



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 4 OF 2015**

**CLAYTONE CHIMWANI SHIKOTE.....PLAINTIFF**

**-VERSUS-**

**NJUGUNA SAMUEL.....1<sup>ST</sup> DEFENDANT**

**JAMES GATHOGO NDUNGU.....2<sup>ND</sup> DEFENDANT**

**KIGAI FRANCIS.....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. The hearing of this suit proceeded against the 3<sup>rd</sup> Defendant only after the Plaintiff withdrew his case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. A default judgment was entered against the 3<sup>rd</sup> Defendant on 10<sup>th</sup> June 2015. The Plaintiff, **Claytone Chimwani Shikote** sued the 1<sup>st</sup> Defendant in his capacity as the registered, actual or beneficial owner of the motor vehicle KAM 312S.

2. In the amended plaint filed on 27<sup>th</sup> April 2015, the Plaintiff avers that while lawful travelling in the said vehicle along Naivasha/Nairobi Road on 12/5/2014 the vehicle was involved in accident. That the accident was occasioned by the negligence of the 3<sup>rd</sup> defendant, his driver or agent. That as a consequence of the collision the Plaintiff sustained a fracture of the cervical spine leading to paralysis of the upper and lower limbs; resulting in disability. He therefore claimed special and general damages.

3. During formal proof, the Plaintiff gave evidence and called two witnesses. The sum total of the Plaintiff's case is as follows. The Plaintiff was aged 35 years old and was self employed as a carpenter prior to the accident. On the date of the accident, he was travelling in the accident motor vehicle from Kakamega. The vehicle lost control and overturned at a place called View Point along the Nairobi/Naivasha road. A second vehicle was also involved.

4. The Plaintiff sustained skeletal injuries to the cervical spine primarily, and was admitted at Kijabe hospital, and treated upon discharge at St. Elizabeth hospital Mukumu and is constantly under treatment and physiotherapy. He is bound in a wheel chair following paralysis of the upper and lower limbs and is therefore unable to continue his carpentry trade or for his income or carry out personal tasks. He also suffers from erectile dysfunction, stool and urine incontinence.

5. According to Dr. Theophilus Wangata the Plaintiff sustained fractures of the cervical spine at C3 to C5 and is a paraplegic with stool incontinence. He has to use a catheter and diapers. He also developed erectile dysfunction. Total permanent incapacity was assessed at 95%. He outlined the Plaintiff's various medical and related needs resulting from the injuries.

6. Upon the conclusion of the formal proof, Mr. Kulecho, counsel for the Plaintiff made written submission. Therein he reiterated evidence adduced at the trial. He urged the court to award the Plaintiff a sum of Shs 5 million in light of the severe injuries sustained in the accident. He further urged an award of Shs. 7.7 million in respect of future medical and related costs. Regarding loss of earnings and earning capacity, Mr. Kulecho urged the court to award the sum of Shs 4.8 million, with special damages of Shs 6,500/=.

7. The question of liability was settled by the entry of the default judgment. Regarding damages, I have considered the Plaintiff's evidence which was unchallenged, as well as the submissions and authorities cited in the body of submissions and those attached to the submission.

8. The Plaintiff's evidence as adduced leaves no doubt that the Plaintiff sustained fairly severe injuries. The discharge summary from the AIC Kijabe Hospital indicates that the Plaintiff was admitted to the hospital on 12/5/2014 and discharged on 14/6/2014, the primary diagnosis being spinal injury. The report on x-rays done on 17/5/2014 details the particulars of the injury with a conclusion that: "**C3 to C5 posterior column unstable fractures with cord haemorrhage**". The P3 form completed on 30/10/2014 also indicates that the Plaintiff suffered grievous harm in the form of spinal injury.

9. Other injuries pleaded in the amended plaint are secondary to the cervical spine fractures. These are paraplegia with stool and urine incontinence. Although evidence was led that he developed erectile dysfunction, this consequence was not pleaded in the amended plaint. Other consequences of the injury to cervical cord according to Dr. Wangata's report are recurrent chest, urinary tract and chest infections due to being bedridden. When he appeared in court the Plaintiff was on a wheel chair. He has endured physical, psychological pain and suffering due to the injuries.

10. The Plaintiff primarily relied on the High Court authority of **Georgina Wangari Mwangi -Vs- David Mwangi Muteti [2014] eKLR** which in my view is almost on all fours with the present case, and I am persuaded thereby. However, I note that the Plaintiff therein suffered more extensive spinal fractures and other fractures to ribs on both sides of the chest. Several authorities considered in that case are also useful.

11. In the case of **David Chege Ndungu -Vs- Robert Macharia & 2 Others HCC 340 of 2009 Aburili J** awarded a Plaintiff who suffered comparable injuries a sum of Shs 4 million as general damages, while **Majanja J** awarded a sum of Shs 6 million to a Plaintiff who sustained cervical injury with paraplegia and loss of bowel function. The Plaintiff in **Dorothy Kanyua Mbaka & Anor -Vs- Permanent Secretary of Defence & Others [2014] eKLR** was awarded Shs 10 million in respect of a pelvic fracture with paraplegia and trauma to the bladder.

12. It is true that no amount of damages can fully compensate a victim of gruesome and incapacitating injuries much less restore his frame. However the trend in awards in respect of spinal injury with paraplegia and the circumstances in each case must be considered. In my view an award of Shs 5 million for pain and suffering as sought as general damages herein is reasonable. Under this head I therefore award the sum of Shs 5 million as general damages for pain and suffering.

13. Regarding the future medical expenses the Plaintiff seeks an award of Shs 7.7 million. Although the amended plaint at paragraph 8 and in prayers plead such an award, no figures or particulars were stated whatsoever. However, evidence was led by the Plaintiff on a variety of medical and related needs, all consequences of his injuries.

14. Under this head the Plaintiff seeks damages in the sum of Shs 60,000/= every year for 35 years he may live, being the cost of a wheel chair. While the cost may be reasonable, it cannot be that the Plaintiff needs to replace such a costly wheel chair every year, possibly every 3 years. Thus I would award 1/3 of the sum of Shs 2,100,000/= claimed under this head, that is Shs 700,000/=. I also award the sum of Shs 1,500,000/= being the cost of replacement of a special hydraulic or electric bed to ease pressure and an air filled ripple mattress every ten years.

15. The Plaintiff is incapacitated and unable to engage in gainful employment or perform personal and other tasks. Eighty percent permanent disability was pleaded in the plaint although the doctor assessed it at the higher rate of 95%. That notwithstanding, the Plaintiff as he appeared in court does require a constant helper, particularly to attend his catheter, urine bags and diapers, in addition to performing personal tasks for him. I do therefore allow the sum of Shs 2 million urged in the submissions.

16. Regarding actual medical expenses and other incidentals the Plaintiff will require drugs, diapers and

catheters all his life, and transport to hospital by taxi or other motorized means. For each of these heads that is medical and transport costs I do award the sum of Shs 1 million, the total being Shs 2 million as damages. Total awards for future medical expenses and incidentals is therefore Shs 6.2 million.

17. Turning to lost earnings and lost earning capacity, while I accepted the proposed multiplier of 35 years, the Plaintiff did not tender any evidence, beyond the certificate of qualification as a carpenter, of actual earnings in the sum of Shs 100,000/= per month as pleaded in the amended plaint.

18. In support of the Plaintiff's oral evidence in that regard his advocate placed reliance on the case of **Jacob Ayuga Maruja -Vs- Simon Obayo [2005] eKLR**. The Court of Appeal in that case did not endorse the view that the only way to prove a persons profession and earning is by certificates and pay slips.

19. In **Mumias Sugar Company Ltd -Vs- Francis Wanalo [2007] eKLR** the Court of Appeal observed 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 the 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.”***

20. In **Butler -Vs- Butler** the court stated that loss of damages is different from actual loss of future earning, the latter which is:-

**“.....compensation for loss of future earnings (which) is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.”**

21. Having pleaded an income of Shs 100,000/= per month in the amended plaint, the Plaintiff now seeks Shs 20,000/= per month in submissions under the said heads. It seemed however that the two heads of lost earnings and lost future earnings were merged together. There was no evidence led specifically regarding the period for which lost income was claimed nor was any distinction made in the evidence regarding these two heads.

22. I am prepared to accept that the Plaintiff as an adult man fended for himself by working for gain. He resided in Kakamega as a carpenter. The Regulation of Wages (General) (Amendment) Order 2015, Legal Notice No. 117 of 2015 fixed the minimum monthly wage of an ungraded artisan in former municipalities at Shs 13,646.40. Using this sum and the proposed multiplier of 20 years, I would assess lost income together with lost earning capacity as follows:

$$\text{Shs } 13,646.40 \times 12 \times 20 = 3,275,136/=$$

I also allow special damages in the sum of Shs 6,000/= in respect of the medical report and the P3 form. No evidence was led regarding the copy of records.

23. In the result, the Plaintiff is awarded damages as follows:

General Damages for pain and suffering	-	Kshs	5,000,000.00
Future medical and allied expenses		Kshs	6,200,000.00
General damages for lost earnings and earning capacity	-	Kshs	3,275,136.00
Special damages	-	Kshs	<u>6,000.00</u>
<b>TOTAL</b>	-		<b><u>14,481,136.00</u></b>

24. Judgment is therefore entered for the Plaintiff against the 3<sup>rd</sup> Defendant in the total sum of **Shs. 14,481,136.00**. The Plaintiff will get the costs of the suit and interest.

Delivered and signed at Naivasha this **28<sup>th</sup>** day of **February, 2017**.

In the presence of:-

Miss Karanja holding brief for Mr. Kulecho for the Plaintiff

N/A for Defendant

Court Assistant - Barasa

**C. W. MEOLI**

**JUDGE**