



**IN THE HIGH COURT AT KISUMU**

**CIVIL SUIT NO. 43 OF 2015**

**BETWEEN**

**ALEX OTIENO AMOLO.....1<sup>ST</sup> PLAINTIFF**

**HELLEN AKINYI OTIENO.....2<sup>ND</sup> PLAINTIFF**

**AND**

**HAYER BISHAN SINGH & SONS LIMITED.....DEFENDANT**

**JUDGMENT**

1. On 29<sup>th</sup> November 2013, the 1<sup>st</sup> plaintiff was working at the defendant's construction site in Kisumu. He was on the second floor of the building preparing slab shutters while concrete slabbing works were going on. The other employees were preparing to deliver concrete from a concrete mixer machine but suddenly and without ascertaining whether the 1<sup>st</sup> plaintiff was ready, started releasing concrete through a pipe at a very high speed causing it to strike him in the face. The 1<sup>st</sup> plaintiff fell from the 2<sup>nd</sup> floor to the ground floor and sustained serious injuries. As a result, the 1<sup>st</sup> plaintiff and his wife, the 2<sup>nd</sup> plaintiff, sued the defendant for damages. The issue of liability was settled in the ratio of 90:10 against the defendant. The matter proceeded for assessment of damages.

2. According to the plaint, the 1<sup>st</sup> plaintiff sustained the following injuries; a fracture of the spinal cord, left tibia and fibula and the humerus, blunt trauma on the back and the entire body. He was declared a complete paraplegic with full paralysis, total immobility and total permanent incapacity as a consequence of the injuries.

3. The 1<sup>st</sup> plaintiff did not testify but his wife, the 2<sup>nd</sup> plaintiff (PW 1) and Dr David Olima (PW 2) gave evidence on the 1<sup>st</sup> plaintiff's medical condition. PW 1 told the court that the 1<sup>st</sup> plaintiff was totally bedridden and she took care of all his needs. She told the court that after he was injured, he was admitted to the Nyanza Provincial General Hospital for 2 weeks then referred to the National Spinal Cord Injury Hospital (NSCIH) in Nairobi where he was hospitalized for 1 year. She produced the Discharge Summary from the NSCIH, X-rays reports and copies of receipts evidencing payment made for treatment confirming that the 1<sup>st</sup> plaintiff was admitted to hospital and was treated for the injuries.

4. PW 1 told the court that she was her husband's sole caregiver and that at the time of the accident he was 47 years old and was doing construction work for the defendant where he was earning Kshs. 800/- per day. She stated that she abandoned her business of selling vegetables in order to take care of her husband. She testified that she was earning Kshs. 200/- per day. She further testified that she was forced to rely on well-wishers to support herself and her family and that their children, who were supported by her husband, had dropped out of school.

5. Dr David Olima (PW 2), a medical practitioner, testified that he examined the 1<sup>st</sup> plaintiff on 25<sup>th</sup> September 2015. In cross-examination, he recalled that he examined him in the car park as he was in a wheel chair and could not come up to his office. Dr Olima also confirmed that the 1<sup>st</sup> plaintiff sustained the following injuries;

a. Head and Neck

- Soft tissue injuries to the neck
- Chemical conjunctivitis in both eyes from the cement dust

b. Central Nervous System

- Complete spinal transection with paraplegia at the time of the accident

c. Chest and Abdomen

- Blunt chest injuries
- Multiple rib fractures both sides (left and right)

d. Musculoskeletal region

- Comminuted fracture middle 1/3<sup>rd</sup> of the left tibia
- Fracture neck of the left tibia
- Lacerations of both knee joints

6. Dr Olima examined the 1<sup>st</sup> plaintiff's medical records and noted that after treatment, he was managed conservatively with physiotherapy and rehabilitation. His bladder had a catheter inserted. The 1<sup>st</sup> plaintiff's complaints at the time of examination were paraplegia and diminished vision in the right eye. He verified that the 1<sup>st</sup> plaintiff was a paraplegic, had a cataract in the right eye and deformity at the tibial fracture site. He assessed the 1<sup>st</sup> plaintiff's incapacity at 85%.

7. The 1<sup>st</sup> plaintiff claimed the following heads of damages in the plaint;

1. General damages for pain, suffering, extended stay in hospital, loss of consortium and conjugal rights and finding himself in complete paraplegia.
2. Special damages for hospital and treatment costs amounting to Kshs. 228,000/- and medical report and doctor's attendance costs amounting to Kshs. 20,000/-.
3. Loss of earnings and earning capacity on account of the loss of his ability to undertake any other work resulting.

8. The 2<sup>nd</sup> plaintiff claimed that due to the 1<sup>st</sup> plaintiff's condition, she had been unable to do or undertake any meaningful business to earn a living and as she had been taking care of the of the 1<sup>st</sup> plaintiff by providing nursing care including fixing his catheters and disposal of human waste as he had been rendered immobile.

9. The nature and extent of injuries sustained by the 1<sup>st</sup> plaintiff are undisputed. In assessing general damages for pain and suffering and loss of amenities, I am guided by the statement of principle set out in the case of **Tayab v Kinany [1983]KLR 114** where Potter JA adopted the dicta of Lord Morris of Borth-y-Gest in **West (H) & Sons Limited v Shepard [1964]AC 326, 345;**

*But money cannot renew a physical frame that has been battered and shuttered. All the courts can do is to award sums which must be regard as giving reasonable compensation. In the process there must be the endeavour 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.*

**10. HALSBURY'S LAWS OF ENGLAND 4th Ed, vol. 12(1) page 348 at para. 883 explains the purpose for awarding damages for pain and suffering as follows;**

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

11. In order to assist the court assess general damages, the plaintiff cited the case of ***Dorothy Kanyua Mbaka & Another v PS In Charge of Department of Defence & Others* MERU HCCC No. 15 of 2004 [2014]eKLR**. In that case the 1<sup>st</sup> plaintiff sustained, inter alia, a pelvic fracture, trauma to the bladder and urethra, loss of sexual function and permanent incapacity arising from paraplegia. She was awarded Kshs. 10 million as general damages in 2014. In ***Georgina Wangari Mwangi v David Mwangi Muteti* KERUGOYA HCCC No. 40 of 2013 [2014]eKLR**, the court awarded Kshs. 7 million as damages in 2014. The defendant proposed a sum on Kshs. 1.5 million as general damages based on ***Patrick Mwangi Irungi v Charles Macharia & Another* NKU HCCC No. 188 of 2005 [2008]eKLR** where the plaintiff sustained paraplegia secondary to fracture on the T-12 and L1 vertebra.

12. Admittedly, the decision cited by the defendant is an old case and may not be reflective of current awards taking into account inflationary trends. The cases cited by the plaintiff are more recent and the claimants therein suffered similar injuries to the 1<sup>st</sup> plaintiff herein. In a more recent Court of Appeal decision, ***Simon Taveta v Mercy Mutitu Njeru* NYR CA Civil No. 26 of 2013 [2014]eKLR**, the Court reduced an award of Kshs. 4 million to Kshs. 3.5 million for a claimant who sustained paralysis of the lower limbs and lost bowel function. I am aware that each case is different and must be assessed on its own merits. What is undisputed though is that the 1<sup>st</sup> plaintiff is a paraplegic, he is immobile and sustained multiple fractures. As a result of the accident, the 1<sup>st</sup> plaintiff must have suffered considerable pain. In light of the decisions cited and I am of the view that the sum of **Kshs. 6 million** would be appropriate as general damages for pain and suffering and loss of amenities.

13. As regards the claim for loss of earnings and loss of earning capacity, the Court of Appeal in ***Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR** observed as follows;

*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.*

14. The defendant contended that the 1<sup>st</sup> plaintiff's claim was not strictly pleaded and proved and should be dismissed. Counsel cited the decision of the Court of Appeal in ***Mbaka Nguru & Another v James George Rakwar* [1998]eKLR** it observed that loss of earning was in the nature of special damages which must be pleaded and proved. It noted that, "*The plaintiff cannot just 'throw figures' at the judge and ask*

him to assess damages.”

15. I reject the defendant’s argument on the ground that the claim was clearly pleaded at paragraph 10 of the plaint. By recording a consent on liability, the defendant admitted that the 1<sup>st</sup> plaintiff was working at its construction site when he was injured. PW 1 testified that he was earning Kshs. 800/- per day and since this information was within the knowledge of the defendant, as his employer, then nothing would have been easier than for it to provide evidence to the contrary. I therefore find and hold that the 1<sup>st</sup> plaintiff was earning Kshs. 800/- per day doing construction work.

16. According to the plaint, the 1<sup>st</sup> plaintiff was 56 years at the time of filing suit which means he was 53 years at the time of the accident. PW 1 stated in her testimony that he was aged 47 years although she did not seem to be sure. This 1<sup>st</sup> plaintiff’s age is confirmed by the hospital discharge summaries produced in court. Although the medical report by Dr Olima states that he was 58 years old, I am more inclined to adopt the age set out in the hospital documents as they were prepared on various dates and are consistent. I therefore find that his age at the time of the accident was 53 years.

17. As the 1<sup>st</sup> plaintiff was doing manual construction work, he would probably work until he was 60 years but taking into account the uncertainties of life, I adopt a multiplier of 5 years. The total sum due under this head is therefore **Kshs. 800 X 20 X 12 X 6 = Kshs. 1,152,000/-**. This sum is reduced by 10% (Kshs. 115,200/-) to take into account the fact that the 1<sup>st</sup> plaintiff will receive an accelerated lump sum payment which will be invested. The total award is therefore **Kshs. 1,036,800/-**.

18. It is trite law that special damages must be pleaded and proved (see **Charles Sande v Kenya Cooperative Creameries Ltd NAI Civil Appeal No. 154 of 1992 (UR)**). The 1<sup>st</sup> plaintiff sustained serious injuries which necessitated treatment as evidenced by the receipts which were produced and which amounted to Kshs. 93,409/-. PW 2 confirmed that he was paid Kshs. 3,000/- as attendance fees. I therefore award the said sum of **Kshs. 96,409/-** as special damages.

19. In the written submissions, the plaintiff’s claimed future medical expenses amounting to Kshs. 3,600,000/-. This sum was not pleaded and no evidence was led to show the nature and extent of future medical expenses sought. In this respect, I would do no better than quote the case **Kenya Bus Services Ltd v Gituma [2004] EA 91** where the Court of Appeal stated as follows;

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

20. The 2<sup>nd</sup> plaintiff’s claimed damages for pain and suffering, loss of consortium and conjugal rights and loss of her ability to engage in any constructive economic activity. The 2<sup>nd</sup> plaintiff’s claim, as I understand it, is one for loss of consortium and *servitium*. In **Chege Kimotho & Others v Maria Vesters & Another [1982-88]1 KAR 1197**, the Court of Appeal accepted the principle that the spouse of an injured person was entitled to damages for impairment resulting in curtailment of sexual life and the physical and emotional effects resulting therefrom. It stated that;

*Companionship, love, affection, mutual services, sexual intercourse all belong to the married state. Serious injury to any one of the components that to make consortium would affect others. The first respondent’s injuries affected every ingredient of consortium giving the second respondent a cause of action.*

21. The sums awarded are modest hence I reject the 2<sup>nd</sup> plaintiff’s claim to extrapolate such claim under the head of loss of earning capacity which, in my view, would be too remote. I am guided by the case of

**Salvatore De Luca v Abdullahi Khalil & Another MSA CA Civil Appeal No. 73 of 1994 [1994]eKLR** where the Court of Appeal awarded a global sum of Kshs. 40,000/- for loss of consortium and *servitium*. In **Wangari v Nkaru NRB HCCC No. 191 of 2002 [2004]eKLR**, the court awarded Kshs. 100,000/- under this head while in **Jeremiah Njuguna & Another v Angela Yator & Edel Biwott (Administrators of Paul Kiplagat) ELD HCCA No. 119 of 2006 [2016]eKLR**, the court accepted an award of Kshs. 100,000/-. Taking into account the decisions I have cited, I award the 2<sup>nd</sup> plaintiff **Kshs. 100,000/-** for loss of consortium and *servitium*.

22. The final award in the matter shall be as follows;

<b>1<sup>st</sup></b>		<b>Plaintiff</b>
General Damages	Kshs. 6,000,000/00	
Loss of Earning Capacity	Kshs. 1,036,800/00	
Special Damages	Kshs. 96,409/00	
<b>2<sup>nd</sup> Plaintiff</b>		
Loss of Consortium	Kshs. 100,000/00	
Sub Total	Kshs. 7,233,209/00	
Less 10% Contribution	(Kshs. 723,321/00)	
<b>TOTAL</b>	<b>Kshs. 6,509,888/00</b>	

23. I therefore enter judgment for the plaintiffs against the defendant in terms of paragraph 22 above and direct that interest on special damages shall run from the date of filing suit while on special damages it shall run from the date of this judgment until payment in full. The plaintiffs shall have the costs of this suit to be agreed upon or taxed.

**DATED and DELIVERED at KISUMU this 1<sup>st</sup> day of August 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Juma instructed by Namada & Company Advocates for the plaintiff.

Ms Kesei instructed by Onyinkwa & Company Advocates for the defendant.