



**REREPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 658 OF 2009**

**JAMES GATHIRWA NGUNGI.....PLAINTIFF**

**VERSUS**

**MULTIPLE HAULIERS (E.A.) LIMITED .....1<sup>ST</sup> DEFENDANT**

**MOSES KIASALU KILONZI .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff claims against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for special and general damages for injuries he sustained from an accident involving the car he was travelling in KAR 129B a Nissan /Datsun and the motor vehicle registration KAT 398/ZC 3054 M/Benz trailer that was being driven/controlled by the 2<sup>nd</sup> defendant who he alleges is the agent, servant of the 1<sup>st</sup> defendant. He claims that on or about 10<sup>th</sup> March 2007 he was lawfully travelling in motor vehicle registration Number KAR 129B Nissan /Datsun along the Nairobi – Mombasa Road when at Manyani or thereabout, the 2<sup>nd</sup> defendant as driver, agent and/or servant of the 1<sup>st</sup> defendant negligently drove, managed and/or controlled the said motor vehicle registration number KAT 398/ZC 3054 M/Benz trailer that he caused the same to violently collide with the said motor vehicle registration number KAR 129B. The 2<sup>nd</sup> defendant's alleged negligence is set out as follows;

- a. Driving and/or parking motor vehicle registration Number KAT 398N/ZC 3054 without due care and attention.
- b. Failing to exercise or maintain any sufficient or adequate control of the said motor vehicle registration Number KAT 398N/ZC 3054
- c. Causing and/or permitting the said motor vehicle registration number KAT 398N/ZC 3054 to violently collide with motor vehicle registration number KAR 129B
- d. Parking the said motor vehicle registration Number KAT 398N/ZC 3054 in the middle of the road without any due care and/or any warning to other road users or at all
- e. Causing obstruction of other road users and in particular motor vehicle registration number KAR 129B
- f. Failing to keep any or any proper lookout or have any sufficient regard for traffic that was or might reasonably be expected on the said road.

g. Failing to stop, slow down, put reflectors/hazards, avoid or swerve or in any other way manage the said motor vehicle registration number KAT 398N/ZC 3054 to avoid the said accident.

As a result of the said accident the plaintiff sustained personal injuries accompanied by pain and suffering.

2. **Particulars of injuries**

1. Compound comminuted fracture of the right tibia
2. Compound comminuted fracture of the right fibula
  - iii. Fracture of the left proximal radius
  - iv. Fracture of left ulna
  - v. Head injury
  - vi. Deep cut wound of the parietal region about 4cm
  - vii. Soft tissue injury and bruises of both hands multiple facial cuts and lacerations
  - viii. Pathological /re-fracture of the right leg

3. **Residual injuries**

- a. Re-fracture of the right leg
- b. Many sinuses on the right leg with pus
- c. Bone exposure
- d. Chronic bone infection and dead bone
- e. Restriction in walking.
- f. Difficult in walking
- g. Restriction in mobility of the fore arm
- h. Difficulties in squatting
- i. Weakness of the left upper limb
- j. He cannot carry or lift heavy objects
- k. Walks with aid of clutches
- l. Restriction of movement of the left limb
- m. Pain due to prolonged surgery procedure

4. **Particulars of special damages**

- i. Police abstract..... Kshs. 200.00

- ii. Motor vehicle search.....Kshs.1,000.00
- iii. Medical report.....Kshs.5,000.00
- iv. Transport and subsistence.....
- v. Loss of earnings..... Kshs. 495,000.00
- vi. Medical/ treatment Expenses..... Kshs.405,694.00

Total .....Kshs. 906, 894/-

5. The plaintiff claims loss of earnings; that he was a PSV conductor based at Mombasa at the time of the accident earning Kshs.500.00 per day with effect from the date of the accident and claims for loss of future earnings at the rate of Kshs. 59.70 for an average of 14 hours as per legal Notice No. 70 the Regulation of Wages and conditions of Employment Act (Cap 229) the regulation of wage (General) (Amendment) Order 2009 OR at the prevailing earning rate of a PSV conductor. Further the plaintiff claims for future medical treatment and/or expenses of approximately Kshs. 120,000/-.

6. The defendants vide their statement of defence dated 21<sup>st</sup> January 2010 denies the 1<sup>st</sup> defendant is the registered owner of motor vehicle registration Number KAT 398N/ZC 3054 Mercedes Benz Trailer or at any material time the said motor vehicle was being driven by the 2<sup>nd</sup> defendant or that the 2<sup>nd</sup> defendant was the 1<sup>st</sup> defendant's authorized driver agent and/or servant within the scope of his employment and put the plaintiff to strict proof thereof. They denied that at any time on 10<sup>th</sup> March 2007 that the 2<sup>nd</sup> defendant negligently drove, managed and or controlled the motor vehicle registration number KAT 398C/ZC 3054 or caused or permitted the said motor vehicle to collide with motor vehicle registration KAR 129B Nissan/Datsun. They denied the particulars of negligence as raised by the plaintiff and puts him to strict proof thereof. They further argued that the if any accident so claimed took place the same was substantially caused by the negligence, carelessness and or recklessness of the driver, agent or servant of the owner of motor vehicle registration KAR 129B Nissan/Datsun, in which the plaintiff was allegedly travelling in. The defendants deny the jurisdiction of the court and argued that the suit was misconceived, embarrassing and incompetent and should be struck out and particularized the negligence.

7. The defendant vide the third party Notice dated 16<sup>th</sup> June 2011 sought to enjoin a third party Lee coach Services Limited the owner of KAR 129B to this proceedings. However despite service the 3<sup>rd</sup> defendant never entered appearance.

8. The plaintiff's evidence is that on 10<sup>th</sup> of March 2007 he was travelling in vehicle registration no. KAR 129B from Mombasa. On reaching Mayani area along the Nairobi Mombasa road at about 2 a.m. the vehicle he was in suddenly rammed into the trailer that was parked in the middle of the road having broken down. He was awake when the accident happened. He stated that the trailer had no trail light on nor did it have any warning of its presence on the road like a triangle life saver, hazard lights or branches. He did not see its reflectors. As a result of the accident he suffered various injuries as stated in particulars of injuries. The accident was reported at Voi Police Station, the driver of the trailer was charged in court. He was issued with a P3 form and a police abstract. He added that he was treated in various hospitals such as Moi District Hospital, Voi, Thika District Hospital, Guru Nanak, S. Hospital, Wellington, Radiant and St. John's Hospital; that due to the injuries he sustained he has not been able to resume work and claims for loss of earnings and loss of future earnings, general and special damages.

9. He testified that his leg became problematic and he had to be fitted with a metal plate incurring Kshs. 405,694/- for treatment. He adduced a discharge summary from Voi Hospital exhibit4, exhibit 5 from Thika and Guru Nanak A B & C and sought to adduce receipts for payments made. He added that Dr. Wakobi treated him and he paid him Kshs. 2,000/- for the report; that his work as a conductor required him to walk and he earned between Kshs.500 – Kshs.800/-.

10. On being cross examined the plaintiff testified that he paid fare, there were not many vehicle on the road, he saw about 3 or so vehicle, he does not recall if the road was straight or hilly, he saw the vehicle before the accident, he did not see a vehicle approach from the opposite side, he lost consciousness after the accident but later on woke up and called for help and that he did not testify in the traffic case. He testified that he was being paid Kshs.500/- daily and was off duty when the accident occurred. He added that he has not looked for work after the accident and did not know the driver of the trailer. In re-examined he testified that he has not been able to look for work due to his condition as a tout he has to run and walk to get passengers.

11. PW2 Dr. Washington Wakobi testified that he examined the plaintiff and wrote a medical report dated the 9<sup>th</sup> of October 2009. In his findings he indicated that the plaintiff suffered fracture of left radius bone, fracture of the left ulna, fracture of the right tibia and fracture of the right fibula. On re-examining the plaintiff he observed that the plaintiff still had external clamps and pus still oozed from the puncture areas of the external fixation and that his leg had much muscles wasting caused by the long period of disuse. An x-ray done on 3/4/2013 showed there were multiple islands of active bone infections (osteomyelitis) which were still active. In his opinion from the medical, clinical and x-ray evidence he stated that although the fractures had united there was still substance of bone infection. He recommended removal of the external fixators and proposed another form of immobilization to be applied. Further that the plaintiff be given very vigorous courses of strong antibiotics to treat and possibly cure the osteomyelitis. He assessed the cost of such treatment at Kshs. 150,000/- with 6 sessions of interrupted antibiotics treatment fortnight at Kshs. 25,000/- per session. In his opinion the plaintiff will have a disability of 20 % adding that with a cure he could be able to resume gainful employment as a driver within 18-24 months.

12. He disagreed with the opinion of Doctor Shah that Kshs. 15,000/- was sufficient for future medical stating that the worst infection is bone infection and it required costly treatment and there was possibility that it could recur in future even when one thinks it has healed. He also differed with Doctor's Shah's opinion that the injuries were not of a disabling nature. He indicated that he had not examined the plaintiff again.

13. On being cross-examination he testified the infection was not occasioned by how the treatment was carried out but that the same could occur after an injury. Though he could not state for a fact what caused the infection and that the subsequent surgeries were to control the infections.

14. Doctor R. P. Shah a surgeon testified that he examined the plaintiff on the 26<sup>th</sup> of May 2010 and prepared a report. His opinion on the plaintiff's injuries were that; the left forearm bones fractures are expected to have healed well in around 10 to 12 weeks after the accident, as such fractures usually do. He re-examined of the plaintiff on 29/10/2013 and based his findings on Dr. Wakobi's medical report and the x-ray reports of the plaintiff's right leg dated 3/10/2013. In his findings he stated that there was occurrence of osteoarthritis which had re-occurred once or twice since the accident, after his operation and fixation of external fixators in March 2007. He also found pus at the entrance of the pin entrance of the external fixators within the leg. He blamed the plaintiff for not seeking further medical care for 5 years since 2008. He stated that the plaintiff had failed to remove the external fixators and that had he had so there was likely hood that the bone infection would not have occurred. From the said x-rays dated 29/10/2003 the same showed no active bone infection and the subsequent x-ray done November/2009 showed that the plaintiff's fractures had healed. That though he walked with clutches there was no significant wasting of muscles. In his conclusion he argues that the injuries sustained by the plaintiff healed within 1 year in 2009 but this did not happen as he neglected to take medical care and he would have been cured by the end of 2009. He recommended removal of external fixators which and assessed costs at Kshs. 15,000/- in a government hospital and a course of antibiotics at a cost of Kshs. 3,000/- that he needs no clutches as the x-rays of 2009 showed the fractured had healed. He assessed total cost of treatment at Kshs. 60,000/-

15. On cross-examination he stated that a compound fracture is an injury where the skin is damaged or torn and the skin can allow an infection. He explained the 3 operations the plaintiff had. He admitted that the presence of pus is a sign of infection. That at the time he examined the plaintiff he did not produce

any document to show that he was attending any hospital for treatment. He maintained his opinion that once the external fixation is removed the plaintiff will be able to work again and that they should have been removed in 2009.

16. DW2 Moses Kilonzi the 2<sup>nd</sup> defendant testified that on 10<sup>th</sup> March 2007 at around 5 p.m. whilst driving the vehicle registration KAT 398M trailer registration No. ZC 3054 M/Benz the same broke down due to an oil leak. He put one life savers about 70 meters in front of the trailer and another behind the vehicle at a distance of 100 meters. He called the head mechanic who said he would send mechanics in the morning since it was late. At around 1 a.m. while he was sleeping in the vehicle he heard a bang and on alighting the trailer he saw that the bus registration number KAR 129B had hit the trailer and overturned opposite the lorry. A fire started and he together with other people assisted in putting it off and removing the injured people from the said vehicle; that he saw that 3 people had died at the scene. He went to Manyani and informed his boss about the accident and he promised to send a team in the morning. He went back to the scene and found that the police had arrived and were pulling people from the wreckage when they measured the distance between the lifesaver and the trailer. A breakdown came at 9.00. a.m. in the morning and towed the vehicle to Voi Police Station. He stated that the driver of the said vehicle had seen the life savers and the branches as over 400 other vehicles had passed through that road and had not hit him meaning that they saw the life savers and branches. That he had tried to move the vehicle from the load slightly off the road adding that all the vehicles at Multiple Haulier's were well maintained and if it was an engine failure the same would have been foreseen.

17. In cross examination DW2 stated that 1000 to 2000 vehicles had passed before the accident as it's a busy highway. He admitted that police found him to blame and he was charged. He maintained that the vehicle was well maintained though he has no document to prove that. He stated that the bus driver was not charged. That he had placed the triangles and branches and had held the branches with stones.

18. Parties made written submissions under various heads as follows;

### 1. Liability

a. The plaintiff submitted that no evidence showed that the trailer had broken down and that the defendant were negligent having left the trailer obstructing a busy road for that length of time and did not adduce evidence to prove that there were life savers and branches that had been kept on the road by the 1<sup>st</sup> defendant to warn oncoming vehicles of the same nor adduced evidence showing that the vehicle was properly maintained as claimed by the 2<sup>nd</sup> defendant. The plaintiff further submitted that it was clear that the defendants were negligent and what was before the Court was a civil matter on tort of negligence and that he had proved his case on a balance of probability as required under the law. He added that an acquittal in a criminal matter did not absolve the party from negligence in a civil suit; he relied on the case of **Michael Herbert Kloss –vs- David Seroney & 5 Others (2009) eKLR** where the Court held;

*“The acquittal of .....in a traffic case would of course not be binding on a civil Court subsequently considering the issue of negligence on standard of proof which is lower than proof beyond reasonable doubt”*

The plaintiff raised an objection to production of the traffic proceedings without evidence therein being subjected to cross examination and therefore the Court can only evaluate the evidence before it on negligence. He urged the Court to find the defendant 100% liable for the accident and proceed to access damages payable to him for pain and suffering.

b. The defendant on the other hand denied liability and submitted that the plaintiff only gave evidence on causation and lay blame on the defendants by stating that he did not see any warning signs. He however, did not give any evidence that the driver took any measures to swerve to avoid hitting the truck. In his testimony he stated that he lost consciousness immediately after and therefore had no opportunity to see what was around the truck. It was further submitted that the plaintiff deliberately chose not to produce the police file as the records would have provided evidence showing that the defendants were not

to blame for the accident as was in line with the 1st defendant's testimony in that he had done all that was necessary to avoid the accident; that it is settled law that traffic proceedings and judgment are not binding on a Civil Court but nevertheless the relevant proceedings cannot be ignored **Michael Hubert Kloss & Another –vs- David Seroney & 5 Others [2009] eKLR** it was held 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.”

Further it was held that;

“But an acquittal is certainly relevant and significant especially so in this case because Kloss and his passenger, Sabine, were not available to testify in the superior Court, and the proceedings before traffic court were produced as an exhibit with the consent of the parties.”

It was further submitted that in the present case the witnesses who testified before traffic Court could not be called without undue hardship and expense and Counsel relied on the case of **Joash M. Nyabicha v Kenya Tea Development Authority & 2 Others [2013] eKLR** where it was held that;

“Again with all due respect to the learned judge, we do not see how the charging of the appellant in the traffic case would, in the circumstance, suggest that the appellant was liable for the accident. We agree with the appellant that the learned judge's conclusion based on the mere charging of the appellant with a traffic offence was unfounded and without basis.”

The defendants blamed the bus driver for the accident and submitted that the third party did not enter appearance nor file a defence despite having been served and can only be deemed to have admitted the plaintiff's claim against it. Further, that traffic Court in its judgment concluded that the truck driver (1st defendant) had done all he could in the circumstances to avoid the accident and also there was no evidence to controvert the defence case.

19. **On quantum**

a. The plaintiff gave evidence on his injuries and produced treatment notes, discharge summary, P3 form and 2 medical reports by Dr. Washington Wakobi to prove his injuries. From his medical reports he listed the injuries the plaintiff sustained and the residual injuries as they appear in the plaintiff's plaint. From his own evidence the plaintiff argued that he was unable to tout as it required a lot of physical movement and had not been able to perform any gainful job to earn a living since the date of the accident. The residual injuries were disputed by Dr. Shah, though he acknowledges that the plaintiff was unable to work for a period of time what is disputed by the plaintiff is the duration. Dr. Shah attributes the prolonged time taken to heal was attributed to the plaintiff's neglect to follow up on medical care. The plaintiff on his part argues that he spent a lot of money in various hospitals and at some point was unable to seek medical attention due to lack of funds. He urged the Court to go by the 7 years the plaintiff was unable to work as he sustained a re-fracture and chronic bone infection.

20. **On pain and suffering**

a. The Plaintiff relied on the following case;

**Margaret Aoko Diero –vs- African Line Transport company Ltd. & Another (2004)**

For dislocation of the ankle with fractures of malleoli both tibia and fibula with multiple soft tissue injuries, the Court awarded Kshs. General Damages Kshs. 1,250,000/- general damages and pain and suffering and a further Kshs. 250,000/- for loss of earning capacity.

**Samuel Mwangi Kamau –vs- Joseph M. Kimemia & Another HCCC No. 192 of 2001.** The plaintiff in this case suffered a fracture of the left leg, fracture of the right tibia and fibula,

fracture of the left temporal bone and other soft tissue injuries, the court awarded Kshs. 1,000,000/- General damages for pain and suffering and loss of amenities.

***Robert Gitau Kanyiri –vs- Charles R. Kahiga & 2 Others HCCC No. 22 of 2009 Nakuru***

Fracture of the right ulna, fracture of the right radius fracture of the femur and humerous, head injuries, the court awarded Kshs. 1,000,000. General damages for pain and suffering and loss of amenities and Kshs. 240,000/- loss of earnings.

**James Katua –vs- Simon Mutua Muasya (2008) eKLR**

The plaintiff sustained fractures including comminuted fracture of the left tibia and fibula a fracture of the acetabulum roof and of the left hip and other soft tissue injuries, the Court awarded Kshs. 2,000,000/- General damages for pain and suffering and loss of amenities

No award was made on loss of earnings.

Counsel for the plaintiff in factoring the high rate of inflation since the above awards were made proposed an award of Kshs. 2,000,000/- for general damages for pain and suffering.

b. The defendant refutes the extent of the injuries sustained by the plaintiff and added that the injuries listed in the plaint were a creation of the plaintiff and were without foundation. The defendants submitted that Dr. Wakobi in his medical report dated 9th October, 2009; lists the injuries as fracture of the left radius and ulna and fractures of the right tibia and fibula and the same were confirmed by Dr. Shah in his medical report dated 26th May, 2010. The two doctors' findings were that the radius and fibula were treated conservatively with immobilization with a plaster and had healed well. Dr. Wakobi had indicated that the plaintiff's bones had infections which take a long time to heal and that the plaintiff required surgery to remove dead bone and treat the existing infection. However, Dr. Shah in his medical report dated 26th May 2010 was of contrary opinion and stated that the fracture as per the x-rays had healed well and there was no sign of bone infection.

c. Further in his medical report dated 9th October, 2013 confirms that the fractures healed adding that the plaintiff would no longer require surgery as stated in his earlier medical report but in his medical report dated 5th November, 2013. He confirmed that the fractures have healed but there is bone infection where the external fixators were and blamed the plaintiff for not visiting the hospital since 2008 and had he visited the hospital he would have avoided the infection.

The defendants submit that Dr. Shah's reports both in 2010 and 2013 were consistent with the outcome. But that Dr. Wakobi's reports lacked consistency and accuracy and the cost estimated for surgery was unnecessary adding that the cost of Kshs. 10,000/- was adequate to treat bone infection. However in the 2013 report the costs sky rocketed with no plausible explanation. They proposed an award of Kshs. 900,000/- in general damages for pain and suffering and loss of amenities and relied on the following cases;

***Mary Pamela Oyioma –v- Yess Holdings Limited [2011] eKLR***, where the plaintiff sustained a comminuted fracture of the right femur; compound fracture of right tibia, fracture of left tibia; soft injuries to the right shoulder and multiple cut wounds over the whole body. The Court awarded him Kshs.900,000/- in general damages.

***Gibson Kariithi Kairu & Another v Joseph Mutio Peter [2009] Eklr***, where it was held that an award of Kshs. 400,000/- was adequate compensation for the plaintiff who had sustained following injuries a compound fracture right tibia and fibula leading to; shortening of the right leg by 3.5%, deformity at the fracture site the right lower leg, varus angulation at 20% at the fracture site due to mal union of the future, muscle wasting on the leg; laceration over the pina of the right ear and soft

tissue injuries to the right chest.

**Thomas Muendo Kimilu & 2 Others [2009] eKLR**, Kshs. 700,000/- awarded for pain and suffering where the plaintiff sustained segmented fractures of the right leg tibia-fibula bones with marked swellings; fracture of the left of the left humerus and partial amputation of the left index finger and injury to middle and little finger.

The defendants argued that the cases cited by the plaintiff were for much more severe and sought to distinguish them as follows; In **Kamau Kimemia [2004] eKLR** there was permanent disability, in **Robert Gitau vs Charles R. Kihiga & Others**, the plaintiff suffered head injury causing paralysis classified as 60% permanent disability while in **James Katua Peter v Simon Mutua Muasya [2008] eKLR**, where the plaintiff sustained a fracture dislocation on the hip joint; compound fracture of left tibia and fibula and fracture of left malleolus. Disability was assessed at 70% and the plaintiff required total hip replacement.

Counsel for the defendants submitted that the cases cited by the plaintiff were severe from 60% to permanent disability and referred the court to findings by Dr. Wakobi who assessed the disability at 20% while Dr. Shah assessed the same at 10%. Counsel urged the Court to be guided by the case of **Chege vs Vesters (192-88)1 KAR, 1021** where it was held; “*damages must be within the limits set out by the decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitable passed on to the members of the public , the vast majority of whom cannot afford the burden , in form of increased cost of insurance cover or increased fee...*”

## 21. Loss of earning Capacity

- a. Though the plaintiff did not adduce any evidence of earnings he was very clear on his earnings. It is also noted that the prevailing minimum wage of a turn boy in Mombasa is Kshs. 92.20/- per hour as per the **Legal Notice No. 196 of the Regulation of wages and Conditions of employment Act Cap 229 the Regulation of wages (General Amendment) Order 2013**; that the defence did not call any evidence to challenge his evidence on earnings and urged the Court to adopt the same as his earnings. From the evidence adduced it is clear that the plaintiff was unable to work for a long time due to the injuries sustained as a result of the said accident. Doctor Wakobi gave the plaintiff a further 2 years and a permanent disability of 20% while Dr. Shah gave the plaintiff 7 years as the period that the plaintiff was unable to do any work due to his injuries. Counsel submitted that the plaintiff had proved his claim for loss of earnings or earning capacity. Plaintiff relied on the case of **Sophia Co. Ltd. & Another –vs- Daniel Nganaga Kanyi** the Court of appeal held that;

*“...the loss of earning capacity is prospective financial loss and which is awarded as part of general damages which does not have to be specifically pleaded which is justified an award in the form of general damages.”*

The Court upheld the award of Kshs. 720,000 for loss of earning capacity.

*“The respondent testified that he was a farmer.... The evidence was not challenged at the trial ....there was ample medical evidence that his earning capacity had been reduced as a result of the accident....”*

*Plaintiff’s counsel urged the Court to adopt a multiplicand of Kshs 500 per day which totals to Kshs.1,260,000/-*

*And in regards to loss of earning capability*

*20 x 500 x 30 x 12=Kshs. 720,000/-*

*Total loss of earning capacity Kshs. 1,980,000/-*

b. Under this head the defendants submitted that the particular of loss of earnings lacks particularity of how the figures were arrived at and the Court is not able to make out what claim is based on. On loss of capacity of earnings the plaintiff claims for Kshs. 500/- per day from the date of the accident he relied on the case of **Butler -vs- Butler [1984] KLR 225**

i. **“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.**

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

iii. **Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an 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.**

iv. **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.**

v. **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.**

vi. **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 claimant; his remaining length of working life; his disabilities and previous service, if any.”**

22. Dr. D. P Shah in 2010 indicated that the plaintiff had healed well and should have resumed work by January 2010 and he should have been able to earn his normal pay from January 2010, the plaintiff confirmed that he never tried to seek employment since the accident; that there is nothing to bar the plaintiff from earning a living and that the claims for loss of earning capacity was exaggerated as he claimed he worked every day including Sundays and public holidays and had no rest days; that normal working hours are 8 in a day with at least one day rest per week, with a month having 4 weeks. He sought to assess the loss of earning from date of accident till December 2009 (21 months)

$59.7 \times 8 \times 6 \times 4 = \text{Kshs.}11,462/-$

$11,465 \times 21 = \text{Kshs.} 240,702/-$

23. It was submitted that the plaintiff has not supported his claim and has not complied with section 19 of the stamp Duty Act and therefore cannot be relied on. Defendant’s counsel relied on the case of **S.D.V. Transami K. Ltd v Scolastic Nyambura [2012] eKLR**, where it was held, **“the requirement of the Stamp duty Act are Mandatory and should have been complied with at time. At the time of production of the receipt, the Court had discretion to allow the respondent time to obtain certificate from the stamp collector in terms of section 19(3)(b) the Court was not to exercise its discretion to enable the plaintiff obtain a certificate from the stamp duty collector.”**

#### 24. **Future medical Expenses**

a. The plaintiff pleaded for Kshs. 120,000/- for future medical expenses but as at the time the doctor

testified he estimated the same to be at Kshs. 150,000/- and urged the Court to award Kshs. 150,000/-.

b. The defendant under this head submitted that in 2013 Dr. Wakobi estimated the cost of infection went up to Kshs. 150,000 however Dr. D. P. Shah retained that there was no infection and assessed the cost of removing the external fixator at Kshs. 15,000/- and places treatment of the infection at Kshs. 60,000/-. Under this head the defendant proposed a sum of Kshs. 15,000/- pointing out that had the plaintiff sought treatment in 2009 and removed the fixators in time he would have avoided infection.

25. **Special damages**

a. The plaintiff under this head listed the special damages as follows;

Loss of earnings ..... 990 x 500=Kshs. 495,000/-

Police Abstract.....Kshs. 200.00

Search .....Kshs. 1,000.00

Medical Report .....Kshs. 5,000.00

Loss of earnings .....Kshs. 495,000.00

Medical expenses .....Kshs. 405, 694.00

**Kshs. 906,894.00**

b. On special damages the defendants submitted that the same must be specifically pleaded and proved. He submitted that the police abstract, motor vehicle search, and medical report was not difficult to prove if the receipts were there but blamed the 3rd party for the accident and since they were served and chose not to defend the matter they should bear full responsibility for any awardable damages.

26. **Final award**

Counsel for the plaintiff urged the Court to enter judgment in favor of the plaintiff for;

Liability 100%

General damages

Pain and suffering Kshs. 2,000,000.00

Loss of amenities Kshs.1,980,000.00

Special Damages Kshs. 906,894.00

Future Medical Expenses Kshs. 120,000.00

Costs and interests at Court rates.

**ISSUES FOR DETERMINATION**

- i. Has the plaintiff proved negligence against the defendant?
- ii. If so who bears liability?

- iii. What general and special damages is the plaintiff entitled to if at all?

## **DETERMINATION**

27. The defendant objects to the jurisdiction of this court. This I believe is a matter that ought to have been raised at the preliminary stages and not in the submission stage failure to do so it was evident that the defendants had submitted themselves to the jurisdiction of this Court.

### **On liability**

28. The plaintiff sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants and later on vide a third party notice dated 16<sup>th</sup> June 2011 sought to enjoin Lee Coach Services Limited the owner of the motor vehicle the plaintiff/respondent was travelling in. The plaintiff was granted leave by the honorable Court on 7<sup>th</sup> June 2013 to effect service via substituted service to the last known address P.O. Box 81493 Mombasa. After the said substituted service the third party did not enter appearance or file a defence as against the plaintiff's claim. The defendant in their submissions argued that the third party failure to enter appearance or file a defence despite having been served and can only be deemed to have admitted the plaintiff's claim against it. I note that the driver of the vehicle the plaintiff was travelling in was enjoined as a third party and not a co-defendant therefore third party proceedings are invoked. Third party proceedings raise questions between the defendant the third party of liability of third party to make contribution or indemnity and normally proceed after the trial suit between the plaintiff and the defendant this in essence is a suit between the defendant and third party see the case of *Sango Bay Estates Ltd and others –vs- Dresdner Bank A-G [1971] E.A.17*. The third party herein was served with the third party notice but failed to file a defense. Order 1 rule 17 of the Civil Procedure further provides that, “..... **as a third party cannot be in default of defence unless he has been ordered to do so.**” Guided by this authority this Court cannot in essence enter judgment against the third party in default of defense. Should the defendant seek to pursue the third party for contribution in liability they should move the court appropriately.

29. It is not in dispute that the accident occurred and that the vehicle the plaintiff was in that belongs to the third party rammed into the 1<sup>st</sup> defendant's vehicle. DW1 stated that he placed branches and a triangle to warn other road users and that the accident happened at 1 a.m. after the vehicle broke down at 6.p.m. I find that the vehicle stayed too long on the road thus causing obstruction to other road users. It is unbelievable that 1,000 to 2,000 vehicles had travelled on the said road between 6.p.m. and 1 a.m. However the driver of the bus too ought to have exercised due care and caution on the road as he approached the stationary vehicle. In my view that liability should be apportioned 50-50 between the defendant's and the third party. On the issue of ownership of the Motor vehicle KAT 398C/ZC 3054 though disputed by the defendant, the plaintiff adduced a copy of the police abstract and records from the Registrar of Motor vehicles dated 22/10/09 which gives the name of the owner of the said prime mover and trailer as Multiple Hauliers E.A. Ltd the 2<sup>nd</sup> defendant herein no evidence has been adduced to controvert this and this leads me to conclude on the balance of probability that the 2<sup>nd</sup> defendant is the owner of the said motor vehicle. Judgment is therefore entered for the plaintiff against the defendants jointly and severally. The defendant may proceed as provided under Order 1 rule 21 (1) against the third party.

30. On general damages both parties adduced medical reports. Dr. Wakobi and Dr. D.P. Shah in their medical reports dated 9/10/2009 and 26/5/2010 respectively confirmed the injuries sustained by the plaintiff as fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula and treatment by immobilization of the left upper limb and right lower limb and operating and plating of tibia bone fracture of right leg and immobilized with an external fixator and recommended the removal of dead bit bones from right tibia as infection had occurred. Dr. Wakobi had assessed the cost of the operation and treatment at Kshs. 120,000/-. By the time Dr. D. P. Shah examined the plaintiff almost 8 months later he stated that all fractures were well healed and no infection was visible and advised the removal of the external fixator at a cost of Kshs. 15,000/-. Dr. Wakobi indicated that the plaintiff may not be able to be in gainful employment within 5 years from the time of the examination while Dr. D. P. Shah

indicated that the plaintiff's incapacity was 10% and that his temporary incapacity would be for about 3 years 3 months.

### **Future medical**

31. Dr. D.P. Shah and Dr. Wakobi's medical report dated 5/11/13 and 9/10/2013 respectively. Dr. D. P. Shah confirmed that there was pus from 2 or 3 places in the right leg and concurred with Dr. Wakobi's recommendation for removal of the external fixator and treatment with antibiotics which he estimated would cost Kshs. 60,000/-. Dr. Wakobi on the other hand indicated that though there bones had united there was still active bone infection and proposed another form of immobilization be applied after the removal of the external fixator coupled with application of strong antibiotics to cure the chronic bone infection. Dr. Wakobi placed disability at 20% and incapacity period of 18-24 months while Dr. D.P. Shah quoted 10% disability and incapacity of a further 3months. From the plaintiff's medical history it is evident that he had prolonged case of bone infection and from my reading of the said medical reports the bone infection is still persisting. I find that an award of Kshs. 100,000/- would be fair for the plaintiff's future medical expenses considering the recurring bone infection he has had since the accident.

### **General damages on pain and suffering**

32. Plaintiff's counsel proposed an award of Kshs. 2,000,000/- for general damages for pain and suffering. From the medical reports by both Dr. Wakobi and Dr. D. P Shah the undisputed injuries sustained by the plaintiff are fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula. The defendants argued that the cases cited by the plaintiff were for much more severe injuries with disability ranging between 60% to permanent disability and proposed an award of Kshs. 900,000/-. I have perused the authorities cited by the plaintiff and find that the injuries sustained by the plaintiffs therein were more severe with higher disability as compared to the plaintiff in this case. The case cited by the defendant of **Mary Pamela Oyioma –vs- Yess Holding Limited (supra)** where the plaintiff sustained a comminuted fracture of the right femur; a compound fracture of the right tibia, a fracture of the left tibia; soft tissue injuries of the right should and multiple cuts over the whole body bears comparable injuries to the this case and was awarded Kshs. 900,000/-. I find that the proposed sum by the plaintiff of Kshs. 2,000,000/- is too high. The plaintiff in the instance case has suffered a lot of pain and has been subjected to numerous operations due to re-occurring bone infection. In this regard I find that an award of Kshs. 1,500,000/- would be adequate compensation for the plaintiff for pain and suffering.

### **Loss of earnings**

33. The plaintiff sought Loss of earnings and loss of earnings capacity in the amount of Kshs. 495,000/- and Kshs.1,980,000/- respectively. From the severity of injuries sustained by the plaintiff it is evident that the plaintiff lacked physical capability to be in gainful employment since the date he was involved in an accident on 10th March 2007 to 8.12.2009 when this suit was filed the plaintiff claims for Loss of earnings Kshs.495,000/-. From the medical report by both doctors are in agreement that the plaintiff was incapacitated.

34. On loss of Earnings am guided by the words of **Fairly versus John Thompson Ltd (1973) 2Lloyds Report 40, Lord Denning** stated: *“It is important to realize the difference between an awards for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.”*

35. In the present case the plaintiff has adduced a copy of certificate of good conduct and a copy of license to act as a conduct to corroborate that he had some form of employment. The defendant Counsel urged the court to find that without any documentary proof, that the claim of loss of earning and loss of earning capacity could not be sustained. Am guided by the Court of appeal decision, In the case of **Jacob Ayiga Maruja & another v Simeon Obayo, Civil Appeal No. 167 OF 2002 Justices OMOLO, TUNOI & GITHINJI, JJ.A** held that;

*“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”*

36. I find that the certificate of good conduct and license proved on a balance of probability that the plaintiff indeed worked as a conductor prior to the accident. During the period the plaintiff was incapacitated he did not engage in gainful employment. I however find that the plaintiff could not have committed all 7 days to work and may have taken a day or two a week to rest. As such I will give him 5 days at 8 hours per day at the rate of Kshs. 500 which translates to;

### **Loss of earnings**

59.7\*8\*6\*4\*21= Kshs. 240,710/-

### ***Future loss of earnings***

37. Dr. Wakobi and Dr. D.P. Shah assessed permanent disability at 20% and 10% respectively. According to Dr. Wakobi in his report dated 9th October 2013 he indicated that the plaintiff still had external clamps and the puncture areas were oozing pus and incapacity adding that the plaintiff could resume work in 18-24 months. Dr. D.P. Shah in his medical report dated 5th November 2013 stated that the plaintiff walks well and estimated that the plaintiff's old fractures of the middle third of the right tibia and fibula have healed with satisfactory alignment. Dr. Shah's report is the latest and he indicates that the plaintiff is fully recovered from the fractures with only recommendation to have the external clamps removed. I find that having recovered from the said injuries the plaintiff claim for loss of future earnings is not sustainable as he has not shown if at all he has tried to get an alternative job to earn a living.

### **Specials**

38. On special damages the defendant was not opposed to award of the same if only there was evidence proving the same. I have gone through the receipts of the expenses he incurred in getting treatment. These are my findings;

Guru Nanak receipts amounts to = Kshs. 325,000/-

Pharmacy receipts Moi = Kshs. 2,600/-

Thika District Kshs. 23,360/- + 4,000 = Kshs. 27,360/-

Shikamed = Kshs. 35,225/-

Dr. Calisto Odongo= Kshs. 19,600/-

St. John = Kshs. 500

Abstract = Kshs. 200

Motor vehicle search Kshs. 1,000/-

Medical report Kshs. 5,000/-

Total= Kshs. **396,885/-**

The specials are proved to the extent of **Kshs. 396,885/-**

**Final award**

General damages for pain and suffering.....Kshs. 1,500,000/-

Special damages..... Kshs.396,885/-

Loss of earnings ..... Kshs. 240,710/-

Future medical expenses.....Kshs. 100,000/-

Total Kshs. **2,237,595/-**

I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 2,237,595/-. The plaintiff shall also have costs and interests of this suit, from the date of this judgment until payment in full.

Orders accordingly.

Dated, signed and delivered this **13<sup>th</sup>** day of **February** 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Plaintiff**  
.....**For the 1<sup>st</sup> & 2<sup>nd</sup> Defendants**

**Mr. Makori**

**Court Clerk**