



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 97 of 2011

No.585

SABINA ADHIAMBO ODONGO PLAINTIFF
VERSUS

RUTH WANGUI 1ST DEFENDANT

ALEX OKARI NYANDIKA 2ND DEFENDANT

JUDGMENT

1. The plaintiff herein, Sabina Adhiambo Odongo commenced this suit by way of a plaint dated 25th May 2012 seeking judgment against the defendants jointly and severally for:-

- (a) *General damages for pain, suffering and loss of amenities and damages for loss of earnings and loss of earning capacity.*
- (b) *Special damages as aforesaid in the sum of Kshs.55500/=.*
- (c) *Costs of and incidental to this suit.*
- (d) *Interest at court rates.*
- (e) *Any other or further relief that this honourable court may deem fit and just to grant.*

2. The plaintiff's claim arises out of a road traffic accident which is said to have occurred on or about 29th January 2011 as the plaintiff was travelling as a passenger on board the 1st defendant's motor vehicle Reg. No. KBE 613B along the Oyugis-Kisumu road where the 2nd defendant, for whose torts the 1st defendant is vicariously liable, drove the said motor vehicle registration number KBE 613 B so carelessly and/or negligently that he caused the same to collide with motor vehicle registration NO. KBN 316S. The plaintiff alleges that the 2nd defendant was negligent by driving at a speed that was excessive in the circumstances; driving without due care and attention to other road users; failing to keep any or any proper lookout and that the said 2nd defendant also failed to brake, swerve or to in any other way control the 1st defendant's motor vehicle so as to avoid the accident and that the 2nd defendant also recklessly overtook before first ensuring that it was safe to do so. The 2nd defendant was also accused of driving into the lawful path of motor vehicle registration Number KBN 316 S.

3. As a result of the said accident, the plaintiff suffered the following injuries:-

- *Crush injury to the right forearm leading to below the elbow amputation.*
- *Injury right side.*
- *Bruises on right arm and chest.*

4. The plaintiff further pleaded that due to the severity of the injuries sustained, especially the loss of her right arm which is her dominant limb, she has been unable to continue with her work as a tailor and tailor tutor. The plaintiff averred that she is a trained tailor by profession and was earning approximately Kshs.50,000/= per month from tailoring. She claims damages for loss of earnings and loss of earning capacity.

5. Though duly served with the plaint and copy of summons to enter appearance, the defendants neither entered appearance nor filed defence, so the case came up before me for formal proof on 5th March 2012.

6. The plaintiff testified and explained how the accident occurred. She testified that before the accident, the motor vehicle KBE 613B was being driven at very high speed and that she, among other passengers loudly complained to the driver to reduce speed but that their complaints fell on deaf ears. The plaintiff produced the following exhibits:-

- *P. Exhibit 1 – Discharge Summary from Kericho District Hospital.*
- *P. Exhibit 2 – P3 from.*
- *P. Exhibit 3 – Police Abstract.*
- *P. Exhibit 4 – Copy of Records for m/v KBE 613 B from KRA.*
- *P. Exhibit 5 – KRA receipt for Kshs.500/= being payment in respect of the Copy Records.*
- *P. Exhibit 6 – Bundle of receipts in support of special damages.*
- *P. Exhibit 7 – Receipt for Kshs.5000/= issued by Dr. Odhiambo.*
- *P. Exhibit 8 – Medico Legal Report by Dr. Odhiambo.*
- *P. Exhibit 9 – Plaintiff's Certificate of Dress making dated 26th March 2003.*
- *P. Exhibit 10 – Record Book of Accounts for plaintiff's dress making business.*
- *P. Exhibit 11 (a) – (d) – Bundle of receipts issued to her customer showing earnings from her business.*

7. At the close of the plaintiff's case, counsel filed written submissions supported by relevant authorities. It was submitted that there was clear evidence that the 2nd defendant was negligent in the manner he drove and/or managed m/v KBE 613 B and that the 1st defendant is vicariously liable for the negligence of the 2nd defendant. It was submitted that since the defendants did not controvert the pleadings and the evidence of the plaintiff, the court ought to accept the plaintiff's evidence as given and find both defendants liable in negligence. It was contended that accidents do not just happen without there being a negligent act and that the court should find that there is explicit evidence of negligence on the part of the defendants herein. Counsel also referred the court to the doctrine of *res ipsa loquitur* and the decision of the Court of Appeal in **Embu Public Road Services Ltd. –vs- Riimi [1968] EALR 22** where the court stated that **“where circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the**

accident which does not connote negligence.”

8. The court was also referred to the words of Sir Charles Newbold, P at P. 24 of the judgment in the **Embu Public Road Services** case (above) to the effect that:-

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances, does not have to show any specific negligence, he merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant.”

9. Counsel also referred the court to the case of **Nandwa –vs- Kenya Kazi Ltd. [1988] KLR 488** where the court held that:-

“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.”

10. It was plaintiff’s case that there is nothing on record to show that the plaintiff in any way contributed to the accident which gave rise to her near fatal injuries, and that in the circumstances, the defendants should be held 100% liable. Further, that by filing no defence, the defendants have not provided any answer to the inference that the accident herein was caused by their negligence.

11. I have considered the evidence and the law on the issue of liability, and I am persuaded that indeed there is nothing on record that could suggest, even in the slightest manner, that the plaintiff contributed to the accident in which she was injured. The defendants neither filed defence nor came forward to testify. In the circumstances, I find the defendants jointly and severally 100% liable for the accident in which the plaintiff was injured.

12. On the issue of quantum, it was submitted on behalf of the plaintiff that taking all the evidence into account, the nature and extent of the injuries sustained, the plaintiff is entitled to an award of Kshs.1,800,000/= in general damages for pain, suffering and loss of amenities. To support this figure, the court was referred to **Nairobi HCCC NO.478 of 2007 – Sofia Yusuf Kanyare –vs- Ali Abdi Sabre & another [2008] e KLR**. In the case the plaintiff whose right arm was amputated was awarded Kshs.1,750,000/= in general damages on 26th September 2008. The court was also referred to **Kericho HCCC No.54 of 2004 – Frederick Wanyama Makina –vs- Humphrey Luamba & another** where for an amputated arm, the plaintiff was awarded Kshs.1,400,000/= on 6th February 2012.

13. Considering all these authorities and the fact that the loss of the plaintiff’s right arm was both traumatizing and humiliating, I am of the humble view that an award of Kshs.1,500,000/= general damages for pain suffering and loss of amenities is fair in this case.

14. The plaintiff has also asked for damages for loss of earning capacity following the loss of her right hand which was the active limb for her profession as a tailor. She adduced evidence to show that she was earning about Kshs.50,000/= per month from her business. Plaintiff’s counsel submitted that if the accident had not occurred, the plaintiff would have carried on her business until age 65. From the medical report prepared by Dr. Odhiambo, the plaintiff was 39 years old as at 29th January 2011 when the accident occurred. Counsel asked for loss of future earning capacity in the sum of Kshs.15,600,000/= using a multiplier of 26 years. Reliance for this amount was placed on Court of Appeal decision at Nairobi in **Civil Appeal No.49 of 1983 – Butler –vs- Butler**, in which their Lordships Kneller JA and Chesoni and Nyarangi Ag. JJA set out the factors to be taken into account in considering damages under loss of earning capacity. They stated:-

“The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualification of the claimant, his remaining length of working life, his disabilities and previous service if any.”

15. It was contended that in the instant case, the accident has forced the plaintiff to employ a domestic worker at a cost of Kshs.6000/= per month to carry out duties around the home which duties the plaintiff herself ordinarily performed before the accident. Though no evidence was led by the plaintiff on the domestic worker’s salary, the plaintiff is asking for Kshs.1,872,000/= made up as follows:- **Kshs.6000x12x26 years**. The plaintiff relied on Nairobi **HCCC NO.2865 of 1993 – MMKisoso –vs- Express (K) Ltd.** where Hayanga J allowed for Kshs.5000/= for a domestic worker and a multiplier of 10 years for a plaintiff who was 58 years old.

16. In the instant case, I am alive to the fact that the plaintiff, like all humanity, would be subject to the vicissitudes of life, thereby affecting her active life as a tailor. In this regard, I would put her active life at 60 years, giving a multiplier of 21 years. Secondly, the sum of Kshs.50,000/= in a business that depends on many other factors like the effect of second hand clothes business in the market would be subject to fluctuations. An allowance has also to be made for taxes. I would this put these earnings at Kshs.30,000/= per month as no bank statements or business accounts were produced to support the figure of Kshs.50,000/= per month.

17. As for the house help, I think that a sum of Kshs.5000/= per month for the kind of setting the plaintiff lives in would be adequate in my view. Accordingly, I would compute the awards as follows:-

- *Loss of Future Earnings*

Kshs.30000/= x 12x21 = Kshs.7,560,000.00

- *Domestic Help*

Kshs.5000/= x 12x21 = Kshs.1,260,000.00

- *Special Damages*

The amount proved under this head is Kshs.49,791/=.

18. Accordingly, I enter judgment for the plaintiff as against the defendants jointly and severally as follows:-

1. ***Liability* 100%**
2. ***General Damages* Kshs.1,500,000.00**
3. ***Loss of Future Earnings* Kshs.7,560,000.00**
4. ***Domestic Help* Kshs.1,260,000.00**
5. ***Special Damages* Kshs. 49,791.00**

***Total* Kshs.10,369,791.00**

19. The plaintiff shall also have costs of the suit and interest at court rates from date of judgment save from date of filing suit on specials until payment in full.

20. It is so ordered.

Dated and delivered at Kisii 1st day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. G.J. Masese for Sila Munyao (present) for Plaintiff

N/A for Defendants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.