



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.C. NO. 15 OF 2004.

DOROTHY KANYUA MBAKA.....1ST PLAINTIFF

MARY SYUNTHI NGUMBAU2ND PLAINTIFF

VERSUS

P.S. IN-CHARGE OF DEPARTMENT OF DEFENCE IN

THE OFFICE OF THE PRESIDENT.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANTS

J U D G M E N T

The first plaintiff **DOROTHY KANYUA MBAKA** and the 2nd plaintiff **MARY SYUNTHI MUSYOKA** through separate suits filed on 19th February, 2004, against the defendants as a result of motor vehicle accident involving the plaintiffs while travelling as passengers in motor vehicle registration number 08 KAF 42 owned by the 1st defendant and driven by the one William Majimbo(deceased), by then an employee, servant and/or agent of the 1st defendant sustained the following injuries:-

Injuries sustained by the 1st plaintiff as per paragraph 8 of the plaint are said to be as follows:-

- a. **Severe pelvic injury with fracture of pubic Isochial racni**
- b. **Trauma of the bladder and urethra**
- c. **Rapture of the urethra**
- d. **Loss of sexual function**
- e. **Permanent incapacity**
- f. **Permanent paraplegia**
- g. **Permanently immobilized and condemned to a wheelchair for the rest of her life.**
- h. **Loss of control over bowels and urine**
- i. **Regular bedsores**

The plaintiff also claimed special damages as per paragraph 9 of the plaint as follows:-

- (a) **Cost of medical treatment is continuous but capable of being assessed during the hearing of the suit.**

(b) Medical report

(c) Police abstract

The 2nd plaintiff under paragraph 8 of the plaint averred to have sustained the following injuries:-

- a. *Severe pelvic injury with fracture of pubic Isochial racni*
- b. *Trauma of the bladder and urethra*
- c. *Rapture of the urethra*
- d. *Loss of sexual function*
- e. *Permanent incapacity*
- f. *Permanent paraplegia*
- g. *Permanently immobilized and condemned to a wheelchair for the rest of her life.*
- h. *Loss of control over bowels and urine*
- i. *Regular bedsores*

The 2nd plaintiff claimed specials of damages under paragraph 9 of the plaint as follows:-

(a) Cost of medical treatment is continuous but capable of being assessed during the hearing of the suit.

(b) Medical report

(c) Police abstract

The plaintiffs in their respective plaints prayed for judgment against the defendants jointly and severally for:-

- a. *General damages for pain, suffering and loss of amenities.*
- b. *Special damages as pleaded and proved*
- c. *Compensation for the cost of future medical and surgery treatment*
- d. *Expense and maintenance of the wheelchair*
- e. *Loss of employment and actual income for the plaintiff*
- f. *Compensation for the cost of domestic help*
- g. *Costs and interest of this suit*
- h. *Any other or better relief that this Honourable court may deem fit and just to grant.*

The defendants on their joint statement of defence denied the plaintiffs claim and all particulars of negligence on part of their driver, however they did not deny the occurrence of the accident or that William Majimbo(the deceased) was the driver of the ill-fated vehicle. They denied the particulars of the special damages as stated in paragraph 9 of the plaint. The defendants further averred that they would raise and argue a point of law on the hearing of this suit, that the suit offends the provision of Section 3(1) of the Public Authorities Limitation Act(Cap.39) Laws of Kenya and Section 13A of the Government Proceedings Act(Cap.40) Laws of Kenya.

I have carefully considered the pleadings in this case and the evidence by both the plaintiffs and their witnesses. The written submissions by Counsel and authorities in support. The issues for determination in this case can be summarized as follows:-

- a. *Who was to blame for the accident?*
- b. *Whether the plaintiffs were guilty of any contributory negligence?*
- c. *What injuries did the plaintiffs sustain?*
- d. *What damages are the plaintiffs entitled to?*
- e. *Who is entitled to costs?*

According to the court records the two suits were on 4th May, 2006 consolidated by consent of both

counsel and HCCC 15/2004 taken as a lead case as the cause of action in both suits arose out of the same accident. When the matter came up for hearing the plaintiffs gave evidence and called two witnesses. The defendants did not give evidence nor did they call any single witness.

The 1st plaintiff gave evidence as PW1 whereas the 2nd plaintiffs gave evidence as PW4. The plaintiffs testified that the cause of accident was due to carelessness and negligence driving of the 1st defendant's driver. The plaintiffs in their evidence testified that at Juja area the driver started driving at an excessive speed and overtaking dangerously through the wrong lanes. That the vehicle started swaying from one side to another then it rolled. The plaintiffs evidence was not challenged by the defendants or controverted by calling any evidence, however it was submitted for the defence that since the plaintiffs in their testimony had testified that from Laikipia Airbase the said motor vehicle went upto to Petrol station at Karatina where the driver alighted to check on the tyre pressure, since the tyre did not have enough pressure, then that could have been solely the main cause of the accident and that being the case, the plaintiffs ought not have boarded the vehicle and as such they contributed to the said accident and the defence urged the court to find them 50 percent liable for the accident. It was further submitted for the defence that any passenger who voluntarily boards a vehicle which he or she knowingly has some defects in the circumstances as purportedly obtained in this case, must bear some measure of contributory negligence and in the circumstances the defence suggested the plaintiffs should bear 50 percent contributory negligence. The court is still alive of the fact that the defence did not call any evidence in support of their submissions and are being speculative in their submissions. There is no evidence whatsoever to support the defendants' submissions that the main cause of the accident was due to inflated tyres and not as per evidence of the plaintiffs who were the passengers in the said vehicle. There is no evidence that had been tendered to warrant this court find that the plaintiffs who were bonafide passengers in the ill-fated motor vehicle acted or omitted to do a particular act that contributed to sustaining serious injuries they got. I find in absence of evidence to show how the plaintiff contributed to the accident being passengers there is no way this court can hold the plaintiffs contributory negligent to the aforesaid accident. The plaintiffs' evidence as to how the accident occurred remains unrebutted and as such I find and hold that the accident occurred due to negligence of the 1st defendant's driver. The plaintiff's evidence is clear and uncontroverted; that the vehicle was being driven negligently. This court observes that generally vehicles do not normally go about overturning consequently, I do not therefore find that the doctrine of Res IPSa liquitor is not applicable in this case and hold the 1st defendant's driver 100 percent liable and subsequently the defendants jointly and severally vicariously liable.

I will now turn to the issue of quantum of damages. The 1st plaintiff Dorothy Kanyua Mbaka was first examined by Dr. John Macharia on 24/10/2005(see plaintiff's list of documents marked "DKM 9A(1-9) dated 9th June, 2011 and later by PW2, Dr. Admani Asif an Orthopedic Surgeon who produced the medical report of the plaintiff as exhibit No.11. That bundle of the clinical notes and treatment notes were produced by consent of both counsel on 22nd January, 2014. The defence relied on their part on clinical notes by Dr. Major Colonel A. Mattano of the Armed Forces Memorial Hospital marked "MSA 8A(1,-8A((X LIII) defence exhibit 1. The 1st plaintiff testified that following the accident she was rushed to Thika Hospital with injuries listed in paragraph 8 of her plaint. That to date she cannot do anything on her own and she needs support throughout. That she relieves herself on the bed and cannot do anything without a house help. That she usually gets bedsores and she is supposed to have a special bed but has an ordinary one. That since the injury the pain has never reduced. That she needs expensive pampers. That she is always on medication as various problems keeps on occurring. She prayed for a new wheelchair as the one she has is torn. The 1st plaintiff testified that the report PMFII-1 was made by Dr. John Macharia and she paid Kshs.3000 as per receipt MFI-2. She produced her photograph on a wheelchair "DNK3" as exhibit 3. An order to file suit out of time dated 17th December, 2013 as P.exhibit 4, extracted order as P.exhibit 5, Police abstract as P.exhibit 6 and a receipt as P.exhibit 7. P3 form as P.exhibit 8. Demand notice as P.exhibit 9 and clinical summary notes from Forces Memorial Hospital as DMK8(A) (1) – DMK8(A), 53 as per P.ehhibit 10.

As regards the 2nd plaintiff she was similarly examined by Dr. John Macharia on 24/10/2005(see Plaintiff's list of documents "MSA 9A(1)-9(V) dated 9th June, 2011 and letter by PW2 Dr. Admani Asif

an Orthopedic Surgeon. The report was produced as P.exhibit 11. A bundle of clinical notes was produced by consent on 22/1/2014 which included clinical notes by Dr. Major Colonel A. Mattano of the Armed Forces Memorial Hospital marked "MSA BA (1)-8A(X LIII) as defence exhibit 1.

