



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 4122 OF 1994

ANASTACIA WANJA MEHTA.....PLAINTIFF

VERSUS

JOHN W. KWERI1ST DEFENDANT

PAUL WAINAINA MWANGI.....2ND DEFENDANT

ERINE K. KABUTHIA.....3RD DEFENDANT

BARNABAS N. MACHARIA.....4TH DEFENDANT

JUDGMENT

On the night of 16th January, 1994 a collision took place between two motor vehicles registrations Nos. KRQ 085 a saloon and a lorry KXF 388 along Limuru road. The plaintiff herein was a passenger in motor vehicle registration No. KRQ 085 owned by the 1st defendant and driven by the 2nd defendant at the time of the accident. The motor vehicle registration No. KXF 388 was owned by the 3rd defendant and driven by the 4th defendant at the time of the accident.

The plaintiff was seriously injured as a result of the said accident and filed this suit against the four defendants jointly and severally claiming damages for the injuries sustained. The plaintiff in addition to her evidence called P.W. 1 P.C Bobby Okari, a police officer who produced the police accident abstract showing the lorry driver was to blame for the accident. This officer was not at the scene of the accident and other than the accident abstract he produced, no sketch maps or any other evidence was available in relation to the scene of the accident.

According to the evidence of P. W. 1 and D.W. 1 the accident took place at a corner and both parties blamed one another for the accident. The plaintiff is not a driver but stated in her evidence that the lorry approached from the opposite direction at high speed, and after the collision their motor vehicle was driven off the road by the impact.

On the other hand, D.W. 1 the lorry driver testified that he was driving up hill when a motor vehicle emerged on his side leading to a collision, and that the saloon car stopped on his side after the impact. His speed was about 30 to 35 kilometres per hour, his lights were good, he braked hard and stopped. He blamed the other driver for the accident.

This court is faced with two conflicting versions as to the occurrence of the accident and who is to blame for the same. In the absence of any independent evidence, considering the two motor vehicles were in the management of the 2nd and 4th defendants who were the respective drivers I hereby apportion liability equally. Both drivers must have been driving with authority of the two respective owners and therefore vicarious liability attaches to the 1st and 3rd defendants respectively for negligence of their drivers.

The plaintiff sustained serious injuries as set out in the reports by Doctor W. Irungu Ndirangu which in summary are as follows,

- a). Wound on lower limb
- b). Loss of upper incisor teeth.
- c). Fractured mandible at the neck and body
- d). Multiple fractures of the ribs.
- e). Larynx – by lateral paralysis of vocal cords and stenosis of the trachea. – Below larynx.

The doctor set out what the plaintiff had to undergo soon after the accident. She was subjected to an emergency tracheostomy below the tracheal stenosis, and later on to tracheal reconstruction which however was unsuccessful. Since then, she has been living and breathing through the aid of a silver tracheotomy tube. As a result, she lost her speech and has been unable to do any strenuous work to date.

The doctor recommended more surgery to the plaintiff's trachea and insertion of a speaking valve to be conducted at a specialised centre not available in the country. This would cost Kshs. 700,000/=. I note the dated of the reports are 10th December, 1994 and 8th July, 1998.

I watched the plaintiff testify and there is no doubt the accident devastated her. The lifelong injuries cannot be underestimated. She spoke in a whisper and even then one is compelled to strain to hear her at a distance of only three metres. From the date of the accident to date, she has lived with those ailments for 24 years.

The court has been referred to several authorities which include **Beena Khambaita vs. Tavindar Singh & 3 others (2015) e KLR**. In that case the plaintiff suffered very serious injuries which included,

- a. Compound communitated fracture right femur lower hand third.
- b. Fracture left callaneum distol radius ulna.
- c. Communitated fracture left femur one third.
- d. Communitated fracture left neck of humerus
- e. Fracture ribs 2nd to 7th side with haenothorax
- f. Septicaemia
- g. Bilateral hymphothorax, pneutherax on right side.
- h. Lung contusion and shock lung syndrome
- i. Acute renal failiure
- j. Esophagil bleed
- k. Paraletic ileus
- l. Vaginal infection
- m. Broken place right lower radius.
- n. Tracheal stenosis.

In that case, the court made an award of Kshs. 4,000,000/= for pain, suffering and loss of earning capacity.

One other cases cited in the case of Beena was **Michael Njagi Karimi vs. Gideon Ndungu Nguribu & another (2013) e KLR and Joseph Kaidi Maina vs. Evans Kamau Mwaura & 2 others (2014) e KLR**.

It is clear that the plaintiff in the Beena case suffered more serious injuries than in the present case. However, Beena was aged 58 years old at the time of the accident while the plaintiff herein was aged 35 years at the time to the accident. She has lived and continues to live with these disabilities and, whereas not two cases may be the same, her suffering has been more prolonged in the circumstances.

I note that with the intervention recommended by the doctor the plaintiff may just be lucky to recover her voice to ameliorate the many years she has lost without hearing her own voice. That however may not reduce the pain and suffering she has had to endure due to negligence of fellow human beings. She continues to use an artificial breathing aid at the cost of Kshs. 30,000/= after every three years. Although the cost was not proved by way of production of any receipts, she appeared in court using one and clearly that is an implement she cannot do without.

Doing the best I can in the circumstances of the case, I make an award of Kshs. 4,000,000/= general damages for pain, suffering and loss of amenities. The recommended surgery was made in 1998. There is no doubt that the value of money has considerably depreciated. In this regard, I enhance the figure of Kshs. 700,000/= to Kshs. 1,000,000/=. The plaintiff pleaded special damages of Kshs. 476,259.60. However the receipts produced amount to Kshs. 293,151.75.

Accordingly there shall be judgment for the plaintiff against the four defendants jointly and severally for;

1. General damagesKshs. 4,000,000
2. Recommended surgery.....Kshs. 1,000,000

3. Special damages.....Kshs. 293,151.75

Total.....Kshs. 5,293,151.75

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

Dated, signed and delivered at Nairobi this 12th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE