



**KWW (Minor Suing Through His Mother and Next Friend BNW) v Shajanand Holdings Limited & another (Civil Case 1 of 2023) [2024] KEHC 9199 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL CASE 1 OF 2023**

**DK KEMEL, J**

**JULY 26, 2024**

**BETWEEN**

**KWW (MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND BNW) ..... PLAINTIFF**

**AND**

**SHAJANAND HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MAVONGA MANGALI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The principal claim in the Amended Plaint dated 23<sup>rd</sup> October 2023, and filed in Court on 15<sup>th</sup> August 2023, arises out of an accident which occurred on or about 28<sup>th</sup> November 2021, when the Plaintiff was a lawful pedestrian along Lwanda-Ekitale road near or thereabout Lwanda Primary School area when the 1<sup>st</sup> Defendant’s driver or agent so negligently drove, managed and or controlled motor vehicle registration number KTCA 033C which was hauling trailer Reg. No. ZD 2554 to violently knock the Plaintiff thereby causing him to sustain severe injuries. The Plaintiff in this case seeks for special damages of Kshs. 31, 590/=; general damages; future medical expenses of USD 690,000/= and costs of the suit as well as interests.
2. The Plaintiff pleaded the particulars of negligence of the 1<sup>st</sup> Defendant as follows:
  - a. Employing a careless driver.
  - b. Allowing unqualified person to drive.
  - c. Failure to regularly service the said motor vehicle.
  - d. Failure to take effective control of the motor vehicle as its owner.
  - e. Failure to train its driver on the highway traffic rules.



- f. Allowing a defective motor vehicle to be driven on a public highway.
- On the part of the 2<sup>nd</sup> Defendant the following particulars of negligence were pleaded:
- a. Over speeding.
  - b. Careless driving.
  - c. Knocking the Plaintiff from behind.
  - d. Driving in a zigzag manner.
  - e. Driving without due regard to other road users especially the Plaintiff.
  - f. Driving in a blatant disregard to the highway traffic rules.
  - g. Failure to stop, brake, swerve or in any other way avoid the accident.
  - h. Failure to hoot or in any other way warn the Plaintiff or rider of the impending danger.
  - i. Driving a defective motor vehicle on a public highway.
  - j. Failure to pay attention while driving.
  - k. Driving while under the influence of alcohol
  - l. Driving while not qualified to do so.
  - m. Causing the accident.
3. As a result, the Plaintiff pleaded that he suffered amputation of his right hand and distal forearm with a permanent disability of 75%.
4. The Plaintiff also pleaded that as a result of the injuries, he will require intensive physical and psychological rehabilitation and requirement of a forearm/hand prothesis. He further pleaded that he will require training to write, eat and do all his chore using his left hand.
5. The Defendants filed a Statement of Defence dated 4<sup>th</sup> August 2022 and filed on even date which, in essence, is a total denial. In the first place, the Defendants deny that there was a road traffic accident as alleged in the Plaint or at all. In the second place, the Defendants averred that if any accident or injuries were allegedly obtained were as a result of the Plaintiff's own negligence.
6. The Defendants particularized what they claimed as the negligence of the Plaintiff as follows:
- a. Failing to give way to the vehicle.
  - b. Disregarding the warning by the vehicle.
  - c. Walking in the wrong lane of the road
  - d. Failure to adhere to the set safety rules and precautions while walking on the road.
  - e. Failure to adhere to the hooting of the said motor vehicle. Failing to adhere to the Traffic Rules and Highway code.
  - f. Being absent minded on the road.
7. The Plaintiff filed his list of witnesses and written statements pursuant to Order 3 Rule 2 of the [Civil Procedure Rules](#). Additionally, the Plaintiff filed copies of his documents which included the following:



