



REPUBLIC OF KENYA



KENYA LAW
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**Gicharu & another v Richard & another (Civil Case 300 of 2014)
[2024] KEHC 12736 (KLR) (Civ) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 300 OF 2014

AN ONGERI, J

OCTOBER 15, 2024

BETWEEN

ALICE WANJIRU GICHARU 1ST PLAINTIFF

HENRY GICHARU KAMAU 2ND PLAINTIFF

AND

WAMBUGU RICHARD 1ST DEFENDANT

JOSEPH KAIRU NJUGUNA 2ND DEFENDANT

JUDGMENT

1. The plaintiffs, Alice Wanjiru Gicharu and Henry Gicharu Kamau (hereafter referred to as the 1st and 2nd plaintiffs respectively) have sued the two defendants Wambugu Richard and Joseph Kairu Njuguna (hereafter referred to as the 1st and 2nd defendants respectively) seeking the following remedies;
 - i. General damages for pain, suffering, and future medical care, and future recommended corrective surgeries estimated at the aggregate sum of kshs.1,500,000/= and loss of earnings or reduced earning capacity, and loss of amenities and damages for loss of society and consortium for the 2nd plaintiff particularly set out hereinabove.
 - ii. Special damages aforesaid by now in the sum of kshs.2,348,290/= 2,812,302/=
 - iii. Costs of this suit.
 - iv. Interest on (i), (ii) above from the date of filing this suit, being 18th September, 2014 and (ii) above at court rates, until final payment.
 - v. Any other relief or order this honourable court may deem fit to grant.



2. The cause of action arose on 20/9/2011 when the 1st plaintiff was hit by motor vehicle registration no. KBJ 108E Toyota matatu belonging to the 1st defendant while it was being driven by the 2nd defendant.
3. The plaintiffs aver as follows in the further amended plaint dated 12/9/2019
4. On or about the 20th day of September, 2011, the 1st Plaintiff was lawfully walking along Langata Road, when the 2nd Defendant so negligently drove or managed, motor vehicle KBJ 108E Toyota “Matatu” causing the said accident and as consequence of which the Plaintiff has suffered loss and damage.

Particulars of 2nd Defendant's Negligence

- a. Driving a speed that was excessive in the circumstances.
- b. Driving without due care and attention.
- c. Failing to have any or effective control of the said motor vehicle.
- d. Failing to observe the road safety rules and regulations.
- e. Failing to swerve or slow down or in any other way so as to manage and/or control of the said motor vehicle and avoid the accident.
- f. Being reckless while on the road.
- g. Failing to keep motor vehicle in good mechanical condition.
- h. Causing the said accident,

And the 1st Defendant shall be vicariously held liable for the negligence of the 2nd Defendant as the 1st Defendant employee, servant, agent and/or driver in the course of the said employee.

5. As a consequence of the matters aforesaid, the 1st Plaintiff sustained injuries and has suffered loss and damage.

Particulars of Injuries Suffered by the 1st Plaintiff

- a. Spine injury
- b. Lumbar hyperlordosis
- c. Degenerative desiccation
- d. Annulus fibroses bulge.

The 1st Plaintiff's Present Complaints

- a. Severe lower back pain secondary to prolapsed intervertebral disc with radiculopathy.
- b. Continued orthopedic follow up.
- c. Continued physiotherapy treatment.
- d. Excess body weight.
- e. Reduced earnings and earning capacity.
- f. The 2nd Plaintiff who is the husband of the 1st Plaintiff has subsequently lost the society and consortium of his wife, as a consequence of the aforesaid injuries.



6. The 1st plaintiff underwent a second surgery in Ahmedabad, India on 21st January, 2015. She underwent a diagnostic left St Joint block (left sacroiliac joint injection- a joint that connects the pelvic bones to the spine) she also underwent a ganglion impart block procedure (a procedure used to reduce some of the symptoms of chronic pelvic or rectal pain by blocking nerve impulses) The surgery also included radio frequency ablation procedure of left side median branch of 1 3-4-5SI and intraarticular SI joint (pulsed radio frequency of the ganglion impart (A method of pain management)

She was then, further retained in the hospital for further observation and management where she was given antibiotics, analgesics and other supportive care. She was discharged on 24th January 2015, following medication and advice. The 1st plaintiff had to look for further out of hospital accommodation in India.

7. Further Complaints

- a. Severe pain around the thorasic region and the right shoulder.
- b. Severe pain radiating to the groin area resulting in inability to walk for long period.
- c. Difficulty in breathing.
- d. Sitting intolerance due to severe pain over the sitting area.
- e. Severe left sacroiliac joint pain.
- f. Coccygodania (disabling pain over the tail bone area)
- g. Permanent disability assessed at 100% (one hundred percent (if not reduced by the recommended surgeries.

8. Particulars of Special Damages

- a. Police abstract ksh.100
- b. Copy of records ksh.500
- c. Medical expenses ksh.2,196,330
inclusive of Inpatient bill (Indian
Rupees 207,025)ksh.314,678/= ksh.2,530,508
- d. Medical report ksh.20,000
- e. Freight expenses ksh.85,000
- f. Visa application expenses ksh.50,244
- g. Accommodation expenses in India ksh.135,750

Total ksh.2,812,302

And the special damages by way of further medical expenses, medical care and future medical care and expenses estimated at ksh.1,000,000/= for neuro surgeons surgery, hospitalization and anesthetic costs and kshs.500,000/= for sacro-iliac joint and disc bulges correction by surgery, hospitalization as well as anesthetic costs and loss of earning capacity continue to accrue.

9. The 1st plaintiff due to the said accident and the present complications she is suffering from, has had to take privilege sick leave due to this complications including medical and surgical treatment. This has



resulted in the exhaustion of her sick leave and has led to her termination from work on the alleged ground of desertion of duty by her employers.

To the aforesaid, the plaintiffs claim loss and damages including damages for pain and suffering, loss of amenities and loss of earnings amounting to KShs.503,535 (being the salary unpaid in the period of 2011-2015) and future earnings and reduced and/or extinguished earning capacity to be adduced at the hearing hereof and further also claims the costs of future medical treatment as estimated in the above paragraph.

10. The defendants filed a defence dated 24/12/2014 denying the plaintiff's claim.
11. During the hearing of this case, the plaintiffs called two witnesses as follows;
12. The 1st plaintiff testified as PW 1. She said she filed this case with the 2nd plaintiff who is her husband.
13. PW 1 said on 20/9/2011 she was walking to work at 6.50am at Bomas of Kenya when matatu registration no. KBJ 108E was overlapping at high speed when it hit her while she was in between the two lanes at a zebra crossing.
14. PW 1 said the matatu was registration no. KBJ 108E. The matatu which hit her stopped. She was taken to Karen hospital
15. She said she was in pain. She got admitted several times. After one year the hospital said that they did not have equipment for spinal surgery. In 2013 she got surgery in India at Chalby hospital.
16. PW 1 said she could not work after the accident. In 2015 she was scheduled to another operation at Ahmedhabad in India.
17. In cross examination, PW 1 said when motor vehicle registration KBJ 108E hit her on the driver's side, she fell down backwards on her back and landed on the road.
18. She said that is how she sustained back injuries. She denied that she had a pre-existing condition before the accident.
19. PW 1 said implants were surgically put in her body in the spine to help her cope with post-accident pains which are permanent.
20. PW 1 said she suffered permanent disability which cannot be reversed.
21. The plaintiffs called Dr. Nassir Hasham Bhanji who testified as PW. He said he examined PW 1 on 1/7/2015 and he produced a medical report dated 3/7/2015. PW 2 said during the review, PW 1 complained of the following
 - i. Inability to sit more than 20 minutes.
 - ii. Inability to stand straight for more than 10 minutes due to backache.
 - iii. Becomes restless
 - iv. Restrictions in movements of the spine
 - v. Inability to walk for long distances.
22. PW 2 awarded a permanent disability of 100% which he said would be reduced if the 1st plaintiff undergoes corrective surgery.
23. The defendant called 2 witnesses. DW 1, Joseph Kairu Njuguna, who was the driver of motor vehicle registration no. KBJ 108E at the time of the accident.



24. DW 1 said that the 1st plaintiff was to blame for the accident because she was crossing at a place where there was no zebra crossing. He said he is the one who took her to hospital.
25. In cross examination DW 1 said he swerved to the right side to avoid hitting the 1st plaintiff. He denied that he hit the plaintiff and said she panicked and fell down.
26. DW 2 DR Leah Wainaina said she examined the 1st plaintiff on 24/8/2014 and produced a report dated 24/8/2014 as an exhibit in this case.
27. In cross examination, DW 2 said she did not undertake an xray or scan for the re-examination of the 1st plaintiff but she relied on treatment notes that the 1st plaintiff had.
28. The report produced by DW 2 stated that the 1st plaintiff sustained soft tissue injuries to the back and further that the back problems came later after the traffic road accident.
29. The parties filed written submissions in this case as follows; the plaintiffs submitted that the 1st plaintiff testified that as she was heading to work in the morning at around 6:50 am, she was hit by a matatu as she was crossing at a zebra crossing at the Bomas of Kenya junction. She got admitted at Karen hospital several times and after one year of treatment the doctors could not manage her spinal injury as they did not have the equipment to do so. She proceeded to India for her first surgery and in 2015 she had her second surgery. In the medical report dated 12/3/2013 the 1st plaintiff had severe lower back pain secondary to prolapsed intervertebral disc with radiculopathy; post-traumatic stress disorder (PTSD) and excess body weight.
30. It was the 1st plaintiff's submission that she proved the defendants were liable and that the 2nd defendant was the driver of the matatu owned by the 1st defendant. the defendants did not call any witnesses that testified to the contrary.
31. The 2nd plaintiff corroborated the testimony of the 1st plaintiff and it was submitted that due to the accident their lives completely changed. The 2nd plaintiff lost the society and consortium of his wife as a consequence of the injuries. The plaintiffs proposed Kshs. 800,000 as damages for loss of consortium and in support cited *Salvadore De Lucas v Abdullahi Hemedi Khalil & Another* [1994] eKLR where the court awarded Kshs. 800,00 for loss of consortium in July 2016.
32. On general damages the plaintiff submitted that in consideration of the 1st plaintiff's injuries and the degree of disability at 100% the plaintiffs proposed an award of Kshs. 2,000,000 under this head. In support the plaintiffs cited the following cases among others;
 - a. *Guardian Coach Ltd & Another v Kiptoo (Civil Appeal No. 34 of 2020)* [2022] KEHC 12397 [KLR] where the court upheld an award of Kshs. 2,500,000 as general damages and Kshs 3,000,000 as future medical expenses.
 - b. *Solomon Muriithi Munyarah v SMK (Minor Suing through her next friend AKK)* [2021] eKLR where the court upheld an award of Kshs. 2,500,000 as general damages and Kshs 1,500,000 for loss of earning capacity for crush injury to the right femur leading to hip disarticulation; crush wound left lower limb over ankle joint region and cut wound right-hand dorsal surface.
33. On the claim for special damages the plaintiff submitted that they provided proof of the same and further the plaintiffs got a loan from cooperative bank of Kshs 640,000 and Kshs 830,000 from Standard Chartered Bank to pay for her medical treatment. On loss of earnings the plaintiffs submitted that due to the complications that the 1st plaintiff suffered resulted in exhaustion of her sick leave and



led to her termination from work of ground of desertion of duty. The same amounted to Kshs. 503,535 being the salary unpaid in the period of 2011-2015.

34. The defendants submitted that the 1st plaintiff admitted that she was with her colleague on that date of the accident and that she was half way across the road when she was knocked down by the alleged over speeding motor vehicle registration number KBJ 108 Toyota Matatu. She did not call the said eye witness to testify and corroborate her evidence. She also confirmed during cross examination that she was unconscious after the accident and does not recall what transpired after, she regained consciousness while in hospital. The respondents argued that the plaintiffs therefore failed to adduce evidence that proved the 2nd defendant was negligent.
35. The respondent further argued that the police abstract dated 17/7/2014 is not proof of the negligence by the 2nd defendant and that the information contained in it is vague and misleading. The police called upon by the plaintiff, did not author nor make the contents of the said abstract. It was the respondents' contention that by failing to call the investigating officer the plaintiffs failed to prove their case on liability. The defendants indicated that the 1st plaintiff was the author of her own misfortune by virtue of having suddenly entered the main road and into the direct path of the matatu.
36. The respondent on quantum submitted that the discharge summary dated 24/9/2011 provides for the injuries the 1st plaintiff sustained as a result of the accident which were soft injuries in nature. The said discharge summary further provided for the tests and treatment done on the 1st plaintiff which include x rays and the most important one being the x-ray of the c-spine, l-spine and pelvic which all came out as normal. The respondent argued that the injuries pleaded by the plaintiff in the further amended plaint are not related to the injuries sustained by the 1st plaintiff on 20/9/2011.
37. The respondents argued that that the illness the 1st plaintiff was treated in India was not related to the accident as the x-ray/ultrasound report dated 17/12/2011 show that there was a fracture or dislocation of the spine. Dr Viral Shah also prepared a report and recommended that the 1st Plaintiff undergo X-rays at Infocus Diagnostics dated 14/5/2013 where an MRI stress valuation was done and the conclusion was that the 1st plaintiff had sustained minor narrowing the spinal canal and nowhere does the said x-ray report show the said injuries as being as a result of a road traffic accident that occurred.
38. On loss of consortium the respondents submitted the respondent submitted that the 1st plaintiff admitted that she relocated with her family to America. The defendants argued that she ought to furnish the court with her disability green card which is usually issued by the national council for persons of disability confirming she is suffering 100% disability. That further the loss of consortium is not anchored in law and therefore not awardable and that since the claim is founded on the [Law Reform Act](#) and the [fatal accidents act](#) such an award is not provided for by the statutes.
39. On general damages for loss of amenities, loss of earning and reduced earning capacity the respondents argued that the same was not proved. That further the 1st plaintiff has not proved the relation between her additional injuries to the alleged injuries she sustained. There were no warning letters, pay slips or any documentary evidence that proved the loss of earnings.
40. It is the duty of the plaintiffs to prove their case to the required standard in civil cases which is on a balance of probabilities.
41. The issues for determination in this suit are as follows;
 - i. Whether the defendants are liable in negligence for the injuries the 1st plaintiff sustained.
 - ii. Whether the plaintiff contributed to injuries she sustained.



- iii. Whether the defendants are liable to pay the 1st plaintiff the damages she is seeking against them.
42. On the issue as to whether the defendants are liable in negligence for the injuries the 1st plaintiff sustained, the 2nd defendant (DW 1) who was driving motor vehicle registration no. KBJ 108E at the material time denied that he hit the plaintiff.
43. DW 1 said the plaintiff got shocked and she panicked and fell down.
44. He said he took her to hospital after the incident.
45. The 1st plaintiff who testified as PW 1 said in her evidence that she was hit by the right side of the motor vehicle and she fell down and lost consciousness.
46. PW 1 said later she found herself in hospital. She said she did not have pre-existing back problems.
47. The evidence on record amounts to the word of PW 1, the 1st plaintiff against that of DW 1, the 2nd defendant.
48. I am inclined to believe the testimony of PW 1 because DW 1 admitted he took her to hospital after the accident.
49. There is no logical explanation why DW 1 would offer to take a stranger who just panicked and collapsed on the road if he did not hit her.
50. PW 1's evidence was that she was hit and she fell down backwards and that motor vehicle registration no. KBJ 108E was overlapping when this happened.
51. PW 1 said she fell on the back and that is how she sustained the back injuries.
52. Although there was no other witness who testified on the accident, the police abstract produced by PW 3 confirmed that the accident did occur involving the 1st plaintiff and motor vehicle registration no. KBJ 108E on the material day.
53. I hold the 2nd defendant 100% liable and the 1st defendant vicariously liable.
54. On the issue as to whether the defendants are liable to pay the plaintiff the damages she is seeking, the answer is in the affirmative.
55. The plaintiff suffered the following injuries;
- a) Spine injury
 - b) Lumbar hyperlordosis
 - c) Degenerative desiccation
 - d) Annulus fibroses bulge.
56. I have considered the submissions by both parties. I find that the plaintiff's back injuries were directly linked to the accident she was involved in on 20/9/2011.
57. The plaintiff suffered permanent disability and she will never be able to work again. The plaintiff submitted the degree of disability 100%.
58. In the medical report dated 12/3/2013, it is stated that the 1st plaintiff had severe lower back pain secondary to prolapsed intervertebral disc with radiculopathy; post-traumatic stress disorder (PTSD) and excess body weight.



59. However, on loss of consortium, I find that the 1st plaintiff did not state in her evidence that the accident affected her capacity to engage in sexual activities.

60. In the case of Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR, the court stated as follows;

“....the doctors who examined the plaintiff did not find that the injuries sustained by him hindered his ability to perform his marital duties in any way. In addition the plaintiff did not raise any such complaint at the time of examination to enable the doctors to assess the same. For this reason I find that the claim of inability to perform sexual relations had not been proved”

61. I assess damages as follows

General damages for pain & suffering 2,000,000

Loss of earning capacity 2,000,000

Future medical expenses 1,500,000

Special damages 2,812,302

Total 8,312,302

62. Judgment be and is hereby entered in favour of the plaintiffs against the defendants jointly and severally in the sum of ksh.8,312,302/= plus costs and interest in respect of general damages from the date of this suit and in respect of the special damages from the date the same were pleaded.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH OCTOBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

