



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 611 OF 2007**

**GUARDIAL SINGH GHATAURHAE.....PLAINTIFF**

**-VERSUS-**

**PARMINDER SINGH MANKU.....1<sup>ST</sup> DEFENDANT**

**KEWAL CONSTRATORS LIMITED.....2<sup>ND</sup> DEFENDANT**

**DAVID MBAI KIWA.....3<sup>RD</sup> DEFENDANT**

**KESHRA & SONS CO. LIMITED.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1) On 14<sup>th</sup> September 2014 Guardial Singh Ghataurhae, the plaintiff herein, was involved in a road traffic accident while on board motor vehicle registration no. KAR 900H which was being driven by Parminder Singh Manku, the 1<sup>st</sup> defendant herein, along Nairobi-Mombasa road. The aforesaid motor vehicle was involved in an accident with motor vehicle registration no. KAH 418Z driven by David Mbai Kiwa, the 3<sup>rd</sup> defendant herein and trailer registration no. ZA 7724 being pulled by motor vehicle registration no. KQX 129.

2) As a result of the accident the plaintiff sustained the following injuries.

***i. Comminuted intra articular fracture of the right tibial plateau and metaphysic.***

***ii. Fracture right patella.***

***iii. Comminuted fracture of right distal radius.***

***iv. Osteoarthritis of right knee.***

***v. Fracture of four ribs on right side.***

***vi. Severe lacerations, bruising and scarring.***

3) The plaintiff then filed this suit against the defendants seeking for both general and special damages. The defendants filed their defences to deny the plaintiff's claim.

4) When this suit came up for hearing the plaintiff was the only witness who testified in support of his case. Guardial Singh Ghataurhae (PW1) stated before this court that on 14.9.2004 he was a passenger in motor vehicle registration no. KAR 900H. PW1 produced an accident report prepared by Jared Arita, a traffic accident investigator of 15 years standing from the firm of Accident & General Investigators.

5) According to that report, it is stated that the 3<sup>rd</sup> defendant bears the greatest responsibility for the accident. It is pointed out that the 3<sup>rd</sup> defendant moved his vehicle towards the offside lane before ascertaining that it was safe to do so hence resulting to a collision with the 1<sup>st</sup> defendant's vehicle.

6) In the report, the 1<sup>st</sup> defendant too was found culpable as he overtook the 3<sup>rd</sup> defendant in a stretch of the road which is prohibited as

characterized by a continuous yellow line.

7) Two witnesses testified in support of the 3<sup>rd</sup> and 4<sup>th</sup> defendants' defence while the 1<sup>st</sup> and 2<sup>nd</sup> defendants closed their defence without summoning any witness to testify in support of their defence.

8) It is the evidence of David Mwanzia Ndulili (DW1) that the 1<sup>st</sup> defendant overtook in a stretch of the road with a continuous yellow line. DW1 was of the submission that the 1<sup>st</sup> defendant was solely to blame for the accident. DW1 stated that the 1<sup>st</sup> defendant hit him from the rear and was hit by the lorry behind him.

9) David Mbai Kiwa (DW2) told this court that he was the driver of lorry registration no. KAH 418Z and that there were three vehicles all heading to Mombasa. DW2 further said that his lorry was following another lorry while the prado registration no. KAR 900H was behind his lorry.

10) He said that the driver of KAR 900H overtook him and hit the lorry ahead of him at the right rear side. DW2 said he swerved and in the process he hit the prado (KAR 900H) on the right mud guard. DW2 confirmed that the accident occurred in a stretch of the road with a continuous yellow line. DW2 also stated that the driver of motor vehicle registration KAR 900H was wholly to blame for the accident.

11) At the close of evidence, learned counsels appearing in this case were invited to file written submissions. Having considered the evidence and the rival submissions two main issues arose for the determination of this court namely: liability and quantum.

12) On liability, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have urged this court to find the 3<sup>rd</sup> defendant wholly to blame for the accident. It is argued that the 1<sup>st</sup> defendant switched on his offside indicator light to warn other road users that he was overtaking two motor vehicles ahead of him.

13) The 3<sup>rd</sup> and 4<sup>th</sup> defendants are of the submission that the 1<sup>st</sup> defendant is wholly to blame for the accident for overtaking in a stretch of the road which is not allowed. It is also stated that the prado was being driven at high speed.

14) Having considered the evidence presented by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, I am convinced that the 1<sup>st</sup> defendant, the driver of motor vehicle registration no. KAR 900H bears the greatest responsibility for the accident. It is clear that he overtook on a continuous yellow line at high speed. The evidence also show that the 3<sup>rd</sup> defendant, the driver of motor vehicle registration no. KAH 418Z takes the lesser responsibility. He moved his vehicle towards the offside lane without first ascertaining that it was safe to do so. In the end, I find the 1<sup>st</sup> defendant 60% culpable while the 3<sup>rd</sup> defendant is found 40% liable.

15) On quantum, the plaintiff has asked this court to grant him both general and special damages. The plaintiff has prayed to this court to award him ksh.671,405 being the costs he incurred in medical treatment. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have urged this court not to award the amount because the plaintiff failed to justify that he had travelled to India for medical treatment.

16) It is also stated that the figure quoted is extravagant hence it should be denied. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not address this court on special damages.

17) Having considered the rival submissions, I am convinced that the plaintiff pleaded and presented credible evidence in form of medical invoices. It is also on record that the 3<sup>rd</sup> and 4<sup>th</sup> defendants recorded an agreement over special damages on 23.2.2016. I therefore award the plaintiff ksh.671,405 on account of special damages.

18) On general damages, the plaintiff beseeched this court to grant him ksh.3,000,000/=. The plaintiff cited the following cases:

***i. Duncan Kimathi vs Ngugi David & 3 others (2016) eKLR where a total of ksh.4,000,000/= was awarded. The plaintiff in this case suffered injuries in form of blunt head injury with the loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fracture of the maxilla bilaterally, compound fracture of mandible, comminuted fracture of the right humerus, articular region of the elbow surface of radio carpal and multiple lacerations of the hands and forearms***

***ii. In Gabriel Mwashuma v Mohammed Sajjad & Another (2015) eKLR the court awarded general damages of ksh.3,000,000/= to the plaintiff where he had a segmental left femur fracture, a compound fracture left patella and femoral condyle, a comminuted left distal tibia/fibula (pilon) fracture, soft tissue injuries right knee.***

***iii. In the case of Sabina Nyakenya Mwangi v Patrick Kigoro & Another (2015) eKLR the court awarded the plaintiff general damages of ksh.3,000,000/= after she suffered a fracture of the humerus, fracture of the pelvis fracture of the right knee, fracture of the condyle femur, bruises on the face, severe retroperitoneal haemorrhage and multiple soft tissue injuries.***

***iv. Furthermore, in the case of Geoffrey mwaniki Mwinzi v Ibero (K) Limited & another (2014) eKLR the court awarded general damages of kshs.2,000,000 where the plaintiff had a fracture of the collarbone and fractures to his left leg.***

19) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are of the opinion that an award of ksh.500,000/= as sufficient compensation. They cited the following authorities

***a) Akamba Public Road Services v Abdikadir Adan Galgalo (2016) eKLR where the Court of Appeal in a case where the respondent with shortening of the leg reduced quantum payable from ksh.800,000/= to ksh.500,000/=.***

b) *Samwel Mwangi Kamau v Joseph M. Kimemia & Another (2004) eKLR*. The plaintiff in this case suffered a fracture of the left leg, fracture of the right tibia and fibula, fracture of the left temporal bone and other soft tissue injuries, the court awarded ksh.1,000,000/= general damages for pain and suffering and loss of amenities.

c) *Mary Pamela Oyioma –v- yues Holdings Limited (2011) eKLR*, where the plaintiff sustained a comminuted fracture of the right femur; compound fracture of right tibia, fracture of left tibia; soft injuries to the right shoulder and multiple cut wounds over the whole body. The court awarded her ksh.900,000/= in general damages.

20) On the other hand the 3<sup>rd</sup> and 4<sup>th</sup> defendants are of the submission that the plaintiff is entitled to ksh.700,000 for general damages. They cited the following cases:

a) *In Florence Njoki Mwangi v Peter Chege Mbitiru (2014) ekLR* the appellant suffered broken femurs bilaterally, two degloving injuries of the right knee and the right ankle. The fractures needed internal fixation. On appeal the court found that an award of sh.700,000/= for general damages for pain and suffering was reasonable.

b) *In Akamba Public Road Services v Advikari Adal Galgalo (2016) eKLR* the respondent sustained a fracture of right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle. The respondent had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. It was estimated that he had permanent partial disability of three per cent. The court set aside an award of shs.800,000/= for general damages for pain and suffering. The court awarded shs.500,000/= as general damages for pain and suffering.

21) Having considered the rival submissions find the authorities cited by the plaintiff to be recent and relate to near similar injuries as those obtaining in this case. In the circumstances I find that a sum of ksh.2,500,000/= is reasonable and commensurate to the injuries sustained.

22) In the end I enter judgment in favour of the plaintiff and against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

23) Liability is apportioned as follows:

**1<sup>st</sup> and 2<sup>nd</sup> defendants 60% liability**

**3<sup>rd</sup> and 4<sup>th</sup> defendants 40% liability**

24) The plaintiff is awarded as follows:

**i. General damages for pain & suffering ksh.2,500,000/=**

**ii. Special damages ksh. 671,405/=**

**Total ksh.3,171,405/=**

**iii. Costs of the suit.**

**iv. Interest at court rates in respect of (i) and (ii) above from the date of judgment until full payment.**

Dated, Signed and Delivered at Nairobi this 23<sup>rd</sup> day of November, 2018.

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendants/Respondents