



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 209 OF 2011**

**SIMON NJOROGE NGOTHO.....PLAINTIFF**

**VERSUS**

**MASARI DISTRIBUTORS LIMITED.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit vide a plaint dated 30<sup>th</sup> March, 2011 seeking damages for personal injuries arising out of road traffic accident which occurred on 17<sup>th</sup> August, 2008. The Plaintiff blames the accident on the negligence of the Defendant, his driver, servant or agent in the manner of the driving of motor vehicle registration No. KBC 1705.
2. The claim is denied as per the Defence filed herein dated 29<sup>th</sup> August, 2011. In the alternative, the Defendant wholly and/or substantially blames the accident on the Plaintiff's negligence.
3. The case proceeded to a full hearing. The Plaintiff, Simon Njoroge Ngotho (PW1) and PW2 Francis Gathuna Kamaka testified and adopted their Witnesses Statements as their evidence. Dr. Washington Wokabi (PW3) testified and produced his medical report as an exhibit.
4. The Defendant's side closed their case without calling any witnesses. The medical report by Dr. Wambugu P.M dated 8<sup>th</sup> December, 2011 was produced by the consent of the parties in support of the Defendant's case.
5. Both PW1 and PW2 gave a corroborative account of evidence that the Plaintiff fell off the motor vehicle when the motor vehicle started moving before the plaintiff had fully disembarked. According to the Plaintiff, he told the driver to wait for him to alight but that the driver started moving while the Plaintiff was alighting. It is also clear from the evidence of both PW1 and PW2 that PW1 was disembarking through the front right door while PW2 the turn-boy was at the rear of the motor vehicle. Thus, as acknowledged by PW2, he did not know what had transpired before the Plaintiff started alighting. I have found no material contradictions between the evidence of PW1 and PW2 as argued by the Defendant's counsel. The evidence from the Plaintiff's side on how the accident happened is uncontroverted by any other evidence. I find the Defendant 100% liable.
6. The Plaintiff's evidence is that he was unconscious for two weeks and was admitted twice at Kenyatta National Hospital then continued with outpatient treatment at Tigoni Hospital.
7. The medical report dated 26<sup>th</sup> February, 2019 produced by a Consultant Surgeon, Dr. W. M. Wokabi also reflects that the Plaintiff sustained major injuries on both legs and was admitted for a period of six months at Kenyatta National Hospital. The doctor's opinion was that the Plaintiff suffered a lot of pain and blood loss from the excessive skin and muscle loss (degloving injuries) on both legs and underwent many surgical procedures. That the Plaintiff lost a lot of the muscles of both legs with restricted movement of the left ankle which caused a limp. The degree of permanent incapacity was assessed at 30% on both legs but will not require further surgery as the Plaintiff would not benefit much from it.
8. The medical report dated 8<sup>th</sup> December, 2011 by Dr. Wambugu P.M, a Consultant Surgeon describes the Plaintiff's injuries as multiple extensive degloving wounds involving both legs. The treatment given included surgical toilets and skin grafts while admitted at Kenyatta National Hospital. Dr. Wambugu's opinion is that the Plaintiff suffered an apparent shortening of the left leg deformity due to contracture formation and requires further surgery at the cost of Ksh.50,000/= at Kenyatta National Hospital. Permanent incapacity was assessed at 25%.
9. Essentially, the two doctors are in agreement on the injuries sustained by the Plaintiff. The difference of 5% incapacity is, as stated by Dr.

W. M. Wokabi, within acceptable standards.

10. The Plaintiff's advocate submitted for an award of Ksh.3,000,000/= as general damages for pain and suffering. He relied on the case of **Patrick Kithaka Kivuti v John Mwangi [2018] eKLR** where an award of Ksh.2,000,000/= was made for lacerations, loss of use of the right upper limb, degloving injury to the right upper limb which required skin grafting and severe blood loss.

11. The Defendant's counsel submitted for an award of Ksh.500,000/= as general damages. He relied on the following cases:

(a) **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** where an award of Ksh.250,000/= was made for degloving injuries affecting the left calf region.

(b) **Jackson Wanyoike v Kenya Bus Service Ltd & another [2003] eKLR** wherein an award of Ksh.300,000/= was made for soft tissue injuries and degloving injuries to the left leg resulting in 15 - 20% disability.

