



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 403 OF 2012**

**ZIPORRAH NANGILA.....PLAINTIFF**

**VERSUS**

**1. EDORET EXPRESS LIMITED.....1ST DEFENDANT**

**2. DAVID KABAIBAI RUTO.....2ND DEFENDANT**

**3. ABABA CHANASA ATAFARA.....3RD DEFENDANT**

**JUDGMENT**

1. On the 2nd January, 2012 the plaintiff Zipporah Nangila Lusweti was seriously injured in a road traffic accident along Naivasha – Nakuru road while a fare paying passenger in motor vehicle Registration Number KBP 925Q that collided with motor vehicle Registration Number KAU 130V a Scania Bus, the property of the first defendant, being driven by David Kibaibai Ruto, the second defendant as the authorised driver and agent of the first defendant.

The plaintiff blames the driver of the said bus for negligence and holds the first defendant vicariously liable for the drivers negligence.

Particulars of negligence are itemised in the Amended plaint dated 10th February 2015. She seeks compensation in both general and special damages.

2. In their statement to Amended Defence dated the 27th May 2015, the defendants denied being liable in negligence and damages and the ownership of the said vehicle and in turn blamed the driver of motor vehicle registration No. KBP 925Q for negligence.

At this point it is important to state that the owner and driver of motor vehicle Registration No. 925Q are not parties to this suit.

3. The plaintiff recorded a statement on the 8th May 2012 on the occurrence of the accident. That statement was adopted by the court as her evidence. In her oral evidence before the court, she testified that she boarded A Mini bus registration Number KBP 925Q from Eldoret going to Nairobi on the 2nd January 2012 and sat at the front cabin next to the driver so she could see in front. She testified that she saw a bus registration number KAU 130V coming from the opposite direction overtaking several vehicles and then suddenly it came onto the path of motor vehicle registration KBP 925Q at a high speed, that the driver of motor vehicle KBP 925Q tried to avert the collision but could not go off the road as there was a ditch at the verge the road. It was her testimony that the two vehicles collided on the left lane of

the road, the correct lane of motor vehicle KBP 925Q. It was her further testimony that she was trapped for four hours in the minibus and good Samaritans used other buses to pull her and the driver who was then dead from the minibus. She was taken to Naivasha district hospital for treatment and later transferred to Nairobi Hospital on the same day where she was admitted up to the 23rd March 2012.

She produced the documents as exhibits

- Hospital discharge summaries
- Hospital treatment notes
- Payment receipts of medical costs from various hospitals in Nairobi

She stated that she has not recovered and walks with difficulty using crutches and depends on other people for care. A full medical report was later produced by her doctor. I shall come to the injuries and complaints at a later stage.

The plaintiff She blamed the accident on negligence of the driver of the Bus Registration Number KAU 130V whom she stated was driving carelessly, overtaking dangerously and on high speed in the circumstances.

4. A police officer from Naivasha traffic police base, PC. Alice Wangare testified that she was not the investigating officer but had with her the investigation file over the accident, and the covering report. The findings of the investigation was that motor vehicle Registration No. KAU 130V Scania bus was to blame for the accident. She produced sketch maps that showed the point of impact having been on the left lane of the road. It was her evidence that the driver of motor vehicle Registration No. KAU 130V was charged and produced the charge sheet and the police file No. IAR Fatal 1 of 2012 (by consent of both counsel). The driver (second defendant) was charged with the offence of causing death by careless driving to which, on his own plea of guilt was fined Kshs.50,000/=. The police officer confirmed that the plaintiff was a victim of the accident.

The defendants did not cross-examine the police officer, nor did they call any evidence.

## 5. Liability

Relying on evidence and documents produced by the plaintiff and the police officer, the plaintiff by her Advocate Mrs. Njeri Onyango submitted that the plaintiff had proved her case on a balance of probability that the driver of motor vehicle registration number KAU 130V was negligent and therefore liable in damages. That, there having been no evidence by the defendants to contravert the plaintiff's and her witnesses' evidence, the court ought to make a finding that the driver, and by his admission of guilt in the traffic case and the conviction, and sentence to a fine of Kshs.50,000/= on the offence of causing death by dangerous driving, the court ought to find in the plaintiff's favour.

The plaintiff in proof of ownership of the bus produced Records from the Registrar of motor vehicles that settled the matter.

6. **The defendant** through her advocate Ms. Akaka submitted that the plaintiff's failure to prove negligence against the driver of motor vehicle Registration Number KAU 130V, by failing to enjoin and the driver of the vehicle she alleged to have been a passenger in. It was her submission that the said vehicle registration number KBP 925Q was partly to blame for the accident. It was her submission that failure to enjoin the driver and owner of the vehicle as third parties did not automatically attribute full liability on the defendants, and so urged the court to restrict the defendants' liability to the extent of its blame worthiness, that she assessed as not more than 50%.

