



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL SUIT NO. 1 OF 2018

ABDI WERDI ABDULAHI.....PLAINTIFF

VERSUS

JAMES ROYO MUNGATIA.....1ST DEFENDANT

JOSEPH MWONGELA MUNGANA.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 25th July, 2018, the plaintiff sued the defendants herein claiming for general damages for pain, suffering and loss of amenities, special damages of Kshs. 20, 280, 400/= compensation for the cost of future medical treatment, purchase, expenses and maintenance of wheel chair, loss of income and actual income, compensation for the cost of nurse aid and costs of the suit, interest and any other relief that the court may deem fit to grant.

2. The parties filed a consent on liability on 20th May, 2019 where they agreed that 20% liability be apportioned to the Plaintiff and 80% apportioned to the defendants .It therefore follows that this court will solely deal with the issue of assessing quantum as the issue of liability has been settled in the ratio of 80% to 20% in favour of the plaintiff against the defendant.

3. The plaintiff's claim against the defendant arises from an alleged road accident which occurred on or about the 25th April, 2018 involving the Motor cycle Registration No. GKB 455P rode by the plaintiff and Motor Vehicle Registration No. KCP 221D driven by the 1st Defendant and registered in the name of the 2nd Defendant.

4. The plaintiff alleges that he was riding the subject motor cycle on Miraa Road in Garissa town and was awaiting to join Kismayu Road in Garissa Town and the 1st Defendant was driving Motor Vehicle Registration KCP 221D from Madogo heading towards the direction of Garissa County Referral Hospital.

5. As a result of the said accident the Plaintiff sustained grievous injuries to his body, the same has been particularized as follows:-

- 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 retro pulsed fracture fragments
- f) Deep bruising on the chest due to dragging on tarmac
- g) Head trauma injuries leading to concussion

6. The Plaintiff claims the following special damages:-

i. Medical Expenses

a) Medical Report	Kshs. 2000
b) Hospital Fee	Kshs. 120,000
c) Affixation of Metal plates	Kshs 230,000
d) Medicine	Kshs. 450,000
e) Amputation	Kshs. 120,000
f) Police Abstract	Kshs. 2000
TOTAL	Kshs. 924,000

ii. Future Medical Expenses

a) Physiotherapy Sessions	300*3*4*12*42	Kshs. 1, 814,400
b) Motorized when Chair	350,000*3	Kshs. 1,050,000
c) Prosthetic/Artificial Limb	260,000*14	Ksh 3,640,000
d) Clutches	5000*3*12*12	Kshs. 2,160,000
e) Wound Dressing	250*3*4*12	Kshs. 36,000
Total		Kshs. 8,700,400

iii. Nurse Aid

400*30*12*10	Kshs. 1, 440,000
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iv. Loss of Earnings and Earning capacity

24000*12*32	Kshs. 9,216,000
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7. As noted above the issue of liability has already been agreed upon by consent, therefore this court shall not delve into the specific acts of negligence attributed to the defendant, his agent, servant and or driver of the accident motor vehicle. Both parties filed their respective submissions

Plaintiff Submissions

8. The plaintiffs filed his written submissions on 17th June, 2019 where he addressed the following claims; general damages for pain and suffering, Principles governing the assessment of damages, future medical expenses and special damages.

9. The first issue addressed by the plaintiff is the claim for **general damages for pain and suffering**, where they submitted that the Plaintiff sustained severe injuries which have greatly affected his quality of life and that of his family and therefore seeks reasonable compensation. In support of this the Plaintiff relies on the Medical report from Garissa County Referral Hospital and Nairobi East Hospital which states that the plaintiff suffered Multiple trauma with fractured right femur: traumatic amputation of right tibia/fibula.

10. The plaintiff described the situation after the accident as follows that he was unconscious, very seek looking, multiple bruises with swollen eyes, internal bleeding nose and mouth. The right thigh deformed due to a fractured femur and the right leg crushed. And that as a result he was admitted to the ICU for 3 days, where his femur/tibia was amputated and needed skin grafting. In this regard the plaintiff submits that he suffered great pain and suffering as supported by the medical report.

11. The second issue addressed by the Plaintiff is on the **Principles governing the assessment of damages**. In this respect the Plaintiff submitted that the damages being sought as general damages are not punitive in any way but only meant to compensate the plaintiff. In this they relied on the following authorities **Cecilia W. Mwangi & Another v Ruth W. Mwangi (1997) eKLR**, **Kim Phoo Choo V Camden & Islington Area Health Authority (1979) 1 ALL ER 332** and **Halsbury’s Laws of England** where the court noted in this regard that money cannot renew a physical frame that has been shattered but courts should endeavor to compensate a plaintiff fairly and reasonably but not punish the defendant and that comparable injuries be compensated by comparable awards.

