



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 161 of 1998

**GETRUDE AKUNGO (a minor suing through
her next friend and mother CAROLYNE ATIENO
MC OJWANG.....1ST PLAINTIFF**

**IRENE AYO O (a minor suing through her next friend
and mother CAROLYNE ATIENO
MC OJWANG.....2ND PLAINTIFF**

CAROLYNE ATIENO MC'OJWANG.....3RD PLAINTIFF

VERSUS

**JAMES MWANGI MUTURI
T/A TOTAL WESTEND SERVICE STATION.....1ST DEFENDANT**

TOTAL (KENYA) LIMITED.....2ND DEFENDANT

JUDGMENT

According to the 3rd Plaintiff, she has been a customer of the 1st Defendant, from whom she has been buying “**Meko**” gas cylinders. She further added that that 1st Defendant was the registered agent dealing and stocking the 2nd Defendant’s products including “**Meko**” gas cylinders and other oil and/or Petroleum products. Sometimes in July, 1995 the 3rd Plaintiff entered into an oral agreement with the 1st Defendant where for a consideration she bought a “**Meko**” cylinder which had been supplied by the 2nd Defendant.

It was an implied term of the said agreement and the 1st Defendant thereby warranted that the said cooking gas was of merchantable quality. According to the 3rd Plaintiff, at the time of the said sale, the 1st Defendant knew or ought to have known that the particular purpose for which the cooking gas was bought was for use in domestic cooking and it was in that premise an implied condition of the said contract and the 1st Defendant thereby warranted that the cooking gas to be delivered and sold to the 3rd Plaintiff was fit for the purposes for which it was bought.

During the trial, the PW1 –Caroline Atieno Mc Ojwang stated that on 26th July, 1995 at around 7.00 p.m., the electricity supply disappeared and her husband brought a cylinder full of gas. Using a candle to

help her see she went and took the gas cylinder and placed the same on the floor. However, when she tried to lit the same with a match-stick, the same blew up. After the explosion, the PW1 fell down unconscious and only regained the same on the following day when she found herself at the Pine Breeze Hospital. Consequently, the PW1 realized that she had sustained burns on the face. Left arm and on the left thigh. During the accident, one **Nancy Wegesa** died. In her evidence, the PW1 produced the admission letters – **Ex. 1 (a), (b) and (c)** from Pine Breeze Hospital. She also produced the Admission letter from War Memorial Hospital – **Ex. 2 (a), (b) and (c)**. The PW1 further added that she was discharged on 16th August, 1995 – as shown by the Discharge Summaries – **Ex. 4 (a), (b) and (c)**. Eventually, Dr. Ogada prepared three Medical Reports – **Ex. 6 (a), (b) and (c)**. The PW1 also produced the P3 form and a letter that was written to them by Total (K) Limited – Ex. 8.

After the close of the Plaintiff's case, Mr. Kimatta informed the Court that his client had opted **not** to offer any evidence. Earlier, on 22nd September, 2004, the Counsels informed the Court that they had agreed that judgment be entered in favour of the Plaintiff against the Defendant jointly and severally on liability at 50%.

Subsequently, both Counsels handed in written submissions to guide the Court in the assessment of damages. Mrs. Wanderi urged the Court to make an award of Kshs.800,000 to compensate the 1st Plaintiff for the injuries that she sustained. As far as the 2nd Plaintiff is concerned, she urged me to grant an award of Kshs.900,000 as compensation. In relation to the 3rd Plaintiff, Mrs. Wanderi urged me to award her a sum of Kshs.800,000. In support of her submissions, Mrs. Wanderi quoted the following authorities:

(1) George Thambura Vs Taab Construction Nakuru HCCC No. 288 of 1996

In the above case, the Plaintiff suffered burns to the chest, face and both hands and was awarded Kshs.600,000 general damages for pain, suffering and loss of amenities. The said sum was however reduced to Kshs.402,44.90 (*the figure must have been quoted erroneously by the Counsel*) upon subtraction of the Workmen's compensation that he had earlier received and 30% liability he had consented to.

(2) NZILANI NDARI VS BONIFACE MUSYOKA NDOO & ANOTHER NAIROBI HCCC NO. 954 OF 2000

The Plaintiff in this case sustained burns on the right arm, forearm, on the trunk and both legs. The Plaintiff was awarded Kshs.500,000 general damages for pain suffering and loss of amenities.

(3) BONIFACE MUSYOKA NDOLO VS PAULINE KATONGE MSAU CIVIL APPEAL NO. 34 OF 1996, NAIROBI.

On the other hand, Mr. Kimatta has urged the Court to make the following awards for general damages:

2nd Plaintiff:

(a) Irene Ayoo – Kshs.200,000.00

3rd Plaintiff:

(b) Caroline Atieno Mc Ojwang – Kshs.180,000.00

1st Plaintiff:

(c) Getrude Akongo – Kshs.150,000.00

This Court has carefully gone through all the above authorities. Having done, I have taken note of the age of the same and viewed them in the light of the inflationary trends which have drastically reduced the

value and purchasing power of the Kenyan Shilling. I have also considered the injuries sustained by each of the Plaintiffs. Doing the best that I can under the circumstances, I hereby make the following awards to the Plaintiffs:

1st Plaintiff:

Getrude Akongo – Kshs.700,000.00

2nd Plaintiff: Irene Ayoo – Kshs.800,000.00

3rd Plaintiff:

Carolyne Atieno Mc Ojwang – Kshs.700,000.00

Since liability had already been agreed at 50% - 50%, the Defendants will have to pay a total sum of Kshs.1,100,000. It is rather unfortunate that the Plaintiffs' Counsel never negotiated a more favourable deal given the circumstances of the case. Lastly, though the Plaintiffs were hospitalized for long periods, the Court was shocked that none of the receipts were produced to prove the special damages. A basic principle in law is that special damages should not only be pleaded but also be proved.

It is my sincere hope that the Defendants would consider compensating the unfortunate family of the medical expenses that they incurred. The same may be done on humanitarian grounds. That would greatly boost the corporate image of the Oil Company in the eyes of its faithful clients. In conclusion, I hereby order the Defendants to pay the Plaintiffs, the full costs of the Suit.

Those are the Orders of the Court.

Right of Appeal explained.

MUGA APONDI

JUDGE

Judgment read signed and delivered in open Court in the presence of Mrs. Wanderi for Plaintiffs and Mr. Kimatta for Defendants.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005