



**REPUBLIC OF KENYA**

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

**(CORAM: R MWONGO, PJ)**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 262 OF 2014**

**JAMES MAINA MURIITHI.....PLAINTIFF**

**VERSUS**

**MY BEAUTY TRANSPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**TIMOTHY KINUTHIA.....2<sup>ND</sup> DEFENDANT**

**PETER NJIHIA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiff was a fare paying passenger in vehicle registration No KBT 242Q when, on 31<sup>st</sup> March, 2013, at Koma Rock Road, it overturned, causing the plaintiff serious injuries, loss and damage. As a result of the accident, he is currently confined to a wheelchair. He has sued the first and second defendants who were the registered owners of the said motor vehicle. The third defendant was the authorised driver, servant or agent of the first and second defendants.

2. The suit is for damages wherein the plaintiff prays for judgment against the defendants for:

- "a) Special damages in the sum of Kshs. 7,152,056.00;**
- b) Damages in respect of lost income and future living expenses Kshs 15,500,000.00;**
- c) General damages for pain and suffering;**
- d) General damages for loss of amenity and consortium;**
- e) Costs of the suit;**
- f) Interest on (a) (b) and (c) at court rates."**

Particulars of negligence are itemised in the amended plaint dated 16th March, 2016.

**The Parties' cases**

3. At the hearing, three witnesses gave evidence for the plaintiff. PW1 James Maina Muriithi, the plaintiff, adopted his witness statement. He testified that he was a passenger in a Mitsubishi bus registration number KBT 242Q on the way to work at Kariokor market where, he says, he was a grocer selling mostly cabbages. The bus carrying him swerved and overturned and he was thrown about and injured seriously. After being extricated from the wreckage, he was taken to Mama Lucy Hospital in Kayole before being transferred to Kenyatta Hospital. He did not lose consciousness, but was in great pain

4. The plaintiff was confined in Kenyatta Hospital for almost one month, and after being discharged, continues to make regular return visits

for check-up and therapy. His arm and right leg were amputated; he uses a prosthesis which requires repair over time; at each service he has spent Shs 3,000/= and now needs to get another one.

5. According to him, he is subjected to regular injections and can only hope to regain mobility through invasive surgical procedures and arthroscopic intervention, including shoulder disarticulation modular prosthesis. For these he obtained quotes from doctors.

6. The plaintiff also gave evidence that at the time of the accident, he was thirty five years old and had lost all prospects of continued employment; that he reasonably expected to continue in employment for a further twenty five years; that he will have to rely on a caretaker all his life to assist him with mobility and day to day functions for the rest of his life; that he has unrelenting soreness and pain.

7. Plaintiff also stated that he earned a monthly income of about 30,000/= as he was earning about 700/= per day; that he never kept any documents or receipts to show his income; that he now depends on friends, brothers and parents for his survival; that his wife has no serious work; that she helps him with changing his clothes; and that he has a son who is presently three years old in kindergarten. He said he spends about 15,000/= per month on movement using taxis and for other needs.

8. Finally, the plaintiff testified about his marital life. He said that as a man without money, life was very difficult; that his wife is his main caretaker; that though he has healed generally, he is still badly off psychologically.

9. PW2, Prof. Kiama Wangai, is both an advocate and professor of medical law & forensic medicine. He gave expert evidence and produced a medical legal report dated 5<sup>th</sup> December, 2013. According to that report the plaintiff sustained the following injuries:

**“Frictional burns over the lower abdomen**

**Frictional buns on both thighs**

**Crush injury right lower limb with eventual below knee amputation**

**Crush injury left upper limb with eventual disarticulation**

**Pains, blood loss and soft tissue injuries”**

10. In his prognosis, Dr Kiama stated that the plaintiff has significantly recovered from the injuries, and would benefit from functional prosthesis. Such prostheses for the lower limb would cost 400,000/- and for the upper limb would cost 1,000,000/=. He also assessed permanent functional disability at 50% for each of the lower and upper limbs.

11. PW2 stated that having seen the quotations for the prosthesis in the plaintiff’s bundle of evidence, what he had given as costs were estimates, and that the true prices would be within a price range. His estimates were made in 2013 and today’s estimates may be 800,000/- for lower limb and 1,800,000/- for upper limb prosthesis. He also estimated that during the plaintiff’s remaining lifetime, he would need to change his prosthesis three to four times.

12. Peter Ongubo PW3, said he is an Orthopedic Technologist, specializing in prosthetics and orthotics. That means he is qualified to make medical devices used to fix or support a part of the body. He produced a Quotation dated 24<sup>th</sup> April, 2017 by Gateway Prosthetics and Orthotics Limited, which he said he had prepared. The quotation includes a below knee prosthesis for Kshs301,600 and two options for shoulder disarticulation prostheses: Option A for Kshs 551,080/= and Option B for myo-electric shoulder prosthesis for Kshs 6.500.000/=-.

13. PW3 testified that the plaintiff visited his office in 2013, he examined him and then prepared a first quotation.in 2013. He explained in detail the functioning of the prostheses and the differences in the models in the different options. Option A, he said, has a lifespan of 5-6 years and gives only 10% use and has a replaceable glove of shs 30,000/- - 40,000/- that lasts about a year. Option Buses electrodes and muscles and as up to 70% functional use. It has parts such as batteries and electrodes and can last 4-6years. He stated that the latest quotation has the better options. It excludes physiotherapy costs as his company does not provide that service. he said he could not tell why the doctor quoted lower figures.

14. Peter Gitau gave evidence as DW1, adopting his witness statement. He said that he had been a driver for 17 years. He was driving vehicle registration No KBT 242Q from Nairobi towards Dandora, when suddenly a *boda boda* motorcycle carrying a lady and a child overtook him and cut-in ahead of him. To avoid hitting them, he swerved sharply to the right as there was a trench on his left. Another car approaching from the opposite direction, so he drove onto the pavement on the right-hand side of the road. The vehicle then lost control and overturned on the passenger side. In cross examination he said that he was driving at about 40 km/h. That he could not use the emergency brake because the *boda boda* was too close, and also that his vehicle would not have stopped immediately. He knew of one person who had been injured, namely the plaintiff.

15. DW 2, Anthony Wainiana Gichina, the conductor of the accident vehicle, also adopted his witness statement. He recalled the accident, and remembered seeing the plaintiff seated in the area near where he was towards the door. He testified that the plaintiff was wearing a seatbelt, because he had told the passengers to wear them. In cross examination, he said that he became unconscious when the accident occurred, and regained consciousness when he was in hospital.

#### **Analysis of Evidence, Submissions and Determination**

16. The parties filed a joint list of agreed issues for determination identifying ten issues. In light of the evidence availed and submissions of

the parties, I consider that the issues that need be determined are

- a. Liability- the question of apportionment
- b. The quantum of damages, if any, payable under the various heads

### The Question of liability

17. On liability, the only real issue that was disputed is in the defendants' submissions. They make two contentions: First, that the plaintiff had not fastened his seat belts, which is evidenced by the level of his injuries. On this it was argued that a comparative analysis between the plaintiff's injuries and those of DW 1, shows that had the plaintiff fastened his seatbelts like DW1 did, his injuries would have been significantly reduced. Secondly, they contend that the plaintiff never raised any concerns with the driver or conductor that the driver was speeding. Consequently, the defendants propose liability at 60:40 in favour of the plaintiff.

18. The plaintiff urges that liability should be at 100% as against the defendants. Citing the case of **Sofia Yusuf Kanyare v Ali Abdi Sabre & Another [2008] eKLR**, where the court stated that:

**“On liability the plaintiff is required to furnish proof of the defendants' link to the accident vehicle and driving followed by establishment of blameworthiness in her favour...”**

19. In the present case, the evidence is that DW1 was the driver of the accident vehicle, and DW2 his conductor. Both said they worked for the 1<sup>st</sup> Defendant. PW2 exhibited a copy of records for the accident vehicle dated 20<sup>th</sup> March, 2014, which shows that United Credit Limited were the registered owners with the Second Defendant. It is also on record that United Credit Limited, who had previously been sued by the plaintiff as the 1<sup>st</sup> defendant filed a motion in court exhibiting a sale agreement for the said vehicle to My Beauty Transporters Limited and a registration certificate of the said vehicle dated 20<sup>th</sup> November 2012 in that name. Following that motion, the plaintiff amended the plaint and filed an amended plaint incorporating My Beauty Transporters Limited.

