



**Mucheru v Mithamo & another (Civil Suit 768 of 2023)
[2025] KEMC 35 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEMC 35 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT 768 OF 2023
PA NDEGE, SPM
MARCH 13, 2025**

BETWEEN

JOHN WAMAE MUCHERU PLAINTIFF

AND

KAGOIYA ARTHUR MITHAMO 1ST DEFENDANT

ALICE WANZA MUSYOKI 2ND DEFENDANT

JUDGMENT

1. On or about 12/03/2023 along Nairobi- Nakuru road, at Greensteads area, the plaintiff was a lawfully pedestrian when the designated/ authorised driver of motor vehicle registration number KDD -461Q which was being driven by one of the defendants and/or any other lawful/ designated driver thereof who was the defendants' agent, servant, employee, so carelessly, negligently and/or recklessly drove, managed and/or controlled the same and thereby permitting it and/or causing the same to violently hit, collide with, smash, run over and or ram into the plaintiff herein as a result whereof an accident occurred and the plaintiff sustained serious injuries and loss. The plaintiff is thus suing the defendant for: -
 - i. General Damages for Pain and Suffering;
 - ii. Damages for Loss/ Diminution of (Future) Earning Capacity;
 - iii. Loss of Income/ Earnings at Kshs. 30,000/- per month (and any other sum/ minimum wage) for such period/ time that the honourable court shall deem fit;
 - iv. Costs of Future Medication/ Treatment and or Removal of implant;
 - v. Cost of Domestic Help at Kshs. 12,000/- per month (and or any other sum/ minimum wage) for such a period/ time that this honourable court shall deem fit;



- vi. Special damages of Kshs. 170, 485/-;
 - vii. Costs of this suit;
 - viii. Any such other or further relief as this Honourable Court may deem fit and just to grant;
 - ix. Interest at the rate of 12% per annum on all the above prayers from the date of filling suit until payment in full.
2. The defendant has already agreed to be 75% liable for the accident and the resultant injuries and loss. The plaintiff in his Plaint dated 19/12/2023, pleaded special damages of Kshs. 170,485 /=-, being Kshs. 8,000/- for the medical legal report; Kshs 161, 934/- for medication and Kshs. 550/- for the motor vehicle search certificate.¹
 3. It is further the plaintiff's claim that at the time of the accident herein, he was working as a businessman (a salesman), earning about Kshs. 30,000/- per month and that as a result of the seriousness and incapacitating nature of the injuries that he sustained in the accident herein, he has never gone back to his work to date and hence he claims loss of earnings/ income for the entire period that he will not have worked.
 4. Further that he was fitted with implants which will require removal in the future with estimated cost being at least Kshs. 400,000/-. Further that he is currently being taken care of by a domestic helper at a cost of Kshs. 12,000/- per month. As such, he claims costs of future medication/ treatment, removal of implant and domestic helper and which costs are not static but subject to change.
 5. When the matter came up before me for the hearing on 24/09/2024, the plaintiff was represented by Ms. Kurere, while the Defence was represented by Ms. Mwashu. On that day, the parties herein entered an oral consent that was adopted to apply in this matter. The consent closed the hearing without calling any witness. All the documents filed by the parties herein together with their statements were admitted as exhibits herein without calling their makers. Those admitted for the plaintiff are: -
 - i. Copy of the Plaintiff's Identity Card
 - ii. Discharge Summary from Nakuru County Referral and Teaching Hospital
 - iii. Medical image request forms and prescriptions from Nakuru County Referral and Teaching Hospital
 - iv. Outpatient card from Nakuru County Referral and Teaching Hospital
 - v. Copy of P3 Form
 - vi. Police Abstract
 - vii. Radiological reports
 - viii. Medico-legal Report by Dr. Mugenyu
 - ix. Bundle of Receipts/ Paid invoice amounting to Kshs. 170,485/-
 - x. Demand Letter
 - xi. Motor vehicle Copy of Records

¹ Refer to paragraph 5 of the Plaint



6. The Defendants were also allowed to have the medical examination report by Dr. M. S. Malik, dated 07/02/2024, admitted herein as DEXH. No. 2. Of most importance, however, was the consent judgment on liability herein wherein the plaintiff agreed to a partial liability of 25%. Parties thereafter closed their cases and the submissions were confirmed filed and exchanged, and this judgment was fixed for the 13/03/2025. The issue remaining for determination is the quantum of damages awardable herein.
7. I however first need to analyse the documentary exhibits and evidence admitted herein with regards to the injuries sustained. Contrary to the learned counsel for the defence's submissions, I find that the two medical reports presented herein agree that the plaintiff sustained the injuries pleaded as a result of the accident herein. The other medical evidence of the injuries such as the P3 form, and the radiological reports further confirm the injuries. I thus find that the plaintiff sustained the injuries pleaded as a result of the accident herein.
8. There were authorities cited by both counsels herein. General damages are however damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. It has repeatedly been stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab Vrs Kinanu* [1983] KLR 114 And *West (h) & Son Ltd Vrs Shepherd* [1964] AC 326, 345). Damages must therefore be within limits set by decided cases and also within the limits that the Kenyan economy can afford (see *Nyota Tissue Products Vrs Lawrence Kuboka & 4 Others* [2020] eKLR)
9. There is however no one best formula of assessing damages in injury claims. Such assessment is an act of art rather than science. In HCCC NO. 752/1993 *Mutinda Matheka Vs Gulam Yusuf* that was cited by Warsame, Ag. J (as he then was) in *Jenipher Milay O. Okuku Vrs Kenya Bus Services Ltd* (kisumu HC MISC. Civil APPL. 172/2001), *Wambilyangah J.*, held that the court will essentially consider the nature of the injuries suffered, the period of recuperation etc.²
10. I am also aware of the other guiding principles in awarding general damages such as: - damages should be within the limits set out by decided cases, within my pecuniary jurisdiction, within the limits that the Kenyan economy can afford and must be commensurate to the kind of injury, and extent of pain and suffering.
11. Guided by the above principles, I find the decision in *Gabriel Mwasguma Vrs Mohammed Sajjad & Anor.* [2015] e KLR that was cited by the learned counsel for the plaintiff to be the most relevant herein. Kshs. 3,000,000/= was awarded to the victim therein in 2015. Even if the injuries sustained by the plaintiff herein could be said to be slightly less serious, I do still award the same amount to the plaintiff herein, having factored in passage of time and inflation since the case was decided, and subject to the plaintiff's 25% contribution as consented herein.
12. As to general damages for loss of earning and earning capacity, I do agree that apart from the pleadings, there was no evidence tendered to disprove that the plaintiff was not a businessman as pleaded and stated in his evidence. The medical evidence herein is however that he was incapacitated for about 8 months only and I shall therefore use the minimum wage for a general worker as submitted by the learned counsel for the plaintiff and award him Kshs. 15,201.15 x 8 = Kshs. 121, 608/-.

² See *Simon Taveta Vrs Mercy Mutitu Njeru* [2014] eKLR, as cited in *James Okongo Vrs Elmat Sagwe Ogega* [2021] eKLR



13. The Court of Appeal in the case of Karani Vrs Nchedu (1995-1998)1 EA 87 stated:

The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Kshs. 50,000/= per month.

14. The Court of Appeal in S J VRS Francesco Di Nello & Another [2015] eKLR while making a distinction between loss of future earnings and loss of earning capacity stated that: -

Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley Vrs John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

15. The court proceeded to state that: -

The correct position as in the Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & Another v Ruth W. Mwangi [*CA No. 251 of 1996*](#) as hereunder:

Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. "In the authority of Butler v Butler [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said: "Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

16. There were however no submissions on the claim for loss or diminution of, or future, earning capacity. No evidence was tendered herein including from the plaintiff himself that the plaintiff had lost his capacity to work and earn as a businessman or a salesman. I thus do hereby dismiss the claim for loss or diminution of earning or future earning capacity.

17. As to Costs of Future Medical expenses, the issue herein is whether the claim for future medical expenses is awardable. The issue of future medical expenses was considered in the case of Tracom Limited & Another Vrs Hassan Mohamed Adan [2009] eKLR where the Court of Appeal pronounced stated as follows: -

We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:

-



‘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 damage 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 right should be pleaded.’

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

18. However, the Court of Appeal in *Kenya Power & Lighting Company Limited Vrs Amk (suing As The Mother And Next Friend Of JMK - MINOR)* [2021] KECA 52 (KLR) (8 October 2021) (Judgment) stated as follows:

28. As has been held above, in as much as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.

32. On the challenge to the award on future medical expenses which the appellant says had not been specifically pleaded and proved, this does not turn on much as the respondent had in their plaint stated that the minor requires additional and medical care. In our view, the functional prosthesis (artificial limbs) and their maintenance costs are covered under that prayer and as held in *Tracom Limited & another v Hassan Mohamed Adan (supra)* it was not mandatory for the respondent to delve into detail of the future expenses at that stage thus that ground of appeal fails.

19. Similarly, in the case of, *Forwarding Company Limited & Another Vrs Kisilu; Gladwell (third Party)* [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal in overturning the decision of the High Court declining to award future medical expenses on the ground that the plaintiff had pleaded generally on the same but had failed to attach a specific figure thus lacked specificity, stated as follows: -

62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.



20. In the instant case, the plaintiff did not plead the amount he claims as cost of future medical expenses. There was however contradicting evidence of the 2 experts herein as to the costs of the future medical operation. I will go with the decision in *Hellen Atieno Oduor Vrs S. S. Mehta & Sons Ltd & Muthitu Nanua [2015] e KLR*, where an award of Kshs. 150,000/- was found justified for similar medical procedure in 2015. Given the rise in costs of living since then, I will enhance the same to Kshs. 180,000/- as proposed by the learned counsel for the plaintiff.
21. I will also award the plaintiff Kshs. 12,000 x 8 months when the plaintiff was incapacitated, hence Kshs.96,000/- as the costs of hiring a helper for the period. The amount is also subject to his 25% contribution as consented to herein.
22. On Special Damages, I find proof from PEXH. No. 10 that the plaintiff incurred Kshs. 8,000/- being the cost of the medical report, Kshs. 149,035 vide the medical receipts produced herein being the amounts paid for his treatment and Kshs. 550/- vide PEXH. NO. 11 being the cost of the motor vehicle search. I thus award the plaintiff Kshs. 157, 585/- as special damages which is also subject to his 25% contribution as consented to herein.

Conclusion and Disposal Orders

23. Judgment is hereby therefore entered for the plaintiff against the defendants herein as follows:
 - i. General damages for pain and suffering of Kshs. 2,250,000/=
 - ii. Damages for Loss of Earning: Kshs. 91,206/=
 - iii. Costs of Future Medication/ Removal of implant: 135,000/=
 - iv. Cost of Domestic Help: Kshs. 72,000/=
 - v. Special damages of Kshs. 118, 188/=
 - vi. Costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 13TH DAY OF MARCH , 2025

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Kurere h/b Njuguna

Defence counsel: Mwashu h/b Gathiru

Plaintiff: n/a

1st Defendant: n/a

2nd Defendant: n/a

Mwashu: Praying for 30 days stay of execution

Kurere: No objection

CT: 30 days stay granted as prayed.

ALOYCE-PETER-NDEGE



SENIOR PRINCIPAL MAGISTRATE

