



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 80 OF 2008

DAMARIS WAMUCII KAGECHU PLAINTIFF

VERSUS

JOSEPH KIRUI1ST DEFENDANT

UNILEVER TEA (K) LTD2ND DEFENDANT

JUDGMENT

By dint of a plaint dated 6th December, 2007 and filed on 13th March, 2008 the plaintiff brought this suit against the defendants jointly and severally claiming general and special damages following a road traffic accident that took place on 16th June, 2005 in which she sustained some injuries.

The said accident involved motor vehicle registration No. KAN 926 K said to be owned by the 2nd defendant and driven by the 1st defendant at the time of the accident. As a result of the said accident the plaintiff sustained serious injuries to both her legs and blamed the same upon the negligence of the 1st defendant who was the employee of the 2nd defendant. She pleaded that the 2nd defendant was vicariously liable for the negligence of the 1st defendant.

The defendants denied the plaintiff's claim in a defence dated 28th April, 2008 and filed on 6th May, 2008. The plaintiff gave evidence in support of her pleadings but the defendants opted not to call any evidence. The plaintiff also called Dr. Fredrick Sanford Kinama a medical officer of 11 years practice to give evidence in the form of opinion on the medical reports relating to the plaintiff's injuries.

After the close of the trial, resting with the defence recording that they were not calling any evidence, on 10th April, 2019 counsel appearing for the parties herein informed the court that the three medical reports on the plaintiff were agreed and may be accepted in evidence without calling the makers. Subsequently the parties herein made their respective submissions.

According to the plaintiff who adopted her witness statement, she was a business lady and on the date of the accident she was at the market when the driver of the motor vehicle veered off the road and knocked her leading to the injuries sustained.

The accident took place off the road and it was her evidence going by her written witness statement dated 5th September, 2018 and filed on 4th December, 2018 that the motor vehicle was being driven at a high speed and veered off the road. It was also her evidence going by the same statement that the 1st defendant did not have any regard to those around him and drove without due care and attention. The driver also failed to apply brakes in sufficient time and failed to control the motor vehicle so as to avert the accident.

The plaintiff was subjected to cross examination by the defence counsel but remained firm relating to the occurrence. Although the plaintiff told the court that she had friends at the market none was called to testify and further although she said the driver was charged she did not bring any proceedings and judgment to that effect. The plaintiff also said she reported the accident to the police and issued with Police Accident Abstract, however she did not produce any neither did she call the police to testify.

Proof in civil litigation is on a balance of probabilities. There has not been any serious challenge advanced by the defendant to the plaintiff's testimony. Although the defendants denied the accident took place they did not bring any evidence to counter the plaintiff's testimony. The doctrine of *res ipsa loquitur* is also applicable. The plaintiff established to the required standard that the accident took place on the date pleaded that it involved the motor vehicle cited in the pleadings, and that the defendants were the driver and owner respectively. To that extent liability has been established against both defendants jointly and severally.

Following the accident, the plaintiff sustained serious injuries to both legs and admitted to Kericho District hospital for two days, thereafter she was transferred to Kenyatta National Hospital where she remained for the following three weeks before she was discharged.

Although the plaintiff called Dr. Kinama to analyse and give an opinion on the three medical reports relating to the plaintiff's injuries, the subsequent admission of the three reports by consent does not make it necessary for this court to delve into the opinion of Dr. Kinama. I say so because, the three medical reports have the opinions of the doctors who examined the plaintiff.

Going by the dates of the said reports, the report by Dr. Maina Ruga dated 4th August, 2006 was the first in terms of time. The doctor noted that the plaintiff sustained bilateral compound fractures of the tibia and fibula to both right and left legs. Management was done by full length plaster of Paris and the plaintiff confined to a wheel chair.

At the time the doctor examined her, fractures showed malunion with slow progress in healing. She would require an operation for open reduction and plating of the tibia at the cost of Kshs. 150,000/=. Thereafter she would also require medications and physiotherapy for about one year.

After the healing she may be weaned off the wheelchair and use arm crutches but may later walk unaided. The doctor was not able to assess the level of permanent disability which could only be assessed after the outlined treatment. The 2nd medical report on the plaintiff is dated 22nd January, 2007 by Doctor. Timothy Kagoda Byakika. The doctor used Doctor Maina Rugas report as the source of information and also a discharge summary from Kenyatta National Hospital.

When doctor Byakika examined the plaintiff on 5th December, 2006 she had inability to walk and was using a wheel chair. The right leg had some scars but was not deformed. The left leg however had a slight valgus deformity. The doctor's opinion was that the plaintiff sustained severe injuries but the fractures had healed although with a valgus deformity to the left leg. This would lead to abnormal stresses on the ankle joint with resultant early onset osteoarthritis. This deformity can be corrected surgically at a cost of approximately Kshs. 150, 000/= at Kenyatta National Hospital. After about two years the plate that would be inserted may be removed at the cost of Kshs. 50,000/=. If no corrective surgery is carried out, the plaintiff would suffer 10% permanent disability.

There is then the last report on the plaintiff by Doctor Waithaka Mwaura dated 13th February, 2019 .This report noted the injury sustained by the plaintiff which however had healed with scars at both tibias. The doctor assessed residual degree of permanent disability at 8%.

There is no doubt that the plaintiff sustained serious injuries to both her legs which led to inconvenience in movement associated with pain. When she gave evidence in April, 2019 she told the court she cannot

walk for long and if she did so she would feel pain. Considering the time it has taken from the date of the accident to the time she gave evidence, this may be a lifelong experience. She also told the court that she cannot undertake heavy duties or carry heavy loads. In fact she washes her clothes while seated. Psychologically she fears crossing roads and the sound of a motor vehicle makes her uncomfortable.

Both counsels have cited some authorities relating to quantum. No amount of compensation may however repair an injured human frame. Comparable injuries should however attract comparable awards.

The cited cases include **Alphonsa Wathaya Warutu and Another vs. Joseph Mwema (2017) e KLR**, where the plaintiff was awarded Kshs. 800,000/= general damages for compound fractures of the right humerus and right tibia, **Alphonse Muli Zuki vs. Brian Charles Ochuotho (2014) e KLR** where the plaintiff was awarded Kshs. 800,000/= for compound fracture of the right tibia and fibula. **Frankline Chiribasi Spii vs. Kirango Liston (2017) e KLR** where the court awarded Kshs. 1,800,000/= general damages for compound and comminuted fracture of the right distal tibia and distal fibula, fracture of the distal right radius extending to the wrist joint, injuries to the scalp, and friction burns on the left forearm and a large wound to the right leg and foot. – see also **James Gathirwa Ngugi vs. Multiple Hauliers (EA) Limited and Moses Kiasalu Kilonzi**.

I have considered the injuries sustained by the plaintiff and the after effects related thereto. Guided by the medical reports and comparable cases cited by the parties herein, I make an award of Kshs. 1,500,000/= general damages for pain suffering and loss of amenities. The plaintiff is also entitled to Kshs. 200,000/= being the cost of corrective surgery and plating as appears in the report of Dr. Byakika.

Although the plaintiff pleaded loss of income and future earnings no evidence was led in that regard. She also pleaded special damages. These however must be strictly proved. This was not done. In the end there shall be judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs. 1,700,000/= plus costs and interest at court rates.

Dated, signed and delivered at Nairobi this 17th Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE