



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA**

#### **AT MALINDI**

#### **CIVIL SUIT NO.30 OF 2015**

**FRANKLINE CHILIBASI SPII.....PLAINTIFF**

**VERSUS**

**KIRANGI LISTON..... DEFENDANT**

#### **JUDGEMENT**

On 3<sup>rd</sup> November, 2013 at about 2.00pm the plaintiff was riding motor cycle registration number KMCR 489T along the Malindi – Mombasa Road when he was involved in an accident with Motor vehicle registration number KBR 607Q, Toyota Probox. He filed this suit seeking both general and special damages contending that the accident was entirely caused by the defendant's negligence.

Five witnesses testified in support of the plaintiff's claim. PW1 is the plaintiff. His evidence is that he lives at Msabaha along the Malindi-Mombasa road on the left hand side as one faces the Mombasa direction. On the material day at about 2.00pm he was heading for a burial while riding motor cycle registration number KMCR 489T along the Malindi-Mombasa Road. He reached Patanani stage and indicated that he was turning to the right. While in the process of turning an accident occurred. He lost consciousness and only regained his consciousness on Monday 6<sup>th</sup> November 2013 while at Aga Khan hospital in Mombasa.

It is the plaintiff's evidence that he was informed that before being taken to Aga Khan Hospital, he had been taken to Tawfiq Hospital in Malindi. He was admitted at the Aga Khan Hospital from 3.11.2013 to 9.11.2013 when he was discharged as the hospital bill was increasing. He continued with home care. His wounds got healed by February, 2014 when a plaster of Paris was applied to his fractured leg. Some iron fittings were implanted on the leg and were still in place. He stayed with the plaster cast for two years.

PW1's further evidence is that he retired from working for the Kenya Commercial bank in 2010 and became a dairy farmer. He had fifteen (15) dairy cows and used to earn a gross income of Ksh.80,000 monthly from the dairy business. The dairy business was a partnership with his son (PW4). According to the plaintiff, the dairy business deteriorated and the milk output reduced from about 120 litres per day to around 30 litres per day. He attended a traffic case hearing whereby the driver of the probox accident vehicle was charged for careless driving and pleaded guilty.

PW2 KACHIRI COLLINS testified that he lives at Kwa Mumba along the Mombasa – Malindi road. On 3.11.2013 at about 2.00pm he was heading for a burial of mzee Kwisa Tsui when he witnessed the accident. He saw the plaintiff riding the motorcycle. It is his evidence that the plaintiff indicated that he was turning to the right. The plaintiff also used his hand to indicate that he was turning to the right. PW2 saw a vehicle coming from behind the motor cycle and shortly heard a loud bang. The vehicle went off the road and after moving for about 100 metres turned to the left and landed in a ditch. He checked on the plaintiff who was bleeding on the leg. The plaintiff was taken to hospital.

PW3 CHARLES KASEWA is a Tuk Tuk driver. On 3.11.2013 he was heading towards Gede. He saw a motor cycle ahead and the cyclist indicated that he was turning to the right. The cyclist was using his indicator as well as his hand to signal that he was turning to the right. According to PW3, a vehicle came from behind, overtook the tuktuk and in the process hit the motor cyclist who was turning to the right. It is PW3's evidence that he indicated using his right indicator for the vehicle behind him so that it could not overtake. There was a burial nearby and people went to the scene.

PW4 KENNEDY MGANGA CHILIBASI is the plaintiff's son. On 3.11.2013 he was in Mombasa when he got a phone call that his father was involved in an accident and was at Tawfiq hospital. He went to the hospital and the plaintiff was referred to Mombasa. The plaintiff was taken in an ambulance to Aga Khan hospital where he was admitted upto 9.11.2013. He paid the hospital bill of Ksh.460,000. He also paid Tawfiq hospital Ksh.20,000. It is his evidence that the hospital bill for Aga Khan hospital did not include the doctors fees. He paid the doctors over Ksh.200,000. The plaintiff was discharged and was being treated at home. The home based care cost him Ksh.39,000. They were also buying medicine. While his father was hospitalized, he hired a taxi for 35 days which cost him Ksh.350,000. PW4 further testified that he was in partnership with his father in the dairy business. It is the plaintiff who was running the dairy business.

PW5 PC EUSTUS NGARI was stationed at the Malindi Police station on traffic duties. The accident was reported on the same day at the station. The driver of motor vehicle number KBR 607 Q was charged with the offence of careless driving and he pleaded guilty. He was fined Ksh.20,000/=.

The defence closed its case without calling any witness. The defence produced a medical report by Dr. Seth in support of the defence case.

Counsel for the appellant in his submissions urged the Court to find the defendant 100% to blame for the accident. The plaintiff clearly indicated that he was turning to the right. Further, the defendant pleaded guilty to the charge of careless driving.

