REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E244 OF 2024

JOSEPHART MWANIA KALITI……PLAINTIFF

VERSUS

SWIFTSTRIDES LOGISTICS LTD……1ST DEFENDANT

FRANCIS OCHIENG LUMUMBA……2ND DEFENDANT

JUDGMENT

THE CLAIM

Josephart Mwania Kaliti (hereinafter referred to as the plaintiff) filed this suit on 4/10/2024 vide a plaint dated 26/9/2024. He sued Swiftstrides Logistics Ltd and Francis Ochieng Lumumba (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 10/8/2023 along Nairobi-Mombasa road. The plaintiff averred that on the above stated date, he was travelling as a passenger in motor vehicle registration number KCJ 331D along Nairobi-Mombasa road when the driver of the said motor vehicle so negligently drove the motor vehicle and lost control, thereby causing the motor vehicle to violently hit another motor vehicle registration number KCY 129C in the rear. As a result, the plaintiff sustained serious bodily injuries and suffered loss and damage.

The 1st defendant was sued as the registered owner of motor vehicle registration number KCJ 331D whereas the 2nd defendant was sued as the authorized driver of the said motor vehicle. The plaintiff pleaded the following particulars of negligence as against the defendants:

a) Driving too fast in the circumstances;
b) Driving without due care and attention;
c) Driving without regard for the safety of other road users especially the plaintiff;
d) Driving in a negligent manner;
e) Driving without regard for traffic rules;
f) Driving without keeping a proper look out;
g) Driving a defective and unroadworthy motor vehicle;
h) Driving under the influence of alcohol;
i) Failing to keep and maintain control of the said motor vehicle;
j) Failing to stop, brake, swerve, slow down or otherwise to avoid the accident;
k) Failing to keep the motor vehicle in good repair condition;
l) Causing the accident.

The plaintiff further particulars of injuries and those of special damages. He relied on the doctrines of *Res ipsa loquitor* and vicarious liability then 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. 146,050/=;
3) Costs of the suit and interest.

THE DEFENDANTS' DEFENCE

The defendants entered appearance on 6/11/2024 and filed a joint written statement of defence on 8/11/2024. The defendants admitted being the owner and driver respectively of motor vehicle registration number KCJ 331D. They further admitted occurrence of the accident on 10/8/2023 involving motor vehicles registration numbers KCJ 331D and KCY 129C but denied the version of the plaintiff on how the accident occurred. The defendants denied the particulars of negligence pleaded by the plaintiff and blamed the driver of KCY

129C for dangerously driving the said motor vehicle in a zigzag manner thereby contributing largely and/or causing the accident.

The defendants pleaded the following particulars of negligence as against the driver of motor vehicle registration number KCY 129C/ZE 7669:

a) Driving the said motor vehicle dangerously in a zig zag manner on a busy highway;
b) Failing to indicate hazards to inform other road users of the said motor vehicle's intention to change lanes;
c) Knowingly endangering the lives of his passengers, his own and other road users, specifically the motor vehicle registration number KCJ 331D/ZD 9556;
d) Failing to have due regard and attention to other road users, specifically motor vehicle registration number KCJ 331D/ZD 9556;
e) Driving recklessly and carelessly on a busy road thereby causing an obstruction to other road users, especially motor vehicle registration number KCJ 331D/ZD 9556;
f) Engaging in his own frolics and antics;
g) Being generally negligent;
h) Failing to adhere to the Highway Code and the provisions of the Traffic Act.

The defendant relied on the doctrines of *Res ipsa loquitor* and *Volenti non fit injuria* and averred that despite all reasonable measures that the driver of motor vehicle registration number KCJ 331D/ZD 9556 took to avert the occurrence of the accident, the same was inevitable in the circumstances and the said driver should not be blamed for that which could not be reasonably foreseen and avoided. The defendants denied the particulars of injuries, special damages and future medical expenses as pleaded by the plaintiff. They urged the court to dismiss the suit with costs or that a substantial finding of contributory negligence be made against the driver of motor vehicle registration number KCY 129C/ZE 7669.

THE EVIDENCE

The Plaintiff's Case

Three witnesses were called on behalf of the plaintiff. PW 1 Dr. Jacks Nthanga testified that he examined the plaintiff and prepared a medical report in respect of the examination.

He produced his report in evidence. PW 2 was the plaintiff himself. He adopted his statement filed in court as part of his testimony. His evidence was that on the material day, he was a passenger in motor vehicle registration number KCJ 331D along Nairobi-Mombasa road when the driver of the said motor vehicle drove fast and lost control of it. That he caused the motor vehicle to ram into the rear of motor vehicle registration number KCY 129C which was ahead.

