



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL SUIT NO. 15 OF 2015**

**RICHARD BOKE CHACHA.....1<sup>ST</sup> PLAINTIFF**

**FRIDAH KAIMURI KIREMA.....2<sup>ND</sup> PLAINTIFF**

**EMMANUEL TALAM.....3<sup>RD</sup> PLAINTIFF**

**EPHANTUS MWANGI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**LINUS KAIKAI.....DEFENDANT**

**JUDGMENT**

**Background**

1. On 28<sup>th</sup> April 2012, the plaintiffs and the defendant were travelling from Nairobi to Kilgoris on the invitation of the defendant for a funds drive. They were all friends working in media at the material time. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs, and the defendant, worked with the Nation Media Group (NMG). The 3<sup>rd</sup> plaintiff worked as an editor with China Central TV (CCTV).

2. The friends were all in the defendant's vehicle registration number KAZ 433F Toyota Land Cruiser, driven by the defendant. They left Nairobi at about 8.30am that morning, and at around 11.30 am at Sattelite along Narok Maai-Mahiu road, there was a loud sound, like a tyre burst. The vehicle then swerved from side to side before it rolled over several times.

3. The accident resulted in serious injuries suffered all round. The plaintiffs sued the defendant and two others (Family Bank Limited and one Stephen Macharia) for general and special damages and loss of future earnings.

4. During the lengthy course of the proceedings, the suits against the second and third defendants were withdrawn. Similarly, the suit by the 4<sup>th</sup> plaintiff was withdrawn after the hearing of PW1's evidence. Thus, the suit parties are now only the 1<sup>st</sup> – 3<sup>rd</sup> plaintiffs and the defendant.

5. The plaintiffs' Further amended plaint particularises the injuries sustained, the damage incurred and damages sought. In the plaint, the plaintiffs seek judgment against the defendant as follows:

- a) *General damages for pain and suffering and loss of amenities.*
- b) *Special damages as set out in paragraph 11 through to 16 of the plaint.*
- c) *Cost of this suit.*
- d) *Cost of future treatment as set out in paragraphs 11 through to 16 of the plaint.*
- e) *Loss of future earnings as set out in paragraphs 11 through to 16 of the plaint.*
- f) *Interest on (a),(b),(c),(d) and (e) above at Court rates.*

6. From the plaint the injuries, damage sustained and damages sought by each of the plaintiffs are particularized as follows:

1) *In respect of the 1<sup>st</sup> Plaintiff:*

*Injuries:*

- a) Paralysis of the lower limbs.
- b) Degloving injury to the vertex.
- c) Epidural hematoma.
- d) Cut wound on the scalp.
- e) Moderately severe head injury.
- f) Blood loss, physical and psychological pains.
- g) Physical disability
- h) He continues to undergo treatment at the time of filing this suit and will incur future medical expenses and costs.

*Special damages in respect of 1<sup>st</sup> Plaintiff:*

- a. Medical bills Ksh. 2,523,278.03
- b. Medical report Ksh. 5,000.00
- c. Search for Motor Vehicle Ksh. 1,000.00
- d. Police abstract Ksh. 200.00
- e. Medical neuro rehabilitation and medical care Ksh. 20,000.00
- f. Costs of medical care Ksh. 8,000,000.00
- g. Drugs and consultancy Ksh. 25,000.00
- h. Cost of diapers and pads Ksh. 25,000.00
- i. Homecare Nursing salary form Ksh. 33,600.00
- j. Homecare Occupational Therapy costs Ksh. 40,000.00
- k. Cost of physiotherapy Ksh. 30,000.00
- l. Salary for driver Ksh. 30,000.00
- m. Cost of diapers and pads Ksh. 25,000.00
- n. Costs of wheel chair Ksh. 250,000.00
- o. Air tickets and visas to India (5 trips) Ksh. 839,062.60
- p. Hotel accommodation whilst in India Ksh. 900,000.00

*Sub total Ksh.12,747,140.63*

*Future costs for the 1<sup>st</sup> plaintiff per month from 1<sup>st</sup> March 2015:*

- 1. Medical neuro rehabilitation and medical care Ksh. 20,000.00
- 2. Costs of medical care Ksh. 8,000,000.00

3. Drugs and consultancy Ksh. 25,000.00
4. Cost of diapers and pads Ksh. 25,000.00
5. Homecare Nursing salary form Ksh. 33,600.00
6. Homecare Occupational Therapy costs Ksh. 40,000.00
7. Costs of physiotherapy Ksh. 30,000.00
8. Salary for driver Ksh. 30,000.00

*Sub total Ksh. 8,000,000.00*

The 1<sup>st</sup> Plaintiff seeks the application of a multiplier of 17 years given that he is only 43 years for future medical costs.

*Loss of future earnings for the 1<sup>st</sup> plaintiff:*

1. The Plaintiff lost his employment in July 2015 as a result of his health condition as a result of the accident.
2. At the time of the accident, the 1<sup>st</sup> Plaintiff was earning Ksh. 202,000 per month and he is unable to earn the said monthly income which he lost at a very early age in life and he claims the loss of earning for the next 17 years at the rate of Ksh. 202,000 per month.

*1<sup>st</sup> Plaintiff's tabulation for medical bills:*

6,750+1,830+1,960+3,765+2,925+2,925+3,920+4,885+3,500+6,052+1,960+6,845+5,880+5,880+2,925+3,920+4,885+4,950+6,845+17,610+2,925+3,465+9,110+19,829+9,770+3,920+1,830+29,25=

153,986+ 2,215,306.03=Total medical bills **Ksh. 2,523,278.03**

**Grand total: Special Damages Ksh. 12,747,140.63**

**Future Costs Ksh. 8,203,600.00**

**Total Ksh. 20,950,740.70**

2) *In respect of the 2<sup>nd</sup> Plaintiff:*

*Injuries:*

- a) Scalp injuries.
- b) T2- Y5 thoracic spine cord injury with resultant paraplegia.
- c) Uterine fibroids and bilateral ovarian endometriosis.
- d) Left forearm fracture.
- e) Lower limb weakness.
- f) 80% permanent disability.
- g) Blood loss, physical and psychological pains.
- h) She continues T3- 6 vertebral compressive fracture with cord compression and contusion and kyphotic deformation.
- i) to undergo treatment at the time of filing this suit and will incur future medical expenses and costs.

*Special damages in respect of 2<sup>nd</sup> Plaintiff:*

- a) Medical bills Ksh. 17,490,989.33
- b) Medical report Ksh. 5,000.00



**Future costs per month Ksh. 3,403,500.00**

**TOTAL Ksh. 21,328,989.40**

3) *In respect of the 3<sup>rd</sup> Plaintiff:*

*Injuries:*

- a) Extradural hematoma.
- b) Clavicle It distal.
- c) T3- T4 compression fracture.
- d) Cut right ear.
- e) Blood loss, physical and psychological pains.
- f) He continues to undergo treatment at the time of filing this suit and will incur future medical expense and costs.

*Special damages in respect of 3<sup>rd</sup> Plaintiff:*

- a) Medical bills Ksh. 2,111,420.24
- b) Medical report Ksh. 5,000.00
- c) Search for Motor Vehicle Ksh. 1,000.00
- d) Police abstract Ksh. 200.00

TOTAL Ksh. 2,117,620.24

*3<sup>rd</sup> Plaintiff's tabulation of Medical bills:*

941,896.45+1,169,523.79 = **Ksh. 2,111,420.24**

7. In each case, the plaintiffs produced alleged particulars of special damages as well as medical reports detailing the injuries sustained by the plaintiffs and prognosis for future treatment.

8. At the hearing, each of the plaintiffs gave their testimony. Fridah Kaimuri Kirema testified as PW1; Richard Boke Chacha as PW2, and Emmanuel Talam as PW5. Caroline Waithaka Kirika, PW1's Nursing aid, testified as PW3; and George Mutahi Karoki, a taxi driver who was contracted to drive PW1, testified as PW4. Corporal Kiprono Bett testified as PW6. The defendant was the only witness for the defence.

9. During the hearing, the parties entered into consents on the following matters:

- a) That witness statements be adopted as parties' evidence and deponents be cross-examined;
- b) That they would not pursue receipts attached by the 2<sup>nd</sup> Plaintiff which which were in the names of:
  - i. Nairobi Hospital,
  - ii. Aga Khan Hospital,
  - iii. Mater Hospital,
  - iv. MP Shah Hospital, and
  - v. All receipts addressed to or in the name of Nation Media Group; would not be pursued in the litigation
- c) That 1st Plaintiffs' list of documents at pages 17-69 of their bundle be admitted on condition that:
  - i. No reference will be made to or reliance made on documents/receipts for or in name of Nairobi Hospital, Aga Khan Hospital, MP Shah Hospital and Mater Hospital;

ii. In respect of the Police Abstract at pg 19 of the Plaintiffs' List of documents, the maker thereof shall be called to produce it and be cross-examined;

d) That the Medical Report of Dr CK Musau dated 31<sup>st</sup> July, 2012 at pages 27-28 of the Plaintiffs' List of documents and the medical Report of Dr CK Musau dated 8<sup>th</sup> December, 2016; together with the Certificate of the same doctor are admitted in evidence without the need to call the doctor for cross examination; are admitted as evidence

e) The Medical Report of Dr Kiboi Githinji dated 24<sup>th</sup> September, 2017, is admitted as evidence for the 3<sup>rd</sup> plaintiff, Emmanuel Talam;

10. The basic facts as to the ownership of the accident vehicle, the driver's identity, the persons injured, and the fact of the occurrence of the accident are not in dispute.

#### **Issues for determination by the Court**

11. Having considered the parties' pleadings and evidence, the issues for determination are as follows:

1. Liability: Whether the defendant was negligent in any way for the accident
2. If so, to what extent was the defendant to blame for the accident?
3. What quantum of damages is awardable, if any, under the circumstances?

#### **On the issue of Liability**

12. In the pleadings the plaintiffs assert that the defendant was the driver of the accident vehicle; that he drove fast and was negligent in the way he drove and handled the vehicle; that the accident occurred because he did not control the vehicle properly; and that he failed to adhere to the provisions of the Traffic Act. As a result, the accident occurred with the consequence that they suffered the injuries and damage asserted in the plaint.

13. As regards the evidence availed, the plaintiffs submitted that the defendant was not able to show the alleged reasonable speed at which he drove; or that the vehicle had been serviced; or that the tyres were serviceable. Further that since the road was good as he alleged, then the defendant must logically have acted negligently otherwise he would, as a prudent driver, have been able to mitigate the effects of a tyre burst, and been able to control the vehicle and bring it to a safe stop.

14. Although the plaintiffs sought to introduce the doctrine of *res ipsa loquitur* during the hearing, the pleadings do not indicate reliance on the said doctrine. Thus, argues the defendant, the doctrine is inapplicable as it was un-pleaded.

15. On his part, the defendant denies all the plaintiffs' allegations and puts the plaintiffs to strict proof of every such allegation. However, the defendant admits that he drove the vehicle and had an accident on the material day. He denies any negligence on his part, and asserts that the accident was inevitable. Thus, he should not be blamed for what could not be reasonably avoided. He also asserts that he had maintained the vehicle in proper and serviceable condition and did not contribute to the accident in any way.

16. In dealing with the issues of *res ipsa loquitur* and the defence of inevitable accident, it is necessary to revert to authorities that define and lay the foundation for their application.

17. In **Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR**, the Court of Appeal said of the doctrine of *res ipsa loquitur*:

*"21...[T]he High Court reversed the trial court on the application of the doctrine of res ipsa loquitur and we may briefly comment on it. Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12<sup>th</sup> edition, appears this passage:*

*"Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:*

*I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.*

*The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."*

24. Similar sentiments were expressed by Hobhouse L.J. in the case of **Ratcliffe v. Plymouth & Tobay HA 1998 PIQR 170:**

**“.....the expression *res ipsa loquitur* should be dropped from the litigator's vocabulary and replaced by the phrase 'a *prima facie* case'. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a *prima facie* case has been made out.”**

25. Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of *Nandwa vs. Kenya Kazi Ltd, Civil Appeal No. 91/1987* for the reason that evidence is not to be pleaded. Also see *Bennet v Chemical Construction (GB) Ltd 3 All ER 822* where the Court emphasized that:

**“It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable”**

**Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability.”**

18. Counsel for the plaintiffs cited the case of *Embu Public Road Services Ltd. v Riimi (1968) EA 22* in which they suggest it was held that the driver had been negligent before the tyre burst by driving at a high speed due to which it must be that, following the tyre burst, he was completely unable to take adequate corrective action to avoid losing control. In the *Embu Public Road Services* case, the court stated as follows concerning the application of *res ipsa loquitur*:

**“...where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.”**

In the present case the defendant's explanation for the accident is that the blame lies on the burst tyre, although he did not tender any evidence to explain that the tyre burst had no probable cause, or that the accident was hence inevitable.

19. The Court of Appeal (Madan Law and Potter) in *Kago v Njenga [1979] eKLR* had occasion to deal with a case of a tyre burst and compared that case with the case of *Embu Public Road Services v Riimi*. The Court of Appeal stated that:

**“That was also a case of a burst tyre, after which a bus overturned, causing injuries to the respondent who successfully sued for damages. The appeal was dismissed, because it was held that the bus should not have overturned, although the tyre had burst, had the driver taken that amount of corrective action which should be expected of a competent driver. The driver had been guilty of negligence after the tyre burst. In the instant case, no such negligence was established against the driver. Faced with a sudden emergency, he did all that could be expected of a reasonably competent driver, but could not prevent the bus from moving over the crown of the road.**

20. From the foregoing, it appears clear to me that a tyre burst, on its own, cannot necessarily be deemed to result in inevitable accident. From that standpoint, I can therefore see why the plaintiffs refer to the circumstances as fitting into the parameters that fit the *ipsa loquitur* doctrine, although I do not think the doctrine applies here.

21. The defence argued, relying on *Msuri Muhiddin v Nazzar Bin Saif (1960) EA 201* that:

**“the respondents can avoid liability if they can show either that there was no negligence on their part which contributed to the accident or that there was a probable cause for the accident which does not connote negligence on their part; or that the accident was due to circumstances beyond their control”**

22. Thus the defendant's case was, however, that the accident was due to circumstances beyond his control. That is to say, that the probable cause of the accident was the tyre burst. The defendant cited the case of *Joash Misikhu Viranje v Wanjiru Mwangi & Anor [2016] eKLR* where, on appeal, Meoli J stated:

**“23. On my own evaluation of the evidence I would agree that the tyre burst was the probable cause of accident and that accident was inevitable. For all the foregoing reasons, I have found no justifiable cause for interfering with the findings of the lower court. I find no merit in this appeal and will dismiss it with costs.**

23. However, in that appeal, the evidence was that the vehicle was fitted with a speed governor, there was no estimation of the speed the vehicle was travelling, there was evidence of receipts for purchase of two new tyres, evidence of a service card and receipts, there was evidence of a measured braking distance after the front tyre burst, and that the vehicle did not overturn. The circumstances in that case are quite different from those in the present case, as shown hereafter.

24. In respect of the defendant's plea of inevitable accident, that defence was considered in *Dewshi v Kuldip's Touring Co. [1969] E.A 189, 192* where the Court of Appeal for East Africa quoted Lord Esher in *The Schwan v The Albano [1892] P. 419* who observed as follows:

**“What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence –that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill.**

25. In the same case of **Dewshi**, the Court cited **Barkway v South Wales Transport Co. [1948] 2 All ER 460, 465** where Buckhill LJ., stated:

***I think that the defendants, in order to avoid liability, must prove to the satisfaction of the Court that they took all reasonable steps to ascertain that the tyre was fit for use ... and I think on the evidence they failed to do so...***

26. I now move to the evidence given at the hearing which will be critical in determining the issue of negligence, in light of the legal guidance in the authorities cited.