12. In addition, the Plaintiff went ahead and made reference to various authorities where the court awarded general damages for pain and suffering. They include the case of **Bernard Mutisya Wambua vs Swaleh Hashil(2017)e KLR** where the court awarded 6,500,000/= for 80% paralysis of the right Limb, **Beatrice Anyango Okoth v Rift Valley Railways(Kenya) Limited & Another(2018) eKLR** where the court awarded damages of Kshs. 6,000,000/= where the injuries suffered exposed the plaintiff to grave and debilitating life-long Physical

disability, **Charlene Njeri Kuria vs Gitu Geoffrey and Another (2016) eKLR** where the court awarded 5,000,000/= for 60% disability with partial paralysis of the lower limbs and **Emmanuel Kombe Nzai vs Basari Company Limited & Another(2017)eKLR** where the court awarded 6,000,000/= to a plaintiff who suffered 80% disability with paralysis of the lower limbs.

13. In sum the plaintiff submits that based on the above the plaintiff ought to be awarded Kshs. 8,000,000/= in view of the fact that the sum of Kshs. 6,500,000/= was awarded before 2019 factoring in inflation.

14. The third issue addressed by the Plaintiff in their submission is on **Loss of earning Capacity**. In this regard the plaintiff submitted that being a motor cycle rider employed by the government of Kenya and having sustained serious injuries and loss of right lower limb, he cannot appropriately engage in the career that he properly trained for. In addition, he submits that the head injuries sustained may make him unable to carry out desk duties due to strains and the requirement to be taken care by a nurse due to wounds on his stumps.

15. The plaintiff additionally submits that the prayer for loss of earning capacity is made on the basis of plaintiff injuries will lessens his chances for future work in the labour market. In this the plaintiff relies in the following authorities **Coast Bus (MSA) Ltd Vs Harrison Kenga Hare (2017) eKLR**, **Nicholus Njue Njuki vs Eliud Mbugua Kahuro (2014)eKLR**, **Alex Otieno Amolo & Another vs Hayer Bishan Singh & Sons Limited (2016) eKLR** and **Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Another(2014) eKLR**.

16. In this respect the plaintiff submitted that he was earning a salary of Kshs. 24,000/=, he has 6 children, he is aged 38 years and that retirement age for drivers is 70 years and took a multiplier of 32 and where he calculated his claim under this as follows $24,230 * 12 * 32 = \text{Kshs. } 9,304,320/=$ as compensation for loss of earnings.

17. The Fourth Issue addressed by the Plaintiff is the issue of **future medical expenses**. In this regard the plaintiff submitted that he is 38 years old and the average life expectancy is 70 years and that he is expected to live for another 32 years. He considered a multiplier of 30 years in the circumstances.

18. The plaintiff submitted that he would need a **nurse aid** to help him move around and dress his amputated limb and give him attention on daily basis. In this regard he submitted that the sum of Kshs. 1,440,000/= would be adequate being at the rate of Kshs. 400 per day, and a multiplier of 10 years as within that period the stump on the leg would heal and he would become acquainted with the prosthetic and crutches. He calculated it as follows $400 * 30 * 12 * 10 = 1,440,000/=$. In this the plaintiff relies on the following authorities, **Brian Muchiri Waihenya Vs Jubilee Hauliers Ltd & 2 others(2017)Eklr**, **Ngure Edward Karega vs Yusuf Doran Nassir(2014)eKLR** and **Caroline Endovelvia Mugayilwa vs Lucas Mbae Muthara(2016)eKLR**.

19. Additionally and under future medical expenses the Plaintiff claims a **Motorized wheel chair** which he alleges that he will need 3 in a lifetime at the cost of Kshs. 350,000/= each totaling Kshs. 1,050,000/=. He relies on the medical report to the effect that he suffered a traumatic amputation of the right limb and may not be able to perform daily tasks on his own. In this he places reliance in the case of **Ngure Edward Karega vs Yusuf Doran Nassir (Supra)**.

