



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E006 OF 2020

NICHOLAS NZIOKI NDAMBUKI.....PLAINTIFF

VERSUS

**BONIFACE MUMO.....1ST
DEFENDANT**

CYRUS KOMO NGINYO.....2ND DEFENDANT

JUDGMENT

THE CLAIM

Nicholas Nzioki Ndambuki (hereinafter referred to as the plaintiff) filed this suit on 16/9/2020 vide a plaint dated 15/9/2020. He sued Boniface Mumo and Cyrus Komo Nginyo (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 28/6/2019 in Kibwezi Township along Kibwezi-Kitui road. The plaintiff averred that on 28/6/2019 he was a riding motor cycle registration number KMEB 654U along the above said road when the 1st defendant, being the driver of the 2nd defendant, negligently drove, controlled and/or managed motor vehicle registration number KAD 837Y and caused an accident, whereof the plaintiff sustained serious injuries. The 1st defendant was sued as the driver of motor vehicle registration number KAD 837Y whereas the 2nd defendant was sued as the registered and/or beneficial owner of the said motor vehicle.

The plaintiff pleaded the following particulars of negligence as against the 1st defendant:

- a) Driving at a speed which was excessive in the circumstances;
- b) Driving too fast and/or at a manifestly excessive speed in the circumstances at a place with a lot of human traffic;
- c) Driving motor vehicle registration number KAD 837Y carelessly and negligently;
- d) Driving without due care, attention and caution to passengers on board and other road users;
- e) Violating the provisions of the Traffic Act and the Highway Code; and
- f) Driving a defective motor vehicle.

The plaintiff further pleaded the following particulars of negligence against the 2nd defendant:

- a) Failing to employ a competent and careful driver;
- b) Permitting the said motor vehicle to be driven negligently and/or carelessly; and
- c) Failing to keep the said motor vehicle in good and serviceable state.

The plaintiff pleaded the particulars of negligence and those of special damages. He thus prayed for judgment against the defendants jointly and severally for:

- 1) General damages for pain, suffering and loss of amenities;
- 2) Special damages of Ksh. 10,800/=;
- 3) Costs and interest.

THE 1ST DEFENDANT'S DEFENCE

The 1st defendant entered appearance on 9/10/2020 and filed a written statement of defence on 21/10/2020. The 1st defendant denied being the driver of the suit motor vehicle and averred that the suit was fatally defective and an abuse of the court process as it did not disclose a cause of action. The 1st defendant denied the occurrence of the accident and the particulars of negligence attributed to him. He averred in the alternative that if the accident occurred, then the plaintiff was the sole author and/or substantially contributed to the occurrence of the accident.

The 1st defendant pleaded the following particulars of negligence as against the plaintiff:

- a) Riding on the said road in a zig zag manner;
- b) Riding on the said road without due care and attention to the road users and in particular towards the 1st defendant;
- c) Riding on the said road at a high speed in the circumstances;
- d) Failed to control the said motor cycle to avoid the said accident;
- e) Failed to apply brakes in time or sufficiently to avoid the said accident;
- f) Riding a defective and uninsured motor cycle on the said road;
- g) Riding the said motor cycle without a valid driving licence;
- h) Hitting the said motor vehicle from the front side;
- i) Causing the accident.

The 1st defendant prayed that the plaintiff's suit be dismissed with costs.

NON-APPEARANCE BY THE 2ND DEFENDANT

The record indicates that the 2nd defendant was served but he failed to enter appearance and file a statement of defence. Consequently, upon request by the plaintiff, interlocutory judgment was entered against the 2nd defendant on 1/12/2020.

THE EVIDENCE

The Plaintiff's Case

Three witnesses were called on behalf of the plaintiff. PW 1 Police Constable Edwin Cheruiyot produced a police abstract in respect of the accident herein. He confirmed the occurrence of the accident as well as the involvement of the motor cycle and motor vehicle. The witness also confirmed that the plaintiff was involved. He also produced a copy of the OB extract in respect of the accident report. According to the witness, the investigating officer blamed the driver of the motor vehicle for the accident. PW 2 was the plaintiff himself. He adopted his statement filed in court as part of his testimony. His evidence was that on 28/6/2019 he was riding his motor cycle registration number KMEB 654U along Kibwezi-Kitui road when motor vehicle registration number KAD 837Y veered onto the plaintiff's lane and knocked him down.

That the accident occurred at a junction and the driver of the other motor vehicle did not indicate that he was turning. In the process, the plaintiff was knocked down. PW 3 Doctor Titus Ndeti Sila testified that he examined the plaintiff and prepared a medical report. He classified the degree on injury as grievous harm and assessed permanent disability at 10%. The witness produced the medical report in evidence.

The 1st Defendant's Case

The 1st defendant did not attend court to testify nor call any witness.

MAIN ISSUES FOR DETERMINATION

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

- i. Whether an accident occurred on 28/6/2019 at Kibwezi area involving motor vehicle registration number KAD 837Y and motor cycle registration number KMEB 654U;
- ii. Whether the defendants are the driver and owner respectively of motor vehicle registration number KAD 837Y;
- 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

The plaintiff relied on the evidence on record and urged the court to find the defendants 100% liable in negligence and for the accident. He submitted that his evidence was unrebutted. On quantum, the plaintiff submitted a sum of Ksh. 2,000,000/= in general damages for pain and suffering and relied on the following authorities:

- a) ***Edward Mzamili Katana v CMC Motors Group Ltd & another [2006] eKLR*** wherein Ksh. 2,000,000/= was awarded for multiple fractures and soft tissue injuries;

- b) *Samwel Mwangi Kamau v Joseph M. Kimemia & another [2004] eKLR*, wherein Ksh. 1,000,000/= was awarded for head injury leading to paralysis of the left upper limb, fracture of the right tibia and fibula resulting to permanent deformity and soft tissue injuries.

For special damages, the plaintiff urged the court to award Ksh. 10,800/= as proved.

THE 1ST DEFENDANT'S SUBMISSIONS

The 1st defendant did not file submissions despite being given sufficient time to do so.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the plaintiff as well as the authorities 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 vehicle and motor cycle in issue as well as the plaintiff herein. There is also sufficient evidence by way of a police abstract and copy of records from the Registrar of motor vehicles to prove that the 1st and 2nd defendants were the driver and owner respectively of motor vehicle registration number KAD 837Y at the time of accident. No contrary evidence was furnished.

Liability

There is only one version as to how the accident occurred. According to the plaintiff's uncontroverted evidence, on 28/6/2019, he was riding his motor cycle registration number KMEB 654U along Kibwezi-Kitui road when motor vehicle registration number KAD 837Y veered onto the plaintiff's lane and knocked him down. That the accident occurred at a junction and the driver of the other motor vehicle did not indicate that he was turning. In the process, the plaintiff was knocked down. 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 plaintiff with particulars of negligence. 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 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.”

The uncontroverted evidence of the plaintiff clearly shows that the driver of the accident motor vehicle 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 in cross-examination. 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 the motor vehicle, 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 1st defendant **100% liable** in negligence and for the accident.

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.

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.”

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.”

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.”

It has not been denied in evidence that the 1st defendant was driving the accident motor vehicle in the course of his employment with the 2nd defendant. Consequently, I find the 2nd defendant **100% vicariously liable** for the accident.

Quantum

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

- i. Lacerations on the left hand;
- ii. Compound fracture of the tibia/fibula bones;
- iii. Wound on the right lower limbs extending from the knee to the right ankle; and
- iv. Laceration wounds on the left foot.

Dr. Ndeti assessed the degree of functional permanent incapacity of the right leg at 10%.

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 defendants.

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”.

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.”

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.”

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.

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

General Damages for pain, suffering and loss of amenities

I have considered the injuries sustained by the plaintiff. The plaintiff suffered injuries which were classified as maim in the P3 form. In my opinion, the authorities relied upon by the plaintiff involved more serious injuries and are therefore not comparable. On my part, I have considered the following authorities:

1) Julie Akoth Onyango v Daniel Otieno Owino & another [2020] eKLR.

The plaintiff and appellant in the appeal sustained a compound fracture of the tibia and fibula of the left leg, cuts on both legs, pain in the thighs and left hand. Ksh. 600,000/= was awarded in general damages on 19/6/2019. On appeal, the award was reduced to Ksh. 500,000/= on 29/5/2020.

2) Tirus Mburu Chege & another v JKN (minor suing through the next friend and mother DWN & another [2018] eKLR.

The minor plaintiff and respondent in the appeal sustained fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken front tooth, nose bleeding and consistent loss of consciousness. The trial court awarded Ksh. 800,000/= on 20/5/2015. On appeal, the award was reduced to Ksh. 500,000/= on 3/10/2018.

Given the nature of the injuries sustained by the plaintiff herein and the age of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 950,000/= in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

- a) Medical report.....Ksh. 3,000/=
- b) Cost of motor cycle repairs.....Ksh. 6,250/=

c) Motor vehicle search fees.....Ksh. 550/=

Total.....Ksh. 10,800/=

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”

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.”

The special damages were sufficiently proven but the amount should be Ksh. 9,800/= and not Ksh. 10,800/= as pleaded. I therefore award **Ksh. 9,800/=** as special damages.

DISPOSITION

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. 950,000/=

2) Special damages.....Ksh. 9,800/=

Total.....Ksh. 959,800/=

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 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.”

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.**

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.”

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)

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, from the date of filing suit to the date of judgment/decree.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 7TH DAY OF OCTOBER,
2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.