On the issue of quantum, Counsel for the plaintiff relies on the medical report by Dr. Ndegwa. The plaintiff sustained compound comminuted fracture of the right distal tibia, compound and comminuted fracture of the right distal fibula, fracture of the distal right radius extending to the wrist joint, severe head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit and other soft tissue injuries. The plaintiff has been on a wheelchair since he was discharged from hospital. The implants are in situ. Counsel contend that the plaintiff has endured a lot of pain as a result of the accident. Dr. Udeyan Seth assessed permanent incapacity at 15%.

Counsel for the plaintiff submit that an award of Ksh.2.5million for general damages is reasonable. Counsel relies on the case of **JAMES GATHIRWA NGUGI –V- MULTIPLE HAULIERS [E.A] LTD & ANOTHER [2015] eKLR**. In this case Kshs.1,500,000 was awarded. Counsel also relies on the case of **JOSEPH MUSEE MUA –V- JULIUS MBOGO MUGI & THREE OTHERS [2013] eKLR** where Ksh.1.3 million was awarded for similar injuries.

It is further submitted for the plaintiff that he is entitled to loss of earning due to the loss of his dairy business. The plaintiff was earning Kshs.80,000 monthly from the dairy business. He was incapacitated for 46 months. All the family finances were directed towards the treatment of the plaintiff. Some of the cows died. Counsel urges the Court to grant a sum of Ksh.3,680,000, for the period the plaintiff was incapacitated.

Mr. Kaingu further urged the Court to award the sum of Ksh.1,463,446 being claimed as special damages. This amount was incurred as medical and logical expenses. A further sum of Ksh.500,000 is being claimed for cost of future medical expenses for the removal of the implants.

Mr. Kishore Nanji, Counsel for the defendant concedes that the defence did not call any witness. Counsel submit as follows on the issue of liability:-

***“We are not able to successfully submit that the plaintiff contributed in any way to the occurrence of the accident and we therefore leave the issue to the Court to decide on the evidence on record.”***

On the issue of quantum, Counsel relies on the medical report by Dr. Udayan R Sheth dated 5<sup>th</sup> April, 2016, Counsel submit that an award of Ksh.800,000 is adequate compensation for pain, suffering and loss of amenities. Counsel relies on the case of **JACKSON MURERWA – VS- JALAMBE ENTERPRISES; Civil Appeal No.148 of 2010 (Mombasa)**: An award of Ksh.500,000 for comminuted fracture of the left upper tibia and comminuted fracture of the left upper fibula was awarded on 24.11.2011. Counsel also relies on the case of **DAVID KASI NTHUKU -V- MATIKU KENYA Msa HCCR No.317 of 1993** where Ksh.90,000 was awarded for a fracture of the right Zygoma (Cheekbone) in January 1994. Other references relied upon by the defendant’s Counsel are that of **A.O BAYUSUF & SONS LTD –V- OJALLE ABDULLAHI BULLE**. In that case Ksh.450,000 was awarded as general damages for pain suffering and loss of amenities for compound fracture of the tibia – fibula and other soft tissue injuries.

The suit herein raises only two issues. Firstly, who is to blame for the accident and what is the extent of the liability. Secondly, whether the plaintiff is entitled to damages and if so, to what extent.

The plaintiff’s evidence is to the effect that on the material day he was riding his motor cycle heading towards the Kilifi direction as one comes from the Malindi direction. He was turning to the right and gave the indication of his intention. Suddenly he was hit by a vehicle and he lost consciousness.

PW2 witnessed the accident. It is his evidence that the plaintiff indicated that he was turning to the right. He even used his hand indicating that he is turning to the right. PW3 was on the road on a tuktuk. He used his right indicator to inform the defendant not to overtake. However, the plaintiff started to overtake and hit the plaintiff whom he could not see as he was behind the tuktuk.

Apart from the evidence of the eye witnesses, the record shows that the defendant was charged with the offence of careless driving. The plea was taken on 21.8.2014 and the defendant pleaded not guilty. On 4.2.2015 the defendant changed his plea and pleaded guilty. The facts were read over to the defendant and he confirmed the facts to be correct. The facts of the traffic case No.886 of 2014 (Republic Vs Liston Mugiira) indicate that the defendant on 3.11.2013 was driving the accident motor vehicle registration number KBR 607Q along the Mombasa – Malindi road. He wanted to overtake a motor cycle that was turning to the right onto a feeder road. The defendant hit the motor cyclist which fell on the right lane. The defendant’s vehicle stopped about 400 metres from the road. The defendant confirmed that the facts were correct.

Given the evidence on record, I do find that it is the defendant who caused the accident. The defendant was not able to control his vehicle after noticing that the plaintiff was entering into a feeder road. Had the defendant been patient and careful while driving his vehicle, he could have avoided the accident. It was during the day and he could have clearly seen the plaintiff turning to the right. The defendant could have observed the indicator of the tuk tuk that was ahead of him signaling him not to overtake. I find that the defendant is 100% to blame for the occurrence of the accident.

The next issue involves the amount of quantum payable to the plaintiff. There are two medical reports which itemize the plaintiff's injuries: The medical report by Dr.S.K. Ndegwa was done on 12.5.2015. The accident occurred on 3.11.2013. The report describes the injuries as:-

1. Compound and comminuted fracture of the right distal tibia
2. Compound and comminuted fracture of the right distal fibula
3. Fracture of the distal right radius extending to the wrist joint.
4. Severe head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit, haematoma on the right temporal scalp and soft tissue contusion on the left peri-orbital and front scalp.
5. 8x3cm large friction burns on the left forearm.
6. 6cm long friction burns on the left forearm.
7. Large wound on the right leg and foot.

At the time Dr. Ndegwa saw the plaintiff, he was still on a wheelchair. According to the doctor, future medical expenses would cost Ksh.500,000. This involves surgical removal of the multiple surgical implants.

The report by Dr. Udayan R Sheth was done on 5<sup>th</sup> April, 2016. This was a period of over two years after the accident. The doctor describes the injuries as follows:-

***“He sustained comminuted fracture lower end of the right tibia – fibula, fracture lower end of the right radius, fracture zygomatic process left side extending to lateral wall of left orbit, haematoma over temporal scalp, friction burn over left forearm and hand. He was operated, fracture tibia was fixed with plates and screws, fracture distal end of radius was fixed with K-wire, elevation of zygomatic arch was done by dentist, surgical toilet of the wound over left forearm and hand done.”***

Dr. Sheth assessed permanent incapacity at 15%. He also indicates that the plaintiff will have to undergo surgery to remove the plate from the right tibia which will cost approximately Ksh.150,000 at a private hospital.

Whereas Counsel for the plaintiff opines that an award of Ksh.2.5million for pain, suffering and loss of amenities would be sufficient, counsel for the defendant is of the view that Ksh.800,000 will be sufficient compensation. Counsel for the plaintiff cited Halbury's laws of England, 4<sup>th</sup> edition Vol 12 Par 884 where damages for pain and suffering are described as follows:

***“Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and future as a result of injury. This includes the pain caused by the injury itself and the treatment intended to alleviate it; the awareness of an embarrassment at the disability or disfigurement or suffers caused by anxiety that the plaintiff's condition may deteriorate.”***

On his part, counsel for the defendant relies on the case of WEST(H) & SON LTD –V- SHEPHERD (1964) A-C 326 where Lord Morris stated as follows:-

***“But money cannot renew a physical frame that has been battered and shattered. All that judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”***

I have gone through the authorities submitted by both advocates. I do find the case of **JAMES GATHIRWA NGUGI –V- MULTIPLE HAULIERS (E.A)LTD & MOSES KIASALU KILONZI E. Nrb HCC 658 of 2009 [2015] eKLR** to be providing similar injuries. In that case the plaintiff sustained compound comminuted fracture of the right tibia and fibula, fracture of the left proximal radius and fracture of the left ulna, head injury and other soft tissue injuries. Ksh.1.5 million was awarded as general damages for pain and suffering on 13<sup>th</sup> February, 2015. In the case of **MWAURA MUIRURI -V- SUERA FLOWERS LIMITED and BENSON MAUNDU NAKURU HCCC No.189 of 2009**, Justice Anyara Emukule awarded Ksh. 1,450,000 on 28.2.2014 as damages for pain and suffering. The claimant in that case suffered compound double fractures of the right leg upper and lower 1/3 tibia-fibula, comminuted fractures of the right humerus upper and lower third of the tibia, multiple lacerations on the face and soft tissue injuries.

The accident occurred on 3.11.2013. By the time the plaintiff was testifying on 31.8.2016, he was still on a wheel chair. It is clear that the plaintiff has not fully recovered from the accident. I do find that apart from the fractures of the right leg and right hand, the plaintiff also sustained a fracture on his left cheek(zygomatic arch). Counsel for the defendant cited the case of **DAVID KASI NTHUKU –V- MATIKU KYENGO** (Supra) for that particular injury. Ksh.90,000 was awarded on 19.1.1994 for fracture of the right zygoma cheek bone. There is the case of **JOHN KARANJA KABUI –V-JOSEPH KAMAU NJUGUNA & 2 OTHERS Nairobi HCCC No.4537 of 1993** where Ksh.120,000 was awarded by Mwera J for fracture of the mandible (lower jaw).

The plaintiff herein also suffered friction burns on the left forearm and a large wound on the right leg and foot. I do assess the plaintiff's

general damages for pain and suffering at Ksh.1.8 million. These injuries are more severe than those suffered in the cases above.

There is the issue of special damages. Ksh.1,463,446 is pleaded in the plaint, Counsel for the defendant has conceded to a sum of Ksh.865,644 made up as follows:-

(a) Receipts issued by Tawfiq hospital	Ksh. 6,680.
(b) Various medical Receipts	Ksh. 85,264.
(c) Doctor's receipt	Ksh.295,000.
(d) Aga Khan Hospital	Ksh.460,000.
(e) Copy of records	Ksh. 500.
(f) Police Abstract	Ksh 200.
(g) Medical Report	<u>Ksh. 18,000.</u>
Total	Ksh.865,644.

The defence contests the claim for Ksh.510,000 for car hire services. It is true this amount is not pleaded. The plaintiff was hospitalized between 3.11.2013 and 9.11.2013. He used to attend checkups both at Malindi and Mombasa. According to PW4, he hired a vehicle for 35 days. I do find this claim to be exorbitant. That amount can buy a good second hand vehicle. Taking into account the fact that the plaintiff used to be taken to hospital at times, I do find that an award of Ksh.40,000 is sufficient. Part of the treatment was done at home. However, the plaintiff has been confined to a wheelchair all along and it would have been prudent to hire a vehicle to take him to hospital for the checkups.

There is the claim for Ksh.410,000 being doctor's payment. The plaintiff summarized that claim to amount to Ksh.410,000. There are three receipts by Dr. Kaale for Ksh.140,000, 105,000 and 50,000 respectively. There is a receipt for Ksh.2000 from Dr. ASIF. PW4 testified that the bill from Aga Khan Hospital does not include payment to the doctors. No other receipt from a doctor has been produced. I will add the sum of Ksh.2000 paid to Dr. Asif to the amount paid to Dr. Kaale making a total of Ksh.297,000. I therefore find that the plaintiff has proved special damages totaling Ksh.867,000/=. I will add a sum of Ksh.40,000 to this amount being the cost of car hire. This brings a total of Ksh.907,000 as special damages.

The last issue involves the claim for loss of earning. The plaintiff is claiming Ksh.80,000 monthly for a period of 46 months. Counsel for the plaintiff is seeking Ksh.3,680,000 for loss of business. It is submitted that the dairy business brought in Ksh.400 daily. The evidence on record shows that the plaintiff was 59 years old in 2016. He retired in 2010 from the Kenya Commercial Bank. He testified that he bought dairy cattle from Vipingo plantation. He has four workers in the dairy business. His wife also used to assist him but due to his condition she had to attend to him. He used to supply the milk himself. The production reduced from about 120 litres per day to 30 litres per day.

Although this is a civil case and the standard of proof is that of on a balance of probabilities, I do find that this claim has not been proved. There is no sufficient evidence to award this claim. There are no proper records of the dairy milk production. No photographs of the cows, no evidence from any of the four workers, no permanent records from the plaintiff's clients or evidence that the plaintiff used to deliver milk to them. The Court cannot simply assume that the plaintiff used to have a successful dairy business. It appears that there was no money being banked from the business. No bank records were produced. The plaintiff had retired and although at 59 years he is still energetic enough to work, I am not convinced that there was a successful dairy business. The 30 litres daily being produced seems to be the much the business was generating. The plaintiff could have still generated income from the business since he had workers and a five acre plot planted with nappier grass. The workers could have taken care of the cows and make the deliveries. The plaintiff was conscious and able to co-ordinate the activities of the business. The plaintiff is not a specialist in the dairy industry to conclude that his absence led to the collapse of the business.

Both doctors opined that the plaintiff will need to undergo an operation to remove the implants. According to Dr. Ndegwa, such operation will cost Ksh.500,000. Dr. Sheth estimated the cost to be Ksh.150,000. I am satisfied that the claim for future medical treatment is reasonable. The plaintiff cannot use the amount awarded as damages for pain, suffering and loss of amenity to cater for future medical expenses. This is an expense which will be incurred and its cost can be estimated. The plaintiff still has iron plates fixed in his limbs. They will have to be removed. That operation will have to be paid for. Since the two doctors are not in agreement on the exact cost for the operation to remove the plates, I do assess the cost of future medical expenses at Ksh.250,000/=-. The plaintiff is awarded Ksh.250,000 as cost of future medical expenses.

In the end, I do find that the defendant is 100% liable for the occurrence of the accident. The plaintiff is awarded damages in the following terms:

(a) Damages for pain, suffering and loss of amenities –	Ksh.1,800,000
(b) Special damages	Ksh. 907,000
(c) Future Medical expenses	<u>Ksh. 250,000</u>

Total

Ksh.2,957,000

The plaintiff is awarded a total of Ksh.2,957,000 plus costs.

**SAID CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Malindi this 21<sup>ST</sup> day of JUNE 2017**

**WELDON KORIR**

**JUDGE**