The 2nd plaintiff testified that after the accident she lost consciousness and when she gained it she tried to stand but she could not. That she was taken to Thika Hospital then transferred to Moi Memorial Hospital. The 2nd plaintiff reiterated that she sustained injuries as particularized under paragraph 8 of the plaint. She testified as a result of the said accident she is paralyzed from mid-body downwards. That she cannot control stool and urine. That she has no feelings at all and that she is unable to enjoy sex with her husband. She further testified she cannot carry on with her cloth business as it has since collapsed. She testified that she is unable to discharge household duties. That she cannot cook as she is not mobile and has to rely on a househelp. She averred that she needs a special bed which costs at around Kshs.100,000/-. She also needs orthopedic mattress and two wheelchairs as the one she has is worn out and an automatic wheelchair which can be used without someone to push her around. The 2nd plaintiff further stated that due to her injuries she needs a special toilet and a special bathroom. The plaintiff averred that she still continues to undergo treatment for pressure sores, urinary infection, painful ribs and backache. She testified that her life is stressful as she cannot perform her wifely duties. In the plaintiffs' separate plaints each plaintiff sought:-

- a. *General damages for pain, suffering and loss of amenities*
- b. *Special damages as pleaded and proved.*
- c. *Compensation for the cost of future medical and surgery treatment.*
- d. *Expense and maintenance of wheelchair.*
- e. *Loss of employment and actual income for the plaintiff.*
- f. *Compensation for the cost of domestic help*
- g. *Costs and interests of this suit.*
- h. *Any other or better relief that this Honourable Court may deem fit and just to grant.*

Under pain, suffering and loss of amenities.

The 1st plaintiff Dorothy Kanyua Mbaka was 35 years old when she met the accident on 15th July, 1997, whereas the 2nd plaintiff Mary Syonhi Musyoka was 33 years. That both the plaintiffs suffered similar injuries and have since been condemned to the wheel chair permanently. That according to the Doctors who examined each of the plaintiff, each of them has lost sensation below the level of the 4th thoracic vertebra. That each of the plaintiff sustained flaccid paralysis(power grade zero) over the lower limbs and absent reflexes over the lower limbs. Each of the plaintiffs has developed urinary and stool inconstitence. Each has since lost the ability to enjoy sex. The pain and suffering under which each of the plaintiffs has undergone for the last (16) years they have been under the wheelchair is simply unbearable and unimaginable. The distress and mental anguish for such young mothers at the age of 35 and 33 respectively is enormous and frustrating. Each of the plaintiff is most of the time either confined to a wheelchair or in bed. Each of the plaintiff will completely depend on others for their very essential needs for the rest of their life. The plaintiffs have since 1st July, 1997 not known and will not know the joys of independency, sittings, standing, walking, running, dancing, joggings, sports, socializing, travelling, driving, cooking, washing, cultivating, reading etc, etc. That because of their conditions as per PW2 they will be prone to multiple and unimagined infections. This court is alive of the fact that whatever monetary award each of the plaintiff may get or be awarded, her battered and shattered frame cannot be renewed and their life will never be the same again since that day of the accident, but that notwithstanding money will certainly go some way if not all the way in making their respective lives much more tolerable or a bit comfortable.

The plaintiff in support of their claim under pain, suffering and loss of amenities referred this court to the case of **CASEY ADISA MARENGE V LUCY WANJA MBAKA & MARK KARANI MGANDI HCSC 529 OF 2005(NAIROBI)** in which Hon. Mr. Justice H. P. G Waweru awarded the plaintiff who had suffered almost similar injuries to the plaintiffs Kshs.7,500,000/- for pain, suffering and loss of amenities.

The defendants on their part referred the court to the case of **MBAKA NGURU & ANOTHER V JAMES GEORGE RAKWAR C.A 133 of 1998** in which the respondent had been awarded general damages for pain, suffering and loss of amenities for paraplegia of Kshs.2,500,000/- was reduced to Kshs.1,500,000/-. The decision was delivered on 23rd December, 1998, that is about 16 years ago. The defendants further referred to the case of **SAMMY MACHOKA OIRA V JOSPHAT MWAINGI KIHURO & ANOTEHR HCCC 433 of 2005(Nairobi)** in which Hon. Lady Justice R. N. Nambuye, as she then was, awarded general damages for pain and suffering and loss of amenities of Kshs.1,750,000/- on 31st October, 2008 for back injury in which the plaintiff was attending physiotherapy alongside chiropractor and needed to go for a correctional operational. Lastly the defendants referred to the case of **LABAN BUYOLE MAMBOLEA V RIFT VALLEY TEXTILES HCC NO. 59 OF 1996(Eldoret)** In which Hon. Lady Justice R. N. Nambuye as she then was, on 26/1/1998, awarded kshs.650,000/- to the plaintiff who had sustained fractures of the right temporal bone and zygomatic bone amongst other injuries.

The authorities relied upon by defence are not relevant due to the age of the decisions relied upon. The authorities are 16 years old and secondly they can be distinguished in that the injuries sustained by the parties in those cases were less severe as compared to the injuries sustained by the plaintiffs herein. The authorities relied upon by the plaintiff is relevant in that the injuries sustained by the plaintiffs herein are almost similar to the injuries sustained by the plaintiff in the case of **CASEY ADISA MARENGE V LUCY WANJA MBAKA & ANOTHER(Supra)**.

I will therefore be persuaded by the said judgment and shall consider it as relevant in my judgment.

I have very carefully considered the authorities cited by the plaintiffs' advocates in support of this heading and the authorities by the defendants' counsel as well. In my humble view the courts should always consider each case on its own merits and ought to consider the period under which the claimant has been suffering. The courts have to be sensitive and considerate to enormous physical suffering and mental anguish that must attend total paralysis of the body, particularly the young mothers and wives. I am also alive of the fact that comparable injuries must attract comparable awards and also the need to keep general damages at manageable levels because of the attendant consequences like raised premium of insurance amongst others. Bearing in mind the period under which the two plaintiffs have been suffering and doing the best I can, in the circumstance, I will award each of the plaintiffs Kshs.10,000,000/- for pain suffering and loss of amenities.

SPECIAL DAMAGES

The plaintiffs in their respective complaints have under paragraph 9 pleaded and proved special damages for medical report-Kshs.3000 and police abstract of Kshs.100/-. I therefore award each plaintiff special damages of Kshs.3100/- specifically pleaded and proved.

FUTURE MEDICAL EXPENSES

The 1st plaintiff is now 53 years old whereas the 2nd plaintiff is 51 years old. They have been undergoing medical treatment for the last 16 years and have not recovered. I have carefully considered the evidence of PW2, the doctor, the plaintiffs and the doctor's assessment of the plaintiffs' respective future needs and the estimated costs and replacement rates of the equipment's prescribed. The Doctor did not in his evidence give opinion, of the plaintiff's life expectancy but it has to be noted from the nature of the injuries sustained by the plaintiffs the expectancy is significantly compromised; however allowance will have to be for usual uncertainties and tragedies of life. The court has also to take due regard to the fact that payment will be made in a lump sum and advance, hence the high chance of investment of income.

I will in the circumstances award a multiplier of 12 years to the 1st plaintiff and 14 to the 2nd plaintiff that means each of the plaintiffs will need a replacement of her wheelchair, bed and mattress 3 times. I also find that each of the plaintiff will require an electric wheelchair and replace the same two times. That each of the plaintiff will need medical treatment from complications arising thereto due to urinary complication and sores. The doctor testified the electric chair would cost Kshs.100,000/- and normal

chair 20,000/- the orthopedic bed would cost about Kshs.100,000/- and mattress Kshs.20,000/=. The plaintiffs also shall require drugs, suppositions and diapers, and monthly physiotherapy and a house help. I have considered submissions by the plaintiffs and defendants on various items and considering all the submissions, I will award the following on the following items:-

(a) Drugs, suppositions and diapers for each plaintiff at a rate of Kshs.20,000/- per month,

(b) Physiotherapy at a rate of Kshs.12,000/- per month for each of the plaintiffs

(c) checkups, bi-annually at Kshs.5,000 every attendance for each of the plaintiff and care-giver Kshs.20,000/ monthly for each of the plaintiff.

Under this heading, I would make the following and for each of the respective plaintiff.

