



**Macharia v Mwaniki (Civil Suit E005 of 2024)
[2025] KEMC 79 (KLR) (17 April 2025) (Judgment)**

Neutral citation: [2025] KEMC 79 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
CIVIL SUIT E005 OF 2024
AT SITATI, SPM
APRIL 17, 2025**

BETWEEN

PAUL MUCHERU MACHARIA PLAINTIFF

AND

DANIEL MAINA MWANIKI DEFENDANT

JUDGMENT

1. By a plaint dated 28th February, 2024 verified by an affidavit of similar date, the plaintiff prayed for:
 - a. Special damages of Kes. 39, 910/-
 - b. General damages for pain and suffering
 - c. Costs of this suit plus interest
 - d. Interest on (a), (b) and (c) above at court rates until payment in full
 - e. Any other or further relief that this Honourable Court may deem just and fit to grant in the interest of justice and fairness.

Accompanying the plaint were:

List of witnesses dated 28/02/2024 enumerating Paul Mucheru Macharia, Lucy Njeri Kabere, Joseph Maina Mwaniki, Ntaayia Lesumpat, traffic Police, and doctor as the expected witnesses. Plaintiff's written witness statement dated 28th February, 2024. Written witness statement of Lucy Njeri Kabere dated 28th February, 2024; Bundle of documents containing Police abstract dated 24/09/2023 OB entry 14/24/09/2023 at 1302 hours P3 Form issued on 24/09/2023 Paediatric Discharge summary – admission 24/09/2023 receipts from Maralal Chemists totalling Kshs 3,000/- 3 receipts from Sungura Samburu Agencies totalling Kshs 220/- Samburu Pharmacy receipt Kshs 200/- 4 Nile Medical receipts totalling 3, 400/- County Medicare receipt for Kshs 1,400 Samburu County Referral Hospital patient bill Kshs 18, 860/- Medical report Samburu County Referral Hospital clinic receipts Discharge



summary dated 24/12/2023 Demand letter ID Card Further List and bundles of documents dated 8th February, 2025 containing the following Special clinic treatment note dated 23/1/2024 ID card for Lucy Njeri Kabere; Charge sheet in Traffic case no. E003 of 2024 Maralal SPM Court Certified proceedings in Traffic Case No. E003 of 2024

2. The plaintiff was represented by the firm of Kihoro Kimani & Associates Advocates.
3. Upon being served with the pleadings, the defendant initially failed to appear and file a defence resulting in the entry of an interlocutory judgement against the defendant. Subsequently, this was set aside and the defendant filed a defence. A further reply to defence dated 8th February, 2025 was filed reiterating the plaint and affirmed that the subject driver was charged with the traffic offence of driving without due care and attention to other road users. There was an earlier Reply to Defence dated 27th September, 2024 and earlier Further List of Documents which were subsumed by the subsequent ones.

The Plaintiff's Case

4. PW1 Paul Muecheru Macharia adopted his witness statement as his testimony, by it, he told the court that as a loader he was called over by the defendant driver but before he boarded the lorry, the driver sped off and crushed his feet with the rear wheels. He was admitted in hospital and his left foot amputated above the ankle after surgical procedures could not rescue the left leg. He lamented that he had become a disabled person due to the loss of this foot and was dependent on crutches. He added that he suffered an average of Kshs 2, 000 daily wage loss. He produced the above listed documents in evidence. In cross-examination, the following came out: PW1 was initially at the Maralal town central roundabout waiting for casual work as a porter when he saw the subject lorry approach the roundabout; He then approached the lorry by walking towards it while the lorry was still in motion; He approached the lorry after the driver called him over to approach the lorry; He boarded the lorry at the roundabout while the lorry was still in motion; As he boarded the moving truck, he tripped, fell and the rear wheels caught his leg crushing his leg in the process; he admitted that he attempted to board the lorry from the turn-boy's side while the door was still locked; while answering the question about his average daily wage, the witness appeared confused, slow and slurred of speech. He switched between Kshs 1,300/-, 1500/- and 2, 000/- as daily portorage wage.
5. In re-examination, the witness indicated that the lorry stopped briefly as he tried to board it from the turn-boy side and that he approached the lorry after the driver called him over. He denied hanging onto the lorry door. He clarified his daily wage at Kshs 1,500/=.
6. PW2 Lucy Njeri Kabere adopted her witness statement as her testimony. She told the court that the plaintiff was her son. By her statement, she told the court that on 24th September, 2024 (but later corrected to 2023) her son's feet were run over by the defendant's lorry causing the left leg to be amputated as it could not be healed despite being admitted in hospital for more than 78 days. She added that the son had become totally dependent on her following his injuries that disabled him. In cross-examination, the following came to light: PW2 did not witness the incident; She worked as a green grocer and made an average of Kshs 100/- daily; The plaintiff was her 4th born child out of 5 children; She affirmed that the plaintiff used to give her Kshs 1,000/- daily from his portorage work but she had not records to support this figure; She lived in a rented house where she paid Kshs 5,000/-
7. In re-examination, she affirmed that she was reliant on the plaintiff prior to the accident. At that stage, the plaintiff closed his case.



The Defence Case

8. DW1 Daniel Mwaniki adopted his witness statement dated 01/10/2024 as his testimony. In summary, he told the court his driver alerted him of the incident and he rushed over to witness the already occurred event.
9. In cross-examination, the following came to light: It was true that his driver Daniel Nderitu Mwangi drove the subject lorry; The lorry driven by his lawful driver ran over the feet of the plaintiff; The plaintiff was not his employee as a turn-boy; He did not witness the actual event but arrived after about 10 minutes.
10. In re-examination, the witness told the court that his former driver left the employment more than a year ago. He affirmed that it was his driver who called him to the scene and that the police abstract did not apportion liability. At the end of his re-exam, the defendant closed his case. At that stage, the parties exchanged written submissions.

The Plaintiff's Written Submissions of 12.03.2025.

11. The plaintiff submitted that 100% liability should be entered against the defendant and his employer vicariously for causing the lorry to run over the feet of the plaintiff. Consequent upon the driver's negligence aforesaid he was charged in a traffic case for driving without due care and attention. He pleaded that he was entitled to special and general damages for incurring the following: Pain and suffering at the time of the incident; - Recurrent pain on the left leg; Amputation of the left leg; - Inability to walk fast or run; Inability to lift heavy loads as he used to as a porter; Loss of future earnings
12. The plaintiff urged the court to consider the following authorities:
 - a. *Kigaragari v Aya* [1985] KECA 47 (KLR), where the High Court awarded Kshs 250,000, and in awarding Kshs 51,000 as loss of earnings as the respondent was not employed on permanent terms. The claimant in the case had sustained injuries leading to amputation of his right leg. The court of appeal upheld the said award. That is, some 40 years ago.
 - b. *Munyoki v County Government of Kiambu & another (Civil Appeal E168 of 2021)* [2023] KEHC 1956 (KLR) (17 March 2023) (Judgment), the trial court awarded appellant Kshs. 2,140,000 in general damages where the claimant had sustained injuries following which his right leg was amputated. The said award was upheld on appeal.
 - c. *Catherine Njeri Njoroge v Benard N. Njeru (Civil Suit 305 of 2011)* [2016] KEHC 6040 (KLR) (Civ) (3 March 2016) (Judgment), the High Court sitting as the appellate court awarded the plaintiff Kshs. 3,000,000/= as General damages for pain, suffering and loss of amenities, where the plaintiff had been involved in a car accident and had undergone amputation of the right lower limb as a result of the accident.
 - d. *Oeba & another v Ombese (Civil Appeal E055 of 2022)* [2023] KEHC 2122 (KLR) (21 March 2023) (Judgment) the High Court upheld the trial court's award of Kshs 2,500,000 in general damages where the claimant had been in a road traffic accident involving motor vehicle.
 - e. *Edwina Adhiambo Ogol v James Kariuki* [2020] KEHC 2034 (KLR), the claimant was awarded Kshs 2,200,000 in general damages, where the plaintiff had suffered amputation of the left leg as a result of the injuries sustained in an accident.



The Defendant's Written Submissions Of 12.03.2025

13. The defendant submitted that while the Plaintiff alleged that the accident was as a result of negligence on the part of the Respondent, the said plaintiff had failed to discharge the burden of proof for negligence as discussed in the authority of *Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & Martin N. Mwea* [2022] KEHC 2664 (KLR) where the Court relied on *Donoghue v Stevenson* (1932) A.C 562 to lay down the elements of tort which must be satisfied to prove negligence as follows;
 - (a) Duty of care,
 - (b) Breach of that duty of care and
 - (c) damages as a result of the breach
14. Further reliance was placed on *Isaac v Transafric Timber Limited* [2024] KEMC 63 (KLR) where it was held that in an action for negligence, the burden of proof falls on the plaintiff alleging to establish each element of the tort. It was argued that section 107 of the *Evidence Act* lay the burden of proof on the plaintiff.
15. It was contended that the injuries that befell the Plaintiff were of his own doing in conformity with the maxim of *volenti non fit injuria*. The defendant submitted that the defence of *volenti non fit injuria* was defined by Wills J. in *Osborne vs The London and North Western Railway Company*(1888) 21 Q.B.D 220 as follows:

“If the defendants desire to succeed on the ground that the maxim "*volenti non fit injuria*" is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it”.
16. As proof of the taking the full risk, the Plaintiff admitted that the vehicle was still in motion when he tried to unlock the door on the passenger's side so that it was argued that if only he had exercised due care and not tried to board a moving vehicle, then the accident would not have happened.
17. It argued further that the Plaintiff had not tendered any evidence to prove contributory negligence on the Defendant's part aside from his own testimony. the defendant contended that that the police abstract is not sufficient proof of negligence on the part of the Defendant as held in *Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & Martin N. Mwea* [2022] KEHC 2664 (KLR) where the court, held as follows;

“As such, in my view the police abstract cannot substitute the requirement or the need to adduce evidence to prove the case on the part of the appellant. This is despite the fact that production of the same was not opposed.”
18. The defence submitted that the Plaintiff did not produce any police sketch or investigation report to prove that after investigation the Defendant was found negligent and also that the Plaintiff did not call an investigating officer to explain how on what basis the Defendant was blamed for the accident in the abstract. Additionally, the OB extract which was presented in evidence by the Defendant negated the contents of the abstract, as the investigating officer reported that the Plaintiff had gotten injured after hanging off the mirror of the moving vehicle.
19. The defendant attacked the evidence of PW2 Lucy Njeri Kabere stating that she did not witness the accident and her testimony amounted to nothing but mere hearsay. In urging the court to dismiss her testimony, the defendant cited the authority of *Wainaina* (Suing as the Administrator of the Estate



of Ephantus Kamande Wainaina - Deceased) v Kiruthi [2024] KEHC 14955 (KLR) where the court stated that loss of earnings or income is a special damage claim, and it is trite law that special damages must be pleaded and strictly proved so that where there is no evidence regarding special damages, the Court is obligated not to award any damages to this effect.

20. It was submitted that the advocates fees for drafting a demand letter and statutory notice fall under instruction fees hence the same cannot form part of the special damages claimed and should be addressed in the party and party bill of costs should any arise. Reliance was placed on the decision of KWW (Minor Suing Through His Mother and Next Friend BNW) v Shajanand Holdings Limited & another [2024] KEHC 9199 (KLR), where the court stated as follows in regards to special damages;

“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.”

21. The sum of Kshs. 800,000 was proposed as sufficient compensation for the injuries suffered by the Plaintiff guidance being sought from the case of Silvanus Ondiek Ochola v Delta Haulage Services Ltd & Another [2009] KEHC 3125 (KLR) where the Plaintiff was awarded Kshs. 800,000 as damages 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. An additional authority was the case of Jane Wangui Murage vs Dakianga Distributors Ltd [2012] eKLR where Kshs. 400,000/= was awarded for bruises on the face, cerebral concussion, bruised left arm, crushed injury to the left leg and trauma above knee amputation.

22. The duty of the Court is to determine the following issues:

1. Liability;
2. Quantum of damages awardable, if any
3. Payment of costs.

Issue 1: Liability

23. There is no dispute that the plaintiff suffered the pleaded injuries after the lorry's wheels ran over him.
24. From the tested evidence of the respective cross-examinations of the witnesses, especially PW1, the court is satisfied that the following sequence of events led to the eventual tort -
- i. the lorry driver signalled the plaintiff to approach the moving lorry for some tasks;
 - ii. In conformity with the signal, the driver slowed down the lorry near the midtown roundabout;
 - iii. seeing the slowing down lorry, the defendant clung on the lorry's door with a view to open it and board the cabin only for him to miss and fall;
 - iv. when he fell it resulted in the wheels of the slow moving lorry running over his feet;
 - v. there is no evidence to show that the driver applied emergency brakes to stop the unfortunate occurrence that followed;
 - vi. in the same, vein the plaintiff took a risk when he agreed to lurch onto a moving truck and concurrently struggle to open its cabin door for boarding;



- vii. the court considers that had the driver completely stopped and parked the lorry before inviting the plaintiff over for tasks, the event would not have arisen at all and no liability would have attached to him because the actual cause of injuries were the wheels running over the legs of the plaintiff.
25. In the court's judgement based on the forgoing confluence of factors, the liability shall be apportioned as follows: 70% liability against the driver and 30% against the loader. The defendant shall shoulder the same vicariously.

Issue 2: Quantum Of Damages

26. The special damages incurred were proved at Kshs 39, 190 which is hereby awarded.
27. As for the general damages, the court has considered the authorities by the parties and noted that the defence authorities were for the year 2009 and earlier and were thus overtaken by inflation. The plaintiff cited the most recent authorities and comparable awards for similar injuries. Therefore, the court enters an assessment of KES 2, 200, 000 as general damages for pain and suffering.
28. The awards shall be adjusted and reduced by 30% contributory negligence. The claim for loss of future earnings and/or loss of income was not specially pleaded and is dismissed.

Issue 3: Costs

29. Costs follow events under section 27 of the Civil Procedure Act and are awarded to the plaintiff. In sum, the following awards are made:
- a. Special damages of Kshs. 39, 910/- plus interest at 14% from date of filing the suit till payment in full subject to 30% contributory negligence.
 - b. General damages for pain and suffering Kshs 2, 200,000/- plus interest at 14% from date of judgement till payment in full subject to 30% contributory negligence.
 - c. Costs of this suit plus interest at 14% from date of filing till payment in full subject to 30% contributory negligence.

Orders to issue. Right of appeal is 30 days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 17TH DAY OF APRIL, 2025

HON. T. A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

PRESENT

MR. KIHORO ADV FOR THE PLAINTIFF

THE PLAINTIFF

MISS ABIERO ADV FOR THE DEFENDANT