27. In their written statements, PW1 (Fridah), PW2 (Richard) and PW5 (Emmanuel) all testified that they were in the defendant's said vehicle travelling from Nairobi to Kilgoris when the accident occurred along Maai Mahiu Narok road. They each availed a witness statement and a further witness statement. None of them explained how the accident occurred, except PW5 who said that while travelling in the vehicle at around 11.30 am at Satellite he suddenly heard a loud noise which he suspected to be a tyre burst. PW5 added that the vehicle then swerved from side to side, before overturning:

***"I do recall at one point the car rolled on the left side where I was seated at the 2<sup>nd</sup> row on the left. The car then rolled several times and it was then I lost consciousness"***

28. From PW5's recollection in his statement the vehicle rolled several times, suggesting that it was moving at a speed substantial enough to generate the energy necessary for it to roll several times.

29. PW1 said she lost her memory when the accident occurred and regained consciousness in hospital. In oral testimony, she said she was seated in the back seat, and that they were talking when the incident occurred.

30. PW 2 in cross examination stated that he recalled that there was a tyre burst and that the defendant tried to control the vehicle, but it rolled. He was unable to attribute a cause to the tyre burst.

31. PW5 said in cross examination that he assumed that the tyre burst was the cause of the accident. They were all confused when they heard the bang, and then the car rolled. He also stated in cross examination that:

***"The vehicle was well driven. We were talking. It was not recklessly driven"***

In re-examination, he said that after the loud bang, he asked the driver what had happened, then a few seconds later, the car rolled.

32. The police abstract forms which were produced in court did not provide any light concerning how the accident occurred. PW6, Corporal Kiprono Bett, stated that the accident was pending under investigation; that the accident was self-involved; and that he did not know if the defendant was charged. He confirmed that the Occurrence Book entries indicate that the rear right wheel burst,

33. DW1, the defendant, testified that the rear right wheel burst and:

***"I started losing control. I did all I could to control the vehicle. I was holding the steering and trying to control the vehicle. I did not contribute in any way to the tyre burst.....The vehicle had not shown any problems prior...[it] was in very good condition... I did not foresee this burst..."***

***I did my best to control the vehicle. There was nothing I could do to stop the burst. No one in that position could do more than I did"*** (emphasis added).

34. In cross examination, he said that the road is familiar terrain as it is his regular route home. He could not recall the age of the tyre that burst, but estimated it was not more than six months old. He also said he was driving at a reasonable speed, and that a well serviced car driven at reasonable speed is safe. He said he serviced the car regularly but had not produced the garage maintenance tag, or any receipts for replaced tyres.

35. The defendant also filed a report with his insurer, Jubilee Insurance company, dated August 29<sup>th</sup> 2012. From the report, written and filed in court by him as his evidence, the following information emerges concerning the occurrence of the accident:

*The road surface was tarmac and visibility was clear. The road was dry. The driver was driving at an estimated speed of 100kph, and the weather conditions are stated as clear/good.*

36. In his statement to the insurers the defendant stated:

***"At around 11am while driving towards Narok from Maai Mahiu at the speed of around 100 kph the rear driver's side wheel burst and suddenly the vehicle started swerving from right to left as I struggled to control it...."***

***The vehicle hit the tarmac on its left side and rolled several times off the road. My 5 passengers and I were involved. We were taken to hospital by well-wishers"***

37. The defendant also drew a sketch plan of the accident scene in his report to the insurer. It shows that: *the road is a single carriageway; that after the tyre burst, the vehicle swerved first to the right, then to the left, then to the right again, then to the left again, and then hit the tarmac on its left side. It then rolled about three times before it rested on its roof off the road.*

38. From this report to the insurers, it is clear that the vehicle was fully loaded with six adults including the defendant as driver. It was driven at about 100kph – this was an approximation by the defendant – which means the speed could have been a somewhat faster or somewhat slower speed than 100kph. The road was dry and weather conditions were clear with good visibility. The terrain of the road was not stated, in that there is no indication whether the road was bumpy, rough, pot-holed or smooth, although it was no doubt tarmacked.

39. Under the **Traffic (Speed Limits) Rules** made under **section 119** of the **Traffic Act, Rule 2 Paragraph 1(a)(ii)** of the **Schedule** prescribes the statutory *maximum* speed limit for motor cars on single carriageways as follows:

**“2. The speeds set forth in the second column of the Schedule shall, for the purposes of subsection (1) of section 42 of the Act, be the maximum speeds for the respective classes of vehicles set forth in the first column of the Schedule.**

#### **Schedule**

**1 (ii) Motor cycles and motor cars including all cars normally used for hire but excluding all other public service vehicles when travelling on single carriageway highways: Maximum speed in kilometres per hour: 100”**

Thus, the absolute maximum speed which the defendant was allowed to drive his vehicle on a single carriageway was 100kph, not approximately or about 100kph.

40. Piecing all the evidence together, my appreciation of the whole situation is as follows. The defendant’s vehicle was loaded with six adults including the driver. It cannot be said for certain that the vehicle was in an unserviceable condition – although no mechanical test was produced as evidence – but it was nevertheless driven at the maximum legal speed limit for that type of vehicle and road. The evidence is that the passengers were all friends and were talking inside; when the right rear tyre burst there was a momentary shock and confusion; PW5 asked what that was; then the vehicle naturally lurched and veered to the right as the punctured side lost traction, slowed, and suddenly dragged the rest of the vehicle rightwards; the driver tried to “control” or guide or direct the vehicle, as he said, by steering it back to the left; the weight of the vehicle and passengers in it shifted as it veered in the opposite direction, and the driver had to correct the veer again by steering in opposite direction; this occurred thrice, the driver concentrating on guiding or controlling the vehicle; finally the vehicle overturned onto the tarmac and rolled thrice.

41. It appears from the evidence that four of the passengers were in the back seat behind the driver. There is no indication as to whether they were wearing seat belts, but given the number, it is unlikely that the vehicle had that number of seat belts in the rear seating section.

42. In my view, the combination of the weight of the vehicle and that of its passengers made controlling and guiding the vehicle harder given that it was being driven at the maximum allowed speed. There is no indication by the defendant that he sought to use his brakes to decelerate and bring the vehicle to a stop; from his evidence he appears to have concentrated on controlling the vehicle as best as he could by steering.

43. In my understanding, basic driving involves the physical skills to be able to control direction, acceleration and deceleration. In most instances the skills include the ability to co-ordinate these multiple actions effectively, safely, and using focused attention and reasonable judgment in different circumstances and environments such as diverse weather conditions, light and darkness, road terrain, and loading and condition of the vehicle. For motor vehicles, the tasks include: starting the vehicles’ engine with the starting system; setting the transmission to the correct gear; steering the direction of the vehicle with the steering wheel; applying brake pressure to slow or stop the vehicle; operating other important auxiliary devices such as the indicators, headlights, parking brake and windshield wipers.

44. I am persuaded from the evidence available, that on a balance of probability, the defendant did not exercise apt judgment by choosing to drive his vehicle, fully loaded with passengers, at the maximum allowable speed and not being able to clearly state he used his brakes to decelerate upon the occurrence of a tyre burst. It is common knowledge to drivers that a tyre burst would cause an unbalanced trajectory of a vehicle, particularly if the burst involves the front tyres; that tyre bursts can occur due to defective tyres whether the defect is latent or patent, or can be caused by an object on the roads or potholes, or by seriously uneven road surfaces; and that a driver must be constantly alert to the many dangers posed by the fact that he is managing a moving vehicle, which is otherwise not dangerous in itself when stationary.

45. There can be no doubt that, as a matter of logic, the slower one’s speed, the less the injuries one will have to deal with. Further, that if one is driving at 80Kph or 60kph it reduces the odds of fatally injuring other road users. The slower the speed, the more effective generally will be the actions a driver takes to avoid an accident. The slower the speed the more effectively brakes can be used and a car steered to avoid serious injuries to other road users. Thus, one has a better chance of taking effective evasive action should that option be available. It is common knowledge that to safely break, swerve, or turn while still in control of the car at 60 Kph as compared to 100 Kph is more likely.

46. In this case, I find from the evidence that the defendant did not exercise the level of judgment, skill and care required of a competent driver in the circumstances. In particular, it is clear that he did not appear to use the deceleration ability of the vehicle once the rear tyre burst occurred, relying instead only on his control or steering ability. Knowing he was driving at about 100kph he must be understood to have been aware that his instant and instinctive reaction time in event of a sudden emergency would have to be that much faster given that the movement or pace of his vehicle was proceeding at over twenty-seven (27) metres per second. Further, there is no indication from the evidence that there were other vehicles on the opposite side of the road that made it more difficult for the driver to exercise corrective action to avoid an accident.

47. From the facts in the present case, the defendant did not demonstrate that he took all reasonable steps to ascertain that the tyre was fit for use and properly serviceable as posited in **Barkway v South Wales Transport Co.(supra)**, or that the vehicle was otherwise in proper

condition.

48. Accordingly, I find that despite the rear right tyre burst being an inevitable event that in itself contributed to triggering the swerving that led to loss of control and ultimately to the accident, the defendant also carried blame for the accident. I do not embrace the view that, generally, rear tyre bursts in a vehicle driven at a safe speed and managed by a competent driver, would result in an inevitable accident, involving multiple rolling wrecks.

49. Ultimately, I would say that the defendant's level of blame was at least 90% negligence, given that: he was, admittedly, travelling at the maximum statutory speed for the type of road; that the vehicle was fully loaded; and that his reaction in taking corrective action to avoid an accident did not include deceleration. I attribute 10% blame to causation from the tyre burst. I so find and hold.

## **Damages**

50. The evidence shows that the accident resulted in invariably serious injuries to the plaintiffs. I saw the plaintiffs as they gave evidence in court, and was able to appreciate the effects of some of the injuries on them. It is not disputed that when the accident occurred, the vehicle rolled both on the tarmac and off the road several times. The doctors' reports, admitted by consent without calling the doctors, described and detailed the injuries as shown hereunder.

*In respect of the 1<sup>st</sup> Plaintiff Richard Boko Chacha (PW2)*

51. Dr Chris Musau's (consultant surgeon/neurosurgeon) report dated 31<sup>st</sup> July 2012 on the 1<sup>st</sup> Plaintiff records that the injuries suffered by Mr Chacha were:

- i. Degloving injury to the vertex*
- ii. Irregular scalp laceration over the vertex*
- iii. Complete paralysis of lower limbs*
- iv. Small epidural haematoma over right parietal region*
- v. Fracture dislocation of C7-T1 with marked kyphotic deformity*

The doctor's post-operative prognosis was that 1<sup>st</sup> plaintiff:

- i. Was stable, able to talk; and his centres are intact with good memory*
- ii. Has weakness of upper limbs involving C6 & C7, triceps and hand muscles were weak*
- iii. Lower limbs are weak at power grade 0/5*
- iv. Feeds normally with assistance; has a silicon catheter*
- v. Was undergoing physiotherapy once a day*

1<sup>st</sup> plaintiff was referred for further neurohabilitation

52. In a letter of 17<sup>th</sup> March, 2014 from the Nation Media Group two years after the accident (page 29 of his bundle), the head of legal services stated that 1<sup>st</sup> plaintiff:

***“...works as a Political Affairs Editor/Reporter...[his work] is hampered by the gravity of his physical disability which requires that he limits his ability to undertake travels out of the office by virtue of being currently on a wheelchair....he has to spend more time than would otherwise be necessary to complete most of the tasks he has to undertake, besides having to work less than 8 hours on any given day.....Mr Chacha has had to employ a full time driver to drive him to and from the events he needs to attend as part of his usual duties...[he] still has to exert himself much more than than would be necessary for a person without his kind of disability in order to attain the efficiency and productivity levels expected of any person in his position.....Mr Chacha continues to undergo physiotherapy sessions and further medical attention which have exceeded the limits of his Medical Insurance cover which the company offers him as an employee.”***

53. In his testimony contained in his witness statement dated 23<sup>rd</sup> April, 2015 and further witness statement dated 21<sup>st</sup> March 2017, the 1<sup>st</sup> plaintiff said that after the accident, they were taken by good Samaritans to hospital in Naivasha and they were stabilized. Thereafter, their employer organised for their airlifting to Nairobi Hospital. He was admitted in hospital for six weeks in intensive care unit and then to the HDU and later to the general ward. He was in hospital for three (3) months. Thereafter he went to Saifee Hospital, India, for one month and then to Kokilaben Hospital also in India for one month.

54. He resumed work with Nation Media in 2012, but by December 2012, he had to fly back to India's Ayurveda Hospital for 28 days of

treatment, and again to Mater Hospital for two months. He went back to Kerala India for 28 days in December 2013 and again in March 2015 for treatment. At the time of giving testimony, he was still undergoing physiotherapy.

55. He stated that the accident affected his life financially, his career and his health, in addition to ruining his future, as he is now permanently in a wheelchair.

56. In the submissions of the plaintiffs, the authorities referred to for the 1<sup>st</sup> plaintiff were also relied on by counsel for the second plaintiff.

57. The 1<sup>st</sup> plaintiff claims **general damages** of Kshs 104,682,800/- for the injuries sustained, citing a number of authorities. These include, but are not limited to the following: **Bernard Mutisya Wambua v Swaleh Hashil [2017]eKLR** where the High Court awarded general damages of Shs 6,000,000/- and Shs 1,980,000/- for diminished earning capacity. There the injuries of the plaintiff were paralysis of the right hand and 80% permanent incapacity, as he was unable to return to gainful employment.

58. The case of **Emmanuel Kombe Nzai v Basari Company Ltd and Another[2017]eKLR**, was also cited by the 1<sup>st</sup> Plaintiff. There, the High Court awarded the plaintiff Kshs 6,000,000/- for lower limb paralysis, loss of bladder control, compression of fractures of vertebrae T5&T6, fracture dislocation of chest bone, cut wound on the head and loss of consciousness. The 1<sup>st</sup> plaintiff's injuries were less serious than those suffered by **Emmanuel Kombe**.

59. Reference was also made to **Joseph Maganga v Kenya Power & Lighting Compay Ltd [2012]eKLR** where the plaintiff was awarded Kshs 3,000,000/= suffered burst displaced fracture of thoracic spine, wedge compression of lumbar spine and also on left transverse process, spinal cord and exit nerve compression leading to total paralysis below L1, bone fragments within spinal canal, urine and stool incontinence, erectile dysfunction, fracture of the head of right and left T1and T2 tibs. These were described by the doctor as debilitating multiple bone and spine injuries leading to complete paralysis of both lower limbs at 100% disability.

60. In my view, **Joseph Maganga's** injuries are less serious than in the present case as his paralysis is below L1 lumbar spine. However, I note that the case was delivered in 2012, over eight years ago, and the time lapse would result in some level of escalation in inflation and costs.

61. On his part the defendant cited the cases of: **Brian Muchiri Waihenya v Jubilee HauliersLtd & 2 Others Nakuru HCCC 34 of 2014** where an award of Kshs 8,000,000/- was made for what the defendant considers were more serious injuries; **David Chege Ndungu v Robert Macharia & 2 Others [2015]eKLR**, where the High Court awarded Kshs 4,000,000/- for paralysis from the waist down and fractures of C6 C7 with dislocation.

62. I have carefully studied the authorities submitted by the parties. Taking into account the nature of the injuries suffered by the plaintiff here and their long term effects,I think that an award of 5,000,000/- for general damages, pain and suffering, and loss of amenities is a reasonable amount, and I so award.

