



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 198 OF 2015**

**FRANCIS MUVINGA MUSILI.....PLAINTIFF**

**V E R S U S**

**AFRO PLASTIC (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**BHAVESH DAMJI GOHIL.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff **Francis Muvinga Musili** filed a compensatory suit against **Afro plastics (K) Ltd and Bhavesh Damji Gohil**. In his plaint, he claimed that on 30<sup>th</sup> June 2012, he was riding motor cycle registration number KMCR 845C along Garden Estate road coming from Balozi road when the 2<sup>nd</sup> defendant negligently drove motor vehicle registration number KAX 930G causing it to collide with the plaintiff as a result of which he suffered severe injuries and damage. The defendants denied the plaintiffs claim by filing a defence.

2. In the aforesaid plaint, the plaintiff sought for judgment against both defendants jointly and severally as follows:

*i. General damages for pain, suffering and loss of amenities with interest thereon.*

*ii. Damages for quadriplegic equipment, future medical and nursing care, hospitalization and drugs as set out at paragraph 7 and 9 above.*

*iii. Damages for loss of earning and loss of earnings capacity as set out at paragraph 8*

*vi. Special damages as set out above with interest.*

*v. Costs of this suit with interest.*

3) When the matter came up for hearing, the plaintiff testified and summoned the evidence of two witnesses. The defendants on the other hand did not call any witnesses. At the close of evidence, learned counsels were invited to make final submissions, which they did.

4) On 4<sup>th</sup> May 2016, the parties entered into a consent on liability only where they agreed for liability to be shared at a ratio of 70:30% in favour of the plaintiff as against the defendants. This consent was adopted as the judgement of the court. Consequently the only issue of determination is the quantum payable.

5) During the trial, the plaintiff testified and produced documents to illustrate that he suffered injuries as a result of the accident. He testified as PW1 where he stated that he is aged 24½ years. He claimed that he was injured from the neck downwards and as a result he has to be assisted in dressing up and feeding himself. He added that due to his condition he cannot engage in sexual activity and that he has to be carried on the wheel chair. He further claimed that he needs to undertake physiotherapy sessions regularly. He asserted that he cannot control of passing of urine and stool and as a result he uses 3 diapers per day which diapers costs him ksh.100 per diaper. He also claimed that he used one uridom per week which goes for kshs.100/= per piece. He testified that he gets recurrent infection when he fails to pass urine and stool that forces him to visit the hospital. He sought to be paid compensation to pay a helper at kshs.500/= per day. He further stated that he was not in a position to secure any employment for the last 4 years since he is paralysed. He added that the wheel chair he is using was bought at ksh.15,000/= and he needs a better wheel chair. He produced his bundle of documents in support of his case being copy of records from the registrar of motor vehicles as Pexh 2, police abstract as Pexh 3, P3 form as Pexh 4, Admission and discharge documents as Pexh 5, medical card from KNH Pexh 6, various X-ray reports as Pexh 7, a bundle of receipts as Pexh 8 and medical report by **Dr. Ashwiri Madiwala** as Pexh 9. He averred that he used to operate a boda boda business where he would earn a sum of 800/= per day and he would pay the owner of the business a total of kshs.4,000/= and that he pays ksh.3,000/= per month for his rent.

6) The plaintiff called **Dr. Joseph Maundu** as PW2. He produced a medical report and averred that the plaintiff was on a wheel chair when he first saw him. He added that the plaintiff is unable to control urine and stool and that he has chest problems and bed sores due to his immobility. He stated that the use of diapers, catheters and urine bags will be necessary as there is no hope of recovery. He further averred the plaintiff can live for 50 years and that he will require physiotherapy. He produced the medical report as Pexh (6) and court attendance Pexh 1(c). He stated that the cost of the items needed is listed in his report though the market prices, they keep on changing.

