



JM (Minor suing through his guardian and next friend Andrew Maruti Opudi) v Abdulaziz & another (Civil Case 61B of 2008) [2024] KEMC 78 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEMC 78 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE 61B OF 2008
YA SHIKANDA, SPM
NOVEMBER 11, 2024**

BETWEEN

**JM (MINOR SUING THROUGH HIS GUARDIAN AND NEXT FRIEND
ANDREW MARUTI OPUDI) PLAINTIFF**

AND

**AISHA ABDULAZIZ 1ST DEFENDANT
GENERAL CARGO SERVICES LTD 2ND DEFENDANT**

JUDGMENT

The Claim

1. Joseph Maruti (hereinafter referred to as the plaintiff) filed this suit on 24/4/2008 vide a plaint dated 23/6/2017. An amended plaint was later filed on 13/6/2021. The plaintiff sued Aisha Abdulaziz and General Cargo Services Ltd (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 5/11/2007 along Mombasa-Nairobi road. The plaintiff averred that on the material day he was a fare paying passenger aboard motor vehicle registration number KAU 399V belonging to the 1st defendant when the same was driven so negligently and recklessly that it was caused to crush into motor vehicle registration number KAM 072B belonging to the 2nd defendant, which was also being driven negligently, thereby causing severe injuries to the plaintiff.
2. The 1st defendant was sued as the registered and beneficial owner of motor vehicle registration number KAU 399V whereas the 2nd defendant was sued as the registered and beneficial owner of motor vehicle registration number KAM 072B. The plaintiff relied on the doctrine of Res ipsa loquitor, the [Traffic Act](#) and the Highway code and pleaded the following particulars of negligence.

Against the 1st defendant's driver:



- a. Driving at an excessive speed in the circumstances;
- b. Driving without due care and attention;
- c. Driving without due regard to the safety of other road users;
- d. Failing to slow down, stop, manage or have effective control of the motor vehicle at a crucial point in time;
- e. Knowingly driving or allowing the driving on a public road, a defective motor vehicle brakewise and tyrewise;
- f. Ignoring traffic rules with impunity;
- g. Driving the said motor vehicle off the road abruptly;
- h. Driving the said motor vehicle on the wrong side of the road;
- i. Overtaking vehicles carelessly and when it was not safe;
- j. Causing the motor vehicle to crush into motor vehicle registration number KAM 072B.

Against the 2nd Defendant's driver:

- i. Driving at an excessive speed in the circumstances;
- ii. Overtaking vehicles carelessly and when it was not safe;
- iii. Causing the motor vehicle to crush into motor vehicle registration number KAU 399V.

3. The plaintiff averred that as a result of the accident, he sustained injuries and incurred medical expenses. The particulars of the same were listed in the plaint. The plaintiff thus prays for judgment against the defendants jointly and severally for:

1. General damages for pain, suffering and loss of amenities;
2. Special damages of Ksh. 200/=;
3. Costs and interests.

The 1st Defendant's Defence

4. The 1st defendant entered appearance on 22/5/2008 and filed a statement of defence on the same day. At that time, she was the only defendant. The 1st defendant basically denied the allegations that were made by the plaintiff against her. She prayed that the plaintiff's suit be dismissed with costs.

The 2nd Defendant's Defence

5. Following amendment of the plaint, the 2nd defendant filed a written statement of defence on 9/5/2023. The 2nd defendant also denied the allegations that were made by the plaintiff. In the alternative, the 2nd defendant alleged that if there was an accident, the same was solely and/or substantially contributed to by the negligence of the driver of motor vehicle registration number KAU 399V. The 2nd defendant pleaded the following particulars of negligence against the aforementioned driver:



- a. Driving at an excessive speed in the circumstances;
 - b. Failing to keep any or any proper look-out or to have any sufficient regard for other traffic on the said road;
 - c. Driving on or onto the wrong side of the road;
 - d. Driving too close to motor vehicle registration number KAM 072B on the said road;
 - e. Colliding with motor vehicle registration number KAM 072B on the said road;
 - f. Exposing himself to a risk of damage or injury of which he knew or ought to have known;
 - g. Driving without due care and attention;
 - h. Failing to pay any or sufficient attention to the presence of motor vehicle registration number KAM 072B on the said road;
 - i. Failing to give way or any adequate warning of his approach;
 - j. Failing to stop, to slow down, to swerve or in any other way to manage or control the said motor vehicle registration number KAU 399V so as to avoid the said collision.
6. The 2nd defendant prayed that the plaintiff's suit against it be dismissed with costs.

