



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF OF KENYA AT MOMBASA**  
**CIVIL SUIT NO. 334 OF 2009**

FARHIN KANA.....PLAINTIFF

VERSUS

MANOJ SHAH.....1ST DEFENDANT

MOOSA KASSIM HUSSEIN.....2ND DEFENDANT

SHASHIKALA JAYANTILAL SHAH.....3RD DEFENDANT

AND

YAKUB HASSAN .....1ST THIRD PARTY

KHALID ANWARALI HAJI .....2ND THIRD PARTY

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

**PRELIMINARY**

This case was part heard, that is, the evidence of PW1, by Mwongo J. I only received evidence of the doctor when Mwongo J was transferred from Mombasa law court. Further this judgment was delayed by three factors. Firstly I was invited to attend a training course at Judicial Training Institute and thereafter proceeded on my annual leave. On my return to Mombasa law courts I found my secretary and my court assistant were on transfer from Mombasa law court. The delay is indeed regretted.

**PLAINTIFF'S CASE**

1. On 4th October 2006 FARHIN KANA, the plaintiff got married to YAKUB HASSAN YAKUB, DW1. Both were 21 years old. The events that occurred on 1st November 2006 were to drastically change their lives most dramatically. On that day while Yakub was driving motor vehicle registration No. KAS 699 H, while Farhin was his passenger the 3rd defendant, SHASHIKALA JAYANTILAL SHAH, whilst driving motor vehicle registration No. KAS 303 B collided with them whereby Farhin was extensively injured.

2. Farhin seeks judgment against the defendants jointly and severally for general damages and costs of future operation; special damages of Ksh 1,219,610, and loss of future earnings.

3. Yakub stated in evidence that on 1st November 2006 he was driving the vehicle on Mama Ngina drive towards treasury square, Mombasa. Farhin was seated on the passenger front seat. When he reached State House at the bend he saw a motor vehicle registration No KAS 303 B come out of the left at a junction

without stopping. It crashed into his car on the left side where Farhin was seated. He said the impact dragged his vehicle to 2 to 3 feet from the Mombasa State House wall. The collision pushed Farhin toward the windscreen which caused her head to be hit.

4. An ambulance came to the scene but its personnel realized that they needed to use a collar on Farhin. Later she was taken to Aga Khan Hospital Mombasa and she was admitted there for 10 days. She became quadriplegia as a result of that accident. She was taken to the United Kingdom, since she is a British citizen, for further treatment. She had to be stabilized for that journey by anterior cervical fixation with a plate and bone graft procedure.

5. The defendants and the third party did not present any evidence and it follows that the evidence of Farhin's witness Yakub remains unchallenged.

6. It is important to note that the 3rd defendant was convicted of the offence of careless driving, following that accident and was fined Ksh 5,000/= Although the 1st and 3rd defendants, by their submissions sought that the court would find that the Yakub contributed to the accident, that submission is rejected. It is rejected on two fronts. Firstly the evidence of Yakub shows that the 3rd defendant approached the junction joining Mama Ngina drive without stopping and thereby collided into the vehicle driven by Yakub. Indeed from the uncontroverted evidence of Yakub the vehicle driven by 3rd defendant was at such high speed and because it did not stop at the junction dragged Yukub's vehicle close to state house wall. Secondly the 1st and 3rd defendant's submissions are rejected because of the provisions of section 47 A of the Evidence Act Cap 80. That section provides:

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

7. PW2, Corporal Steven Muindi submitted in evidence the police abstract which confirmed the 3rd defendant's conviction. He stated that the 3rd defendant was convicted on her own plea of guilty. That evidence was not controverted and with the 1st and 3rd defendant having failed to call evidence, I do find that the blame of the accident is only attributable 100% against the defendants.

8. Further the Court of Appeal in the case **IMBRAHIM WANDERA -VS- P N MASHRU CIVIL APPEAL NO 33 OF 2003** found that a police abstract can establish ownership of a vehicle. The court of appeal stated thus in that case:

***“The learned Judge did not at all make reference to the police abstract report which the appelland tendered in evidence. In that document the accident bus is shown as KAJ 968 W, with Mashru of P.O. Box 98728 Mombasa as owner. This fact was not challenged. The appelland was not cross-examined on it and that means that the respondent was satisfied with the evidence...The police abstract form established ownership of the accident bus and the appelland was properly given judgment by the trial court against the respondent.”***

Similarly, Okwengu, J. (as she then was) in **SAMUEL KAMUNGE VS JOHN MWANGI KAMURU NYERI HCCCA NO. 34 OF 2002** expressed herself as follows:

***“A police abstract is sufficient proof of ownership of a motor vehicle if not controverted. Though a certificate of search from the registrar of motor vehicle would show who was the registered owner of motor vehicle according to the records held by the registrar of motor vehicle, that however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved as vehicles often times change hands but the records are not amended.”***

9. The learned counsel for the 1st and 3rd defendant in discussing, in his submission, the injuries suffered

by Farhin, in my view raised far too high the bar of proving a case in civil proceedings. It bears to remind the said counsel that the standard of proof in civil litigation is on a balance of probability. The civil standard of proof was discussed in the book *Principles of Evidence, second edition, by Alan Taylor* thus:

***“Denning J in Miller v Minister of Pensions (above) also explained the operation of the civil standard of proof:***

***That 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, but if the probabilities are equal, it is not.***

***Thus proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

10. I remind myself of that standard of proof because the 1st and 3rd defendants through their learned counsel sought to argue that Farhin needed to almost prove the injuries she suffered on standard other than that of civil proceedings.

