motor vehicle for whom and with whose permission the 2<sup>nd</sup> defendant was driving the vehicle was held to be vicariously liable.

On quantum, for the plaintiff Naomi Wanjiku Romano who was aged 15 years as at the time of the accident and 20 years as at the time of the trial, had suffered head injury, cerebral concussion, crush injury to right arm, leading to above elbow amputation of the same and deep abrasion over the right breast with loss of flesh, the court awarded the following:-

- § Damages for pain suffering and loss of amenities – Kshs.1,350,000.00
- § Cost of prosthesis – Kshs.400,000.00
- § Domestic help – Kshs.39,680.00
- § Special damages – Kshs.94,100.00

**Total – Kshs.2,235,780.00**

For Esther Kirigo who was 61 years at the time of trial, sustained a cut on the right ear lobe, with penetrating injury to the right shoulder region, hospitalized for 4 weeks. The court awarded:-

- § Damages for pain and suffering –Kshs.300,000,00.
- § Cost of future reconstruction and repair of the ear – Kshs.200,000,00.
- § Special damages – Kshs.9,450,00.

**Total – Kshs.500,450.00.**

The case was decided on 25.1.2001.

The court was also referred to the case of **RAPHAEL OLOO VERSUS INDUSTRIAL PLANT EA LTD. NAIROBI HCCC NO. 4400/87**. Where the plaintiff sustained injuries at the place of work. The defendant did not tender evidence. The plaintiff sustained injuries to the lower back and lost six teeth. The court awarded:-

- § General damages – Kshs.1,000,000.00
- § Loss of earnings – Kshs.468,000.00
- § Special damages – Kshs.4,000.00

Sub-total – Kshs.1,472,000.00 less paid under workman's compensation of Kshs.18,958.30 leaving a balance of Kshs.1,453,041.70. The case was decided on 31.1.2001.

On the courts assessment of the facts herein, it is clear that the defence tendered no evidence, as such the court, has to act only on the basis of the plaintiffs pleadings and evidence to determine:-

- (1) Liability of the defendants.
- (2) Quantum of damages.

On liability, the court, is guided by the provisions of Order VI Rule 9 (1) Civil Procedure Rules which makes provision that, failure to controvert a pleading operates as an admission subject to proof of the said claims by the required standards. By virtue of this provision this court, makes a finding that the defendant by failing to enter appearance and file a defence is deemed to have admitted the allegation of the plaintiff save as to damages which the law requires to be proved by the required standards.

The required standards have been set by case law. In the case of **BACHU VERSUS WAINAINA [1982] KLR 108**, it was held inter alia that at the exparte hearing, the plaintiff was under a legal duty to prove his case against both the defendants.

- (2) The burden of formal proof is the same as that required in any civil case.

The case of **KABUGI AND ANOTHER VERSUS KABIYA AND 3 OTHERS [1987] KLR 347** also a court, of appeal decision, where it was held inter alia that the burden on a plaintiff to prove his case remains the same throughout the proceedings, even though the burden only becomes easier to discharge where the matter is not validly defended.

Applying these two guiding principles to the facts herein, the court, is satisfied that the lack of the defence pleading, and evidence, does not give the plaintiff a clean bill of success. She needs to establish her claim against the defendant.

On liability the plaintiff is required to furnish proof of the defendants' link to the accident vehicle, in terms of ownership and driving followed by establishment of blame worthiness in her favour. On ownership, the plaintiff has produced exhibit 7 (a) a letter by her counsel then on record addressed to the Registrar of motor vehicles dated 12.10.2006 inquiring about the ownership of the motor vehicle KAJ 041 C as of 11<sup>th</sup> October 2005. A copy of the records exhibit 7 (c) dated 12.11.200 reveals that motor vehicle KAJ 041 C a Nissan Datsun bus/coach was owned by one Ali Abdi Sabre and CMC Motors Group P.O. Box 30135, Nairobi who has been named as the first defendant. The police abstract exhibited lists the 2<sup>nd</sup> defendant as the driver. There is no contrary evidence to disprove the documentary evidence. On that account the court, is satisfied that the first and second defendants are the proper persons to answer the plaintiffs claim herein.

On the causation of the accident, the plaintiff relies on the content of the abstract exhibit 1, to the effect that the driver was to be charged with the offence of careless driving. However, this was not conclusive as the matter was still pending under investigation. That notwithstanding there is P.W.1's evidence that the vehicle appear to have been speeding, the accident was self involving. In the absence of any contrary explanation, the only reasonable inference that can be drawn from the circumstances, is that, the vehicle was being negligently driven. The plaintiff as a passenger had no control over the manner of driving. The driver takes full responsibility for that and since he was in the course of his employment, he binds the employer vicariously. The defendants are therefore to be held 100 % liable for the injuries sustained by the plaintiffs.

Having established liability the court comes to the assessment of damages. The heads claimed fall under special and general damages. On special damages, the law is that this court, has judicial notice of, requires that these be specifically pleaded and proved. In the plaint the plaintiff has pleaded Kshs.4,100.00. Mode of proof required in law is production of receipts. There is on record exhibit 9 (b) as search fee with the Registrar of motors to the tune of 500/=, exhibit 6 (c) to the tune of Kshs.8,675/= as advocates fees, bus tickets exhibit 9 (a), (b) for Kshs.1,200.00, exhibit 10 (b) (c) being receipts for payment of medical fees to the tune of Kshs.3,060.00. These total Kshs.17,035.00. Counsel has urged the court to allow the amounts in the receipts. Counsel had an opportunity to apply orally to amend those figures but he did not. The request is made in the submissions. It will be unprocedural for the court, to amend pleadings on the basis of a request through submissions. For this reason the court will only allow the amount claimed of Kshs.4,100.00 as specials.