20. Further, the plaintiff claims costs for Physiotherapy sessions offered by a **specialized physiotherapist** for purposes of watching over and taking care of his open stump to avoid further infections and amputation and that he will need 3 sessions a week in his life with a multiplier of 32, thus $300 * 3 * 4 * 12 * 32 = \text{Kshs. } 1,382,400/=$. In this they rely in the case of **Kenya Bus Services Ltd Vs Gituma (20014) EA 91**.

21. Furthermore, the Plaintiff has submitted that he would need to undertake **wound dressing, crutches and special seat** as part of future medical needs. In respect to wound dressing the plaintiff prays that he will require the same for a period of 12 months all year round with a multiplier of 10 years which amounts to Kshs. 360,000/= calculated as follows $250 * 3 * 4 * 12 = 360,000/=$.

22. In regard to crutches, the plaintiff submitted that he would need a minimum of 3 in a year at the cost of Kshs. 5000 each with a multiplier of 12 years which totals Kshs. 2,160,000/=. This he submits will enable him in places where he would not use a motorized wheel chair.

23. The final issue addressed by the Plaintiff is the issue of special damages, which he submitted to have proved the same to the tune of Kshs. 924,000/= in following headings:-

a) Medical Report	Kshs. 2000/=
b) Hospital	Kshs. 120,000/=
c) Affixation of metal plates	Kshs. 230,000/=
d) Medicine	Kshs. 450,000/=
e) Amputation	Kshs. 120,000/=
f) Police Abstract	Kshs. 2,000/=
Total	Kshs. 924,000/=

Defendant's submissions

24. In response, the defendants filed their written submissions dated 28th June, 2019 and filed on 2nd July, 2019 and In a rejoinder the

defendants submitted that indeed they had reached a consent on liability, however they refuted that they had consented to production of any document and alleged that the further list of documents filed by the plaintiff on 17th June, 2019 were filed without the leave of the court and thus not admitted as evidence as per the consent.

25. The defendants in their submissions addressed the following claims by the Plaintiff: General damages for pain and suffering; future medical expenses; and the claim for special damages.

26. On **general damages for pain and suffering**, the defendants submitted that as per the medical report presented by the plaintiff from one Dr. Ernest Amos Siwo the General surgeon Garissa County referral Hospital, it indicates that the Plaintiff suffered multiple bruises with swollen left eye, right thigh deformed(fracture femur) and crashed leg(traumatic amputation of the right tibia/fibula). It is their submission that the plaintiff has proved his case in this regard and this court ought to award damages within the limits that is favourable to the plaintiff and affordable to the defendants as was stated in the case of **Cecilia W. Mwangi & Another vs Ruth Wangui[1977 CA 251/96]**.

27. The defendant submits that Kshs. 800,000/= would be adequate compensation to the plaintiff in the circumstances. In this they rely on the following authorities;- **Florence Njoki Mwangi vs Peter Chege Mbitiru(2014)eKLR**, where the court considered Kshs. 700,000/= adequate where the plaintiff suffered fractured right mid shaft femur, fracture of the left mid shaft femur, degloving wound on the right fibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead, **Jane Wangui Murage vs Dakianga Distributors Limited(2012)eKLR** where the court awarded Kshs . 400,000/= for injuries including bruises on the face, cerebral concussion, bruised left arm, crushed injury to the left leg and trauma above knee amputation, **Silvanus Ondiek Ochola vs Delta Haulage Services & Another Kericho HCC No 92 of 2007** where Kshs. 800,000/= was awarded for amputation of the right limb above the knee, Deep cut wound on the medical aspect of the left knee, severe injury to the left eye and blunt injuries to the chest.

28. In regard to **future medical expenses**, the defendants submitted that the cost ought to be pleaded and proved as special damages as was held by the Court of Appeal in **Simon Taveta vs Mercy Mutitu Njeri Civil Appeal No. 26 of 2013**.

29. On **Physiotherapy Sessions**, the defendant submitted that the claim of Kshs. 1, 814,400/= in the plaintiff claim which has been scaled down to Kshs. 1, 382, 400/= in their submissions is not supported by any documentary evidence tendered in court. They allege that since the plaintiff did not suffer 100% permanent incapacity he ought to be paid the sum of Ksh 216,000/= calculated as follows Kshs. 300*3*4*12*5=216,000/=.

30. On the cost of **Motorized wheel chair** where the plaintiff claims Kshs. 1,050,000/= being 3 wheel chairs at the cost of Kshs. 350,000/=, the defendants submitted that the medical report by Dr. Ernest Amos Siwo does not make such provisions for a motorized wheel chair or a normal one and further they allege that there was no assessment on his degree of permanent incapacity and neither did he undertake the second medical opinion as requested by the defendants. They submit that had the plaintiff proved his claim the sum of Kshs. 120,000/= would be sufficient in the circumstances his upper limbs are well functioning. In this they rely on the case of **Nuru Badi Said vs Okumu Paul & Bernard Odhiambo Okumu(2019)eKLR**.

31. On claim for **Prosthesis/Artificial Limb** the defendants submitted that nothing has been tendered to justify the same in the terms claimed of Kshs. 3, 640,000/= at the cost of Kshs. 260,000/= each and to be changed 14 times and stated the same ought to fail as it has not been proved.

32. On claim for **Clutches** where the plaintiff is claiming Kshs. 2, 160,000/= being at the cost of Kshs. 5000 *3*12*12, which translates into 3 clutches per year for a period of 12 years, the defendants submits the same has been proved and ought to be denied and they add that had he proved the same they would be amenable to pay Kshs. 25,000/= being Kshs. 5000 cost of a clutch to be changed yearly in 5 years.

33. On **wound dressing** claim of Kshs. 36,000/= the defendants submitted that the same has not been justified nor proven as the medical report tendered does not make provision for the same and the claim ought to fail. They further submit that had the plaintiff proven the same the cost of Kshs. 72,000/= would be commensurate, being Kshs. 36,000/= cost of wound dressing for a period of five years.

34. On the claim for award of Kshs. 1,440,000/= for **Nurse Aid/helper** by the plaintiff, the defendants submitted that the medical report by Dr. Siwo filed by the Plaintiff does not support this claim and that the same has not been proved to the required standard and ought to be dismissed. This they add is further prejudiced by the fact that the Plaintiff never underwent a second medical examination. In this regard they submit that had the same been proven the calculation ought to be as follows:- Kshs. 400*30*12*5=Kshs. 720,000/=.

35. The final issue addressed by the defendant under the head future medical expenses is **the Loss of future earning capacity**. The defendant submitted that the Plaintiff has failed to tender evidence in support of this prayer, arguing that he has not produced any evidence to the effect that he has been declare redundant by the County Government of Garissa due to his injuries nor a sacking letter. Further they submit that a claim for loss of earnings is a special damage and it is settled in law that it must be specifically pleaded and proved and that the plaintiff has only thrown a figure of Kshs. 9,304,320/= without any proof. In this they rely on the Court of Appeal decision in **Cecilia W. Mwangi & Another vs Ruth W. Mwangi (supra)** and the case **Mohammed Hassan Musa & Another vs Peter M. Mailanyi & Another Nyeri .C.A NO. 243 of 1998**

36. Additionally they submit that had the Plaintiff proved the same the calculation ought to be as follows Kshs. 18,319.50*12*10=Kshs. 1,099,170/= , Kshs. 18'319.50 being minimum wage of a driver as per 2018 for 12 months for 5 years noting the uncertainties of life.

37. In regard to **Special damages** the defendants submitted the plaintiff in this respect is claiming the sum of Kshs. 924,000/= and that he has failed to produce receipts to support his claims and thus not entitled to special damages. They submit that the law on special damages is well settled that a party must tender evidence to prove the special damages as a matter of fact, in this he relies on the following authorities of **Anthony Francis Wareham T/A AF Wareham & 2 others vs Kenya Post Office Savings Bank(2004)e KLR**, **Caltex Oil(Kenya) Limited vs Rono Limited(2016) eKLR** and **Neyma vs Akamba Public Service(1985)eKLR**.

38. On costs the defendant submits that each party ought to bear its costs in purview of the fact that they recorded consent.

ISSUES AND ANALYSIS

39. I have considered the pleadings by the plaintiff and the defendants and the documentary evidence adduced, the submissions by both counsels for the parties and the authorities relied on in support of the quantum for damages.

40. It is trite as envisaged under Section 107 of the Evidence Act Cap 81 Laws of Kenya that when a person is bound to prove the existence of any fact it is said that the burden of proof lay on that person and that whoever desires any court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist .

41. This court at this juncture takes note of the sentiments of the English court as cited by the plaintiff in **Lim Poh Choo v Health Authority (1978) 1 ALLER 332** as were echoed by Potter J in **Tayab v Kinany (1983) KLR14**, quoting dicta by Lord **Morris Borth-y-Gest in West (H) v Shepherd (1964) AC 326**, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

42. Additionally, the court must exercise its discretion judiciously in assessing general damages for pain, suffering and loss of amenities. It must be guided by decided cases but also give regard to what is affordable within the limits of the economy. In **KIGARAGARI -VS- AYA (1982-88) 1 KAR 768** and **CHEGE -VS- VESTERS (1982-88) 1 KAR, 1021** the court in this regard noted that:-

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee”

43. Further, the court of appeal in **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** noted in this regard that

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.**
- 2) The award should be commensurable with the injuries sustained.**
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.**
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.**
- 5) The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.’**

44. Therefore with the above in mind this court therefore delves into the commensurate compensation for the respective claims made by the plaintiff and whether indeed the burden of prove has been discharged to warrant the same.

General damages for pain and suffering

45. The **HALSBURY’S Laws of England 4th Ed. Reissue Vol 12(1) at page 348, paragraph 883** states that general damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff. In the circumstance of the plaintiff, it is not in dispute that he is entitled to damages for pain and suffering a fact admitted by the defendant, the issue is the quantum.

46. The plaintiff under this head claims the sum of Kshs. 8,000,000/= citing inflation and that the court before 2019 based on above cited authorities awarded the sum of Kshs. 6,500,000/=. The defendant on the other hand submits that Kshs. 800,000/= would be adequate compensation to the plaintiff in the circumstances citing several authorities.

47. The medical report filed with the plaint by one Dr. Siwo indicates that the plaintiff at the time of admission was very sick looking, with multiple bruises with swollen eye, internal bleeding nose and mouth and was admitted to the ICU for 3 days after being amputated on right lower limb.

48. The plaintiff cited various authorities in support of his claim of Kshs. 8,000,000/=. I have looked and considered the same. . In **Bernard Mutisya Wambua vs Swaleh Hashil (supra)** where the court awarded 6,500,000/= the circumstance are different from the plaintiff case as

the plaintiff suffered loss of his right hand in addition to other paralysis which was considered 100% permanent disability.

49. In **Beatrice Anyango Okoth v Rift Valley Railways(Kenya) Limited & Another(supra)** the court awarded damages of Kshs. 6,000,000/= however it can be distinguished as the plaintiff lost use of both legs and degree of disability at 70%.

50. In **Charlene Njeri Kuria vs Gitu Geoffrey and Another (2016) eKLR** where the court awarded 5,000,000/= the disability was at 60% disability with partial paralysis of the lower limbs. And in **Emmanuel Kombe Nzai vs Basari Company Limited & Another (2017) eKLR** where the court awarded 6,000,000/= the plaintiff suffered 80% disability with paralysis of the lower limbs. The link between the above authorities is that the plaintiffs lost use of both limbs, however in the instant case the plaintiff lost only the right limb and permanent disability percentage stands unknown to this court.

51. In **Daniel Kosgei Ngelechei v Catholic Trustee Registered Diocese of Eldoret & another [2013] eKLR** the Plaintiff suffered far worse than the instant plaintiff, however there were some similarities as he suffered Traumatic amputation of left lower limb above knee, Loss of two central incisors with lacerations of lower lip, Multiple abrasion dorsum of both hands, Bruises and abrasions right leg and Laceration right leg above ankle, he was award the sum of Ksh. 2,100,000/= for pain, suffering and loss of amenities.

52. More recently, the High Court in **C M (a minor suing through mother and next friend M N v Joseph Mwangangi Maina [2018] eKLR** awarded the sum of Kshs. 2 million as general damages for pain and suffering where the minor leg below the knee was severely crushed and devitalized and was amputated.

53. Further, In **John Kipkemboi & another v Morris Kedolo [2019] eKLR** the respondent sustained Injuries including amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. The Court awarded him Kshs 2,500,000.00 as sufficient compensation for pain and suffering.

54. Therefore applying the above principles to this case and considering the injuries suffered by the plaintiff and their resultant effects and taking into account the submissions and authorities of the parties, its notable that the injuries sustained in the plaintiff authorities were more serious than the instant one's and the defendant authorities on the other hand points to lesser injuries and the figure of Kshs. 800,000/= suggested dates back to the year 2007. In view of the foregoing cited authorities the commensurate and sufficient compensation for pain and suffering and loss of amenities for injuries suffered by the Plaintiff is an award of Kshs 3,500,000/= factoring inflation.

Loss of Earning Capacity

55. The Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo (2007) eKLR** stated in this regard that:

“...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 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 approximate financial loss that the plaintiff has suffered as a result of disability.”

