Case Number:	Civil Case 3161 of 1982
Date Delivered:	14 May 1989
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Abdul Majid Cockar
Citation:	Aggrwal v Ratanya [1989]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL CASE NO 3161 OF 1982

AGGRWAL.....PLAINTIFF

VERSUS

RATANYA.....RESPONDENT

JUDGMENT

May 14, 1989, **A M Cockar Judge** delivered the following judgment:

The claim is for general and special damages in respect of injuries suffered by the plaintiff in a traffic accident which occurred on February 4, 1981. At the time of the accident the plaintiff, a 37 years old married woman and trained teacher, was an English tutor at Kamwenja Teacher's college where she had been employed since January, 1971. Her work included also visits to various schools even in the bush where the pupil teachers from the college were posted. Her husband was a medical practitioner in private practice in Nyeri and she had two children who at the time she was giving evidence were 8 and 11 years old.

The plaintiff said that immediately after the accident and after the x-rays were taken she was admitted at Consolata Mission Hospital for one week. She was there told that she had injured her spine. She was given injections and tablets. Thereafter she was given a 6 weeks complete bed-rest in a hard bed. After 3 weeks in bed when she tried to phone she found that she could not lift the phone with her left hand and the hand felt very weak and had gone numb. There was a pain in the region of the neck spreading to the left back shoulder and then into the left hand. Then followed a consultation with and a visit to Dr Beecher at Nairobi and on his recommendation the plaintiff started using a hard collar during the day and a soft collar during the night. Medical treatment continued. As the pain in the neck did not go even with the use of the collars the plaintiff again saw Dr Beecher who recommended surgery which the plaintiff refused to undergo.

Dr Sheikh who next saw her at the Kabete Orthopaedic Unit prescribed medication and physiotherapy both of which she thereafter continued to receive. On Dr sheikh's advice she now permanently wore the soft collar during day time. If the pain continued after she retired to bed she would then wear the soft collar at night also. Occasionally she still wore the hard collar also. That was the state of the pain in her neck on the day she gave evidence four years after the accident.

In addition to the pain in the region of the neck the plaintiff said that her left hand was much weaker now and had also gone thinner than the right hand. She showed the court her hands. The left hand still went numb particularly when it was cold. In cold weather she experienced a lot of pain in the neck, back and in the hand. She had minimized the use of her left hand and now made as much use of the right hand in her normal work as possible.

The plaintiff used to do cooking at home for the family. Now she was unable t do so and had to engage

an additional servant – a maid, to do the cooking. This was because she was unable to bend or stretch at the neck and shoulder joint without experiencing a lot of pain while doing household work or when trying to lift anything with her left hand despite wearing the collar. She had lost a lot of weight and easily got tired. Before accident she used to entertain quite a lot at home. Now she was unable to do so. The plaintiff complained that because of the pain her posture had changed. She had assumed a more stooping posture at the neck and shoulders when walking or sitting. That had not been so before \the accident. Because of the injury she had also stopped driving the car. If she turned her head suddenly then for a few seconds she had a blackout and during the blackout she would not know where she was. Even as a passenger she had to use the soft collar as she could not stand any jerks.

A confidential medical report signed on October 11 and 12, 1984, by tw doctors – one for the plaintiff and one for the defendant, was put in by consent as Exh 1. The injury, the pain and the physical disability particularly with regard to the weakening of the left hand, the feeling of numbness and the thinning of the hand are more or less all confirmed by the report. The report dated November 16, 1983 (Exh 3) of a Medical Board convened in connection with the plaintiff's ability to continue with her work described in the same terms the injuries received by her and the pain that she was suffering. I accept the evidence produced on behalf of the plaintiff relating to what she has suffered and the physical handicaps and inconvenience she is now experiencing.