On general damages, the P3 exhibit 2 lists the plaintiff as having sustained:-

- (1) Crushed right hand, multiple cuts due to the accident.
- (2) Suffered shock.
- (3) Was not unconscious.
- (4) Suffered a cut on the fore head.
- (5) Nerve damage on the left side of the face.
- (6) Lost 2 upper molars and 2 upper incisors.

(7) The crushed upper right hand was non viable. It had been amputated and the stump was healed.

(8) Deep cuts on the left shoulder, arm and hand and pieces of glass were removed and had healed as at the time the P3 was filled.

Exhibit 3 is a document from Lodwar District Hospital proving that the plaintiff had been admitted there with a crushed right hand, deep cuts on the left shoulder, arm and hand, she lost 2 molars on the upper jaw, small cuts on the fore head and two loose incisors which were eventually lost. It is noted that she was taken to the theatre and the crushed hand amputated.

The medical report is produced under exhibit 5 from Lodwar Hospital is dated 24.3.08. It confirms that the plaintiff was admitted at Lodwar District Hospital, after the accident, and it was noted that she had a permanent disability of loss of her right hand, wrist and a phantom limb.

Exhibit 4 is dated 11.11.2006. The findings on examination were listed as:-

1. Ten missing teeth,
2. Several scars on the left upper limb and the same was a bit swollen,
3. Right upper limb amputated from mid fore arm level.
4. 2 inch long operation scar at the end of the amputation stump,
5. Right elbow movements are full and right arm raising movement at the shoulder is restricted to 90 degrees.

The doctors opinion is that the plaintiffs injuries were severe crush injury to right upper limb, some cuts over left upper limb, and loss of some teeth. Loss of 5 teeth was permanent and replacement could cost Kshs.30,000.00 at a Government Hospital, loss of right hand, wrist and half of the forearm are permanent disabilities. She has only one hand to use. A hook type of artificial limb would be suitable for her. Such cosmetic prosthesis could cost Kshs.15,000.00 to Kshs.50,000.00.

The doctor went on to note that imported electronic prosthesis are extremely expensive and give only a limited function and technology in Kenya is not good enough to repair and maintain such artificial limbs. So they are not really recommended. Any artificial limb will give very limited function and so she is going to be very handicapped the rest of her life. Her temporary incapacity could be several months and permanent incapability is 60 %.

There is also communication from City Orthopedic Technology Services dated 20.12.2005. The content reveal that the plaintiff had been assessed and it was recommended that she would require a right below elbow prosthesis, voluntary cable controlled at an estimated cost of Kshs.120,000.00.

On the courts assessment of the injuries as per medical documents exhibited, there is no doubt that the plaintiff suffered both soft tissue injuries and permanent injuries. The soft tissue injuries involve cuts and bruises which have healed leaving scars. The permanent injuries involve the loss of the right fore hand and teeth ten (10) in number. Her life will never be the same again. The doctors opinion that the teeth can be replaced at a cost of Kshs.30,000/= at a Government Hospital. This was the cost of loss of 5 teeth in 2006 giving an average of Kshs.6,000.00 per tooth. When made to cover 10 teeth the costs would come to Kshs.60,000.00 which must have exceeded by now due to the rise in the cost of living. The injury of the lost arm is permanent. She requires a prosthesis. Some City Council facility recommended an electronic one. But the doctor objected to the same because of their disability, lack of repair technology and recommended an ordinary one. The lost right hand is irreplaceable and the prosthesis is simply meant to try and ameliorate the handicap. All these injuries were caused by the fault of the defendants. The plaintiff is therefore entitled to compensation. When assessing damages the court has to bear in mind the following guiding principles:-

- (1). An award of damages is a matter of discretion on the part of the court, seized of the matter.
- (2).The award should not be too high or too low.
- (3)It is not meant to enrich the victim, but to try as much as possible to restore him/her in the positing in which they were in, before the accident.
- (4). Awards in past decisions are meant to be mere guides and each case should depend on its circumstances.
- (5). Where awards in the past decisions are to be taken into consideration, their age, and the rate of inflation as well as the value and the purchasing power of the Kenyan shilling should be taken into consideration.

This court, has applied the afore set out guiding principles to the facts herein, considered the nature and extend of the injuries suffered by the plaintiff, their permanent effect on her. Also considered the awards in the decisions referred to this court, especially the award for **NAOMI WANJIKU RUMANO IN HCCC 2231 OF 1996** decided in January 2001 and the court, doing the best it can, it proceeds to make the following award for general damages.

- (a) Loss of 10 teeth – Kshs.150,000.00.
- (b) Serious soft tissue injuries which healed – Kshs.70,000.00.
- (c) Loss of right upper arm – Kshs.1,750,000.00

Total – Kshs.1,970,000.00.

Also to be considered is cost of an artificial limb or prosthesis. Estimated cost in 2006 was Kshs.50,000.00 which may have more than doubled by now. I therefore allow Kshs.200,000.00 under this head.

I therefore enter judgement for the plaintiff on the following terms as against the defendants jointly and severally:-

- (1) Liability at 100 % as against both defendants, jointly and severally.
- (2) Special damages of Kshs.4,100.00 with interest at court, rates from the date of filing till payment in full.
- (3) General damages for pain, suffering and loss of amenities covering compensation for serious soft tissue injuries, loss of 10 teeth, loss of right upper hand – Kshs.1,970,000.00.
- (ii) Cost of prosthesis at the estimated current rate – Kshs.200,000.00. **Total – Kshs.2,170,000.00.**
- (4) The general damages will carry interest at court, rates from the date of judgement till payment in full.
- (5) The plaintiff will also have costs of the suit.

**DATED, READ AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2008.**

**R. N. NAMBUYE**

**JUDGE**