



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 139 OF 2009

JAPHETH NGULA MATINGI.....PLAINTIFF

VERSUS

HON. THE ATTORNEY GENERALDEFENDANT

JUDGMENT

1. By a plaint dated 19th March 2009 and filed in court on the same date and amended with leave of court on 5th July 2012, the plaintiff Japheth Ngula Matingi sued the defendant Honourable Attorney General claiming for general damages and special damages of shs 655,904 costs of the suit and interest.

2. The claim arises from allegations that on or about the 25th day of March 2008, the plaintiff was lawfully driving motor vehicle registration number KAX 978J(a taxi) along Chiromo road roundabout in Nairobi when, without any or any just cause, police officers Tsuma Sanga and Luke Simwa, while in the course of their duty and employment in the Kenya Police Department, fired and shot the plaintiff thereby seriously injuring him.

3. It was averred by the plaintiff that the said police officers acted negligently and used force in carrying out their mandate as law enforces. The plaintiff set out particulars of negligence on the part of the police as:

- a. Shooting at the plaintiff who was unarmed and not a threat to their safety or at all.
- b. Opting to shoot the plaintiff instead of arresting him in case they had reason to detain him.
- c. Shooting at the plaintiff five times
- d. Failing to use any other reasonable means to arrest or detain the plaintiff if they had reason to suspect that he had committed an offence.

4. The injuries allegedly sustained by the plaintiff are:

- a. Gunshot injury to the spine with consignment paraplegia

5. The plaintiff also claimed for special damages in the sum of shs 655,904.

6. It was further averred that the defendant was vicariously liable for the injuries, loss and damage suffered by the plaintiff due to the negligent acts of the police. The plaintiff also pleaded particulars of loss as a result of the negligent shooting by the police.

7. The defendant entered appearance on 17th April 2009 and filed a statement of defence on 11th August 2009, denying the plaintiff's claim in toto and putting the plaintiff to strict proof thereof.

8. On 22nd September 2010 the plaintiff's counsel filed an agreed list of issues.

9. On 5th July 2012, the plaintiff and the defendant's counsels agreed and had the following documents produced in evidence by consent, before Honourable Waweru J.

a. Medical report Otworu as PEX 1

b. Medical report dated 27th January 2009 by Dr Mana Ruga as PEX 2.

c. P3 (medical examination report) dated 9th December 2008 as PEX 3.

d. Discharge summary from (MP Shah Hospital) dated 28th March 2008 as PEX 4.

e. CT Chest & Abdomen report from MP Shah Hospital dated 20th January 2009 as PEX 5.

f. Medical report dated 25th April 2008 by Musau (K) as PEX 6.

g. Bundle of discharge summons from National Spinal Injury Hospital as PEX7.

f. Statutory notice to the Attorney General dated 11th September 2008 as P Ex 8.

h. Attorney General's reply dated 15th September 2008 as P Ex 9 on 2nd December 2015.

10. The hearing commenced before me with the plaintiff testifying on oath while confined in a wheel chair. He relied on his written statement filed on 8th April 2011 and a further statement filed on 16th December 2014 as his evidence in chief.

11. The plaintiff testified that he used to work as a taxi driver employed by JATCO who also paid part of his hospital medical bills amounting to shs 424,905 on 9th March 2009. He produced receipts for purchase of drugs and further medication as **PEX 10 a-z and receipt and letter from his employer as PEX 11(a-e).**

12. In his adopted witness statements the plaintiff stated that on the night of 25th March 2008 he was on duty at Yaya Centre when he received a booking from his employer's (JATCO) Control Office to go and pick a client from K-rep Bank. That the name of the customer was not indicated since it was a general pick up. That JATCO vehicles including his which was KAX 987J went for the job. That he arrived second and picked two passengers who were both ladies. That one client was going to Karen opposite Ngong Race Course. That after dropping the client at her destination, he proceeded with the remaining passenger towards Mombasa Road and passed by a police Roadblock at Kenol near Santak Estate without any hitch.

13. That along Ngong Road near Uchumi Hyper he found another police Roadblock and there he found a long queue of vehicles moving very slowly but he also passed without any hitch; and neither was he stopped.

14. That as the plaintiff was driving down Valley Road, a vehicle which was driving behind him tried to block his car. The plaintiff then told his passenger that they were in danger and should take refuge.

He therefore decided to drive to the JATCO offices in Westlands where there were many JATCO Taxis parked at Mobil Petrol station and who would come to his aid. He however did not communicate with the JATCO Control due to panic as he was being trailed by the suspicious motor vehicle.

15. That as the plaintiff approached the Museum Hill, the pursuing vehicle closed in on him and he heard a gunshot. He lost control of the vehicle, knocked another vehicle and hit an electrical pole which prevented him from landing in the Nairobi river.

16. That a man came out of the trailing car, and opened the plaintiff's car and pulled the plaintiff out of the vehicle. He pushed the plaintiff onto the ground and stepped on the plaintiff's back and ordered the plaintiff to lie down. The man in question was holding a pistol while pointing it up in the air. He was joined by two other men who also had guns. Members of the public were screaming and the plaintiff shouted saying he was not a thief. That another JATCO car arrived, stopped and after seeing what was going on, its driver called JATCO offices. That the plaintiff also called his brother and narrated to him the ordeal and asked him to come to where the plaintiff was. That the plaintiff was taken to MP Shah Hospital by JATCO staff and while he was at MP Shah Hospital, some policemen in civilian clothes visited him. That on 28th March 2008 he was transferred to Kenyatta National Hospital and again some 3 police officers in civilian clothes went to see him in the evening at 11.00p.m. One of the men had a mask and that his physical appearance was similar to the one who shot at the plaintiff. That the masked man looked at the plaintiff briefly and left while the other two men asked the plaintiff how he was and left after the plaintiff told them that he was in pain.

17. The plaintiff further testified that the incident was reported to the Central Police Station by JATCO staff and that after three weeks, a Police Officer from Central Police Station visited the plaintiff at the Hospital and took a statement from the plaintiff and since then, the plaintiff never heard anything from the Police. He testified that he was now paralyzed from the waist downward and can only move using a wheel chair.

18. In his further witness statement filed on 18th December 2014, the plaintiff reiterated the contents of his earlier statement filed on 8th April 2011 and added that although the incident occurred at night, the place was well lit with street lights and that he was able to clearly see the registration number of the vehicle that trailed him and that when the members of the public and his JATCO colleagues came to the scene, the people who shot the plaintiff stated that they were Police Officers as was confirmed by Police Officers from Central Police Station who recorded a statement from the plaintiff while at the Hospital.

19. The plaintiff further testified that after leaving Hospital, he was able to gather from his own sources that those who shot him were in motor vehicle registration No. GK A 739G Mercedes Benz 240 with an alternative civilian registration number KAC 013 R. He also got particulars of the officers who were in the said vehicle as:

- a. No 74442 CPL Maurice Aoko
- b. No. 52535 Tsuma Sanga
- c. No. 71863 PC Luke Simwa
- d. No. 73939 PC Mohammed Abdi

20. All the above named officers, according to the plaintiff, were from General Service Unit attached to the Headquarters Unit. That the plaintiff then learnt that PC Tsuma was the one who opened the door to the plaintiff's car and pulled him out throwing him onto the ground and stepping on his back. The plaintiff also learnt that PC Tsuma and PC Luke Simwa fired the shots that hit him and that PC Tsuma was armed with a pistol while PC Luke had a rifle.

21. Further, that The plaintiff learnt that the shooting was booked at the Central Police Station vide OB

No. 119. The plaintiff maintained that his shooting by the Police was unjustified since he was not armed and that neither did he pose any threat to the said Police Officers. Further, that he had no means of knowing that the persons trailing him were Police Officers at the time he was being trailed hence he had to escape to save his life. He maintained that the police had no reason to shoot him and that they used excessive force. The plaintiff blamed the Government because the police officers were on duty and they caused him 100% paralysis which had made him suffer multiple complications associated with paraplegics as evidenced by the several medical reports produced as exhibits. The plaintiff testified that he still had a bullet lodged in his spine; that he could not control his bladder or bowels; uses urinary catheter; wears diapers and risks infections and septicemia. Further, that at the time of the plaintiff's shooting, he was aged 33 years and was married but now he was unable to have any sexual activity with his wife due to the paralysis, which had affected him psychologically and strained his relationship with his wife. that he required a wheelchair costing shs 60,000 plus repairs and replacement every year; modification of his house to include ramps; wider doors; wider corridors and user friendly toilets estimated at shs 500,000. That he also requires a special bed (hydraulic) or electric to ease pressure at pressure points; a special mattress costing Shs 350,000 and shs 150,000 respectively; that he would require a nurse at shs 20,000 per month; regular medical checkups; medicines and physiotherapy @ shs 12,000 per month and that he can only travel by hired taxi.

22. That the plaintiff used to earn shs 10,000/- per month which he had now lost. He has 3 children and that he was their sole breadwinner but had lost the capacity to earn a living and been rendered a destitute.

23. The plaintiff sought for compensation for the loss and pain he had undergone, compensation for loss of future earning capacity and loss of ability to have sexual intercourse and special damages as pleaded together with costs and interest.

24. In cross examination by Mr Munene counsel for the defendant, the plaintiff responded that he was shot on 25th March 2008 on his way to Westlands after dropping a client on Mombasa Road. He recalled that the car that trailed him was a Mercedes 240 with serial No. KAC 013R and that when he saw it, it had a civilian number plate. He stated that he had not given the make of the car in his first witness statement because when he was shot, he lost consciousness but he later learnt that the car had an alternative number plate and this information he came about it after leaving hospital. That the shooting was reported to the police immediately and officers from Central Police Station went to the scene. He maintained that some police officers visited him at Kenyatta National Hospital with one wearing a mask and that he had physical features similar to the person who shot him. The plaintiff confirmed being employed by JATCO Taxi Company and earning shs 10,000 per month then. He denied that he had any other benefits like medical insurance. He stated that JATCO assisted him to clear the medical bill and that the money was refundable. He confirmed that he bought the special mattress while at the hospital. He confirmed that he requires all the items or services he had enumerated in his evidence in chief. He could however not remember where his passenger went but that he panicked and sped off towards their offices after being blocked by the Mercedes Benz.

25. In reexamination by Mr Mwangi, the plaintiff stated that he remained admitted in hospital for one year. That he spent 6 months at Kenyatta National Hospital while 6 months at the National Spinal Injury Hospital. He stated that it was after leaving hospital that he gathered more information which is contained in his further witness statement. He maintained that the money that JATCO paid for his hospital bill was refundable. He stated that the shooting incident occurred between 7 pm and 8 pm.

26. The plaintiff also called PW2 Isaac Ngatia, the operations Manager of JATCO Taxis who confirmed that at the time of the incident, the plaintiff worked with JATCO as a driver and earned shs 10,000/- per month as per the letter signed by their former Human Resources Manager which he produced as PEx 12 (b) and (b). PW2 also produced PEx 13 a letter addressed to the plaintiff's advocates concerning the bill that was settled on behalf of the plaintiff by his employer, JATCO Taxis amounting to shs 424,905 and receipts from MP Shah and Kenyatta National Hospitals.

27. The parties' advocates filed and exchanged written submissions.

THE PLAINTIFF'S SUBMISSIONS

28. In his submissions filed by his advocates and dated 8th December 2015, the plaintiff reiterated his evidence in chief and maintained that he was shot by police officers yet he was not armed and neither did he pose any threat hence they used excessive force. He urged the court to find the defendant liable as the officers were on duty as employees of the Government.

29. On what damages the court should award him, the plaintiff prayed for:

- a. Loss of future earning capacity and future earnings calculated as follows: shs 10,000 x 12 x 30 = 3,600,000
- b. Wheel chair @ shs 60,000 x 30 = 1,800,000
- c. Nurse @ shs 20,000 x 12 x 30 = 7,200,000
- d. Physiotherapy and related treatment shs 10,000 x 12 x 30 = 3,600,000
- e. Napkins and diapers @ shs 4800 x 12 x 30 = 1,728,000
- f. Electric Hydraulic bed shs 350,000
- g. Special mattress shs 150,000
- h. Modified toilet shs 5,000
- i. On the prayer for damages for pain and suffering, the plaintiff prayed for shs 5,000,000 relying on the cases of **Rosemary Wanjiru Kungu V Elijah Macharia Githinji & Others [2014] e KLR** where a plaintiff, a complete paraplegia was awarded shs 3,000,000; and **Joseph Maganga Kasha v Kenya Power & Lighting Company Ltd [2012] e KLR** where the court awarded the plaintiff paraplegic shs 3,000,000 for pain, suffering and loss of amenities.

30. The plaintiff also prayed for special damages as pleaded as per the documentary evidence adduced all totaling shs 424,905 paid by his employer which was said to be refundable and further specials as pleaded and proved by receipts of shs 655,904. In total, the plaintiff prayed for a sum of **shs 24,513,809** together with costs and interest.

THE DEFENDANT'S SUBMISSIONS

31. In their written submissions dated 20th May 2016 and filed in court on 23rd May 2016 the defendant framed three issues for determination by the court.

1. Whether the defendant is liable for the shooting of the plaintiff and whether the shooting was justified.
2. Should the court find that the defendant is liable for the shooting of the plaintiff what damages should be awarded to the plaintiff?
3. Whether the plaintiff is entitled to special damages.
4. Who should bear the costs of the suit?

32. On the first issue, the defendant's counsel submitted that the people who shot the plaintiff could have been thugs as the plaintiff did not know them and that he could not prove that they were in GK vehicle as

they were in civilian clothes. Further, that the plaintiff is not an investigator and that only the National Police have the mandate to investigate crimes hence he could not have investigated on his own to establish who shot at him. It was therefore submitted that the burden of proof lies with he who alleges as stipulated in Sections 107-109 of the Evidence Act, and as was espoused in the cited case of **China Wuyi & Company Ltd Vs Samson K Metto [2014] e KLR and Statpack Industries V James Mbithi Munyao Nairobi HCCA NO. 152 of 2003**, in the absence of proof that the police shot him, the court should dismiss this case against the defendant.

33. On the second issue of what damages the court should award the plaintiff should it be found that he was shot by the police and that the shooting was unjustified, the defendant submitted, urging the court to consider the contingencies of life including the fact that the plaintiff could have died prematurely or injured of a cause other than the shooting as well as the fact that the money will be paid in lump sum. Counsel for the defendant relied on **Ireru Mugo V Githinji Ngari HCCA 5087/1990** in her submissions on the multiplier to be used where the court set out principles applicable on multiplier with *"due regard having to the expectation of working life and dependency by the named dependants as well as the contingencies of life including the fact that the deceased could have died prematurely of a cause other than the accident that took him as well as the fact that the money will be paid in lump sum."*

34. The defendant also relied on **Rosemary Wanjiku Kungu V Elijah Macharia Githinji & Another [2014] e KLR** where the court used a multiplier of 15 years as reasonable and **Gladys Nyaboke V Modern Transporters Ltd HCC 1055/2000** where the court used a multiplier of 15 years for a 25 years old paraplegic. The defendant urged the court to adopt a multiplier of 15 years. Nonetheless the defendant urged the court to disallow the claim for loss of future earnings and future earning capacity on the ground that this claim is a special damage and which should have been pleaded, and proved, but that it was not pleaded and so it must fail. Reliance was placed on the cases of **A.A.M V Justus Gisairo Ndarera & Another[2010] e KLR; Mbaka Nguru & Another V James Rakwar CA 133/98** and **Cecilia Mwangi & Another V Ruth W. Mwangi CA 251/1996 (unreported)**.

35. On the loss of earnings and future earning capacity the defendant's counsel submitted that the plaintiff had not pleaded loss of future earnings and that as such his claim under that head must fail since it is a special damage which must be pleaded and proved. Reliance was placed on **AAM V Justus Ndarera & Another (2010) eKLR**. Where the Court of Appeal citing with approval **Mbaka Nguru & Another V James Rakwar CA 133/98** stated that loss of future earnings was a special damage which must be specifically pleaded and strictly proved whereas the claim for loss of earning capacity can be classified as general damages but that they must also be proved on a balance of probabilities. Nonetheless, the defence counsel submitted that should the court find that the plaintiff is entitled to this claim the Kshs 1,800,000.00 would be sufficient calculated as $sh10,000 \times 12 \times 15 \text{ years} = 1,800,000.00$ for loss of future earnings and loss of earning capacity.

36. The defendant proposed **shs 1,700,000** damages for pain, suffering and loss of amenities relying on **Mbaka Nguru & Another V James Rakwar CA 133/98** where the Court of Appeal reduced an award of shs 2.5 million made by the High Court to shs 1.5 million for a plaintiff who had sustained injuries of paraplegia resulting from a fracture of T12 thoracic vertebra with spinal cord damage; severed phalanx of the left index finger and cuts on the right cheek; and was confined in a wheelchair. The defendant also cited **Nancy Oseko V BOG Maasai Girls High School [2011] e KLR** where a school girl was awarded shs 2,500,000 general damages on 12th June 2011 for similar paraplegic injuries; and **Francis Kaguta Mumu V John Simiyu Malaba & Others HCC 1460 OF 1990** where the plaintiff was awarded sh 900,000 for total paralysis.

37. On the cost of nursing care and physiotherapy and treatment, the defendant proposed shs **10,000/-** per month based on Rosemary Wanjiku Kungu (supra) case.

38. On the claim for: cost of wheelchair, the defendant relying on **Rosemary Wanjiku Kungu v Elijah Macharia Githinji & Another (2014)eKLR** case proposed shs $60,000 \times 3 \text{ wheelchairs} (15/5) = 180,000$ on the basis that the plaintiff would only require 3 wheel chairs at shs $60,000 \times 3$ per wheel

chair.

39. On the claim for cost of nursing care, the defendant's counsel submitted that Kshs 10,000 x 15 x 12 = 1,800,000 would be sufficient based on the **Rosemary Wanjiku Kungu (supra) case**.

40. On the claim for physiotherapy the defence proposed shs 720,000 calculated at 200 per visit for 5 days thus 200 x 20 x 12 x 15 = 720,000.

41. On the cost of diapers and napkins, electric hydraulic bed, special mattress and modified toilet an award of kshs 1,369,000 was proposed made up as follows:

a. Diapers/napkins-4800x12x15=840,00

b. Electric hydraulic bed- ksh 350,000

c. Special mattress-shs 150,000

d. Modified toilet-kshs 5,000

42. On whether the plaintiff was entitled to special damages, the defendant's counsel submitted that since it is the plaintiff's employer JATCO that paid for his medication, then the plaintiff could not claim for the same. The court was urged to decline this claim for special damages. The defendant proposed **total damages in the sum of kshs 5,769,0000**.

DETRMINATION

43. I have carefully considered this case, the pleadings, evidence adduced orally and through documents, submissions and the decided cases relied on by both parties' advocates. In my humble view, the issues for determination are as proposed by the defendant's counsel. I will proceed to determine each issue as set out above.

44. On the issue of whether the defendant is liable for the shooting of the plaintiff, and whether the said shooting was justified, the plaintiff testified that on the material date, he was going about his normal duties as a taxi driver picking and dropping customers as assigned by his employer and on reaching Valley Road, he noticed a private motor vehicle behind him obstruct him. He suspected that his life was in danger and sped off towards JATCO officers in Westlands with the customer. Approaching Museum Hill, the offending motor vehicle closed in on him and its occupants fired shots at the plaintiff who lost control of the motor vehicle, hit another vehicle and as his vehicle stopped, he was approached and pulled out of the vehicle by an armed man who came from the vehicle that had been pursuing the plaintiff. The plaintiff was ordered to lie down and the said assailant was joined by two other men who were also armed with guns. Another JATCO driver came by. Members of the public went to the scene. The plaintiff managed to call his brother and explained to him what had happened to him. The plaintiff was taken to MP Shah Hospital. While he was at the hospital, the plaintiff was visited by some police officers. One of them was masked but he fitted the description of the man who pulled the plaintiff from the vehicle. That the plaintiff was also visited while at Kenyatta National Hospital. The incident was reported to Central Police Station who also visited the scene and booked the incident Vide OB 119.

45. From the evidence adduced by the plaintiff, which was not rebutted by the defendant, the question is whether the plaintiff has proved on a balance of probabilities that he was shot by the police officers and if so whether the said shooting was justified.

46. According to the defendant, the people who could have shot the plaintiff could have been thugs. I disagree and proceed to give my reasons below:

47. First, is that following the shooting of the plaintiff, it is not disputed that the police arrived at the

scene and later booked the incident at Central Police Station vide OB No. 119. Secondly, there is undisputed evidence that the police visited the plaintiff while he was still admitted in hospital and recorded a statement from the plaintiff. Third is that the plaintiff produced P3 form dated 25th March 2008 filled on 9th December 2008 and which was issued to him by the OCS Central Police Station Nairobi vide OB No. 119/25/3/2008. The P3 form was directed to the police surgeon and the brief details in the said P3 are that: **“ He was involved in a police shooting incident as per OB 119/25/3/2008. Please examine him.”**

48. In my humble view, the OCS Central Police Station in making such an entry in the P3 form which is a public document was certain that the plaintiff was involved in a police shooting incident, which was reported vide OB No. 119 of 25th March 2008 and not just in a shooting incident.

49. The police surgeon then in filling the P3 form confirmed that the plaintiff had gun shots and bullet heads were lodged at his C6 CT side which resulted in paralysis of the lower limbs.

50. From the above evidence, what this court concludes is that the police are the law enforcement and investigative agencies as by law established. In the instant case, even if the plaintiff did not or could not recognize the persons who shot him but whom he believed were police officers, the question is, the incident having been reported to the police and the police having visited him in hospital and recorded his statement and even issued him with a P3 form confirming a police shooting incident, why did the police not investigate that shooting incident and avail the results of the investigations so that the plaintiff can know whether they were thugs who shot him and not the police.

51. The other question would be why would the police take a back seat after receiving the shooting incident report, visiting the scene and recording the plaintiff's statement? Who is supposed to investigate such a serious case involving near loss of life by the plaintiff? The police are under a duty to protect the lives of citizens and their property. Where a criminal incident is reported to the police, the latter are under a legal duty to investigate the incident and bring to book the suspects. In this case, curiously, the police have not turned up to tell the court what they did not follow up the report of the incident. The police have not said that they investigated and found that it was not the police who shot the plaintiff. They have also not said that they investigated the incident and found that the plaintiff was shot by unknown persons or suspected thugs.

52. The defendant Attorney General who was sued on behalf of the Government Police Department simply filed a defence denying everything and putting every allegation made against him to the plaintiff's strict proof. He then opted not to file any witness statement or call any evidence to rebut the plaintiff's evidence.

53. The plaintiff in his plaint and statement and testimony in court named police officers Tsuma Sanga and Luke Simwa as the police officers who shot him. He also provided their Police Force Numbers. Yet, the defendant Attorney General never found it necessary to summon those police officers mentioned to come and exonerate themselves from blame. The defendant also never called any witness to deny that the named persons were serving police officers and that they could not have possibly been found at the shooting incident at the material time of the shooting of the plaintiff.

54. Whereas I am in agreement with defendant's submissions that the burden of proof lies with he who alleges as stipulated in Sections 107-109 of the Evidence Act, and as was espoused in the cited case of **China Wuyi & Company Ltd Vs Samson K Metto [2014] e KLR and Statpack Industries V James Mbithi Munyao Nairobi HCCA NO. 152 of 2003**, this court finds that a mere denial is not a sufficient defence in this type of case where the police as the security agents of the state owe a duty to the citizenry, the duty of protecting their lives and property. It is expected that the police would come to court and testify clarifying what actions they took, after the report of the shooting of the plaintiff vide OB No.119 of the material date. It was expected that the police would investigate to establish the motive for the shooting. Accordingly, I accept the plaintiff's evidence that while in hospital, he was visited by the police who even recorded his statement on the incident but chose to do nothing about it.

55. The other question is, what did the police do with the plaintiff's statement implicating them (the police) for the unprovoked shooting? In my humble view, this is a case where the police deliberately neglected and refused to investigate the circumstances leading to the shooting of the plaintiff who was not armed and neither did he resist any order to stop nor any attempt to arrest him. The said police also refused to come to court and testify as to what steps they took as law enforcement agencies, to establish who shot the plaintiff and why.

56. In a case where the plaintiff even through his own independent sources (and he should not be faulted for doing so), identified his attackers by name and their police force numbers, this court is indeed perturbed by the inaction on the part of the defence to call the persons named, being law enforcers with a duty to protect life and property, yet the incident was reported to them instant; to bring the culprits whether thugs or the police to book; and or to explain why the police would, in the circumstances stated by the plaintiff, trail and shoot at the plaintiff's car thereby seriously injuring him and leaving him a vegetable.

57. This court had the opportunity to see and hear the plaintiff who was confined in a wheelchair. He appeared candid and truthful. Nothing in his testimony suggests that he is framing up the police for the shooting, especially with the police clearly issuing him with a P3 form that is filled by the Police Surgeon and the police themselves expressly stating that the plaintiff was involved in a police shooting incident.

58. I reiterate that the police having received the report on the shooting of the plaintiff by the police themselves and having recorded the same in the Occurrence Book and the plaintiff having mentioned the names and force numbers of his assailants, and there being no denial that persons by the names mentioned by the plaintiff were serving in the police force with the general service unit, I find that it is the police officers who shot at the plaintiff without any justifiable cause and they seriously injured him.

59. In addition, this court believes the plaintiff that when he was visited by the police while he was in hospital, he managed to recognize one of the 'visitors' who was masked as having the features of the person who shot him.

60. The other question is, why were the police when visiting the injured plaintiff in hospital accompanied by a masked 'person' who was a stranger, to see the plaintiff? Since the police are the investigators in this country, it cannot be expected that the plaintiff proves beyond reasonable doubt that he was shot by the police officers named. It was upon the defendant to investigate and come up with a report of the incident.

61. In this case, it is my view that only the police have answers and or information regarding the shooting of the plaintiff and that they have refused to bring forth an investigation report which would implicate them in the shooting. In **Ragbir Singh Chatte V National Bank of Kenya Ltd [1996] e KLR**. The Court of Appeal citing many other decisions held, inter alia;

“ First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

62. I find that it was not sufficient for the defendant to merely deny the plaintiff's claim and put him to strict proof yet the plaintiff had even named the persons responsible for his shooting. The defendant did not seek any better particulars from the plaintiff and neither did the plaintiff refuse to give those particulars. In fact, after leaving hospital nearly one year after the shooting incident, the plaintiff gathered from his own independent sources more information and he did record witness statements which were served upon the defendant, who chose not to counter those statements with any other independent evidence of proper investigations carried out.

