



**Wambua v Nyakundi (Civil Suit 61 of 2020)
[2023] KEHC 24589 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 24589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 61 OF 2020
MN MWANGI, J
AUGUST 9, 2023**

BETWEEN

JOHN MAINGA WAMBUA PLAINTIFF

AND

POLYCAP O. NYAKUNDI DEFENDANT

JUDGMENT

1. On 27th August, 2020, the plaintiff filed a suit vide a plaint dated 17th August, 2020, seeking judgment against the defendant for general damages, pain, suffering and loss of amenities, special damages of Kshs. 252,489/=, damages for loss of future earnings, damages to cover nursing care, wheelchair replacement costs, costs of purchase of a paraplegic bed and mattress and replacement costs for the same, hospital visits and related expenses, all as pleaded in paragraph 7 of the plaint. The plaintiff also seeks costs of and incidental to this suit and interest at Court rates from the date of filing suit until payment in full. The defendant never filed a statement of defence and as a result, on 27th October, 2020, the plaintiff filed a request for judgment dated 22nd October, 2020. On 2nd November, 2020, the Deputy Registrar entered an interlocutory judgment for the plaintiff as against the defendant on liability and special damages of Kshs.252,489.00 with interest until payment in full subject to formal proof.
2. The plaintiff's cause of action was that on or about 9th October, 2017 while he was a lawful passenger on board Tuk-Tuk Registration No. KTWA 854V Piaggio, along Changamwe-Port Reitz Road near Tornado Carriers Limited premises, the defendant by himself, his servant and/or agent carelessly, recklessly, negligently, and dangerously drove, managed and/or steered the Tuk-Tuk at a very high speed and lost control of it. The plaintiff alleged that the defendant permitted the said Tuk-Tuk it to veer off the road, ramming onto an electricity pole. It was alleged that the Tuk-Tuk rolled several times before coming to a standstill, occasioning serious injuries that left the plaintiff permanently incapacitated.



3. The plaintiff holds the defendant directly and/or vicariously liable as the case may be, for the occurrence of the accident since the latter was the registered, insured and/or beneficial owner of Tuk-Tuk registration No. KTWA 854V Piaggio and that the said accident occurred due to the negligence, recklessness and carelessness of the defendant, his servant and/or agent in the manner of steering that Tuk-Tuk on a public road. The plaintiff averred that he suffered immense injury, loss and damage as a result of the said accident.
4. The plaintiff claimed that on conclusion of the investigations carried out by the Investigating Officer, he blamed the defendant for occurrence of the said accident and charged him in Court with the charge of driving without due care, but the said charges have since been withdrawn under Section 87(a) of the Criminal Procedure Code, without any attempt to reach out to the plaintiff to present his evidence.

Evidence Tendered by the Plaintiff

5. To prove his case, the plaintiff testified as PW1 on 24th October, 2022. It was his evidence that that he suffered injuries on 9th October, 2017 as he was going to Port Reitz, when he boarded a Tuk-Tuk registration No. KTWA 854V at Changamwe stage, and on reaching a company known as Tornado Carriers, the Tuk-Tuk driver overlapped and drove on the wrong side of the road, and when he attempted to go back to his lane, he hit a street light and the Tuk-Tuk overturned. The plaintiff averred that he had fastened his seatbelt thus he was not thrown outside the Tuk-Tuk. He however sustained injuries on his head (scar seen), on his right eyebrow and on his left temporal region.
6. It was PW1's testimony that as a result of the said accident, his back was injured and he sustained paralysis on both his legs and that is why he cannot do anything, let alone sit down and/or walk without assistance. The plaintiff stated that he sustained traumatic cord compression with fracture dislocation of T4/T5, he was treated at Bomu Hospital on 9th October, 2017, then taken to Mewa hospital on the same day where he was admitted up to 16th October, 2017, when he was discharged, and at that time, he was paraplegic.
7. He further stated that on 7th November, 2017, he was taken to Coast Province General Hospital where he was admitted up to 8th November, 2017 for treatment of bed sores, and on 21st November, 2017 he was again admitted to the said Hospital up to 25th November, 2017 for treatment due to complications. That on 13th May, 2019, he was taken to the National Spinal Injury Referral Hospital in Nairobi where he was admitted for four (4) months up to 2nd September, 2019, where he received counselling and rehabilitation into the society. He testified that more investigation was done on his injuries, and he was also taught how to be independent and how to live with his injuries since they could not be cured.
8. The plaintiff testified that he continues to see Dr. Muthuri, who checks on his progress, but the doctor informs him that his injuries still remain the same. PW1 stated that he uses a wheelchair which he bought at Kshs. 30,000/= to move around, and that whenever he goes to see Dr. Muthuri, he pays taxi fare to and from the hospital at Kshs.2,000/=. That he also and pays the doctor's consultation fees at Kshs.5,000/= per visit. He testified that he uses a corset to support his back to be straight. He also uses knee caps, which are worn out but he had not worn a corset on the day he gave his evidence because it was worn out.
9. It was PW1's evidence that he cannot control his bowels, which calls for him to wear confidence diapers throughout. He stated that the ten (10) pack diapers range from Kshs.950-1,000/= (large size), the eight (8) pack ranges from Kshs.950-1,100/= (extra-large), a single diaper ranges from Kshs.120/= . 150/= (extra-large) and Kshs.100-120/= (large). The plaintiff averred that he gets burns caused by urine and stool, and he also gets urinary tract infections which necessitate him to buy medicine to treat the



- said infections. He testified that his wheel chair wears out fast because of the humidity where he lives in Mikindani, and he therefore needs a better wheel chair that can serve him for a longer duration of time.
10. PW1 testified that the doctor recommended that he buys a paraplegic bed which will help to protect his spine and prevent him from getting bed sores. He stated that a paraplegic bed and mattress cost about Kshs.500,000/= and needs to be replaced every eight (8) years. He has however not bought the bed since he cannot afford it. He stated that he claims Kshs.252,489.00 being special damages to cover the costs of a police abstract report, medical expenses and a medical examination report.
 11. PW1's evidence was that before he sustained the injuries herein, he was working at Sandy Carriers as a Turnboy in the year 2015 and due to his hard work, he was on 13th March, 2015, promoted to a Field Clerk, where he was earning a salary of Kshs.15,000/= per month. His evidence was that at the time the accident herein occurred, he was on bench, working as a reliever and he would be paid Kshs.1,500/= since work had gone down. He stated he was later recalled to work on contract when workflow improved but by then he was injured. The plaintiff stated that he cannot do anything for himself and that he depends on other people, and at home he lives with his mother and family members who assist him. He prayed for expenses for paying a nurse to do the work which his family members were doing for him. He indicated that due to his injuries, he cannot get a wife.
 12. PW1 stated that the defendant is the one who was driving the Tuk-Tuk at the time the accident occurred but he has never met the costs of the treatment he had undergone. PW1 produced a bundle of documents as plaintiff exhibits No. 1-73 in support of his case. On closure of the plaintiff's case, this Court proceeded to close the defendant's case since he did not defend his case.
 13. Ms Muyaa, Learned Counsel for the plaintiff, sought for time to put in written submissions and on 8th December, 2022, the law firm of Kinyua Muyaa & Company Advocates filed written submissions on behalf of the plaintiff. Ms Muyaa submitted that this matter proceeded to formal proof hearing without the defendant's participation, therefore, the plaintiff had established that the defendant was 100% liable for the injuries he sustained in the accident, which injuries turned him to a paraplegic, with severe spinal injury rendering him 100% permanently disabled from the spine down.
 14. She submitted that at the time of the accident, the plaintiff was 23 years old and despite undergoing physiotherapy repeatedly for many months, he remains wheelchair bound. She also submitted that Dr. Muthuri, the plaintiff's examining doctor indicated that because such traumatic cord compression was not decompressed at the critical hour which is within the first eight (8) hours of the accident, the plaintiff lost chances of any useful recovery and further improvement is unlikely.
 15. On general damages for pain, suffering and loss of amenities, Ms Muyaa submitted that spinal injury is uncomfortable and terribly painful hence the plaintiff requires pain management medication for life. In addition, she stated that the injury is irreversible and has affected the plaintiff's entire lower body rendering him dependent on people to move and carry him around as well as to carry out all chores for him as he suffers 100% permanent disability, with urine and stool incontinence. She submitted that the plaintiff has been through treatment in various hospitals and has been subjected to prolonged suffering that will last for life. She relied on the case of Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd [2018] eKLR, where the Court awarded a litigant Kshs. 10,000,000/= for pain, suffering and loss of amenities for comparable injuries. She stated that an amount of Kshs. 14,000,000/= would suffice under the head of pain, suffering and loss of amenities.
 16. On the purchase and recurrent replacement cost of a wheelchair, Ms Muyaa submitted that from the Doctor's report, it is evident that the plaintiff is wheel chair bound and will be so confined for life, therefore, he requires a stable, comfortable and stable wheelchair. In addition, the said wheelchair will require to be replaced at certain intervals due to wear and tear from corrosion of metallic parts since