7) PW3, **Kasemeli Nguta** testified that he was the plaintiff's cousin who takes care of him at no cost. He however intimated that he has time and again failed to go to work so as to take care of the plaintiff and he said that a helper would cost ksh.10,000/= per month and informed the court that they are financially constrained forcing them to borrow money to assist the plaintiff.

8) I have perused the documents adduced in evidence by the plaintiff. The injuries suffered by the plaintiff as per the documents include:

1. Neck injury with subluxation of CT
2. Transection of the CT
3. Paralysis of both upper limbs from neck up to the lower limbs.
4. Loss of sensation from the CT downwards
5. Loss of urine and stool control
6. Loss of sexual infection
7. Deep cut on the scalp
8. Quadriplegia.

There was no evidence adduced to controvert the injuries enumerated above. The plaintiff avers that he suffered 100% disability causing him to be confined in a wheel chair. He will also require nursing care and since he has no control of passing urine ad stool, he has to constantly use diapers, uridom and catheter. The plaintiff proposed to be awarded a sum of ksh.7,000,000/= as general damages for pain and suffering and loss of amenities. He cited the cases of **Suleiman Mbango –vs- Mboya Wambui & others**

**High court Civil case no. 1079/2002 (Nairobi)**, where the plaintiff was awarded kshs,6,500,000 as general damages for pain and suffering and lost of amenities having suffered similar injuries. He relied on another case of **Jacqueline Syombua Vs B.O.G Elkalakala Secondary School, High Court no. 118 of 2006 (Embu)** where the plaintiff who suffered similar injuries was confined to a wheel chair and as a result was awarded kshs.6,500,000/= as damages. In another case of **Eva Mueni Wambugu v Simon Peter Githae & another (2012) eKLR**, the court awarded ksh.3,500,000/= as general damages and in the case of **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & another (2014) eKLR** the plaintiff suffered similar injuries and was awarded kshs.3,000,000 for general damages. He further relied on the case of **Nancy Oseku v Board of Governors Masai Girls High School (2011) eKLR** where the plaintiff was awarded ksh.2,500,000/= in general damages.

The defendants on the other hand are of the view that the plaintiff's proposal is exorbitant and proposed a sum of ksh,2,500,000. They relied on the case of **Joseph Omwombo Owiti vs Magadi soda Company Ltd & 2 others (2014) eKLR** where the court entered judgment for the plaintiff against the defendant for pain and suffering and loss of amenities at ksh.2,500,000/= and the case of **Ngure Edward Karega –vs- Yusuf Doran Nassir (2014) eKLR** where the court awarded general damages of ksh.5,000,000/=

9) I have carefully considered the rival proposals on the award on this head. I have also taken into account the authorities cited. Taking into consideration the injuries suffered by the plaintiff that saw him confined to a wheel chair and the cited authorities by the parties, those cases cited by the plaintiff awarded between a sum of kshs 6,500,000/= , 2,500,000/= while those cited by defendants range from kshs.5,000,000 – 2,500,000/= for pain and suffering. I am of the view that in the circumstances, all considered , a sum of kshs 6,500,000/= would be reasonable.

10) The plaintiff has prayed to be awarded damages for loss of earning capacity. This court was urged by the plaintiff to award him ksh.10,000 per month for 30 years. i.e  $10,000 \times 12 \times 30 = 3,600,000$ . The defendant on the other hand proposed a multiplier of 25 years due to the nature of the work the plaintiff undertook. They argued that the alleged earning of kshs.800/= per day has not been proved and neither is the proposed wage of kshs.10,000/=. They proposed that the court considers minimum wage of workers of ksh.7,000/=. They further proposed a dependency ration of 1/3 since the plaintiff had no dependants.

