



Accident
Not a fare paying passenger
Injuries - soft tissue
o on teeth/incisor
oo on cut on leg

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.2498 OF 1988

ESTHER WAMBUI NDERITU PLAINTIFF

VERSUS

FRANCIS GITHINJI 1ST DEFENDANT

KAGUMBA MATHENGE 2ND DEFENDANT

JUDGMENT

Esther Wambui Nderitu's story in this case - and as given in her evidence was that she was at Naru Moro. She boarded a vehicle registration No. KWT 334. She knew the owner of the vehicle as Francis Gathinji (the 1st defendant herein).

She travelled in the said vehicle towards Nyeri. An on coming vehicle came. The headlamps shone brightly. An accident occurred. It was at night. She was rushed to hospital.

She stated that she had injuries sustained whereby her jaw was broken and had to be placed in a wire. She had cuts below the knee.

This accident occurred on the 28th of June 1987. A year later on the 28th of June 1988 she filed suit against the 1st defendant and the second defendant in this case.

She later amended her Plaint to correct who in fact was the alleged owner of the vehicles. She further amended the Plaint to reflect that the accident occurred along the Nanyuki/Nyeri road whilst the evidence it reflected that it was along the Naru Moro/Nyeri road. Nonetheless, the two defendants entered appearance and filed defence through their advocates. In their defence they each blamed the other for the accident.

Exactly 10 years and 3 months later, (on the 28th of September, 1998) the two defendants and the plaintiff entered into a consent judgement on liability. They appeared before Hon. Mr. Justice Aganyanya.

The consent was recorded as follows:-

“By consent judgement be and is hereby entered for the plaintiff against the defendants at 50% by 50% respectively.

The parties failed to agree on quantum. Almost two years later, they appeared before me on the 7th of February, 2000 for hearing on the issue of Quantum. I believe the agreed issue signed (but undated) and filed on the 19.1.94 has dealt with the aspect of liability. This is para 1(a) & (e).

The remaining issues para 1(b), (c) (d), (e) (g) more or less repeated itself but dealt with the injuries and quantum namely: “Did the plaintiff sustain injuries and if so, to what extent; Is the plaintiff entitled to general and special damages; Was notice of intention to sue served on the 1st defendant;

Quantum of damages if any to the plaintiff costs.” These agreed issues were agreed only between the plaintiff and 1st defendant. The 2nd defendant appears not to be a party to it.

What was clear and to which the plaintiff’s advocate referred to in his opinion address was the aspect of the main issue to be considered was that of General Damages on pain suffering and loss of amenities.

In this case the injuries described by Esther was different from that in the report and Plaint. She claim that she had a fractured jaw. No mention of this was made in the report produced by her.

The Plaint describes her injuries as:-

- Injuries to the jaw resulting to the loosening of 2 incisors teeth.
- Cut wounds on right leg.

The two medical reports produced by the parties by consent were prepared in 1987 and 1996 respectively.

The first medical report was prepared by two doctors namely Dr. Wairagu jointly with Dr. Paul Wangai Jr. although the two doctors described themselves as consultant - one is a Renal Specialist whilst the other to a Public Health Nutrition and lifestyle doctor. It would be of great assistance if advocates would send their patience to relevant doctors. In this case

it would have been appropriate if the doctor who would have examined Esther, dealt with bones or teeth.

Dr. Shah - a consultant also gave his report - 8 years later (i.e 4 years ago). His report was more accurate. He said that Esther “needs no treatment for the injured teeth as they have been restrained to normality within the final 2 months after her accident”.

Right leg injury was minor and has left her with a scar. No pain can occur ...”

The doctors Wanjau & Wangai stated that the teeth were injured to such an extent that denture would be required.

Esther herself in evidence stated her teeth was normal except that when eating meat she was not able to pull at it with her teeth.

All in all I have come to the conclusion of the evidence given that Esther sustained injuries which is basically:-

1. Injury to lower front teeth
2. a cut over her right leg.

It would have been of further assistance if a recent medical report would have been availed.

Nonetheless I note as to Quantum the advocate for the plaintiff relied on the case law of:-

Edward Muriga through Stanley Mobisa Mariga

V

Nathaniel David Schulter

Esco (K) Ltd.

Hccc No.23/97

I am not sure why the advocate relied on this authority. It deals with the liability attributed to a minor. It was held by the court of appeal that as a matter of law a child of tender age cannot be held guilty of contributory negligence.

When the advocate for the plaintiff referred this case to me he stated that an award to injuries similar to the one sustained by the plaintiff was made of Ksh.80,000/-.

In the above case the injury of the minor was a fracture of the left femur and bruises on both hands.

The present case no fractures was sustained. The advocate wanted an award of Ksh.150,000/-.

The two defendants advocates relied on the cases of:- John Otieno Ojwok V Samuel Onyango Abunga & Another

Hccc 2001 of 1992

Githinji, J.

Raphael Mwaniki V. Joseph Njogu Kinyua

Hccc 3974 of 1988

A.G. Ringera J.

Whereby injuries for soft tissue was given at Ksh.30,000/- respectively for each case.

The 1st defendant asks that this court awards Ksh.40,000/- as does the 2nd defendant. I must admit that the injuries sustained was very minor and slight. No dentures was required. Esther teeth are back to normal.

I award as General Damages Ksh.20,000/- and accordingly enter judgement .

Special Damages was abandoned as not having been proved by the plaintiff. In summary:

Injuries

1. Injury to the lower front teeth
2. A cut over the right leg 10 cm. now all healed.

Liability

Agreed by consent at 100% against the two defendants (ratio 50%: 50%)

Quantum

General Damages for pain and suffering Ksh.20,000/-

i.e. ratio Ksh.10,000/- : 10,000/- 1st and 2nd defendants Special Damages NIL

(Not proved) I award interest of this case from the date of this judgement.

Dated this 8th day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE