



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 665 OF 2007

CAROLINE ENDOVELIA MUGAYILWA.....PLAINTIFF

VERSUS

LUCAS MBAE MUTHARA.....DEFENDANT

JUDGMENT

This is a claim for special and general damages on account of a road traffic accident which occurred on 16th October 2005 along the along Kangundo Road Nairobi. The accident involved motor vehicle registration number KRL 158 and KAQ 158B Mercedes Benz. The Plaintiff was a duly authorized passenger in the motor vehicle registration number KRL 158. It is her case that the motor vehicle registration number KAQ 158B was so carelessly and negligently driven by the Defendant, his duly authorized agent, servant and/or driver that he caused it to hit motor vehicle registration number KRL 158 thereby causing the Plaintiff to sustain serious injuries. Particulars of negligence and injuries she sustained are enumerated in paragraph 4 of the Plaintiff.

The Defendant filed his statement of defence on 6th October 2008 and while he conceded that an accident did occur at the time and place in the Plaintiff, he denied being negligent or that the Plaintiff suffered any injuries. He contended that the accident was wholly caused by and/or substantially contributed to by the negligence of the owner or authorized driver of the motor vehicle registration number KRL 158; that the driver herein was even charged with a traffic offence as a result of the said accident. Particulars of negligence attributed to this driver are listed in paragraph 4.

The Plaintiff subsequently filed reply to defence on 9th October 2008 where she joined issue with the Defendant on his statement of defence. She averred that notwithstanding the Traffic Court's verdict in Nairobi Case Number 50327 of 2005, this Court has discretion to re-evaluate the evidence and reach a different verdict in her favour.

Third party proceedings were taken out by the Defendant herein against Peter Kioko Mwake through third party notice filed on 16th March 2011. As he did not enter appearance after being served the Defendant proceeded to request for Interlocutory Judgment which was granted on 6th October 2013.

Two witnesses testified on behalf of the Plaintiff. PW1 Corporal Edwin Nyikuri attached to Kayole Police station performing traffic duties and who started work in that station in April 2015 referred to the Occurrence Book (O.B.) entry in reference to the accident. The entry indicated that an accident was

reported to have occurred at around 4 pm on 16th October 2005 along Kangundo Road at Makongeni involving Motor Vehicle Registration Number KAQ 158B Mercedes Lorry driven by Felix Kyalo and Motor Vehicle Registration Number KRL 158 Toyota Pick-up driven by Peter Kioko. It also revealed that the said Peter Kioko failed to keep to his side of the road and thus hit the other Motor-vehicle. That as a result of the impact, it veered off the road and landed upside down on the side of the road. That the Plaintiff was one of the passengers of that Motor-Vehicle who sustained injuries and was rushed to Kayole Hospital and later transferred to Kenyatta National Hospital. The witness confirmed that other than the O.B. entry, he could not trace the police file. He then produced in evidence a copy of the O.B. and the Police Abstract as Exhibit 1A and 1B respectively. He clarified that Kangundo road is a single lane road.

Upon cross-examination, he stated that he was not familiar with the scene of the accident but from the O.B. he could tell there were four passengers in the pick-up including the driver. That from the abstract, it is indicated that the driver of the pick-up was to be charged with careless driving. From the proceedings, he could tell that the driver of the KRL 158 was convicted and fined Kshs. 10,000/- with the option of serving six months imprisonment. That he did not know of the status of the accident motor-vehicles.

On re-examination he concurred that according to the criminal court proceedings, the driver of the Lorry attempted to overtake the pick-up.

In the course of hearing, consent was recorded in the following terms-

‘we have agreed to acquire a new wheel chair and have agreed to amend paragraph 4 of the plaint- particulars of special damages (b) medical expenses to include Kshs. 9,450/- for the wheel chair altering the total pleaded from Kshs. 90,410/- to Kshs. 99,860/-. Grand total for medical expenses shall now be Kshs. 105,560/-. All these have been approved subject to proof...we have also agreed that the Defendant filed list of documents on 14.2.2012. The documents of the Defendant and the Plaintiff’s medical Report by Dr. Morris Simiyu of 26.8.2006 is also going in by consent.’

The Plaintiff testified as PW2. She adopted her witness statement filed on 13th December 2011 as her evidence-in-chief. She recalled the date of the accident when she was assisting her brother shift houses from Dandora to Ruai in Nairobi. She was a passenger in motor-vehicle registration number KRL 158 pick-up at the back with her sister (Doreen Lumadede) on benches attached to the vehicle. The pick-up’s back was enclosed. That after crossing a police road block, a vehicle from behind attempted to overtake and ended up hitting the pick-up at the right rear side. The pick-up veered off the road and overturned at which point she lost consciousness. When she came to, she was at the Kenyatta National Hospital but she later learnt from her medical records that she was first admitted to Kayole health centre before being transferred. She realized she had suffered a head injury and a spinal cord injury. At Kenyatta National Hospital she was admitted from 16th October 2005 to 10th January 2006. She was then transferred to Spinal Injury Hospital as the injury had left her paralysed from waist downwards. Here she was admitted for about 5 to 6 months.

She was working with the Kenya Bus Service (K.B.S) at the time of the accident; she has a Diploma in Computer Science from Informatix Computer College in Pakistan whose certificate is dated August 1999. She also studied Bachelor of Arts in Economics and Political Science at the University of Punjab. At K.B.S she was earning Kshs. 700/- per day. She was a casual worker but after the accident she was unable to work and she hasn’t resumed. She lives on the Third floor.

She obtained a police abstract which states that the registration number of the lorry that hit them is KAQ 158B. That Dr. Siminyu examined her on 8th August 2006 and prepared a report dated 26th August 2006.

She established through her Advocate that the Defendant was at the material time the owner of the motor-vehicle registration KAQ 158B. She testified that she uses diapers and urine bags, drugs for bed sores and urinary tract infections, drugs to control bowel movement for which she doesn’t know the cost. She produced her entire bundle of documents as P Exhibit 2. That when her wheelchair broke down she

replaced it with one that cost Kshs. 9,450/- whose receipt she produced in evidence as P Exhibit 3(a) and (b). That she has employed an assistant to help her around whom she pays Kshs. 20,000/- per month. She prayed for judgment to be entered as prayed.

On cross-examination, she confirmed that she lives in California Estate with her mother who pays the rent. This is where she used to live even prior to the accident. She neither sued Kioko (driver of the pick-up) nor the owner as they did not cause the accident. That though she knew Kioko was charged in the lower court criminal case, she did not give evidence as she was in hospital. She sat on benches fixed to the pick-up facing her sister without a safety belt. Even though she could not see in front or behind, she could tell the pick-up was moving slowly. She did not see the lorry try to overtake. However, she could not remember many things after she suffered the head injury.

The Plaintiff maintained that she had worked for K.B.S. for about a year when the accident occurred and previously worked at Green House Restaurant as finance manager though she did not have a letter to confirm this. She worked 31 days a month as she worked weekends for same pay. She has not sought any job opportunities in the Government though she is aware of its policy on People Living with Disabilities. Despite the fact that she can work, she is unable to sit for long periods of time. On the issue of bed sores and physiotherapy, she asserted that she has learnt to avoid the pressure of the bed sores and despite the fact that she has attended hospital in Eastleigh for treatment; she did not have proof in court.

On being re-examined, she confirmed that the pick-up was moving slowly before the accident which happened approximately five minutes after passing a police road block. Before the accident she could work from 8 am to 5 pm with a lunch break but currently, her spinal injury cannot allow it. She also uses diapers. That the reason she does not attend physiotherapy is because it costs money and it is not carried out free of charge at the Spinal Injury Hospital. That was the close of the Plaintiff's case.

The defence called two witnesses. DW1 Philip Kyalo Ngwili adopted his witness statement dated 1st December 2014 as his evidence-in-chief. He added that he gave evidence in Traffic Case No. 5027 of 2005 where accused was Peter Kioko Mwake, the driver of the pick-up registration number KRL 158. He explained that there was an accident between the pick-up and the lorry (Registration Number KAQ 158B) he was driving on 16th October 2005 along Nairobi-Kangundo Road. He was with his conductor Paul Kinyanjui. The lorry was loaded with building sand.

He attempted to overtake on the right hand side as he did not see any sign warning him that he should not overtake. The road was marked with a broken line and as he overtook, the pick-up accelerated and moved to his lane leading to a collision with the left hand side mudguard of the lorry. The pick-up went back to the left side, rolled once and rested on its left hand side.

After the collision the lorry rested on the right hand side of the road still facing the direction it was moving. That there was no police road block just before the accident. He had observed that the pick-up was moving in a zigzag manner before he started to overtake and according to him the pick-up driver was not observant and caused the accident when he came to his side while he was overtaking. He reiterated that he did not cause the accident.

Upon cross-examination, he asserted that he qualified as a driver in 1998 to drive lorries. He was transporting sand from Kangundo to Nairobi when he noticed the pick-up moving in a zigzag manner from 50 to 100 metres before he started overtaking. He did not hoot but only flashed and then indicated he was overtaking. After the accident he drove the lorry to Kayole police station and later saw the Pick-up arrive. At that point, the police informed him that Kioko had been taken into custody as he was liable for the accident. He denied that he took the opportunity to report the accident when he realized the driver of the pick-up was not present at the police station.

According to him, there were no oncoming vehicles. It is the pick-up which veered to his side of the road when he was in the process of overtaking leading to the collision between the two vehicles. He conceded that a driver has to keep distance between his vehicle and that in front while also focussing on the front and should be more cautious. That in his estimation, the size of the road was about 10 metres

wide, his vehicle was about 4 metres wide, the pick-up was smaller so he had all the room to overtake.

The second witness for the defence Paul Kinyanjui Ndung'u (DW2) stated that he worked for the Defendant as a mechanic from 1997 to 2010. He adopted his witness statement dated 1st December 2014 as his evidence in chief. He gave evidence in the lower court criminal case relating to the accident when the pick-up driver was charged.

On being cross-examined he stated that the pick-up entered the road from the left side ahead of the lorry and drove ahead for more than 500 metres. That he did not encounter a police road block. He could see the pick-up move in a zigzag manner more than 500 metres ahead even as they approached it. He saw the driver of the pick-up talk on phone though this is not mentioned in his statement. There were no oncoming vehicles when the lorry overtook. When the accident occurred, he and other good Samaritans removed the injured from the pick-up before proceeding to the police station where they were questioned. When they returned the following day, the police who had visited the scene were there and the report was made. It was the scene of the accident that led to the pick-up driver to be charged and not the report made to the police. He insisted that PW1 was not avoiding oncoming vehicles when the accident occurred as he estimated the speed of the lorry at 50 Kilometres per hour. That the pick-up had completely slowed down but increased speed at the point of overtaking.

On re-examination, the witness maintained that after the collision, the lorry stopped on the right side; that the pick-up entered the road from the left and drove ahead of them for about 500 metres.

That was the end of the testimonies of the witnesses. In dispute is whether or not the accident can be attributed to the negligence of the Defendant in his manner of driving and control of his motor vehicle, and if so, to what extent vis-à-vis the third party who did not enter appearance thus did not testify. Should negligence be found as against PW1, the Defendant's vicarious liability cannot be in dispute.

If the issue of liability is decided in favour of the Plaintiff, there will then be the issue of what damages and the quantum thereof should be awarded to the Plaintiff.

LIABILITY

Only two eye-witnesses testified in regard to liability. These are the defence witnesses; the driver and mechanic of the motor-vehicle KAQ 158B. They both attribute liability to the third party who drove the pick-up and was ahead of their motor-vehicle when they attempted to overtake it thereby causing the accident. Their views are buttressed by the conviction of the said third party in the lower court traffic case from which no appeal was preferred.

Section 47A of the Evidence Act reads –

"A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

The Court of Appeal in **Robinson -Vs- Oluoch (1971) EA 376** stated –

"The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of

another person in subsequent civil proceedings. That is not what S. 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the Plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident.”

