



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 48 OF 2017

DAVID TUTI MATENDECHERE APPELLANT

VERSUS

ALICE WANJIKU MAINARESPONDENT

JUDGMENT

1. In his plaint dated 22nd August 2016, the plaintiff, *David Tuti Matendechere* filed suit against the defendant, *Alice Wanjiku Maina* seeking both special and general damages, costs of the suit and interest following personal injuries sustained in a road traffic accident involving motor vehicle registration number KBZ 175 owned by the defendant whose occurrence he blamed on the defendant's negligence.

2. The plaintiff pleaded that on 30th July 2015 at about 7.30 am, he was riding his bicycle on a footpath along the Thika-Sagana highway when the defendant, who was driving in the opposite direction lost control of her aforesaid vehicle, crossed to the path in which the plaintiff was lawfully riding thereby causing a collision in which he sustained serious injuries.

3. The court record shows that initially, interlocutory judgment was entered against the defendant for failure to file a defence within the prescribed time. The judgement was subsequently set aside by consent of the parties after which the defendant filed a statement of defence dated 20th March 2018. In the statement of defence, the defendant denied all the allegations contained in the plaint and in the alternative, pleaded that if the accident occurred as alleged, it was caused or substantially contributed to by the plaintiff.

4. Subsequently, the parties filed a consent on liability in the ratio of 80:20 in favour of the plaintiff against the defendant which was adopted as an order of the court on 30th May 2018. Hearing thereafter proceeded for assessment of damages.

5. The issue of liability having been settled by consent of the parties, my only task in this case is to assess the damages payable to the plaintiff guided by the pleadings and the evidence adduced by both parties.

6. In his plaint, the plaintiff pleaded that he suffered the following injuries as a result of the accident:

- i. Polytrauma with bilateral subdural hematoma;
- ii. Multiple facial fractures;
- iii. Multiple rib fractures with left pneumothorax;
- iv. Fracture of the left femur;
- v. Fracture of the left clavicle;
- vi. Traumatic amputation of left middle finger;
- vii. Continues to tolerate PEG tube to feed and tracheotomy decannulation to protocol.
- viii. Will depend on an assistant for mobilization for the rest of his life.

7. In addition to general damages, the plaintiff prayed for special damages itemized as follows:

- i. Medical expenses -KShs.4,795,021

ii. Medical reports	-KShs.12,000
iii. Cost of walking aid	-KShs.320,000
iv. Cost of regular checkups and taxi charges	-KShs.960,000
v. Loss of earnings from April 2016	-KShs.104,706
vi. Loss of earning capacity	-KShs.20,103,532.

He also prayed for costs of the suit and interest.

8. At the hearing, the plaintiff testified as PW2 and called two additional witnesses being a doctor (PW1) and his wife (PW3).

9. In his evidence, the plaintiff reiterated his injuries and produced his Identity Card as exhibit 3 to prove that he was 47 years old. A perusal of the identity card shows that the plaintiff was born on 27th July 1972. He testified that before the accident, he was working as a gardener at Kakuzi Limited earning a salary of KShs.11,634 but after the accident, due to the severity of the injuries sustained, he was unable to work in any capacity; that he just stayed at home and relied on his wife to not only support the entire family but to assist him in performing daily simple tasks including his mobility.

10. In his evidence under cross examination, the plaintiff admitted that at the time he testified, he could walk on his own and he did not require a walking aid.

11. The plaintiff further testified that after the accident, he remained conscious. He was taken to Kenol Hospital for first aid after which he was transferred to Aga Khan University Hospital where he was admitted for treatment; that he incurred a bill of KShs.4,785,02 which was paid by Kakuzi Limited's holding company East African Produce Limited; that he was examined by doctors at Aga Khan Hospital and *Dr. Wambugu* whose reports he produced in evidence by consent of the defendant as Exhibits 5 (a), (b), (c) and Exhibit 8. He complained that his injuries had not completely healed as he still suffered intense pain and could not walk for long distances; that his left arm could not function without the support of a sling.

