



Wambua & another (Suing as the administrators ad litem of the Estate of Henry Nzuki-Deceased) v Nazish Motors Limited & another (Civil Case 447 of 2010) [2024] KEHC 4641 (KLR) (Civ) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4641 (KLR)

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

CIVIL

CIVIL CASE 447 OF 2010

CW MEOLI, J

APRIL 11, 2024

BETWEEN

MARGARET KASWII WAMBUA & KENEDY MULI WAMBUA (SUING AS THE ADMINISTRATORS AD LITEM OF THE ESTATE OF HENRY NZUKI-DECEASED) PLAINTIFF

AND

NAZISH MOTORS LIMITED 1ST DEFENDANT

ALEXANDER MWANGI KIRONZI 2ND DEFENDANT

JUDGMENT

1. This suit was initially instituted by Henry Nzuki (the deceased) vide the plaint dated 29th September, 2010. Following his death, Margaret Kaswii Wambua and Kenedy Muli Wambua (hereafter the Plaintiffs) upon obtaining a limited grant of letters of administration ad litem in respect of the estate of the deceased, were substituted in place of the deceased plaintiff and an amended plaint dated 1st September, 2016 (the Amended Plaint) filed.
2. Nazish Motors Limited and Alexander Mwangi Kironzi (hereafter the 1st and 2nd Defendants) were named as defendants. The 1st Defendant was sued in its capacity as the registered owner of the motor vehicle registration number KBB 104K (the subject motor vehicle) while the 2nd Defendant was sued as the driver thereof, at all material times. The claim was for general damages for pain, suffering and loss of amenities; damages for loss of future earnings and future earning capacity, inter alia, arising from a road traffic accident.
3. It was alleged in the Amended Plaint that sometime on or about 5th October, 2008 the deceased was lawfully standing on the side of the road along Mombasa Road, near Syokimau area. That the 2nd



Defendant so carelessly, negligently and/or recklessly drove, managed and or controlled the subject motor vehicle that it lost control and veered off the road, knocking down the deceased who sustained serious injuries which subsequently led to his death. The particulars of negligence were pleaded in the following manner:

Particulars of Negligence of the 2nd Defendant

- a. Driving at an excessive speed under the circumstances.
- b. Driving off the road to the pedestrian walk.
- c. Driving without due regard to other motorists and/or pedestrians on the said road.
- d. Driving without any due care and attention.
- e. Driving carelessly, recklessly and without regard to the Highway Code.
- f. Failing to slow down, brake, swerve or in any other way control the said vehicle as to cause the accident.
- g. Causing the accident. (sic)

4. The injuries sustained by the deceased were particularized as follows:

Particulars of Injuries

- a. Serious head injuries leading to mental loss;
- b. Abdominal injuries leading to inability to pass urine due to bladder injury;
- c. Multiple fractures to the left leg leading to unstable walking gait;
- d. Multiple soft tissue injuries over the head, legs, hand and truck; (sic)

5. It was pleaded that the deceased's injuries resulted in health complications particularly affecting his kidneys, and resulting in his sudden death on 6th March, 2015.

6. It was further pleaded that prior to the accident, the deceased who was then aged 30 years led a normal life and enjoyed good health with high prospects. That the deceased worked as a mason, earning a monthly salary of Kshs. 15,000/-. That following the accident, the deceased was hospitalized for a period of 211 days, during which time he was in a coma for about 2 weeks. That, consequently, the deceased lost his future earnings and earning capacity, and his family was forced to hire a nurse/assistant to attend to him, at a daily rate of Kshs. 5,000/-.

7. Upon being served with summons, the 1st and 2nd Defendants entered appearance and jointly filed their statement of defence dated 4th March, 2011 and amended on 12th September, 2016 (the Amended Defence). Therein denying the key averments in the Amended Plaintiff and liability against them. In the alternative, the Defendants averred that if at all the accident occurred, then the same was substantially/solely caused by negligence on the part of the deceased, under the following particulars:

Particulars of negligence of the deceased

- a. Failed to keep the pedestrian walk
- b. Failed to have regard of other road users and particularly motor vehicle registration number KBB XXXXX
- c. Failed to walk with due care and attention



- d. Failed to move and avoid the accident
 - e. Walked carelessly and dangerously on the road
 - f. Entered the road without observing the kerb drill
 - g. Crossed the road from left to the right hand side in a negligent and/or reckless manner when it was unsafe to so do. (sic)
8. The hearing commenced on 2nd December, 2019. Dr. Cyprianus Okoth Okere was summoned as PW1. Upon setting out his professional qualifications, the doctor testified that he examined the deceased, who gave him a detailed account of the accident. The doctor testified that he confirmed the deceased's injuries to constitute a compound fracture of the left femur, a head injury and a blunt abdominal injury, which injuries he classified as grievous harm in nature. That he subsequently prepared the medical report dated 9.07.2012 which he proceeded to produce as P. Exhibit 1. That he further charged the respective sums of Kshs. 1,500/- for the medical report and Kshs. 5,000/- for his court attendance. It was the doctor's evidence that the deceased further suffered urinal incontinence which meant that he could not control his urine flow.
 9. In cross-examination, the doctor stated that at the time of performing the medical examination, the deceased complained of weakness and pain, notwithstanding the fact that the accident had occurred several years earlier. The doctor further stated that previously, the deceased had been discharged from hospital and that the cause of death indicated in the death summary was uramic encephalopathy due to end stage renal disease, indicating kidney failure.
 10. During re-examination, the doctor testified that at the time of examination, the deceased had not shown any signs of being diabetic and that the abdominal injuries sustained did affect his kidneys.
 11. The 1st Plaintiff testified on oath as PW2, stating that she was the mother of the deceased. She relied on her witness statement dated 5.07.2019 as her evidence-in-chief. She then stated that prior to his death, the deceased supported her by giving her a sum of Kshs. 10,000/-p.m.
 12. During cross-examination, PW2 testified that at the time of his death, the deceased who was aged 39 years, was not married and had no children. Admitting that documentation showing the deceased's earnings had not been tendered but was at her home. She confirmed that the deceased was discharged from the hospital nine (9) months following the accident, and that the cause of his death, nine (9) years after the accident was not disclosed to her. Further she stated that the deceased had not resumed his normal duties between the years 2009 and 2015.
 13. In re-examination, it was her evidence that the deceased worked in the construction industry.
 14. Daniel Mung'ao Mbithuka (PW3) also adopted his signed witness statement dated 5.07.2019 as his evidence-in-chief and testified that he worked as a mason. In cross-examination, the witness stated that he was present at the scene of the accident on the material date and that he managed to escape from the path of the subject motor vehicle. That after the accident which occurred at about 7.00 p.m., he did not return to the scene to confirm the condition of the deceased but chose to briefly observe the scene from a distance.
 15. He nevertheless stated that the deceased did not die immediately and that prior to his death, the deceased who was also a colleague at work earned a monthly salary of about Kshs. 15,000/-, paid in cash. That he knew the deceased financially supported his mother and brothers. His testimony during cross-examination was echoed in re-examination, marking the close of the Plaintiffs' case.



16. Dr. Jennifer Nyawira Kahuthu testified as DW1 and proceeded to produce the medical report prepared by her colleague (Dr. Leah Wainaina), dated 24.06.2015 as D. Exhibit 1. It was her evidence that the deceased was re-examined by Dr. Wainaina in relation to the femur fracture injury, abdominal and head injuries arising out of the road accident. She further testified that the deceased died from a uramic encephalopathy resulting from renal disease, diabetes and hypertension, which conditions had no correlation with the injuries sustained in the accident. That the kidney disease was diagnosed, sometime in the year 2015.
17. In cross-examination, she admitted that not having personally examined the deceased, she relied on the report prepared by her colleague. Her further evidence was that the certificate of death in respect of the deceased supports her testimony concerning the cause of death and which cause has no relation to the accident. That the report showed that at the time of the second medical examination, the deceased was able to walk, albeit with a limp.
18. During re-examination, the doctor maintained her earlier evidence that the cause of death of the deceased had no connection to the accident.
19. PC Kennedy Kitonga being DW2, confirmed the occurrence of the accident involving the subject motor vehicle and the deceased, as recorded in the police abstract. The police officer stated that he was not the investigating officer and had no knowledge whether charges were laid against any person in relation to the said accident and that although investigations were carried out, he did not peruse the Occurrence Book (OB) extract. During cross-examination, it was his testimony that the deceased sustained injuries categorized as grievous harm. This marked the close of the defence case.
20. Upon close of the hearing, the parties were directed to file and exchange written submissions. However, the court noted that at the time of writing this decision, only the submissions of the Plaintiffs had been filed. Despite having been granted an opportunity to comply, the Defendants did not put in their written submission for the court's consideration.
21. The Plaintiffs' counsel submitted on two issues namely: liability and quantum of damages. On liability, it was briefly submitted that evidence has been tendered to support the claim that the accident and injuries sustained by the deceased were the direct result of negligence on the part of the 2nd Defendant. That based on the evidence tendered, the court ought to find the Defendants jointly and severally liable.
22. On quantum, counsel submitted on three (3) heads of damages. Concerning the prayer for general damages pain, suffering and loss of amenities, counsel proposed the separate sums of Kshs. 15,000,000/- on pain and suffering, predicated on the cases of Tijan Kisilu v Bonfide Clearing and Forwarding Company Limited & 2 Others [2018] eKLR; Susan Wanjiru Njuguna v Keringet Flowers Ltd (HCCC 64 of 2001); and Edward Mzamili Katana v CMC Motors Group Ltd & Another [2006] eKLR. And a further Kshs. 2,500,000/- for loss of amenities, citing the decision in Mwaura Muiruri v Suera Flowers Limited & Another (2014) eKLR where the court held that this head of damages is awardable in instances where it has been shown that certain aspects of a plaintiff's life have diminished as a result of an accident.
23. On the claim for loss of future earnings and loss of earning capacity, the Plaintiffs' counsel cited various decisions rendered by the Court of Appeal, including SJ v Francesco Di Nello & Another [2015] eKLR, Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR on the distinction between damages under the heads of loss of future earnings and loss of earning capacity. In that respect, counsel proposed a multiplier of 30 years; a multiplicand premised on the the minimum wage at Kshs. 10,954.70 applicable to a domestic worker pursuant to the Legal Notice No. 116- Kenya Subsidiary



Legislation, 2015; Kenya Gazette Supplement No. 9 of 26th June, 2015 enacted under the [Labour Institutions Act](#), No. 12 of 2007. Hence tabulating the damages as follows:

Kshs. 10,954.70 x 12 x 30 = Kshs. 3,943,692/-

24. Counsel concluded by setting out the total award sought on quantum as being Kshs.21,443,692/-.
25. The court has considered the pleadings, evidence tendered at the trial, as well as the submissions by the Plaintiffs and the authorities cited. The court proposes to deal sequentially with the twin issues of liability and quantum.
26. Starting with liability, it is trite law that the burden of proof rested with the Plaintiffs to prove their case against the 1st and 2nd Defendants, on a balance of probabilities. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya clarifies this position by providing that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
27. Moreover, the evidential burden of proof which is captured in Sections 109 and 112 of the same Act stipulates that:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
28. The abovementioned provisions were discussed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal rendered that:

“As a general proposition under Section 107(1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
29. Based on the material on record, the accident occurred on the material date and at the place pleaded in the Amended Plaintiff. Equally, there is no dispute that the deceased sustained injuries in the said accident. Regarding the ownership of the subject motor vehicle, the copy of records dated 27.05.2010 contained in the Plaintiffs’ bundle of documents indicates the name of the 1st Defendant as the owner of the subject motor vehicle, at all material times. Pursuant to the provisions of Section 8 of the [Traffic Act](#), Cap. 403 Laws of Kenya the person whose name appears on the registration document in respect to a motor vehicle is considered, prima facie, to be its owner. Here, the evidence stood unchallenged.
30. In the police abstract dated 9.01.2010, copies of which constituted the respective parties’ bundle of documents, the 2nd Defendant was shown to be the driver of the subject motor vehicle on the material date. No contrary evidence was tendered to rebut this position.
31. Regarding the question of negligence, the Plaintiffs’ evidence was that the 2nd Defendant being the driver of the second motor vehicle, caused the material accident through his negligence, and that the 1st Defendant is vicariously liable by virtue of its ownership of the said vehicle. Specifically, PW3 who



was an eyewitness to the accident, testified that the deceased was knocked down while standing on the edge of the road and that the driver of the subject motor vehicle was to blame for veering towards the two people standing by the roadside. The witness further testified that he too was in the line of danger but managed to escape unhurt, whereas the deceased was not as fortunate. It was the Plaintiffs' case that the injuries sustained by the deceased eventually resulted in his death, several years later.

32. The evidence by PW3 was not controverted or seriously challenged during cross-examination.
33. That said, the question of the injuries sustained and relationship with the eventual death of the deceased requires some interrogation. While the medical reports tendered as P. Exh. 1 and D. Exh. 1 respectively, confirmed the injuries pleaded, the certificate of death filed as part of the Plaintiffs' documents, indicates that the deceased died from a uramic encephalopathy resulting from end stage renal disease. Both PW1 and DW1, confirmed the latter position in their evidence -in-chief, with the latter going a step further in stating that the renal disease resulted from diabetes and hypertension, both of which are chronic conditions that had no connection to the injuries sustained in the accident. Assertions by PW1 during re-examination connecting the abdominal injuries sustained in the accident to the eventual disease that was the cause of the deceased's death cannot in the absence of other corroborative expert evidence be taken seriously. Or be taken as detracting from the opinion found in D.Exh. 1. More so because, the deceased died about six (6) years following the accident and no records of intervening diagnosis or treatment tending to connect the accident injuries to the eventual cause of death were tendered.
34. In the court's considered view, no credible evidence was tendered in support of the Plaintiffs' averments that the conditions resulting in the death of the deceased were either the direct or indirect result of the injuries sustained in the accident. Or in other words that the injuries sustained in the accident were the proximate cause of the eventual death of the deceased. To my mind, the accident and resultant injuries appear too remote to the cause of death indicated in the death certificate in respect of the deceased. That notwithstanding, on a balance of probabilities, it is more plausible than not that the accident arose due to negligence on the part of the 2nd Defendant. Further that, the accident resulted in the injuries pleaded in the Amended plaint.
35. In finding so, the court draws guidance from the following decision by the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



36. As regards vicarious liability on the part of the 1st Defendant, for the acts of the 2nd Defendant, the following was held in *Karisa v Solanki* [1969] EA 318:

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See *Bernard V Sully* [1931] 47 TLK 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”

37. Further, where a defendant pleads contributory negligence on the part of a plaintiff or deceased person, he must adduce evidence to prove those specific acts of contributory negligence. In the present instance, no such evidence was tendered to demonstrate that the deceased in any way contributed to the accident. See the Court of Appeal case of *Embu Public Road Services Ltd v Riimi* [1968] EA 22.

38. Consequently, the court is satisfied that the Plaintiffs have proved their case against the Defendants to the required standard and finds that the 1st and 2nd Defendants were wholly liable, jointly and severally for the accident.

39. The court will now address the various heads under which damages were sought. On general damages sought for pain, suffering and loss of amenities, the court is of the considered view that damages encompassed therein are to be awarded globally and not separately as urged by the Plaintiffs’ advocate. The medical evidence on record confirms the injuries sustained by the deceased as: a compound fracture of the left femur, a head injury, and a blunt abdominal injury. The earliest medical report dated 9.07.2012 prepared by PW1 and tendered as P. Exh. 1 classified these injuries as grievous harm and further confirmed earlier medical evidence indicating that the deceased had been admitted at the Kenyatta National Hospital (KNH) for a period of about nine (9) months following the accident.

40. Moreover, the medical report prepared by Dr. Leah Wainaina and dated 24.06.2015, produced as D. Exh. 1 by DW1, echoed the above evidence and went a step further in stating that following his treatment and discharge, the deceased was later re-admitted in hospital for a condition, which led to his eventual death; and that the re-admission had nothing to do with the accident injuries. Furthermore, save for the medical report dated 31.01.2011 prepared by Dr. Charles Nzioki and found in the Plaintiffs’ list and bundle of documents dated 5.07.2019 in which the doctor assessed incapacitation at 90%, none of the other medical reports contained a determination regarding permanent disability. The said doctor did not testify and his findings were not captured in any of the two medical reports by PW1 and by Dr. Wainaina.

41. No doubt, following the accident, the deceased must have undergone immense pain and agony arising from the injuries sustained, and which led to his prolonged admission in hospital and period of morbidity, coupled with surgical and other treatment procedures as set out in the medical evidence.

