



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 238 OF 2012

MONICA MUTHONI KIRUKU..... PLAINTIFF

V E R S U S –

AMALGAMATED LOGISTICS INTERNATIONAL LTD.....1ST DEFENDANT

DENNIS NTWIGA.....2ND DEFENDANT

JUDGEMENT

1. Monica Muthoni Kiruku, the plaintiff herein, filed this compensatory suit against Amalgamated Logistics International Ltd and Dennis Ntwiga, the 1st and 2nd defendants respectively vide the plaint dated 4.8.2012 and amended on 12.8.2014. In the aforesaid plaint, the plaintiff sought for judgement against both defendants jointly and severally as follows:

- a. General damages for pain and suffering.***
- b. Special damages***
- c. Future medical and related expenses as tabulated in paragraph 5 (c) namely:***
 - i. Diapers at the cost of kshs.3,000/= per month.***
 - ii. Versatile wheel chair at the cost of kssh.80,000 and at every five (5) years.***
 - iii. A nurse at a monthly pay of kshs.15,000 per month.***
 - iv. A special bed at a cost of ksh.150,000 and at every 10 years***
 - v. Physiotherapy sessions at ksh.3,300 every month for, life***
- d. General damages for loss of earning capacity***
- e. Costs of the suit and interest on (a), (b), (c) and (d) at court rates***

2. This suit arose out of a road traffic accident which occurred on 5.12.2010 along Nakuru-Nairobi near Zambezi area involving motor vehicle registration no. KAZ 084F and KBJ 015Y/ZC 8935 Mercedes Benz. As a result, the plaintiff, who was a passenger in motor vehicle registration no. KAZ 084F got seriously injured. The defendant denied the plaintiff's claim by filing a defence which was later amended on 19.8.2014.

3. When the case came up for hearing, the plaintiff testified and summoned the evidence of four witnesses. The defendants case on the other hand was supported by the evidence of four witnesses. At the close of evidence, learned counsels were invited to make final submissions which they did. The main twin issues to be determined are basically liability and quantum.

4. On liability, I have already stated that the plaintiff's case is supported by five witnesses. Monicah Muthoni Kiruku (P.W.4) told this court that she was a passenger in motor vehicle registration no. KAZ 082F at the time of the accident. She stated that their car was hit at the rear and refuted the suggestion that it was their vehicle that rammed into truck no. KBJ 015Y/ZC 8935B. PW4 said that she sat behind the driver while holding her little brother, the late Emmanuel. Samuel Orange Ongwae (PW1), a gazetted motor vehicle inspector, stated that the truck sustained damages on the front left bumper and stairs leading to the cabin's passenger door. He further averred that in his assessment that if the truck was hit from the front the opposite vehicle could only have been in front of the truck. Jackson Kuruku (P.W.1), the driver of motor vehicle registration no. KAZ 084F told this court that he was hit on the rear right side. The defendants on the other summoned the police officer (DW2), the 2nd defendant (D.W.1), the investigator (DW3) and motor vehicle inspector (DW4). DW4 produced the inspection report in respect of KAZ 084F where he confirmed that the same had been damages on the tyres. DW4 also stated that they could not ascertain the point of impact on the saloon car i.e KAZ 084F since it had damages everywhere because it rolled after the impact. PW2 denied that the saloon car had a tyre burst but had a slow puncture. PW2 also stated that after the impact he lost conscience hence he did not know what transpired. PW3 confirmed from his report that the motor vehicle was off the road. Mwandemo DW2, stated that though he was not the investigating officer, he had the occurrence book report and the police investigation file. He stated that upon investigation, the driver of the saloon car was found wholly to blame for the accident since his motor vehicle had a tyre burst forcing it to ram into the truck. There was a statement of PW2 in the investigation file wherein PW2 is said to have admitted that his motor vehicle had a tyre burst.

5. The defendants are of the view that the police conducted investigations and came up with findings which are to the effect that the accident was wholly occasioned by motor vehicle registration no. KAZ 084F which further aver that the plaintiff did not tender evidence to contradict these findings. The defendants invited this court to find that the accident was inevitable hence the defendants are not culpable for the occurrence of the accident. This court was beseeched to dismiss the suit. I have carefully considered the evidence presented by both sides together with the documents. I have also taken into account the rival written submissions. The plaintiff (PW4) together with PW1 and PW2 are consistent that the saloon car (KAZ 084F) was hit from the rear. PW2 was categorical that he observed through the side mirror that the truck (KBJ 015Y) was moving at a high speed. In his evidence in cross-examination, D.W.1 told this court that the saloon car hit the rear wheels of the truck before it veered off the road and landing in a ditch. This contradicted his evidence in cross-examination when he stated that the saloon car hit the truck on the left front side of the prime mover (truck). The evidence of DW1 has raised some doubts over his credibility as a witness. The evidence of DW1 that the truck was hit from the front contradicts the evidence the private investigator (DW3) who stated that the saloon car hit the truck from the rear. A sketch map was produced showing that the road is curved towards the left with a gentle slope towards Nairobi direction. DW1 told this court that the right side of the road is a concrete wall and on the left is a ditch. The sequence of events as told by DW1 may not add up. A car full of people and luggage and driving downhill, will have headed to the ditch upon the tyre bursting..

6. According to the evidence of DW1, the truck was using the right Lane and was hit while stationary and remained there even after the collision. This narrative does not tally with the sketch map drawn by the police which shows the landing position of the truck to be on the left lane. The proceedings in the court which conducted the inquest show that two motor vehicles were following each other and that the point of impact was the outer lane. Therefore the assertion by DW1 that the saloon car approached from the rear and ended up hitting the truck on its front left cannot stand. After carefully considering the evidence tendered before the Kikuyu Senior Principal Magistrate's court on the inquest vis-a-vis those tendered before this court on how the accident occurred, I am convinced that the truck hit the saloon car from the rear before shoving it off the road and stopping ahead of it, on the same lane. The assertion that the saloon car suffered a tyre burst before the accident is therefore discounted by the inspection report

presented by DW4 who stated that the damage occurred during the accident and not before. PW2 denied the allegation in his statement which was to the effect that he is recorded to have said that his car had a tyre burst. There was an entry in the police occurrence book report that the accident was as a result of a tyre burst. It must be noted that by that time the police had not recorded witness statements to give a good account of what had happened before or during the time of the accident. I am persuaded by the plaintiff's evidence that the saloon car had a puncture and not a tyre burst before the accident. The evidence tendered by the defence seem to suggest that they intended to enjoin the owner of motor vehicle registration no. KAZ 084F as a party to this suit. The defendants did not deem it fit to do so. Therefore in the absence of such an enjoiner this court cannot make any finding apportioning liability against a party who is not a party to this suit. There is uncontested evidence that the plaintiff was a mere passenger in motor vehicle registration no. KAZ 084F, therefore she cannot be held liable. In the end I find the defendants wholly liable for the accident.

7. Having determined the question of liability, let me now consider **quantum**. The plaintiff testified and produced documents showing that she suffered the following injuries”

a. fracture on T4, T5, T6 and T7 of Thoracic veterbra leading to total paralysis from waist downwards.

b. Permanent disability

8. It is her evidence that she suffered 100% disability and that she will be confined to a wheel chair for life. She will also require nursing care since she has no control of passing urine and stool and has to constantly use diapers.

9. There was no evidence tendered to controvert the injuries the plaintiff has enumerated to have suffered. The plaintiff proposed to be awarded ksh.11,500,000/=. She cited the cases of **Dorothy Mbaka and another =vs= A.G and others Meru H.C.C.C. no. 15 of 2004** and **Ngure Edward Karega =vs= Yussuf Nassir, Nakuru H.C.C.C. no. 157 of 2012**. The defendants are of the view that the plaintiff's proposal is exorbitant. They suggested that an award of ksh.2,500,000/= to be sufficient and reasonable. They relied on the cases of

i. Nancy Oseko =vs= B.O.G Masai Girls High school (2011) eKLR and

ii. Rosemary Wanjiru Kungu =vs= Elizabeth Macharia Githinji & another (2014) eKLR

10. I have carefully considered the rival proposals on the award on this head. I have also taken into account the authorities cited. I have already restated the sort of injuries the plaintiff suffered. This court vide **Meru H.C.C.C. no. 15 of 2004**, awarded the plaintiff ksh.10,000,000/= for pain and suffering for comparable injuries. In **Nakuru H.C.C.C no. 157 of 2012**, this court awarded ksh.5,000,000/= on this head.

11. In the cases submitted by the defendant, this court awarded between ksh.2,500,000/= and ksh.3,000,000/= for near similar injuries for pain and suffering.

12. I am of the view that in the circumstances of this case an award of ksh.6,000,000/= is reasonable.

13. The plaintiff asked to be awarded damages for loss of earning capacity. This court was urged to award the plaintiff ksh,20,000 per month for 35 years. I.e $20,000 \times 12 \times 35 = 8,400,000/=$ The plaintiff cited the case of **Nicholas Njire Njoki =vs= Eliud Kahura Muranga H.C.C.C no. 21 of 2013** in which this court made an award of ksh.20,000/= per month with a multiplier of 30 years for a plaintiff aged 25 years.

14. The defendants are of the view that loss of future earnings is a special damage claim that needs to be specifically pleaded and strictly proved. It is argued that the plaintiff has pleaded but has not specifically proved the claim. This court was urged in the circumstances to instead adopt the minimum wage of

ksh.10,000 with a multiplier of 25 years i.e. $10,000 \times 12 \times 25 = 3,000,000/=$

15. I have considered the rival submissions and the authorities cited over the claim on this head. There is no doubt that the plaintiff was incapacitated at the age of 17 years. The question of earning capacity is a matter which is within the discretion of the court and depending on the circumstances of each case. The plaintiff has demonstrated in her evidence that were it not for the accident, she would have passed her exams and proceed to study a course in accounting. However, despite the challenges she faced, she managed to obtain grade C in her K.C.S.E. I am convinced that the plaintiff would have potentially taken a course in accountancy. I also note that she will not at the moment completely lose her earning capacity since she is yearning to further her studies. What I suspect is that she may not get her dream job as an account due to the condition she is at the moment. The figure of ksh.20,000/= which was proposed by the plaintiff is not supported by any evidence. However the figure proposed by the defendant of ksh.10,000 is the minimum wage recognized by Labour Regulations. I will therefore go as per the defendants proposal save that the multiplier will change to 35 years. On this head I award the plaintiff kshs.10,000 with a multiplier of 35 years i.e $10,000 \times 12 \times 35 = 4,200,000/=$

16. The plaintiff has also prayed to be awarded ksh.176,004 as special damage. She produced receipts on account of hospital bills, purchase of drugs, medical aids and physiotherapy. The defendants do not oppose the prayer. I am satisfied the figure has been pleaded and specifically proved. I award the plaintiff ksh.176,004/= as special damage.

17. On **future medical expenses and related costs**, the plaintiff has prayed for the following:

- | | |
|--------------------------|-------------------|
| i. Diapers | Kshs. 1,800,000/= |
| ii. Versatile chair | Kshs. 800,000/= |
| iii. Nursing care | Kshs.9,000,000/= |
| iv. Special bed | Kshs.750,000/= |
| v. Physiotherapy session | Kshs.1,980,000/= |

The defendants on the other hand have proposed the following

figures on each need:

- | | |
|-------------------|-----------------|
| i. Diapers | ksh600,000/= |
| ii. Wheel chair | ksh400,000/= |
| iii. Nursing care | ksh.2,400,000/= |
| iv. Special bed | ksh250,000/= |

18. On physiotherapy session the defendants urged this court to award none because the plaintiff had failed to show prove.

19. I have considered the rival proposals. It is not in dispute that both sides agree that awards should be made on the aforementioned sub-heads. On the above, the plaintiff has proposed a multiplier of 50 years. The defendants gave a multiplier of 25 years and relied on the case of **Nancy Oseko =vs= B.O.G Masai Girls High School (2011)eKLR**

20. With respect, I think the multiplier proposed by the defendants appear to be reasonable hence I will adopt the same. Having determined the question on multiplier, let me now determine quantum on each subhead.

i. Diapers

The plaintiff proposed ksh.3000/= per month while the defendants proposed kshs.2,000/=. Due to increasing inflationary rates I think the figure proposed by the plaintiff appears to be reasonable. On this head I award ksh.900,000/= tabulated as follows $3000 \times 12 \times 25 = 900,000/=$

ii. Versatile wheel chair The plaintiff proposed a replacement of such an equipment after every 5 years. The plaintiff asked for ksh.800,000 i.e $50/5 \times 80000 = 800,000$ The defendants on their part agreed on the price of ksh.80,000 per wheel chair and on the frequency of change. They proposed a figure of ksh.400,000 i.e. $25.5 \times 80,000 = 400,000/=$ I find the proposal by the defendants to be plausible save that the multiplier should be 35. I award the plaintiff ksh,560,000/= on this head i.e. $35/5 \times 80,000 = 560,000/=$

iii. Nursing care the plaintiff asked to be paid ksh.15,000/= per month for 50 years i.e $15,000 \times 12 \times 50 = 9,000,000$ The defendants were of the view that a month sum of kshs.8,000/= per month is reasonable for 25 years. The defendants proposed an award of kshs.2,400,000/= i.e. $8000 \times 12 \times 25$ On my part, I think, a nurse who will be hired may be on part time hence a figure of ksh.10,000/= per month is reasonable with a multiplier of 35 years. Consequently, I award the plaintiff ksh,4,200,00 i.e. $ksh.10,000 \times 12 \times 35 = 4,200,000$

iv. On physiotherapy session the plaintiff has asked to be paid ksh.3,300/= per month for 50 years. The defendants have urged this court to reject the proposal as unproved. There is no doubt that the plaintiff has to undergo physiotherapy for the rest of her life. Though she did not tender any evidence of payment per session I am satisfied that her proposal to be paid ksh.3,300/= per month is not excessive. I grant the award but with a multiplier of 35 years. Consequently I award the plaintiff on this head a sum of kshs.1,386,000/= i.e. $3,300 \times 35 \times 12 = 1,386,000/=$

v. On special bed and after considering the submission of both sides I am convinced the proposal by the defence is reasonable except for the multiplier. I award ksh.300,000 i.e. $100,000 \times 3 = 300,000/=$

21. In the end I enter judgement in favour of the plaintiff and against the defendants as follows:

i. General damages for pain and suffering	ksh.6,000,000/=
ii. Damages for loss of earning capacity	ksh.4,200,000/=
iii. Special damage	ksh.176,004/=
iv. Future medical and other related costs	
a. Diapers	ksh.900,000/=
b. Wheel chair	ksh.560,000/=
c. Nursing care	ksh.4,200,000/=
d. Special bed	ksh.300,000/=
e. Physiotherapy	<u>ksh.1,386,000/=</u>
Net total	ksh.17,722,004/=

v. Costs of the suit.

Dated, Signed and Delivered in open court this 9th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant