



REPUBLIC OF KENYA



KENYA LAW
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**Ogutu v Flying Cargo Ltd (Civil Case 328 of 2012)
[2023] KEHC 27160 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27160 (KLR)

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

**CIVIL
CIVIL CASE 328 OF 2012**

AN ONGERI, J

DECEMBER 22, 2023

BETWEEN

PATRICK OLUOCH OGUTU PLAINTIFF

AND

FLYING CARGO LTD DEFENDANT

JUDGMENT

1. The plaintiff herein Patrick Oluoch Ogutu (hereafter referred to as the plaintiff only) filed the plaint dated 27/6/2012 seeking the following remedies against the defendant Flying Cargo LTD (hereafter referred to as the defendant only)
 - i. General damages for loss of amenities with interest.
 - ii. Damages for loss of earnings and loss of earning capacity.
 - iii. Special damages as set out herein with interest.
 - iv. Costs of this suit with interest on (i) (ii) and (iii) above at court rates.
2. The plaintiff averred in the plaint that on or about the 2/10/2009, the plaintiff was a lawfully cycling along Lunga Lunga road near Donholm when the motor vehicle registration number T420 AG-XT415AGR was carelessly and negligently driven and managed by the defendant's driver, servant and/or authorized agent that it squeezed and knocked him down and ran over his legs whereby the plaintiff sustained severe injuries.
3. The particulars of negligence were pleaded as follows;
 - a. Driving at a speed that was excessive in the circumstances



- b. Driving without due care and attention to other road users especially the plaintiff
 - c. Driving carelessly in the circumstances
 - d. Failing to stop, slow down or in any other way so to manage or control the said Motor Vehicle to avoid accident.
 - e. Failing to apply brakes, to swerve, to steer properly or at all so as to avoid the accident.
 - f. Failing to have any adequate control of the motor vehicle
 - g. Failing to effectively steer, manage, and or control the said motor vehicle so as to avoid the accident.
 - h. Failing to see the plaintiff at all or in good time and thereby hitting him.
4. The plaintiff also pleaded the following special damages;
- Particulars of Special Damages
- a) Medical report Kshs 2,000/-
 - b) Medical expenses Kshs 350/-
 - b) Police Abstract Kshs. 200/-
 - c) Motor vehicle search Kshs. 500/-
- Kshs.3, 150/=
- 5. The defendant filed a defence dated 15/5/2014 denying the plaintiff's claim.
 - 6. The plaintiff who testified as PW 1 produced his witness statement 20/11/2018 as his evidence in chief.
 - 7. He stated that on 2/10/2009 at around 8.00 am in the morning he was from his place of work along outer ring/lunga lunga road near Don Holm when a trailer registration number T420AG-T415AGR which was being driven carelessly, negligently without attention and which was also overtaking him from behind, squeezed him against the pavement of the road, knocked him down and ran over both of his legs.
 - 8. As a result of the said accident, he sustained severe bodily injuries. He was later taken to Kenyatta National Hospital where he was admitted for six months. He was discharged and issued with treatment notes.
 - 9. The plaintiff asked the court to assess loss of future earnings and diminished earning capacity at the court rate.
 - 10. Prior to the accident the accident the plaintiff was employed by Kenpoly Manufacturers Ltd. as a casual machine operator earning an average income of Kshs 9,480 per month.
 - 11. Due to the injuries the plaintiff has not been engaged in any gainful employment and he claims loss of earnings from 2/10/2009 until the date of judgment at the rate of kshs 9,480 per month.
 - 12. In cross examination PW 1 said he was hit by the puller of motor vehicle registration no. T420AG-AT415AGR Scania trailer.
 - 13. He said that the trailer had already passed when the back side hit him. He said he was cycling on a pathway near the road when he was hit by the back side of the trailer.



14. The plaintiff also said at the time he was working at Kenpollo when the accident occurred. He has not returned to work since that time.
15. The plaintiff pleaded the following particulars of injuries;
Particulars of injuries
 - a. Extensive degloving injury on the right leg with resultant extensive skin & muscle loss from lower thigh to ankle
 - b. Extensive degloving injury on the outer aspect of the left leg with resultant skin and muscle loss causing the fibula to be removed.
 - c. The plaintiff claimed costs of future surgery to release the tight tendon Achilles at the cost of Kshs 200,000. done on one sitting occasions(ETA and STC) and if the surgery is successful he would require follow physiotherapy over a period of 6 months so as to keep the elongated tendon stretched and mobile. The physiotherapy would cost him 80,000/- (twice weekly sessions at Kshs 1500/- per session.
16. The defendant did not call any witnesses.
17. The parties filed submissions as follows; the plaintiff submitted that he has proved his case on a balance of probabilities as required by law. He demonstrated to the court that he was involved in an accident on 2/10/2009 along the Lunga Lunga Road near Donholm. The Police Abstract dated 27/7/2011 issued by the Traffic Division Buruburu which is duly stamped confirms that the Plaintiff was a pedal cyclist. The Police Abstract further confirms the name of the Plaintiff as the person injured and the nature of injury is recorded as grievous harm.
18. The plaintiff submitted that he suffered Extensive degloving injury on the right leg with resultant extensive skin & muscle loss from lower thigh to ankle, the outer aspect on the left leg with resultant skin and muscle loss causing the fibula to be removed. The Plaintiff has produced Attendance Card from Kenyatta National Hospital issued to the Plaintiff. There is also the treatment notes issued to the Plaintiff who was admitted to the said hospital together with the P3 form confirming the Plaintiff's injuries.
19. The plaintiff proposed the amount of Kshs. 3,000,000 as general damages as adequate and in support relied on the following cases;
 - a. Peace Kemuma Nyang'era v Michael Thuo & another [2014] eKLR where the appellant suffered a fracture of the sacrum bone (transformational fracture), fracture of the right superior pubic ramus of the public bone, fracture of the right ischium/inferior pubic ramus of the pelvic bone, Haematoma on both thighs and Lumbo-sacral haematoma. The court awarded Kshs 2,500,000/=.
 - b. Florence Hare Mkaha – Vs – Pwani Tawakal Muni coach & Another (2012) eKLR Mwongo J where the plaintiff fractured her right superior and inferior ramus of pubis fracture of ischium, fracture of right acetabulum, fracture lateral condyl of femur, dislocation of left knee with torn collateral ligament, skin graft surgery on left leg, shortened left leg by 4 cm. the court awarded her Sh. 2,400,000/- general damages for pain, suffering and loss of amenities.
20. On special damages the plaintiff submitted that he presented a the Medical Report by Dr. Wokabi who notes that the Plaintiff will require Kshs 200,000/= for surgery to release the tight tendo Achilles (ETA



