



REPUBLIC OF KENYA

Olesa (an infant) v Bayete Peugeot Services Limited

High Court, at Nairobi January 30, 1985

O’Kubasu J

Civil Case No 297 of 1984

Cases

- 1. Jones v Giffiths [1969] 2 ALL ER 1015**
- 2. Burke and Others v Wolley and Maughan [1980] C A No 744 Kemp & Kemp – 4th Edition at pages 3311 and 3459.**
- 3. Kimathia v Bhamra Tyre Retreaders and Others [1971] E A 81**
- 4. Rahim Tayab & Another v Anna Mary Kinanu Civil Appeal No 29 of 1982**
- 5. Aris Gramanatices v Ernest Muiruri & Aggregate Limited – H C C C No 2326 of 1973**
- 6. Bashir Ahmed Butt v Uwais Ahmed Khan – Civil Appeal No 40 of 1977**
- 7. Conolly v. Camden Area Health Authority [1981] 3 ALL E R 250**
- 8. Zablon W Marige v Morris Wambua Musila – Civil Appeal No 66 of 1982**
- 9. John Okelo Oratah v George Ayuko Otieno – H C C C No 109 of 1983**

January 30, 1985, O’Kubasu J delivered the following Judgment.

The plaintiff, H O[*minor*], is a female child now aged about twelve years and is suing through her father Rashid Matano. The defendants are Bayete Peugeot Services Limited and John Martin Kibiegion. This suit arises out of a traffic road accident which occurred on August 31, 1981. The plaintiff was a passenger in a motor vehicle registration number KLR 388 owned by the 1st defendant (Bayete Peugeot Services Limited) and being driven by the 2nd defendant (John Martin Kibiegion). The said vehicle was involved in an accident and as a result the plaintiff was injured. The defendants admitted liability and hence the only issue before the court is quantum of general damages since special damages have also been agreed at Kshs 8,650. Three medical reports were admitted by consent of both advocates and so were the school reports of the plaintiff. The three medical reports are marked ‘Exhibit 1’ while the plaintiffs school reports are marked ‘Exhibit 2’.

Rashid Matanko the father of the plaintiff gave sworn evidence. He said that the plaintiff was born on the January 5, 1973 and she started school in 1979. She was attending Mathare Valley Primary School when

she was injured in a road accident on August 31, 1981. As a result of the accident the plaintiff was unconscious for 23 days. She was initially admitted at Kericho District Hospital and after one day she was transferred to Nakuru Provincial Hospital. She remained in hospital for about 46 days. She was then transferred for regular out-patient treatment at the Kenyatta National Hospital.

According to the father the plaintiff's academic record has deteriorated. Before the accident the plaintiff was a cheerful child who enjoyed the company of the other children and visitors but all this was changed by the accident. She does not like playing with children of her age as she prefers to play with much younger children.

The plaintiff became epileptic since August, 1983 and she gets fits twice or thrice a month. She now takes drugs every day.

The first medical report on the plaintiff was prepared by Dr B Odhiambo. According to this report which was produced as Exhibit 1 the plaintiff suffered the following injuries:

“(1) Severe brain concussion.

(2) Deep lacerated wound right occipital: right forehead above right palpabrae; right temporal region; left leg medial aspects.

(3) Profuse scalp oedema.”

In that report which is dated March 12, 1982, Dr Odhiambo gave the following as his opinion on this plaintiff:

“Miss O[*minor*] at a very tender age of 9 years suffered serious brain injury as a result of hard bang on the head. For over three weeks she remained deeply unconscious., in critical general condition. Although surprisingly she managed to recover without serious neurological deficits she however suffered the following permanent body incapacities.

(1) The permanent facial scars are easily visible and disfiguring her and causing her a lot of public embarrassment

(2) Traumatic headaches are also permanent features that she shall have to live with. Demanding frequent medical attention”.

The plaintiff was seen and examined by Professor R F Ruberti on October 6, 1982 who prepared a report dated October 13,1982. In that report Professor Ruberti states, inter alia

“E E G findings are in favour of a post concussion syndrome and most probably a mild permanent brain damage following the injury. I would assess her permanent disability to between 10 – 15%”

Then on December 15, 1983 Professor Ruberti saw the plaintiff again and this is what he (Professor Ruberti) says in his report dated December 22, 1983:

“An EEG was grossly abnormal of the left parietal area. I reduced the Epanutin to 200 mg in the evening for one month after which time I would like to see her again.

Obviously this patient has become a post-traumatic epileptic and therefore her permanent disability should be reassessed now between twenty five to thirty percent. The patient will continue to stay on medical treatment for at least two – three years after which time she may possibly be cured but this cannot be guaranteed.”

Lastly the plaintiff was seen by Dr Gerishon M Sande a Consultant Neurosurgeon who prepared a

medical report dated October 15, 1984. Dr Sande's conclusions were as follows:

“Miss O[*minor*] suffered a severe brain injury as evidenced by prolonged unconsciousness. This degree of brain injury is recognized as a cause of intellectual impairment. Such patients run a high risk (about 25% as compared to .5% in the general population) of developing post-traumatic epilepsy.

The reported deterioration in her school performance and the epilepsy she now suffers from are a direct consequence of the injury. The electroencephalogram shows that the fits arise from a wide area of the brain. This type of epilepsy is not amendable to surgery. She will therefore have to remain on anti-epileptic drugs for along time, probably for life.

These drugs are expensive and have undesirable side effects.

Both the degree of brain injury she sustained and recurrent fits cause intellectual deterioration.

The drugs that are used for the treatment of epilepsy also depress intellect. It can therefore be safely stated that Miss Olesa's intellect has been permanently compromised.

Epilepsy reduces not only the quality but also the span of life.

The hypertrophic scar over the right eye brow can only be removed by expensive plastic surgical procedures.” What I have set out above from the medical reports give us an indication of the type of victim that we are dealing with. The plaintiff was a very bright girl prior to the accident but now her intellect has been permanently compromised. Her chances of higher education have been greatly reduced. This will affect her career options. It also follows that her marital opportunities are severely compromised.

How should this little girl be compensated? I agree with Mr Mwaura for the plaintiff and Mr Muchui for the defendants that damages in this case should be under the following heads:

- (1) General damages for pain, suffering and loss of amenities of life.
- (2) General damages for loss of earning capacity.
- (3) Cost of future medical care
- (4) Special damages

The leading English authorities on epilepsy are Jones v Giffiths [1969] 2 ALL ER 1015 and Burke and Others v Wolley and Maughan [1980] C A No 744 reported in Kemp & Kemp – 4th Edition at pages 3311 and 3459. The awards made by foreign courts must be used as a guide only as was said in Kimathia v Bhamra Tyre Retreaders and Others [1971] EA 81 by Law JA: when he said:

“In my view awards made by foreign courts although helpful as a guide do not necessarily represent the standards which should prevail in Kenya where the conditions relevant to the assessment of damages such as wages, rents and cost of living generally may be very different.”

In Kenya the leading case on epilepsy is Rahim Tayab & Another v Anna Mary Kinanu Civil Appeal No 29 of 1982.

In Tayab's case the Court of Appeal reduced an award of Kshs 750,000 to Kshs 300,000. In Aris Gramanatices v Ernest Muiruri & Aggregate Limited – H C C C No 2326 of 1973 there was risk of epilepsy estimated at 100% and the award was Kshs 700,000. In my view the case of Grammatices was of

severe brain injury and hence can only be of assistance as a guide but is not similar to the present case.

In *Bashir Ahmed Butt v Uwais Ahmed Khan* – Civil Appeal No 40 of 1977 an award of Kshs 400,000 was reduced to Kshs 300,000 on appeal.

I have also considered the other unreported cases cited by Mr Mwaura but I prefer Mr Muchui's submission to the effect that the facts of this case are similar to Tayab's. Doing the best I can in the circumstances I award Kshs 400,000 as general damages for pain, suffering and loss of amenities.

As regards loss of future earnings this is a problematic aspect of this case. Mr Muchui was of the view that this should be left out completely since the plaintiff is a young girl still in primary school.

I think that cannot be the correct legal position in view of what was said in *Conolly v. Camden Area Health Authority* [1981] 3 ALL E R 250 as applied in *Zablon W Marige v Morris Wambua Musila* – Civil Appeal No 66 of 1982.

Elsewhere in this judgment I have said that as a result of the injuries sustained by the plaintiff which have severely affected her intellect her career options have been reduced.

Even Dr Sande in his report said that due to epilepsy her span of life has been reduced. In *John Okelo Oratah v George Ayuko Otieno* – H C C C No 109 of 1983 Masime J gave an award of Kshs 250,000 to a 3 year old boy for loss of earning capacity. In the present case the plaintiff has not been reduced to a moron as Mr Mwaura put it but we must bear in mind what the doctors said about her future. In my view a figure of Kshs 150,000 would be fair compensation for loss of earning capacity. As regards cost of future medical care I have to rely on the report of Dr Sande in which the cost of treatment was estimated at Kshs 431,200 assuming that average span of life is about 60 years. Now that we have noted the effect of epilepsy on life span I am of the view that since the plaintiff has already been compensated for loss of future earnings and in view of the fact that the plaintiff's life span is likely to be reduced I feel that the figure of Kshs 431,200 should be reduced but only slightly. Hence for cost of future medical care I award the plaintiff Kshs 400,000

Special damages were agreed at Kshs 8,650.

In view of what I have stated above I now award damages as follows:

1. General damages for pain suffering and loss of amenities	Kshs 400,000
2. Loss of earnings	Kshs 150,000
3. Cost of future medical care	Kshs 400,000
4. Special damages	Kshs 8,650
Total	Kshs 958,650

Hence the total comes to Kshs 958,650. I enter judgment in favour of the plaintiff for this amount of Kshs 958,650 plus interest at court rates and the costs of this suit. Order accordingly.