



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 142 OF 1998

V.N (a minor suing thro' her mother and next friend

J.W PLAINTIFF

V E R S U S

FRANCIS MWASEGHE DEFENDANT

Coram: Before Hon. Justice Mwera

Karigithu for Plaintiff

Ongera Adembesa for Defendant

Court clerk – Sango

JUDGEMENT

The minor plaintiff, V suing by her mother and next friend J.W claims damages for the injuries suffered on 2nd August 1998 when, so it was pleaded, the defendant or his agent drove motor vehicle Reg. No. KAK 591F to a spot off the Bamburi – Kiembeni road where she was walking with her mother. That the offending motor vehicle was driven without due care and attention, at an excessive speed in the circumstances and with no regard for the safety of other road users like Veronica. That that motor vehicle was driven from the road to the path where V was carefully walking where it hit her causing a fracture of the right femur, diastasis of pubic symphysis, perineal lacerations and multiple contusion and bruises. It was in the prayers that the plaintiff get special damages of Kshs. 293,960/-, general damages and costs.

A defence filed on 2nd February 1999 denied the occurrence of the said accident and / or that the plaintiff (minor) either solely caused or substantially contributed to it by proceeding along without having sufficient regard for his (her?) safety while crossing the road. That she did not heed the presence of motor vehicle Reg. No. KAK 591F on the said road. That she darted into / across that road and by that the driver of the subject motor vehicle did not have sufficient time to avoid the collision. Injuries claimed together with reliefs sought were also denied.

Parties took 7th July 2004 by consent for the trial herein. On that day only the plaintiff was present and ex parte hearing proceeded. J.W (PW 1), the plaintiff's mother told the court that, the two were walking along a path by the said road when, near a corner, the defendants' motor vehicle appeared at a high speed from the opposite side. That the motor vehicle driver seemed to have lost control of it and so it hit V on the path and passed on to ram in a gate. That PW1 took her daughter to Aga Khan Hospital with a broken right leg and abdominal injuries that resulted in much bleeding. That PW1 paid Kshs. 241,860/-, there (Exhibit PIA, B) and a P3 form plus a police abstract were issued by Bamburi Traffic Patrol Base (See

Exhibit P6,7 by Sgt Tsurwa PW3).

PWI also produced documents including an inspection report (Exh P2A,B) to show that the defendant was the driver of the subject motor vehicle. She also produced a lawyers' letter dated 12th August 1998 (Exh. P3) requiring the defendant to accept liability. That all in all it could not be said that V contributed to the accident in issue.

Dr. Jamlick Muthuuri (PW2) examined the minor on 28th September 1998 following the road accident. The doctor went over the fractured right leg which had been put together and the injuries to the hip and pubic area which were treated. That two months later Veronica had no complaints. She appeared well healed with no residual disabilities. That implants in her body would now require Kshs. 80,000/- to remove up from Kshs. 50,000/- estimated as the time of the report (See Exh. P3 dated 28th September 1998). That such an operation was a must for children. The doctor was paid Kshs. 5,000/-.

In the submission by the plaintiff's side, the court was asked to find 100% liability to be borne by the defendant because he led no evidence to rebut that. This court agrees. The court was not left in doubt as per the documents produced that the defendant was the driver of the subject motor vehicle which he had acquired from Ziotech Motors Company.

As for general damages, after going over the injuries, a sum of Kshs. 1m was proposed with a further Kshs. 80,000/- to remove the implants. The cases of IRENE GITONGA VS KINYANJUI NGETHE & OTHERS, NAKURU HCCC 456/1996 and LIVINGSTONE WENDO VS ONYANGO OGWENDO NAIROBI HCCC 4562/91 were cited in this regard. While age was not mentioned in both cases the Irene Gitonga case spoke of the plaintiff having been in a wheel chair for 8 months and when she went to work 2 years after the accident her performance appeared below par. She had a permanent limp. General damages stood at Kshs. 1m.

As for Wendo, his right leg was shortened and there was persistent right leg partial paralysis.

Kshs. 450,000/- was for pain and suffering, with the more extensive injuries he suffered as compared to Veronica's.

In the court's view Kshs. 250,000/- is awarded for pain and suffering (plus future medical expenses). The special damages as pleaded have been proved and therefore Kshs. 293,960/- is awarded. The court has taken note that Veronica who was three and a half years of age at time of the accident, healed well without residual disability or probability of any.

In sum:-

General Damages	Kshs. 250,000/-
Special Damages	<u>Kshs. 293,960/-</u>
TOTAL	<u>Kshs. 543,960/-</u>

The plaintiff also gets costs and interest at the lower court rates.

Judgement accordingly.

Delivered at Mombasa this 10th day of September 2004.

J. MWERA

JUDGE