



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 294 OF 2005**

**FRED M. O. ....1ST APPELLANT**

**DUNCAN M. MICHIRA .....2ND APPELLANT**

**JOHN KIPRUTO .....3RD APPELLANT**

**AND**

**SARAH ACHIENG SALASIE .....RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya  
Nairobi (Ransley, Commissioner of Assize) (as he then was) dated 23rd October, 2002***

**in**

**H.C.C.C. No. 605 of 1994)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal arises from the judgment of the superior court, (*Ransley – Commissioner of Assize*) dated and delivered on 23rd October, 2002. It arose from a traffic road accident along Kakamega-Nakuru road in which Sarah Achieng Salasie (*PW1*)(*Sarah*) was seriously injured. Sarah had boarded the bus christened *Obuya* registration number *KAB 542R* at Kakamega on 22nd October 1993 to go to Nairobi. When the bus reached Ngata area, it rammed into the rear side of a trailer registration number *KN 3379L* which was parked on the left side of the road. The bus overturned and for a moment Sarah lost consciousness. When she regained consciousness she saw rescuers at work trying to remove survivors from the bus. She was removed from the bus and felt as if the lower part of her body had been cut off. She discovered she was paralysed.

Sarah was rushed to the Rift Valley Provincial General Hospital where she was admitted for one week before being transferred to Kenyatta National Hospital where she was hospitalized for two more weeks. She was then transferred to the National Spinal injury Hospital where she remained for over 1½ years. By this time she had developed serious sores as a result of lying on her back continuously for one week at Rift Valley Provincial General Hospital. The sores were then treated and healed at this hospital.

On 14th February 1994 she filed a suit in the superior court through Messrs. Nguli & Company Advocates to claim from the joint owners and driver of the bus both general and special damages for the injuries sustained plus costs of the suit and interest at court rates. All the defendants, now appellants, were represented by Messrs. Kiogora Mutai & Company Advocates. They filed a defence to the suit on 30th March 1994 and denied that they were responsible for the accident which occurred on 22nd October 1993. Instead they blamed it on the negligence of the driver of the truck trailer number KN3379L/KN8423R and in paragraph 6 of the said defence the appellants stated:-

***“The Defendants will take out third party proceedings against the driver and owner of motor vehicle registration number KN 3379L/KN 8423R.”***

Our perusal of the appeal’s record reveals that third party proceedings were indeed taken against the interested party on 13th June 1994. The third party notice named one ***Kambala Muteke*** and ***Maicon Mbanga*** driver and owner respectively of truck registration number KN 3399L and trailer number KN 8423R. It seems the accident the subject matter of the suit in the superior court was a multiple one involving three vehicles, a lorry truck, a passenger bus and a saloon car, to wit KN 3399L/KN 8423R, KAB 542K and GK 1297. There were many claimants numbering about 150 with equal number of suits being filed, one of which was the case subject to the present appeal. A court order was therefore made on 18th April 1996 by Bosire J, as he then was, that the suit subject to the present appeal be heard as a test case in order to determine the issue of liability.

When the case was heard in the superior court between 12th March 2002 and 12th September 2002 the respondent and her witnesses, M. M. Qureshi (PW2) and Gregory A. Cornelius (PW3) and John Kipruto (DW1) the sole defence witness and driver of the bus, testified. The 1st and 2nd appellants who were joint owners of the bus did not testify at that trial and the issue of third parties to the suit did not feature there at all. The learned Commissioner of Assize wrote and delivered his judgment in the matter on 23rd October 2002 in which he stated:

***“The 3rd Defendant admitted that there were vehicles traveling along the road in front of him but could not explain why they had not hit the lorry.***

***I find that the 3rd defendant was driving too fast or too first in the circumstances. Had he been going slower and had he been driving with care he would have been able to avoid hitting the lorry by stopping in time. It is notorious that vehicles are frequently parked in (sic) roads in this country without lights – A careful driver should bear this in mind and drive with due care and attention accordingly.”***

The learned Commissioner of Assize, thus, found ***Kipruto*** (DW1) solely to blame for the accident and proceeded to assess damages against the appellant as follows:

Loss of earnings Kshs.486,000/=

Loss of earning capacity 1,200,000/=

Nurse Maid payments 192,000/=

Future Nurse Maid payment 300,000/=

Loss of Amenities 5,000,000/=

Special damages 241,741/=

***Total Kshs.7,419,741/=***

The appellants were aggrieved by the superior court’s judgment and they filed an appeal to this Court. Their Memorandum of Appeal was dated and lodged in the Court’s Registry on 18th November 2005.

The Memorandum of Appeal lists 12 grounds of appeal which challenge both the liability and quantum of damages awarded. And when the appeal was heard before us on 30th October 2008, **Mr. Kimathi** learned Counsel for the appellant questioned the various awards made to the respondent arguing that there was no evidence to support them adding that though the respondent was seriously injured the law had to be followed. He stated that special damages were not specifically pleaded nor strictly proved. He complained about the high award of damages given to the respondent considering the inflationary trend and prayed that the appeal be allowed.

**Mr. Ombete**, learned counsel for the respondent, opposed this appeal and stated that an award of Kshs.5,000,000/= for loss of amenities was reasonable considering that the respondent had claimed a sum of Kshs.8,000,000/= on this item. That loss of earning capacity had been sufficiently pleaded and that an award of Kshs.1,200,000/= on this subhead was proper. Counsel also supported awards of Kshs.192,000/= for past nurse maid services and Kshs.300,000/= for future nurse maid services and asked this Court not to disturb the learned Commissioner of Assize's awards. On the whole counsel's arguments on both sides concentrated on the quantum of damages.

One of the disputed awards made by the learned Commissioner of Assize was that of loss of earnings where he awarded to the respondent Kshs.486,000/=. Though in the plaint the respondent was shown as earning Kshs.4,500/= per month as at the time of the accident, when she testified on 12th March 2002 she specifically stated during cross-examination:-

***"I was not earning anything."***

With this kind of evidence from the respondent herself, the learned Commissioner of Assize had no basis for awarding her a total of Kshs.486,000/= on this subhead. But having attended and completed training in technology and information services according to her evidence, the respondent would have obtained gainful employment in that field during her lifetime and therefore an award of Kshs.1,200,000/= for loss of earning capacity was justified. The learned Commissioner of Assize was satisfied that the respondent suffered serious injuries which confined her to a wheel chair to which, we were informed at the time of hearing this appeal, she is still confined. In the circumstances an award of Kshs.192,000/= and Kshs.300,000/= respectively for the past and future nursing care were justified. The same argument goes for the award of Kshs.5,000,000/= for loss of amenities given that the accident occurred in 1993 and from that year to-date the respondent has been confined to a wheel chair. We see no hope that her health will change for the better.

As regards special damages, though these were not specifically pleaded, the respondent, nevertheless, produced receipts for physiotherapy which were accepted by the court, and we feel she was entitled to damages as shown on those receipts. The amount shown thereon was Kshs.238,406/= and not Kshs.241,741/= as awarded by the learned Commissioner of Assize. In the result this appeal is allowed to the extent only that **Kshs.486,000/=** for loss of earnings and **Shs. 3,335/=** awarded as specials in excess of what was proved will be deducted from the initial award of **Kshs.7,419,741/=** made by the superior court leaving a balance of **Kshs.6,930,406/=** for which judgment is entered for the respondent with full costs of the superior court case while the appellants will be paid ¼ of the costs of this appeal.

***These shall be the orders of this Court.***

Dated and delivered at Nairobi this 11th day of December, 2008

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**