



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

Civil Suit 370 of 1989

MRS. B. K. GHULLA.....1ST PLAINTIFF

MR. J. S. GHULLA.....2ND PLAINTIFF

VERSUS

MOLOT ENTERPRISES (MOLOT POSHO MILL).....1ST DEFENDANT

HARUN KANDIE.....2ND DEFENDANT

ROBINSON OBWAYO ODIEK.....3RD DEFENDANT

JUDGMENT

The plaintiffs herein are wife and husband respectively. According to their plaint, on or about the 28th of August, 1987 at about 7.30p.m. the second plaintiff was lawfully driving his motor vehicle registration number KUP 417 in the company of members of his family including the first plaintiff along George Morara Road in Nakuru when the third defendant, as the authorised driver of motor vehicle registration number KUF 655 owned by the first and second defendants, drove the said motor vehicle so negligently that he caused the same to collide with the second plaintiff's motor vehicle causing damage and injuries to the plaintiffs and the plaintiffs thereafter filed this suit.

On 17th June, 1992 a consent order was recorded as follows:-

“BY CONSENT:

Liability be apportioned in the ratio of 30:70 against the plaintiffs and defendants respectively. Parties to negotiate quantum of damages or proceed to assessment if need be”.

The same was executed by Bowry, Maraga & Company Advocates for the plaintiffs and Mungai & Gakuru Advocates for the defendants. The file then went missing until 4th November, 1998 when a skeleton file was reconstructed and assessment of damages commenced on 7/5/2003 before Visram J but the said Judge was transferred out of the station shortly thereafter. The matter was thereafter set down for assessment of damages but the court file went missing and on 4th November, 1998 a skeleton file was reconstructed.

The matter came up for hearing on 4th May, 2005 but the defendant's advocates did not appear despite having been served with a hearing notice on 4th November, 2004 and having acknowledged receipt of the same by stamping the face of the said notice. The assessment of damages therefore proceeded ex parte.

The first plaintiff testified that in 1989 she was a house wife and had three children aged 17, 14 and 12

years. As a result of the said accident, she sustained a cut on the head and she received seventeen (17) stitches thereon, fracture of the left shoulder and fracture of the right ankle bone. Her right leg was left deformed. After the accident, she was admitted at War Memorial Hospital, Nakuru for six days and thereafter she was transferred to M. P. Shah Hospital, Nairobi. After her discharge, she had to keep on going for treatment as an outpatient once a month for two years. She was bedridden for two years and could not do any household work for almost three years and her husband had to employ two domestic workers as she could not even bathe herself and had to be bathed from her bed including passing toilet waste from her bed. She testified that she suffered a lot of pain and had to take painkillers for a long period of time. She had to walk with the aid of crutches for about three and a half years. Sixteen years after the accident she was still experiencing pain on the shoulder and on the right ankle whenever it was cold. She also cannot walk fast or stand for long or cross her legs for long whenever she goes to the temple. A comprehensive medical report was prepared by Professor M. K. Jeshrani (PW 1) and it was produced as an exhibit, and according to the Doctor, there was still a small plate in her left fibula which required to be removed at a cost of Kshs.50,000/- but given her age, she was likely to suffer osteoporosis. The first plaintiff was aged 40 years at the time of the accident and had to forego her normal matrimonial life for about three years.

As for the second plaintiff, he was 44 years old at the time of the accident and was a Food Technologist by profession, employed as a Manager with Kabazi Cannery Ltd. According to the medical report prepared by PW1, he suffered neck injuries, bruises and abrasions over the shoulders, small cut on the right eye brow and loss of consciousness. He was hospitalised for two days and was off duty for about one week. As a result of the accident he developed a brown speck in his right eye.

The second plaintiff testified that he was responsible for all the medical expenses for himself and the first plaintiff. In the plaint, he claimed a sum of Kshs.47,673/- on account of medical, hospital and doctor's charges and fees. However, the receipts which he produced in support thereof, Exhibits 8, 9 and 10 showed an amount of Kshs.40,048/-. It is trite law that special damages must not only be specifically pleaded but must also be proved strictly, see **COAST BUS SERVICE LTD VS MURUNGA & OTHERS** [1992] LLR 318 (CAK). For that heading of special damages, I will therefore award Kshs.40,048 and not Kshs.47,673/- as claimed.

The plaintiffs also claimed a sum of Kshs.14,400/- on account of transport to and from Nairobi when the first plaintiff was being taken to M. P. Shah Hospital as well as Kshs.1,500/- for medical report, Kshs.100/- for police abstract, Kshs.26,400/- for wages for a maid and a cook who were taking care of the first plaintiff and Kshs.78.70 for official search at the Registrar of Motor Vehicles. These claims were proved and I award the same. The total award in respect of special damages therefore amounts to **Kshs.82,426.70**. I would state that the plaintiffs would have been entitled to recover additional special damages on account of medical expenses but the same were not pleaded. The plaintiffs had all the time to amend their plaint to include those claims but they did not do so. I will also award a sum of Kshs.50,000/- for future operation to remove the metal plate implanted in the left fibula of the first plaintiff.

Turning to the claim for general damages, the plaintiff's learned counsel cited several authorities in support of his written submissions. It is obvious that there is no case that is exactly identical to any other on all facts and circumstances but that notwithstanding, courts are always guided by previous decisions which are comparable to the matter under consideration in their assessment of general damages. In **WINNINGSTONE NJAGI WANJOHI VS GEOFFREY MUGO MBUGUA & ANOTHER** HCCC No. 1673 of 1988 (unreported) the plaintiff suffered head injuries, fracture of right ankle, dislocation of shoulder and loss of a few teeth. He was awarded Kshs.800,000/- in general damages.

In **RODRECK NDIRANGU WANDARUA VS PETER MAINA KARIUKI** Civil Appeal No. 190 of 1997 (unreported) the respondent, aged 32 years sustained head injuries, compound fractures of right tibia and fibula, soft tissue injuries and lacerations. He underwent various surgeries and was hospitalised for three months, later requiring prosthesis. The Court of Appeal awarded a sum of Kshs.500,000/-.

In the present matter, the plaintiffs' counsel urged the court to award to the first plaintiff a sum of Kshs.1,200,000/- as general damages for pain, suffering and loss of amenities and to the second plaintiff

Kshs.300,000/-.

In **PATRICK K. NGULI VS STEPHEN KARANJA & ANOTHER** HCCC No. 2907 of 1987 (unreported) the plaintiff sustained bruises on the head, neck, right shoulder and laceration of the forehead. The court awarded him Kshs.150,000/- in general damages.

Doing the best I can, I award to the first plaintiff Kshs.1,00,000/- as general damages for pain, suffering and loss of amenities. And for the second plaintiff, I award Kshs.150,000/- also on account of general damages.

There will be judgment for the plaintiffs against the defendants jointly and severally as hereunder:-

For the First Plaintiff:

- | | |
|--|-------------------|
| (i) General Damages for pain, suffering and loss of amenities..... | Kshs.1,000,000.00 |
| (ii) Special damages..... | Kshs. 82,426.70 |
| (iii) Cost of future medical expenses..... | Kshs. 50,000.00 |

For the Second Plaintiff:

- (i) General damages for pain, suffering and loss of amenities.....Kshs. 150,000.00

TOTAL.....Kshs.1,282,426.70

The plaintiffs will also have interest on the aforesaid sums at court rates. The interest on the special damages will accrue from the date of filing the suit while interest on the other sums shall accrue from the date of judgment until payment in full.

The plaintiffs will also have costs of the suit.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of June, 2005

D. MUSINGA

JUDGE

29/6/2005