I agree with the argument of the court in **Robinson -Vs- Oluoch (1971) EA 376** that being charged and convicted of careless driving connotes a degree of negligence. However, that is not to say that the person convicted for such an offence is necessarily the only person whose negligence caused the accident, and that it can be concluded that other people were also to blame for the accident.

Listening to the testimonies of the defence witnesses on how the accident occurred, as they were strictly the only eye witnesses who testified, it is clear in my mind that they were less than candid in their recollection of the events that occurred that day.

For example DW2's stated –

“I saw the pick-up moving in a zig zag manner when it joined the road and then when we neared it, it started moving in a zig zag manner....I did not anticipate any accident. When we neared the pick-up it was slow and that is why we overtook. When we neared Kioko was very slow-not driving in a zig zag manner. I saw the driver of the pick-up talking on phone. I have not mentioned the phone my statements....”

The above testimony as is evident, is very inconsistent and is tailored towards getting the Court to decide in the Defendant's favour. For one, the witness is inconsistent on whether the pick-up was moving at a slow speed or in a zig zag manner. Additionally, it would have been expected that the Defendant's motor-vehicle would keep a safe distance from a vehicle that was moving ahead of it in a haphazard manner especially because as per the Defence witnesses' testimony, their motor-vehicle was loaded with sand a fairly heavy material. The overtaking and hitting the pick-up driven by the third party on the right side points to negligence on the part of the Defendant's agent and/or driver for which the Defendant is vicariously liable. This court finds on a balance that despite the conviction of the third party in the lower court, the Defendant also had a major role to play in the occurrence of the accident.

The Plaintiff should also take responsibility for some negligence as she did not deny that she was seated at the back of the pick-up on a bench without any seat belt on. This meant that even very little impact on the pick-up would have led to injuries being inflicted on the Plaintiff.

Therefore the court apportions liability on the three parties as follows; Defendant- 45%, Third Party – 45% and Plaintiff to shoulder 10% of the blame for the injuries she sustained.

DAMAGES

I will now consider what damages are due to the Plaintiff.

There was a medical report by Dr. Maurice Peter Siminyu dated 26th August 2006. There was also a case summary dated 29th August 2006.

In the medical report, Dr. Siminyu noted that the Plaintiff sustained the follow injuries:-

1. Wedge compression fracture of T12, with paralysis to both lower limbs.
2. Loss of motor function from waistline downwards.
3. Loss of sensory function from T10.
4. Loss of urine and stool control.
5. Head injury with loss of consciousness and a deep scalp wound.
6. Loss of sexual function.

The doctor also noted the treatment the Plaintiff received both at Umoja clinic, at Kenyatta National Hospital and at the National Spinal Injury Hospital.

When he examined her on 26th August 2006 he found that she was in good nutritional status, well oriented in time, place and person.

The doctor also found that all the Plaintiff's systems were essentially normal except for the following:-

“Skin: He initially had bedsores, but these had been treated and healed, hence only residual scars are remaining at various pressure points.

Spine: she has a residual *kyphosis (gibbus)* at the fracture dislocation area at T12 with mild tenderness elicited on applying pressure to the site.

Lower Limbs: she has *flaccid paralysis* of both limbs with occasional episodes of spasms. There is loss of muscle tone and bulk due to dis-use.

Urinary System: She has an in-dwelling catheter *in situ* which is to assist her in collecting urine into the urine bag due to the loss of urine control.

Stool: She has mild abdominal distension due to a full gut. Use of laxatives and sometimes manual evacuation of stool have to be undertaken due to the stool incontinence.

Sexual Function: Cannot be assessed.

Chest: No obvious deformity noted. The chest is moving with respiration. Air entry is normal bilaterally. No *crepitations* nor *rhonchi* were heard.”

