



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL CASE NO. 05 OF 2016**

**BETWEEN**

**NURU BADI SAID.....PLAINTIFF**

**AND**

**OKUMU PAUL.....1<sup>ST</sup> DEFENDANT**

**BERNARD ODHIAMBO OKUMU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint amended on 27<sup>th</sup> November, 2017, NURU BADI SAID (*hereinafter referred to as Plaintiff*) has sued OKUMU PAUL and BERNARD ODHIAMBO OKUMU (*hereinafter referred to as Defendants*) jointly and severally claiming damages for injuries she suffered on 31<sup>st</sup> May, 2014 while was walking along Kisumu-Ahero Road when she was knocked down by Motor Vehicle KQW 272 (*hereinafter referred to as the accident motor vehicle*) owned by the 2<sup>nd</sup> Defendant and which was driven negligently by the 1<sup>st</sup> Defendant.

2. The defendants in a joint amended statement of Defence denied the claim and blamed the Plaintiff for crossing the road without due care and attention thereby causing the accident.

**Plaintiff's case**

3. The Plaintiff told court that she was walking on the pavement off Kisumu-Ahero Road near a petrol station that was under construction when *the accident motor vehicle* that was being driven into the petrol station knocked her down causing her severe injuries to which she has to date not recovered and is unable to work and earn a living having been confined to a wheel chair as a result of the severe injuries she suffered in the accident. Plaintiff gave evidence that she was initially treated as an inpatient at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) and was discharged by a discharge summary dated 21.6.14 **PEXH. 1**.

4. Plaintiff was later to be admitted at the National Spinal Injury Referral Hospital and Pandya Memorial Hospital from where she was discharged by discharge summaries dated 24.3.15 and 16.4.15 **PEXH. 2** and **PEXH3** respectively.

5. In support of her case, Plaintiff produced further exhibits including an MRI Report dated 16.4.15 from Metropolitan Diagnostic Centre **PEXH. 4**, medical report dated 16.4.15 from Pandya Memorial Hospital **PEXH. 5**, referral letter from dated 19.6.14 from JOOTRH **PEXH. 6**, a bundle of receipts for medical expenses **PEXH. 7**, demand notice and statutory notice dated 19.3.15 **PEXH. 9** and **PEXH. 10**, P3 Form **PEXH. 11**, Police Abstract **PEXH. 12**, receipt for Kshs. 5,000/- paid to Dr. Ogando **PEXH. 13**, copy of records for *the accident motor vehicle* in the name of the 1<sup>st</sup> Plaintiff and receipt for Kshs. 500/- **PEXH. 14 (a)** and **(b)** respectively and a bundle of payslips from her employer Al-Momin Girls Trianing Institute showing her gross salary as Kshs. 7,000/- whereas the net salary as Kshs. 6,800/- **PEXH. 15**.

6. **PW2 PC MWAKWEKE NYOKA** testified that the accident herein was reported to Kisumu Police Station. He told court that he did not visit the scene, investigate the accident or trace the police file but that the OB report showed that the accident occurred off the tarmac as the victim dashed in front of *the accident motor vehicle* which was being driven into a petrol station. The witness told court that the OB did not specify the probable point of impact but showed that the case was pending under investigations.

**Defence case**

7. **DW1 BERNARD ODHIAMBO OKUMU**, the 2<sup>nd</sup> Defendant conceded that he was driver of *the accident motor vehicle*. He also conceded that an accident occurred involving that vehicle and the Plaintiff but blamed the Plaintiff for walking onto the path of the vehicle causing the collision.

### Analysis and Determination

8. This court has considered the parties' pleadings evidence on record and the submissions on behalf of the parties.

### Quantum

9. The occurrence of the accident was an undisputed fact and the only issue was who was to blame for the accident. Neither side called an independent witness to confirm and fortify their respective versions of the circumstances leading to the accident.

