



1. Running down Cause
2. TORT
3. Motor vehicle collision with train
4. Passenger in motor vehicle male adult aged 27 years old in 1990
5. Injuries:
 - a) Fracture pelvis – roof of right acetabulum
 - b) Fracture right side, 3 ribs
6. Liability:

100% against the defendant (deputy registrar 16.11.04)

 - a) Defendant attempted to join Kenya Railways as 3 party
 - b) Leave granted but defendant took no action
 - c) Defence struck out order 10 r 20 CPR
 - d) Interlocutory judgment by deputy registrar on 16.11.04.
7. Plaintiff dies in 2000 and substituted by widow
8. Quantum on assessment of damages
- I: General Damages
 - a) Pain and suffering - Ksh.250,000/-
 - b) Special Damages - Nil not proved
9. Case law
 - a) Patrick Kosgei Kipkenda v Enock Cheserek Hccc916/92, Githinji,J.
 - b) Christine Kanini Muthoka v Simon Okoth Obok & Another Hccc3987/93,Juma
- rd
10. Advocates:

Mbigi Njuguna for Mbigi Njuguna & Co. Advocates for the plaintiff
No appearance for Gachoka & Co. Advocates for the defendant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 6510 of 1991

JOSHUA MWANIKI NDUATIPLAINTIFF

VERSUS

SAMUEL MUCHIRI NJUGUNA DEFENDANT

JUDGMENT

1: PROCEDURE

1. The plaintiff herein is the widow of one Joshua Mwaniki Nduta (now deceased). She was substituted to proceed with this matter in place of her late husband. This suit is a running down matter in tort the deceased was on the material day of the 6th of August 2000 travelling as a fare paying passenger at about 6.40 a.m. along the Nakuru/Naivasha road. Due to the negligence of the defendant agent and or servant, the vehicle Reg. KWS 706 which the deceased was travelling in collided into a Railway train Engine No.9209 at the Gilgil Railway level crossing. The deceased sustained injuries and was taken to the Ol Kalou district hospital where he was discharged after treatment.

2. He sued the defendant herein for damages on personal injuries some time in 1991 (Plaint filed 6.12.91 and dated 2.12.91).

The defence entered appearance filed defence and attempted to join the Kenya Railway as third party in these proceedings. Leave having been granted to the defendant, he failed to subsequently place this matter down for 3rd party directions. The plaintiff suit was adjourned on the issue of direction between September 1992 and May 1993. The third party entered appearance on 16.12.92. The suit was adjourned between 27 September 1994 to 7.10.97. In 1998 notices of change of advocates was filed. In 1999 the suit was stood over because parties were pursuing settlement. Osimo, J who was then handling the matter was not available to hear this suit.

4. Between February 2000 to 2002 the matter was not confirmed for hearing at the call over. The duty judge (Ransely J) allowed an application to substitute the plaintiff who was now deceased. He also allowed an application dated 13.11.00 on 29.6.04 in which the defendant failed to comply with the court order to set matter down for directions of the third party. The defence was struck out by the duty judge and Interlocutory Judgment entered on 16.11.04

II: LIABILITY

5. The effect of the deputy Registry entering interlocutory judgment is that liability against the defendant is at 100%.

III: QUANTUM

6. The suit proceeded to the assessment of damages

I: General Damages

a) Pain and suffering

The plaintiff whilst alive was examined by:-

Mr. W.M. Wokabi

MB ChB M.Med

Consultant surgeon

The doctor confirmed the injuries sustained by the plaintiffs as:-

6.1. Pelvis- fractured right acetabulum

6.2 Fractures of 3 ribs

The plaintiff took a bed rest and required 6 months of rehabilitation was approximately of developing osteoarthritis was appropriate.

The fracture to the ribs were expected to with in future. The advocate for the plaintiff prayed this court

awards Ksh.400,000/-. He relied on the case law of:-

a) Christine Kanini Muthoka

V Simon Okoth Obok & Another Hccc3987/93 Juma, J.

This was of a female adult passenger involved in an accident whilst travelling in a bus between Machakos and Nairobi road. She sustained fracture of the pelvic bone and other blunt injury. Juma J (as he then was) assessed injuries at Ksh.200,000/- and awarded the general damages for pain and suffering.

b) Patrick Kosgei Kipkendi V

Enock Cheserek Hccc916/92, Githinji J.

The plaintiff – male adult aged 22 years old sustained fracture to the left side ribs (No.2,3 and 4) and fracture of the midshaft femur left leg. An award for fracture of femur was given at Ksh.200,000/-. The head and chest injury at Ksh.150,000/- 8. In the latter case law injuries are one and inadmissible. There can be no award for different injuries on a body.

I would find in this present case that the deceased indeed sustained injuries. It seems there the fracture of the acetabulum related to the pelvic and the rib fracture caused pain and suffering to the deceased. I would accordingly award Ksh.250,000/-.

III Special Damages

9. The plaintiff did not speak on this claim. I hereby dismissed the same with view that the same was never pleaded. I accordingly enter judgment for the plaintiff on the proved sum. In summary 1.0.1. Passenger aged 27 years old 1990 male adult

1.0.2 Motor vehicle train collision

1.0.3. Injuries

a) Fracture pelvis –roof of right acetabulum

b) Fracture right side 3 ribs

1.0.4. Liability 100% against the defendant (Deputy Registry 16.11.04)

1.0.5 Plaintiff dies in 2000 and substituted by present/plaintiff

1.0.6 General Damages

a) Pain and suffering Ksh.250,000/-

b) Special damages Nil_____

1.0.7. Total Ksh.250,000/-

11. I award the costs of this suit to the plaintiff. I award interest on general damages from the date of this judgment.

Dated this 6th day of July 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Mbigi Njuguna & Co. Advocates for the plaintiff Gachoka & Co. Advocates for the defendant