



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 404 OF 2000**

MARTIN WAWERU MUKURIA.....PLAINTIFF

VERSUS

AUGUSTINE MWANGALE KHAEMBA.....1<sup>ST</sup> DEFENDANT

AKAMBA BUS SERVICES LTD.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. In the Further Amended Plaint dated 29<sup>th</sup> June 2013 and filed on 5<sup>th</sup> July 2013 Martin Waweru Mukuria (*the Plaintiff*) claimed *inter alia* -

- (a) Special damages,
- (b) General damages, and
- (c) Costs of the suit,
- (d) interest on (a) & (b) at court rates until payment in full.

2. The Plaintiff's claim arises out of a road traffic accident which occurred on the Christmas Day of 25<sup>th</sup> December 1997 involving the Plaintiff's motor vehicle KUK 544, and the Second Defendant's motor vehicle (Bus) registration number KZ 478, being driven by the First Defendant. The Plaintiff claims that the accident was caused by the negligence of the First Defendant, and as a result thereof he suffered the following injuries -

- (a) severe cervical contusion,
- (b) chest flank injuries,
- (c) cracked left upper and lower incisor teeth,
- (d) injured left index fingers,
- (e) injured left mid fingers,
- (f) injury to the neck
- (g) soft tissue injuries

The Plaintiff also claimed special damages -

- (1) Police Abstract Ksh. 100.00
- (2) Medical Report Ksh 2,500
- (3) Cost of Medical Treatment Ksh 265,819

3. In an Amended Statement of Defence, dated 18th June 2009, and filed on 22nd June 2009, the Defendant's denied liability and pleaded contributory negligence on the part of the Plaintiff, and prayed that the Plaintiff's suit be dismissed with costs. There was no Defence to the Further Amended Plaintiff.

4. By a consent order recorded on 28th June 2013, judgment was entered for the Plaintiff against the Defendant on liability at 80% to the Plaintiff with 20% contribution by the Plaintiff. The matter proceeded to hearing on 16th June 2014, when the Plaintiff testified and closed his case. The Defendants offered no evidence and closed their case. Thereafter Counsel for the respective parties filed written submissions. The Plaintiff's Counsel's submissions dated 10th July 2014 were filed on 11th July 2014. The Defendant's Counsel's submissions are dated and were filed on 1st July 2014.

5. The question of liability having been settled at 80:20 in favour of the Plaintiff, the sole issue for determination is quantum.

6. In this regard, the Defendant's Counsel reiterated in their submissions, the cardinal rule in pleadings, that parties are bound by their pleadings – **Joseph Karobia Gicheru vs Michael Gachoki Gicheru [2008] eKLR**. This is a requirement of Order 2, rule 6(1) except upon prior amendment of the Civil Procedure Rules 2010 (*formerly Order VI, rule 6(1)*) of the said former Rules. The assessment of damages must therefore be made by reference to the particulars of injuries enumerated in the Further Amended Plaintiff and established by evidence at the trial. There is no dispute however that the Plaintiff's evidence on the nature of injuries were in accord with his pleadings.

7. The Defendants' Counsel also reiterated the principles established by authorities for the assessment of damages in personal injury claims. These are, fairness, reasonableness, moderation, and principles of “stare decisis” ....that an injury should attract an award equivalent or near equivalent to previous court awards for similar injuries. These principles have been restated in many cases, including in particular – **WEST (H) & SON LTD VS. SHEPHERD [1964] AC 336** at p. 345, **LIM POH CHOO VS. CAMDEN & ISLINGTON AREA HEALTH AUTHORITY [1979]1 ALL E.R. 332**, both of which cases were applied in **CECILIA W. MWANGI & ANOTHER VS. RUTH MWANGI (CA NO. 251 OF 1996)**.

In **WEST (H) & SON vs SHEPHERD (supra)**, the Court said -

***“... But money cannot renew a physical frame which has been battered and shattered. All that Judges and Courts can is to award sums, which must be regarded as giving reasonable compensation.***

***In the process there must be an endeavour to give some uniformity in the general 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, it still must be what amounts which are awarded are to a considerable extent conventional....”***

8. In **LIM POCHOO'S** case Lord Denning MR in his inimitable style said -

***“In considering damages for personal injury claims, it is often said – the Defendants are wrongdoers, so make them pay up in full. They do not desire any consideration” This***

***is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often compensated for all the loss and detriment he has suffered. That is not the law, he is only entitled to what is in the circumstances, a fair compensation, fair both to him and to the Defendant.”***

9. In **HASSAN VS. NATHAN MWANGI KAMAU TRANSPORTERS & 5 OTHERS (Nairobi CACA 123 of 1985)** the Court of Appeal observed -

***“...inordinately high awards will lead to monstrously high premiums for insurance of all sorts, and is to be avoided for the sake of everyone in the country.”***

10. In his testimony, the Plaintiff testified that he was admitted to Nairobi Hospital on 26th December 1997 and later discharged on 9th July 1998. A copy of the Discharge was produced as PEx I. He did not heal immediately. He was issued with appointment cards to Nairobi Hospital which were produced as PEx. 2.

11. Later on 16th February 2010, the Plaintiff went to Dr. Patrick Akuku Okoth who examined him and prepared a medical report which was produced as PExh. 3.

12. According to Dr. Akuku who is a neurosurgeon the Plaintiff sustained a permanent residual deficit of twenty per cent (20%).

