



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Case 302 of 1999

AGATHA WANJIRU NJUGUNA
PLAINTIFF

VERSUS

MARY WANJIKU IKIKI 1ST
DEFENDANT

ANTHONY WAGURA 2ND
DEFENDANT

CHRISTOPHER NUTHU 3RD
DEFENDANT

PAUL NGICHIRA GITHAIGA 4TH
DEFENDANT

J U D G M E N T

By a further amended plaint dated 3rd June 2005 Agatha Wanjiru Njuguna hereinafter referred to as the Plaintiff has brought this suit against Mary Wanjiku Ikiki (hereinafter referred to as the 1st Defendant), Anthony Wagura Ikiki (hereinafter referred to as the 2nd Defendant), Christopher Nuthu (hereinafter referred to as the 3rd Defendant) and Paul Ngichiria Githaiga (hereinafter referred to as the 4th Defendant) seeking judgments against the Defendants jointly and severally for general and special damages loss of earnings (including future earnings) cost of future nursing and medical care, cost of domestic help, value of one motorized wheel chair and prosthesis and costs of the suit.

It was the Plaintiff’s contention that she was traveling as a fare paying passenger in motor vehicle Reg. No. KWC 159 belonging to the 1st Defendant when the motor vehicle was involved in a collision with motor-vehicle KRZ 279. As a result of the accident the Plaintiff suffered severe injuries including fractures of both legs which resulted in both her legs being amputated above the knee.

The Plaintiff maintained that the accident was caused by the negligence of the 2nd Defendant who was the driver of motor vehicle KWC 159 and for whose negligence Plaintiff holds 1st Defendant vicariously liable.

The 1st and 2nd Defendant filed a joint defence in which they denied that the collision took place as a result of the negligence of the 2nd Defendant and maintained that the accident was caused by the

negligence of the 4th Defendant in the management and control of motor vehicle Registration No. KRZ 279 causing it to collide with motor vehicle KWC 159. The 1st and 2nd Defendants further denied that the Plaintiff suffered any injuries as a result of the accident. The 3rd and 4th Defendants also filed a joint defence in which they denied the Plaintiff's claim. They admitted that an accident involving motor vehicle KWC 159 and KRZ 279 occurred but maintained that the accident was caused by the negligence of the 2nd Defendant.

The suit has had a long history. The accident occurred on the 25th December 1988. Although the suit was initially filed on 20th December 1991, in Nairobi High Court Registry by the Plaintiff and 32 others. The suit remained pending until 21st June 2006. By this time the suit had been transferred from Nairobi High Court to Nyeri High Court Registry. The suit in respect of all the other 32 plaintiffs were separated and transferred to the Nyeri chief magistrate's court for hearing and final disposal.

On 21st June 2006 when the plaintiff's case came up for hearing, only the advocate for the 1st and 2nd Defendant was served. There is an application in the court file dated 15th June 1995 from the advocate for 3rd and 4th Defendants seeking to withdraw from the suit. The application however appears not to have been served or prosecuted. Be that as it may the 3rd and 4th defendants were not served with a hearing notice. The court decided to proceed with the hearing as the suit was an old case and proper service had been effected on the 1st and 2nd Defendant who did not attend court. Hearing therefore proceeded ex-parte as against the 1st and 2nd Defendant.

In her evidence the Plaintiff blamed the 2nd Defendant for driving very fast whilst approaching a bridge on a hill near a corner causing motor vehicle KAC 159 to swerve, collide with motor vehicle KRZ 279, before overturning and rolling 3 times. She maintained that 2nd Defendant was not attentive to other road users. As a result of the accident 5 passengers died on the spot. The Plaintiff testified that the 2nd Defendant was later tried and convicted of causing death by dangerous driving. The Plaintiff was however unable to produce copies of the proceedings as she was unable to get the court file.

P.C. Julius Marete (P.W.2) an officer attached to Othaya police station testified that the record from the station confirmed that there was an accident involving motor vehicle KWC 159 and KRZ 279 on 25th December 1988 as a result of which the 2nd Defendant was charged with the offence of causing death by dangerous driving.

As a result of the accident the Plaintiff was injured and was admitted at Nyeri Provincial General Hospital with multiple fractures on both lower limbs. She remained in hospital for 2 months and 22 days during which period both her legs had to be amputated. As a result she had to drop out of Othaya Girls High School where she was a form III student. She produced a letter from the school confirming this. She also produced a card from Nyeri Provincial General Hospital, a copy of a P3 form and a medical report prepared by Dr. Eliud Mwangi Wachanga.

Dr. Wachanga who testified (P.W.2) formed the opinion that the Plaintiff had suffered 100% permanent physical disability and needed a good motorized wheelchair or good artificial legs.

In his submissions Mr. Gathiga Mwangi submitted that the Plaintiff had proved her case against 1st and 2nd Defendant and urged the court to find them 100% liable. Counsel urged the court to award the Plaintiff Kshs.2,700 as special damages in respect of the police abstract and medical report. He also urged the court to award a sum of Kshs.649,830 in respect of a motorized wheelchair and prosthesis, a sum of Kshs.1,026,000/= in respect of future domestic help required by the Plaintiff, Kshs.561,600/= in respect of loss of earnings and earning capacity, Kshs.750,000/= cost of future nursing and medical care and Kshs.4,500,000/= general damages for pain suffering and loss of amenities.

He relied on various authorities all of which were availed to the court and I have had the advantage of going through them.

As regards liability, although the Plaintiff sued 4 Defendants, in her plaint, she only alleged negligence against the 2nd defendant for which negligent she held the 1st Defendant vicariously liable. In her evidence the Plaintiff again only alleged negligence against the 2nd Defendant. As rightly pointed out by the defence counsel, no evidence was actually tendered against the 3rd and 4th Defendant. I therefore find that there is no evidence upon which they can be held liable for the accident.

As for the 2nd Defendant, I am satisfied that there was sufficient evidence that he was negligent in the management and control of motor-vehicle KWC 159 and this is what caused the motor-vehicle to collide with motor-vehicle KRZ 279. I am satisfied that Plaintiff has established on a balance of probability that the accident was wholly caused by the negligence of 2nd Defendant for which the 1st Defendant as owner of the motor-vehicle was vicariously liable. Accordingly, I hold the 1st and 2nd Defendants 100% jointly and severally liable to the Plaintiff who was only a passenger in the motor-vehicle and did not in any way contribute to the accident.

In her further amended plaint the Plaintiff claimed special damages of Kshs.5,950/=. However only a receipt for Kshs.2,600/= for the medical report was produced. I am prepared to allow a further sum of Kshs.100/- for the police abstract report copy of which was produced. Since no evidence was adduced in respect of the sum of Kshs.3,250/- for the medical expenses, none will be allowed.

As regards the motorized wheelchair and prosthesis. The medical report and the evidence of Dr. Eliud Mwangi Wachanga clearly show that in the light of the injuries suffered by the Plaintiff these are a necessity. I would therefore allow the sum of Kshs.649,830/= for the wheelchair and a pair of prosthesis.

The Plaintiff claimed cost of domestic help and cost of future nursing and medical care. In my view this was duplication. Taking into account that with a prosthesis and a motorized wheelchair the Plaintiff would not be as helpless as she currently is and would not therefore require as much assistance, I would award the Plaintiff a sum of Kshs.600,000/= for cost of domestic help and future nursing care.

As regards damages for pain, suffering and loss of amenities the Plaintiff suffered 100% incapacity. She had to abandon her education and this has no doubt impacted negatively on her life. She could not achieve her ambition of being a school teacher. The Plaintiff also no doubt suffered a lot of pain, anguish and loss of amenities.

I am satisfied that the Plaintiff has lost earning capacity and is entitled to damages for future earnings. I would adopt a sum of Kshs.5,400/= as monthly income with a multiplicand of 25 = **5,400 x 12 x 25 = 1,620,000**. In his calculation counsel for the Plaintiff based his calculation on $\frac{1}{3}$ dependancy ratio which is not applicable given that the claim has been brought by the Plaintiff.

I would further award the Plaintiff a sum of Kshs.2,500,000/= as general damages for pain, suffering and loss of amenities.

The upshot of the above is that I do give judgment in favour of the Plaintiff as against the 1st and 2nd Defendant jointly as severally as follows: -

a) Special damages	2,700.00
b) Motorised Wheelchair and Prosthesis	649,830.00
c) Cost of domestic help and nursing care	600,000.00
d) Loss of future earnings	1,620,000.00
e) Damages for pain and suffering	2,500,000.00
Total	5,372,530.00

The Plaintiff shall further have costs and interest on the general damages from the date of this judgment. I dismiss the Plaintiff's suit against 3rd and 4th Defendants but make no orders as to costs.

Dated, signed and delivered this 22nd day of September 2006.

H. M. OKWENGU

JUDGE