



**Ng'ang'a & another v Excellent Logistics Limited (Civil Case
394 of 2013) [2024] KEHC 3170 (KLR) (Civ) (2 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 394 OF 2013

AN ONGERI, J

APRIL 2, 2024

BETWEEN

JOYCE WAIRIMU NG'ANG'A 1ST PLAINTIFF

SAMUEL MAINA MUKUNDI 2ND PLAINTIFF

AND

EXCELLENT LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. The plaintiffs in this case, Joyce Wairimu Nganga and Samuel Maina Mukundi (hereafter referred to as the 1st and 2nd plaintiffs respectively) have sued Excellent Logistics Limited (hereafter referred to as the defendant only) seeking special damages and general damages for injuries the plaintiffs sustained on 17/9/2010 while travelling as lawful passengers in motor vehicle registration no. KAU 089Q along Mombasa Road.
2. The plaintiffs who are husband and wife averred in their plaint dated 16/9/2013 which was amended on 9/10/2017 that on or about the 17th September, 2010 the 1st and 2nd plaintiffs were lawfully passengers in motor vehicle registration number KAU 089Q which was being lawfully driven along Mombasa Road in Nairobi area when Joseph Kamau, so negligently, recklessly, dangerously, drove, managed, controlled and/or handled motor vehicle registration number KAE 307B with trailer ZC 1984 that he caused and/or allowed it to collide into and hit motor vehicle registration number KAU 089Q in which the plaintiffs were travelling passengers.
3. The plaintiff's listed the following as particulars of negligence of the Defendant's servant and/agent;
 - a. Failing to keep any or any proper lookout;
 - b. Failing to heed the presence of other vehicles in/on the road;



- c. Failing to stop, brake, control or in any other way manage his motor vehicle registration number KAE 307B/ZC1984 so as to avoid colliding into motor vehicle registration number KAU 089Q.
 - d. Colliding into motor vehicle registration number KAU 089Q
 - e. Failing to have any due or any regard for other road users
 - f. Driving across the Mombasa Highway in the face of oncoming traffic;
 - g. Performing a dangerous manoeuvre along the highway without any due regard for the safety of other road users.
4. The plaintiffs relied on the doctrine of *res ipsa loquitur*. The plaintiffs further averred that the aforesaid Joseph Kamau was acting in the course of his employment and with authority of the defendant and holds the defendant vicariously liable.
- The plaintiffs averred that the defendant is liable to them in damages and is therefore interested in these proceedings.
5. By reason of the matters aforesaid, the plaintiffs sustained severe personal injuries and have suffered loss and damage for which they said that the defendant is liable.
6. The 1st plaintiff suffered the following injuries;
- a. Comminuted fracture of the left femoral shaft
 - b. Comminuted fracture of the right femoral shaft
 - c. Generalised soft tissue injuries.
7. 1st plaintiff was transfused 5 pints of blood; in-patient for 13 days' fitted with metal plates on both legs; has developed un-cosmetic scars, leg shortening, permanent pain, severe complications and disabilities and requires further medical treatment, care and attention estimated to cost kshs.590,000/= as at date of filing this plaint. The 1st plaintiff claims the said sum from the defendant or the equivalent thereof as at time of trial.
8. The 1st plaintiff is seeking the following special damages;
- a. Hospitalization (in Kenya) ksh.403,127.00
 - b. Doctors fees for surgeries ksh.222,000.00
 - c. Consultations for reviews & x-rays ksh. 59,640.00
 - d. Anaesthetist fees ksh.180,000.00
 - e. Medications/drugs ksh. 94,738.00
 - f. Dressings ksh. 2,875.00
 - g. Physiotherapy ksh. 78,000.00
 - h. Nursing care ksh. 24,000.00
 - i. House help todate ksh. 108,000.00
 - j. Wheel chair ksh. 19,400.00



- k. Hiring of equipment (bed and Mattress) ksh. 77,570.00
 - l. Hiring of ambulance ksh. 36,500.00
 - m. Medical report ksh. 15,000.00
 - n. Police abstract ksh. 4,000.00
 - o. P3 form & Completion ksh. 4,000.00
 - p. Copy of records ksh. 1,000.00
 - q. Additional cost on accommodation ksh. 36,000.00
- Total ksh.1,365,850.00
9. The 1st plaintiff stated that to alleviate her pain and suffering arising from the disabilities and complications of the injuries set out above and pursuant to medical consultation and advice she has sought medical care and attention in India and has incurred expenses loss and damage for which she holds the defendant liable.
10. The plaintiff pleaded the following particulars of special damages arising from hospitalization in India the Indraprastha Hospital and related consequential costs;
- a. Medical care and attention, hospitalization
(Rupees 416437) – Equivalent of
At exchange rate of 1/= for 1.85 rupees ksh.749,586.00
 - b. Accommodation and upkeep for plaintiff
And care giver whilst in India ksh. 90,000.00
(for one month)
 - c. Physiotherapy costs following
in India ksh.154,000.00
 - d. Medication costs prior to and following
Discharge from India ksh. 51,870.00
 - e. Transport costs (airfares to & from India) ksh. 120,000.00
 - f. Taxi fares from hotel to hospital in India ksh. 10,500.00
 - g. Additional house help costs from date of
Filing plaint to date ksh. 347,000.00
 - h. Updated medical report ksh. 20,000.00
 - i. Accountant fees for financial report ksh.487,200.00
- Total ksh.2,030,156.00
11. The 1st plaintiff claims particulars of damages as follows;



- a. Head injury (cerebral concussion)
 - b. Shock and confusion
 - c. Deep laceration over the left eyebrow
 - d. Injury to the temporal side of the scalp causing haematoma
 - e. Injury by broken glass to the proximal interphalangeal joint of the left little finger leading to deformity.
 - f. Injury to the left shoulder joint causing acromio-clavicular subluxation.
 - g. Cuts and bruises on the neck at the back and soft tissue injury to the neck
 - h. Tender left shoulder.
 - i. Blunt injury to the right leg and hip
12. The 2nd plaintiff was admitted as an in-patient for one night at the Nairobi hospital. Minor surgery was undertaken.
13. He has developed headaches, backaches, insomnia and subluxation of the acromio-clavicular joint. Has developed permanent pain, severe complications and disabilities that require further medical treatment, care and attention to cost ksh.350,000/= as at date of filing plaint.
14. The 2nd plaintiff claims the said sum from the defendant or the equivalent thereof as at time of trial.
15. The plaintiff claimed the following in respect of special damages;
- a. Hospitalization & theatre charges ksh. 50,915.00
 - b. x-rays and CT scans ksh. 39,165.00
 - c. physiotherapy ksh. 52,260.00
 - d. drugs/medications/creams ksh. 1,437.00
 - e. medical report ksh. 10,000.00
 - f. police abstract ksh. 200.00
 - g. P3 form & Its completion ksh. 4,000.00
 - h. Updated medical report ksh. 17,000.00
 - i. Accountant fees for financial report ksh.139,200.00
- Total ksh.314,177.00
16. By reason of the injuries sustained and their disabling sequelae, the 1st plaintiff averred that she has lost housekeeping ability and has had to engage the services of a domestic help at the additional costs of kshs.3,500/= per month from September 2010. To date of filing this plaint the
17. 1st plaintiff further averred that she has incurred a sum of ksh.108,000/= towards domestic help and claims this sum from the defendant. As at the date of this amended plaint the 1st plaintiff has incurred a further sum of ksh.347,000/= being cost of domestic help and claims the totals sum of kshs.455,000/= from the defendant.



18. The 1st plaintiff averred that this is a continuing loss and the 1st plaintiff claims the cost thereof from the defendant to date of trial and damages for future loss of housekeeping ability.
19. Further, 1st plaintiff averred that the complications and disabilities she is left with have adversely affected her sexual performance and other social activities. The sexual dysfunction has negatively impacted her relationship and marriage to the 2nd plaintiff and she has suffered loss and damage. And the 1st plaintiff claims damages.
20. Further to the foregoing, the 1st plaintiff averred that by reason of the 4cm leg shortening she has been left with, she now requires to mobilise using raised footwear. Estimated cost of such footwear is a sum of kshs.6,000/= per pair. The 1st plaintiff requires 5 pairs of shoes every year thus being a sum of ksh.30,000/= per year for the rest of her life. The 1st plaintiff claims the cost of footwear from the defendant. And the 1st plaintiff claims damages.
21. As at the time of the accident, the 1st plaintiff was a businesswoman trading in her own name and under the business name of Finyard Enterprises. Due to the complications and disabilities arising from the accident, she was rendered unable to effectively manage and run her various businesses and has lost profits and income. To date she has lost a sum of ksh.12,814,000/= or thereabouts being lost profits and income. She claims this sum from the defendant.
22. The 1st plaintiff also claims a sum of kshs.241,509/= from the defendant being cost of redeeming a loan arrangement from Kenya Womens Finance Trust that fell into arrears due to inability to resume business as a result of the accident and service the said loan.
23. By reason of the aforesaid complications and disabilities the 1st plaintiff has since June 2012 had to employ a manager/marketer to support and assist her in the running of Finyard Enterprises at the cost of kshs.30,000/= per month. The 1st plaintiff claims the sum of kshs.450,000/= to date from the defendant.
24. The loss is a continuing loss and the 1st plaintiff shall claim the same as at the date of trial as at the date of this amendment the 1st plaintiff has incurred an additional sum of kshs.1,440,000/= in salaries to the said manager/marketer. The 1st plaintiff claims the said sum from the defendant.
25. As at the time of the accident, the 2nd plaintiff was a businessman trading in his own name and under the of Samco Insurance Agency. Due to the complications and disabilities arising from the accident, he was rendered unable to effectively manage and run the said business and has lost profits and income. Todate he has lost a sum of kssh.1,440,000/= being lost profits and income. He claims this sum from the defendant.
26. By reason of the aforesaid complications and disabilities the 2nd plaintiff had to employ a manager/marketer to support and assist in the running of Samco Insurance Agency at the cost of ksh.20,000/= per month for 8 months. The 2nd plaintiff claims the sum of ksh.160,000/= from the defendant in respect of manager's salary.
27. The 2nd plaintiff further averred that by reason of the sequel of the injuries the 1st plaintiff has been left with, his marriage to her has been adversely affected and he claims loss of consortium from the defendant.
28. The plaintiffs pray for judgment against the defendant for
 - i. Ksh.18,796,515/= being special damages and lost profits and income for the 1st plaintiff, and ks.1,914,177/= being special damages and lost profits and income for the 2nd plaintiff.



- ii. General damages for pain, suffering and loss of amenities; damages for cost of domestic help to date of trial; damages for future housekeeping disability; damages for sexual dysfunction; loss of consortium; further/future medical care; lost earnings to date of trial and damages for loss of and/or diminished future earning capacity for the 1st and 2nd plaintiffs.
 - iii. Costs.
 - iv. Interest on 1, 2 and 3 at court rates.
29. The defendant filed a defence dated 2/12/2015 amended on 29/1/2018 denying the plaintiffs' claim.
 30. The plaintiff called 4 witnesses during the hearing of this case while the defendant called one witness.
 31. A summary of the plaintiffs' case was that on the material day, the two plaintiffs were travelling in motor vehicle registration no. KAU 0809Q along Mombasa road as passengers.
 32. They said motor vehicle registration no. KAE 307B with trailer ZC 1984 drove dangerously across Mombasa Road without regard to other road users and collided with motor vehicle registration no. KAU 089Q in which the two plaintiffs were lawfully travelling.
 33. The plaintiffs said they were lawful passengers in the matatu Registration No. KAU 089Q at around 7:30 pm when the trailer drove straight into the highway suddenly without indication or warning.
 34. They said the trailer cut across the highway to join the highway on the opposite side of Mombasa road either to join Enterprise road or head towards mlolongo area.
 35. The matatu driver tried to avoid colliding into the trailer by breaking hard and changing lanes to no avail. The driver collided into the right rear side of the trailer.
 36. The 1st plaintiff testified as PW 1. PW 2 was the police officer from Industrial Area police station who produced the police abstract.
 37. The 2nd plaintiff testified as PW 3 and said he has been married to the 1st plaintiff for 17 years and they have 3 children.
 38. PW 3 said he operates an insurance agency which he registered in March 2010. He produced two witness statements as his evidence in chief dated 16/9/2013 and 9/10/2017.
 39. PW3 said it was the trailer that caused the accident by crossing Mombasa road and coming towards the vehicle the plaintiffs were travelling in.
 40. The plaintiffs called PW 4 Nicholas Anduuru an accountant who works with Charles and company certified public accountants who produced a financial statement in respect of the plaintiffs' businesses.
 41. PW 4 produced his report as an exhibit in this case.
 42. The plaintiffs also called PW 5 Dr. Nassir Bhanji who is a consultant general surgeon and traumatologist based at Aga Khan hospital who also produced medical reports on behalf of the plaintiffs.
 43. The defendants called one witness DW1 Joseph Kamau Mbugua who was the driver of the registration no. KAE 307B with trailer AC 1984.
 44. DW 1 said it was motor vehicle registration no. KAU 089Q that hit the trailer at the rear.



45. The parties filed written submissions as follows; on liability the plaintiffs submitted that on 17/9/2010 they were lawful passengers in a matatu motor vehicle No. KAU 089Q. A around 7:30 pm a trailer drove straight into the highway suddenly without indication or warning.
46. The trailer cut across the highway to join the highway on the opposite side of Mombasa road either to join Enterprise road or head towards mlolongo area.
47. The matatu driver tried to avoid colliding into the trailer by breaking hard and changing lanes to no avail. The driver collided into the right rear side of the trailer.
48. It was the plaintiffs submission that the driver of the trailer was negligent because he drove across the Mombasa Highway in the face of oncoming traffic; Performed a dangerous maneuver along the highway without any due regard for the safety of other road users; failed to keep any or any proper lookout and failed to have any due or any regard for other road users.
49. As a result, the 1st plaintiff suffered the following injuries;
 - (i) Left femur - Comminuted fracture of the mid-shaft of the femur with displacement of the fractured fragments.
 - (ii) Right femur - Fracture of the mid shaft of the femur with displacement of the fractured fragments.
 - (iii) Generalized soft tissue injuries.
50. The 1st plaintiff submitted that in addition to the complaints set out above she has developed gastro-oesophageal reflux disease. She has had to travel to India for further medical care and attention.
51. An updated medical report dated 9/10/2017 has been prepared by Dr. Bhanji capturing the medical interventions that have taken place. 1st Plaintiff has been advised to undertake surgery for gastric reflux.
52. On general damages the 1st plaintiff proposed Kshs 6,000,000 as adequate compensation and in support cited among others the following cases;
53. Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR where an award of Ksh.4,000,000/= was made for injuries which included: a fracture of the right femur; fracture of the 3-6 ribs; pain in the right side of the chest and right thigh; persistent pain in the right knee.
54. Treatment included several operations, removal of metal implant and knee replacement surgery.
55. Ziporrah Nangila v Eldoret Express Limited & 2 Others [2016] eKLR where the plaintiff sustained comminuted compound fracture of the distal and fibular, fracture of the left distal and fibular and was awarded Kshs. 2,400,000 as general damages,
56. The defendant on the other hand submitted on liability that the Plaintiffs have failed to prove their case on a balance of probability, and also failed to prove that the Defendants were liable and/ or contributed to the occurrence of the said accident.
57. Further, that the 2nd Plaintiff in this matter testified in court that he blames the driver of motor vehicle registration number KAE 307B/ZC1984 for causing the accident that led to him sustaining injuries. In support of this claim, he called a police officer to testify.
58. On cross-examination, the police officer confirmed that he was not the Investigating officer and he did not visit the scene of the accident in this matter and also confirmed that he was merely in court to produce the Abstract only, as presented to him. The Plaintiff failed to call the Investigating Officer, who



would have clearly narrated his conclusive findings upon investigations of the same, and the subject of liability would have been determined.

59. On quantum the defendant submitted that if the court finds that the plaintiffs have proven their case against the defendant on a balance of probabilities; As regards the 1st plaintiff the defendants proposed an award of Kshs. 400,000 and in support cited the case of Ibrahim Kalema Lewa vs. Estee Company Limited [2016] eKLR in which an award of Kshs. 300,000/= was upheld on appeal in 2016 in a case where the Plaintiff sustained a fracture of the left femur; was thereafter admitted for 2 months and healed with a 25% disability.
60. On damages for loss of housekeeping ability, cost of raised shoes, lost earnings, cost of employing a manager to date, redeeming loan to Kenya Women's finance trust, future loss and or diminished future capacity and special damages, it was the defendant's argument that the plaintiff failed to prove the same to the required standards and therefore should not be awarded.
61. The defendants further submitted that the 1st Plaintiff has pleaded the sum of Kshs.12,814,000/ = being lost income for the time she was not able to run her business due to the injuries she suffered.
62. Further that the Plaintiff produced a report by an Accountant indicating that the 1st Plaintiff did not maintain a book of accounts of her business. That the statements that were produced only show the cash flow of the business and not a profit and loss that the company was actually earning.
63. That the same therefore cannot be said to have been specifically pleaded and proved by the 1st Plaintiff.
64. That the Accountant in his testimony further confirmed that the figures are not a true reflection of the accounts of the 1st Plaintiff as the figures may be different from the actual profit and loss.
65. The defendant submitted that the 1st Plaintiff also contradicted herself as she claims to have made losses in her business but at the same time she prayed for income for hiring a Manager at the Cost of Kshs.30,000 to run her business while she was incapacitated. That this is a clear indication that the 1st Plaintiff's business did not suffer any loss as the same was carried out by her employee.
66. Further, that the law is very clear when it comes to prayers for loss of earnings that same is awarded alongside General damages which the Plaintiff has already pleaded. The court therefore cannot make a double award for a party and thus enrich her at the expense of another party.
67. On the issue of damages for sexual dysfunctional, the defendant submitted that the 1st Plaintiff pleaded the fractures that she suffered as a result of the alleged accident and there was no mention of sexual dysfunction.
68. That the same was not pleaded by the 1st Plaintiff in this matter and that they cannot claim for the same in their submissions which do not form part of the pleadings of parties.
69. The Defendant relied on the case of: Civil Appeal No, 52 of 2017 Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd
70. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.
71. Further that the settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG)



vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings as follows: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation. ”

72. The Defendant further submitted that there was no proof of the same in the Plaintiff's Pleadings as to how the subject accident has in anyway affected the sexual life of the 1st Plaintiff. There is no tangible evidence that the sexual life of the 1st Plaintiff cannot or will never carry out her conjugal duties and rights. Neither the 1st Plaintiff nor 2nd stated that they were not able to perform sexual activities but rather it was uncomfortable to do so. It is therefore correct to state that there is no malfunctioning of the sexual life of the Parties.
73. The Plaintiffs relied on the case of John Maina Wmuyu VS J.V Strabag Bau-AG Lima Ltd in which the Plaintiff became impotent and therefore the court had to award the Plaintiff for loss of Consortium. This is case however is different as the Plaintiffs can still perform their sexual acts.
74. On the 2nd plaintiff the defendant proposed an award of general damages in the amount of Kshs. Kshs.200,000 and relied on Civil Appeal No. E009 of 2020 Francis Omari Ogaro vs JAO (minor suing Through next friend and father GOD) in which Justice E.N. Maina in 2021 set aside an award of Kshs. 230,000 and replaced it with Kshs. 180,000/= for a Respondent who had suffered;
- (i) Multiple cut wounds on the right lower limb.
 - (ii) Bruises on the right lower limb.
 - (iii) Bruises on both elbows.
 - (iv) Bruises on the right iliac region.
 - (v) Bruises on the frontal region.
 - (vi) Bruises on the temporal region.
 - (vii) Lacerations on the frontal region.
 - (viii) Cut wounds on the left iliac region.
 - (ix) Cut wounds on the frontal region.
 - (x) Cut wounds on the temporal region.
 - (xi) Blunt trauma to the abdomen.
75. I have carefully considered the evidence adduced in this case together with the reports filed herein and the submissions. It is the duty of the plaintiffs to prove their case and the standard of proof in civil cases is on a balance of probabilities.
76. The issues for determination in this case are as follows;
- i. Whether the plaintiffs have proved their case against the defendant to the required standard.



- ii. Whether the defendant is liable to pay the plaintiffs the damages they are seeking in this case.
77. On the issue as to whether the plaintiffs have proved their case to the required standard, I find that the two plaintiffs gave evidence that they were being driven along Mombasa road when the trailer crossed Mombasa road from Maasai junction and failed to give way and it was hit by motor vehicle registration no. KAU 089Q in which the plaintiffs were travelling in at the rear.
78. I find that it was the duty of the motor vehicle registration no. KAE 307B with trailer ZA1984 to give way to motor vehicles along Mombasa road before joining from the junction.
79. There is evidence that the trailer cut across the highway to join the highway on the opposite side along Mombasa road either to join Enterprise road or head towards mlolongo area.
80. There is evidence that the matatu driver tried to avoid colliding into the trailer by breaking hard and changing lanes to no avail. The driver collided into the right rear side of the trailer.
81. I find that there is evidence that the driver of the trailer was negligent because he drove across the Mombasa Highway in the face of oncoming traffic; Performed a dangerous maneuver along the highway without any due regard for the safety of other road users.
82. He also failed to keep any or any proper lookout and failed to have any due or any regard for other road users.
83. DW 1, the driver of motor vehicle registration no. KAE 307B with trailer ZA1984, said it was the matatu motor vehicle registration no. KAU 089Q that hit the trailer at the rear. However, I find that it was DW1, driver of the trailer that failed to keep a proper lookout when he drove across the Mombasa Highway.
84. I find that the plaintiffs have proved their case to the required standard in civil cases.
85. I hold the defendant's driver 100% liable in negligence. The defendant is held vicariously liable as the registered owner of motor vehicle registration no. KAE 307B with trailer ZA1984.
86. On the issue as to whether the defendant is liable to pay the plaintiffs the damages they are seeking against it, I find that the answer is in the affirmative.
87. The two plaintiffs who are husband and wife suffered severe injuries as follows; the 1st plaintiff suffered the following injuries;
- (i) Left femur - Comminuted fracture of the mid-shaft of the femur with displacement of the fractured fragments.
 - (ii) Right femur - Fracture of the mid shaft of the femur with displacement of the fractured fragments.
 - (iii) Generalized soft tissue injuries.
88. The 1st plaintiff said she was a businesswoman trading in her own name and under the business name of FINYARD ENTERPRISES, and she was rendered unable to effectively manage and run her various businesses and has lost profits and income.
89. Due to the complications and disabilities arising from the accident, the 1st plaintiff lost a sum of ksh.12,814,000/= or thereabouts being lost profits and income. She claims this sum from the defendant.



90. The 1st plaintiff also claims a sum of kshs.241,509/= from the defendant being cost of redeeming a loan arrangement from Kenya Women Finance Trust that fell into arrears due to inability to resume business as a result of the accident and service the said loan.
91. By reason of the aforesaid complications and disabilities the 1st plaintiff has since June 2012 had to employ a manager/marketer to support and assist her in the running of Finyard Enterprises at the cost of kshs.30,000/= per month.
92. The 1st plaintiff claims the sum of kshs.450,000/= to date from the defendant. The loss is a continuing and she incurred an additional sum of kshs.1,440,000/= in salaries to the said manager/marketer.
93. The defendants submitted that the 1st Plaintiff has pleaded the sum of Kshs.12,814,000/ = being lost income for the time she was not able to run her business due to the injuries she suffered.
94. Further that the 1st Plaintiff produced a report by an Accountant indicating that the 1st Plaintiff did not maintain a book of accounts of her business. That the statements that were produced only show the cash flow of the business and not a profit and loss that the company was actually earning.
95. That the same therefore cannot be said to have been specifically pleaded and proved by the 1st Plaintiff.
96. That the Accountant in his testimony further confirmed that the figures are not a true reflection of the accounts of the 1st Plaintiff as the figures may be different from the actual profit and loss.
97. The defendant submitted that the 1st Plaintiff also contradicted herself as she claims to have made losses in her business but at the same time she prayed for income for hiring a Manager at the Cost of Kshs.30,000 to run her business while she was incapacitated.
98. That this is a clear indication that the 1st Plaintiff's business did not suffer any loss as the same was carried out by her employee.
99. Further, that the law is very clear when it comes to prayers for loss of earnings that same is awarded alongside General damages which the Plaintiff has already pleaded. The court therefore cannot make a double award for a party and thus enrich her at the expense of another party.
100. The defendant further submitted that the 1st Plaintiff is seeking double compensation under the head of future loss of and/or diminished future earning capacity as she already sought for the same damages under Cost of Employing a Manager to date.
101. That the 1st Plaintiff has not strictly proved this claim contrary to the findings of Lord Denning in the case of Fairley v John Thomson Ltd (1973) 2 Lloyd's Law Reports 40 quoted earlier above indicated that there: ".....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages. "
102. The defendant also submitted that the 1st Plaintiff under this head did not specifically plead the amount prayed for as she has failed to provided real evidence to support the claim that she had hired a manager and the period the alleged manager will be in her employment.
103. That the same precedent states that the award for diminished future earnings capacity is awarded under General Damages and therefore awarding the 1st Plaintiff under this head will amount to double compensation.
104. On the issue of damages for sexual dysfunctional, the defendant submitted that the 1st Plaintiff pleaded the fractures that she suffered as a result of the alleged accident and there was no mention of sexual dysfunction.



105. That the same was not pleaded by the 1st Plaintiff in this matter and that they cannot claim for the same in their submissions which do not form part of the pleadings of parties.
106. The Defendant relied on the case of: Civil Appeal No, 52 of 2017 Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd
107. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.
108. Further that the settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings as follows: -
109. The Defendant further submitted that there was no proof of the same in the Plaintiff's Pleadings as to how the subject accident has in anyway affected the sexual life of the 1st Plaintiff. That there is no tangible evidence that the sexual life of the 1st Plaintiff was affected or that she will never carry out her conjugal duties and rights.
110. That neither the 1st Plaintiff nor 2nd plaintiff stated that they were not able to perform sexual activities but rather it was uncomfortable to do so. The defendant submitted that it is therefore correct to state that there is no malfunctioning of the sexual life of the Parties.
111. The Plaintiffs relied on the case of John Maina Wmuyu VS J.V Strabag Bau-AG Lima Ltd in which the Plaintiff became impotent and the court had to award the Plaintiff for loss of Consortium. This is case however is different as the Plaintiffs can still perform their sexual acts.
112. The submissions in respect of the 2nd plaintiff were similar to those of the 1st plaintiff except that the injuries suffered were not similar. However, both claimed damages under the same headings including damages for Lost earnings and income, loss of consortium and sexual dysfunction and Lost and/or diminished future earning capacity and special damages.
113. On the heading of damages for pain and suffering, the 2nd plaintiff stated that he suffered the following injuries;
 - a. Head injury (celebral concussion)
 - b. Shock and confusion
 - c. Deep laceration over the left eyebrow
 - d. Injury to the temporal side of the scalp causing haematoma
 - e. Injury by broken glass to the proximal interphalangeal joint of the left little finger leading to deformity.
 - f. Injury to the left shoulder joint causing acromio-clavicular subluxation.
 - g. Cuts and bruises on the neck at the back and soft tissue injury to the neck
 - h. Tender left shoulder.
 - i. Blunt injury to the right leg and hip



114. At the time of the accident, the 2nd plaintiff also said was a businessman trading in his own name and under the of Samco Insurance Agency.
115. Due to the complications and disabilities arising from the accident, he was rendered unable to effectively manage and run the said business and has lost profits and income.
116. The 2nd plaintiff said that he lost a sum of kssh.1,440,000/= being lost profits and income.
117. By reason of the aforesaid complications and disabilities the 2nd plaintiff had to employ a manager/ marketer to support and assist in the running of Samco Insurance Agency at the cost of ksh.20,000/= per month for 8 months. The 2nd plaintiff claims the sum of ksh.160,000/= from the defendant.
118. The 2nd plaintiff said that by reason of the sequel of the injuries the 1st plaintiff has been left with, his marriage to her has been adversely affected and he claims loss of consortium from the defendant.
119. The 2nd plaintiff was only admitted in hospital for one night and therefore there is no evidence that he was not able to carry on with his business.
120. I have also perused the amended plaint dated 9th October 2017 and I find that the 1st and 2nd plaintiffs did not plead damages in respect of sexual dysfunctional and loss of consortium in the particulars of injuries which they suffered and the same are not payable.
121. They only mentioned the same in the last paragraph of the plaint and not in the particulars of injuries sustained.
122. In respect of lost earnings from their businesses, the plaintiffs called a witness, PW4, Nicolas Anduuru who works with Charles and co Certified Public Accountants(Kenya) who gave a report in respect of the financial performance of the plaintiffs' businesses.
123. I find that the said evidence was not controverted by the defendant.
124. The cost of domestic house help and loan repayment were to be paid from the future earnings and therefore they are catered for from the said award.
125. The damages in respect of salary for the managers was not proved by both plaintiffs since no pay slips were produced in respect of the same.
126. This court already held that the 2nd plaintiff is also not entitled to damages for loss of Business since there is no evidence that he was unable to carry on with his businesses.
127. I award damages as follows in respect of 1st plaintiff;
 - i. General damages for pain and suffering Ksh.4,000,000
 - ii. Lost earnings from Businesses Kshs. 10,814,000.00
 - iii. Lost and/or Diminished Future
 - iv. earning capacity Kshs.2,640,000.00
 - v. Special damages Kshs.2,941,006.00
 - vi. Raised Shoes Kshs.724,000.00Total Kshs.20,472,100



128. In respect of the 2nd plaintiff;

i. General damages for pain and suffering Kshs.900,000

ii. Future medical care Kshs.350,000

iii. Special damages Kshs.314,177

Total Kshs.1,564,177

129. The total award in respect of the two plaintiffs is Kshs.22,036,277

130. Judgment be and is hereby entered in favor of the 1st and 2nd plaintiffs against the Defendant in the sum of Kshs. 22,036,277 together with costs and interest at court rates from the date of this judgment until payment in full.

131. In respect of special damages, the interest is payable from the date the same were pleaded.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
2ND DAY OF APRIL, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

