



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 192 of 2012**

**TIJAN KISILU.....PLAINTIFF**

**VERSUS**

**BONFIDE CLEARING AND FORWARDING**

**COMPANY LIMITED.....1<sup>st</sup> DEFENDANT**

**DAVID LAWRENCE KIGERA.....2<sup>ND</sup> DEFENDANT**

**OTIENO GLADWELL.....THIRD PARTY**

**JUDGMENT**

1. This case was by consent of all parties agreed to be a test suit on liability as between the plaintiff, the defendants and the Third Party respecting any other suit filed by affected parties and arising from a road traffic accident which occurred on the morning of 15<sup>th</sup> day of April, 2012 along James Gichuru /Waiyaki way, involving two motor vehicles and their occupants namely: - Registration No. KAH 500Y and KBA 111E. It therefore follows that the determination of this suit on liability shall affect the issue of liability in the matters related to the material accident.

**PLEADINGS**

2. By a Complaint dated 22<sup>nd</sup> May 2013 and a further amended complaint dated 22<sup>nd</sup> May 2016, the plaintiff herein **TIJAN KISILU** instituted suit against the defendants **BONFIDE CLEARING AND FORWARDING COMPANY LIMITED** and **DAVID LAWRENCE KIGERA** jointly and severally seeking the following orders:

- a. special damages in the sum of 7,400,004.00 together with interest;**
- b. general damages for pain and suffering and loss of amenities;**
- c. costs of this suit and interest thereon;**
- d. future medical expenses and any other or further relief that this Honourable Court may deem fit and just to grant.**

3. The plaintiff alleges that on or about the 15<sup>th</sup> day of April 2012, he was a lawful passenger in motor vehicle registration No. KAH 500Y along James Gichuru Road, Nairobi when the 2<sup>nd</sup> defendant **DAVID LAWRENCE KIGERA** then driving a motor vehicle registration No. KBA 111E from the opposite direction negligently, recklessly controlled the 1<sup>st</sup> defendant's motor vehicle KBA 111E thereby causing it to collide with the motor vehicle registration No. KAH 500Y.

4. The plaintiff set out the particulars of negligence levelled against the 1<sup>st</sup> and the 2<sup>nd</sup> defendants respectively in the complaint. On the part of the 1<sup>st</sup> defendant, it was alleged that the motor vehicle was driven excessively at high speed; allowing its driver agent or employee to drive carelessly without due regard and attention; to drive dangerously without due regard to other road users, allowing and causing the accident.

5. On the part of the 2<sup>nd</sup> defendant driver, it was alleged that he failed to keep any proper lookout or sufficient regard for other lawful road users; driving at an excessive speed; failing to see the plaintiff in sufficient time; failing to stop in time or at all so as to avoid the accident; failing to slow down; stop, swerve and brake or manoeuvre the said vehicle under his control so as to avoid the said accident; and failing to adhere to the Highway Code.

6. The plaintiff claimed that as a result of the acts complained of above, the two motor vehicles collided and as a consequence, the plaintiff sustained serious injuries namely: blunt chest injury with likely fractured ribs; bilateral fracture femur; profuse bleeding per oral, bipartition of the tongue; extensive oral lacerations; avulsion of the anterior part of the mandible; grossly comminuted compound fracture mandible; extensive Para nasal lacerations; and extensive right facial lacerations.

7. The plaintiff also claimed special damages, being medical expenses, doctors' consultations and related expenses and motor vehicle search expenses totalling **Ksh 7,400,004.00**.

8. The defendants entered appearance and filed their joint defence dated 2<sup>nd</sup> July 2013 on the same date. They admitted the descriptive parts of the plaint but denied that the 1<sup>st</sup> defendant was the registered owner of motor vehicle registration number KBA 111E or that it was being driven by the 2<sup>nd</sup> defendant as an employee/agent of the 1<sup>st</sup> defendant as alleged by the plaintiff or at all.

9. The defendants denied the particulars of negligence attributed to them and contended that if the accident did occur in the manner described by the plaintiff in his pleadings then it was the driver of motor vehicle KAH 500Y in which the plaintiff was allegedly travelling that caused the accident. The defendants also listed the particulars of negligence attributed to the driver of motor vehicle KAH 500Y for: failing to keep to his lawful lane; driving onto the lawful lane of motor vehicle registration KBA 111 E; driving without presence of mind or under influence of substance; failing to be on the proper look out and hence causing the accident.

10. The defendants further contended that by boarding and remaining aboard the said M/v registration No. KAH 500Y, the plaintiff voluntarily assumed the risk involved and which the driver of motor vehicle registration number KAH 500Y exposed him to.

11. It was further contended that the defendants would at an opportune time seek indemnity or contribution against the said driver of motor vehicle registration number KAH 500Y at the material time and would issue a Third Party Notice upon the said driver, his estate, his master or the principal as the owner or his master or his principal as the owner of the said motor vehicle. The defendants denied all other allegations in the plaint and put the plaintiff to strict proof thereof. They contended that the doctrine of *Res ipsa loquitur* applied.

12. The plaintiff did file a reply to defence dated 5<sup>th</sup> July 2013 joining issues with the defence and reiterating his averments in the plaint, while denying each and every allegation levelled against him by the defendants.

13. By an application dated the 25<sup>th</sup> January 2014 by the defendants, the parties consented that the issue of liability between the 3<sup>rd</sup> party and defendants shall be determined during the trial.

14. The Third Party **Otieno Gladwell** filed her defence on 5<sup>th</sup> February, 2014 denying that she was the registered owner of Motor vehicle KAH 500Y as alleged in the Third Party Notice served on her. She contended that the plaintiff was not a lawful passenger in the aforesaid motor vehicle as alleged in the plaint and also denied the allegations that an accident occurred in the manner pleaded by the plaintiff. She also denied that she was vicariously liable for the occurrence of the material accident as alleged in the Third Party Notice issued by the defendants.

15. The Third party further contended that if such an accident occurred as alleged by the plaintiff, then it was an inevitable accident. Further, that if an accident did occur as alleged by the defendants then it was the 1<sup>st</sup> defendant's agent or driver then driving motor vehicle registration No. KBA 111E who was wholly responsible for the accident in that: he drove at an excessive speed in the circumstances; colliding with the Third Party's Motor vehicle; driving motor vehicle No. KBA 111E on the wrong side of the road; failing to have any proper control of the motor vehicle No. KBA 111E; Veering into the Third Party's motor vehicle; driving the said motor vehicle without due care and attention; Falling to stop, swerve or control motor vehicle KAB 111E in such a manner that would have prevented a collision with motor vehicle KAH 500Y; failing to have any sufficient regard for other road users.

16. The Third Party further attributed negligence or contributory negligence on the part of the plaintiff for: failing to take any precautions for his own safety; failing to heed to the Third Party's instructions on safety precautions when travelling; failing to wear a seat belt.

17. The Third Party denied all allegations of injuries, loss and or damage attributed to her by the plaintiff. She urged the court to dismiss the plaintiff's claim and the defendant's Third Party Notice and claim against her with costs.

## **EVIDENCE**

18. The plaintiff **TIJAN KISILU** a male adult of sound mind testified on oath and adopted his witness' statement as filed in court. He called three witnesses. In his evidence in chief, **PW1-Tijan Kisilu** testified that he was a student undertaking a diploma in Culinary Arts at the Bomas of Kenya and at the University of London, studying Politics and International Relations through distance learning. That these were not the courses he had desired as the injuries he sustained from the accident had prevented him from studying an integrated master's degree in mechanical engineering at the University of Nottingham in 2011; this would have taken one and three years respectively. After the accident the opportunity was no longer available. From the accident he sustained two fractured legs, one was a multiple fracture, fractured three ribs, shattered lower jaw, lost five teeth and suffered haemorrhage.

19. According to the plaintiff, on 15<sup>th</sup> April, 2012 at around 2.00 am he was with three of his friends from attending a birthday party of their

friend and as they were proceeding to Karen to watch one of their friends Eugenio a D J perform he was seated in the passenger seat in a vehicle KAH500Y which was being driven by Sylvano Otieno along James Gichuru Road near Gitanga Road, they were involved in an accident which left three of his friends dead.

20. The plaintiff testified that as their car was slowing down opposite Ramisi Road junction, and while Sylvano was driving at about 50km/hr to show a friend's house to Otis, one of the occupants, he saw bright headlights headed towards them on their left side of the road. That Sylvano steered the vehicle to the extreme left side of the road to avoid the oncoming car and applied breaks but the oncoming car hit them as the oncoming car was very fast. He remembers being thrown forward on impact where he hit his head. That the oncoming vehicle was bigger than theirs as they were in a Volkswagen. That he lost consciousness finding himself in Nairobi Hospital. He testified that there is an ongoing traffic case at the Chief Magistrate's Court. He produced his list of documents dated 22/5/2013 as PEX 1 and a supplementary list of documents dated 22/2/2016 filed with a further amended plaint as PEX 2.

21. On being cross examined by the defendants' advocate Mr Ochieng, the plaintiff stated that he had been a student doing a Diploma in Culinary Arts from September, 2015 but that he did not have any documentation to show that he was doing Culinary Arts. He restated that prior to the accident he had planned to do something else and had been accepted at the University of Nottingham in 2011, but admitted to having no evidence to show for the same. He admitted that he did not mention the said courses in his statement which he signed in 2013.

22. The plaintiff further responded that on the material day he arrived at the residence with a different group. That they left at 9pm as they were preparing to go to a birthday party and that they were all adults and that as expected, some would take alcohol but that none of them took alcohol. He stated that they used Waiyaki Way and that the accident was after the party.

23. The plaintiff further stated that they were heading to a different location as their friend was a Disco Joker (DJ). He stated that it was Waweru Mwaura who was showing them where he lived but that the driver did not know what was being shown. That as they headed towards Gitanga Road, the motor-vehicle was a right-hand drive and that he did not look at the house, as he was looking at his phone, and that upon impact he lost consciousness and found himself at the Nairobi Hospital where he was admitted for about three weeks.

24. The plaintiff further stated that he could not know whether his colleagues had taken alcohol at the party and that before the impact, he felt the motion of the vehicle as it swerved from its left lane side to its far left side of the road. That later he learnt that the vehicle ended up in a ditch on the left side of the road.

25. The plaintiff further stated that he could not tell the speed of the other motor-vehicle which hit them. That he looked up prior to the impact of the accident and saw the headlights. He stated that he had been searching on Facebook. He stated that he knew the people were looking at the house. He could however not remember how many vehicles passed them prior to the accident. He stated that the driver of the vehicle he was travelling in was Sylvano who was a year older than him. The plaintiff stated that although Sylvano used to drink, but that on that fateful day he had not taken any alcohol.

26. In cross examination by Mr Orare counsel for the Third Party, the plaintiff stated that he had testified in the traffic case where Mr Kigera was the accused charged with the offence of causing death by dangerous driving and reckless driving. He stated that Sylvano Otieno was their driver and that the said Sylvano was the son to Gladwel Otieno. He stated that the accident was near head on collision and that Sylvano died on impact. Further, that it only the plaintiff who was the sole survivor in the fatal accident. The plaintiff maintained that Sylvano had not taken any alcohol. Further, that Sylvano had at some time left them at the party as he dropped colleagues and returned to the party and that the accident occurred as they were returning from dropping friends. He stated that he did not know if Mr Kigera had taken alcohol. He maintained that he would be aware if their vehicle had been on the wrong lane. He also maintained that Sylvano was driving on his lane which was the left side of the road. He stated that the point of impact was just after their friend's residence on their lane which was the left lane. The plaintiff further responded that he had seen Cynthia Munyi's witness statement which stated that Lawrence the 2<sup>nd</sup> defendant was taking spirits and left the party. He denied that he himself was drunk. That he would be aware if their vehicle would have been on the wrong side of the road and insisted that they were on the left lane. He blamed Lawrence for the accident for driving on the plaintiff's side of the road at a high speed.

27. In re-examination by Mr Kimathi counsel for the plaintiff, the plaintiff stated that he enrolled for the courses after the filing of this suit. He stated that he was telling the truth and maintained that he did not see Sylvano take any alcohol at the party and that Sylvano dutifully dropped friends to their various destinations and returned to the party that night. That he saw headlights ahead prior to the accident and at the same time he was looking at the phone. That he also looked at the lights when the vehicle swerved and that those two events were simultaneous. He blamed Lawrence for the accident as he drove at a high speed and came on their side of the road. He stated that their driver had no time to change direction and further stated that if they had been on the wrong side the impact would have been on the right side of the road.

28. On being asked by the court, the plaintiff stated that they were four people in the vehicle and that he was the sole survivor.

29. **FREDERICK KISILU**, a male adult of sound mind testified on oath as PW2 and adopted his witness statement filed on the 23/5/2013. He stated that **Tijan Kisilu**, the plaintiff herein was his son and that as the father/parent, he paid all the medical bills for his son following the accident. He stated that the plaintiff was a student in Culinary Arts and an online student at the University of London. He testified that the plaintiff continues receiving treatment as he has not healed and that he had also claimed for future medical expenses.

30. According to PW2, on 15<sup>th</sup> April 2012 at about 4.15 am, he received a call from Nairobi Hospital asking him if he was the plaintiff's father and after he had confirmed, he was asked to urgently proceed there as Tijan had been involved in an accident.

31. He proceeded to Nairobi Hospital in 15 minutes and found his son lying in a hospital bed. He was asked by a nurse to fill forms to enable his son proceed to theatre. Next to his son lay another patient whom he learnt was Kapyra. He found some family members of other victims spoke to them and learnt of what had happened to the victims who were being driven by Sylvano Wilhelm Otieno. He later went to the scene of accident and saw the aftermath. His son was in ICU and HDU for 12 days and moved to the wards for two weeks and that he was still on

treatment on and off having sustained multiple body fractures, lost teeth and haemorrhage. He stated that his son who was to study for a degree in Mechanical Engineering in England was affected by the accident and so he could not due o the serious injuries sustained and that he had been paying for medical treatment while the insurance company paid some expenses.

32. On being cross-examination by Mr Ochieng counsel for the defendants, PW2 stated that he lives off Jakaya Kikwete Road with his son. He testified that it is him claiming the money. That he was not aware of documents linking him to be the father to the plaintiff. He stated that the medical bills were still on-going due to the treatment the plaintiff was receiving and that the claim stood at 7,400,004.00. PW2 testified that the last bill was for the denture in 2016 but that he had not made any payments in the two weeks preceding the hearing of the case. The witness stated that the receipts produced all add up to the amount claimed in the further amended plaint.

33. PW2 stated further that when he went to the scene of the accident the following day at 10.00 the motor vehicle had been removed. He stated that he was aware that the plaintiff used to drink but that he could not remember his son telling the Kibera Court that he had taken alcohol on the accident date. It was PW 2's testimony that he did not know what his son had told the Kibera court about the state of the driver of the accident motor-vehicle.

34. PW 2 stated that prior to the accident his son was to attend the University of Nottingham, that he had paid his fees but could not remember the exact month as it had been four years. He also stated that his son was confined in a wheel chair for three years.

35. In cross examination by Mr Orare, PW2 stated he had visited his son in hospital after the accident at 4.15 am and later visited the scene at 10.00 a.m., later on he visited Muthangari Police Station, spoken to the police man who informed him that the owner of the land cruiser was to come later. That he knew motor vehicle KAH 500Y was the motor vehicle that his son had boarded. It was his testimony that he had been to the Kibera traffic court and the accused person in that case is the owner of KBA 111E who is the 2<sup>nd</sup> defendant in this case. He stated that the doctors' fee paid by the insurance was ksh 1,896,400 while the insurance cover also paid 5,318,755.12. He stated that he is entitled to it even though it was paid by the insurance.

36. In re-examination by Mr Kimathi, PW2 stated that the plaintiff was 21 years at the time of the accident and that the plaintiff had informed PW2 of the plaintiff's whereabouts, with friends at a birthday party. That at the hospital he learnt that the other boys had passed away. That at the Police Station he saw two vehicles the Volkswagen which was severely damaged and the Land Cruiser which had a huge dent on the driver's side. He stated that the accident happened on Gitanga Road towards Lavington where he saw debris on the left side of the road. That the police together with the driver of KBA 111E were there and they showed him the scene of the accident. He stated that the accused person is Lawrence Kigera, the 2<sup>nd</sup> defendant. He testified that his son TIJAN partakes alcohol but that he was not the driver and could not have contributed to the accident. He testified that it was him and his wife who took out the insurance for the medical cover and that it had not been easy for him financially and emotionally. He stated that he could not recall the exact dates when his son was admitted to the University but was to do Integrated Engineering as he had obtained grades for Engineering which would have been a better course.

37. **NO. 58486 CORPORAL FRANCIS OKUNGU** testified as PW3 that on the 15/4/2012, he was on duty on traffic accident standby at Muthangari Police Station when he received a report of a road accident on James Gichuru Road at Gitanga Road Junction. He proceeded to the scene and found two vehicles KBA 111E Land Cruiser on the right side of the road facing the southern direction of Ngong direction while KAH 500Y Volkswagen was on the extreme left side of the road, in a ditch facing North towards Waiyaki Way.

38. He testified that it was a fatal accident with many people involved. That two of the victims were in KAH 500Y, with two passengers in the front seat and that all backseat passengers were dead.

39. PW3 then called assistance from Red Cross ambulance and other officers from lower Kabete Police Station for reinforcement and removal of the bodies drew the sketch plan and transported the two bodies to the Lee Funeral Home.

40. He further testified that at the scene of accident they inquired and found that there were two other victims of KAH 500Y who had been rushed to the Nairobi Hospital for treatment. He proceeded to the Nairobi Hospital where he found the victims of KAH 500Y in ICU, and that one, Kapya later died. At the said scene of accident and at the Nairobi Hospital he did not find the driver of the Land Cruiser. That the driver of KBA 111E Land Cruiser later on went to the Muthangari Police Station at 11.00 am accompanied by D.T.O CI Mwangangi while under arrest.

41. They later on revisited the scene with the driver of the Land cruiser vehicle together with relatives of the deceased. That the said driver confirmed that he was driving from Ngong Road towards Waiyaki Way and that the other car was being driven from Waiyaki Way towards Ngong Road. According to PW3, the Land cruiser driver informed him that after the accident, he went to Aga khan Hospital for treatment. That his boss, Chief Inspector Mwangangi accompanied the said driver to Aga khan Hospital. Later on they recorded statements from witnesses and preferred three charges of causing death by dangerous driving and one of reckless driving against the surviving driver of KBA 111E Land Cruiser, Mr David Lawrence.

42. It was PW3's testimony that he had given evidence in the traffic case which was yet to be concluded and that he is the one who drew the sketch plan of the accident scene, showing the position of the two motor vehicles after the accident. He testified that debris was on the left side of the road towards Ngong Road and that KAH 500Y was driving from Waiyaki Way towards Ngong Road. He testified that where the debris lay was the possible point of impact and that KAH 500Y was in the ditch on its left hand side of the road while the Land Cruiser was on the right hand side of the road facing Ngong direction. He stated that the accident was a brush and not a head on collision.

43. PW3 further stated that KAH 500Y was extremely damaged on the right hand side while the Land Cruiser was damaged on the right side from the wheel. He stated that photographs were taken at the scene, which shows the condition of the motor vehicles after the accident.

44. It was PW3's testimony that the police investigation file has a document written by the doctor at Aga khan addressed to Whom It May Concern dated 13/6/2012, showing that Lawrence Kigera was treated on 15/4/2012 at emergency, he was soaked in blood much of which

was from the victims which he assisted at the scene of the accident. He stated that he could see some alteration/ super imposition on the word *spirit*. That the file was in the custody of the police and that the accident was recorded in the Occurrence Book which he had extracts with him from OB No2 of 15/4/2012 at 5.00 hours which is 5.00am. He produced the Occurrence Book and Police Investigations file as PEX3 and PEX4 and the police Abstract of the material accident as PEX No.5. He stated that he blamed the driver of motor vehicle KBA 111E Land Cruiser and charged him with traffic offences because that driver left his lane and moved onto the other lane of the oncoming vehicle thereby hitting KBH 500Y.

45. In cross-examination by Mr Ochieng counsel for the defendants, PW3 stated that the letter dated 13/6/2012 is from Aga Khan Hospital and it is in the Police Investigation File, although he could not explain its details. He stated that he met the doctor who wrote the report for the 2<sup>nd</sup> defendant at Aga Khan. He could however not recall what he said in Kibera Court in his testimony, which he gave in 2014 and as he was not the Investigating Officer in the traffic case at Kibera and further that Boniface was yet to testify. He stated that a doctor was testifying in Kibera court but was yet to finish his testimony. He was not aware that the said doctor ran away and refused to return to complete his testimony.

46. PW3 testified that there is overwriting in Cynthia's handwritten statement and that in typed form the word is spirit. He could not tell whether Cynthia did self-recording of the statement as he did not meet her. He testified that IP Mwangangi was the Investigating Officer and that he assisted the said IP Mwangangi in drawing the sketch plan and preparing the post mortem reports.

47. PW3 stated that after 16<sup>th</sup> April, 2012 he did not assist Mwangangi in the investigations and neither did he see Cynthia record or sign her statement. He stated that in her statement, Cynthia stated that she reported and recorded her statement at Muthaiga Police Station.

48. PW3 stated that he met Samuel Barasa on the date of the accident, who said to have seen what had happened. That Samuel had testified in the Kibera court traffic case. PW3 stated that he learnt that the Volkswagen was upside down and that it had been overturned by the members of the public while assisting victims, while the Land Cruiser was on the right side of the road after the accident facing Ngong Road, where it had come from. He testified that he did not mention skid marks and did not avoid mentioning them for any reason. That the debris consisted of broken parts of the two vehicles after the accident and they were on the left side of the road facing Ngong Road.

49. PW3 stated that he was not told of swerving, neither of the vehicles position 10 seconds prior to the accident. He stated that the case was thoroughly investigated, but that he could not tell the possible speed of the motor-vehicles. He stated that he did not interview TIJAN KISILU. That he spoke to Samuel Barasa and other members of the public. That Lawrence was brought in the station by his D.T.O.

50. PW3 stated that the debris fell on the left side of the road and not on the lane where KBA 111E was being driven and that therefore it was only possible that the point of impact was on the lane of KAH 500Y. He stated that he could see Cynthia's statement where she says on the 16<sup>th</sup> April 2012 she reported to Muthangari police station, and that she recorded and signed her statement. He stated that the police do not force witnesses to record or sign statements and that Cynthia willingly went to record her statement.

51. PW3 testified that skid marks were indicated in the sketch plan to be on the lane of KAH 500Y, and that the skid marks indicate a possibility of KAH500Y trying to stop hitting into KBA 111E, or the driver applying breaks when the driver sees an object in front and stops before impact, but that there were no skid marks on the lane of KBA 111E. He reiterated that KBA 111E was damaged on the right front wing which means its driver encroached on the opposite lane. He stated that in the post-mortem for Sylvan Otieno, Part C is blank and that it talks of details of drug/ food taken before but that he could not remember if any tests were done on his body.

52. In cross examination by Mr Orare, PW3 testified that PC Mwanzia filled the post-mortem report. He stated that the doctor's report does not show that the deceased took alcohol. He stated that the letter from Aga Khan shows that the 2<sup>nd</sup> defendant had alcoholic breath and that Cynthia confirmed that Lawrence Kigera was taking alcohol. He maintained that Kigera was charged in Kibera Court and that CI Mwangangi was the lead Investigating Officer. Further, that the Investigations were conducted before Kigera was charged. He stated that the police are in charge of the investigations. He testified that the debris was on the left side of the road facing Ngong direction. He testified that there was some little debris on the right hand side and that it is not possible that motor-vehicle KAH 500Y encroached on right wing. He stated that Tijan Kisilu miraculously escaped death. He blamed the driver of KBA 111E for the accident.

53. In re-examination by Mr Kimathi, PW3 testified that there is no requirement in law that a statement must be self-recorded or indicated as such and that Cynthia's statement says she recorded her statement. He maintained that the accident was a brush not a head on collision. That there was no interference with the scene and the car was overturned so that the victims could be assisted. That the conclusive post-mortem report on Sylvano Otieno did not reveal any presence of alcohol in his system.

54. That in his line of work he meets many people, almost 500 on a daily basis and that it was possible to forget whether he met a male or female person at Aga Khan hospital. He stated that there was no limit in terms of the time they take to charge suspects. That in this case he was aware that investigations were on-going before the charges were preferred against Kigera. He testified that he saw blood on the left side of the road where the impact occurred.

55. The plaintiff' was recalled and by consent of all the parties and his Medical reports by Prof. Dr Wangai dated 15/6/2016 and by Prof Dr Wambugu dated 27/5/2016 were produced by consent of the parties on 9/11/2016 as the plaintiff's exhibit PEX 6 and the other as Defence Exhibit No 1 respectively.

56. At the close of the plaintiff's case, the defence called **DAVID LAWRENCE KIGERA**, the 2<sup>nd</sup> defendant who testified as DW1 and stated that he had followed all the proceedings, heard all the evidence of the police officer. He stated that the accident happened on the 14<sup>th</sup>/4/2012. He adopted his signed witness statement. It was DW1's evidence that on the material date he was attending a friend's wedding at the Jockey Club and left at 1:00 am on the 15/4/2012. That at the said wedding he was with Cynthia Munyi and left her there as he went home. That the wedding took place during the day and proceeded with the reception until 1.00am. That he was having sodas throughout and no alcoholic drinks. That as he was heading home which is in Lavington near Muthangari Police Station driving through the Nakumatt

Junction via James Gichuru Road, a few meters after Braeburn he met an oncoming car being driven on his side of the road towards Muthangari Police Station.

57. He testified that he flashed his lights several times and that when he saw that the other driver was not moving on to his (other driver's lane), DW1 swerved to the right side of the road which was clear. That to his left were trees and an oncoming car whereas on the right there was no vehicle or barrier. He stated that his swerve to the right lane was minimal. Consequently, his Land Cruiser KBA 111E Toyota and the other oncoming vehicle Volkswagen KAH 5007 crushed.

58. DW1 testified that the impact happened on his side next to the dotted line about 90 per cent on his side. He stated that he was alone in the car and that his vehicle landed on the left side of the road. That his vehicle turned and faced where he was coming from. That he saw the other motor-vehicle on the far right side of the road in the ditch laying on its side facing the direction it was going to. He came out of his car and walked to the Volkswagen car and helped remove the passengers.

59. DW1 testified that he removed one person from the wreck of the Volkswagen and that he (DW1) was taken to the hospital by Cynthia who came while he was in the process of assisting the passengers of the other motor vehicle. That DW1 was taken to Aga Khan Hospital and that he was aware of what was going on even though he could not recall what time he arrived at the Hospital.

60. That later on in the morning DW1 went to Muthangari Police Station accompanied by his brother. They found police officers in a meeting and after the meeting, they all went to the scene and in the process of him explaining what had transpired, members of the deceased family became rowdy. They then went to the Aga Khan Hospital to check on his treatment records and returned to the Kabete Police Station where after recording a statement DW1 was placed in the cells until 16/4/2012 when he was released on bond and told that he would be taken to court. He testified that he later learnt that some of the occupants of the Volkswagen had passed on, which he termed as unfortunate. He denied that he was on the wrong side of the road. He stated that the other car was in a very high speed on his side of the road and that it was the one at fault as it was overtaking. He stated that he did everything he could to avoid the accident. That he had driven vehicles from the age of nineteen years and could tell when the vehicle was being driven at high speed. He testified that the owner of the other vehicle is **Gladwel Otieno** who is the Third Party in this case. He produced the copy of records as DEX2.

61. DW1 further testified that he did not see the driver of the other vehicle overtaking and that he was assuming as he did not understand how he was on his side of the road. He stated that there was a bend on the road. He urged the court to dismiss the suit with costs.

62. In cross-examination by Mr Kimathi counsel for the plaintiff, DW1 stated that at the time of the accident, he was 24 years old although he could not recall when he had obtained his driving licence. He admitted to having had a self-involved accident in 2010 near Village Market. He stated in that in that accident, he had swerved and entered a ditch. He testified that on the material day of accident subject of this suit, he had been attending a wedding where he met Cynthia, and that him and Cynthia sat together as they knew each other. He denied that there were any alcoholic drinks being served at the wedding.

63. DW1 testified that he had not seen the statement by Cynthia as filed in court by his advocate and disagreed with her statement that he was taking *spirits*. He testified that in his statement he did not mention her and maintained that he was at the time taking *sprite* soda just like Cynthia was.

64. DW 1 further stated that at the time of the accident he was driving between 30 -80 Km/hr. when he saw a car at high speed from the opposite direction and so he swerved to the right. That the impact was 90 per cent on his side of the road towards Lavington as the swerve was minor. He testified that he did not see the sketch map plan or the photographs on the point of impact and that he would be surprised if they showed the point of impact to be on the other side of the road on the lane of the other vehicle.

65. DW1 testified that the other vehicle landed on the other side of the road where it was going while his car was on the left side facing where he was coming from. That the reason he swerved on the right was because there was no vehicle on the right lane. That the accident happened suddenly and that he had an impulse reaction to swerve to the right. That he was conscious and assisted the injured from the other car. That he assumed that the oncoming car was overtaking and that the overtaking could be the only reason why the other car could have come to his side of the road. He testified that on his left there were trees and a ditch and it was safe for him to swerve to the right where there was space. He blamed the driver of the Volkswagen but stated that he had not filed any suit against the owner of the other motor vehicle.

66. DW1 further testified that Dr Mativo noted alcoholic smell but that DW1 did not see that medical report and that he had only heard of it and that the said Doctor did not attend to the DW1. He stated that his car was bigger and higher and spun upon impact turning to where he was coming from. He was emphatic that the plaintiff was not entitled to compensation from him but from the plaintiff's friend who drove the other car.

67. In cross-examination by Mr Orare counsel for the plaintiff, DW1 testified that he had known Cynthia Munyi for many years and she together with her friend had taken him to hospital. He stated that the right side of his car got damaged and that he could not recall where the debris was after the accident. That from the photographs of the vehicle the front part is what was damaged. He testified that he did not know PC Ritho, although he had seen his statement. He denied that the collision might have occurred on his opposite lane. He admitted that in his witness statement he did not say that he swerved. He stated that in his statement he recorded that the accident was a head on collision. He stated that he assisted to remove one occupant from the vehicle but could not remember where that occupant sat and that that's when Cynthia came and on seeing blood on him she decided to take him to hospital as she thought he was injured. He testified that he was locked up at Kabete Police Station and released the following day on 16/4/2012. That he was treated at Aga Khan Hospital and was not told that he had alcohol breath.

68. DW1 testified that he had not sued the police for unlawful detention but had sued the hospital as they brought a male doctor yet he had been attended to by a female one, because they released his personal records to a third party advocate without his authority and the case is still going on and was not aware if judgement had been delivered. He also stated that the case in Kibera is still on-going in which he is the only accused person.

69. In re-examination by Mr Ochieng DW1 testified that he was never admitted in Aga Khan Hospital. That what the report contained is not what the one who treated him told him. That his vehicle was damaged and that he reported it to the insurance Company. He could however not remember the position of the passenger he tried to assist was in, and that as the vehicle was on its side, he did not see anything else inside the vehicle. He testified that he swerved minimally to the right and that is where he collided with the oncoming saloon car. That he did not know why each vehicle ended up where they did after the impact and that his vehicle had more damage on the front right side. That when he went back to the scene he did not find the car there and there was glass all over the road. That he met Cynthia, his friend at the wedding and at scene of the accident.

70. The defendants called **JANET WANJIRU** who testified on oath as DW2. She was an in-house lawyer. She testified that on the 14/4/2012 she was with some friends at ABC Place. They left between 1.00am and 2a.m headed towards Ngong Road on James Gichuru Road in a Subaru Forester. That enroute, a blue Golf vehicle in high speed overtook them and stayed on the overtaking lane. She stated that the road was clear and that the overtaking vehicle met with an oncoming vehicle which she saw spinning on its lane. They stopped and rushed to the oncoming vehicle only to find a male occupant who was confused trying to find his way out. It was then that she saw a blue vehicle lying on its roof in a ditch. She walked to the scene. Other vehicles came and she went to sit in the car as she was so traumatised. She later on recorded a statement at Muthangari Police Station and on the 19/4/2012 she recorded a statement with Detect Insurance who had contacted her to tell them what had happened. She stated that the handwritten statement was hers and that it tallied with the typed statement. It was her evidence that there was an error on the typed version and that the Volkswagen was moving at a very fast speed. It was her testimony that their driver looked at the side mirror thinking that they were being chased by somebody else.

71. On being cross examined by Mr Kimathi DW2 stated that they were coming from ABC Place between 1-2am. That they were overtaken between turning to Strathmore and Lavington Petrol Station. She testified that the Golf car was driving very fast and had several occupants. That she could see them although she didn't count them. That they later found the Golf car had been involved in an accident 4-5 minutes after overtaking them and using the wrong lane all through. That she saw the impact which was very quick and they arrived after the accident had just happened. She testified that they were not speeding and that the road was level and therefore she saw the impact and spinning of the car from ahead. That the impact happened very quickly and she could not give specifics of where exactly it happened. She admitted that it's possible the impact was on the left side of the road in the lane of the speeding car.

72. In cross examination by Mr Orare DW2 stated that when the accident happened the four-wheel drive vehicle had the right front side of it damaged inclusive of the bonnet. That the blue car was lying upside down. She testified that she was at the ABC Place and took water. She recorded her statement at Muthangari Police Station and did not know on whose behalf the Insurance Company recorded her statement. She stated that Charles Kigwe was her friend and that she was not aware whether he recorded his statement concerning the accident.

73. In Re-examination by Mr Ochieng', DW2 stated that it took them 4-5 minutes to see the car which overtook them when the accident happened and they saw the spinning Land Cruiser.

74. The defendants further called **STEPHEN NDIMU KARIUKI** the then member of Parliament for Mathare Constituency testified as DW3 and stated that on the material night, he was coming from a function at Ngong Race Course headed towards Kileleshwa when he came across the accident several meters after Gitanga Road on James Gichuru Road. He stated that many cars had packed with hazard lights on and it was early in the morning but he could not remember the exact time. He also went to assist the injured. He took the injured to Nairobi Hospital. The nurses present recorded the particulars from him. He testified that his vehicle had to be cleared by the Hospital and he made all efforts to contact family members of the victims. He saw the items from the victim's pockets being recorded. That the Hospital refused to treat one victim whose family they could not trace and he paid ksh 17000 for him. That one victim was an International student from USIU. He tried to call the University to get the insurance particulars of the injured student but he was unsuccessful. That he also paid some money for the said student and left them being attended to.

75. In cross examination by Mr Kimathi, DW3 testified that the accident was before day break but that he could not remember the time and that it occurred on James Gichuru Road. He stated that he did not know which vehicles were involved in the accident as he only assisted victims by taking them to hospital. He stated that the hospital staff searched the injured and items from them recorded. He denied seeing any list of the items as recorded and stated that he could not tell the difference between bhang and cigarettes. He could also not tell whether it was smoked bhang or not. He stated that he had recorded a statement but could not remember which year it was, and that he had never recorded a statement with the police as they never called him. That the detective told him he was investigating an accident and could not tell whether he was a private detective.

76. In cross examination by Mr Orare, DW3 stated that he felt obliged to assist the injured victims, although he could not remember the colour of the car or how passengers were seated in it. He stated that he was present when the items were being documented from the victims but could not tell whether one of them was a driver. Further, that he could see the names of **TIJAN KISILU** and **OTIS KATIER** who were injured.

77. The defendants further called **CYNTHIA MUMBI NGUGI** who testified as DW4 that on the 14/4/2012 she was at the Jockey Club attending a wedding with family and friends and stayed on late into the night. That she knew Lawrence Kigera DW1 and that the two of them sat next to each other at the wedding in question and that they left past 11.00 pm. That she left through Ngong road as she was dropping a friend upon which she saw familiar people and two cars which had been involved in an accident. That one of the cars belonged to Lawrence and the other, a smaller car whose registration number she could not remember.

78. That she saw Lawrence at the scene and took him to hospital where he was treated and later discharged. That Lawrence had no external injuries and did not smell alcohol. That she did not see a document indicating that Lawrence was intoxicated.

79. In cross examination by Mr Kimathi, DW4 stated that at the wedding reception, no alcohol was being served but that at the evening party, alcohol was being sold and people were drinking. She however could not tell the exact time that Lawrence left and that neither could she tell the time that she arrived at the scene nor at the hospital.

80. DW4 further testified that Lawrence's car was on the road touching the centre line facing Waiyaki way and that debris was spread all over the road. She stated that she was with Lawrence throughout and that no blood sample was taken from him at the Hospital. That he had blood on his shirt and some injury on his abdomen. She testified that she recorded her statement at Muthangari Police Station. She could not remember recorded her statement for Detect Insurance Investigators on the 24/4/2012 at Upper Hill Centre at Java House. She could not recall if Stephen Kariuki was there when she recorded her statement. She stated that her typed statement with the Police says *spirit* not *sprite* and she denied that she altered her statement. She stated that she said *sprite* not *spirit*.

81. In cross examination by Mr Orare, DW4 stated that she could not remember the name of the physician who attended to Lawrence, but that it was a lady. She stated that she was not privy to the medical report on Lawrence. That alcohol was being served at the evening party; and that Lawrence left before her but that she could not tell whether Lawrence took alcohol.

82. **GLADWEL SUSANNE WATHONI OTIENO**, the Third Party testified as DW5 and stated that she received a call at 2.50 pm from a woman informing her that an accident had occurred which involved her son Sylvano Mandla Wilhelm Otiemo on James Gichuru Road. She stated that her son had informed her that he was attending a party of his long-time friend in Lavington. She testified that she was later told he had passed on at the accident scene. She stated that the post-mortem carried out at Lee Funeral Home in her presence noted that there was nothing noted in the food intake. That she asked the pathologist whether alcohol was noted on her son but he denied. That as a family they had suffered loss and damage. That the deceased's younger brother had suffered depression whereas his father was diagnosed with cancer due to stress. She stated that Sylvano was a vibrant intelligent young man.

83. In cross- examination DW5 by Mr Kimathi counsel for the plaintiff, DW5 stated that her son had authority to drive the vehicle.

84. On being cross examined by Mr Ochieng counsel for the defendants, DW5 stated that she was present when the post-mortem was being done and that she inquired from the pathologist whether his son's body had any smell of alcohol as she wanted to be sure of what had happened. That the traffic case is still on going and that she was told of what had happened.

85. In re -examination by Mr Orare, DW5 stated that had her son taken alcohol he would never have been allowed to drive the vehicle.

## SUBMISSIONS

86. The parties' respective advocates filed written submissions which echo their clients' respective testimonies and those of their witnesses and together with all the case law cited which I take cognizance.

87. According to the plaintiff through his counsel's submissions, the defendants were liable in negligence and therefore they should be held 100% liable for the accident.

88. It was submitted that occurrence of the accident and ownership of the accident motor vehicles as pleaded was not denied by the defendants and that evidence by PW3 Corporal Okungu was clear that the defendant's vehicle swerved to the side of the third party's vehicle's lane thereby causing the accident in which lives were lost and the plaintiff lone survivor sustained serious injuries.

89. It was further submitted that in any case, DW1 admitted swerving to the right side of the road and that he was found to have taken alcohol when taken to Agha Khan Hospital and corroborated by Cynthia Munyi that DW1 partook of alcohol at the ceremony. The plaintiff submitted that as the statements by witnesses of the defendants were recorded by an insurance company's investigator, they cannot be reliable. It was submitted that Cynthia Munyi's statement was contradictory as she stated that the 2<sup>nd</sup> defendant's vehicle was facing Waiyaki way contrary to all witness evidence that it was facing where it had come from after spinning on impact hence the court should disregard her evidence.

90. On quantum, it was submitted that medical reports were produced by consent and that the specials were proved hence they should be awarded as pleaded. Relying on several case law, the plaintiff urged the court to award him **Ksh 25,000,000** general damages and special damages as pleaded and as per the amended plaint all totalling **ksh 35, 327,000**.

91. In the submissions filed by the defendants' counsel, it was submitted that the plaintiff had not proved that the defendants were liable for the material accident. Further, that the 2<sup>nd</sup> defendant was driving at the speed of 60km/hr and was in full control of his vehicle when, according to DW2 Janet Wanjiru, the deceased Sylvano Otiemo overtook them at a very high speed and remained on the overtaking lane and that after a short while, crushed into the oncoming vehicle. It was submitted that the evidence by Janet corroborated that of DW1 on how the other vehicle was being driven on the wrong side of the road. The defendants urged the court to disregard the submissions by the plaintiff's counsel that the 2<sup>nd</sup> defendant was callous in his testimony for stating that he would have taken the same evasive action given similar circumstances. It was further submitted that Cynthia Munyi disowned the statement allegedly written by her to the effect that the 2<sup>nd</sup> defendant was drinking spirit as opposed to *sprite*.

92. It was further submitted that **DW4 Stephen Kariuki** saw bhanga among the items taken from the deceased victims in Hospital and that this corroborates the evidence by Janet that the vehicle was driven at very high speed and on the wrong side of the road because the occupants must have been high on the Psychotropic substances.

93. On liability, the defendants maintained that the evidence on record showed that the defendants were innocent and that despite the criminal charges facing the DW1, he was deemed innocent until proven guilty in the criminal/traffic matter. Reliance was placed on **Robinson v Oluoch [1971] EA 376** where it was held inter alia that a person convicted of careless driving may allege that another person was also guilty of negligence on account which caused or contributed to the accident.

94. It was therefore submitted that even if the 2<sup>nd</sup> defendant herein was to be found guilty in the traffic proceedings, the law still allows him

to state and seek to prove that the 3<sup>rd</sup> party's driver was responsible for causation of the road accident or at least substantially contributed to its causation. The defendants relied on this court's decisions in **Kenyatta University v Isaac Karumba Nyuthe [2014]eKLR** where the court stated that determination of liability in road traffic accident cases is not a scientific affair as acknowledged by Lord Reid in **STAPLEY V Gypsum Mines Ltd(2) 1953 A.C 663 Pg. 681** and as cited by the Court of Appeal in **Michael Hubert Koss and another v David Seroney and 5 others[2009] ECLR** where it was stated, inter alia, that in a court of law, the question of liability must be decided as a properly instructed and reasonable jury would decide it.

95. Further reliance was placed on **Karanja v Malele [1983] 142 and Berkely Steward Ltd and another v Lewis Kimani Waiyaki [1982-88]1KAR 101-108** where it was held that where there is no crucial evidence on who was to blame between the two parties, both should be held equally to blame.

96. In this case, it was submitted that the evidence pointed to the 3<sup>rd</sup> party driver as the one who was at fault hence the third [arty should bear all the liability.

97. It was therefore submitted that the plaintiff had not proved negligence on the part of the defendants and therefore his suit should be dismissed and or that the court do find that it was the third party driver who was to blame or substantially to blame for the accident in question.

98. On quantum of damages, the defendants urged the court to award only that which was, in the case of special damages, specifically pleaded and strictly proven. It was submitted that as the plaintiff did not personally pay the incurred medical expenses, and as the insurance company is the one that settled special damages, then the plaintiff should be awarded nothing.

99. On general damages, the court was urged to examine the medical reports by Doctors Wambugu and Kiama WANGAI and based on the cases of **John Kibicho Thirima v Emanuel Parsimei Mkoitiko [2017] eKLR AND Rebecca Mumbua Musembi v Lucy K. KINYUA [2014] eKLR** and award **Ksh 2,000,000** as general damages for pains suffering and loss of amenities and that any interest awarded should be at court rates.

100. On the part of the 3<sup>rd</sup> Party, the defendants were to blame for the accident because the evidence by the Police Officer who was also the investigation officer who also produced the police investigations file and the sketch plan of the scene of accident was clear that the point of impact of the accident was on the left side of the road where debris was also concentrated. Further, that PW3 also blamed the driver of the Land Cruiser for the accident for leaving his side of the road and swerving onto the right lane into the oncoming vehicle. It was also submitted that the statement of Cynthia was clear that DW1 partook of alcohol (spirits) and that the medical report from Agha Khan Hospital confirms the position. It was submitted urging this court to find that the plaintiff's evidence on how the accident took place was not rebutted by the defendants and their witnesses hence the court was urged to find the defendants jointly and severally liable for the accident at 100%. It was further submitted that the defendants had failed to prove any contributory negligence on the part of the 3<sup>rd</sup> party hence the court should dismiss the defendant's claim against the 3<sup>rd</sup> party.

101. On quantum of damages, the 3<sup>rd</sup> party submitted that the medical reports produced in evidence showed that the plaintiff sustained serious injuries that can be classified as grievous harm but that he had made tremendous healing hence a sum of **Ksh 3,000,000** general damages in compensation would suffice. Reliance was placed on **NRB HCC 75 OF 2012 DUNCAN KIMATHI KARAGANIA V NHGUGI DAVID AND 3 OTHERS [2016] eKLR** and **NRB HCC 728 OF 2007 REGINA MWIKALI WILSON V STEPHEN M. GICHUHI AND ANOTHER [2015] eKLR** where the plaintiffs sustained more serious injuries and were awarded 4,000,000 and 2,500,000 respectively for pain suffering and loss of amenities.

102. On special damages, it was submitted that the same must be specifically pleaded and strictly proven. In this case, it was submitted in contention that albeit the plaintiff had sought Ksh 74000004, only Ksh 2,081,248/78 had been proven as monies personally paid towards treatment of the plaintiff and that as the insurance paid Ksh 5,318, 755/22 the plaintiff is not entitled to the latter sum.

## **DETERMINATION**

103. I have considered the pleadings, evidence both oral and documentary, and case law cited by the parties' advocates in their respective clients' written submissions. In my humble view, the issues for determination are:

- a. *Who are the respective owners of motor vehicle registration Nos KBA 111E; and KAH500Y?*
- b. *Who between the defendants and the Third Party are to blame for the material accident; and whether the plaintiff in any way contributed to the material accident;*
- c. *Whether the plaintiff suffered injuries and damages;*
- d. *What orders should the court make; and*
- e. *Who should bear the costs of this suit?*

104. On the 1<sup>st</sup> issue of ownership of the accident motor vehicles registration Nos. KBA 111E; and KAH500Y, this court observes that in their joint defence, the defendants had categorically denied owning the subject accident motor-vehicle KBA 111E. Similarly, the Third Party denied owning Motor vehicle KAH 500Y. During the hearing, however, no evidence was led to controvert the plaintiff's testimony and documentary evidence adduced by way of police records and copy of records that clearly showed that the 1<sup>st</sup> defendant and the Third Party

were the registered owners of the respective motor vehicles as pleaded by the plaintiff. Further, there was overwhelming evidence adduced not only by the plaintiff and his witnesses but also as adduced by the 2<sup>nd</sup> defendant and the Third Party that the accident motor vehicles as described in the plaint were owned by the 1<sup>st</sup> defendant and the Third party and that they were at the material time of the accident being driven by the 2<sup>nd</sup> defendant in the case of KBA 111E and in the case of KAH500Y it was being driven by the deceased Sylvano Otieno.

105. The 2<sup>nd</sup> defendant, DW1 produced a copy of records dated 17/8/2012 which showed that the vehicle registration No. KBA 111E was registered in the 1<sup>st</sup> defendant's name. The police abstract produced in court also corroborated evidence that the motor vehicle No. KBA 111E is owned by the 1<sup>st</sup> defendant, Bonfide Clearing and Forwarding, whereas KAH 500Y was owned by Otieno Gladwel.

106. In the defence it had also been denied that the 2<sup>nd</sup> defendant was driving the vehicle registration No. KBA 111E. However, in his testimony on oath he conceded that he was the driver of the Land cruiser motor vehicle No. KBA 111E at the time of the accident which was involved in an accident with the vehicle in which the plaintiff was a passenger, KAH500Y. DW5 the Third Party Gladwel Otieno also testified that her deceased son Sylvano Otieno was the driver of KAH500Y

107. All the evidence adduced point to the fact that the 2<sup>nd</sup> defendant was the one in-charge of the vehicle KBA 111E at the material time of the accident. He did not attempt to lead evidence to the contrary. The investigating officer PW3 even took DW1 to the scene of accident, and the testimony of his friend Cynthia Munyi was clear that she found DW1 at the scene of the accident and took him to Aga Khan Hospital. DW1 also testified of how the accident happened according to him. It is therefore common cause that indeed the second defendant was the one driving the motor vehicle KBA 111E. He did not dispute the evidence that he was its driver. Accordingly, this court finds and holds that the motor vehicle KBA 111E was owned by the 1<sup>st</sup> defendant and driven on its behalf by the 2<sup>nd</sup> defendant.

108. On the second issue of who was to blame for the material accident as between the 3<sup>rd</sup> party and the defendants wherein the plaintiff claims he was seriously injured, and whether there was contributory negligence on the part of the plaintiff, **PW1 TIJAN KISILU** gave his account of how the accident occurred. That he was a passenger in motor vehicle registration **No. KAH 500Y** being driven by the late Sylvano Otieno. They were coming from a birthday party, and that they had not taken any alcohol. They were on their left side lane of the road when he saw a Land cruiser coming from the opposite direction with its headlights moving on to their lane. The next thing he remembers was waking up in Nairobi Hospital. In cross examination, the plaintiff was definite that they were on the left lane and that the Land cruiser was the one on the wrong as it was on their lane.

109. **PW3** the Police Corporal investigating officer who received the accident report and rushed to the scene of accident also gave an account of the accident and the investigations that the police, including himself having visited the scene of accident and drawing the sketch maps of the accident scene, conducted. He personally drew the sketch map showing the position of the two vehicles after the accident. He testified that the vehicle in which the plaintiff was a passenger was found in a ditch on its left side of the road. He stated that the accident was a brush and not a head on collision. He stated that the right side of the Volkswagen was greatly damaged as was the Land-cruiser's. That debris of the accident was concentrated on the left side of the road, on the lane of the Volkswagen. He further testified that there were skid marks from the side of the Volkswagen golf indicative that it had attempted to break or stop. He did not find any skid marks on the path of the defendants' vehicle. He as a result preferred charges against the 2<sup>nd</sup> defendant for causing death by dangerous driving and reckless driving. His evidence was unshaken in cross examination.

110. **DW1** on the other hand gave evidence that the Volkswagen had encroached on his side-the right side of the road and that its driver was therefore to blame for the accident. That he was from a wedding party and had not taken alcohol. That his vehicle was on the right lane and the accident happened 90 per cent on his side of the road.

111. Janet Wanjiru in her testimony averred that the Volkswagen overtook the vehicle she was travelling in at high speed and kept on the overtaking lane until it crushed into an oncoming vehicle and that they reached the scene of accident about four minutes later.

112. From the evidence adduced, I find and hold that there is sufficient evidence that the 2<sup>nd</sup> defendant swerved into the right lane and side of the road into an oncoming vehicle and as a result had a brush with the oncoming vehicle which was on its left lane and side of the road facing the opposite direction.

113. This court does not believe the testimony by Janet Wanjiru that the Volkswagen rammed into the oncoming vehicle from the overtaking lane. This is because the sketch map shows that the point of impact was in the Volkswagen's lane and not on the lane of the Land cruiser as stated by the 2<sup>nd</sup> defendant, while contradicting himself that the accident occurred 90% into his lane. Furthermore, Janet could not even tell the point of impact of the material accident. The sketch map is clear that the point of impact was on the side of the Volkswagen. The 2<sup>nd</sup> defendant too conceded in his testimony that he swerved to the right side of the road as there were trees on the right side and therefore there is no way an accident could have happened 90% into his lane, which was the right side of the road.

114. **PW3** CPL Francis Okungu also testified that on his arrival at the scene of the accident, it had not been tampered with. He carried out investigations, drew a sketch plan and recorded witnesses' statements including the statement of Samuel Barasa who had already given evidence before the traffic case in Kibera and who witnessed the accident as it happened, and came to the conclusion that the 2<sup>nd</sup> defendant was the one to blame for the accident because he was to be found at the material time driving on the lane of the oncoming motor vehicle. He testified that the debris of the accident was concentrated on the left side of the road which was the lane of the motor vehicle that the deceased Sylvano Otieno had been driving. He also stated that there were skid marks by the deceased driver of KAH 500Y indicating that there was an attempt to either stop or to prevent the accident from happening. The skid marks were on the left side of the road, where the deceased Sylvano was driving from, which is further proof that the Volkswagen vehicle was indeed on the left side of the road when it was hit by the 2<sup>nd</sup> defendant driving the Land Cruiser. The skid marks did not touch or emerge from or on the right side/lane of the 2<sup>nd</sup> defendant. They were visible on the left side of the road. The evidence of the debris being concentrated on the left side of the road was backed by **PW2** who though did not witness the accident; saw the debris when they went to the scene together with the police.

115. The second defendant and the Third Party mother to the deceased Sylvano Otieno also testified that the debris was heavily concentrated on the left side of the road. This is corroborated by the exhibits produced in court being the investigations file which contains photographs of the motor vehicles showing damage and the scene of the accident, and the sketch map of the accident scene. Furthermore, there was non-controverted evidence that the vehicles were damaged on their right sides indicating it was a brush, though the Volkswagen was significantly damaged on impact.

116. The fact that there were no skid marks on the side of the Land cruiser demonstrates that there was no attempt on the part of the second defendant to avoid or prevent the accident from occurring, and a further indication that the vehicle was in high speed taking into account the impact and damage exhibited on the Volkswagen.

117. There is also evidence by the 2<sup>nd</sup> defendant that his vehicle on impact **spinned and turned to where it was coming from**, an inference of high speed and this further waters down the evidence of DW1, that the accident happened ninety per cent in his lane, or that he was driving at slow speed of about 60km/hr. at the material time of the accident.

118. DW3 Janet Wanjiru's evidence that the 2<sup>nd</sup> defendant's vehicle managed to stop right on the dividing lane is not credible evidence as the evidence is not backed by what this court gathered from the photographs and sketch maps of the accident scene and the evidence of PW3 who was the investigating officer of the accident and who established that the 2<sup>nd</sup> defendant failed to keep to his lane thereby driving into the lane of the oncoming vehicle. DW3 could neither tell what time DW1 came from the party, nor what time she arrived at the scene nor at Aga Khan Hospital. Her evidence was in my view, not credible. Her testimony was that the Volkswagen overtook them at high speed and four minutes later the accident happened. Whereas this is possible, she was unable to tell that four minutes for an automobile creates sufficient distance that it cannot be said that one is able to witness the occurrence of an accident. And if she witnessed the accident take place on the right side of the road and lane of the Land cruiser, how come all other evidence points to the accident taking place on the left lane.

119. Whereas DW1 testified that he had not consumed alcohol, the police file produced by PW3 contains a medical report from the Aga Khan Hospital indicating that the 2<sup>nd</sup> defendant's breath was reeking of alcohol. In addition, the 2<sup>nd</sup> defendant testified that he had sued the hospital for bringing the wrong doctor in the traffic case. The court had the opportunity of reading the file which shows that the 2<sup>nd</sup> defendant's main contention against the Aga Khan hospital was for releasing the 2<sup>nd</sup> defendant's medical report which he considered confidential as opposed to bringing the wrong doctor.

120. DW3 Cynthia Munyi also testified that she was with the 2<sup>nd</sup> defendant at the wedding and that the 2<sup>nd</sup> defendant had not taken alcohol. However, her written witness statement with the police was clear that she took spirit and that Lawrence was taking spirit and their other friends were taking their "choices" and in cross examination she could not tell what time Lawrence left the party and whether or not he took alcohol. In addition, Cynthia's statement with the police and that with the Insurance Company's Investigators Detect, were contradictory. She told the Detect insurance investigators that no alcohol was being served at the party and that Lawrence was taking sprite soda whereas her statement with the police was clear that Lawrence took spirit. Cynthia never complained that her statement with the police investigators was doctored against Lawrence. She first recorded her statement with the police on 16<sup>th</sup> April 2012 when the events were very fresh in her mind and on 24<sup>th</sup> April 2012 she recorded her statement with the Detect Insurance Investigators on behalf of the defendants. She did not seek to record a further statement with the police to correct her first statement that she saw Lawrence taking spirit. Instead, the court observed that there was an attempt to overwrite on her hand written statement the word **sprite** instead of **spirit**. Albeit the defendant's counsel submitted that he opposed the production of the medical report document from Aga Khan Hospital, the record shows that the police investigations file was produced in its entirety without any objection from the defendants. The original file was later released to the Investigating Officer for use in the traffic case at Kibera Chief Magistrates Court. The defendant had an opportunity to cross examine the plaintiff's witness, PW3 on the documents which formed the basis of investigations into the accident and the traffic charges before Kibera Court.

121. On the part of deceased Sylvano Otieno (on whose behalf his mother the Third Party was sued), the autopsy report according to the evidence of PW3 and the deceased's mother DW5 showed that the deceased at the material time of the accident had not taken any alcohol. The Third Party was candid that albeit her son used to take alcohol, he would not be allowed to drive under the influence of alcohol and the autopsy report corroborated that fact. The defence was not able to shake that evidence in cross-examination.

122. In the end, I find and hold that the plaintiff has on a balance of probabilities established that the accident was wholly caused by the negligence of the 2<sup>nd</sup> defendant who drove into the lane of the deceased Sylvano Otieno and crushed into the Volkswagen as a result of which a fatal accident took place killing three occupants and injuring the plaintiff lone survivor.

123. On whether the plaintiff contributed to the material accident and in which way, the defendants and Third Party were not able to show how the plaintiff could have contributed to the accident; the plaintiff was only a passenger in the subject accident motor-vehicle. Allowing oneself to be driven in a motor vehicle which is hit by another in the course of the journey in no way places liability on the passenger by dint of merely being present in the accident motor vehicle. The defendant and Third Party in their testimonies did not attempt to prove the allegations they levelled against the plaintiff that he contributed to the accident. Pleadings cannot substitute evidence. Pleadings which are not supported by evidence remain just allegations which are unproven.

124. Although the defendant's in their counsel's submissions maintained that the evidence pointed to contributory negligence between the defendants and the Third Party, and that as a result, albeit the 2<sup>nd</sup> defendant was charged with traffic offences, he was entitled to claim contribution from the third party, this court had the opportunity of hearing and seeing witnesses as they testified and was persuaded that in this case, there is no doubt as to who was responsible for the accident. The evidence as a whole pointed to the 2<sup>nd</sup> defendant's fault in that he drove into the opposite lane and met the oncoming vehicle. This court is not in doubt as to who encroached on the other's lane, between Lawrence and the deceased Sylvano Otieno. This court is also persuaded that Lawrence was intoxicated at the time of the accident and that therefore his decision and judgment of driving onto the opposite lane was not prudent or sound. There is no credible evidence pointing to the intoxication of Sylvano Otieno as the post-mortem report ruled out any alcohol or drug in his system. It therefore follows that the cases relied on by the defendants on contributory negligence though relevant are not applicable to the circumstances of this case.

125. Accordingly, I find and hold that the defendants were not able to show how the Third Party vehicles driver could have contributed to the accident because the evidence points to the fact that the Land cruiser is the one that encroached on the left lane of the road thereby invading on the Volkswagen's lane.

126. Albeit the defendants submitted urging the court to find that the third party driver must have been smoking bhang because bhang was found in the pocket of one of the occupants of the Volkswagen, as recorded by Stephen Kariuki, there was absolutely no evidence tending to prove that allegation or that the driver of the Volkswagen could have smoked or been smoking bhang at the material time of the accident. Stephen Kariuki in his testimony in court denied that he could tell that the items collected from the victims of the accident which he assisted included bhang.

127. Having found that there is more than sufficient evidence that the 1<sup>st</sup> defendant was the owner of the vehicle KBA 111E and that the 2<sup>nd</sup> defendant was its driver, I further find and hold that on a balance of probabilities, the plaintiff has proved that the 2<sup>nd</sup> defendant was negligent in the manner he drove the motor vehicle KBA 111E as set out in the pleaded particulars of negligence by the plaintiff. The 1<sup>st</sup> defendant is therefore vicariously liable for the accident as there was no evidence to show that the 2<sup>nd</sup> defendant had no authority to drive the vehicle belonging to the 1<sup>st</sup> defendant. I find the two defendants jointly and severally liable at 100%. I am fortified on this point by the decision of the Court of Appeal in the cases of **Pritoo v West Nile District Administration (1968) EA 428 at page 435 paragraph E-F and Karisa V. Solanki (1969) EA 318 page 322 paragraph 9 G** where it was held:

*“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard V sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lend to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”*

128. I further find that on the evidence adduced as a whole, neither the Third Party nor the plaintiff have been proven to have contributed to the occurrence of the material accident.

129. On the third issue of whether the plaintiff suffered injuries and damages, the plaintiff pleaded the injuries he suffered and testified that because of the accident he was unable to undertake the course of his desire pursuant to the injuries he had sustained. In particular, that he had sustained injuries as particularised in the plaint and medical reports produced by consent as **blunt chest injury with likely fractured ribs, bilateral fracture femur, profuse bleeding per oral, bipartition of the tongue, extensive oral lacerations, avulsion of the anterior part of the mandible grossly comminuted compound fracture mandible, extensive paranasal lacerations and extensive right facial laceration.**

130. The medical reports by Dr Wambugu, Dr Wangai and Dr Kahugu were all produced by consent. The plaintiff in his submission made reference to the injuries sustained as pleaded in the plaint and relied on the cases of **Duncan Kimathi Karagania V Ngugi David And 3 Others 2016 eKLR, Peris Onduso Omondi V Tectura International Ltd And Another 2012 eKLR, Regina Mwikali Wilson verses Stephen M. Gichuhi and another 2015 eKLR, and Gabriel Mwashuma v Mohammed Sajjad and another 2015 eKLR.**

131. The court had an opportunity to see the plaintiff in court. His body mandibles were badly injured. He could not walk or speak well. He had scars all over his face. He could not sit straight. He sat lying on his side on the court bench.

132. The plaintiff sought to be awarded damages for pain and suffering and loss of amenities ksh 25,000,000 and special damages which included i) medical receipts 7,400,004.00 doctors reports 30,000 and future medical expenses (physiotherapy, dental reconstruction (amounts derived from Dr Kahugu and at the implant and laser dental centres recommendations of ksh 2,000,000. The total sum is 35,327,000.00. 90. The plaintiff relied on the case on **Cecilia Mwangi and another V Ruth Mwangi CA 251/1996** on the principles applicable in assessing damages for personal injuries. It was submitted that the plaintiff sustained severe injuries which greatly affected his future and the quality of his life.

133. The 1<sup>st</sup> and 2<sup>nd</sup> defendants urged the court to award what had been specifically pleaded and proved excluding the amount paid by the insurance company, taking into account that the plaintiff is not the one who incurred the expenses. They stated that the net effect is that the claim for special damages had not been prove.

134. On general damages the defendants submitted that should the court find any degree of liability on them then the quantum of general damages for pain and suffering and loss of amenities should be assessed at Ksh 2,000,000 Kenya shillings. They relied on the authorities of **John Kibicho Thirima V Emanuel Parsmei Mkoitiko 2017 eKLR and Rebecca mumbua Musembi V Lucy Kinyua 2014 eKLR** where this court made awards in the range of 3 million where according to the defendants; the plaintiffs sustained more serious injuries.

135. On the part of the Third Party, she relied on the medical reports as produced by consent and submitted that the medical reports showed that the plaintiff sustained serious injuries that can be classified as grievous harm but that he had made tremendous healing and submitted that an award of Ksh 3,000,000 would be good compensation, factoring in the issue of inflation and the age of authorities relied on. She relied on **HCCC No 75 of 2012 Duncan Kimathi Karagina vs Ngugi David and 3 others 2016 eKLR** where the plaintiff sustained more serious injuries and was awarded ksh 4,000,000 for general damages pain and suffering and loss of amenities. She also relied on the case of **Regina Mwikali Wilson Vs Stephen M Gichuhi and Another 2015 eKLR** where the plaintiff sustained more serious injuries and were awarded 2,500,000 for general damages for pain and suffering.

136. On **special damages**, the Third Party submitted that they should be specifically pleaded and proved. That the plaintiff has proven special damages of Ksh 2,081,248/78 as the monies he personally paid towards treatment of the plaintiff in his witness statement. That he further acknowledged that the insurance paid a total of ksh 5,318,755/22 which he is not entitled to.

137. The Court of Appeal in the case of **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** observed as follows:

***“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”***

138. It is trite law that special damages must be specifically pleaded and proved. Parties are therefore bound by their own pleadings and non would be awarded for failure to plead.

139. Even though the medical reports were produced by consent and both were in agreement that future medical expenses would be required, there was no specific pleading for the future medical expenses and therefore the same is disallowed. The plaintiff did not seek leave of court to amend his plaint to include the actual amounts that the two doctors stated in their respective medical reports, would be necessary future medical expenses. Future medical expenses are in the nature of special damages and the same must be pleaded and proved. **In Kenya Bus Service Limited v Gituma [2004] EA 91**, the Court of Appeal stated:

***“and as regards future medication [physiotherapy], the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded if evidence thereof is to be lead and the court is to make an award in respect thereof. That follows from the general principle that all loses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded.”***

140. Similarly in **Mbaka Nguru and another v James George Rakwar CA 133 of 1998** it was held that claims for future medical expenses must be pleaded and proved as a special damage claim. See also **Simon Taveta v Mercy Mutitu Njeru [2014]eKLR CA at Nyeri [Otieno Odek, Visram and Koome JJA]**.

141. Accordingly, the claim for future medical expenses though pleaded generally, there was no specific figure attached to it in the plaint hence this court declines to make any award under this head, for want of specificity and proof. The plaintiff could have sought leave of court to amend the plaint even at the hearing of the suit to specify the claim for future medical expenses. He did not and therefore he gets nothing.

142. The motor vehicle search expenses were pleaded and proved. I therefore award ksh 1500. Medical expenses and doctors’ consultations and related expenses were lumped up together totalling to Ksh 7,400,004.00.

143. PW2 stated in his evidence in court that he is the one who was claiming the amount of money as the plaintiff is his son; that he still lived with the plaintiff. He further testified that the insurance company paid some of the money but that he was entitled to the payment of the same. That his son would still require future medical expenses which he had claimed. During cross examination PW2 stated that the receipts would add up to the amount as claimed in the amended plaint. However, I have examined all the receipts as produced in the bundle of documents and they all total a sum of **Ksh 632,655** only issued in the name of the plaintiff Tijan Kisilu.

144. PW2 had also in his evidence stated that the doctors’ fees paid by the insurance were Ksh1, 896,400 while the insurance also allegedly paid Ksh 5,318,755.12. He stated that he is entitled to this sum although this was settled by his insurance company. From PW2’s testimony, the total money allegedly paid by the insurance is Ksh 7,215,155.12. However, as I have stated above, there is no proof of this payment by way of receipts.

145. The rest of the documents produced in the two bundles bear the bulk of invoices and detailed inpatient bills from the hospitals where the plaintiff received medical attention. Nonetheless, assuming that PW2 would have been able to prove these payments, he would only be entitled to reimbursement if he was a party to these proceedings and claimed for such reimbursement. This is so because the doctrine of subrogation does not apply to personal injury claims. See **HCCA 22 of 2015 Leli Chaka Nodoro v Maree Ahmed and S.M Lardhib [2017] eKLR** citing with approval **George White v Jubitz Corporation, SC of State of Oregon[2009]** where the court stated:

***“Damages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff on account of injury. For it is given as a pure gift, not intended by the giver to be in lieu of damages, or else it is given in performance of a contract, the consideration of which was furnished by the plaintiff. In neither case has the defendant any equitable or legal claim to share the benefit...”***

146. In this case the plaintiff did not pay any premiums for the medical insurance, it was his father, PW 2 who claimed that His insurance company paid some medical expenses and therefore PW2 or Catherine Kisenga under whose name some bills were issued should have been enjoined to this suit to claim for such reimbursement of special damages incurred on their dependant/ son-the plaintiff herein and settled by the insurance company. However, there was no such claim lodged by PW2 and therefore the plaintiff would only be entitled to special damages of **Ksh 634,155 which was proved out of the over 7 million claim**. I hereby award him this sum of **Ksh 634,155** as special damages.

147. On the general damages and based on his submissions on this limb, the plaintiff claimed a total of **Ksh 25,000,000.00** for pain and suffering and loss of amenities. The law with regard to the awards of general damages was settled by the Court of appeal in the case of **Nyambura Kigaragari V Agrippina Mary Aya 1982-1988 1 KAR** where it was observed as follows:

***“I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover...”[emphasis added].***

148. The above is the approach that the courts have adopted all through and this is what guides the courts when it comes to the assessment of general damages.

149. In this case, it is the view of this court that the amount being claimed by the plaintiff is extremely astronomical compared to the injuries that he sustained in the fatal accident which claimed all his friends who were occupants of the vehicle that he was travelling in. He must count himself to be a man of nine lives. Therefore, whereas this court does agree that the injuries described in the medical reports are serious considering that the plaintiff's friends all perished in the material accident, a perusal of the plaintiff's submission and the authorities cited do not come anywhere near the amount that the plaintiff is claiming. In one of the cases cited by the plaintiff- **NANCY OSEKO v BOARD OF GOVERNORS MASAI GIRLS HIGH SCHOOL [2011] eKLR**, the plaintiff in that case had suffered much more severe spinal cord injury and suffered permanent loss of some of her functions. She was awarded ksh 12,460,911.00 general damages for pain suffering and loss of amenities.

150. General damages, it is trite, must be awarded within reasonable bounds. That compensation must be fair in line with recent authorities of comparable injuries. This is further backed by the Court of Appeal in the case of **Rahima Tayah and Another v. Anna Mary Kinaru [1987-88] 1 KAR 90** where it was stated:

*“I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd v. Shepherd [1964] A.C. 326 at pg 345:-*

*But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common 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.”*

151. Considering the injuries that the plaintiff suffered and taking into consideration that the two medical reports produced by consent differed in their assessment of permanent disability with Dr Kiama Wangai giving 30% as the permanent functional disability whereas Dr Wambugu gave him 10% degree of permanent incapacitation respectively following medical examinations undertaken almost at the same time-May and June 2016, it would have been prudent for the parties to have called the medical practitioners to testify to enable the court understand why the difference in the assessment above. However, as it is, the court will go with the latest medical report of Professor Kiama Wangai which assessed functional disability at 30% on 15<sup>th</sup> June, 2016.

152. In **Duncan Kimathi Karagania v Ngugi David & 3 others [2016] eKLR**, the plaintiff sustained blunt head injury with loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fractures of the maxilla bilaterally at the Le Fort 11 level. Compound fracture of the mandible. Comminuted fracture of the right humerus, articular region of the elbow surface of radio carpal. Multiple lacerations of the hands and forearms, and 30 % permanent disability. The court awarded him **ksh 4,000, 000** general damages for pain suffering and loss of amenities.

153. In the view of this court, the above decision compares well with this case in terms of the injuries sustained by the plaintiff **Tijan Kisilu**, who suffered the following injuries confirmed by the two medical reports produced in evidence: blunt chest injury with likely fractured ribs; bilateral fracture femur; profuse bleeding per oral, bipartition of the tongue; extensive oral lacerations; avulsion of the anterior part of the mandible; grossly comminuted compound fracture mandible; extensive Para nasal lacerations; and extensive right facial lacerations. The fact that the case of **Duncan Kimathi Karagania v Ngugi David & 3 others** is a recent authority, this court stands guided by the above decision and taking into account the inflationary trends and the lapse of time from when the decision was made, I award the plaintiff a sum of **Ksh 5,000,000 Five Million Kenya Shillings only** as general damages for pain, suffering and loss of amenities. I further award the plaintiff special damages of **Ksh 634,155** Kenya shillings Six Hundred and thirty-four thousand, one hundred and fifty-five only, to be paid to the plaintiff by the defendants jointly and severally. [**Total award of damages Ksh 5,634,155**], together with costs of this suit, which awards will all attract interest at court rates. The interest on special damages will accrue from the date of filing suit until payment in full, whereas the interest on general damages and on costs will accrue from the date of pronouncement of this judgement until payment in full.

**Dated, signed and delivered in open court at Nairobi this 19<sup>th</sup> day of March, 2018.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Kirika advocate h/b for Mr Kimathi advocate for the plaintiff

Mr Wangai advocate for the 3<sup>rd</sup> Party

Mr Githuka h/b for Mr Ochieng advocate for the defendants

CA: Kombo