63. Albeit the law under (sections 107-109) of the Evidence are clear that the burden of proof lies on he

who alleges, Section 112 of the Evidence Act is clear that: "*In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*" In **Munyu Maina V Hiram Gathika Maina [2013] e KLR** the above legal principle was applied. In the instance case, the power and duty to establish who and why the plaintiff was shot was with the police machinery. No doubt, by their conduct they had knowledge of who and why the plaintiff was shot, but refused to investigate and refused to adduce any evidence in defence. They instead filed a terse denial. The question is, whom did the police expect to investigate such an incident and to come up with a conclusive report on who and why he plaintiff was shot? In **Edward Muriga through Stanley Muriga V Nathaniel D. Schulter D. Schulter CA 23/1997**, the Court of Appeal had this to say of Sections 107-109 of the Evidence Act, which places the legal burden of proof or what may be called evidential burden of proof on the party making the assertion:

“ in this matter; apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remained uncontroverted and the statement in the defence therefore remains mere allegations.....” (See Munyi Maina V Hiram Gathiha Maina (Supra).

64. The plaintiff herein was able to demonstrate candidly through evidence that he was shot at by people whom he suspected to be police officers and this was confirmed by the P3 form issued by the OCS Central Police Station and filled by the Police Surgeon.

65. The defence claimed that they were strangers to the allegations by the plaintiff and never produced a police investigations report to exonerate the police from the shooting. In my view, the fact of who shot the plaintiff was a fact within the knowledge of the police and they therefore were under an obligation to discharge the burden of proof but the defendant did not.

66. Upon my consideration of that issue and on evidence adduced, I am of the respectful view that the plaintiff was shot by the police on the material day of 25th March 2008 at about 8.00p.m. And in the absence of any explanation why the police shot at an un armed, harmless human being like the plaintiff, I find the shooting of the plaintiff by the police unlawful, unjustified, done with excessive force, unwarranted, reckless and negligent. I find the defendant is vicariously liable for the acts of the reckless and negligent police officers who were on duty and who knew and or ought to have known that the consequences of their shooting the plaintiff could be near fatal. I therefore find the defendant 100% liable for the unjustified and unexplained negligent and reckless shooting of the plaintiff on 25th March 2008 and therefore the plaintiff is entitled to compensation in damages.

67. This court having found the police and therefore the defendant liable for the unjustifiable shooting of the plaintiff, the next question is whether the plaintiff was injured and whether he is entitled to any damages and if so, how much?

68. It is not in dispute that the Plaintiff was injured as a result he is now a total paraplegic. There is no denial that prior to the shooting, the plaintiff led a normal happy life, married with 3 children and aged 33 years old. He was also gainfully employed by JATCO a taxi company as a driver earning Kshs 10,000/- per month as confirmed by his letter of appointment and the testimony of PW2.

69. As a direct result of the shooting, the plaintiff who was rendered a paraplegic lost his ability to work and eke a living for himself and his family. He cannot have intimate sexual relations with his wife, he cannot control urine and stool. He still has a bullet lodged in his spine. He has and continues to attend to medication. He has suffered physical and psychological trauma as stated clearly in the numerous medical reports produced in evidence by consent of both parties. He incurred medical expenses and would continue to incur several expenses throughout his life.

70. The damages categorized by the plaintiff are:

a) loss of earning capacity using a multiplier of 30 years = shs 10,000 x 12 x 60 = 3,600,000.

The defendant on this head urged the court to consider the contingencies of life including the fact that the plaintiff could have died prematurely or injured of a cause other than the shooting as well as the fact that the money will be paid in lump sum. It relied on **Ireri Mugo V Githinji Ngari HCCA 5087/1990** where the court set out principles applicable on multiplier with due regard having to the expectation of working life and dependency by the named dependants as well as the contingencies of life including the fact that the deceased could have died prematurely of a cause other than the accident that took him as well as the fact that the money will be paid in lump sum.”

58. The defendant also relied on **Rosemary Wanjiku Kungu V Elijah Macharia Githinji & Another [2014] e KLR** where the court used a multiplier of 15 years as reasonable and **Gladys Nyaboke V Modern Transporters Ltd HCC 1055/2000** where the court used a multiplier of 15 years for a 25 years old paraplegic. The defendant urged the court adopt a multiplier of 15 years. Nonetheless defendant urged the court to disallow the claim for loss of future earnings and future earning capacity on the ground that this claim is a special damage and which should have been pleaded, and proved, but that it was not pleaded and so it must fail.

59. I have carefully perused paragraph 8 of the plaint dated 19th March 2009. The plaintiff pleaded under the 15 line paragraph that he was aged 33 years, earning a monthly salary of Kshs 10,000 as a qualified driver and his wife was a housewife, he was the sole bread winner to his wife and his 3 children Michael Matingi (10 years) David Kitonga 7 years; and Rosebelle Ngii (11 months). He also pleaded as follows: **“.....the plaintiff can no longer work and has lost future earning capacity and future earnings.....”**

60. Although this aspect of the pleading was not summarized in the final prayers , the plaintiff in his further statement filed in court on 18th December 2014 which was adopted as his evidence in chief and not controverted by the defendant testified that he lost capacity to earn a living and had been rendered a destitute. He sought for damages for the loss and pain he had undergone including compensation for loss of future earning capacity.

71. From the above pleadings and evidence of the plaintiff, it is not true as alleged by the defendant that the plaintiff failed to pleaded the claim or that he did not specifically claim for loss of future earnings and future earning capacity. Therefore the cases of **A.A.M V Justus Gisairo Ndarera & Another[2010] e KLR; Mbaka Nguru & AnotherV James Rakwar CA 133/98** and **Cecilia Mwangi &Another V Ruth W. Mwangi CA 251/1996 (unreported)** though relevant would not be applicable in this case where there was clear pleading, evidence led and documents produced to prove what the plaintiff used to earn per month.

72. In the cited cases (though not annexed), the court was clear that the plaintiffs had not specifically pleaded the claim for loss of future earnings and future earning capacity. They had pleaded it generally unlike in the instant case. That being the case, I find that the defendant’s submissions on an award under the heads for loss of future earnings and loss of future earning capacity especially on the multiplier to be used is irrelevant.

73. The plaintiff’s counsel did not rely on any precedent under this claim for loss of future earning capacity.

74. In **Cecilia Mwangi & Another V Ruth W. Mwangi Nyeri CA 251/1996** the Court of Appeal held that damages under loss of earning capacity can be classified as general damages but these have to be proved on the balance of probabilities. From the evidence adduced by the plaintiff, the plaintiff could not and will never go back to his work as a driver following his paraplegic state assessed at 100%.

75. In **Butler V Butler [1984] KLR 225** the Court of Appeal held that:

“1. A person’s loss of earning capacity occurs where as a result of injury his chances in

the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.

2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of earning earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.

5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.

6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case and they include such factors as the age and qualifications of the claimants, his remaining length of working life; his disabilities and previous service, if any."

76. In applying the above laid principles the plaintiff in this case was 33 years old at the time of the shooting. It is true that in Kenya, the legal retirement age for majority of workers other than constitutional office holders and persons with disabilities is at the age of 60 years but due allowance must be given for the uncertainties of life.

77. I am in agreement with the decision relied on by the defendant of **Rosemary Wanjiku and Gladys Nyaboke** (supra) as being applicable, that although the fact that plaintiff was a healthy and happy man in undisputed, however, the work of a taxi driver in Nairobi is no doubt a risky job. The risks of being carjacked or abducted or hired by thugs is very high and in such circumstances, one's life could be shortened other than by shooting by reckless/negligent police officers mistaking him for a criminal. However, the plaintiff was in a marked taxi cab which was easily identifiable by the police and if they wanted him to stop, they should have immobilized the car and not shoot him directly as they did. That being the case, and doing the best I can, I would adopt a multiplier of 20 years. Thus Kshs 10,000 x 12 x 20 = 2,400,000 loss of future earnings.

78. On the claim for damages for loss of earning capacity, I will include it in the claim for pain, suffering and loss of amenities since it is a general damage. The plaintiff submitted **shs 5,000,000** relying on **Rosemary Wanjiku Kungu V Elijah Macharia Githinji & Another** (supra) where a paraplegic plaintiff was awarded shs 3,000,000 in July 2014. A similar award was made in **Joseph Maganga Kasha v Kenya Power & Lighting Company [2012] e KLR** in October 2012.

79. The defendant proposed shs 1,700,000 relying on **Mbaka Nguru & Another V James Rakwar CA 133/98** where the Court of Appeal reduced an award of shs 2.5 million made by the High Court to shs 1.5 million. The defendant also cited **Nancy Oseko V BOG Maasai Girls High School [2011] e KLR** where a school girl was awarded shs 2,500,000 general damages on 12th June 2011; and **Francis Kaguta Mumu V John Simiyu Malaba & Others Nairobi HCC 1460/90**.

80. Taking into account the above rival positions, and having regard to the fact that the plaintiff was rendered a total paraplegia and has a bullet lodged in his spine with no possibility of it being removed, and the time lapse since the decisions cited by the defendant were made and the

inflationary trends in Kenya on the Kenya shilling, an all inclusive sum of **shs 3,000,000** general damage for pain, suffering and loss of amenities and loss of earning capacity would adequately compensate the plaintiff.

81. On the claim for: a) cost of wheelchair, the plaintiff prayed for shs 1,800,000 whereas the defendant relying on Rosemary Wanjiku Kungu case proposed shs 180,000 on the basis that the plaintiff would only require 3 wheel chairs at 60,000 per wheel chair after every five years for 15 years. The medical report made by the National Spinal Injury Hospital's medical Doctor Dennis Otworu on 13th May 2009 and produced as PX1 by consent is clear that the wheel chair would last for between 10-12 months. There was no contrary evidence adduced by the defendant. Accordingly, I award the plaintiff the cost of a wheel chair at shs 60,000 for 20 years = **60,000 x 20 = 1,600,000**.

82. On the cost of nursing care and physiotherapy and treatment, the plaintiff pleaded and testified that he requires shs 20,000 per month for nursing care. The defendant proposed shs **10,000/-** per month based on Rosemary **Wanjiku Kungu** (supra) case. Taking care of a paraplegic is not the same as hiring an ordinary house help. This is specialized nursing care by a person who is trained as a health nurse. Even going by the labour laws, a qualified nurse cannot earn shs 10,000/-. In the premise, I would award the plaintiff shs 20,000/- being the cost of hiring a nurse per month to handle the plaintiff's dire paraplegic state as proposed by Doctor Otworu. Thus **shs 20,000 x 12 x 20 = 4,800,000**.

83. On the cost of physiotherapy, the plaintiff sought for 3,600,000 whereas the defendant proposed shs **720,000/-** as adequate in view of the recommendation by National Spinal Injury Hospital of shs 200 per visit for 5 days. The medical report by Dr Otworu from National Spinal Injury Hospital proposes daily physiotherapy sessions for 5 days a week at shs 200. I accept that proposal and award the plaintiff shs **200 x 5days x 4weeks in one month x 12months a year x 20 years = 960,000**.

84. On the costs of napkins and diapers, electric hydraulic bed, special mattress and modified toilet, the plaintiff proposed shs **1,728,000** based on Doctor Otworu's medical Report whereas the defendant proposed shs **1,369,000**. The medical report proposed the cost of:

- a. Diapers and Napkins /catheters - weekly shs 1,800
- b. Electrical Hydraulic bed - shs 350,000
- c. Special mattress shs 150,000
- d. Modified toilet shs 5,000

85. I award the plaintiff as follows:

- a. cost of Diapers, Napkins/catheters 1,500,000
- b. cost of Electrical Hydraulic bed shs 350,000
- c. cost of Special mattress 150,000
- d. cost of Modified toilet 5,000

Total shs 2,005,000.

86. On the claim for special damages, the law is that they must be specifically pleaded and strictly proved. The plaintiff by an amended plaint claimed for special damages of shs 655,904. However, in his submissions he claimed for shs 655,904 + 424,905=1080809. In his testimony and the testimony of PW2, the plaintiff stated that his former employer settled for him his hospital bill which was refundable since he did not have any money to pay for his hospital bill. Further, that the employer

did not have any medical insurance policy for its employees hence it paid in cash and that it was therefore entitled to a refund of the money advanced to the plaintiff. The amount allegedly paid toward the plaintiff's medical treatment at National Spinal Injury Hospital and Kenyatta National Hospital and MP Shah was shs 424,905 by the employer. On the other hand, the defendant submitted that the plaintiff would only be entitled to special damages which he paid from his own pocket and not from the employer.

87. In this case, the employer's official testified as PW2 and stated that the company had no medical cover for its employees so it advanced the plaintiff the sum of shs 424,905 being hospital bills recoverable in this case. He also produced hospital receipts from MP Shah Hospital, Kenyatta National Hospital and National Spinal Injury Hospital and a letter to the plaintiff's advocates asking for refund of the said sum.

88. In my view, although the defendant contended that the plaintiff could not claim for reimbursement of the hospital expenses paid for him by his employer, my view is that there was no evidence that the employer paid the medical expenses as a gift advanced to the plaintiff. This was a loan advanced to the plaintiff to enable him leave hospital which amount has to be refunded. Since he has called someone from his former employer's organization to testify in support of the loan advance claim, I am satisfied that the plaintiff has proved that he is entitled to the claim of special damages paid on his behalf for medical care by his employer as a loan advance which is refundable and would therefore accordingly award him that sum paid on his behalf by his employer and which is refundable to the employer.

89. The plaintiff also prayed for other special damages besides shs 424,905 paid by the employer. However the plaint as amended only enhanced the special damages from shs 554,894 to shs 655,904. That being the case, and as special damages must be specifically pleaded and strictly proven with payment receipts, I must examine all the receipts for special damages as produced plaintiff's exhibit 10 consisted of

- a. shs 3,000 for medical examination
- b. Shs 67,2000 for GI Ripple mattress with pump, days commode; free man's corset and back slab.
- c. Parallel bar 10,000
- d. Physiotherapy 38,000
- e. Physiotherapy 37,000
- f. Nursing care 6250
- g. Nursing care 4770
- h. Nursing care 4650
- i. Physiotherapy 31,000
- j. Bed sore medication 1840
- k. Bed sore medication 1840
- l. Medicine 1965
- m. Other medical expenses 4840

Total Kshs 212,355

90. Receipts as per JATCO payments for:

- a. Kshs 132,379 dated 31st May 2008
- b. Kshs 197,526 dated 28th March 2008
- c. Kshs 50,000 dated 26th March 2008
- d. Kshs 10,000 dated 28th March 2008
- e. Kshs 35,000 dated 28th March 2008
- f. Kshs 10,100 dated 27th May 2008
- g. Kshs 1000 dated 24th May 2008

Total Kshs 436,005

Total amount Kshs 212,355 + 436005 = Kshs 648,360.

91. Thus albeit the plaintiff pleaded for **Kshs 655,904**, he only proved **shs 648,360**. **However, he pleaded for shs 424,905** with regard to the employer's support which I hereby award him.

92. In the end, I enter judgment for the plaintiff against the defendant as follows:

- a. Liability - 100%
- b. General damages
 - i. Pain suffering and loss of amenities shs 3,000,000
 - ii. Loss of earning capacity 2,400,000
 - iii. Cost of hiring a paraplegic nurse shs 4,800,000
 - iv. Cost of physiotherapy shs 960,000
 - v. Napkins, diapers catheters 1,500,000
 - vi. Special mattress 150,000
 - vii. Electrical Hydraulic bed 350,000
 - viii. Modified toilet 5,000

Total Kshs 13,802,260

Add special damages pleaded and proved Kshs 424,905 + 212,355 = 637,260

Total damages Kshs 14,439,520.

93. I also award the plaintiff costs of the suit herein to be paid by the defendant. I further award him interest on special damages at court rates from the date of filing suit until payment in full. I also award

him interest on general damages (excluding loss of future earnings) at court rates from the date of this judgment until payment in full.

Dated, signed and delivered at Nairobi this 26th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Kimani h/b for Mwangi for the plaintiff

N/A for Defendant

CA: Adline