



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 107 OF 2005

BEENA KHAMBAITA.....PLAINTIFF

VERSUS

1. TALVINDER SAGOO)

2. MAHENDER SAGOO)

3. MANJIT KAUR SAGOO)

4. HARPIN KAUR SAGOO.....DEFENDANTS

JUDGMENT

1. This claim arises from a road traffic accident wherein the Plaintiff Beena K. Khambaita sued the 1st Defendant Talvinder Sagoo as the driver of motor vehicle registration number KAE 009S (***suit vehicle***) and the 2nd Defendant Mahender Sagoo as the registered owner of the suit vehicle at the material time.
2. The Plaintiff claims that she was travelling aboard motor vehicle registration number KAH 306T on 27th July, 2003 and on reaching the junction of Lower Kabete and Brookside roads, the suit motor vehicle registration No. KAE 009S driven recklessly by the 1st defendant and owned by the deceased BALWANT SAGOO whose estate is administered by the 3rd and 4th defendants hereto lost control and collided with motor vehicle KAH 306T as a result thereof, she suffered the following injuries:-
 - i. compound communitated fracture right femur lower and third.
 - ii. Fracture left callaneum distal radius ulna.
 - iii. Communitated fracture left femur one third.
 - iv. Communitated fracture left neck of humerus.
 - v. Fracture ribs 2nd to 7th side with haenothorax.
 - vi. Septicaemia.
 - vii. Bilateral hemothorax, pneumotherax on right side.
 - viii. Lung contusion and shock lung syndrome.
 - ix. Acute renal failure.
 - x. Esophageal bleed.
 - xi. Paralytic ileus.
 - xii. Vaginal infection.
 - xiii. Broken place right lower radius.
 - xiv. Tracheal stenosis.

3. Amongst the particulars of negligence attributed to the 1st Defendant were that: he was driving at an excessive speed in the circumstances; failing to keep any proper control of the suit vehicle; failing to stop, slow down or swerve or in any other way manage the suit vehicle to avoid causing the accident; driving without due care and attention; driving a defective vehicle, causing the accident; and failing to heed the presence of KAH 306T on the road. The Plaintiff sought special damages of KShs. 5,000/= for medical report, Kshs. 100/= for police abstract, Kshs. 9,992,115/= for medical expenses, Kshs. 171,463.40/= for travel, accommodation and related expenses Kshs. 330,000/= for future medical expenses and Kshs. 54,546,279 for loss of employment and earnings.
4. No defence was filed in response to the third amended plaint and an interlocutory judgment was entered against the defendants and the matter proceeded for formal proof with the participation of the defendant's counsel on record.
5. 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.”

6. In the circumstances, I find that the plaintiff did prove on a balance of probabilities that the defendants were to blame for the occurrence of the material accident at 100% and I would proceed to assess evidence relating to damages.
7. Nonetheless, the plaintiff did testify and stated that on the material day of the accident, she was travelling as a lawful passenger in her sister's Mrs Madhubala's vehicle registration No. KAH 306 Toyota Starlet on Lower Kabete Road, just a few yards from the junction of Brookside Drive and Lower Kabete Road, going towards Lower Kabete at around 10.00 pm when the accident occurred wherein their said motor vehicle collided with the defendant's vehicle registration No KAE 009S she was seriously injured and admitted at MP Shah Hospital. The driver of the offending car-the first defendant was charged with reckless and dangerous driving and convicted. That evidence was not controverted or at all and therefore liability against the defendants stands proved.
8. The plaintiff called Dr. Dhiramia Shah (PW1) a doctor at M.P.Shah Hospital who recounted that the Plaintiff was under his care when she was admitted at M.P.Shah at the material time. He stated that he advised that the Plaintiff sees specialists and noted that the injuries were consistent with a traffic road accident. He stated that among the injuries sustained by the Plaintiff was a fracture which occasioned her per frustum of the lungs as there was collection of air in the thoracic cavity. He stated that there were other complications which developed in the cause of treatment.
9. Dr. Zephania Mwangi Kamau (PW2) also examined the Plaintiff. He stated that the Plaintiff had suffered various fractures including the chest, upper and lower ribs. He produced a p3 form to that effect as P. Exhibit 2.
10. Dr. Modi Mukund Kumar (PW3) who is an orthopaedic surgeon who also attended to the Plaintiff had this to say. That he examined the Plaintiff and concluded that she still needed further medical attention which would cost about Kshs. 45,000/= and physiotherapy which would cost about Kshs. 60,000/= and removal of implants at Kshs. 80,000/=. He stated that the main injuries suffered by the Plaintiff were bilateral fractured femur, humerus, ulna, ribs among others. He made it clear that there was no probability that the injuries were sustained before the accident. He also stated that the Plaintiff has made good progress in healing. PW3 produces a medical report to that effect as P. Exhibit 3 &4.
11. Dr. Wambugu Mwangi (PW4) who is a consultant surgeon testified that the Plaintiff was her patient on 3rd December, 2007. He stated that by the time he was examining the Plaintiff, i.e. four (4) years after the accident, she had made good progress in healing since the fractures had united. He stated that the injuries were consistent with the accident and that the removal of the implant would cost an estimated amount of KShs. 200,000/= considering that times had changed. He stated that the Plaintiff had 36% degree of permanent incapacitation and her mobility was an issue.

- He produced a medical report he prepared as P. Exhibit 5.
12. The Plaintiff (PW5) recounted that she was admitted in the intensive care unit (ICU) for a month and four (4) days. That she remained on a wheelchair for a year and was undergoing treatment by removal of implants from time to time since she had several fractures. Her lungs were punctured and she suffered respiratory infections. She stated that she left the hospital a week before the day of trial (7/5/15). That she had to hire nurses and a driver to take care of her. She stated that she went to India in company of her sister and daughter for an operation. She produced a medical report and discharge summary to that effect (P. Exhibit 7 (a) & (b)). She stated that she is a Gemmologist and was running her own business. She stated that she would make between Kshs. 500,000/= to Kshs. 2 Million per month and produced receipts to that effect as P. Exhibit 8. She stated that she was immobile for four (4) years after the accident and had to close down her business.
 13. The Plaintiff justified her claim to special damages by relying on the receipts and documents produced in evidence which amounted to Kshs. 9,896,635/=. On travel and accommodation, reliance was placed on exhibit 9 which amounted to Kshs. 171,463.40/=. On future medical expenses, the Plaintiff relied on Dr. Modi's revised estimation of Kshs. 330,000. On loss of employment and earnings, she cited the nature of her business and the period within which she was incapable of working and further relied on her bank deposit slips which amounted to Kshs. 25,076,367/= in the year 2000, 2001 and 2003 and urged for an average of Kshs. 8,358,789.06/= per year to be multiplied by 12 being the number of years she was unable to work i.e. Kshs. 66,870,312.48 less taxation and vagaries of life giving the sum of Kshs. 54, 546,279/=.
 14. On the issue of general damages for pain and suffering and loss of earning capacity, she urged the court to consider the extent of her injuries and the manner of treatment she underwent. Relying on her age of 66 years, it was submitted that she could have worked for another 10 years if it were not for the accident and urged that a multiplier of 9 years be applied. Incorporating her disability placed at 36% she urged that her award for loss of earning works as follows:- $8,358,789.06 \times 9 \times 36\%$ 27,084,479.55.
 15. On pain and suffering, the Plaintiff cited among others **Michael Njagi Karimi v. Gideon Ndungu Nguribu & Another (2013) eKLR** and **Joseph Kahindi Maina v. Evans Kamau Mwaura & 2 Others (2014) eKLR** where the Plaintiffs suffered similar injuries to hers and urged for an award of Kshs. 4,000,000/=.
 16. The Defendant on the other hand on the head of future medical expenses cited **Zacharia Waweru Thumbi v. Samuel Njoroge Thuku (2006) eKLR** where it was held that no such award exists and it is unsafe to give an award which is analogous to, but not quite the same as special damages. They proposed an award of Kshs. 200,000/= in the event this court is inclined to award future medical expenses.
 17. On loss of employment and future earnings, the Defendant emphasised the principle for calculating the award was to use the claimant's income at the time of the accident and multiply by the life expectancy. It was argued that by the time the accident occurred, the Plaintiff was aged 58 and had two more years left to reach the retirement age. It was argued that adding her 12 more years was being speculative. It was further argued that during trial, the Plaintiff could not clarify with certainty that all the deposits emanated from her gemmology business. The Defendant cited a book on Gemmologist Salary and gave an average ratio of Kshs. 77.97/= between the years 1993 and 2015 and urged for an award of Kshs. 300,000/=.
 18. As for medical expenses, the Defendant urged the court to countercheck the receipts to avoid exaggeration.
 19. On general damages, the Defendant cited **Homabay HCCA No. 1 of 2014, Gogni Rajope Construction Company Limited v. Francis Ojuok Olewe** among other cases in which the Plaintiff's suffered similar injuries and urged for an award of KShs. 700,000/=.