10. PW 2 was not the investigating officer and he could not tell from the information he had who was to blame. He similarly could not give an outline of the scene since he did not have the Police file and he therefore did not tell the court where the collision took place for the court to determine who was to blame. Both the Plaintiff and the 2<sup>nd</sup> Defendant blamed each other for the accident. The Court of Appeal faced with a similar situation in the case of Hussein Omar Farah v Lento Agencies NRB CA Civil Appeal No. 34 of 2005[2006] eKLR observed that:

**“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”.**

11. In the light of the conflicting evidence on both sides and having considered that the 1<sup>st</sup> Defendant had in his control a lethal weapon, I would apportion liability equally at 70:30%. (See Karanja v Malele [1983] KLR 42). The plaintiff will bear 30% and the Defendants 70% jointly and severally.

### Quantum

12. **PW3 Dr. Ezekiel Ogando Zoga** stated that he examined the Plaintiff on 26.11.15 and confirmed that she suffered the following injuries:

- **Severe head injury**
- **Complete spinal cord transection of the level of T7 and T8**
- **Dislocation both knees**
- **Dislocation both shoulders**
- **Cuts both ankles**
- **Bruises on the gluteal area**
- **Deep cut on the occipital region**

13. It was his evidence that the injuries caused the plaintiff total transection of the spinal cord leading to:

- **Paraplegia (total loss of activities below the section cord)**
- **Predisposition to post traumatic epilepsy**
- **Permanent disfiguring scars**

14. The witness noted that the Plaintiff:

- **Is on regular follow up at the National Spinal Injury Referral hospital with a high cost implication for the rest of her life**
- **Is predisposed to suffer recurrent urinary infections and sepsis and has to be in hospital on and off**
- **Will need regular change of catheter and pampers at an estimated cost of Kshs. 6,000/- per month for life**
- **Will suffer pressure sores due to loss of sensation on the lower limbs and being on pampers and requires prophylactic antibiotics every 2 to 4 weeks at a cost of Kshs. 2,400/- biweekly for life**
- **Will need an assistant and close nursing care for life**
- **Will need special wheelchair at about Kshs. 120,000/-**
- **Will need special mattress at a cost of Kshs. 350,000/- to minimize pressure Sores**

15. The doctor concluded that the Plaintiff had suffered total permanent incapacity. He produced the Plaintiff's medical report and his receipt for Kshs. 30,000/- as **PEXH. 16** and **PEXH. 17** respectively.

16. The Plaintiff was examined by Dr. D.O.Olima on the instructions of the defence and his report dated 03.03.17 was produced by consent

as **DEXH. 1**. The findings in that report concur with the findings in Dr. Ogando's report **PEXH. 16** that Plaintiff suffered severe injured which caused her:

- **Complete paraplegia from T7 with loss of sensation in the lower limbs**
- **Loss of bowel functions and urine control**
- **Scars on the entire back, gluteal regions and posterior aspect of both shoulders**
- **Reduction of power in the left upper limb**
- **Scar in the occipital region**

17. The doctor also noted that the Plaintiff is dependent on the services of a personal assistant for daily chores.

18. Plaintiff prays for general damages in the sum of Kshs. 15,000,000/- for pain and suffering, Kshs. 9,000,000/- for loss of consortium, Kshs. 9,000,000/- for psychological trauma, Kshs. 3,600,000/- for wheelchair, Kshs. 10,800,000/- for nursing aid, Kshs. 4,680,000/- for catheters, urine bags, diapers and napkins, Kshs. 720,000/- for stool evacuation and drugs, Kshs. 720,000/- for infections management, Kshs. 600,000/- for quarterly checkup, Kshs. 600,000/- to hire taxi, Kshs. 8,640,000/- for physiotherapy, Kshs. 3,240,000/- for painkillers, Kshs.2,168,040/- for paraplegic bed, Kshs. 900,000/- for special mattress, Kshs. 600,000/- for hip replacement surgery and Kshs. 2,448,000/- for loss of future earnings. Reliance was placed on the following authorities:

**i. Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR** where the plaintiff who became a complete paraplegic with a 100% permanent incapacitation was awarded Kshs. 8,000,000/- damages for pain and suffering, Kshs. 7,200,000/- for loss of earning capacity, Kshs. 3,960,000/- for nursing aid, Kshs. 3,960,000/- for medical supplies, Kshs. 250,000/- for electric chair and Kshs. 350,000/- for electric bed

**ii. Ngure Edward Karega v Yusuf Doran Nassir [2014] eKLR** where the plaintiff who suffered spinal injury confining him to a wheelchair was awarded Kshs. 5,000,000/- for pain and suffering, Kshs. 9,576,000/- for loss of earning capacity, Kshs. 5,133,600/- for diapers and catheters, Kshs. 3,091,200/- for nursing aid and Kshs. 361,340/- for motorized wheel Chair.

**iii. Jackson Wahome Ngatia v Agridutt (K) Ltd & 2 Others [2007] eKLR** where the plaintiff who suffered paralysis of lower and upper limbs was awarded Kshs. 4.5 Million for pain and suffering, Kshs. 1,728,000/- for loss of earning capacity, Kshs. 1,080,000/- for future medical expenses, Kshs. 2,595,000/- for a helper, Kshs. 648,000/- for colostomy bags, Kshs. 561,600/- for diapers, Kshs. 252,000/- for future medical expenses, Kshs. 150,000/- for special bed and Kshs. 50,000/- for special mattress.

19. Defendants offer Kshs. 3,500,000/- for pain and suffering, Kshs. 120,000/- for wheelchair, Kshs. 720,000/- for catheters, urine bags, diapers and napkins, Kshs. 350,000/- for ripple mattress and bed and Kshs. 816,000/- for loss of future earning capacity. Reliance was placed on numerous authorities including the following:

**i. Edward Mungai Waweru V Samson Ochieng Kagunda & Another [2018] eKLR** where the plaintiff who suffered paralysis and was confined to a wheelchair was awarded Kshs. 3.5 Million for pain and suffering, Kshs. 1,800,000/- for loss of earning capacity, Kshs. 1,800,000/- for loss of future earning, Kshs. 1,800,000/- for a helper, Kshs. 120,000/- for diapers, Kshs. 300,000/- for special mattress and Kshs. 30,000/- for special mattress.

**ii. Mary Njoki Macharia v James Oyugi [2014] eKLR** where the plaintiff who suffered paralysis and was confined to a wheelchair was awarded Kshs. 2,000,000/- for pain and suffering, Kshs 600,000/- for helper, Kshs. 300,000/- for disposables, Kshs. 300,000/- for special mattress and bed and Kshs. 60,000/- for wheel chair.

**iii. Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another [2014] eKLR** where the plaintiff who suffered total paralysis and was confined to a wheelchair was awarded Kshs. 3,000,000/- for pain and suffering, Kshs. 150,000/- for wheel chair, Kshs. 750,000/- for diapers, Kshs. 150,000/- for mattress, Kshs 1,800,000/- for helper, Kshs. 4,680,000/- for weekly transport, Kshs. 3,510,000/- for physiotherapy and Kshs. 180,000/- for daily skin care.

20. I have considered the injuries suffered by the Plaintiff *vis a vis* the pleadings and cited authorities and the I shall address each claim separately as follows:

#### **a. Pain and suffering**

21. Plaintiff suffered total paralysis of the lower limbs and Reduction of power in the left upper limb. I find that the injuries in the more recent case of **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others (Supra)** are more or less similar to the injuries suffered by the plaintiff in this case. Plaintiff suffered 100% permanent incapacitation and is hereby awarded Kshs. 8,000,000/- under this heading.

#### **b. Loss of future earning capacity**

22. At the time the Plaintiff sustained injuries, she was 44 years old and was earning a net pay of Kshs. 6,800/- as evidenced by a bundle of pay slips marked **PEXH. 15**. Plaintiff proposed a multiplier of 30 years and the Defendant 10 years. The normal retirement age in Kenya is 60 years but those in private sector have a longer working life. Considering the vicissitudes of life, I find that a multiplier of 15 years is reasonable and hence I award  $6800 \times 12 \times 15 =$  Kshs. 1,305,600/- under this heading.

#### **c. Special Wheelchair**

23. Dr. Oganda assessed the cost of a special mattress at Kshs. 120,000/- and the same is hereby awarded.

**d. Special bed and Mattress**

24. Dr. Oganda assessed the cost of a special mattress at Kshs. 350,000/- and the same is hereby awarded.

**f. Catheters and diapers**

25. Dr. Oganda stated that plaintiff will need regular change of catheter and pampers at an estimated cost of Kshs. 6,000/- per month for life and hence I award  $6000 \times 12 \times 15 =$  Kshs. 1,080,000/- under this heading.

**f. Future medical expenses**

26. Dr. Oganda stated that plaintiff is predisposed to suffer pressure sores due to loss of sensation on the lower limbs and being on pampers and requires prophylactic antibiotics every 2 to 4 weeks at a cost of Kshs. 2,400/- biweekly for life. Hence I award  $2400 \times 12/2 \times 15 =$  Kshs. 216,000/- under this heading.

**g. Helper**

26. The minimum consolidated wages by region and occupation in Kenya with effect from May 1, 2018 provides for Kshs. 12,926.55 for a house servant and hence I award  $12,926.55 \times 12 \times 15 =$  Kshs. 2,326,779/- under this heading.

**h. Taxi**

27. It is on record that the Plaintiff suffered total paralysis and is confined to a wheelchair. Even in a wheel chair, the Plaintiff no doubt will require to move around particularly to seek regular follow up at the National Spinal Injury Referral hospital as was recommended by Dr. Ogando. Plaintiff seeks Kshs. 5,000/- for times a year and that in my considered view is not out of the ordinary fare and hence I award  $5000 \times 12 \times 15 =$  Kshs. 900,000/-.

**i. Special damages**

28. Plaintiff has proved special damages in the sum of **Kshs. 1,969,753.50** which included Kshs. 1,964,253.50 for medical expenses, Kshs. 5,000/- for the medical report by Dr. Ogando and Kshs. 500/- for copy of records.

29. No evidence was tendered in support of cost of painkillers, cost of future medicine for recurrent chest pain, urinary track and skin infection, stool evacuation drugs, hip replacement, calipers and orthopedic boots and for loss of consortium and the claims thereof are disallowed.

**DISPOSITION**

30. In the result, I enter judgment against the defendants jointly and severally at 70% as follows:

|                          |                           |
|--------------------------|---------------------------|
| Pain and suffering       | Kshs. 8,000,000.00        |
| Loss of future earnings  | Kshs. 1,305,600.00        |
| Special wheel chair      | Kshs. 120,000.00          |
| Special bed and mattress | Kshs. 350,000.00          |
| Catheters and diapers    | Kshs. 1,080,000.00        |
| Future medical expenses  | Kshs. 216,000.00          |
| Helper                   | Kshs. 2,326,779.00        |
| Taxi                     | Kshs. 900,000.00          |
| <u>Special damages</u>   | <u>Kshs. 1,969,753.50</u> |
| <u>Total Award</u>       | <u>Kshs.16,268,132.50</u> |

**(Sixteen million, two hundred sixty-eight thousand, one hundred thirty-two and fifty cents)**

31. Special damages will earn interest at court rates from date of filing suit while the rest of the sums will earn interest from the date of this judgment until payment in full.

32. Costs of the suit are awarded to the Plaintiff.

**DELIVERED AND SIGNED IN KISUMU THIS 16<sup>th</sup> DAY OF May 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Felix

**For the Plaintiff** - Mr. Nyasae

**For the Defendants** - N/A