Ndiema v Kababa t/a Channia Classic (Civil Case 10 of 2018)
[2025] KEMC 262 (KLR) (9 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE 10 OF 2018

YA SHIKANDA, SPM

OCTOBER 9, 2025

BETWEEN

ANNET CHEMTAI NDIEMA ..... PLAINTIFF

AND

DANIEL MURITHI KABABA T/A CHANNIA CLASSIC ..... DEFENDANT

JUDGMENT

1. Annet Chemtai Ndiema (hereinafter referred to as the plaintiff) initially filed this suit on 29 1 2018 vide a plaint dated 21 12 2017. The plaintiff later amended her plaint which was filed on 16 7 2018. The plaintiff sued Daniel Murithi Kababa T a Channia Classic (hereinafter referred to as the defendant) on account of a road traffic accident that allegedly occurred on 2 7 2016 at Makindu along Mombasa-Nairobi Highway. The plaintiff averred that on the material day, she was a lawful passenger in the defendant's motor vehicle registration number KBX 019J Isuzu bus when the said motor vehicle was so negligently driven by the defendant's driver that it knocked motor vehicle registration number KBH 129D-ZC 6898 M Benz from behind. That as a result of the accident, the plaintiff sustained serious injuries and the accident is attributed to the negligence of the defendant's driver to which the defendant is vicariously liable.

2. The defendant was sued as the registered and or beneficial owner of motor vehicle registration number KBX 019J Isuzu bus. The plaintiff pleaded the following particulars of negligence as against the defendant's driver:

    a. Driving the said motor vehicle in an excessive speed in the circumstances;

    b. Driving the said motor vehicle without any special look out or due regard to other road users;

    c. Failing to keep any proper look out and or any sufficient regard to other road users;

d. Failing to stop, slow down, swerve, brake and or manage to control the said motor vehicle from stopping abruptly on the road;

e. Driving a defective motor vehicle;

f. Causing or permitting the accident to occur;

g. Overtaking another motor vehicle without proper regard to other road users;

h. Turning without any due care and regard to other road users;

i. Failing to keep his lane while on the road;

j. Failing to keep safe distance between motor vehicle registration number KBX 019J and motor vehicle registration number KBH 129D-ZC 6898;

k. Knocking motor vehicle registration number KBH 129D-ZC 6898 from behind;

l. Failing to maintain his side of the road.

3. The plaintiff further pleaded the particulars of injuries and those of special damages. She relied on the doctrine of Res ipsa loquitor , the Highway Code and the provisions of the *akn ke act 1953 39 Traffic Act* and prayed for judgment against the defendant for:

1. General damages;

2. Special damages;

3. Damages for hiring a helper, costs of artificial limbs, costs of wheel chair, loss of earning or income, damages for inconveniences in child birth and bearing and damages for future medication and care;

4. Costs and interest.

The Defendant's Defence

4. The defendant entered appearance on 6 6 2018 and filed a written statement of defence on the same date. The defendant denied being the registered and or beneficial owner of motor vehicle registration number KBX 019Jand denied the occurrence of the accident. The defendant averred that even if the accident occurred, then the plaintiff was not lawfully travelling in the suit motor vehicle. In the alternative, the defendant further averred that if the alleged accident occurred, which was denied, then the accident was entirely caused by the negligence on the part of the driver of motor vehicle registration number KBH 129D ZC 6898. The defendant denied the particulars of negligence pleaded by the plaintiff.

5. The defendant pleaded the following particulars of negligence as against the driver of motor vehicle registration number KBH 129D ZC 6898:

a. Driving without proper look out and or attention;

b. Failing to maintain proper and or effective control of the motor vehicle reg. KBH 129D ZC 6898;

c. Failing to stop, swerve, brake, slow or in any other manner steer the said motor vehicle so as to avoid causing an accident with motor vehicle registration No. KBX 019J;

d. Blocking the way of passage of m v reg. KBX 109J when it was in motion hence causing the accident.

6. The defendant denied the applicability of the doctrine of Res ipsa loquitor, the Highway Code and the provisions of the *akn ke act 1953 39 Traffic Act* and prayed that the plaintiff's suit be dismissed with costs.

The Evidence

The Plaintiff's Case

7. Only the plaintiff testified in support of her case. She adopted her statement as part of her testimony. The plaintiff testified that on 2 7 2016 she was involved in a road accident along Mombasa-Nairobi Highway. That the accident occurred between Makindu and Kibwezi. It was the evidence of the plaintiff that she was a passenger aboard motor vehicle registration number KBX 019J and was from Mombasa heading to Nairobi. That the motor vehicle that the plaintiff had boarded was being driven at a high speed and in the process, it rammed into the rear of motor vehicle registration number KBH 129D-ZC 6898.

8. The plaintiff stated that she was injured as a result of the accident. She sustained injuries to the face, chest, both hands and had both legs amputated below the knee. The plaintiff blamed the driver of the motor vehicle she had boarded for failing to control the bus. That the driver drove at a high speed and failed to keep to his lane. The plaintiff produced in evidence the documents filed on record.

The Defendant's Case

9. The defendant did not attend court to testify nor call any witness.

Main Issues For Determination

10. In my opinion, the main issues for determination are as follows:

    i. Whether an accident occurred on 2 7 2016 at Makindu area involving motor vehicles registration numbers KBX 019J and KBH 129D ZC 6898;

    ii. Whether the defendant is the owner of motor vehicle registration number KBX 019J;

    iii. Whether the plaintiff was involved in the accident;

    iv. Who was to blame for the accident?

    v. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;

    vi. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;

    vii. Who should bear the costs of this suit?

The Plaintiff's Submissions

11. The plaintiff relied on the evidence on record and urged the court to find the defendant 100% liable in negligence and for the accident. She submitted that her evidence was unrebutted. On quantum, the plaintiff submitted a sum of Ksh. 7,000,000 = in general damages for pain and suffering and relied on the authority of China National Aerotechnology International Engineering Corporation v Lawrence Naibei Chemurugo [2021] eKLR, wherein Ksh. 6,000,000 = was awarded for similar injuries. The plaintiff proposed a sum of Ksh. 3,892,752 as cost of domestic help. This was made up

of a multiplicand of Ksh. 8,109.90 and a multiplier of 40 years. The plaintiff further proposed a sum of Ksh. 1,200,000 = as costs of artificial limbs for three cycles and Ksh. 300,000 = for a wheelchair.

12. The plaintiff proposed Ksh. 500,000 = for what she called damages for inconvenience and difficulty in birth or child bearing. The plaintiff asked for Ksh. 1,000,000 = as damages for what she called inconvenience in her profession. That her job as a teacher, which ordinarily requires standing and walking across the classroom as well as doing sporting activities. For special damages, the plaintiff urged the court to award Ksh. 27,000 = as proved.

The Defendant's Submissions

13. The defendant did not file submissions despite being given sufficient time to do so.

Analysis And Determination

14. I have carefully considered the evidence on record and given due regard to the submissions made by the plaintiff as well as the authority relied upon. From the evidence of the plaintiff including the documents produced in evidence, I find that there is uncontroverted evidence to prove the occurrence of the accident and the involvement of the motor vehicles in issue as well as the plaintiff herein. There is also unrebutted evidence by way of a police abstract to prove that the defendant was the owner of motor vehicle registration number KBX 019J at the time of accident. No contrary evidence was furnished.

Liability

15. There is only one version as to how the accident occurred. According to the plaintiff's uncontroverted evidence, on 2 7 2016, she was lawfully travelling as a passenger aboard motor vehicle registration number KBX 019J along Mombasa-Nairobi Highway when the said motor vehicle was driven at a high speed that the driver lost control and rammed into the rear of motor vehicle registration number KBH 129D ZC 6898. It is the duty of the plaintiff to establish or prove negligence on the part of the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence.

16. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the *akn ke act 1963 46 Evidence Act* which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of Kirugi & Another v Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held thus:

> " The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

117. The uncontroverted evidence of the plaintiff clearly shows that the driver of the accident motor vehicle, which she had boarded was at fault. He was reckless in his manner of driving. It does not show that the plaintiff was to blame. There is clear and uncontroverted evidence on how the accident herein occurred. I find that the evidence of the plaintiff as to how the accident occurred was consistent and was not shaken. The defendant, in his statement of defence attributed negligence to the other motor vehicle but did not attend court to give evidence nor institute third party proceedings against the driver of the other motor vehicle or even the owner. Allegations in pleadings remain mere allegations unless backed by evidence.

18. The plaintiff relied on the doctrine of Res ipsa loquitor. Is the doctrine applicable in this case? In the leading case of Scott v London and St Katherine Docks Co (1865) 3 H & C 596, Erle CJ at page 600 held as follows:

> " There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

19. In Black's Law Dictionary 9th Edition page 1424, the principle is defined as follows:

> " [Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."

20. The Dictionary goes further to explain the circumstances the Court will infer negligence as follows:

> " The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."
>
> "It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."
>
> 'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

21. Kennedy L.J. in Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548 at p. 551 as follows:

> " ....that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

22. The Learned Judge then continued:

> " Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."

23. In Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson stated:

> " In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

24. In the case of Embu Public Roads Services Ltd v Riimi (1968) EALR 22, the Court of Appeal held as follows:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident".

25. From the foregoing, it is clear that the doctrine of res ipsa loquitor applies only where circumstances are established which afford reasonable evidence, in the absence of explanation by the defendant, that the incident leading to the injuries arose from their negligence. In an appropriate case, the plaintiff establishes a prima facie case by relying upon the fact of the incident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the incident. Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case.

26. On the basis of the evidence on record, a prima facie case of negligence has been established as there is a causal link between the driver of the accident motor vehicle that the plaintiff had boarded and the injuries that were sustained by the plaintiff. The doctrine, in my view, will thus apply. In view of the evidence on record, there is a sufficiently high degree of probability, that, but for the acts of omission and commission by the driver of motor vehicle registration number KBX 019J, the accident would have been prevented. I find that the driver of the motor vehicle was solely culpable as far as the accident is concerned. In my view, there are concrete facts on which a finding would be made that the said driver was solely negligent. In the circumstances, I find the driver of motor vehicle registration number KBX 019J 100% liable in negligence and for the accident.

27. Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, respondeat superior, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

28. In the case of Morgan v Launchbury [1972] ALL ER 606, it was held, inter alia, that:

> " To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

29. Similarly, In Kaburu Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR the Court of Appeal held that:

> " Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

30. Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of Kenya Bus Services Ltd v Humphrey [2003] KLR 665; [2003] 2 EA 519, the Court of Appeal cited Kansa v Solanki [1969] EA 318 wherein it was held that:

> " Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

31 It has not been denied in evidence that the driver of motor vehicle registration number KBX 019J drove the said motor vehicle in the course of his employment with the defendant. Consequently, I find the defendant 100% vicariously liable for the accident.

Quantum

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

    i. Crush injury to the lower right limb;

    ii. Crush injury to the left lower limb;

    iii. Blunt injury and bruises to the chest;

    iv. Cut wound to the forehead;

    v. Bruises on the upper limbs

33. The plaintiff's lower limbs were both amputated below the knee. The injuries were classified as grievous harm. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the finding on liability, the plaintiff is thus entitled to damages as against the defendant.

34. 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".

35. I am also guided by Lord Denning's decision in Kim Pho Choo v Camden & Islingtom 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."

36. The Court of Appeal in Southern Engineering Company Ltd v Musingi Mutia [1985] KLR 730 held that:

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed

to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

37. 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.

38. Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

39. I have considered the injuries sustained by the plaintiff. The plaintiff suffered injuries which were classified as grievous harm in the P3 form. In my opinion, the authority relied upon by the plaintiff is comparable. On my part, I have considered the following authorities:

1. Samwel Andayi Anganya v Lucy Wangeshi & another [2019] KEHC 10714 (KLR)

40. The plaintiff sustained head injury with brain concussion, fracture of the right tibia and fibula leading to below the knee amputation and fracture of the left tibia and fibula leading to below the knee amputation. The court awarded Ksh. 6,000,000 = in general damages on 31 1 2019.

2. Ibrahim v Durage & another [2025] KEHC 8743 (KLR)

41. The plaintiff sustained a crush injury on his left leg that led to its amputation below the knee. The court awarded Ksh. 3,000,000 = in general damages on 19 6 2025.

3. Everlyne Shivachi v Thara Trading Co. Ltd [2013] KEHC 5454 (KLR)

42. The plaintiff sustained extensive cuts and abrasions on the left forearm followed by extensive skin and muscle loss, fracture of the bones of the left forearm, close to the wrist joint and severe crush injuries to both legs leading to amputation of both legs above the knee. The court awarded Ksh. 5,000,000 = in general damages on 18 1 2013.

43. Taking all these comparative awards into account and taking into consideration the other injuries suffered by the plaintiff, it is my opinion that the award of Kshs. 7,000,000 = suggested by the Plaintiff's counsel is, indeed, a reasonable award. I have taken into consideration the long term effects of the

double amputation including its effects on mobility and dexterity (even after prosthesis); the limitation on economic activities the plaintiff can engage in, as well as the traumatic and psychological effects. I have further considered the age of the awards in the above authorities coupled with the vagaries of inflation and I find that an award of Ksh. 7,000,000 = in general damages would suffice. I award the same.

Special Damages

44. The plaintiff pleaded special damages as follows:

    a. Medical expenses.....Ksh. 22,813 =

    b. Medical report.....Ksh. 2,500 =

    c. Filling P3 form.....Ksh. 2,000 =

    d. Cost of artificial limbs.....Ksh. 400,000 =

    Total.....Ksh. 427,313 =

45. 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"

46. 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."

47. The costs of artificial limbs cannot be categorized strictly as special damages but should be future medical expenses. I will address the issue of future medical expenses later. The only special damage that was proved according to law was that of the medical report. I will thus award Ksh. 2,500 = as special damages.

Future medical expenses

48. Under paragraph 6 of the plaint, the plaintiff pleaded, inter alia, costs of a wheel chair, costs of artificial limbs and costs of future medical care and expenses. The costs of artificial limbs was wrongly pleaded under special damages. I say so because the plaintiff had not procured the artificial limbs at the time of filing suit but pleaded that the same would be required in the near future. Special damages ordinarily refer to loss or expense incurred prior to the filing of the suit. If the plaintiff had procured the artificial limbs prior to the filing of the suit, she would have properly claimed them under the head of special damages. In the circumstances, the claim would fall under future medical expenses.

49. In addressing this issue, I will highlight some Court of Appeal authorities on the subject.

Simon Taveta v Mercy Mutitu Njeru [2014] eKLR

50. In a judgment delivered on 5 2 2014, the court held as follows on the issue of future medical expenses:

> " The issue for our consideration is whether the pleadings as stated above in the plaint include a claim for future medical expenses. In the case of Kenya Bus Services Ltd. - v Gituma, (2004) 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 damages and is a fact that must be pleaded, if evidence thereon 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 the infringement of a person's legal rights should be pleaded'.
> >
> > We observe that the trial judge correctly held that the plaint did not contain a pleading for future earnings or the need for employment of a house help and nurse and that these ought to have been pleaded and proved as special damages..... In Mbaka Nguru & Another - v- James George Rakwar, Court of Appeal Civil Appeal No. 133 of 1998, it was stated that claims for future medical expenses must be pleaded and proved as a special damage claim".

Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR

51. In a judgment delivered on 9 10 2009, the court observed as follows:

> " The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no proof.....Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of the required amounts for future treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in McGregor on Damages, 16 Edition at page 1654 in relation to medical expenses:
>
> 'Both expenses already incurred at the time of the trial and prospective expenses are recoverable and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident of the time the case comes on for hearing, implies no substantive differences.'
>
> We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard".

Mbaka Nguru & Anor. v James George Rakwar[1998]eKLR.

52. Judgment herein was delivered on 23 12 1998. The court held as follows:

> " We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the

plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head...."

Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees Of Eldoret & another [2016] eKLR.

53. In a judgment delivered on 14 6 2016, the court held that prospective medical expenses that have not crystallized as disbursements may be claimed as general damages but the same cannot be awarded without evidence.

54. From the above authorities, I gather that damages for future medical treatment are awardable but there must be evidence for the need for future medical treatment as well as an estimate of the same. There is divided opinion in the Court of Appeal as to whether such damages are in the nature of general or special damages. There is medical evidence to show that the plaintiff will require the use of artificial limbs.

55. Doctor Kubasu in his report dated 27 6 2017 estimated the cost at Ksh. 200,000 = per limb. He did not lay a basis for his estimate. I am aware of the existence of the Medical Practitioners and Dentists (Professional Fees) Rules. Rule 3 thereof stipulates that the fees specified under the Schedule to the Rules shall be the fees charged by practitioners offering medical or dental services, or both and that the fees shall be adhered to by all practitioners and institutions registered under the Act and no practitioner may agree or accept fees above that which is provided under the Rules.

56. Accordingly, the Rules provide that for fitting surgery for prosthesis, the minimum charge shall be Ksh. 180,000 = whereas the maximum shall be Ksh. 300,000 =. The fees are subject to the annual inflation rate. Dr. Kubasu's report was made in June, 2017. Being guided by the Medical Practitioners and Dentists (Professional Fees) Rules and bearing in mind the vagaries of inflation, I award Ksh. 400,000 = as future medical expenses for fitting surgery of two prosthetic limbs. There is no medical report to indicate at what intervals the limbs would require to be replaced, if at all.

Damages for loss of earnings.

57. The plaintiff pleaded and prayed for damages for loss of earnings. She pleaded that she would not be able to perform her duties as a teacher. In her testimony, the plaintiff stated that she was a student at Shanzu Teachers Training College, pursuing a certificate course in teaching. That the accident affected her career and that she may not effectively pursue her career as a teacher. When she attended court to testify, the plaintiff stated that sometimes she does not go to work. She did not state why. All in all, her evidence indicates that the plaintiff was able to get employed as a teacher even after the accident. The plaintiff appears to have confused loss of earning capacity and loss of earnings.

58. In Kibet v Alunda [2024] KECA 64 (KLR), the Court of Appeal held:

> "".....it is clear that a court will accept an invitation to make an award for "loss of earning capacity" once it is established that there is a risk that the level of disability suffered by a plaintiff diminishes his chances of returning to work at the same level, working the same hours or that the disability may be long-term. This, in other words, can be equated to a diminished earning capacity which decreases an individual's earning ability as a result of the disability. It is, however, distinguishable from "loss of earnings" which ordinarily is an assessment of the actual loss of earnings as a result of the accident. In this regard, the current known earnings of the claimant are used to determine what the plaintiff is awarded. This is a special loss because it is a known loss which can be calculated. The claim must therefore

be specifically pleaded and proved as special damages. It does not matter whether a party infuses the word "future" into the two distinct claims as either way, the end result is that "loss of earning capacity" concerns the estimated loss that the plaintiff is likely to suffer in future while "loss of earnings" is actual and determinable as it is tied to the plaintiff's current earnings." (Emphasis supplied)

59. Similarly, in Douglas Kalafa Ombeva v David Ngama [2013] KECA 538 (KLR), the Court of Appeal stated:

> " While loss of earnings fall under the head of special damages, which must be specifically pleaded and proved, loss of earning capacity on the other hand, falls under the head of general damages and would need to be proved on a balance of probabilities. See Cecilia W. Mwangi& Another v Ruth W. Mwangi [1997] eKLRwhere this court stated that:
>
> > 'Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability."

60. Apart from merely pleading in the plaint, there is nothing else that the plaintiff produced to prove her earnings. This being a claim in the nature of special damage, I find that the plaintiff has failed to prove the same. I thus dismiss the claim and make no award under this head.

Cost of hiring a domestic help

61. In her plaint, the plaintiff stated that she could not be able to carry out her personal chores on her own and that she would need a helper for the rest of her life. The accident occurred in 2016 whereas the suit was filed in 2018. If she really needed a house help, she must have hired one by the time she filed suit. The plaintiff did not plead how much she was paying or was to pay the house help. She did not even testify on whether she had hired a house help and how much she was paying for the services. No documentary evidence was adduced to confirm the position. In the case of Kenya Power & Lighting Company Limited v Kassim Wekhoba Toloi & another [2019] KEELRC 2454 (KLR), the court set aside an award of domestic help on the basis that no evidence was adduced by the Plaintiff at all to support his claim.

62. In the authority of Salim S. Zein T A Eastern Bus Service & Another V Rose Mulee Mutua [1997] KECA 94 (KLR), the Court of Appeal held:

> " There is no evidence at all upon which the awards of Shs.50, 000 - and Shs.120, 000 -, for future medical expenses and the hire of domestic help can be sustained. The plaintiff did not give evidence in support of her claim for these expenses. So the awards were based on no evidence. That is a serious transgression of principle on the part of the Judge which this Court has a duty to correct. Accordingly, these awards are set aside in their entirety."

63. In Mwangi ((Suing as the Administrator of the Estate of Beatrice Njeri Kamau - Deceased)) v Ngige & another [2023] KEHC 23311 (KLR), the court held:

> " As regards the claims for nursing and domestic care, and future treatment, I do concur with the respondent's submissions, once a party claims an identifiable and or specific amount of money, it supposes that figure is certain, ascertainable and is capable of proof. It is indeed a matter of special damages. Therefore the same should be specifically pleaded and strictly

proved. Further, I note from the amended plaint that no single paragraph makes reference to those claims, save for the sums in the final prayers. I therefore find that the respondent's submissions to that effect are valid."

64. In Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited [2016] KEHC 3434 (KLR), the court observed that the claim for hire of domestic help was not proven as no documentary evidence was adduced. That an assertion that house help earned the said sum or that she was the Plaintiff's employee without any proof remained just a mere assertion. Case law suggests that the claim for domestic help is in the nature of special damages which must be specifically pleaded and strictly proved. Given the circumstances of this case, I am inclined to dismiss the claim.

Cost of wheelchair

65. The plaintiff pleaded costs of a wheelchair but did not indicate how much it was. In her statement which was adopted as her evidence in-chief, the plaintiff stated that after the accident, she had to be confined to a wheel chair at the time of doing her exams. In her testimony before court, the plaintiff stated that she uses artificial limbs or a wheelchair. This implies that the plaintiff incurred expense for the wheelchair before filing suit. Given the circumstances, it is my view that the plaintiff ought to have pleaded and proved the claim as a special damage. The plaintiff did not even state how much the wheelchair cost. The figure was just mentioned in the submissions. Submissions cannot take the place of evidence. In the circumstances, I dismiss the claim for cost of a wheelchair.

Damages for inconvenience in child birth and bearing

66. This was pleaded in the plaint. There is no medical evidence to show that following the accident, the plaintiff may not be able or may have difficulties in giving birth. When the plaintiff testified, she did not state that she was unable to get married or bear children because of the injuries sustained in the accident. Damages cannot be awarded on assumptions. There must be a basis for making an award. Given that no basis was laid by the plaintiff, I proceed to dismiss the claim.

Damages for inconvenience in the Plaintiff's profession.

67. The plaintiff submitted a sum of Ksh. 1,000,000 = under this head. Her argument was that given her condition, she would not be able to stand in the classroom for long and even participate in sporting activities as is expected of a teacher. I have already made an award under general damages for pain, suffering and loss of amenities. Loss of amenity refers to the reduction in a person's quality of life due to an injury, impacting their ability to enjoy hobbies, engage in social activities, or perform everyday tasks. It is a non-financial form of damage that is claimed as part of a personal injury settlement, covering the loss of comfort, pleasure, and the enjoyment of life that is no longer possible after the injury. Examples include being unable to play a musical instrument, participate in sports, or even care for one's family in the same way as before. It was superfluous on the part of the plaintiff to make a separate claim under this head. Consequently, the claim is dismissed.

Disposition

68. In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendant. Consequently, I make the following awards:

    1. General damages for pain, suffering and loss of amenities.....Ksh. 7,000,000 =
    2. Special damages.....Ksh. 2,500 =
    3. Future medical expenses (Artificial limbs).....Ksh. 400,000 =

Total..... Ksh. 7,402,500 =

69. The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the *akn ke act 1924 3 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."

70. 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.

71. Second, Under Section 26(1) of the *akn ke act 1924 3 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."

72. Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of Omunyokol 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)

73. 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 decree until payment in full and

on Special damages and future medical expenses, from the date of filing suit to the date of judgment decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 9 TH DAY OF OCTOBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.