## 7. **Analysis of evidence and findings**

The court as the first appellate court is under a legal duty to evaluate and consider the evidence tendered before it to arrive at its findings and conclusions therefrom.

There is no dispute that the plaintiff was injured in the accident, and that she was a passenger in motor vehicle registration no KAU 130V, and that its driver, the second defendant pleaded guilty to a charges of careless driving and causing death by dangerous driving.

The defendants did not call any evidence and therefore the plaintiffs evidence that the defendant's bus was being driven carelessly and at an excessive speed in the circumstances was not controverted. The defendant failed to call its driver to testify. That could only be interpreted to mean that his evidence was unfavourable to its case **Simba Commodities Ltd vs Citibank N.A(2013) e KLR** where such observations were made. It is on record that the police investigations were not challenged. The sketch plans produced as exhibits too were not challenged. The point of impact of the two vehicles after the accident was on the left lane, the correct lane of motor vehicle registration Number KBP 925Q. The Defendant's vehicle had veered from its lane and on to the path of the said vehicle.

8. The defendants defence therefore raised mere allegations. **Section 107 and 108 of the Evidence Act** is clear that he who asserts must prove by evidence. In **Anter Singh Bahra and Another vs Raju Geridji HCCC No 545 of 1998**, the Judge faced with similar circumstances held that the defendant's claim must fail as it was unsubstantiated by any evidence. See also **D.T. Dobie and &Co (K) Ltd vs Wanyuonyi Wafula Chebukati (2014) e KLR** quoting **Lord Denning, in Miller vs Minister of Pensions(1947)** had this to say on burden of proof:

*“That the degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say:*

*“we think it more probable than not,” the burden is discharged, if the probabilities are equal, it is not.”*

9. The evidence tendered before the court by the plaintiff and her witnesses coupled with the documents produced are sufficient material to prove that the plaintiff has discharged the burden of proof. The court finds that the first defendant is vicariously liable for the negligence of its driver the second defendant, and for that, the defendants are jointly and severally liable to compensate the plaintiff for the injuries and loss she sustained, and continues to sustain.

#### 10. Quantum of damages

In the Amended plaint dated the 10th February 2015, the plaintiff itemised the injuries she sustained together with particulars of special damages towards medical expenses in the sum of Kshs.5,216,357/= as at the date of filing the amended plaint. She pleaded that since then, she has incurred further costs on treatment and pleads future medical expenses and costs as she has to have 24 hours nursing care for the rest of her life.

11. Dr. (Prof) John E.O Atinga, a Consultant Orthopaedic Surgeon prepared a medical report for the the plaintiff. It is dated 7th September 2012. He produced the same as PExt I. The plaintiffs injuries were enumerated as follows:

- Bilateral leg injuries
- right wrist injury
- Fracture dislocation of the right ankle
- comminuted compound fracture of the distal and fibular
- Fracture of the left distal and tibia and fibular
- Extensive skin loss with bones exposed in the right tibia. He made the following observations:

She had emergency surgical toilet, debridement of the right ankle and external fixation used to stabilise the foot on the ankle. The leg was cold with no distal pulses. Minimal fixation of the above fragments with interfragmentary screw.

The right leg had no viable circulation, but an option to wait for demarcation in case amputation was

necessary. Left tibia was treated with minimal contact locking plating system. The wrist was treated by manipulation and cast application.

The doctor went on to state that the plaintiff needed prolonged wound care with multiple surgical toilets and subsequent skin grafting by a plastic surgeon, Dr. Khaiga. She has had a protracted course of antibiotic treatment to control infection both in the pin tracts and the above. The left tibia has progressed well with the implants. The right wrist fracture was now out of the cast. She had to use a wheel chair until satisfactory union of the right radius to enable use of crutches on the left lower limb. Currently, her right ankle and tibia have extensive skin grafts both on the planer surface and dorsan of the foot which is in equinus malposition. The left tibia is united and will need plate removal.

Dr. Ating'as opinion was stated as follows:

The sustained bilateral severe leg injuries with the right ankle and foot permanently stiff and acts like a stump which may not function even in modified shoes. She has a plate in her left tibia which will require removal in due course.

The right wrist is painful in volar malunion. Total functional loss with a lifeless right foot and ankle is 70%. She will need surgery to remove the implants at a cost of Kshs.300,000/=. She will need special shoes on the right leg permanently at a cost of up to Kshs.15,000/= per shoes whose life may be three years at maximum.

She will need major operation to fuse the right ankle estimated at Kshs.600,000/= including hospital stay. She will permanently limp because of her permanent deformity and may need o use a cane all the time.

The said doctor was paid a sum of Kshs.10,000/= and receipt produced for Kshs.40,000/= being his court attendance and balance was to be paid (PExt.2).

12. Upon cross examination, Dr. Atinga stated that the plaintiff's left leg was cosmetic, that it was not functional, and that it cannot move. At the time of testifying, she was walking in crutches.

On future medical expenses, he explained that it varies on the treatment and the hospital.

He stated that the injuries have affected her income as a business lady as mobility is limited.

13. **PW2 was Dr. Wafula Khamala** is also an Orthopaedic surgeon at Aga Khan hospital, Nairobi. He stated that he treated the plaintiff in 2014 after she developed complications, with puss discharge from her right foot. He produced his medical report dated 8th July 2015 as PExt .4. It is the most recent report. The report shows that the plaintiff has

- Disability on the right leg and right hand that is not mobile,
- Left leg not functional
- Roes cannot touch the ground
- will require corrective surgery at an estimate of up to Kshs.1,000,000/=
- will require aids to walk
- Experiences swelling and heaviness in the right foot on walking half a kilometer.
- Experiences morning stiffness and altered sensation in the right foot
- Left leg had healed surgical scars – with near normal range of motion of the ankle and foot

- Right wrist joint has a deformity with prominence of the ulna head
- Distal radioulna joint of the wrists is dislocated and twisted, movements cannot occur
- Cannot perform most daily living activities involving squeezing, twisting and turning the right wrist.

The doctors opinion was that:

- she will require further corrective surgery and specialised shoes for the right leg and at an estimate of Kshs.1,000,000/=
- She will need specialised shoes for the rest of her life, each pair estimated to cost Kshs.30,000/= and replaced annually.
- Corrective osteotomy of the right wrist and rehabilitation at an estimated cost of Kshs.600,000/=.
- She will remain on long term limping and use of a cane or crutch for the rest of her life.

The plaintiff produced as exhibits all the discharge summaries from the various hospitals that the above doctors used in the preparation of the two medical reports (PExt No 6A & 6B).

14. The Defendant's Doctors report was prepared by Dr. Leah Wainaina. It is dated 24th November 2015. It was admitted by consent of the parties DExt I.

The court has considered the injuries sustained by the plaintiff.

It will proceed to assess damages under the following subheads

- (1) *Damages for pain and suffering*
- (2) *Damages for loss of earnings and loss of earnings capacity*
- (3) *Nursing care*
- (4) *Future cost of treatment*
- (5) *Special damages*

#### 15. **Damages for pain and suffering.**

The defendant, citing the cases **Daniel Kosgei Ngelewei vs Catholic Trustee Registered Diocese of Eldoret and Another, (2013) e KLR** and **Lilian Gakethi Mworira vs Stanley Mwithimbu M'Ithiri (2010) e KLR** proposed a sum of Kshs. 1,500,000/=.

In the **Daniel Kosgei** case above, the injuries sustained were amputation of the left lower limb above the knee with soft tissue injuries. The court awarded Kshs.2,100,000/= in June 2013.

In the **Lilian Gakethi Case** (Supra), for compound fractures of the tibia/fibular, and to the left humerus and compressed fractures of the T3 with transection of the spinal cord, paralysis of the upper and lower limbs among other injuries, the court awarded Kshs.2,000,000/= in June 2010. For the plaintiff, a sum of Kshs.4,000,000/= was proposed. Counsel for the plaintiff cited numerous authorities in support. I have considered them.

In **Regina Wilson vs Stephen M. Gichuchi & Others, Hccc No 728 of Kshs.2,500,000/=** for pain and suffering. The plaintiff had sustained multiple fractures of the right side 3rd – 6th ribs, comminuted fracture soft right radius bone, fracture of the femur involving the neck, fractures of the right tibia/fibula bones of same leg and soft tissue injuries.

In **Edward Mzamili Katana vs CMC Motor Group – (2006) e KLR** the court awarded Kshs.2,000,000/= in May 2006. The injuries sustained by the plaintiff were head injury leading to concussion, cut wound and bruises to the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, compound fracture of the 5th – 7th ribs and fracture of the left femur upper 1/3 shaft.

In **Almed Mohammed Adam vs Jimmy Tomino and 2 Others (2006) e KLR** for injuries – amputation of the left lower limb below the knee multiple fractures of the tarsal bones of the right foot and burns, compound fracture of right malleolus and dislocation of the right ankle joint and stiff knees of ankle joint, a sum of Kshs.1, 900,000/= was awarded in 2006. Injuries in the above authorities were more serious as they involved amputations of the limbs and multiple fractures.

I have considered the plaintiffs injuries, the degree of incapacitation assessed at 70%, and the three doctors opinions as as contained in their separate reports. There is no doubt that the plaintiff has suffered and experienced a lot of pain, having to undergo 28 operations. The injuries sustained by the plaintiffs in the cases tendered by both the plaintiff and the defendant referred to above are equally serious, and damages by all the Learned Judges were in the region of Kshs.1,900,000/= to Kshs.2,500,000/= for pain and suffering.

I have considered the seriousness of the plaintiffs injuries. I have also considered inflation incident. I find a sum of Kshs.2,400,000/= damages for pain and suffering reasonable. I award the same.

#### **16. Loss of earnings and loss of earning capacity.**

The plaintiff testified that before the accident she was operating a business with an income of Kshs.100,000/= per month. She produced bank statements to show the business financial transactions that came to a stand still since the accident in January 2012. The plaintiff upon review of the bank statement submits that an average income of Kshs.50,000/= per month is reasonable. The plaintiff is 51 years old and as indicated the medical reports, will not engage in any gainful venture for the rest of her life.

She claims loss of earning capacity. The plaintiff proposed a multiplier of 10 years.

The defendants on their part submits that no proof of business was made as no certificate of registration of a business or business entity was provided. On the bank statements, it was submitted, that they did not support a business. It is further submitted that even if there was an on going business, in her own testimony she testified that she had hired workers to conduct the alleged transport business and therefore her current inability and incapacitation will not affect the business negatively.

17. A claim for loss of earning capacity is a general damage. It can be awarded as part of general damages for pain and suffering, and can be awarded to compensate the party for the risk that he may never get employment if he was not employed, or may lose the same if he was employed. As concerns a party who is in business, the incapacitation from the injuries may cause the party not to comfortably manage the business he was engaged in, or even to venture into other businesses.

18. For the plaintiff, it is not disputed that she will never be able to engage in any income generating venture on her own. As submitted by the defendant, no documentary evidence was tendered to confirm what business the plaintiff was engaged in prior to the accident. That as it may, there was evidence that the plaintiff operated a **Bank A/C at KRep Bank Ltd** before and after the accident. This account cannot be said to have been an active account. The transactions are very minimal. She had an account at Equity Bank at Bungoma. Between March 2011 and January 2012 when she was injured, there is evidence of some deposits as well as withdrawals. It is in her personal names. There are no indications from where the deposits were made from. What is clear is that there were some transactions upto December 2011. The plaintiff did not provide statements for the year 2012 and thereafter.

19. In her KCB account, still in her personal names, there are minimal transactions between September 2011 and April 2013.

From these statements, the court cannot reasonably come to a conclusion that before the accident, the plaintiff had a flourishing business with an average income of Kshs.50,000/= as the plaintiff submits. No evidence was tendered to support that submission.

In **High Court Civil Case No 287 of 2007 Simon Ano Mua vs Kioga Mukwaro vs Kioga Mukwaro (2013) e KLR**, it was held that loss of earning capacity occurs where as a result of the injury, the plaintiff's chances in the future of any work in the labour market is lessened whereas loss of future earning capacity is an award for real and assessable loss, proved by evidence.

20. While assessing a claim for damages for loss of earning capacity, factors as age and qualifications of the claimant, his disabilities and previous abilities must be taken into account.

The plaintiff herein did not lead any evidence as to her professional or academic qualifications. She was 51 years when she testified. She could have worked for a period of not less than 10 years to reach the official retirement age of 60 though in informal sector, it could be more than 70 years. Her income was not evident from the evidence tendered, or from the bank statements. Doing the best I can, I find that as an energetic and healthy woman and taking into account all vicissitudes of life, she could have gainfully worked for eight years. That is the multiplier this court will adopt, against an income of Kshs.15,000/= per month as a businesslady. The court will therefore award the plaintiff damages for loss of earning capacity made up as follows:

$$15,000/= \times 12 \times 8 = \text{Kshs.1,440,000/=}$$

#### 21. Nursing Care

The plaintiff's incapacitation was assessed at 70% with that incapacitation, the plaintiff will require assistance in her daily activities. She will have to use crutches to walk but will not manage her household and personal needs. She will require assistance in her day to day needs.

22. The defendants Doctor, Leah Wainaina was silent on the percentage of physical disability resulting from the injuries. The plaintiff's doctors did not specifically recommend a nurse but considering the injuries and disability, it is the court's considered opinion that the plaintiff will require a second hand to assist her in her daily chores as her left hand and legs are dysfunctional and will be so for the rest of her life. I shall allow the claim that will be worked out for a house help for the next eight years at a conservative salary of Kshs.10,000/= per month. This is informed by the current wages for house helps. It will no doubt rise in due course. That works up to **Kshs.10,000 X 8 X 12 = 960,000/=**

#### 23. Future cost of treatment.

It is the defendants submission that a claim for future cost of treatment is futuristic and ought not be granted, as it cannot be proved until the treatment is given, and further, being a special damage claim, until proven, it ought be denied.

The plaintiff however submits that she will require future treatment to correct the deformities and remove the implants. The doctors gave estimates of the costs.

In **Sosphinaf Company Ltd & Another vs Daniel Ng'ang'a Civil Appeal No 315 of 2001**, the Court of Appeal held that a claim for future medical treatment was part of general damages and did not need to be specifically pleaded.

Also in the case **Simon Taveta vs Mercy Mutitu Njeru (2014) e KLR** the court of appeal, referred to the case of **Kenya Bus Ltd vs Gituma (2004) EA 91** and held held:

***“And as regards future medication (physiotherapy), the law is well established that although an award of damages meet the cost thereof is made under the rubric of general damages, the need for future medicare is itself special damage and is a fact that must be pleaded. If evidence***

***thereon is to led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.”***

24. As a special damage within a claim for general damages, the court went ahead to state that it ought to be pleaded and proved – See **Tracom Ltd & Another vs Hassan Mohamed Aden (2009) e KLR**.

It is not in dispute that the plaintiff in this case has proved the need for future medical treatment.

Indeed the two Doctors, Prof. Atinga and Dr. **Wafula Khamala** recommended future surgeries to the plaintiff to remove the implants as well as special shoes, and a major operations to fuse the right ankle.

I do not doubt the expertise and competence of these very learned Doctors.

They estimated the cost of:

*(a) Corrective surgery at Kshs.1,000,000/=*

*(b) Special shoes for the rest of her life at a cost of Kshs.30,000/= to be replaced annually.*

*(c) Corrective osteotomy of right wrist and rehabilitation at a cost of Kshs.600,000/=.*

Learned Judges of **Appeal in Civil Appeal No 133 of 2005 Paul N. W. Njoroge vs Abdul Sabini Sabonyo (2015) e KLR** faced with a similar situation had this to say:

***“In this part of the world it is normally considered wise to remove metal after the fracture has healed even if it is not causing any trouble. However, this opinion is not shared by all doctors ”***

They held that, subject to proper professional assessment and counselling, future medical surgery was not ruled out and that it was only fair that a reasonable sum be awarded for the eventuality. They proceeded to award the claim for future medical costs. That was on the 27th February 2015.

25. In the present case, I am satisfied that the plaintiff requires future treatment and surgeries as recommended by the doctors.

As stated above, the doctors gave estimate cost of the surgeries and other medical procedures and equipment.

Upon due consideration, the court shall allow the claim for future cost of treatment as follows:

**(a) Cost of removal of implants - Kshs.200,000/=**

**(b) Cost of specialised shoes @ Kshs.10,000(every year) for 8 years Kshs.80,000/=**

**(c) Further surgeries - Kshs.700,000/=**

The above awards are informed by the fact that the doctors gave only estimates of the future cost of treatment.

In this subhead, the total award is **Kshs.980,000/=**

## **26. Special damages**

A sum of Kshs.4,940,357/= is pleaded in the in the amended plaint. A bundle of receipts from various hospitals, health providers were produced, including taxi services representing a sum of Kshs.2,751,579/=

It is submitted that the balance was paid through the plaintiffs. Insurance and National Hospital Insurance Fund(NHIF) Deductions. This fact is acknowledged by the defendant. I shall allow the sum of Kshs.2,751,579 as a special damages, and duly proved.

27. The upshot of the above is that there shall be judgment entered for the plaintiff against the defendants jointly and severally as follows:

- (a) Liability at 100% against the defendants jointly and severally
- (b) General damages for pain and suffering - Kshs.2,400,000/=
- (c) Damages for loss of earnings and earning capacity - Kshs.1,440,000/=
- (d) Nursing care - Kshs. 960,000/=
- (e) Future treatment cost - Kshs. 980,000/=
- (f) Specials damages - **Kshs.2,751,579/=**

The plaintiff is awarded costs of the suit.

Interest on special damages at court rates from the date of filing of the amended plaint.

**Dated, signed and delivered in open court this 21st day of July 2016**

**JANET MULWA**

**JUDGE**