11. In that regard I wish to state that I am satisfied that Farhin pleaded in her amended plaint at paragraph 10 that she became quadriplegic as a result of her injuries. That was what is evident from all the medical reports submitted before court. Those medical reports form part and parcel of the evidence being considered in this judgment. Those medical reports show the extreme suffering Farhin has undergone following the accident. The medical reports show Farhin will require 24 hours care which she gets through nursing care provided by the UK government under their health scheme. Yukub stated in evidence that she is totally dependent on him otherwise.

12. Although Yakub said that the nursing care offered by the UK government was for limited number of hours and if there was need for further care he would need to pay for it, he did not support that contention with any documents. Even when he traveled to Mombasa to testify in this case he did not prove that he had to pay for extra nursing care given to Farhin in his absence.

13. Farhin is also provided by UK government with a wheel chair, diapers and other necessities she now relies upon in view of her condition.

## **QUANTUM**

14. General Damages:

The defendants submitted that Farhin ought to be awarded Ksh 2.5 million as compensation for pain and suffering and loss of amenities. They relied on the cases:

***a) Mombasa HCCC N. 232 of 2008 Margaret Mnyasi Karisa -vs- Mohamed H Jerah where in 2010 the court awarded Ksh 2 million.***

I have perused this authority and I was unable to find any indication in the evidence tendered, the age of the plaintiff. The only information given was that the plaintiff before the accident was a teacher. For that reason I am not persuaded by that case.

***b) Meru HC NO32 of 2004 JOHN MWONGELA -V- STANLEYMAINGI NGEERA*** was relied on by defendants. In that case the award was Ksh 2 million in general damages. The award was made by the court in the year 2007. That is now 8 years ago.

15. I find I am more persuaded by the case relied upon by plaintiff's counsel namely ***HCCC No. 157 of 2012 Ngure Edward Karega -v- Yusuf Doran Nassir*** where the court in 2014 awarded Ksh 5 million in general damages.

16. I will in respect to general damages award Ksh 7 million.

17. Farhin also, through the evidence of Yakub sought compensation for lack of consortium. Farhin has no sensation from the neck down ward and hence why there is a claim under that head. I have considered defendant's opposition to this head on the ground that it was not claimed. Indeed it is correct to submit as the defendants did that a court can only determine a case on the issues presented by pleading. However I wish to draw defendant's notice to the case **ODD JOBS -V- MUBIA (19970) EA 466** where it was held:

***“ a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to court for decision; b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”***

18. Yakub in examination in chief referred to his claim for lack of consortium. Had it been left there perhaps then I would not have considered it but counsel for defendant went ahead to cross examine him on that issue. That in my view left that issue to the court to determine.

19. For that claim I will award an amount of Ksh 1,000,000 bearing in mind the decision in **HCCC No.21 of 2013 MURANGA NICHOLAS NJUE NJUKI -V- ELIUD MBUGUA KAHIRO** where an award of Ksh 2 million was made under that head.

20. Under the head of loss of earning and earning capacity I am satisfied that Farhin has produced salary slip showing that she was working part time and earning UK pounds 800 per month and in another job earning U K pounds 403.10 as at 28th February 2006.

21. I will use multiplicand of 30 years and accordingly there shall be judgment on that head as follows:

$800+483.10 \times 30 \times 12 = \text{UK pounds } \pounds 174,716.$

22. The plaintiff in my view has proved on a balance of probability the claimed special damages as pleaded and I shall award Ksh 1,219,610.

23. Before concluding this judgment it is to be noted that one of the award made in this judgment is in UK Sterling Pounds (£). For the avoidance of doubt I wish to state that in accordance with the decisions in **INGRA-V- NATIONAL CONSTRUCTION CORPORATION (1987) eKLR** a High Court decision and **BELUF ESTABLISHMENT -V- ATTORNEY GENERAL (1993) eKLR** a court of appeal decision conversion date of that award in foreign currency shall be at the Central Bank exchange rate applicable when the judgment amount is made or enforced.

## **CONCLUSION.**

24. **There shall therefore be judgment for plaintiff jointly and severally as against defendants as follows:**

**a) General damages Ksh 7 million.**

**b) Lack of consortium Ksh 1 million.**

**c) Loss of earning capacity £174,716.**

**d) Special damages Ksh 1,219,610**

**e) Plaintiff is awarded costs of the suit payable by all defendants.**

**f) There shall be interest on (d) above from the date of filing suit until payment in full.**

**g) There shall be interest at court rate in (a) (b) and (c) from the date of this judgment until payment in full.**

**h) The suit against 3rd party is dismissed with costs payable by the 1st and 3rd defendants.**

Dated and delivered at Mombasa this 25<sup>th</sup> day of June 2015

**MARY KASANGO**

**JUDGE**

25.6.2015

Coram

Before Justice Mary Kasango

C/assistant – Kavuku

For plaintiff:

For 1st and 3rd defendant:

For third party:

**Court**

The judgment is delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**