



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 728 OF 2007**

**REGINA MWIKALI WILSON.....PLAINTIFF**

**VERSUS**

**STEPHEN M. GICHUHI**

**PETER M. MUINDE.....DEFENDANTS**

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

1. By a plaint dated 12<sup>th</sup> October, 2007, the Plaintiff sued the Defendants herein seeking:
  - i. *General damages for pain and suffering and loss of amenities with interest.*
  - ii. *Damages for paraplegic equipment, future medical and nursing care, hospitalization and drugs as set out under paragraph 6 and 8 above.*
  - iii. *Damages for loss of earnings and loss of earning capacity as set out in paragraph 7 of the plaint.*
  - iv. *Special damages as set out above with interest.*
  - v. *Costs of this suit with interest.*
2. Her claim is that an accident occurred on 16<sup>th</sup> January, 2005 along Mombasa-Nairobi Road involving the 2<sup>nd</sup> and 1<sup>st</sup> Defendant's motor vehicle registration No.s KAP 769E and KAR 530X respectively occasioning her injuries. The Plaintiff was on the material day a passenger aboard motor vehicle registration number KAP 769E. She pleaded that motor KAR 530X was so negligently driven that it collided with motor vehicle registration number KAP 769E as a result of which the Plaintiff sustained severe injuries and suffered loss and damage.
3. Though the Defendants were duly served with summons, they neither entered appearance nor filed defence. Interlocutory judgment was subsequently entered against the Defendants upon the Plaintiff's request and the matter proceeded for formal proof.
4. The Plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the Plaintiff is required to do therefore is to prove damages. See **Felix Mathenge v. Kenya Power & Lighting Co. Ltd (2008) eKLR** where the Court stated:

***“The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.”***

5. PW1, Dr. Wambugu Mwangi testified that the Plaintiff sustained multiple fractures of the right

side involving the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> ribs, communitated fractures of the right radius bone; fracture of the femur involving the neck; shaft and supra condoler region which was severely communitated in many pieces; fractures of the right tibia and fibula bones on the same leg. On the left leg a fracture of the femur and a deep cut wound on the left knee and abrasion wound over the right supra orbital above the eye brow. He stated that the Plaintiff was managed as an out-patient up to the 23<sup>rd</sup> February, 2014 on appropriate surgical intervention. That the fractures on both femurs were managed by open reduction and fixed with metal implants. She developed infection of the right femur which necessitated a re-do surgery by removal of the metal implants and the application of a different type of metal implants. The Plaintiff attended rehabilitation physiotherapy.

6. The doctor told the court that when the Plaintiff saw him, she complained of scarred deformed and painful right wrist joint, scarred right thigh associated with a painful right knee joint, stiffness of right hip-joint, metal implants were still in place and inability to fully exert herself due to pains in the left thigh. On examination, the Plaintiff had scar towards the right wrist joint. The joint was deformed and stiff. She still had metal implants that were used to repair the fracture. On the left leg she was walking with a right-sided limping gait aided by two elbow clutches, the leg was short by 3.5 cm and the muscles were wasted, there were surgical scars on the thigh. The knee joint was still achieving only 30% of flexion movement. The hip joint was also stiff and only achieving 20% of adduction movement. The ankle joint was also stiff and its movements was restricted by 10%. On the left lower limb surgical and laceration scars were noted. The femur fractures had united and the movement of the hip, knee and ankle joint were all normal.
7. PW1's prognosis was that the injuries were consistent with those due to blunt trauma. That the injuries were severe including multiple skeletal fractures and soft tissue injuries which occasioned her pains and prolonged ongoing morbidity. His opinion was that an amount of KShs. 200,000/- would be required to remove metal implants. The right lower limb could be fit for a limb lightening procedure whose cost he estimated at KShs. 250,000/-. The right knee joint replacement was estimated at KShs. 350,000/-. He stated that the remnant scars were of concern to the Plaintiff. That she had developed osteoarthritis across both knees and right wrist joint which would require intermittent medication to relieve the pain associated with the said conditions. He estimated her incapacitation at 20% degree. He produced a Medical Report dated 21<sup>st</sup> September, 2007 (P. Exhibit 1(a)) and a receipt in respect thereof for KShs. 3,000/-(P. Exhibit 1(b)) and a receipt for KShs. 6,000/- being court attendance fees.
8. The Plaintiff (PW2) testified and confirmed her injuries as was stated by PW1. She told Court the Court that she incurred a cost of KShs. 320,809/- to treat herself and produced P. Exhibit 3 in support of her contention. She stated that before the accident she used to work with Population Service International (PSI) where she used to be paid KShs. 300/- per day. For the injuries she sustained as a result of the accident, she told the court that she was first treated at Machakos Hospital and transferred to Kenyatta National Hospital. She was in hospital from 16<sup>th</sup> January, 2005 to 20<sup>th</sup> February, 2005 i.e. for about thirty five (35) days. She produced a discharge summaries from Machakos District Hospital, Kenyatta National Hospital and South 'B' Hospital. She was thereafter admitted at National Spiral Injury Hospital where metal implant was put on her right thigh. She complained that the right wrist cannot raise or hold any object; she cannot bend to work on the right leg as it was shortened and the implants are still in place. The right lower leg also has a crack. She complained of continued pain. She said that she can no longer engage in any gainful employment.
9. The Plaintiff's Counsel filed written submission. In those submissions, it was urged that an award of KShs. 3.6 Million as general damages for pain and suffering would be appropriate. The cases of **Terry Kanyua Marangu v. Wells Fargo Limited (2014) eKLR, Embu HCCC No. 118 of 2006, Jacqueline Syombua v. BOG Ekalakala Sec. School, Nairobi HCCC No. 382 of 2009, Julius Maina Kagiri v. Tirth Construction Limited and Nairobi HCCC No. 5978 of 1993, James George Rakwar v. Mbaka Nguru and Kenya Wildlife Services** were relied on. It was urged that the Plaintiff be awarded cost of future medical expenses as follows:-

Cost of metal implants removal            KShs. 250,000/-

Knee replacement surgery                KShs. 350,000/-

Operation to correct leg shortening	KShs. 250,000/-
Cost of attendance to hospital	KShs.2,000/- per week
Cost of physiotherapy	KShs.1,000/- per week
Cost of transportation	KShs.12,000/-per month
Cost of medication	KShs. 2,000/- per month

10. It was further submitted that the Plaintiff is unlikely to engage in gainful work in future and an award of loss of earnings and earning capacity was prayed for. Mrs. Onyango, Learned Counsel for the Plaintiff submitted that the Plaintiff had lost earnings since the date the accident occurred. She urged that an award of KShs. 708,000/- would suffice. As for future earning capacity she urged the court to rely on minimum wage of KShs. 9,870/- and apply multiplier of ten (10) years i.e.  $9,870 \times 12 \times 10 = 1,184,000/-$ . The plaintiff also prayed for cost of hire of assistance which she placed at KShs. 5,000/- per month and urged that a multiplier of 10 years be applied. She finally prayed for special damages of KShs. 320,809/-.

11. **Halsbury's Laws of England 4<sup>th</sup> Edition, Vol 12(1) page 348-883**, the Learned writers give the rationale for award of damages for pain and suffering as follows:-

***“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.”***

12. In the case of **H. West & Sons Ltd –vs- Shepherd (1964) AC 326 at Page 364**, the court stated:-

***“The court has to perform the difficult task of converting into monetary damages the physical injury and deprivation and pain to give judgment for what it considers to be a reasonable sum. It does not look beyond the judgment to the spending of damages.”***

The court went on to state that:-

***“Money cannot renew a physical frame that has been battered and shattered. All that Judges can do is to award sums which must be regarded as giving reasonable compensation.”***

13. In **Jackline Syombua –vs- BOG & Ekalakala Secondary School Embu HCCC No. 118 of 2006 (UR)** the court held:-

***“The task of assessing damages in a case such as this is a difficult one. The court must nonetheless be guided by relevant precedents... In assessing compensatory damages the court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the plaintiff has suffered. Damages only assuage the pain or loss suffered by the Plaintiff because no amount of money can replace a lost limb.”***

14. As I acknowledge that authorities are a guide to the amount of damages to be awarded, caution must be exercised as was stated in **Kigaraari v. Aya (1982-88)1KAR 768** that:-

***“Damages must be within the limits set out by the decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increases insurance and increased fees.”***

15. I have carefully considered the nature of the Plaintiff's injuries and the authorities relied on. In **Ahmed Mohamud Adam v. Jimmy Tomino & 2 Others (2006) eKLR** the plaintiff had an amputation of the left limb below the knee joint, multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of his foot, compound fractures of the right malleolus and dislocation of the right ankle joint and stiffness of the ankle joint and was awarded KShs. 1.9 Million in 2006. In the case of **David Kigotho Iribe v. John Ndung'u & Another (2008) eKLR**, the plaintiff suffered amputation of the right lower limb and partial amputation of the right lower leg with 70% permanent disability and was awarded KShs. 1.3 Million in 2008. In view of the seriousness of the injuries suffered by the Plaintiff and the incident of inflation, I find the sum of KShs. 2.5 Million as general damages to be reasonable.
16. For loss of future earning capacity, account ought to be taken not only to the present loss but also the capacity of the Plaintiff to earn a future or improved income. The evidence on record was that the Plaintiff earned KShs.300/- per day. The Plaintiff would therefore be entitled to KShs. 648,000/- as loss of earning comprising of KShs.6,000/-(300×4 weeks) ×108 (the period from the date of accident and when she testified) months incapacity. Taking that the Plaintiff was aged 37 at the time of the accident and would have continued working for another 23 years or so, future earning capacity would be 6,000 ×23 ×12 making a total of KShs. 1,656,000/-. Considering that the plaintiff will not be totally incapacitated, I reduce the sum by 50% thus KShs. 828,000/-.
17. At the time of trial, the Plaintiff had not fully recovered from the injuries she had sustained from the accident and shall incur future medical expenses as confirmed by the doctor. The doctor testified that there has been inflationary effect of 20% on the figures he gave in 2007 when he prepared the Medical Report on the Plaintiff. I award the said anticipated medical expenses as estimated by the doctor and taking into account the inflationary effect as follows:-

KShs. 250,000/- for removal of implants

KShs. 250,000/- for limb lengthening procedure

KShs. 350,000/- for right knee joint replacement

I also award special damages of KShs. 320,809/- as pleaded and proved.

18. The Plaintiff testified that she was unable to do anything for herself. She relies on relatives and friends and has four children. She will require assistance. I assess the assistance to be at KShs. 5,000/= per month. Considering her age and the corrective measures proposed by the doctor, a multiplier of 10 years would in my view be reasonable. I award KShs.600,000/= under this head.
19. In the end, the total amount awarded is as follows:-

- |   |                   |
|---|-------------------|
| a. General damages for pain and suffering | KShs. 2,500,000/= |
| b. Loss of future earnings                | KShs.828,000/=    |
| c. Loss of earnings                       | KShs. 648,000/=   |
| d. Future medical expenses                | KShs. 850,000/=   |
| e. Special damages                        | KShs.320,809/=    |

Total KShs.5,146,809/=

20. I award interest on the award at court rate from the date of judgment. I also award costs of the suit to the Plaintiff.

It is so decreed.

**Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of January, 2015**

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**A MABEYA**

**JUDGE**