



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO.590 OF 2009**

**HEMAL-KIRAN PINDOLIA**

**Suing thro' guardian and husband**

**PINDOLIA HEMAL BABU.....PLAINTIFF**

**VERSUS**

**MARTIN MUTURI KARUGU.....1<sup>ST</sup> DEFENDANT**

**OTINGA WALTER.....2<sup>ND</sup> DEFENDANT**

**PAYPOINT SOLUTIONS LIMITED (K) LTD.....3<sup>RD</sup> DEFENDANT**

**AMBAO CYPRIAN.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The plaintiff Hemal – Kiran Pindolia is the wife of Pindolia Hemal Babu who brings this suit as guardian husband of the plaintiff following injuries sustained as a result of a road traffic accident that took place on 30<sup>th</sup> October, 2006 along Magadi- Nairobi road.

The plaintiff was a passenger in motor vehicle Registration No. KAE 697Z owned by the 2<sup>nd</sup> defendant and driven by the 1<sup>st</sup> defendant at the time of the accident. The plaintiff was said to be in the course of her employment with the 3<sup>rd</sup> defendant who instructed her to travel to Ongata Rongai. The said motor vehicle is said to have collided with motor vehicle registration No. KWC 299 owned by the 4<sup>th</sup> defendant.

Although the injuries sustained by the plaintiff were as a result of the collision of the two motor vehicles, the 3<sup>rd</sup> defendant who was the employer was also blamed for the said injuries because, it was alleged, it was its duty to take all necessary precautions towards the safety of the plaintiff while engaged in employment, and not to expose her to any risk, injury or damage which it knew or ought to have known would occur, and provide safe systems and means of work at all times in the course of her duty.

It was therefore the plaintiff's case that, the accident occurred as a result of the negligence and or omissions of all the defendants herein, and breach of contract by the 3<sup>rd</sup> defendant. All the defendants were served with summons to enter appearance but only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed statements of defence. There is a judgment on record against the 4<sup>th</sup> defendant who did not enter appearance or file any defence.

After all preliminaries leading to the hearing had been met, the suit was set down for hearing in the absence of the defendants who had been served with hearing notices. Hemal Pindolia Babu gave evidence in support of the plaintiff's case, adopted his statement as his evidence in chief, and produced the bundle of documents as exhibits in support of the pleadings.

The defendants having not appeared to support their respective pleadings, it must be accepted that, whatever the plaintiff has said through her husband is, and remains uncontroverted. Where a party fails to call evidence in support of the pleadings, such pleadings remain only statements of fact and can only be converted into evidence, if such evidence is adduced to support the same. – see **HCCC No. 1243 OF 2001 Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others, HCCC No. 95 of 1988 Karuru Munyoro vs. Joseph Nduhia Murage & Another, Linus Ng'ang'a Kiong'o & 3 others vs. Town Council of Kikuyu (2012)e KLR.**

In relation to the 3<sup>rd</sup> defendant, the plaintiff pleaded that her employer had a duty of care to ensure that she was not exposed to any danger or risk. Other than the pleadings, there was no evidence that the 3<sup>rd</sup> defendant could foresee the negligence and subsequent accident attributed to the driver of motor vehicle registration No. KAE 697Z in which the plaintiff was a passenger. It cannot also be said that the 3<sup>rd</sup> defendant

was in control of the said motor vehicle just because the plaintiff herein was its employee, and was therefore negligent in the circumstances. It is not enough to say that the 3<sup>rd</sup> defendant instructed the plaintiff to travel in that motor vehicle to attach any liability. It must be proved that the 3<sup>rd</sup> defendant could foresee that by so doing, the plaintiff would be exposed to danger. That evidence is lacking in the circumstances of this case. The 3<sup>rd</sup> defendant is therefore absolved from any liability.

On the other hand, the collision between motor vehicle Registration Nos. KAE 697Z and KWC 299 has not been denied. Even if that were the case, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants have not appeared in court to give evidence to the contrary. There is a copy of Police accident abstract dated 16<sup>th</sup> September, 2009 showing the 1<sup>st</sup> defendant was charged with the offence of careless driving but acquitted under Section 210 of the Penal Code. Acquittal of a driver involved in an accident does not necessarily absolve him of civil liability in a claim for damages.

The doctrine of *res impsa loquitor* applies in the circumstances. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants cannot escape liability to the plaintiff. In my judgment, the 1<sup>st</sup> and 2<sup>nd</sup> defendants on one hand, and the 4<sup>th</sup> defendant on the other, are hereby held liable to the plaintiff jointly and severally, in equal measure, for the injuries suffered as a result of the said accident.

In the statement filed by the guardian/husband on behalf of the plaintiff and in support of the pleadings, it is clear that, following the injuries sustained by the plaintiff, the plaintiff was not in a position to testify. This is because she was not able to attend court, having lost use of all her limbs and is unable to speak.

The plaint summarized the particulars of the injuries sustained by the plaintiff as follows,

- a. Parietal bleeding of the brain diagnosed as brain oedema
- b. Fracture of the mandibular
- c. Fracture of the left clavicle
- d. Complete loss of use of limbs
- e. Complete loss of neurological functions
- f. Glasgow coma
- g. Diffuse axonal injury of the brain

There are several medical reports availed on the injuries sustained by the plaintiff, the treatment she underwent both in Kenya and India, resting with her current condition. These reports were prepared by Dr.C.K.Musau, a Consultant Neurosurgeon, Dr.David Silverstein, a Consultant Cardiologist/Physician,DR.S.H Keer. Dr.Rajan Shah, Dr.Eric Kuhugu( cited by Dr. Parmar) and Dr. P.H.Parmar. Some pictures of the plaintiff are also part of the record.

The medical reports present a profile of severe injuries suffered by the plaintiff, and desparate efforts made by the doctors and her family to save her life. According to the medical reports, the plaintiff suffered 100% permanent incapacity. Going by a medical report prepared by Dr. P.H. Parmar and dated 17<sup>th</sup> February, 2015, the following extract is instructive,

**“Mrs. Hemakiran has lost her expectancy of good and happy life. She cannot partake in any human activities, and has to watch silently, the misery caused by her state to her loved ones. At present, she cannot do anything to relieve her pain or discomfort- what does she do if she gets an itch anywhere on her body? She understands what is happening, she has emotions, she feels touch, itching, pain, etc. The sensation is there but motor function is missing. With her forced sedentary life style, she has high risk of having a heart attack. Her muscles are wasting away due to non-use and her bones must be getting fragile because of non-use and lack of vitamin D that one gets from sunlight. We do not know what micro-nutrients she lacks as her foods are highly selected. She has very high chance of getting pneumonia and bed sores, and when she gets them (hopefully never) it would be difficult to treat.**

**Is she thinking same as I do? Would it have been better if she had died in the accident than all the miseries she and her loved ones have gone through and are going through? Neither she nor anyone else has the answer or control on the situation.”**

The plaintiff being totally immobilised needs support 24 hours a day. She cannot brush her teeth, she cannot feed on her own, she has to be bathed and assisted to go to the washroom. She has to undergo physiotherapy and taken out for sunlight. She has to be turned on her bed from time to time to avoid bed sores. At the moment she is looked after by her mother, mother in law, the husband and a maid. The cost of a professional nurse for every 12 hours is said to be Kshs. 25,000/= which the husband says he cannot afford. The evidence of that cost is contained in the statement of Dr. P. H. Parmar.

The plaintiff was employed by the 3<sup>rd</sup> defendant as a Business Account Manager. The letter of employment dated 24<sup>th</sup> November, 2005 and the contract signed on 21<sup>st</sup> January, 2006 produced in evidence confirm that position. Her salary per annum was Kshs. 600,000/= which translates to Kshs. 50,000/= per month.

The plaintiff has produced two bundles of documents relating to special damages pleaded. These relate to medication in Kenya and India, and also cost of medicine and travel expenses relating to her treatment. Special damages must be specifically pleaded and strictly proved.

The plaintiff has also pleaded loss of earnings, future loss of earnings and loss of earning capacity. She has also pleaded future medical expenses/nursing and medical care expenses. This is in addition to general damages for pain and suffering.

I have already observed that no negligence can be attributed to the 3<sup>rd</sup> defendant and therefore the claim for damages for breach of contract fails.

There is no doubt that the plaintiff suffered very serious injuries as enumerated in several medical reports filed herein, and according to Dr. Parmar she is unlikely to improve, if anything she will probably deteriorate. She has suffered cardiac arrest and she is likely to suffer the same. She will never be able to bear a child. Her condition is irreversible.

Counsel for the plaintiff has cited some authorities to assist the court in considering damages awardable. It is accepted that no amount of money can renew the physical frame of a human being that has been battered and shattered. – see **Tayab vs Kinany (1983) KLR 114, Dorothy Kanyua Mbaka & Another vs. P.S Department of Defence (2014) e KLR, Georgina Wangari Mwangi vs. David Mwangi Muteti (2014) e KLR, Caroline Endovelia Mugayilwa vs. Lukas Mbae Muthara (2016) e KLR.**

In considering damages to be awarded each case depends on its own facts because no two cases are alike. The court is also bound to consider that damages should not be excessive, and that comparable injuries should attract comparable awards.

Taking into consideration the medical reports, the current status of the plaintiff, and attendant circumstances, I consider an award of Kshs. 8,000,000/= to be adequate compensation in terms of general damages for pain, suffering and loss of amenities.

Although the plaintiff pleaded special damages amounting to Kshs. 5,041,194.60, evidence adduced through the documents filed add up to Kshs. 4,834,554/= which I consider proved.

At the time of the accident, the plaintiff was aged 26 years old. In her condition she will never be able to work again. The plaintiff pleaded at paragraphs 15 and 16 as follows,

**“15. Further, at the time of the accident the plaintiff was aged 26 years and in good health and fruitful employment earning Kshs. 50,000/= per month. The injuries from the accident have led to brain damage and complete loss of use of her limbs. She shall require medical attention and nursing for the rest of her natural life.**

**16. In the circumstances the plaintiff will seek damages for lost earnings, loss of earning capacity and future earnings at the rate of Kshs. 50,000/= per month and cost of future medication.”**

In **Madina Gathoni vs. Ali Shalo Shosi & Another (2009) e KLR**, the court stated as follows,

**“In assessing loss of earnings, and loss of earning capacity, the general practice is to take the plaintiff’s annual earnings at the accident and multiply the same with the number of years that the loss of the power of earning is likely to subsist, taking into account relevant changes in the plaintiff’s circumstances which could have taken place since the injury and which are likely to either increase or diminish the plaintiff’s loss.”**

The retirement age of public servants and in many private companies is 60 years. It has been suggested that I apply a multiplier of 24 years which in my considered view is reasonable. The plaintiff has ended up with 100% incapacity. She is not likely to recover and this is confirmed by the medical reports. Her future earning capacity, for lack of a better word, is zero. Damages under this head would work out to  $Kshs. 50,000 \times 12 \times 24 = Ksh. 14,400,000/=$ .

The cost of looking after the plaintiff by a professional nurse has been put at Kshs. 25,000/= for every 12 hours. This appears in the plaintiff’s statement through her husband and also Dr. Parmar. Whereas it is true considering the plaintiff’s condition that constant nursing care is required and necessary, no evidence has been presented that the plaintiff has been spending 25,000/= for every 12 hours in that regard. That is not to say she is not entitled to it, going by her condition.

The plaintiff’s husband has already stated that for the time being, the family, assisted by a maid, is taking care of the plaintiff. I believe in the absence of any evidence, a modest salary of Kshs. 25,000/= per month for a paramedic is sufficient to take care of the plaintiff. Using the same multiplier of 24 years, I make an award of Kshs. 7,200,000/= for nursing care.

There is a claim contained in the plaint for cost of future medication. From the documents presented, it is clear that the plaintiff has been undergoing regular acupuncture sessions, and also medication among other interventions. Regrettably, this has not been properly captured in the further documents filed on 9<sup>th</sup> April, 2019. However, the court is able to conclude from the receipts and tabulations provided that there was an average of Kshs 25,000/= per month for medication.

In the absence of any other guidance, I believe that would be the best guide. In that regard therefore the cost of future medical cost is calculated at Kshs. 25,000/= per month, and using the same multiplier of 24 years I make an award of Kshs. 7,200,000/= under that head.

In the end there shall be judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants jointly and severally as follows,

a. General damages for pain,

suffering and loss of amenities	Kshs. 8,000,000/=.
b. Special damages	Kshs. 4,834,554/=
c. Loss of earning capacity	Kshs. 14,400,000
d. Nursing care	Kshs. 7,200,000/=.
e. Cost of future medication	Kshs. 7,200,000/=
<b>Total</b>	<b>Kshs. 41,634,554/=</b>

The plaintiff shall also have the costs of the suit and interest at court rates.

***Dated, signed and delivered at Nairobi this 11<sup>th</sup> Day of July, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**