REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL CASE NUMBER 294 OF 2010

NELSON NJIHIA KIMANI.....PLAINTIFF

VERUS

DAVID MARWA.....1ST DEFENDANT

STEADY LIMITED.....2ND DEFENDANT

JUDGMENT

1. **Background**

On the 15th September 2009 the plaintiff was driving motor vehicle Registration KBG 039L along the Nakuru/Eldoret road and while at Ngata Bridge it is alleged that the steering wheel of the vehicle broke and and as a result the vehicle lost control rolled over upon which the plaintiff sustained serious injuries.

2. **The Pleadings**

By his plaint dated 6th May 2010 and filed on the 11th November 2010, the plaintiff sued the registered owner of the vehicle the 1st Defendant and the 2nd Defendant as the beneficial owner for negligence, particulars stated and sought compensation for injuries in terms of general damages, loss of earnings and future medical expenses together with special damages.

3. In their joint statement of defence dated 23rd February 2011 and filed on the 25th February 2011, the defendants denied in their totality allegations as to ownership of the subject motor vehicle all particulars of negligence and injuries and in the alternative blamed the plaintiff for negligence in the manner of driving of the vehicle. Further, the 1st Defendant denied authorising the plaintiff to drive his motor vehicle on the material date.

4. **Plaintiff's Evidence**

In his evidence in Chief, the plaintiff testified that on the material date, he was an employee of the 2nd defendant company whose owner was the 1st Defendant one David Marwa. It was his testimony that he was assigned to drive the vehicle from Migori to Gilgil, that while driving along Nakuru/Eldoret road near Ngata bridge, the vehicle's steering wheel broke causing the vehicle to loose control and overturned. He was injured. He produced motor vehicle KRA records to prove ownership of the vehicle as the 1st Defendant.

5. His testimony was that the vehicle that he had driven for a month was not serviced and maintained and

his request for it to be greased and serviced was not heeded to yet he had driven the vehicle for over a month from Migori to Nairobi with loads of timber and estimated the journeys to about seven within the month.

He further blamed the owner of the vehicle for overloading the vehicle with timber that made it very heavy and although his testimony was that he was not driving fast, nor was he drunk, he could see very well as it was in the morning about 7.30a.m., and while taking a diversion, the steering wheel broke.

He testified that he had been authorised to drive the vehicle by the manager one Samuel Marwa but the authority was not in writing. He testified that he could not have driven the vehicle all the way from Migori to near Nakuru if he had no authority to drive and more so that the owner of the goods was with him in the vehicle.

6. Upon cross examination, it was his testimony that he was not given an appointment letter by the company or the owner (1st Defendant) but had worked for it since July 2009. He confirmed that the trailer was new and that last service was done in June 2009 and was due for service after 3 months. He produced photographs of the vehicle showing the vehicles steering wheel broke as a result of overloading, none service and lack of maintenance.

7. **Defence Evidence.**

In response to the plaintiffs evidence, **DW1 the 1st Defendant** testified that the vehicle subject of the accident was relatively new about six months old at date of the accident. He confirmed that he was the owner, and had hired out the vehicle to transport timber from Migori to Gilgil but denied that the plaintiff was his driver, or his employee but confirmed seeing him at the Nakuru Provincial Hospital with serious injuries after the accident.

8. He testified that at the scene of the accident, he found the trailer damaged but denied that the steering wheel had broken nor cut off. He testified that the vehicle had been serviced by a reputable mechanic and produced a manual of vehicle service and an assessment report on the damage of the vehicle that showed no pre-accident defects.

It was his testimony that his authorised driver to whom he had assigned the vehicles had fled to Sudan and could not be found to testify.

9. On cross examination,the defendant (DW1)stated that he hired out his vehicle with his driver and so did not know the plaintiff, and further that he had six vehicles and six drivers in his employment but did not maintain a record of the drivers.

He confirmed that at time of accident,the hirer of the vehicle was inside the vehicle, and reiterated that he did not know the plaintiff as he was not his authorised driver.

Producing the vehicle warrant book, he stated that the last service was on the on the 9th September 2009 and 6 days later, the accident occurred. He confirmed being the owner of the vehicle.

10. DW2 was the Nakuru County Motor Vehicle Mechanic. Upon inspection of the vehicle at the scene of accident, he noted that the steering box under the cabin was broken,and made an opinion that the accident could have been caused by high speed, a bump or due to overload, and damage was caused by an impact that depends on speed and load.

