



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutunga v St. Catherine Schools Limited & another (Civil Case  
23 of 2017) [2023] KEHC 2237 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE 23 OF 2017  
MW MUIGAI, J  
MARCH 16, 2023**

**BETWEEN**

**SHARACK MUASYA MUTUNGA ..... PLAINTIFF**

**AND**

**ST. CATHERINE SCHOOLS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JACKSON MUASYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Plaint**

1. The plaintiff, by way of a plaint dated November 23, 2017 prays for judgment against the defendant as follows:
  - a. General damages for pain suffering and loss of amenities together with interest thereon.
  - b. Damages for quadriplegic equipment, future and hospitalization and drugs as set out in paragraph 9 of the plaint.
  - c. Special damages for loss of earning capacity as set out at paragraph 11 of the plaint.
  - d. Special damages of Kshs 17,311,148.30 as pleaded together with interest.
  - e. Interest on (a), (b), (c) and (d) above at such rate and for such period as this court may deem fit to grant.
  - f. Costs of the suit
  - g. Any other relief the court deems fit to grant.
2. The plaintiff has pleaded that at all material times herein the 1st defendant was the registered owner of motor vehicle registration No KBA 731 T while the 2<sup>nd</sup> defendant was the authorized driver, servant



- and or agent of the 1<sup>st</sup> defendant acting within his scope of his employment or authority for the benefit of the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant is vicariously liable for the acts of the 2<sup>nd</sup> Defendant.
3. The cause of action as in the Plaintiff is that on the 28<sup>th</sup> day of May, 2016 at around 6.00 a.m. the Plaintiff was lawfully and carefully driving his motor vehicle registration No. KBL 933X along Nairobi - Mombasa road coming from Nairobi heading to Machakos when at Namanga interchange, where the dual carriage begins, the 2<sup>nd</sup> Defendant, so carelessly, recklessly and negligently drove, managed and/or controlled motor vehicle Reg. No. KBA 731T that he took the wrong lane along the said road.
  4. That due to his carelessness, recklessness and negligence and whilst driving in the opposite direction to the plaintiff, the 2<sup>nd</sup> Defendant motor vehicle registration No. KBT 731T collided with the Plaintiff's M/Vehicle registration No. KBL 933X.
  5. The plaintiff will in so far as is applicable and necessary rely on the Doctrine of *Res Ipsa Loquitur*.
  6. As a result of the said road traffic accident, the Plaintiff sustained severe physical injuries. The particulars of the Plaintiff's injuries are as follows:-
    - a. Bilateral closed fracture shaft of femur
    - b. Open right patella fracture with rupture of patellar tendon
    - c. Head injury with intra cerebral bleed
    - d. Multiple cut wound on the face
    - e. Myositic bone of both the hips
    - f. Gross heterotopic ossification and fusion of both hips, knees and right elbow
    - g. 100% paralysis
  7. The Plaintiff further avers that by reason of the aforesaid matters, he has suffered loss and damage for which he holds the Defendants liable. That prior to the accident he was employed by Ketraco Limited as an Accounts Assistant but due to the injuries sustained he has not been able and shall not be able to engage in gainful employment.
  8. That despite demands made and intention to sue, both Defendants have failed, neglected and/or refused to settle the Plaintiff's claim.

## DEFENSE

9. The Defendants filed their defense dated 22<sup>nd</sup> January, 2018 denying each and every allegation that has been made by the Plaintiff in the plaint. However, they admit that an accident occurred on 18/05/2016 but deny the allegations that the same was as a result of carelessness, recklessness and/or negligence on the part of the 2<sup>nd</sup> Defendant as alleged in the plaint.
10. That the doctrine of *Res Ipsa Loquitur* has no application to this case as alleged in the Plaintiff and put the Plaintiff to strict proof thereof.
11. That the accident was caused and /or substantially contributed to by the negligence of the Plaintiff in the manner that he drove, controlled and/or managed motor vehicle registration KBL 933 X.
12. The Defendants deny the allegation that the Plaintiff is unable to engage in gainful employment, claims for loss of earnings and/or future earnings or earning capacity together with the claim for future nursing care as pleaded.



13. Further the plaintiff was a beneficiary of a private medical insurance cover as well as a member of NHIF which paid for and continues to care for his medical expenses. The Plaintiff also benefited from fundraising initiatives and as such the claim for special damages as made in the Plaintiff would amount to unjust enrichment.
14. That no demand and/or notice of intention to sue preceded the institution of this suit and as such Plaintiff is not entitled to an award of costs in any event.

### **REPLY TO THE DEFENDANTS STATEMENT OF DEFENSE**

15. The Plaintiff filed his reply to the Defendants defense dated 19<sup>th</sup> March, 2018 and denied all the averments of the Defendants statement of defense specifically that the said accident occurred as a result of contributory negligence on his part as particularized or in any other manner whatsoever and put the defendants to strict proof thereof.
16. That the instant suit is competent and proper in law contrary to the defendant's averments in their statement of defense.

### **COURT PROCEEDINGS**

17. Pre-trial directions were taken and the matter listed down for hearing on 21/02/2019.
18. On 21/02/2019 when this matter was set for hearing the Plaintiff failed to attend Court hence this matter was dismissed with costs.
19. On 26<sup>th</sup> February, 2019 the Plaintiff filed a Chamber Summons seeking among other orders of setting aside the orders of Hon. G. V. Odunga J issued on the 21<sup>st</sup> February, 2019 dismissing the Plaintiff's suit and the reinstate the same.
20. The said application was canvassed by way of written submissions and Ruling delivered on 6<sup>th</sup> May, 2020, the Court stated thus:-

Par 18: In the result the plaintiff's application dated 18.1.2019 is allowed in terms of prayer 1 on condition that the plaintiff pays the defendant throw away costs of Kshs 20,000/ within the next fourteen (14) days from the date hereof failing which the orders setting aside the dismissal shall lapse. It is further ordered that upon the payment of the throw away costs the plaintiff do set down the matter for hearing as a matter of priority.

21. The Plaintiff filed another application dated 10/08/2020 seeking leave to amend his Plaint as well as file further list of documents and witness statement among other orders which orders were granted and the Plaintiff filed Amended Plaint.

### **AMENDED PLAINT DATED 15/10/2020**

22. The Plaintiff further avers that by reasons of the aforesaid matters, he has suffered loss and damage which he holds the defendants liable to a cost of Kshs.17,311,148.30
23. That further to the subsequent filing of the instant suit on the 22/12/2017, the Plaintiff sought further medical attention in India and as a result thereof incurred expenses totaling to Kshs.1,261,279/- plus Travelling expenses for 3 Individuals to be produced before trial.
24. Due to the injuries sustained the Plaintiff has not been able and shall not be able to engage in gainful employment. The Plaintiff thus claims for



- a. Loss of earnings from august 2017 until judgment hereof at Khs.159,259/- a month
  - b. Loss of future earnings and or earning capacity at Kshs.159,259.00
25. Further due to the injuries sustained the Plaintiff is unable to look after himself and will require a permanent assistance and care for the rest of his life for which he now claims as follows:
- a. Some of the already expended funds for nursing as at the hearing of this suit computed at a monthly expenditure of kshs.20,000/-
  - b. Future costs of personal assistant at a monthly cost of kshs.20,000/-
  - c. Adequate provisions for hire of nursing assistance for the rest of his life.
26. That due to the said injuries sustained, the plaintiff is unable to enjoy consortium with his spouse due to injuries sustained from the accident.
27. That the plaintiffs pray for judgment against the defendants jointly and/or severally for:-
- a. General damages for pain and suffering, loss of amenities and loss of consortium together with interest thereon.
  - b. Damages for quadriplegic equipment, future medical and hospitalization and drugs and nursing as set out in par 9 and 15 of this Plaint.
  - c. Special damages for loss of earnings and loss of earning capacity as set out at paragraph 11.
  - d. Special damages of Kshs.17,311,148.30 as pleaded together with interest.
  - e. Special damages of Kshs.1,261,279/- as pleaded together with interest.
  - f. Interest on a, b, c, and d above at such rate and for such period as this Court may deem fit to grant.
  - g. Costs of this suit
  - h. Any other relief the court deems fit to grant

**AMENDED STATEMENT OF DEFENCE DATED 6/11/2020**

28. The Defendants denied all the allegations pleaded herein but admitted that an accident occurred on 28/05/2016 but denied the allegations that the same was a result of carelessness, recklessness and/or negligence on the part of the 2<sup>nd</sup> defendant as alleged.
29. The Plaintiff filed amended Reply to the Defendants statement of defense reiterated the contents of his amended plaint and put the defendants to strict proof thereof.

**EVIDENCE**

30. The plaintiff called six (6) witnesses in support of his case while the Defendants called two (2) witness in support of their case.

**PLAINTIFF'S CASE**

31. Pw.1 No. 68609 Cpl Zephania Amdany attached at Athi River police station performing traffic duties produced police abstract dated 6-12-2016 over OB No. 3 of 28/5/2016 in regard to one Shadrack Mutunga (the Plaintiff) who was involved in a road traffic accident on 28-5-2016 while being a driver



- of motor vehicle registration KBL 933X. He was driving from Nairobi towards Machakos general direction at about 5.30 am. The investigating officer was Pc Mwangangi who visited the scene and blamed driver of motor vehicle KBA 731T Isuzu bus and the same is captured in the police abstract.
32. On cross –examination by Mr. Kiplagat Advocate for the Defendants he stated that the accident led to serious injuries on the parties. That it is unusual to refer matter to insurance when there is serious injury. That if the victim is seriously injured and is responsible for the accident then matter will be referred to insurance.
  33. Pw2 Francis Kyalo Kitumba an eye witness of the said accident adopted his statement recorded/dated 30/06/2017 as his evidence. In his evidence he stated that on the particular date he saw the defendant’s motor vehicle (school bus) being driven on the wrong side of the road at the Namanga interchange along. Motor vehicles driven from Nairobi were flashing him with their headlights to signal to him that he was driving on the wrong side of the road. Then suddenly the school bus collided with an oncoming saloon car. Upon the collision the bus run over the car. The driver of the saloon car got trapped.
  34. On Cross Examination by Mr. Kiplagat he stated that he had known the accident scene for about six years. He was employed in the year 2009 and worked near the scene. He could not recall the year when the dual carriage way and interchange was officially opened to motorists. That in the year 2009 there was only one road (single). In 2016 the dual carriage way was still new. He further stated that if one is coming from Mombasa direction then on reaching the interchange he has to move to the left so as to join the dual carriage way. That he had seen motorists from Mombasa direction irregularly joining the Nairobi direction instead of moving to the left. The bus moved into the opposite road and the accident took place. There were headlights. He was at a distance of 100 meters from where the bus was and that the accident took place about ten meters from where he was. It was a head on collusion. He could not tell the speed the saloon car was making at the time. The both vehicles were being driven at high speed. He did not see the bus moving off the road. He heard both vehicle brakes being applied by the drivers.
  35. On re-examination he stated that the saloon car was on its rightful lane while the bus should have been on the other side of the road.
  36. Pw3 Shadrack Mwasya Mutunga the plaintiff herein stated that he is employed by Ketracko as an accountant. He sustained injuries in an accident where he was driving KBN 933X and was hit by motor vehicle KBA 731T. The scene was at the Namanga road interchange. He was heading to Mua Hills. It happened at 5.30 am. It was a head on collision. The other driver was driving on his lane. The distance was 100 meters and he tried to swerve. He was rushed to Shalom Hospital and later transferred to Aga Khan Hospital. An emergency surgery was done. He was in a coma for about three months. He incurred hospital expenses and produced receipts as proof. The receipts of payment from Aga Khan Hospital where he paid a total sum of Kshs. 8,357,192/= . He owed the hospital a sum of Kshs. 7,731,572/= as at 26-1-2021. PEXH 5- A hospital (in patient) final bill dated 26-1-2021 from Aga Khan Hospital. He was discharged from Aga Khan on 26-9-2016 and later one went to India for further treatment on corrective surgery. The same were done at a cost and had the receipts of payment. He underwent physiotherapy by Dr. Subbash Chanda and produced the receipts. He returned to Kenya from India in November 2020. He had also incurred other expenses in Kenya. He was accompanied to India by his brother and cousin. A flight was booked. He now have a personal assistant who washes and cleans him at a salary of Kshs. 20,000/= per month. The physiotherapist visits him at home to conduct the physiotherapy at Kshs. 3000/= per session. He was married before the accident. He was earning Kshs. 153,000/= per month before the accident. The accident has affected his career since his master’s degree program was cut short. He is now unable to get some promotion at the work place. He requires a lot of things at home such as an electric wheelchair, diapers, doctors’ visits, and physiotherapy mattress. He produced invoice and receipt from Praviatech solution. PEXH 12- A & B- sales invoice



- and delivery notes. He prays for compensation for the expenses incurred as well as the future medical expenses as pleaded. He also prays for general damages for injuries, loss of consortium as well as special damages pleaded.
37. On Cross Examined by Kiplagat he stated that he saw the bus at a distance of 100 meters away. He applied brakes but his vehicle swerved away. He could not remember on which side of the road he swerved to. There was a truck ahead of him and he was overtaking it. He still works for Ketraco. He is not aware that he is due to retire in 2050. That he is a beneficiary of a medical scheme by Ketraco and he is still a member. The medical scheme guaranteed medication by virtue of his employment. Ketraco paid some of the Aga Khan bills. He do not know his medical cover benefits limit. He could not tell how a credit note of about Kshs. 900,000/= found its way in his hospital bill at Aga Khan. He do not agree that his employer and NHIF paid the credit of Kshs. 900,000/= to Aga Khan. He was not aware that the medical provider or NHIF caters for overseas medication. He did not seek from NHIF and medical provider to settle my overseas medical bills. He had not presented the bills to the insurer. The defendant should not be made to pay when he can get refund from the insurers. He do not know that NHIF can settle the physiotherapy charges. The treatment in India had not worked well. He had received the elbow replacement and physiotherapy. He can still perform his duties as an accountant and thus he has not seriously incapacitated.
38. On Re-examination he stated that the Accident took place at Namanga interchange. That the bus had moved onto his lane and left his left lane. The collision took place on his correct lane. There were metal grills on either side of the road. His car was trapped under the bus and he was assisted by good Samaritans. The medical provider paid only as per his limit. He incurs Kshs. 36,000/= per month on physiotherapy. He was at home for four months without being paid the salary and which has not been sorted out.
39. Pw4 Dr. George A. Musebe stated that he met the plaintiff at Aga Khan Hospital in May 2016. His relationship is/was professional in nature. He examined him subsequently in the course of his treatment and did three reports. The first report is dated 28-11-2016 addressed to the plaintiff's employer. The second was to his lawyer and dated 17-8-2017 and not 17-7-2017 as earlier indicated. He established that the plaintiff sustained 100% permanent disability. He lost use of his limbs and was not able to walk and is now wheelchair bound. The doctor produced the reports.
40. On Cross Examination by Mr. Kiplagat he stated that his second report showed the plaintiff had recovered, his mental capacity was alright as patient recovered while the mobility was 100% disability. That the patient can function well on the upper right limb regarding muscle power. The patient had been walking previously and in the present state he is 100% incapacitated.
41. On re – examination he stated that the mental incapacity can be experienced as the patient is psychologically affected.
42. Pw5 Dr. Ashwin Madhiwala stated that on 25/9/2017 he saw the plaintiff herein who was then aged 28 years. He had been involved in a road accident along Mombasa road. He was then on a wheelchair and passing urine stool and in a diaper. He could not use right hand. He established that he suffered 100% disability and recommended that he undergoes further surgery in India. He was to undergo about six surgeries with each costing about 5000-6000 dollars. He also needed other intervention such as nursing, wheelchair, diapers, physiotherapy, drugs for pain and vitamins.
43. On Cross Examination by Kiplagat he stated that the patient had a catheter for passing urine and there were diapers. He established that there was incontinence regarding stool and urine. He recommended for further surgeries in India. The patient went to India where surgery was done but it did not work out well. It is not true that the recommended surgeries were not needed. He recommended for



electrical wheelchair. The physiotherapy is easily available in public hospitals. NHIF caters for costs of physiotherapy and hence the eventual costs will come down. NHIF caters for overseas surgeries to some extent.

44. Pw5 Julius Mutunga Ndasyo stated that the plaintiff herein is his son. That they incurred expenses regarding the plaintiff's admission and treatment at Aga Khan Hospital. At the time of discharge the sum incurred was Kshs. 16,745,264/=. The plaintiff had been subscribed to NHIF which paid Kshs. 468,000/= when the plaintiff was in ICU and another Kshs. 188,000/= while in HDU thus leaving a balance of Kshs. 16,088,764/=. He had so far paid Kshs. 8,357,192/=. The amount due now was Kshs. 7,731,572/=. They went to India for further treatment where they stayed for nine months and incurred other expenses on private doctors in the sum of Kshs. 2, 046,000/=. While in India more expenses were incurred such as Kshs. 2,228,069/= (admission). He gave his title deed to Agakhan Hospital as security or guarantee of payment. The said title deed is still being held there and will be released upon clearance of the fees.
45. On Cross –examination by Miss Kariuki he stated that he had already settled some of the bills. The plaintiff had been employed and had an insurance cover. The Plaintiff's employer (Ketraco) through the Insurance paid a sum of kshs.1,500,000/-. He was forced to sell some of his properties and also used up his pension and savings. He had never conducted fund raising for the bill. That part of the 8 million shillings paid came from NHIF insurer and other sources from him. The plaintiff's insurance cover limit was 1,500,000/-.

#### **Defense evidence**

46. DW.1 Jackson Muasya Kavuse stated he was the school bus driver. He had worked for 25 years. That the accident took place around 5.45 a.m. and it was still dark. He had his full lights on. He was driving the school Isuzu bus along Athi river Interchange highway and suddenly realized that he had joined the wrong lane. He had moved just a few metres and stopped so as to establish the correct route as there were diversions. He flashed my headlights to the oncoming vehicle but it was at high speed and came and hit his vehicle. He and the student passengers were not injured at all since the bus was not in motion. The plaintiff was driving at a high speed. The plaintiff ought to have seen his vehicle from far. He was not charged with a traffic offence. He blamed the plaintiff or his driver for causing the accident due to over speeding and carelessness.
47. On Cross – examination by Mr. Lorot he stated that he was on the left side as he moved towards Nairobi. He mistakenly drove onto the right lane. The accident took place on the interchange. He had moved for about 100 metres only to realize that he had entered onto a wrong lane. He had stopped the bus in the middle of the road. The small car was overtaking a certain lorry and he was perfectly in order to do so.
48. On Re-examination he stated that the road had no signs as one approached the interchange.

#### **OBSERVATIONS**

49. This Court took the liberty to outline the evidence on record as obtained from Court proceedings. The dilemma is that this Court set to write and deliver judgment did not hear the matter at any point, save for the defense. Secondly, after typed proceedings were ready and/or availed to the parties, no directions were obtained on how the matter ought to proceed. This Court proceeded and took the evidence of the doctor and the Defense closed the case and the court received written submissions on the matter. Guided by the tenets of fair hearing, natural justice and fair administrative action all enshrined in Constitution 2010 and following case-law;



50. In *Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & another* [2022] eKLR, the Court observed;

“ Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.

The twin rules of natural Justice that no man shall be a Judge in his own cause (*Nemo Judex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*) are cardinal principles of law which are fundamental in our Justice system. They are basically an embodiment of the duty to act fairly.”

51. In *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others* [2017] eKLR, The Court observed;

“ Natural justice has been described as “fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair.

Its rules have been traditionally divided into two parts: Audi alteram partem– the duty to give persons affected by a decision a reasonable opportunity to present their case. Nemo judex in cau sa sua debet esse–the duty to reach a decision untainted by bias. “Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it.”

## DISPOSITION

52. This Court takes the view that the hearing was not conducted before this Court and the evidence on record was before the Trial Court.

53. For this Court to write and deliver judgment, then directions ought to have been taken as follows;

- a. Proceedings typed proof read and availed to parties to the suit of the preceding Court proceedings.
- b. The parties and/or through advocates to attend/appear in Court for directions on how to proceed going forward; either to rely on the evidence on record; recall witness(s) or start de novo.
- c. Taking directions on documents admitted by Consent and/or those subject to challenge.
- d. Take directions on filing of written submissions served/exchanged and filed.
- e. Take dates on implementing directions as agreed by Parties/Counsel.
- f. Further Mention for Directions on a date to be agreed on by parties/Counsel through Deputy Registrar Machakos High Court.

**DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 16<sup>TH</sup> MARCH, 2023.  
(VIRTUAL /PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

In The Presence Of:



Mrs Mwangangi- For The Plaintiff

Mr. Kiplagat For The Defendants

Patrick/geoffrey – Court Assistants

Court: Further Mention On 23/04/2023