63. In his submissions, the 1<sup>st</sup> plaintiff also claims **loss of earning capacity and future earnings** of Kshs 41,208,000/-. According to him, this is made out as follows: that the 1<sup>st</sup> plaintiff was aged 43 years and earned Kshs 202,000/- per month. Retirement would have been at age 60 thus could have worked for 17 more years, thus a multiplier of 17 years:  $17 \times 12 \times 200,000 = 41,208,000/-$

64. The plaintiff cited the case of **Kiran Pindolia v Martin Muturi Karugu & 3 Others[2019]eKLR** in which Mbogholi, J relied on **Madina Gathoni v Ali Shalo Shoshi & Another [2009]eKLR** where it was held concerning assessment of loss of earnings:

*“In assessing loss of earnings and loss of earning capacity, the general practice is to take the plaintiff's annual earnings at the time of accident and multiply the same with the number of years that the loss of the power of earning is likely to subsist, taking into account relevant changes in the plaintiff's circumstances which could have taken place since the injury and which are likely either to increase or diminish the plaintiff's loss”*

65. In **Butler v Butler [1984] KLR 225**, loss of earning capacity was poignantly explained as follows:

*i. “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 as paid as before the accident are lessened by his injury.*

*ii. 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.*

*iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.*

*iv. Loss of earning capacity can be a claim on its own, as where the 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.*

*v. 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 proper to award it under its own heading.*

**vi. 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.”**

66. The 1<sup>st</sup> plaintiff did not avail his salary slip or any other formal document to confirm his earnings. Instead, he produced his NCPWD assessment form in which he indicated his salary as Kshs 189,606/-. In cross examination, he admitted that he hadn't produced a payslip for his job as Senior Political Affairs Correspondent with Nation Media Group; that he stayed jobless after leaving NMG; that his employer did not meet any of his expenses; that he was not able to put all his expenses together; and that the document of the Ministry of Medical Services showing his salary as Kshs 189,606/- did not emanate from his employer.

67. The defence in opposing the award of damages under this head pointed out that the 1<sup>st</sup> Plaintiff's evidence was that he worked for the County Government of Mombasa. In cross examination he said that at the time of the accident he worked as the NMG Senior Editor; and that after the accident to the present date he was working as the Director of Communications with Mombasa County Government. He did not indicate his present salary, nor did he indicate whether in his new job his salary had increased or diminished or remained the same. In the circumstances, there is no proof of his loss of earning capacity and future earnings. I find he is not entitled to an award under this head for loss of earning capacity.

68. In addition, the 1<sup>st</sup> plaintiff claims **future costs** of Kshs 43,977,600/- made up as follows: 203,600x12x18= 43,977,600/- He alleges that as a result of the accident, he was completely slowed down, that his ability to work was inhibited as is well set out in the letter from Nation Media Group at page 29 of his documents.

69. In the Further Amended Complaint, the 1<sup>st</sup> plaintiff's claim for future costs is really for future medical costs including: medical care, drugs and consultancy, cost of diapers and pads, homecare nursing salary, homecare occupational therapy costs, physiotherapy costs and salary for his driver. These costs set out in the complaint amount to Kshs 8,203,600/-. I am, however, unable to follow the logic of the claim between the complaint and the submissions.

70. In the submissions, the 1<sup>st</sup> Plaintiff states that:

***“The quoted costs of the future are guided by the bundle of receipts ...annexed ...dated 23.4.15 at pages 28-69”***

71. I have carefully perused those receipts and documents at pages 28-69. My observations are as follows:

-Pages 26-29 are the 1<sup>st</sup> plaintiff's medical report and his employer's letter;

-Page 30 is a printout of what appears to be a hospitalization bill for 205,000 Rupees but is not on a letterhead and there is no indication of whom it was payable to;

-Pages 31-44 & 67-68 are hospitalization bills for Kokilaben Dhirubhai Ambani Hospital, Mumbai, covering a period from 30-8-2012 to 16-9-2012 showing deposits/payments of Rupees 180,000;

-Pages 46-49 are assessment reports by NCPWD and Ministry of Medical services; -Pages 50-54 are Discharge Summaries from Mater Hospital and Nairobi Hospital which – according to the parties' consent recorded at the hearing of 1<sup>st</sup> plaintiff's evidence on 13<sup>th</sup> March 2019 – were documents abandoned and cannot to be relied upon or referred to;

-Pages 55-57 are Discharge summary and advisories from Ayurvedic Hospital & Research Centre, Kottakkal, Kerala India;

-Pages 58 and 60 are airline tickets for Rupees 12,084 and USD1,723,93 respectively;

-Pages 61-64 are hospital bills for Ayurvedic Hospital, Kerala India, for the periods 2/3/2015 to 28/3/2015; 3/12/2012 to 29/12/2012 and 13/12/2013 to 12/1/2014 for the amounts of Rupees 240,000; 185,000 and 205,000, respectively.

-Pages 65-66 is a Discharge Summary from Saifee hospital for a period of admission from 1-8-2012 to 30-8-2012 showing his clinical summary, examinations and investigations and treatment course but without any figures attached to the summary.

72. The 1<sup>st</sup> Plaintiff's Supplementary Bundle filed on 22<sup>nd</sup> February 2017, contains at:

-Page 3: Amas Medical Services Pvt Ltd a Kenya Airways Fitness to Fly report dated 10.01.2014 for a flight travel date of 13.01.2014 to Nairobi. It shows 1<sup>st</sup> Plaintiff's Medical Summary as:

***“History of Spinal Injury in 2012, visits India, Kerala every yearly for the Ayurveda therapy and physiotherapy.....He is accompanied by relatives as non- medical escort.....Travel details 13/1/2014 to Nairobi...”***

-Page 4 is a receipt from Amas Medical Services for 2,000 Rupees

-Pages 5-7 consists of flight ticket receipts for USD 3,955.72 and Jet Airways boarding passes

-Pages 8-13 are receipts in the 1<sup>st</sup> plaintiff's name for various items for a total of Kshs100,600/-

-Page 14 is for two receipts from Ayurvedic Hospital for Rupees 205,000 and Rupees 47,994 respectively

73. The total costs shown to have been incurred by the 1<sup>st</sup> plaintiff from pages 28-69 of his bundle in the plaint is **USD 1, 723.93 and Rupees 1,195,000.**

Similarly, the total costs shown to be incurred from the 1<sup>st</sup> Plaintiff's supplementary bundle is **Kshs 100,600/-; USD 3,955.72 and Rupees 252,994.60.**

I will treat the totality of these as **special damages**, for the periods from 2012 to 2015 which are recoverable. Thus, I award Special Damages will be USD 1,723.93 +3,995.72= **5,719.72**; and Rupees 1,195,000 +252,994 = **1,447,994/-**; and Kshs **100,600/-**.

74. The advisories in the bundles do not indicate that these treatments are to be conducted repeatedly into an unforeseeable future, except that in the 1<sup>st</sup> Plaintiff's Medical summary it is indicated that *Ayurveda therapy and physiotherapy* is done yearly, without stating whether the prognosis is for the lifetime of the plaintiff. Although the Ayurveda Hospital therapy and physiotherapy clinic is indicated as annual, the recurring annual cost is not specifically indicated and proved. However, the 2014 trip to India appears to have cost USD 3,955.72 flight + Rupees (2000+ 205,000+47,994) = Rupees 254,994 for therapy/hospital costs + Kshs 100,600/= for purchase of necessary items.

