REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.340 OF 2009

DAVID CHEGE NDUNGU…….....PLAINTIFF

VERSUS

ROBERT MACHARIA……..……1ST DEFENDANT

PETER MAINA……2ND DEFENDANT

SAMUEL NDIRANGU…….3RD DEFENDANT

J U D G M E N T

The plaintiff David Chege Ndung'u was a passenger in motor vehicle KAX 678M which collided with Motor vehicle KAX 287D causing an accident on 16/11/2008 along Naivasha-Mai Mahiu Road in which the plaintiff sustained serious injuries. The plaintiff claims that at the time of the accident the 1st defendant was the driver and the 2nd defendant was the registered owner of motor vehicle KAX 287D and the 3rddefendant was the registered owner of motor vehicle registration No. KAX 678M which was being driven by Timothy Mburu now deceased.

By his plaint dated 24thJune 2009, the plaintiff claims general and special damages for the injuries he sustained as a result of the said accident, averring that the accident was a result of the negligence on the part of the 1st and 3rd defendants and that the 2nd defendant also contributed to the accident. That the plaintiff sustained injury at C6 and C7 fracture with dislocation which rendered him paraplegia. The 1st and 2nd defendants filed a joint defence and denied that the plaintiff was a passenger in motor vehicle registration No KAX 678M.

This case was partly heard before Hon. Mrs Joyce Khaminwa (RIP) on 18/6/12 who heard the testimony of the plaintiff.

When parties appeared before me, they agreed to proceed from where Hon. Khaminwa had left the matter.

The plaintiff had testified as **PW1**, adopting his pre recorded statement and told the court that he was a passenger in motor vehicle KAX 678M together with his cousins Hellen Wangari, and Timothy Mburu. That it was Timothy Mburu who was driving the car when the accident occurred.

The plaintiff stated that he was asleep and sited at the back of the salon car and when he woke up he saw the windscreen shattered. He also saw a truck KAX 287D and other vehicles on the road. He was taken to Kijabe Hospital where he was admitted and stayed in hospital for 6 weeks and later referred to Nairobi Spinal Injury Unit where he was treated for 5 months.

At the time of the accident the plaintiff was 33 years old and married to Leah Wanjiku and he was blessed with a daughter who was 5 years. He testified that he worked at the Kijabe Hospital at the theatre earning a salary of Ksh 17,268. He produced a copy of search from Registrar of Motor Vehicles as PW Exhibit 1 showing motor vehicle KAX 678 is owned by Samuel Ndirangu, another search produced as PW Exh2 dated 15/2/2009 showing motor vehicle KAX 287D Mercedes Benz owned by Mr. Macharia Robert. He also produced receipts for search certificates, medical report from Kijabe hospital, treatment notes from Kijabe hospital and medical report from Mai Mahiu. He testified that at the time of the accident, he was employed at Kijabe hospital in theatre and that he was trained on the job, earning Ksh 17,268 and gross salary of 19,670. He also produced his pay slip as an exhibit. He stated that he was still working at the same place but he could not be promoted since he was confined to a wheelchair always and is dropped every morning to his place of work and taken home in the evening since he lives 3 kilometers away from his place of work. That his life was never the same after the accident as he can not advance his career, cannot control his urine and he needs a nurse. His wife washes him and that he is embarrassed that his wife has to help him all the time. He wished to have three children but that had been thwarted by the accident. He was cut off from social life and cannot sexually function. he plaintiff prayed for general damages and special damages against all the defendants.

In cross examination, he maintained that on the material day, they were coming from Naivasha where there was a wedding and that the accident occurred at 2.30 am. He however stated that he was asleep when the accident occurred and he was a passenger in KAX 678M which was being drive at high speed. That the salon car belonged to Samuel Ndirangu, the third defendant. He stated that he was trained for 2 years in grafting and helping doctors although he had not brought his certificate which he stated he had,. He stated that following the injury, he now uses urine bed and catheter as training. He stated that he did not need a permanent nurse but the catheter need changing to avoid infection. He stated that he was in the accident vehicle and that the seat he was wearing caused the accident in KAX678M.

In re examination the plaintiff stated that he was injured as a result of the impact of two vehicles. That there was a forward backward movement of the body because of the belt which injured him in the spinal cord. He blamed both drivers of the two vehicles for the accident and his injuries.

Hellen Wangari Githengu, a business lady in Kijabe testified as **PW2**, she stated that on 16/11/2008 between 3 am and 5am she was traveling to Kijabe from a relative's wedding party in Naivasha. She was travelling in motor vehicle KAB 678M together with her two cousins, the plaintiff who was sited at the back seat and Timothy Mburu Waweru who was driving the car. She was sited in the co-driver's seat. She stated that at the time of the accident none of its occupants had taken any alcohol. The car was registered in the name of Samuel Ndirangu the 3rd defendant. She testified that the accident was caused by a trailer KAX 287D which was coming from the opposite direction at a high speed which hit them head on after leaving its lane to their side.

The witness recalled that a Good Samaritan took them to Naivasha General Hospital and they were later transferred to Kijabe Hospital. She stated that the plaintiff was seriously injured; he could not talk or walk and was later transferred to Nairobi spinal injury hospital. She told the court that at the time of the accident the plaintiff was working in theatre at Kijabe hospital. That after the accident the life of the plaintiff changed as he was now confined to a wheelchair having sustained spinal injuries and needs help all the time since he cannot do anything for himself.

The accident was reported to Mai Mahiu police station where they recorded statements. That they were medically examined and no alcohol was found in their blood.

In cross examination by Mr. Osiemo, PW2 told the court that the accident occurred at 3:00 am on their

way back to Kijabe and that none of them was under the influence of alcohol and that they had come from a wedding party at Naivasha. She stated that Timothy was driving on the left side of the road when the truck hit them and pushed them backwards. She further stated that their driver tried to swerve to the right to avoid being hit. She testified that Timothy did not die in this accident but unfortunately he was later involved in another accident and he died. She denied their driver Timothy was over speeding at the time of accident. She also stated that the said Timothy was not injured but was stuck at the steering wheel. She stated that she suffered fracture of cheek bone and other minor injuries although she had not filed any suit as she was under the care of her parents who did not advise her to file suit.

In re-examination PW2 stated that it was the front left side of their car that was hit by the truck.

Simon Kanyoru, testified as **DW1 and** told the court that he was a turn boy employed by Robert Kariuki, the 1st defendant. He stated that they left Mombasa enroute to Kampala carrying spares in a trailer. They rested at the Mlolongo Weighbridge and left at 2.00am On reaching Mai-Mahiu road they met an oncoming saloon car from the Naivasha side, the car was on the left side of the road. They were going uphill while the saloon car was going downhill in full lights. As they approached closer, the truck driver tried to avoid the head-on collision by trying to swerve but the two vehicles collided head on and the salon car was thrown into the valley. The car hit the trailer where he was sited and the trailer also fell off. He stated that the saloon car driver came out of the car and told them that he was drunk and could not be taken anywhere. The witness further testified that the passengers in the saloon car were injured and they were taken to Naivasha hospital for treatment. He stated that the truck driver kept to the left side of the road and the saloon car is the one which was on the right (wrong) side that is why it hit the trailer from the left side of the road where it fell.

In cross examination by Mr. Mbuvi advocate, **DW1** told the court that the trailer KAX 287 D was driven by Peter Maina but it belonged to Robert Macharia. He stated that the trailer was under the escort of the Kenya Revenue Authority officers who were in a separate vehicle belonging to the 1st defendant. He stated that they were not tired because they had slept at Mlolongo weighbridge and rested from 3pm and left at 2:00am. He further stated that he concluded that the driver of the saloon car was drunk according to how he staggered, although he admitted that he did not accompany the injured to Naivasha Hospital to confirm if the driver was in a drunken state. He confirmed that the plaintiff was one of those injured in the accident. He denied that the accident was a head on collision and stated that the truck driver swerved but that he was not on the wrong side of the road. DW1 further stated that the accident occurred when they were going uphill at about 30 kilometers per hour. He stated that the saloon car hit the control arm of the truck.

The witness admitted that the control arm was underneath the truck while the size of the saloon was at the tyre level. He denied that their driver was tired or asleep at the material time as they had rested enough at Mlolongo before departing for Kampala only to encounter the accident. He stated that their vehicle fell in the middle of the left side of the road after swerving to avoid colliding with the saloon car coming from the opposite direction.

Peter Maina, the second defendant testified as **DW2**, he stated that he was driving the trailer registration No. KAX 287D from Mombasa to Kampala and upon reaching hilltop to Naivasha along Mai Mahiu road, he saw a saloon car coming in high speed driven on the right side, while he drove on the left side. He saw the car at a distance of about 20-30 meters away and he tried to swerve but the car hit them on the left side and it fell in a ditch, the trailer fell in the middle of the road. The driver of the salon car came out of the car and shouted saying he was drunk and he could not be taken anywhere. A Good Samaritan took the passengers to Naivasha hospital. The police came later and the trailer was removed from the road. He stated that he had driven the trailers for over 30 years so he was used to the road. According to him the accident occurred at around 5 am.

In cross examination, DW2 stated that the truck belonged to Robert Macharia and that he had had enough rest at Mlolongo weighbridge after weighing the truck, from 3 pm the previous day and the duo only departed for Kampala at 2 am of the following day, taking about 3 hours to Mai Mahiu the scene of accident. He stated that the saloon car had full lights on so he could not see properly but that he flashed at

it signaling him to dim the lights. He stated that there was no bend at the scene of accident and that he drove at about 50 Km/hr going uphill on a single lane not dual carriage way so on seeing the saloon car come his way, he swerved to avoid a head on collision. He stated that it was the salon car driver who drove on the wrong side of the road, thus, on the side of the truck. He denied that the control arm of his truck was affected or broken.

In reexamination DW2 clarified that he saw the saloon car from far but could not tell how far it was until when it was 20 meters away when he noticed it was on his side of the road and that he swerved to control the vehicle and to avoid a head on and that that is why the truck fell on the road.

At the close of their respective parties' cases, their advocates agreed to file written submissions which were filed and exchanged.

The plaintiff submitted that after the accident the life of the plaintiff changed, his self esteem has been affected. He is unable to engage in sexual intercourse and therefore his plan to expand his family has been thwarted. That his psychological well being had also been affected. He stated that he had proved his case against the defendants on liability to the required standard. It was submitted that the plaintiff's evidence on record was uncontroverted evidence on how the accident occurred and the injuries sustained which led to qua-paralysis. He submitted that the defendants' witness confirmed that the driver of the salon car swerved to avoid the head on collision with the trailer and that the trailer driver swerved to avoid the truck rolling off the cliff.

The plaintiff also submitted that the defence gave contradicting evidence at the speed in which they were driving in that whereas DW1 told the court that their truck was being driven at 30Km/hr, DW2 stated that the truck was being driven at 50km per hour. The plaintiff also asserted that the two defence witnesses contradicted themselves in their testimonies that the control arm of the truck was damaged. The plaintiff submitted that the accident was solely caused by the negligence of the truck driver and therefore both 1st and 2nd defendant are 100% liable and that the 1st defendant owner of the truck is vicariously liable for the acts of the 2nd defendant who was the truck driver.

On quantum, the plaintiff submitted that Ksh 6,500,000 would be reasonable as the award of general damages for pain and suffering. He stated that the medical report of Dr G.K Mwaura dated 17/9/2009 confirms that the plaintiff sustained serious injuries, which injuries were also confirmed by the defendants' Doctor Timothy K. Kagoda's medical report dated 26/3/2011 which report stated that the plaintiff lacks self esteem as a young man. In support of his case the plaintiff cited the case of **JOYCE WAYUA RICHARD VERSUS MIKE TROJANU AND RICHARD MUTINDA MWANTHI CIVIL CASE NO. 112 OF 2008 (2014) EKLR** where the court awarded Ksh 3,200,000 in a similar case. In **MARTIN KIDAKE VERSUS WILSON SIMIYU SIAMBI (2014) EKLR CIVIL SUIT NO. 557 OF 2005** the court also awarded a sum of Ksh 3,500,000 for general damages. In 2012 the court in the case of **NGURE EDWARD KAREGA VERSUS YUSUF DORAN NASSIR (2014) EKLR CIVIL SUIT NUMBER 157 OF 2012** awarded the plaintiff Ksh 5,000,000.

The plaintiff submitted that at the time of the accident he was 33 years old. He could have retired at the age of 6o years and life expectancy and he was just about to further his career, he suggested a multiplicand of 27 years. His salary of Ksh 19,657 per month which would amount to Ksh 19,657 x 12x27 =6,368,868. The plaintiff also submitted that he requires physiotherapy on a weekly basis at Ksh 4,000. Using the multiplicand of 27 years the amount would be 4000x 4x 12x27=5,184,000. Cost of a nurse to take care of the injuries 7000 x 12x27= 2,268,000. The plaintiff also stated that he requires house help to aid him around the house at Ksh 4000x 12x 27=1,296,000. For future medical expenses and specialized needs the plaintiff suggested Ksh 6000x 4x12x27=7,776,000. The whole amount sought by the plaintiff is the sum of Ksh**. 28,096,868**

The defendants submitted that the plaintiff did not witness the accident since he was sleeping at the back seat. The defendants stated that the 3rd defendant ought to be liable for the accident, that the plaintiff testimony and the witness did not at any given time implicate the 1st and 2nd defendant for the occurrence

of the accident. The defendants submitted that since the plaintiff was not an eye witness he was not able to tell this court what actually happened but only the effect the accident had left him with. The defendants further submitted that the plaintiff's claim is purely on tort of negligence and that it was the 3rd defendant driver's negligence that caused the accident and injuries on the plaintiff.

On quantum, the defendants submitted that the plaintiff did not call any doctor to testify and produce the medical report. The defendants cited the case of **Francis Michael Nthiga vs. David Waweru (2015) eKLR** where the plaintiff was awarded Ksh 1,500,000 as general damages for similar injuries. On loss of earnings the defendants submitted that the same cannot be awarded since the accident was not fatal and that the plaintiff did not also adduce evidence that he was in the process of furthering his career. The defendants submitted that the plaintiff was still employed and there was no basis upon which a multiplier of some sought ought to be taken into consideration. The defendants further submitted that there was no evidence to support the cost suggested for a nurse, house help and physiotherapy. The defendant relied on the case of **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another (2013) Eklr** and **MosesOchieng Owili vs Benard Githaka Kamau (2004) eKLR.**

I have carefully considered, the pleadings evidence on record and the written submissions before this court which carefully considered, the issues for determination are:

a. ***Who was to blame for the accident?***
b. ***What injuries did the plaintiff sustain?***
c. ***What damages is the plaintiff entitled to?***
d. ***Who is entitled to costs?***

ON LIABILITY, It is the plaintiff's case that the accident was caused by the negligence on the part of the 1st and 2nd defendant who hit the saloon car in which the plaintiff was a lawful passenger. The plaintiff on his part was asleep when the accident occurred. **PW2** stated that the accident was head on collision as the driver of the salon car tried to swerve the car to avoid hitting the truck which had left its side of the road into the side of the saloon car. PW2 stated that the truck was coming from the different direction in a high speed. In cross examination she told the court that their driver was driving on the left side of the road, they were pushed back and they were hit on the left as they tried to swerve to avoid the accident.

In their statement of defence, the 1st and 2nd defendants pleaded that the accident was contributed to by the negligence of the driver of motor vehicle KAX 287D who crossed the road and drove directly onto his lawful path. DW1 gave his version of how the accident occurred and stated that the saloon car was from Naivasha and it was on the left side of the road as one faces Naivasha and the two vehicles collided head on, with the saloon car hitting them on the passenger's side.

The occurrence of the material accident is not denied. The question is who between the saloon driver and the truck driver, were to blame for the occurrence of the accident.

At the hearing, he attended court confined in a wheel chair and quite frail. He was a mere passenger in the saloon car and therefore he could not have, in any way contributed to the occurrence of the accident.

Both the plaintiff and the 1st defendant's witnesses claim that the vehicles were being driven on their respective left sides of the road from the opposite direction which is the rule of the road for all motorists in Kenya. In other words, each party claims that they were on their correct sides of the road when the opposite party came to their sides and therefore in the process of swerving to avoid each other, there was a head on collision at some angle. None of the parties called the police who investigated the accident and neither was a sketch plan of the scene of accident produced in court.

In my own assessment, it is not clear who between the drivers of the accident motor vehicles was entirely responsible or wholly to blame for the accident in which the plaintiff sustained very serious injuries.

In my view both drivers were under a duty to each other and other road users and that they, at different

levels, must have driven on the wrong side of the road and on realizing that there was an oncoming vehicle, they tried to avoid each other but that it was too late hence, the collision that left the plaintiff with debilitating injuries. The Court of Appeal in **Hussein Omar Farah v Lento Agencies Civil Appeal 34 of 2005[2006] eKLR** observed that:

> ***"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."***

In **Multiple Hauliers Limited v Rahab Muthoni Kimani Civil Appeal No. 300 OF 2010[2015] eKLR** the court held that:

> ***"14. In the present case, the Respondent/Plaintiff had a duty to prove that the accident was caused by the Defendant's/Appellant's driver on a balance of probability. The Appellant too had a similar duty to prove that the damage to its lorry as stated in its counterclaim was as a direct result of the negligence of the Respondent's negligence and thus liable to satisfy the same on a balance of probability.***
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> ***15. the evidence on record, and as stated earlier, is not full prove that either party was wholly to blame. In my own assessment I find that both drivers were under a duty to each other and other road users and that they, at different levels, were to blame. In particular, I find the Appellant's driver overly negligent in attempting to overtake on a continuous yellow line when it was not safe to do so and in failing to take any evasive action to avoid hitting the Respondent's Nissan vehicle, which had stopped, and could not move out of the lane as there was constraint by a dam and a road barrier on its lane."***
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> ***The Nissan vehicle, property of the Respondent was extensively damaged and was written off. This clearly points to the fact that the lorry must have been driving at a very high speed downhill. The lorry too sustained damages."***

In this case, based on the evidence adduced, I am persuaded to find that the driver of the saloon car and the 1st defendant did not drive the respective motor vehicles with due care and attention, and are to blame for the accident. Had each of them driven on their respective lanes or sides of the road, it is unlikely, in the circumstances that the accident could have occurred. There was no evidence that any of the two vehicles lost control before the accident, to suggest that one may have rammed into the other in an inevitable circumstances. There was also no evidence that the driver of the saloon car, as alleged by the DW1 and DW2 was drunk at the time of the accident. If it were that he was drunk, nothing prevented the DW1 and DW2 from availing divulging that information to the police who visited the scene of accident to confirm that position or even producing medical evidence of alcohol in his blood since the said driver was taken to hospital immediately after the accident.

In the premise, I find that the 1st defendant driver was responsible for the accident and consequently, the 2d defendant owner of the Motor Vehicle Registration Number KAX 287D is vicariously liable for the acts of the 1st defendant driver/agent or servant who was engaged upon his duty in the course of employment with the 2nd defendant. The issue of master servant between the two was settled when the defence witness DW2, the truck's turn boy admitted that the truck belonged to the 1stdefendant. I further find that the 3rd defendant is also vicariously liable for the acts of the deceased driver of the saloon car registration No. KAX 678M.

Iam fortified on the above holding by the decision in the case of **KENYA BUS SERVICES LTD VS. HUMPHREYS [2003] KLR 665[2003] 2 EA 519 the Court of Appeal** held that:

"… Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the care was lent to the driver 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."

In this case, the 3rd defendant did not testify as to the occurrence of the accident involving his motor vehicle. However, there is ample evidence from PW1 and PW2 that the salon car which was being driven by the deceased driver belonged to the 3rd defendant as shown by copy of records. Therefore, in the absence of any evidence that the deceased driver was not the agent or servant of the 3rd defendant, this court, applying the principle laid out it the case of **KENYA BUS SERVICES LTD VS. HUMPHREYS (supra**) finds that the salon car was being driven with the authority of the owner and for the joint benefit of the owner and driver. And having found that the driver thereof is liable in negligence for the accident, I find that the 3rd defendant was vicariously liable for the negligent acts of the driver of the salon car.

The plaintiff produced copies of records proving that the 1st and 3rd defendants were owners of the respective accident motor vehicles which conclusively, in the absence of any evidence to the contrary, settles the issue of ownership of the two motor vehicles.

Having found that both drivers of the respective motor vehicles were to blame for the accident in the circumstances of this case in view of the available evidence on record, I apportion liability between the driver and owner of the truck and driver and owner of the saloon car to be shared in equal proportions of 50%:50%.

On INJURIES WHAT INJURIES were suffered by the plaintiff, it is not disputed that the accident occurred and the plaintiff was seriously injured in the said accident. What is disputed is the magnitude of the injuries sustained and the proposed damages. The plaintiff claims that he sustained spine injuries at C6C7 fracture with dislocation therefore becoming paraplegia whereof all the body limbs from the waist down are paralyzed. He produced hospital treatment notes from Kijabe Hospital as well as from Nairobi Spinal Injury Hospital together with a P3 form dully filled by a doctor from the Nairobi Spinal Injury Hospital which all confirm that he suffered debilitating injuries, he remained in a hospital for over 6 weeks and continues to attend medication. He has sores for continued confinement to a wheelchair. He has to be assisted all the time and pushed 3 kilometers away from his work place. He was married with one child. He lost sensations in the lower part of the body and can therefore not enjoy his conjugal rights. He has lost his self esteem and feels embarrassed for being assisted by his wife. He cannot control urine and bowel.

The court had the opportunity to see the plaintiff in court on the occasions of hearing this case. He was confined in a wheelchair with lifeless limbs. The plaintiff must have undergone severe pain and suffering following the injury as confirmed by Dr G.K Mwaura and Dr. Timothy K. Kagoda which were ***admitted by consent*** without calling the doctors to testify.

Albeit the 1st defendant's advocate submitted that there is no medical evidence to prove that the plaintiff was severely injured because the doctors who examined him did not testify on his injuries, I dismiss that submission as defeatist. No doubt, an agreed medical report can properly be admitted in evidence without calling their maker. The parties having consented to the production of the said medical reports without calling their makers, the 1st defendant is estopped from contesting it in his submissions.(**SEE DAVID NDUNGU MACHARIA VS SAMUEL K. MUTURI AND ANOTHER, NAIROBI HCCC NO. 125 OF 1989** Per Ringera J. (as he then was).

ON WHAT DAMAGES THE PLAINTIFF is entitled to, the plaintiff proposed Ksh 6,500,000 as reasonable damages for pain and suffering. In **SAMUEL NJOROGE MBURU V NGA'NGA KAMAU& ANOTHER [2006] EKLR** the plaintiff sustained a cervical spine injury resulting in paraplegia. **The court awarded Ksh 2,000,000. In Rosemary Wanjiru Kungu v Elijah Macharia**

Githinji& another [2014] eKLR awarded the plaintiff Khs 3,000,000. In Alexander Kipkoech Kosgey v Frederick Towet & 4 others [2005] eKLR Kimaru J awarded the plaintiff Ksh 2000,000 for sustained severe cervical spine injury that resulted in the subluxation of the C5-C7 resulting into quad-paresis and atonic bladder.

Considering the injuries sustained by the plaintiff in this case, compared with the injuries sustained by the plaintiffs in the above cited authorities, and considering that no amount of money can ever compensate, taking into account inflationary trends and the lapse of time since the above awards were made, In this case I would allow the plaintiff Ksh **4,000,000** as general damages for pain, suffering and loss of amenities.

The plaintiff has also proposed Ksh **6,368,868 as** the amount to be awarded under the heading of loss of future earnings.

In **Simon Ano Mua v Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others [2013] eKLR** stated:

> ***"The principles to be considered in determining whether an injured person is entitled to damages under this head were settled in the Court of Appeal in Butler vs Butler [1984] KLR 225. It was held there as follows "-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.***
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> **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 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.***
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> **3.** ***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.***
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> **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 claimant; his remaining length of working life; his disabilities and previous service, if any."***

The injuries sustained by the plaintiff in this case are undisputed. He attended court confined in a wheelchair, and which spinal injuries were confirmed by the two doctors who examined him. The medical reports produced by consent were in agreement that he will never walk or use his feet again. His total permanent incapacity was assessed by both Doctor G.K. Mwaura and Doctor Timothy Kagoda Byakika at 100%.

At the time of the accident the plaintiff was 33 years old. He worked at Kijabe Hospital as a theatre attendant nurse. He was earning Ksh 19,657 gross, net of Ksh 17,268 as shown by his pay slip produced in evidence. He is still in employment although he now does different jobs. He however did not specify

which jobs he does at the moment. He testified that he has lost opportunities for training and promotion.

I accept the submission that as a public servant, the plaintiff would have expected to train and enhance his career even for purposes of promotion due allowance must however be given due to the uncertainties of life. I will therefore award him a multiplier of 20 years.

However, the plaintiff did not plead any damages for loss of earning capacity. As espoused in the case of **Simon Ano Mua v Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others (supra), *the claim*** *for loss of loss of earnings is different from the claim for loss of future earning capacity.* In this case, the plaintiff's claim is for loss of future earnings. **Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. In this case, it was not proved. As loss of earning capacity was not pleaded, I decline to award any damages under this head.**

The plaintiff pleaded and testified that he will need a nurse to handle paraplegic patients at a cost of Ksh 7,000 per month. I accept this claim. (7000*12*20)= 1,680,000.00

I also accept the claim that the plaintiff will need a houseboy to take care of him at an estimated salary of Ksh. 4000 per month which I find nominal and award him. (4000*12*20)=960,000.00

The plaintiff pleaded that he requires continuous physiotherapy, and other medical expenses which may be so, but he did not cost them. I disallow the claim.

He also pleaded and testified that he will need drugs and related items costing 6000 per week. There is no specification for related items. However, I accept the claim for cost of drugs and in my view, Ksh. 2,000 per week would be reasonable and award him Ksh 8000 per month (6000*12*20) = 1,929,00.00.

For the claim for future medical care, including physiotherapy the case of Kenya ***Bus Services Ltd. - v - Gituma, (2004) EA 91 is relevant. In that case, the*** *court held that:*

> ***"And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded."***

I find the claim for future medical care-physiotherapy was not proved as required by the law and decline to grant the same.

*I allow the claim for **Ksh. 2000** for medical report paid to Dr G.K.Mwaura. This was pleaded and proved.*

In the premises therefore I would enter judgment for the plaintiff as against the defendants jointly and severally as hereunder:

(i) On Liability

Liability is at 100% in favour of the plaintiff, apportioned at 50:50 % between the 2nd and 3rd defendants. The 2nd defendant is vicariously liable for the acts of the1st defendant. Therefore, all the defendants are jointly and severally liable for the accident and the resultant injuries occasioned to the plaintiff.

(ii) On quantum

a. **General Damages for pain and suffering and loss of amenities Ksh 4,000,000**
b. **Loss of future earnings not proved.**
c. **The plaintiff did not plead loss of earning capacity. The claim is therefore declined.**
d. **Cost of paraplegic nurse Ksh 1,680,000.00**
e. **Cost of house help for mobility Ksh 960,000.00**
f. **Cost of drugs for paraplegia Ksh 1,440,000**
g. **Medical report Ksh 2,000**

Total **Ksh 8,562,000**

(iii) the plaintiff will have Costs of the suit.

(iii) the plaintiff will also have Interest at court rates on award Nos. a), c), d) and e) above from the date of this judgment until payment in full. Interest on f) shall accrue from date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY, 2015.

R.E.ABURILI

JUDGE