



FRIDAH MERCY CHEBII KIPLAGAT (*Minor suing thro' her father and next friend*)

JULIUS KIPLAGAT TUITOEK.....PLAINTIFF

VERSUS

KIPCHUMBA CHELIMO CHEBET.....1ST DEFENDANT

ESTHER JETSONO KIPKORIR.....2ND DEFENDANT

JUDGMENT

The plaintiff, Frida Mercy Chebii Kiplagat filed suit through her father and next friend Julius Kiplagat Tuitoek against the defendants seeking to be paid damages on account of injuries she alleged to have sustained on the 26th September 2004 along the Kabasis-Tartar Primary School road in Sacho Division when motor vehicle registration No.KAM 056V lost control as it was ascending a hill and as a result of which it suddenly reversed and injured the plaintiff. The plaintiff attributed the said accident to the negligence of the driver of the said motor vehicle. She set out the particulars of negligence and the injuries that she sustained. When the defendants were served, they entered appearance. They denied that they were negligent. They attributed the accident to the negligence of the plaintiff who climbed the rear of the said motor vehicle knowing or having reason to know that it was unsafe so to do. The defendants denied the plaintiff's claim that she was entitled to any damages and put the plaintiff to strict proof thereof.

At the hearing of this suit, the plaintiff and the defendant compromised the suit on liability. Liability as between the plaintiff and the defendants was agreed at 35% and 65% respectively. The defendants were to bear 65% liability whilst the plaintiff was to bear 35% contributory negligence. Special damages was assessed at Ksh.37,102/= . The issue that was left for determination by the court was the general damages to be paid to the plaintiff. The plaintiff is a thirteen year old girl. According to PW2, Dr. Wellington Kiamba, the plaintiff sustained the following injuries; amputation of both legs below the knee, her lungs had collapsed, there was a tear of the diaphragm, there was severe injury to the abdomen that resulted in internal bleeding, there was multiple cut wound injuries on the head. The plaintiff was operated on the chest to stop the bleeding into the abdomen. Dr. Kiamba assessed the degree of injury to the plaintiff at 80%. He produced his medical report as *plaintiff's exhibit No.1*. He charged the plaintiff Ksh.2000/= to prepare the report. The receipt was produced as *plaintiff's exhibit No.2*. The P3 form was produced as *plaintiff's exhibit No.3*.

According to PW3 Alice Chebet Tuitoek, after the accident, the appellant was admitted at Moi Referral Hospital for a period of nearly three months. She produced her discharge summary as *plaintiff's exhibit No.4*. She testified that due to the injuries the plaintiff sustained, she required a wheel chair. She was forced to employ a maid at a monthly salary of Ksh.2,500/= to assist the plaintiff. She employed the maid for five months. She recalled that the plaintiff was admitted at Ol Kalau School for disabled but was later transferred back to Kabasis Primary School, her former school. She produced the police abstract report of the accident as *plaintiff's exhibit No.5*. She also produced a copy of the certificate of search issued by the Registrar of motor vehicles which certified that the 2nd defendant was the registered owner of the motor vehicle that was involved in the accident (*produced as plaintiff's exhibit No.6*). She also produced the

medical report by Dr. Malik as *plaintiff's exhibit No.7*.

After the close of the plaintiff's case, the defendants closed their defence without calling any evidence. The parties to the suit agreed by consent to submit written submissions to the court for the purposes of assessing the general damages to be paid to the plaintiff. The plaintiff urged the court to pay her Ksh.3,000,000/= for general damages for pain, suffering and loss of amenities. She relied on the decision of **Samuel Wanguru Njoroge vs Kenya Bus Service Ltd NBI HCCC.No.495 of 1998 (unreported)**. On their part the defendants submitted that the plaintiff should be paid Ksh.800,000/= general damages. They relied on the decisions of **Preston Mwasaha Deche vs Wilfred Mbwika & Anor. MSA HCCC No.9 of 1992 (unreported)**, **Maxillan John Kisaka vs Boondo Transporters & Anor. NBI HCCC No.2317 of 1980 (unreported)** and **Isabel Nyambura vs Sanric Suppliers Ltd Nyeri HCCC No.349 of 1996 (unreported)**.

I think it would be imperative for this court to set out the injuries sustained by the appellant as noted by Dr. Malik, the doctor who the plaintiff was referred to by the defendants. Dr. Malik examined her and wrote a second medical opinion. According to the report which was produced as *plaintiff's exhibit No.7*, the plaintiff sustained the following injuries;

(i) *There was a scar of an incision over the left lateral surface of the chest. This was the site where the tube was inserted to drain blood from her lungs.*

(ii) *There was a 16 cm long, vertical, midline operation scar on the abdomen. The abdomen is scaphoid and moves with the respiration.*

(iii) *Both legs were amputated at a level 10 cm below the tibial tubercles (below knee amputation). There are traverse scars measuring 13 cm and 14 cm respectively on the right and left amputation stumps. Both scars are healed and were non-tender. Both knees are fully mobile and free of pain. He noted that the plaintiff was walking with a stick with some difficulty. At the time of the examination, he noted the prostheses had become short due to the fact that the plaintiff had outgrown them. He recommended that prostheses be changed to match her growing body.*

(iv) *On the lungs, he observed that the left lung was partially expanded with a tube inserted in it.*

(v) *On the pelvis, there was a fracture of the right iliac bone, both superior pubic rami and subluxation of the left sacro-iliac joint.*

In his prognosis, Dr. Malik noted that although the plaintiff had fully recovered from her injuries, he assessed the degree of permanent disability at 80%. The Court of Appeal noted in the case of **John Maseno Ngala & Anor. vs Dan Nyanamba Omare CA Civil Appeal No.320 of 2002 (Nakuru) (unreported)** at page 9 of its judgment,

“It is our view that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible, be compensated by comparable awards in keeping in mind the correct level of awards in similar cases.”

The Court of Appeal in the same case quoted with approval the speech of Lord Morris of Borth-y-Gest in the case of **West (H) & Son Ltd vs Shepherd [1964] A.C 326** at page 345:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Further-more, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

In the present case, it is evident that the plaintiff sustained injuries which will impact negatively on her quality of life. She will walk for the rest of her life with the assistance of prosthetic limbs. Her chances of being married and founding a family has been diminished. Some of the injuries that she sustained would cause her to have difficulty in breathing particularly when she grows older. Her schooling was disrupted for a period a year during her hospitalization.

Doing the best that I can in the circumstances of this case, and taking into consideration the decided cases referred to me by the parties to this suit, and also upon my own personal research, I will award the plaintiff general damages for pain suffering and loss of amenities at Ksh.2,800,000/=. I will further award the plaintiff the sum of Ksh.12,500/= being the costs of house help when the plaintiff was recovering from the injuries that she had sustained in the accident.

The upshot of the above reasons is that judgment is entered for the plaintiff against the defendants, jointly and severally as hereunder;

(i) On liability

Liability is apportioned at the ratio of 65:35 in favour of the plaintiff. The defendants shall bear 65% liability whereas the plaintiff will shoulder 35% contributory negligence.

(ii) On quantum

(a) General damages for pain suffering and loss of amenities.....Ksh.2,800,000/=

(b) Cost of house help.....Ksh.12,500/=

(c) Agreed special damages.....Ksh.37,102/=

Sub-total Ksh.2,849,602/=

Less 35% Contributory negligence **Ksh.997,360/70**

Sum awarded TOTAL Ksh.1,852,241/30

(iii) The plaintiff shall have the costs of the suit.

(iv) Interest on special damages shall be paid from the date of filing suit while interest on general damages shall be paid from the date of this judgment.

DATED at NAKURU this 18th day of December 2007

L. KIMARU

JUDGE