



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 112 OF 2013**

**P N N(*Suing as guardian ad litem of***

**F R N N)..... PLAINTIFF**

**VERSUS**

**CHARLES JOHN MUSEE.....DEFENDANT**

**JUDGMENT**

This Suit was instituted by way of a Plaint dated 8<sup>th</sup> April, 2013 which Plaint was amended twice and a Further Amended Plaint dated 21<sup>st</sup> April, 2016 was filed on 28<sup>th</sup> April, 2016. The Plaintiff avers that at all material times, the Defendant was the registered owner of motor vehicle registration number KAV 623J and that on or about 1<sup>st</sup> day of June, 2012, the Plaintiff was a lawful passenger in the said motor vehicle along Langata Road, Nairobi, when the Defendant's driver, servant, employee or agent, so carelessly, negligently, and/or recklessly drove, managed and/or controlled motor vehicle registration number KAV 623J that he caused it to lose control and overturn resulting in severe head injury to the Plaintiff.

The Plaintiff attributed negligence to the Defendant's said driver for failing to keep proper look out, driving at excessive speed, failing to slow down and stop in time and failure to manoeuvre the said vehicle so as to avoid the accident. The plaintiff also relied on the doctrine of "*Res ipsa loquitur*"

As a result of the accident, the Plaintiff avers that he suffered the following injuries;-

- a. Severe head injuries with deep cut wound on the scalp.
- b. Cut wound on the left supraorbital area
- c. Chest injuries with lung contusion
- d. Severe brain injury involving the brain stem.

As a result, the Plaintiff has sued for;-

- e. Special damages in the sum of Kshs. 10,971,872.15 together with interest
- f. General damages for pain, suffering and loss of amenities,
- g. Future medical expenses

h. Costs of this suit and interest thereon at court rates.

i. Any other relief that this Honourable Court may deem fit and just to grant.

The Defendant filed a Further Amended Statement of Defence dated 16<sup>th</sup> May, 2016 and denied the claim. He denied that his driver, servant, employee or agent so carelessly drove the motor vehicle KAV 623 J causing it to lose control and overturn resulting in severe injuries to the Plaintiff and puts the plaintiff to strict proof thereof. He attributed the accident to the negligence of the Plaintiff wholly or substantially, for travelling as an unauthorized passenger, failing to wear seat belt and travelling while standing in a moving vehicle. Without prejudice to the foregoing, the Defendant also attributes the accident to the negligence of drivers of unknown motor vehicles who drove their vehicles negligently. The particulars of negligence are enumerated in the Statement of Defence.

The Defendant denied that he is vicariously liable to the Plaintiff in respect of the said loss and damage and further averred that the suit is incurably defective and an abuse of the Court process hence the same should be struck out.

At the hearing of this case, the Plaintiff called doctor **Julius Githinji Kiboi (PW1)** as the first witness. PW1 is a neurosurgeon practicing as such in Nairobi hospital, as a brain and spinal specialist. He attended to F R N N all though since he was admitted in the hospital. He testified that at the time of admission, F R N N was 19 years old and as a result of the accident he sustained a severe head injury with a deep cut wound on the scalp which injury had damaged the brain stem. He also had left supra orbital above the left eye, chest injuries and was unconscious thereby necessitating ICU management. He is severely disabled and cannot function normally. Before the accident, F R N N was intelligent and had scored grade A according to the history he had taken. However, when he saw him after the accident, his brain function was poor and he did not have speech, visual perception and could not walk. PW1 testified that F R N N needed long term treatment and home nursing which would be expensive to cater for. He will also require anti-epileptic drug. As a result of the accident, the doctor's opinion was that it would be very difficult for F R N N to continue with his education and get employment.

In cross examination, PW1 testified that there was some improvement between the time he made his report and now. However, the perception has not improved for the last 6 to 7 months and there is little possibility that the plaintiff will improve. PW1 was not able to quantify future medical expenses. In re-examination PW1 testified that F R N N would require long life treatment.

**P N N**, F R N N's father filed the suit as a guardian ad litem of F R N N and testified as **PW2**. His testimony was that F R N N was born on 23<sup>rd</sup> July, 1993 and that on the material day, 1<sup>st</sup> June, 2012 at around 6.30 to 7 pm, he received a call from a good samaritan using F R N N 's phone that F R N N had been involved in a serious accident. He called his elder son to proceed to Langata hospital. When he together with his wife proceeded to check on F R N N, he had been transferred to Nairobi hospital where they found him being resuscitated. He met the parents of the driver who was driving the ill-fated vehicle at Langata hospital casualty department, who had also brought their injured son to the hospital. He learnt from them the details of the accident and from there he proceeded to Langata police station where he saw the vehicle and inspected the OB where he learnt that his son was traveling as a passenger in the vehicle.

He further testified that to date, his son can't take care of himself and he is under 24 hour nursing care, can't walk and the speech is not audible. He provides nursing care together with physiotherapy, speech therapy and occupational therapy. Every six months a review is done. It was his testimony that in the year 2011, F R N N had completed his "o" level and attained a grade A and had been admitted to study Bachelor of Science (BBS) financial economic course. In cross examination he testified that his son requires medication which is continuous to date. However, he did not produce evidence to show that he is still being attended to, by doctors.

The Plaintiff called **Warren Mboya** an eye witness who testified as **PW3**. Warren was also travelling in the ill-fated vehicle. He knows both the Plaintiff and the Defendant herein since they are the fathers of his friends. He testified that the vehicle they were travelling in was a pick up. That F R N N and Kevin were

seated in the front cabin and F R N N was an authorized passenger. He told this Court that he was seated in the back of the pick-up with the fourth colleague one Stephen Njoroge. They had travelled to Masai lodge in Ongata Rongai for lunch and had all assembled at T-Mall from where the driver picked them and they willingly boarded the vehicle.

On their way back, as they approached kobil petrol station, along Langata road, another vehicle veered into the road and as Kevin was trying to avoid hitting it their vehicle lost control and rolled. On their way back they were seated in the same positions. After the accident, they were all taken to Langata hospital and F R N N was profusely bleeding. He told the court that the last time he saw F R N N was early 2015 and he had difficulties in performing basic tasks. In cross examination, he stated that it is the other vehicle that caused Kevin to lose control and that he was not sure whether F R N N was wearing a seat belt. He also clarified that there is a passenger's seat in the front cabin.

The Defence called one witness, Stephen Gatei Njoroge (DW1) who was also a passenger in the subject vehicle. DW1 was seated at the back of the pick up together with Warren. He testified that they had gone to Masai lodge for swimming and at around 6.30 pm when they were on their way back, as they were approaching Carnivore, two cars emerged from a minor road on the left side of Langata hospital. Their driver was driving on the main road and as he maneuvered to avoid hitting the cars, their vehicle swerved and he was thrown outside. He became unconscious but he could see that the vehicle rolled and hit a tree and an electric pole.

He was not sure whether the passengers in their vehicle had worn safety belts. He testified that they had not been involved in any other accident before when Kevin drove them. He blamed the two unidentified vehicles for causing the accident.

In cross examination he testified that there was no contact between their vehicle and the other two vehicles. It was his evidence that if Kevin was not driving at a high speed the accident could have been minor. Kevin was driving at a speed of 70-80 Kph. In re-examination he stated that he could not see the speedometer from where he was and that he was not able to read the registration numbers of the other two vehicles.

After the close of the defence hearing, Counsels filed and exchanged written submissions.

The Plaintiff filed written submissions dated 9<sup>th</sup> November, 2016. On liability, he submitted that DW1 Stephen Gatei testified that the accident would probably not have occurred if the vehicle was not being driven at an excessive speed.

The Plaintiff also submitted that the accident cannot be blamed on an unknown motor vehicle as claimed by DW1 and therefore since the plaintiff's evidence has not been rebutted, the Plaintiff urges the court to find the Defendant liable.

On quantum of damages, it is the Plaintiff's submission that F R N N suffered severe disability and requires 24 hour nursing care and continuous physiotherapy. That he will need a long term nursing care. F R N N was an intelligent young man who had scored a high score of A- in high school and his mental functions have slight chance of recovery and the victim's parent still continue to incur massive bills in terms of nursing care and physiotherapy.

The Plaintiff relied on the cases of **Martin Kidake v Wilson Simiyu [2014] eKLR** where the Plaintiff had suffered,

***“Injuries on the head, hands, neck and shoulder. Thereafter he was taken to Kenyatta National Hospital in a coma. The Plaintiff cannot walk, feed himself or talk as the brain is severely damaged and he is paralysed. At the time of giving evidence on 14<sup>th</sup> December, 2012, the plaintiff was 14½ years old.”*** And the court awarded damages as follows;

***a. General Damages for pain, suffering and loss of amenities Kshs 3,500,000.00***

**b. General Damages for loss of future earning capacity Kshs 500,000.00.**

**c. Costs of future surgery Kshs. 550,000.00.**

**d. Special damages Kshs. 34,120.00.**

**e. Cost of the wheelchair Kshs 525,000.00**

**f. Cost of minder Ksh 4,200,000.00**

**g. Costs of the suit.**

**h. Interests on (a), (b), (c), (e) and (f) above at court rates from the date of judgment till payment in full. Interests on (d) at the same rate from the date of filing suit till payment in full.”**

The Plaintiff also relied on the case of **Brian Kieya Mokuia v Christopher Komen [2015] eKLR** where the Plaintiff had suffered Glasgow coma scale 8/15 , paralysis on the left upper limb and bilateral lower limbs, swollen face, cut wounds and pain and blood loss among other injuries and the courts award was as follows:-

**a. “Kshs.6,000,000/-Less 20%.....Kshs.4,800,000/-**

**b. Future Medical expenses: .....Kshs.1,445,000/-**

**c. Less 20%.....Kshs.1,156,000/-**

**d. Special damages.....Kshs. 10,500/-**

**e. Total.....Kshs,5,099,500/-“**

In the above case, the total award was therefore Kshs. **5,099,500** and not Kshs. 15,042,157.32 as tabled and submitted by the Plaintiff. The plaintiff also submitted that in the instant case the Glass glow com was severe at 4/15 unlike in this authority where it was 8/15.

The Plaintiff also relied on the case of **RUKIA MUGOYIA v JOHNSON JUMA OGUTU & ANOTHER [2007] eKLR** where the Plaintiff had suffered wedge compressions, fracture dislocation, facial paralysis, loss of stool control and loss of sensation from the naval region downwards and he was awarded Kshs. **12,462,000.00** in general damages.

The plaintiffs submitted that the injuries in the instant case were more severe and proposed awards as follows;

**a. General damages for pain and suffering, loss of amenity and loss of earning capacity - Kshs. 50,000,000**

**b. Special damages with interest from filing of the suit**

**c. Medical Receipts – Kshs. 10,971,872.15/=**

**d. Doctors attendance Kshs. 20,000**

**e. Future medical expenses (Physiotherapy, occupational therapy, speech therapy, home nursing (amounts derived from total of May 2014 - August 2015 using a multiplier of 40. – Kshs, 45,200,000.00**

**Therefore the Plaintiff prayer for a total of Kshs. 106,191,872.20**

On the other hand, the Defendant submitted that he should not be held vicariously liable for the accident of the driver. The driver in this matter was his son. He submitted that the driver of the suit vehicle was not driving the pick up while in performance of tasks or duties that were for the benefit of the Defendant and from the evidence adduced in Court, the occupants were on a leisure drive. On this, he relied on the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014]** where the court restated its decision in **Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986** as follows:-

***“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”***

Therefore, the Defendant submitted that on the fateful day the vehicle was neither being used in performance of task or duty that was delegated to the Defendant’s driver by the Defendant. The Defendant further submitted that he did not owe a duty of care to the Plaintiff as he ought to have known that by riding in the single cab pickup he was taking a risk. He relied on the case of **Tabitha Nduhi (supra)** which case quoted the case of **Ormrod & Another –vs- Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA**, where it was held that:-

***“The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern.”***

The Defendant also submitted that the Plaintiff failed to mitigate his injuries by not wearing a seat belt and that the Plaintiff was not at the scene and therefore he was not in a position to give direct evidence as to the occurrence of the accident.

On quantum of damages, the Defendant submitted that the Plaintiff did not plead specific amounts in future medical expenses. That there was no evidence relating to future medical expenses subsequent to 2015. After leave was granted to file further documents, the Plaintiff only filed documents relating to the year, 2012. The defendant also states that the Plaintiff had made recovery going by the evidence of PW1 who stated that the Plaintiff was making progress as he could move on wheel chair and there was a possibility of improvement.

On general damages for loss of earning capacity the Plaintiff proposed an amount of Kshs. 1,000,000/= and relied on the case of **A.A.M Vs Justus Gisairo Ndarere & Another (2010) eKLR** where the sum was awarded to a student who was paralysed following a road traffic accident. On General damages for pain and suffering, the Defendant proposed Kshs. 1,500,000/= and relied on **Nairobi HCCC No. 1728 of 1999 Reuben Memo Werunga Vs. Michael Odindo** where the Plaintiff was paralysed and the Court awarded Kshs. 1,500,000/= for pain, suffering and loss of amenities.

I have considered the arguments of both parties, the evidence before this court, submission and authorities cited. There is no dispute that the said accident occurred. This Court will therefore seek to determine the following issues;

- i. Whether the defendant’s driver, servant or agent was to blame for the accident and whether the defendant is vicariously liable.
- ii. Whether the unknown drivers are to blame for the accident.

- iii. Whether the Plaintiff was an unauthorized passenger.
- iv. Whether the Plaintiff contributed to the accident.
- v. Whether the Plaintiff is entitled to the prayers sought.

On liability, the standard of proof in civil cases is on a balance of probability. From the evidence before this court, it has been proven that an accident occurred on 1<sup>st</sup> June, 2012 involving motor vehicle registration number KAV 623J which was being driven by the Defendant's son. The vehicle is registered in the names of the Defendant. The Defendant does not deny that the said accident occurred but rather attributes negligence to unknown motor vehicles.

In the case of **Gachanja Muhoro & Sons Ltd v Titus Mwala Nduva [2015] eKLR** where the Appellant blamed the accident on the negligence of unknown third parties, the Court held that,

***“On whether the accident was caused by the negligent acts of a third party, it is noted that the appellant was the registered owner of the motor vehicle according to the copy of records produced from KRA. As stated by the Court of Appeal in Kenya Bus Services Limited Vs. Humphrey (2003) KLR 665: (2003) 2 EA 519 the Court of Appeal held that:***

***“...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. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”***

***“I find the Appellant 100% liable to the accident.”***

The testimony of the plaintiff's witness PW3 who was also travelling in the said motor vehicle was that the car was being driven at an excessive speed that it lost control and overturned. The accident, according to the testimony of PW3 was self-involving. Both the Plaintiff and Defendant called an eye witness who was travelling in the subject motor vehicle. Apart from attributing the accident to the high speed at which the vehicle was driven, it was testified that the driver of the vehicle was obstructed by unknown driver(s) who approached the road from a minor road. The eye witnesses did not take the registration numbers of the other vehicles. As it was held in the case of **Muhoro & Sons Ltd v Titus Mwala Nduva** (supra), negligence cannot be attributed to unknown drivers. The said unknown drivers are not parties to this suit and as such they remain unknown.

According to the evidence tendered in Court, it is not clear whether the Plaintiff had fastened his seat belt or not. The evidence of PW3 and DW1 is that they could not tell whether the Plaintiff had fastened his seat belt. The law is trite that he who alleges must prove and I find that the Defendant has not substantiated his claim that the Plaintiff had not fastened his seat belt.

The Defendant raised the issue of vicarious liability and submitted that in the circumstances of this case, the car was not being driven for his benefit. He also submitted that since there was no agency relationship, then the Defendant should not be liable. However, I find that that was not the true position. The Defendant here was aware and had authorized the driver, his son, to use the vehicle. The Defendant has not denied having authorized his son to use the vehicle. There was no evidence tendered to show that the driver took the car and drove it without the knowledge and authority of the defendant. Vicarious liability is not limited to employment relationships. In **Messina Associated Carriers –vs- Kleinhaus, [2001] 3 All SA 285 (SCA)**, which was quoted in the case of **Tabitha Nduhi** (supra) the Court noted that-

***“The law will permit the recovery of damages from one person for delict committed by another where the relationship between them and the interest of the one in the conduct of the other is***

***such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, ... where ‘in the eyes of the law’ the one was in the position of the other’s servant.”***

In **Kenya Bus Services Limited Vs. Humphrey** (Supra) the Court of appeal held that;

***“...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. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”***

The driver of the subject motor vehicle is a son of the Defendant. By the time the accident occurred, the driver had just finished his high school and was living with the Defendant. This in essence would translate to the fact that he was under the care of his parents who would be responsible for eventualities occasioned by the driver using the defendant’s vehicle. Even though the subject vehicle was a pick-up, the Plaintiff was seated in the cabin next to the driver and not at the back truck. The seat occupied by the Plaintiff was meant for passenger and not for goods. Unlike DW1 and PW3 who were riding on the back of the truck, the Plaintiff was lawfully travelling in a passenger’s seat. The testimony of the two eye witnesses was that the plaintiff was authorised by the driver to use the passenger seat in the front cabin. Therefore I find that the Defendant is vicariously liable for the accident and I enter judgment on liability against him at 100%.

On quantum of damages, it is a well-established principle that the assessment of quantum of damages in a claim for general damages is a discretionary exercise which must be exercised judiciously having regard to the facts of the case within the context of existing legal principles.

In **Denshire Muteti Wambua Vs KPLC Ltd (2013) eKLR** the Court of Appeal observed that;

***“further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that of comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd vs Bimomo & 2 Others (2004) 2 KLR 101)”***

I have considered the submissions of the Counsels for both parties on the issues of damages. The Defendant is opposed to an award on future expenses and argues that the Plaintiff did not plead a specific amount. It is trite law that a party is bound by its pleadings. The Plaintiff did not plead future medical expenses to enable this Court make an award on the same. Therefore this prayer fails.

On special damages, the same must be specifically pleaded and proven. From the Plaintiffs list of document, I have done a computation of the expenses properly incurred which have been pleaded and proved. When doing my computation, I have noted that there are medical expenses for quite substantial amount of money but without proof of payment which I could not factor in, in my computation. In total I have arrived at a figure of Kshs. 6,968,382 as the special damages pleaded and proved.

On general damages, I have considered the authorities submitted by both parties. The plaintiff’s authorities are more similar to the injuries sustained herein. I have also factored in the fact that the Plaintiff had a bright future having excelled well in “O” levels with a grade of A- and about to join University to pursue a degree course in Bachelor of Business Science (BBS) Financial Economics Course. According to the medical examination of PW1 it is clear that the plaintiff suffered severe injuries which included severe head injury with a deep cut wound on the scalp which injury has damaged the brain stem. That the plaintiff had left supra orbital above the left eye, chest injuries and was unconscious thereby necessitating ICU management. His opinion was that the plaintiff was severely disabled and cannot function normally. PW1 also formed the opinion that the Plaintiff had little chances of advancing

his education and getting employment. The plaintiff had a very bright future which was completely ruined by the subject accident at his young age of 20 years. His life will never be the same again. In the result I enter judgment in favour of the plaintiff and against the defendant in the following terms:

- a. General damages for pain and suffering - Kshs. 10,000,000
- b. Special damages with interest from the date of filing of the suit
  - i. Medical Receipts – Kshs. 6,948,382 /=
  - ii. Doctors attendance - Kshs. 20,000

Total Kshs. 16,968,382/=.

The plaintiff is also awarded the costs of the suits.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of December, 2017**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:-**

.....**for the Plaintiff**

.....**for the Defendant**