The expense now being incurred in respect of a maid-cook at Kshs 950 per month who has been engaged since the accident, was accepted by Mr Noad for the defendant. He also accepted the expense incurred in respect of the soft collars at 4 collars a year and Brufen tablets of which the plaintiff was taking one tablet three times a day to relieve pain. It was also accepted that the plaintiff had to take velium when retiring for the night, only when she was experiencing more pain. Agreed costs of soft collars was Kshs 260 less 10% = Kshs 234 per collar and of Brufen tablets it was Kshs 550 for 250 tablets. These works out to Kshs 936 for soft collars, Kshs 2,400 for Brufen tablets and Kshs 11,400 for the cook-maid per year totaling Kshs 14,736 per year. Adding the cost of valium to it I assess the annual costs for medicine, soft collars and the main-cook at Kshs 15,000 per year.

Despite the injury the plaintiff had continued working until she was medically retired with effect from March 15, 1984. She had been able to work because she was given a very light time-table –with 3 afternoons off per week and her traveling on rough roads also had been cut down. For her service with the Teacher's Service Commission for the period January, 1971, to March 15, 1984, she was given a gratuity of Kshs 64,274 and a pension Kshs 1,071 per month. Her net salary after the normal deductions in respect of PAYE, medical fund, etc at the time of her retirement was Kshs 3,967 pm. Her retirement after deducting the amount of pension from her salary had resulted in a net loss of income at Kshs 2,896 per month. Born on April 24 1944 she was reaching 40 years of age when she was retired. The plaintiff said that she would have continued working up to the age of 55 years and after that if she was fit, and provided her services were needed, she would have worked on contract, - every contract being of 2½ years duration. That, she added, happened often with teachers. It would therefore, appear that the plaintiff, subject to her fitness, ad another 15 years of income earning life and thereafter, again subject to her fitness, and also if her services were needed, she had a few more years of an income earning life. Mr Noad had suggested a multiplier of 8 to 10 years. Mr Gitau for the plaintiff had suggested a multiplier of 10 years. I feel that a multiplier of 10 years would be fair and just in the circumstances of this case. I would, however point out that if the plaintiff had continued working, for the full span of her working life the gratuity as well as the pension received by her on her retirement would have been quite substantially higher.

On the other hand she has already received a gratuity much earlier than the date she would otherwise have received it. Further she will also receive her loss of future income which was payable monthly,

again much earlier in a lump-sum. To my mind that loss is adequately balanced by these payments received in lump-sums now.

Working on the basis of a multiplier of 10 years and a net salary of Kshs 2,896 pm I assess the loss of income at Kshs 347,520. Likewise I assess the additional expenditure that the plaintiff will incur in respect of medical expense and the additional maid's expense at Kshs 150,000.

Coming now to the question of damages by way of pain, suffering and loss of amenities the advocates by consent submitted a bundle of cases from Kemp on the point for consideration of the court. Mr Gitau drew particular attention to the cases of Hall v Lord Halsbury, a 1973 decision, and Hartry v The international Paint Co Ltd, a 1972 decision. Mr Noad, however, felt that the decision in Hall v Lord Halsbury had not quite followed the proper line and was therefore wrongly decided. He submitted that an award of 6,000 pounds to 8,000 ponds under this head would be adequate. Mr Gitau, however, felt that the award under this head should be around 25,000 pounds. He referred to the table from Kemp and kemp which showed the value of "pound" at various dates and submitted that awards made in 1973 should, according to the table, be multiplied by 3.84 to arrive at the correct conversation for an award in 1985. I am mindful of all the submissions made by both the learned advocates. I have also studied all the relevant cases in the bundle of authorities that was handed in for my consideration.

In Hall v Lord Halsbury the pre-accident condition of the plaintiff's back was in some degree comparable to that o the plaintiff in this case. In the cited case because of a previous injury to the back this part of Miss Hall's body was more liable to give trouble than if she had not sustained that injury. The pain and suffering experienced by Mrs Hall to my mind appears to have been greater than that experienced by the plaintiff in this case. But Mrs Hall who was about the same age as the plaintiff herein, had undergone surgery with the result that the post-surgery residual pain and symptoms were comparable to those of the plaintiff in this case who, however, is suffering the additional weakness in and thinning of the left hand. On the other hand Mrs Hall was physically more active than the plaintiff herein both in connection with her work and recreational activities and her loss in that respect would be felt with somewhat greater poignance. The damages awarded to Mrs Hall for pain, suffering and loss of amenities amounted to 15,000 pound in 1973.

In Hartry's case the injuries were more serious and the permanent incapacity was also greater and of physically more restrictive nature. However, the plaintiff therein was 50 years old as compared to the age of 37 years of the plaintiff herein at the time of the accident. The Court of Appeal upheld an award of general damages of 10,000 pounds for pain, suffering and loss of amenities in 1972. Harry also had undergo surgery to fix and stabilize a crushed section of the spine.

In this case I have already stated the plaintiff has refused to undergo surgery. The medical board which had recommended the plaintiff's retirement from service on medical grounds had also recommended in strong terms for the plaintiff to undergo an operation to stabilize her thoracic and cervical spine. In their opinion and assessment – para III of their confidential report (Exh 1) prepared by them, the two surgeons Mr Patel and Mr Stuart have made a mention of surgery subject to prior investigations regarding the probability of the existence of some other neurological problem.

The plaintiff said in her evidence that when Dr Beecher recommended surgery he had told her that this would involve fusion of the bones in the affected area with the help of a piece of bone removed from the hip joint. The plaintiff said she got frightened and refused surgery and gave the following reasons:

1. She was told that there was no guarantee that the pain in the neck would disappear.

2. Dr Beecher had told her that a pain might also start in the hip which would cause difficulty in walking

Dr Sheikh whom she had next consulted also confirmed that there was no guarantee that the pain in the next would disappear with surgery.

In cross-examination she said that Mr Stuart also had asked her to undergo surgery but he would not guarantee the cure. When referred to the recommendation made in the Medical Board's report she said that she had thought that she might go overseas for an operation but it all depended on whether there was some guarantee and further she could not have afforded the expense. Unless there was a guarantee for a complete disappearance of pain an operation might add to her problems.

Mr Noad wondered whether the plaintiff had made a reasonable choice in not undergoing surgery when there was a pre ordinance of medical opinion that surgery ought to be tried. He strongly urged that to be kept in mind. I have carefully considered all the aspects of this question. Leaving aside the question of lack of finance to enable surgery to be undergone overseas, which it is not disputed would be or have been an expensive exercise, the plaintiff's fears were that there was not only no guarantee that the pain in the neck would disappear but there was also a probability that the hip joint might develop a pain on removal of a bone from there to enable fusion of the bones in the affected area. Instead of getting better she might be left in worse and more painful condition. And that is why she has not opted for surgery. Would she be able to stand or cope with her condition if it got worse after the surgery. To my mind she had justifiable reasons for the choice she has made.

Mr Noad had thought 8,000 to 10,000 pounds as adequate compensation for such an injury under this head. Mr Gitau thought that 25,000 ponds would be about adequate. Being mindful of all the relevant aspects and keeping in mind the table showing the value of "pond" at various dates which was handed in I feel that a sum of Kshs 350,000 will be a fair and just compensation for pain, suffering and loss of amenities.

The general damages as assessed hereinbefore amount to a total sum of Kshs 847,520 made up of Kshs 150,000 by way of medical expenses and additional maid's expenses, Kshs 347,520 by way of loss of income and Kshs 350,000 by ay of pain, suffering and loss of amenities. It was agreed at the commencement of the hearing that the assessment of general damages will be halved in view of the medical opinion that the injury caused by the accident had a contributory effect on 50% only.

Special damages had been agreed at Kshs 5,847.90 cents.

Damages are therefore assessed at Kshs 5,847.90 cents as special damages and Kshs 453,760 as general damages. Judgment is entered for the plaintiff for Kshs 429,607.90 cents by way of special and general damages plus costs and interests at court rates on general damages from to-day and on special damages from the date of filing of suit.

Dated and delivered at Nairobi this 14th day of May , 1989

A M COCKAR

JUDGE