



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 209 OF 2013

PEACE KEMUMA Nyang'era PLAINTIFF

VERSUS

MICHAEL THUO 1ST DEFENDANT

WAIGANJO JANET 2ND DEFENDANT

J U D G M E N T

The plaintiff in this suit is Peace Kemuma Nyangera, a 26 year old university student. She has sued the defendants Michael Thuo and Waiganjo Janet, jointly and severally for special damages, general damages, costs of the suit and interest at court rates.

The claim arises from a road traffic accident which occurred on 15th June 2012 along Komarock Road Phase 1 Sector 3B round about when the 1st defendant, while driving motor vehicle registration No. KBM 247V negligently, carelessly and or recklessly drove, controlled and or managed the said motor vehicle that he caused it to knock down the plaintiff who sustained very serious injuries and suffered loss and damage.

The plaint dated 3rd June 2013 and filed in court on 5th June 2013 particularizes the injuries sustained as:

- a) Fracture of the sacrum bone (transforaminal fracture)
- b) Fracture of the right superior pubic ramus of the public bone
- c) Fracture of the right ischium/inferior pubic ramus of the pelvic bone
- d) Haematoma on both thighs
- e) Lumbo-sacral haematoma

The said plaint also sets out particulars of the defendants' negligence as

- a) Driving too fast in the circumstances
- b) Driving in a speed, which was excessive in the circumstances
- c) Driving the said motor vehicles without care and attention
- d) Failing to keep any proper lookout or to have any sufficient regard for other road users particularly the plaintiff
- e) Driving the said motor vehicle along the said road without paying regard to the slippery/poor condition of the road
- f) Failing to exercise or maintain any proper or effective control of the said motor vehicle
- g) Failing to take any or any adequate measures to prevent the vehicles from causing the accident
- h) Failing to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle as to prevent the said accident
- i) Res ipsa loquitur
- j) Failing to exercise the common law duty of care to the plaintiff

It was alleged that the 2nd defendant owner of the accident motor vehicle is vicariously liable for the negligent acts/omissions of her driver the 1st defendant.

The plaintiff further claims for special damages in the sum of Sh. 1,347,543 made up of

Medical expenses	1,145,043
Medical report	2,000
Future medical expenses	200,000
KRA Search	500

The defendants herein were served with summons to enter appearance on 21st August 2013 and 12th June 2012 respectively but they defaulted to enter appearance or file defence and on 9th October 2013 interlocutory judgement was entered against them in default of appearance and defence paving the way for formal proof hearing.

EVIDENCE

The plaintiff called two witnesses, herself and Dr. Theophilus Wangata. She testified that she is 26 years, student at Kabarak University. On 15th June 2012 she was a student at Inoorero University in Parklands. She left the said University in the evening for town and boarded a 'Double M' bus to Komarock where she lived. It was at about 9.00 pm. The motor vehicle she boarded was KBM 247V minibus.

When they reached near Mama Lucy Hospital along Kangundo Road, the conductor of the said minibus alighted and when she reached her stage at Sector 3B, she called out to the driver to stop the vehicle to enable her get off the bus but he did not stop. By that time it was about 10.00 pm and she stood up, asking the driver to stop at the stage. He proceeded on and stopped at a roundabout and when she was

just about to get off the bus, he started driving off the bus again. She hung on the door post and as she was not fully off the bus, she slid and fell down and was ran over by the bus. She screamed and other passengers inside the bus shouted at the driver to stop. He stopped and a Good Samaritan who was near the scene of accident carried her back into the bus and asked the driver to take her to hospital.

Instead, he went dropping off all other remaining passengers first and took her to Modern Hospital where she was given first aid and was seriously bleeding internally. The good Samaritan called her sister who went and caused her transfer to mater Hospital where she was admitted.

She underwent 3 surgeries and physiotherapy. She had sustained fractures in her pelvis and back. She also felt a lot of pain and bled a lot. She had metal implants inserted in her body. She was hospitalized for 3 weeks. She later reported the accident to Kayole Police Station and was issued with a police abstract and P3 form which was filed by the doctors. She produced hospital discharge summary as Exhibit 2 (a), X-ray reports – exhibits 2 (b, c, d), P3 – exhibit 3 and police abstract as exhibit 4. She did not know whether the driver whom she learnt was Michael Thuo was charged in court with any traffic offence. She produced medical expenses receipts bundles as incurred by her parents all amounting to Sh. 1,145,043 as exhibit 5 and paid Sh. 500 for motor vehicle search certificate at Kenya Revenue Authority as exhibit 6.

She instructed an advocate who sent a demand notice to the owner of the motor vehicle and the insurance and produced the said notice as exhibit 7 and 8 respectively.

She blamed the driver of the motor vehicle for the accident because after refusing to stop at the bus stage and driving off, he did not let her fully get off the bus before driving off at the roundabout where he had stopped shortly. She further blames the driver for letting off the conductor to inform him to stop at designated bus stops to enable passengers alight.

She complained of pain when standing, a twitching right leg, she could not bend, she walks with a limping gait (court observed this). She could also not wear closed shoes and she continues to suffer pain. She urged the court to award her general damages, special damages as pleaded and proved plus costs and interest.

She called Dr. Theophillus Wangata, a general physician as PW1 who testified that on 8th February 2013 he examined the plaintiff who complained of having been crushed by a motor vehicle and sustained injuries as enumerated in the medical report which he produced as evidence. The said injuries are similar to the ones enumerated in the plaint. These are:

- a) Fracture of the sacrum bone – lowest back bone spine
- b) Fracture of the right superior pubic ramus of the pubic bone – right hip bone
- c) Fracture of the right ischium bone part of the pelvis – lower part as one sits down
- d) Haematoma on both thighs
- e) Haematoma in the lumbar - sacral – lower part of spine between the 2 buttocks.

According to the doctor, the plaintiff had been treated and operated on at Mater Hospital, X-rays taken. She had three operations which involved:

- Evacuation of haematoma
- Open reduction and internal fixation on the right side of the pelvis
- Ilio sacral screw fixation of the sacrum she was given anti coagulants because she was at risk of getting blood clots – thrombosis. She was admitted in hospital for three weeks.

At the time of examining the plaintiff, she had deformities which included a limping gait, tender right hip

and when bend in the back which was painful. She had various scars confirming areas of surgery, one measuring 22 cm on the right inguinal region, 18 cm on the left side lower back and another scar on the lower back, scars on both hips measuring 3 cm each.

The doctor concluded that the plaintiff had sustained multiple fractures and several haematoma. The injuries caused a lot of physical, psychological pain, blood loss and suffering. He classified the injuries as grievous harm and consistent with being ran over by a motor vehicle. She remains with large scars of cosmetic significance.

She is consequently at high risk of having difficulties during pregnancy and child birth. She already had contracted arthritis of the right hip. She was 24 years then with no history of child birth. She risked getting pelvic infections CPD due to the changes in her pelvis caused by multiple fractures. The permanent limping gait was due to the fractures of the pelvis. The implants were still *in situ* and require removal at an estimated cost of Sh. 200,000/-

He assessed her permanent incapacity at 45%. He charged her Sh. 2000/- for preparation of medical report and Sh. 7000/- as court attendance. The doctor produced the medical report and receipts as exhibits 19, (b) and (c).

The plaintiff closed her case and her advocate was to file written submissions and supply the court with authorities within 21 days but todate, no such submissions and authorities have been filed.

EVALUATION OF EVIDENCE

I have carefully considered the evidence as adduced by the plaintiff and her witness, the doctor who examined her following the accident and injuries sustained.

ON LIABILITY

I am satisfied that the plaintiff has on a balance of probability, proved liability against the defendants jointly and severally. The 1st defendant, driver of the accident motor vehicle was under a duty to ensure the safety of passengers by stopping to allow them get off the vehicle before driving off. He was negligent in that he drove off before the plaintiff completely got off the bus thereby causing her to slide, fall and he overran over her causing her serious permanent injuries. Her evidence on how the accident took place has not been controverted. I therefore find the 1st defendant liable in negligence for the accident which caused the plaintiff serious injuries, pain and suffering.

I also find the 2nd defendant owner of the accident motor vehicle registration No. KBM 247V vicariously liable for acts and omissions of the driver/agent/servant, the 1st defendant. The plaintiff produced a search certificate to prove ownership of the accident motor vehicle as belonging to the 2nd defendant. The accident was reported to the police who issued her with a P3 form and a police abstract. There is also evidence that the owner of the motor vehicle and her insurer Invesco Assurance Co. Ltd were issued with notice of institution of suit.

ON QUANTUM

The plaintiff narrated to court the injuries she sustained following the accident. She was admitted in hospital for 3 weeks, lost a lot of blood, underwent 3 surgeries and had implants inserted in her body which will require removal at a later stage. She fractured her pelvis and lower back. She will need future operation to remove the implants.

She has been left with a permanent limping gait and cosmetic scars. She developed arthritis and will have difficulties in pregnancy and childbirth. The doctor assessed her permanent incapacity at 45%. She incurred medical expenses and will require future operation at a cost estimated by the doctor to be Sh. 200,000/-. She produced medical report, P3 and medical notes from Mater Hospital to confirm the

injuries. She cannot stand for long hours.

DAMAGES PAYABLE

a) General damages

This court has given due consideration to the findings in the doctor's opinion as per his testimony, in court and the medical report produced. That the plaintiff suffered serious injuries which have healed with permanent disabilities. The injuries were fractures around the pelvis.

Although no award has been suggested by the plaintiff's advocates for general damages, based on the evidence adduced, this court proceeds to make an award guided by decided authorities, the current weakness of the Kenyan shilling and the prevailing inflationary trends.

I take cognizance of the fact that an award of general damages is an exercise of judicial discretion which is based on injuries sustained and comparable award for comparable injuries as was held in the case of **Simon Taveta – Vs – Mercy Mutitu Njeri [2014] eKLR.**

Doing the best I can, I assess the plaintiff's general damages for pain, suffering and loss of amenities to be sh. 2,500,000/0

I am guided by the case of **Florence Hare Mkaha – Vs – Pwani Tawakal Muni coach & Another (2012) eKLR Mwangi J** where the plaintiff fractured her right superior and inferior ramus of pubis fracture of ischium, fracture of right acetabulum, fracture lateral condyl of femur, dislocation of left knee with torn collateral ligament, skin graft surgery on left leg, shortened left leg by 4 cm. the court awarded her Sh. 2,400,000/- general damages for pain, suffering and loss of amenities.

ON SPECIAL DAMAGE

The plaintiff pleaded that she incurred special damages in the sum of Ksh. 1,347,543/- made up of:

Medical expenses	1,145,043
Medical report	2,000
KRA search	500

The total amount is inclusive of future medical expenses for operation to remove the implanted plates which Dr. Theophilus assessed at Sh. 200,000/-. The plaintiff produced receipts to prove the special damages incurred.

Accordingly, I award her Sh. 1,347,543/- special damages as pleaded and proved, inclusive of future medical expenses for the operation of Sh. 200,000/-

I decline to grant her the Sh. 7,000/- for the doctor's court attendance costs as this is a cost of the suit and not a pleaded or proven special damage.

In summary, I enter final judgment for the plaintiff against the defendants jointly and severally for:-

- a) General damages 2,500,000/-
- b) Special damages 1,347,543
- c) Interest on general damages at court rates from the date of this judgment until payment in full
- d) Interest on special damages from the date of filing suit

e) Costs of this suit

Orders accordingly.

Dated, signed and delivered at Nairobi this 3rd day of December, 2014.

R.E. ABURILI

JUDGE