



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 173 OF 2008

1. SAMWEL MBURU N NG'AARI
2. SARAH WANJIKU N NG'AARI
3. GRACE WAITHIRA N NG'AARI
4. MARY WAITHIRA MBURU
5. JEANETTE WANGUI MBURU.....PLAINTIFFS

VERSUS

1. WANGIKI WANGARE
2. CHRISTOPHER KIMANI KURUMA.....DEFENDANT

FINAL JUDGMENT

1. On 1st November 2013, the Court delivered a preliminary judgment in this case in which it found for the Plaintiffs on liability at 100%. The Court also permitted re-opening of the case to give a chance to the 1st and 2nd Plaintiffs to file proper medical reports to enable the Court to properly assess the damages due to them.

2. Two medical reports were filed, both prepared by **Dr. Nicholas Okumu**, an orthopaedic and trauma surgeon. The first medical report is dated **20th February 2014** while the second one is dated **21st March 2014**. They are both in respect to the 2nd Plaintiff. No further medical report in respect to the 1st Plaintiff was filed. I will now assess damages in respect to each Plaintiff in turn.

1st Plaintiff

3. The 1st Plaintiff pleaded the following injuries in the plaint -

- **Compound fracture of the left hand**
- **Compound fracture of the right hand**
- **Compound fracture of the left leg**
- **Injury to muscle**

4. In his testimony the 1st Plaintiff referred to a medical report issued by **Metropolitan Hospital**. As I indicated in the preliminary judgment this medical report is in long hand and illegible. But it is just possible to decipher from it **multiple soft tissue injuries** which were treated by surgical toilet. The 1st Plaintiff himself testified to **bleeding from the head and hands**. He never referred to any fractures of any of his bones. As already indicated no further medical report for the 1st Plaintiff was made available

despite the court according a further opportunity to do so.

5. From the material now before the court I conclude that the 1st Plaintiff suffered **moderate soft tissue injuries** in the accident for which he was treated and discharged the following day after admission in hospital.

6. **For pain and suffering I will award the 1st Plaintiff general damages of KShs 120,000/00.**

7. The 1st Plaintiff also claimed loss of earnings for one year. To begin with, the nature of the injuries that he received could not have kept him out of work for a year. As already observed he was treated for multiple soft tissue injuries and discharged the following day. There is no evidence of further treatment or management or re-admission to hospital. Secondly, the 1st Plaintiff did not testify regarding his employment or occupation, or his earning therefrom. I dismiss his claim for loss of earnings.

8. the 1st Plaintiff also claimed special damages of KShs 14,544/0. **Only KShs 9,034/00 was proved. I will award that sum.**

2nd Plaintiff

9. The following injuries were pleaded for the 2nd Plaintiff -

- **Cerebral concussion/closed head injury**
- **Multiple bleeding bruises to the forehead**
- **Fracture of the left *radius* and *ulna* and severe injury to the left arm**
- **Compound fracture of the left hand**
- **Deep cut on the palm of the left hand**
- **Severe injury to the flexion tendons of the fourth and the small fingers of the left arm.**
- **Partial paralysis of the right hand-side of the body with nerve injury**
- **Loss of urine and stool control**

10. In her testimony the 2nd Plaintiff referred to her injuries as pleaded in the plaint. She also testified that she was **partially paralyzed on her right side** and that she had suffered a **fracture on her left hand**. She also referred to a medical report which turned out to be a police medical report (P3) which indicated **fractures of the left radius and scars on the left hand**.

11. As already seen, after the preliminary judgment two further medical reports were filed on behalf of the 2nd Plaintiff, both by Doctor Nicholas Okumu. The first one is dated 20th February 2014 and is part of the notice by the 2nd Plaintiff's employer of an occupational accident. The employer was **R Billings and Co., Advocates**. The 2nd Plaintiff was their legal secretary. This medical report indicates that the 2nd Plaintiff has **weakness in her right upper limb and is unable to use the hand effectively**. Some **contracture in the left hand** is also indicated. The doctor has assessed the 2nd Plaintiff's **permanent incapacity at 85%**.

12. The second medical report is dated 21st March 2014. It is much more detailed than the previous one. The report says that the 2nd Plaintiff sustained a **traumatic brain injury** in the accident and developed **weakness in the right side of her body**. She also sustained a **fracture of the left distal**

radius and **tendon injury on her left hand** involving the ring and small finger. She had undergone surgery for the fracture and the tendon injuries and was managed conservatively for the traumatic brain injury. Upon examining her, the doctor found that she was in **fair general condition**. A systemic examination found –

- ***Central Nervous System:*** Was fully conscious with a *gascow coma scale* of 15/15 and equally reacting pupils. She was oriented in time, person and place with good long term and short term memory. She appeared to have a normal mood and affect with no evidence of depression.

She had good eye and ear function, with clear speech. She however had evident weakness in her right upper limb, with *power grade 4* in her hand abductors and adductors as well as wrist extensors.... She was able to walk unsupported which indicated normal motor function in the lower limbs. Sensation was assessed to be normal in both upper and lower limbs.

- ***Musculoskeletal System:*** As noted there was *weakness in the right upper limb*. Also noted were *contractures in the ring and small fingers* of the left hand which prevented full movements of these fingers, particularly flexion and she did not have full extension of these fingers.

She otherwise had *excellent motor function in the right upper limb and both lower limbs with no notable hypertonia or flaccidity.*

13. The doctor made the following observations regarding the 2nd Plaintiff's condition –

- **Her respiratory, cardiovascular, abdominal and genito/urinary systems were essentially normal.**
- **She still had significant residual disability relating to the accident and the likelihood of full recovery so many years after the accident is highly unlikely. Her residual disability is therefore permanent.**
- **That permanent residual disability was calculated at 85% “due to loss of function in both limbs”.**

14. The 2nd Plaintiff's **hospital discharge summary** (part of the many documents admitted in evidence from the Plaintiffs) shows that she was admitted at ***The Mater Hospital*** on the day of the accident, that is 8th May 2005 and discharged on 24th May 2005. **She was thus in hospital for 16 days.** She was then aged 32 years. There is evidence of follow-up treatment and management after discharge from hospital.

15. The 2nd Plaintiff obviously suffered very serious injuries. She underwent treatment both in and out of hospital over a long period of time. Due to the nature and extent of her injuries the treatment was painful and uncomfortable. The residual permanent disability has been assessed by the doctor at 85%, which appears rather exaggerated; but there is no other medical opinion to contradict this assessment.

16. I have considered the submissions made on behalf of the 2nd Plaintiff and the cases cited in respect thereto. I have also seen the following cases:

- **Machakos HCCC No 254 of 1999 - James Kyule –vs- Elijah Musyoka (Unreported).** The Plaintiff suffered a serious head injury. He subsequently developed post traumatic epilepsy requiring drugs and medical review for the rest of his life. The court awarded general damages of KShs 988, 247/00 in 2002.
- In **Eldoret HCCC No. 118 of 1996 Prisca Cheronno Kiticheruiyot –vs- Kiara Songok & Another (Unreported)** decided in May 2004, the Court awarded KShs 1.7 million. Here the Plaintiff had suffered a fractured skull, severe primary brain injury with left extradural hematoma,

spastic paralysis of the left arm and left leg, weakness of the right arm; he later developed slurred speech and poor memory and had become temperamental.

- In **A A M –vs- Justus Gisairo Ndarera & Another [2010] eKLR**, damages of KShs 2.5 million were awarded to the Plaintiff who had suffered a fracture of the left temporal lobe, intra cerebral hemorrhage, diffused brain edema, paralysis of the right hand especially the forearm and fingers and shortening of the right leg. At the time of examination, the Plaintiff experienced frequent migraine headaches, reduced memory, reduced cognitive function, right side weakness and significant speech deficit.
- In **H K N –vs- Kenafric Bakery Limited & Another [2010] eKLR**, the plaintiff was awarded KShs 2.5 million. He had suffered a severe concussion leading to edema and loss of consciousness, fracture of the jaw, fracture of the left *ulna* and *radius* at third distal, fracture of the left collarbone, traction injury of the left brachial plexus, laceration wound of left cheek, severe contusion of right thigh *quadriceps*, de-gloving injury to the right thigh muscle, laceration of right *saphenous* and *anterior cutaneous* vein of the thigh compromising the *venous return* of the lower limb.

Upon examination the doctor noted that the Plaintiff had weakness of the left upper limb, swollen right lower limb, unappealing scar on the face and right thigh, pain in the left upper arm, long-standing wound on the left *dorsum* of the hand and deformation of the upper limbs. He assessed permanent disability of the whole person at 60%.

17. The last case above comes quite close to the facts and circumstances of our case. Doing the best that I can and balancing this against that **I will award the 2nd Plaintiff KShs 2.2 million for pain, suffering and loss of amenities.**

18. The 2nd Plaintiff also claimed loss of earnings for 8 months when she was not able to work. Evidence of her employment and monthly salary of KShs 20,000/00 is on record. Her claim for what she would have earned during the 8 months she was under convalescence and not earning is justified and meritorious. **I will therefore award her KShs. 160,000/00 for loss of earnings.**

19. The 2nd Plaintiff finally claimed special damages of KShs 2,078,192/55. **Only KShs 1,039,445/00 was proved and I will award that sum.**

3rd Plaintiff

20. The 3rd Plaintiff pleaded in the plaint minor injuries, abrasions and bleeding. She did not testify and no medical report was filed on her behalf. In the circumstances I must dismiss her claim for general damages. She did not claim any special damages. Her suit is therefore dismissed with no orders as to costs.

4th Plaintiff

21. The 4th Plaintiff likewise pleaded minor injuries, abrasions and bleeding. She testified generally to suffering minor injuries with no particulars. I will award her KShs 50,000/00 for pain and suffering. She did not make any claim for special damages.

22. In summary therefore, and notwithstanding the various sums reflected in the interlocutory judgments entered against the Defendants, I will enter judgment for each of the 1st, 2nd and 4th Plaintiffs, jointly and severally against the Defendants, as follows -

1st Plaintiff

- i. General damages KShs 120,000/00
- ii. Special damages.....9,034/00

2nd Plaintiff

- i. General damagesKShs 2.2 million
- ii. Loss of earnings160,000/00
- iii. Special damages.....1,039,445/00

4th Plaintiff

- i. General damagesKShs 50,000/00

23. The general damages will carry interest at court rates from the date of delivery of judgment. The special damages will carry interest at court rates from the date of filing suit.

24. The 1st, 2nd and 4th Plaintiffs will have costs of the suit.

25. The 3rd Plaintiff's suit is dismissed with no orders as to costs. The 5th Plaintiff's suit was earlier struck out with no orders as to costs.

26. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 11TH DAY OF JUNE 2014

H. P. G. WAWERU

JUDGE