



Pedestrian
Female adult
Aged 88 years in 1995
Knocked down by a lorry
Liability 25%:75%
Plaintiff: Defendant
Injuries
Cut above left eye
Fracture of both superior
and pubic ramii left side
trochanteric fracture - left femur
fracture of both tibia and fibula
cuts on dorsum of both feet
Disability 30%

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 742 OF 1997

BARBARA FENWICK PLAINTIFF

VERSUS

BERNARD NGIGI NDIRIMA & ANO. DEFENDANT

JUDGMENT

Barbara Fenwick, an elderly adult female, aged 88 years old in 1995, was on the 3rd of August 1995 walking along the verge of Ring Road Milimani. She saw a lorry approach and knew at once that she could not get out of the way. The said vehicle came and hit her whilst she was still on the pavement and on the side of the road. She stated that the lorry was travelling extremely fast and was noisy.

She lost consciousness. She was rushed to Nairobi hospital where she was admitted.

The injuries that she sustained were:-

1. A cut above the left eye
- 2) Fractured both superior and inferior pubic ramii left side
- 3) Trochanteric fracture
- 4) Fractured both tibia and fibula
- 5) Sustained cuts on the dorsum of both feet.

She was in hospital from the 3.8.95 to 29.8.95 - a total of 26 days. Thereafter she was discharged and continued on with physiotherapy and nursing.

On the 26.3.97 she filed a suit against the 1st and 2nd defendant who were the owner and the driver of motor vehicle lorry registration No. KVQ 977.

The two defendants entered appearance through M/s Waruhiu Gatonye & Co. Advocates on the 20.6.97.

The said advocates filed a defence in which they denied that the said accident even occurred. If indeed an accident occurred it was not as a result of the 2nd defendant's negligence. Namely that Barbara Fenwick was the author of her own misfortune.

Particulars of negligence were duly pleaded by the two defendants of Barbara Fenwick's negligence.

Namely:-

“that she walked into the path of a wrong motor vehicle without due care and attention, failed to heed the hooting and other measures warning her to keep off the road. Suddenly appearing on the path of a moving motor vehicle attempting to cross the road without first ascertaining it was clear and safe; walking in both disregard of her arm safety and failing to keep a proper look - out for on coming traffic.”

After the parties agreed on issues and were for summons for directions on the 17.10.97, the two defendants surprisingly changed advocates. They engaged the services of M/s Mareka & Co. Advocates.

On the 18.2.98 the advocates filed their notice of change of advocate and took up the conduct of this matter on behalf of the defendants. It therefore meant the hearing of this case scheduled for the 19th and 19th of February 1998 had to be adjourned.

Six months later the parties filed a consent on liability. This was agreed as follows and judgement entered accordingly:-

“... judgement be and is hereby entered for the plaintiff against the defendants on the issue of liability only on the following basis, the defendants will bear 75% contribution and the plaintiff will bear 25% contribution”

The parties were to agree on quantum failure to do so it would be assessed by the court.

The case was set down for assessment on the 20.7.99, 30.9.99 before Hon. Justice Amin and Hon. Justice Okubasu (as he then was) respectively. No settlement was reached.

The case came before me for hearing on the 22.2.2000. It was noted that the parties had filed a consent on the aspect of Special Damages. This was duly filed on the 22.2.2000 and recorded by the Principal Deputy Registrar under order 48 Civil Procedure Rules (Ministerial powers).

Before I began the trial I was surprised to learn that the defendants again had changed their advocates to M/s Julia Kariuki & Co. Advocates.

She prayed for time to comprise this suit. I gave her this time but by 11 a.m. She informed the court that she was ready to proceed on.

The only issue for hearing before me according to the advocate for the plaintiff was on quantum. This was under General Damages for Pain, suffering and loss of amenities.

Barbara Fenwick gave evidence of the accident and confirmed to court her injuries. Namely a cut over

her elbow, the broken legs. She confirmed her long treatment that she underwent.

She told me that she is now in a home. Before then she was able to cook, keep house, drive. Infact she had been to Yaya Centre to collect her driving glasses. Now she is unable to do any of that. I noted that she wore dentures and had on hearing aids.

She called Prof. J.A.O. Mulimba to give evidence. His qualifications being MB. CHB M.Med, FRc.S. He is a consultant orthopaedic and Trauma surgeon. Besides using a private practice at Nairobi hospital, he is also a Professor with the University of Nairobi based at Kenyatta Hospital.

He attended Barbara Fenwick on the 3.8.95 and has been with her all along her recovery. He confirmed to this court the injuries sustained by Barbara Fenwick. He stated in his prognosis and opinion that:-

Head:- the cut over the left brow mastreated. That perhaps the loss of memmory eyes and ear problems may be due to the accident or other functions.

Pelvis:- Prof. Mulimba confirmed that Barbara Fenwick fractured both superior and inferior public ramii on the left.

Right femur:- A trochanteric fracture of the femur was occasioned. There was an open reduction and fixation which had healed well. Complete remodelling was not expected due to her age.

Left leg: Fracture of the tibia and fibula. These fractures were treated conservatively and have healed well. There would be swelling and pain especially during change in the weather.

Both feet: These had cuts which healed well. The scars were to remain and permanent feature.

Prof. Mulimba assessed the disability at 30%. He noted that the effect of the injuries are such greater than in a younger person.

The advocate for the plaintiff relied on three case law. She wished this court to consider them with a view of making an award in favour of the plaintiff for Ksh.1,000,000/-.

1) Issa Swadi, Yasuf & Another Vs. Peter Njoroge & Another

Nairobi Hccc 173/93

Mbogoli-Msagha,J.

A young man aged 16 years old after an accident whereby he was knocked by a vehicle along Moi Avenue sustained injuries. These injuries were a fracture of the right superior and inferior pubic ramii, dislocation of the right sacroiliac joint fracture of the neck of the right femur; Dalmatian over the right cover abdomen.

The plaintiff conceded to 15% contributory negligence.

An award of ksh.1.2.95,000/- was made on the head of damages of pain suffering and loss of amenities.

I found with this authority that the injures though similar, the plaintiff therein was a young man and had considerable difficulties with his urinary track. The injuries were more serious. The case of

Timo Kalevi Jappinen & Another V. Texcal House services Station Ltd. & Another

Hccc 220/91

Juma, J.

This case is of a head on collision between two vehicles. The plaintiff was injured. The defendants were found liable in negligence both jointly and severally.

The plaintiff had a dislocation of the right hip joint with comminuted fractures of the posterior rim of the acetabulum.

Compound comminuted fractures in the lower third of the left tibia and fibula.

Bruises over the right side of the forehead.

The plaintiff was awarded Ksh.1,750,000/- for pain suffering and loss of amenities.

I am unable to comment on the third authority as it does not disclose which judge decided it.

The advocate for the defendant stated she had no authority to support her arguments. This being that the award for General Damages should be Ksh.400,000/- for pain suffering and loss of amenities.

I have considered the submissions made to me by both advocates. I have also considered the two authorities before the court as put in by the advocate for the plaintiff.

In giving an award the principal to take into the account is that an award is no more than a solarium as Hon. Justice Ringer (as he then was) stated in the case of

James Ahiga Keya V. Alhanas Osawo & Another

Hccc 1635/92

That an award for pain suffering is “a judicial way of saying pole to the victim” In the court of appeal decision of:

Cecilia W. Mwangi & Another V. Ruth W. Mwangi

251/96 (Nyeri High court)

from decision of Osiemo J.

The Court of Appeal framed on large awards. This is that awards of damages should be “within limits set by decided cases and also within the limits that Kenyans can afford.”

Further “money cannot renew a physical prove that has been battered and shattered. All that judge and courts can do is to award sums which must be treated as giving reasonable compensation” See West (H) K Sam. Ltd. V. Shephard 1964 AC 326 at page 35.

In the Cecilia Mwangi case the Hon Judge had awarded Ksh.450,000/- for pains suffering and loss of amenities for (similar injuries of pelvis). The court of appeal reduced this to Ksh.300,000/- (Ksh.50,000 was added for treatment costs and transportation).

I find that in this case the plaintiffs injuries were serious. She not only had injuries to her pelvis but sustained future fractures to her legs. Her age has been taken into consideration. She will be 93 years in August 2000.

I would compute as a reasonable award Ksh.500,000/-

In conclusion

A) Liability

Consent judgement of parties recorded by the Principal

Deputy Registrar.

Plaintiff to bear 25% liability

Defendant to bear 75% liability.

B) Injuries:

1. Cut wounds over the left brow
2. Fracture of both superior and inferior pubic ramii
- 3) Trochanteric fracture of the femur
- 4) Fracture of the tibia and fibula
- 5) Cuts on feet

C) 1. Quantum

Judgment be and is hereby entered on General

Damages for:- pain suffering and loss of amenities

Ksh.500,000/-

2. Special Damages (agreed by consent of the parties) Ksh.502,932.70

Ksh.1,002,932.70 Less 25%

- Ksh.250,733.10

Net Total Ksh.752,199.60

Say

Ksh.752,200.00/-

There will be costs of this suit to the plaintiff.

The defendants will pay interest on General damages from the date of this suit. They will pay interest on Special Damages from the date of filing suit at court rates.

Dated this 23rd day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE