



**Kiarie v Kariuki (Civil Suit 861 of 2019)
[2024] KEMC 164 (KLR) (5 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 164 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT 861 OF 2019
PA NDEGE, SPM
SEPTEMBER 5, 2024**

BETWEEN

STEPHEN NDUNGU KIARIE PLAINTIFF

AND

JAMES MACHARIA KARIUKI DEFENDANT

JUDGMENT

1. This is a case based on an industrial accident that occurred on 03rd July, 2019 whilst the plaintiff, Stephen Ndungu Kiarie, was engaged in his duties at the Defendant's premises. It is his case that the defendant, James Macharia Kariuki, so negligently provided him with an unsafe and poor working system, such that he was fixing a formwork on a door, a nail he was hammering suddenly broke and its sharp shard flew and pierced his right eye, causing him severe injuries.
2. The defendant filed a Statement of Defence dated 15th April 2021. In the said Statement of Defence, the occurrence of the accident was denied. But in the alternative, it was averred that if the accident occurred, then its occurrence was contributed to by the negligence and want of care by the plaintiff.
3. The parties agreed on liability and consent judgment on liability was entered by the parties on 03rd May 2024 in the ratio of 25:75 in favour of the plaintiff against the defendant herein. What remained, as parties could not reach consensus, is the quantum of damages payable. The plaintiff was the only witness herein. He testified and also produced several documents, the relevant ones being the medical evidence.
4. The plaintiff's prayers as pleaded in his Complaint dated 13/08/2019, however appears ambiguous. He prays for: -
 - a. General damages
 - b. Special damages as above



- c. Costs of this suit and interest on (a) and (b) above
5. It is however noteworthy that in paragraph 8 of the Plaintiff, the plaintiff pleaded and prayed for damages for diminished earning capacity and loss of earnings due to the 50% permanent incapacity he suffered to be calculated by this Honourable Court for such period that it deems fit; and Kshs. 100,000 costs of future medical expense.
 6. It is trite that in awarding damages, the court considers the nature and the extent of injuries in relation to awards in similar cases. In *Denshire Muteti Wambua Vrs Kenya Power And Lighting Company (2013) e KLR*, it was stated that the general method of approach in assessment of damages, is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases. Also, in *H. West And Son Ltd Vrs Shepherd (1964) AC 326*, the court held: - ‘..., but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.’
 7. The plaintiff’s counsel in their written submissions submitted for an award of Ksh.1,700,000/= for pain and suffering and loss of amenities, Kshs. 900,000 for loss of earning and earning capacity and Kshs. 100,000/= future medical expenses.
 8. The defendant’s in their written submissions relied on the case of *DWA Estate Limited Vrs Joseph Kalamba Nthuku [2014] eKLR* and proposed Ksh.150,000/= as general for pain and suffering. On the claim for diminished/ loss of future earning capacity, learned counsel for the defendant relied on the case of *Paul Njoroge Vrs Abdu Saburi Sabonyo [2015] e KLR*, and submitted that the plaintiff herein did not show how his disability has affected his work in any way. That furthermore the claim was not captured by Dr. Omyoma in his medical report dated 09/08/2019. That the doctor did not state in his report that the plaintiff’s ability to work had been diminished following the accident. That furthermore the plaintiff did not demonstrate the same while giving his evidence in court. That in that regard, the plaintiff had not proved that his earning capacity was diminished or affected in any way and therefore the award under this heading be dismissed.
 9. The report by Dr. Obed Omyoma dated 09/08/2018 contained injuries reported at the time of the accident. Treatment received show that the plaintiff was taken to J. M. Kariuki (Ol Kalou) County Hospital where he was given 1st aid. He was later taken to Rift Valley Provincial Hospital Nakuru where he was put on probeta eye drops, oral analgesics and antibiotics. He was later taken to St. Mary’s Rift Valley Mission Hospital for further treatment. In addition, the medical report prepared by Dr. Omyoma enumerates the injuries suffered by the Plaintiff as:
 - a. Penetrating injury to the right eye with traumatic cataract formation
 - b. Dislocation lens of the right eye with corneal foreign body.
 10. The report further found that the plaintiff had lost eyesight in the right eye, and had suffered a permanent disability of 50%. That he will need to undergo ophthalmic operation i.e. cataract removal which will cost about Kshs. 100,000. It further assesses the degree of injury as Grievous harm.
 11. I find the injuries suffered by the plaintiff herein not to be comparable to the injuries suffered by the victims in the cases submitted by both counsels herein. 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 take into account the nature of the injuries suffered, the period of recuperation etc.

12. 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.
13. Guided by the above principles, I find that Kshs. 750,000/= shall adequately compensate the plaintiff herein being general damages for pain and suffering for the serious and painful injuries on his right eye. I do therefore award the same subject to his 15% contribution in liability as consented to herein.
14. On loss of earning capacity, the Court of Appeal in *Mumias Sugar Company Limited Vrs Francis Wanalo (2007)* eKLR stated as follows: -

...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to either losing his job in the future or in case he loses the job, his diminution of chances of getting an alternative job in the labor market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing the loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.
15. Again in the case of *Butter Vrs Butter (1984)* KLR the Court of Appeal stated that compensation for loss of future earnings, is awarded for real assessable loss proved by evidence while compensation for diminution of earning capacity is awarded as part of general damages¹. In *Clark Vrs Rotax Aircraft Equipment Ltd (1975)* KLR 1570 cited by the Court of Appeal in the case of *Mumias Company Limited Vrs Francis Wanalo (supra)*, illustrates that a court can in appropriate cases, give an award for loss of earnings capacity to the same plaintiff so as the overlap of the two awards of damages is avoided. From the above authorities, it is clear that a claim for loss of future earning may be awarded by courts depending on the circumstances of each case and can be awarded as general damages or under its own heading. Once a court determines that the party has lost earning capacity as a result of the injuries sustained in an accident, the court awards damages under that head. The party bears the burden to prove with evidence that he lost his capacity to earn. The plaintiff herein was engaged as a carpenter. His right eye was permanently injured. He can however still use the left eye to get and do a carpentry job which is generally manual in nature. The injury is not such an extent that he will not be able to find a suitable carpentry or other manual job to do with the remaining eye.
16. I thus do agree with the learned counsel for the defendant's submissions that in the present case, the plaintiff did not adequately prove that as a result of the subject accident, his work was terminated and that his chances of getting employment elsewhere in future had diminished. To this end, I am guided

¹ See also *Cecilia W. Mwangi vrs Ruth W. Mwangi* Court of Appeal Nyeri No. 251 of 1996.



by the holding in the case of Kenblest (k) Ltd Vrs Musyoka Kitema (2020) eKLR where the court stated as follows: -

Additionally, the respondent did not prove that as a result of the injuries sustained, he was exposed to either losing his job in the future or that in case he had lost his job, his chances of getting an alternative job in the labor market were slim. Even though, it was not mandatory for the respondent to plead the same, it is my finding that there was no evidence that the respondent was no longer in employment or that the chances of gaining employment in the future were diminished as a result of the injuries sustained and as such, no award was applicable under the head of loss of future earning capacity.

17. The plaintiff herein suffered loss of eye sight in one eye. He was a carpenter and it is common knowledge that such manual works can be performed even using 1 eye sight. The plaintiff was under an obligation to prove how the loss of the eyesight in one eye led to loss of his job and that he was incapable of working. To this end, this court arrives at the conclusion that the plaintiff has failed to prove his claim for loss of earning capacity.
18. There is also no proof that the plaintiff tried to secure an alternative employment but failed as a result of his injuries. To this end, I am therefore inclined to agree with the submissions of the Defendant that damages under this head has not specifically been substantiated by evidence.
19. On the Claim for Future Medical Expenses, the Court of Appeal in the case of Tracom Limited & Another Vrs Hassan Mohamed Adan [2009] eKLR stated: -

...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 v 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 thereof 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 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...

20. In this case, it was the evidence of in Dr. Omuyoma's medical report, PEXH. NO. 4, which is uncontroverted, that the plaintiff shall need approximately Kshs. 100,000 to undergo ophthalmic operation to remove the cataract. The medical report was produced in court by consent. I have considered the submissions of the parties in respect the issue of an award for future medical expenses. In light of the evidence in PEXH. NO.4, it is my view that the claim for Kshs. 100,000/= as cost for the cataract removal was specifically pleaded and proved. In the circumstances, I find that the plaintiff is entitled to Kshs. 100,000/= being cost of future medical expenses which I do hereby also award.



21. On Special Damages, it is trite law that the same must be specifically pleaded and proved with a degree of certainty during the trial. The Court of Appeal in *Jogoo Kimakia Bus Service Ltd Vrs Electrocom International Ltd* (1992) KLR 777 stated that special damages are 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. I do find that the Kshs. 6,000/- for the medical report was proved vide PEXH. NO. 8, and only Kshs. 260/- was proved for the medical expenses vide PEXH. NO. 3. I do therefore assess the special damages herein at Kshs. 6,260/-. All the awards herein are subject to the 25% consent judgment on liability entered to herein.
22. On the issue of costs, I also do find that the necessary demand letter or notice of intention to institute suit was duly issued to the defendants herein. The demand letter, as aforesated, was produces as PEXH. NO. 5. I this see no ground to deny the plaintiff costs of the suit.

DIVISION - Conclusion and Disposal Orders

23. I do therefore hereby find that the plaintiff is entitled to Kshs. 756, 260.00 less 25% contributions leaving a net of Kshs. 567,195 /=-, costs and interest.

DATED, SIGNED AND DELIVERED AT NAKURU THIS...05TH DAY OF SEPTEMBER ,2024

A.P NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

.....Githira..... for the Plaintiff

.....n/a.....for the Defendant

Plaintiff: n/a

Defendant: n/a

