



REPUBLIC OF KENYA



**Ilahalwa v Coast Motorcycles & another (Civil Case E010 of 2024)
[2024] KEMC 182 (KLR) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEMC 182 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CIVIL CASE E010 OF 2024
FM MULAMA, RM
AUGUST 14, 2024**

BETWEEN

NELSON HALULU ILAHALWA PLAINTIFF

AND

COAST MOTORCYCLES 1ST DEFENDANT

KAZUNGU KENGA CHARO 2ND DEFENDANT

JUDGMENT

A. Introduction.

1. By a plaint dated 7th May 2024 the plaintiff seeks the following prayers from the court.
 - a. General damages
 - b. Special damages of Kshs.2,550/=
 - c. Costs of metal implant removal Kshs.120,000/=
 - d. Loss of earning.
 - e. Diminished earning capacity.
 - f. Cost of the suit.
 - g. Interests on (a)to (f)
2. The suit is not opposed since no defence was filed despite on one occasion counsel appeared as intending to represent the 2nd defendant. He was granted leave to file his defence and all compliance documents but both the defendants neither entered appearance formally nor file any defences and as such the matter proceeded by way of formal proof.



Plaintiff's case

3. The plaintiff avers that on or about 28/9/2023 along Gamba-Witu road at Nagelle Auction Yard area while the plaintiff was lawfully travelling as a pillion passenger on motor cycle registration number KMF 526U, the 2nd defendant so negligently rode, managed and/or controlled M/v no. KMGK 184Q that the same lost control, veered off its lane and hit Motor cycle registration number KMF 562U as a result whereof the plaintiff sustained severe injuries.
4. During the hearing of the matter the plaintiff sought to amend the plaint and his statement orally which application was allowed. The amendment was to the effect that the motor cycle he rode on was KMGK 184Q and not KMF 526U and the confusion arose because the accident involved both motor cycles.
5. The plaintiff adopted his statement with amendments as his evidence in chief and has also pleaded particulars of negligence on the part of the rider of motor cycle registration number KMF 526U.
6. Similarly he produced as exhibits all the documents contained in the list of documents dated 7/5/2024 in the manner in which they appeared.

Issues for Determination

7. The following issues commend themselves to me for determination.
 - a. Who is liable for the accident?
 - b. What is the quantum awardable to the claimant if any.
 - c. Who bears the costs of the claim.

Analysis and Determination.

a. Who is liable for the accident.

8. In *Stapley vs Gypsum Mines Limited*(2) (1953) A.C 663 at P. 681 Lord Reid had this to say;

“ to determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid, logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it... the question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one sole cause but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can apply generally”
9. The facts speak for themselves that an accident indeed occurred on 28th September 2023 and reported vide OB No. 21/28/9/2023 and the same is proved by the Police abstract dated 31/12/2023.



10. The plaintiff has pleaded particulars of negligence on the part of the defendant rider and further the said police abstract blames the 2nd defendant for the accident and in the absence of any rebuttal to these, there can only be one conclusion that the 2nd defendant is to be blamed for the accident.
11. The 1st defendant is vicariously liable for the acts of the 2nd defendant and as such I do find that the defendants are liable at 100% jointly and severally.

b. What is the quantum awardable to the claimant if any.

12. It is now not in doubt that the plaintiff was involved in an accident and as a result of the said accident the plaintiff avers that he sustained a fracture of the right femur thigh bone.
13. The plaintiff avers that he was rushed to hospital where he was treated and admitted for 18 days. A P3 was equally prepared and assessed the injury as harm. It is also clear that the plaintiff injured his femur.
14. The medical report prepared by Dr. Ajoni Adede and dated 23/2/2024 opines that the plaintiff sustained a 12% disability as a result of the injuries he sustained and he would require in future the removal of the metal plate and/or implants at a cost of Kshs.120,000/=
15. It is against this backdrop that the plaintiff seeks compensation in the various heads as prayed in the plaint which I will shortly consider.

a. General damages

16. The starting point is that comparable injuries should as far as possible be compensated by comparable awards, taking into account that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda*, Nyeri CA Civil Appeal No.147 of 2002 [2004] eKLR that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
17. In *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support, the court awarded Kshs. 700,000 as general damages.
18. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR Odunga J dealt with a fracture of the femur, and stated:“In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body. There, the court awarded Kshs 600,000/- in general damages.
19. In *Bhachu Industries Limited v Peter Kariuki Mutura*, NRB HCCA No.503 of 2009 [2015] eKLR, the Plaintiff suffered an injury on the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- including 50,000/- for removal of K-Nail.
20. The injuries in the above mentioned cases were more serious and multiple than the one suffered by the plaintiff herein and as such taking into account the rate of inflation I proceed to award the plaintiff Kshs. 350,000/= under this head.



b. Special damages of Kshs.2,550/=

21. It is trite law that special damages have to be specifically pleaded and proved.
22. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in [Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd](#) [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

23. Similarly, in [Hahn vs. Singh](#), Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

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

24. The plaintiff has pleaded and proved Kshs.2,000/= for the preparation of the medical report and also Kshs.550 for the copy of records and as such the award of special damages is allowed as prayed.

c. Costs of metal implant removal Kshs.120,000/=.

25. It is not uncommon to award future medical costs or costs for removal of implants on the estimate of a doctor. In [Bhachu Industries Limited v Peter Kariuki Mutura](#)(*supra*) the Plaintiff suffered an injury to the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- including 50,000/- for removal of K-Nail.
26. The prayer being uncontroverted and is further supported by the expert estimation and evidence in the medical report at it is allowed as prayed.

d. Loss of earning.

27. The plaintiff avers that prior to the accident, he used to work as a farmer and used to earn Kshs.15,000/= per month and since then he has not been able to work.
28. Loss of earning is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. The plaintiff asserts that ever since he was involved in the accident, he has not been able to work as he used to.
29. In [Butler v Butler](#) [1984] KLR 225 the Court of Appeal differentiated the damages awarded for loss of earning capacity and loss of future earnings in the following terms:

“A plaintiff’s loss of earning capacity occurs where, as a result of his 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. ... It is a different head of damages from an actual loss of future



earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages....”

30. Since such an award is in the nature of the general damages, the same is awarded under that head as awarding it separately under this head would amount to double compensation.

e. Diminished earning capacity.

31. In this case, the plaintiff did not submit any evidence regarding his remuneration, the plaintiff has just stated that he earns Kshs.15,000/= from his farming business. He does not state which kind of farming and how he arrives at a conclusion that he earns that amount each month.
32. Furthermore, it is not stated that the plaintiff will completely be unable to work and if that was the case the percentage would have been higher than 50% and as such there is nothing upon which the court can calculate his diminished earning capacity. Any attempt to make a calculation in his favour would be based on mere speculation. This, the court cannot be engaged in.

c. Who bears the costs of the claim.

33. Having found that the Plaintiff is the successful party in this matter and the fact that costs follow events, he is awarded costs of the suit.

Conclusion and Disposition.

34. The upshot is that the suit is allowed in favour of the plaintiff as against the defendants jointly and severally in the following terms;
- Liability 100%
- General damages Kshs.350,000/=
- Special damages Kshs.2,550/=
- Costs of implant removal Kshs.120,000/=
- Total Kshs.472,550/=
35. The plaintiff is also awarded costs of the suit and interest on general damages from the date of this judgment and that of special damages from the date of filing of the suit until payment in full. The cost of implant removal being a future expense that is yet to be incurred does not accrue any interest
36. Orders accordingly.

FLAVIAN M.MULAMA

RESIDENT MAGISTRATE

In the presence of

Court Assistant:- Fathiya Loo.

Ms. Nyabuto for the Plaintiff

N/A for the Defendants

DATED, DELIVERED AND SIGNED AT LAMU LAW COURTS THIS 14TH DAY OF AUGUST, 2024.



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HON. FLAVIAN.M. MULAMA
RESIDENT MAGISTRATE