75. Based on The 1<sup>st</sup> plaintiff's evidence in his witness statement is that he continues to attend physiotherapy at Sayidda Fatimah Hospital, Mombasa, for which he did not avail the cost. Further, he did not indicate whether he had attended in India in 2016, 2017, 2018 and 2019. Given the scant evidence available, and doing the best I can, I am prepared to take the therapy costs in India reduced by 50% (and converted into Kenya shillings at the current rates of 1 Rupee:1.41 Kshs), excluding flight costs for the period from 2016 to date of retirement for the future therapy costs. Thus Rupees 254,994/2 =127,497. This would amount to shillings as follows: 127,497x1.41= **Kshs 179,770/- per annum for thirteen(13) years from 2016 up to 2029 when the 1<sup>st</sup> plaintiff would have retired: =179,770/= x 13 = 2,337,010/= for future medical costs.**

76. I saw the witness on a wheelchair, and it is in evidence that he is wheelchair bound. However, I have not seen any indication of the cost of a wheelchair, or whether it will need to be replaced and if so, what type and how frequently. I am thus at a loss to make any award on this aspect without being unduly speculative.

77. In respect of expenses, the 1<sup>st</sup> plaintiff submits at page 7 of the submissions, that from 1<sup>st</sup> March 2015 to 31<sup>st</sup> March 2017 the 1<sup>st</sup> Plaintiff expended Ksh13,747,200/- Yet he claims Kshs 8,453,600/- in expenses. However, no clear evidence was tendered in proof of this amount at all. I note that a large chunk of the plaintiff's bills and costs relating to Nairobi Hospital, Agakhan Hospital, MP Shah Hospital and MP Shah Hospital were not admitted into evidence by consent of the parties. In the absence of explanation or proof, I make no award on these.

*In respect of the 2<sup>nd</sup> Plaintiff, Fridah Kaimuri Kirema (PW1)*

78. Dr Chris Musau's Medical Certificates dated 30<sup>th</sup> July 2013 and 20<sup>th</sup> February 2014; and his Medical Report of 8<sup>th</sup> December, 2016, were admitted by consent. They show that the 2<sup>nd</sup> Plaintiff had been admitted under his care following an airlift soon after the accident.

79. Reading both reports together, the injuries suffered by the 2<sup>nd</sup> plaintiff were:

i. Large degloving injury of the scalp

ii. Thoracic spinal cord injury with paralysis of the legs:- details being Severe compression fractures of the vertebral bodies of T3-T6 with a gibbus at T7; and sensation was impaired totally below T5 i.e permanent paralysis, loss of bladder control

iii. Fracture of the left wrist – distal 1/3<sup>rd</sup> of left radius bone

iv. Injuries to the knees: torn cruciate and meniscus of both knees

80. The doctor's prognosis on Fridah's condition as at December, 2016 was that:

***“To date she has remained with paralysis of the legs and incontinence of urine – a sequelae of the spinal injury. This is likely to be permanent. She has continued with home-based physiotherapy and rehabilitation to date. She has also continued to use medications in view of pains and urinary tract infections.***

***She needs to keep seeing her doctors on a regular basis. She is yet to go for further surgery of her left and right knee.***

81. Her employer, Nation Media Group, in a letter of 18<sup>th</sup> March, 2014 written by the head of legal services, stated that the 2<sup>nd</sup> plaintiff was in employment as Administration Supervisor, a role hampered by her physical disability due to being wheelchair bound, and that she is:

***“....compelled to take regular breaks from her work for physiotherapy sessions during her working hours. As a result of this she has had to employ a part-time nurse to attend to her while she is at work....***

*[She] continues to undergo physiotherapy sessions and further medical attention which have exceeded the limits of the Medical Insurance cover which the company offers her as an employee. I would therefore unreservedly recommend Ms Frida Kirema for the exemption that [s]he has sought by virtue of his (sic) disability”*

82. The 2<sup>nd</sup> plaintiff also exhibited a letter dated 2<sup>nd</sup> July 2015 from Dr Vincent Mutiso, an orthopaedic and trauma surgeon with Sportrac. He points out that the 1<sup>st</sup> plaintiff had been complaining of an unstable right knee. He then gave a prognosis as follows:

*“Clinical examination has revealed laxity of the medial collateral ligament.*

*Surgical reconstruction can be done and would involve admission to hospital and surgery. The surgery could cost in the region of Kshs 1,000,000/-(Kenya shillings one million) depending on the hospital chosen, the materials used and the follow up required.*

*She also has an implant in the left knee which will soon be due for removal. This would cost in the region of Kshs 500,000/-(Kenya shillings five hundred thousand), again depending on the hospital and follow up required.”*

83. Additionally, she submitted evidence of her registration as a person with disability under the Ministry of Medical Services. Her Assessment report by a team of assessors and is dated 23-10-2013. It shows, inter alia, that her form of mobility is a wheelchair, that she is unable to stand or walk due to paralysis, that her supportive environment includes a person or rail, and recommended occupational therapy, physiotherapy and orthopaedic.

84. Attached to her documentary evidence is a statement setting out how she has been affected by the accident. In summary she says she has had: Health complications- highlighted by her immobility, spine and back pains due to metal plate implants, incontinence and lack of stool control; Financial distress- highlighted by the fact she had to change her living quarters to downstairs, increased home maintenance costs, medicines and psychotherapy costs, and costs for hiring a driver as she cannot drive; Distractions in her career development: including disruption of her MBA program and upgrading; Psychological and personal stress- difficulty in accepting new situation, sexual dysfunction, lack of personal independence.

85. During the hearing of the evidence of the 2<sup>nd</sup> Plaintiff, Counsel for the defence stated that he had concerns about the production of documents. These were medical reports and medical receipts. Counsel for the plaintiffs then stated that he would not be pursuing any receipts in the names of Nairobi Hospital, Aga Khan Hospital, MP Shah Hospital and Mater Hospital, and those addressed to NMG. The Court then ordered the Parties respectively to:

*“...produce a bundle of receipts in respect of which the author or their representative will be called to produce or to be cross examined. The rest of the documents can be produced”.*

There being failure by all parties to produce such contested documents, all documents were then deemed produced without contest, except those specifically subjected to any condition for admission.

86. Thus for the defendant to allege that the 2<sup>nd</sup> plaintiff's bundle of receipts were not formally produced is ingenious for two reasons. Firstly, the 2<sup>nd</sup> plaintiff's Further Witness statement filed on 13<sup>th</sup> April, 2017, clearly identifies all the documents she relies upon in support of her case. The record shows that on 6/12/2018 the parties, by consent, “admitted” the 2<sup>nd</sup> Plaintiff's witness statements which were then adopted as her evidence in chief and she was availed for cross examination. Secondly, at no point did the defendant raise any issue about these documents until filing of submissions. Reliance is thus placed on all admitted evidential material.

87. In addition, the defendant sought that the court disregard receipts on which no stamp duty had been paid. He cited **section 19** of the **Stamp Duty Act** that concerns Non-admissibility of unstamped instruments in evidence; and penalty. When faced with this type of challenge, the practice is to note that the Stamp Duty Act allows for late/delayed payment of duty – with penalties where the case so requires. In **Suderji Nanji Ltd. -vs- Bhaloo (1958) EA 762 at page 763** Law J., (as he then was) quoted with approval the holding in **Baghat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854** that:

*“...before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty .....*

*The Appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2<sup>nd</sup> defendant/Respondent and he must be given the opportunity”.*

88. Following the authorities on this point, in **George Kigambia v Buuri Dairy Farmers Co-operative Society [2018] eKLR** the High Court held:

*“[13] Applying the test of law, the learned trial magistrate was clearly in error in rejecting the receipts without giving the Appellant an opportunity to have the receipts stamped and to pay penalties attendant thereto as provided in the Stamp Duty Act. Non-compliance thereof does not per se invalidate or render the receipts herein inadmissible in evidence. The Appellant ought to have been given an opportunity to comply or pay the requisite penalty. The Appellant proved that his vehicle was involved in an accident and was damaged as a result; he repaired it and incurred expenses which he paid.”*

89. In light of the above, rather than exclude the unstamped receipts, I direct that the plaintiff do satisfy the Deputy Registrar that they have paid stamp duty on all unstamped receipts which are dutiable, before extraction of the decree herein.

90. In the submissions, the 2<sup>nd</sup> plaintiff claims **general damages** of Kshs 112,086,500. The plaintiff relied on the authorities already cited in respect of the 1<sup>st</sup> plaintiff. No basis is laid for that claim of that magnitude as none of the authorities cited by either the plaintiff or defendant lend any support to the claim. I am unable to understand its basis, given the authorities cited.

91. I would remind parties that I must bear in mind that in assessing damages comparable injuries should as far as possible be compensated by comparable awards. This was the position of the Court of Appeal in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR** where it stated:

***“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”***

92. This point had earlier been emphasised by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd v Shepherd [1964] AC. 326,345**, where he observed that:

***“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 endeavour to secure some uniformity in the general method of approach. By common consent 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”.***

93. Similarly, the Court of Appeal in **Jabane v Olenja [1986] KLR 661** outlined this position in the following words:

***“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by this court to an award of damages by a trial judge.***

***1. Each case depends on its own facts;***

***2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politic);***

***3. comparable injuries should attract comparable awards.***

***4. inflation should be taken into account; and***

***5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award, leave well alone”.***

94. In **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 others [2017] eKLR** the court awarded general damages of Kshs 8,000,000/= for the injuries suffered by the plaintiff in that case. The injuries were: Severe spinal injury at the neck and cut wound on the head, pain at the neck, complete loss of sensation from the chest up to the lower limbs extremities, incontinent of urine and stool, weakness of right upper limb, loss of power in the left upper limb. The doctor in that case further observed the following details: C5 complete spinal cord injury, C6/C7 extension distractory injury, Cut wound of the occipital region of the scalp, has wasting of muscles on the upper limbs, has complete loss of muscle power and tone on the lower limb, has incontinent of stool and has pampers applied, has an indwelling catheter applied with urine bag, loss of muscle power and tone in lower limb is permanent, he is paraplegic, as a result, he requires constant attention to change positions as he is likely to develop bed sores, will develop urinary tract infections due to indwelling catheter, will require medication for the rest of his life, requires a nurse aid, permanent disability assessed at 100%

95. In my view the injuries inflicted on the 2<sup>nd</sup> plaintiff are slightly less serious than those suffered by the plaintiff in the case of **Brian Muchiri**, but more serious than those suffered by the 1<sup>st</sup> plaintiff or the third plaintiff in this case. I think with her permanent disability indicated at 85% an award of Kshs 7,000,000/- in general damages for pain, suffering and loss of amenities would be reasonable comparable compensation for the 2<sup>nd</sup> plaintiff's injuries. I award the same.

96. In submissions for the 2<sup>nd</sup> plaintiff the following additional amounts are claimed:

a. monthly expenditure on medical and home care from March 2015 at Kshs 403,500/-. Added to it is the said sum for 27 months up to 31<sup>st</sup> May, 2017 Thus the total claim for monthly medical and homecare expenditure is the amount of 250,000 + (153,500x27) =4,394,500/- monthly expenditure.

b. future medical care and home expenses in the amount 52,800,000/-

c. Costs for knee surgery of Kshs 3,000,000/-

- d. Wheelchair purchase at Kshs 250,000/-
- e. Occupational therapy at Kshs 22,599/- per month
- f. Sterile medical services for surgical home nursing at Kshs 35,000/-per month
- g. Hire of a driver at Kshs 15,000/- per month
- h. Medications as set out in pages 149-261 of her Supplementary bundle

97. I start with the claim for **loss of future earnings**. The 2<sup>nd</sup> plaintiff claims that she was earning Kshs 120,000/- per month and will have difficulty getting another job for the next 22 years of her working life. She has jacked up the salary amount to Ksh 200,000/-x 22 x 12 = 52,800,000/-

98. The defendant opposes all the claims except those for the cost of the nurse aid and driver.

99. For purposes of loss of future earnings, the 2<sup>nd</sup> plaintiff's age was stated in submissions to be 40 years with a salary of 120,000/- per month. However, her age was indicated to be 36 years old according to Dr Vincent Mutiso's report (pg3) of 2<sup>nd</sup> July 2015, and in the Ministry of Medical Services PWD Assessment Report dated 23<sup>rd</sup> October, 2013 (pgs10-11) two years earlier; and 39 years old according to her Occupational Therapy Management Report dated 28<sup>th</sup> April 2012. I have not seen evidence of her birth certificate or ID. Equally, I have not seen any document – such as a salary slip – that proves her salary. In addition, in her oral testimony she did not indicate either her age or salary amount.

100. Further, it was clear from 1<sup>st</sup> Plaintiff's evidence that she was still in the employment of NMG as Operations Supervisor and the issue of loss of future earnings may not be appropriately dealt with in the circumstances. As was stated in **Butler v Butler (supra)**:

***“ii. 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.”*** (emphasis added).

101. For these reasons I think that any discussion on loss of future earnings would be wholly unsafe given the uncertainty and doubt pertaining to the critical ingredients central to such a discussion. Accordingly, I am not prepared to accommodate any assessment on this aspect and the issue will lie as is. No determination is thus possible as there is no reasonable chance of proving the claim in the circumstances. Accordingly the claim under the head of loss of earning capacity fails.

102. I now deal with the 2<sup>nd</sup> plaintiff's claims for expenditure which was receipted, and which I consider to generally qualify or fall under the head of special damages.

103. The 2<sup>nd</sup> plaintiff produced a Supplementary bundle of documents filed on 22<sup>nd</sup> February, 2017, through her witness statements. I have gone through the documents availed painstakingly. Pages 15 to 261 essentially contain receipts in the 2<sup>nd</sup> plaintiff's name. In her evidence, she stated that she paid these costs herself, and this evidence was uncontroverted. Amongst the receipts were several for Nairobi Hospital, Mater Hospital at pages 224, 226 and 233 to 237 which add up to 45,449/=. These shall be excluded in light of the parties' agreement to exclude reliance on documents from those hospitals.

104. The balance of the receipts exhibited in the 2<sup>nd</sup> plaintiff's bundle add up to Kshs 2,513,776 - 45,449= 2,468,327/=. I award these as proved special damages.

105. With regard to **Future medical and home care and equipment costs**, there were several heads as already indicated.

106. *Occupational Therapy*: The medical reports all show that the 2<sup>nd</sup> plaintiff would be required to undergo occupational therapy on a regular basis for an indefinite period. Receipts attached in the bundle for which special damages were awarded show that the 2<sup>nd</sup> plaintiff was paying 22,500/- monthly to Occupational Therapy Network. I award the same amount monthly as follows 22,500 x 12 x 20 = 5,400,000/=

107. *Wheel chair*: it is not in dispute that the 2<sup>nd</sup> Plaintiff is confined to a wheelchair indefinitely. It cannot also be seriously disputed that wheelchairs must be replaced and serviced. In this case there were no quotations for a new wheelchair and the frequency of its replacement. Without a quotation from a medical supplies institution, I have considered the case of **Ngure Edward Karega v Yusuf Devan Nassir (2014) e KLR**. In that case, the court allowed future purchase of an electric chair that would require regular maintenance, and relying on a quotation by a physical therapy services allowed Kshs.361,340/= for the electric chair. A sum of Kshs.250,000/= had been suggested by Dr. Kiamba. I will allow the said sum of Kshs.250,000/=.

108. The cost of a wheelchair paid for by the 2<sup>nd</sup> plaintiff in 2014 is in tandem with the purchase price shown in the receipts for purchase of a wheelchair by the 2<sup>nd</sup> plaintiff in 2013 at pages 129 and 130 of her bundle. Assuming a lifespan of ten years for a wheelchair, I would award for two wheelchairs at 250,000/- each. The award will be for 500,000/- for a wheelchair and one replacement.

109. *Left knee implant and Surgical reconstruction*: Dr Mutiso indicated in his report of 2<sup>nd</sup> July 2015 that the 2<sup>nd</sup> plaintiff would need Surgical reconstruction for injuries to the knees: torn cruciate and meniscus of both knees. She would also have to get the implant in her left

knee removed. The doctor estimated the cost of these procedures at Kshs 1,000,000/- and Kshs 500,000/- respectively. These were estimates made in 2015. This estimate was not challenged and the documents were admitted by consent. I award the amount of Kshs 1,500,000/- for these two procedures.

110. *Nurse Aid*: the 2<sup>nd</sup> plaintiff provided with her 2 Further Witness statement evidence that she had hired a Nursing Aid, one Caroline Waithira Kirika. A service agreement was exhibited with her dated 1<sup>st</sup> June 2014. Caroline Waithira testified as PW3. She confirmed her salary was 24,500/- per month. She lives with the 2<sup>nd</sup> plaintiff, turns her at night, helps her with exercises, administers medicine, washes her, and helps her get to where she otherwise wouldn't be able to go. Caroline could not tell for how long she would work for the 2<sup>nd</sup> plaintiff.

111. The defendant did not oppose an award in respect of a Nurse Aid.

112. I reckon the age of the 2<sup>nd</sup> plaintiff to be between the age of 36 and 40 in around 2017 as earlier stated. It is not disputed that the 2<sup>nd</sup> plaintiff is paralysed, and according to the medical certificates of Dr V Mutiso, her disability will continue indefinitely. Assuming a lifespan of 60 years and taking into account that the award herein would be a lumpsum, I award Kshs 24,500 x 20 x12 = 5,880,000/= for the Nurse Aid.

113. *Driver*: From the letter of S. Owino of NMG and the testimony of PW4 George Mutahi Karoki, a taxi driver, there is indication that the 2<sup>nd</sup> plaintiff required or used a driver to get around. The driver testified that it was he who ferried the 2<sup>nd</sup> plaintiff to court for the hearing. Although no receipts were produced to prove payments made to him, under the **Regulation of Wages General Order, 2013, Legal Notice No. 196, 2013**, the minimum monthly wage for a Lorry driver or car driver was Kshs 7,113/- per month. I would award as follows: 7,113 x 20 x12 =1,707,120/-

114. *Medical Supplies*: The 2<sup>nd</sup> Plaintiff annexed to her bundle of documents receipts at pages 15 to 51 showing that she was paying for monthly medical supplies. These include diapers, cotton-wool, gloves, massage oil and the like. The figure in the receipts varies from month to month from a high of 25,375 to a low of 11,740. The average monthly cost is therefore about 13,557 which I will round up to 14,000/- per month. For medical supplies I award as follows: 14,000 x 12 x 20 = 3,360,000/-

*In respect of the 3<sup>rd</sup> Plaintiff, Emmanuel Kipkorir Talam (PW5)*

115. The 3<sup>rd</sup> Plaintiff's medical report dated 24<sup>th</sup> September, 2019 was also admitted by consent without the need to call Dr Kiboi Julius Githinji. The report relates to the accident of 28<sup>th</sup> April, 2012, and indicates that the plaintiff was seen at Nairobi Hospital. According to the report, the confirmed injuries are as follows:

a. *Right extradural haematoma with fracture of skull*

b. *Fracture right clavicle; and fracture T3,T4 vertebrae*

116. According to the doctor's report, the 3<sup>rd</sup> plaintiff's head was managed surgically without event and the T3,T4 fracture was dealt with by elective operation between 6<sup>th</sup> and 18<sup>th</sup> June 2012. The patient has been stable and is currently on follow up. There are no other medical notes regarding the 3<sup>rd</sup> plaintiff, and no receipts were produced for follow up treatment or special damages.

117. In his witness statement dated he says that his surgery and post surgery procedures were carried out at Nairobi Hospital and MP Shah Hospital. He said he experiences back pain after travelling for long distances.

118. 3<sup>rd</sup> plaintiff attached medical reports and discharge summaries. He also attached a bill from Nairobi Hospital for 11<sup>th</sup> May 2012 and 18<sup>th</sup> June 2012. However, these were excluded from admission by consent of the parties. Accordingly, no evidence of special damages is available for the 3<sup>rd</sup> plaintiff and none is payable.

119. The 3<sup>rd</sup> Plaintiff claims **general damages** of kshs 8,000,000/- and special damages of Kshs 2,117,620.24. Reliance is placed on the cases of:

**-BAJ v Roadstar Ltd & 2 Others HCCC No 374 of 2009** which relied on the case of Paul Meshack Onyango v Dismus O Nyanya to award Kshs 1,500,000/- for head injury, right side extradural haematoma, subdural hygroma, bilateral temporal mandible, cut wound on right forehead, shock and 17 teeth extraction.

**-James Gathirwa Ngungi v Multiple Hauliers & Another [2015] eKLR** where the award was Kshs 1,500,000/= for injuries with residual complications far more serious than those suffered by the 3<sup>rd</sup> plaintiff.

I find that the authorities cited by the plaintiff are for more serious injuries and not for injuries comparable to those suffered by the plaintiff.

120. The defence relied on **Milton L Milimu v Coast Bus Safaris Ltd and Another [2015] eKLR** where an award of Kshs 600,000/- was made for fracture of right clavicle, fracture of lateral border of scapula, multiple cuts of forehead nose and 4<sup>th</sup> toe.. the defence proposed an award of Kshs 400,000/- on the ground that the injuries in Milton's case were more serious.

121. I agree with the defence with regard to Milton case, and given that even Milton's injuries are more serious, and that the decision was rendered in 2015, I would award 600,000/- in general damages

## Disposal

122. To summarise, I found liability against the defendant at 90%. Consequently, judgment is entered for each the plaintiffs against the defendant at 90% of the following sums:

### Damages awarded to 1<sup>st</sup> Plaintiff:

1. General damages for pain, suffering and loss of amenities 5,000,000/=

2. Future Medical costs 2,337,010/=

3. loss of earning capacity Nil

Sub-total Kshs 7,337,010/=

Less 10% 733,701/=

**Total Kshs 6,603,309/=**

4. Special Damages denominated as follows:

a. **Kshs** 100,600/- less 10% (10,060) = 90,540/-

b. **USDollars** 5,719.72 less 10% (571.97) = 5,147.75

c. **Rupees** 1,447,994.00 less 10% (144,799) = 1,303,195

### Damages awarded to 1<sup>st</sup> 2<sup>nd</sup> Plaintiff:

1. General damages for pain, suffering and loss of amenities Kshs 7,000,000/-

2. Loss of earning capacity fails Nil

3. Occupational Therapy Network. 5,400,000/=

4. Wheelchairs 500,000/-

5. Left knee implant and Surgical reconstruction procedures .Kshs 1,500,000/-

6. Car driver 1,707,120/-

7. Nurse Aid 5,880,000/=

8. Medical supplies 3,360,000/-

9. Special damages I award these as proved. 2,468,327

Sub-total 27,815,447/=

Less 10% liability 2,781,544=

**Total 25,033,903/=**

### 3<sup>rd</sup> Plaintiff:

1. General damages for pain, suffering and loss of amenities 600,000/-

2. Special damages –none proved Nil

Les 10% 60,000/-

**Total 540,000/-**

123. With regard to receipts admitted but not duly stamped under the Stamp Duty Act, I direct that the plaintiffs do satisfy the Deputy Registrar that they have paid stamp duty on all unstamped receipts which are dutiable, before extraction of the decree herein

124. The plaintiffs are awarded the costs of the suit.

**Administrative directions**

125. 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 Zoom video/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 Deputy Registrar/Executive Officer, Naivasha.

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

127. Orders accordingly.

**Dated and Delivered by videoconference at Nairobi this 28<sup>th</sup> Day of May, 2020**

**RICHARD MWONGO**

**JUDGE**

Delivered by video-conference in the presence of:

1. Mr Chigiti for the Plaintiff.
2. Mr Muchela for the Defendant.
3. Court Clerk - Quinter Ogutu