42. Upon consideration of the awards suggested by the Plaintiffs under this head, as well as the authorities relied upon in their submissions, the court finds that the cited cases of *Susan Wanjiru Njuguna v Keringet Flowers Ltd* (HCCC 64 of 2001) and *Edward Mzamili Katana v CMC Motors Group Ltd & Another* [2006] eKLR may not be comparable, having been decided several years ago. Regarding the decision in *Tijan Kisilu v Bonfide Clearing and Forwarding Company Limited & 2 Others* [2018]eKLR also cited in the Plaintiffs’ submissions, the case involved a plaintiff who sustained blunt chest injury with likely fractured ribs; bilateral fracture femur; profuse bleeding per oral, bipartition of the tongue; extensive oral lacerations; avulsion of the anterior part of the mandible;



grossly comminuted compound fracture mandible; extensive Para nasal lacerations; and extensive right facial lacerations. Save for the femur fracture injuries, the remaining injuries sustained therein are not comparable to those sustained by the deceased in the present instance.

43. The court considered the case of *Isaac K. Chemjor & another v Laban Kiptoo* [2019] eKLR where the High Court sitting on appeal reduced an award in the sum of Kshs. 3,000,000/- to the sum of Kshs. 1,500,000/- , in relation to a claimant who sustained a left hip fracture, right mid temporal tube area brain contrusion, head injury, soft tissue injuries as well as resulting abdominal complications; and the more recent case of *Azhar Ali v Sheikha Mohamed* [2020] eKLR where the High Court also sitting on appeal upheld a similar sum of Kshs.1,500,000/ awarded under this head at the instance of a person who suffered inter alia, severe head and fracture injuries.
44. From a reading of the just cited authorities, it is apparent comparing the injuries sustained therein, though fairly similar in nature to those in the present instance, to note that they were less severe in extent. Considering the age of the deceased, the nature and extent of the injuries suffered, the prolonged morbidity and suffering of the deceased and inflationary factors, the court is persuaded to award a sum of Kshs. 2,500,000/- for pain, suffering and loss of amenities.
45. Regarding general damages for loss of future earnings and loss of earning capacity, the Court of Appeal in the case of *William J Butler v Maura Kathleen Butler* [1984] eKLR acknowledged that:

“...compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”
46. A similar position was echoed by the Court of Appeal in the decision rendered in *SJ v Francesco Di Nello & Another* [2015] eKLR cited in the Plaintiffs’ submissions, when it held thus:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley V John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows: “It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. 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.”
47. The above-cited decisions set out distinctively the difference between loss of future earnings, otherwise referred to as loss of income, and loss of earning capacity.
48. Flowing from the foregoing, loss of income/future earnings being in the nature of special damages must be pleaded and proved. Loss of earning capacity on the other hand, comprises general damages and need not be pleaded though they must be proved on a balance of probability. See *Cecilia W. Mwangi and Another v Ruth W. Mwangi* NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR.
49. That being the case, the court upon perusal of the record and more particularly the pleadings, noted that the Plaintiffs did not specifically plead the particulars of loss of income and/or future earnings



resulting from the accident. In the case of Douglas Kalafa Ombeva v David Ngama [2013] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

50. In view of all the foregoing circumstances, the court unfortunately cannot grant any damages under the above head.
51. As pertains to loss of earning capacity, upon examination of the material and evidence on record, the court similarly did not come across anything credible to suggest that owing to the injuries resulting from the accident, the deceased’s earning capacity diminished. Neither the medical evidence nor oral evidence by the Plaintiffs demonstrated that following the injuries suffered in the accident, the deceased’s earning capacity was diminished. In view of the foregoing factors, the court declines to make any award in that regard.
52. Consequently, judgment will be entered in favour of the 1st and 2nd Plaintiffs against the 1st and 2nd Defendants jointly and several as hereunder:

Liability 100%

- a. General damages-pain, suffering
and loss of amenities Kshs. 2,500,000/-
 - b. Loss of income/future earnings NIL
 - c. Loss of earning capacity NIL
- Total Kshs. 2,500,000/-

53. The costs of the suit are awarded to the Plaintiffs. The Plaintiffs shall also have interest at court rates from the date of judgment until payment in full.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiffs: Mr. Malanga

For the Defendants: Ms. Bor

C/A: Erick

