



REPUBLIC OF KENYA



**KENYA LAW**  
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**Auren v Director General of Police & another (Civil Case 274 of 2016)  
[2023] KEHC 2931 (KLR) (Civ) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2931 (KLR)

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

**CIVIL**

**CIVIL CASE 274 OF 2016**

**JK SERGON, J**

**MARCH 28, 2023**

**BETWEEN**

**DANCAN EKWAM AUREN ..... PLAINTIFF**

**AND**

**DIRECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in the present instance filed the plaint dated October 24, 2016 and sought for judgment against the defendants in the following manner:
  - a. General damages
  - b. Special damages
  - c. Loss of income
  - d. Loss of consortium
  - e. Future medical expenses
  - f. Costs of this suit plus interest on (a) and (b) above
  - g. Any other relief this court may deem fit to grant.
2. The plaintiff pleaded in his plaint that on or about February 14, 2015, at approximately 1930 hours, he was legally strolling alongside the Kakuma-Lokichoggio road toward the Karemchuch Center with other pedestrians when suddenly he heard a vehicle approaching them with one headlight on. As a



result of the negligence of the first defendant's driver, servant, or agent in control of the motor vehicle, registration number GKA 640R, a Toyota pick-up, he was violently hit, resulting in grievous

3. The plaintiff has further pleaded in his plaint that the said accident was solely caused by the negligence of the 1<sup>st</sup> defendant's driver, servant and or agent at the time of the accident as particularized in paragraph 5 of the plaint.
4. The defendant entered appearance upon service of summons and filed its statement of defence on December 5, 2016 to deny the allegations brought out in the plaint.
5. In their statement of defence, the defendants stated that if the said accident did occur, which is denied, then the accident was solely caused and or substantially contributed by the negligence and carelessness of the plaintiff.
6. At the hearing, the plaintiff testified while the defendant called one (1) witness to support its case.
7. The plaintiff adopted his executed witness statement as evidence and produced his list and bundle of documents as P. Exhibit 1.
8. In cross-examination, the plaintiff stated that the said motor vehicle was a government owned motor vehicle and that the copy of records does not read it to belong to the government but the registration plate was that of a GK.
9. Philip Kangongo Tumdo who was DW1 adopted his signed witness statement as evidence and produced the defendant's list and bundle of documents as exhibits.
10. The witness stated that he is currently attached to DCI West Pokot as a driver.
11. On cross-examination, the witness stated that on the day the accident happened it was dark and that the motor vehicle he was driving had headlights but it was dim and that the victim emerged from the bush running to the highway.
12. The witness further stated that when he turned back the victims had already been taken by an ambulance and that there were other motor vehicles coming.
13. Upon close of the trial, the parties were directed to file their submissions but at the time of writing this judgment the defendants had not filed their submissions.
14. The plaintiff gave brief facts of the matter and prayed to rely on the evidential doctrine of Res ipsa loquitura and on this argument the plaintiff relied on the case of *Mary Ambeva Kadiri suing as the administrators of estate of Saleh Juma Kadiri (deceased) v Country Motor Limited* (2017) eKLR at pages 2-3/5 paragraphs 10-11 the court noted that the *Black's Law Dictionary* (8<sup>th</sup> Ed.) page 1336 defines *res ipsa loquitur* as,

“the thing speaks for itself”.

It goes on to explain that,

“The doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case”.



In *Nandwa v Kenya Kazi Limited* [1988] eKLR, Court of Appeal (Gachuhi JA) cited, with approval, a portion *Barkway v South Wales Transport Company Limited* [1956] 1 ALLER 392, 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:

The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.

15. The plaintiff submitted that he presented an abstract from police on a road accident dated March 19, 2016, and that the said abstract does indicate that an accident occurred on the February 14, 2015 involving the defendant's vehicle GKA 640R and the plaintiff.
16. It is the plaintiff's submissions that he was walking with other pedestrians on the side of the road before the accident occurred and that the occurrence of this accident raises an inference of negligence on the defendant's driver, thus he has established a prima facie case.
17. On the issue of damages, the plaintiff submitted that in his witness statement filed he had stated that the accident left him paralyzed from the waist down and that he suffered a lot of pain and was traumatized to know that he would never walk again or do most basic things for himself again. The Plaintiff has attached a medical examination report which confirmed that the accident herein left him a paraplegic who will need special care and attention and will be confined to a wheel chair for the rest of his life, use adult diapers, attends physiotherapy and sleeps on special mattress.
18. On this the plaintiff relied on the case of *Rosemary Wanjiru Kungu v Elijah Macharia Gitinji & another* (2014) eKLR as it was held by Potter, JA in *Rabima Tayab & Others vs. Anna Mary Kinanu* Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 while relying on the oft cited case of *H. West and Son Ltd vs. Shephard* [1964] AC 326 AT 345.:

“Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

19. The plaintiff further relied on the following authorities
  - a. In *Joseph Maganga Kasha vs. Kenya Power & Lighting Company Ltd* [2012] eKLR, the plaintiff sustained serious injuries and became paralysed from his waist downwards. He was rushed to Aga Khan Hospital by the Defendant's vehicle. He was X-rayed, taken for a CT scan and admitted. He was discharged on February 4, 2005, two months after admission. The medical report revealed that he had sustained very severe and debilitating spinal injuries with burst displaced fracture of thoracic spine; wedge compression fracture of lumbar spine and also on the left transverse process; spinal cord and exit nerve



compression leading to total paralysis below L1; bone fragments within the spinal canal; and urine and stool incontinence, erectile dysfunction. He also sustained a fracture of the head of the right and left T12 ribs. The doctor concluded that the injuries were severe and debilitating multiple bone and spinal cord injuries leading to complete paralysis of both lower limbs. In his opinion, the Plaintiff had healed with 100% permanent disability due to the spinal cord injuries but had a ruined working life and would never be able to resume his usual work. Further he had a ruined sexual life while single and with no children of his own and would forever be dependent and in need of full time home based nursing care. He was awarded Kshs 3,000,000.00 on October 12, 2012. The plaintiff was 22 years at the time of the accident. After taking into account the fact that the award would be a lump sum payable and might therefore, be invested to good return in the future, the Court adopted a multiplier of 38 years to the plaintiff who was a casual worker.

- b. In *William Wagura Maigua vs. Elbur Flora Limited* [2012] eKLR, the plaintiff, a carpenter, lost consciousness after the accident. He was rushed to Molo Hospital for first aid where he came to. He was later on treated at the Provincial General Hospital, Nakuru before he was transferred to Kenyatta National Hospital and later to the Spinal Injuries Unit where he was confined for 14 months. According to the doctor who examined him, the plaintiff was suffering from paralysis of the limbs as a result of spinal injuries and was unable to use his limbs and had to depend on other people for mobility. He was awarded Kshs 3,000,000.00 for general damages on 5th October, 2012.
- c. In *Nancy Oseko vs. Board of Governors Masai Girls High School* [2011] eKLR, the plaintiff, a student aged 19 years old sustained Chest injury with accumulation of blood in the chest; head compression fracture of the thoracic spine no 12; loss of sensation from the level T-12 downwards; loss of motor function from same level downwards; loss of control of urine and stool. She testified that she underwent an operation of the spine where metals were fixed to stabilize the spine, an open chest operation to remove blood; underwent physiotherapy, occupational therapy; ambulating her on a wheelchair. She developed bed sores which were healed and had to use medication to evacuate stool. The Doctor opined that she had permanently lost ability to walk and was confined to a wheel chair for life and a paraplegic and needed a lapel all her life; inability to control stool; inability to control urine, she was fitted with a catheter rundown, and urine bag, uses diapers or napkins. She also lost the ability to engage in sexual life in future though she could conceive and deliver by caesarean section. She was psychologically affected and there was a possibility that she might never engage in any gainful employment. She was predisposed to recurrent chest and urinary tract infections and infections due to the nature of her injuries and required frequent check-ups. She also required a special bed that could be turned by hydraulic or electronic system and a special mattress and regular follow up as an outpatient for life on a three Monthly basis. The doctor's opinion was that her life had completely changed and that she suffered 100% disability. She was awarded Kshs 2,500,000.00 in general damages on 12th June, 2011. The Court adopted a multiplier of 20 years.



20. It is the contention of the plaintiff that he was only 23 years old when the accident occurred and had the rest of his life ahead of him as he was working as a waiter at the Lutheran World Federation and was an upcoming musician and that he humbly prays that the court awards him comparable damages to those awarded in the cited authorities and should consider that inflation and hard economic times have affected the Kenyan shilling.
21. I have considered the evidence on record, the submissions and authorities relied upon by the plaintiff. It is clear that the twin issues for determination are liability and quantum.
22. On liability, the plaintiff stated that he gave evidence that as per his knowledge, the 1<sup>st</sup> defendant was the owner of the subject motor vehicle while the 2<sup>nd</sup> defendant is sued as such for the acts and omissions of the 1<sup>st</sup> defendant.
23. Upon my examination of the evidence on record, both oral and documentary, I established that an accident took place on the material date involving the subject motor vehicle, the result of which the plaintiff was left paralysed.
24. On the subject of ownership of the subject motor vehicle, the plaintiff tendered a police abstract dated March 19, 2016 as P. Exh 1 indicating that the 1st defendant was the registered owner of the subject motor vehicle at all material times.
25. The defendants on their part did not challenge the contents of the police abstract by way of evidence or at all during the trial. In the absence of contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another* (2010) eKLR as referenced in the case of *Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki* [2016] eKLR that:
 

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”
26. Going by the legal positions above and my examination of the evidence produced in court, I am satisfied that the plaintiff has proved on a balance of probabilities that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were at all material times the registered and/or beneficial owners of the subject motor vehicle.

### **Quantum of Damages**

27. In the plaint, the remedies sought, beyond costs and interest, are; special damages in the sum of Kshs 205,500/ general damages, I presume, for pain suffering, loss of consortium and future medical expenses.
28. In assessing and awarding general damages for personal injury, the court consider the nature and extent of the injuries pleaded and proved together with the residual effects upon the claimant. Here, the injuries of the plaintiff as pleaded and proved by oral evidence and the produced medical documents including the medical report by Dr. Edward Karuga dated 07.4.2016 revealed that the plaintiff was left paraplegic and he is confined to a wheel chair for the rest of his life, he uses adult diapers ,he attends



physiotherapy at least three times in a week and sleeps on a special mattress. I consider the injuries to be grave and debilitating with indeed with devastating effects on the plaintiff's quality of life for the remainder of his life. Having taken all into consideration, I consider that I need to assess damages under the following heads; -

#### **Pain and Suffering, loss of amenities and consortium:**

29. For pain and suffering the award is made in consideration of the amount of pain and suffering the Plaintiff underwent and any deprivation suffered in the enjoyment of usual amenities of life which determine ones quality of life. I consider the amenities of life to consist of the mundane activities like being able to walk, bathe, eat or just dance unaided but also transcend to the greater ideals perpetuation of the humankind by procreation. The award is to compensate for the physical and mental distress undergone by the Plaintiff occasioned by the bodily injuries even though it must be born in mind that no amount of money can restore a physically deformed body.
30. In the filed submissions, the plaintiff proposed the sum of Kshs 3,000,000/= under this head. Both cited decisions in support of respective positions. I have had the benefit of reading the plaintiff's submissions and the cited decisions which I shall take into a court as guides but not binding because assessment of damages must remain resident in the discretion of the court. Having read the decisions in *John Hugo Kinyaki v. Cmc Motors Group Ltd & Anor*, Nairobi HCCC No. 1366 of 1997, *Cosmas Mutiso Muema vs Kenya Road Transporters Ltd & another* HCCC No. 285 of 2016 and *Ngure Edward Karega –vs- Yusuf Doran Nassir* (2014) eKLR cited by the parties in which varied awards were met at different times by different courts. In applying my mind to what would be a reasonable award, while taking into account the incidence of inflation and the plaintiff's overall conditions inflicted by the accident, I do award to the plaintiff the sum of Kshs 6,000,000 for general damages.

#### **Loss of income**

31. Loss of earnings or income is a special damage claim, and it is trite law that special damages must be pleaded and strictly proved. Where there is no evidence regarding special damages, the Court will not act in a vacuum or whimsically. In *S J v Francesco Di Nello & another* [2015] eKLR the Court of Appeal 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.

32. From the above-cited authorities, loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages. Nevertheless, the Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in *Wambua v Patel & another* [1986] KLR 336, where the Court had found the Plaintiff had not kept proper records of what he earned but stated:

“Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop more sophisticated business method” .... But a victim does not lose his remedy in damages because the quantification is difficult.” See also *Jacob Ayiga Maruja & Another vs. Simeone Obayo* [2005] eKLR for the proposition that the proof of ‘profession of a person must be by



production of certificates and that the only way of proving earning is equally the production of documents’.

33. In the absence of proof of income and profession, even the application of minimum wage become unrealistic. I find the claim not proved and decline to make any award.

### **Future Medical Costs**

34. It is well established that future medical expenses also take the face of special damages but are awarded as general damages. In *Kenya Bus Services Ltd v Gituma* [2004] EA 91:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the Court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded.”

35. According to the evidence by the two doctors who testified, the Plaintiff would need a wheel chair for the rest of his life, he uses adult diapers, he attends physiotherapy at least three times in a week and sleeps on a special mattress.

36. These are claims that were never specifically pleaded in the plaint put evidence was led on them in a manner to suggest that the parties had let same for the courts determination. I will thus take that evidence into account, I hold that owing to the nature of the plaintiff’s injuries, future medical expenses are inevitable. I chose a global sum of Kshs 2,500,000 under this head.

37. The upshot is that I find the defendnats liable. Consequently, judgment is entered in favour for the plaintiff and against the defendants with the following awards:

- i. General damages for pain and suffering and loss of consortium Kshs 6,000,000/=
- ii. Damages for future medical Expenses Kshs 2,500,000/=
- iii. Special damages Kshs 200,500/=
- Total Kshs 8,700,500/=
- iv. Interest on special damages from the date of filing sit until the date of full payment which interest on general damages at court rates from the date of judgment until the date of settlement in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

.....  
**J. K. SERGON**  
**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant



..... for the 2<sup>nd</sup> Defendant