Doctor Siminyu inferred that the Plaintiff sustained a spinal injury which has shattered her hopes in life because of the permanent loss of the following functions:-

“1. Inability to Walk

She will be confined to a wheelchair for the rest of her life. He will therefore require a change of wheelchairs from time to time due to wear and tear. A wheelchair costs KShs. 60,000/- and has a lifespan of 10-12 months.

She is a quadriplegic and is a dependent person. On average such a person requires to employ a helper for life since she requires to be assisted all the time...on average such a person will require to be paid approximately KShs. 20,000/- per month.

2. Inability to control stool for life

This will require frequent use of drugs to evacuate the stool weekly. Occasionally, if the stools are too hard, an assistant may require to evacuate them manually, hence the need for the salary stated above. The drugs for evacuation of stool from her system will cost her approximately KShs. 500/- per month.

3. Inability to control urine for life

She...requires the frequent usage of a catheter, *uridom*, urine bag, diapers and napkins on a weekly basis. These will cost her approximately KShs. 600/-

4. Ability to engage in active sexual life in future

She can engage in sexual relationships but only mechanically because she has lost sensation. She can conceive and carry the pregnancy to term. The delivery however, will have to be by Caesarean Section.

5. She is affected psycho-socially, due to the state in which he has been transformed into. She requires change of the previous nature of employment. If she does not adjust appropriately, she may never engage in any gainful employment.

6. She is predisposed to recurrent chest, urinary-tract and skin infections due to the nature of her injuries and the state in which she is in, i.e., bed-ridden and wheelchair- bound. She therefore requires frequent and regular check-ups. The check-ups and purchase of the medicines prescribed may cost him approximately KShs. 2,000/ - per month.

7. As a quadriplegic patient she requires a special bed which can be turned by hydraulic or electric system to ease pressure at pressure points. Such a bed costs approximately KShs. 350,000/-. She also requires a special mattress i.e Rippo-mattress. This is an air filled mattress, which helps also in easing pressure at pressure points. Such a mattress will cost him approximately KShs. 150,000/-.

8. Finally, she requires regular follow-up as an out-patient for life, when she eventually is discharged from hospital. This will require that she hires a taxi at every visit.

Outpatient follow-up clinics are scheduled on a 3-monthly basis. Every visit will cost her approximately KShs. 3,000/- in taxi charges.”

In conclusion, Dr. Siminyu stated that the Plaintiff had a permanent residual disability of 100%.

Doctor Siminyu’s report was admitted in evidence by consent of the parties.

It is clear that the Plaintiff suffered very serious injuries that left her paralysed from the waist down.

The Plaintiff has claimed the following damages in the plaint:-

- 1. General damages for pain, suffering and loss of amenities.**
- 2. Damages for paraplegic equipment future medical, domestic and nursing care, hospitalization and drugs as serialized hereinabove.**
- 3. Special damages and damages for loss of earnings and loss of earning capacity and diminished earning capacity as set out in paragraph 5 and 6 hereinabove.**
 - i. Cost of physiotherapy and medical check-ups- Kshs. 2,000/- per month for life**
 - ii. Cost of catheter, urine bag and uridom at KShs. 600/- per week for life.**
 - iii. Cost of drugs to evacuate stool- 500/- per month for life**
 - iv. Cost of a wheel chair – Kshs. 60,000/- per annum**
 - v. Outpatient hospital attendances and transportation every fortnight – Kshs. 3,000/- for life**
 - vi. Hydraulic system bed at Kshs. 350,000/-**
 - vii. Rippo mattress – Kshs. 150,000/-**
 - viii. Loss of earnings from 16.10.2005 until date of judgment- Kshs. 20,000/- per month**
 - ix. Loss of future earnings and diminished earning capacity at Kshs. 20,000/- per month**
 - x. Permanent nursing assistance for life- Kshs. 20,000/- per month for life.**
- 4. Special damages as follows:-**
 - i. Medical report – KShs. 5,000/-**
 - ii. Medical expenses – KShs. 90,410/-**
 - iii. Police abstract – KShs. 200/-**
 - iv. Motor vehicle search – KShs. 500/-**

I will consider damages in the following categories:-

1. **General damages for pain, suffering and loss of amenities.**
2. **General damages for loss of earning capacity.**
3. **General damages for future medical expenses and equipment.**
4. **Special damages.**

1. **For pain, suffering and loss of amenities.**

The Plaintiff is now a quadriplegic who will be wheelchair bound for the rest of her life. She is totally unable to do anything for herself and will have to rely on others. She will need to be assisted in feeding, drinking and bowel movement. She will have to be put to bed like a small baby and be turned frequently in order to prevent or alleviate bed-sores. She will require frequent medical consultation in order to preserve her life and make that life tolerable.

The Plaintiff has been devastated not only physically but also psychologically and spiritually because of her condition. Frequent psychological and possibly psychiatric counselling will be necessary to prevent depression from setting in.

The Plaintiff will be able to have sexual relations in future albeit mechanically. This is no doubt devastating for a young lady who was in the prime of her life at the time of the accident. She was 31 years old then.

From her own testimony and also as is evident from the medical report, the Plaintiff underwent long and painful courses of treatment. As already observed, she will need to consult doctors regularly for the rest of her life.

I have considered the written submissions filed on behalf of the parties, including the cases cited. As already seen, the Plaintiff was medically assessed to have a permanent residual disability of 100%.

In the case of **Salim Kungu vs Kenya Ports Authority, Nairobi HCCC No. 1436 of 1998** (unreported) where the plaintiff had a permanent residual disability of 70%, KShs. 2.5 million was awarded on 21st November 2000 for pain, suffering and loss of amenities.

In **William M. Mutungi vs Samuel K. Nyutu & Another, Nairobi HCCC No. 2735 of 1998** (unreported), the plaintiff was paralysed from the waist down. On 30th August 2001, KShs. 3 million was awarded for pain, suffering and loss of amenities.

I have taken into account also the long course of treatment that she underwent and will continue to undergo; the loss of amenities, for example, the simple things in life, like being able to walk whenever one wants, or being able to move from here to there without requiring the assistance of anyone; in short, being able to do all the things that a whole person is able to do on their own.

I have also taken into account the inflationary trends of the last few years, and the diminishing purchasing power of our currency.

But I have borne in mind that damages ought to be reasonable, and not be so high as to provoke increased costs in insurance, etc. Doing the best that I can, I will award the Plaintiff KShs. 4.5 million for pain, suffering and loss of amenities.

2. **For loss of earning capacity.**

It is indisputable that the Plaintiff will never be able to work again or earn her own livelihood. Although the accident did not incapacitate her mentally, our stage of development as a country is such that the opportunities for a person who is paralysed from the waist down to work and earn her own living are probably quite minimal.

The Plaintiff is therefore entitled to damages for loss of earning capacity. She was 31 years old at the time of the accident. She would probably have been able to work well into her 60s. But allowance must be given to the vagaries and uncertainties of life. I will therefore apply a multiplier of 25 years.

The Plaintiff was working as a data entry clerk with the Kenya Bus Services on a casual basis at the time of the accident earning KShs. 20,000/- per month. She produced a Staff Bus card as proof that she worked with the said Corporation. It is not very clear whether this sum was gross of net as no pay-slip was produced. From 1st May 2005 to 30th April 2006, pursuant to Legal Notice No. 42 of 2005, the prescribed minimum wage was Kshs 7,237/= with house allowance the amount was Kshs 8,322/=. In the absence of a payslip to prove the salary earned by the Plaintiff, the minimum wage will suffice as what she earned.

I will award KShs. 2,496,600/= as general damages for loss of earning capacity calculated as follows:-

$$\text{KShs. } 8,322/00 \times 12 \times 25 = \text{KShs } 2,496,600/=.$$

This sum is modest and reasonable, bearing in mind that it has not taken into account the Plaintiff's expected advancement in her career especially having tendered in evidence certificates of studies she had undertaken up to degree level.

3. Future medical expenses

I accept that the Plaintiff will wheelchair-bound for life. The wheelchair will cost about KShs. 60,000/= and may need to be changed once every year. It will be reasonable to use the multiplier that I have already determined of 25 years. I will therefore award KShs. 60,000/= x 25 = KShs. 1,500,000/= for the wheelchair.

(ii) The Plaintiff will need a helper for the rest of her life. The helper's salary has been claimed at KShs. 20,000/0= per month. I think this is on the higher side; KShs. 15,000/= per month is a more likely figure. Again I will use the same multiplier of 25 years and award KShs. 4,500,000/= for the helper.

(iii) For her inability to control stool, the Plaintiff will need help to evacuate it manually at times and drugs for this purpose for life. KShs. 500/ per month has been claimed for these drugs. There was no firm evidence, though Kshs. 500/- seems a reasonable amount for drugs every month. I will therefore award KShs. 500/= x 12 x 25 = KShs. 150,000/=.

v. For her inability to control urine, KShs. 600/00 per week has been claimed for catheters, urine bags, diapers, napkins and related materials. This is a reasonable sum. I will therefore award KShs. 600/= x 52 x 25 = KShs. 780,000/=.

(v) I accept that the Plaintiff's condition predisposes her to recurrent chest, urinary-tract and skin infections. She shall therefore require frequent check-ups and treatment, including purchase of medicines. The doctor gave the frequency of one visit after every three months. I will award KShs. 1,500/= every three months for life for doctor's consultation and for purchase of medicine.

There is also the cost of travelling by taxi when visiting the doctor. The doctor estimated that the taxi charges will be approximately KShs. 3,000/= per visit, but no basis was given for this figure. The court was not told how far from her home the Plaintiff will have to travel to see a doctor for these check-ups. For the taxi I will award KShs. 2,000/= quarterly for life.

This sub-head thus works out to KShs. 3,500/= x 4 x 25 = KShs. 350,000/=.

(vi) For her condition, the Plaintiff no doubt requires a special bed, with a platform that can be turned or adjusted either hydraulically or electrically. The doctor opined that this bed will cost KShs. 350,000/=, but no quotations from suppliers were produced. There are very innovative *jua-kali* artisans in this country. They would probably be able to make such a bed of acceptable functionality for much less. I

will award KShs. 150,000/00 for the special bed.

(vii) The bed will need a special mattress (air- or liquid- filled) in order to ease pressure at pressure points and thus alleviate bed-sores. KShs. 150,000/00 has been claimed for this, but again, no quotations from suppliers were produced. I will award KShs. 50,000/= for this item.

5. Special damages

The proven special damages were specific medical expenses whose receipts were availed, receipt for copy of search records from Kenya Revenue Authority and police abstract. I award a total sum of KShs. 31,598/=.

In summary I award the Plaintiff the following sums:-

1. Pain, suffering and loss of amenities.....**KShs. 4,500,000/=**
2. Loss of earning capacity.....**Kshs. 2,496,600/=**
3. Future medical expenses
 - i. Wheel chair.....KShs. 1,500,000/=
 - ii. Helper.....KShs. 4,500,000/=
 - iii. Drugs for stool evacuation...KShs. 150,000/=
 - iv. Catheters, urine bags, etc....KShs. 780,000/=
 - v. Follow-ups, medical consultations & taxi charges.....KShs. 350,000/00
 - vi. Special bed.....KShs. 150,000/=
 - vii. Special mattress.....KShs. 50,000/=

Sub-total **KShs. 7,280,000/=**

Total KShs. 14,476,000/=

4. Special damages.....**KShs. 31,598/=**

Grand Total KShs. 14,507,598/=

There will be judgment for the Plaintiff against the Defendant and third party jointly and severally for general damages in the total sum of **KShs. 14,507,598/=** and special damages of **Kshs. 31,598/=** all subject to the contributory negligence apportioned to each of the parties including the Plaintiff. There shall be interest at court rates on the general damages from the date of judgment until payment in full. There will also be interest at court rates on the special damages from the date of filing suit until payment in full.

The Plaintiff shall also have costs of the suit.

Dated and delivered at Nairobi this 24th Day of February, 2016.

A.MBOGHOLI MSAGHA

JUDGE