



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 567 OF 2009

ANN WANJIKU KAMAU.....PLAINTIFF

-VERSUS-

OGUTU JOSEPH.....DEFENDANT

JUDGMENT

1. Ann Wanjiku Kamau who is the plaintiff in the present instance instituted a suit against the defendant vide the plaint dated 11th August, 2003 and amended on 29th September, 2014 in which she sought for various reliefs in the following order:

- a) **Special damages in the sum of Kshs.9,012,511/.**
- b) **General damages for pain and suffering.**
- c) **Costs of the suit.**
- d) **Interest on a), b) and c) above at court rates.**
- e) **Any further or other relief that this Honourable Court may deem fit to grant.**

2. The defendant was sued in its capacity as the registered owner and driver of motor vehicle registration number KAW 922V Toyota Land Cruiser (“*the subject motor vehicle*”) at all material times.

3. In her plaint, the plaintiff pleaded that sometime on or about 15th March, 2009 while lawfully walking along Chiromo Road on the zebra crossing, she was knocked down by the subject motor vehicle, the result of which she sustained serious injuries whose particulars were laid out in the plaint.

4. The plaintiff attributed the accident to negligence on the part of the defendant by setting out its particulars in the plaint.

5. The defendant, upon being served with summons, entered appearance and filed his statement of defence dated 13th November, 2009 and amended on 24th July, 2012 to challenge the plaintiff’s claim.

6. The defendant pleaded in his defence that whereas the accident took place on the date and in the place described in the plaint, the same was not a consequence of any negligence on his part; rather, the same resulted from negligence of the plaintiff, the particulars of which were set out under paragraph 4 of the statement of defence.

7. At the hearing, the parties’ respective cases were supported by the evidence of two (2) witnesses each. For the plaintiff’s case, Dr. Okoth Okere who was PW1 stated that he examined the plaintiff on 26th August, 2009 and subsequently prepared a medical report on like date which he produced as P. Exh 1 together with receipts in relation to costs of his court attendances and preparation of the medical report as P. Exh 2 and 3 respectively.

8. The doctor’s testimony is that the plaintiff sustained a fracture of the ulna and pelvis, in addition to abdominal injuries.

9. In cross-examination, it was the evidence of the good doctor that he examined the plaintiff close to five (5) months from the date of the accident and that he relied on the discharge summary. He further stated that metal plates were implanted in the plaintiff and that the same ought to be removed in the future at an approximate cost of Kshs.200,000/.

10. The plaintiff in her evidence as PW2 adopted her signed witness statement and stated that she earns a living by selling clothes while adding that preceding the accident she worked as a professional nanny but lost her job after the accident and cannot now work under such capacity owing to her injuries.
11. The plaintiff further stated that following the accident, she was admitted into ICU (Intensive Care Unit) at M.P. Shah Hospital where she remained for three (3) days before being transferred to Nairobi Women's Hospital.
12. In cross-examination, the plaintiff testified that the accident occurred at about 6.00pm on the material date and that the subject vehicle's headlights were not on prior to the accident. The plaintiff added that she was on the right lane of the road at a zebra crossing when the defendant knocked her down.
13. It was the plaintiff's testimony that the subject motor vehicle did not lose control or veer off the road prior to hitting her and that she was attempting to cross over to the third lane when she was hit.
14. It was also the testimony of the plaintiff that following the accident, the defendant rushed her to hospital.
15. According to the plaintiff, she settled the hospital bill of Kshs.800,000/ out of which a substantial sum of Kshs.356,161/ was paid using her employer's card and that the said employer is holding her family member's title deed as security.
16. The plaintiff stated that prior to the accident, she was employed as a nanny earning a consolidated monthly salary of Kshs.20,000/ and that she is now engaged in business.
17. The plaintiff further stated that she is a single parent to two (2) minor children.
18. It was the evidence of the plaintiff that as at the time of trial, she was still seeing medical specialists and that though she has two (2) children, she cannot give birth normally due to her pelvic injuries brought about by the accident.
19. In re-examination, the plaintiff stated that there was enough light for her to see the road on the date of the accident and that she was hit while crossing the road.
20. The plaintiff also stated that she paid the medical expenses incurred by taking out loans. The plaintiff's case was subsequently closed.
21. The defendant through his evidence as DW1 adopted his signed witness statement and further stated that he was driving the subject motor vehicle on the material date.
22. The defendant admitted in his testimony that he was driving on the right side of the road prior to the accident and that a woman who claims to have been in the company of the plaintiff mentioned to him that the plaintiff was running away from thugs when she came onto the road.
23. According to the defendant, his headlights were on at all material times and the plaintiff did not use the stairs near the road but chose to recklessly run across the road. The defendant further stated that he has never been arrested or charged with any offence arising from the accident.
24. The defendant produced the police abstract and inspection report as D. Exh 1 and 2.
25. In cross-examination, it was the evidence of the defendant that he did not see the plaintiff running and stated that he tried to avoid the accident by pulling off the road. According to the defendant, the accident occurred between 7.00pm and 7.30pm.
26. The defendant further testified in re-examination that he braked but could not swerve off the road and that it is the front section of the subject motor vehicle that hit the plaintiff.
27. Dr. Peter Wambugu Mwangi who was DW2 stated that he examined the plaintiff one (1) year following the material accident and prepared a medical report to that effect which he produced as D. Exh 3. The doctor mentioned that the plaintiff had suffered a collapse of the lungs and stated that the metal implants need not be removed.
28. It was the evidence of DW2 that the plaintiff's permanent incapacity is assessable at 35%.
29. The doctor was cross-examined, during which time he testified *inter alia*, that the metal implants require removal at a cost of Kshs.80,000/ and mentioned that this cost is not fixed. It was also his testimony that the pelvic injuries can be surgically corrected or through bed rest. This marked the close of the defence case.
30. At the close of the hearing, this court directed the parties to put in written submissions. The plaintiff submitted that going by the evidence tendered before this court, it is clear that the defendant is entirely to blame for the accident. The plaintiff therefore urged that the defendant be found 100% liable.
31. On quantum, the plaintiff urged a sum of Kshs.3,500,000/on general damages and relied on the case of **Samuel Theuri Kibatia v**

Ephantus Ngugi Mwaura & Another [HCCC No. 27 of 2004 (Nyeri)] where the court awarded a sum of Kshs.1,200,000/ in respect to similar injuries.

32. In respect to special damages, it was the plaintiff's submission that the sum of Kshs.9,012,511/ pleaded and proved should be awarded.

33. In reply, the defendant contended that the plaintiff wholly or substantially caused the accident. In this regard, it was the defendant's argument that contrary to the provisions of **Section 107** of the **Evidence Act** that a person who desires judgment on liability must prove that the facts pleaded exist, the plaintiff has not proved any degree of liability against the defendant hence the suit consequently dismissed.

34. On quantum, it was the defendant's submission that an award of Kshs.800,000/ would constitute sufficient general damages. He went on to cite various cases including:

a) The case of **Sosines Orindo v Emkay Builders Limited [2019] eKLR** where the Court of Appeal reinstated the lower court's award of Kshs.900,000/ under this head, made to a plaintiff with a head injury with loss of three teeth, a fracture of the right femur and injury to the back and chest;

b) The case of **Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR** where the Court of Appeal substituted an award of Kshs.200,000/ with one of Kshs.500,000/ in the instance of a plaintiff who had suffered Multiple comminuted fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 cm, displaced fracture of the left shoulder blade, swelling and stiffened knee; and

c) The authority of **Texcal House Service Station Ltd & another v Timo Kalevi Jappinen & Another NBI HCCA 134 of 1998** where a plaintiff had to undergo 5 operations for various fractures and permanent incapacity was assessed at 35%.

35. On special damages, the defendant was of the view that the plaintiff was only entitled to the sum of Kshs.100,000/ for medical expenses paid by herself and a sum of Kshs.2,000/ for receipt number 892 to Dr. G. Adari. The remaining medical costs and taxi expenses were brought to question by the defendant.

36. On damages for loss of future earnings, it was the defendant's view that the same was not proved which is to say that the plaintiff is not entitled to an award of such kind.

37. I have considered the evidence placed before this court and I have equally considered the rival submissions and authorities cited by the respective parties.

38. It is noteworthy that the twin issues for determination are on liability and quantum.

39. On liability, it is undisputed that the defendant was at all material times the registered owner of the subject motor vehicle and its designated driver at all material times. In any event, the plaintiff tendered the copy of records and police abstract, both of which indicate the defendant as being the registered owner of the said vehicle. It also remains uncontroverted that the accident took place on the material date, the result of which the plaintiff was injured.

40. Going by the testimony of the parties herein, it is apparent that the accident took place during the estimate hours of between 6.00 p.m and 7.30 p.m. There is no indication that the defendant lost control of the subject motor vehicle and notwithstanding his evidence that his headlights were on and which evidence was not corroborated by any independent witness, I am of the view that had he been driving at a reasonable speed, he would have been able to slow down and avoid hitting the plaintiff.

41. Further to the foregoing and in addressing the defendant's position that he was never arrested or charged in relation to the accident, I opine that the standard of proof in civil cases is lower than that in criminal cases which is to say that the absence of an arrest or criminal charges does not automatically dispel liability on a person under civil law.

42. In the present instance, the defendant did not deny knocking down the plaintiff and as I have already pointed out, he did not bring any evidence to show any real steps or precautions taken in ensuring the safety of other motorists or pedestrians for that matter. In any case, the defendant did not bring any independent witness to corroborate his theory that the plaintiff was running across the road when the accident occurred. In the premises, I find the defendant negligent and hence liable for the accident.

43. This brings me to the next issue under this limb which has to do with whether this is an appropriate case for apportioning liability. From the oral evidence of the plaintiff, she was hit while crossing the road. There was no independent or credible evidence to support her statement that she was crossing at a pedestrian track at the time of the accident. Both the plaintiff and defendant stated at the trial that there were stairs suited for use by pedestrians yet the plaintiff admitted that she was on the road when she was knocked.

44. It therefore follows that the plaintiff equally did not demonstrate any active steps taken in ensuring her own safety, including confirming that the road was clear before crossing or using the designated stairs to get to the other side of the road.

45. From the foregoing, I am of the view that blame/liability ought to be apportioned between the parties and I will do so in the ratio of 70:30 in favour of the plaintiff.

46. I will address the next limb touching on quantum in two (2) parts as follows:

a) General damages for pain and suffering and loss of amenities

47. The nature of injuries pleaded in the plaint were confirmed both by the medical report dated 26th August, 2009 and produced by PW1 as P. Exh 1 and the report dated 18th January, 2010 produced by DW2 and are as follows:

i. Fractures of the left midshaft radius and ulna

ii. Comminuted fracture of the left femur shaft with minimal displacement.

iii. Tension pneumothorax

iv. Fracture of the pelvis

v. Blunt abdominal injury

48. According to the doctor, plates were inserted in the plaintiff's body and would require removal at a cost of Kshs.200,000/. The doctor further stated that the injuries had left surgical scars to the forearm and upper leg and assessed permanent incapacity at 40%.

49. In the second medical report, Dr. P.M. Wambugu categorized the plaintiff's injuries as soft tissue in nature and stated that the metal implants may be removed at a cost of Kshs.80,000/ in a private institution. The doctor proceeded to assess her degree of permanent incapacity at 35%.

50. Upon considering the authorities cited by the parties, I find that the authority cited by the plaintiff was decided over a decade ago. The authorities cited by the defendant appear to constitute relatable injuries to those suffered in the present instance; in the two (2) cases of **Sosines Orindo v Emkay Builders Limited [2019] eKLR** and **Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR** which I cited hereinabove, no permanent incapacity was assessed. Furthermore, the case of **Texcal House Service Station Ltd & another v Timo Kalevi Jappinen & Another NBI HCCA 134 of 1998** in which permanent incapacity was assessed to a similar degree as in the present instance was decided years ago.

51. I took into account the degree of permanent incapacity assessed between 35% and 40%. I also considered other separate authorities with comparable injuries. In the case of **P W v Peter Muriithi Ngari [2017] eKLR** the High Court on appeal substituted an award of Kshs.600,000/ with one of Kshs.1,600,000/ in the instance of a plaintiff who had suffered a fracture of left femur which was operated on and fixed with a metallic plate, fractures of the left fibula and tibia malleoli which were operated on and fixed with K-wires and plates and blunt injuries to the pelvis causing fractures of the pelvis with 20% permanent incapacity. Also, in the authority of **Ndathi Mwangi & 2 others v Benson Lumumba Ndivo [2018] eKLR** where the medical prognosis was fracture of the ulna, compound fracture of the femur in the middle one third, compound displaced fracture of the left tibia and fibula and soft tissue injuries, an award of Kshs.1,250,000/ was made, though I note that in that particular case, there was no permanent incapacity.

52. Upon considering the above authorities, the degree of permanent incapacity, the passage of time and vagaries of life, I find an award of Kshs.1,500,000/ to be reasonable in the circumstances.

a) Special damages

53. On the medical expenses/costs incurred, I note from the evidence that part of the hospital bill was settled by the plaintiff's then employers (Saelaert Alex and Riikka Torppa) totalling a sum of Kshs.546,161/. No credible evidence was tendered before this court to indicate that the plaintiff was to refund the aforesaid amount or to show that a title deed had been issued to the employers as security as stated by the plaintiff. In the circumstances, I take the view that the plaintiff is not entitled to the sum of Kshs.546,161/. I also find that the plaintiff is not entitled to the cost of Kshs.3,000/ for court attendance of PW1 the same not having been pleaded as a special damage.

54. Be that as it may, I considered the taxi receipts and find them to be credible. Upon tabulating the receipts of medical related costs incurred, the police abstract costs, the cost of obtaining the copy of records; and having taken into account my position in respect to the bill paid by the plaintiff's former employers, I find that the plaintiff is entitled to the aggregate sum of Kshs.240,340/ in respect to medical and other related costs.

55. On future medical costs, I considered the approximated amounts stated in the respective medical reports and I also considered the plaintiff's proposed amount of Kshs.200,000/ which amount was stated in the medical report produced as P. Exh 1 coupled with the fact that DW2 stated that the cost of Kshs.80,000/ indicated in his medical report is not fixed. I am therefore satisfied that my decision to award of Kshs.200,000/ for future medical reports is justified since the same is provided for in P. Exh 1.

56. On costs for future earnings, I considered the plaintiff's evidence on her career path and which evidence was supported by a letter of employment dated 27th September, 2007. The said letter which was tendered in court indicated that the plaintiff would receive a monthly salary of Kshs.20,000/.

57. While I agree with the defendant that there was no proof of earnings, I am considerate of the legal position that it is not in every job sector that parties are able to prove earnings by way of receipts or pay slips.

58. I similarly note that in the second medical report which was produced by the defendant, Dr. P.M. Wambugu who was DW2 indicated that given the nature of her injuries, the plaintiff would unlikely exert herself manually.

59. Be that as it may, I did not find any credible evidence to show that the plaintiff actually lost her job as a nanny following the accident or that she was unable to earn an income as a result. It is important to note that damages arising out of loss of future earnings is real actual loss which ought to be proved by way of evidence. I am therefore not satisfied that the plaintiff has proved her entitlement to damages under this particular head.

60. The upshot is that judgment is hereby entered in favour of the plaintiff and against the defendant follows:

i. Liability	70%:30%
ii. General damages for pain and suffering	
and loss of amenities	Kshs.1,500,000/
iii. Special damages	
a. Medical and other expenses	Kshs. 240,340/
b. Future medical costs	Kshs. 200,000/
c. Loss of future earnings	<u>NIL</u>
Gross total	Kshs.1,940,340/
Less 30% contribution	<u>Kshs. 582,102/</u>
Net total	<u>Kshs.1,358,238/</u>

iv. Costs of the suit are awarded to the plaintiff.

v. The plaintiff shall also have interest on special damages at court rates from the date of filing of the suit and interest on general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant