



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 96 OF 2013**

**BN (A minor suing thro' the Next friend IMS).....PLAINTIFF**

**VERSUS**

**MARY CHEBET KOSKEY CHUMO and**

**DAVID KIPNG'ETICH KOSKEY (sued as administrators of**

the estate of **SOLOMON KIPSANG KOSGEY.....1<sup>ST</sup> DEFENDANT**

**TELKOM (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**SONI JITENDRA JAYANTJA.....3<sup>RD</sup> DEFENDANT**

**TEN FOLD LIMITED.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, BN instituted this suit through a plaint (Amended) dated 6<sup>th</sup> October, 2008. It was pleaded that on or about the 5<sup>th</sup> November, 2005, the Plaintiff was a lawful passenger in motor vehicle registration No. KAH 980Y Toyota Saloon when the motor vehicle which was being driven by the Late Solomon Kipsang Kosgei (deceased) was involved in an accident with motor vehicle registration No. KAM 569 J Isuzu pickup and as a result the Plaintiff sustained injuries. The accident is blamed on the negligent manner that the two motor vehicles were allegedly driven. The Plaintiff relied on the doctrine of *Res Ipsa loquitor*.
2. The administrators of the estate of the deceased were sued as the 1<sup>st</sup> Defendant and as the owners of the motor vehicle registration No. KAH 980Y together with the 2<sup>nd</sup> Defendant, Telkom (K) Limited.
3. The 3<sup>rd</sup> Defendant, Soni Jitendra Jayantjla was sued as the driver, agent, servant or employee of the 4<sup>th</sup> Defendant, Tenfold Limited, the registered owner of motor vehicle registration No. KAM 569J.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of Defence dated 20<sup>th</sup> November, 2007 and denied the claim. In the alternative, it was pleaded that if the accident occurred the same was wholly or substantially contributed to by the negligence of the driver of motor vehicle registration KAM 569J.
5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied the claim. In the alternative it was pleaded that if the accident occurred, it was solely contributed to be the deceased.
6. During the hearing of the case, the Plaintiff, BN (PW2) testified. Her evidence was that she was a passenger in motor vehicle KAH 980 Toyota Corolla which was being driven by the deceased. That she was seated at the back seat and had dozed off only to wake up at Naivasha District Hospital with pains in her hand. That she was transferred by ambulance to Aga Khan Hospital, Nairobi where she later woke up in the Intensive Care Unit with a plaster on the hand, dressed stomach and back injury that required surgery. Her further evidence was that she was hospitalized for about 1 ½ months.
7. Isaac Mukung Sasuri (Pw1), the Plaintiff's father and next friend testified. His evidence was that he was informed of the accident and rushed to hospital to see the Plaintiff. That the injured Plaintiff was transferred to Aga Khan Hospital in Nairobi and admitted at the Intensive Care Unit. That the Plaintiff who had ruptured her stomach was admitted in the Intensive Care Unit for eight days and later

transferred to the High Dependency Unit then to the ordinary ward. That the Plaintiff was eventually discharged after 52 days and thereafter continued with out-patient clinic.

8. The 1<sup>st</sup> to 4<sup>th</sup> Defendants closed their cases without calling any witnesses.

9. The parties then proceeded to file written submissions.

10. From the evidence of the two witnesses called to testify for the Plaintiff's side, none of them was able to explain how the accident occurred. Pw2 had dozed off according to her evidence and only woke up at the hospital. Pw1 was informed of the accident and was not at the scene.

11. The Plaintiff's counsel submitted that the inference that can be drawn from the evidence adduced is that the Defendants are culpable. He relied on the doctrine of *Res Ipsa Loquitur*.

12. It was further argued that the Plaintiff was a 14 years old Minor at the material time and no contributory negligence can be attributed to her and that, in any event, the Plaintiff was a passenger at the material time.

13. It was submitted for the Defendants that the Plaintiff had failed to discharge the burden of proof. It was further submitted that there was no proof of negligence either by way of direct or circumstantial evidence.

14. In addition to the evidence of Pw1 and Pw2 as analyzed above, the Police abstract form was produced as an exhibit. The Police abstract form confirms that the accident occurred between the two motor vehicles and that the Plaintiff was a passenger and was injured in the accident. The police abstract form reflects the accident as "**pending under investigations.**"

15. The evidence from the Plaintiff's side and the contents of the police abstract form remain uncontroverted by any other evidence. This court therefore accepts the evidence that the accident occurred between the two motor vehicles and that the Plaintiff was a passenger in motor vehicle KAH 980Y Toyota Saloon.

16. The circumstantial evidence that the two motor vehicle collided connotes negligence in the manner that either one or both vehicles were being driven at the material time. In the absence of any explanation by any of the Defendants, the inference that can be drawn is that there was negligence. Motor vehicles which are properly managed would ordinarily not collide.

17. The Plaintiff relied on the doctrine of *res ipsa loquitur* to make the case that the Respondent was liable. The **Black's Law Dictionary (8<sup>th</sup> page Ed.)** page 1336 defines *res ipsa loquitur* as, "**the thing speaks for itself.**" It goes on to explain that, "**The doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case**".

18. In **Nandwa v Kenya Kazi Limited [1988] eKLR**, the Court of Appeal cited, with approval, a portion **Barkway v South Wales Transport Company Limited [1956] 1 ALLER 392,393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:

**The application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.**

(See also **Margaret Waithera Maina v Micheal K Kimaru [2017] eKLR**, Court of Appeal and **Beatrice Kavindu Musembi** (suing as the legal representatives of the Estate of **Peter Muteti Musembi – Deceased**) **V Patrick Mbithi Kavita [2019] eKLR**)

19. The evidence from both Pw1 & Pw2 reflects that the Plaintiff was 14 years old at the material time. Although the Plaintiff was a minor she was not a child of tender age who could not be responsible for her actions. However, there is no evidence of any negligence on the Plaintiff's side.

(See for example **Basier Ahmed Butt v Uwais Ahmed Kahn [1982-88] 1 KAR 1 & [1981] KLR 349**).

20. On the issue of ownership of the motor vehicles the police abstract reflects that the deceased was the driver of motor vehicle KAH 980Y. The name of 2<sup>nd</sup> Defendant, Telkom (K) Limited is not reflected in the police abstract. The Copy of Records from Kenya Revenue Authority produced as an exhibit herein reflects the name of Josephine N. Otsyula as the owner of motor vehicle KAH 980Y as at 5<sup>th</sup> November, 2005. The said Josephine N. Otsyula had been sued as the 5<sup>th</sup> Defendant herein but the case against her was withdrawn.

21. The 2<sup>nd</sup> Defendant Telkom (K) Ltd paid for the material damage for motor vehicle KAH 980Y to the administrators of the estate of the deceased. The payment voucher for the sum of Ksh.245,000/= is amongst the bundle of documents produced herein by the

Plaintiff. These documents further reflect that the said amount was paid to the 2<sup>nd</sup> Defendant, Telkom Ltd, by the Kenya Alliance Insurance Company Limited being payment for the claim involving motor vehicle KAH 980Y with the insured being the deceased and Telkom Kenya Ltd.

22. The police abstract further reflects that TenFold Limited, the 4<sup>th</sup> Defendant, was the owner of motor vehicle KAM 569J. The name of the driver is not reflected either in the police abstract or in the evidence adduced by the Plaintiffs witnesses.

23. As held by the Court of Appeal in the case of **Joel Muna Opija v East African Sea Food Limited [2013] eKLR**:

**“We agree that the best way to prove ownership would be to produce document from the Registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”**

24. From the foregoing, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the owners of motor vehicle KAH 980Y Toyota Saloon and the 4<sup>th</sup> Defendant, TenFold Ltd, the owner of motor vehicle registration KAM 569J Isuzu pickup. The 3<sup>rd</sup> Defendant, Soni Jitendra Jayantjla has not been connected by way of evidence as either the driver or the owner of any of the motor vehicles herein.

25. I apportion liability on a 50:50 basis between the two motor vehicles. The circumstances of this case makes it difficult to lay blame on any one of the two vehicles.

26. Faced with a similar scenario, the Court of Appeal in **Hussein Omar Farah v Lemto Agencies [2006] eKLR** held as follows:-

**“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”**

27. The Plaintiff sustained the following injuries according to the medical report dated 28<sup>th</sup> August, 2006 prepared by Professor B.S. Mbindyo:

1. **Blunt injuries to the abdomen with rupture of the intestines.**
2. **Fracture of the right radius.**
3. **Fracture of the right ulna.**
4. **Fracture of the third lumbar vertebra.**
5. **Fracture of the left iliac bone.**

28. The doctor's opinion was as follows:

**“Miss. Brenda Nanguni Mukung sustained severe and life threatening injuries resulting in ruptures of the small and large bowels. She also suffered severe injuries in the form of fractures of the right radius, ulna, left iliac bone and the third lumbar vertebra. The injuries caused her severe pains and much suffering and inconveniences and cost her 50 days of hospitalization, three months of missed schooling and she was still undergoing treatment more than ten months after the accident**

**The ruptured intestines were successfully repaired but she was left with peritoneal adhesions which will remain a source of off and on pains and discomfort and she to suffer intestinal obstruction(s). The peritoneal adhesions also limited her in the amount of food she may wish to enjoy at any one time.**

**The fractures of the right radius and ulna healed with an angulation deformity which was expected to correct on its own as the child grows.**

**The fracture of the lumbar spine healed with an angulation deformity which produced a kyphosis. The deformity put abnormal strains and stresses in the adducent intervertebral joint which will in future suffer post traumatic osteoarthritis with worsening pains and disability.**

**The fracture of the left iliac bone healed leaving no permanent disability but may become a source of off and on pains due to the fibrosis that ensued.”**

29. The medical report by Dr. P.M. Wambugu dated 15<sup>th</sup> December, 2009 who examined the Plaintiff at the request of the 1<sup>st</sup> Defendant was also produced as an exhibit by the Plaintiff. The said medical report is essentially in agreement with the findings reflected in the medical report by prof. B.S. Mbindyo.

30. The Plaintiff's side submitted for an award of Ksh.8,000,000/= as general damages for pain suffering and loss of amenities. The following cases were relied on:

(a) **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR** where an award of Ksh.4,000,000/= was made for injuries which included:

- a fracture of the right femur.
- fracture of the 3-6 ribs.
- pain in the right side of the chest and right thigh
- persistent pain in the right knee.

Treatment included several operations, removal of metal implant and knee replacement surgery.

(b) **Madina Gathoni v Ali Shalo Shosi & another [2009]** where an award of Ksh.3,200,000/= was made for injuries which included:

- fracture of the right femur distal 1/3
- fracture of the right tibia/fibular
- fracture of the right femur proximal
- fracture of the right femur supracondylar
- fracture of left tibia/fibular

Treatment included insertion of K-nails in both the left and right femur and a “DHS” to reduce the supracondylar fracture of the right femur and immobilization with a plaster of paris. The Plaintiff underwent three major surgeries, was assessed at 60% in capacity and was confined to a wheelchair for the rest of a life.

(c) **Fred M O & 2 others v Sarah Achieng Salasie [2009] eKLR** where an award of Ksh.5,000,000/= was made to the Plaintiff therein who was paralyzed in the lower part of the body and was confined to a wheel chair.

31. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted for an award of Ksh.400,000/= as general damages. Reliance was placed on the following decisions:

(a) **Neelam Mansukhlal Shah & others v Duncan Linscott NBI HCCC No. 1018 of 2007** where the third plaintiff sustained fractures to public bones, cerebral concussion fracture of six ribs on the left side of chest, fracture of ilio and ischio public rami on rights and multiple bruising on forehead and right elbow knee right foot and left hand. General damages for pain, suffering and loss of amenities assessed at Ksh.250,000/=

(b) **Phillip Musyoka Mutua v Leornard Kyalo Mutisya [2018] eKLR**

The Plaintiff sustained a cut wound on the face near right eye, blunt injury to the forehead, bruises on the chest, blunt injury to both the shoulder, deep cut wound on the left hand, bruises on the left hand and fracture distal left radius. On appeal, the award of general damages for pain, suffering and loss of amenities assessed at Ksh.400,000/= was reduced to Ksh.300,000/=

(c) **Bildad Mwangi Gichuki v TM-AM Constructions Group (Africa) [2000] eKLR**

The Plaintiff therein sustained a fractured pelvis, fractured 3 ribs and segmental fracture of the left femur bone and loss of consciousness. He was awarded Ksh.250,000/= as general damages for pain, suffering and loss of amenities.

(d) **Samuel Muthama v Kenneth Maundu Muindi [2009] eKLR**

The Plaintiff therein sustained blunt injury to the head with loss of consciousness for about four hours, blunt injury to the neck, cut on the scalp, injury to the right eye with periorbital oedema, blunt injury to the chest and back, blunt injury to the low back with spondylolisthesis L2 (Compression of the L.2 vertebra) and small cuts on the dorsum of the right hand.

On appeal, the award of general damages for pain, suffering and loss of amenities assessed at Ksh.380,000/= was upheld.

32. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted for an award of Ksh.500,000/= as general damage. The case of **Kweri Peter & 2 others v Ann Wanjiku Maina [2017] eKLR** was referred to. In the said case, the sum of Ksh.600,000/= was awarded for injuries which included skeletal injuries which involved admission in hospital. The Plaintiff fully healed and only required the removal of plates from the fracture site and permanent incapacity which also included loss of two teeth was assessed at 20%.

33. In addition to the cases referred to by the parties herein this court has also looked at the awards in the following cases with comparable injuries:

(a) In **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR** the Plaintiff therein sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula. The court awarded a sum of Kshs.1,750,000/= general damages for pain and suffering and loss of amenities in the year 2014.

(b) In **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR**, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological re-fracture of the right leg. Award general damages was assessed at Ksh. 1,500,000/= for pain and suffering and loss of amenities.

(c) In **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR**, the Plaintiff therein sustained extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fracture collar bone. The treatment included internal fixation of the fracture with a metallic plate and subsequent amputation of the left leg. General damages for pain, suffering and loss of amenities was assessed at Kshs 2,000,000/=.

34. It is observed that the cases relied on by the Plaintiff bear more severe injuries than in the case at hand. The cases cited by the Defendants reflect less severe injuries. Taking into account the comparable awards in comparable injuries and the passage of time and inflation, I award the sum of Ksh.2,000,000/= as a reasonable award of general damages to the Plaintiff herein.

35. Special damages must be specifically pleaded and specifically proved. The Plaintiff's claim for special damages was for Ksh.1,323,186.80 for payment of medical Bills. However, the Plaintiff's father's evidence in court was that his employer paid the Bill and he paid 10% of the same which is Ksh.132,341.20 as per the letter from his employer dated 26<sup>th</sup> April, 2006 which reflects that the said amount was recovered from his salary. The claim for Ksh.3,000/= for the medical report was proved as per the receipt produced. No receipt was produced for the sum of Ksh.500/= claimed for obtaining the police abstract. Total special damages claimed and proved therefore comes to Ksh.135,341.20. Together with the award of general damages at Ksh.2,000,000/= the total comes to Ksh.2,135,341.20.

36. In the upshot, judgment is entered for Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally and against the 4<sup>th</sup> Defendant for the sum of Ksh.2,135,341.20 costs and interest on a 50-50 liability basis between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 4<sup>th</sup> Defendant. The case against the 3<sup>rd</sup> Defendant is dismissed with costs.

Date, signed and delivered at Nairobi this 3<sup>rd</sup> day of June, 2021

**B. THURANIRA JADEN**

**JUDGE**