REPULIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
CIVIL SUIT NO. 384 OF 2000

ESTHER WANJIRU KIARIE ……..PLAINTIFF

VERSUS

JOSEPH KIARIE NG'ANG'A ……..DEFENDANT

JUDGMENT

On January 7, 1999 at around 6.30 a.m., the Plaintiff was travelling as a passenger in motor vehicle registration number KAE 071M (hereinafter referred to as "the offending motor vehicle") when the same collided with motor vehicle registration number KAH 293G and the Plaintiff was thereby injured. In her testimony before me, the Plaintiff said that while travelling in the offending motor vehicle, its driver was overtaking another motor vehicle when the collision in issue occurred. She said that the offending motor vehicle was being driven at a high speed and that it was on the wrong side of the road when the collision occurred. She said that the driver of motor vehicle registration number KAH 293G was not to blame for this accident. The driver of the offending motor vehicle was killed in the accident.

The Plaintiff has sued the Defendant who was the owner of the offending motor vehicle. In his defence, the Defendant did not dispute the occurrence of the accident but averred that it was caused by the negligence of the driver of motor vehicle registration number KAH 293G. However, when the case came up for hearing on April 8, 2003, Mr. Makori who was holding brief for Mr. Manek for the Defendant sought adjournment to enable Mr. Manek to apply to withdraw from acting for the Defendant. The Plaintiff's Advocate opposed the application for adjournment and the Court agreed with her that because the Defendant's Advocate had had ample opportunity to withdraw, he had not done so and was not entitled to an adjournment. The hearing then proceeded without the participation of the Defendant. That being the case, the Plaintiff's case was uncontroverted and I, therefore, find that the Defendant's driver was the author of the accident in issue and, consequently, the Defendant is liable therefor.

After the accident, the Plaintiff was taken to Mt. Sinai Hospital at Ongata Rongai where she received first aid and was thereafter transferred to Kenyatta National Hospital for treatment where she was admitted for five weeks. The substance of the Plaintiff's injuries were set out in the Medical Report prepared by Dr. Wokabi on March 10, 2000 (EXT 1). They were as follows:

(a) Fracture of the left humerus which was reduced and plaster applied.

(b) Fracture of the right tibia and fibula. This was treated by the leg being immobilized in a plaster. On follow up it was found that the fracture of the tibia had failed to unite. She underwent surgery at Kikuyu Mission Hospital during which the fracture was fixed with a metallic plate and cancellous bone grafts applied.

(c) Fracture of the socket of the left hip.

(d) Dislocation of the left hip joint.

(e) Crash injury to right ring finger.

(f) Avulsion to the distal end of the finger.

The fracture of the socket of the left hip and dislocation of the left hip joint were treated by closed reduction and the leg was put on traction. The injuries to the right hand fingers were dressed for several weeks. When first examined by Dr. Wokabi, the following was found:

(a) She had a slight bonny deformity of the left arm which consisted of angulation and rotation

(b) Moderate swelling on the right shin with two surgical scars

(c) Pain and restriction of movement on the left hip

(d) The distal pulp of the right ring finger was partially missing with rudimentary nail.

Dr. Wokabi was of the opinion that the Plaintiff would require Kshs. 60,000/= to remove the metallic implants aforesaid and that the hip injury might lead to ostearthritis. The same Doctor examined the Plaintiff once again and prepared another medical report dated October 8, 2001 (EXT 2) in which he was of the opinion that the Plaintiff had suffered osteoarthritis of the left hip joint and right knee joint. The pain which was being experienced by the Plaintiff was likely to worsen with advancing age. She would require to take medication from time to time in the form of pain killers and anti arthritis drugs.

Dr. Wokabi was called as PW1 and he confirmed to this Court his findings.

I have carefully considered the nature of injuries sustained by the Plaintiff and taking into account the Submissions of her Counsel I am in agreement that an award of Kshs. 1,000,000/= would be fair compensation for the Plaintiff's pain, suffering and loss of amenities and I award her that sum.

As for Special Damages the Plaintiff claimed Kshs. 36,079/= made up as follows:

(a) Medical Expenses - Kshs. 33,979/=

(b) Medical Report - Kshs. 2,000/=

(c) Police Abstract - Kshs. 100/=

TOTAL Kshs. 36,079/=

The Plaintiff specifically proved special damages for Kshs. 35,984/= and the same is hereby awarded.

As to the cost of future operation, I will say as follows. Although Dr. Wokabi stated that the Plaintiff would require Kshs. 60,000/= to remove the metallic implants, the Plaintiff did not amend her Plaint to specifically plead this. As was clearly pointed out in the case of Coast Bus Service Ltd. v. Sisco E. Murunga Ndanyi & Others Civil Appeal No. 192 of 1992, Special Damages must be pleaded specifically. According to Mary Mukiri v. Njoroge Kiania Civil Appeal No. 48 of 1996, the cost of future medical costs are special damages. As the Plaintiff did not specifically plead the sum claimed as cost of future operation, the same cannot be awarded. I, therefore, enter Judgment for the Plaintiff as follows:

(a) General Damages - Kshs. 1,000,000/=

(b) Special Damages - Kshs. 35,984/=

TOTAL - Kshs. 1, 035,984/=

The Plaintiff will also have the costs of the suit, and interest as prayed.

Dated and Delivered at Nakuru this 15th day of July, 2003.

ALNASHIR VISRAM

JUDGE