



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 658 OF 2004
SALOME WAKARINDI WACHIRAPLAINTIFF

V E R S U S

- 1. SIGNON FREIGHT LTD**
- 2. FRANCIS KIPKOSGEI MITEI**
- 3. AUTOMOBILE ASSOCIATION OF KENYA**
- 4. LUCAS NDWIGA NJUNODEFENDANTS**

J U D G M E N T

This is a “**running down**” case in which the Plaintiff claims the following:-

- (i) Special damages of KShs. 38,130/00.
- (ii) General damages for pain, suffering and loss of amenities.
- (iii) Future medical expenses.
- (iv) General damages for loss of earnings and loss of earning capacity.
- (v) Costs of the suit.
- (vi) Interest on all the awards at court rates.

The accident occurred on 9th March, 2004 at about 1.50 p.m. when the Plaintiff was run down along the Nairobi–Mombasa road within the city of Nairobi. She was working in the Environment Department of the City Council of Nairobi and was at that time performing her duties of collecting litter along the highway. The motor vehicle that run her down was registration number KAM 447H, a Mercedes Benz lorry which was pulling a trailer. It was owned by the 1st Defendant and driven by its servant or agent, the 2nd Defendant. There was another motor vehicle involved in the accident. It was registration number KAQ 896R, an Isuzu Canter, owned by the 3rd Defendant and driven by its servant or agent, the 4th Defendant.

On 9th July, 2007 a consent order was recorded which settled the issue of liability as between the Plaintiff

and the Defendants and as between the Defendants themselves. By that consent the Plaintiff would shoulder 20% of the liability, the 1st and 2nd Defendants, jointly and severally, 60% and the 3rd and 4th Defendants, again jointly and severally, 20%. Judgment on liability was accordingly entered.

On 14th November, 2007 I heard the case for purposes of assessment of damages. Only the Plaintiff testified. However, by the aforementioned consent order recorded on 9th July, 2007, some sixteen (16) documents were admitted into evidence. They included three medical reports as follows:-

1. By DR. J. K. MOGIRE dated 7th May, 2004 (Exhibit P4).
2. By DR. R. P. SHAH dated 8th October, 2004 (Exhibit D2).
3. By DR. WAMBUGU P. M. dated 1st December, 2005 (Exhibit D1)

There was also a medical discharge summary dated 24th March, 2004 (Exhibit P2) issued by Kenyatta National Hospital.

By her testimony the Plaintiff sustained the following injuries:-

- (i) Amputation of the right leg above the knee (about mid-thigh).
- (ii) Injury to the chest.
- (iii) Injury to the left ribs.
- (iv) Closed injury to the left leg and hip.
- (v) Abrasions to both arms.
- (vi) Closed injury to the back.

She was hit by the lorry as she worked along the road. The trailer that the lorry was pulling lay on her. She lost consciousness. She came to in the ward at Kenyatta National Hospital. By that time her right leg had already been amputated. She had pains all over her body and could not do anything for herself. She had to be fed like a baby.

The Plaintiff further testified that she still aches all over the body; the lower back and left rib-cage are especially bad. She uses crutches to hobble about with difficulty and pain. A prosthesis was fitted to her right leg; but she cannot walk with it without crutches. It is a cheap prosthesis which does not fit her well at all. She could not afford to buy a good prosthesis.

She also testified that she is unable to sit for a long time because of the pain in her back. If she walks for a distance her left leg swells and pains a lot. She now has high blood pressure which she attributes to her inactive life-style forced upon her by the injuries she suffered in the accident. Relieving herself is a problem because she cannot squat; as a result she soils herself with urine.

I have read (as best I could) the handwritten discharge summary (Exhibit P2). It shows that the Plaintiff was admitted at Kenyatta National Hospital on 9th March, 2004 following a road traffic accident. She had a crush injury of the right leg and was in shock due to loss of blood. She also complained of back pains. She was taken to theatre where her right leg was amputated above the knee. She was then heavily bandaged. She also received some blood transfusion. The amputation wound was cleaned and dressed daily until she was discharged to the orthopedic clinic for follow-up. Daily cleaning and dressing of the wound would continue until it was fully healed.

I have also read the three medical reports by Dr. J. K. Mogire (Exhibit P4), Dr. R. P. Shah (Exhibit

D2) and Dr. Wambugu P. M. (Exhibit D1). Dr. Mogire examined the Plaintiff on 7th May, 2004, about two months after the accident. His report says that on arrival at hospital she was noted to have sustained:-

1. Injuries to the head resulting in loss of consciousness for about 8 hours. X-ray examination of the head did not disclose any fractures.
2. Injuries to the chest, especially in the rib-cage over the left side, without fractures or haemopneumothorax (?)
3. Deep abrasions over the extension surface of the right elbow, but no underlying fractures.
4. Mangled right lower limb with severely crashed soft tissues and bones from mid-thigh and elbow.

Emergency surgery was arranged and the right leg was amputated above the knee about mid-thigh.

Dr. Mogire observed that the Plaintiff had made good recovery from her injuries, though she still had chest pains which were controlled by mild analgesics. The amputation wound had healed but with residual significant pain of multiple origins. He noted especially that the Plaintiff suffered “**phantom**” limb pain, a phenomenon where the severed limb is perceived to be still present and often painful or itchy. Dr. Mogire says this is “**extremely disturbing to the extent of requiring psychiatric care and psychotropic medication.**”

The doctor also noted that the Plaintiff would benefit from an artificial limb once the amputation scar had healed; it would have to be a “**hip-level bearing prosthesis which would attract enormous financial cost, especially taking into consideration her female anatomy**”. He estimated this cost at about KShs. 1 million. He concluded that there was a possible risk of “**fits, mood disturbances, dementia, etc**”. She would require continued medical care for the remainder of her life. He graded the loss of the limb as constituting 50% total permanent disability.

Dr. Shah examined the Plaintiff on 8th October, 2004, about seven (7) months after the accident. He noted that there was no mention of any injury to the head, chest or shoulder in the Kenyatta National Hospital discharge summary or any other evidence that those injuries were sustained. The Plaintiff’s amputated leg stump showed excellent soft-tissue cover, with no pain or other symptoms expected; at any rate, the Plaintiff did not complain of any pain or other symptoms. He noted the availability of good artificial limbs in Kenya at about KShs. 50,000/00 that last about 15 years; the Plaintiff could be fitted with one once her amputation wound had healed.

Dr. Wambugu P. M. examined the Plaintiff on 1st December, 2005, that is, about one year and nine months after the accident. He noted her injuries as traumatic amputation of the right leg following a severely comminuted fracture and blunt chest trauma. Her complaints were painful right amputation stump, “**phantom**” limb pains and inability to walk unaided. She found the “**Jaiper**” artificial limb fitted on her to be heavy and cumbersome and she had to use two elbow crutches. He recommended light-weight functional leg prosthesis to improve her mobility. This was available in Kenya and would cost about KShs. 40,000/00, including fitting and training, and would last 4 to 5 years. He assessed her total permanent incapacitation at 70% due to the loss of the leg.

I have considered the Plaintiff’s testimony, the discharge summary and the three medical reports. She suffered a severe blunt crushing trauma that resulted in a mangled right lower limb from the mid-thigh down. The injury was so severe that the limb had to be amputated at about mid-thigh. Following the accident the Plaintiff was unconscious for about 8 hours. She was admitted in hospital for 15 days. She also suffered blunt trauma to the chest and cuts and abrasions all over the body. This was to be expected; given that she was knocked down by a lorry and the trailer it was pulling lay on her. She underwent a long and painful recuperation. Having lost one of her lower limbs, she will never be the same woman again. She is no longer able to walk properly, but I note this problem will be alleviated once she is fitted with a proper artificial limb. In this respect I accept the assessments of both Dr. Shah and Dr. Wambugu P. M. that a good quality artificial limb will be locally available. There is also the residual effect on her

due to the amputation, especially the “**phantom**” leg pain that Dr. Mogire says is disturbing.

Finally, I note the Plaintiff’s permanent total disability. Dr. Mogire assesses it at 50% and Dr. Wambugu P. M. at 70%. Dr. Shah is silent on this.

I have also considered the written submissions of the learned counsels including the various cases cited. I did not find the cases cited by the Plaintiff’s learned counsel to be helpful. They all involved different kinds of injury, mainly to the spinal cord or pelvis. They are not germane to the Plaintiff’s injuries. He suggested general damages for pain, suffering and loss amenities of KShs. 2 million.

The 1st and 2nd Defendants’ learned counsel cited two cases. The first is **Nairobi HCCC No. 920 of 1990, Stephen Kibet Teigutwo –vs- Stage Coach Limited & Another** (unreported). The injuries here were a crushed left leg and haemorrhagic shock. KShs. 900,000/00 was awarded. The second case was **Nairobi HCCC No. 968 of 1998, Wilson Kuria –vs- Tibi Githiora** (Unreported). The injuries here resulted in amputation of the left leg above the knee. KShs. 450,000/00 was awarded. The 1st and 2nd Defendants’ learned counsel suggested damages of KShs. 1 million for pain, suffering and loss of amenities.

The 3rd and 4th Defendants’ learned counsel cited two old cases. They are both Court of Appeal cases, sitting at Nakuru. The first is **Civil Appeal No. 66 of 1981, Ugenya Bus Service Limited –vs- Gachoki** (Unreported). The Plaintiff’s right leg was amputated below the knee, but he had other injuries. An award of KShs. 200,000/= was upheld. The second case is **Civil Appeal NO. 85 of 1983, Kagagari -vs- Aya** (unreported). Again here there was amputation of the right leg. An award of KShs. 250,000/00 was upheld.

I have considered all the material placed before the court, including the high rate of inflation over the last many years, and the rising cost of living. Doing the best that I can I will award the Plaintiff KShs. 1,200,000/00 for pain, suffering and loss of amenities.

The Plaintiff’s other claims are future medical expenses, general damages for loss of earnings and loss of earning capacity and special damages.

Future Medical Expenses

There is no dispute that the Plaintiff will need an appropriate artificial limb to assist her in mobility. I have noted what the three doctors have said in this regard. I accept that a good light-weight artificial limb at the cost of about KShs. 50,000/00 will be available locally. The same will probably last about 10 years. Given the Plaintiff’s age, I assess that she will probably need to replace the artificial limb two times. I will therefore award her KShs. 150,000/00 for this future medical expenses. It is the only future medical expense that has been proved to the satisfaction of the court.

Loss of Earnings and Earnings Capacity

The Plaintiff was aged about 52 or 53 years at the time of the accident. Her employer retained her in employment until retirement at the age of 55 years. It is not true as she claimed that she was retired on medical grounds due to the injuries she suffered in the accident. She has not proved any lost earnings. Regarding lost earning capacity, there was no evidence of what gainful activity the Plaintiff might have engaged in after retirement were it not for the injuries suffered in the accident. Indeed some people do engage in income-generating activities after retirement; but equally, others do not and just go home to rest. This claim has also not been proved.

Special Damages

These must be specifically pleaded and strictly proved. KShs. 38,130/00 is claimed comprising police abstract (KShs. 200/00), medical report (KShs. 2,000/00) and medical expenses (KShs. 35,930/00). The receipts admitted in evidence prove special damages of KShs. 36,239/00. One payment

of KShs. 31,590/00 was objected to upon the ground that the same was not paid by the Plaintiff herself but by her employer. The invoice is addressed to her. I do not consider that this payment should be denied her merely because someone else paid it for her when she was critically ill and admitted in hospital. I will therefore award the proved amount of KShs. 36,230/00.

In the result I will enter judgment for the Plaintiff in the sum of KShs. 988,984/00 made up as follows:-

(i) General damages for pain, suffering and loss

of amenitiesKShs. 1,200,000.00

(ii) Special damagesKShs. 36,230.00

Total.....KShs. 1,236,230.00 Less 20%
.....KShs. 247,246.00

KShs. 988,984.00

The Defendants shall pay this sum as per the consent recorded on 9th July, 2007.

The Plaintiff shall have her costs of this suit, the same to be reduced by 20% and paid by the Defendant as per the aforesaid consent. There shall be interest on the general damages awarded at court rates from the date of this judgment until payment in full. There will be interest on the special damages and the costs of the suit at court rates from the date of filing suit until payment in full. Those shall be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 7TH DAY OF DECEMBER, 2007

H. P. G. WAWERU

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