He stated that a vehicle cannot fail suddenly and that there must be a rapture or breakage and that the steering wheel was broken.

11. **DW3 Samuel Marwa**, the 1st defendants mechanic confirmed that he used to service the motor vehicle and that the last service was on the 5th May 2009 and also produced the motor vehicle service

book. He could not produce his certificates to confirm being a qualified mechanic, or a mechanic for that matter.

12. **The Hirer of the vehicle testified as DW4, Mr. Joseph Mogesi**. His testimony was that he left Mirogi with the owner's driver by name "*wasiwasi*" but at Kericho another driver, the plaintiff, took over the vehicle. He was in the vehicle and stated that the was driving fast and cautioned him three times and while near Ngata Bridge the vehicle hit a construction materials site near a diversion and the vehicle overturned. The 2nd defendant was sued as co-owner and or beneficial owner of the vehicle. No evidence was adduced to that effect. The suit is therefore dismissed against the 2nd Defendant, as motor vehicle records and evidence of 1st Defendant confirmed its ownership.

13. **Analysis of Evidence**

There is no dispute that the accident occurred and that the plaintiff was the driver while the 1st Defendant was the owner of the accident vehicle. The defendant denied both in his defence and in evidence that the plaintiff was his authorised driver. It was his evidence that he had a fleet of six vehicles and six drivers but could not produce a record of the drivers nor did he know their names. It was his testimony that his authorised driver was known as "*wasiwasi*" but could not give his official names. This was the name given by the hirer of the vehicle. He too did not know the driver's name save the name "*wasiwasi*."

14. There is no dispute too that the accident happened when the vehicle was on its authorised route to its destination having been loaded with logs (timber) at Migori to transport for the hirer, Joseph Mogesi (DW4) to Gilgil and who accompanied the lorry and was in the vehicle with the driver when the accident occurred.

15. Evidence tendered does not support the 1st defendants assertion that the plaintiff was a stranger in his vehicle. In his own evidence, the plaintiff testified that the was assigned the vehicle by the manager whom he named as Samuel Marwa and the accident occurred enroute to the intended destination Gilgil. I have considered the evidence of Samuel Marwa. He described himself as a qualified mechanic of the owner of the accident vehicle. He did not produce any documents to certify that he was indeed a mechanic nor a qualified mechanic. He did not deny that he was the one who assigned the accident vehicle to the plaintiff. Indeed, in the motor vehicle service booklet that he produced he stated that the drivers names are not indicated.

16. I have also considered the evidence as well as the parties respective pleadings, and submissions.

The issues that comment to me for determination as may be discerned from the evidence are:

> ***(i) Whether the plaintiff was the 1st Defendants authorised driver and if the answer is in the affirmative, whether the accident happened while the plaintiff was in the course of employment or within the owners authority to drive the said vehicle to the designated destination.***
>
> ***(ii) What was the cause of the self involving accident at Ngata Bridge on the material date and time.***
>
> ***(iii) Whether the plaintiff was injured and if so, whether he is entitled to the reliefs sought against the 1st Defendant.***

17. It was sufficiently demonstrated that the 2nd Defendant hired out the vehicle to Joseph Mogesi (DW4). He stated that he left Migori with the vehicle and the assigned driver one "*wasiwasi*" from Migori and at Kericho, another driver took over the vehicle but he was not worried because he did not know the arrangements with the owner of the vehicle, and while on the authorised route towards Nakuru, the accident occurred. He confirmed that at the time of accident they were only two in the vehicle himself and the plaintiff. He denied having colluded with the 1st defendant to hide identity of the driver.
I have considered that the hirer did not however report to the owner of the vehicle that a stranger had

taken over driving of the vehicle that was loaded with his goods. He also did not record a statement at the police station until 2013, three years after the accident.

18. I have analysed this witness' evidence carefully. No where did he tell the court that when the "stranger"driver took the vehicle at Kericho that he asked him his name and his authority to drive the vehicle, if indeed alleged the authorised driver, the said "*wasiwasi*" had given the keys to a stranger without telling him that a new driver would take over the vehicle. In my view, this strange behaviour smacks of some mischief, taking into account that the hirer ordinarily would have enquired the identity of a stranger taking over driving of a vehicle loaded with his goods, and without a word from the "*wasiwasi* driver whom he said he knew.

The narrative and circumstances are such that the plaintiff would not have driven the accident vehicle without the knowledge or authority of the owner, either expressly or impliedly. No evidence was adduced by any of the parties as to the authority and identity of the plaintiff upto and until the accident occurred.

See **Tabitha Nduhi Kinyua -vs- Francis Mutua Mbuvi & Another C.A 186 of 2009 (2014) e KLR**

19. In my considered opinion, had the accident not occurred, and the hirer's goods delivered to the designated place, the 1st defendant would not have raised any issue or at all as to the identity and authority of the plaintiff to drive the vehicle. I do not think so. No evidence was adduced that the driver took a "floric" of his own.

In very similar circumstances in **Kenya Power & Lighting Co. Ltd -vs- Kenneth Lugalia Imbugua (2016) e KLT J** that court held that there is a presumption in law that a vehicle is driven for the benefit of the owner, and by his authority, unless otherwise proven.

There having been no record or sufficient evidence to contravert the plaintiff's evidence that he was the authorised driver of the vehicle by its owner, this court comes to the finding that the plaintiff was the authorised driver, and was in the course of duties assigned to him by the 1st defendant and/or his authorised agent. See also **HCA No. 142 of 2006 Hannah Nyawira Maina -vs- James Karanja (2016) e KLR**, where I made similar findings in similar circumstances.

20. It is trite that an employer is required to keep a written record of all his employees. See **Section 74(1) of the Employment Act.**

The Traffic Act, Section III provides:

(1) Any person who employs any person to drive a motor vehicle shall keep written record of the name, address and driving license number of such other person.

(2) ----------

(3) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.

The 1st defendant failed to comply with the above legal provisions of both the Employment Act and the Traffic Act. He could not name any of his alleged drivers, not even the accident driver.

21. The court shall, in the absence of any contrary evidence, came to the assumption that the plaintiff was the authorised driver to drive the accident vehicle to Gilgil when the subject accident occurred. No sufficient and convincing evidence was tendered to rebut that presumption in law that the plaintiff was such a driver.

In the same breath, it is my further finding that when the accident occurred, the vehicle was being driven

on the owners (1st Defendant) authority, and within the scope of the authority by the owner to the driver. See **C.A No 538 of 2912 Kenya Power & Lighting Case** (Supra and **C.A No. 156 of 2010 Israel Mulandi Kisengi -vs- The Standard Limited & 2 Others (2012) e KLR** where the court discussed the authority of an owner of vehicle to his driver and agent.

22. Citing the case **Mary Waitherero -vs- Chella Kimani & Another (2006) e KLR**, it was rendered:

> ***"it is well settled law that a master is liable even for acts which he has not authorized that are so connected with the acts which he has authorised that they may be regarded as modes although improper modes of doing them. On the other hand, if the unauthorised and lawful act f the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, the master is not responsible for such a case the servant is not acting in the course of employment but has gone outside it."***

23. Further in the old case of **Ormand -vs- Cross vile Motors Service (1953) 2 ALL ER 753, Lord Denning** rendered that the owner of a vehicle is liable if the driver is his agent, that is to say, the driver with the owners consent, driving the vehicle on the owners business or for the owners purposes.

Applying he above old age legal principles and on our very own and recent jurisprudence on the subject, I come to the conclusion on the two issues that the plaintiff was the authorised driver and/or agent of the 1st defendant when the accident occurred.

24. The accident was self involving. The driver/plaintiff blamed the owner (1st defendant) for allowing a defective motor vehicle to be driven on the road and failure to maintain the same to a good working condition.

The plaintiff lead evidence that for a whole month the vehicle was not serviced after doing seven trips from Migori to Nairobi, with the diesel lorry. It was his testimony that after every one such trip, service was necessary. He also stated that the vehicle was overloaded when the accident occurred.

25. **Nakuru County Mechanic DW2** inspected the vehicle soon after the accident. **His findings were that the cabin under the steering wheel was broken, and that there were no old cracks and that damage was extensive.**

His opinion was that:

" the cause of the accident was due to overload or bump or high speed and that it could not have been caused if the vehicle was on low speed, that damage was caused by an impact that depends on speed and load-----"

The County mechanic ruled out pre-accident defects to the vehicle. He rationalised that the cause of the accident could have been due to high seed, overload or bump.

If it was due to overload which the owner of the goods had denied as well as the owner of the vehicle, then the said owner would be liable. If however there was proof and findings that the accident was due to high speed which the owner of goods testified was the case, then the driver would be liable. If again it was due to a dump and the impact, again the driver would be held liable. None of the probabilities were proved. See Section 1**07-109 of he Evidence Act.** They were only assertions.

26. I have considered that none of the evidence tendered of high speed was collaborated by any witnesses. Documents to show the load carried by the vehicle were not tendered for the court to determine whether the vehicle was overloaded with the timber or not. The investigating officer did not testify or produce sketch maps to confirm presence of bumps at the scene of accident. All that evidence remains uncorroborated and not proved. It was made to suit each parties position on the cause of the accident. The county motor vehicle mechanic gave the three options that could have caused the accident. Being an expert in that field, his evidence is more believable.

In the absence of full proof as to what exactly was the cause of the accident, this court is unable to declare with certainty the cause of the accident. The county mechanic gave three probabilities. None of them was proved.

27. When there is no clear cut prove or cause of an accident even after the rival parties have tendered their evidence, the court nevertheless has to come to a finding, with the evidence as adduced.

In **C.A. No.131 of 2006 – Chivatsi Simba Mwangiki -vs- Bonfiace Musyoka (2011) e KLR J Ojwang (as he then was)** faced with conflicting evidence before the trial court, rendered himself that

> ***"As the very essence of the judicial task is invariably application of the law, and assessment of evidence a focused attention to these matters is vital, and this is especially so for evidence because it nearly always unfolds differently for every case. What is sought in the evidence is the true story, and an effective scrutiny of evidence given, however long or short it is, will always illuminate the true position,the court's orders must be founded on the truth."***

28. Taking que from the above observations by the Learned Judge of the Supreme Court (as he is now), the truth of the evidence in this case even after agonising over the evidence is that either of the three options could have crossed the accident. In **H.C.A. NO 105** of **2013 Muturi & KPLC -vs- Samuel Irungu Ngugi & Another (2017) e KLR, a**pplying the legal position in Kenya that:

> ***"there is yet no liability without fault in the legal system, a plaintiff must prove some negligence against the defendant where the claim is based on negligence."***

I must state here that both the plaintiff and the 1st defendant blame each other for the causation of the accident. The evidence before the court does not give the true story and the truth as to the real cause, but scrutiny of the same shows that and it is my finding, that both parties played a role, to the causation. The owner of the vehicle, the 1st defendant may have overloaded the vehicle, a fact not proved, or the driver may have been overspeeding which again was not proved or may have ran over a bump, lost control and the vehicle overturned. In that limbo the best I can do is to find that both the plaintiff and the 1st defendant were equally to blame for the accident, and for the consequential injuries to the plaintiff and damages that flow from their negligent acts of commission, or omission.

29. ***Quantum* of damages**

There is no dispute that the plaintiff sustained injuries during the accident, as well stated by the 1st Defendant when he visited him in hospital.

By consent of the parties, all the medical records from Kenyatta National Hospital, War Memorial Hospital and treatment notes from Royal clinic were produced and admitted. I have considered them together with each parties submissions on *quantum* of damages.

30. In his plaint, the plaintiff pleaded general damages for the injuries stated as:

- ***Head injury with left frontal subcute subdural haematoma***
- ***Traumatic amputation of the lower right limb.***

He further pleaded general damages for loss of earning capacity and for medical expenses and special damages. Permanent incapacitation was assessed at 40%.

(a) General damages for pain and suffering and loss of amenities

The plaintiff cited the case of **Daniel Kosgei Ngelichei -vs- Catholic Registered diocese of Eldoret (2013) e KLR**

The **plaintiff herein sustained serious injuries including a traumatic amputation of the lower limb and degree of disability assessed at 80%.**

On this subhead, a sum of Kshs.2.1 Million was awarded.

31. In **Isabel Nyambura -vs- Sanric Suppliers Ltd HCCC No 349 of 1996 (Nyeri - unreported)** the plaintiff with 70% degree of incapacitation was awarded Kshs.1,250,000/=.

The plaintiff in **David Kigotho Iribe -vs- John Wambugu Ndungu & Another (2008) e KLR** was awarded Kshs.1,300,000/= for injuries including amputation of the right lower limb, with a 50% permanent disability.

The plaintiff proposed Kshs.3,000,000/= but did not tender any authority to support such proposal.

32. **Damages for Pain and suffering** are awarded for the physical and mental distress caused to the plaintiff including the pain itself, the treatment intended to alleviate it, disfigurement and suffering caused by anxiety that the plaintiff's condition may deteriorate.

Indeed the plaintiff in this case testified that being a professional driver he may never drive again. I shall award the sum of Kshs.1,500,000/= as reasonable compensation.

33. **Damages for Loss of future earning capacity**

This subhead of damages must be specifically pleaded and proved. The plaintiff testified that his salary as a driver was Kshs.18,000/= per month. He was 30 years old at the date of accident. He testified that he may never drive again. I have considered that no evidence of employment or a salary were adduced. However, the plaintiffs could have been a driver at call. The only guidance that the court can consider is by adopting the basic wages salary in 2009 for a lorry driver. There is no dispute that the plaintiff was a lorry driver. The wages guidelines for 2009 are not provided. What is provided is the 2012 Regulations that state earnings of a heavy vehicle driver as Ksh.19,360/50.

In my opinion, it would be proper and reasonable to adopt earnings of Kshs.15,000/= per month. His incapacitation was assessed at 40%, hence it cannot be true that he would not be able to engage in any gainful venture in future. The plaintiff has to mitigate the loss.

34. It is now trite that compensation for future earnings are awardable for real assessable loss proved by evidence. None of the above evidence was produced as I stated above.

See **C.A No. 91 of 2003 (Kisumu) Mumias Sugar Co. Ltd -vs- Francis Wanalo Ordinarily.** Loss of earning capacity without proof can be inferred from the nature of the work either before or after the injury, and the damages would be for loss of ability to earn and it ought to be reasonable.

35. Being 30 years old at the date of accident, the plaintiff would have worked and earned income for upto 60 years and beyond for over a period of over 30 years. He is however not 100 % incapacitated. For that, I shall adopt an income of Kshs.15,000/= for 20 years and a multiplicand of 1/3. That would therefore work up as follows:

15,000 X 12 X 20 X 1/3 = KShs.1,200,000/=

See **Nicholas Njue Njuki -vs- Eliud Mbugua Kachuro (2014) e KLR** where Justice Ngaa adopted an income of Kshs.5,000/= for a plaintiff whose income was not proved and at 25 years adopted a multiplier of 30 years and proceeded to award damages for loss of future earing capacity assessed at the above, and on the assumption that the plaintiff would be more than 75% incapacitated which I find was not the case, in the present case as he would find some gainful venture having incapacitation of 40%.

36. The sum of Kshs.7,560,000/=proposed by the plaintiff was not supported by any sound legal

submission or authorities or at all having urged a salary of Kshs.18,000/= per month for 35 years.

37. **Future Medical Expenses were pleaded at** Kshs.6,340,000/= made up of cost of first artificial leg and 90 replacements of the limb at Kshs.70,000/= a piece.

I have stated above that no expert evidence was tendered to prove the expense. This was merely throwing figures to the court, I agree an expense would go to the purchase of the first artificial limb but none was tendered. Dr. Kiamba in his report did not give the cost of the 1st artificial limb but only replacements at Kshs.70,000/=.

38. I have considered several authorities where doctors have estimated the cost of various artificial limbs, depending on the nature and from what institution that range from 50,000/= upwards.

The plaintiff has proposed Kshs.40,000/= for the first artificial limb. I shall allow the same that being a necessity taking the nature of the injury to the plaintiff. Future replacement costs were not proved.

See **Daniel Kosgei Case (Supra**). Though I have said the expense was not proved, it is a reality and a natural course flowing from the nature of the injury. I shall allow 3 replacements of the artificial limb at Kshs.40,000/= each, every six year period. That comes to Kshs.160,000/=.

39. **<u>Special Damages</u>**

A sum of Kshs.158,890/= was pleaded as special damages, and basically as medical expenses.

During his evidence, the plaintiff produced a bundle of receipts in support of the special damages. I shall allow the said sum of Kshs.158,890/= as pleaded and proven.

40. From the foregoing, the court finds that the plaintiff has proved his case on a balance of probability to the extent stated above. Consequently, judgment is entered for the plaintiff against the 1st defendant as follows:

(1) Liability is apportioned equally at 50:50 basis between the plaintiff and the 1st defendant.

(2) The plaintiff's case against the 2nd defendant is dismissed with no orders as to costs.

(3) General damages

(a) Pain and suffering – Kshs.1,500,000/=

(b) Loss of future earning capacity - Kshs.1,200,000/=

(c) Future medical expenses - Kshs. 160,000/=

(d) Special damages - Kshs. 158,890/=

Total Kshs. 3,018,890/=

50% thereof = Kshs. 1,509,445/=

(e) The above sum shall accrue interest at court rates from the date of this judgment.

(f) Each party having been found to have been 50% liable, no costs will be awarded to either the plaintiff or the 1st defendant.

(g) The plaintiff case against the 2nd Defendant is dismissed with no orders as to costs.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N. MULWA

JUDGE