56. The Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity in the case **Butler v Butler (1984) KLR 225** as follows: -

a) A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

b) Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c) Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d) Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e) Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f) The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

57. In **Mumias Sugar Company Limited vs. Francis Wanalo (supra)** the Court of Appeal allowed general damages in this respect in the sum of Shs. 500,000/- for a relatively minor (15%) disability sustained by the plaintiff. In **C M (a minor suing through mother and next friend M N v Joseph Mwangangi Maina (supra))** the court awarded Kshs. 900,000/= to the minor plaintiff who suffered almost similar injuries with the plaintiff.

58. The Plaintiff claims in his submissions that he is 38 years old and worked as a motorcycle rider employed by the government of Kenya earning a net salary of Kshs. 24,000/= and that after the accident he cannot continue doing his job and even doing a desk job is difficult due to injuries sustained and in this regard he is claiming the sum of Kshs.9,304,320/=.

59. From the record nothing except the pays lip has been tendered by the plaintiff to effectively support this prayer including as whether he was rendered jobless and or his state of permanent disability is unknown to the court, as nothing to support this prayer has been produced. The doctor report does not help in confirming the permanent incapacity and his inability to work. In the circumstances and considering the age of the plaintiff a global figure of Kshs. 500,000/= would suffice.

Future medical expense

60. In **Kenya Bus Services Ltd. V Gituma, (2004) EA 91**, the Court of Appeal stated in this regard that:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

61. Further, In **Bonham Carter Vs. Hyde Park Hotel Ltd. (1948) 64 T.R. 177**, it was stated:

“The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma – v- Nairobi City Council (1976) KLR 297, 304)”

62. The plaintiff has pleaded for damages and costs of future medical expenses, he has claimed the costs for a nurse aide/helper at the cost of Kshs. 1,440,000/=, motorized wheel chair at the total cost of Kshs. 1,050,000/=, Physiotherapy sessions at Kshs. 1,382,400/=, wound dressing at Kshs. 360,000/= and crutches at Kshs. 2, 160,000/= all totaling the sum of Kshs. 6,392,400/=.

63. Apart from the medical report from the Dr. Siwo which doesn’t help much in this respect, nothing has been filed by the plaintiff to support his claims for the above listed claims for future medical expenses. The said medical report filed does not state nor recommend that the plaintiff would require a nurse aide/helper, motorized wheel chair, Physiotherapy sessions as claimed by the Plaintiff, he was not called to testify and therefore nothing has been tendered to prove the same.

64. This court however notes the claim for future medical expenses is not farfetched. And in the circumstances the court ought to award a global sum of Kshs. 1 million.

Special damages

65. The court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, held that special damages must both be pleaded and proved before it can be awarded by the Court. It stated:-

“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 decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

66. The consequence of the above is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. The practice being a party presenting actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. However an invoice is not proof of payment as was held in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR** and in **Douglas Odhiambo Apel & Anor Vs. Telkom Kenya Ltd CA No.115 of 2006** it was stated thus;

“..a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court... unless consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed...”

Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.”

67. Therefore looking at the plaintiff case, the only receipts produced are the ones in respect to the charge sheet from Garissa County Referral Hospital where he was charged Kshs. 294,000/= and the consolidated Invoice from Nairobi East Hospital all totaling Kshs. 606,705/=.

68. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice. In this case, the Plaintiff presented the following documents in her claim for specific damages.

69. The consolidated Invoice from Nairobi East Hospital of Kshs. 606,705/= cannot be awarded as it is an invoice and not a receipt and so is the charge sheet from Garissa county Referral Hospital for the sum of Kshs. 294,000/= and therefore failure to avail receipts means that there is no demonstration of actual payments to satisfy the above principles for payment of special damages. On this note this prayer ought to fail.

CONCLUSION

70. In view of the foregoing, the following awards are to be awarded subject to the agreed apportionment ratio of 80:20 against the Defendants as follows:

- i. General damages for pain and suffering Shs. 3,500,000/-(Three Million Five Hundred Thousand).
- ii. General damages for loss of earning capacity – Shs. 500,000/- (Five hundred Thousand).
- iii. Future medical expenses KShs. 1,000,000/-.
- iv. Judgment therefore is entered for the Plaintiff against the Defendant in the total sum of Shs. 5,000,000/- subject to the apportionment ratio in respect of damages. The Plaintiff is awarded the costs of the suit and interests.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 6TH DAY OF NOVEMBER, 2019.

.....

C. KARIUKI

JUDGE