



**ADA v CAD & another (Civil Suit E002 of 2021)
[2023] KEHC 2821 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL SUIT E002 OF 2021
JK SERGON, J
MARCH 30, 2023**

BETWEEN

ADA PLAINTIFF

AND

CAD 1ST DEFENDANT

AAM 2ND DEFENDANT

JUDGMENT

1. On 6th December, 2010 the 1st Defendant in full glare of the public, at Franco Ethiopian Restaurant attacked the Plaintiff based on allegations that the Plaintiff had fathered and/or sired a child with his wife, the 2nd Defendant. The Plaintiff sustained several injuries to wit; stab on the neck, several stabs on the right rib cage, stab on the chin and deep cuts on the left arm. Following the attack at the restaurant, the Plaintiff was rushed to hospital for medical treatment and the police arrested and detained the 1st Defendant and he was charged with grievous harm which was subsequently amended down to assault vide CMCRC no 831 OF 2010. The Plaintiff was therefore seeking compensation under two heads; general damages for having been robbed off the prime and the most productive years of his life as he was only 23 years at the time of the attack and condemning the plaintiff to a life of constant chronic pain and agony and special damages incurred for medical treatment and therapy following the attack.
2. The Plaintiff subsequently filed the instant suit *vide* a plaint dated 5th July, 2021 seeking the following orders;
 - (i) A declaration that deoxyribonucleic acid (DNA) to be conducted on the issue, the Plaintiff and the Defendants herein as well as the child to determine paternity
 - (ii) Compensation both special and general damages
 - (iii) Interest



- (iv) Costs of the suit
3. The court while taking cognizance of the fact that the defendants herein having been duly served with the plaint, verifying affidavit, list of witnesses, list of documents and witness statements failed to enter appearance and /or file a defence within prescribed time frame entered an interlocutory judgment against the defendants as prayed and listed the matter for formal proof.
 4. The matter came up for formal proof on 28th February, 2021 whereby the Plaintiff opted to adopt his witness statement dated 5th July, 2021 as his evidence -in -chief and produced a bundle of the list of documents in support of his case as exhibit 1. The Plaintiff prayed for judgment as prayed in the plaint.
 5. The Plaintiff in his submissions reiterated that he underwent a lot of anguish and emotional turmoil as a result of the allegations that he fathered a child with another man's wife which is contrary to the norms of the Dinka community, the plaintiff stated that his reputation had been ruined in his community and amongst his kinsmen. The plaintiff therefore argued that he had made out a prima facie case warranting the court to grant an order for DNA test and further that it was in the best interest of the minor herein to have the test conducted to ascertain paternity. The plaintiff cited the case of *Bhabani Prasad Jena v Convener Sec Orissa* Civil Appeal no 6222 of 2010.
 6. The Plaintiff submitted that he was entitled to compensation and costs of the suit on account of the fact that he had suffered financially and physically as a consequence of the actions of the Defendants, as a result of the attack by the 1st Defendant he was left paralyzed and the injuries he sustained made him dependant and affected his earning capacity.
 7. I have considered the plaint, verifying affidavit, list of witnesses, list of documents, witness statements and submissions filed herein.
 8. The provision governing interlocutory judgment is found under the provisions of Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules, 2010* which provide as follows: “ (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form no 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
 9. Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form no 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”
 10. The crux of the matter at hand is a protracted dispute on the paternity of a minor borne by the 2nd Defendant herein, this led to the assault on 6th December, 2010, the paternity of the minor herein remains to be a bone of contention as it was never resolved. Supreme Court of India in *Bhabani Prasad Jena v Convener Sec Orissa*, Civil Appeal nos 6222-6223 of 2010, the court, in a case involving a child, while interrogating DNA testing considered whether the test was “eminently needed” to establish the truth and reach a just conclusion in the matter absent any other form of evidence and whether a prima facie case warranting the order had been established. However, some courts have been wary of ordering for compulsory DNA testing, the courts in *S.W.M. v G.M.K.* (2012) eKLR and *D.N.M. v J.K.* (2016) eKLR have held that: “The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights.” In *WKG*



v. JWM & another [2016] eKLR where the court having alluded to Sections 107-9 of the [Evidence Act](#) (Cap 80) was of the view that in paternity cases where both parties were unable to prove paternity or non-paternity, the court could opt for a scientific method for conclusive results. The court seemed to give prominence to a truth finding mission than to the dispute resolution duty of the court in an adversarial system. The case involved two non-consenting adults. Sibling DNA testing was ordered to help establish paternity. In the instant matter I find that the plaintiff has set out a prima facie case warranting an order for DNA testing, in *M.W. v K.C.* (2005) eKLR the court ordered for DNA testing on the basis that it had been established that there was a likelihood that the petitioner was the father of a child.

11. I have considered the medical reports, treatment notes and the evidence adduced. I find that there is no justification for the amount of ksh 50,000,000 proposed by the plaintiff's advocate as general damages and ksh 30,000,000 as special damages. With regards to the prayer for special damages, it is trite law that special damages must be specifically pleaded and proven, in the instant matter, the prayer must fall as the Plaintiff failed to adduce satisfactory evidence namely invoices and the receipts as to the amounts he incurred while undergoing treatment in various facilities listed, in his witness statement he conceded that following the attack, his employers IRC and IOM organized for him to be airlifted for medical treatment and that UNHCR resettled him to the United States of America on medical grounds. The Court of Appeal in [Douglas Kalafa Ombeva v David Ngama](#) [2013] eKLR, observed as follows; "Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically."
12. The Court of Appeal in [S/v Francesco Di Nello & another](#) [2015] eKLR held 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 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."
13. On the distinction between loss of earning capacity and loss of future earnings, in [Butler & Butler](#) 1984 eKLR 225 where it was held as follows; "1. A person's loss of earning capacity occurs where as a result of injury his chances in the future of any work in the labour market or work as well as paid as before the accident are lessened by his injury."
14. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
15. Damages under the head of loss of earning capacity and loss of future earnings which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity are not qualified separately and no interest is recoverable on them.
16. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity or a claim in addition to another as where the claimant was in employment then and/or at the date of the trial.
17. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.



18. The facts to be taken into account in considering damages under the head of loss of earnings capacity will vary with the circumstances of the case, and they include such factors as the age and qualification of the claimant, his remaining length of working life, his disabilities and previous service, if any."

19. I find that in the circumstances of this case the plaintiff has not set out his case on loss of earning capacity, therefore a sum of ksh 2, 000, 000/= would suffice as general damages for pain and suffering and loss of amenities. In the case of *Samwel Mburu N Ng'aari, Sarah Wanjiku N Ng'aari, Grace Waitihira N Ng'aari, Mary Waitihira Mburu & Jeanette Wangui Mburu v Wangiki Wangare & Christopher Kimani Kuruma* [2014] eKLR, the 2nd plaintiff suffered several injuries to wit partial paralysis of the right hand-side of the body with nerve injury, the court taking into account her hospital discharge summary and evidence of follow-up treatment and management after discharge from hospital, awarded her as follows;

"...Doing the best that I can and balancing this against that I will award the 2nd Plaintiff ksh 2.2 million as general damages for pain, suffering and loss of amenities.

The 2nd Plaintiff also claimed loss of earnings for 8 months when she was not able to work. Evidence of her employment and monthly salary of ksh 20,000/00 is on record. Her claim for what she would have earned during the 8 months she was under convalescence and not earning is justified and meritorious. I will therefore award her ksh 160,000/00 for loss of earnings.

The 2nd Plaintiff finally claimed special damages of ksh 2,078,192/55. Only ksh 1,039,445/00 was proved and I will award that sum."

20. I hereby enter Judgment in favour of the plaintiff on the following terms;

- (i) A declaration that a deoxyribonucleic acid (DNA) test be undertaken on the issue, the Plaintiff and the Defendants at the Government Chemist on a date to be agreed with costs to be shared by both parties.
- (ii) The Plaintiff is awarded a sum of ksh 200, 000/= as general damages to be paid by the Defendant.
- (iii) The plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MARCH, 2023.

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J. K. SERGON

JUDGE

In the presence of:

C/Assistant – Chepkoech

Maryanne Kariuki holding brief for Lele for Plaintiffs

No Appearance for the Defendant