12. It was also the plaintiff's case that he still had metal plates in his left femur and he would like to have them removed since they caused him pain whenever he walked for long distances. He also testified that Eastern Produce Limited had demanded a refund of the money the company expended in clearing his hospital bills.

13. PW3 in her evidence supported PW1's evidence in all material particulars. She added that after the plaintiff was discharged from Aga Khan Hospital, he became a different man. He could not make decisions on his own even on daily activities and she had to do everything for him; that she was the one taking care of the family as the plaintiff could not work; that she used to hire taxis to take him to Thika for physiotherapy but on cross-examination, she admitted that she did not have receipts to prove the claim for KShs.960,000 for transportation expenses.

14. The defendant did not call any witness during the trial but relied on the medical report by *Dr. Wambugu* which was produced by the plaintiff by consent of the parties.

15. After the close of the hearing, parties agreed to file final written submissions which they duly filed. The submissions were highlighted before me on 7th October 2019 by learned counsel *Ms Nyabuto* who appeared for the plaintiff and learned counsel *Mrs Ochieng* who represented the defendant.

16. I have carefully considered the pleadings, the evidence on record, the written and oral submissions made on behalf of the parties as well as all the authorities cited. As stated earlier, my only task in this case is to determine the award of damages payable to the plaintiff guided by the material placed before me.

17. A perusal of the various medical reports produced by the plaintiff including those from *Dr. Wambugu* and *Dr. Ndeti* all confirm that the plaintiff sustained the injuries stated in the plaint as a result of the accident. Those injuries were largely not disputed by the defendant. I had reproduced the injuries sustained by the plaintiff in paragraph 6 of this judgement.

18. The reports from Aga Khan Hospital show that the plaintiff was first admitted at the intensive care unit for about two weeks where he underwent various surgical procedures including insertion of metal plates to fix the fracture on his left femur. He was then transferred to the high dependency unit and later to the general ward. He was discharged on 4th September 2015 but continued to attend the hospital as an outpatient. He also continued to attend a hospital in Thika for physiotherapy.

19. In his evidence before the court, the plaintiff claimed that the injuries had not healed since he was still in pain in the affected areas, his left arm could not also function without support. This was confirmed by *Dr. Wambugu* in his medical report in which he stated that the plaintiff had suffered residual paralysis of the left upper limb. *Dr. Ndeti* (PW1) and *Dr. Wambugu* both confirmed that the plaintiff had suffered permanent incapacity assessed at 70%.

20. The only variance between *Dr. Wambugu's* and *Dr. Ndeti's* reports is that though *Dr. Ndeti* indicated that the plaintiff had poor memory and slurred speech, *Dr. Wambugu* who examined the plaintiff on 13th July 2016 over two years before *Dr. Ndeti's* examination on 9th March 2018 stated that at the time of his examination, the plaintiff's memory was intact and his speech was normal. When the plaintiff testified, I

noted that his speech was normal and he admitted as much in his evidence.

21. In his submissions, the plaintiff proposed an award of general damages in the sum of KShs.10,000,000 relying on the following authorities: *Beatrice Anyango Okoth V Rift Valley Railways (Kenya) Limited & Another, MSA HCC No. 450 of 2011*; *Ngure Edward Karega V Yusuf Doran Nassir, NKR HCC No. 157 Of 2012* and *Mueni Wambugu V Simon Peter Githae & Another, Machakos HCC No. 202 Of 2009*.

Having read the above authorities, I find that the injuries sustained by the plaintiffs in those authorities are not comparable to the injuries suffered by the plaintiff in this case. The plaintiffs in those other cases suffered largely different injuries.

22. The defendant on her part proposed a sum of KShs.2,500,000 relying on several authorities in which the plaintiffs suffered multiple fractures of less severity without any brain injury or amputation of a finger and in most of those authorities, the plaintiffs were awarded general damages for pain and suffering in sums ranging from KShs.1,500,000 to KShs.2,400,000. The authorities relied on by the defendant included the following:

i. Teresiah Ngugi & Another V Michael Masia Kimende [2018]eKLR;

ii. Zipporah Nangila V Edoret Express Limited & Two Others [2016] eKLR;

iii. James Gathirwa Ngungi V Multiple Hauliers (EA) Limited & Another [2015] eKLR; and

iv. Daniel Kosgei Ngelechei v Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR.

23. In this case, I have considered the severity of the injuries the plaintiff sustained. He was hospitalized for over a month at the Aga Khan Hospital and half of that time was spent in the intensive care unit. He underwent several surgical procedures. He must have undergone intense pain and suffering which pain persisted to the time he testified in court over three years later. I have also considered the fact that he lost his left middle finger which was amputated and his left arm became paralysed. This means that he has lost the ability of using his left arm. The doctors confirmed that he had suffered 70% permanent incapacity.

24. Considering the foregoing and the authorities cited by the parties which involved less serious injuries as well as inflationary trends between now and the time of the accident, I find a sum of KShs.4,000,000 to be reasonable and adequate compensation for the plaintiff's pain and suffering as well as loss of amenities. I consequently award the plaintiff KShs.4,000,000 in general damages.

25. Regarding special damages, the plaintiff particularized his claim as stated in paragraph 7 of this judgment. I must start by pointing out that it is trite law that special damages must not only be pleaded but must also be strictly proved.

On the claim for medical expenses in the sum of KShs.4,795,021, the plaintiff testified that this amount was paid by his employer and though claiming that East African Produce Limited had demanded a refund of the amount, no evidence was adduced to prove that claim. The plaintiff did not therefore prove that he had expended any money on his medical expenses. In the circumstances, I am unable to award the plaintiff the aforesaid amount.

26. The plaintiff also prayed for KShs.12,000 being costs of the medical reports. He was however only able to prove payment of KShs.5,000 for *Dr. Ndeti's* medical report. The amount of KShs.5,000 being the only amount proved is hereby allowed.

27. Turning to the claim for cost of a walking aid in the sum of KShs.320,000, none of the medical reports indicated that the plaintiff would need to purchase a walking aid. The support alluded to by *Dr. Ndeti* in his report apparently referred to other kinds of support like the one which was being provided by his wife. In fact in her evidence, PW3 stated that she was the support the doctor was referring to. In his evidence, the plaintiff confirmed that as a matter of fact, he did not require a walking aid. I saw him in court and saw that he was walking without difficulty. In the premises, I am satisfied that this claim was not proved and the same is dismissed.

28. With regard to the prayer for medical check-ups and taxi charges, PW3 admitted in her evidence that the plaintiff had not produced any evidence to support this claim. As the claim has not been proved, the same collapses and is dismissed.

29. The plaintiff also prayed for loss of earnings as from April 2016. He claimed a sum of KShs.104,706 under this head.

It is not disputed that prior to the accident, the plaintiff was working as a gardener earning a monthly salary of KShs.11,634. He produced a payslip for February 2016 as proof of this fact. It is not clear from the pleadings or the plaintiff's evidence how he had arrived at the figure of KShs.104,706 but since he has specifically prayed for lost income from April 2016 and it is not disputed that he was unable to work after the accident, I find that he is entitled to lost income from April 2016 to the date of filing suit.

The suit was filed on 24th August 2016 which means that as correctly submitted by the defendant, the plaintiff was entitled to lost income for a period of five (5) months which translates to KShs.58,170. The same is awarded.

30. With respect to the claim for KShs.20,103,522 for loss of earning capacity, I wish to point out that a claim for diminution of earning capacity is totally different from a claim of future earnings. The Court of Appeal in *Butler V Butler [1984] KLR 225* defined loss of earning capacity and differentiated it from a claim for loss of future earnings in the following terms:

“ i. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour

market or work, as well paid as before the accident are lessened by his injury;

ii. *Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;*

iii. *Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;*

iv. *Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;*

v. *Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading;*

vi. *The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”*

31. Before embarking on a consideration of the amount payable to the plaintiff under this head, I wish to point out that an assessment of damages for loss of earning capacity is an arduous task because the court is required to consider a myriad of factors which includes not only whether the plaintiff was incapacitated by the injuries sustained in the accident and if so to what extent but also whether he had chances of getting any other form of employment in the labour market.

