



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 122 of 1999

MARY NYADZUA NGALE PLAINTIFF

- Versus -

SHEIKH OMAR BIN DAHMAN T/a MALIDI BUS DEFENDANT

J U D G M E N T

The plaintiff, Mary Nyadzua Ngale, was on 6th October 1997 travelling as a passenger in the defendants bus registration number KZJ 451 along Malindi – Mombasa road. The bus was involved in an accident whereat the plaintiff suffered injuries. She was first taken to Kilifi District Hospital but she was transferred to coast General Hospital and later on the same day to New Mvita Hospital where she was admitted for one month. She suffered a dislocation to the cervical spine C3 and C4 leading to numbness for some time of the right upper and lower limbs and a contusion of the right shoulder. She filed this suit and sought both general and special damages. Liability was resolved by consent and judgment was entered for the plaintiff at 85% against the defendant. The plaintiff is to shoulder 15%. What now remains for determination by the court is the assessment of the quantum of damages payable to her.

In her plaint the plaintiff has claimed special damages of Sh. 2,279,000/= and general damages. I will first deal with general damages.

The major injury the plaintiff suffered was a subluxation (dislocation) of cervical vertebrae C3 and C4 with narrowing of the disc space in between them. This resulted in weakness to both the right leg and arm for some time but both Dr. Muthuuri and Dr. Patel who testified in this case said she has since recovered from that weakness and both limbs are now normal. Both doctors, as well as Dr. Odede, who did not testify but whose report was produced by consent, are agreed that the plaintiff still suffers pain and stiffness of the neck during extension and rotation and this is a permanent disability. She will experience pain and stiffness during rotation and extension for the rest of her life unless, according to Dr. Muthuuri and Dr. Odede there is surgical intervention. Dr. Patel on the other hand thinks that surgical intervention will worsen her condition. What then should be a reasonable award for pain and suffering?

Counsel for the plaintiff relying on cases of **Wellington Richa Vs Alfred Karisa Kanga & Another Mombasa HCCC No. 61 of 1991** and **James Kitambi Lihui Vs Joseph Kibua & Others, Nairobi HCCC No. 2325 of 1998** recommended a sum of Sh. 500,000/= as adequate compensation. On his part counsel for the defendant citing the authority of **Michael Okiya Bwonga Vs Kenya Airways Ltd. Nairobi HCCC No. 2501 of 1990** recommended a sum of Sh. 200,000/= as reasonable compensation.

I have considered these authorities. In the case of **Wellington Richa** the plaintiff suffered a crack fracture of the 6th and 7th cervical vertebrae ending up with a post traumatic deformity. He was able to resume

duty after one year. He was awarded Sh. 250,000/= for pain and suffering and loss of amenities. Those in my view were more serious injuries than the ones suffered by the plaintiff in this case.

The case with fairly similar injuries and sequelae is the one of **Michael Okiya Bwonya** cited by counsel for the defendant. The plaintiff in that case suffered fractures of the 3rd and 4th cervical vertebrae and soft tissue injuries to the head. He was hospitalized for two weeks and wore a cervical collar for 3 months. He was off-duty for 4 months.

Examination revealed marked spasm of the muscles around the neck and tenderness over the cervical spine. There was also spasm of the muscles of the back. The movement of the cervical spine was painful and restricted. This and the pain the plaintiff suffered radiating from the neck to the lower back were permanent disabilities. He was awarded Sh. 120,000/= in October 1990, about 15 years ago.

Considering these authorities and the injuries the plaintiff in this case suffered I am of the view that a sum of Sh. 300,000/= is reasonable compensation for pain and suffering and loss of amenities.

The most seriously contested claim is for an award for a surgical operation of the neck said to cost about Sh. 400,000/= to relieve the plaintiff of the pain she is now experiencing. Both doctors Odede and Muthuuri, called by the plaintiff, recommended it. The former says the plaintiff "possibly" needs it. Dr. Patel who examined the plaintiff and prepared a report at the request of the defendant said the plaintiff does not require any surgical intervention. According to him that will make her condition worse. But all the three doctors are agreed that the plaintiff still experiences pain in the neck on extension or rotation. The plaintiff herself said she would have undergone the operation if she had money. Both doctors Odede and Muthuuri say the plaintiff will develop osteoarthritis of the cervical spine later in life if she is not operated on.

Having considered all the medical evidence placed before court and that of the plaintiff herself I am of the view that the plaintiff requires the operation and I therefore award her Sh. 400,000/= for it.

The plaintiff also claims a sum of Sh. 1,200,000/= being the loss of income she said she suffered for a period of four months when she was not able to work. She said she owned a stall at Ole Tip Tip Market at Kilifi from where she sold vegetables to various institutions and made a profit of Sh. 10,000/= per day. She did not produce any bank statements or delivery notes signed by any of the institutions. She did not produce a certificate of registration of her business or even a trade license. All she relied on were some exercise books with some figures without even details of the vegetable bought and sold.

I doubt if the plaintiff carried out the business she claimed she did. If she did then she did not suffer any loss as she said she had two able assistants who must have continued running the business in her absence. In her evidence she said the business is now raising. There is no evidence to show that while she was in hospital and the time she was recuperating at home her business ground to a halt. Moreover the entries in the note book do not differentiate between capital and profit. As the plaintiff herself said they cannot be understood by an outsider. This being a special damage claim I am afraid it has not been strictly proved as required and in the circumstances I am not persuaded to make any award for the alleged loss.

Counsel for the defendant made heavy weather of the settlement of the hospital bill. He argued that the same having been settled with the assistance of the plaintiff's family the plaintiff did not suffer that loss and the claim should be disallowed. The plaintiff herself said she paid the bill with the assistance of her family. We are not told how much she paid and how much the family contributed. What is clear is that the payment came from the plaintiff and her family's kit. The receipt for payment – **Exhibit 9** is in her name. I find that the plaintiff suffered that loss and she has proved it. But the sum pleaded as medical expenses is Sh. 75,000/= while the receipt is for Sh. 75,600/=. I allow the sum pleaded.

The plaintiff did not produce any receipt in respect of the sum of Sh. 3,500/= claimed as fees she paid for the medical reports. She however produced two medical reports. They cannot have been given for free. I find that sum reasonable and allow it. As the defendant concedes the sum of Sh. 100/= for police abstract report I also allow it. In total I find that the plaintiff has proved the claim for special damages of Sh.

78,600/=.

In the final analysis I enter judgment for the plaintiff against the defendant for Sh. 661,810/= made out as follows:-

Pain and suffering and loss of amenities	Sh. 300,000.00
Future medical expenses	Sh. 400,000.00 S
special damages	<u>Sh. 78,600.00</u>
Total	Sh. 778,600.00
Less 15% contribution	Sh. <u>116,790.00</u>
Amount payable	Sh. <u>661,810.00</u>

DATED and delivered this 13th day of May 2005.

D.K. MARAGA

JUDGE