



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 374 OF 2009**

**B A J .....PLAINTIFF**

**VERSUS**

**ROADSTAR LIMITED.....1<sup>ST</sup> DEFENDANT**

**ROADTAINERS LIMITED .....2<sup>ND</sup> DEFENDANT**

**JOSIAH MBATIAN KAPUSA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, B A J sued the 1-3 Defendants, Roadstar Ltd, Roadtainers (Mombasa) Ltd and Josiah Mbatian Kapusa for damages arising out of a Road Traffic Accident.
2. On 17<sup>th</sup> March, 2016, the parties entered into a consent judgment on liability at 10% against the Plaintiff and 90% against the Defendants jointly and severally. Subsequently, the case proceeded for assessment of damages.
3. The Plaintiff, a student at the [particulars withheld] on the date she testified, gave the date of the accident as 17 March, 2008 when she was a 17 year old secondary school student. She adopted her witness statement as her evidence. She described her injuries as facial and leg injuries which necessitated two weeks of admission and five operations to correct her disfigured face, scarred legs and to remove some of the metal implants. Her further evidence was that a metal plate below her left eye and in her chin were still *in situ* and required to be removed at an estimated costs Ksh.150,000/=.
4. The Plaintiff further testified that she still experiences pain in her right ankle if she stands for long. That the right leg also swells if she walks for long and is unable to lift heavy objects. She added that the scars cause her embarrassment and she cannot wear skirts, do modeling or swim as she used to do before. The Plaintiff produced a medical report by Dr. Rono to back the claims. She also produced a medical report by Dr. Wambugu, the Defendant's doctor who also examined her. A bundle of documents was also produced in support of the special damages claims of Ksh.1,498,171/= as per the amendment made in court on 23<sup>rd</sup> January, 2018 following an oral application.
5. The Plaintiff's father, PW2 C O J testified and adopted his witness statement as his evidence. PW2 stated that he made some of the payments for the Plaintiff through his employer Chevron (K) Ltd and made other payments personally. He explained that Chevron (K) Ltd traded in Kenya in the name of Caltex (K) Ltd which was later purchased by Total marketing (K) Ltd. His evidence was that the first two admissions were paid for by the employer through the medical scheme. That the said medical scheme was managed by Eagle Africa Insurance Brokers and had a limit of Ksh.200,000/= per family. That he paid the rest of the medical expenses amounting to Ksh.1,141,617/= through deductions made to his salary and when he left Chevron (K) Co Ltd, the outstanding balance was deducted from his final dues.
6. The Defendants did not call any witnesses. Both parties filed written submissions which I have considered.
7. Dr. Edwin K Rono's interim medical report dated 10<sup>th</sup> November, 2008 reflects the Plaintiff's injuries as a complex fracture of the face and degloving serious injuries to her lower limbs. The facial fractures were described in the medical report as follows:

**1. Lt orbital floor and margin fractures with pneumo-orbit.**

**2. Comminuted LT maxillary fractures of the anterior and posterior lateral wall.**

**3. LT zygomatic arch fracture**

#### **4. LT mandible angular fracture**

#### **5. RT parasymphyseal mandibular fracture**

8. It is stated in the said medical report that on the day of admission the Plaintiff had an operation to control the bleeding in her legs and open reduction and internal fixation of the fracture of the mandible. That a second operation was carried out to remove the wires and implants.

9. The medical report by Dr. Wambugu P.M. was prepared about 8 years later and is dated 12<sup>th</sup> October, 2016. It describes the injuries sustained by the Plaintiff are described there as follows:

**- Complex orbito-zygomatico-maxillary and mandibular fractures.**

**- Degloving wounds right ankle medical aspect and lateral aspect of left leg.**

10. The treatment given as described in the medical report of Dr. Wambugu included at least four admissions, surgical toilet and skin grafting. The report further states that the facial fractures were managed by way of open reduction and internal fixation using metal implants. The doctor's opinion was that the Plaintiff made adequate recovery but has residual but subtle facial asymmetry and scars on both lower limbs which are of significant cosmetic concern.

11. The cost of removal of the metal implants was estimated in the medical report at Ksh.200,000/= in a private hospital. The doctor added that the removal of the implants must be considered against the background of the benefits visa viz the surgical skills involved. The doctor concluded that in his view the Plaintiff should not undergo any further surgery of the lower limbs' scars.

12. The two medical reports are essentially in agreement on the injuries sustained by the Plaintiff. The medical report by Dr. Wambugu which was prepared about 8 years after the accident contained more details on the progress made.

13. The Plaintiff's counsel submitted for an award of general damages of Ksh.10,000,000/=. He relied on the following authorities.

**1. NBI HCCC. 1977/2000 Paul Meshack Onyango v Dismas O. Nyanya (Lady Justice May A. Angawa ) The Plaintiff sustained the following injuries in a running down Accident:**

**a) Head Injury**

**i. Right side extra dural haematoma**

**ii. Subdural hygroma**

**b) Bilateral temporal-mandible joint dislocation**

**c) Cut wound on right forehead**

**d) Shock**

**e) 17 teeth extraction**

General damages was assessed at Ksh. 1,500,000/=

**2. Nakuru HCCC 554/1996 Edith Wanja Wairubi v Newton Mbutha (Lady Justice S. C. Ondeyo) which the Plaintiff sustained the following injuries:**

**a) Severe head injury – Brain concussion and loss of consciousness for one week.**

**b) Fracture of the right clavicle**

**c) Fracture of the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> ribs on the right side of the chest**

**d) Bilateral fracture of the pelvis both the superior and inferior rami**

**e) Degloving injury to the left leg above the ankle joint**

General damages were assessed at Ksh. 550,000/=

14. The injuries in the said decisions were more severe but the authorities are rather old. The assessment of general damages at Ksh.10,000,000/= by the Plaintiffs counsel is high and is not supported by the cases cited.

15. On the other hand, the Defendant's counsel submitted for an award of Ksh.1,500,000/= as general damages. He relied on the following decisions:

**1. Maintenance Ltd & another v W. A (A minor suing through next friend and father S.K. H [2015] eKLR. The court considered the sum of ksh.800,000/= to be adequate compensation, where the plaintiff listed the following particulars of injuries: Depressed skull fracture on the left temporal region. The plaintiff further stated the continuing effects of the injuries and disability as "increased chances of developing convulsive disorder."**

**2. James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR, the plaintiff suffered the following injuries: Compound comminuted fracture of the right tibia, Compound comminuted fracture of the right fibula, Fracture of the left proximal radius, Fracture of left ulna, Head injury, Deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations, Pathological/re-fracture of the right leg, with residual injuries like:-**

- a) Re-fracture of the right leg**
- b) Many sinuses on the right leg with pus**
- c) Bone exposure**
- d) Chronic bone infection and dead bone**
- e) Restriction in walking**
- f) Difficult in walking**
- g) Restriction in mobility of the fore arm**
- h) Difficulties in squatting**
- i) Weakness of the left upper limb**
- j) He cannot carry or lift heavy objects**
- k) Walks with aid of clutches**
- l) Restriction of movement of the left limb**
- m) Pain due to prolonged surgery procedure**

The award of general damages was Ksh.1,500,000/=

16. It is noted that in both cases, the injuries therein are much more severe than in the instant case. The decisions were also made about three years ago and are not old.

17. On my part I have also looked at the following other authorities:

**1. Zachary Kariithi v Jashon Otieono Ochola [2016] eKLR**

**2. Caroline Wanjiku Karimi v Simon K Tum & another [2012] eKLR**

The awards in these cases ranged from Ksh.1,500,000/= to Ksh.1,800,000/= for more serious injuries than in our instant case.

18. The Plaintiff is a young lady. The facial asymmetry and scars on the legs are of cosmetic concern. In my view an award of Ksh. 1,500,000/= is a reasonable award of general damages herein.

19. The special damages claim of Ksh.1,000/- for the copy of records was proved as per the two receipts dated 23<sup>rd</sup> July, 2018 from Kenya Revenue Authority which were produced as evidence.

20. The claim for Ksh.35,700/= taxi charges we proved as per the receipts/invoices produced which total Ksh.35,700/=.

21. The Plaintiff in his evidence stated that the medical expenses came to a total of Ksh.1,141,617 made up as follows:

- Ksh.1,074,936/=

- Ksh.19,681/=

- Ksh.12,000/=

- Ksh.35,000/=

**Total Ksh. 1,141,617/=**

22. The aforesaid figures are reflected in the statement dated 11<sup>th</sup> September, 2008 from Chevron (K) Ltd. There are also documents from M.P. Shah Hospital and from private doctors in support of the claim for medical expenses. I am satisfied that the said claim has been proved.

23. The medical report by Dr. Simiyu was expunged from the record. The claim of Ksh.2,000/= for the said medical report was therefore not proved. The claim for Ksh.200/= for the police abstract and the claim for Ksh.2,200/= for loss of spectacles were also not proved by way of evidence. The invoices/payments made to Aga Khan Hospital in the year 2011 which are contained in the Plaintiffs supplementary bundle of documents are not supported by any evidence. The total special damages claimed and proved is as follows:

- Ksh.1,141,617/=

- Ksh. 1,000/=

- Ksh. 35,700/=

- Ksh. 100/=

**Total Ksh.1,178,417/=**

24. The Plaintiff in her evidence gave the future medical expenses as Ksh.150,000/= as pleaded. Dr. Wambugu in his medical report estimated the same as Ksh.200,000/=. I award the sum of Ksh.150,000/=.

25. The total award is as follows:

General damages

Ksh.1,500,000/=.

Special damages

Ksh.1,178,417/=

Future medical expenses Ksh.150,000/=

**Total Ksh.2,828,417/=**

Less 10 % contribution Ksh.282,841.70 comes to Ksh.2,545,575.30

26. Consequently, I enter judgment for the Plaintiff against the Defendants jointly and severally for the sum of Ksh. 2,545,575.30 plus costs and interest.

Date, signed and delivered at Nairobi this 17<sup>th</sup> day of May, 2018

**B. THURANIRA JADEN**

**JUDGE**