



REPUBLIC OF KENYA



KENYA LAW
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**Marangu & another v Wanjiru & 2 others (Civil Case 11 of 2019)
[2022] KEHC 13524 (KLR) (Civ) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13524 (KLR)

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

CIVIL

CIVIL CASE 11 OF 2019

JK SERGON, J

SEPTEMBER 23, 2022

BETWEEN

JOSEPH KABURU MARANGU 1ST PLAINTIFF

CAROLINE WAIRIMU KABURU 2ND PLAINTIFF

AND

GEORGE WANJIRU 1ST DEFENDANT

IBRAHIM WAITHUKI MAINA 2ND DEFENDANT

DANIEL NG'ANGA MURIITHI 3RD DEFENDANT

JUDGMENT

1. The plaintiffs herein filed a suit by way of the further amended plaint dated January 22, 2020 and sought for judgment against the defendant in the following manner:

For the 1st plaintiff

- a. General damages for pain and suffering and loss of amenities
- b. Special damages Kshs 1,755,154/=
- c. Damages for future costs for medical expenses and special needs as pleaded.
- d. General damages for loss of consortium
- e. For the 2nd plaintiff
- f. Damages for Loss of consortium
- g. Costs of the suit and interest



2. The plaintiffs pleaded in their plaint that on or about January 22, 2016 that the 1st plaintiff was walking lawfully along waiyaki way at Kangemi when the defendant's driver drove managed or controlled motor vehicle registration number KBU 990A that he caused or permitted the same to violently collide with the plaintiff and knock him down as a result he sustained severe bodily injuries.
3. As a result of the said accident the plaintiff sustained grievous injuries to his body, the same has been particularized as follows;-
 - a. Unstable neck injury at 2nd neck vertebrae (C2) Motor Sensory loss from lower neck downwards causing downwards causing permanent irreversible spinal cord damage that level down (quadriplegia) hence:-
 - i. Irreversible paralysis of upper limbs
 - ii. Irreversible paralysis of lower limbs
 - iii. Irreversible incontinence of stools and urine
 - b. Injury right knee ligament.
 - c. Dislocation right wrist
 - d. Laceration left scalp
4. The plaintiffs further pleaded that the 1st plaintiff who is married has lost ability to engage in sexual life and has greatly suffered psychologically and as a result of the accident and injury to her spouse the both plaintiffs have suffered loss of consortium and claims damages.
5. The defendants were served with summons to enter appearance and all accompanying pleadings but they did not enter appearance and file a statement of defence. The plaintiffs requested that interlocutory judgment be endorsed after the defendants failed to enter its appearance. *Vide* a court order dated May 5, 2022, interlocutory judgement was entered against the defendants. The matter proceeded by way of formal proof on May 25, 2022 with the plaintiffs calling three witnesses to test.
6. Dr Wokabi Washington who was PW1 stated that he examined the 1st plaintiff on October 29, 2019 in an ambulance outside his office and did a medical report dated November 5, 2019 which he produced as PEXH-1.
7. The witness stated that the 1st plaintiff sustained a spinal cord injury which rendered him in a total paralysis and that there are many challenges which arise that will make him totally dependable all the time.
8. The 1st plaintiff who was PW2, stated that adopted his signed witness statement dated January 15, 2019 as his evidence in chief and produced the plaintiffs' list and bundle of documents as exhibits as PEXH3-22.
9. It is the testimony of the witness that he was involved in road accident along Waiyaki way upon alighting and was walking on the pavement when he was struck at the back by a vehicle and fell on the ground on the ground at the edge of the pavement.
10. The witness stated that he did not lose consciousness and could hear people shouting and banging on the vehicle and asked a god Samaritan to pull out his mobile telephone from his pocket and call his wife who is doctor and told her send an ambulance as she works in a hospital.



11. The witness further stated that admitted at MP shah hospital and later transferred to Kenyatta National Hospital then referred to Spinal Injury Hospital where he stayed upto September 2019 when he was discharged and advised to receive homecare.
12. It is was the testimony of the witness that he can only sit on a wheel chair for a while and that has to be assisted to visit the washroom and that he blames the driver of the matatu as he was reversing from the exit end of the road.
13. He stated that he relies on prescribed drugs which are very expensive.
14. The 2nd plaintiff who was PW3, stated that the 1st plaintiff is her husband and that she lost companionship from him and became the sole bread winner.
15. She further stated that she lost conjugal rights from the husband since he was seriously injured as well a social life and had to hire someone to take care of him when she is away.
16. Upon close of the hearing, this court gave directions for the plaintiffs to file their written submissions.
17. The plaintiff vide its submissions dated July 25, 2022 gave brief facts of the matter and on general damages made a claim for pain and suffering at Kshs 15,000,000 and submitted that this figure was reasonable and commensurate to the degree of injuries the 1st plaintiff sustained.
18. To support this argument the plaintiffs relied on several authorities including the following :

- a) *Dorothy Kanyua Mbaka & Another v PS In charge of Department of Defence in the Office of the President & Another* (2014) eKLR

The 1st plaintiff sustained permanent paraplegia ,trauma of the bladder and urethra ,Loss of sexual function, permanent incapacity, permanent immobilization and was condemned to a wheelchair for the rest of her life, loss of control over bowels and urine and regular bedsores. General damages for pain, suffering and loss of amenities awarded at Kshs 10,000,000/= 2014.

