



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 305 OF 2011

CATHERINE NJERI NJOROGHE.....PLAINTIFF

VERSUS

BENARD N. NJERU.....DEFENDANT

JUDGEMENT

1. Catherine Njeri Njoroge, the plaintiff herein was a passenger aboard motor cycle registration number KBB 142C when motor vehicle registration KAW 816H hit the aforesaid motor cycle. As a result of the collision the plaintiff suffered the following injuries:

- i. ***Avulsion injury to the right femoral artery with resultant a vascular necrosis of the right femur and total amputation of the right lower limb at the hip;***
- ii. ***Fracture of the right femur; and***
- iii. ***Compound fracture of the superior and inferior pubic ramus of the right bone.***

2. The plaintiff blamed Benard Njeru Njiru, the defendant herein, for negligently driving an or managing motor vehicle registration no. KAW 816H making it to lose control and collide with motor cycle registration no. KBB 142C. The plaintiff consequently filed this suit seeking for damages. The defendant filed a defence denying the plaintiff's claim.

3. The plaintiff's case is supported by the evidence of five (5) witnesses while the defendant testified without summoning the evidence of an independent witness. It is the evidence of the plaintiff that she was on the material day travelling using motor cycle registration no. KBB 142C from Garissa road towards Thika town. Three people were on the aforesaid motor cycle. Upon reaching Tusky's supermarket it is the evidence of the plaintiff (PW1) that she saw motor vehicle registration no. KAW 816H with its full lights on and travelling from the opposite direction. The motor cycle was also with its lights on. PW1 said that suddenly the motor cycle and the motor vehicle collided and in the process she was seriously injured. PW1 said she found herself on the ground next to a flower bed off the road. The rider of the motor cycle, Albanus Mwanzia (PW 3) denied liability but admitted that he was charged in court for the offence of driving a motor cycle on a public road without a driving licence and for carrying excess passengers. Corp Emmoudoulu (PW 5), a police officer attached to Thika Police Station stated that the accident was solely causal by the motor cycle rider (PW 3). He pointed out that PW2 was charged and eventually convicted for the offence of careless driving and fined ksh.4,000/=.

4. Benard Njagi Njiru (DW1) defendant on his part confirmed that on the fateful day he drove along Thika-Garissa highway and upon reaching Tusky's supermarket he saw a motor cycle with its full lights on. DW1 claimed he signalled to the rider to dim and slow down. DW1 stated that he saw the motor

vehicle suddenly move in a zig zag manner before hitting his motor vehicle. In cross-examination DW1 stated that he was forced to dim his lights and flashed to the rider who did not respond but instead proceeded to hit his motor vehicle. The defendant was of the view that the plaintiff the defendant should share liability in equal measure.

5. At the close of evidence, learned counsels from both sides were given a chance to file final written submissions. After considering both the evidence and the rival submissions, the following issues arose for determination:

- i. Who is to blame for the accident.
- ii. In the circumstances of this case, are damages awardable, if yes how much?
- iii. Who should bear costs of the suit?

6. On the first issue regarding liability, the plaintiff is of the view that the defendant is wholly to blame. The defendant on the other hand is of the view that liability should be shared equally between the plaintiff and the defendant. On liability, four witnesses testified. Three testified in support of the plaintiff's case while the defendant testified alone in support of his defence.

7. I have already stated the evidence of PW3, the driver of the motor cycle registration no. KBB 142C and that of his pillion passenger (PW1). The independent witness who shed light on what happened on the fateful night is Samuel Karanja (PW4), who said he drove a motor cycle registration no. KBD 132X. PW4 averred that motor vehicle registration no. Kaw 816H overtook him near to the scene of the accident before veering off the road thus colliding with motor cycle registration no. KBB 142C. He stated that the driver of KAW 816H did not stop after causing the accident but instead switched off its head lights before speeding off. PW4 stated that he gave a chase and caught up with the motor vehicle and noted the registration number. The defendant's driver declined to stop even after PW4 promoted him to stop. PW4 said he went back to the scene to assist take PW1 and PW4 for treatment in hospital. He later recorded his statement at Thika Police Station where he gave the police the registration number of the aforesaid motor vehicle. I have carefully analysed the evidence of PW1, PW3 and PW4 are in agreement that motor vehicle registration no. KAW 816H veered off the road before hitting motor cycle registration KBB 142C.

8. It is clear from the evidence that the motor cycle was hit besides the road. The rider of motor cycle registration no. KBB 142C was charged with traffic offences. The first charge is that of driving on a public road without a driving licence contrary to Section 30((1) of the Traffic Act. He was also charged with the offence of carrying excess passengers. The defendant has beseeched this court to apportion liability in equal measure. I have taken into account the defendant's evidence and it is clear in my mind that evidence tendered by the defence did not in any way shake the testimonies of the plaintiff's witnesses. The evidence tendered in support of the plaintiff's case is consistent. In the circumstances I find that the defendant was wholly to blame for the accident. It would appear he drove too fast that he lost control of the motor vehicle thus colliding with the motor cycle where PW1 was a pillion passenger. I decline to apportion liability thus making the defendant solely to blame for the accident.

9. Having settled the question of liability, let me turn my attention to quantum. The key witness who gave evidence explaining the nature of injuries the plaintiff suffered is Dr. Theophilus Wangata (PW2). He stated that the plaintiff suffered damage to a major blood vessel of her right leg which led to its amputation. PW2 to stated that the plaintiff suffered a fracture of the right femur and a compound fracture of the velvic bone. PW2 also said that the plaintiff suffered both physical and psychological pain. He also acknowledged the fact that she lost a lot of blood. PW2 produced a medical report to buttress his evidence. In short, the plaintiff sustained the following injuries:

- a. Fracture of the right femur
- b. Compound fracture of the superior pubic ramus
- c. Avulsion injury to the right femoral artery with a resultant vascular necrosis of the right femur.

10. According to Dr. Thophilus Wangata (PW2) the plaintiff underwent a special operation for the total

amputation of the right at the hip joint. The plaintiff was initially treated at Thika Level 4 hospital and later transferred to Kenyatta National Hospital where she was admitted for 3 months. She was put on an armchair and later discharged on crutches in May 2009. PW2 further stated that the injuries healed leaving a 30cm scar at the position where the plaintiff's leg was amputated. It is the plaintiff's evidence that she was fitted with an artificial limb in the month of September 2009 and can only walk with the assistance of crutches to date. The defendant did not offer any evidence to controvert the evidence tendered by the plaintiff to establish the injuries she sustained. From the evidence tendered, I am convinced the plaintiff was injured as pleaded in the plaint. In paragraph 5 of the amended plaint, the plaintiff asked for ksh.336,320/= as special damages. The aforesaid amount was to cover medical reports, hospital fees, motor vehicle search fees, police abstract and artificial limb. However the plaintiff submitted evidence which proved that she is instead entitled to kshs.337,360/=. The principles to be applied in making an award for special damages are well settled. A party must specifically plead and prove. In this case I am convinced that the plaintiff has proved that she is entitled to ksh336,320/= instead of ksh.337,360/= which was not pleaded.

11. On the head of general damages, she has stated that she had Completed form 4 and was aged 19 years at the time of the accident. She had her leg amputated and was put on crutches and had an artificial limb fixed. She also stated that she was put on a counselling course and has even taken up a degree course in counselling at United States International University, The plaintiff averred that she would have liked to take a course in journalism if the accident had not happened. It is her submission that the accident interfered with her career and plans. The defendant was of the view that there was no proof that the accident interfered with the plaintiff's career. It is also stated that the plaintiff did not lose any earnings as she had not started earning by the time of the accident. The doctor, PW2 testified that the plaintiff will always have difficulties in doing tasks that require both legs like standing for a long time. The doctor opined that the plaintiff was 70% of permanent incapacity in relation to the leg while she is 20% permanent incapacity to the whole body. The plaintiff beseeched this court to award her kshs.18,000,000/= as general damages. The plaintiff was of the view that she would have earned ksh.50,000/= per month as a journalist for the next 30 years. Therefore the plaintiff calculated ksh.18 million using a multiplier of 30 years as follows:

$$50,000 \times 12 \times 30 = 18,000,000/=$$

12. The plaintiff relied on the case of **AAM =vs= Justus Gasairo Ndandera and another CA no. 115 of 2003 (Unreported)** In this case, the plaintiff was a form 2 student at Highway Secondary School in South B in Nairobi when the accident happened. He suffered serious injuries including, impaired memory and dysfunctional right hand. The plaintiff was awarded ksh.4,545,450/=.

13. The defendant on the other hand is of the view that the award the plaintiff has asked is exorbitant, excessive and without any basis in law. The defendant proposed that a reasonable award should be kshs.2,000,000/=. The defendant cited the case of **Daniel Kosgei Ngelechei =vs= Catholic trustee Registered Diocese of Eldoret and another H.C.C.C. no. 111 of 2000 (Unreported)** The plaintiff in this case had his left leg amputated above the knee joint and also had psychological complication due to amputation. The plaintiff is said to have suffered between 72% and 20% permanent incapacity. The plaintiff was awarded ksh.2,100,000/= as general damages.

14. The defendant also cited the case of **Bayusuf Freighters Ltd =vs= Patrick Mbatha kyengo C.A no. 109 of 2014 (Unreported)** In this case the plaintiff had his left leg amputated above the knee as a result of a road traffic accident. He was said to have suffered 85% permanent incapacity and was awarded ksh.1,600,000/=.

15. I have considered the rival proposals. I am convinced that the defendant has cited the relevant authorities as opposed to those cited by the plaintiff. The mode of calculation proposed by the plaintiff cannot stand. The authorities cited by the defendant were in respect of judgements delivered in 2013. Considering the inflationary trends and the serious injuries the plaintiff suffered in this case I am convinced that a sum of kshs.3,000,000/= is reasonable and adequate compensation.

16. In the end judgment is entered in favour of the plaintiff and against the defendant as follows:

- i. General damages for pain, suffering and loss of amenities – kshs.3,000,000/=
- ii. Special damages – kshs.336,320/=
- iii. Costs of the suit.
- iv. Interest on (i) (ii) and (iii) at court rates from the date of judgment until full payment.

Dated, Signed and Delivered in open court this 3rd day of March, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant