



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Case 57 of 2004**

**HELLEN KWAMBOKA ONCHONG'A ..... PLAINTIFF**

**VERSUS**

**JOHN OUKO OYOO ..... DEFENDANT**

**JUDGMENT**

The plaintiff stated in her plaint that on 4<sup>th</sup> March, 2002 at Kisii-Kisumu bus stage, the defendant and/or his driver drove and/or managed motor vehicle registration number KAP 387 F, so negligently that it mounted the road pavement and hit her while she was off the road. She set out particulars of negligence.

By reason of the said accident the plaintiff sustained swiss roll type degloving injury to the right leg necessitating a surgical operation and skin grafting.

As a result of the injuries she sustained, the plaintiff, who used to drive herself being a business woman, is unable to drive and has had to engage a driver at a cost of Kshs. 12,000/= per month and she claimed that expense, saying that she will have

to rely on a driver for the rest of her life.

She further claimed other special damages as hereunder:

(i) Treatment expenses ..... Kshs. 1,900,000.00

(ii) Subsistence and travelling

expenses ..... Kshs. 240,000.00

(iii) Future reconstructive

surgery ..... Kshs. 1,900,000.00

(iv) Police abstract ..... Kshs. 100.00

(v) Medical report ..... Kshs. 5,000.00

The plaintiff also prayed for general damages for pain suffering and loss of amenities.

The defendant filed a statement of defence and denied all the averments in the plaint. He added that if the said accident did occur, the same was wholly caused and/or substantially contributed to by the plaintiff's negligence in that she failed to keep any or any proper look out for traffic which was on the road and especially the defendant's motor vehicle aforesaid.

When the suit came up for hearing, a Miss Wambui Advocate held brief for Miss Omondi, the defendant's advocate. She sought an adjournment on the ground that the defendant was unable to procure court attendance of a Doctor who had

Performed a second medical examination on the plaintiff.

The application was opposed by Mr. Bosire, the plaintiff's advocate. When the court declined to grant the application Miss Wambui did not participate in the proceedings any further.

The plaintiff testified that on the material day she was buying onions near Uhuru Plaza building within Kisii Municipality when the defendant and/or his authorized driver was unable to manage the said lorry and it went down hill, mounted the road pavement and hit her. She was rushed to Kisii District Hospital but was transferred to Aga Khan Hospital on the following day. She was discharged from Aga Khan Hospital on 14<sup>th</sup> May, 2002. The hospital bill was Kshs. 1,719,762.40. She produced an invoice as **P. Exhibit 3**. She produced a medical report dated 22<sup>nd</sup> May 2003 by Dr. W.N. Khamala of Aga Khan Hospital. The Doctor stated that the plaintiff suffered extensive circumferential degloving injury to her right lower limb as well as superficial bruises over the right hand. She underwent three sessions of degranulation and bone decortication. Skin grafting was also done. She continued to be attended as an out patient and she incurred considerable travelling and accommodation expenses.

**Dr. P.M. Ajuoga, PW2**, examined the plaintiff on 1<sup>st</sup> April, 2005 and prepared a medical report. He produced the same as **P. Exhibit 4**. He confirmed the injuries as stated by Dr. Khamala. Dr. Ajuoga added that the plaintiff's right lower limb is deformed with no muscles on the anterior aspect of the leg and as a result she could not walk long distances. He recommended further constructive surgery preferably in the United States of America because, in his view, there are no good facilities for doing such operations in our local hospitals. He said that such an operation would cost her about Kshs. 1.9 million in the United States of America whereas in Sweden it would cost the equivalent of Kshs. 2.5 million.

The plaintiff produced a bundle of receipts (**P. Exhibit 9**) in respect of travelling expenses between Kisii and Nairobi. They amount to Kshs. 49,024/=. Accommodation and subsistence expenses (**P. Exhibit 10**) amount to Kshs. 27,000/=. The plaintiff paid Kshs. 100/= for a police abstract report. The claim of Kshs. 5,000/= for a medical report was not proved. There are also some expenses that were proved but had not been pleaded and consequently they cannot be allowed. The plaintiff was able to prove that she had engaged a driver at a salary of Kshs. 12,000/= per month, see **P. Exhibit 14 (a)**. The plaintiff also produced a copy of records in respect of motor vehicle registration No. KAP 387 F which revealed that the said motor vehicle belongs to the defendant.

From the evidence on record, I find that the defendant's motor vehicle was unable to climb a gentle hill and reversed, went over a road pavement and hit the plaintiff. She sustained severe injuries as a result. A well maintained vehicle under the control of a careful driver does not ordinarily go down hill and hit people walking off the road. I am satisfied that the said accident occurred due to the negligence of the defendant and/or his authorized driver. I find the defendant fully liable for the said accident.

Turning to the plaintiff's claim for damages, counsel urged the court to award Kshs. 1,000,000/=. Having considered the kind of injuries sustained by the plaintiff and comparing the same with awards made in similar cases, I am of the view that an award of Kshs. 800,000/= is reasonable compensation as general damages for pain, suffering and loss of amenities.

#### Loss of future earning capacity

In **SOPHINAF COMPANY LIMITED –VS- DANIEL NG'ANG'A KANYI**, Civil Appeal No. 315 of 2001, the Court of Appeal held that loss of earning capacity is a prospective financial loss which is awarded as part of general damages. It is not mandatory that it be pleaded, though it is better to do so.

The plaintiff had been employed by Pebo (K) Ltd. as the General Manager. She worked there from 1<sup>st</sup> June, 1995 upto April 2003 when her services were terminated due to her inability to perform as a result of the injuries which she sustained. Her monthly salary was Kshs. 40,000/=. At the time of the accident, the plaintiff was 48 years old. The medical report by Dr. Khamalla done on 22<sup>nd</sup> May 2003 stated she was 49 years. She would have worked for another 7 years until she attained the retirement age of 55 years. I will therefore adopt a multiplier of 7. The plaintiff is still capable of doing some jobs, though she can't walk or stand for long. Unfortunately the medical reports do not state the percentage of her incapacity.

In my view, the damages payable under this heading should be discounted by 50%. That is so because, firstly, the plaintiff is not 100% incapacitated and can still work. Secondly, the amount to be awarded will be paid in lump sum and can be invested to generate more income.

I will proceed to compute the same as hereunder:

$$\text{Kshs. } 40,000 \times 12 \times 7 \times \frac{1}{2} = 1,680,000/=$$

Hire of a driver.

The plaintiff is no longer able to drive on her own. Her husband has had to employ a driver for her at a monthly salary of Kshs. 12,000/=.

The plaintiff's advocate urged the court to adopt a multiplier of 10. I will however adopt the same multiplier as above. I proceed to compute the cost of employing a driver as hereunder:

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

I award the aforesaid sum.

Special damages

The following sums were pleaded and proved:

(a) Treatment expenses at

Aga Khan Hospital ..... Kshs. 1,719,762.40

(b) Travelling expenses ..... Kshs. 49,024.00

- (c) Accommodation and subsistence expenses ..... Kshs. 27,000.00
- (d) Police abstract report ..... Kshs. 100.00

**Total Kshs. 1,795,886.40**

Reconstructive surgery

Dr. Ajuoga estimated the cost of reconstructive surgery in the United States of America to be Kshs. 1.9 million whereas if it is done in Sweden it would be Kshs.2.5 million.

However, the aforesaid figures were not based on any actual quotations from any medical institution. The witness said that the proposed reconstructive surgery cannot be undertaken in our local hospitals.

The plaintiff did not tell the court whether she had made any effort to enquire about the charges of undertaking such an operation in cheaper places like South Africa or India.

Before a person is flown all the way to the United States of America or Europe, all due effort must be made to determine whether the required treatment can be done locally or in other cheaper destinations.

While I agree with Dr. Ajuoga that the plaintiff will benefit from reconstructive surgery, I think the suggested charges are very high and required supportive documents. Doing the best I can, I award Kshs. 1 million for reconstructive surgery.

There will be judgment in favour of the plaintiff in the following sums:

- (a) General damages for pain suffering and loss of amenities ..... Kshs. 800,000.00
- (b) Loss of future earning Capacity ..... Kshs.1,680,000.00
- (c) Cost of hiring a driver ..... Kshs.1,008,000.00

(d) Special damages ..... Kshs.1,795,886.40

(e) Cost of reconstructive

surgery ..... Kshs. 1,000,000.00

**Total     Kshs. 6,283,886.40**

The plaintiff will also have costs of the suit plus interest at court rates.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF DECEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**16/12/2006**

Before D. Musinga, J.

Mobisa – cc

Mr. Leteipa for the plaintiff

N/A for the defendant

**Court:** Judgment delivered in open court on 16<sup>th</sup> December, 2009.

**D. MUSINGA**

**JUDGE.**