1ST PLAINTIFF – DOROTHY KANYUA MBAKA

(1) Wheel chair	- 3 x20,000	=	60,000/-
(ii) Electric Wheel Chair	- 2x100,000	=	200,000/-
(iii) Beds and Mattress	-3x120,000	=	360,000/-
(iv) Drugs, suppositions and Diapers - 20,000 x12x12	=	2,880,000/-	
Iv) Physiotherapy	-12,000x12x12	=	1,728,000
(VI) Checkups bi annually	- 5000x2x12	=	120,000/-
(v) Care- giver (monthly)	20,000x12x12	=	2,880,000
Subtotal		=	<u>8,228,000</u>

2nd PLAINTIFF MARY SYUNTHI MUSYOKI

(1) wheel chair	- 3 x20,000	=	60,000/-
(ii) Electric Wheel Chair	-2x100,000	=	200,000/-
(iii) Beds and Mattress	-3x120,000	=	360,000/-
(iv) Drugs, suppositions and Diapers	20,000 x12x14	=	3,360,000
Iv) Physiotherapy	12,000x12x14	=	2,016,000/-
(VI) Checkups bi annually	5000x2x14	=	140,000/-
(v) Care giver(monthly)	20,000x12x14	=	3,360,000
Subtotal		=	<u>9,496,600</u>

LOSS OF FUTURE EARNINGS.

The 1st plaintiff did not in her evidence state her nature of employment but she stated that she was a

housewife. The 2nd plaintiff averred that she was a business woman at Nanyuki town. No evidence of income was tendered before this court on behalf of any of the plaintiffs. That though the plaintiffs did not produce any record of income as housewives they were contributing to the family income through doing household chores which included cooking, washing and general duties in the house. It should be noted that housewives play a very important role in contributing towards the welfare of the family and by doing jobs at the house which requires a house help which can be taken as saving on family income by not hiring a house help. The salary that would have gone to a house help can be taken as each of the plaintiff's earnings. I will therefore find as housewife, each of the plaintiff was contributing towards the welfare of the family and saving an income that would have gone to the househelp. I will therefore take that as their income and find an income of kshs.7,000/- per month to be a reasonable income in respect of each of the plaintiff for a period of 12 years in respect of the 1st plaintiff and 14 years for the 2nd plaintiff.

I will assess loss of earning capacity as follows:

1ST PLAINTIFF

$$\text{Kshs.7,000} \times 12 \times 12 = 1,008,000/$$

2nd PLAINTIFF

$$7,000 \times 12 \times 14 = 1,176,000/=$$

The upshot is that the plaintiffs succeed in the respective claims against the defendants jointly and severally and judgment is entered in favour of the plaintiffs as follows:-

1st PLAINTIFF

(1). General damages for pain, suffering and loss of amenities	- 10,000,000
(ii) Special damages	- 3,100
(iii) Costs for future medical expenses and needs	
a. wheelchairs(3x20,000)	- 60,000
b. Electric Chairs(2x100,000)	-200,000
c. Bed and Mattress (2x120,000)	-360,000/-
d. Drugs, suppositions and diapers(20,000x12x12)	-2,880,000
e. physiotherapy 12,000x12x12	-1,728,000
f. Checkups bi-annually 500x2x12	- 120,000
g. Care giver 20,000x12x12	-2,880,000
h. Loss of earnings(7000x12x12)	-1,008,000
Total	<u>19,239,100</u>

FOR 2ND PLAINTIFF

(1). General damages for pain, suffering and loss of amenities	- 10,000,000
(ii) Special damages	- 3,100
(iii) Costs for future medical expenses and needs	
a. Wheelchairs(3x20,000)	- 60,000
b. Electric Chairs(2x100,000)	-200,000

c. Bed and Mattress (3x120,000)	-360,000/-
d. Drugs, suppositions and diapers(20,000x12X14)	-3,360,000
e. Physiotherapy (12,000x12x14)	-2,016,000
f. Checkups bi-annually (500x2x14)	-140,000
g. Care giver 20,000x12x14	3,360,000
h. Loss of earnings(7000x12x14)	-1,176,000

Total

20,065,100

Costs of the suit to the 1st and 2nd plaintiff with interest on specials from the date of filing the suit and on general damages from the date of the judgment.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF APRIL, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Riungu for the plaintiffs
2. Mr. Menge for the defendants

J. A. MAKAU

JUDGE