Indeed as argued by the defendant the alleged earnings of ksh.800 per day was not proved. However, despite lack of proof, the plaintiff has only prayed that a multiplicand of kshs10,000/= being the minimum wage recognised by labour regulations be used instead of a total of kshs 24,000/= per month that would have been derived from the ksh.800/= per day. As such I find it only fair to use kshs.10,000/= as the multiplicand. On the proposed multiplier of 30 years I note that the plaintiff was 21 years old when the accident occurred. Despite the nature of his work, I am convinced that he would have worked for another 30 years upto the age of 51 years as was also said by doctor. As a result, under this head a total sum of kshs.3,600,000 ( $10,000 \times 12 \times 30$ ) would be sufficient.

11) The plaintiff has also prayed to be awarded kshs.196,020.74 as special damages. He produced receipts on account of hospital bills. The defendants on the other hand argues that the sum pleaded and specifically proved is kshs.183,255/= which they have no contention with. I therefore under this head award the sum of kshs.183,155/= being the sum that was specifically pleaded and proved.

12) On future medical expenses and related costs, the plaintiff has prayed for the following:

**(i) Physiotherapy session**

A sum of kshs.3,600,000/= since as stated by the doctor in his evidence it will cost him ksh.2,500 per week for life. The plaintiff proposed a sum of ksh.2,600,000/= ( $2,500 \times 4 \times 12 \times 30$ ). The defendant on his part submitted that ksh.1,800,000/= being kshs.2000 per ( $2000 \times 3 \times 13 \times 30$ ) would be enough. I have considered the doctors proposal and under this head I hereby award the sum proposed by the plaintiff of ksh.3,600,000/=

**(ii) Uridom, condoms, urine bags and diapers**

The plaintiff submitted that while he is travelling he wears adult diapers and uses one diaper in a day. He stated that urine bags, uridom and condoms are kshs600 per week. He therefore proposed a sum of ksh.864,000/= being  $600 \times 4 \times 12 \times 30$  and kshs6,480,000 for adult diapers being  $600 \times 30 \times 12 \times 30$ . The defendants on the other hand proposed ksh.720,000 ( $600 \times 4 \times 12 \times 25$ ) for the urine bags, uridom and condoms and for kshs.360,000/= ( $300 \times 14 \times 12 \times 25$ ) for diapers.

I have looked at Dr. Maundu's report that was produced in evidence. He has listed therein various costs of these necessities. He asserts that the plaintiff will require 2 adults napkins/diapers per day for life and that each costs ksh.300/=. Under this head therefore I award kshs,6,480,000/= being  $300 \times 2 \times 12 \times 30 \times 30$ . On the issue of catheter, urine bags, uridom and condoms, the doctor stated that it will cost the plaintiff 600/= per week, which is calculated as  $600 \times 4 \times 12 \times 30$  bringing the total to ksh.864,000/= awarded to the plaintiff.

### **(iii) Laxatives**

The plaintiff complained of difficulties in bowel movements which often requires stool evacuation or use of laxatives. Looking at the doctors report, he was of the view that this will cost the plaintiff ksh.500/= weekly. The defendants did not contest. I therefore award a sum of ksh.720,000/= being  $500 \times 4 \times 12 \times 30$ .

### **(iv) Wheel Chair**

Dr. Maundu in his report intimated that a wheel chair costs ksh.60,000 and that it has a life span of 10-12 months and maintenance of ksh.2000. The plaintiff submitted that he bought the second hand wheel chair in July 2015 and that it is currently worn out. He therefore proposed that he be awarded 1,860,000 ( $62,000 \times 30$ ). The defendants argued that they disagree with the doctor that a wheelchair need to be changed ever once a year, they instead opined that a wheel chair should serve the plaintiff every two years hence kshs,775,000 being  $62,000 \times 25 \times \frac{1}{2}$  years. I have considered the proposals by the parties. While I understand the defendants argument that the plaintiff should use one wheel chair in a span of two years, the defendants have not adduced evidence to controvert the opinion of Dr. Maundu, which opinion he adduced as an expert of the medical field.

However, in several cases cited by the parties herein, the doctors have opined that one wheel chair can be used for a period of 2 years. I believe if the plaintiff maintains the wheel chair, then the same can serve him for 2 years. As such I hereby award a sum of kshs930,000 i.e.  $62,000 \times 30 \times \frac{1}{2}$ .

### **(v) Drugs**

The plaintiffs and Dr. Maundu gave evidence to the effect that the plaintiff gets various infections arising from his present condition and use of urindoms and catheters. The doctor recommended in his report a monthly hospital attendance and drugs which will cost kshs.3,000 per month. In that case I believe that a sum of kshs.1,080,000 i.e.  $3000 \times 12 \times 30$ , would be sufficient.

### **(vi) Transport**

During hospital attendances the plaintiff and the doctor have averred that he will need to take a taxi for his transport. The plaintiff testified that it would cost about 6,000/= to and from Kitui County hospital. He therefore proposed a sum of kshs.2,160,000/=. The doctor proposed a sum of ksh.3,000 for taxi charges. The defendant on the other hand under his subheading proposed a sum of ksh.12,000 per annum will be adequate especially given that the plaintiff pleaded transport of kshs.12,000 per annum. I have considered the proposals by the parties.

From the evidence on record, the plaintiff will be expected to make a monthly visit to the hospital. This visit, the doctor opines will cost ksh.3,000/= for the taxi to and from hospital. In that case, I believe that a sum of ksh.3,000/= per monthly visit will be sufficient. I therefore award a sum of kshs.3,240,000 i.e.  $3000 \times 12 \times 30 \times 3$ .

**(vii) Specialized bed and mattress**

On this subheading the plaintiff claims that the doctor proposed that they would have to acquire a specialised bed and mattress. He proposed an award of kssh.450,000/=. I am of the view that ksh.450,000/= will be adequate. I am guided by the case of **Nancy Oseko v Board of Governors Masai Girls High School (2011) eKLR** where the plaintiff who suffered similar injuries was awarded a sum of kssh.400,000/=.

**(viii) (Nursing care**

On this subheading the plaintiff testified that his cousin takes care of him. His cousin PW3, claimed that sometimes he is forced to abscond from work so as to take care of the plaintiff as instructed by the family. The plaintiff is therefore seeking compensation to allow him get someone to assist him on a full time basis. The plaintiff therefore proposes that a sum of ksh.10,000/= being the minimum basic wage under the 2015 minimum wage guideline be adopted. As such he proposes the sum of kssh.3,600,000. The defendant on his part submitted that ksh.5,000/= will be adequate since the person looking after the plaintiff is not a professional. They claim that a trained person will be expensive. In my view, it will be unfair to subject PW3 to any further burden of looking after the plaintiff at the expense of his business. The plaintiff will require specialised help and even if he doesn't get that assistance, he should be empowered enough to get someone who assists him at all times. I will therefore accept the proposed sum of kshs.10,000/= subhead a sum of ksh.3,600,000/= i.e 10,000x12x30.

13) In the end, I enter judgment in favour of the plaintiff against the defendant as follows:

i. General damages for pain and suffering	ksh.6,500,000/=
ii. Damages for loss of earning capacity	ksh.3,600,000/=
iii. Special damages	ksh. 183,255/=
iv. Future medical and other related expenses	
a) Physiotherapy	ksh.3,600,000/=
b) Uridom, condoms, urine bags & diapers	ksh.7,344,000/=
c) Laxatives	ksh. 720,000/=
d) Wheel chair	ksh. 930,000/=
e) Drugs	ksh.1,080,000/=
f) Transport allowance	ksh.3,240,000/=
g) Specialised bed & mattress	ksh. 450,000/=
h) Nursing care	ksh.3,600,000/=
Gross total	<u>ksh.32,177,255/=</u>
Less 30%	9,653,176.5
<b>Net total</b>	<b><u>22,524,078.5</u></b>

v. Costs of the suit.

Dated, Signed and Delivered in open court this 25<sup>th</sup> day of November, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant