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Date Delivered:	19 Dec 2017
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Margaret Njoki Mwangi
Citation:	Emmanuel Kombe Nzai also known as Kombe Emmanuel v Basari Company Limited & another [2017] eKLR
Advocates:	Mr. Kilonzo Wambua for the Plaintiff, Mr. Asena for the Defendants
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit Allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 80 OF 2015

EMMANUEL KOMBE NZAI also known as

KOMBE EMMANUEL.....PLAINTIFF

VERSUS

1. BASARI COMPANY LIMITED

2. HORIZON COMPANY LIMITED.....DEFENDANTS

JUDGMENT

1. Through a plaint dated 14th April, 2015 and filed on 19th June, 2015, the plaintiff has brought a claim for damages following a road traffic accident that happened on 24th December, 2013 along the Mombasa-Nairobi highway at Kambu area. The plaintiff suffered serious injuries for which he prays for judgment against the defendant jointly and severally for:-

- (i) General damages, special damages and costs of further medication;
- (ii) Loss of earning capacity;
- (iii) Cost of house help;
- (iv) Cost of this suit;
- (v) Interest on (a), (b), (c) and (d) above; and
- (vi) Any other or further relief as this Honourable court may deem fit and just to grant.

2. Through a statement of defence filed on 28th July, 2015 the 1st and 2nd defendants denied ownership of motor vehicle registration No. KBM 688J. They also denied the particulars of negligence attributed to them. The defendants averred that the accident was solely caused by the negligence of the plaintiff and/or the Driver of motor vehicle registration No. KBV 225X. The plaintiff filed a reply to the defence on 31st July, 2015.

3. The plaintiff Emmanuel Kombe Nzai alias Kombe Emmanuel testified as PW1. He informed the court that he lives in Malindi and prior to the accident he used to work for Bosco farm. He was a permanent employee who was earning a salary of Kshs. 12,000/= . He was employed on 11th December, 2013.

4. It was his evidence that at 3:00 a.m. on 24th December, 2013 while traveling to Nairobi, an accident occurred at Mtito Andei. He was on board a bus by the name Spring whose registration No. was KBV 225X. The said bus collided with another, heading to Mombasa from Nairobi. Its name was Horizon and

its registration No. was KBM 688J.

5. It was his evidence that while seated on seat No. 26 of the bus registration No. KBV 225X, he saw the Horizon bus approaching and it moved to their side and the two vehicles collided. He stated that the Horizon bus Driver had overtaken a trailer and then moved to the left side of the vehicle that the plaintiff was traveling in. He added that there was a bend at the place where the Horizon bus overtook the trailer. He stated that the Horizon bus was being driven at a high speed. He blamed the Horizon bus for causing the accident and that was the reason why he sued the defendants.

6. It was his evidence that after the accident, he was taken to Makindu Hospital where he regained consciousness after 2 days. He testified that he was seriously injured on the chest where he suffered a fracture dislocation of the chest centre-bone. He sustained injuries on his back at the T5 and T6 which fractured. He also got spinal injuries which left him paralyzed from the chest downwards thereby losing control of the bowel and bladder system. This makes him to use a catheter every day. He explained that his legs are paralyzed and this has led to their shrinking which has made them thinner. He stated that his legs are supported as they are bent and he can no longer walk. He informed the court that he uses a wheelchair which the Doctor told him would be for the rest of his life. He stated that he has a special toilet for bowel movements.

7. He testified that he was 24 years old when the accident happened but he has lost his earning capacity. He indicated that he would have worked to the age of 60 years. He now relies on his relatives for upkeep as he lost his employment after the accident.

8. The plaintiff stated that the Doctor told him that he will require to undergo an operation to stabilize his back at the cost of Kshs. 650,000/=. He further stated that the catheter he uses is changed after every 2 weeks and that he needs someone to assist him in his daily chores. The cost for engaging such a person is Kshs. 7,000/= per month.

9. He testified that after Makindu Hospital, he was transferred to Voi Hospital and thereafter to Coast Provincial General Hospital where he was admitted for 3 weeks. After that, he was taken to Kijabe Hospital for an operation. The plaintiff produced medical reports and referral letters from various hospitals in support of his case as plf. exhs. 2-9.

10. He indicated that he reported the accident at Mtito Andei Police Station where he was issued with a P3 form which he produced as plf. exh. 10. He was also given a police abstract which was marked as MFI-11. The plaintiff stated that a search done at the Kenya Revenue Authority (KRA) revealed that the bus that caused the accident was registered in the name of the Basari Company Ltd., (1st defendant) he produced the KRA report as plf. exh. 12.

11. The plaintiff was examined by Dr. Adede whom he paid Kshs. 2,000/= for a medical report which was marked as MFI-12. He produced the receipt for the said payment as plf. exh. 14. The said Doctor told him that he had 80% disability. He stated that he is unable to do any work for himself. He indicated that he is not married and cannot marry as he lost his sexual function. He testified that his Advocate wrote a demand letter to the defendants which he produced as plf. exh. 15. He also produced X-ray reports as plf. exh. 16. He further stated that he was treated at Fortis Hospital in India where he was admitted for 3 weeks and where his back was operated on. He produced the said document as plf. exh. 17. He paid 432,688/= rupees at the said hospital and produced a discharge summary as plf. exh. 19. He also produced a bundle of receipts which he said was for the sum of Kshs. 182,000/= as plf. exh. 18. He produced receipts from Fortis Hospital as plf. exh. 19. He prayed for compensation for medical expenses, future medical expenses and for all the expenses supported by the documents produced.

12. On cross-examination, the plaintiff was consistent and stood firm by restating that it was the Driver of the motor vehicle registration No. KBM 688J who caused the accident by overtaking a trailer at a bend. He stated that the Driver of the motor vehicle he was in swerved a little bit off the road but a collision occurred. He reiterated that motor vehicle registration No. KBM 688J was being driven at a high speed.

13. PW2 was Dr. Ajoni Adede. He examined the plaintiff on 5th January, 2015 following a road traffic accident on 24th December, 2013 in which he suffered spinal injuries due to cord compression at site T5 and T6 resulting in paralysis of the lower limbs, intestinal paralysis and loss of bladder control. He also had a fracture of the back bone T5 and T6, dislocation of the chest center bone, a cut on the head and loss of consciousness.

14. The Doctor further testified that the plaintiff was treated at Makindu District Hospital, then at Moi Voi Hospital and was admitted for 19 days at Coast Provincial General Hospital. A follow up was done at Kijabe Hospital. After CT scans were done, he was given a lumbar corset, a urine catheter was inserted and he was allowed to go home on a wheelchair. The Doctor further testified that he examined the plaintiff 1 year and 11 months after the accident. At the said time, he complained of inability to move on his own, lack of urine control and bowel movements. He was paralysed and the lower limbs were stiff. He had a spinal corset and catheter.

15. The Doctor further testified that the plaintiff had many X-rays taken and had with him scan reports dated July, 2014, treatment notes and a P3 form. He noted that the plaintiff's back could be reinforced with permanent metal implants to prevent further damage to the spinal cord at a cost of Kshs. 650,000/= at Agakhan hospital, Nairobi.

16. It was the Doctor's evidence that the plaintiff needs a Medical Assistant as he needs to have the catheter changed every 2 weeks and enema done every 3 days. He expounded that the minder will help the plaintiff to bathe, use the toilet and to push the wheelchair. The Doctor assessed the plaintiff's disability at 80% because of the paralysis and lack of movement without assistance. He further stated that the plaintiff's sexual function is impaired and there is a further risk of spinal injury before an operation is done. He further testified that the loss of bowel movement and use of catheter makes him susceptible to infections. The Doctor produced the medical report as plf. exh. 13. He stated that he charged the plaintiff Kshs. 2,000/= for medical examination. He charged him Kshs. 5,000/= for court attendance as per the receipt produced as plf. exh. 19.

17. He indicated that the plaintiff's legs have braces to control their movement so that they are not injured. The corset at his back protects his backbone so that there is no further injury to his spinal cord. The Doctor concluded by stating that due to the injuries the plaintiff sustained, he cannot do any work as the paralysis has rendered him helpless. He assessed the degree of injuries as grievous harm which can cause in death.

18. The Investigating Officer, No. 63174 PC Abdalla Barufa testified as PW3. He informed the court that he was stationed at Mtito Andei Police Station. He had 4 years' work experience in traffic duties. He testified that when on duty on 24th December, 2013 at the said Police Station, he was informed of an accident involving motor vehicles registration No. KBM 688J Mercedes Benz which was heading to Mombasa and KBV 225X Hino which was heading to Nairobi. He stated that the accident happened at 02:30 a.m., at a sharp corner when motor vehicle registration No. KBM 688J was trying to overtake. He visited the scene and found the buses on the tarmac in the middle of the road. It was his evidence that investigations revealed that motor vehicle registration No. KBM 688J was at fault as the Driver left his lane and crossed to the other side of the lane. In addition, vehicles are not supposed to overtake at a corner. He stated that the plaintiff who was a passenger in motor vehicle registration No. KBV 225X was

injured. PW3 issued him with a P3 form and police abstract which he produced as plf. exh. 10 and plf. exh. 11, respectively. He indicated that the two Drivers died at the scene and therefore no one was charged. He stated that according to passengers, motor vehicle registration No. KBM 688J was being driven at a high speed and the Driver tried to overtake at a corner and in the process collided with motor vehicle registration No. KBV 225X.

19. On being cross-examined, PW3 stated that he found the two motor vehicles and dead people lying on the road. He indicated that motor vehicle KBM 688J was overtaking a trailer on the right side as one faces Nairobi direction. Motor vehicle registration No. KBV 225X was on the left side. Motor vehicle registration No. KBM 688J was lying on the yellow line. He blamed the Driver of the motor vehicle registration No. KBM 688J for the accident although the police abstract did not indicate who was to blame. He stated that at the scene of the accident there was a sharp corner and skid marks were visible from motor vehicle registration No. KBM 688J towards motor vehicle registration No. KBV 225X which had not made any skid marks on the road.

20. On re-examination, PW3 stated that he did not write on the police abstract who was to blame for the accident because both Drivers died. If they had survived he would have charged the Driver of motor vehicle registration No. KBM 688J.

21. The defendants called no evidence in support of their case. The court gave directions as to the filing of written submissions. The plaintiff's Counsel filed his on 19th July, 2017 while the defendant's Counsel filed his on 10th October, 2017. The said submissions were thereafter highlighted.

ANALYSIS AND DETERMINATION

The plaintiff filed his list of issues on 12th January, 2016. They are as follows:-

- (i) Whether or not an accident occurred on the 24/12/2013 along the Mombasa - Nairobi road at Kambu area involving motor vehicles registration No. KBM 688J and KBV 225X;
- (ii) Whether or not motor vehicle registration No. KBV 225X contributed to the occurrence of the accident and if so to what extent;
- (iii) Whether the plaintiff was a passenger in motor vehicle registration No. KBV 225X or not;
- (iv) Whether or not the plaintiff herein was injured and if so to what extent;
- (v) Who was to blame for the accident;
- (vi) What is the quantum of damages payable to the plaintiff; and
- (vii) Who is to bear the costs of this suit.

22. It was not contested through evidence that an accident happened on 24th December, 2013 between motor vehicle registration Nos. KBV 225X and KBM 688J at Kambu area in Mtito Andei along the Mombasa-Nairobi highway. The plaintiff who was a passenger aboard motor vehicle registration No. KBV 225X was seriously injured and rushed to Makindu District Hospital where he regained consciousness after 2 days. He was issued with a police abstract from Mtito Andei Police Station. He was treated at Moi Hospital Voi, Coast Provincial General Hospital, Kijabe Hospital, and Fortis Hospital in India. He incurred expenses in a bid to improve his state of health. He produced receipts to prove the

expenses incurred. The plaint clearly indicated the injuries he sustained and the future medical intervention he requires. Though paralyzed from the waist downwards, the plaintiff gave a vivid account of how the accident occurred and the problems he has encountered since the accident, which problems will be a part and parcel of his life.

23. Dr. Ajoni Adede elaborated on the injuries suffered by the plaintiff, his current predicament and the future medical care required. This evidence was not controverted by the defendants. It therefore remains unshaken in evidence. The medical report produced shows that the plaintiff became paralyzed from the waist downwards as a result of the injuries he suffered. These injuries have left him with 80% disability. He can no longer fend for himself as he is confined to a wheelchair. He needs to undergo an operation at the cost of Kshs. 650,000/= at Agakhan Hospital, Nairobi or Kshs. 400,000/= at Kenyatta National Hospital to reinforce his back using a metal implant. He needs a minder to take care of him as well as medical expenses for purchase of catheters and for enema after every 3 days. A summary of the injuries that the plaintiff sustained are:-

- (i) Lower limb paralysis;
- (ii) Intestinal paralysis;
- (iii) Loss of bladder control;
- (iv) Compression of fractures of the vertebral bones T5 and T6;
- (v) Fracture dislocation of the chest centre bone (manubro-sternum);
- (vi) Cut wound on the head (scalp); and
- (vii) Loss of consciousness.

24. Counsel for the plaintiff prayed for compensation in the sum of Kshs. 7,000,000/= for pain and suffering. He stated that the same amount would take into account inflation as he relied on a decision delivered on 16th of May, 2014 of **Ngure Edward Karega vs Yusuf Doran Nassir**, HCCA No. 157 of 2012, Nakuru where the plaintiff suffered a fracture of the 6th cervical with paralysis from the nipples downwards fracture of the right leg and bruises on the head and palms. The plaintiff therein was awarded Kshs. 5,000,000/= in general damages for pain and suffering, loss of future earnings in the sum of Kshs. 9,576,000/=, medical expenses of Kshs. 2,164,974/=, specialized needs at Kshs. 5,133,600/=, future purchase of motorized wheelchair at Kshs. 361,340/=. The total gross damages awarded was Kshs. 25,327,114.

25. The plaintiff herein prays for an award in the sum Kshs. 5,184,000/= for loss of earnings and earning capacity, Kshs. 7,200,000/= being costs for hiring a house help, Kshs. 6,890,000/= for future medical expenses, special damages in the sum of Kshs. 184,000.03 and 43,688.00 rupees.

26. Counsel for the defendant relied on the case of **Joseph Maganga Kasha vs Kenya Power and Lighting Company Ltd.**, [2012] eKLR where the plaintiff who was 22 years old suffered 100% disability, was paralyzed from the waist downwards and was awarded Kshs. 3,000,000/= as general damages in the year 2012. In the said case a multiplier of 38 years was applied. Counsel submitted that in the present case, the plaintiff suffered 80% disability and therefore he can still engage in some meaningful activity although immobilized. He also cited the case of **William Wagura Maigua vs Elbur Flora Limited** [2012] eKLR where the plaintiff suffered paralysis from the waist downwards, he was awarded

Kshs. 3,000,000/=. He also made reference to the case of **Rosemary Wanjiku Kungu vs Elijah Macharia Githinji & Another**, HCC 145 of 2010 and **Nancy Aseko vs Board of Governors Masai Girls High School** [2011] eKLR where awards in the sum of Kshs. 3,000,000/= were made for general damages. The defendant argued that the plaintiff should not be awarded compensation for loss of earning capacity as he is not 100% disabled and what he ought to have pleaded was diminished earning capacity. Counsel for the defendant submitted that the plaintiff's upper limbs are normal and so are his oratory skills, as such he can be trained on how to adopt to a new lifestyle and to fend for himself in an alternative way. Mr. Asena in his written submissions on one hand stated that an award of general damages in the sum of Kshs. 3,000,000/= would be a fair compensation for the plaintiff herein and also stated that a sum of Kshs.2,000,000/= would be fair compensation. In highlighting his submissions, he indicated that Kshs. 2,000,000/= should be awarded as general damages.

27. With regard to the costs to be incurred to employ a househelp, it was submitted for the defendant that the sum of Kshs. 2,184,000/= would be adequate if a multiplier of 26 years and a monthly salary of Kshs. 7,000/= for the house help, is applied. An amount of Kshs. 1,560,000/= was proposed for future medical costs.

General damages

28. There is no evidence of negligence on the part of the Driver of motor vehicle registration No. KBV 225X or the plaintiff in this case. I therefore hold the defendants vicariously liable, jointly and severally for the accident caused by their Driver.

29. On 12th June, 2014 Mutende J., made an award of Kshs. 3,200,000/= in the case of **Joyce Wayna Richard vs Mike Trojanuok and Another** [2014] eKLR, where the plaintiff sustained the following injuries:-

- (i) Concussion of the brain with loss of consciousness for a day;
- (ii) Blunt injury on the right side;
- (iii) Deep cut wound on the head measuring 8 cm;
- (iv) Blunt trauma on the back;
- (v) Fracture of the thoracic spine T5 and T6;
- (vi) Spinal injury causing total paralysis of the lower limbs;
- (vii) Multiple cut wounds on both wrists; and
- (viii) Blunt injury to the left knee.

30. In the case of **Bernard Mutisya Wambua vs Swaleh Hashil** [2017] eKLR, Meoli J., awarded general damages in the sum of Kshs. 6,500,000/= to the plaintiff who suffered 80% paralysis of his right limb among other injuries which rendered the plaintiff incapable of working. It is however worth noting that in the present case, the plaintiff's upper limbs are functional.

31. In the case of **Charlene Njeri Kuria vs Gitu Geoffrey and Another** [2016] eKLR, Mbogholi J award Kshs. 5,000,000/= to the plaintiff who sustained 60% disability with partial paralysis of the lower limbs.

32. After taking into account all the foregoing decisions and the fact that the plaintiff herein suffered 80% disability with paralysis of the lower limbs, going by the recent trends set by the courts decisions delivered in the years 2016 and 2017; and taking into account inflationary trends, I herewith award the appellants Kshs. 6,000,000/= as general damages for pain and suffering.

Loss of earnings and future earnings

33. The plaintiff's identity card shows that he was born on 17th April, 1989. As at the time of the accident he was 24 years of age. He was working at a salary of Kshs. 12,000/= per month. He produced an employment letter to support that fact. He lost his employment following the accident. The plaintiff could have worked up to the age of 60 years being the retirement age. This could however have been subject to the vagaries of life.

34. Counsel for the defendant submitted that the claim for loss of earning capacity is not applicable as the plaintiff's working capacity has diminished as he is 80% incapacitated. In **Moelika vs Reyrolle and Company Limited** [1977] 1 WLR 132, the court stated thus on diminished earning capacity:-

“ This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.”

35. It is apparent therefore, that the plaintiff is right in praying for the loss of earning capacity and future earnings. The plaintiff is not employed any longer due to the accident. He is therefore entitled to the damages sought under the above head. In the case cited by Counsel for the defendant of **Joseph Maganga Kasha vs Kenya Power and Lighting Company Ltd.**, [2012] eKLR, the court applied a multiplier of 38 years as in that case the plaintiff suffered 100% disability at the age of 22 years. In this case, although the plaintiff is paralysed from the waist downwards, he still has use of his upper limbs, I will therefore apply a multiplier of 32 years. I therefore award the plaintiff loss of earnings and future earnings as tabulated here below:-

$12,000 \times 32 \times 12 = \text{Kshs. } 4,608,000/=$

Costs of a House help

36. With regard to costs of a House help, I take note of the fact that the plaintiff requires the assistance of a person to cook for him, assist him in bathing, using the toilet after enema, general household chores and to push his wheelchair. I will apply the monthly wage of Kshs. 12,926.55 as per Legal Notice No. 111 dated 16th May, 2017. The said wages are payable in the larger cities but I have considered that the minimum wage will vary over time but the award to the plaintiff for payment of a House help will remain constant over the years. Secondly, the cost of a House help whose duties will include bathing the plaintiff, assisting him to use his special toilet after enema and to push his wheelchair cannot be equated to the normal kind of work done by House helps. The plaintiff was not married at the time of the accident and due to his sexual disability, the prospects of ever marrying are almost nil. He will therefore rely on the services of a House help in doing the activities that he is unable to do for himself for the rest of his life I therefore make the following award for costs of hiring a House help:-

$12,926.55 \times 32 \times 12 = \text{Kshs. } 4,963,795.2$

Cost of future medical expenses and specialized medical needs

37. Doctor Ajoni Adede indicated that the plaintiff will require to have his back reinforced using permanent tent metal implants to prevent further damage to the spinal code. The cost of the said surgery will be Kshs. 650,000/= at Aga Khan Hospital, Nairobi or Kshs. 450,000/= at Kenyatta National Hospital. This court takes judicial notice of the recent Doctors and nurses strike that left many patients without medical care and attention in public hospitals. Some patients died as a result of that industrial action due to lack of medical treatment. To protect the interests of the plaintiff, I award him the sum of Kshs. 650,000/= for the said surgery to be undertaken at Agakhan hospital, Nairobi. It is not disputed that the plaintiff will require diapers, urine bags, urine tubes and catheters for the rest of his life. Catheters will need to be changed after every two weeks. Enema will need to be done after every 3 days. I am inclined to award the plaintiff the sum of Kshs. 10,000/= per month calculated as follows:-

$10,000 \times 32 \times 12 = \text{Kshs. } 3,840,000/=$

In addition to the sum of Kshs. 650,000/= for the operation, the total award for the cost of future medical expenses and specialized medical needs amounts to Kshs. 4,490,000/=.

Special damages

38. The plaintiff pleaded special damages in the sum of Kshs. 184,000.03 and 432,688.00 rupees. The said claim was proved by production of receipts and I hereby award it as prayed. The exchange rate that will be applied for conversion of the Indian rupees into Kenya Shillings will be the rate that was prevailing as at 8th April, 2015 when the plaintiff was discharged from Fortis Hospital, New Delhi in India.

39. The total award made is Kshs. 20,245,795.20 plus 432,688.00 rupees. Costs of the suit are awarded to the plaintiff. Interest is awarded at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of December, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Musili holding brief for Mr. Kilonzo Wambua for the plaintiff

Mr. Asena for the defendants

Mr. Oliver Musundi - Court Assistant



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