



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 337 OF 2004

F K M.....1ST PLAINTIFF

P M M.....2ND PLAINTIFF

VERSUS

EVANS NGORE.....1ST DEFENDANT

SIMON KUBUGI TIRI.....2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated 5th October 2012 and filed in court on 8th October 2012, the plaintiffs F K M and P M M claimed against the defendants Evans Ngore and Simon Kubugi Tiri special and general damages, costs and interest arising from injuries allegedly sustained from a road traffic accident.

2. The plaintiffs who are husband and wife alleged that on or about the 11th day of October 2003 the 1st plaintiff was lawfully travelling in a matatu registration No. KAL 639X as a fare paying passenger when at or near Clay works, Nairobi, the said vehicle owned by the 1st defendant and driven by the 2nd defendant as the former's agent/servant, lost control and overturned thereby seriously injuring the 1st plaintiff. The plaintiffs blame the 2nd defendant's negligence for the occurrence of the said accident in that he:

- a) Drove too fast in the circumstances.
- b) Failed to have any adequate control of the said vehicle.
- c) Failed to apply any effective breaks.
- d) Drove without any effective breaks.
- e) Drove without any due regard for the safety of the passengers on board the said vehicle.
- f) Failed to stop, slow down or in any other way to manage the said vehicle as to avoid the said accident.

3. The plaintiffs sought to rely on the police investigations and traffic case proceedings and

judgment in Nairobi Traffic base No. 428/2004 resulting from the material accident.

4. The plaintiffs claimed that as a consequence of the said accident, the 1st plaintiff who had a healthy and active life sustained injuries involving:

a) Fracture of sternum.

b) Head injuries

c) Fracture /dislocation of T11/T12.

d) Total paralysis from the waist down the lower limbs as a result of which she lost her natural right to sexual fulfillment with her husband the 1st plaintiff .

5. On the part of the 2nd plaintiff, it was averred that he suffered loss of conjugal rights with his wife, the 1st plaintiff and that he suffered mental and psychological torture, loss of servitude and consortium.

6. The two plaintiffs claimed for damages as follows:

a) Special damages -shs 2,528,051.81

b) Cost of remodeling her house in view of the serious paraplegic injuries –shs 1,258,446

c) General damages.

d) Costs of the suit.

f) Interest on (a) and (b)

g) Any further relief that the court may deem fit to grant.

7. The defendants filed a joint statement of defence dated 5th October 2004 on 7th October 2004 denying all the allegations leveled against them regarding the occurrence of the pleaded accident; particulars of negligence attributed to them; and or any injury/loss sustained /suffered by the plaintiffs as alleged in the plaint. The defendants also denied that the 1st plaintiff was or at all a lawful passenger in motor vehicle registration No. KAL 639X on the material date of accident and put the plaintiffs to strict proof. The defendants further contended that if at all an accident occurred as pleaded then it was wholly due to unforeseeable and unavoidable circumstances beyond the power and control of the defendants and not because of want of care or negligence on the part of the 2nd defendant.

8. All particulars of injuries and loss was denied. The defendants also denied that the 2nd plaintiff was a husband to the 1st plaintiff and or that the two plaintiffs suffered the damages-special or general or loss of servitude and consortium and put the plaintiffs to strict proof thereof.

9. The plaintiff's counsel filed reply to defence dated 1st October 2004 reiterating the contents of the plaint and correcting the names of the 1st defendant to read Evans Njoroge as contained in the Memorandum of Appearance.

10. On 7th February 2005 both parties' advocates filed 11 agreed set of issues for determination and on 23rd April 2007 the plaintiff's counsel filed a list of documents. On 20th May 2011 the defendants' counsels were granted leave to cease acting for the defendants and the court ordered that the defendants be served personally.

11. The plaintiffs too changed their advocates upon which the present advocates Kilonzo & Company Advocates took over the conduct of the matter from Mbugua and Mbugua advocates with leave of the court granted. Notice of change of advocates dated 31st July 2008 was filed in court on 4th August 2008.

12. The defendants did not file any documents. They were served with hearing notice for pretrial directions on 12th November 2014 but they never appeared upon which the court certified the suit herein as ready for trial on 29th July 2015.

