REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL CASE NO. 8 OF 2019

(Formerly Nakuru HCCC No 25/2013)

EUGENE REEKSTING.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

JOHNSON NZWILI.....2ND DEFENDANT

JUDGMENT

1. On 4th March 2010 at about 3.00pm the Plaintiff was driving his vehicle, a Pajero Registration Number KAW 559Y on Naivasha Nakuru Highway headed to Nakuru. He testified that the road was clear and that at Gilgil area near Cabro Gate, he suddenly saw a vehicle headed straight towards him. It had overtaken another vehicle and was in his lane. He swerved to the left but was unable to avoid a head on collision with the vehicle, Registration Number GKA 580, a Toyota Van ambulance assigned to Gilgil Sub-District Hospital.

2. The plaintiff's claim is for general damages for the injuries suffered and special damages for medical costs incurred and continuing to be incurred, replacement of vehicle, compensation for chemicals stolen from the vehicle and loss of income. According to the amended plaint, the particulars of loss related to the plaintiff's vehicle, goods carried, and special damages including loss of income, amount to Kshs 25,706,170.80. He seeks compensation for these amounts. He also prays for costs of the suit and interest.

3. The claim is contested, negligence denied, and the plaintiff is put to strict proof in respect of all his claims. The defence case is essentially that the injuries and loss suffered by the plaintiff were on account of his own negligence, failure to wear safety belts, failure to give way to an ambulance in accordance to traffic regulations, driving a high speed, driving without a licence, failing to control his car and failing to swerve or otherwise avoid the accident.

4. In his evidence in chief, PW1 testified that the road was clear, that he was driving at about 85 kms per hour, and that he noticed the other driver - the 2nd Defendant - had a cellphone on his hand and was talking on it. Although it would be impossible to tell without checking inside the ambulance, he said there was no passenger in it. PW1 further testified that the ambulance was driving recklessly, that there was no emergency, as it was driving in his lane, hence the accident. He suffered severe injuries to the hip, wrist, ribs, and lungs, and was taken to hospital by good Samaritans.

5. In cross examination he said that the ambulance did not have its siren on; and that a driver only gives way to an ambulance when it has its siren on or its lights are flashing. He stated that there was an eyewitness that could be called; that he lost consciousness and was taken to St Mary's hospital, stabilized then transferred to Aga Khan hospital where he gained consciousness; that his attending doctor (Dr Niraj) recommended further in South Africa; that thereafter he was flown to Life Wilgeheuwel Hospital in South Africa for further treatment and was bed ridden for six (6) months after the accident; that as a result of the accident he incurred losses of agro chemicals he was carrying in the vehicle; that his consultancy business suffered losses resulting in serious loss of income. The plaintiff also alleged that he lost lucrative contracts as he was bed-ridden for six months.

6. PW2, PC Paul Komen, testified that the investigating officer of the case was one Corporal Jacklyne Kagendo who had been transferred from Gilgil Police station. He said he had worked with her. Shown PB1 page 11, he identified the Police Abstract dated 29th March 2010 under which the accident had been reported on 4th April 2010. The report was recorded as OB No 12. The case was marked as pending under investigation and he could not ascertain who was to blame. In cross examination he confirmed he had only the abstract which he had confirmed from the Accident Register. He had not gone through the Police File.

7. Recalled to testify a month later on 29/10/2020 PC Komen stated that the accident occurred when GKA 580K attempted to overtake

another vehicle and as a result collided with the plaintiff's vehicle. Both vehicles were extensively damaged and towed to the police yard pending investigation. The OB page was produced as PB 3. On cross-examination, PC Komen reconfirmed that he was not the investigating officer; that the Abstract does not show that the GK vehicle was an ambulance and that it showed that the 2nd defendant was also injured. He also stated that he was not aware if there was any apportionment of blame or if anyone was charged with a traffic offence.

8. PW 3 Dr Obed Omuyoma who examined the plaintiff on 25th October, 2019, over ten years after the accident, testified as to the injuries sustained by the plaintiff. These he set out in his medical report contained in the plaintiff's supplementary bundle PB4a, as follows:

a. Fracture distal end of the left radius;

b. Fracture head of the left femur with posterior dislocation of the left hip joint;

c. Fracture posterior wall of the left acetabulum;

d. Multiple fracture ribs of the left side of the chest;

e. Lung contusion.

9. Dr Neeraj, who attended to the plaintiff at Aga Khan Hospital from the day after the accident on 5th March 2010 was not called to testify. However, two of his medical reports were exhibited with the plaintiff's bundles of documents.

10. Dr Omuyoma produced his brief medical report, and testified that he relied on discharge summaries and X-rays. In cross examination he said that: the plaintiff's injuries constituted multiple fractures; there are facilities in Kenya to cater for such injuries; that at the time he examined the plaintiff all the fractures were fixed by way of Open Reduction and Internal Fixation (ORIF); that the plaintiff received the best treatment at Aga Khan Hospital by having the implants fixed.

11. Dr Omuyoma further testified in cross examination that some of the implants will require removal in future; that removal could cost about Kshs 200,000/- based on the current schedule for surgery; that depending on the facility one uses, the figure can go upwards or downwards; that the patient was discharged on oral analgesics (painkillers and antibiotics) and crutches. He opined that the plaintiff suffered 30% permanent disability; and that he is able to go on with his business to the extent of 70%.

12. Finally, PW3 stated that an old person with the same injuries could take about 3 months to fully heal, and a young person 4-6weeks.

13. DW 1 Jackson Nzwii, was the sole defence witness. He was the ambulance driver, and was alone in it at the time. He said that he had completed taking one patient to Nakuru hospital from Gilgil. Thus, he was rushing from Nakuru to Gilgil to pick a second patient to deliver to Nakuru hospital. He said he had his siren on, and was driving in his lane. However, a matatu stopped ahead of him to load passengers, and he swerved to avoid hitting the matatu. He came into the plaintiff's lane, and that was when the collision occurred. He felt certain that the plaintiff was driving very fast as the impact of the accident pushed his car backwards and he and he, too, got injured and was taken to hospital. He felt that the plaintiff should have avoided him due to his siren.

14. In cross examination he said that he had left the patient escort, a sister, at Nakuru, to hand over the previous patient while he rushed for the second patient. He had however not attached the work ticket to show that he was at work. Once at Gilgil he would be escorted by another sister for the second patient.

15. Two issues arise: the first is the question as to which party is liable, or if both what is the level of apportionment. The second is the issue of quantum: what amounts are payable, if any.

Liability

16. There is no doubt that it is for the party that asserts to prove its assertions. There are many authorities on this point. The case of **Dharmagma Patel & Another v T A (minor) suing through his mother and next friend [2014] eKLR** quoted with approval the authority of **Kiema Mutuku v Kenya Hauliers Service Limited** where the court stated:

> ***''…there is no there is no liability with no fault and there must be prove of negligence where the claim based on it, it was stated:…."there is as yet no liability without fault in the legal system in Kenya and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

17. The plaintiff asserted that he was driving at about 85 Kph whilst the defendant was driving at an excessive speed, and using his telephone. DW1 stated that he was alone and from his appreciation of the Plaintiff's speed, the plaintiff was doing at least 100 kph. DW1 also stated that his siren was loud pitched.

18. It is thus common ground that the defendant drove into the plaintiff's lane, and was of the view that the plaintiff ought to have given way. The defendant admits that he was driving fast to pick another patient and had his siren on. It is also common ground that there was no passenger on board the ambulance.

19. In my view, the plaintiff's admission that he swerved into the plaintiff's lane to avoid a matatu picking passengers and that there was no passenger in the ambulance, suggests that the emergency did not warrant the plaintiff driving at an emergency speed as would be required to save a life on board the vehicle.

20. However, given the impact of the collision on both vehicles, and the damage as shown in the pictures availed by the plaintiff, there can be no doubt that both vehicles were driving at a high speed. The defence relied on **Rule 83** of the **Traffic Act** which provides that:

> ***"Every driver shall, upon hearing the sound of any gong, bell (other than a bicycle bell) or siren, indicating the approach of a police vehicle, ambulance or fire engine, at once give such vehicle right of way, and if necessary pull his vehicle to the near side of the road and stop until the police vehicle, ambulance or fire engine has passed."***

21. On his part, the plaintiff asserted that there was no siren and that in fact he observed the ambulance driver using his phone as he drove. If indeed he saw the ambulance driver on his phone, then he had time to take evasive action. He testified that he sought to swerve off the road to the left. However, as no sketch or drawing of the accident scene was availed to show specifically where the accident occurred on the road, there is no proof of evasive action taken.

22. The defendant's written submissions cited the above case of **Kiema Mutuku** and relied on **Rule 83** of the **Traffic Act**. I think this is rather unsatisfactory, as the evidence adduced in court supports some level of negligence of the defendant in that he said he was in his lane until he swerved to avoid hitting a matatu that had stopped to pick passengers.

23. In Kenya **Bus Services Ltd & another v Henry Kipkemboi & another [2005] eKLR Visram J,** (as he then was) persuasively stated:

> ***"The learned Magistrate had a choice to believe either version of the accident, and because he had the benefit of observing the witnesses, I must respect his finding. However, the issue is, was the bus driver keeping a proper look-out, and did he fail to give way to the police vehicle? The answer, I am convinced, is No. If he was he could have taken evasive action, as did everyone else. He could have stopped immediately he heard the siren, even if he saw the police car late because he was emerging from a minor road into Ngong road. But it is difficult to believe that he did not hear the sirens, or observe the flashing lights, as apparently everyone else did so. On the other hand, the police car was being driven at an excessive speed, at a busy time, on a very busy road. It was attempting to overtake in the face of oncoming traffic. That was reckless, and in complete disregard to the other road users. Clearly, the accident happened in the middle of the road, over the yellow line. The police driver was equally negligent, and I have no difficulty in holding both drivers equally to blame for this accident.***
>
> ***The Respondent has argued that Rule 83 of the Traffic Act absolves the police from liability when in the exercise of their lawful duties they are speeding – as long as the siren is on.***
>
> ***I would not support that argument. In my humble opinion it is not tenable in law. In my view, a police driver, like any other civil driver of a motor vehicle, owes a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger. The question that must be asked is this: Is it clear that the police driver, on this occasion, judged by the standard of an ordinary driver of a motor vehicle driven by an ordinary driver, on his private occasion, is to be held guilty of negligence causing the accident? The answer in this case is clearly "Yes". To drive at an excessive speed, at lunch time, on Ngong road, and attempt to overtake in the face of oncoming traffic, even with your siren on, is, in my view, highly reckless. Now, Rule 83 of the Traffic Act, Cap 403, only gives police vehicles "priority", but does not exempt them from the speed limit applicable to that road."***

24. Visram J went further to state:

> ***"In England, unlike here in Kenya, the Traffic Act, expressly exempts police, fire brigade and ambulance vehicles from observing the applicable speed limits. Even then, in the case of Gaynor (supra) the Court held that that section only enables the driver of such vehicles to escape criminal sanction or liability, but not the civil liability in negligence. It is, therefore, my considered view that the police driver in this case was as guilty of negligence as the bus driver, and I hold both equally liable for this accident. Accordingly, and for reasons stated, this appeal, insofar as it relates to liability, is allowed…''*** *(Emphasis added)*

25. The reasoning in the above case and his interpretation of Rule 83 of the Traffic Act is sound and agreeable to me. I find that 1st defendant herein is liable for some level of recklessness in that the Nakuru Nairobi highway is a busy highway even at 3:00pm when the alleged accident occurred. The testimony of the PW1 and PW2 vis a vis that of DW1 is clear that even though DW1 may have had his siren on he appears to have left his lane to avoid a matatu. On his part, PWI appears also to have been driving fast and not to have taken sufficient evasive action, appearing to insist that he was in his right lane.

26. All said, however, I do not think that **Rule 83** of the **Traffic Act** entirely absolves an ambulance driver from taking any care at all simply because he may have his siren on. He must not recklessly enter into another lane without due care and attention for public safety. His job is not to create safety hazards, but to resolve them.

27. Ultimately, therefore, I would apportion liability at 80% to 20% in favour of the plaintiff. Hence, the defendants are 65% liable and the plaintiff 35% liable.

Quantum

28. The first thing to point out is that the injuries of the plaintiff were not seriously contested. What the defence argued was that: special damages have to be strictly proved and that there was no proof or report showing the urgency of the plaintiff having to seek emergency treatment to South Africa when the treatment could be done in Kenya. This was the position taken by Dr Obed Omuyoma in his testimony.

29. The plaintiff has tendered into court 20 itemized documents beginning from 5th March 2010, a day after the alleged accident to 6th June 2010 namely, receipts from various local entities, namely, Aga Khan hospital Nairobi MP Shah Hospital, receipts from specific doctors, a Dr

Sarjona R. Shah, Dr. Neeraj Krishnan, taxi receipts, towing charges, travel expenses for James Attika and two medical reports of Dr. Dr. Neeraj Krishnan. And from South Africa's Life Wilgeheuwel hospital. Of concern is itemized receipts no. 16, 17, 19 which look unfounded as they do not identify who charged who and for what services though the indexing narration against these items discloses them as taxi receipts et al.

30. In Trust Bank Limited vs Paramount Universal bank Limited & 2 others Nairobi Milimani HCCS No.1243 of 2001 it was held that:

> ***''It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged.''***

General damages

31. The plaintiff sought general damages of Kshs 21,200,000/-. These were tabulated as follows:

1. Pain and suffering Kshs 4,000,000/-

2. Diminished earning capacity amounting to Kshs.12,000,000/-

3. Diminished quality of life amounting to Kshs 5,000,000/-

4. Future medical expenses amounting to KShs200,000/-

32. What this court must do is to compensate on the basis of comparative compensation for similar injuries awarded by the courts.

33. On *pain and suffering* the Plaintiff sought Kshs 4,000,000/-. He relies on the authority of Kiambu **Civil Appeal No. 97 of 2016** where the plaintiff was awarded Khs 2,000,000/- for the pain and suffering resulting from a leg that was severely crashed and devitalized below the knee. Permanent incapacity was assessed at 40% having been hospitalized for three weeks. Here, there were multiple injuries and the plaintiff alleges he was bedridden for 6 months.

34. However, the medical report by Dr Neeraj of 29th April 2020 states that the plaintiff was admitted on 5/3/2010 and discharged on 13/3/2010 with two crutches. On 29th April he was *"mobile without any support"*. According to the same doctor's detailed medical report of 6th June 2010 at paragraphs 7and 8, the plaintiff was confined to bed from 7/3/2010 to 10/3/2010 and confined to the house from 10/3/2010 to 23/3/2010.

35. In the case of **Zachary Kariithi v Jashon Otieno Ochola [2016] eKLR,** the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th 5th ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. In 2016, Hon. Majanja J awarded a sum of KShs 1,500,000/= general damages, pain and suffering and loss of amenities. These injuries were less grievous than the ones sustained by the Appellant

36. In the case of **Maina Onesmus v Charles Wanjohi Githome [2019] eKLR Civil Appeal 3 of 2018** in which the High Court revised the Trial Court's award of KShs. 600,000/= to KShs. 350,000/= where the Respondent suffered a fracture of the midshaft humerus, a fracture of the condyles, a fracture of the shoulder gird and pain and psychological trauma. The Respondent, Charles Wanjohi Githome therein, suffered multiple fractures for which the Court awarded Kshs. 350,000/=. The Appellant in the instant suit suffered two fractures of the tibia and fibula.

37. In the case of **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & Another [2014] eKLR** the court awarded general damages of Kshs. 2,000,000 where the plaintiff had a fracture of the collarbone and fractures to his left leg which injuries were more severe than those the appellant herein sustained.

38. In light of all the above cases, and taking into account the passage of time and inflation, I would award the plaintiff Ksh 2,500,000/- for pain and suffering.

39. On *diminished earning capacity*, the plaintiff sought Kshs 12,000,000/-. He stated that he was 70 years at the time of accident and earned Kshs 4,000,000/- annually; further, that he would have worked for ten (10) more years beyond his age of 70. He urges that given the 30% disability, he is entitled to 30% of the expected earnings for the ten years interfered with.

40. With regard to loss of earning capacity and loss of future earnings a distinction between the two was brought out in the case of **SJ v Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

> ***"Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved……"*** (Emphasis added).

41. An award under this head must take into account certain principles. The Court of Appeal in **Mumias Sugar Company Ltd v Francis Wanalo [2007]eKLR** stated:

> ***"[19] ……The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."*** *(Emphasis added)*

42. In **Butler v Butler (1984) KLR 225** the principles for a claim for loss of earning capacity were highlighted. They may be summarized as follows:

> *a) A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;*
>
> *b) Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;*
>
> *c) Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;*
>
> *d) Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;*
>
> *e) Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and*
>
> *f) The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any."*

43. The plaintiff alleged that he was earning Kshs 4,000,000/- per annum as an engineer and consultant. He did not provide the court with a basis for the figure, and I am unable to make any assessment for the claim for loss of earning capacity. Accordingly I can only make a general award of damages as part of the award for general damages and loss of amenities. I would award Kshs 1,000,000/- for loss of earning capacity. This is based on the fact that the plaintiff was an engineer and agro-consultant, and his continued ability to earn has been diminished by 30%. Further in his oral testimony, the plaintiff concentrated on loss of future earnings. I think the award of Kshs 1,000,000/- will suffice here for diminished earnings.

44. On *diminished quality of life* the plaintiff seeks an award of Kshs 12,000,000/-. The plaintiff testified that he could no longer play golf, and is dependent on painkillers to numb his constant pain, walks with a permanent limp, and his arm movements are restricted. On this point he cited the case of **John Kipkemboi & Another v Morris Kedolo [2019] eKLR**. I have carefully perused the **Kipkemboi** authority and the plaintiff's submissions and do not find the authority to be directed to a claim under this head. As such, I am unable to find an evidential basis for an award under this head having already made an award under general damages for pain suffering and loss of amenities.

45. As regards *future medical expenses*, Dr Omuyoma testified that the plaintiff would incur future medical expenses for the removal of implants. He estimated the cost of this at Kshs 200,000/- this was also indicated in his report. Dr Neeraj in his report as far back as 29 th April 2010 also stated that the plaintiff would need total hip replacement in future, but did not indicate the expected cost.

46. On this head the plaintiff is entitled to an award of Kshs 200,000/- for future medical expenses, which I hereby award.

Special Damages

47. The special damages sought by the plaintiff are:

1. Medical expenses amounting to KShs1,459,582/-

2. Loss of Motor Vehicle amounting to KShs1,200,000/-

3. Loss of chemicals on board amounting to Kshs 1,650,000/-

4. Loss of contracts business opportunities 16,548,735/-

48. The key point to note in respect of special damages is that they must be specifically proved. See for this the holding in **Hahn v Singh Civ App No 42 of 1983 (1985) KLR 216**, where the Court of Appeal stated:

> ***"Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct or natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves"***

49. On that basis, I now deal with each of the plaintiff's specific special damages claims as follows.

50. *Medical expenses of Kshs 1,459,582/-* claimed. The claimant's claim here included the various receipts contained in his bundle PB 2.

51. The plaintiff was not able to show the basis for, or any doctor's recommendation for attending hospital in South Africa. Dr Omuyoma testified that the injuries sustained by the He stated in his testimony that when he went to South Africa:

> ***"…they repaired (my) rotator calf and muscles torn on my arm. The operation was not really a success. I'm due for surgery on my left arm at Kijabe Hospital"***

52. One therefore wonders at the medical justification for his trip to South Africa and the receipted payment at the Life Wilgeheuwel Hospital of Rand 6,5149.03 (equivalent to Kshs 813,574.50 at Central Bank Exchange rates of 12.48/- per rand as at 17/10/2011). I believe that, being South African, the plaintiff really just wanted to be nearer home, as no other explanation for the trip is given. I have therefore declined the bills for South Africa as not properly justified, in addition to the fact that he admits that the treatment there was largely unsuccessful.

53. Similarly, I have discounted the receipts for MP Shah Hospital as these were not specifically pleaded. In addition, during the hearing on 13/11/2019, the defence objected to and demanded that the receipts for MP Shah Hospital be specifically verified. The Court ruled that they may be subjected to further verification of the issuing officer, but also allowed that the original receipts of MP Shah Hospital be accepted. The record does not show that verification or the originals were produced.

54. The court has also omitted receipts on Page 18 and 21 of PB2 which are repetitions of pages 1 and 10. Similarly pages 19, 20 and 22 are omitted from consideration as they are not receipts.

55. The proven medical expenses receipts are therefore 788,384.54/= which I hereby award.

56. *Written off Pajero* claim of Kshs 1,200,000/-. No evidence of the written off value of the vehicle was availed. Further, though there was a record of the insurance on the police abstract it was not shown that no insurance payment was made. That amount is not proved and is not payable. The only receipt availed in respect of the vehicle was for its recovery and towing of Kshs 10,000/-. I award this amount.

57. *Chemicals on board vehicle* claim for Kshs 1,650,000/-. Here again, no evidence of any chemicals on board the vehicle or stolen from the vehicle, was availed. The claim is not payable.

58. *Loss of contracts and business opportunities claim* for Kshs 16,548,735/-. In respect of this claim, the plaintiff asserted that his company was Laiser Engineering Supplies through which he provides mechanical and agricultural engineering services and consultancy. He availed a copy of a contract proposal (PB 1 Page 2) being a letter dated 16th June 2009, from a Rwandese flower company for a sum of US Dollars 65,000. The letter indicates that there was a proposal for development of Rwanda Flower Project. It notifies the plaintiff that:

> ***"completion of the documentation required for the presentation of the project to the financial institutions is now becoming critical….."***

and that:

> ***"….On presentation of the bound volume, on or before due date, the sum of USD 65,000 (sixty five thousand) will be paid within 14 days***
>
> ***Failure to complete the project will negate the agreement in its entirety…"***

59. This letter of 2009, nine months before the accident, does not constitute evidence that the plaintiff did in fact eventually enter into the said proposed contract, or that the proposed contract was terminated as a result of the accident. Accordingly, no award is proved to be payable under this head.

Disposition

60. In the end, the court finds in favour of the plaintiff and makes an award as follows:

a) Liability is apportioned at 80% to 20% in favour of the plaintiff, with the defendants being jointly and severally liable at 20%.

Accordingly, damages are awarded to the plaintiff as follows:

b) General damages

1. Pain and suffering	Kshs 2,500,000.00
2. Diminished earning capacity	Kshs 1,000,000.00
3. Diminished quality of life -	Nil
4. Future medical expenses amounting to	Kshs 200,000.00

c) Special damages

1. Medical expenses amounting to	Kshs 788,384.54
2. Loss of Motor Vehicle -	Kshs 10,000.00
3. Loss of chemicals on board -	Nil
4. Loss of contracts business opportunities -	Nil
Total	Kshs **4,498,384.55**
Less 20% apportioned liability	899,676.91
Total Award	**Kshs 3,598,707.64**

61. The plaintiff shall have costs and interest at court rates.

Administrative directions

62. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

63. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

64. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 26TH DAY OF JULY, 2021.

……

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Wairegi for the Plaintiff

2. Weche for the Defendant

3. Court Assistant – Quinter Ogutu