



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL SUIT NO. 188 OF 2009

HELLEN ATIENO ODUOR.....PLAINTIFF

VERSUS

S.S. MEHTA & SONS LTD..... 1ST DEFENDANT

MUTHITU NANUA.....2ND DEFENDANT

JUDGMENT

1. On the 7th of April 2009 the plaintiff filed suit against the 1st and 2nd defendant seeking general damages and special damages of Kshs. 265,956/-, plus damages for future medical care and surgery. She claims that on the 6th day of August 2008 at about 6.45am whilst standing on the pedestrian's footpath off Mombasa Road the 2nd defendant who is the authorized driver of the 1st defendant who is the registered owner of vehicle registration number KAH 572L Mitsubishi lorry, so negligently drove, managed and or controlled the said vehicle that it swerved off the road at an excessive high speed and violently hit the plaintiff and she sustained grievous injuries, pain, suffering and loss of amenities.

2. The plaintiff has particularized her injuries as;

- a. Fracture of the right tibia and fibula
- b. Multiple fractures of the ribs, on the right side of the chest(3rd ,4th 5th, 6th,7th and 8th)
- c. Chest injury and hemothorax
- d. Blunt abdominal trauma
- e. Fracture of the right scapula
- f. Surgical scars on the right knees interiorly and right ankle joint medially.

3. She particularizes her special damages at kshs. 65,000/-, her future medical orthopedic and physiotherapy expenses at Kshs. 50,000/- and future medical surgery (tibia intramedullary nail removal) Kshs. 150,000/-

4. The defendants filed a joint defense dated the 13th of May 2009. They deny the plaintiff

allegations against them and aver that if the accident then the plaintiff was negligent and they particularize the plaintiff's negligence and seek a dismissal of the plaintiff's suit.

5. The plaintiff filed a reply to the defense on the 21st of May 2009 denying all the averments in the defense.

6. This is the plaintiff case. On the 6th of August 2008 at 6.45am she was standing on pedestrian's footpath along Mombasa road about 2 meters from the pavement. Whilst there she saw a vehicle from town sides going towards Mololongo. The said vehicle was being driven in a zig zag manner and was in speed. The vehicle hit her and she sustained injuries. The driver stopped and talked to her husband who advised that she be taken to hospital. Later her husband took her to hospital. She was admitted at Aga Khan she was in HDU for 3 days and in the ward for 2 weeks. She sustained the following injuries a fracture on her right leg, broken ribs (3rd to 8th), abdominal and stomach injuries. She paid Kshs. 63256/- as special damages, 200/- for the police abstract, 12000/- for the doctors report and court attendance. She got to know the driver was called Muthitu Nanua. She underwent further surgery to for the removal of screws in her right leg. During cross-examination she stated that it was foggy, she saw the vehicle approach, it was being driven in speed, the place she stood to cross was a place where people crossed, the road was under construction, she was not crossing the road, she did not hear the vehicle hoot, but she heard people shooting at the said vehicle as it did not stop after it hit her, she does not know if the driver was charged, she gets a lot of pain in her ribs and cannot sleep on one side and she cannot wear high heels.

7. The plaintiff was examined by Doctor Moses Kinuthia on the 4th of December 2008. His opinion was that the injuries the plaintiff sustained were grievous harm and they caused her pain, suffering and blood loss. The multiple fractures of the ribs, fracture of the right scapula and fracture of the right tibia and fibula had not resolved. That she required orthopedic follow up and physiotherapy at an estimated cost of Kshs. 50,000/-. That the tibia IM nail would require surgical removal once the fractures are united at an estimated cost of Kshs.150,000/-. The scars are permanent, ugly and of cosmetic significance.

8. P.C Elvis Nakure testified that the records they have show that the accident happened on the 6/8/08 and involved vehicle registration number KAH 572L a Mitsubishi Tipper driver by Muthitu Nanua, the plaintiff was injured, she was later given a P3 form and a police abstract No. 0080233 (ext.no. 3) but as per their OB (copy ext. no. 4) it was not confirmed who was not to blame for the said accident and the matter is still under investigations. During cross-examination he stated that he cannot know the current state of the investigation

9. The 2nd defendant testified as follows; he was driving vehicle registration no. KAH 572 at 30kmp on his lane at 6.00am, it was still dark, he was not driving on the pavement nor in a zig zag manner; that the accident happened on his lane, the road was being constructed the plaintiff came from the ditch on the left hand side and jumped onto the road, she was hit by the rear of the lorry she did not check the road, the vehicle had lights on he stopped immediately there was no zebra crossing at the place she crossed and he was not charged. In cross-examination he denied driving a defective vehicle, he stated he could see well, he was in his lane, that he saw her as she left the ditch and entered the road without looking and continued to cross, that he avoided a vehicle that was from the left and then hit her, his vehicle did not lose control, he saw a stationery vehicle ahead and then she suddenly came out, that she did not fall into the ditch but on the road,

10. The 2nd defendant's witness Stephen Mutungi Kitili testified that on the material day he was with the 2nd defendant and was in the co driver's seat; the 2nd defendant was driving at 25-30 kmp; he saw a lady from the left side of the road near a drainage she was fast she did not ascertain whether it was safe to cross, she was near the vehicle he shouted and the driver swerved and she was hit by the vehicle, the vehicle was not being driven in a zig zag manner, the left side of the lorry caused the accident. In cross-examination he admitted that the road had no boundaries, that the driver saw the plaintiff, he did not see any small vehicle, the plaintiff did not stop as she crossed she came and met with the vehicle and the driver could see despite the darkness.

11. The defendant tended the medical report of doctor Modi who examined the plaintiff on the 28/4/10. At the time she was

examined she complained of chest pains on and off, pain over the right leg during cold weather and after walking a long distance, swelling over the right leg. Doctor Modi's conclusion was as follows; that the plaintiff sustained multiple rib fractures over the right side from the 3rd to 8th rib, fracture right tibia, fracture right scapula and blunt abdominal injury. Fractured ribs caused haemothorax that was drained with chest tube insertion. The chest injury had healed completely. Her complaint of chest pain is expected and is due to the injuries sustained over the chest. Fracture scapula was managed conservatively. It has healed completely without giving any disability. Shoulder mobility was full. Fracture right tibia required fixation with interlocking nail. Two distal locking screws were removed as they were loose and were causing discomfort. The fracture right tibia has healed in good alignment. Right knee mobility was full but the right ankle mobility was slightly reduced, but there was no shortening of the right lower limb. That inter locking nail would require removal in future and it will cost about Kshs. 150,000/- and that the plaintiff suffered permanent disability of 10% arising from the said injuries.

12. Parties filed written submissions. The plaintiff submitted as follows; on liability the defendants should be held 100% liable as the road was under construction and it was incumbent upon the 2nd defendant to drive with extreme caution. On quantum it was submitted that the plaintiff be awarded Kshs. 2,500,000/- as general damages, special damages of Kshs.65, 956/- and Kshs. 200, 00/- for future medical expenses. The plaintiff relied on the following cases; the case of **Ahmed Mohammed vs Abdulhafidh M. Banragah Mombasa HCCC No. 319 RD of 2001** where a plaintiff who sustained a fracture of the left femur subtrochanteric and compound fracture of the left tibia and fibula was awarded kshs. 750,000/-; the case of **Joseph Kitheka vs Stephen Mathuka Pius Nairobi HCCC 1750 of 1999**, where a plaintiff who sustained a fracture of the left radius and ulna, fracture of the right tibia and fibula and blunt head injury, contusion and bruises on the scalp was awarded Kshs. 1,280,000/-; the case of **Rosemary Tamba (suing as next friend of Kevin Walimbwa Mike) vs Francis Sikanga Sikolia & another [2013] eKLR Kakamega HCCC No. 185 of 2011** where a plaintiff who sustained a closed head injury leading to loss of consciousness for two weeks, facial abrasions, loosening of one tooth in the lower jaw and fracture of two ribs on the right side of the chest was awarded Kshs. 900,000/- as general damages and future medical expenses of Kshs. 400,00/-.

13. The defendants submitted as follows; that there 2 issues for determination;

i. Who was to blame for the accident which occurred on the 6/8/08?

ii. What is the general damages awardable, if the first issue is determined in the plaintiff's favor.

14. Learned counsel for the defendants pointed out what he considers as inconsistencies as follows; that the 2nd defendant was not charged with a traffic offence after the accident if he were to blame for the accident; that the plaintiff stated that the accident happened at 6.45am yet the 2 defense witnesses said the accident happened at 6am when it was still dark and that the headlights were on; that the plaintiff evidence that the vehicle was being driven in a zig zag manner was not in her witness statement; that the plaintiff evidence that she was hit at the pedestrian's footpath and subsequently fell into the ditch was not corroborated by other any witness; that the road being under construction at the point that plaintiff was crossing she ought to have been more careful having and that the nature of injuries tabulated by the doctors corroborate the defence case that the plaintiff was hit by the side part of the motor vehicle as opposed to a collision as the plaintiff stated.

15. On liability it was submitted that the plaintiff was the sole author of her misfortune. Learned counsel relied on the definition of negligence as stated at page 186 of Charlesworth on Negligence 3rd edition that states that " a pedestrian owes a duty of care to other highway users to move with due care; what the Kenyan Highway Code stipulates on crossing the road and section 68(3) of the Traffic Act Cap 403. The defence relied on the case of **Patrick Mutie Kimau & Another-vs- Judy Wambui Ndurumo & another Civil Appeal No. 254 of 1996** where the Court of Appeal held that the respondent did not take extra care and that though they were sympathetic with she was response for the accident.

16. It was submitted that in case the court is in doubt than the court should rely on the following case; **Geraldine Kaimuri & Another-vs- Fred's Academy & others HCCC No. 228 of 201** where it was held that since the court could not decide on whom to blame for the accident then the court would hold both parties equally to blame. It was conceded that both doctors reports stated that the plaintiff required future medical attention and both proposed the sum of Kshs. 150,000/-. On special damages it was submitted that special damages must be specifically pleaded but also proved (see case of **Hann-vs- Singh Civil Appeal No. 42 of 1983) 1985 KLR pg 216**). It was submitted that the sum claimed for special damages was not proved, that though a credit card payment receipt was produced the relationship between the credit card holder and the plaintiff was not established. The defense relied on the case of **Ahmed Mohammed -vs- Abdulhafidh**

Banragah (supra) and the case of **Samuel Kibet Ngetich-vs- Robert Nandwa Sunguti & Another (2007) eKLR HCCC No. 73 of 1998** where a plaintiff with similar injuries was awarded Kshs. 980,000/-.

17. I have carefully determined the evidence, the submissions and the authorities relied on. The issues for determination are on liability that is who is to blame for the accident and quantum if liability is proved. The accident is not denied it is how it happened that is in dispute. It is the plaintiff's evidence that she was hit whilst waiting to cross the road, the 2nd defendant claims that she walked into the side of the vehicle. The plaintiff's version on how the accident happened considering the circumstance is more plausible than the defendant's. It is evident that the driver and his passenger saw the plaintiff before the accident their version that she walked into the side of the lorry is not reasonable, the injuries she sustained were all on her right side, if she walked into the vehicle as alleged then impact would not be on her right side of the body. Further if indeed the 2nd defendant was driving between 25 to 30 kmp then the 2nd defendant ought to have stopped immediately upon seeing the plaintiff, there is also evidence from the defendant that the 2nd defendant was trying to avoid a vehicle from the left side. If this so then the plaintiff's evidence that the vehicle was being driven in a zig zag manner is plausible. I do not find that the plaintiff contributed to the accident, neither am I in doubt as to the negligent party. In my view the defendant's driver is wholly to blame for the accident, the fact that the driver was not charged does not mean that he was not negligent. It appears that the police chose not to conclude their investigation and the plaintiff has the right to sue for injuries sustained by her as a result of the accident. The 2nd defendant drove in a dangerous manner in that he was in speed and swerved off the road to the pedestrian path where the plaintiff was and caused the accident. The 2nd defendant had a duty of care to drive carefully on the road. I do not find that the plaintiff contributed at all to the occurrence of the said accident. The 1st defendant is the owner of the vehicle the 2nd defendant was driving. In his witness statement he states that he is driver and works for S.S. Mehta & Sons Limited. The 1st defendant being the owner of the vehicle KAH 572L is vicariously liable for the acts of his driver.

18. Next is quantum, the plaintiff's injuries are not in dispute. She sustained the following injuries, fracture of the right tibia and fibula, multiple fractures of the right ribs on the right side of the chest (3rd, 4th, 5th, 6th, 7th and 8th), chest injury with hemothorax, blunt abdominal trauma, fracture of the right scapula, surgical scars on the right knee anteriorly and right ankle joint medially. According to Doctor Modi who examined her in May 2010, the chest injury had healed completely, her complaint of chest pain is sometimes expected, the fracture scapula was managed well conservatively and has healed completely without giving any disability and the shoulder mobility is full. That the fracture right tibia required fixation with interlocking nail, that the fracture right tibia has healed in good alignment, right knee mobility is full but right ankle mobility is slightly reduced and there is no shortening of the right lower leg. He concludes the report by stating that the plaintiff has suffered a permanent disability of 10% arising from the said injuries.

19. The plaintiff seeks Kshs. 2,500,000/- for general damages for the said injuries. The defendant relied on 2 cases where the plaintiff's were awarded Kshs. 750,000/- and 980,000/-. In my view the plaintiff's in some of the cases cited by the plaintiff had serious injuries for instance a head injury, contusion, closed head injury leading to unconsciousness for 2 weeks compared to the plaintiff in this case. In the case of Ahmed Mohammed vs Abdulhafidh M Banragah (supra) a plaintiff who sustained a fracture of the femur subtrochanteric and compound fracture of the left tibia and fibula was awarded Kshs. 750,000/- as general damages. In the case cited by the defendant of Samuel Kibet Ngetich vs Robert N. Sunguti & Another a plaintiff who sustained multiple cut wounds on the face and knees, fracture of the right temporal bone of the skull, posterior dislocation of the hip joint with fracture of the iliac and inferior parts of the acetabulum, fracture of the lateral condyle of the right ankle joint and comminuted compound fracture of the medial malleolus was awarded Kshs. 980,000/-.

20. Considering the injuries sustained by the plaintiff, taking into account the element of inflation it is my view that a sum of Kshs. 1,500,000/- is sufficient for general damages. The cost of

future medical attention is not disputed. I award the plaintiff the sum of Kshs. 150,000/-. Special damages must not only be pleaded but proved. The plaintiff has proved the following a sum of Kshs. 63256/- was paid to The Aga Khan hospital. It was her evidence that her husband paid the said bill. There is a credit card payment acknowledgment that proves this payment. This is sufficient proof of payment of the bill she incurred, the receipt bears her name. She paid Dr. Kinuthia Kshs. 2000/- for the medical report. Kshs. 500/- for the search and 200/- for the police abstract. She has proved her claim of kshs. 65956/- on special damages. She is also awarded Kshs. 50,000/- for the medical orthopedic and physiotherapy.

21. The total award is as follows;

- i. General damages kshs. 1,500,000/-
- ii. Special damages of Kshs. 65956/-
- iii. Future medical expenses of Kshs. 200,000/-

22. I therefore enter judgment for the plaintiff against the defendants jointly and severally in the sum of Kshs. 1765956/-. The plaintiff is also awarded costs and interests from the date of this judgment until payment in full.

Order accordingly.

Dated signed and delivered this 30th day of **January 2015**.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Plaintiff**

.....**For the Defendants**

.....**Court Clerk**