12. The authority cited by the Plaintiff bears more serious injuries as the Plaintiff therein lost the use of the limb. On the other hand, the cases referred to by the Defendant involve less severe injuries. Inflation due to passage of time must also be considered.

13. This court has also considered other comparable cases e.g.

1. **Budget Driving School v Anne Syombua Musele [2020] eKLR.**

2. **Kiiru Tea Factory & another v Peterson Watheka Wanjohi [2008] eKLR.**

Where awards made ranged from Ksh.800,000/= to Ksh.1,000,000/= for comparable injuries.

I assess general damages herein at Ksh.1,000,000/=.

14. The two doctors had different opinions on whether the Plaintiff will require further surgery. Dr. Wokabi's view is that none was required while Dr. Wambugu's opinion was that the contracture formation required further surgery at Ksh.50,000/= at Kenyatta National Hospital. It is however noteworthy that the Plaintiff's doctor's view is that no further surgery is necessary. The evidence by the Plaintiff's side does not therefore support the claim for future medical expenses. This claim therefore fails.

15. The Plaintiff has prayed for loss of future earnings and or diminished earning capacity. As stated by the Court of Appeal in **S J v Francesco Di Nello & another [2015] eKLR**:

**"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.**

**This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg 14 wherein Lord Denning M. R. said as follows:**

**It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.**

**Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings. The correct position as in the Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & another v Ruth W Mwangi CA No. 251 of 1996 as hereunder;**

**Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as proved on a balance of probability."**

16. In the case at hand, although it was pleaded that the Plaintiff earned Ksh.40,000/= a month, the period the plaintiff was not working is not stated. The medical evidence reflects that the Plaintiff was not able to work for six months. However, the Plaintiff's evidence that his income was Ksh.40,000/= a month has not been substantiated. No documents have been produced in support of the Plaintiff's business. A matatu business and a soda distribution business are types of business where some documentation would be expected. There are no figures given in respect of what was earned from the business. No figures have been given on the salary earned from employment and no documents have been produced in support of the employment. The claim for loss of future earnings has not been proved.

17. In arriving at the above decision, I find support in the exposition of the law by the Court of Appeal in the case of **Douglas Kalafa Ombeva v David Ngama [2013] eKLR** where it was stated:

**"Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically. In the present case, the**

**appellant provided no evidence that he was indeed employed at Bons Company and that he was earning the 3,670.00. In this case, the sum pleaded was Kshs.3,913.60, but like in the Karanu case, there was no evidence to support this claim. Even though the appellant claims that the sum was reasonable, and the court ought to allow it, we find no basis to do so. We are satisfied that the trial judge applied the correct principles on this head and this ground of appeal therefore fails.”**

18. The two medical reports produced herein did not reflect whether Plaintiff is able to work or not. However, both medical reports reflect a 25% to 30% permanent incapacity with restricted movement of the right ankle and a limp. The Plaintiff's ability to earn may have been reduced by the accident but it is not clear from his evidence why it would be completely impossible to work or to run his businesses. I would award the sum of Ksh. 500,000/= for diminished earning capacity. (See for **example Joseph Muchiri Mbugua v Gatimu Ndirangu AKA Augustine [2019] eKLR**)

19. The claim for medical expenses at Ksh.337,045/= has been proved. The documents produced herein reflect expenses over and above the Ksh.337,045/=. The claim for Ksh.1,500/= for obtaining the medical report and Ksh.500/= for the search certificate for the motor vehicle have also been proved as per the receipts produced. The receipt for the claim of Ksh.200/= for the police abstract was not produced. The total amount of special damages specifically claimed and specifically proved comes to Ksh.339,045/=.

20. The total award is as follows:

- (a) General damages Ksh.1,000,000.00
- (b) Diminished earning capacity Ksh. 500,000.00
- (c) Cost of future medical expenses Nil
- (d) Loss of future earnings Nil
- (e) Special damages Ksh. 339,045.00

**Total Ksh.1,839,045.00**

21. The upshot is that judgment is entered for the Plaintiff against the Defendant for the sum of Ksh.1,839,045/= costs and interest.

Date, signed and delivered at Nairobi this 24<sup>th</sup> day of Feb., 2021

**B. THURANIRA JADEN**

**JUDGE**