

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 81 OF 2000 (RD)

ELIZABETH MULWA PLAINTIFF

- VERSUS -

TAWFIQ BUS SERVICES DEFENDANT

J U D G E M E N T

The plaintiff Elizabeth Mulwa was traveling as a fare paying passenger in the Defendant's bus Registration number KAD 820U on 12.9.98. On reaching Sultan Hamud on the Nairobi – Mombasa road the said bus lost control and rolled causing serious injuries to the plaintiff. She was treated at Machakos General Hospital.

She filed the suit on 3.5.99 claiming damages for injuries suffered and attributed the accident to negligence on the part of the defendant's driver.

The Defendant filed a defence on 5th August, 1999 denying any negligence. However on the 26.7.01 the parties entered into a consent judgement on liability with the plaintiff conceding 10% while the Defendant took responsibility of the remaining 90%. The matter was then set down for the assessment of Damages.

The plaintiff testified that she had suffered a fracture of the Femur, Fracture of the Tibia and fibula and a cut on the right thigh. She complained that she had not fully recovered from the injuries and her leg was shortened.

Two medical Reports by Dr. Hemant Patel and Dr. J.M. Muthuuri were produced by consent. Both Doctors are in agreement that she suffered a fracture of the Femur Right leg. However Dr. Hemant Patel describes her injury to the Tibia and Fibula as comminuted while Dr. J.M. Mutuuri describes the same injury as just a Fracture. Dr. Hemant Patel does not say how he arrived at the conclusion that the fracture to the Tibia and Fibula was comminuted while Dr. Muthuuri does say he used x-rays to get the information. In the circumstances, I will go by Dr. Muthuuri's report that the Fracture of the Tibia and Fibula was not comminuted. In their conclusion both Doctors were of the opinion that the plaintiff had a shortening of Right leg and Bone lengthening procedure recommended.

However it was only Dr. Hemant Patel who gives the Cost of the operation to be Kshs.350,000/= without any details as to how he arrived at the figure and whether the same service was available at a cheaper rate at the Government Hospitals. It is my view that Doctors should in future be more elaborate and give details such as service of information, rates offered by different Hospitals etc.

In his submissions the Counsel for the plaintiff Mr. Mburu Kariuki prayed for an award of Kshs.300,000/= on Damages for pain and suffering and Kshs.350,000/= for cost of future operation. On his part Mr. Were for the Defendant submitted an award of Kshs.200,000/= was adequate compensation under Damages for pain and suffering. However as regards the cost of future operation, he submitted that the same was merely an estimate which was not supported by an independent report of the instruction where the operation was to be carried out.

The Counsels referred to the case law in Hamprey Kaingu –vs- K.P.A. hcc.30/1991 (MSA) UR MASHA KOMBO –VS- NICHOLAS NYANGE HCC.403/96 (MSA) UR PATRICK M. KANGUNDU – VS- DAVID M. MUSILA & OTHERS HCC.204/90, NYAMRU STEPHEN MWAINGU –VS- DAVIES NAKULI WANDERA HCC.30/91 MSA (UR) and MARY SALOME DANIEL –VSGULAMHUSSEIN

AND ANOTHER HCC. 909/88 MSA (UR).

I have considered the authorities referred to in light of the current case and note that none of them is similar in all four, but are a good guide. Doing the best I can I make an award of Kshs.250,000/= on Damages for pain and suffering.

As for the cost of future operation, I note that the same is not pleaded for. Instead the amount is claimed as Special Damage yet no evidence was lead to proof the same. It is now trite law that Special Damages must not only be pleaded but must be strictly proven. The plaintiff testified that the Doctor had made the recommendation for further operation but not that she had undergone one. And also failure to plead the same is fatal to the claim in that a party is bound by its own pleadings. In the circumstances the claim fails.

The plaintiff shall therefore have judgement in the sum of Kshs.250,000/= plus costs. The same shall however be subject to the contribution on liability.

Dated and Delivered at Mombasa this 28th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE