



**Mwangi v Bhudia & another (Civil Suit 475 of 2020)
[2022] KEMC 47 (KLR) (25 March 2022) (Judgment)**

Neutral citation: [2022] KEMC 47 (KLR)

**REPUBLIC OF KENYA
IN THE KIAMBU LAW COURTS
CIVIL SUIT 475 OF 2020
SK MOTARI, RM
MARCH 25, 2022**

BETWEEN

TERESIAH MUTHONI MWANGI PLAINTIFF

AND

SHANTI RAMJI BHUDIA 1ST DEFENDANT

RAMAN ENTERPRISES 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of Complaint dated 28/09/2020 and filed on 13/10/2020 seeking orders inter alia general damages and special damages for accident she alleges occurred on the 23/09/2017 while she was travelling in motor vehicle reg. no. KAU 675X along Ruaka-Kahawa West road when the defendant's motor vehicle reg. no. KBY 516Q Tata Lorry is said to have been negligently driven/managed/controlled that it lost control veered off the road and caused an accident.
2. The Defendants failed to enter appearance and file defence within the stipulated period. Interlocutory judgment was entered against the 1st and 2nd Defendants on the 24/09/2021 on the basis of Affidavit of Service of Japheth Kabogoi sworn on the 12/08/2021.
3. I have considered the pleadings, testimony, exhibits produced and submissions filed in this matter. I proceed and make a determination in this matter under the following heads:

Liability

4. The court having been satisfied that the Defendants had been served with Summons to Enter Appearance and failed to do so, entered interlocutory judgment against them under the provisions of Order 10 Rule 6. The entry of such a judgment indicated that the Plaintiff's suit had on a prima facie level, a cause of action, however, the Plaintiff still had to discharge his burden of proof which is why the matter went for formal proof, see *Julius Munga Ndungi v John Maina* [2020] eKLR. The particulars



of negligence as pleaded in the plaint needed to be proved which was to be done by way of evidence at the formal proof.

5. In her Plaint, the Plaintiff pleaded under paragraph 5 as follows;

‘That on or about the 23rd September, 2017 the Plaintiff was lawfully travelling in motor vehicle registration no. KAU 675 along Ruaka-Kahawa West road or thereabout when the Defendant or defendant’s driver/agent and/or servant so negligently drove managed and/or controlled the said motor vehicle registration no. KBY 516Q Tata Lorry, that he caused, and/or permitted the same to cause the accident thereby causing the Plaintiff serious injuries.

Particulars of negligence of the defendants, their driver servant, employee and/or agent

- a. Driving at an excessive speed in the circumstances
- b. Causing or permitting the said motor vehicle registration number KBY 516Q to cause injuries
- c. Failing to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle so as to avoid the accident
- d. Failing to maintain any or any proper care and control of the said motor vehicle
- e. Causing the accident’

6. At the formal proof hearing of this matter, the Plaintiff adopted her statement as evidence in chief. In her witness statement, the Plaintiff indicated to have sued the Defendants herein because of a road traffic accident involving the defendants’ motor vehicle registration no. KBY 516Q Tata Lorry driven by the 1st Defendant or the defendant’s driver, servant and/or agent, that happened along Ruaka-Kahawa West road or thereabouts. She stated that on 23/09/2017 at around 1600hrs she was a passenger in KAU 675X when motor vehicle reg. no. KBY 516Q was driven along said road at high speed that it veered off the road and caused an accident. She further averred that the driver appeared to have lost control of the said vehicle due to high speed. She blamed the driver of the motor vehicle for causing accident as he drove the vehicle negligently, without due care and attention and carelessly.

7. The Plaintiff produced a Police Abstract dated 5/10/2017 as P-Exhibit a. The Police Abstract indicated that matter had been referred to insurance and to blame is motor vehicle KBY 516Q.

8. In her pleadings, the Plaintiff did not plead how the negligence of the Defendants occasioned her injuries pleaded in her Plaint. I also note that there is no testimony or exhibit that was produced to this court to show or explain the circumstances in which the accident occurred. The Plaintiff avers to have been travelling in motor vehicle reg. no. KAU 675X but no evidence was produced to show how the said vehicle was involved in the accident or what happened until the Plaintiff sustained injuries on the fateful date. There is no connection explained as to how the negligence of motor vehicle reg. no. KBY 516Q resulted to the Plaintiff suffering damages yet she was travelling in a different motor vehicle.

9. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya provides that:-

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



10. I find that the Plaintiff gave no evidence as to what role the Defendants' played in the occurrence of the accident in question that led to her injuries. She simply blamed the motor vehicle reg. no. KBY 516Q. The Plaintiff did not plead particulars of negligence against the Defendants that showed how their negligence occasioned her injuries and also failed to tender evidence to prove the same. It is therefore the conclusion of this court that the Plaintiff did not discharge his burden of proof on the issue of liability as against the 1st and 2nd Defendants.

Quantum

11. It is trite law that there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence, see *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* 1991. I have already established that the Plaintiff failed to prove liability as against the Defendants in this matter and thus he is not entitled to an award on quantum. However, it is the practice that the court assesses damages that it would have awarded in the event liability had been proven. I thus proceed and quantify the Plaintiff's case as follows:

General Damages

12. The Plaintiff pleaded to have sustained injuries namely, swollen tender form on lower lip, blunt injury to lower jaw front teeth and blunt injury to right thigh. She produced Medical Report dated 15/09/2020 as P-Exhibit e which was filled approximately three years post the accident in question. The Medical report classifies the injuries suffered by the Plaintiff as soft tissue injuries. At the time of examination the Plaintiff was found to be complaining of bouts of headaches but prognosis was fair. P3 Form (P-Exhibit f) is was filled one day after accident in question classified the injuries sustained by the Plaintiff as 'harm'.
13. The Plaintiff submitted that the Plaintiff should be awarded Kshs 200,000 as general damages. She relied on the case of *Habiba Abdi Mohammed v Peter Maleve* [2000]eKLR, the case of *Francis Ochieng & Another v Alice Kajimba* [2015]KLR, and the case of *George O. Obare & Another v Fransisca Tavitha Mbuvi* HCCA 89/2017. I find that in the case of *Habiba Abdi Mohammed v Peter Maleve, supra*, the Plaintiff sustained more severe injuries as there was surgery involved. In *Francis Ochieng & Another v Alice Kajimba, supra*, the Respondent had sustained cerebral contusion with loss of consciousness for 2 hours, massive haematoma on the right parietal head, subconjunctual haematoma of the right eye, peri-orbital haematoma, peri-orbital ecchymosis, nuckial stiffness, cut wound on the right hand and the right knee, and was admitted in hospital. The said injuries are clearly more severe than those suffered by the Plaintiff in the case at hand. The actual judgment for the case of *George O. Obare & Another v Fransisca Tavitha Mbuvi* was not attached to the Plaintiff's submissions for the court's consideration.
14. In my determination I have further made reference to the case of *Edward Mutevu Maithya & another v Edwin Nyamweya* [2022] eKLR whereby the Respondent had sustained cut wounds on the scalp, bruises the back, right upper limb and the left lower limb. The High Court in that case set aside the award on general damages of Kshs 550,000 and substituted the same with an award of Kshs 100,000. In the case of *FM (Minor suing through Mother and next friend MWM) v JNM & another* [2020] eKLR. The appellant sustained injuries namely blunt object injury to the head, neck, thorax, abdomen and limbs. The court awarded an award of Kshs. 100,000/= for general damages.
15. Taking into consideration the nature of injuries suffered by the Plaintiff in this case, the passage of time and rate of inflation, I find that an award of Kshs 120,000 would have been sufficient under the head of general damages if the Plaintiff had discharged his burden of proof on liability.



Special Damages

16. The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:-

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

17. The Plaintiff pleaded special damages under paragraph 10 of his Plaint as follows;

- a. Medical Report Kshs 3,000
- b. Medical Expenses Kshs 1,270
- c. Motor vehicle search Kshs 550

Total Kshs 4,820

18. At the hearing of this suit, the PW1 produced an Invoice Paid for Copy of Records amounting to Kshs 550 and the actual Copy of Records as P-Exhibit d. PW1 also produced as P-exhibit g a bundle of receipts for medical expenses amounting to Kshs 2,320 and a receipt for the Medical Report expense of Kshs 3,000. I find that the Plaintiff discharged the standard of proof for the special damages for Medical Report, medical expenses and motor vehicle search. I would thus have awarded the Plaintiff the pleaded amount of Kshs 4,820.

Conclusion

19. The upshot therefore is that I hereby dismiss the Plaintiff’s case with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF MARCH, 2022

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S.K. MOTARI

RESIDENT MAGISTRATE

In the presence of:-

