



REPUBLIC OF KENYA



**Smith v Maleche (Civil Case E02 of 2021) [2023] KEHC 2398 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E02 OF 2021  
MW MUIGAI, J  
MARCH 16, 2023**

**BETWEEN**

**KEITH SMITH ..... PLAINTIFF**

**AND**

**LAZARUS AFWAYI MALECHE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff, by way of a Plaint dated January 11, 2021 prays for judgment against the Defendant as follows:
  - i. Special damages of 25,444.18 USD (Kshs 2,796,315.40/)
  - ii. Future medical expenses of R 279,900(Kshs 2,020,878/-
  - iii. General damages for pain and suffering and loss of amenities
  - iv. Damages for loss and diminished future earning capacity
  - v. Costs of the suit and interest at court rates.
2. The Plaintiff has pleaded that the Defendant was working for gain within the Republic of Kenya and was at all times material to this suit the registered owner of motor vehicle registration No KBB 990 M/Z 6702 Mercedes Benz.
3. The cause of action as outlined in the Plaint is that on or about July 8, 2019 at around 10.00 a.m. the Plaintiff was lawfully and carefully driving motor vehicle registration No KBS 164F RAV 4 along Nairobi- Machakos Road, at Mto Mawe Bridge when the defendant, his authorized driver, employee, servant and/or agent so carelessly, negligently and recklessly drove, managed or controlled motor vehicle registration No KBB 990 M/ZC 6702 Mercedes Benz aforesaid that he caused, permitted and/or allowed the same to veer off its lane upon ramming into another motor vehicle which was in front of it and to move directly onto the Plaintiff's on-coming traffic lane and caused a head – on collision



with the car which was being driven by the plaintiff. By reasons of the collision both the Plaintiff's said motor vehicle and the defendants said motor vehicle plunged into the river beneath and as a result the Plaintiff was occasioned severe bodily injuries, was put to loss and damage.

4. As a result of the said road traffic accident, the Plaintiff sustained serious bodily injuries and has been put to loss and damage.
5. The Defendant did not enter appearance nor file their statement of defence despite being duly served the summons and pleadings vide affidavit of service sworn by Margaret A Ngesa sworn on March 31, 2021.
6. The Plaintiff filed his request for judgment dated September 2, 2021 in Court on October 12, 2021 seeking interlocutory judgment for Kshs 2,187,193.40 with interest.

### **Court Proceedings**

7. This matter was listed down for formal proof on March 29, 2022.
8. The Plaintiff herein was represented by the firm CB Mwangela & Co Advocates.

### **Evidence**

9. Pw.1 Keith Smith (virtual platform) testified that he is an Electrical Engineer by profession. He had been working in various countries in Africa. In the period of 2018 – 2019 he was stationed in Machakos working for Snr Site Managers – KPLC Contractors of World Bank project. He was earning 9,500 US Dollars per month. He is a qualified Motor vehicle driver with 45 years' experience. While in Kenya he used to drive himself and he was familiar with the Country Driving Code. On July 8, 2019 at around 10.00 am he was heading to Nairobi to have a meeting with one of the Directors. On reaching Athi River he was hit by motor vehicle Reg No KBB 990 M/ZC 6702 Mercedes Benz and the two motor vehicles plunged into the river. Pw1 lost consciousness and Good Samaritans rescued him and took him to Mater Hospital and later transferred to Aghakan Hospital. He suffered very serious injuries. He came to know of the motor vehicle which was involved in the accident as No KBB 990 M/ZC 6702 Mercedes Benz and the owner as Lazarus Afwayi Maleche according to the police Abstract. He stayed at Aghakan Hospital for 2 weeks and was then flown to Cape Town South Africa for more specialized treatment. After the accident he had not resumed his duties as an engineer due to the severe injuries that he suffered. He had 2 seal pins/screw inserted on his backbone. At that time of the accident he was aged 62 years and he had intended to work until he reaches 67 years but he has not been able to resume working. Before the filing of this suit the Defendant was served with demand letter and the insurance company was also served with Notice that the matter would be filed. During the accident he lost many items and the list and their value is detailed and the loss was documented by the police. The Plaintiff sought judgment for the pain suffering, expenses incurred and future medical expenses, loss and diminished future capacity and costs and interest of the suit.
10. Pw2 John Beelders (online platform) testified that he is an Earnings Expert dealing with interviewing claimants undertaking career and career programmes and give analysis on the same. On October 1, 2020 he interviewed Keith Smith (the Plaintiff herein) and prepared a report on October 30, 2020 and issued the Receipt for the services rendered. According to his career history his contract was to end at the age of 68 years having a five years contract. The said contract could have been completed satisfactorily should the accident had not occurred. This findings were corroborated by the medical reports which found that the Plaintiff will not be able to earn an income in the health state he is in now and is unlikely to secure employment.



11. Pw3 Julie Valentin testified that he is a founder of Institute of Actuaries since 2012. He attended Mr Keith Smith and received the reports by Beelders and made their assessment. They looked at the earnings and compared with what he would be paid if he was not working, loss of earnings as 4:4, total loss of earnings for pain and further earnings to USD 446,000.
12. Pw4 Dr Fazal Mohd Akil Hakim testified that he is an Orthopaedic Surgeon. In 2019 he attended Keith Smith (the Plaintiff herein) and prepared a medical report dated 28/06/2022. The Plaintiff had an unstable LI spinal bone that had been compressed by the LI bone a condition that required urgent surgery and insertion of screws and removed bone that was pressing the spinal code. The surgery was successful and the Plaintiff was discharged after 3 days. He further stated that the Plaintiff can live normally. Spinal fixation will cause life inactivity on excessive lifting and long standing. He charged the Plaintiff Kshs.100,000/- for the payment and attendance to court.
13. The Plaintiff closed his case on October 17, 2022. This Court directed that written submissions be filed.
14. On December 14, 2022 this matter came up for mention to confirm compliance of the Court's order of October 17, 2022 and this Court found that the Plaintiff has complied with the order. The Defendant herein did not comply with the said Order.

### Written Submissions

#### Plaintiff Submissions dated November 21, 2022

15. On behalf of the Plaintiff there are 2 issues for determination;
  - i. Whether the plaintiff has proved his case against the defendant to the required standard.
  - ii. Whether the plaintiff is entitled to the prayers sought in the suit.
16. On the issue of whether the plaintiff has proved his case reliance was made in the in the case of *Eastern Produce (K) Ltd – Chemomi Tea Estate v Bonfas Shoya* [2018] eKLR the Court emphasized that in civil cases the burden of proof rests with the plaintiff to prove his case against the defendant on a balance of probabilities.
17. The Plaintiff relied on the doctrine of *res ipsa loquitur* to establish negligence. The doctrine was discussed in *Mary Ambeva Kadiri (Suing as the administrators of estate of Saleb Juma Kadiri (deceased)) v Country Motor Limited* [2017] eKLR, thus
 

“ the thing speaks for itself .....in some circumstances, the mere fact of an accident occurrence raises an inference of negligence the establishes a *prima facie* case.
18. The doctrine of *res ipsa loquitur* is also dependent on adequate explanation by the defendant to disprove negligence inferred upon him. in the instant case, the defendant did not appear to defend hence no adequate explanation has been given therefore be concluded as was in held in *Embu Public Road Services limited v Riimi (supra)* that the plaintiff has sufficiently discharged his burden of proving that the defendant by his negligence caused the accused as pleaded in the plaint.
19. On the issue of whether the plaintiff is entitled to the prayers sought in the suit it is submitted that as it is evident from the said exhibits, the plaintiffs claim for special damages is supported by invoices and medical bills. The reports are controverted and are therefore sufficient proof of the future medical expenses pleaded by the Plaintiff.



20. The plaintiff produced actuarial report from Munro Forensic Actuaries dated November 17, 2020 which is based on the pre and post morbid scenarios. The report entails the plaintiffs past and future loss of income based on the pre and post morbid scenarios. Factors for consideration in assessing damages for loss of earning capacity which results in a total capital value loss of income of USD 446,000.00.
21. Reliance is made in the following cases *Alpharama limited v joseph Kariuki Cebzon* [2017] eKLR and in the case of Beatrice Wangui Thairu v Hon Ezekiel Barngetuny & another NBI HCCC No 1638 of 1998.
22. Also in the case of *Mumias Sugar Company limited v Francis Wanalo* (CA KSM Civil Appeal No 91 of 2003) [2007] the Court of Appeal found;
 

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labor market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future.....”
23. It is finally submitted that it is trite that costs follow the event. The plaintiff herein has discharged his burden of not proving the defendant’s blameworthiness for the accident but has also proved his entitlement to compensation. It therefore goes that costs of the suit should be borne by the defendant.
24. That the total amount of damages claimed by the plaintiff against the defendant is Kshs 61,332,593.40.

**Determination**

25. The Court considered the pleadings, oral evidence by witnesses and written submissions on record the issue(s) emerging for determination are liability, quantum and /or future earnings if merited or not.

**Liability**

26. Liability was determined upon interlocutory judgment entered on October 15, 2021 in default of filing defense after service of summons as evidenced by Affidavit of service filed on April 12, 2021 by one Margaret A Ngesa. The matter was set down for formal proof on December 9, 2021.
27. Despite the Plaintiff’s service of summons and interlocutory judgment entry it is trite that whoever wishes the court to decide as to any right or liability whose proof depends on the existence of a set of facts must prove the existence of those facts (section 107(1) of the *Evidence Act*).
28. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Court of Appeal held that:-

“Denning J, in *Miller v 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.”

29. The Interlocutory judgment is temporary judgment and it is a final judgment after formal proof proceedings. In the case of *Paul Muiyoro T/A Spotted Zebra v Bulent Gulbahar Remax Realtors* [2016] Court of Appeal No 20 of 2014 held;

The formal proof entailed that taking of evidence in order to demonstrate the loss arising from the Respondents’ alleged breach of agreement and the justification for the reliefs sought by the Appellant. The Court at this stage of formal proof is only concerned with the extent of the loss and appropriateness of the relief sought.

30. The pleadings filed by the Plaintiff, the Complaint contains particulars of the road -traffic accident; on 8/7/2019 at 10 am the Plaintiff drove motor vehicle KBS 164F Toyota Rav 4 along Mombasa- Nairobi Road. Whilst lawfully driving the driver of Motor vehicle KBB 990 M/ZC702 Mercedes Benz Lorry veered of its lane rammed into another vehicle that was in front of the Plaintiff’s vehicle and rammed into the Plaintiff’s vehicle which plunged into river beneath. The road traffic accident caused the Plaintiff severe bodily injuries, loss and damage. He lost consciousness and later found himself in Mater Hospital and was later transferred to Aga Khan Hospital.
31. The Police Abstract of 26/7/2019 confirms a road traffic accident occurred on 8/7/2019 at 10am along Mombasa-Nairobi Road and the incident was reported at Athi River Police Station. The matter was pending under investigation. The plaintiff Keith Smith driver of motor vehicle Reg KBU 164 F was seriously injured.
32. The Police Abstract indicated Lazarus Malache as registered owner of Motor vehicle Reg KBB 990 M/ ZC 6702. The Motor Vehicle Copy of Records from NTSA confirms that as at 20/9/2019 the owner of KBB 990M was Lazarus Afwayi Maleche.
33. The totality of the evidence above presented by the Plaintiff proves on a balance of probability that on 8/7/2019 the Plaintiff herein was involved in accident with the defendant’s motor vehicle and resulted in bodily injuries, loss and damage. In the absence of any response or representation, the Plaintiff’s claim is uncontroverted .Hence liability is at 100% against the Defendant in favour of the Plaintiff.
34. In *Nandwa v Kenya Kazi Limited* [1988] eKLR, Court of Appeal (Gachuhi, JA) cited, with approval, a portion *Barkway v South Wales Transport Company Limited* [1956] 1 ALL ER 392, 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:

“The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.”



## Quantum

### General damages for pain, suffering & loss of amenities

35. The Plaintiff presented and relied on the following documents to prove injuries sustained and treatment:
- a. The P3 Form dated 18/7/2019, The plaintiff sustained back pain, grazes on the neck, abrasions on upper back severe back pain. He was investigated by Xray & MRI prior to operation to stabilize Umbar Fracture.
  - b. The Aga Khan University Hospital Medical report by Dr/ Mr Njalalle Baraza Orthopedic Surgeon of 18/7/2019 revealed,
  - c. the particulars of the Plaintiff's injuries are as follows:-
    - a. L1 burst fracture with cord compression
    - b. Abrasions on upper back
    - c. Severe back pains
    - d. Grazes on the back
    - e. Lumbar fracture
    - f. After admission an MRI was taken and surgery advised. On July 10, 2019 stabilization and fusion was done from T1 to L3 with rods and interpedicular screws and laminectomy of L1. He was then immobilized in a brace for about 2 weeks before being sent back home to Cape Town.
    - g. Present complains – severe pain in the upper and mid back hence cannot sit for long nor stand for long, difficulty getting up from a low chair or a low bed, stiffness in the neck, can only stand for less than ½ hour and even then with much pain and with the residue paid he has it's highly unlikely that he will ever return to working as an electrical engineer.
36. The evidence and Medical Report of 28/6/2022 Dr Akil Fazal PW4 who testified on October 17, 2022 observed that the Plaintiff's unstable L1 spinal bone that had a complete fracture , the spinal cord was compressed by the L1 bone,a condition that required urgent surgery, which he conducted and was successful, he put in screws and removed the bone that lay on the spinal cord. The plaintiff would recover but have instability in long standing and excessive lifting. He charges Kshs 100,000/- for attendance and medical report produced as Exhibit 32.
37. In *Odinga Jacktone Ouma v Maureen Achieng Odera* [2016] eKLR the Court held that in assessing damages, the general approach should be comparable injuries as far as possible to be compensated by comparable awards.
38. In *Lydia Moraa Mokaya v Patrick Kiarie & anor* [2021] eKLR the Plaintiff burst compression fracture L1 with cord transaction and fracture on the left humerus. She underwent operation from T11T12 to L2 & 13 and was awarded Kshs 7,000,000/-
39. In *Martha Karuu Karobia v China Zhongxing Construction Co Ltd & 2 others* [2018] eKLR the Plaintiff suffered head concussion, fracture of C4 & C5 vertebral, cervical spine 4& 5 and other injuries with complete paraplegia of the body and was awarded Kshs 5,000,000/-



40. The Plaintiff testified online on 29/3/2022 and relied on his Witness Statement as evidence and he confirmed the injuries sustained and treatment and operation he underwent. He stated today he can walk but in pain and he sleeps on his back and cannot sit/stand for long. He cannot bend and cannot do many things. He has inserted 2 seal pins and screws in the backbone during the operation he underwent.
41. The Plaintiff suffered pain suffering and loss of amenities, from the day of the accident, he was plunged to the river he was unconscious and was saved by Good Samaritans and he found himself in hospital. He underwent treatment and operation. Later he travelled back to South Africa for further treatment. These circumstances depict pain and suffering and loss of amenities that warrant global the sum of Kshs 3,000,000/=.

### Special damages

42. It was held by the Court of Appeal in *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716 as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

43. The Plaintiff sought special damages as follows as pleaded in the Plaintiff;

- a. P3 Form ..... 9.3 USD
- b. Official Search of M/V KBB 990M/ZC6702 .. Kshs 550/-
- c. Lost Nike Spectacles.....399.37 USD
- d. Lost HP laptop.....1141.24USD
- e. Medical bills at AgaKhan hospital.....21,454 USD
- f. Hilton Garden Inn Bill.....Kshs 22,940
- g. Medical Bill by Centric Radiology..... 399.19USD
- h. Flight ticket to South Africa.....625 .54USD
- i. Radiology Bill.....57.22 USD
- j. Earnings Report.....1141.56 USD

44. The Plaintiff annexed a List of Documents to prove the claims expenses and gadgets as follows;

1. Invoice dated 5/03/2018 by Outsource Support Ltd for lost HP probook laptop
2. Medical examination Report, P3 form dated 8/07/2019
3. Motor claim form dated July 11, 2019 filed by LUKS Insurance Agency to Occidental Insurance Co ltd.
4. Copy of passenger medical clearance (PMC) from dated July 19, 2019
5. Copy of visa receipt dated July 20, 2019



6. Copy bill dated July 21, 2019 by Hilton Garden Inn bill
7. Copy of payment receipt dated July 21, 2019 issued by Hilton Garden Inn
8. Copy of invoice payment dated July 21, 2019 for flight ticket to south Africa
9. Police Abstract report dated July 26, 2019 for lost property (OB No 59/26/7/19).
10. Police abstract report
11. Photographs of the plaintiff's vehicle
12. Medical report of July 18, 2019 by Dr Njalalle Baraza of the Aga Khan University Hospital.
13. Invoice receipt dated 6/08/2019 by Spec Savers
14. Invoice receipt dated August 30, 2019 by Centric Radiology.
15. Motor vehicle copy of Records dated 20/09/2019 issued by National Transport and Safety Authority (NTSA)
16. Invoice paid on September 20, 2019 to NTSA
17. Copy of the plaintiffs national Identity
18. Copy of certificate of Insurance Sticker for motor vehicle Reg No KBS 164 F issued by Occidental Insurance company
19. Copy of certificate of registration for motor vehicle Reg KBS F 164 station wagon registered in the name of Stephen Njai Mutarura.
20. Medical report verification dated March 18, 2020 by Dr Hartley Tharbit.
21. Statutory notice dated March 27, 2020 served upon CIC General Insurance.
22. Certificate of posting the statutory notice to insurance
23. Demand letter dated March 27, 2020
24. Certificate of posting the demand letter dated April 14, 2020
25. Medical report dated May 18, 2020 by Dr. Rael Jaffe
26. Hospital bill dated July 18, 2020 by Aga Khan University Hospital
27. Occupational Therapist report dated 7/09/2020 by Aneeqa Hassan
28. Earnings report dated October 30, 2020 by Analytico
29. Invoice dated October 30, 2020 for Earnings report by Analytico
30. Invoice dated October 30, 2020 for earnings report by Analytico
31. Accrual report dated November 17, 2020 by Munro Actuaries the receipts , invoices, documents depict prices, payments in different currencies, Kenya Shilling, South African Rand and US dollar. Since the claim and proceedings are conducted in Kenya, this shall consider the claim pleaded and proved as a lump sum in Kenya Shillings.

A figure of Ksh 2,000,000/- is reasonable as pleaded and proved by documents annexed to Plaintiff's bundle.



## Loss of earnings/loss of earning capacity

45. Regarding the loss of earning capacity, it was submitted on behalf of the Defendant that the Plaintiff has not shown that she lost her employment or that her chances of gaining employment in the future were diminished as a result of the injuries sustained from the accident. The Defendant has urged the court to disallow the claim.
46. Loss of earning capacity is described in *Butler v Butler* (1984) KLR 225 as follows:
- “A person’s loss of capacity occurs when as a result of an injury, his chances in the future of any work in the labour market or work, as well as paid before the accident are lessened by his injury.”
47. The Court of Appeal at Mombasa in *Tile & Carpet Center Warehouse v Okello* (Civil Appeal 74 of 2019) [2022] KECA 5 (KLR) (4 February 2022) held:-
- “20. Loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. See Cecilia W Mwangi & another v Ruth W Mwangi [1997] eKLR. In S J v Francesco Di Nello & another [2015] eKLR, this Court held that: 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 Llyod’s Law Reports 40 at pg 14 wherein Lord Denning MR 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.”
48. In Court through online proceedings the evidence from PW2 Earnings Expert & PW3 Actuary gave expert opinion on the projected earnings of the Plaintiff in light of assessments they made projections and produced Reports.
49. The Plaintiff is an electrical engineer but no documents of his qualifications, employment or consultancy and/or earnings were produced to confirm the employment or business and earnings and thereafter inform the assessment of the loss of earnings and/or earning capacity.
50. This court appreciates that the Plaintiff’s work entails outdoor working environment. From the medical reports presented, more importantly, the medical report of 18/5/2020, the Plaintiff was/is an Electrical engineer and at the time was working on a project in Kenya both administrative, supervisory and onsite inspections. After the accident, injuries, operation and treatment he was not able to return to work. It is possible movement would be hampered by the injuries sustained from the accident. However, the extent and impact of the Plaintiff’s medical/health status after the accident, it is not possible to assess and/or evaluate in the absence of documents to prove the claim prepared by the experts vide reports presented.
51. Therefore, this Court shall award a global conservative figure of Ksh 1,000,000/-



### **Current & future medical expenses**

52. The medical reports and plaintiff's pleadings deposed the future Medical expenses envisaged to manage the Plaintiff's condition in the future. Apart from future possible spinal injury and operation which prognosis was /is not given by the doctors, this Court shall not award the item, as there is no medical proposal of such possibility and the Plaintiff is mobile not contained in a wheelchair or in bedridden, he may not require spinal injury operation into the future.
53. The plaintiff walks though with pain and cannot stand for long or engage in heavy lifting. The rest of the items proposed by the doctors as outlined in their reports are reasonable. A figure of Ksh 3,000,000/- which will cater for current and future medical expenses.
- i. Physiotherapy on back & neck
  - ii. cost of medication/drugs
  - iii. Cost of removal of rods and screws
  - iv. Cost of medical consultation by an Occupational Therapist/Industrial Psychologist

### **Disposition**

54. The plaintiff pleaded and proved the following claims
- i. General damages pain & suffering & loss of amenities.....Kshs 3,000,000/-
  - ii. Special damages..... Kshs 2,000,000/-
  - iii. Loss of earnings/earning capacity..... KShs 1,000,000/-
  - iv. Current & future medical expenses.....Kshs 2,000,000/-
  - v. With interest and costs of the suit against the defendant for the plaintiff.

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

**MW MUIGAI**

**JUDGE**