13. Both the plaintiffs testified and called 2 other witnesses to corroborate their testimonies.

14. PW1 No. 39038 Police Constable Duke Mogaka testified on oath that he was attached to Pangani Police Station performing traffic duties. He produced a police abstract and occurrence book extract in respect of an accident involving motor vehicle KAL 639X driven by one Simon Kubugi along Thika Road at Clay Works on 11th October 2003. He testified that according to the records, investigations were carried out leading to the said driver being charged with the offence of causing death by dangerous driving. He identified the 1st plaintiff F K as being one of the passengers in the said accident motor vehicle which was a Nissan matatu type and that other passengers died and the driver was charged vide traffic 428/2004 at the City Court, Nairobi. The witness produced the police abstract as P exhibit 1 and OB extract as PEX 2.

15. PW1 further testified that the driver of the accident motor vehicle is reported to have lost control of the motor vehicle which rolled and landed in a ditch thereby fatally injuring its occupants while others like the 1st plaintiff were seriously injured. He added that there was no other motor vehicle involved in the fateful accident. That after the accident, the driver left the scene and was later arrested and charged in court after investigations.

16. The 1st plaintiff testified as PW2 that she was a mother of 3 children and that on 11th October 2002 she was involved in a road accident along Thika Road near Clay Works. She was a passenger in the matatu KAL 639X. She was hospitalized for 3 months. That since the accident, she had never been the same person. She was now confined in a wheel chair. That at the material time she was constructing a house in Githurai and was compelled to stop and later recall the contractor to redesign it in view of her serious disability state, to enable her access the house using a wheel chair since she was completely paralyzed. She testified that she led a stressful life because her husband was jobless as he has to take care of her, make her bed, cook, and wash her and her inner pants. That she was incapable of using public means to travel. She had to take a loan to buy a car to facilitate her movement and that she had held her daughters hostage. They also take care of her and are not married because maids demand a lot of money which she cannot afford. She could not go places with her husband, and that she is unable to have sex with her husband. That she was a senior clerical officer but she has now lost promotional opportunities because she cannot train and improve on her career prospects. She was therefore confined to doing small jobs yet she is the sole bread winner for her family. She suffers from bed sores, urine and stool incontinence which forces her to use napkins and a catheter permanently.

17. The 1st plaintiff emotionally narrated her problems to the court while breaking down and adopting her witness statement material accident, the driver had stopped at Roysambu junction with one person alighting and they proceeded via Githurai route. Before reaching Clay works, and as the matatu was flying speedily, it started swaying side to side. She heard a person seated next to the driver saying the matatu had no breaks. She sat behind the driver so she held onto the metal bar ahead of her. Passengers started screaming. She found herself at Kenyatta National Hospital after the vehicle lost control and overturned, rolling severally. She testified that the alterations to her house were approved by doctors. The 1st plaintiff stated that since the accident she had been operated on three times and has to go to hospital 3 times a week for physiotherapy. She also visits Professor Atunga after every 4 months Professor Sande, Dr Gikonyo and Dr Bhanji among other doctors who have prepared medical reports. That she has no feelings from the waist down and cannot control her urine or stool. That after every 3 hours she has to relieve herself.

18. At the time of the accident, she was 42 years and at the time of hearing of this case she was 54 years. That her husband is depressed because he cannot have sex with her. She cannot be left on her own in the house. She cannot perform any household chores for her husband and children. That as a married woman, she feels very embarrassed about her condition. She produced her bundle of documents as filed in court as PEX3 which include receipts for special damages, medical reports and medical treatment chits.

19. She prayed for judgment as per her amended plaint including amendments that were done at the hearing for the cost of a helper at shs 10,000 per month. She also prayed for costs of the suit and interest.

20. PW3 P M M, the 2nd plaintiff testified that he worked with Jua Kali dealing in electrical goods. That the 1st plaintiff was his wife since 1984 and that they had 3 children aged 32, 30 and 26 years respectively.

21. The 2nd plaintiff recalled that on 11th October 2003 his wife the 1st plaintiff had gone to visit their daughter in Machakos where she was in boarding school. She never returned and the following day, he received information that she was at Kenyatta National Hospital following a road accident at Clay works. Upon being discharged from Kenyatta National Hospital, she was taken to the Nairobi Hospital where she was admitted for 2 1/2 months. At that time, all their children were still in school so he took care of them. That his wife was a responsible wife who did all household chores until the accident which forced him to employ house helps who left from time to time forcing him to take care of her, and that she is not able to do anything on her own. That he could not have sex with her as his wife though he loves her very much which had affected him emotionally to the extent that at one time he thought of leaving her but he had to persevere. He urged the court to compensate him and his wife for loss of conjugal rights and damages for a helper and for the injuries she sustained. He added that he cannot go to work because most of the time the 1st plaintiff is sickly and he only goes to work when she is well but that he has to take her to hospital for check up thrice every week.

22. PW4 Dr. Nassir Bhanji testified that he had been in medical practice for 35 years as a consultant. That he examined the 1st plaintiff and prepared for her a medical report on 9th May 2005. He confirmed that the 1st plaintiff sustained very serious injuries as reflected in his medical report. That she is completely paralyzed from her waist down leading to incontinence of stool and urine; and requires catheter and napkins. She cannot move on her own on the lower limbs. She cannot cook for herself; alterations have to be made to her house including a bed, light switches, dining table, chest drawers, entrance, mirror, bathroom shower, soap holder, the bell to enter her house and that all those alterations would cost her money. The Doctor also testified that the plaintiff needed replacement of a wheel chair whose life span was 4-5 years.

23. That the 1st plaintiff developed blood clots in the legs because of immobility. She requires physiotherapy regularly at shs 3000/- per session, 3 times a week, has to use a taxi or bring a private physiotherapist at home, she had developed bed sores hence requires a special bed to minimize those bed sores. The catheter has to be replaced after 7 days to prevent infections and kidney failure. She needs a nurse 24 hours at a cost of shs 20,000-25,000 per month, x-rays and frequent visits and attention by doctors as she ages.

24. That her fractures which were fixed with metals and screws require surgery. She cannot engage in any sexual activity due to paralysis. She therefore requires a psychologist at shs 6000/- per month plus medication and hospitalization. She lost social life. She had multiple fractured ribs and dislocated her chest muscle which affects her neck. She will require a motorized wheelchair at shs 1.7 million which is very easy to maintain and maneuver.

25. According to PW4, the cost of surgery for bed sores for 2 weeks hospitalization is over shs 275,000. She requires a trained nurse and a taxi at 3000/- one way to hospital. Complications associated with passing stool would require surgery to the tune of shs 300,000, to correct and remove stool is about shs 20,000. She would also require an auto mattress at 200,000 to last for 2 years. She had a long

surgical scar on the spine and bed sore scars. She feels pain in her chest, breast bone and psychological pain. She is susceptible to depression and mental breakdown. Her condition was not expected to improve.

26. The Doctor produced 2 medical reports as PEX 4 and PEX 5 dated 9th May 2005 and 25th February 2010 respectively. He also produced a receipt for shs 15,000/- being court attendance charges as PEX 6. He also identified/recognized the plaintiff who was present in court.

27. The plaintiff's counsel at the close of the plaintiff's case filed submissions to guide the court determine the issues which she framed for the court namely:

1. Whether the 2nd defendant negligently drove motor vehicle registration no. KAL 639X losing control of motor vehicle on 11th November 2003.

28. On this issue, it was the plaintiff's submission that PW1 corroborated the plaintiff's evidence that the 2nd defendant drove negligently as shown by police investigations, proceedings and judgment in Nairobi Traffic case No. 428 of 2004. Further, that the accident was not inevitable or beyond the control of the defendants.

29. On the second issue of **whether the 1st defendant was the registered owner of motor vehicle registration no. KAL 639X**, it was submitted that the plaintiff produced Kenya Revenue Authority copy of records for the accident motor vehicle dated 27th April 2012 showing the 1st defendant as the registered owner of the accident motor vehicle. She relied on **Osapil V Kaddy [2000] 1 EALR 187** where it was held that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle is registered was presumed to be the owner thereof unless proved otherwise. In this case it was submitted that the plaintiff had proved that the 1st defendant was the owner of the accident motor vehicle.

30. On the third issue of **whether the motor vehicle was driven by the 2nd defendant at the material time of accident, as the agent, servant of the 1st defendant**, it was submitted that since there was no evidence that the 2nd defendant was on a frolic of his own, the 2nd defendant was the driver, agent or servant of the 1st defendant owner of the accident motor vehicle. Reliance was placed on **Mwona Ndoo V Kakuzi Ltd [1982-88] 1 KAR 523** and **KBS Ltd V Humphrey [2003] KLR 665** where 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.”

31. It was submitted that in view of the fact that the 2nd defendant was the agent or driver for the 1st defendant, the 1st defendant was vicariously liable for the negligent acts of the 2nd defendant.

32. On the fourth issue of **whether the plaintiff sustained injuries and or incurred damages as a result of the accident**, reliance was placed on the medical reports and oral testimony by the plaintiff and Doctor N.H. Bhanji as detailed in his evidence in chief on what the plaintiff would require in her lifetime in view of her paralysis and after effects of the injuries she sustained.

33. On the fifth issue of **whether the plaintiffs had proved their case on a balance of probabilities** it was submitted that the plaintiff's testimonies in court were not controverted in any way. Reliance was placed on the decision of **General Motors EA Ltd V Eunice Aula Ndeon & Another [2015] e KLR** that he who asserts must prove. In this case, it was submitted that the plaintiffs had

discharged their burden of proof.

34. On the sixth issue of **whether the plaintiffs are entitled to costs of the suit and special and general damages as a consequences of the accident on 11th October, 2003 and if so, what is the quantum.** The plaintiffs' counsel submitted that the plaintiffs were entitled to damages as pleaded and proved as well as general damages.

35. On general damages for pain, suffering and loss of amenities it was submitted, relying on **Jobbling V Associated Dairies Ltd [1981] 3 WLR 172** that the plaintiff deserved to be compensated not for having the serious injuries but for inability to lead a full life. The principles to be considered for award of general damages as laid down in the case of **Rahima Tayab & Others V Anna Mary Kinanu CA 29/1982[1983] KLR 113** were cited. Relying on **Joseph Maganga Kasha V KPLC Ltd [2012] e KLR**, **William Wagura Maigua V Elbur Flora Ltd [2012] e KLR** and **Nancy Oseko V BOG Maasai Girls High School [2011] e KLR**, the plaintiffs prayed for shs 5,000,000 general damages for pain and suffering for the 1st plaintiff inclusive of physical pain and mental distress caused to her and the treatment intended to alleviate it, the awareness of an embarrassment at the disability or disfigurement or suffering caused by anxiety that the 1st plaintiff's condition may deteriorate relying on **Mwaura Muiruri V Suera Flowers Ltd & Another [2014] e KLR** citing with approval **Halsbury's Laws of England 4th Edition VOL 12 (1) page 348-883.**

36. On loss of earning capacity, the plaintiff prayed for shs 1,500,000. Reliance was placed on **Mumias Sugar Company Ltd V Francis Wanalo [2007] e KLR** and **Butler V Butler [1984] KLR 225; Fairley V John Thompson Ltd {1973} 2 LLLR 40 page 14** and on loss of consortium the plaintiffs relied on the case of **Best V Samuel Fox & Company Ltd [1951] 2KB 639** cited with approval in **Kimotho & Others V Vosters & Another [1988] KLR 48** where the Court held that

“Companionship, love, affection, comfort, mutual services sexual –intercourse all belongs to the married state (cited in **Mwaura Muiruri V Suera Flowers Ltd & Another** (supra). However, no sum of money was proposed under the head of sexual fulfillment, loss of servitude and consortium.

37. On the claim for care, transport, equipment and other extra costs the plaintiff prayed for the sums as proposed by Dr. Bhanji PW4. In the end, the plaintiffs submitted that the court should find the defendants liable in negligence at 100% and award them damages as pleaded and proved.

Determination

38. I have carefully considered the plaintiff's claim, the defendant's defence of denial, the evidence tendered in court by the plaintiffs and their witnesses, their counsel's elaborate submissions and authorities relied on both on liability and quantum of damages. In my humble view, and from the list of issues filed by both parties to this suit, the main issues for determination are:-

- i. Who should bear liability for the material accident?
- ii. Whether the 1st plaintiff was injured as a result of the material accident and if so, what injuries?
- iii. What is the quantum of damages payable to both the plaintiffs?
- iv. Who should bear costs of the suit?

39. On the first issue of who should bear liability for the material accident, the evidence adduced by the 1st plaintiff and PW1 a Police Officer is trite that an accident did indeed occur at Clay Works Nairobi involving motor vehicle KAL 639X and that the 1st plaintiff who was a passenger in the said public service vehicle. It is also clear that the said vehicle was being driven very fast at the material time; that it lost control and veered off the road, overturned and rolled several times. It also emerged

from the evidence of the 1st plaintiff and PW1 that no other motor vehicle was involved in the material accident. It is also not in dispute from the evidence adduced and which evidence was not controverted that the 2nd defendant was the driver of the said motor vehicle, owned by the 1st defendant and that the 2nd defendant driver was charged with the offence of causing death by dangerous driving following the material accident wherein several passengers lost their lives. The 1st plaintiff produced police abstract no. A569706 issued by Traffic Department at Kasarani Police Division wherein the accident was reported, scene visited and investigations carried out, leading to the driver of the accident motor vehicle and who is the 2nd defendant herein being charged in court vide Traffic 428 of 2004.

40. In my humble view, even in the absence of any results of the traffic charge, I am satisfied that the 1st plaintiff did, on a balance of probabilities prove that the 2nd defendant was negligent in the manner he drove the accident motor vehicle, for there was no explanation by the 2nd defendant as to why a motor vehicle which is well driven, well maintained and well managed could have lost control and rolled several times. It is now a well established principle of law that motor vehicles which are well driven and well managed and or well maintained do not just get involved in accidents. This principle was espoused in the recent Court of Appeal decision of **Rahab Micere Murage V Attorney General & 2 Others [2015] e KLR** where it was stated that there must be a cause to an accident and in this case, only the driver of the accident motor vehicle could explain that cause. In this case, however, the driver chose not to give any evidence in court to explain that cause to the satisfaction of the court.

41. In **Embu Republic Road Services Ltd V Riimi [1968] EA 22** the court stated that:

“ Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence....”

42. In the instant case, the defendants chose not to attend court to advance any theory explaining why the accident occurred. This court, therefore, has no hesitation in concluding that the 2nd defendant who was the driver, agent or servant of the 1st defendant, then managing, driving and or controlling the accident motor vehicle while carrying passengers was negligent. I find the 1st defendant vicariously liable for the negligent acts of the 2nd defendant. The two are hereby held to be jointly and severally liable at 100% for the accident which occasioned to the plaintiff very serious injuries.

43. On the second issue of whether the 1st plaintiff sustained injuries and if so, what injuries, the 1st plaintiff testified and called Dr. Bhanji who examined her and produced medical report on her injuries. She also produced a P3 in her bundle of documents as well as medical treatment, discharge summaries from Kenyatta National Hospital and The Nairobi Hospital. The medical reports by Dr. Bhanji compared with his detailed testimony by the plaintiff and Dr Bhanji reveal that the 1st plaintiff sustained injuries involving:

1. Head injury- cerebral concussion
2. Fracture dislocation at T11/T12 level of the thoracic spine causing paralysis.
3. Separation of breast bone.
4. Fractures of ribs on both sides of the chest wall.

44. The plaintiff is unable to move on her own due to paralysis. She uses a wheel chair. She cannot perform any household chores, not even bathing herself; she has stool and urine incontinence and cannot have sexual intercourse as a married woman. She is a total paraplegia left with permanent paralysis and

surgical scar over the spine.

45. This court had the opportunity of seeing the plaintiff and observing her as she testified. She was confined in a wheel chair. The plaintiff having suffered severe injuries as a result of negligence of the defendants, she is entitled to damages.

46. On what quantum of damages the 1st plaintiff is entitled to, based on the injuries as enumerated by Dr. Bhanji and the pleadings, it is not in dispute that on special damages, the 1st plaintiff incurred heavy medical bills for the treatment which bills continue to accrue in view of her condition which is permanent paraplegia with all its associated complications.

47. The law regarding special damages is that they must not only be specifically pleaded but strictly proved. The 1st plaintiff pleaded for shs 2,528,051.81 which include the doctor's fees, hospitalization charges and physiotherapy. She produced a bundle of receipts to prove the same. Some bills were settled on her behalf by the employer the National Assembly through the medical insurance cover. Nonetheless, that is a benefit that was due to the 1st plaintiff, the same as AON Minet Insurance Company who also settled some of her bills. I have examined the receipts produced and I am satisfied that the plaintiff has proved on a balance of probabilities that she incurred the medical expenses plead which I hereby awarded her sh 2,528,051.81 as proved.

48. The plaintiff also sought for special damages in the sum of shs 1,258,446 being the cost of remodeling her house. She testified that due to her paraplegic condition, she could only access her house on a wheel chair. Further doctor Bhanji testified that the 1st plaintiff would require such alterations to the house to facilitate her movement. The plaintiff produced a valuation report by Nthunguni Builders dated 31st July 2006. However, an examination of that valuation report though headed "valuation for the extension and alteration works", the details in the said report, showing completed work give a clear indication that the house was being built and not altered. There is a whole difference between alterations to a house and building of a house. In the item under main house, the valuation shows foundations – natural stones, ground floor slabs, walls, ring beam and columns, roof structure timber, roof covering-prepainted sheets, floor furnishes, ceiling, painting, fittings, plumbing and electrical works. Total sum sh 1,258,446.64. However, this court was not shown the "alterations" to the main house that would fit the description of alterations to an existing or a house under construction suitable for the 1st plaintiff's paraplegic condition.

49. Furthermore, the 1st plaintiff testified that at the time of the accident, she was constructing a house which she had to stop and recall the contractor to re-design it in view of her serious disability state to enable her access the house. That may be so. However, there is no evidence adduced to show the original design and the re-designed house with alterations to suit her situation. This court does not doubt the fact that the 1st plaintiff's condition is such that she would require easy access to her house. However, it is doubtful that the whole house would be redone to suit her state. She would no doubt require ramps to access areas. But the evidence adduced in court fell short of the required standard that on a balance of probabilities, the plaintiff spend shs 1,258,446.46 to make alterations to her house to fit her situation.

50. No photographs of the specific alterations to the said house were shown to the court. Not even the contractor who was engaged in the alleged house modification testified as to what specific alterations or fittings were done to the house specifically for the 1st plaintiff's easy access to the various parts of her house. That being the case, I find that the plaintiff's claim for shs 1,258,446.64 being the cost of alteration to her house was not proved on a balance of probabilities and I hereby disallow it.

51. On the claim for extra costs which are continuing expenses such as clothing, special mattresses, bed pans, high profile cushions, cost of a caretaker and nursing care etc, the plaintiff and PW4 doctor Bhanji testified that she would require physiotherapy at shs 3000/- per session 3 times a week to prevent blood clots in her limbs, transport at shs 8,000/- 3 times a week, a water bed to reduce bed sores; catheters removable after 7 days at 500 to be done by a trained nurse. A trained nurse on 24

hours basis at shs 20,000 per month; A neurologist at shs 8,000/-; Surgery to remove metal implants in case of infections; Psychiatrist charges at shs 6000/- per session due to depression and low self esteem; A motorized wheel chair at shs 1.7 million which is easy to maintain. Operations for bed sores at shs 275,000; Transport to and from hospital at shs 6,000/- two way; and Surgery for incontinence at 250,00.

52. Doctor Bhanji confirmed that all the above items are necessary for the plaintiff to sustain her life. He estimated her life expectancy to be at 80 years. At the hearing, the plaintiff was aged 55 years.

53. Considering the evidence adduced and the dire condition of the 1st plaintiff, in my view, the 1st plaintiff proved, on a balance of probabilities that she requires the above named items and medical care in view of her paraplegic state. Accordingly, I award to the plaintiff the extra cost pleaded and proved as follows, using a multiplier of 20 years, for the plaintiff who was at 55 years at the time of hearing of this suit and taking into account vicissitudes of life;

- a) Physiotherapy 3,000 x 3 weekly = 9,000 x 4 weeks x 12 x 20 = 8,640,000
- b) Transport to and from hospital three times a week at 2000 per day x 3 weekly = 6,000 x 4 weeks x 12 x 20 = shs 5,760,000.
- c) Cost of a water bed – not provided
- d) Cost of catheters = 500 x 4 x 12 x 20 = shs 480,000
- e) Cost of hiring a trained nurse at shs 18,000 per month x 12 x 20 = shs 4,320,000
- f) Cost of neurologist shs 8,000 x 12 x 20 = shs 1,920,000
- g) Cost of psychiatry services 6000 per session x 12 x 20 = shs 1,440,000
- j) Cost of a motorized wheel chair shs 1,700, and 00.
- i) Cost of future surgery on sores shs 275,000
- k) Cost of surgery for continence shs 250,000 x 6/12 x 20 = 2,500,000

Total kshs 27,035,000

54. On the claim for loss of earning capacity, reliance was placed on **Mumias Sugar Company Ltd V Francis Wanalo** (supra) where the Court of Appeal stated that the claim for loss of earning capacity is a general damage claim and as such it is deemed to flow directly from the claim and need not be pleaded. In this case, the plaintiff prayed for any other relief that this Honorable court may deem as fit and proper. She did not specifically plead for loss of earning capacity.

55. However, the **Mumias Sugar Company Ltd V Francis Wanalo** (supra) case is clear that “ loss of earning capacity can be claimed and be awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages and that the award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to assess the real or approximate financial loss that the plaintiff has suffered as a result of disability.

56. The above decision also made it clear that the award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial and when he is not in employment. The justification for the award when the plaintiff is employed is to compensate him for the risk that the disability has exposed him of either losing his job in future or in case he loses his job, his diminution of chances

of getting an alternative job in the labour market.

57. The principles to be considered in making this award was stated in the case of **Butler V Butler [1984] KLR 225** which I have considered. Taking into account the injuries suffered by the 1st plaintiff and its resultant effects, and the fact that the 1st plaintiff's prospects of promotion beyond chief clerical officer are diminished as she had to be assigned lighter duties due to her disability, and based on the decision in **Cecilia Mwangi V Ruth W.Mwangi CA 251/1996**, I would, in addition to the claim under general damages for pain, suffering and loss of amenities I award to the 1st plaintiff a further sum of shs 800,000/- for loss of earning capacity, without using any multiplier.

58. On the claim by the 2nd plaintiff for loss of sexual fulfillment loss of servitude and consortium, the plaintiffs testified that they are husband and wife and that as the 1st plaintiff lost all sensation from the waist downwards due to total paralysis, she lost her libido. She cannot have sex with her husband. She tried and failed. The husband too testified that due to the 1st plaintiff's paralysis, he was unable to have sex with her. He has suffered psychologically and that at one time he considered abandoning her but had to persevere because of his love for her.

59. The case of **Best V Samuel Fox & Company Ltd [1951] 2 KB 639** cited in **Kimotho & Others V Vesters & Another** (supra) defined consortium as *'companionship, love, affection, comfort, mutual services, sexual intercourse all belong to the married state.'*

60. The 1st plaintiff sustained very serious injuries. Her paraplegic state is permanent. They have affected her ability to provide any consortium to her spouse the 2nd plaintiff. Both have suffered psychologically. The 1st plaintiff can be compensated by an award under pain, suffering and loss of amenities whereas the 2nd plaintiff can be compensated for loss of consortium. The doctors' medical reports and testimony by Dr Bhanji confirms that the 1st plaintiff lost inability to have any sexual intercourse.

61. In the premise, I find the claim for loss of consortium by the 2nd plaintiff proved and accordingly I award him a sum of shs 800,000/- damages for loss of consortium.

62. On the 1st plaintiff's claim for pain, suffering and loss of amenities, based on the decision in **Joseph Maganga Kasha V Kenya Power & Lighting Company Ltd [2012] e KLR** where the plaintiff was rendered 100% permanent disability, he was awarded kshs 3,000,000 general damages for pain, suffering and loss of amenities. Similar award was made in **William Wagura Maigua V Elbur Flora Limited [2012] e KLR** and **Nancy Oseko V BOG Maasai Girls High School[2011] e KLR** all cases of total paraplegia, I would award the plaintiff **kshs 3,000,000** general damages under this head.

63. In the end, I enter judgment for the plaintiffs against the defendants jointly and severally on liability at 100%.

64. On quantum I enter judgment for the plaintiffs against the defendants jointly and severally as follows:

a. Special damages of **Shs 27,035,000** made up as follows:

i. Physiotherapy shs **8,640,000**

ii. Transport to hospital **shs 5,760,000**

iii. Cost of catheters **shs 480,000**

iv. Cost of hiring a trained nurse **shs 4,320,000**

- v. Cost of neurologist shs **1,920,000**
- vi. Cost of psychiatry services **shs 1,440,000**
- vii. Cost of motorized wheel chair **shs 1,700,000**
- viii. Cost of future surgery **shs 275,000**
- ix. Surgery for incontinence **shs 2,500,000**

b. General damages **shs 4,600,000** made up as follows

- i. For pain and suffering and loss of amenities shs **3,000,000.**
- ii. Loss of earning capacity **shs 800.000**
- iii. Loss of consortium for the 2nd plaintiff **shs 800,000**

Total damages shs. 31,635,000/-

65. I also award to the plaintiffs costs of this suit and interest on general damages (except on loss of earning capacity) at court rates from the date of this judgment until payment in full.

66. I award the plaintiffs interest on special damages at court rates from the date of filing suit until payment in full.

67. Those are the final orders of this court.

Dated, signed and delivered in open court at Nairobi this 19th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of

Miss Kethi Kilonzo for the plaintiff

N/A for the defendants

CA: Adline