The plaintiff stated that he was injured and was taken to hospital for treatment. He blamed the driver of motor vehicle registration number KCJ 331D for the accident. The plaintiff produced documents in support of his case. PW 3 Police Constable Joseph Mwaura from Emali Traffic base testified that he visited the scene on the day of the accident. That he found both motor vehicles at the scene and established that KCJ 331D had rammed into the rear of KCY 129C after losing control of the motor vehicle. PW 3 stated that the plaintiff was a passenger in motor vehicle registration number KCJ 331D. The witness stated that upon investigations, he blamed the driver of motor vehicle registration number KCJ 331D for the accident.

The Defendants' Case

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

FACTS NOT IN DISPUTE

From the pleadings, the following facts are not in dispute:

a) An accident occurred on 10/8/2023 along Nairobi-Mombasa road involving motor vehicles registration numbers KCJ 331D and KCY 129C;
b) The 1st and 2nd defendants were the owner and driver respectively of motor vehicle registration number KCJ 331D.

MAIN ISSUES FOR DETERMINATION

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

i. Whether the plaintiff was involved in the accident;
ii. Who was to blame for the accident?

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

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

v. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on the evidence on record and submitted that the act by the driver of motor vehicle registration number KCJ 331 D of driving the motor vehicle at a very high speed therefore losing control and hitting motor vehicle KCY 129 C was grossly negligent and was the cause of the accident and the resultant injuries suffered by the plaintiff. That the 2nd Defendant who was the driver of the said motor vehicle had a legal duty to drive with due care, attention and regard to the safety of other road users, including the plaintiff, which he disregarded to the detriment of the plaintiff and must be held fully liable for the same. The plaintiff further submitted that his evidence on liability was corroborated by PC Mwaura from Emali Police Station who produced the police abstract and testified that indeed, an accident occurred on 10/8/2023 involving motor vehicle registration number KCJ 331 D and motor vehicle KCY 129 C and the plaintiff, as a result of which the plaintiff was injured. He testified that after investigations, the driver of KCJ 331D was blamed for the accident.

The plaintiff submitted that he was a mere passenger in the motor vehicle. That it was the 2nd defendant who allowed the plaintiff in the motor vehicle and it was the plaintiff's testimony that he did not know that the vehicle was not allowed to carry passengers. The plaintiff argued that the 1st defendant who the plaintiff holds vicariously liable for the actions of his employee the 2nd defendant, did not call any witness or adduce any evidence in court to show that the motor vehicle was prohibited from carrying passengers. The plaintiff pointed out that the defendants did not challenge the evidence of the plaintiff and his witnesses. He urged the court to hold the defendants 100% liable.

On quantum, the plaintiff proposed a sum of Ksh. 1,350,000/= in general damages and relied on the authority of ***Joseph Musee Mua v Julius Mbogo Mugi and Others [2013] eKLR***, wherein the plaintiff suffered a fracture of the tibia and fibula of the left leg, a broken molar and canine on the upper jaw, chest injury, injury on the right shoulder and bruises on the

left elbow. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected. He suffered 5 % disability. The Court awarded him General damages of Kshs. 1,300,000/=. On special damages, the plaintiff urged the court to award Kshs. 146, 050/= as pleaded and proved, as well as costs of the suit and interest.

THE DEFENDANTS' SUBMISSIONS

The defendants argued that the plaintiff admitted that he had no privity of contract, employment or any legal relationship with the insured and further admitted that he was fully aware prior to boarding the motor vehicle that the same was strictly licensed for transportation of goods and not passengers. That this was a clear case of *volenti non fit injuria*. The defendants relied on authorities whose copies were not annexed. The defendants argued that the plaintiff's unlawful boarding of the motor vehicle and conscious assumption of risk disentitles him from recovery and constitutes a complete defence. In the alternative, the defendants submitted that liability be apportioned in the ratio of 80% against 20% in favour of the defendants or that the same be apportioned equally.

On quantum, the defendants proposed a sum of Ksh. 350,000/= in general damages. Once again, the defendants relied on alleged authorities whose copies were not annexed. For special damages, the defendants urged the court to award what was strictly proved by production of receipts. The defendants argued that future medical expenses are in the nature of special damages and as such, none should be awarded for want of proof.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties as well as the authorities relied upon. From the evidence of the plaintiff including the documents produced in evidence, I have no doubt that the plaintiff was involved in the accident as a passenger in motor vehicle registration number KCJ 331D.

Liability

There is only one version as to how the accident occurred. According to the plaintiff's uncontroverted evidence, the 2nd defendant drove motor vehicle registration number KCJ

331D at a high speed, lost control and rammed into the rear of motor vehicle registration number KCY 129C. 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. 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 motor vehicle registration number KCJ 331D 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.

The defendants argue that since the plaintiff was an unauthorized passenger according to them, he cannot claim damages from the defendants. The defendants relied on an authority whose copy they did not file. I have however, taken the trouble to dig out the authority of ***Peter v Masai Carriers Limited [2025] KEHC 11179 (KLR)***, which the defendants kept brandishing as both a sword and shield. The facts of that case can be distinguished from the instant case. In the authority, there was evidence of a clear notice on the motor vehicle that it was strictly not allowed to carry unauthorized passengers. There was also evidence by way of testimony as well as documentary from the owner of the motor vehicle

that there was a company policy that restricted the driver from carrying unauthorized passengers.

In the authority, the owner of the motor vehicle was exempted from vicarious liability for the acts and omissions of their driver. The authority was actually on the issue of vicarious liability and not negligence as such. In this case, there is absolutely no evidence to show that there were clear instructions from the 1st defendant to the 2nd defendant that no passengers were to be allowed on the motor vehicle. The defendants cannot rely on the mere fact that the motor vehicle was ordinarily licensed for the carriage of goods and not passengers. In any event, the existence of such a policy, if proven, would exonerate the owner only, and not the driver of the accident motor vehicle. The defence was not even pleaded in the statement of defence. It cannot be raised by way of submissions. In the circumstances, I find the 2nd defendant **100% liable** in negligence and for the accident. There is no basis for holding the plaintiff liable in any manner. He was a mere passenger who had no control of the motor vehicle.

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 was admitted in the statement of defence that the 2nd defendant was an agent of the 1st defendant at the material time. As already indicated, there is no evidence to show that the actions of the 2nd defendant were not authorized by the 1st defendant. Consequently, I find the 1st 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. Blunt injury on the right leg;
ii. Fracture of the tibia bone;
iii. Fracture of the fibula bone;
iv. Bruises on the right elbow; and
v. Open wounds on the right lower limb.

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 & 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."

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 authority relied upon by the plaintiff involved more serious injuries and is therefore not entirely 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) Doctor's court attendance fees……Ksh. 10,000/=
c) Police court attendance fees……Ksh. 10,000/=
d) Medical expenses……Ksh. 42,500/=
e) Search certificate……Ksh. 550/=

f) Future medical expenses……Ksh. 80,000/=

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."

To begin with, attendance fees for the doctor and police officer cannot be termed as special damages. These can be claimed as part of the costs of the suit. I will thus disregard the claim for attendance fees. Secondly, I will address the issue of future medical expenses separately. The receipts for medical expenses amount to Ksh. 7,500/=. There is a receipt for the medical report and search certificate. Consequently, special damages pleaded and proved amount to **Ksh. 11,050/=.** I award the same.

Future Medical Expenses

The plaintiff pleaded future medical expenses of Ksh. 80,000/= for removal of the implant from the fracture site. In addressing this issue, I will highlight some Court of Appeal authorities on the subject.

1) ***Simon Taveta v Mercy Mutitu Njeru [2014] eKLR***

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".

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

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".

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

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...."

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

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.

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 removal of the implant.

Doctor Nthanga estimated the entire cost at Ksh. 80,000/=. 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.

Accordingly, the Rules provide that for removal of implants in respect of long and short bones, the minimum charge shall be Ksh. 24,000/= whereas the maximum shall be Ksh. 60,000/=. The fees are subject to the annual inflation rate. Dr. Nthanga's report was made in August, 2023. Being guided by the Medical Practitioners and Dentists (Professional Fees) Rules and bearing in mind the vagaries of inflation, I award **Ksh. 80,000/=** as future medical expenses for removal of the implant.

The plaintiff pleaded in his plaint damages for future earning capacity but did not lead evidence nor submit on the same. It would appear that the claim was abandoned. I will thus not address it.

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. 11,050/=
3) Future medical expenses.....Ksh. 80,000/=

Total.....**Ksh. 1,041,050/=**

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 <u>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</u>……..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 and future medical expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED VIA CTS THIS 17TH DAY OF MARCH, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.