



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

**Civil Case 86 of 2004**

**JACKLINE A. OBONDO.....PLAINTIFF**

**VERSUS**

**KENYA BUS SERVICES.....1<sup>ST</sup> DEFENDANT**

**PATRICK WAINAINA WAWERU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, Jackline Akinyi Obondo filed suit against the defendants seeking to be paid damages on account of injuries she alleges to have sustained when motor vehicle registration No.KAP 414W which she was travelling in as a fare paying passenger on the 29<sup>th</sup> February, 2004 was involved in an accident along the Kericho-Nakuru road. The plaintiff averred that the said accident was self involving and as a result of the said accident, she sustained serious injuries. The plaintiff attributed the said accident to the negligence of the 2<sup>nd</sup> defendant who was the driver of the said motor vehicle. The plaintiff particularized the particulars of damages in her plaint. She pleaded that the 1<sup>st</sup> defendant was vicariously liable for the acts of the 2<sup>nd</sup> defendant. The plaintiff particularized the injuries that she sustained. The plaintiff pleaded that she should be awarded damages for loss of earning capacity. She urged this court to pay her general and special damages for the said injuries that she sustained.

The defendants filed a defence. They denied that the accident which the plaintiff pleaded in her plaint took place. They further denied that they were the owners of the motor vehicle which was involved in the accident. They denied that they were negligent or that they were responsible for causing the said accident. They further pleaded that the plaintiff contributed to the said accident, by among other things, failing to wear the seat belt and further by jumping out of the said motor vehicle. They denied that the plaintiff sustained the injuries that she claimed to have sustained. After the close of the pleadings, this case was listed for hearing.

At the hearing of the case, the plaintiff called two witnesses in a bid to prove her case against the plaintiff. She testified that on the 29<sup>th</sup> February, 2004 she boarded the 1<sup>st</sup> defendant's motor vehicle registration No. KAP 414W at Bondo. She paid the fare to travel to Nairobi. The journey was uneventful until the motor vehicle went past Kericho when it was involved in an accident. The plaintiff testified that the said accident was caused by the fact that the 2<sup>nd</sup> defendant drove the said bus at a very high speed and when it reached a bend on the road, the driver lost control resulting in the said motor vehicle overturning. The plaintiff testified that the said motor vehicle did not collide with any other motor vehicle. When the accident occurred, she was injured and lost consciousness. She regained consciousness when she was already admitted at the Provincial General Hospital, Nakuru. She produced the discharge summary as *plaintiff's exhibit No.1*. She was later seen by Dr. Ochieng who wrote a medical report. The report of Dr. Ochieng was produced as *plaintiff's exhibit No.2*. She paid Dr. Ochieng Ksh.3,000/= for the preparation

of the said report (*receipt produced as plaintiff's exhibit No.3*).

When she recovered, she made the report to the police at Kericho and was issued with a P3 form. The said P3 form was duly filled by a doctor and was produced as *plaintiff's exhibit No.4*. She was issued with a police abstract report which was produced as *plaintiff's exhibit No.5*. She was X-rayed on her hip joint and hand. The X-rays were produced as *plaintiff's exhibit No.6 (a), (b) & (c)*. She conducted a search at the Registrar of Motor vehicles and established that the said motor vehicle was owned by the 1<sup>st</sup> defendant. The copy of records was produced as *plaintiff's exhibit No.7*. The plaintiff testified that at the time of the accident, she was travelling to Nairobi so that she could train as a hair dresser. She testified that she was 19 years old and had gone to school up to standard 8. Because of the injury that she sustained, that resulted in the amputation of her hand, she would be unable to work as a hair dresser as hair dressing required the use of two hands. She further testified that she paid the sum of Ksh.4,760/= before she was discharged from hospital. She testified that she would require the sum of Ksh.200,000/= to be fitted with an artificial arm. She testified that as a hair dresser, she expected to earn a salary of Ksh.8,000/= per month. She conceded that although she was one armed, she was not totally incapacitated that she could not do the work which a one handed person can do. She reiterated that it was the 2<sup>nd</sup> defendant's negligence that caused the accident.

PW2, Dr. Athanasius Kacera Ochieng testified that he examined the plaintiff on the 23<sup>rd</sup> June, 2004. He noted that the plaintiff had sustained severe comminuted compound fracture of the left radius and ulna bones which had led to the amputation of the left fore arm below the elbow. She had sprained her left hip. She had suffered brain concussion. She was treated at the Provincial General Hospital, Nakuru as an inpatient from the 29<sup>th</sup> February, 2004 to the 8<sup>th</sup> March, 2004. At the time of examination, the injuries which the plaintiff had sustained had healed and the amputation stump had also healed. He testified that the plaintiff would require to be fitted with an artificial arm which would cost a sum of Ksh.200,000/=. He assessed the degree of permanent injury to be 50%. He conceded that he had relied on the medical records of the plaintiff and particularly the discharge summary from the Provincial General Hospital, Nakuru. He conceded that in the discharge summary, it was not indicated that the plaintiff had sustained brain concussion or had been treated for spraining her left hip joint.

PW3, PC Dan Omachode produced the P3 form and the police abstract as exhibits in the case. He testified that after the accident had occurred on the 29<sup>th</sup> February 2004, the same was reported at Kericho Police Station. The investigations commenced. The police established that the accident was self involving. He testified that from the records of the police, no one was to blame for the accident. The driver of the bus was not charged with violating any traffic offence. The plaintiff then closed her case. The defendant did not call any witness other than to produce a medical report prepared by Dr. Andrew Otieno as *defence exhibit No.1*. After the close of both the plaintiff's and defendant's case, the parties agreed to file closing written submissions. They both filed the said closing written submissions.

I have carefully read the pleadings filed by the parties in this case. I have also carefully considered the evidence that was adduced by the plaintiff and the medical report that was produced by the defendants in this case. I have also considered the written submissions filed by the plaintiff and the defendants. The issues for determination by this court are two fold; whether the defendants were to blame for the accident that resulted in the injuries that the plaintiff sustained. The other issue for determination, if the first issue above is determined in favour of the plaintiff, is what damages should be paid to the plaintiff for the said injuries that she alleges to have sustained. As to the first issue, it was the plaintiff's evidence that as she was travelling in motor vehicle registration No.KAP 414W as a fare paying passenger on the 29<sup>th</sup> February 2004, the said motor vehicle was involved in an accident along the Nakuru-Kericho road. The said accident was investigated by the police. It was self involving. It is apparent that the driver of the said motor vehicle lost control of the said motor vehicle resulting in the said accident. The police did not blame anyone for the said accident.

However, upon evaluating the evidence on record, it is clear that when the plaintiff boarded the said motor vehicle at Bondo, she expected to be ferried safely to her destination, Nairobi. She did not reach safely to her destination. The bus which she was travelling in was involved in an accident as a

consequence of which she was injured. I agree with the finding of the Court of Appeal in the case of **Embu Public Road Services Ltd vs Riimi [1968] EA 22** where it was held that where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.

In the present case, it is clear that if the driver of the bus had carefully driven the said bus, the said bus could not have been involved in the said accident. The 2<sup>nd</sup> defendant did not offer any evidence to exonerate himself from blame for causing the said accident. In the circumstances therefore, having carefully evaluated the evidence on record, I do hold that the plaintiff has established, on a balance of probabilities, that the defendants were negligent. The 2<sup>nd</sup> defendant is solely to blame for causing the said accident. The 1<sup>st</sup> defendant is vicariously liable for the acts of the 2<sup>nd</sup> defendant. I therefore hold that the defendants shall be jointly and severally liable on in negligence to the extent of 100%.

On quantum, the plaintiff sustained the following injuries according to the medical reports which were prepared by Dr. a. Kasera Ochieng and Dr. Andrew Otieno;-

Head injury, severe comminute compound fracture of the left radius and ulna leading to amputation of the left fore arm below the elbow, dislocation of the left hip joint, blunt injury on the abdomen and on the back. The last two injuries are soft tissue injuries.

Dr. Ochieng and Dr. Otieno were of the opinion that the degree of permanent disability that the plaintiff had sustained was 50%.

In his submissions before court, the plaintiff relied on the decision of **Nairobi HCC No.223 of 1996 Naomi Wanjiku Romano vs Alice Wanjiku Kimani & another (unreported)**, where the plaintiff had sustained an amputation injury of the elbow and was awarded Ksh.1,350,000/=. The said decision was delivered in 2001. On their part, the defendants relied on the decision made in **Mombasa CA Civil Appeal No.555 of 1989 (unreported)**, where the plaintiff had similarly sustained an amputation fracture of the right forearm. The plaintiff was awarded Ksh.260,000/= general damages. The said decision was delivered on the 20<sup>th</sup> June, 1989.

I have carefully considered the said submission made by the plaintiff and the defendant. I am of the considered opinion that the award of Ksh.1,350,000/= made in the case referred to by the plaintiff was a bit on the higher side whilst the case referred by the defendant is outdated. This court had occasion to deal with a case where a plaintiff had sustained injuries which led to his right hand being rendered completely useless. The degree of permanent injury in the said case was assessed at 30%. The case is **Kericho HCCC No.70 of 2000, Philip Kipkorir Cheruiyot vs Nebco K. Ltd & Another (unreported)**. This court awarded the plaintiff general damages of Ksh.600,000/=.

Taking into consideration that the degree of permanent disability by the plaintiff has been assessed at 50% and doing the best that I can in the circumstances, I will award the plaintiff general damages assessed at Ksh.750,000/=. I will further award the plaintiff the sum of Ksh.200,000/= being the cost of being fitted with an artificial arm. I will not make any award under the head of loss of earning capacity, because in my view, once this court has made an award that would enable the plaintiff to be fitted with an artificial hand, it would be unnecessary for this court to make another award for loss of earning capacity. If this court did that, it would amount to the plaintiff benefiting from her misfortune and not being compensated for the injury that she sustained. The plaintiff proved that she paid Ksh.3,000/= to Dr. Ochieng to prepare the medical report. She further proved that she paid Ksh.4,760/= to the Provincial General Hospital, Nakuru when she was admitted after the accident. She is thus awarded Ksh.7,760/= special damages.

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

**(i) On Liability,**

The defendants are hereby held to be 100% liable.

**(ii) On quantum**

- (a) General damages for pain, suffering and loss of amenities.. ..Ksh.750,000.00
- (b) Cost of artificial arm . . . .Ksh.200,000.00
- (c) Proven Special damages ..Ksh. 7,760.00

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**TOTAL Ksh.963,760.00**

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- (iii) The plaintiff shall have the costs of the suit.
- (iv) Interest on the sum awarded shall be paid from the date of delivery of this judgment.

**DATED at KERICHO this 22<sup>nd</sup> day of March, 2007**

**L. KIMARU**  
**JUDGE**