



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Suit 85 of 2010**

**FLORENCE HARE MKAHA ..... PLAINTIFF**

**VERSUS**

**1. PWANI**

**TAWAKAL MINI COACH**

**2. MOHAMED ATHMAN .....DEFENDANT**

**JUDGMENT**

1. On 20<sup>th</sup> June 2007, the Plaintiff, Florence, was travelling as a fare paying passenger on the bus Pwani Tawakal Mini Coach. It was headed towards Tanzania. It collided with another bus and overturned at Msambweni. The Plaintiff was injured and filed the suit herein on 24<sup>th</sup> March, 2010.

2. The facts of the case as to liability are not disputed. The parties agreed to apportion liability as follows: the Plaintiff would bear 15% liability and the Defendant would bear 85% liability. The only dispute being an assessment of the quantum of damages, a hearing was held on 7<sup>th</sup> March 2012. The plaintiff, herself, and Doctor Lidayan Sheth gave evidence on the plaintiff’s behalf. The Defendant did not call any witness. However, the parties agreed, by consent, to the admission of a second medical report, by one Doctor M H Mohamed as Defendant’s Exhibit 1.

3. In her plaint, Florence particularized her injuries for which she claims damages, as follows:

- “1. Fracture of left iliac crest**
- 2. Superior Ramus on left pubis**
- 3. Fracture left acetabulum**
- 4. Left knee – fracture lateral condyl of femur”**

And she claims special damages as follows:

Fee for accident abstract .....	200
Fee for medical examination and Report due to Dr. Ashraph .....	2 000

P 3 Form .....500

Paid to Mvita Hospital for hospitalization ... 173 390

Paid to Dr. D Mwaura for treatment ..... 14 200

Total 190 800

### **Special Damages**

4. In addition to the special damages highlighted above, Florence sought

**“The Plaintiff who was prior to the accident a keen businesswoman indulging in the business of buying and selling of clothes from Tanzania is now totally incapacitated and is unable to work anymore.**

**.... Special and general damages including loss of earning capacity and future medical care.**

**The plaintiff further claims loss of earnings and earning capacity occasioned by and as a result of the said accident.” (paragraph 7, plaint).**

The prayers sought were for:

- a) Special damages
- b) General damages
- c) Interest at Court rates; and
- d) Costs

5. As there is no essential dispute between the parties on the nature of and on the injuries sustained, I do not propose to recite the evidence thereof at length. The Defendant’s key arguments against the claim are that:

- The prayers in the Plaint do not specify the amount claimed. It simply states **“special damages”**.
- Thus, the plaintiff is entitled only to general damages for pain and suffering and loss of amenities and costs.
- No documentary evidence was placed before the court to show that the Plaintiff was earning shs. 20,000/= which fact is not pleaded.

### **Special Damages**

6. I commence with the assessment of special damages.

In her evidence, Florence produced evidence of the following special damages. PExb 2, a receipt for shs. 2 500/= consultation fees for Dr. Ndayan Sheth which was not pleaded; PExb 3 a bus receipt for 1,000/= not pleaded; PExb 4 a Police Abstract but excluding the receipt from the amount paid; PExb 6 (a) – 6 (i) receipts for shs 131,700/= for hospitalization and consultation at New Mvita Hospital although shs. 173, 000/= was specifically particularized and pleaded.

For treatment by Dr. Mwaura a receipt PExb 6 (I) for shs 19,200/= was provided although only shs. 144,200/= was pleaded. No receipts were produced for P3 Form (500/=) or for Report due to Dr. Ashraph (2 000/=).

7. The plaintiff's Exhibits 6(k) and 6(l) were invoices. The one for New Mvita Hospital Exb 6(l) for shs 101, 200/= was for admission on 22<sup>nd</sup> June, 2007 and discharge on 6th July, 2007; whilst Exb 6(k) for shs 67, 000/= was for admission on 17<sup>th</sup> July, 2007 and discharge on 22<sup>nd</sup> July, 2007. The total amount invoiced was shs. 168,200/=. However, there was no evidence tendered to clarify these invoices, although the various receipts for the hospitalization have contemporaneous dates falling within the respective admission and discharge dates.

8. Given the above, I find the following special damages which have been particularized in the pleadings, to be specifically proved:

Exb 6 (a) – (i) Paid to Mvita Hospital for

Hospitalization .....	shs.	131 700.00
Exb 6(J) - Paid to Dr. Mwaura for		
treatment .....	shs.	<u>14 200.00</u>
Total		<u>145 900.00</u>

I therefore award receipted Special Damages in the sum of shs 145,900/= less 15% contribution ie  $145,900 \times 85/100 = 124,015/=$

I may point out that as submitted by the Defendant only special damages specifically pleaded and specifically proved can be awarded.

### **General Damages**

9. The injuries set out in the medical reports are not disputed. In his written submissions at page 2, Mr. Kiarie for the defendant submits:

#### **“The Plaintiff sustained injuries as set out in the medical reports”.**

The medical reports submitted were PExb 1 of Dr. Udayan Sheth dated 26<sup>th</sup> September 2009, PExb 5 of Dr. Dawoud Mwaura dated 31<sup>st</sup> July, 2009, and DExb 1 of Dr. M H Mohamed dated 15<sup>th</sup> July, 2010. The reports agree on the injuries sustained by the Plaintiff as particularized in the Complaint. In summary Florence's condition is as follows. She now walks with the help of two crutches; she has left foot drop which is shortened by 4 cm; left knee has stiffness and painful mild movements; whole left leg has scars; skin grafting site scar mark are left thigh and painful, stiff, hip joint. Both reports indicate that Florence is now saddled by permanent incapacity or disability, but the level or percentage thereof is not indicated in any of the reports.

### **Pain and Suffering**

10. The plaintiff was taken to Msambweni hospital, unconscious, after the accident on 20<sup>th</sup> June, 2007. Later she was transferred to Al Farook Hospital whilst still unconscious. The greater impact was on her lower body, from the pelvis down. The medical report from Al Farook New Mvita Hospital records her arrival on 22<sup>nd</sup> June, 2007 as a referral patient. She had extensive soft tissue injury on the left leg with degloving injury Antero-Lateral aspect of the leg leaving tibia and fibula bare. She had a dislocation of the left knee with Torn medial and Lateral collateral ligament; and Posterior dislocation of the hip. Pelvic X-ray revealed fractured superior and inferior ramus pubic bones bilaterally. She underwent surgical debridement and repair of torn ligament on 24<sup>th</sup> June, 2007 after blood transfusion; then she was on intravenous drip for 5 days.

11. In the meantime plaintiff's wounds were dressed daily from the time of surgery until 17<sup>th</sup> July, 2007 for follow up as an outpatient. In total she was in hospital from 20<sup>th</sup> June, 2007 to 22<sup>nd</sup> July, 2007, ie 32

days. The medical reports all show she has foot drop as result of the shortening of her left leg, and walks with the aid of two crutches. She experiences stiffness and pain with mild movement, and shows scars over the whole left leg including the skin grafting donor site over the left thigh.

The plaintiff sought shs. 2,500 000/= general damages for pain and suffering.

12. I have perused the authorities cited by the parties. The Plaintiff relied on **Madina Gathoni Vs Al Shelo Shosiad Mwi Shariff HCCC No. 11 of 2006 Malindi** where the plaintiff was awarded shs. 400 000 for less 20% contribution for pain, suffering and loss of amenities. There, the Plaintiff underwent three major surgeries, was hospitalized for 11 months, is unable to support herself or her limbs and was mobilised in a wheelchair. Her incapacity was assessed at 60%.

The case of **Daniel Irungu Mwangi Vs Loise Wambui Karanja and Andrew Kamau HCCC NO. 42/2002 Embu** was also relied upon. There, the Plaintiff was hospitalized at various times for 5 months, was in coma for 3 days. He was operated on 4 times, suffered incapacity at 30%, and walks on two crutches with the left leg shorter by 6 centimeters. He was awarded shs.

2, 500, 000 including 200,000/= for future operation to remove implants.

13. The Defendant relied on the cases of **Johnstone Okumu Vs John Magolo HCC No. 142 of 1991** and **Francis Ngera Vs John Matolo HCCC 3648 of 1989**. Both cases were decided 19 years ago, and the awards made then were for shs. 480,000/= and 600,000/= respectively.

I consider these decidedly out of touch with present reality as far as the amounts are concerned.

### **Pain and Suffering**

14. As noted earlier, the plaintiff's injuries included: concussion for 3 days, fractures of Right superior and inferior Ramu of pubis, fracture of Ischian, fracture left Acetabulum, fracture Lateral Condyl of femur, dislocation left knee with torn collateral ligament; skin grafting surgery on left leg, and left leg shortened by 4 cm. She is permanently disabled and on two crutches, but the disability level was not indicated. She was hospitalized for a total of 32 days.

Madina Gathoni's case is more persuasive and current. The court there awarded shs. 4,000,000/= but the Plaintiff's injuries there were far more serious and the level of incapacity there was assessed at sixty (60%). In **Julian Anyango Kuni Vs United Milers HCCC 35 of 2004** for fairly similar injuries the court awarded shs. 1,500,000/= for pain and suffering. In **Daniel Irungu Vs Loise Wambui Karanja & Another HCC 42 of 2002** the Plaintiff was awarded shs. 2,500,000 for similar injuries and medical expenses, although for a 5 month stay in hospital. The level of incapacity there was 30%.

In this case, I consider the plaintiff's claim for shs 2,500,000 slightly on the higher side given her shorter hospitalization, even taking into account the passage of time since the **Daniel Irungu** decision in 2002. I therefore award shs 2,400,000/= less 15% contribution, hence shs. 2,040,000  
 $2,400,000 \times \frac{85}{100} = 2,040,000$ ./=.

### **Nursing Care; Loss of capacity**

15. I now come to the issues of nursing care and loss of capacity. The defence considers that these are special damages that should have been specifically pleaded and proved. That, having not been pleaded or proved they cannot be recovered, and the plaintiff is entitled to recover only general damages for pain, suffering and loss of amenities as prayed in prayer (b), and for costs, and no more.

16. A close perusal of the plaint shows that the prayers section of the plaint seeks judgment for:

- a) special damages
- b) general damages

- c) Interest at court rates; and
- d) Costs”

However in paragraph 7 of the plaint, after providing particulars of special damages, are the following averments:

**“And the plaintiff claims special and general damages including loss of earning capacity and future medical care.**

**The Plaintiff further claims loss of earnings and earning capacity occasional by and as a result of the said accident.”**

17. One of the key objects of pleadings is to alert the opponent of the case that it will meet. It can also aid the parties in their quest for amicable or non litigated resolution of their dispute. In this case, I am satisfied that the averments in paragraph 7 highlighted above, although not contained in the concluding prayers, are sufficient to form a basis for the claim for loss of earnings and medical care. When the Plaintiff appeared in court, I saw her and heard the doctor’s evidence. I formed the impression that her condition would probably require nursing care, and I was prepared to grant damages on that head. The plaintiff’s evidence was that she has a maid who assists her.

**“I have a worker for washing housework and cooking ..... My brother is the one who pays her, she is paid 5,000/= per month.”**

18. However, she did not call her brother or the maid to give evidence in support of the said claim and the amount paid. This would have been essential in view of the fact that no specific amount had been particularized or claimed in the pleadings under this head.

In the absence of any corroborating oral evidence or documentary proof to support the employment and payment of a maid to offer regular nursing care in addition to handling household chores, I am unable to make any award thereon.

### **Loss of Earnings**

19. Again, this head did not feature in the “prayers” section of the plaint, but was present in paragraph 7 thereof. It really is about compensation to an individual who is no longer able to earn their normal wages because of an injury resulting from someone else’s negligence.

I agree with the defence that the plaintiff did not prove her alleged earnings of shs 20,000/= as submitted. The plaintiff’s evidence was that she was a clothes dealer, supplying to her clients in offices. She said:

**“My business used to earn about 20,000/= or more. My job came to an end after the accident. I can’t sell, I can’t travel to buy clothes.”**

20. The Plaintiff’s figure appeared to be a tentative **estimate** of 20,000/= or more. She did not provide any supporting or corroborating evidence to confirm her earnings. It was not clear whether the approximate amount of shs. 20,000/= she said the business earned, included revenue or whether she made any payments to any workers or third parties out of that amount. It is therefore unsafe to rely on the said figure.

21. The plaintiff did, however, provide documentary evidence of her earnings from her previous employer. This was in form of a payslip No. 2830 PExb 9 for January, 2003, and a letter from her former employer Bridge Up Container Services Ltd dated 27<sup>th</sup> October, 2011 confirming such employment. The salary slip shows her gross pay as 12,166/= in January 2003. I will take that figure as her earnings in 2003.

At the time of the accident the plaintiff was aged 43 years, and taking judicial notice of the then, Government retirement age of 55 years, in the absence of any other evidence, she had another 12 years useful working life.

Accordingly the loss of earnings calculation is as follows  $12,166 \times 12 \times 12 = \text{shs. } 1,751,904$

She is therefore entitled to shs. 1,751,904 – 262,785.60 being 15% contribution – resulting in shs. 1,489,118.40

22. In summary, the Plaintiff is awarded as follows :

	shs.
(i) General damages	2,040,000.00
(ii) Special damages	124,015.00
(iii) Nursing care	Nil
(iv) Loss of earnings	<u>1,489,118.40</u>
Total	3,658,133.40

(v) Interest at court rates

The plaintiff shall also have the costs of the suit.

Orders accordingly.

**Dated, signed and delivered this 31<sup>st</sup> day of July, 2012.**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**Coram:**

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

- a) .....
- b) .....
- c) .....
- d) .....