- a. Medical receipts from Bungoma County Referral Hospital.
  - b. Out-patient card from Bungoma County Referral Hospital.
  - c. Discharge summary from Bungoma County Referral Hospital.
  - d. Medical report by Dr. Mulianga Ekesa.
  - e. Receipt for the Medical Report.
  - f. Police Abstract.
  - g. P3 form.
  - h. NTSA invoice.
  - i. Copy of records for Motor Vehicle Reg. No. KCTA 033C-ZD2554
  - j. Certificate of Insurance for Motor Vehicle Reg. No. KCTA 033C-ZD2554.
  - k. Plaintiff's birth certificate entry number 0021845839.
  - l. Letter dated 28<sup>th</sup> November 2021 from Friend's School Secondary, Lwanda Boys.
  - m. Demand Notice.
8. The Defendants complied with pre-trial directions by filing their list of witnesses and their written statements. Additionally, the Defendants filed copies of their documents which included the following:
- a. Copy of insured driver's ID.
  - b. Copy of insured driver's driving licence.
  - c. Amended medical report by Dr. Oketch dated 1th June 2023.
9. On 23<sup>rd</sup> November 2023, the parties by consent settled the contentious issue on liability with the same being apportioned at 15% for the Plaintiff and 85% for the Defendants. This Court proceeded to set the matter down for hearing on assessment of quantum of damages.
10. It was the evidence of PW1 (KWW) that he is a student at Friends Secondary School Lwanda Boys High School. This Court proceeded to adopt his recorded witness statement dated 4<sup>th</sup> August 2023 and his documents (exhibits 1-29) as his evidence in chief. He testified that he is a right-handed person but due to the accident he has been forced to use his left hand. According to him, his right hand was gravely affected after the accident that occurred on 28<sup>th</sup> November 2021, leading to its amputation. He told the Court that he is expected to purchase a prosthesis but his parents lack the financial capability. On cross-examination, he told the Court that he is a form two student at Lwanda Boys High School and that he is an average performer. He testified that it his dream to be a doctor but the accident has impeded his dream. He told the Court that due to lack of finances he has not been able to purchase a prosthesis. On re-examination, he told the Court that he lacks money for the artificial arm and that has caused his performance in school to plummet and that he still aspires to be a doctor but requires the money for the prosthesis.
11. PW2 was Dr. Mulianga Ekesa who testified that he is a consultant surgeon based in Bungoma. According to him, he examined the Plaintiff herein aged 16 years old on 6<sup>th</sup> December 2021, who had been involved in a road traffic accident on 28<sup>th</sup> November 2021. He testified that the Plaintiff sustained



severe injuries on his right forearm. He told the Court that the Plaintiff was treated at Bungoma County Referral hospital where he got pain killers, antibiotics and an operation to refashion the injured right arm into a stump. According to him, the Plaintiff had the following complaints:

- a. Loss of right forearm, hand and fingers.
- b. Pains at the amputee stump.
- c. Loss of valuable scrotal time.
- d. Learning to write using the left hand.

He testified that his main findings were on the right arm that had been amputated and he formed the opinion as follows:

- a. Patient suffered soft tissue injuries.
- b. Crush injury of the right distal forearm.
- c. Psychological trauma.

12. He testified that the Plaintiff's complaints were accident related. The loss of the right arm and fingers is permanent. He noted that the amputation has interfered with the Plaintiff's future severally as he is excluded from pursuing certain careers e.g. disciplined forces, medical courses e.g. nursing, radiology etc. He testified that he assessed the injury as permanent disability at 75% due to the loss of right arm. He elaborated that the elbow at 65% and the loss of life long estimate and psychological path at 10%. He told the Court that the Plaintiff will need intensive rehabilitation both psychologically and physically and that he will need to undergo various rehabilitation procedures especially on the left arm to assist him. Further, the Plaintiff needs an artificial arm which is fairly costly and that the Plaintiff's injuries were grievous and that they require a lot of expenses. He produced in Court the Plaintiff's medical report dated 6<sup>th</sup> December 2021 as PEXH5. On cross-examination, he told the Court that he saw the Plaintiff as soon as he was discharged from hospital and that he did not have an opportunity to review the Plaintiff's injuries. He told the Court that the degree of recovery is a variable factor and that the Plaintiff is still psychologically devastated. He told the Court that the Plaintiff experienced a total loss of his arm from elbow to fingers and that the same attracts 65% disability while the 10% is contracted by psychological trauma. He told the Court that the process of psychological rehabilitation should have started immediately as the bigger problem is not physical but psychological. He told the Court that prosthesis have different values (costs) but he did not mention the countries of origin. He testified that the issue of the prosthesis will depend on the test and ability and functionality. On re-examination, he told the Court that functionality is crucial when choosing the prosthesis since the Plaintiff is still a young man.

13. At the defence hearing, DW1, DR. Okech Protus Were, testified that he is a medical practitioner and that he examined the Plaintiff herein on 7<sup>th</sup> September 2022. He proceeded to produce in Court the medical report dated 14<sup>th</sup> June 2023, as DExh.1. On cross-examination, he testified that he saw the Plaintiff on 7<sup>th</sup> September 2022, and that he prepared two reports for the Plaintiff namely on 7<sup>th</sup> September 2022 and 14<sup>th</sup> June 23 because he was requested to come up with another report as the previous one was not comprehensive. He testified that he had seen the report by Dr. Mulianga Ekesa and that the Plaintiff is a student. According to him, the patient sustained a crush injury to the right hand and that he observed that the hand was missing. According to him, he did not establish if the Plaintiff was left-handed or right handed and that the loss of the hand was both physical and psychological. He stated that he was only able to determine the physical aspects but not on the psychological one. He concurred that the Plaintiff will need to be examined by a psychologist and that



he was not able to cover psychological aspect in his report. He accepted that there might have been an error on his report and that he proposes the procurement of a prosthesis. He told the Court that there are various places where a prosthesis can be procured and that he proposed three types prosthesis. He testified that prosthesis can enable the Plaintiff perform several tasks and that he would recommend the functional prosthesis via micro electric prosthesis which goes for around Kshs.6.5 million in the markets. He told the Court that the Plaintiff will have difficulty in handling several tasks with the missing hand, and he formed the opinion that permanent incapacity was 60% on the physical. He acknowledged that his report is incomplete as it did not capture the psychological effects. He told the Court that he physically examined the Plaintiff the year of the accident but he did not treat him and that he did not find any others illnesses. He testified that he did not indicate the source of the types and values of the prosthesis and that prosthesis have to be changed as the patient continues to grow and which entails extra costs. He testified that functional prosthesis are currently sourced outside the county and that the Plaintiff still needs to be attended to by psychologists from time to time. On re-examination, he testified that he is not in a position to quantify the damages suffered upon the Plaintiff psychologically and that he is not in a position to state the costs to be incurred in psychology examination and treatment. He testified that he consulted his colleagues who gave him the references on the issue of prosthesis.

14. Parties filed and exchanged their written submissions. The Plaintiff's submissions are dated 4<sup>th</sup> April, 2024 while those of the Defendants are dated 16<sup>th</sup> April, 2024. The said submissions dwelt on the proposed quantum of damages that the Plaintiff should be awarded.
15. Mr Bwonchiri for the plaintiff submitted on all the heads of damages namely general damages, loss of future earning capacity, future medical expenses and special damages. As regards the award of general damages, counsel proposed a sum of Kshs 5,000,000/-. As regards damages on loss of future earning capacity, it was submitted that the amputation of the right arm has curtailed the Plaintiff's future earning capacity and productivity as he is automatically excluded from some careers like disciplined forces, medical courses such as nursing, laboratory, physiotherapy and thus a sum of Kshs 15,000,000 was proposed. As regards future medical expenses, it was submitted that the Plaintiff sustained 75% permanent disability and hence he will require intensive rehabilitation both physically and psychologically and the acquisition of forearm/hand prosthesis. The sum of USD 115, 000 being the cost of prosthesis which has to be changed five times before the Plaintiff reaches the age of 60 years which works out to a sum of USD 690,000 and that if the same is converted into Kenya shillings at the rate of Kshs 130 which comes to Kshs 89, 700, 000/-. Finally, on special damages, the sum of Kshs 31, 590/ was proposed.
16. M/s Menezes and Masinde Advocates also submitted on all the heads of damages just like the Plaintiff. As regards the award of general damages, the sum of Kshs 1, 700, 000/ was proposed. As regards loss of future earning capacity, it was submitted that once the myoelectric prosthetic arm is fitted, the Plaintiff will be able to lead a normal life just like those without disability and hence the claim under this head amounts to speculation. It was submitted that as the same have not been proved then the same should not be granted and that should the court be inclined to grant then a modest sum of Kshs 500, 000/ would be reasonable. As regards the claim for future medical expenses, it was submitted that the Plaintiff did not avail quotations/estimates. Pro forma invoices or any other document sourced from suppliers or manufacturers of prosthesis arms. Finally, as regards special damages, it was submitted that the sums can be awarded if supported by rfeceipts.
17. I have given due consideration to the pleadings herein and the testimonies of the respective witnesses as well as the rival submissions. I find the only issue for consideration is on the quantum of damages to be awarded as the issue of liability was duly settled.



18. In regard to special damages, the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
19. Jurisprudence is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary to this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR.
20. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice. In this case, the Plaintiff presented the following documents in his claim for specific damages:
- a. Bungoma County Referral Hospital Receipts for Kshs. 27,490/=.
  - b. Medical Report by Dr. Ekesa receipt for Kshs. 3,000/=
  - c. NTSA Invoice-008436335 issued on 1<sup>st</sup> December 2021 for Kshs. 550/=
21. I have carefully perused these documents. As is readily obvious, one of them is a pro forma invoice and not a receipt as is required. I am therefore unable to award the amount represented by that invoice as special damages. The receipts presented only amount to Kshs. 30, 490/= This is the only amount proved by evidence and it is the only amount i will award.
22. As regards future medical expense, the Plaintiff has specifically claimed USD. 690,000. He presented a report by Dr. Mulianga Ekesa which demonstrates both the need for the treatment – purchase of a forearm/hand prosthesis and psychological rehabilitation. The doctor quoted the figures for the forearm/hand prosthesis as USD 5000 to USD 10,000 for the functional prosthesis and USD 20,000 to USD 100,000 for myoelectric arm. The defence submitted their own medical report by Dr. Oketch who quoted the figures for the forearm/hand semi-functional prosthesis as ranging between Kshs. 200,000/= to Kshs. 600,000/= and functional (myogenic) prosthesis as ranging from Kshs. 600,000/= and above. It is elaborate from the evidence of both expert witnesses that the Plaintiff requires a functional prosthesis which will require to be changed as the Plaintiff grows and that both medical experts concurred that the Plaintiff will require intensive psychological and physical rehabilitation. The Defendant’s doctor Okech (DW1) did indicate in his testimony that functional prosthesis which costs around Kshs 600,000/ is appropriate for the Plaintiff. Learned counsel for the Plaintiff submits that the said prosthesis will have to be replaced after every ten years and that since the Plaintiff was aged 16 years then it will be about five times. Counsel for the Plaintiff has proposed a total of Kshs 89, 700, 000/ whereas counsel for the Defendant submitted that the sums are outrageous since no document has been availed to support the outrageous amounts and further that the Plaintiff is already above 18 years



and unlikely to require replacement of the prosthesis. Learned counsel for the Defendant has proposed a modest sum of Kshs 500, 000/-. From the two medical reports and the evidence of the doctors, it is clear that indeed the Plaintiff requires the functional prosthesis and which, in my view, will require replacement about five times before the Plaintiff hits the age of 60 years old. I am persuaded by the Defendant's doctor that the functional prosthesis is suitable and which costs Kshs 600,000 and that the same will be required five times thus bringing the sums to Kshs 3,000,000. Due to the effects of inflation on the Kenyan shilling, I find an award of Kshs 4,000,000/- would be adequate for the purchase and replacement of the functional prosthesis.

23. On general damages, the Plaintiff was not specific on what amount would be adequate to compensate him for the pain, suffering and loss of amenities that he suffered as a result of the accident. It is noted that the parties do not disagree on the injuries – but they sharply disagree on the permanent disability percentage. It was the evidence of Dr. Ekesa that the permanent disability of the Plaintiff is at 75% with 65% for loss of right forearm and 10% for the life long estimate and psychological treatment. Dr. Oketch on the other hand estimated the permanent disability at 60 % and in his evidence concurred that he had failed to factor in the life-long estimate and psychological treatment in his report. Hence, it is safe to take the view that the Plaintiff suffered 75% permanent disability.
24. In my view, and taking into consideration the nature of the injuries in this case and the global impact on quality of life it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering, loss of future earnings and loss of amenities is take into consideration both the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages (see, for example, *Bhagal v Burnbridge and Another* [1957] EA 285). Based on the available literature, I find that the forearm prosthesis pricing is all dependant on the sizes required and it is clear that the same will be changed each time the Plaintiff changes in size. This simply means that the prices as quoted by the medical experts was with regard to the forearm prosthesis as per this moment and that both of them failed to factor in the aspect that the Plaintiff will require to have the same changed to tally with his growth levels. Also, it is imperative to note that the Plaintiff herein will require intensive psychological and physiotherapy rehabilitation. Learned counsel for the Plaintiff has proposed the sum of Kshs 5 million as general damages while counsel for the Defendant has proposed the sum of Kshs 1, 700, 000/= as general damages. Several cases were cited by counsel for the Defendant in this regard namely *Jm (A minor suing through the father and the next friend CMK v Gitboya Transporters (K) Ltd* [2022] EKLK where a sum of Kshs 1,500,000/= was awarded as general damages to a minor victim who suffered traumatic amputation of the right arm below the elbow. Also in the case of *Joseph Wangethe v EW* [2019] eKLR a similar award was made for a victim who suffered amputation of the right hand at elbow joint and permanent disability at 70%. Similarly, in *John Nkuja Mbatia v Esther Muthoni Mburu* [2017] eKLR a similar amount was awarded for traumatic amputation of right upper limb. As stated, I have taken into consideration that the Plaintiff's quality of life has been vastly affected and that he has a permanent disability at 75% with the amputation of his right forearm. Also, I have considered that he will suffer more pain as he undergoes the future intensive rehabilitation both physically and psychologically which have been recommended by his doctors. However, the sum proposed by the counsel for the plaintiff is grossly exaggerated. This court is guided by the circumstances of the case as well as the comparable awards. I find in the circumstances an award of Kshs 2,000,000/= would be adequate as general damages for pain, suffering and loss of amenities.
25. As regards the claim for future earning capacity, learned counsel for the Plaintiff proposed a sum of Kshs 15,000, 000/- and submitted that the educational and career progress of the Plaintiff was curtailed due to the amputation of the arm. It was submitted that the Plaintiff had dreamed of becoming a nurse and which has now been thwarted. On the other hand, counsel for the Defendant submitted



that the school report card indicated the Plaintiff as a below average student with a mean grade of D and hence the claim that he would have qualified as a clinical officer /nurse is mere speculation and conjecture. It is not in dispute that the Plaintiff was still in school and that it will take time before it can be established what he would become in future and that the Plaintiff should not confuse a claim for loss of earning from loss of future earning. As the Plaintiff was not employed at the time of the accident then he cannot claim for loss of earning. The Plaintiff was expected to avail evidence of real loss but this was not done. I find that the Plaintiff's loss in earning capacity could as well be taken together as part of general damages. One cannot tell what the Plaintiff could have become had the accident not occurred. However, what is not in doubt is that the Plaintiff's chances of securing a good job has been diminished by the accident. As the plaintiff has not specifically pleaded the specific sums in this regard, I am of the view that a one off global sum just like that awarded to minor victims of accidents would be appropriate in the circumstances. The Defence counsel has proposed a sum of Kshs 500,000. However, I find the sum to be rather low and proceed to award the sum of Kshs 1,000,000/ to cater for loss of future earning capacity.

26. In the result, I find that the plaintiff has proved his case on balance of probabilities. Consequently, judgement is hereby entered for the plaintiff against the Defendants jointly and severally as follows:

- A. General damages.....Kshs 2,000,000
- B. Future medical expenses.... Kshs 4,000,000/
- C. Loss of earning capacity.....Kshs 1,000,000/
- D. Special damages..... Kshs 30,490/  
Sub-total..... Kshs 7,030, 490/  
Less 15% contribution.....Kshs 1,054,573/50  
Grand Total..... Kshs 5, 975,916/50
- E. The Plaintiff is awarded the costs of the suit plus interest. The interest on the special damages shall be from the date of filing suit while interest on the general damages shall be from the date of this judgement.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF JULY 2024.**

**D.Kemei**

**Judge**

In the presence of:

Wamalwa R for Bw Onchiri for Plaintiff

Micheso/Mutungu for Defendants

Kizito Court Assistants