Determination of damages

20. In assessing damages the following may guide the court. **Halsbury's Laws of England 4th 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.”

21. 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.”

22. 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.”

23. 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.”

On future medical expenses

24. I do not agree with the Defendant in their submissions that the award of future medical expenses is imaginary and not available to the plaintiff. I am guided by the Court of Appeal decision in Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR where it was held as follows:-

“The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-“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 damage 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 right should be pleaded.”We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if

overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

25. The Plaintiff relied on Dr. Modi's revised estimation of KShs. 330,000/= while the defendant urged for 200,000. This expense is for an operation to remove metal implants in her leg that fractured. The plaintiff was in court and the court did observe that indeed she experienced a lot of difficulties in walking due to the implants. Both doctors for the plaintiff and defendant are in agreement that she has to undergo an operation in future to remove the implants. Taking into account inflation and the ever increasing cost of medical care in this country, I find the sum of 330,000 as recommended by Dr Modi to be reasonable and I so award this figure for future medical expenses.

Pain and suffering

26. On the issue of damages for pain suffering and loss of amenities, the plaintiff testified that she sustained very life threatening injuries involving multiple fractures of the left thigh bones, left lower leg and heel, right and left wrists, left arm upper bone near the shoulder and bone between elbow and wrist, six ribs on the left side with punctured lungs. As a result of the above fractures, she developed several complications including septicaemia, bilateral haemathorax and pneumothorax on right side, lung contusion and shock lung syndrome, acute renal failure, esophageal bleed, paralytic ileus, Tracheal stenosis, broken lace right lower radius and vaginal infection. She underwent between 28 to 30 surgeries in order to manage and repair all the fractures and complications. She was in ICU and placed on very strong drugs, she had tube insertions, blood transfusions, pump inhibitors and due to complications on breathing she had to go to India for Tracheal Stenosis. After being discharged from hospital she was still bedridden for 7 months. She has suffered mental and physical and psychological trauma and at the time of the hearing she was still undergoing treatment.

27. The plaintiff's testimony was corroborated by the Doctors who examined her and who produced medical reports to that effect. This court had the opportunity of seeing and hearing the plaintiff and her doctors who attended to her narrate her ordeal and pain in nursing the injuries that she sustained and I am persuaded that she indeed suffered very serious injuries and that her survival is attributed to her ability to pay for very complicated and expensive medical care both within and without Kenya, thanks to her lucrative business as all evidence point to payments by cash, otherwise she would be long gone and forgotten like many of the accident victims.

28. As to how much damages the plaintiff should be awarded in the circumstances, and relying on the principles that I have alluded to above, I have examined the serious injuries sustained by the plaintiff and considered the rival authorities cited by both parties. I take cognizance that it is not easy to assess general damages for personal injuries. The venerable Madan, JA (*as he then was*), aptly captured the difficulties that confront a judge in the assessment of general damages in the context of personal injury claims in the case of UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page 579 as follows:-

"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."

29. The Court of Appeal has also stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See JABANE V OLENJA, (1986) KLR 1. In MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986 (unreported) Madan, JA again, aptly observed that an award of general damages should not be miserly, it

should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument tying the quantum of damages to an appellant's station in life stating:

“It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.”

30. This court is further guided by the fact that damages are not meant to enrich the victim but to compensate them for the injury suffered and try as much as possible to restore them to the position they were in before suffering the injury. I must also be guided by past awards but consider each case on its own merits and peculiar circumstances. Where past awards are taken into account, their age and rate of inflation and strength of the Kenya shilling when the said awards were made and the time when the intended award is of paramount consideration.

31. **In Kemfro Africa Ltd. T/A Meru Express Service Gathogo Kanini –vs- A.M. Lubia & another cited** in the case of **Stanley Maore –vs- Geoffrey Mwenda – Civil Appeal No.147 of 2002 (Nyeri)**, the Court of Appeal held:

“The principles to be observed by an appellate court in deciding the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that the judge, in assessing the damages took into account irrelevant factors or left out of account relevant ones or that: short of this, the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

32. In the instant case, considering the injuries sustained by the plaintiff, the excruciating physical, mental and psychological pain that she underwent, and guided by similar awards in cases where similar injuries were sustained and taking into account the fact that no two cases can be the same, and that the plaintiff was immobile for a considerably long time making it impossible for her to resume her business, I award the plaintiff a sum of Kshs. 3,800,000 general damages for pain, suffering and loss of amenities, including loss of earning capacity. **See Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [2012] eKLR** where the plaintiff sustained more or less similar injuries but which were not as serious as those sustained by the plaintiff herein, Hatari Waweru J awarded her Kshs 2,400,000 damages for pain, suffering and loss of amenities. The cases of **Homabay HCA 1 of 2014 (supra)**, **HCCA 2 of 2015 Gami Quarries Ltd v Antony Ngaita Kavoi** and **HCCA 602 OF 2009 Robert Ngatia & Appollo Musyoka Mutisya v Marco Ndome Madina** relied on by the defendants, the plaintiffs suffered much less serious injuries than the plaintiff in this case.

Loss of employment and future earnings

33. With regard to damages for loss of employment and future earnings, the principles to be considered in determining whether an injured person is entitled to damages under this head were settled by the Court of Appeal in the case of **Butler v. Butler [1984] KLR 225** where it was held as follows:-

“1. A Person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.

2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

3. Damages under the heads of loss of earning capacity and loss of future earnings, which in

English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.

5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.

6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

34. Thus the claim for loss of earning capacity is a general damages claim as such it is deemed to flow directly from the claim and need not be pleaded specifically. In this case the plaintiff pleaded that head together with general damages for pain suffering and loss of amenities and therefore I shall not award it under a separate head albeit in her submissions there was an attempt to separate the two heads and also mix it with the claim for future earnings which should not be the case. I support my findings with decided case in KISUMU CIVIL APPEAL NO. 91 OF 2003 – Mumias Sugar Company Limited v. Francis Wanalo – Bosire, O’kubasu and Githinji, JJA. In distinguishing what is required in proving damages for loss of earnings, the Judges of Appeal cited with approval the case of Fairley v. John Thompson Ltd (1973) 2 LLOYDS REP. 40 at Page 41 in the following words:-

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future earning capacity. Compensation for future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”(with emphasis added).

35. The above holding was also applied by the Court of Appeal in the case of MUMIAS SUGAR COMPANY LIMITED Vs. FRANCIS WANALO [2007] eKLR laying down the principles for the award for loss of earning capacity 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.”(emphasis added).

36. In other words, loss of earning capacity is part of general damages which do not have to be specifically pleaded. See Butler v. Butler [1984] KLR 225 at page 232 where while making the distinction between loss of future earnings and loss of earning capacity Kneller JA Said:-

“It is a different head of damages from an actual loss of future earnings which can readily be

proved at the time of the trial. The difference was explained in this way:

‘...compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.’ Lord Denning MR in Fairley –VS- John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd’s Rep 40, 42 (CA).

37. Chesoni Ag JA (as he then was) described the loss of earning capacity in the same case in the following words:

“What a victim whose earning capacity is diminished through an accident loses is an interest which if not sellable in the labour market, has an assessable value. It is, therefore, an economic loss of the same class as the “lost years,” for which the wrongdoer should fairly compensate the victim.” (Page 235.)

38. Echoing the same view also in that case Nyarangi Ag JA (as he then was) stated:

“I would liken loss of earning capacity to the doctrine of ‘lost years’ whereby a victim, whose capacity is lessened by the negligence of the defendant, is entitled to be compensated for the ‘lost years’. In my judgment, the decisions in the Picket –VS- British Rail Engineering Ltd [1979] 1 ALL ER 774 and civil Appeal no. 66 of 1982 [that is Mariga –VS- Musila [1982 –88] 1 KAR 507] provide clear authority for separate compensation for loss of earning capacity which, as I have already observed, is akin to the loss of the whole period for which a person has been deprived his ability to earn.” (Page 237).

39. Thus, loss of earning capacity is a head of general damages therefore awardable irrespective of whether the Plaintiff was in salaried employment before injury or not. The factors to be considered in awarding it vary with the circumstances of each case. They include the age and qualifications of the plaintiff, his remaining length of working life, his disabilities, previous service, if any, and so on. That is totally different from the claim for loss of future earnings and loss of employment which is a special damage and which must therefore be specifically pleaded and strictly proved. In the instant case, the Plaintiff was a Gemmologist. She suffered injuries which Dr. Wambugu (PW4) opined occasioned her 36% degree of permanent incapacitation and her mobility was an issue. She was immobile for long and chances of her recovering her lost business are nil. It is clear therefore that her ability to work has been greatly diminished by these injuries. In the circumstances she has suffered loss of earning capacity for which on the authority of **Butler v. Butler** (supra) she should be compensated.

On the claim for loss of employment and future earnings

40. The Plaintiff was 58 years old at the time of the accident and would have worked for another 2 years to the age of retirement which is capped at 60 by employment laws of this country. However, bearing in mind that she was running her own business, she would have no doubt worked longer, since there is no evidence to show that she was in poor health or any form of disability prior to the accident. From the record of earnings submitted to court, she earned good money as shown by her bank deposits in 2000, 2002 and 2003 and therefore she would be in a position to take care of any medical needs arising. However, considering the vicissitudes of life, I think that the plaintiff would have actively worked for another 7 years.

41. The only issue would be what earnings the court should adopt in calculating the loss of future earnings since she did not plead what she proved in terms of her earnings. The law is clear that parties are bound by their pleadings. The plaintiff only pleaded for loss of employment and future earnings. She did not specify those earnings. The plaintiff testified and submitted that she used to receive and bank between Kshs 500,000 to 2,000,000 per month during her working life before the accident as shown by the bank statements and bank slips. She however did not produce any profit and loss account to show the trading patterns of her business and the taxation aspect. Every business has got its ups and downs. There is no evidence of profit margin or loss.

42. The plaintiff's counsel urged the court to take Kshs 8,358,789.06 as annual earnings on average for 12 years whereas the defendants counsel submitted that there was no evidence that all the deposits made in her bank account emanated from her business of Gemmologist and that she did not clarify as to which precious stones she was dealing, for purposes of quantifying the claim and stated that the figures given by the plaintiff were outrageous and speculative. The defendants urged the court to read and take into account some web writings titled "**are Gems Good Investments**" to show that business of dealing in precious stones is not as lucrative as the plaintiff portrayed. The defendants also urged the court to find that in the USA the current annual income for such workers in that kind of work is UDS 44,000 and further that the said business is full of uncertainties. As was held in **Postal Corporation of Kenya v Job Njagi(2006) eKLR**, the defendants proposed a sum of Kshs 300,000 as reasonable annual income in the circumstances.
43. Whereas I agree that every business has its ups and downs and that the plaintiff did not specify the precious stones she traded in, I do not agree with the defendants that I should use some figures obtained from some website which is not authoritative on the matter before me. The plaintiff did produce evidence to show the kind of business she did and all the trade licences and monies received during her trading period. The defendants did not counter her evidence on her earnings or prove that what she produced as bank deposits came from other business other than her said trade. Even if the money had come from other trade it would in any event still be her earnings which was not controverted. I would therefore reject the defendants' insinuations that the plaintiff who was self employed can be equated with a salaried person in the USA earning about UDS 44000 annually in the absence of any authoritative source of such information. In this case i find on a balance of probabilities that the plaintiff worked as a gemmologist and she was so licensed and that the bank deposits show how much she earned from her trade. However, as earlier stated, she did not produce a financial statement to show her profit and loss account and or her trading pattern, and neither did she plead the exact earnings before proceeding to prove them. I would accordingly only award her under this head for reasons that the defendants conceded and gratuitously accepted that she is entitled to some amount for loss of employment and future earnings in the sum of Kshs 300,000 per annum and multiply this figure by 7 years which comes to a sum of shs 2,100,000.00.

Police abstract

44. There is no receipt to this item although shs 100.00 as claimed which I reject.

Medical report

45. There was no receipt produced for the sum of Kshs 5000 pleaded so I reject it.

Medical expenses

46. The plaintiff pleaded for medical expenses and produced a summary comprising the following items:-

a. Physiotherapy proved	Kshs	2,085,000.00
b. Doctors' fees proved by receipts	Kshs	2, 324,17.00
c. Pharmaceutical/cost of drugs expenses proved		486,224.75
d. Hospital charges proved		<u>2,299,940.00</u>
<u>Total</u>		<u>7,205,334.75</u>

All the above items were pleaded and have been proved by way of production of verifiable receipts which I hereby award the plaintiff.

Home nursing care and driver hire

47. Under this subheading, which also comes under medical expenses, the court notes that the item was not specifically pleaded. The object of pleadings is to alert the opponent of the case that it

will meet. Considering the type of injuries pleaded and suffered by the Plaintiff, an impression can be gotten that she indeed required home nursing care and a driver to take her to hospital for treatment from time to time and she testified to that effect. However, considering that she did not particularise the said claims, it would have been essential to call any of the said maids or home caretaker or the driver to support her claim to ascertain the amounts paid to them. In the absence of such corroboration and failure to specifically plead the two, the same cannot be awarded. Further, the two items are not medical expenses as they have been termed. It was prudent upon the Plaintiff to have specifically pleaded them independently. The law is clear that special damages must not only be specifically pleaded but that they must be strictly proved. This court gets guidance from the Court of Appeal holding **Hahn v. Singh (1985) KLR 716** where it was stated:-

“...special damages must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”

48. The plaintiff failed to plead the above special damage and tended to mix it up with medical expenses which this court has refused to accept and therefore her testimony tending to prove those special damages amounted to nothing. She had an opportunity to apply for amendment to her pleadings to include those special damages, which application could have been made at any time of the suit and the defendant given an opportunity to respond thereto before judgement. She did not. Accordingly, I disallow the claims under this head.

Travel, accommodation and related expenses

49. The plaintiff pleaded this item and produced the receipts on record but only an expenditure of KShs. **105,248.00/=** out of the pleaded sum of Kshs. 171,463.40/= has been proved being travel expenses to seek for treatment from India following complications that she developed. I hereby award her Kshs 105,248.00. the item of Accommodation though pleaded has not been proved. The receipts produced in evidence reading “**for service**” have no nexus to accommodation or housing in India. They are too ambiguous. Further, it is not clear what “**related expenses**” the Plaintiff was referring to. Accordingly, I award nothing under this head of “**accommodation and related expenses.**”

50. Summary

1. I enter Judgement for the plaintiff against the defendants jointly and severally on liability at 100%. The 2nd defendant, 3rd and 4th defendants are vicariously liable for the negligent acts of the driver/agent of the deceased owner of the suit motor vehicle.

2. General Damages for pain suffering and loss of earning capacity Kshs 4,000,000.00

3. Medical expense Kshs 7,205,334.75

4. TravelexpensesKshs 105,248.00

5. Loss of employment and future earnings 2,100,000.00

6. Future medical expenses 330,000.00

Total damages Kshs 13, 740,582.75

7. Interest on 2,3,4 and 6 only at court rates

8. No interest on 5 and 6

9. Interest on specials as awarded from date of filing suit until payment in full

10. Interest on 2 from date of this judgment until payment in full

11. The plaintiff is also awarded costs of the suit to be borne by the defendants.

Dated, signed and delivered at Nairobi this 30th day of November, 2015

R.E.ABURILI

JUDGE