



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 723 of 2000

ESTHER INGOLO PLAINTIFF
VERSUS
SWALEH SAID HAMED BILEL
SAMMY KIPTUM
KARISA KATANA NZAO DEFENDANTS

J U D G E M E N T

The Plaintiff amended his plaint and filed the same on 19.9.02. In the pleadings, it is stated that the defendants:

- 1) Swaleh Said Hemed
- 2) Karisa Katana Nzao were the registered owners respectively of KAE 975S Nissan Matatu and KAG 530X Nissan Matatu.

On or about 14.10.97 at about 7.30 the Plaintiff was lawfully traveling as a fare-paying passenger in the motor vehicle KAE 975S along the Malindi-Kilifi Road when the vehicle violently collided with motor vehicle KAG 530X. It is pleaded that the said accident was caused by the negligence of the drivers, agents and or servants of the Defendants respectively and therefore each of the Defendants is vicariously liable.

The particulars of negligence are set out in the plaint. The Injuries suffered are also stated and the special damage including loss of income the total value of special damage is claimed as Sh. 1,923,365.10.

It is also pleaded that at the time of the accident the Plaintiff was a Laboratory Technician earning a monthly sum of Sh. 8,000/=. She prays for special damages for suffering and loss of amenities and for loss of earning capacity with interest and costs.

Statement of defence was filed for first defendant in which the accident is admitted but other allegations are denied. Statement of defence is also filed in respect of now 2nd Defendant who also admitted the accident but denied all other allegations. The 2nd Defendant alleged contributory negligence against the driver of 1st Defendant, KAE 975S and sets out the particulars of negligence.

This being a traffic accident matter the issues are of liability and the assessment of damages.

On liability it was agreed before court on 7.5.03 that Plaintiff will bear 15% and the Defendants 85%. The suit was therefore set down for assessment of damages.

The hearing commenced on 19.6.03 with the Plaintiff testifying first. She stated that on 14.10.97 she boarded a matatu vehicle registration No. KAE 975S. However, the vehicle was involved in a head on

collision with another registration KAG 530X. She sustained injuries on right leg, which was totally crushed on the lower part. She also sustained scratches on leg, face and arms. The right leg was amputated. She had also head injuries and multiple contusion to the chest, neck and back. She was taken to Kilifi Hospital and then transferred to Aga Khan hospital same day.

She was in I.C.U. for seven days and later taken to General ward. She was discharged on 24.10.97. Her right leg was amputated above the knee. She was treated by Dr. Muthuri. She paid Sh. 95, 832/- to the hospital exhibit 1a and 1b. She exhibited receipts for payment to Dr. Muthuri exhibits 2(1-12).

She also exhibited receipts for payment of Sh. 14,366/=. She also exhibited receipts of payments by her sister for Sh. 22,246/=. She also attended physiotherapy at Kilifi and was paying sh. 20/= per session. Her sister was taking to the hospital. She was under crutches over one year and 4 months. She traveled to Tanzania to fit an artificial limb. She incurred transport expenses and accommodation and the artificial limb where she paid Sh. 39,000/-. Exhibit 4 shows a total receipt of Sh. 223,409/=. She obtained medical report exhibit 6. she paid sh. 2,000/= for the examination. She was also examined by Dr. Patel and paid him sh. 2,000/=. She further testified that she has no difficulties in walking long distances because of the artificial limb. She cannot do much. She was fixed with the artificial limb in 1997. she had to employ a maidservant to whom she paid sh. 2,500/- every month.

She further testified that she used to work at Tiomin before the accident and she stopped work on 9.10.97. She said she used to Sh. 8,000/= per month. She produced a copy of the letter she received. She explained that after school form 4, she undertook medical laboratory at Mombasa Polytechnic and Mass Communications in Nairobi. She produced certificates and diplomas. Since the accident, she has not got a job. She produced a Police Abstract for which she paid Sh. 100/-. She was cross-examined by Mr Gor at length about her employment chances in future. It came out that she had tried training and obtaining a job but she was not successful.

In support of the Plaintiff claim, she called Dr. Hemant Patel practicing surgeon in Mombasa who made out a medical report.

It was confirmed that Plaintiff underwent an operation to amputate her leg above the knee and there was prolonged treatment of infected stump and that she was fitted with an artificial limb which was heavy and was causing her pain. The doctor recommended a lighter limb so that the Plaintiff does not need a crutch. Quotation from Moshi was in the sum of Sh. 350,000/-. The limb would need replacement 3 times during her lifetime. He confirmed having been paid Sh. 2000/- for the report. He had charged Sh. 3000/- for attending court. Dr Muthuri also gave evidence in support of Plaintiff. He is the one who issued P3 form.

Confirmed injuries as “**Maim.**” He was paid Sh. 80,000/= as per exhibit 2. Remarking on Dr Patel he said the amputation was above the knee. Mr Gor did not question this witness.

On medical bills, a credit controller from Nairobi Hospital was called to confirm the payments.

Regarding the payments to Aga Khan Hospital the officer confirmed that a sum of Sh. 85,834/- was settled but that the sum of sh. 1,500/= was refunded to Plaintiff when she returned the crutches.

At this stage the plaintiff closed her case. On 2.3.05, Mr Gor closed his case without calling any witnesses. The advocates made submissions for Plaintiff. Written submissions were made but the defence counsel made his submissions orally in court. He submitted that all the special damages were to be proved (sh. 1,923,365/=) if not the claim should not be awarded. He pointed out;

1) Claim VIII sh. 286,934/= not proved at all.

2) The plaintiff had worked only for 7 months and the programme terminated she submitted no basis for claim made between 14.10.97 to 9.10.2000 as she worked for weeks. He lastly said “I leave it to court to decide what is proved and what is not.”

On general damages, there is no dispute that the leg was amputated above the knees. The prosthesis obtained from Tanzania is best. He proposed no allowance he made for domestic help.

Mr Gor proposed general damages of Sh. 600,000/= to be reduced by 15%. He also reminded the court of the principle that when a lump sum is awarded and is wisely invested the Plaintiff shall be earning income.

Upon considering the submission of both counsel and the evidence tendered by the Plaintiff, (the defendants tendered no evidence) the facts remain uncontroverted.

Negligence is admitted by the Defendants. The duty of the court is to assess the amount payable to the Plaintiff according to her pleadings.

On the issue of special damages:-

Sh. 100 - is allowed by the amount indicated as paid on obtaining the police abstract

Sh. 5,000 to Dr Patel for examination and making report and giving evidence in court.

Sh. 82,000 to Dr Muthuri for medial report examination and medical treatment, see exhibit 2.

Sh. 94,332 to Aga Khan Hospital, see exhibit 25 after deducting Sh. 1,500 on return of crutch. See evidence.

Sh. 18,486 according to receipts exhibited Mombasa Hospital.

Sh. 8,600 per exhibit 18 and 19, transport.

Sh. 39,000 for above knee artificial limb, exhibit 21.

Sh. 16,200 for motel Serenge, Tanzania.

Sh. 3,600 vehicle search for ownership

“not proved” cost of nursing care.

Sh. 720/= drugs nursing services physiotherapy. Exhibit 4 and exhibit 22.

Sh. 19,205 exhibit 2.

Total Ksh. 287,243/=

Those are the items supported by receipts and other documentary evidence.

Other items for consideration is prosthesis. Dr Muthuri recommended an imported limb from overseas. Dr Patel recommended one from Moshi in Tanzania. The Plaintiff states that when she enquired in Germany, they referred her to Moshi in Tanzania. I am inclined towards a decision for Tanzania artificial limb. It proves cheap and more suitable.

The costs are estimated at . 350,000 – Kenya Shillings and the Doctor said that there would be need 3 changes in her lifetime. This is a necessary expense and I order that she paid Sh. 1,050,000/= to cover her next 3 changes.

On the issue of loss of income, it is to be noted that the plaintiff claims loss of earning capacity. Her allegation that she lost the earning at the rate of Sh. 8,000/= per month is not supported by her exhibit No. 9 which shows that she worked for only 7 weeks and that her employment terminated on 28.9.97 due to

termination of the programme. There by 14.10.97 she was not working. Therefore, her claim under item is not payable.

On the other hand, she is highly recommended and she has a certificate, exhibit 11, and there is no reason why she cannot obtain a job in line with her training as Laboratory Assistant. Where she says she wants to work in media work must be difficult for her. In this regard, we have to say that she did loose her capacity to work and earn. Her chances to advance herself in the world has been reduced. From her certificates, she is a bright person. For this reason, I find that a global award in the sum of sh. 350,000/- is sufficient to cover this item.

There is the other claim for nursing and domestic help. Both doctors who gave evidence are of the view that with a good artificial limb fitted the plaintiff should be able to walk and work normally. Therefore no need for domestic help. The stump has healed and there should be no need of nursing at this stage. However, immediately after accident she did require some help and in my view she is entitled to her claim for a reasonable period after she left hospital on 24.10.97 and by 30.9.99 she was still relying on ill-fitting artificial limb.

On 21.7.00 she was examined by Dr H Patel who found the stump to have healed but there was the clumsy artificial limb which was causing problems and causing her to walk slowly with one crutch.

I find a reasonable period of need of need for employing a domestic help to be between when she left hospital and the time she was seen by Dr Patel say between 24.10.97 to 21.7.2000. This is a period of 31 months at the rate of sh. 3,500 brings to a total of Sh. 108,500/=. Total awarded for special damages is sh. 287,243/=.

Looking at the claim of general damages, I have to take into account the changed character of the young lady of 23 years at he time of the accident and the one legged woman now walking with an artificial limb.

It does not matter whether it is well fitted or not. Her appearance is changed completely. The appearance of a woman is a great asset to her. It has to do with her chances in life – marriage, motherhood and chances of obtaining work. Upon considering the counsel submission and the authorities referred to, I am of the view that the sum of Sh. 1.2 million is adequate to compensate the Plaintiff for loss of the leg and pain and suffering and loss of amenities.

Total damages awarded:-

General damages for pain and suffering	sh. 1,200,000.00
Total special damages	sh. 287,243.00
Prosthesis 3 times	sh. 1,050,000.00
Change of loss of earning capacity	sh. 350,000.00
Nursing care for period between 24.10.97 – 21.7.00 at rate of sh. 3500	
Per month	sh. 109,500.00
All totaling	sg, 2,995,743.00

The plaintiff shall bear 15% of the said sum and the Defendants shall pay to her 85% jointly and severally thereof plus interest and costs. Judgement is therefore entered for the Plaintiff accordingly.

Delivered and dated at Mombasa this 14th day of February 2006.

J KHAMINWA

JUDGE