



**Ndungu v Maloba (Civil Suit 7553 of 2016) [2023] KEMC 63 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEMC 63 (KLR)

**REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)**

**CIVIL SUIT 7553 OF 2016**

**JP ADUKE, SRM**

**MARCH 14, 2023**

**BETWEEN**

**PATRICK SAMUEL NJOROGE NDUNGU ..... PLAINTIFF**

**AND**

**MOSES STARLIN MALOBA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the defendant after he sustained injuries following a road traffic accident on 3<sup>rd</sup> November 2013 along Nairobi-Naivasha Highway at Kinoo. In the plaint on record, the plaintiff avers he was a lawful pedestrian living his best life when the Defendant either acting as servant/agent/authorized driver of motor vehicle registration number KBE 856G negligently and carelessly drove the said motor vehicle and without due care caused it to lose control and knock down the Plaintiff who was crossing the road at a pedestrian crossway thereby causing the Plaintiff to suffer injuries.
2. The Plaintiff blames the Defendants and their agents/authorized servants for causing the said accident. The Plaintiff further avers that the said accident was solely caused by the negligence of the Defendants.
3. The particulars of injuries sustained by the Plaintiff are captured in para 4 of the Plaint while the particulars of alleged negligence are captured in para 4 of the Plaint. The Plaintiff prays for general damages for pain and suffering, loss of earning capacity, special damages, costs of the suit and interest at court rates.
4. Return of Service on Record shows that the defendants were served with the suit papers. Neither of the defendants entered appearance. As a result, judgment in default of appearance was entered against the Defendant. The suit proceeded to formal proof hearing. PW1, the plaintiff, adopted and relied on his pleadings and statements on record as his evidence in chief. Parties filed submissions. The issue for determination before this court is one:



## 1. Quontum

5. The Plaintiff prays for General Damages, loss of earning capacity, Special Damages, Costs of the Suit and any other relief. With respect to Special Damages, the Plaintiff prays for KES 291,241/- as captured in para 4 of the Plaintiff. I have seen receipts on record attesting to KES 4,000, KES 1000 and KES 12,000/-. It is settled principle that special damages must be pleaded and proved. I find that KES 17,000/- has been pleaded and proved and award the same.
6. With respect to general damages, I have considered all the submissions on record and the authorities annexed thereto. I have also considered all the exhibits on record. In particular, I have relied on the reasoning of the court in *Samuel Kimani & Another vs Edward Otieno & Another* [2017] eKLR where the court awarded general damages for comparable injuries. From the documents on record, the plaintiff in this instance suffered a fracture of the right leg when the accident happened. Taking into account that no amount of damages can restore the Plaintiff to what he was prior to the said accident, the rate of inflation and cost of living, I hereby award KES 500,000/- as general damages.
7. The plaintiff has pleaded for an award for loss of earning capacity. I have relied on the reasoning of the court in *John Kipkemboi & Another vs Morris Kedolo* [2019]Eklr and *SJ vs Fransesco Di Nello & anor*[2015]EKLr where the Court of Appeal stated as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income, which may be described as real 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.” The plaintiff herein, was a matatu driver prior to the accident. He has since suffered a fracture of the leg. The medical report on record confirms this. I have also seen a letter from the Plaintiff’s employer but no proof of money earned prior to the said accident. Taking into account all the above and the nature of work the plaintiff used to do, I award KES 100,000/- as general damages on account of loss of earning capacity.
8. In conclusion, I enter judgement in favour of the plaintiff as follows:
  1. General damages KES 500,000/-
  2. Loss of earning capacity KES 100,000/
  3. Special damages KES 17,000/-
  4. Costs of the suit.
  5. Interest on 1, 2 and 4 above at court rates.
9. The Plaintiff shall have costs in this suit and interests at court rates from the date of this judgement until payment in full.

**JUDGEMENT SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> MARCH 2023  
IN THE ABSENCE OF THE PARTIES AT 1507HRS.**

**ADUKE JEAL PRAXADES ATIENO  
SENIOR RESIDENT MAGISTRATE**