20. The ownership of the vehicle is therefore established and undisputed. The driver, DW 1, is established. His evidence was that as he was driving he saw a *boda boda* overtake him and cut-in immediately in front of him. He swerved to the right to avoid hitting it. To avoid an oncoming car, he then drove off into the right hand side off the road where the vehicle overturned. In his written statement, which he adopted as part of his sworn testimony after being sworn in, he put it as follows:

**“It was around between 9am and 10am the road was dry with clear visibility..... I was driving at an average of between 40 kph....All of a sudden a motor cycle overtook my motor vehicle while heading to the same direction and immediately swerved in front of my motor vehicle as there was another motor vehicle which was coming from the opposite direction. The motor vehicle was so close and slow moving such that after the oncoming motor vehicle passed I immediately swerved my vehicle towards the right hand side to overtake the motor cycle but unfortunately I lost control of the vehicle and it hit the road kerb and then fell upside down...”** (Emphasis supplied)

21. In my view, this is the crux of the eyewitness testimony on causation. The mere fact that the driver says a *boda boda* cut in *ahead* of him and he had time to allow an oncoming vehicle to pass before he swerved to overtake it, confirms that the driver had some time before swerving to the right side of the road. He opted overtake the motor cycle instead of applying emergency brakes. He was driving in broad daylight with clear visibility. He took no evasive action by overtaking. Then he lost control of the vehicle after he hit a kerb.

22. It does not take a physicist or propulsion expert to conclude that the accident vehicle was driving fast. It does not take a mind reader or psychologist to conclude that the driver was incautious and had poor judgment in swerving to overtake instead of braking if indeed he was driving only at 40kph. Again, it doesn't add up that he was driving at only 40kph in a mini-bus and then lost control upon climbing a kerb. In oral evidence he said he didn't use his brakes because the *boda boda* was too close. He thus underestimated the use of brakes as a main tool of safety.

23. In my view, all this points towards blame on the part of the driver. There is no evidence for apportioning any blame for the accident on the plaintiff who was a passenger. Accordingly, I find that liability for the accident lies wholly on the driver, and vicariously on the owner of the vehicle.

### Quantum of Damages

24. The plaintiff's injuries were not disputed, and all that is needed is to quantify damages.

Pain and Suffering:

25. For pain and suffering the award is made in consideration of the amount of pain and suffering the plaintiff underwent. The award is to compensate for the physical and mental distress undergone by the plaintiff occasioned by the bodily injuries. His injuries are listed out. There were burns and abrasions, crushed upper and lower limbs leading to two amputations, compound injuries on both knees, exposed tibia. He was in hospital for almost one month. He suffered 50% disability in both limbs. I agree with the plaintiff that these are serious injuries by any standard.

26. The plaintiff seeks Kshs 5,200,000/-, being Kshs 200,000/- for soft tissue injuries, Kshs 2,000,000/- for loss of upper limb and Kshs 3,000,000/- for loss of lower limb. The defendant proposes Kshs 2,000,000/- in total.

27. In **Sofia Yusuf Kanyare v Ali Abdi Sabre & Another [2008] eKLR**, the plaintiff was awarded Kshs 1,750,000.00 for loss of upper arm and Kshs 70,000.00 for soft tissue injuries that healed. In **Elizapahan Njamu v Ndaikwa Mwangoro Mombasa HCCNo 45 of 1997** (cited in **John Nkunja Mbatia v Esther Muthomi Mhuri [2017] eKLR**) Okwengu J, as she then was, awarded Kshs 1,500,000.00 for traumatic amputation of right upper limb. In **Kurawa Industries Limited v Dama Kiti & Another [2007]** the court awarded Kshs 2,100,000.00 for damages of pain and suffering. In this matter the Plaintiff suffered permanent disability of 50%.

28. In **Kurawa Industries Limited v Dama Kiti & Another [2017] eKLR** Chitembwe J, summarised a number of cases in which awards were made for amputation of limbs. He stated:

**“The scenario given by the above awards shows that damages for amputation of one’s leg above the knee would range from Kshs 1.2 million to 2.5 million. The trial court awarded Kshs 2million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries”**

29. Doing the best I can, I award a global figure of Kshs 4,200,000/- for pain and suffering.

Loss of Amenity and Consortium:

30. The plaintiff pleaded under this ground that he is unable to use his arm and leg as he used to, and therefore submits that he should be awarded damages as his quality of life has diminished. Relying on **Mwaura Muiruri v Suera Flowers Limited & Another [2014] eKLR** where Kshs 300,000/- was awarded for loss of amenities, he seeks an award of Kshs 500,000.00 and 100,000/- for loss of consortium.

31. The defendant argues that if the plaintiff is awarded under loss of amenities, he should not be awarded under the claims for prosthetics, as awards under both would be punitive. They also argue that a claim for loss of consortium cannot be granted if there is also a claim for amenities. Defining loss of consortium to mean companionship, love and affection, comfort, mutual services and sexual intercourse within the married state, the defendants urge that loss of consortium is payable only to a spouse. In **Mwaura’s case (supra)** Emukule J held that the claim for loss of consortium :

**“.....can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium”**

A plaintiff whose injuries have rendered him unable to perform his marital duties is properly compensated under the claim for loss of amenities.

32. Further Emukule J, stated in **Mwaura’s case** that for a claim under loss of consortium to be well founded, he must have raised the complaint before a doctor for assessment so that there is evidence of its veracity:

**“...the doctors who examined the plaintiff did not find that the injuries sustained by him hindered his ability to perform his marital duties in any way. In addition the plaintiff did not raise any such complaint at the time of examination to enable the doctors to assess the same. For this reason I find that the claim of inability to perform sexual relations had not been proved”**

33. I agree with the defendants that in this case there was no medical evidence to support this claim for consortium. There was no evidence from his wife, either, Accordingly, I make no award under this head.

34. As for loss of amenities I award a lump sum of Kshs 150,000 given that, notwithstanding that an amount is awarded for prosthetics, there is still a percentage loss of capacity and movement which the plaintiff will permanently be faced with.

Loss of earning capacity

The plaintiff claims under this head lost monthly income of kshs 20,000/- for his grocery work; monthly caretaker costs at Kshs 10,000/-; and transport costs at Kshs 5,000/-. For each of these figures, the plaintiff has put a multiplier of 25 years on the basis that he would expect to retire at the age of 60 years. He asks for an award of Kshs 15,000,000/- citing the **Mwaura case**, and the cases of **Millicent Atieno Ochuonyo v Katola Richard [2015] 2015 eKLR**, **Alex Otieno Amolo & another v Hayer Bishan Singh & Sons Limited [2016] eKLR**, **Grace Beldina Adhiambo v Bowers Okelo & another [2017] eKLR**.

35. The defendant urges that a claim under this head is a special damages claim and must be pleaded specifically and strictly proved. This proposition is found in the holding in **Cecilia Mwangi & Another v Ruth W Mwangi [1997] eKLR** where the court stated:

**“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head ‘loss of earning capacity’ can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just ‘throw figures’ at the judge and ask him to assess such damages.”**

36. The defendant may have confused loss of earnings with loss of earning capacity, which are different types of claims. See **Butler v Butler [1984]KLR 225**. That notwithstanding, loss of earning capacity must be predicated on documentation that discloses ascertainable figures which are intended to be relied upon in assessing the damages payable.

37. At no time has the plaintiff been able to produce a single document on which the figures he claims for loss of earning capacity are

predicated. For lost income, the plaintiff's calculation is based on an income of 20,000/-, for which he supplied no documentary evidence. Further, in his oral evidence he said he earned, say, 300-700/- daily, which in any case would not add up to 20,000/- per month. He did not provide evidence that anyone depended on him, nor did he call anyone to support the allegation that he worked as a grocer. It is insufficient to throw figures at the court and ask the court to assess damages. On what basis can this court find that the plaintiff was earning 20,000/- monthly? On what basis are the monthly caretaker and transportation costs to be arrived at?

38. In the plaint, these costs have been termed "Particulars of Lost Income and Future Living Expenses". Here, they are, they are no more than "guesstimates". Further, an award under caretaker costs would amount to a double payment because if prosthesis costs are awarded, the plaintiff would be near back to almost 100% ability, and a caretaker would be unnecessary. Similarly, the claim for transportation costs assumes the plaintiff would continue frequent hospital attendances as before.

39. The claims under this head are not proved, and I make no award thereon.

#### Future Medical Costs

40. The plaintiff's claims under this head are for wheelchair, commode chair, knee and shoulder prostheses, and service fees all amounting to Kshs 6,880,056/- in the plaint. In his submissions, he sought Kshs 8,128,556. The increase is explained by the new price of shoulder prosthesis from Kshs.5,365,500 to Kshs 6,500,000/- with 10% service fee in each case.

41. On this head of claim, PW2, Professor Kiama Wangai, had given an estimated cost of a functional prosthesis as Kshs 400,000.00 for the upper limb and Kshs 1,000,000.00 for the lower limb. The Plaintiff then obtained a quotation from PW3 of Gateway Prosthesis and Orthotics, who gave him a quotation dated 7<sup>th</sup> October, 2013. A more recent quotation from Gateway dated 24<sup>th</sup> April 2017 was also availed in evidence. The difference in the figures was explained by PW3, who stated that the prices were updated and that the prostheses require replacement within a period of 3 to 4 years. The figures above are for only one replacement. The plaintiff seeks an award for up to four replacements since these amounts are futuristic.

42. With regard to the 2017 quotation provided by PW3, the Option B Myo-electric Shoulder Disarticulation prosthesis which costs Kshs. 6,500,000, PW3 stated in his cross-examination that:

**"I'm the only person in Kenya who is certified to do these myo-electric prosthesis"**

This gave the impression that this prosthesis is extremely specialised and may therefore be problematic in the event that the only person specialised to deal with them in Kenya would not be available. That is that a choice for such prosthesis comes with the disadvantage of limited persons to service and the like. I do not think it prudent to make an award in favour of an exceedingly specialised piece of equipment in an environment such as we have in Kenya where there is a risk that only one person can effectively service it.

43. With regard to the claim for a wheelchair, the plaintiff availed a quotation from the Association of Physically Disabled of Kenya for a Power Wheelchair and Commode Chair at Kshs 172,000 and kshs 10,400 respectively. There was also a letter from Kenyatta National Hospital indicating the need for the plaintiff to have a wheelchair for easy ambulation within the house and for toileting.

44. The defendants argue that this is also a special damages claim which must be within the limits set out by decided cases and what the Kenyan economy can afford. On this point, the defendants cited the decision in **Kigaragari v Aya (1928) 1 KAR 768** as quoted in **Bada Hardwares Limited v James Amwoma Oiko [2017] eKLR**.

45. The defendant has proposed an no award for wheelchair, and an award of kshs 520,000/- and 400,000/- for leg and hand prosthetic respectively. They cite the cases of **Patrick Mbatha Kyengo v Bayusuf Freighters Ltd [2013] eKLR** where Wakiaga J, awarded Kshs 250,000/- as pleaded for a *versatile prosthesis* noting that the prosthesis should be replaced every 4-6 years. He found that:

**"...according to Dr Moses Kinuthia the plaintiff sustained amputation of the left leg below the knee, fractured right radius /ulna resulting into no functional flexion/extension movement on the right wrist and all fingers. He assessed permanent incapacity at 85% while Dr Wambugu assessed the same at 80%"**

46. I have carefully considered the claim under this head. I also saw the plaintiff in court, who showed me his main injuries. I have also taken into account the evidence and explanations given by PW3, Peter Ongubo of Gateway Prosthetics. The 2017 quotation by PW 3, was for Dynamic foot prosthesis at Kshs 301,600; For shoulder disarticulation prosthesis he gave Option A from China without a warranty and Option B was from Germany with a warranty of four years. Option A cost 551,080 and Option B cost Kshs 6,500,000. I note that other than these Chinese and German options, other makes and types of prostheses were not availed for comparison, so that only limited choices were availed.

47. Given all the circumstances, and in light of comparative awards, I award as follows: Below knee prosthesis Kshs 520,000 as proposed by the defendants, and for Shoulder Disarticulation prosthesis I award Kshs 650,000. These awards include service fees as explained by PW3.

48. Despite the fact that the plaintiff did not provide a witness to speak to the issue of the wheelchair, I did observe the witness and noted his state. He attended court in a wheelchair. He would be otherwise immobile an unfortunate state. PW3, the Orthopaedic Technologist, when speaking of the prosthetics, said that even with them, the Plaintiff would still have only about 70% mobility. On that basis, I would therefore award Kshs 182,400.00 as claimed for wheelchairs, based on the quotation provided.

#### Special Damages

49. The plaintiff availed receipts for hospitalisation, clinical procedures and transport to hospital. I have carefully perused the same and they add up as follows:

a. Kenyatta National Hosp	11,965.00
b. Kenyatta National Hospital	100,009.00
c. Launch Medical Centre	89,950.00
d. Taxi Cab Services	80,900.00
e. Copy of records	500.00
<b>TOTAL</b>	<b>283,834.00</b>

50. In their final submissions, the defendants challenged the receipts as they were not stamped under the **Stamp Duty Act, Cap 480**, and urged that the court could not admit them as evidence under **section 19** thereof. That section provides:

**“19(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**

**a. in criminal proceedings; and**

**b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”**

51. I agree with the plaintiff’s counsel that the defendant ought to have raised the issue well before final written submissions were filed. However, the law is also clear that under **sections 19(3) and 20** of the **Stamp Duty Act**, there is a statutory right availed for unstamped documents to be stamped out of time, for payment of requisite penalties, and thereafter for them to be relied upon. I am prepared to go this route.

52. This issue has been dealt with in a string of other cases as follows. In **Sunderji Nanji Limited v Mohamedali Kassam Bhaloo (1958) EA** a similar issue arose and Law J held:

**“The issue is as to whether or not a document is inadmissible for want of stamping must be decided when the document is sought to be put in evidence or at some stage before final judgment, so as to give the party producing it an opportunity of paying the requisite duty and penalty and thus making it admissible.”**

And further explained, in reliance on **Baghat Ram V. Rattan Chand (2) (1930), A.I.R Lah 854**, that:

**“...before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant/respondent, and he must be given that opportunity.”**

53. More recently, Majanja J, in **Mwanahamisi Omar Mzee Also Known as Fatuma Mohamed Ali Omar v Chengo Kahindi Birya & another [2018] eKLR** allowed an appeal where the lower court disallowed unstamped documents when the issue had been raised in submissions. There, the court stated:

**I think the trial magistrate erred for several reasons. First, the objection was raised in the respondents’ written submissions rather than at the time the documents were tendered by appellant. In effect the documents were admitted by consent of the parties and could not be rejected by the trial magistrate without giving the appellant an opportunity to respond to the objection. This is particularly in view of the fact that the appellant would be entitled to stamp the documents out of time under section 20 of the Stamp Duty Act had the objection been raised. The purpose of the Stamp Duty Act is to ensure collection of revenue and not necessarily to deprive the party of a cause of action. I hold that such an objection should be raised at the earliest opportunity to enable the party relying on the document comply with the provisions.**

**This same issue was dealt with by the Court of Appeal in Stallion Insurance Company Limited v Ignazio Messina & C S.p.A [2007] eKLR where the Court approved its previous decision in Diamond Trust Bank Kenya Ltd v Jaswinder Singh Enterprises NRB CA Civil Appeal No. 285 of 1998 [1999] eKLR”**

54. It should also be noted that **Article 159(2)(d)** of the Constitution also requires that the court should mete out substantive justice without undue regard to technicalities, and a defendant should not be allowed to defend his case by ambush when full opportunity is granted for full disclosure throughout the Civil Procedure Act. The Constitution also underpins the overriding objective in **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which imposes on the parties and their advocates to assist the court in ensuring substantive justice is achieved.

55. Section 19(3) of the Stamp Duty Act provides as follows:

“(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions–

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21” (Emphasis supplied)

56. Applying the above provision, I will order that subject to the plaintiff effecting the payment of stamp duty on the unstamped receipts, evidence of which shall be produced to the Registrar of the High Court within forty five (45) days from the date of this judgment, the amount of Kshs 283,834.00 is hereby awarded as special damages. As indicated, this special damages award is conditional on payment of requisite stamp duty as assessed by and paid to the collector of stamp duties.

**Disposition**

57. I find liability against the defendants at 100%.

58. Judgment is entered as against the defendants jointly and severally under the following heads:

a) Pain and suffering	Kshs	4,200,000.00
b) Loss of amenities	Kshs	150,000.00
c) Loss of consortium	Kshs	Nil
d) Loss of earning capacity	Kshs	Nil
e) Damages for future medical costs and wheelchair	Kshs	1,352,400.00
	Sub-Total Kshs	<u>5,702,400.00</u>

f) Add Special damages (subject to evidence of stamping) Kshs **283,834.00.**

59. The plaintiff shall have the costs of the suit, and interest on items a), b) and f) at court rates.

Orders accordingly.

**Dated and Delivered at Nairobi this 27<sup>th</sup> Day of September, 2018**

\_\_\_\_\_  
**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

- 1.....for the Plaintiff
2. ....for the 1<sup>st</sup> Defendant
3. ....for the 2<sup>nd</sup> Defendant
4. ....for the 3<sup>rd</sup> Defendant

Court Clerk.....