



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

**AT MERU**

**Civil Case 170 of 2001**

**JESCA KAARI MUTWIRI MWANGI ..... PLAINTIFF**

**VERSUS**

**FARA SAID HASSAN AND ANOTHER.....DEFENDANT**

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**Negligence**

- **In a suit alleging negligence of a driver - the ownership of motor vehicle involved is immaterial to liability-sufficient for plaintiff to show the driver was acting on behalf of a named owner for vicarious liability to attach.**

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

**The Pleadings**

**(1) The plaint**

In a Plaint dated 10<sup>th</sup> September 2001 and filed on 11<sup>th</sup> September 2001 the Plaintiff claimed-

- General Damages
- Special damages
- Damages for loss of capacity and future medical expenses
- Costs
- Interest on (ii) above from the date of filing suit,
- Interest on (i) and (iii) from the date of judgment.

The facts of the claim are set out in paragraphs 3, 4, and 5 of the Plaint. The 2<sup>nd</sup> Defendant was at the material time the owner of motor vehicle registration number KAK 214 J Toyota Land Cruiser, (Para 3),

and that the motor vehicle was being driven by the 1<sup>st</sup> Defendant (para 4).

The Plaintiff set out in paragraph 5 the circumstances and particulars of negligence of the first Defendant, on 12<sup>th</sup> September 1998 when the accident occurred. The essence of the complaint is that the 1<sup>st</sup> Defendant so recklessly, carelessly and/or negligently drove, controlled and/or managed motor vehicle KAG 214 J. that it rammed into motor vehicle KAA 326G in which the plaintiff was lawfully travelling and that the 2<sup>nd</sup> Defendant was vicariously liable.

As a result of the accident the plaintiff suffered the following injuries:-

- (i) Fracture of the right and left femur,
- (ii) Deep cut wounds on the face,
- (iii) Fracture of the mandible
- (iv) Fracture of left femoral neck, and soft tissue injuries right foot heel

The Plaintiff also pleaded that as a result of the grievous harm, she suffered loss and damage. Special damages claimed were-

- (i) Police abstract sh.100.00/-
- (ii) Medical expenses sh.1,173,130/-
- (iii) Loss of earnings at the rate of Ksh.11,475/- p.m. from October 1998.
- (iv) Future medical expenses.

## **2. The Defence**

By a Statement of Defence dated 11<sup>th</sup> October 2<sup>nd</sup> and filed on 15<sup>th</sup> October 2001, the Defendants denied all the particulars of negligence and the claim for general and special damages. Instead the Defendants contended that the accident was substantially contributed by the negligence of the driver of motor vehicle registration No. KAA 326G and pleaded inter alia that the plaintiff's driver was driving too fast in the circumstances, and thus failing to stop, slow down, swerve, or in any other way manage and or control motor vehicle Registration No. KAA 326 G so as to avoid the accident – the defendant also denied receiving notice of intention to sue was given.

## **3. The Evidence**

The Plaintiff called 3 witness. P.W.1 was the plaintiff herself. She, her husband and 3 sons were travelling along the Meru Road to Chuka on 12.09.1998 when the accident occurred at 7.30p.m. at a place called **Pole Pole**. Her husband was driving motor vehicle KAA 326 G. 504 Saloon Car Peugeot. They were driving up hill. Motor Vehicle KAK 214J was coming downhill towards Meru. The other vehicle came to their side, and all she heard was a loud bang and thereafter she passed off she could not remember anything else. She was injured, one of her son's Michael Murithi died as a result of the accident.

P.W.1 testified that she was taken to Chogoria Hospital and later to Nairobi Hospital where she was admitted for three (3)months and was attended to by many doctors. After discharge the Plaintiff was confined to a wheel chair for 1 ½ years and walked with a crutch upto the year 2003. P.W.1 produced a bundle of Exhibits 1 – 7 comprising

- 1) Discharge abstracts from Nairobi Hospital dated 20.06.2001.

- 2) Medical Examination Report dated 21.09.1998,
- 3) Bank statements for A/C No. 2006/7/8 Barclays Bank – Chuka Branch.
- 4) Pay slips for June, July, September and November 1998.
- 5) Dr. Medical Report dated 22/04/2002,
- 6) Proceedings in Chuka Traffic PMC Traffic Case No. 874 of 1992.
- 7) A bundle of statements of expenses from the Nairobi Hospital.

P.W.1 also testified that the accident was reported to the Police who carried out investigations, and issued her husband with a P3 Form dated 4.02.1998. P.W.1 further testified that she used to be in business of trading in cereals and used to earn and bank Ksh.20,000/- per month. In her work as a secretary with the Ministry of Agriculture she used to earn Ksh.11,755/=. She was 47 years of age when the accident occurred. P.W.1 informed the court that she did not know the owner of motor vehicle KAK 214J. All she remembered is that the vehicle was involved in the accident which caused her serious injuries.

P.W.1 maintained her evidence upon cross examination by Miss Mwangi counsel for the Defendant.

P.W. 2 was Dr. John Macharia who produced a Medical Report prepared by Dr. P.M. Wambugu, then based in Nairobi and with whom he had worked while in Nairobi, and was conversant both with both his writing and signature. P.W.2 reiterated that the Plaintiff was involved in an accident on 12.09.1998, and was admitted to Chogoria Hospital and transferred to Nairobi where she was admitted for 3 months. An ex-ray carried out at Nairobi Hospital showed the plaintiff suffered the following injuries-

1. head injury - with loss of consciousness
2. fractures of the mandible both sides
3. fracture of left femur around the neck and the other on the shaft,
4. fracture of the right femur on the shaft
5. Multiple bruises over right elbow forearm and hand.

P.W. 2 testified further that the plaintiff underwent surgery for the injuries with insertions of metallic implants and after which underwent rehabilitation with physiotherapy. The plaintiff was re-admitted for removal of the metal implants followed by more physiotherapy. The plaintiff raised the following complaints-

- (i) Numbness and tingling sensation around the mouth left side;
- (ii) re-current hip and right thigh pains on exertion for which she was taking allergesics
- (iii) inability to exert herself fully,
- (iv) Multiple scars

**The findings of the doctor after physical examination were-**

- (i) Head – fully conscious and orientated
- (ii) Normal speech

(iii) No neurological defects

**(c) On left lower limb**

- i) The plaintiff was found to walk unaided but with obvious left side limping due to shortening of left limb by 1cm,
- ii) There was 50 cm surgical scar on lateral aspect of left thigh but with no sinuses nor tenderness.
- iii) Bone union was complete,
- iv) Slight tenderness over left limb at the groin,
- v) Movements of left hip were restricted especially flexion extension and full abduction,
- vi) Abduction movement is normal,
- vii) Knee and ankle joint movements were normal.

**(d) On right lower limb**

- (i) The doctor noted a 40 cm long surgical scar on lateral aspect of the thigh.
- (ii) bone union was complete.

**(e) Upper limb**

Noted multiple small scars on the dorsum of both hands.

**(f) Other .....**

Were essentially normal.

**The doctor's Opinion and Prognosis**

P.W. 2 testified that the injuries suffered by the Plaintiff were consistent with those due to severe blunt trauma which occurred during the stated accident. The Plaintiff suffered both skeleton and soft tissue injuries. The Plaintiff had multiple fractures involving the mandible and lower limbs which prolonged her morbidity. She was exposed to excessive irradiation while undergoing treatment and was unable to fend for herself and family while recovering from injuries.

The fractures had at the time of examination united but that the plaintiff was unable to exert herself, partly due to recurrent pains of left hip and right thigh. She had a significant shortening of lower limb which causes the limping gait.

- The uneven weight distribution axis disposes the plaintiff to osteoarthritis.
- Recommended a shoe – heel raise to obviate the limp.
- Recommended continued taking of allergesic anti-inflaminatory to relieve the pain.
- Numbness and tingling sensation around the mouth are indications of peripheral nerve traversing, and he expects this to subside with time.
- Metal implants had been removed.

## **FURTHER OPINION.**

The plaintiff would require further follow – up by an orthopaedic surgeon due to osteoarthritis,

- The plaintiff was unlikely to ever fully exert herself as ability to do so would be diminished.
- Remnant scars are of cosmetic significance.

In cross – examination by Miss Mwangi for the Defendant, P.W.2 testified that the report by D. P.M. Wambugu did not include anything about her employment before the accident. P.W.2 however, confirmed that the recurrent pains and shortening of lower limb would hinder the plaintiff’s work, she would not fully exert herself but the total incapacity was not assessed.

P.W.3 was Gilbert Mutwiri Magiri. He was the driver of Motor Vehicle KAA 326 g Peugeot saloon. His evidence was that he was travelling from his rural home at Kanyakine to visit his mother-in-law in Chuka. In his vehicle were his wife, the plaintiff herein his three sons, including Michael Murithi Magiri who died in the accident which occurred at a place called Pole Pole.

P.W.3’s evidence was that he was driving uphill towards Chuka when at the place called Pole Pole Motor Vehicle KAK 214 J coming from Chuka side and that despite his moving to his near side the other vehicle moved to his side forcing him to swerve right to his right side but it was too late the other vehicle hit his vehicle hardest on the left side.

P.W.3 testified that the Police took up the matter, charged the driver of the other motor vehicle in **Chuka PMC Traffic Case No. 894** of 1998 where, he was found guilty and was fined Ksh.10,000/- P.W.3 produced copies of proceedings and judgment in that court as **Pxh. 6**. He reiterated the evidence of P.W.1 that they were first admitted at Chogoria Hospital which found it would not handle the injuries and the plaintiff was driven to Nairobi Hospital by St John’s Ambulance Vehicle.

The Plaintiff, P.W.3 testified, stayed at the Nairobi Hospital for 3 months and he arranged for payments as follows:

1) Chogoria Hospital & St John’s Ambulance - sh.28,403/-

2) Nairobi Hospital

(i) Admission from

13.09.1998 to 19.12.1998 Shs.692,205/50

(ii) Admission of

24.09.1999 to 26.09.1999 Shs.26,881/70/-

(iii) Admission of 18.09.2000

To 22.09.2000 Shs.58,744.70/-

(iv) Admission of 19.06.2001

To 23.06.2001 - Shs.106,572.65/-

## **Doctors expenses**

(i) Dr L.N. Gakuo orthopaedic and trauma surgeon Shs. 233,515/-

(ii) Dr Samuel N. Gatia physician	Shs. 44,615/-
	Shs. 60,000/-
(iii) Dr. Charles R. Kavelo anaesthetist	Shs. 20,000/-
	Shs. 3,213/-
(iv) Dr. Mark Chindia Dental surgeon	<u>Shs. 32,000/-</u>
	<u>Sh.1,133,282.56/-</u>
(v) Dr. G. Kikenye	Shs.15,000/=
(vi) Dr. Ogutu (no receipt)	Shs.10,000/=

(vii) Total

**Other expenses** Shs. 11,475/=

(i) Nurse for 3 months @5000/= p.m Shs.20,000/=

(ii) Diabetes (blood pressure)

**Loss of earnings**

(i) Salary

(ii) Business per month

On cross examination by Miss Mwangi for the Defendant P.W.3 testified that the front part, left hand side of his vehicle was completely destroyed. He was driving at between 50-60 k.p.h as it was drizzling. P.W.3 blamed the driver of the other vehicle for causing the accident. He was not cautious. He was driving on the right side of the road. If that driver had been cautious, he would not have known him. He was driving on his (P.W.3 side) and he was forced to swerve to the right to avoid a head on collision.

P.W.3 confirmed that he was not himself hospitalized, that the receipts are written in his name because he is the person who paid the bills. He came to know the name of the owner of the other vehicle KAK 214J as Duale Aden Ibrahim.

In re-examination by Mr. Muriuki for the Plaintiff, P.W.3 confirmed that he produced certified copies of the receipts for Nairobi Hospital, the traffic case at Chuka court was concluded and to avoid a head on collision he had swerved to his right, hence the other vehicle hit his hardest on the left side of the vehicle.

When the plaintiff case was closed on 3.12.2008, the defence case was fixed for hearing on 16.02.2009. The matter was not however confirmed at the call over of 3.02.2009 as none of the parties counsel attended upon the Deputy Registrar. So when counsel appeared before me on 16.02.2009 Mr. Muriuki learned counsel for the plaintiff and Miss Kianji counsel holding brief for Miss Mwangi informed the court that counsel for the Defendants did not have any witness to call as none of the Defendants had ever attended court. Counsel therefore agreed to file and exchange written submissions.

The Defendant's counsel filed his submissions dated 16<sup>th</sup> March 2009 on the same, date. The plaintiff's

counsel's submissions also dated 16<sup>th</sup> March 2009, were filed on 17<sup>th</sup> March 2009.

Both counsel attached decided cases to their submissions.

Both counsel raised the same issue, and the issue in these running down cases is basically one, what party was responsible for the accident.

In this case the Defendants filed a joint defence dated 11<sup>th</sup> October 2001. They denied ownership of motor vehicle KAK 214 J and also denied the occurrence of an accident and challenged the Plaintiff to strict proof thereof. The defendants denied allegations of negligence against the 1<sup>st</sup> Defendant and blamed the driver of motor vehicle KAA 326G. The Defendants also denied demand or notice of intention to sue, and the plaintiff was put to strict proof of the same.

The Defendants, apart from the denials in the joint statement of defence, offered no evidence to the court. The plaintiff as outlined at length above called evidence of three witnesses, the plaintiff herself, the doctor and her husband, the driver of motor vehicle KAA 326.

On the question of causation of the accident it was the clear evidence of both P.W.1 and P.W.3 that P.W.3 was driving uphill whereas the 1<sup>st</sup> defendant was driving downhill from the opposite direction that the 1<sup>st</sup> defendant drove so recklessly that he forgot his side of the road and drove on the lane or path of the plaintiff's vehicle. The results were disastrous. The driver of the other vehicle took evasive action, even swerving to the right but it was too late, the 1<sup>st</sup> Defendant hit his vehicle hardest on the left side thereof causing very serious and fatal injuries to the occupants of the other vehicle, P.W.1 and P.W.3 lost their son, Michael Murithi Magiri. P.W.1 herself suffered the injuries described in the evidence of P.W.2 Dr. John Macharia. The consequences of those injuries are still felt and will continue to be felt by the plaintiff, the obvious one being the limp from the shortened limb.

The Defendants denied the accident ever happened. This is both a sham and dishonest defence. I say sham and dishonest because the 1<sup>st</sup> defendant cannot run away from or deny the fact that he was charged prosecuted, convicted and sentenced to a fine of Ksh.10,000/- for the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act (Cap 403 laws of Kenya) in Chuka Resident Magistrates court **Traffic Case No. 894 of 1998**.

Section 47A of the Evidence Act (Cap 80 Laws of Kenya) 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 convicted was guilty of that offence as charged.”**

The 1<sup>st</sup> Defendant was charged and convicted of the offence of causing death by dangerous driving. The result of the dangerous driving was the accident in which the plaintiff was seriously injured, and the plaintiff lost her son.

After considering the evidence and judgment in the Chuka Resident Magistrates court traffic case **No. 894 of 1998** the evidence of both P.W.1 and P.W.3, I am satisfied that the plaintiff has proved her case that it was the 1<sup>st</sup> Defendant who was entirely to blame for the accident. If neither the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were the owners of the vehicle, they were certainly authorized to drive it as the vehicle was not reported lost or stolen.

The plaintiff having proved her case on liability the next question is the assessment of damages general and special. I will first deal with the issue of general damages.

### **General Damages.**

There is no question that the plaintiff sustained serious injuries, and although the opinion and prognosis by Dr. D.A. Wambugu suggested that the Plaintiff has no permanent incapacity it is also very clear from the said report that apart from the ugly and permanent scars, the plaintiff will be unable to exert herself fully and will continue to require and use anti – allergesics to ease her pain from time to time.

As often happens in these cases, counsel for the Defendant submitted old authorities with very low awards and little reference to the injuries suffered by the Plaintiff, some as high as Ksh.500,000/- and as low as Ksh.400,000/-

On the other hand counsel for the plaintiff suggested general damages of Ksh.800,000/- pain and suffering and loss of amenities (1) **Victor Musoga vs Linus Wahito Kariuki(Nairobi HCCC No. 2797 of 1997)** and (2) shs.2,000,000/- per Visram J (as he then was) in Nairobi HCCC No. 321 of 1997 **Nichodemus Owuor Ondendo vs Chemilil Sugar Company Ltd).** Whereas like cases should be decided in like manner each case must be decided on its peculiar or particular facts.

In this case despite the plaintiff's suffering multiple fractures as described in the evidence of the Plaintiff (P.W.1) and the Doctor (P.W.3), and the defendants' failure to offer any evidence in support of their denials in joint statements of defence it was the opinion and prognosis of the doctor's report that the fractured bones had healed and united. The plaintiff had also recovered from the concussion from the head injuries, and was normal and well orientated. The Plaintiff would however continue to live with a limp because of the shortened limb and will require a special shoe to hold her balance while walking and going about her other chores. Although the numbness and tingling around the mouth will subside in time the plaintiff will require long term follow up with her orthopaedic surgeon for ensuing osteoarthritis .

I observe both Nicodemus **Owuor Onyondo vs Chemilil Sugar Co. Ltd** (in which Visram J. (as he then was) awarded general damages of Ksh. 2.0 million) and **Victor vs Musoga Vs. Lewis Watito Kariuki** (in which Osiemo J awarded general damages of Ksh. 800,000) were decided in the years 2000 and 2001 respectively. It is now nearly ten years since those cases were decided. Since then there has been both an element of inflation as well as a fall in the value of the Kenya currency vis-à-vis currencies in which most drugs are imported into Kenya and sold to Kenyans such as the plaintiff.

Those are relevant factors in assessing general damages. So taking into account the injuries suffered by the Plaintiff and considering decisions cited I would award a sum of Ksh.1,500,000/- for general damages. I would also award the Plaintiff Shs. 300,000/- for future medical expenses.

### **Special Damages.**

Special damages represent a sum or sums of money which a plaintiff or claimant has actually expended. That is why it is a principle of pleading and the law of evidence that special damages must both be specifically pleaded and also proved. My analysis of the evidence of P.W.3 the husband of the plaintiff who met all of the hospital, doctors and other consultation fees and expenses shows the following as proved-

#### **A. Nairobi Hospital**

##### Admission

13.09.1998 – 9.12.1998	Shs.692,205.51/-
1) Admission – 24 <sup>th</sup> -26 <sup>th</sup> September 1999	Shs. 26,881.70/-
2) Admission – 18 <sup>th</sup> – 22 <sup>nd</sup> September 2000	Shs. 58,744.70/-
3) Admission – 13 <sup>th</sup> – 23 <sup>rd</sup> June 2001	<u>Shs. 106,572.65/-</u>

Sub Total	Shs.884,404.56/-
<b>B. CHOGORIA HOSPITAL</b>	Shs. 4,312.00/-
St John's Ambulance (no receipt)	Shs 0
<b>C. Doctors Fees</b>	
1. Dr. L.N. Gakuu	Shs.250,000/-
Inclusive of receipts of Menelik Chest Clinic	
2. Dr. Charles Kavelo	Shs. 60,000/-
3. Dr. G.K. Kenye	Shs. 500/-
4. Dr. Chadia (no receipt)	Shs. 20,000/-
5. Dr. Ogutu (no receipt)	Shs. 32,000/-
Sub total	<u>Shs.362,500/-</u>
Less unreceipted expense	<u>Shs. 52,000/-</u>
<b>D. Other Expenses</b>	<u>Shs.310,500/-</u>
1. Dr. Mrs Robba V. Chobsay	
2. Pangani Chemist	Shs.1,000/-
3. Crutches X Ray and casualty N. Hospital	Shs. 930/-
4. Baraka Chemist	Shs. 4,923/-
5. Howse & McGeorge Ltd	Shs. 440/-
6. Nairobi Hospital	Shs. <u>585/-</u>
Sub Total	Shs.7,878/-
<b>E. Loss of Salary Employment</b>	<u>Sh. 3,650/-</u>
	<u>Sh.11,528/-</u>

The Plaintiff was hospitalized from 13.09.1998 to 9.12.1998, a period of approximately three months. Evidence was led to show that she attended hospital on physiotherapy from time to time and went back for admission for limited periods, 24<sup>th</sup> September 1999 18<sup>th</sup> – 22<sup>nd</sup> September 2000 and 13<sup>th</sup> – 23<sup>rd</sup> June 2001 No evidence was led to show that she was unable to attend to her duties as an employee of the Ministry of Agriculture or that she was laid off or her services terminated. No evidence was led to show she was not paid for the period of 3 months she was hospitalized. The Defendant's counsel were in their

submissions generous to give the plaintiff 3 months pay while she was in hospital. At the rate of shs.11,755/- per month, I would allow the plaintiff shs.35,265/- for three months for loss of employment.

### **LOSS OF BUSINESS**

The Plaintiff claimed that she was in cereals business and used to earn sh.20,000/- per month and bank it in her account. Her evidence was conflicting, as all sorts of moneys used to go into that account. I would not award any such sum as this would be in the category of special damages. It is not proved.

Special damages would therefore comprise-

A. Nairobi Hospital	Shs.884,404.56/-
B. Chogoria Hospital	Shs. 4,312.00/-
C. Doctors Fees	Shs.310,500.00/-
D. Other Expenses	Shs. 11,527.00/-
E. Loss of salary	<u>Shs. 35,265.00/-</u>
Grand total	<u>Shs. 1,149,998.56/-</u>
Rounded up to	<u>Shs. 1,150,000.00/-</u>

In summary therefore I would award the plaintiff the global sum of Kshs comprising: 2,950,000/-

1. General Damages for pain and suffering	Shs.1,500,000/-
2. Future medical expenses	Shs. 300,000/-
3. Special damages	<u>Shs.1,150,000/-</u>
<b>Total</b>	<b><u>Shs.2,950,000/-</u></b>

I would also award the Plaintiff interest on (3)Special Damages at court rates from the date of filing suit until the date of judgment and on the global sum upon the addition of such interest at court rates from the date of judgment until payment in full.

As no evidence was led as to sending out of notice and intention to sue, I award no costs to the Plaintiff.

There shall be orders accordingly.

Dated, Delivered and Signed at Meru this 31<sup>st</sup> day of July 2009

**ANYARA EMUKULE**

JUDGE

