



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 84 OF 1998 RD

CAROLINE KALOO MBITI.....PLAINTIFF

=V E R S U S=

STAGE COACH KENYA BUS LTD.....DEFENDANT

JUDGMENT OF COURT

The Plaintiff is a female adult who was about 34 years old in 1997 when he was injured. She sued the Defendant as the registered owner of motor vehicle registration number KAD 147G, a Leyland bus which on 30.4.1997 when the accident occurred was being driven by a driver in the employee of the Defendant and driving in the course of his employment.

Judgment on liability was entered by consent of both parties and apportioned at 60% for the Plaintiff against the 1st and 2nd Defendant jointly and severally and 40% against the Plaintiff as contributory negligence on her part.

Counsel for both parties by leave of the court put in written submission on quantum. The Plaintiff gave evidence which was cross-examined and her evidence was supported by Dr. Hemant Patel – FRSC in respect to medical evidence. According to the evidence of Dr. Hemant Patel, the Plaintiff had crash injury of both feet and right lower limb. The wound on the right leg and foot had healed. The right big toe had been lost which caused a right foot-drop. Since Dr. Patel's examination was secondary, he realized that the Plaintiff needed and he recommended for medical examination after further treatment and possible recovery. Dr. Patel's 1st examination took place on 16.4.98 and a final one on 27.8.99. The 2nd examination led him to decide that Plaintiff needed an amputation of the right foot on the basis that the treatment she had received and could receive did not and could not heal the foot which had now been chronically infected. He was strongly cross-examined as to the need for amputation but he stuck to his guns affirming that the infection was unlikely to heal as the foot had now been defleshed and the possibility of fleshing the bone even by plastic surgery was not possible, in his opinion. I believed his evidence. I take into account the evidence of Dr. S.S. Faya and Dr. Charles Omanga. The evidence of Dr. Faya and that of Dr. Omanga both admitted and agreed that the wounds on both feet were disglowed of flesh and that there was a presence of a foot-drop on the right leg. Dr. Faya on 30.6.1998 believed the Plaintiff's would slowly heal. Dr. Omanga on behalf of the Defendant on 9.11.1999 only noticed a limp. He admitted the degloving of the flesh on the two feet of the Plaintiff but said nothing about the issue of the healing process that might either tally with Dr. Patel's opinion or differ from it. It is my opinion and I saw hold, that Dr. Patel's evidence was more reliable and less biased and as I have said hereinabove, I prefer it to that of Dr. Faya or Dr. Omanga who both avoided the issue as to whether or not the Plaintiff's injuries had or were healing. In particular Dr. Omanga examined the Plaintiff after Dr. Patel had recommended amputation but Dr. Omanga neither indicated that Dr. Patel's opinion was not right or

that amputation was not necessary.

In my view there were no injuries that were not noted at Kenyatta National Hospital or discovered by the doctors which were not confirmed later. The final evidence of Dr. Patel was that in view of the fact that the disglowed injuries on both feet of the Plaintiff had failed to heal due to chronic infection and since no surgery would englove the wounds, the right foot should be amputated. Dr. Omanga failed to squarely face the issue.

The Defendant argues that the Plaintiff was negligent and was liable as admitted but that the Defendant should not be liable if the doctors who attended the Plaintiff at Kenyatta National Hospital were negligent. In my opinion, however, the Defendant's liability was never brought to an end by any act of the Plaintiff or his doctor. They were caused through their driver the injuries that took the Plaintiff to hospital and the only way they could reduce such damages could themselves taking responsibility of Plaintiff's medical treatment, probably by taking her to a better hospital or hiring for her more qualified doctors. They did neither. They should not be heard to whine. In any case, the Defendants have not pointed out of any negligence of the doctors who attended the Plaintiff at Kenyatta Hospital. Nor have they pointed out of the Plaintiff's negligence in seeking or during receiving of the medical treatment at Kenyatta National Hospital or elsewhere. I find that the Defendant's negligence was the effective or proximate cause of the Plaintiff's injuries and damage to date.

I now turn to the quantumising of damages.

I have considered the evidence that was adduced. I find that the Plaintiff did not at the end of the day lose any part of her salary. Where it was earlier stopped, she admitted that it was later all paid. That claim is dismissed.

I find that she is entitled to the sums of money she paid to the doctors of Kshs.4,000/- plus Kshs.100/- for Police Abstract.

The claim of Kshs.200,000/- for Plaintiff's future medical treatment is sustainable. The quantum was not opposed as larger than necessary nor did the Defendant suggest any alternative figure to that proposed by Dr. Patel from his knowledge and experience. I award the said sum in full. The cost of artificial leg after the recommended amputation was suggested as Kshs.120,000/- by Dr. Patel. The Defendant nor its doctors did not oppose the actual figure although they opposed the principle upon which it was recommended. Having rejected their position, I award the full sum as claimed, i.e. Kshs.120,000/-.

In respect of the claim of domestic help, I hold that the Plaintiff according to the available acceptable evidence will have to be amputated. She will however be fitted with artificial leg. She will therefore be able to walk however limitedly. It is correct to believe that she cannot stand for long. She is unable to carry any load. She all the time walks in company of another person to help her to support her. She has since she got injured, been paying to a domestic help a sum of Kshs.2000/- per month. She proved this by receipts. She had paid a total sum of Kshs.78,000/- in the last 39 months. I see no impediment in awarding her the said sum of Kshs.78,000/- as special damages although not pleaded as I believe that by the time she went to court the item may not have been clear to be included. Otherwise it would easily form part of general damages. Can the Plaintiff do her washing, her cooking, her office work or her field work without a problem. I have carefully examined this issue in particular, even to the extent of agonizing in respect thereof. I am satisfied on the balance of probability that the Plaintiff is entitled to this claim although not full-time. I accordingly award the sum claimed on half-basis. The servant may work half day, that is to say Kshs.1,000/- per month. The multiplier would be 20 years. That would be the award under this item at $1000 \times 20 \times 12 = 240,000/=$

I will also grant Dr. Patel's court attendance charges of Kshs.2,500/-.

As touching general damages for pain and suffering and loss of amenities, it is no disputed that the Plaintiff's life will never be the same again. She will live with actual pain physical and mental. She will never enjoy doing anything that those who are wholesome do. She will not play any common games. She

will not obviously dance or easily walk along the sandy sea-shores. An award of Kshs.550,000/- will not give her what she has lost due to the negligence of the Defendant but will help soften or ease her life a little. I so award her.

The total award will therefore be as follows:-

1. General damages for pain, suffering and loss of amenities	-	550,000.00
2. Future Medical Operation	-	200,000.00
3. Cost of artificial leg	-	120,000.00
4. Domestic Help – Future	-	240,000.00
5. Actual payment to domestic help	-	78,000.00
6. Special Damages	-	<u>6,600.00</u>
Total		1,194,600.00
Reduced by 40%		<u>477,840.00</u>
		716,760.00
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I accordingly award to the Plaintiff a final sum of Kshs.716,760/- with costs and court interests from the date of this judgment. It is so ordered.

Dated and delivered at Mombasa this 11th day of April, 2002.

D.A. ONYANCHA

J U D G E

Delivered in the presence of:-

Osino - for Plaintiff

Masika - for Kantai - for Defendant