13. Similarly according to Dr. M. M. Quareshi, who examined the Plaintiff in 1997 and made a Report dated 21st September 1998, the Plaintiff sustained a cervical cord contusion which has settled with a degree of neurological dysfunction. The Plaintiff sustained chipped incisor teeth, soft tissue and chest flank injuries and assessed permanent disability of twenty (20%) per cent. Dr. Quareshi Report was produced as PEx. 4.

Dr. Quareshi described the injuries as follows -

***“He sustained a C4/5 cord contusion, pain along the left rib cage, cracked left upper and lower incisor teeth. He developed a quadriparesis with impaired sensation and an MRI of the neck revealed a C4/5 disc prolapse.”***

14. A further review and Report dated 17th April 2014 by Dr. Qureshi and produced as PEx. 5, made the following findings -

***“Clinical examination revealed moderate soreness over the nuchal area, with lumbar spine movements being pain free, the tone, power and sensation over both limbs were intact. No overt loss of sensation was present.***

- Reflexes were normal bilaterally***
- Romberg's sign was negative and gait was normal***
- An MRI scan of his lumbar spine revealed normal findings***
- An MRI scan of his cervical spine revealed degenerative cervical spondylosis at C3/4, C4/5 and C5/6 levels. There was a notable non-enhancing intramedullary lesion at C5/6 representative of a post-traumatic myelomalacia....”***

15. Dr. Qureshi concluded that the features are of a long-standing cord contusion, which explain his symptoms. The Doctor declared the features as permanent, and that his incapacity as a result of his symptoms therefore equate to a permanent disability of TWENTY-PERCENT (20%).

16. These were all serious injuries, which have produced a permanent disability of 20% upon the Plaintiff, and cannot with respect be compared to the more simple injuries suffered and damages awarded in the cases cited by the Defendants Counsel -

(1) *Richard Mungai Gichuhi vs Peter Ngilu Kahia & K. K. Promote Ltd (NRB HCCC NO. 2654 OF 1997 – decided in 2002 damages for multiple tissue injuries were awarded at shs 180,000/=.*

(2) *Josephine Angwenyi vs Samuel Ochilo, Kisii HCA No. 125 of 2008 – damages for shs 70,000/= were awarded for soft tissue injuries and*

(3) *Fast Choice Co. Ltd & Another vs. Hellen Mungare Ngore [2011] eKLR – an award of sh 180,000/= was made for soft tissue injuries to the chest.*

17. Counsel for the Defendant suggested an award of shs 150,000/= as fair in this case, on the ground that the essence of damages would be defeated if any higher award on general damages were made.

18. With respect, I think, the essence of damages as envisaged in the principles envisaged in the earlier cases cited by the Defendant's Counsel would be absolutely defeated in this case, if counsel's submissions were to prevail even though the accident occurred on 25th December 1997. The delay in determining the case is probably due to the loss of the original file, and though it was found after orders of reconstruction of the file. There also appear to have been problems with placing the Second Defendant under receivership or cessation of operations, although was never raised at any time by Counsel. The Plaintiff underwent review of his medical condition in April 2014, which revealed permanent disability of 20% in his movements. It would be both unfair, and unreasonable to peg damages for his injuries to injuries suffered in 1997 and to cases determined six and more than ten years ago. To do so would make the court lose both the passage of time and cost of treatment over that time. But more importantly one of the injuries suffered by the Plaintiff was “severe cervical cord contusion, leading to permanent disability of 20%. The Plaintiff's Counsel sought shs 3 million by way of general damages. This would be far above the awards made for in other cases for other similar injuries, other – that “severe long-standing cord contusion”. I would therefore award the Plaintiff Shs 1,200,000/= in general damages less 20% contributory negligence to shs 960,000/=.

### **SPECIAL DAMAGES**

In **COAST BUS SERVICES VS. SISTO & MURINGA DANJI & 3 OTHERS (CA) 192/1992** (unreported) Shah JA reiterated the principles upon which the court will award special damages -

***“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit, and in this connection is not simply aver in the Plaint ... that the particulars of special damages were to be supplied at the time of filing the suit the particulars can only be supplied at trial by amending the Plaint to include particulars which were previously missing. It is only where the particulars or special damages are pleaded in the Plaint that a claimant will be allowed to proceed to strict proof of those particulars.”***

20. In the Further Amended Plaint dated 28th June 2013 and filed on 5th July 2013, the Plaintiff pleaded the following particulars of special damages -

- |     |                                 |   |                              |
|-----|---------------------------------|---|------------------------------|
| (a) | <b>Police Abstract</b>          | – | <b>shs 100.00</b>            |
| (b) | <b>Medical Report</b>           | – | <b>shs 2,500.00</b>          |
| (c) | <b>Cost of Medical Expenses</b> | – | <b>shs <u>265,819.00</u></b> |

**Total**

**268,419.00**

21. There was no amendment to include the cost of further consultation to Dr. Qureshi, at the cost of shs 15,000/=. There was no objection to production of either the Report or the Receipt therefor. I therefore allow the said sum of shs 15,000/= as legitimate cost for ascertaining the Plaintiff's current condition in relation to the injuries he suffered and subject of the proceedings.

22. In summary therefore I would award the Plaintiff general and special damages as follows -

(1) General Damages	Shs. 1,200,000.00
Less 20% contributory negligence	Shs <u>240,000.00</u>
	Sh 960,000.00
(2) Special Damages (pleaded)	shs 268,419.00
(3) Special Damages not pleaded but proved and not opposed)	shs <u>15,000.00</u>
Total	Shs 1,243,419.00

23. The Plaintiff shall also have the costs herein.

24. The Plaintiff shall pay interest on the above sum, from the date hereof, and on costs from the date of ascertainment thereof, at court rates until payment in full.

25. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of December, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**