



REPUBLIC OF KENYA



**KENYA LAW**  
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**Schultz v Wachira & another; Kamau (Third party) (Civil Case 857 of 2005)  
[2024] KEHC 12651 (KLR) (Civ) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12651 (KLR)

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

**CIVIL  
CIVIL CASE 857 OF 2005**

**AN ONGERI, J**

**OCTOBER 18, 2024**

**BETWEEN**

**JOAN MARIE SCHULTZ ..... PLAINTIFF**

**AND**

**GEORGE MBURU WACHIRA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH NGIGE MACHAGA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JAMES MUNGAI KAMAU ..... THIRD PARTY**

**JUDGMENT**

1. The plaintiff in this case, Joan Marie Schultz (hereafter referred to as the plaintiff only) filed this suit vide plaint dated 2/1/2005 against George Mburu Wachira and Joseph Ngige Machaga (hereafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> defendants) seeking the following remedies;
  - i. General damages for pain, suffering and loss of amenities.
  - ii. Special damages
  - iii. Damages for loss of income/earnings and/or reduced earning capacity.
  - iv. Costs of the suit.
  - v. Interest on (i) and (ii) above
2. The cause of action arose out of a road traffic accident (RTA) which occurred on 12/7/2002 along Peponi Road Nairobi involved motor vehicle registration no. KAP xxxD in which the plaintiff was travelling and motor vehicle registration KWT xxx.



3. The plaintiff averred in the plaint dated 2/1/2005 that on or about 12<sup>th</sup> July 2002 at 5.15pm or thereabouts she was lawfully travelling as a passenger in the 1<sup>st</sup> Defendant's motor vehicle registration number KAP xxxD along Peponi Road, Nairobi when the 2<sup>nd</sup> Defendant being an authorised driver, agent and/or servant of the 1<sup>st</sup> Defendant and in the course and within the scope of his employment with the 1<sup>st</sup> Defendant so negligently, carelessly and recklessly drove, managed and/or controlled the 1<sup>st</sup> Defendant's said motor vehicle registration number KAP xxxD that he caused and/or permitted the said motor vehicle to collide into another motor vehicle registration number KWT xxx as a result of which the Plaintiff sustained severe personal injuries.
4. The particulars of negligence of the second defendant for which the 1<sup>st</sup> defendant is vicariously liable are as follows;
  - a. Driving at a speed which was too fast and excessive in the circumstances.
  - b. Driving without due care and attention.
  - c. Failing to keep any or any proper look-out
  - d. Failing to have any or any sufficient regard for the passenger in motor vehicle registration number KAP xxxD and more so the Plaintiff.
  - e. Failing to exercise or maintain any or proper or effective control of motor vehicle registration number KAP xxxD so as to avoid colliding into motor vehicle registration number KWT xxx.
  - f. Driving and straying from his lane and on to the lane on the oncoming motor vehicles and thereby colliding into motor vehicle registration number KWT xxx.
  - g. Driving on the wrong side of the road.
  - h. Failing to slow down, brake, stop, swerve or in any other way control motor vehicle registration number KAP xxxD in order to avoid the collision with motor vehicle registration number KWT xxx.
  - i. Failing to obey the traffic Rules and Regulations
5. By reason of the matters aforesaid the Plaintiff sustained severe bodily injuries and has suffered loss and damage and holds the Defendants liable the 1<sup>st</sup> Defendant being vicariously liable for the acts and/or omissions of the 2<sup>nd</sup> Defendant.
6. The particulars of injuries to the plaintiff are as follows;
  - a) Fracture of the left clavicle with gross displacement requiring treatment by open reduction and internal fixation of a seven (7) hole fragment plate and physiotherapy for a period of over one year.
  - b) Multiple extensive and severe soft tissue injuries and abrasions over the chest, left shoulder, right abdomen, right leg and knee.
  - c) Massive papilloedema with hemorrhages around the eye disc leading to multiple scotomous and central scotoma due to damage to nerve fibres.
7. The Plaintiff now suffers from the following conditions:-
  - i. Purtschers retinopathy
  - ii. Benign intracranial hypertension



- iii. Inability to read and concentrate for long period of time
  - iv. Difficulties sleeping on her left side.
  - v. Inability to continue with her consultancy job.
  - vi. She experiences generalized body aches and pain
  - vii. Weakness in the left arm.
  - viii. Permanent disability assessed at 15%.
  - ix. Inability to drive in the dark.
  - x. Phobia of being driven in a car
  - xi. May require the removal of the metal plate inserted to treat the fracture clavicle.
  - xii. Unable to read some digits.
  - xiii. Blind spots.
  - xiv. Requires continued physiotherapy
  - xv. Suffers post traumatic disorder.
8. Particulars of special damages  
 Hospital admission charges US Dollars 5,267.47  
 Surgery US Dollars 6,081  
 Physiotherapy US Dollars 1,382.73  
 X-rays US Dollars 1,033.04  
 Medical bills US Dollars 5,537.48  
 Trauma counselling US Dollars 1,580.00  
 Airfare two one way tickets from South Africa US Dollars 1,888.00  
 Subsistence in Johannesburg US Dollars 300.00  
 Airfare to US to determine if needed to relocate to US US Dollars 1685.00  
 Hotel expenses when staying near Doctors for appointments US Dollars 690.00  
 Transport to and from doctors, and, attending medical tests US Dollars 2,400.00  
 Medical reports Kshs.15,000.00  
 Police Abstract Kshs.100.00  
 Loss of income/earnings for a period of 3 1/2 years at US Dollars 50,000.00 per year- US Dollars 175,000.00  
 Cost of eye glasses US Dollars 1,000.00  
 Total US Dollars 197,824.53 or its equivalent in Kenya
9. The Plaintiff stated that at the time of the accident she was aged 52 years, and was a management consultant with the World Bank on short term contracts earning US Dollars 50,000.00 per annum or thereabouts which would have continued for 3½ more years and by reason of the severe injuries she sustained she was unable to resume her work due to disability and she has therefore suffered loss of income/earnings for the duration that she would have taken to complete her said engagement amounting to US Dollars 175,000.00
10. Further to the matters aforesaid and as a result of the disability arising out of the said accident the Plaintiff has suffered a reduced earning capacity and she claims damages for reduced earning capacity.
11. Further to the matters aforesaid the Plaintiff may require to undergo medical surgery for the removal of the metal plate lying in situ which would cost US Dollars 5,000 or such amount as the Court



- deems necessary to undertake the procedure in Kenya. In addition, the Plaintiff continues with medical treatment thereby incurring future medical costs which she will disclose at the hearing hereof and claims the same as general and/or special damages
12. The 1<sup>st</sup> defendant filed a defence dated 4/8/2006 denying the plaintiff's claim.
  13. The plaintiff called Dr. Onkar Singh Dograas PW 1. He said on 12/7/2002 in the evening, he received a call in the evening that the plaintiff had been involved in a road traffic accident along Peponi road.
  14. PW 1 rushed to the scene of the road traffic accident where he found the plaintiff who had suffered severe injuries.
  15. PW 1 said the plaintiff was admitted at Nairobi hospital. She sustained the following injuries
    - i. Momentary loss of consciousness
    - ii. Fracture of the clavicle with gross displacement
    - iii. Total loss of vision in both eyes.
    - iv. Multiple, extensive soft tissue injuries and abrasions over the chest, left shoulder, right abdomen, right leg and knee.
  16. PW 1 said the plaintiff was attended by the following consultants at Nairobi Hospital
    - i. Mr. J. Munene – Cardiothoracic surgeon
    - ii. Mr. R. Gobil – Consultant ophthalmologist surgeon
    - iii. Prof. Gaku – Consultant Orthopedic surgeon
    - iv. Dr. S. Mwinzi – consultant neurologist
  17. The plaintiff called 4 witnesses including herself.
  18. PW 1 produced his medical report dated 23/6/2003. He said in the report that the plaintiff suffered loss of vision due to severe contusion injury (purchers retinopathy).
  19. The plaintiff also developed benign intracranial hypertension.
  20. The plaintiff was evacuated to South Africa for further management where the clavicular fracture was plated.
  21. She also developed essential systematic hypertension while in South Africa and commenced treatment.
  22. PW 1 said that the physical and mental disabilities which are as a consequence of the accident have severely limited her ability to perform her duties as management consultant and reduced her chances of full-time employment in the foreseeable future.
  23. PW 2, Dr. Kamau Marigathe police surgeon produced a P3 form dated 11/3/2003 which was filled by his predecessor Dr. Zephania Kamau who is now deceased.
  24. PW 3, no. 83823 P.C Susan Negna Okubo attached to Parklands police station produced the police abstract dated 16/7/2002.
  25. PW 3 said the accident occurred on 12/7/2002 involving motor vehicle KWT xxx Nissan Sunny and KAP xxxD Toyota along Peponi Road in Nairobi.
  26. The plaintiff testified as PW 4. She said she used to work with World Bank.



27. PW 4 adopted her witness statement dated 9/5/2019 as her evidence in chief.
28. PW 4 said she was travelling in motor vehicle registration no. KAP xxxD owned by the 1<sup>st</sup> defendant while being driven by the 2<sup>nd</sup> defendant.
29. She said the 2<sup>nd</sup> defendant seemed to have passed out with his foot slammed on the accelerator and the motor vehicle moved at a high speed and collided with motor vehicle registration no. KWT xxx.
30. PW 4 said she was taken to a nearby house where she managed to call Dr. Dogra who came and took her to Nairobi Hospital.
31. PW 4 said she suffered loss of vision and fracture of the left clavicle. She was later evacuated to Johannesburg in South Africa where she was admitted in ICU.
32. PW 4 said at the time of the accident she was a consultant with world bank and she was unable to continue with her business.
33. She returned to the USA where she was running a small business called JMS Ventures Inc. importing handmade Kenyan collection but she was swindled by the person she hired to help her to run the business.
34. She is now seeking compensation for pain and suffering and loss of earning capacity.
35. The 1<sup>st</sup> defendant testified as DW 1. He said he works with World Bank where the plaintiff used to work.
36. DW 1 said on 12/7/2002, he gave his motor vehicle registration no. KAP xxxD to the 2<sup>nd</sup> defendant to take the plaintiff to see friends and return the vehicle to him in the evening.
37. DW 1 said he was called in the evening and told that the motor vehicle had been involved in an accident.
38. DW 1 said he went to the scene and found the motor vehicle had been involved in an accident with motor vehicle registration no. KWT xxx. He found the two motor vehicles being towed.
39. DW 1 said the plaintiff did not pay him to use his motor vehicle.
40. In cross examination DW 1 said the 2<sup>nd</sup> defendant was his authorized driver.
41. DW 1 also said his motor vehicle was written off as a result of the accident and he was paid.
42. He said he did not find the plaintiff at the scene. He said he met her at Nairobi hospital.
43. DW 1 further said that the plaintiff partially lost her eye sight. He said her family asked him to accompany her to South Africa before they joined them there.
44. The parties filed submissions which I have duly considered. The plaintiff submitted that she proved that as at 12/7/2002 when the subject accident occurred the 1<sup>st</sup> defendant was the owner of the motor vehicle registration number KAP xxxD. The plaintiff indicated that on the said date she intended to attend a friend's function and the 2<sup>nd</sup> defendant being a colleague at work offered to have his driver drop her there and to return the vehicle back to him.
45. The plaintiff never reached the party as the subject accident occurred. PW3 testified and confirmed that the driver was the 2<sup>nd</sup> defendant who also admitted the same. Default judgement however, was entered against the 2<sup>nd</sup> defendant on 28/3/2007 as no defence was filed on his behalf.
46. The plaintiff submitted that she testified that on the material day she was a lawful passenger in motor vehicle KAP xxxD that was being driven by the 2<sup>nd</sup> defendant. As they were heading towards Sarit



- Centre the 2<sup>nd</sup> defendant appeared to have passed out as his eyes were rolled upwards and his foot slammed into the acceleration pedal. As a result, the motor vehicle sped in the direction of oncoming vehicles and it collided with an oncoming motor vehicle KWT 068.
47. It was the plaintiff's argument that she could not have contributed or caused the accident as the 2<sup>nd</sup> defendant alone could have explained what happened to him. The subject accident occurred as a result of negligence on the part of the 2<sup>nd</sup> defendant for which the 1<sup>st</sup> defendant is vicariously liable.
48. The plaintiff submitted that she suffered injuries, loss and damage as a result of the said accident. PW1 Dr. Dodra tendered evidence his medical report dated 23/6/2003 where he confirmed that the plaintiff suffered the following injuries; momentary loss of consciousness, fracture of the left clavicle with gross displacement, total loss of vision in both eyes and multiple extensive soft tissue injuries and abrasions over the chest, left shoulder, right abdomen, right leg and knee. In the course of treatment PW1 indicated that the plaintiff developed Benign Intracranial and Systemic Hypertension.
49. PW1 testified that because of the plaintiff injury to the eyes she was prescribed for spectacle whose cost averaged Kshs. 60,000-70,000. The removal of the plate implanted in the plaintiff's shoulder required Kshs. 100,000 and Kshs. 150,000 and he charged Kshs. 20,000 for attending court. Dr Kamau (deceased) who completed the P# form classified the injuries sustained as grievous harm and charged Kshs. 10,000 for attending court.
50. The plaintiff submitted further that she remained in ICU for 10 days while in South Africa and that the fractured shoulder was not attended to while she was there. The plaintiff indicated that her problems arising from the accident resolved about 5 years ago meaning that she had endured discomfort for 17 years and as a result she was permanently disabled. On the general damages the plaintiff proposed consequently a sum of Kshs. 5,000,000 as adequate compensation.
51. In further support the plaintiff cited the following cases among others;
- a. Garissa HCCC No. 1 of 2018 [Abdi Werdi Abdulabi v. James Royo Mungatia & Anor](#)  
The Plaintiff therein sustained the following injuries:-
- a. multiple fractures on the right lower and upper limb,
  - b. Amputation of the right lower limb,
  - c. Multiple fractures and bruises on the upper right limb leading to affixation of two metal plates,
  - d. Injury to the right eye leading to impaired vision,
  - e. Compressed burst L4 vertebra with ratro pulsed fracture fragments,
  - f. Deep bruising on the chest due to dragging on tarmac,
  - g. Head trauma injuries leading to concussion.
- The court on 6/11/2019 which is over 4 years ago awarded the Plaintiff therein Kshs.3,500,000 as general damages.
- b. Kiambu HCCC No. 12 of 2016 [Christine Mwigina Akonya v. Samuel Kairu Chege](#)  
The injuries sustained here were:-
- a. Fracture of the right femur,



- b. Fracture of the ribs 3 — 6,
- c. Pain in the right side of the chest and the right thigh,
- d. Persistent pain in the right knee.

The Hon. Justice Ngugi on 21/12/2017 which is over 6 years ago assessed general damages at Kshs.4,000,000.

52. On damages under loss of income and reduce earning capacity the plaintiff submitted that at the time she was working as a management consultant for the World Bank Group earning approximately US Dollars 50,000 per annum and has since produced evidence as proof of the same. The plaintiff proved that she was in the employment record of the world bank for the period of 2002-2005 and therefore under the head of loss of income the plaintiff proposed USD 175,000 as lost income
53. On reduced earning capacity the plaintiff submitted that her life and specifically economic livelihood was altered for good. She was unable to continue with the world bank group as a management consultant. The plaintiff was also unable to run her business JMS Ventures Inc and was compelled to hire someone to manage her day-to-day business. Unfortunately, the person she hired embezzled funds from her company and some customers.
54. At the time of the accident the plaintiff was aged 52 years and had a balance of 3 ½ years on her management contract which would have taken upto the age of 55 ½ years. Under this head the plaintiff prayed that damages be computed as follows;  $15/100 \times 50,000 \times 12 \times 4 \frac{1}{2} \text{ years} = 405,000 \text{ USD}$
55. On special damages the plaintiff submitted that she could not keep records as she was under treatment. She was alone in Kenya and could not keep track of the treatment record as she did not anticipate that the case would end up in court. The plaintiff invited the court to consider that the plaintiff has been undergoing physiotherapy for over 10 years and assign the same a reasonable cost.
56. The 1<sup>st</sup> defendant alternatively submitted that based on the evidence adduced by the plaintiff was not sufficient to prove liability on the part of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant argued that the 2<sup>nd</sup> defendant and the third party were equally liable for causing the accident. The plaintiff submitted her version of the accident and it was unfortunate that the driver for both cars did not appear in this court to testify on how the accident occurred.
57. The 1<sup>st</sup> defendant argued that he should not be held liable for the acts of the 2<sup>nd</sup> defendant as he was not his driver. That further there was no confirmation from a concluded investigation by the court who was to be blamed for the said accident.
58. On quantum the 1<sup>st</sup> defendant argued on general damages that the plaintiff failed to call evidence in support of her 15% disability. PW1 and PW2 produced medical reports and both confirmed they had not arrived at a permanent disability. PW4 admitted that most of the conditions listed had completely disappeared. The 1<sup>st</sup> defendant proposed Kshs. 800,000 under this head.
59. In support, the 1<sup>st</sup> defendant cited among others; *Bethwel Mutai v. China Road & Bridge Corporation* [2008] eKLR, where the court awarded the sum of Kshs.800,000 as general damages where the plaintiff sustained Fracture of the Left Clavicle, Fracture of the Right Humerus and Fracture of the Right Femur.
60. On special damages the 1<sup>st</sup> defendant submitted that the plaintiff failed to meet the test under this head. The plaintiff in this matter has not produced any receipt in support of the special damages sought herein and further has admitted the same. The plaintiff had ample time of more than 21 years to request



for the receipts and produce the same in court. The 1<sup>st</sup> defendant argued that special damages must be specifically plead and proved and in this matter there was no proof presented.

61. On damages for loss of income/earning and reduced earning capacity the 1<sup>st</sup> defendant argued that the plaintiff did not submit any evidence regarding her remuneration or her age or retirement age and having conceded that she continues to earn her full salary. There is nothing upon which the court can calculate her diminished earning capacity and any attempt to make a calculation in her favor would be based on mere speculation.
62. It is the duty of the plaintiff to prove her case to the required standard in civil cases which is on a balance of probabilities.
63. The issues for determination in this case are as follows;
  - i. Whether the 2<sup>nd</sup> defendant was liable in negligence for the accident in which the plaintiff was injured.
  - ii. Whether the 1<sup>st</sup> defendant is vicariously liable in negligence for the accident.
  - iii. Whether the defendants are liable to compensate the plaintiff for injuries she sustained.
  - iv. Who pays the costs of this suit?
64. On the issue as to whether the plaintiff proved her case to the required standard, I find that the plaintiff was an eye witness to the accident.
65. The 1<sup>st</sup> defendant was not present when the accident occurred and the 2<sup>nd</sup> defendant who was driving the motor vehicle has never been traced since the accident occurred.
66. The evidence by the plaintiff has not been controverted. The plaintiff who testified as PW 4 said the 1<sup>st</sup> defendant gave the 2<sup>nd</sup> defendant his motor vehicle registration no. KAP xxxD Toyota to take her to see friends.
67. PW 4 said the driver (the 2<sup>nd</sup> defendant) appeared to pass out while his foot had slammed the accelerator and the motor vehicle lost control and hit motor vehicle registration no. KWT xxx.
68. I find that there is evidence that the accident was caused by the sole negligence of the 2<sup>nd</sup> defendant.
69. I find that the 1<sup>st</sup> defendant is vicariously liable for the negligence of the 2<sup>nd</sup> defendant.
70. The 1<sup>st</sup> defendant said the 2<sup>nd</sup> defendant was not his regular driver but he used to give him work to drive the motor vehicle from time to time.
71. There is no evidence that the plaintiff contributed to the accident in any way.
72. The plaintiff was a passenger in the motor vehicle. I find the defendants 100% liable in negligence for the accident.
73. On the issue of quantum of damages, I find that it is not in dispute that the plaintiff was a consultant with World Bank at the time.
74. There is undisputed evidence that the plaintiff suffered serious injuries and



75. In the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR where the court stated as follows;

“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 the 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 labour 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. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability”.

76. I have also considered the case of *Butler v Butler* [1984] KLR 225 at 232 Kneller JA stated as follows;

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in *Fairely v John Thompson (Design & Contracting Division)Ltd* [1973] 2 Lloyd’s Rep 40,42(CA)....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.”

77. There is evidence that the plaintiff was unable to continue with the world bank group as a management consultant. The plaintiff was also unable to run her business JMS Ventures Inc and was compelled to hire someone to manage her day-to-day business. Unfortunately, the person she hired embezzled funds from her company and some customers.

78. The plaintiff not only lost earning capacity but also actual future earnings.

79. On the issue of special damages, the plaintiff submitted that she could not keep records as she was under treatment. She was alone in Kenya and could not keep track of the treatment record as she did not anticipate that the case would end up in court. The plaintiff invited the court to consider that the plaintiff has been undergoing physiotherapy for over 10 years and assign the same a reasonable cost.

80. The law requires that special damages be specifically pleaded and proved. I find that the plaintiff did not produce receipts in support of the special claims and I award none.

81. I have considered the submissions and the authorities relied on by both parties.

82. I award her damages as follows;

Liability 100%

General damages for pain & suffering Kshs 5,000,000/=

Cost of eye glasses (129,000/=) USD 1,000

Loss of earning capacity Kshs 5,000,000



83. Judgment be and is hereby entered in favour of the plaintiff against the defendants jointly and severally in the sum of Kshs:10,000,000/= and USD 1,000 plus costs and interest in respect of special damages from the date of filing suit until payment in full and in respect of general damages from the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant

.....for the Third Party