- the plaintiff is based in Mombasa, an area that experiences higher humidity than most parts of Kenya. It was submitted by Counsel that at the moment, the plaintiff is using a bulky wheelchair which is not ideal for a paraplegic of his kind since it cannot be adjusted for comfort or folded up for ease of mobility when he needs to move around.
17. Counsel indicated that the plaintiff was 23 years old when he sustained the injuries and one cannot tell for how long he will live, thus she applied a production life span of seventy (70) years for purposes of assessing the need of a wheelchair. She relied on the case of Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd (supra), where the Court assessed the cost of purchase of a functional wheelchair at Kshs.60,000/= and made provision for replacement of the said wheelchair over a 25-year period. Ms Muyaa urged this Court to make an award of Kshs.80,000/= to factor in the change of commodity prices over the last four years and allow for replacement of the wheelchair at two (2) years' intervals over a life span of seventy (70) years, effective from the year 2022.
 18. In regard to nursing care, Ms Muyaa submitted that the plaintiff is a young unmarried paraplegic and because of his state, he is apprehensive that he will not find a favorable life partner. She stated that the plaintiff requires a permanent aide as he cannot move, stand, walk or even undertake other basic chores owing to the nature of his injuries. She also stated that the rate of securing a domestic aide in Kenya at the time of the accident was in the range of Kshs.15,700/= in the Coast region and that expense is expected to rise. Ms Muyaa submitted that the plaintiff requires other orthopedic appliances such as back slabs, knee caps, corsets and braces for spinal and knee support and for basic stability when the plaintiff is placed in an upright position. She indicated that although the same may take a while to wear out before requiring replacement, they will need to be replaced over time throughout the plaintiff's life. She urged this Court to assess these expenses cumulatively at Kshs. 30,000/= to be replaced tri-annually over the span of the plaintiff's life.
 19. It was submitted by Counsel that the plaintiff has sensory impairment owing to paralysis thus he cannot stand or walk, and that he also has urinary and bowel incontinence hence he permanently requires catheters, urinary bags, adult diapers and napkins which expenses are recurrent. Counsel asserted that the plaintiff will require at least three (3) diapers a day, and as the length of time each pack could last is about three (3) days, it means that he requires at least two (2) packs of diapers per week for the remainder of his life. Ms Muyaa urged this Court to adopt the price of Kshs.1,100/= twice a week for diapers, which is equivalent to Kshs.8,800/= per month, and Kshs.2,000/= per month for napkins/wipes since diapers go with napkins and/or wipes.
 20. In regard to medication, learned Counsel submitted that since the plaintiff is bedridden due to paralysis and has urinary and bowel incontinence, he is predisposed to recurrent infections and bed sores which require regular medical checkups on out-patient basis along with medication to ward off and treat such infections and sores. She stated that the plaintiff is also required to attend rehabilitation sessions such as physiotherapy, psychological and psychosocial counselling to help him cope with the effects of the injuries sustained in the accident. It was stated by Counsel, that the plaintiff testified that he incurs taxi charges of Kshs.2,000/= to and from the hospital for periodic physiotherapy and follow up clinics with Dr. Muthuri, whom he pays Kshs.5,000/= per session as consultation fees, along with constant painkillers to manage spinal pain and such treatment as is prescribed for infection. Ms Muyaa cited the case of Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd (supra) and urged the Court to award the plaintiff Kshs.3,000/= per trip for recurrent hospital visits, consultation charges at Kshs.4,000/=:, treatment at Kshs.4,000/=:, physiotherapy at Kshs.5,000/= per session to be computed monthly.
 21. On the cost of purchase of a paraplegic bed, a mattress and replacement costs, Ms Muyaa submitted that a paraplegic with a spinal injury requires a special paraplegic bed and mattress, to ease pressure



at pressure points. She cited the case of Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd (supra) and submitted that given the age of the plaintiff, upon purchase, the paraplegic bed and mattress will require to be changed at intervals of eight (8) years over a 42-year period, therefore, at least five (5) times for the remainder of the plaintiff's life.

22. On loss of future earnings, Ms Muyaa submitted that shortly before the accident, the plaintiff was employed as a Field Clerk at a clearing and forwarding company earning a net salary of Kshs.15,000/= per month, however, his employer scaled down operation two months to the accident herein, placing him on relieving duties for Kshs.1,500/= per session. She submitted that the plaintiff's employer resumed full operations shortly thereafter and re-called him to work on full time basis but he could not go back owing to the injuries sustained in the accident. Counsel contended that the plaintiff could have earned more than he did before his employer scaled down its operations. Therefore, since the plaintiff cannot now engage in similar employment or any employment at all, this Court should make an award of Kshs.6,600,000/= noting the civil service scheme in Kenya currently provides for a working life of up to 60 years in the public sector.
23. Ms Muyaa submitted that special damages must be specifically pleaded and strictly proved to be recoverable. She stated that in this case, the plaintiff pleaded and proved by way of invoices and receipts that he directly incurred numerous expenses as at the time of filing the suit totaling to Kshs. 252,489.00, thus this Court should award this amount as prayed.

Analysis and Determination

24. In light of the evidence adduced herein, the pleadings and the submissions filed by Counsel for the plaintiff, the following issues arise for determination-
 - i. Whether the defendant is liable for the accident in issue; and
 - ii. What is the quantum of damages, if any, to be awarded?

Whether the defendant is liable for the accident in issue

25. It is trite that he who alleges must prove, as provided under Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya which states that-

“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 exist.”

26. The suit herein proceeded undefended since the defendant neither entered appearance nor filed a statement of defence. The defendant as such, did not attend Court on the day set for formal proof to cross-examine the plaintiff who testified on oath as PW1. On analysis of the evidence adduced before this Court by the plaintiff and the submissions filed by Counsel on his behalf, it is not disputed that Tuk-Tuk Registration No. KTWA 854V Piaggio belonged to the defendant, who was also driving it at the time the self-involving accident occurred. It is evident that the plaintiff was a lawful passenger therein when the accident occurred and that he sustained serious injuries as a result thereof. The said issue was not disputed by the defendant, as he filed no documents in support of his defence. In support of the allegations made by the plaintiff, he produced a copy of a police abstract dated 18th April, 2019, as plaintiff exhibit No. 1.
27. The plaintiff testified that he boarded a Tuk-Tuk registration No. KTWA 854V at Changamwe stage, and on reaching a company known as Tornado Carriers, the Tuk-Tuk driver overlapped and drove on the wrong side of the road, and when he attempted to go back to his lane, he hit a street light and the



- Tuk-Tuk overturned. He further testified that he had fastened his seat belt thus he was not thrown outside the Tuk-Tuk. A perusal of police abstract reveals that the defendant was blamed and charged with the offence of driving without due care as a result of the accident. The said charge was however later withdrawn under Section 87(a) of the Criminal Procedure Code.
28. In the case of Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR, the Court held as follows in regard to how a Court should treat evidence given on oath-
- “In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
29. It is this Court’s finding that the plaintiff being a passenger in Tuk-Tuk registration No. KTWA 854V Piaggio, could have done nothing to prevent the occurrence of the accident herein since he had no control of the said Tuk-Tuk, which was in the sole control of the defendant. In addition, a driver of any vehicle owes a duty of care to those in his vehicle and is under an obligation to drive carefully and not recklessly or at a high speed. See Hussein Omar Farah v Lento Agencies [2006] eKLR and Rahab Micere Murage v AG & 2 others [2012] eKLR quoted with authority by the Court in the case of Brenda Nyaboke Michira v German International Co-operation Giz [2017] eKLR.
30. In the absence of evidence by the defendant that he exercised due care and attention when driving Tuk-Tuk registration No. KTWA 854V Piaggio, by applying brakes and/or taking other precautionary measures so as to avoid the accident, and/or driving at a reasonable speed to ensure he had full control of the Tuk-Tuk before hitting the street light, this Court finds that the defendant is 100% liable for the occurrence of the accident that injured the plaintiff..

What is the quantum of damages, if any, to be awarded?

31. In assessing quantum of damages, I am minded of the fact that damages must be within limits set out in decided cases and also within the context of the Kenyan economy. This was the holding by the Court of Appeal in Sameer Jethwa v Francesco Di Nello [2015] and the case of Rahima Tayab & others vs Anna Mary Kinanu [1983] KLR 114 where Potter JA., made the following observation-
- “But 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. 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 it still must be that amounts which are awarded are to a considerable extent conventional.”

i. Damages for pain and suffering and loss of amenities.

32. I have perused the medical report by Dr. Muthuri dated 21st November, 2019 which was produced as plaintiff exhibit No. 21 and the discharge instructions and treatment notes from Mewa Hospital produced as plaintiff exhibit No. 5. From the said exhibits, it is evident that the plaintiff sustained a traumatic cord compression with fracture dislocation on T4/5. The Doctor observed that at the time of examining the plaintiff, he had paraplegia, he had no sensation below level of lesion, there were no lower limb reflexes, he was hypotonic in the lower limb with motor power grade 0 and there was localized kyphotic deformity at the level of injury. The Doctor was of the opinion that since the plaintiff was not decompressed within eight (8) hours of occurrence of the accident, there was no chance for any useful recovery. The Doctor also stated that since the plaintiff had no minimal improvement in



the last two (2) years (as at the time of examination), further improvement was unlikely. Dr. Muthuri assessed the plaintiff's permanent disability at 100%.

33. The plaintiff testified that as a result of the accident herein, he has been treated in four (4) different hospitals, Bomu Hospital on 9th October, 2017, then at Mewa Hospital on the same day where he was admitted up to 16th October, 2017, when he was discharged. He was also admitted to Coast Province General Hospital between 7th November, 2017 and 25th November, 2017 for treatment of bed sores and complications. His last admission was at the National Spinal Injury Referral Hospital in Nairobi between 13th May, 2019 and 2nd September, 2019, where he received counselling and rehabilitation into the society. At the said hospital, he was taught how to be independent and how to live with his injuries since they could not be cured. The plaintiff testified that he cannot control his bowels thus he wears confidence diapers throughout. He also gets burns caused by urine and stool, and develops urinary tract infections thus necessitating him to buy medicine to treat the said infections.
34. The plaintiff's Counsel proposed that a sum of Kshs.14,000,000/= would be sufficient in this case. I am however bound by holding in the case of Jubilee Hauliers Limited & 2 others v Brian Muchiri Waihenya [2021] eKLR, wherein the Court of Appeal reduced an award under the head of pain, suffering and loss of amenities to Kshs.4,000,000/= where the Trial Court had awarded Kshs.8,000,000/= in similar circumstances to this case, where the respondent was a complete paraplegic with 100% permanent incapacitation, had incontinence of stool and had to use diapers. The respondent in the case cited above also had an indwelling catheter with urine bag and had to be on a wheelchair throughout his life. In the said circumstances, it is my finding that an award of Kshs.4,000,000/= under this head is not only fair but reasonable compensation.

ii. Purchase and recurrent replacement cost of a wheelchair.

35. It is not disputed that as a result of the paralysis, the plaintiff cannot walk and/or stand without assistance. The plaintiff testified that ever since the accident happened, he has been confined to a wheelchair. The plaintiff testified virtually from his Advocate's office and it was apparent that he was on a wheelchair. On perusal of the discharge summary dated 26th August, 2019 from the National Spinal Injury Referral Hospital, it is evident that the plaintiff requires a wheelchair for mobility.
36. It was submitted by Ms Muyaa that at the moment, the plaintiff is using a bulky wheelchair which he acquired at Kshs. 30,000/= but it cannot be adjusted for comfort or folded up for ease of mobility when he needs to move around. Counsel submitted that the plaintiff was 23 years when he sustained the injuries. She applied a production life span of seventy (70) years for purposes of assessing the need of a wheelchair since there is no way of ascertaining for long the plaintiff will live. She urged this Court to make an award of Kshs.80,000/= and allow for replacement of a wheelchair at two (2) year intervals over a life span of seventy (70) years effective from the year 2022.
37. In James Njiri & 2 others v FPU & another [2019] eKLR the Court when addressing the issue of life expectancy stated the following-
- “Strictly speaking, even the factoring in of the vicissitudes of life concept, one cannot state with certainty the numbering days a right for a human being (sic). I consider that to be in the future and sometimes in the realm of the unknown as even medical science cannot predict with certainty the lifespan of being. I also take judicial notice that from the latest world bank data life expectancy in Kenya is between 64 and 69 years.”
38. This Court acknowledges the established fact that the plaintiff will be confined to a wheelchair for the rest of his life. He therefore requires a stable and comfortable wheelchair which will have to be replaced



at certain intervals since it is prone to wear and tear, and more specifically as he lives in Mombasa, a place that experiences higher humidity levels than other parts of the country. No quotation from medical stores was given by the plaintiff in support of his claim for Kshs. 80,000/= as the cost of acquiring a suitable wheelchair. He relied on the case of Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd (supra) where the Court made an award for the cost of a wheel chair at Kshs.60,000/= with a life span of one (1) year.

39. Noting that the plaintiff will require a suitable wheelchair that will withstand the effects of humidity in Mikindani area, in Mombasa, where he lives, I allow the plaintiff's proposal of Kshs. 80,000/= as the cost of acquiring a suitable wheelchair. I have also factored in the cost of inflation and the change of commodity prices over the last four (4) years since the case the plaintiff has relied on was decided.
40. Counsel urged this Court to apply a life span of seventy (70) years. However, going by the holding in James Njiiri & 2 others v FPU & another (supra), this Court finds that considering uncertainties of life, a productive life span of 64 years, is not only just, but also reasonable in this case. Further, taking into account that the plaintiff is now 28 years old, I apply a multiplier of 36 years.
41. Ms Muyaa urged this Court to allow a replacement of a wheelchair at two-year intervals. I find the said proposition acceptable. I therefore make an award of Kshs.1,440,000/= for a wheelchair, computed as hereunder-

Kshs. 80,000/= X 18 (half the multiplier of 36 years) = Kshs. 1,440,000/=.

iii. Nursing care.

42. The plaintiff stated that he was not married and he was apprehensive that he would not find a favorable life partner. He further stated that he lives with his mother, whom he relies on, as well as his family members to assist him in standing and undertaking other basic chores since he cannot perform them on his own due to the nature of his injuries. His Counsel submitted that the rate of securing a domestic aide in Kenya at the time of the accident was Kshs. 15,700/= at the Coast region.
43. I agree that the plaintiff requires a permanent domestic aide to help him in carrying out his day to day activities due to the nature of his injuries. Looking at the Regulation of Wages (General) (Amendment) Order, 2017, the prescribed wages of a house servant in Mombasa City was Kshs. 12,926.55 per month. I shall adopt this sum, having already adopted a multiplier of 36 years hereinabove, the award under this head shall be computed as hereunder-

Kshs.12,926.55 X 12 X 36 = Kshs.5,584,269.60.

iv. Support back slabs, knee caps, corsets and braces.

44. It was the plaintiff's testimony that apart from a wheelchair, he requires other orthopedic appliances such as back slabs, knee caps, corsets and braces for spinal and knee support and for basic stability when placed in an upright position. According to the discharge summary dated 26th August, 2019, the National Spinal Injury Referral Hospital recommended the use of these orthopaedic appliances. When the plaintiff gave evidence, it was five (5) years after the occurrence of the accident. He indicated that he did not have the said appliances since they were worn out. I agree with Ms Muyaa that there will be need for replacement of orthopaedic appliances over time throughout the plaintiff's life. Counsel urged this Court to assess these expenses cumulatively at Kshs.30,000/= to be replaced tri-annually over the span of the plaintiff's life.
45. In view of the fact that the plaintiff needs orthopaedic appliances to make his life easier and more bearable, in the interest of justice, I allow the amount of Kshs. 30,000/= to cover the purchase of these



appliances to be replaced annually during the life span of the plaintiff. It is therefore my finding that an award of Kshs. 1,080,000/= under this head computed as hereunder is sufficient compensation-
Kshs.30,000/=X 36= Kshs. 1,080,000/=

v. Catheters, urinary bags, diapers and napkins.

46. It was submitted by Counsel that the plaintiff has urinary and bowel incontinence hence he permanently requires catheters, urinary bags, adult diapers and napkins which expenses are recurrent. The report from the National Spinal Injury Referral Hospital indicated that the plaintiff was fully rehabilitated and has been trained on urine and bowel management. For the said reason, the plaintiff does not need catheters and urinary bags. In his evidence, he did not state that he was using them but indicated that he was using adult diapers, as a result of which he would get burnt by stool and urine. It is however obvious and the plaintiff needs diapers and napkins/wipes due to incontinence. Counsel stated that the plaintiff will require at least three (3) diapers a day, and the length of time each pack could last would be about three (3) days meaning he would require at least two packs of diapers per week, for the remainder of his life.
47. Ms Muyaa urged this Court to adopt the price of Kshs.1,100/= twice a week for diapers, which is equivalent to Kshs.8,800/= per month, and Kshs.2,000/= per month for napkins/wipes since diapers go with napkins and/or wipes. The plaintiff produced a receipt from Naivas Supermarket dated 6th August, 2020 as plaintiff exhibit No. 71 which shows the cost of diapers used by the plaintiff as Kshs.963/= per pack. I will therefore adopt the price of Kshs.963/= per pack for diapers and Kshs.2,000/= per month for napkins/wipes.
48. This Court therefore makes a total award of Kshs.4,192,128.00 under this head, computed as hereunder-
- Diapers: $Kshs.963 \times 2 \times 4 \times 12 \times 36 = Kshs.3,328,128.00$
- Napkins/Wipes: $Kshs.2000 \times 12 \times 36 = Kshs.864,000/=$

vi. Future medical expenses & physiotherapy services.

49. There is no dispute that the plaintiff is predisposed to recurrent urinary tract infections and bed sores which require regular medical checkups on out-patient basis along with medication to ward off and treat such infections and sores. The plaintiff is also required to attend rehabilitation sessions such as physiotherapy, psychological and psychosocial counselling to help him cope with the effects of the injuries sustained in the accident. It was the plaintiff's testimony that he incurs taxi charges of Kshs.2,000/= to and from the hospital for periodic physiotherapy and follow up clinics with Dr. Muthuri, whom he pays Kshs.5,000/= per session as consultation fees. Ms Muyaa urged this Court to award the plaintiff Kshs.3,000/= per trip for recurrent hospital visits, consultation charges at Kshs.4,000/=, treatment at Kshs.4,000/=, physiotherapy at Kshs.5,000/= per session to be computed monthly.
50. No evidence was adduced in support of the claim for taxi charges of Kshs.2,000/= to and from the hospital for periodic physiotherapy and follow up clinics with Dr. Muthuri. I will therefore award a reasonable amount of Kshs.1,500/= for taxi expenses. Ms Muyaa urged this Court to award the plaintiff Kshs.4,000/= consultation charges, however no receipts were produced in support of this claim, the only receipt produced from Dr. Muthuri was for Kshs.5,000/= for preparation of the medical report. Accordingly, in the absence of proof, I make an award for Kshs.2,500/= for consultation fees which is a reasonable amount. The claim for cost of treatment at Kshs.4,000/= per month is in my view reasonable.



51. In as much as the plaintiff was advised to pursue physiotherapy, there was no evidence adduced by him in support of the amount of Kshs.5,000/= per session spent on this service. I will allow an amount of Kshs.2,500/= per session once a month, which I consider reasonable. The plaintiff urged this Court to compute these figures on a monthly basis for the remainder of his life. I therefore find that an award of Kshs.4,536,000/= is sufficient under this head. The said amount has been computed as follows-
- $$\text{Kshs.10,500} \times 12 \times 36 = \text{Kshs.4,536,000/=}$$

vii. Purchase of a paraplegic bed and mattress.

52. I agree with the plaintiff's Counsel that the use of a paraplegic bed and mattress will be of great help to the plaintiff given the nature of his injuries since it will help in easing pressure at pressure points. Counsel submitted that given the age of the plaintiff, on purchase; the paraplegic bed and mattress will require to be changed at intervals of eight years over a 42-year period therefore, at least five times over the remainder of the plaintiff's life.
53. The Court in the case of Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR considered a quotation given by the National Spinal Injury Hospital in the case Japheth Ngula Matingi v AG [2016] eKLR, and made an award for Kshs.350,000/= for an electric bed. In Anthony Mbwabi Khayimba v Laxamanbhai Construction Ltd (supra) the authority relied on by the plaintiff, the Court made an award of Kshs.350,000/= as the cost of a paraplegic bed and a special mattress at Kshs.150,000/=. In addition, the Court held that the same can be changed thrice in a period of 25 years.
54. I adopt the holding in the above cases and award the plaintiff Kshs.500,000/= for the cost of both the paraplegic bed and mattress. Having adopted a multiplier of 36 years, the two items shall be changed four (4) times for the remainder of the plaintiff's life. An award of Kshs.2,000,000/= will therefore be adequate for the said items computed as hereunder-
- $$\text{Kshs.500,000/=} \times 4 = \text{Kshs.2,000,000/=}$$

viii. Loss of future earnings.

55. It was the plaintiff's evidence that before the accident, he was employed as a Field Clerk at a clearing and forwarding company earning a net salary of Kshs.15,000/= per month, but his employer scaled down operations two months to the accident and he was placed on reliever duties, where he was earning Kshs.1,500/= per session. His evidence was that his employer resumed full operations shortly thereafter and re-called him to work on full time basis but he could not go back owing to the injuries sustained in the accident.
56. In as much as the plaintiff produced pay slips from his employer in support of the fact that was employed as a Field Clerk at a clearing and forwarding company earning a net salary of Kshs.15,000/= per month, he did not adduce any evidence to support the allegation that he was recalled to work by his former employer when it resumed full operations. This leads to the inevitable conclusion that at the time of the accident, the plaintiff was working as a reliever at Sandy Carriers Limited where he was being paid Kshs.1,500/= per session. This however does not negate the fact that as a result of the injuries sustained by the plaintiff in the accident, he has no capacity to be engaged in any form of employment and as such, he is entitled to damages under this head.
57. Considering the fact that the number of sessions the plaintiff could have worked per month was it not for the accident, are unknown, his monthly income was not certain at the time of the accident. It is my finding that it is in the interest of justice for this Court to apply the global sum approach, in the circumstance herein. In Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing



as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR, the Court stated thus-

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

58. In the case of *Moses Mairua Muchiri v Cyrus Maina Macharia* [2016] eKLR, a global sum of Kshs.1,700,000/- was awarded to a claimant aged 30 years who was employed and who had evidence of making deposits into her account averaging about Kshs.22,000/- per month. Taking into account the age of the plaintiff herein, the uncertainty of the plaintiff's nature of employment as at the time the accident occurred, inflation and the awards in the above-cited Court decision, this Court holds that a global sum of Kshs.3,000,000/= is reasonable in the circumstances. I hereby make the said award for loss of future earnings.

ix. Special damages.

59. It is trite that special damages must be specifically pleaded and strictly proved. The plaintiff pleaded Kshs.252,489.00 in special damages. In support of this claim, the plaintiff produced receipts attached to his list of documents dated 17th August, 2020. On perusal of the said receipts, it is evident that they relate to purchase of medication and medical items. The amount of Kshs. 252,489.00 as special damages is therefore allowed as having been pleaded and strictly proved.

60. In the result, I enter judgment against the defendant at 100% as hereunder-

- i. Damages for pain and suffering and loss of amenities -Kshs.4,000,000/=
 - ii. Purchase and recurrent replacement cost of a wheelchair -Kshs.1,440,000/=
 - iii. Nursing care -Kshs.5,584,269.60
 - iv. Support back slabs, knee caps, corsets and braces - Kshs. 1,080,000/=
 - v. Diapers and napkins/wipes -Kshs. 4,192,128/=
 - vi. Future medical expenses & Physiotherapy services - Kshs.4,536,000/=
 - vii. Purchase of a paraplegic bed and mattress -Kshs.2,000,000/=
 - viii. Loss of future earnings - Kshs.3,000,000/=
 - ix. Special damages - Kshs. 252,489/=
- Total -Kshs.26,084,886.60

61. Special damages will earn interest at Court rates from the date of filing suit, whereas the rest of the sums awarded will earn interest from the date of this judgment until payment in full.

62. Costs of the suit are awarded to the plaintiff.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 9TH DAY OF AUGUST, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Muyaa for the plaintiff

No appearance for the defendant

Ms B. Wokabi – Court Assistant.

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