- and STC). The Report has confirmed that the Plaintiff was in the process of healing and that he can only walk on tip toe. The Report further notes that the Plaintiff will require Physiotherapy at Kshs 80,000 and twice weekly sessions at Kshs 1,500/= per session.
21. On the claim for loss of earning capacity it was the plaintiff's submission that he was working as a machine operator at Kenpoly Manufacturers Ltd earning Kshs 500/= per day. It was further his evidence that he has not gone back due to the above accident and proposed Kshs 1,592,640.
 22. On loss of future earnings; the plaintiff submitted that he was aged 29 years in his prime age and will never be able to continue with his normal life. He therefore quantified loss of future earning using a reasonable multiplier of 15 and therefore proposed the amount of Kshs 1,706,400 on this head.
 23. The defendant submitted on liability that no evidence has been adduced by the plaintiff to prove on a balance of probabilities or at all. There was no search from the National Transport Authority that was produced by the plaintiff to prove ownership of the vehicle. The plaintiff has relied on the police abstract as proof of ownership but the said abstract does not mention the names of the defendant as the owner of the motor vehicle.
 24. The defendant further submitted that despite the police abstract indicating that the matter was still pending under investigations, the Plaintiff failed to call a police officer to testify and confirm the status of the case on whether the investigations were concluded and the Defendant was blamed for the accident.
 25. The defendant argued that it was quite clear from the Plaintiff's testimony that the Plaintiff was riding on the main highway, very early in the morning when there was still some darkness without a reflector and he was also cycling on the main highway instead of using the pavements and path ways.
 26. On general damages the defendant proposed that the court be guided by the following cases;
 - i. Francis Ndung'u Wambui & 2 Others v Purity Wangui Gichobo (2019) eKLR where the respondent had suffered a deep laceration on the medial side of the left foot and a degloving injury on the left thumb and the award was on appeal reduced from Ksh.450,000/= to 250,000/=
 - ii. Jubilee Hauliers Ltd & Another v Mary Waithera Wanja where respondent had suffered degloving injuries to the right elbow, multiple lacerations on the right arm, and soft tissue injuries on the chest; cut wound on the tongue and bruises on the forehead. An award of Kshs. 200,000/was upheld; and
 - iii. Hassan Farid & Another v Sataiya Ene Mepukori & 7 Others (2018) eKLR where awards ranging between Ksh80,000/= and 450,000/= were made.
 27. The defendants submitted that the plaintiff did not plead for future medical expenses, loss of earnings, loss of future earnings and therefore is not eligible for the same.
 28. I have carefully considered the evidence adduced by the parties in this case.
 29. It is the duty of the plaintiff to prove his case to the required standard which is on a balance of probabilities in civil cases.
 30. The issues for determination in this case are as follows;
 - (i) Whether the plaintiff has proved his case to the required standard
 - (ii) Whether the Defendant is liable to pay the plaintiff the remedies he is seeking.



31. On the issue as to whether the plaintiff has proved his case to the required standard, the plaintiff's evidence was that on 2/10/2009 at around 8.00 am in the morning he was from his place of work along outer ring/lunga lunga road near Don Holm when a trailer registration number T420AG-T415AGR which was being driven carelessly, negligently without attention and which was also overtaking him from behind, squeezed him against the pavement of the road, knocked him down and ran over both of his legs.
32. I find that the plaintiff's evidence was not controverted by the defendant.
33. The plaintiff said he was cycling from work on a pathway next to the road when the rear side of the trailer hit him.
34. I find the defendant 100% liable in negligence.
35. The plaintiff sustained serious injuries as follows;
 - i. Extensive degloving injury on the right leg with extensive skin and muscle loss from the lower thigh to the ankle.
 - ii. Extensive degloving injury on the outer aspect of the left leg with extensive skin and muscle loss. The fibula bone was exposed.
36. On the issue of assessment of damages, I have considered the submissions by both parties and the authorities relied as outlined above.
37. In *Alpharama Limited v Joseph Kariuki Cebon* [2017] eKLR the court said of assessment of damages for diminished earning capacity:-

“To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired”.
38. In the current case the plaintiff did not produce evidence of his age and earning capacity and therefore I award him a global figure of KSH1,000,000 for both loss of future earnings and earning capacity.
39. I award damages as follows;
 - General damages for pain & suffering 2,000,000
 - Future medical expenses 280,000
 - Loss of earnings 1,000,000
 - Special damages 3,150
 - Total 3,283,150



40. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of Ksh 3,283,150 together with costs of the suit and interest at court rates from the date of this judgment until payment in full.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
22ND DAY OF DECEMBER, 2023.**

A. N. ONGERI

JUDGE

