



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 53 OF 1986**

**ANAR KASSAM .....PLAINTIFF**

**VERSUS**

**BHARATKUMAR D. PATEL .....1ST DEFENDANT**

**JIMMY VIRJEE .....2ND DEFENDANT**

**JUDGMENT**

Liability is not in issue here. The parties entered into a consent on that question and Judgment was entered in favour of the Plaintiff to the extent of 100% on December 10, 1998. The case now comes up for assessment of damages payable to the Plaintiff.

The Plaintiff was involved in a road traffic accident on May 8, 1983. The Plaintiff was first examined by Dr. Prakash M. Heda on April 14, 1986 (see his Medical Report dated April 18, 1986 – EXT 2). According to Dr. Heda, the Plaintiff's main injury was whiplash injury to the cervical spine resulting into severe pain and spasm of cervical muscles with radiating pain to the scapular region. At the time of examination by Dr. Heda, the Plaintiff had the following complaints:

- (a) Pain in cervical region radiating to left upper extremity
- (b) Occasional backache in thoracic and lumbar spine
- (c) Occasional blackouts

On examination, Dr. Heda found that the Plaintiff had paravertebral muscle spasm with stiff neck and mild thoraco-lumbar scoliosis. X-rays revealed loss of normal cervical curve and spondylosis changes in cervical spine and mild scoliosis of the thoraco-lumbar spine.

The Plaintiff was also examined by Dr. Musimbi M. Ondeko in 1991 who found that she had vertebral subluxations in the mid-cervical spine and in the thoracic spine with associated muscular spasm. An X-ray examination of the cervical spine revealed a loss of lordosis; and C5 – C6 disc space narrowed with anterior and posterior osteophytes. The Plaintiff would require periodic chiropractic

attention due to the chronic and recurring nature of her condition. The Plaintiff was again examined by Dr. R. P. Shah on March 9, 1996 who was of the opinion that spondylosis at C5 – C6 level is a “*very common naturally occurring degenerative condition.*” He said that there was no X-ray evidence of the Plaintiff having sustained fractures dislocations or subluxation of any cervical vertebra. He, however, did not appear before me to explain the basis of his findings. The only Doctor called as a witness was Dr. M. S. Malik (PW 1) who had examined the Plaintiff one day before the case came up for hearing before me. Dr. Malik’s Medical Report and testimony was substantially according to the findings of Dr. Heda and Dr. Ondeko.

The Plaintiff claims that she still experiences stiffness of the neck; that she continues to suffer pain to this day, that her mobility is highly restricted, that she cannot drive or play any sports, and that her enjoyment of life is severally limited. I believe her testimony. It remains uncontroverted. Dr. Malik said before me that Dr. Shah’s finding that spondylosis occurred naturally was not correct. Without testimony to contradict that, I accept Dr. Malik’s testimony.

That being the case, what damages would adequately compensate the Plaintiff for her pain, suffering and loss of amenities"

Counsel for the Defendant suggested that an award of between Kshs. 55,000/= and 85,000/= would be adequate compensation. The Plaintiff’s Advocate, on the other hand, argued that an award of Kshs. 750,000/= would be reasonable compensation. In doing this, the Plaintiff’s Advocate relied on the case of **Yvonne Fernandes v. Bharat Amrital Rach** NAIROBI HCCC 2750 OF 1987 in which he said that the court awarded the Plaintiff Kshs. 397,000/= for injuries similar to that suffered by the Plaintiff before me. What Counsel may not have noted is that the sum of Kshs. 397,000/= awarded in that case included special damages and an award for loss of employment. Only Kshs. 40,000/= of that sum were awarded as general damages.

Taking into account the injuries sustained by the Plaintiff in this case, the authorities cited by Counsel for the parties and all other relevant factors including inflation and the effluxion of time that has attended the period between the cited cases and the present date, I am of the view that an award of Kshs. 300,000/= would be adequate compensation for the Plaintiff’s pain, suffering and loss of amenities.

As to special damages, the Plaintiff claimed the following:

|  |                       |
|--|-----------------------|
| (a) Medical, hospital and Doctor’s charges and fees  | Kshs. 50,000/=        |
| (b) Transportation charges   | Kshs. 5,000/=         |
| (c) Accident Abstract  | Kshs. 100/=           |
| (d) Surgical Report  | Kshs. 600/=           |
| (e) Loss of earnings from March 1, 1984 to<br>October 21, 1984 at the rate of<br>per month | Kshs. 5,000/=         |
|  | <u>Kshs. 38,750/=</u> |
| Total:   | <u>Kshs. 94,450/=</u> |

The Plaintiff produced before me a bundle of receipts which were marked as EXT 1 for Kshs. 7,720/= which consisted of medical, hospital and Doctor's charges.

As special damages are required to be specifically proved, I award under (a) of the special damages only the sum of Kshs. 7,720/=. As to transportation charges (b) and loss of earnings (e) I will say as follows. There can be no doubt that as a result of her injuries, the Plaintiff was forced to travel to seek medical care. It was also not controverted that before the accident, she had been employed and must have been earning a salary. She told me that she used to earn Kshs. 5,000/= per month but did not have evidence to prove this since they were lost. I do not have any reason to disbelieve her. She appeared to me as an honest person who is not generally driven by mercenary considerations. I also accept her excuse in view of the fact that this case has not been processed expeditiously despite the fact that the Defendants accepted liability for her injuries way back in 1998 and the case was filed way back in 1986. I also think that the sum claimed for transportation charges are reasonable and I award these to the Plaintiff. No Police Abstract or Surgical Report were produced before me and no evidence was shown that expenses therefor were incurred. Those claims are therefore rejected.

I, therefore, enter Judgment for the Plaintiff as follows:

|  |                        |
|--|------------------------|
| (a) General Damages                        | Kshs. 300,000/=        |
| (b) Medical, Hospital and Doctor's charges | Kshs. 7,720/=          |
| (c) Transportation charges                 | Kshs. 5,000/=          |
| (d) Loss of earnings                       | <u>Kshs. 38,750/=</u>  |
| TOTAL                                      | <u>Kshs. 351,470/=</u> |

The Plaintiff will also have the costs of this suit, and interest at Court rates from the date of filing suit until full payment.

**Dated and Delivered at Nakuru this 24th day of June, 2003.**

**ALNASHIR VISRAM**

**JUDGE**



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