The 2nd plaintiff suffered permanent paraplegia, sever pelvic injury with fracture of pubic Isochial racni, trauma of the bladder with rapture of the urethra, loss of sexual function, permanently immobilized and condemned to a wheelchair for the rest of her life ,loss of control over bowels and urine and regular bedsores. General damages for pain, suffering and loss of amenities awarded at Kshs,10,000,000/= in 2014.

- b) In *Bernard Mutisya Wambua v Swaleh Hashil* Naivasha HCCC No 28 of 2016 (2017) eKLR, Meoli J awarded general damages in the sum of Kshs 6,500,000/= to the plaintiff who suffered sustained fractures to the right hand side collar bone ,right hand metacarpals, complete paralysis of right limb, dislocation of the right shoulder , and compound fractures to the right tibia and fibula. The left femur was also fractured .Due to nerve injury on right hand, the hand cannot be used. Permanent incapacity was assessed at 80%. Judgment was on November 3, 2017.



19. On the issue of special damages, the plaintiffs relied on the case of *Abdi Werdi Abdulabi v James Royo Mungatia & another* (2019) eKLR had the following to say in respect of special damages;

“The court of Appeal in *Hahn v Singh*, Civil Appeal No 42 Of 1983 [1985] KLR 716, held that special damages must both be pleaded and proved before it can be awarded by the court. It stated:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

20. It is the plaintiff's submissions that they had pleaded and proved by way of documentary evidence the loss consequent upon the injuries he suffered for *inter alia* treatment, medical checkups, medicines and toiletries, physiotherapy, nursing aid, transport, totaling to Kshs 1,755,154/=.
21. On the claim for future expenses, the plaintiffs contend that they pleaded and led evidence to illustrate his claim that as a result of the above injuries he had been left with 100% permanent disability and a lifetime confinement to bed ,complete dependence on other people for all his personal needs ,round the clock home based nursing care, regular physiotherapy and follow ups as outpatient and medical treatment ,reliance on wheel chair, use of diapers, special dietary needs, special bed, mattress and beddings, skin lotions and claims damages.
22. On this argument the plaintiffs relied on the case *Kenya Bus Services Ltd v Gituma* ,(2004) EA 91 Court of Appeal stated in this regard that:

“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”.

23. The plaintiff urged the court to adopt a multiplicand correspondent to the current minimum monthly wage of Kshs 15,201.65 and multiplier of 20 years. The claim works out to Kshs 3,648,396/00.
24. On claim of the 2nd plaintiff for the loss of consortium, the plaintiffs submitted that the 2nd plaintiff has suffered loss as the spouse of the 1st plaintiff as the injuries he sustained have resulted in impairment which has curtailed every component of consortium and servitium resulting in great physical and emotional suffering. They quantify this claim at Kshs 1,000,000/= relying on the case of *PBS & another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others Nairobi* HCCC No 399 of 2010 (2016)eKLR

The court awarded the sum of Kshs 800,000/= on the July 6, 2016 to the plaintiff who lost a wife and a companion as well as the mother to his three children, who also lost her love and care.

25. I have considered the pleadings by the plaintiff and the documentary evidence adduced, their submissions and the authorities relied on in support of the quantum for damages.



26. The court must exercise its discretion judiciously in assessing general damages for pain, suffering and loss of amenities. It must be guided by decided cases but also give regard to what is affordable within the limits of the economy. In *Kigaragari v Aya* (1982-88) 1 KAR 768 and *Chege v Vesters* (1982-88) 1 KAR, 1021 the court in this regard noted that:-

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee”

27. Further, the court of appeal in *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR noted in this regard that –

The assessment of damages in personal injury case by court is guided by the following principles: -

1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
2. The award should be commensurable with the injuries sustained.
3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
5. The awards should not be inordinately low or high (See *Boniface Waiti & another v Michael Kariuki Kamau* (2007) eKLR.)

28. Under the general damages under pain and suffering, I rely on the *Halsbury's Laws of England* 4th Ed Reissue Vol 12(1) at page 348, paragraph 883 states that general damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff. In the circumstance of the plaintiff, it is not in dispute that he is entitled to damages for pain and suffering a fact admitted by the defendant, the issue is the quantum.

29. The plaintiff under this head claims the sum of Kshs 15,000,000/= citing inflation and that the court before 2019 based on above cited authorities awarded the sum of Kshs 15,000,000/=. The plaintiff cited various authorities in support of his claim of Kshs 15,000,000/=,

30. In *Bernard Mutisya Wambua v Swaleh Hashil* (supra) where the court awarded 6,500,000/= the circumstance are different from the plaintiff case as the plaintiff suffered loss of his right hand in addition to other paralysis which was considered 100% permanent disability.

31. In *Charlene Njeri Kuria v Gitu Geoffrey and Another* (2016) eKLR where the court awarded 5,000,000/= the disability was at 60% disability with partial paralysis of the lower limbs. And in *Emmanuel Kombe Nzai v Basari Company Limited & Another* (2017) eKLR where the court awarded 6,000,000/= the plaintiff suffered 80% disability with paralysis of the lower limbs. The link between the above authorities is that the plaintiffs lost use of both limbs, however in the instant case the plaintiff had a permanent irreversible spinal cord damage that level down (quadriplegia) and permanent disability percentage.



32. Therefore, applying the above principles to this case and considering the injuries suffered by the 1st plaintiff and their resultant effects and taking into account the submissions and authorities of the parties, its notable that the injuries sustained in the 1st plaintiff authorities were more serious than the instant one's.
33. In view of the foregoing cited authorities the commensurate and sufficient compensation for pain and suffering and loss of amenities for injuries suffered by the plaintiff is an award of Kshs 5,000,000/= factoring inflation.
34. On the issue of loss of earnings, in the case of The Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR stated in this regard that:
- “...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 future or in case he loses the job, his diminution of chances of getting an alternative 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 future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. 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 factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”
35. In *Mumias Sugar Company Limited v Francis Wanalo* (supra) the Court of Appeal allowed general damages in this respect in the sum of Kshs 500,000/- for a relatively minor (15%) disability sustained by the plaintiff. In *CM (a minor suing through mother and next friend MN v Joseph Mwangangi Maina* (supra) the court awarded Kshs 900,000/= to the minor.
36. The plaintiff claims in his submissions that he is 58 years old and worked as an insurance agent and as a result of the injuries sustained he suffered loss of any prospect of employment and he claims damages for total loss of earning capacity and future earnings. He therefore urges the court to adopt a multiplicand correspondent to the current minimum monthly wage of Kshs 15,201.65/= and a multiplier of 20 years. In this regard he is claiming the sum of Kshs 3,648,396/=.
37. In the circumstances and considering the age of the plaintiff a global figure of Kshs 1,000,000/= would suffice.
38. On future medical expenses, the plaintiff has pleaded for damages and costs of future medical expenses as a result of the injuries he had been left with 100% permanent disability, complete dependence on other people for all personal needs regular physiotherapy, follow ups as outpatient, use of diapers, special diet needs and special bed. In this regard he is claiming Kshs 25,300,000/=.
39. Also in the case *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR the court of appeal, referred to the case of *Kenya Bus Ltd v Gituma* (2004) EA 91 and held held:
- “And as regards future medication (physiotherapy), the law is well established that although an award of damages meet the cost thereof is made under the rubric of general damages, the need for future Medicare is itself special damage and is a fact that must be pleaded. If



evidence thereon is to 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.”

40. Further, In *Bonham Carter v Hyde Park Hotel Ltd.* (1948) 64 TR 177, it was stated:

“The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down 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 provide it. (See *Ouma v Nairobi City Council* (1976) KLR 297, 304)”

41. Apart from the medical report from the Dr Wokabi which doesn’t help much in this respect, nothing has been filed by the 1st plaintiff to support his claims for the above listed claims for future medical expenses. This court however notes the claim for future medical expenses is not farfetched. And in the circumstances the court ought to award a global sum of Kshs 1 million.

42. In regard to special damages the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the court. Suffice it to quote from the decision of our Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 Of 1983 [1985] KLR 716, at P 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag JA – held:

‘Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.’

43. Therefore, looking at the plaintiff case, he has produced the various receipts on his treatment, medical checkups, medicines and toiletries, physiotherapy, nursing aid, transport, which totaled up to the sum of Kshs 1,755,154/=.

44. On the issue of loss of consortium, on the part of the 2nd plaintiff suffered loss as the spouse after the 1st plaintiff sustaining injuries which resulted in impairment which curtailed every component of consortium and servitium resisting in great physical and emotional suffering. In the circumstances the court will award a global sum of Kshs 1 million.

45. Judgment is entered in favour of the plaintiffs and against the defendants jointly and severally as follows:

a) 1st Plaintiff

i. General damages for pain and suffering Kshs 5,000,000/=

ii. General damages for loss of earning capacity Kshs 1,000,000/=

iii. Future medical expenses Kshs 1,000,000/=

iv. Special damages Kshs 1,755,154/=

Total Kshs 8,754,154/=

v. The amount to attract interest at court rates from the date of judgment until the date of full payment.

b. 2nd Plaintiff



- i. Kshs 1,000,000/= for loss of consortium.
- ii. The aforesaid amount to attract interest at court rates from the date of judgment until full payment.
- c. The plaintiffs to have the costs of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Plaintiff

.....for the 2nd Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant

