



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 318 OF 2013

GRACE BELDINA ADHIAMBO.....PLAINTIFF

VERSUS

BOWERS OKELO.....1ST DEFENDANT

JOSEPH OGUTU.....2ND DEFENDANT

J U D G M E N T

This is a claim for special and general damages arising out of a traffic road accident that occurred on the 20th day of December, 2011 along Kisumu-Kericho road. The accident involved motor vehicle registration Number KBR 376B in which the Plaintiff was travelling as a lawful fare-paying passenger.

In the plaint filed in court on the 6th day of August, 2013 she has blamed the Defendant's driver, servant and/or agent in driving, managing and/or controlling the aforesaid motor vehicle and causing the accident. The particulars of negligence and injuries sustained are enumerated in paragraphs 5 and 7 of the plaint.

The Defendants filed a defence on the 18th September, 2013 in which they have denied the occurrence of the accident but in the alternative have attributed negligence to the plaintiff. They have further denied that the doctrine of Res Ipsa Loquitur, the Highway Code and the Traffic Act are applicable in the case herein. The particulars of injuries, the loss and damage as particularized in paragraph 7 of the plaint are all denied.

A reply to defence was filed on the 4th day of October, 2013 in which the Plaintiff has denied the particulars pleaded in the defence and has contended that the defence filed herein is a sham, mere denial and without merits.

The Plaintiff testified and called four witnesses in support of her case. In her evidence, she told the court that on the 26th December, 2011, she was travelling from Nairobi to Kisumu in a matatu registration number KBR 376B when the vehicle was involved in an accident along Kericho-Kisumu road at a place called Ngamwet. That the driver was driving at a high speed, the music system was on and the volume was high. The accident was self involving.

It was her further evidence that after the accident she sustained injuries to the left hand which was amputated, to the right hand, to the pelvis and she also lost two incisor teeth. She was rushed to Nyanza General Hospital where she was admitted for a month and it was while there that her left hand was amputated. She was transferred to Victoria Amenity where she was admitted for a further three weeks and later to Kenyatta National Hospital.

Thereafter, she reported the accident at Kericho Police Station and she was issued with a P3 form and a police abstract which she produced as exhibits before the court. She was able to conduct an official search for purposes of establishing the owners of motor vehicle KBR 376B which revealed that it was owned by the defendants in this case. A copy of the official search was produced as an exhibit. A copy of the demand letter to the Defendants dated 24th May, 2012 was also produced as an exhibit.

On cross-examination, it was her evidence that she was seated on the third row in the matatu and she could see in front. That though she could not see the speedometer, she could tell the vehicle was moving at a high speed. She was wearing a safety belt at the time of the accident.

The other witness was Bernard Omari who testified as PW 2. He told the court that he is a police officer currently performing traffic duties within Kericho County. It was his evidence that the accident occurred on the 26th December, 2011 along Nakuru-Kericho road and it involved motor vehicle KBR 376B, which was heading to Kisumu. He confirmed that the police file contains a P3 form for Grace Beldina Adhiambo issued and signed at Kericho Police station. That the accident was blamed on Danson Wangari Kamau who was driving the ill fated vehicle at the material time. He investigated the accident but he did not visit the scene.

In cross-examination, it was his evidence that the driver was charged with a traffic offence but the case is still pending in Court.

The other witness was Doctor Washington Wokabi who examined the Plaintiff and prepared a medical report for her. In the report he described the injuries as an amputation of left arm at the level above elbow, extensive abrasions on the right elbow which was treated by skin grafting she also sustained pelvic injuries that caused fractures of the pelvic bones and these were treated on bed rest and pain killers, she also sustained dental injuries whereby the upper incisor teeth were rendered loose.

That at the time of examination, he had four (4) complains as follows: -

Pain on the teeth on biting with them.

i) Pain on the stump.

ii) Pain on the right elbow

iii) Pain on the pelvis.

On clinical examination, he confirmed the fractures and formed an opinion that they were major and multiple injuries. His prognosis was that the painful teeth will forever remain weak while the loss of upper limb is a permanent disability which he assessed at 75%. That the Plaintiff will require a cosmetic artificial upper limb at a cost of Ksh.120,000/- replaceable every five (5) years.

It was his further evidence that the Plaintiff has a contracted scar on the right elbow which could be surgically excised at a cost of Ksh.120,000/-. The fractures of the four bones of the pelvis would heal completely causing no disability.

On cross-examination, it was his evidence that the figures he gave were estimates and that in assessing the cost of the artificial limb, they consider the costs in the market and he could not give an estimated cost at Kenyatta Hospital. That the limb will have to be changed because of wear and tear as they get worn out. The limb will, however, not help much in performance of the Plaintiffs duties. Regarding the cost of excising of the scar, he said the sum of Ksh.120,000/- is an estimate and it could be cheaper in public hospitals.

The Plaintiff's employer Kamaldeep Sandhu testified as PW 3. She is the proprietor of a hair salon called styles of tomorrow. She confirmed that the Plaintiff was her employee since the year 2003. She had employed her as a braider cum hair dresser. It was her evidence that when she started working, she was

earning Ksh.13,000/- but just before the accident, her salary had gone up to Ksh.16,000/-. In addition to this, she was earning her commission for the extra work but after the accident, she is no longer working because she lost her hand. She told the court that she keeps records of every employee and she produced the pay record for the Plaintiff as an exhibit.

In cross-examination, she told the court that she does pay the statutory deductions i.e the NSSF and NHIF though she had not carried the documents in support thereof. That after the accident, she had employed the Plaintiff as a receptionist, a post that she created to assist her earn a living.

Mary Musabi Gideon who works as a hair stylist testified as PW 4. She was working with the Plaintiff at the styles of tomorrow salon. She confirmed the fact that the Plaintiff was employed at the said salon and she was earning between Ksh.12,000/= - Ksh.20,000/=.

The Defendant called one witness namely Doctor Leah Wainaina who testified as DW 1. She told the court that she is a general practitioner since 2009. She is based at Direct Line Insurance Company Medical department. It was her testimony that she prepared a medical report for the Plaintiff herein on the 7th May, 2013 and in so doing, she relied on the history, the treatment records from Nyanza Provincial General Hospital and on x-ray report from Plan X-ray Services. After examination, the injuries sustained by the Plaintiff were as follows: -

- 1) Bilateral superior and inferior pubic ramii.
- 2) An above elbow amputation of the left arm.

Due to amputation, she awarded her permanent disability of 68% based on the work injury Benefits Act which provides for upto a maximum of 70% at shoulder level but the plaintiff's was slightly below it. She confirmed the Plaintiff's injuries as set out in Doctor Wokabi's report.

In her opinion, the prosthesis need not been changed every five years being for the upper limb. On cross-examination it was her evidence that the Plaintiff did not carry along with her the medical report by Doctor Wokabi and therefore she did not factor in, the contents of the said report. That she did not mention the injury to the teeth which was an oversight on her part. On future medical expenses, once the prosthesis is fitted, the disability will go down. She confirmed that it will be difficult for the Plaintiff to continue working as a salonist even after the artificial limb is fitted.

Both parties filed their respective submissions both on quantum and liability. On liability, it is noted that the accident was self involving and it was the Plaintiff's evidence that the motor vehicle was being driven at high speed and at the same time there was music that was on high volume. The Plaintiff has pleaded the doctrine of Res Ipsa Loquitor at paragraph 6 of the plaint. She was a lawful passenger in the motor vehicle and though the Defendants have attributed negligence to her in the defence, they did not tender any evidence to controvert that of the Plaintiff and/or prove the said particulars of negligence against her. The Plaintiff was injured while travelling as a fare-paying passenger in the Defendant's motor vehicle registration number KBR 376B. It is trite law that once the Plaintiff pleads the doctrine of Res Ipsa Loquitor like in the case at hand, the defendants ought to have offered an explanation in order to exonerate themselves from blame. In saying so, I am guided by the Court of Appeal decision in the case of **Embu Public Road Services Limited Vs Riimi (1968) EA 22** where it was held: -

“where an accident occurs and no explanation is given by the Defendant which could exonerate him from liability then the court would be at liberty to apply the doctrine of Res Ipsa Loquitor and hold the Defendant liable in negligence.”

The same principle was articulated by the court in the case of **Nandwa vs Kenya Kazi Ltd (1988) KLR, 488** where it was held: -

“In an action for negligence the burden is always on the Plaintiff to prove that the accident was caused by the negligence of the Defendant. However, if in the course of trial there is proved a set

of facts which raises a prima facie inference that the accident was caused by negligence on the part of the Defendant the issue will be decided in the Plaintiff's favour unless the Defendant provides some answer adequate to displace that inference. These two cases demonstrate the applicability of the doctrine of Res Ipsa Loquitor."

Having analyzed the circumstances under which the doctrine is applicable, I do not hesitate to find that it is applicable in the case herein and I find the Defendants fully liable for the accident.

On quantum of damages, the medical report by Doctor Wokabi sets out in details the injuries that the Plaintiff sustained. The injuries were also confirmed by Doctor Leah Wainaina who prepared a second medical report for her and the only issue that the two doctors do not seem to agree on, is that of future medical expenses and in particular the duration within which the prosthesis is to be changed. The evidence adduced by both doctors has been captured elsewhere in this judgment when I was analyzing the evidence by the witnesses and it would not serve any purpose to rehearse the same evidence.

From the analysis by the two doctors, it is clear that the Plaintiff suffered very major multiple injuries some of which will affect the rest of her life. She has claimed damages under various categories: -

(a) General damages for pain and suffering.

The Plaintiff in her submissions has suggested a figure of Ksh.3,500,000/- under this head. She has relied on: -

(i) Roba Doti Guyo vs Jiwan Zhongemei Engineering Company Limited, HCCC NO. 11 of 2014, in which the Plaintiff was awarded a sum of Ksh.2,500,000/- for pain, suffering and loss of amenities.

(ii) Umoja Rubber Products Limited Vs Bobson Rimba Lewa, High Court Civil Appeal No. 51 of 2015 in which the Plaintiff was awarded a sum of Ksh.2,200,000/-.

On their part, the Defendants have suggested a figure of Ksh.1,500,000/- as sufficient, fair and just compensation to the Plaintiff. They have relied on the case of **Kingsholme Limited & 2 Others Vs Mary Wangui (2016) eKLR**, in which a similar sum was awarded as general damages for pain and suffering.

Under this head and all considered, I find an award of Ksh. 1,500,000/= reasonable.

(b) Special Damages

Under this head, it is trite law that special damages must be specifically pleaded by the plaintiff setting out each particular item and the amount claimed in respect of it. Such damages not being presumed by the law, the plaintiff must expressly prove his special damage, and if he fails either to plead or to prove it he is not entitled to recover. See the case of **James Thiong'o Githiri Vs. Nduati Njuguna Ngugi(2012) EKLR**. ***In this case a total sum of Kshs. 114,182.25/= was claimed but the total amount in the receipts produced in court is 60,424,88cts which the court hereby awards.***

(c) Costs of future medical expenses

It has emerged from the evidence on record that the plaintiff requires to be fitted with an artificial limb (prosthesis). Doctor Wokabi estimated that it would cost Kshs.120,000/= which if properly used would require replacement after every five years.

On her part, Dr. Leah Wainaina was of the view that it would not need to be changed at all since its an upper limb and the wear and tear would be minimal as opposed to a lower limb. It is important to note that in his medical report Dr. Wokabi has captured all this information while Dr. Leah Wainaina has not.

Infact, she only brought out that evidence on cross examination and not even in her evidence in chief. I find Dr. Wakabi's evidence more credible and make an award of Kshs.480,000/- being Kshs. 120,000/- for the prosthesis times 4 taking into account the age of the plaintiff at 44 years and life expectancy of 60 years.

Similarly, in Doctor Wokabi's report, he has estimated the cost of excising the scar and the anterior aspect of the elbow at Kshs.120,000/-. Dr. Wainainas' report and her evidence in court are silent on this cost and in the premises, I hold the view that the evidence of the Plaintiff in that regard was not controverted and I do hereby award the same.

(d) Damages for reduced earning capacity

The summary of the principles of the award of damages concerning this claim was propounded by the Court of Appeal emerging from the case of **BUTLER Vs BUTLER (1984) KLR 225** where the court stated in the case of **MUMIAS SUGAR COMPANY LIMITED Vs FRANCIS WANALO (2007) eKLR** as follows:-

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the Plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

The Plaintiff at the time of the accident was aged 44 years. There is evidence on record that she was earning between Kshs.16,000/- - 20,000/= plus commission. This evidence is supported by PW3 who was the Plaintiff's employer and PW4 who was her workmate. The defendant has argued that there is no proof of employment and the existence of the business which had employed the plaintiff. This court takes judicial notice of the fact that not every employee is given a letter of appointment. That notwithstanding, the evidence on record is sufficient proof of her employment as it was not challenged by the defendant.

The Plaintiff was aged 44 years at the time of the accident and she would have worked for another 18 years considering that she was employed in the private sector where there is no retirement age but taking into account the **vagaries** of life, I make an award of Ksh.1,920,000/= applying a multiplier of 10 years.

(e) Cost of hiring a house help

The plaintiff has submitted on a figure of Kshs.2,640,000/= basing he same on the Plaintiff's age and the minimum wages of a house help which they have put at Kshs.11,000/-. The defendant on their part have asked the court to disregard this claim.

There is evidence on record that the plaintiff has to engage the services of a house help as she cannot be able to perform the house chores using one hand. At the time she gave evidence, she told the court that she has employed a house help at a monthly salary of Kshs.7,000/= and going by that evidence the court finds the sum of Kshs.7,000/- as reasonable monthly salary. A multiplier of 10 years is adopted making to total sum of Kshs.840,000/=

In the end, I shall give judgment for the plaintiff against the defendant as follows;

1. Liability_____100%

2 (a) General damages for pain and suffering____Kshs.1,500,000/-

(b) Cost of future medical expenses_____Kshs.480,000/-

(c) Damages for reduced earning capacity_____Kshs.1,920,000/-

(d) Cost of hiring a househlp_____Kshs.840,000/-

(e) Special damages_____Kshs.60,424/-

TOTAL_____Kshs.4,800,424/-

Special damages shall earn interest at court rates from the date of filing the plaint and the general damages from the date of this judgment.

The plaintiff shall also have the cost of the suit

Dated, signed and delivered at Nairobi this 16th day of February, 2017.

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L NJUGUNA

JUDGE

In The Presence of

.....*For The Plaintiff*

..... *For The 1st Defendant*

.....*For The 2nd Defendant*