



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E205 OF 2022

**JAPHETH MUSYOKI KIIO ALIAS JAPHETH MUSYOKA KIIO ALIAS JAPETH MUSYOKI
KIIO.....PLAINTIFF**

VERSUS

AQUILA MUMO KITHOME.....1ST DEFENDANT

ELIJAH KYAMO.....2ND DEFENDANT

JUDGMENT

THE CLAIM

Japheth Musyoki Kiiro (hereinafter referred to as the plaintiff) filed this suit on 23/12/2022 vide a plaint dated 19/12/2022. The plaintiff sued Aquila Mumo Kithome and Elijah Kyamo (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 29/10/2021 at Tuvila area along Makindu-Kai murrum road. The plaintiff averred that on the material day he was lawfully riding motor cycle registration number KMDS 131V along the aforesaid road when the 2nd defendant so carelessly and negligently drove and/or controlled motor vehicle registration number KDA 500H that he lost control and caused it to veer off its lane and violently collide with motor cycle registration number KMDS 131V, in consequence whereof the plaintiff sustained severe personal injuries, loss and damage.

The 1st defendant was sued as the registered owner of motor vehicle registration number KDA 500H whereas the 2nd defendant was sued as the driver thereof at the material time. The plaintiff relied on the doctrine of *Res ipsa loquitur* and pleaded particulars of negligence against the 2nd defendant. I will not reproduce the particulars of negligence as the parties recorded a consent on liability. The plaintiff averred that as a result of the accident, he sustained injuries and suffered loss and damage. The particulars of the injuries were listed in the plaint. The plaintiff thus prayed for judgment against the defendants for:

- 1) General damages for pain, suffering and loss of amenities;
- 2) Special damages of Ksh. 787,010/=;
- 3) Costs of the suit;
- 4) Interest on the above.

THE DEFENDANT'S DEFENCE

The defendants entered appearance on 26/1/2023 and filed a written joint statement of defence on 2/2/2023. They denied being the owner and driver respectively, of motor vehicle registration number KDA 500H, admitted that the said motor vehicle was driven on the said date and place but denied that the plaintiff was lawfully riding the said motor cycle, denied that motor vehicle registration number KDA 500H was driven negligently and denied the particulars of negligence pleaded by the plaintiff. In the alternative, the defendant averred that if the accident occurred, then the same was wholly and/or substantially contributed to by the negligent manner in which the plaintiff conducted himself as a motor cyclist. The defendants pleaded several particulars of negligence against the plaintiff but for the reason already given, I will not reproduce them. The defendants prayed that the plaintiff's suit be dismissed with costs.

CONSENT ON LIABILITY

On 19/5/2025, the parties recorded a consent in which liability was apportioned at 20% against the plaintiff and 80% against the defendants. The consent was adopted as an order of the court.

THE EVIDENCE

The Plaintiff's Case

Following the consent on liability, only the plaintiff testified in support of his case. He adopted his statement as part of his testimony in-chief. The plaintiff also produced the documents filed on record as part of his evidence. The plaintiff stated how he was injured. He further testified that he had healed but felt pain in the leg during the cold season. He prayed for orders for compensation.

The Defence Case

The defendants did not call any witness but produced a medical report by consent with the plaintiff.

MAIN ISSUES FOR DETERMINATION

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

- i. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;
- ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
- iii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

On quantum, the plaintiff submitted a sum of Ksh. 700,000/= in general damages for pain and suffering and relied on the following authorities:

- a) ***DG (Minor suing through her next friend MOR) v Richard Otieno Onyisi [2021] eKLR***-wherein the plaintiff and appellant in the appeal sustained chest contusion, fracture of the left tibia and bruises on the left foot and left leg. On appeal, an award of Ksh. 400,000/= was made on 15/4/2021.
- b) ***Janet Opiyo & another v Stepehn Tuwei [2012] eKLR***- Wherein the plaintiff and respondent in the appeal sustained a compound fracture of the right tibia and bruises to the left thumb, left side of the face and left knee. The trial court awarded Ksh. 600,000/= on 12/6/2007. On appeal, the award was affirmed on 11/10/2012.

For special damages, the plaintiff urged the court to award Ksh. 48,800/= for lost items, Ksh. 574,170/= as lost earnings and a further Ksh. 30,650/= for other special damages. In total, the plaintiff urged the court to award special damages of Ksh. 653,620/=. He attached copies of authorities relied upon.

THE DEFENDANTS' SUBMISSIONS

The defendants also filed written submissions. On quantum, the defendants submitted an award of Ksh. 400,000/= in general damages for pain, suffering and loss of amenities. The defendants relied on the following authorities:

- 1) ***Kiama v Mutiso [2024] KEHC 5135 (KLR)***- The plaintiff and respondent in the appeal sustained a fracture of the left tibia and blunt injury to the left leg and thigh. The trial court awarded Ksh. 700,000/= on 17/2/2023. On appeal, the award was reduced to Ksh. 400,000/= on 13/5/2024;
- 2) ***Maina v Ngumbi & another [2024] KEHC 7663 (KLR)***- The plaintiff and appellant in the appeal sustained bruises to the head, neck and upper limbs, cut wound to the right leg and fracture of the left malleoli/ankle. The trial court awarded Ksh. 400,000/= on 2/9/2022. On appeal, the award was affirmed on 25/6/2024.

On the claim for loss of earnings, the defendants submitted that the plaintiff had not proven the same. That the plaintiff had not proven that he was out of work and not earning during the period he claimed. That no sick sheet was produced in court or job card to prove the period he was out of employment. In the alternative, the defendants proposed a multiplicand of Ksh. 53,802/= and multiplier of six months. The total award would be Ksh. 322,812/=. For the other special damages, the defendants urged the court to award what was proven.

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.

Quantum

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

- i. Fracture of the right tibia;
- ii. Multiple bruises on the anterior right knee.

From the medical reports by the two doctors, the plaintiff did not suffer permanent incapacity. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the consent 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 grievous harm. The authorities relied upon by the parties are relevant and comparable. On my part, I have further considered the following authorities:

1) *Odhiambo v Obiero [2024] KEHC 15700 (KLR).*

The plaintiff and respondent in the appeal sustained swelling and tenderness on the head, tenderness of the neck, back injury, chest injury, cut wound on the right leg and fracture of the right tibia. The trial court awarded Ksh. 700,000/= on 7/12/2023. On appeal, the award was affirmed on 9/12/2024.

2) *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.

Given the nature of the injuries sustained by the plaintiff herein, and the age of some of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 600,000/= 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) Treatment and medical expenses.....Ksh. 7,100/=
- c) Transport expenses.....Ksh. 20,000/=
- d) Copy of records.....Ksh. 550/=
- e) Lost items.....Ksh. 48,800/=
- f) Loss of earnings for 10 months.....Ksh. 707,560/=
- Total.....Ksh. 787,010/=

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 plaintiff produced in evidence receipts for the special damages (save for lost earnings). He also produced a police abstract indicating that his items were lost. Both parties agree, rightly so, that loss of earnings is in the nature of special damages. In the case of *Karani v Nchedu (1995-1998)1 EA 87* the Court of Appeal stated:

“The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Ksh.50, 000/= per month. She produced no documentary evidence to support this claim but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.”

Similarly, in *Douglas Kalafa Ombeva v David Ngama [2013] KECA 538 (KLR)*, the Court of Appeal affirmed that Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. The plaintiff produced in evidence two pay slips for August and September, 2021 showing that he was employed by China Communications Company Limited as a Foreman. That he earned a net salary of Ksh. 53,802/=. He claimed that he could not work for a period of 10 months owing to the injuries he sustained in the accident. In as much as special damages ought to be specifically pleaded and strictly proved, such proof is on a balance of probabilities.

I agree that a sick sheet from the employer would have been desirable but there is no evidence to rebut the allegation that the plaintiff could not work for a period of 10 months and was not paid for the period. The plaintiff stated that he had a plaster on his leg for three or four months and did physiotherapy for six months. I agree with the defence that the correct multiplicand would be Ksh. 53,802/=. I see no reason why I should not adopt a multiplier of 10 months. Consequently, loss of earnings would work out as follows:

$$53,802 \times 10 = 538,020/=$$

Consequently, I award total special damages to the tune of **Ksh.617, 470/=**

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. 600,000/=

2) Special damages.....	Ksh. 617,470/=
Total.....	<u>Ksh. 1,217,470/=</u>
Less 20% contribution.....	Ksh. 243,494/=
Balance due to the plaintiff.....	<u>Ksh. 973,976/=</u>

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 VIA CTS AT MAKINDU THIS 23RD DAY OF DECEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.