**Kitema alias Jshua Mutinda v Mugi & 3 others (Civil Suit 362 of 2009)**
**[2023] KEHC 1507 (KLR) (Civ) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1507 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 362 OF 2009**

**CW MEOLI, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**JOSHUA MUTINDA KITEMA ALIAS JOSHUA MUTINDA ..... PLAINTIFF**

**AND**

**JULIUS MBOGO MUGI ..... 1ST DEFENDANT**

**KARIMI CHARLES KAMANDA ..... 2ND DEFENDANT**

**MOSES KHAEMBA ..... 3RD DEFENDANT**

**RICHARD MUTURA BARIU ..... 4TH DEFENDANT**

## JUDGMENT

1. Joshua Mutinda Kitema *alias* Joshua Mutinda, (hereafter the plaintiff) sued Julius Mbogo Mugi, Karimi Charles Kamanda, Moses Khaemba and Richard Mutura Bariu (hereafter the 1st, 2nd, 3rd & 4th defendant(s) respectively seeking damages in respect of injuries he sustained in a road traffic accident that occurred on July 30, 2006 along Thika-Garissa road.

2. He averred that the 1st and 2nd defendants were at all material times the owners of motor vehicle registration number KAQ 697C driven by the 1st defendant or his driver, servant or agent of the 1st and 2nd defendants in the course of employment by and with the authority of the 1st and 2nd defendant. That the 3rd and 4th defendants were at all material times the owners of motor vehicle registration number KAR 061Q being driven by the 3rd defendant or the driver, servant of agent of the 3rd and 4th defendant in the course of employment by the with the authority of the 3rd and 4th defendant.

3. It was averred that on the date of the accident, the plaintiff was a lawful passenger in motor vehicle registration number KAQ 697C. And that the 1st and 3rd defendants or the respective drivers, servants and or agents of the defendants so negligently drove and or managed motor vehicles registration

number KAQ 697C and KAR 061Q within Gatuanyaga area that the two collided as a result of which the plaintiff sustained severe injuries, loss and damage.

4. On July 22, 2009 the 1st and 2nd defendant filed a statement of defence denying the key averments in the plaint and liability and pleaded that the accident was solely caused and or contributed to by the negligence of the plaintiff and or that of the 3rd and 4th defendant and or agents.

5. The 3rd and 4th defendant on their part filed a statement of defence on September 22, 2009 equally denying the key averments in the plaint and liability. They too averred that the accident was wholly or substantially contributed to by the negligence of the 1st defendant or of the driver, servant and agent of the 1st and 2nd defendant.

6. Liability having been determined in a test suit appointed in respect of other related causes, this suit proceeded to hearing for purposes of assessment of damages. During the trial the plaintiff testified as PW1. He identified himself as an officer in the Kenya Defence Forces (KDF). He adopted his witness statement dated December 11, 2014 as his evidence in chief and produced into evidence the bundle of documents attached to the list of documents filed on February 23, 2018 as PExh1-11.

7. It was his evidence during cross-examination that he was treated at Thika and Forces Memorial Hospitals for skeletal and soft tissue injuries as well as contused lungs. That he underwent hip replacement surgery and currently walks with the aid of a walking and is no longer on active field duty but engaged in light duties. He admitted failure to tender evidence relating to his contract of employment or ongoing treatment. He further reiterated that the consequence of his injuries is a shortened left leg requiring physiotherapy for recurrent pain. In re-examination he reiterated his employment with the KDF as evidenced by his employment card and medical report dated May 11, 2009 from Forces Memorial Hospital.

8. On the part of the 1st and 2nd defendant the medical report dated June 18, 2016 by Dr Leah Wainaina was produced by consent as DExh1. The 3rd and 4th defendant on their part did not participate the hearing of the suit. Upon the close the respective parties' cases, submissions were filed.

9. Counsel for the plaintiff reiterated his evidence which he asserted to be uncontroverted. Concerning the award under general damages counsel called to aid the decisions in *Duncan Mwangi Kioria v Valley Bakery Limited & 2 others* [2016] eKLR and *Peter Mwaura Ng'ang'a v Lucy W Kimani* [2019] eKLR to submit that taking into account inflation, an award of Kshs 2,500,000/- was sufficient, in view of the plaintiff's injuries. On future medical expenses counsel relied on the decision in *Duncan Mwangi Kioria* (supra) to urge an award of Kshs 350,000/-.

10. Regarding damages for lost income earning capacity counsel anchored his submission on the decisions in *SJ v Francesco Di Nello & another* [2015] eKLR and *John Kuria Mbure v Magare Hire Purchase Ltd & 2 others* [2019] eKLR to contend that as a result of the injuries the plaintiff has been confined to light duties diminishing his eligibility for promotion greater responsibilities at his current post of employment. Pointing out that the plaintiff was 40 years old at the time of the accident, counsel urged that an award of Kshs 3,500,000/- was justified. Counsel relied on the decision in *Peter Mwaura Mugere v Gladys Muchiri* [2021] eKLR in that regard.

11. Finally, on special damages, counsel cited case of *WMT & another (Suing in their own capacity and as Administrators of the Estate of) ETM v Sarova Hotels Limited t/a Sarova Whitesands Beach Resort & Spa* [2021] eKLR to submit that the plaintiff incurred transportation costs in attending treatment and that the same did not require to be specifically proved and the court could award reasonable transport expenses. Consequently the court was urged to allow total damages amounting Kshs 6,606,100/- as prayed and submitted.

12. The 1st and 2nd defendant's counsel relied on the decisions in *Loise Njoki Kariuki v Bendricon Wamboka Waswa & another* [2013] eKLR and *Thomas Muendo Kimilu v Anne Maina & 2 others* [2008] eKLR to submit that an award of Kshs 1,000,000/- as general damages would be adequate compensation for the injuries sustained by the plaintiff. Concerning the award on lost income earning capacity they cited the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR to assert that not having been pleaded, such damages could not be awarded.

13. On future medical expenses, it was submitted that the plaintiff failed to substantiate the claim during trial. In submitting on the award of special damages counsel relied on section 10 and section 3(b) of the of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405 and asserted that the plaintiff is not entitled to the same. At the risk of repetition, the 3rd and 4th defendants failed to file submissions on the matter.

14. The court has considered the pleadings, evidence as well as the submissions filed by the respective parties. As earlier stated in this judgment, the question of liability was settled. Mwongo J on September 18, 2017 adopted the consent of the parties of the finding on liability in Nairobi Milimani HCCC 86 of 2008 earlier selected as a test suit. In the said test suit, the court found and entered judgment on liability as between the 1st & 2nd defendant on one hand, and the 3rd & 4th defendant on the other, in the ratio of 20:80, respectively. See PExh10 (order in test suit Nairobi Milimani HCCC No 86 of 2008) and PExh11 (judgment in Nairobi Milimani HCCC No 86 of 2008).

15. The sole question for determination relates to awardable damages. In that regard, the plaintiff's pleadings are pertinent. The Court of Appeal in *Wareham t/a A.F Wareham & 2 others Kenya Post Office Savings Bank* [2004] 2 KLR 91, stated that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or court on the basis of those pleadings pursuant to the provisions of order xiv of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

16. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, cap 80 Laws of Kenya provides as follows:
>
> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.

However, section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited* civil appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence."

17. The plaintiff by his plaint averred at paragraph 9, 10 and 11 that:-

" 9. As a consequence of the aforestated the plaintiff was severely injured thereby suffering great pain, loss and damage.

Particulars of injuries of plaintiff

(a) Fracture —dislocation of left hip joint with ipsilateral acetabulum disruption,

(b) Shortening of left limp and post traumatic osteoarthritis,

(c) Dislocation on left shoulder joint,

(d) Multiple fractures on right 5 ribs,

(e) Hermothorax and lung contusion on right side,

(f) Non-displaced transverse fracture on neck of left humerous,

(g) Fracture of right scapula,

(h) Sublaxation left sterno-clavicular joint,

(i) Cut wound and tears on left leg,

(j) Pain, blood loss and soft tissue injuries.

.....

10. The plaintiff avers that he is still receiving medical treatment as he has not healed from the injuries sustained and still has implants insitu which will require removal, has a shortened left hip and left leg and walks with a limp. The plaintiff requires corrective surgery to cost an estimated Kshs 80,000/- and the plaintiff claims the same together with all further costs that he will have incurred on medical treatment and transport on attending hospital by the time this suit is heard and determined.

11. Further the plaintiff states that the severe injuries he sustained have occasioned upon him permanent functional disability at 25% and as such he is unable

to discharge his duties as an officer in the armed forces and that has greatly prejudiced his chances of advancement in his career and has therefore suffered loss and he claims damages for lost capacity." (sic)

18. The plaintiff produced a discharge summary dated February 11, 2014 as pexh5 and two medical reports, one dated May 11, 2009 by Lt Col (Dr) J.B Mwika and the other dated June 15, 2009 by Dr P.S Kihia-Kiama Wangai as PExh.6 respectively. The former of the two medical reports is the earliest record of the plaintiff's injuries besides the P3 form dated June 5, 2009 and produced as PExh.4.

19. Dr Mwika's report (part of P Exh 6) captures the plaintiff's injuries to include left hip joint fracture dislocation with ipsilateral acetabulum disruption, left shoulder joint dislocation, multiple rib fractures, right hemithorax, right sided lung contusion, non-displaced traverse fracture to neck of right humerus, fracture of right scapula and subluxation of left steno-clavicular joint. It was his prognosis that "the left hip fracture-dislocation healed with complications mainly shortening of the limb and post-traumatic osteoarthritis. The implants are still *in situ*. Eventually he will require left joint arthroplasty".

20. The later medical report by Dr Wangai (part of P Exh6) captured the gist of the plaintiff's injuries as described in the report by Lt Col (Dr) Mwika. Dr Wangai's prognosis was *inter alia* that:

> "Kitema suffered grievous harm...He has significantly recovered from the injuries. He requires further surgery to remove the metal implants estimated cost is Kshs 80,000. He is at risk of developing chronic back pains due to differential weight distribution and secondary osteoarthritis of the left hip joint. Permanent functional disability is assessed at 25 %".

21. The 1st & 2nd defendants' medical report was by Dr Leah Wainaina and is dated June 18, 2016 (DExh1). This was the most recent report having been prepared more the ten years since the plaintiff sustained his injuries. Whereas D Exh1 confirmed the injuries identified in the plaintiff's medical reports, it also records the finding that for the fracture of the left acetabulum, the x-ray revealed a total hip replacement prosthesis of the left hip joint being in situ. According to Dr Wainaina, the plaintiff's hip injury resulted in a 15% permanent partial disability due to total hip replacement and that having undergone hip replacement , he requires no future treatment as the total hip replacement prosthesis does not require removal.

22. Thus, the medical reports agree on the nature of injuries sustained by the plaintiff, save for the prognosis. Which is probably in part due to the duration between the examinations and related surgical intervention. It is not in doubt based on these reports that the plaintiff's injuries were primarily skeletal fractures and dislocations . He also sustained soft tissue injuries. The court is satisfied that plaintiff's evidence established the pleaded injuries on a balance of probabilities. The most significant injuries were the multiple fractures and subsequent hip replacement. These injuries are severe.

23. Although it is eminently desirable that like injuries ought to attract similar levels of awards in damages, it is impossible to find two case in respect of injuries that match completely, and the court must use the most relevant authorities and apply its mind appropriately to arrive at a just award. In that regard, the exhortation in the English case of *Lim Poh Choo v Health Authority* [1978]1 ALL ER 332 was echoed by Potter JA in *Tayab v Kinany* [1983] KLR14, quoting Lord Morris Borth-y-Gest in *West (H) v Sheperd* [1964] AC 326, at page 345 as follows:-

> "But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of

approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional." (emphasis added).

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd*. [2013] eKLR.

24. In the court's opinion, none of the authorities cited by the parties were on all fours with the instant case. However, as indicated earlier, this court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and a court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities.

25. Although the injuries sustained by the plaintiff constitute relatively severe injuries that had serious consequences, including a shortened limb, inability to walk without the aid of a walking stick, and to carry out field tasks as a soldier. Not to mention extended periods of suffering and treatment, including surgery. That said, the plaintiff's proposal of Kshs 2,500,000/-, if accepted, would result in an estimate that is too high, especially since the injuries were sustained in 2006. On the other hand, the 1st and 2nd defendant's offer of Kshs 1,000,000/- appears too low. There seems to be a dearth of appropriate authorities specific to the plaintiff's injuries to aid in the assessment of general damages but doing my best on the facts of this case snd considering the inflation trends over the years, I am satisfied that an award of Kshs 2,000,000/= (two million) would be adequate as general damages for pain, suffering and loss of amenities.

26. Concerning future medical expenses, the medical report by Dr Wangai anticipated that the plaintiff would require further surgery to remove the metal implants at an estimated cost of Kshs 80,000/-. However, according to the plaintiff's clinical summary marked PExh5 total hip replacement surgery was done in 2014 , long after this suit was filed. This was also confirmed at the time of the plaintiff's examination on June 18, 2016 by Dr Wainaina .The surgery though necessary seems to have been performed at defence forces memorial hospital at the expense of the Kenya Defence Forces and the plaintiff did not prove any expenditure to the tune of Kshs 80,000/- on that account. Hence the claim for the future medical expense of Kshs 80,000/- must fail.

27. On the question of lost earning capacity as pleaded by the plaintiff, the distinction between lost earnings and diminished earning capacity is now settled. The Court of Appeal in *S J v Francesco Di Nello* (supra) while making the distinction stated that: -

> "Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairleyv John Thomson Ltd*[1973] 2 Llyod's Law Reports40 at pg 14 wherein Lord Denning M R said as follows:
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> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

28. The court proceeded to state that: -

> " The correct position as in the *Fairley case* (supra) was restated by this court in the case of *Cecilia Mwangi & another v Ruth W Mwangi* CA No 251 of 1996 as hereunder:
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> "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved."
>
> In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag JA (as he then was) said:
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> "Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

29. The 1st & 2nd defendant counter the claim for lost earning capacity by arguing that the plaintiff failed to plead the claim for lost income earning capacity. Based on the dicta in *Francesco Di Nello* (supra) this is a claim that can be awarded separately or under the head of general damages if the court finds that the plaintiff's earning capacity had diminished owing to injuries sustained. What must be specifically pleaded is a claim for lost income. Thus, the defendants' submission that the claim for lost earning capacity ought to have been pleaded specifically has no merit.

30. The plaintiff, a military officer with the KDF testified that as a result of his injuries and sequela, he is no longer on active field duty and has been confined to performing light duties. This evidently diminished his prospects of promotion *inter alia*, from the age of 40 when he was injured. He relied on the case of *Peter Mwaura Mugere v Gladys Muchiri* [2021] eKLR in urging an award of Kshs 3,500,000/-.

31. In this instance, Dr Wangai's medical report assessed the degree of the plaintiff's permanent disability at 25% whereas the Dr Wainaina assessed partial disability at 15%. Evidently, Dr Wangai's assessment was done prior to the plaintiff undergoing surgery for total hip replacement although both medical reports agree on the injuries sustained. The permanent incapacity average is about 20%.

32. The Court of Appeal in *Mumias Sugar Co Ltd v Francis Wanalo* [2007] eKLR restated the findings in *Butler v Butler* (1984) KLR 225. In that case, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The court stated:

> "The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

33. An award for lost earning capacity may be assessed by way of multiplier method or a global award. In this case, it cannot be disputed that although the plaintiff has retained his job in the KDF, his upward mobility as a soldier, has been adversely affected by the consequences of his injuries. However, the plaintiff did not tender evidence of his pay scale or what his earnings projections could have been had he remained eligible for further promotions and higher responsibilities in his military career. It is therefore difficult to apply a multiplier model here. The plaintiff was in the prime of his life at the time of the accident and has been confined to light duties but on full pay, perhaps for the remainder of his service. Doing my best, I would award a global sum of Kshs 500,000/- (five hundred thousand) as general damages for loss of earning capacity.

34. Special damages pleaded were not contested at the trial and the 1st & 2nd defendant's submissions thereon do not hold water due to inapplicability of section 10 and section 3(b) of the of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405. The Court of Appeal in *David Bagine v Martin Bundi* [1997] eKLR stated: -

> "It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this court in the case of M*ariam Maghema Ali v Jackson M Nyambu t/a sisera store*, civil appeal No 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* [1982-88] IKAR 681 at page 684:
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> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J in *Bonham Carter v Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;
>
> "plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'they have to prove it."

35. Further Chesoni, J (as he then was) in the case of *Ouma v Nairobi City Council* [1976] KLR 304:-

> " Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the english leading case on pleading and proof of damages, *Ratcliffe v Evans* [1892] 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."
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> See also; *Hahn v Singh* [1985] KLR 716

36. The plaintiff specifically pleaded and proved special damages amounting to Kshs 256,100/-. Judgement is therefore entered for the plaintiff against the defendants jointly and severally, subject to the liability ratio in the test suit as adopted herein, as follows:

    a. General damages for pain, suffering, and loss of amenities: Kshs 2,000,000/-.

b. General damages for lost earning capacity: Kshs 500,000/-

c. Special damages: Kshs 256,100/-.

Total _ Kshs 2,756,100/- (two million seven hundred and fifty- six thousand and one hundred)

The plaintiff is awarded the costs of the suit and interest at court rates.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2023**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Plaintiff: Ms. Mwangangi**

**For the 1st & 2nd Defendants: Ms. Mwangi h/b for Mr.Ogode**

**For the 3rd & 4th Defendants: N/A**

**C/A: Carol**