Liability

7. The record indicates that on 26/2/2024 the court directed that the finding on liability in Civil case number 164 of 2008 do apply in this matter. There was no indication of what the finding on liability in case number 164 of 2008 was. I had to go through the trouble of calling for the said file. Upon perusal of the same, I established that vide a judgment delivered on 18/9/2023, liability was apportioned at 10% against the 1st defendant therein, who is the same as in this case and 90% against the 2nd defendant therein who is also the same as in this case. Consequently, liability shall be apportioned as such in this case. Following the determination on the issue of liability, the matter proceeded for assessment of damages.

The Evidence

8. The record indicates that only the next friend testified herein. He appears to have adopted his statement filed in court as his evidence in-chief. The next friend also produced the documents filed in court as exhibits. The evidence of PW 1 was that the plaintiff was his son. That on 5/11/2007, the plaintiff was a fare paying passenger in motor vehicle registration number KAU 399V when the said motor vehicle was involved in an accident with motor vehicle registration number KAM 072B AT Ikoyo area along Mombasa-Nairobi road. PW 1 testified that he was also a passenger in the motor vehicle which the plaintiff had boarded. PW 1 listed the following injuries as sustained by the plaintiff:
1. Severe injury to the left side of the head;
 2. Sprain injury to the neck;
 3. Injury to the right hip area;
 4. Slight burns.
9. The following documents were produced in evidence on behalf of the plaintiff:



- i. Medical report by Dr. P. Ochungo;
- ii. P3 form;
- iii. Police abstract on the accident;
- iv. Payment receipt for the medical report;
- v. Copy of records for motor vehicle registration number KAU 399V;
- vi. Payment receipt for the copy of records;
- vii. Copy of records for motor vehicle registration number KAM 072B;
- viii. Payment receipt for the copy of records; and
- ix. Demand letters.

Issues For Determination

10. In my opinion, the main issues for determination are as follows:
 - i. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;
 - ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
 - iii. Who should bear the costs of this suit?

The Plaintiff's Submissions

11. On quantum, the plaintiff submitted a sum of Ksh. 120,000/= in general damages and relied on the following authorities:
 1. Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR.
The plaintiff and respondent in the appeal herein lost consciousness and sustained multiple soft tissue injuries in the upper limb and neck. She had a fracture of the 1st and 2nd ribs and left shoulder dislocation. She also had a fracture of the left metatarsal. The injuries were classified as grievous harm. On appeal, an award of Ksh. 180,000/= was awarded on 3/10/2016.
 2. Kamenju Charles v Gideon Muia Mutisya [2014] eKLR.
The plaintiff and respondent in the appeal herein sustained blunt injury to the right shoulder, cut wound to the right thumb, bruises to 4 fingers on the right hand and blunt injury to the left ankle with dislocation. On appeal, an award of Ksh. 170,000/= in general damages was upheld on 29/9/2014.
 3. Patrick Mwiti M'Imanene & Another v Kevin Mugambi Nkunja [2013] eKLR.
The plaintiff and respondent in the appeal sustained a swollen scalp on the right side, swollen and bruised left shoulder which was tender, bruised right knee, tender neck and tender back. On appeal, an award of Ksh. 170,00/= was upheld on 28/3/2013.
12. The plaintiff further prayed for special damages of Ksh. 4,200/= as well as costs of the suit and interest.

The 1st Defendant's Submissions

13. The 1st defendant did not file any submissions despite having been duly notified.



The 2nd Defendant's Submissions

14. The 2nd defendant also filed written submissions. On quantum, the 2nd defendant submitted an award of Ksh. 110,000/= in general damages for pain, suffering and loss of amenities. The 2nd defendant relied on the following authority:

1. Jeniffer Jebich Komen & another v Moses Simiyu Nyongesa [2021] eKLR.

The plaintiff and respondent in the appeal sustained bruises on the forehead, soft tissue injury of the back, soft tissue injury of the chest and bruises on the right leg. On appeal, an award of Ksh. 110,000/= was made on 13/5/2021.

Analysis And Determination

15. I have carefully considered the evidence on record and given due regard to the submissions made by the parties.

Quantum

16. The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:

- i. Soft tissue injury to the neck; and
- ii. Soft tissue injury to the right leg.

17. The injuries pleaded in the plaint were exaggerated. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the fact that the defendants have been held vicariously liable for the accident, the plaintiff is thus entitled to damages as against the defendants.

18. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in *West (HI) and Sons Ltd v Shepherd* [1964] AC 326 where Lord Morris said:

“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. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, 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 that amounts which are awarded are to a considerable extent conventional”.

19. I am also guided by Lord Denning's decision in *Kim Pho Choo v Camden & Islington Area Health Authority*, [1979] 1, ALL ER 332 which was adopted in the case of *Nancy Oseko v Board of Governors Masai Girls High School* [2011] eKLR where Wendoh, J stated that:

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.the plaintiff cannot



be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.”

20. The following principles are germane in assessing damages for personal injury claims:
- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
 - ii. The award should be commensurate to the injuries suffered;
 - iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
 - iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
 - v. Awards should not be inordinately too high or too low.
21. Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

22. I have considered the injuries sustained by the plaintiff. The medical evidence produced by the plaintiff indicates that the plaintiff was admitted to hospital for three days and as at 1/4/2008 when he was examined, he had recovered with slight limping of the right leg. The plaintiff suffered soft tissue injuries which were classified as harm in the P3 form. I have further considered the submissions made by the parties on quantum as well as the authorities relied upon. In my opinion, the authorities relied upon by the plaintiff involved more severe injuries whereas the one relied upon by the 2nd defendant involved comparable injuries. The one relied upon by the 2nd defendant is also more recent and offers better guidance. On my part, I have considered the following authorities:
1. Maimuna Kilungya v Motrex Transporters Ltd [2019] KEHC 6280 (KLR)
The plaintiff and appellant in the appeal sustained a blunt neck injury, blunt injury to the left shoulder and bruises on the left ear. On appeal, an award of Ksh. 125,000/= in general damages was made on 26/6/2019.
 2. HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & Jackline Dama Karani [2021] KEHC 7971 (KLR)
The plaintiff and appellant in the appeal herein sustained blunt injury to the head and neck, thorax, abdomen and limbs. The trial court awarded Ksh. 60,000/= in 2019. On appeal, the award was affirmed on 6/4/2021.
23. Given the age of the awards in the above authorities coupled with the vagaries of inflation, I find that both parties made reasonable proposals. On my part, I am of the opinion that an award of Ksh. 115,000/= in general damages would suffice. I award the same.

Special Damages

24. The plaintiff pleaded special damages as follows:
- a. Police abstract.....Ksh. 200/=
 - b. Medical report-



25. No sum for the medical report was indicated in the plaint and even in the final prayers, only Ksh. 200/= was pleaded.
26. It is trite law that special damages must be specifically pleaded and strictly proved. In *Nizar Virani t/a Kisumu Beach Resort- v - Phoenix of East Africa Assurance Co. Ltd* the court said: -
- “It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded”
27. In *Ouma v Nairobi City Council* [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J’s Judgment on page 532 and 533 in *Ratcliffe v Evans* [1832] 2Q.B. 524 an English leading case on pleading and proof of damage:
- “The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”
28. Although the plaintiff produced in evidence a copy of the payment receipt for the medical report, the same cannot be awarded as it was not pleaded as required by law. The sum of Ksh. 200/= although pleaded, was not sufficiently proved. In a nutshell, no special damages are awarded to the plaintiff.

Disposition

29. In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendants. Consequently, I make the following awards:
1. General damages for pain, suffering and loss of amenities.....Ksh. 115,000/=
30. Following the finding on liability, the 1st defendant shall pay to the plaintiff the sum of Ksh. 11,500/= whereas the 2nd defendant shall pay Ksh. 103,500/=. The plaintiff is also awarded interest on the damages as well as costs of the suit.
31. The guiding principles in respect of interest are set out in section 26 of the *Civil Procedure Act* which provides that:
- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 - (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”
32. In the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others* [2018] eKLR, the court stated that:



First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.

33. Second, Under Section 26(1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:

- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
- b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”

34. Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of *Omuniyokol Akol Johnson v Attorney General* (CIVIL APPEAL NO.6 of 2012, UGSC 4 (8th April 2015) stated in part, as follows:

It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment.” (Emphasis supplied)

35. From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see *Jane Ovuyanzi Raphael* (Suing as Legal Representative of Estate of *Japheth Amaayi v Salina Transporters* [2020] KEHC 618 (KLR). Consequently, interest on general damages shall accrue at court rates from the date of judgment/decreed until payment in full.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 11TH DAY OF NOVEMBER, 2024.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