32. In *SJ V Francis Di Nello & Another, [2015] eKLR*, the Court of Appeal alluded to the above complexity when it stated as follows:

“The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to suggest any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market. ...”

33. In this case, the plaintiff testified that he was born in 1972. This means that he was around 43 years at the time of the accident. It is not contested that due to the gravity of the injuries suffered in the accident, he was unable to perform simple daily tasks on his own leave alone work.

The plaintiff in his submissions urged the court to adopt a multiplier of 17 years relying on the authority of *SBI International Holdings (AG) V William Ambuga Ogeri Kericho Civil Appeal No. 24 of 2015* which is not applicable to the facts in this case since the plaintiff in that case was 54 years old and a multiplier of 5 years was adopted by the court.

34. The defendant on the other hand proposed a multiplier of 15 years relying on *Nehemiah Mwangi & Another V Boniface Kasinga Kinga & Nicholas Njue Njuki V Eliud Mbugua Kaburu, [2014] eKLR*.

In the above case, the plaintiff was 25 years old and a multiplier of 30 years was used. The case is inapplicable to the present case because it related to an award of damages for loss of dependency under the *Fatal Accidents Act* and had nothing to do with an award for loss of earning capacity.

35. In this case, both PW2 and PW3 testified that the plaintiff was working as a gardener prior to the accident. Being a person who was not in formal employment, he was not subject to the compulsory retirement age of 60 years. He probably would have worked beyond his 60th birthday but considering his age and the vagaries of life, I find the multiplier suggested by the plaintiff of 17 years to be fair and reasonable and I adopt the same in this case.

36. Given that it is not disputed that he used to earn a salary of KShs.11,634, damages for loss of earning capacity will work out as follows:

$$11,634 \times 12 \times 17 = 2,373,336$$

The plaintiff is awarded the said amount.

37. The defendant in her submissions implored this court to award damages for lost earning capacity as part of general damages and not under its own separate head. Whereas such damages can be pleaded and awarded as part of general damages, where they have not been included within general damages, they can be awarded separately under their own head. The Court of Appeal in *Butler V Butler, [supra]* confirmed this position when it held that:

“... Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading.....”

38. Lastly, under special damages, the plaintiff claimed for cost of replacement of his written off bicycle in the sum of KShs.20,000. The plaintiff did not however adduce any evidence to support this claim. He did not prove that the bicycle he was riding at the time of the accident was actually his property or what its value or cost of purchase was. I therefore have no basis for awarding the amount claimed for

replacement of a bicycle.

39. In her submissions, the plaintiff made an additional claim for KShs.30,000 for *Dr. Ndeti's* attendance fees and cost of future medical expenses in the sum of KShs.300,000. As noted earlier, the law is that special damages which includes cost of future medical expenses and witness expenses must be specifically pleaded in the plaint and strictly proved. The two claims were not pleaded in the plaint. They only featured in the plaintiff's submissions. As submissions are not pleadings or evidence, it is my finding that the plaintiff has failed to both plead and prove the above claims and the same are accordingly dismissed.

40. In the end, judgment is entered in favour of the plaintiff against the defendant in the following terms:

General damages	-KShs.4,000,000
Medical report	-KShs.5,000
Loss of earnings	-KShs.58,170
Loss of earning capacity	<u>-KShs.2,373,336</u>
	-KShs.6,436,506
Less 20% contribution	<u>-KShs.(1,287,301)</u>
Total	<u>-KShs.5,149,205</u>

41. The plaintiff is consequently awarded a total sum of KShs.5,149,205 together with costs and interest at court rates. The award of general damages will attract interest from today's date until payment in full while the award of special damages excluding the award for loss of earning capacity will attract interest from date of filing suit until payment in full.

42. The plaintiff is also awarded costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of April 2020 through electronic mail with the written consent of the parties in compliance with the practice directions issued by the Honourable Chief Justice aimed at mitigating the spread of the COVID-19 pandemic.

C. W. GITHUA

JUDGE