



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 37 of 1991

MONICA KORI NDUNDA.....PLAINTIFF

-VERSUS-

MALINDI TAXIS LIMITED.....DEFENDANTS

JUDGMENT

Judgment of liability was entered by consent apportioned at 50% against the plaintiff and 50% against the defendant. The injuries sustained by the plaintiff are as stated in her evidence: -

1. Fracture on the head shown by a dent, which is visible.
2. Blunt injury on the left ear.
3. Blunt injury to the left eye.
4. Blunt injury to the back and neck.
5. Blunt injury on the left leg.

The complaints as at the time of trial are: -

1. Headaches especially when chewing hard foods.
2. Pain in the left ear.
3. Left ear does not hear properly and she has a blurred vision in the left eye.
4. Neck pains forcing her to lie on flat surface, cannot bend the neck to work, cannot bend because the back pains and she has to wash while standing, injured from the hip up to the knee which is not healed, cannot climb a hill and cannot walk long distances. She cannot do farming as the pains have now increased.

When cross-examined she stated that she was transferred from Makindu, Machakos, Mater to Aga Khan hospital because there was no machine to pull out the dented corner of her head. She was admitted at Machakos hospital for 2 days and then discharged to receive treatment as an outpatient from the brother's house as they had no money. She saw when she was transported from Makindu to Machakos hospital but was semi-conscious. She maintains she bled from the ear although it is not noted. She is surprised that Aga Khan hospital said there was no fracture and yet there is a depression on the head. She maintains she still goes for medication and uses painkillers although she has no documents.

In her re-examination she maintained that she told the Machakos Hospital staff and those of Aga Khan hospital that she had bled from the ears and maintains her health has deteriorated.

In their written submissions to the court counsel for the plaintiff submitted that the injuries sustained by the plaintiff are grave because: -

1. She cannot eat with comfort. She has piercing and splitting pains as she bites or chews food.
2. There is continuous buzzing noise in the ear.
3. The eyes are blurred and she cannot see well.
4. Her neck cannot allow her to sleep flat.
5. Her back cannot allow her to bend.
6. She cannot walk fast or climb as ascend.
7. She cannot engage in any farming activity, which is a source of living prior to the accident.
8. She has been compelled to get the services of a house help to assist her and take care of the family.

On that basis counsel assessed the general damages as Kshs. 600,000/- They referred the court to the case of JOHN KINYANJUI AND ANOTHER –V- THE ATTORNEY GENERAL AND ANOTHER NAIROBI HCCC.NO. 3502 OF 1990 where the plaintiff suffered a brain injury resulting to epileptic fits and minor injuries of bruises. The court awarded Kshs. 600,000/- less 20% contributory negligence against the plaintiff aged 7 years, coming to Kshs. 480,000/- as general damages.

The case of IRENE EGIRA NTHIGA –V- NAIROBI BUS UNION NAIROBI HCCC.NO. 2425 OF 1990 where the plaintiff become unconscious after the accident. She sustained a fracture of the right acetabulum, initial dislocation, was corrected, dislocation of the right knee joint with torn ligaments and popliteal severe injury, fracture of the left radical head, closed head injury. The dislocation of the right knee was reduced with reconstruction of possible ligaments and was done on 24/4/89. The gradual rehabilitation was started. She complained of pain in the right hip, pain and stiffness of the right knee, weakness of the right ankle, shortening of the right lower limb and pain in the left elbow. The court awarded Kshs. 120, 514/50 as special damages, Kshs. 300,000/- as future medical cost, general damages for pain suffering and loss of amenities assessed at Kshs. 450,00/-, damages for loss of earning capacity Kshs. 720,000/-, Total being Kshs. 1, 590.514/50.

The defendant on the other hand submitted and urged the court: -

1. To disregard the evidence and exhibits which tend to suggest that the plaintiff sustained a fracture of the skull among other injuries.
2. That as per exhibit 5 the plaintiff did not get a fracture and so did not get specialized treatment and instead she was but on bed rest for two days and discharged. It is their stand in view of the contents of exhibit 5 that the contents of exhibit 4 are not correct and they do not show a correct picture of the injuries of the plaintiff.
3. Urged the court to go by the injuries stated in paragraph 5 of the plaint and not those stated in exhibit 4 and 6. Counsel for the defence referred the court to the case of JANE OMANGA BASWETI –V- JOSEPH MOGAKA AND ANOTHER NAIROBI HCCC.NO.2108 OF 1990 where the plaintiff suffered cerebral concussion, fractured skull, chest injury and dislocation of the right distal radio ulna joint. The court awarded Kshs. 120,000/- on 13/5/93. He suggested a figure of Kshs. 100,000/- as being an adequate recompense for the injuries sustained less 50% contribution.

On the assessment I find that the plaintiff claimed special damages of Kshs.100/- for the police abstract and Kshs. 800/- being cost of medical report being exhibit 1 and 6 and I allow the same.

On the injuries paragraph 5 of the plaint states that the plaintiff sustained head injury, injury to the left hip and lower back, soft tissue of the chest and massive soft tissue injury of the left thigh. While the injuries stated in court are: -

1. Fracture of the head.
2. Blunt injury on the left ear.
3. Blunt injury on the left eye.
4. Blunt injury on the back and neck.
5. Blunt injury on the left leg.

As submitted by the defence counsel these injuries slightly differ from those pleaded. The rule is that a

party is bound by his pleadings and so the plaintiff is bound by the injuries pleaded.

Coming to the medical evidence counsel for the defence has urged the court to ignore exhibits 4 and 6 and consider only exhibit 5. The court's response to this is that where there are two conflicting medical reports or more and parties do not know which one to follow they call for another medical report from a specialist. No such report was called for from a neurologist and so this court has no alternative but to go by the reports submitted to it.

The medical evidence here is that the plaintiff was involved in an accident. She was rushed to Makindu Dispensary where the staff said they could not manage her case and referred her to Machakos District Hospital. It was also stated by the plaintiff that they should not deal with her case and they referred her to Mater Hospital. She alleged there was no machine, which was to be used in her treatment. The report from this hospital is exhibit 4. It shows the plaintiff was admitted on 3/4/88 complaining of headaches, shoulder and muscle pains and pain over the right hip. The x-ray revealed a depressed skull fracture on the anterior aspect of the right frontal bone. It is indicated that the relatives requested a transfer to another hospital. She was taken to Mater Hospital whose report is exhibit 3. It is dated 4/4/88 and the only diagnosis made was depressed fracture of the right anterior frontal skull. There is not indication in exhibit 4 that the plaintiff was being transferred for specialized treatment elsewhere. It is just indicated that the relatives requested a transfer to another hospital. Exhibit 2 the P3 which lists depressed skull fracture of the left forehead which was confirmed on the x-ray. The cervical spine was tender with restricted movements. There were soft tissue injuries on the thorax and abdomen but no fracture on the ribs. There were also soft tissue injuries on the upper limbs and massive soft tissue injuries on the left thigh but the x-rays revealed that there was no evidence of fracture on the limbs.

Exhibit 5 from Aga Khan Hospital notes that on admission the patient was conscious, oriented, stable and in a satisfactory general condition. Movements of the neck were restricted due to pain and a swelling bump was noted on the left side of the fore head. No neurological deficit was observed. X-ray of the skull No. 1974/88 showed no fracture. Under observation for 24 hours her condition remained stable and the patient was discharged on 5/4/88 to be followed up as an outpatient. The report was on 20/2/89.

The last medical report exhibit 6 was made on 22/2/91 and it diagnosed: -

1. Head injury-small depressed fracture left frontal region of the skull
2. Soft tissue injury of the cervical spine
3. Injury to the left ear
4. Soft tissue injury lumbar spined and left hip.

In his opinions the Doctor said that following a road traffic accident Mrs. Koki Ndunda sustained various injuries outlined above. He would classify this injury as "maim" and would award a temporary disability of six months two months of which would be total and the rest partial. The Doctor then listed the injuries as hereunder:-

1. Head injury. Took approximately two hours to regain bearings of her surroundings. Sustained a depressed fracture left frontal region of the skull. The degree of depression is slight. She has left sided headaches.
2. Blunt injury to the left ear. Has an irritating and continuous buzzing noise in the left ear.
3. Soft tissue injury of the lumbar spine. Has lumbar backache.
4. Injury left-sacro-iliac joint. Has pain in this joint.

Taking all the overall picture into consideration the Doctor awarded a permanent disability of ten percent (10%).

After assessing the evidence and the submissions of both sides I find that apart from the report from Aga Khan Hospital the rest of the medical documents including those of Machakos and Mater Hospital show that there was a depressed fracture on the skull. These were the first medical documents. The officers who made these reports are competent to make them. The Doctor who saw the patient after Aga Khan also

observed the same physically and from the x-ray given it has not been suggested that he too was incompetent to make such a report. The plaintiff pointed out the depressed fracture to the court and it is still visible. There is no evidence that the same was sustained after the accident. This fact coupled with the earlier reports show that the injuries were sustained in the accident complained of. Apart from this the other injuries noted were severe soft tissue injuries which still persist to the present day and have altered the plaintiff's life style.

Commenting on the authorities cited by the plaintiff the first authority related to more serious head injury than that sustained by the plaintiff herein while those in the second related to injuries not similar to those of the plaintiff. As for the defence authority it related to head concussion which is less severe than a depressed fracture.

On my own I would refer to the case of DANIEL GACHERU –V- PAUL KIGIMA KARIMI NAIROBI HCCC. NO. 250 OF 1990 where the plaintiff suffered depression fracture on the frontal area of the skull above the right eye. Bruises on the right hand, right knee and left knee. General damages was assessed at Kshs. 300,000/-

Considering the injuries sustained by the plaintiff, their effect on her present life, the authorities cited, the age of the authorities and taking into account the fact that an award of damages is meant to compensate a party but not to enrich him or her and that such an award should not be inordinately high or low, I make an award of Kshs. 450,000 as an adequate compensation for the injuries suffered which will suffer 50% contribution.

In the premises I enter judgment for the plaintiff on the following terms against the defendant: -

1. Special damages of Kshs. 100/- for abstract and Kshs. 800/- for medical report total Kshs. 900/- less 50% contribution leaving a balance of Kshs. 450/- with interest at court rates from the date of filing until payment in full.
2. General damages for pain suffering and loss of amenities Kshs. 450,000/- less 50% contribution of Kshs. 225,000/- leaving a balance of Kshs. 225,000/- with interest at court rates from the date of filing until payment in full.
3. Costs of the suit.

Dated at Eldoret this 14th day of May 1999

Read and Delivered at Eldoret this 16th day of August 1997

R.NAMBUYE

JUDGE