



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL SUIT NO. 18 OF 2013.**

**TERRY KANYUA MARANGU.....PLAINTIFF**

**VERSUS**

**WELLS FARGO LIMITED.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff through the firm of M/s Khan & Associates through a plaint dated 24<sup>th</sup> April, 2013 sued the defendant claiming special damages as set out under paragraph 5 of her plaint, general damages for pain, suffering, loss of amenities and loss of future earning capacity, costs and incidental to the suit; interest and such other or further relief that this honourable court may deem fit and just to grant.
2. The defendant filed defence through the firm of M/S J. K. Kibicho & Co. Advocates denying liability and in the alternative and without prejudice averring the plaintiff was contributory negligent and prayed the plaintiffs suit be dismissed with costs.
3. That after parties complied with the provisions of the Civil Procedure Act and upon filing on witnesses statements and exhibits to be relied upon the suit was set down for hearing. The plaintiff gave evidence and called two witnesses in support of his claim whereas the defendant called one witness.
4. That before the trial commenced Mr. Ongweno learned advocate appeared for the plaintiff whereas Mr. Ngigi learned Advocate appeared for the defence. The parties counsel agreed that the issues for trial in this matter to be as follows:
  - a. *Issue of liability*
  - b. *Issue on quantum of damages.*
5. The plaintiff in her evidence testified that she is a resident of Chuka and she is a Surveyor by profession and runs her business under the name and style "Kakagu". That on 26<sup>th</sup> July, 2012 at around 6.00 p.m she was on her way home at Godka area walking along Embu-Meru road.
6. That the plaintiff checked the road before crossing and saw from Chuka side a lorry moving slowly and started crossing. That she crossed and on crossing the last lane she did not know what happened as she had completely crossed the road. That she lost consciousness.
7. That after 3 months the plaintiff found herself at her aunt's home in Nairobi. That her aunt was by then taking her to Nairobi West hospital for treatment. The plaintiff had sustained the following injuries:-

- a. ***Injuries to the forehead, nose, eyes***
  - b. ***Lost two teeth***
  - c. ***Injuries to the left arm***
  - d. ***Injuries to the right leg***
  - e. ***General injuries to the head***
8. The plaintiff had been operated at Kenyatta National Hospital, transferred to Nairobi West Hospital and later discharged, however she continues attending treatment as an outpatient.
  9. The plaintiff averred that she sustained the injuries as a result of a road accident on 26<sup>th</sup> July, 2012 at Godka after she was hit by the motor vehicle owned by M/S Wells Fargo Limited M/V REG. NO. KBM 549 V.
  10. The plaintiff carried search with KRA and was supplied with copy of search of M/V KBM 549V which she produced as exhibit P1; a copy of receipt as exhibit P1(b); police abstract from Chuka Police Station as MFI-2.
  11. The plaintiff was treated at Nairobi West Hospital whereby she was admitted on 2<sup>nd</sup> August, 2012 and discharged on 21/8/2012 and produced treatment notes as exhibit P3. That she was thereafter treated at Kahawa Wendani Hospital whereby she was admitted on 21/8/2012 and discharged on 6<sup>th</sup> September, 2012 and produced treatment notes as exhibit P4. That she continued attending clinics thereafter under care of Dr. Vincent Wekesa, a neurosurgeon who treats her even today.
  12. The plaintiff testified that she incurred expenses on treatment. She testified she spent Kshs.372,685/57 at Nairobi Hospital and as she had NHIF card she personally paid Kshs.180,000/, then Kshs.151,000/- totaling to Kshs.331,000/- as per receipts exhibit P5A and P5B. That at Kahawa Wendani Hospital she paid Kshs.83,020/- as per receipt exhibit P6. She testified that she paid Dr. Wekesa for consultation at a rate of Kshs.3,000/- each visit and stated she has visited the Doctor 7 times producing receipts exhibits 7A, B,C,D,E,F and G for total of Kshs.21,0000/.
  13. The plaintiff further averred that her teeth were broken and she saw a dentist who gave her artificial teeth. That she also saw smile care and stated that she has a total of 5 receipts for Kshs.29,500/- and produced the receipts as exhibit P8A, B,C,D and E. She testified that her teeth are painful and the Doctor asked her for Kshs.60,000/- to fix her with two teeth.
  14. The plaintiff testified that she had spectacles before the accident and due to the injuries she attends treatment at Kabete.
  15. The plaintiff saw Doctor Njiru for preparation of a medico-legal report and paid him Kshs.3,000/-. The medical report is dated 11/3/2013 marked MFI-P9A and receipt marked exhibit P9B.
  16. The plaintiff testified that she has not recovered from the injuries she sustained and that she is unable to work as she used to do before. She stated that she only goes to her office but cannot do field work. She produced her firm's certificate as exhibit P10.
  17. The plaintiff further stated that she was relying on her written statement filed with court dated 24<sup>th</sup> April, 2013. She further stated that demand notice was issued to the defendant on 22<sup>nd</sup> February, 2013 and the same was produced as exhibit P11. The plaintiff further produced a bundle of receipts on money spent on eye treatment of Kshs.6,000/- as exhibit P12 A,B,C and D. she testified that from Chuka Hospital to Nairobi she was taken by Leo Funeral and paid Kshs.25,000/ and produced receipts as exhibit P13 and also receipt for bundle of medicine the plaintiff has been taking being receipts all totaling to Kshs 34,662/= as exhibit P14.
  18. During cross-examination the plaintiff testified that she was crossing the road before the accident

- occurred and stated that at the scene there were 3 lanes and that the vehicle which hit her was attempting to overtake the lorry. She testified that since the accident occurred she has been attending treatment before Dr. Wekesa. She stated that she cannot attend to field work from her offices as her brain was damaged and that she is awaiting a second operation. She stated that she is not aware whether any one was charged with a traffic offence.
19. On being re-examined the plaintiff testified that invoice P5B shows total services amounting to Kshs.372,685/87 and payment in cash of Kshs.180,000/- and net balance of Kshs.151,970/-
20. PW2, PC Bonface Kipsang testified that OB No. 3 of 26/7/2012 related to an accident of M/V Reg. NO. KBM 549V Mitsubishi canter and a pedestrian who was walking along a footpath, namely Terry Kanyua at Godka area along Chuka-Meru Road near hospital junction. That the driver was charged with an offence of careless driving in traffic case No.256 of 2012 at Chuka Law Courts.
21. PW2 testified that when the accident occurred the plaintiff was walking on the right side of the road facing Meru direction along a footpath. That at the scene of the accident PW2 testified that there were 3 lanes with a climbing lane towards Chuka direction and which is supposed to be used by drivers from Meru direction. PW2 produced the Police Abstract MFI-P2 as exhibit P2.
22. During cross-examination PW2 testified that he visited the scene after the accident with the investigating officer and later charged the driver with an offence of careless driving. He testified that the driver was over speeding and was driving at the wrong lane and overtaking at a continuous yellow line. PW2 testified that he recorded statement from the plaintiff, before preferring a charge against the driver of M/V Reg. NO. KMB 549V.
23. PW3 Dr. Gofrey Njuki Njiru made a medico-legal report on the plaintiff's injuries in his private capacity on instructions from the firm of M/S Khan & Associates. The plaintiff according to PW3 is a 36 year old lady who is a Surveyor. The plaintiff had been involved in a road Traffic accident on 26/7/2012 along Embu-Meru road within Chuka Township.
- 24.
25. The medical report by Dr. Njiru G.N.(PW3) exhibit P9(a) on Terry Kanyua 36 years old, Surveyor dated 11<sup>th</sup> March, 2013 summarizes injuries sustained by the plaintiff as follows:-
- i. **Head injury and unconsciousness with Glasgow coma scale of 9/15.**
  - ii. **Cut wound on left upper lip**
  - iii. **Loss of two left upper incisors**
  - iv. **Cut wound on left wrist joint with multiple laceration on the distal surface of the hand.**
  - v. **Depressed fracture left frontal region which healed with obvious deformity.**
  - vi. **Peli-orbital left eye swelling with ecchymosis**
  - vii. **Cut wound right lower limb pre-tibia region**
26. The plaintiff was admitted at Chuka District Hospital, Kenyatta National Hospital, Nairobi West Hospital and Kahawa Wendani Hospital with follow-up at Nairobi Hospital to monitor the head injury process.
27. The plaintiff at the time Dr. Njiru was making the report on 11<sup>th</sup> March, 2013 was complaining of persistent loss of memory, feeling drowsy persistently, psychological trauma from the visible facial scars and loss of the permanent upper incisors. The costs of the medication and clinic attendance and inability to continue with her private practice as a Surveyor. The anticipated complications are epilepsy due to head injury and long term anti-epileptic use and their complications.
28. PW3 in his further medical report on the plaintiff dated 16<sup>th</sup> July, 2014 testified through Exhibit 16 that further medical reports revealed that the patient had been on follow up by Dr. Vincent Wekesa, consultant Neurosurgeon at Kenyatta National Hospital and a Lecturer at University of Nairobi and confirms the following:-
- i. **Patient still suffer from memory lapses**

- ii. **Visual impairment**
- iii. **Recurrent tearing and eye irritation**
- iv. **Frontal skull defect due to head trauma making her brain susceptible to injury**
- v. **Psychological trauma due to facial deformity**
- vi. **Recurrent headaches.**

29. The Neurosurgeon recommendation on surgery to correct the facial defect are estimated at the cost of:-

- i. **Titanium skull implants** - **Kshs.300,000/-**
- ii. **Surgeon fees**
  - a. **Neurosurgeon fees** - **Kshs.300,000**
  - b. **Maxillofacial surgeon fees.** **Kshs.200,000**

a. **Plastic surgery fees** - **kshs.200,000/**

**iii. Hospital fees, Medication, Bed**

**Consumables** - **kshs.400,000/-**

**iv Subsequent follow-up(all combined specialties**

**including but not limited to reviews, medications,**

**investigations)** - **Kshs.500,000/-**

30. PW3 produced Dr. Vincent D. Wekesa's note from which he got the information as relied to in Exhibit 16 as plaintiff's exhibit 17.

31. PW3 testified that the plaintiff is still undergoing treatment and that she uses medicine daily costing approximately between Kshs.8,000/- and Kshs.10,000/- per month. During cross-examination PW3 testified that the plaintiff has not realized epilepsy so far as she uses anti-epilepsy drugs. He also confirmed once skull is removed it is not returned adding that the plaintiff do not have a bone on the face where she was operated. He also confirmed the costs recommended by Dr. V. D. Wekesa are for private hospital. He testified that Dr. Wekesa undertakes such surgeries but he also needs other specialist to assist him in the surgery.

32. The defendant called DW1 Joseph M. Ndichu an employee of the defendant company who testified that he was the driver of M/V Reg. No. KBM 549V on 26<sup>th</sup> July, 2012 along Meru-Nairobi road. That on the way back from Nairobi at Chuka junction to Chuka General Hospital at 6.45 p.m. there was a pickup ahead of him which indicated it intended to stop on the left side facing Meru direction. That he saw a girl emerge ahead of the vehicle by then he was at the middle lane, he applied breaks and swerved to the right to avoid hitting her.

33. DW1 Testified that he did not hit the girl at all but his vehicle overturned on the left side of the road. He testified that it is the girl who hit the vehicles passenger door with her head when it was on the right hand side of the road. That when he came out of his vehicle he asked the chase car occupants what happened to the girl and he was told she was taken to the hospital. He went to the hospital and found the girl admitted and a police officer accompanied him to the scene of accident. The vehicle was towed and he was told to go back to the police station the following day. He was subsequently charged with an offence of careless driving. He was found guilty and convicted. He was sentenced to service 1 year sentence or pay a fine of Kshs.100,000/-. He concluded by stating that he blamed the plaintiff for crossing the road recklessly and without due regard to other road users.

34. During cross-examination DW1 testified that he was charged with an offence of careless driving at Chuka Law Courts and was convicted but he could not recall the traffic case number. He testified that he paid the fine and has not appealed against the conviction and the sentence. He

stated where the accident occurred there were 3 lanes out of which only one is used by those travelling to Meru direction. He testified he avoided the girl but she followed him and hit him with her head however he confirmed he did see her hit his vehicle. He stated he was driving at 50-40 kmps and his vehicle had good brakes and on applying the same it could stop at 6 metres and that when he saw the girl she was 8 metres away. He testified he applied emergency brakes, the vehicle moved 3 metres and overturned. He admitted that he hit the girl while at the middle of the lane.

35. DW1 on being re-examined he testified that he went to the other lane to avoid hitting the girl.
36. The court has carefully considered the pleadings, the evidence by the plaintiff and her witnesses the evidence by the defence and all exhibits tendered in this case. It has further considered the submissions by both counsel in support and in opposition of parties opposing positions. The issues for consideration in the matter can be summarized into two, issues that is liability and quantum of damages.
37. On the issue of liability the plaintiff is supposed to prove on balance of probability that the defendant's driver or servant or employee was negligent and due to his negligence the plaintiff sustained the injuries complained of. The plaintiff evidence is that the accident was caused by sole negligence of the driver of the defendant who left his lane, failed to control and manage his motor vehicle or otherwise manage the same and avoid hitting the plaintiff. PW2 blamed the driver of the defendant for driving fast at the wrong lane and causing the accident. The accident occurred at the climbing lane at the middle lane being a lane reserved for vehicles going to Nairobi direction. DW1 admitted the accident occurred on the middle lane or climbing lane. He admitted of not seeing hitting the plaintiff. He stated that he saw the plaintiff at 8 metres away and his vehicle could stop on applying brakes at the speed he was driving at 6 metres; that is before reaching where the girl was by at least 2 metres. He testified that upon applying brakes the vehicle overturned within 3 metres. If DW1 was truthful and from his evidence he would not have hit the plaintiff.
38. DW1 on being cross-examined he admitted hitting the plaintiff at the climbing lane or at the middle lane. He was driving on the wrong lane and more so where there was a continuous yellow line meaning he was not supposed to be driving at the said lane. The accident occurred due to careless driving of the defendant's driver who was convicted and sentenced to a fine of Kshs.100,000/- which he paid. He admitted he has not appealed against the conviction and the sentence. The defendant did not call any evidence to support their particulars of negligence attributed to the plaintiff. The accident did not occur as pleaded by the defendant. It was entirely due to negligence of the defendant's driver DW1. Consequently I do not find any contributory negligence that can be attributed to the plaintiff. I therefore find and hold that the defendant through its driver, agent, and/or employee to be 100 percent liable for the accident herein.
39. On quantum of damages I have carefully considered the submissions by respective counsel and authorities relied upon by each counsel. I have also considered the medical reports produced in support of the plaintiff's claim and injuries sustained by the plaintiff as per exhibits produced by DR. Njiru which the defendant did not controvert in anyway. The authorities relied upon by the defendant in **HCCC 76 of 2000(Mombasa) FRANCIS NZIOKA V WYKEM SECURITY CONSULTANTS LIMITED and HCCC 37 of 1991(Eldoret) MONICA KORI NDUNDA V MALINDI TAXIS LIMITED** though relevant to a certain extent as regards the nature of injuries sustained by the plaintiff were decided between 14-23 years ago and may not give correct reflection on the award due today due to the high rate of inflation since then. Secondly the plaintiff herein sustained serious injuries with severe head injury. She suffered a compound commuted frontal depressed skull fracture, facial cuts, maxillary injuries with severe brain trauma. She underwent toilet and elevation of the depressed skull fracture at Kenyatta National Hospital as a life-saving procedure. The plaintiff was subsequently admitted to the Nairobi West Hospital where further post-operational care was done and currently she has a frontal skull defect due to head trauma which according to Dr. Wekesa makes her brain susceptible to injury. That she suffers from memory lapses, visual impairment, and recurrent tearing and eye irritation. She

experiences severe psychological trauma due to facial deformity, as well as recurrent headaches, and maxillary pain from fractured teeth. Dr. Wekesa's opinion is that the plaintiff needs surgery to correct the deformity as well as follow-ups at a cost of Kshs.1,900,000/-. The report by Dr. Wekesa was not challenged way of submission of case a medico-report by the defendants. Dr. Njiru in his medical report agreed with the report by Dr. Wekesa and added that the plaintiff complaints included persistent loss of memory; feeling drowsy, persistent loss of permanent upper incisors, costs of medication and clinic attendance and inability to continue with her private practice as a Surveyor. He indicated the anticipated complications to be epilepsy due to head injury which had caused brain tissue injury and long term anti-epileptic use and their complications. In his report he relied on discharge summary from Kenyatta National Hospital, Kahawa Wendani Hospital and Chuka Hospital.

40. The plaintiff on quantum of damages referred to **CA NO. 315 OF 2001(NAKURU) SOSPHINAF CO. LTD AND JAMES GATIKU NDOLO V DANIEL NG'ANG'A KANYI** where the plaintiff who had suffered similar injuries and developed a post-traumatic epilepsy and had been taking anti-epileptic drugs lifelong had been awarded Kshs.2,000,000/- as general damages for pain and suffering and loss of amenities. The said case though relevant was decided 8 years ago. I am alive of the principles applicable in awarding damages as set out in **HCCA NO. 29 OF 1982(Nairobi) TAYAB V KANANU** by Honourable Court of Appeal and more particularly that sum awardable must be proportional to awards in other similar cases. That comparable injuries should attract almost similar awards however each case must be decided on its own facts as no cases are similar and no injuries are similar as such. I am further alive to the fact that no compensation can be adequate compensation a plaintiff for a loss of limb or memory or brain as money cannot be enough to give one loss health or sufficiently reduce the pain and suffering following injuries; however in awarding general damages the court is required to assess the general picture, the whole circumstances, effect of injuries sustained by the plaintiff, the party concerned and comparable awards for similar injuries for guideline as well as taking into account the high rate of inflation.

41. In view of the foregoing and in view of the plaintiffs injuries, the comparable awards and taking into account the inflation the plaintiff is awarded damages under the following sub-headings as follows:-

i. **Special damages**

*The pleaded specials were -Kshs.710,200/-*

*but the proved specials as per*

*evidence amounts to - Kshs.656,500/-*

*The plaintiff is therefore awarded*

*special damages as pleaded*

*and proved of:*

*Kshs.656,500/-*

ii. **General damages for pain and suffering**

*The plaintiff counsel sought Kshs.5,000,000*

*whereas defence counsel offered - Kshs.400,000.*

*I find Kshs -Kshs.3,600,000/- to be fair and reasonable.*

*I therefore award.....*

*Kshs.3,500,000/-*

iii. Future medical treatment

*The opinion by Dr. Wekesa's on anticipated surgery tendered before court which was not challenged showed plaintiff will require a total of -Kshs. 1,900,000/- for future medical treatment.*

*The claim under this heading is part of general damages which need not be specifically pleaded.*

*The plaintiff's counsel sought Kshs.1,900,000/- whereas the defence counsel did not make any offer.*

*I find sum sought by plaintiff counsel fair and reasonable in view of the Doctor's unchallenged medical report.*

*I therefore award the heading Kshs.1,900,000/-*

*- Kshs.1,900,000*

iv. Loss of earning capacity

*The defence counsel submitted the plaintiff is not entitled to anything as no proof of earning were tabled before court to enable court wrap its mind around the same. The plaintiff's counsel relied on the case of*

*BUTLER V BUTLER(1984) KLR 225, MUMIAS SUGAR CO. LTD V FRANCIS WANALO C.A 91 OF 2003(2007) EKLR and SOSPHINAF CASE (Supra).*

*I note loss of future earnings capacity are prospective financial loss which are awarded as part of general damages arising out of direct*

*consequences of accident that justifies an  
award in form of general damages.*

*The plaintiff herein was self-employed as Surveyor.*

*She averred her monthly earning was*

*around Kshs.50,000/- per month*

*but did not produce any evidence on*

*her earnings but due to her injuries*

*she is unable to earn as much due to*

*injuries. She cannot do the same work as before.*

*Doing the best I can in view of the evidence*

*adduced before this court I consider an*

*income of Kshs.40,000/- per month for a*

*Surveyor of her status to be reasonable*

*income and not hard to come by and*

*I would apply 15 years as reasonable*

*and propose 1/3 of the total thus*

*740,000x15x12x1/2 = 2,400,000/-*

*- 2,400,000/-*

*I would therefore award Kshs.2,400,000/- under this*

*-2,400,000*

*Total award*

*8,456,500*

*=*

*Costs to the plaintiff with interest on specials from the date of filing suit and on  
general damages from the date of judgment.*

**DATED, SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF OCTOBER, 2014.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

1. Mr. Ogweno for the plaintiff

2. Mr. Ngigi for the defendant

**J. A. MAKAU**

**JUDGE**