



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1110 OF 1993**

VICTORIA MUTIO PLAINTIFF

VERSUS

RAPHAEL K. NZAA DEFENDANT.

JUDGMENT

On the 9th of March 1993, this suit was filed by Victoria Mutio Musyoka. She sues the defendant as the owner and driver of motor vehicle Reg. No. KAC 530J.

she alleged that on the 17.5.92 as she was lawfully walking along the Thika-Garissa road at Makutano the defendant, his driver or agent negligently drove the said vehicle Reg. No. KAC 530J and knocked her.

She sustained the following injuries.

- 1) Fracture of the left medial malleolus causing paralysis.
2. Injuries on the right side of brachial plexus (ankle)
3. Bruises on the legs, face and right arm.

She prayed that she be compensated by way of General Damages, and Special Damages of Ksh.3,100/-. She also prays for future loss of earnings due to her disabilities.

An amended plaint was approved by Hon. Justice Mbogholi- Msagha on the 28th of March 1997. No amended defence was filed.

The defendants had entered appearance and filed defence on the 20.7.93. They did not admit any claim by the plaintiff.

On the 14th of June 1999 almost two years later the parties appeared before Hon. Justice Githinji. A consent judgement was entered into on liability. This was recorded again by myself as the judgement herein contained a typographical error.

This was namely

By consent

“Judgement on liability be entered in favour of the plaintiff for 80%”.

This meant that the defendant was to bear 80% of the liability for this accident and the plaintiff 20%.

It therefore further meant that the issues for determination before me have now been settled on the issue of negligence. This is issue No.1 and 2. Issue No.3 has also been determined. It dealt with the ownership of the said vehicle.

What is left for determination are three issues. Namely: Issue No.4.

Did the plaintiff sustain injuries as a result of the accident and did she suffer loss and damages?

Issue No.5.

Is the plaintiff entitled to General and Special Damages?

Issue No.6

What order shall be made with regard to costs.” On the issue number 4, she attended court and gave evidence in chief. She was cross examined by the defence. She stated that she sustained injuries on her right side causing her arm to become paralysed. She informed the court that she can no longer work at her employment. She has since been relieved of her duties as a teacher. She taught in the classroom. She also taught extra curriculum subjects such as netball. This meant that she now can no longer hold a ball.

She had her own business of knitting sweaters and digging a farm to produce agriculture produce. She has not been able to under take these ventures. It had brought her additional income which she has now lost. Victoria also mentioned her ankle/leg being hit. Her emphasises though was more to her arm. She further produced a medical report which was rejected by this court as it was not the original document. The defence produced an original document from their doctor. Dr. Nesbitt. It is uncertain whether this doctor was a consultant. I shall touch on the document at a later stage. Dr. Nesbitt confirm in his report that the injuries as pleaded in the plaint were sustained. He nonetheless does not mention the bruises on the leg and ears. The plaintiff was said to be 80% incapacitated. On the documents, the reasons why the plaintiff was unable to produce the original was that she had engaged advocates to conduct her case. When she changed advocates they retained her documents. From the evidence given by her, I noted that M/s Ngulli & Co. advocates filed her suit. Thereafter she and her present advocate stated M/s Mulwa & Mulwa Co. Advocates took over and took some of her documents then M/s Murgor & Murgor & Co. advocates took some of her other documents.

When a litigants changes advocates, they must pay the advocates fee. If they do not do so, then the advocate has a right to hold on to the said file and or documents as a lien for their fee. Where a litigant requires the documents urgently as would have been in this case, her current advocate should have given a letter of undertaking to pay her fees. The documents and or files would be released once such a letter is received. The plaintiff stated that she changed advocates often as they would delay her case. This case has been pending for 7 years. I find that failure to put in these documents has an effect on this case.

The advocate for the defendant stated that Special Damages must be specifically pleaded. This was not. Actual loss of earning should be awarded only up to the date of filing suit. Loss of future earning capacity should have a multiplier of 10 years and not 12 as asked for by the plaintiff. Loss of earning capacity salary should be Ksh2,000/- and not ksh.5,8000/- as pleaded to cater for eventualities. He prayed Ksh.340,000/- be awarded. There was mention of future medical care of Ksh.40,000/-. This was never pleaded in the Plaint.

On General damages the advocate for the defendant stated that awards should not be excessive. Case law should be followed on similar injuries. The case law be relied on an award of Ksh.150,000/- and Ksh.200,000/- was awarded. Even the plaintiffs authority an award of Ksh.300,000/- was made.

The plaintiff through her advocate asked for Ksh.500,000/- in General Damages, Ksh.588,400 in loss of income from date of dismissal to today. A letter of dismissal was produced.

A sum of Ksh.684,000 for loss of income future till age 55 years was also prayed for and of care

Ksh.40,000/- for removal of the screw in the ankle. A total of ksh.2,316,400/- was being prayed for. I must note that the advocate for the defendant is correct in stating that awards should not be excessive. The court of appeal decision of:- Cecillia W Mwangi & Another v Ruth W. Mwangi Hccc 251/96 CA at Nyeri from judgement of Osiemo J. Covers this principle well.

I would compute damages for pain suffering and loss of amenities at Ksh.400,000/-/

As to Special Damages for loss of income due to dismissal from employment the salary of Ksh.5,800/- had not been proved. The plaintiff had been dismissed from employment. This being proof that in fact she was employed. I would have computed a minimum wage of Ksh.2,000/- up to the date of filing suit as reasonable 1.8.92 to 9.3.93. I would have award the sum of Ksh.14,000/- (for 7 months). As no proof of income had been proved this claim is dismissed.

As to the claim of future loss of income or earning capacity I make no award due to lack of proof. If in the event I would have had to make an award I would have used Ksh.2000/- minimum wage x 20 years (retired 55 years the plaintiff was said to be aged 34 years at the time of accident) x 12 = Ksh.480,000/-.

I however dismiss this claim.

As to Special Damages on the medical report for the Ksh.3000/- in fees and police abstract of 100/- in fees paid no receipts has been pleaded nor proved. I hereby dismiss these claims.

I hereby enter judgement for the plaintiff as follows:-

A. Liability 80% liability against the defendant.

B. Injuries 1) Fracture of left medial malleolus causing paralysis (ie paralysis of right arm from shoulder to fingers) 2) Injuries on the right side of brachial plexus (fracture of left ankle with screw still implanted). 3). Bruises on face

C. Quantum

General Damages on pain, suffering and loss of amenities Ksh.400,000/- Special Damages Nil (Not proved) All other claims dismissed as not being proved. Total Kshs.400,000 Less 20% Kshs. 80,000/- Total Kshs.320,000/-

I award costs of this suit to the plaintiff. I award interest from the date of this judgement.

Dated this 22nd day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE