



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 166 of 2004

JECINTA WANJIKU.....PLAINTIFF

VERSUS

SAMSON MWANGI.....DEFENDANT

JUDGMENT

The plaintiff filed this suit on 8th June, 2004 claiming general and special damages as a result of a road traffic accident which occurred on 14th March, 2000 along Kenol-Sagana Road. She had obtained leave of the court to file the suit out of time and the same was granted in High Court Miscellaneous Application No. 29 of 2004.

In her plaint, she alleged that on 14th March, 2000 she was lawfully travelling as a fare paying passenger in motor vehicle registration number KAK 068T when the same was so recklessly and negligently driven that it was involved in an accident as a result of which she sustained serious injuries. She alleged that the motor vehicle was driven too fast in the circumstances, that the driver failed to brake, stop or control the motor vehicle in such a way as to avoid causing the accident. She stated that she would rely on the doctrine of “*Res Ipsa Loquitor*”. She gave the particulars of the injuries which she sustained as follows:-

- (a) Head injury with cerebral concussion and a wound on the left forehead and scalp.
- (b) Fracture acetabular rim right hip.
- (c) Fracture of the right knee.
- (d) Post traumatic osteoarthritis right knee.

The plaintiff also claimed special damages in the sum of Kshs.54,595/- made up as hereunder.

- (i) Police abstract report.....Kshs. 100
- (ii) Medical report.....Kshs. 3,000
- (iii) Medical expenses.....Kshs.51,495

TOTAL.....Kshs.54,595

The defendant filed a statement of defence through Wamaasa Mongeri & Company Advocates and denied

the occurrence of the said accident and further stated that if the same occurred, it was inevitable but did not give any particulars of the said allegation. The defendant and his advocates did not attend court for the hearing although both of them had been served with a hearing notice and so the hearing proceeded *ex parte*.

The plaintiff testified that she was a businesswoman who was engaged in the business of buying rice from Mwea and selling the same in Nakuru and that on the day of the accident she was travelling to Mwea for that purpose. She further testified that the motor vehicle they were travelling in was being driven very fast and the passengers therein at one point asked the driver to stop so that they could alight but he refused and continued to drive fast. Near a place known as Kenol along Thika-Embu Road, the driver was unable to negotiate a corner and the vehicle rolled several times and landed on the right hand side of the road. The plaintiff was rushed to Thika Hospital and was admitted there for nine months. She was also admitted at Kijabe Hospital for two weeks.

The plaintiff referred to a medical report prepared by Mr. Angelo D’Cunha (a consultant surgeon) on 27th March 2001. The report indicated that the plaintiff’s fractured right femur was treated with skeletal fixation and an open internal fixation of the bi-malleolus fracture of the right ankle was attempted. The plaintiff was left with the following residual effects:-

- (a) An unsightly scar over her left forehead and scalp.
- (b) Multiple scars over the right forearm.
- (c) Post-traumatic osteoarthritis in the right knee.
- (d) Loss of the right ankle.

The Doctor awarded a permanent disability of 40%.

The plaintiff was re-examined by Dr. Omuyoma on 18th February, 2006. He found that she still suffered pain in the right ankle joint and pain in the right hand and the scars as earlier noted were still visible. His medical report was produced as P. Exhibit 10. Dr. Omuyoma told the court that Mr. D’Cunha suffered a stroke and had been hospitalised and could not attend court and produce the medical report which he had prepared. Dr. Omuyoma said that he was familiar with the signature of his colleague and he produced the plaintiff’s medical report that had been produced by Mr. D’Cunha.

Police Constable Immaculate Wangui who was attached to Makuyu police station where the said accident was reported produced a police abstract report and said that according to police records, motor vehicle registration number KAK 609T belonged to Samson Mwangi, the defendant herein. The plaintiff produced receipts in proof of her claim for special damages totaling to Kshs.54,595/-.

On liability, the plaintiff’s advocate urged the court to find that the defendant was solely to blame for the accident as the plaintiff had tendered uncontroverted evidence to that effect.

On general damages, the plaintiff’s advocate submitted that a sum of Kshs.2,000,000/- was reasonable compensation for pain suffering and loss of amenities. She cited **HANNINGTON MWAU MUTETI VS MOHAMED ALI & 3 OTHERS**, HCCC No. 592 of 1988 at Mombasa (unreported) where the plaintiff therein sustained head injury, fracture of the spine, fracture of both humerus and fracture of the neck of the right femur and was hospitalised for four months. He fully recovered from the fractures of the chest, neck and both arms without any disability. The fracture of the neck of the femur recovered with a resultant shortening of the leg. He was awarded Kshs.450,000/- for pain suffering and loss of amenities.

Counsel also cited **S. J. CHEGE & OTHERS VS VESTERS** Nairobi Civil Appeal NO. 4 of 1984 (unreported) where the plaintiff sustained multiple injuries involving comminuted fracture of the end of the humerus, fracture of the mid shaft of the right femur, compound fracture of the lateral condyle of the right femur, compound fracture of the left tibia, compound fracture of the right ankle and undisplaced

fracture of the right patella. The Court of Appeal reduced damages for pain suffering and loss of amenities from Kshs.910,000/- to Kshs.550,000/-.

I hold that the plaintiff has on a balance of probabilities proved that the said accident was entirely caused by the negligence of the defendant's driver, agent and/or servant and the defendant is fully liable to the plaintiff. It was proved that at the material time the defendant was the registered owner of motor vehicle registration number KAK 609T in which the plaintiff was travelling in as a fare-paying passenger.

On quantum of damages, having taken into account the plaintiff's injuries and the resultant effects thereof and having considered the authorities cited by the plaintiff's counsel, I award the plaintiff a sum of Kshs.1,000,000/- as compensation for pain suffering and loss of amenities.

I also award special damages of Kshs.54,594/- which have been pleaded and proved. There were other sums, which were either pleaded but not proved or proved when they had not been pleaded. It is trite law that special damages must be specifically pleaded and proved strictly. The plaintiff will also have costs of the suit plus interest at court rates. Interest on the special damages shall accrue from the date of filing suit while interest on general damages shall be from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED at Nakuru this 19th day of May, 2006.

D. MUSINGA

JUDGE

19/5/2006

Judgment delivered in open court in the presence of Miss Njoroge holding brief for Mr. Wamaasa for the defendant and N/A for the plaintiff.

D. MUSINGA

JUDGE

19/5/2006