



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 507 OF 1999

ALFRED NGIGE KARANJA.....PLAINTIFF

VERSUS

CHARLES NDUNG’U MUNDIA.....DEFENDANT

JUDGMENT

The plaintiff, Josephine Mumbi Ngige, a minor filed suit through her next friend Alfred Ngige Karanja against the defendant Charles Ndung’u Mundia seeking to be compensated for the injuries which she sustained in an accident which occurred on the 25th of April 1993 along Nyeri-Karatina Road involving motor vehicle registration number KAA 465T owned by the defendant and motor vehicle registration number KLZ 692 when the said motor vehicles collided. The plaintiff, who was travelling in motor vehicle registration number KLZ 692 sustained injuries. At the commencement of the hearing of the case, the plaintiff and the defendant agreed by consent to apportion liability at the ratio of 70:30 in favour of the plaintiff. The plaintiff agreed to bear 30% liability whilst defendant was to bear 70% liability. The parties agreed that evidence was to be adduced to establish the injuries that the plaintiff had sustained so that the quantum of damages may be determined.

The plaintiff called two witnesses PW 1 Dr Adolf Themani Feksi testified that he knew the plaintiff. He testified that he had been treating the plaintiff for epilepsy which followed the injury that the plaintiff had sustained in a road traffic accident. He testified that at the time of the accident, the plaintiff sustained injury to her brain that led her to be unconscious for a period of five days. Thereafter the plaintiff developed epileptic fits. The first time that PW 1 attended the plaintiff was on the 16th of June 1997. When he examined her, the plaintiff had developed momentary loss of awareness. She had developed jerking on the right side of her body. She was drooling saliva. The seizures would last from thirty seconds to three minutes. Thereafter she would remain dazed and confused for thirty minutes before she could regain her composure.

PW 1 investigated whether the movement was caused by brain activity. He sent the plaintiff to have EEG scan done on her brain. The same was done by Prof. Paul Kioi. The EEG results were produced as plaintiff’s Exhibit No. 1. PW 1 established that the EEG indicated that the plaintiff had multiple electric discharges in the brain with secondary generalisation which could cause loss of awareness. PW 1 was of the opinion that the plaintiff was suffering from multifocal seizures as a result of post traumatic

epilepsy. PW 1 prepared a report which he produced as plaintiff's Exhibit No. 2. He established that the plaintiff had sustained post traumatic epilepsy caused by the injury sustained in the road traffic accident. He determined that the plaintiff required to take medication for the rest of her life. PW 1 subsequently wrote another report on the 5th of May 2003. The plaintiff was still suffering from epileptic fits from time to time and would require constant medication. PW 1 assessed the partial permanent disability estimated at 50% for the rest of her life. The subsequent report was produced as plaintiff's Exhibit No. 3. PW 1 further testified that he last attended the plaintiff in May 2004.

He testified that the plaintiff suffered epileptic fits once every two or three months. Her education had been affected and the prospects of total recovery were nil. In his opinion the fits would be controlled but would not be eliminated completely. He further testified that the cause of her epileptic fits could be traced to the road traffic accident as the plaintiff had sustained a fracture of the base of the skull. She also became unconscious. There was formation of scars in the brain. According to PW 1 the scars would continue causing problems to the plaintiff. PW 1 arrived at the determination that the epileptic fits were caused by the road traffic accident because the family of the plaintiff did not have a history of suffering from epilepsy. PW 1 agreed with the opinion of Dr Angelo D'cunha in so far as he related to what had transpired immediately after the accident. He was of the view that apart from the assessment of permanent disability at 10%, the report by Dr Angelo D'cunha was consistent with his report.

He further testified that epilepsy manifested itself differently in different people. If the epileptic fits began from the brain section which dealt with emotions, the affected person would become emotional. PW 1 agreed that he had not mentioned in his report that the plaintiff had been unconscious for five days. He also conceded that he saw the plaintiff four years after the accident and relied on the medical history of the plaintiff as narrated by her parents. PW 1 further conceded that epilepsy could be caused by an injury to the brain by instances of low blood sugar, chemical disturbance of the brain, among other reasons. He stated that the start of epileptic fits could not be predicted and could begin even ten years after the occurrence of the accident. When he examined the plaintiff, he established that the plaintiff did not suffer any other injury or infection to the brain. He stated that he had treated the plaintiff eleven times. He testified that with medication, the plaintiff's condition would improve but would not be entirely treated. He conceded that in between fits, the plaintiff was a normal person except that the epileptic fits had adversely affected her education.

PW 2 Alfred Karanja Ngige, the father and the next friend of the plaintiff testified that he was travelling with his daughter in his motor vehicle when the accident occurred on the 25th of April 1993. After the accident, the plaintiff became unconscious. She was bleeding from both her eyes and nose. She released bowel motion. She was taken to Nyeri Provincial General Hospital where she was admitted for four days. He reported the accident to the police, was issued with a P3 form (produced as Plaintiff's Exhibit No. 4.) and a police abstract report (produced as Plaintiff's Exhibit No. 5). The plaintiff was later examined by Dr Angelo D'cunha who prepared a medical report. The medical report dated the 15th of May 1996 was produced as plaintiff's exhibit No. 6. PW 2 testified that after the plaintiff was discharged, she took medication for about six months after which she started developing convulsions and fits which worsened with time. The plaintiff was seen by three doctors, namely, Dr Warui, Dr Feksi and Dr D'cunha. After the plaintiff was treated, her condition improved and her epileptic attacks became less frequent.

PW 2 further testified that the plaintiff obtained 269 out of the possible 500 marks in her KCPE (produced as Plaintiff's Exhibit No. 7). Her school leaving certificate was produced as plaintiff's exhibit no 8. It was PW 2's testimony that his family did not have a history of epilepsy. He testified that at one time the plaintiff took an overdose of drugs. She was admitted in hospital. The discharge summary was produced as Plaintiff's Exhibit No. 9. As a result of the said injury sustained by the plaintiff, her life had

been disturbed and she would require to take expensive medication daily. PW 2 confirmed that the time of the accident, the plaintiff was aged five years. He testified that the plaintiff was a bright student before the accident but her performance in school had declined after the accident, although the plaintiff was hardworking and responsible. He testified that the plaintiff was at the time he gave his testimony in court a student at Mukumu Girls High School. He reiterated that the school performance of the plaintiff had been erratic.

The defendant did not offer any evidence. Both the plaintiff and the defendant agreed by consent to present written submissions on what they considered to be the proper damages to be awarded to the plaintiff. I have considered the evidence adduced by the plaintiff. I have also considered the submissions made by the plaintiff and the defendant. It is not in dispute that the accident did occur on the 25th of April 1993 whereby the plaintiff was injured. The parties to this suit compromised the suit on liability and apportioned liability at the ratio of 70:30 in favour of the plaintiff and as against the defendant. The issue of liability having been settled, the only issue that remained for determination is the assessment of damages due to the plaintiff based on the injuries that she had sustained during the accident. According to her plaint, the plaintiff particularised her injuries as follows:-

(a) Head injury – Fracture of the base of the skull anterior and middle cranial fossa.

(b) Loss of consciousness for 48 hours.

(c) Post traumatic epilepsy.

According to the medical report which was prepared by Dr Angelo D’cunha, the x-ray taken on the 25th of April 1993 of the plaintiff established that the plaintiff had sustained the fractured base of skull involving the anterior and middle cranial fossa. He further established that the plaintiff had lost consciousness immediately after the accident and took approximately 48 hours before she regained consciousness. At the time the said report was prepared Dr D’cunha was not certain that a pattern of post-traumatic epilepsy had developed but gave the benefit of doubt to the plaintiff. He assessed the degree of permanent disability to be 10%. Dr D’cunha’s report was produced as plaintiff’s Exhibit No. 6. PW 2 testified that soon after the said report was prepared, the plaintiff started developing fits and convulsions. She was referred to see Dr. A. T. Feksi, the Provincial Psychiatrist, Nakuru. On 16th of July 1997, Dr Feksi wrote a report. The said report which was produced as Plaintiff’s Exhibit No. 2 stated as follows:

“There is no doubt that the child suffered from brain injury. This injury was evidenced immediately as bleeding from her right ear and now revealed as epileptic convulsions. These multifocal convulsions have been confirmed by an eletroencephalography tracing done early this month. Conclusions:

(1) Post-traumatic epilepsy following brain injury.

(2) Would require medication for maybe her whole life.”

Dr Feksi, again saw the plaintiff on the 5th of May 2003. He wrote a medical report which was produced as Plaintiff's Exhibit No. 3. According to the said report, the plaintiff was at the time experiencing epileptic fits at least once a week in spite of continuing with medication. He was of the opinion that the intellectual ability of the plaintiff may be compromised by the epileptic fits. He assessed the degree of partial permanent disability to be 50% of total disability for the whole of her life. PW 2, the father of the plaintiff testified that the plaintiff, although of good conduct and hard working, attained 269 marks out of the possible 500 in her KCPE exams. He attributes this poor performance to the injury which the plaintiff had sustained and particularly the epileptic fits and convulsions. He testified that their family did not have a history of epilepsy and therefore the only explanation for the epileptic fits that the plaintiff suffered from was attributable to the accident when she was injured.

I have evaluated the evidence adduced. I do agree with the findings by Dr D'cunha and Dr Feksi that the plaintiff developed post-traumatic epilepsy as a result of the injuries that she sustained during the accident that occurred on the 25th of April 1993. I further find that the plaintiff's quality of life has been affected by the injuries that she sustained especially the post-traumatic epilepsy that she had now developed. Although she appears to be a normal girl attending a boarding school while studying in Secondary School, evidence has been adduced that she would require constant medication for the rest of her life. The medication taken is also expensive and is a burden to her parents. Due to the nature of epilepsy, the plaintiff may not undertake certain tasks, like for instance cooking food as she would likely be injured if she was to develop convulsions. This fact will affect her prospects of marriage and also any prospects that she may have to be employed in a career that would require her to work without supervision. The quality of life of the plaintiff has been affected.

The epilepsy has caused her to suffer mood swings. At one time in April 2004 due to a slight misunderstanding with her mother, she attempted to commit suicide by taking an overdose of the drugs used to control the convulsions and fits. I do find that the injuries that the plaintiff sustained will affect the way she will live for the rest of her life. In assessing the quantum of damages to be paid, the above facts have to be taken into consideration. The plaintiff has submitted that she should be paid Kshs 1,600,000/- as general damages for pain suffering and loss of amenities. She has relied on the decision of **Naomi Wangui Rumano –versus- Alice Wanjiku Ngige (HCCC No. 223 of 1996 (Nrb) (unreported)**. On his part, the defendant has submitted that the plaintiff should be paid the sum of Kshs 300,000/- as general damages. He has relied on the decisions of the High Court in **HCCC No. 1547 of 1984 (Nrb) Mugo Kariuki – versus- Joseph M. Mukundi & Anor (unreported) and HCCC No. 203 of 1985 (Nrb) Jestomore wa Khung'u –vs- Kenya Posts & Telecommunication Corp & Anor (unreported)**. I have considered the said decisions relied on by the plaintiff and the defendant. I am inclined to follow the Naomi Wangui Rumano decision. It is more recent. The two cases quoted by the defendant, though relevant on the injuries sustained by the plaintiff are outdated on the damages to be awarded.

In the circumstances of this case, doing the best that I can, I award the plaintiff general damages for pain, suffering and loss of amenities of Kshs 1,200,000/-. The plaintiff did not prove any special damages. In any event, the plaintiff did not plead the special damages that she is seeking the court to give an award. The said amount of Kshs 1,200,000/- awarded shall be reduced by 30% i.e. Kshs 840,000/-. The plaintiff shall have the costs of the suit. Interest shall be applied from the date of this judgment at the usual court rates.

DATED at NAKURU this 18th day of February 2005.

L. KIMARU

JUDGE



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