



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL CASE NO. 40 OF 2013**  
**GEORGINA WANGARI MWANGI ..... PLAINTIFF**  
**VERSUS**  
**DAVID MWANGI MUTETI .....DEFENDANT**

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

1. The plaintiff initially filed this suit against two defendants. She later on 10<sup>th</sup> February, 2014, filed a Notice withdrawing her entire claim against the 1<sup>st</sup> defendant.
2. Her claim is for special and general damages arising from injuries she suffered when she was involved in an accident along Makuyu/Sagana road in motor vehicle registration number KBM 301S in which she was a passenger, on **24<sup>th</sup> May, 2011**.
3. The said motor vehicle belonged to the defendant. She also blamed the defendant and/or his driver for the accident.
4. As a result of the accident she suffered severe injuries as outlined in paragraph 6 of the amended plaintiff, which are as follows:
  - a. *Spinal injury with paraplegia and urine and stool incontinence.*
  - b. *Comminuted fractures of the dorsal spine at the level of D4 and D5.*
  - c. *Stable fractures of the dorsal spine at the level of D3, D6 and D8.*
  - d. *Soft tissue injuries right forehead.,*
  - e. *Soft tissue injuries left wrist.*
  - f. *Fractures to the 1<sup>st</sup> and 2<sup>nd</sup> rib of the left side of the chest.*
  - g. *Fractures to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> ribs of the right side of the chest.*
5. She also pleaded special damages in paragraph 6 of the amended plaintiff as follows:
  - a. *Medical Report* - Kshs. 15,000.00
  - b. *Police Abstract + Copy of Records* - Kshs. 500.00
  - c. *Medical expenses* -Kshs. 4,652,660.30
  - d. *Special bed* - Kshs. 350,000.00
  - e. *Special mattress* - Kshs. 150,000.00
  - f. *Taxi expenses* -Kshs. 1,000.00 per day since 24/5/11
  - g. *Cost of Wheel Chair* -Kshs. 60,000.00 per year since 24/5/11
6. On 8<sup>th</sup> July, 2014 both parties through their counsels entered a consent on liability to the effect that

judgment be entered in favour of the plaintiff against the defendant in the ratio of **20:80**.

7. The amended plaintiff included a prayer for future medical expenses.

8. The matter then proceeded to hearing for assessment of quantum. The plaintiff called two witnesses including herself. She testified that she had not recovered from the effects of the accident. As a result of the accident she had lost sensation and motion from the chest downwards. She cannot control urine and stool and so is forced to use a catheter and diapers. She is confined to a wheel chair. All this evidence is contained in her witness statement.

9. She produced several documents to support her claims. These were PEXB4-8.

She has also explained her expenditure on a number of items for example;

- i. *Change of catheters @ Shs.4,000/= @ Aga Khan per month*
- ii. *8 packets of diapers @ Shs. 1,000/= per month = 8,000/=*
- iii. *Physiotherapy three times a week @ Shs. 1,000/= per week*
- iv. *Control of infections @ Shs.1,500/= per month*
- v. *Frequent urine tests @ Shs. 1,000/=*
- vi. *Hydrolic mattress and bed*
- vii. *Wheel chair @ Shs.15,000/= for an uncomfortable one*
- viii. *A helper in every aspect of her life.*
- ix. *Taxi charges @ Shs 1,000/= -1,500/=.*
- x. *Lost earnings between June, 2011 – August, 2012 @ Shs. 80,108/=*
- xi. *Need to travel to India for relief of her built up spasms. It cannot be done locally and her insurance does not cover this.*

10 In Cross-examination she said her insurers only paid her in patient bill upto the level of her cover of Shs. 2 million while the bill was Shs. 5 million. She further testified that she had not made any claim which had been paid by her insurers.

**11. Dr. Theophilus Wangata** testified as PW1. He examined the plaintiff on **29<sup>th</sup> July, 2013** and produced his report as (PEXB1). He charged Shs. 15,000/= for it. He further charged Shs. 50,000/= for his appearance in court. He found the plaintiff to be 100% incapacitated. He confirmed all the effects of the accident as had been indicated by the plaintiff. He said the plaintiff would remain on drugs the rest of her life. She cannot bear children because of the permanent catheters.

12. The defendant did not call any witness.

**13. M/S Kulecho & Co. advocates** for the plaintiff filed written submissions on behalf of the plaintiff. In summary he submitted that:

- i. *The special damages of Shs. 5,152,660/30 had been proved.*
- ii. *Lost earnings for 1½ years had been proved @ Shs. 840,000/= i.e 60,000/=(net salary) X 14 months.*
- iii. *House help expenses @ 10,000/= per month for 18 years =Shs. 2,160,000/=.*
- iv. *Taxi expenses @ 18X12X30 days X1,000 =6,480,000.00.*
- v. *Future medical expenses @Shs. 3,000/= per month and Shs. 36,000/= per year i.e 18 years X 36,000/= = 648,000/=.*
- vi. *Physiotherapy @ 12,000/= per month i.e 18 years X 12,000 X 12 = Shs. 2,592,000/=.*
- vii. *A wheel chair per year @ Shs. 32,000/= for 18 years = Shs. 576,000/=.*
- viii. *Catheters and Diapers @ Shs. 7,000/= per months for 18 years i.e 18 years X 7,000 X 12 = Shs. 1,512,000/=*

The total claim would be Shs. 29,960,660.30 less 20% contribution. The balance would be Shs. 20,972,462/20, which is what the plaintiff claims.

14. Counsel cited the cases of:

- i. MERU HCCC NO. 15/04 – **DOROTHY MBARAKA & ANOR VS P.S IN- CHARGE OF DEPARTMENT OF DEFENCE IN THE OFFICE OF THE PRESIDENT**
- ii. NAKURU HCCC NO. 157 OF 2012 **NGURE EDWARD KAREGA VS YUSUF DORAN NASSIR**

15. **M/S Muthoga, Gaturu & Co. Advocates** for the defendant have submitted that in as much as they agree with the effects of the accident on the plaintiff's life they are of the view that no amount of compensation can bring back her shattered frame. And that she is in gainful employment. They opined that an award of Shs. 2,500,000/= would adequately compensate her. Cited were;

- i. **PIUS KIPKAREREI MITEI VS LEONARD KISSONGOCHI & ANOR** ELDORET HCCC.NO. 220/01
- ii. **NANCY OSEKO VS BOARD OF GOVERNORS MASAI GIRLS HIGH SCHOOL** KISUMU HCCC. 171/09. Counsel referred the court to “**The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013** which he submits is applicable to the current case.

16. For special damages the submission is that the plaintiff had only proved Shs. 3,330,360/= as special damages, and that her medical cover catered for Shs 2 million. It was counsel's submission that the plaintiff was only entitled to Shs. 1,330,560/= on the head of Special damages.

17. **M/S Kulecho** for the plaintiff filed a response to the Defendant's submissions. They reiterated their earlier submissions. On the Insurance (**Motor Vehicle Third Party Risks) (Amendment) Act 2013** he submitted that Shs. 3 million limit is only in respect of general damages that the Insurance Company can pay in respect of Motor vehicle Third Party Risks. In a nutshell they opposed the submissions by the counsel for the 2<sup>nd</sup> defendant, saying the plaintiff's testimony was not challenged.

18. There is no dispute that the plaintiff was on **24<sup>th</sup> May, 2011** involved in a road traffic accident. As a result of this accident she suffered very serious injuries which left her a totally different person from what she was before. **Dr. Theophilus Wangata (PW1)** examined the plaintiff and produced his report (PEXB1). In his opinion the extent of permanent and functional incapacity as a result of the injuries sustained in the accident, is estimated at 100%. He did his examination of the plaintiff on 29<sup>th</sup> July, 2013. A second medical examination was carried out on **17<sup>th</sup> June, 2014**, by **Dr. Timothy Byakika**. His final finding on the degree of impairment and incapacity is similar to that of **Dr. Theophilus Wangata (PW1)**.

19. There is therefore no doubt that the plaintiff suffered severe injuries for which she is entitled to damages (*both special and general*). This is in no way to suggest that the damages would bring back her shattered frame. The damages will only enable her go through this challenge with a little bit of ease.

20. A perusal of the reports by the two Doctors shows that they are in total agreement on the condition of the plaintiff and what her requirements are. This is also supported by the personal testimony of the plaintiff. The two doctors have in their reports acknowledged the following as the plaintiff's needs;

- i. *She is unable to use both legs. It means confinement to a wheel chair costing Shs. 60,000/= - 70,000/= . The wheel chair is changeable from time to time.*
- ii. *Due to lack of urine and stool control for her entire life she requires catheters insitu plus urine bags, diapers and napkins. The catheters have to be regularly changed to minimize infections.*
- iii. *To minimize the occurrence of pressure sores she should use a special mattress known as anti-decubitus or ripple mattress. It reduces pressure on the skin. It costs about – 350,000/= . She would equally require a special bed costing between Shs. 150,000/= - 180,000/=.*
- iv. *She requires a helper “Nursing Aid” to help her in all her day to day activities, on a full time*

- basis. Cost for such is between Shs. 10,000/= - Shs. 15,000/= per month.
- v. She also requires regular follow ups, and medical check ups, plus medication and laboratory investigations. This would cost Shs. 3,000/= - 3,500/= per month.
- vi. Taxi services are required to ensure she attends to hospital visits and her office assignments. She cannot use a wheel chair to take her to hospital and the office.

21. Counsel for the defendant raised issue with the Insurance (**Motor vehicle Third Party Risks (Amendment) Act 2013**) saying it limited the courts from awarding the plaintiff over Shs. 3 million. My understating of these provisions is that the limitation is on the amount the insurance pays in respect of 'Third Party Risks'. The party who has been sued here is not the Insurance Company but the defendant. Whatever the award will be the Insurance company would only pay upto shs. 3 million. The curb is therefore not on the courts but on the payment by the Insurance company.

22. I will first deal with the item on general damages.

The plaintiff suffered the following injuries.

- i. *Comminuted fractures of the dorsal spine @ D4 and D5 with stable fractures of D3, D6, and D8.*
- ii. *Traumatic paraplegia (loss of power in the lower limbs) associated with bowel and urinary incontinence.*
- iii. *Fractures of the left 1<sup>st</sup> and 2<sup>nd</sup> ribs and right 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> ribs.*

Both the plaintiff's and defendant's counsels have submitted to this court authorities where the plaintiffs therein suffered similar serious injuries and various awards have been made by the courts namely:

**-Dorothy Kanyua Mbaka & Anor. Vs P.S In-charge of the Department of Defence in the office of the President & Anor. Meru HCCC. NO. 15/04** – Justice Makau on 2<sup>nd</sup> April, 2014 awarded each plaintiff Shs. 10,000,000/= for general damages.

**-Ngure Edward Karega Vs Yusuf Doran Nassir Nakuru HCCC NO. 157/12** Justice H.A. Omondi on 16<sup>th</sup> May, 2014 awarded Shs. 5,000,000/= to the plaintiff as general damages.

**-Pius Kipkarerei K. Mitei Vs Leonard Kissongochi & Anor. Eldoret HCCC.NO. 220/01** the late Justice Bauni Kaburu awarded Shs. 2,000,000/= to the plaintiff as general damages.

**-Nancy Oseko Vs Board of Governors Masai Girls High School Kisumu HCCC. 171/09** the court awarded Shs. 2,500,000 as general damages.

23. It was the submission of the plaintiff that an award of Shs. 10,000,000/= for pain and suffering would suffice. On the other hand, the defendant submitted that on this head the plaintiff should receive Shs. 2,500,000/= citing the case of **Nancy Oseko** (*supra*). The treatment notes produced herein show that the plaintiff has undergone a lot of pain and trauma. She was aged 33 years when this accident occurred. She suffered untold pain as a result of the accident. She continues to go through emotional pain and even loss of esteem as a result. Am guided by the authorities cited and I find an award of Shs. 7,000,000/= to be adequate on this head.

#### **24. Loss of Earnings**

The plaintiff produced an employment letter (PEXB 17). Her gross salary was 80,000/= per month less statutory deductions. She did not tell the court what her net salary was. The mandatory deduction is **Tax** which is 30% of the basic salary. In this case  $30/100 \times 80,000 = 24,000/=$ . Her net salary would come to  $80,000/= - 24,000/= = \text{Kshs. } 56,000/=$  The period she was away was 24<sup>th</sup> May, 2011 – 31<sup>st</sup> July, 2012 = 14 months. Loss of earnings would therefore be  $56,000/= \times 14 = 784,000/=$ .

#### **25. House Help Expenses.**

The plaintiff will require the services of a house help or nurse aid for the rest of her life. The booklet produced as PEXB7 shows she has been paying a house help called **Sylvia Navalayo** Shs. 10,000/= per month. It is obvious that this salary will be reviewed upwards with time. I will however deal with the figure of Shs. 10,000/= as evidenced in the salary confirmation book PEXB 17. Counsel for the plaintiff proposed that the court adopts a multiplier of 18 years while the defendant's counsel proposed 10 years. The plaintiff was 33 years old at the time of accident. Considering the exigencies of life, and giving room for any other shortcomings I find a multiplier of 12 years to be reasonable. I therefore calculate the house help expenses as follows:

$$\text{Shs. } 10,000/= \times 12 \times 12 = 1,440,000/=.$$

## **26. Taxi expenses**

The plaintiff produced a Receipt book (PEXB8) showing how much she has been paying for taxi services. She pays shs. 1,000/= on a daily basis. She claims this amount for 18 years on a daily basis. This has been opposed by the defence, on the ground that a wheel chair is sufficient. A wheel chair would effectively serve the plaintiff while indoors. It would be a challenge for her when she has to go to work and for medical attention. The court must balance this to ensure that the plaintiff is not inconvenienced and the defendant is also not overburdened. I find it more economical for the plaintiff to buy a vehicle specifically for her outdoor movement instead of paying for a taxi daily. She can employ a driver to be driving this vehicle. I will award her Shs. 1 million to enable her buy a vehicle.

## **27. Wheel Chair**

From the doctors' reports and the plaintiff's evidence a good wheel chair costs shs. 32,000/-. The one she has costing shs. 15,000/= cannot last for long and would require a yearly replacement. She had bought one for 32,000/= initially. I am taking that into account as I make this award. In this instance, I will use a similar multiplier of 12 years which would require 4 new wheel chairs @ Shs. 32,000/= each. I therefore award Shs. 128,000/= for this item.

## **28. Future Medical/specialized needs and expenses**

The plaintiff has a medical cover of shs. 100,000/= for out patient treatment. The amount may only cover physiotherapy expenses. For the frequent urine tests, normal medications, diapers, change of catheters, urine bags etc there must be provision for them. I would place the expenses @ Shs. 19,000/= per month making it  $19,000/= \times 12 \times 12 = \text{Shs. } 2,736,000/=$ .

## **29. Special damages**

The Law is that special damages must be pleaded and proved. The following were pleaded and proved vide receipts in bundle.

- i. *Medical report (PEXB 2)* - Shs. 15,000/=
- ii. *Special bed plus Mattress* - Shs. 500,000/=
- iii. *Medical Expenses* - Shs. 4,652,660.30/=

The cost for a wheel chair and taxi expenses have already been taken care of on the said items hereinabove. The plaintiff in her evidence clearly stated that what she claimed was what had not been covered by Jubilee Insurance. There is no evidence to challenge what she told the court on this.

I therefore allow Special damages in the sum of Kshs. 5,167,660.30 (*Five million, one hundred and sixty seven thousand, six hundred and sixty shillings and thirty cents only*). I therefore make the following awards:

- a. *Special damages* -Kshs. 5,167,660.30/=
- b. *Loss of earnings 14 months* - Kshs. 784,000/=
- c. *General damages for pain and suffering* - Kshs. 7,000,000/=
- d. *House help expenses* - Kshs. 1,440,000/=
- e. *Taxi expenses* - Kshs. 1,000,000/=
- f. *Wheel chairs* -Kshs. 128,000/=
- g. *Future medical/specialized needs and expenses* -Kshs. 1,736,000/

**TOTAL** **- Kshs. 18,265,660/30**

Less 20% liability - Kshs. 3,653,120/10

**- Kshs. 14,612,540/20**

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I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 14,612,540/20(*Fourteen million six hundred and twelve thousand, five hundred and forty shillings and twenty cents*).

**DATED AND SIGNED AT KERICHO THIS 20TH DAY OF NOVEMBER, 2014**

**H.I. ONG'UDI**

**JUDGE**

**DELIVERED AT EMBU THIS 26<sup>TH</sup> NOVEMBER, 2014 IN THE PRESENCE OF MR. KULECHO FOR THE PLAINTIFF.**

**F. MUCHEMI**

**JUDGE**