REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 1889 OF 1999

JOSEPH OMWOMBO OWITI.....PLAINTIFF

V E R S U S

MAGADI SODA COMPANY LIMITED…….....…… DEFENDANT

V E R S U S

1. **HERITAGE A.I.I. INSURANCE CO LTD…….....1ST THIRD PARTY**

2. **LION OF KENYA INSURANCE CO LTD……...2ND THIRD PARTY**

J U D G E M E N T

1. On 28th February 1998 motor vehicle registration number **KAE 355 K** was self-involved in a serious accident along the Kiserian-Magadi road. The vehicle was owned by the Defendant, **Magadi Soda Company Limited** and was being driven by one **David Ian Cowe** (**Mr *Cowe***). **Mr *Cowe*** was an employee of the Defendant as its financial director. It is a contested issue whether or not at the time of the accident he was driving the motor vehicle in the course of his employment and for the benefit of the Defendant, or on a frolic of his own.

2. **Mr *Cowe*** had two passengers with him in the motor vehicle. These were the Plaintiff and one **Michael Otieno Okoth** (**Mr *Okoth***). Both passengers were seriously injured in the accident. It is common ground that the Plaintiff was an employee of the Defendant at the time of the accident while **Mr *Okoth*** was not. It is a contested issue whether or not the Plaintiff was travelling in the motor vehicle in the course of his duty as the Defendant's employee or on a frolic of his own.

3. The Plaintiff in this suit is seeking general and special damages on account of the injuries he received in the accident. His case as pleaded in the **plaint dated 24th September 1999** is that he was lawfully travelling in the motor vehicle; that **Mr *Cowe*** was driving the motor vehicle in his capacity as an employee or servant or agent of the Defendant; and that the accident was caused by his negligence. Particulars of negligence are pleaded.

4. The Plaintiff's further case is that as a result of the accident he suffered serious injuries, particulars of which he pleaded. He also pleaded particulars of special damage.

5. The Plaintiff further pleaded that at the time of the accident he was aged 35 years and was a "multi-heavy plant driver" earning a basic salary of KShs 17,011/00 per month; that by reason of the

injuries suffered he was unable to resume his duties; and that the Defendant continued to pay him his basic salary up to 23rd September 1999 when he was retired on medical grounds. He has claimed damages for lost earning capacity. He also seeks damages for total loss of consortium.

6. The Defendant filed a **statement of defence dated 6th December 1999**. It denied that its motor vehicle was involved in an accident as pleaded, or that if there was such an accident it was caused by the negligence of its servant or agent. The particulars of negligence pleaded by the Plaintiff were specifically denied.

7. The Defendant also denied that the Plaintiff was a passenger, or lawful passenger, in the accident motor vehicle as pleaded or at all.

8. In the alternative the Defendant pleaded that if an accident occurred as pleaded it was caused by a sudden tyre burst which made the driver unable to avoid the accident even after exercise of all reasonable care and skill on his part; and that the said failure of the tyre was due to a latent defect which could not have been discovered or prevented by exercise of reasonable care or skill on the part of the Defendant or its servant or agent.

9. The Defendant finally denied that the Plaintiff suffered injuries as alleged and specifically denied particulars thereof pleaded. It also denied the special damages sought as well the other loss and damage pleaded.

10. In a **reply to defence dated 11th January 2000** the Plaintiff joined issue with the Defendant upon its statement of defence. The Plaintiff also specially denied that the accident motor vehicle had a tyre burst as alleged, or that the driver of the motor vehicle exercised any reasonable care or skill.

11. The Defendant subsequently sought and obtained leave to file and serve third-party notices. It served **Third-Party Notices dated 17th January 2002** upon the 1st and the 2nd Third Parties. By those notices the Defendant sought indemnity from the Third Parties in respect of any sum and costs which the Plaintiff may recover in this suit from the Defendant. The grounds for the indemnity sought are that the accident motor vehicle was insured by the 1st Third Party against third party risks while the Defendant had with the 2nd Third Party a valid employer's liability (common law) insurance policy.

12. The Third Parties entered appearance and filed defence. Their respective **statements of defence are both dated 20th December 2004**. The 1st Third Party's defence in summary is that the Plaintiff was travelling in the accident motor vehicle **as an employee of the Defendant**; the motor vehicle insurance with the 1st Third Party did not include employer,s liability cover for the Defendant's staff; and that therefore the 1st Third Party was not liable to indemnify the Defendant in respect to the injuries suffered by the Plaintiff in the accident as he suffered those injuries in the cause of his employment.

13. The 2nd Third Party's defence in summary is that the Plaintiff's claim against the Defendant **did not arise out of and in the course of the Plaintiff's employment with the Defendant**, and that therefore the claim was not covered under the employers liability (common law) insurance policy between the Defendant and the 2nd Third Party.

14. Initially this case was partly heard by Nambuye, J (as she then was). On 26th July 2011 the advocates for the parties agreed that hearing should start *de novo*. Hearing commenced before me on 14th November 2011. The following documents were admitted in evidence by consent and marked as follows –

(i) **Exhibit "A":** Agreed bundle of documents.

(ii) **Exhibit P1** : Plaintiff's supplementary list of documents dated 8th August 2011 (and annexed *Magadi Soda Collective Bargaining Agreement*).

(iii) **Exhibit P3**: Police abstract.

(iv) **Exhibit P4** : Police medical examination report (P3).

15. The Plaintiff testified (as PW1) and called no other witness. For the Defendant two witnesses testified. They were Michael Otieno Okoth (DW1) who has already been mentioned, and **George Gikonyo Kaguru** (DW2). One witness testified for the 1st Third Party. He was **Boniface Irungu Gicheha** (DW3). **Samuel Maina Ng'ang'a** (DW4) testified for the 2nd Third Party. I have considered their testimonies. They all adopted their respective witness statements previously prepared and filed as their testimonies-in-chief.

16. All the parties filed written submissions which I have considered together with the authorities cited. The Plaintiff's submissions were filed on 11th March 2004. The Defendant's submissions in response to the Plaintiff's submissions were filed on 6th May 2014. The Plaintiff then filed a reply to the Defendant's submissions on 26th May 2014. The 1st Third Party filed its submissions on 6th May 2014. The 2nd Third Party filed its submissions on 4th July 2014. On 11th July 2014 the Defendant filed its reply to the Third Parties' submissions.

17. There are two sets of cases that have been tried together in this suit. There is the case as between the Plaintiff and the Defendant. And then there are the cases for indemnity as between the Defendant and the two Third Parties.

THE CASE AS BETWEEN PLAINTFF AND DEFENDANT

LIABILITY

18. The main issues to be determined in this case in respect to liability between the Plaintiff and the Defendant are –

(i) Whether the accident was caused by the negligence of the driver, *Mr Cowe?*

(ii) If so, was he driving the motor vehicle as the servant or agent of the Defendant in the course of his employment or was he on a frolic of his own?

(iii) Is the Defendant vicariously liable for the negligence of *Mr Cowe***?**

These three issues are best dealt with together.

19. Was the accident was caused by the negligence of the driver, ***Mr Cowe***? If so, was he driving the motor vehicle as the servant or agent of the Defendant in the course of his employment or he was on a frolic of his own? Is the Defendant vicariously liable for the negligence of ***Mr Cowe***?

20. By his own statement in court when he testified, the Plaintiff was asleep in the car when the accident happened. His earlier testimony as to how the accident occurred was therefore negated by that admission and is of no assistance to the court. Likewise, the other passenger in the car, DW1 stated that he was asleep when the accident occurred; he had no useful testimony in that regard either. That leaves only the driver, ***Mr Cowe***. He did not testify and no reasons for the Defendant's failure to call him appear to have been given in the course of the trial, though it was stated in the Defendant's submissions that he had since died. It is also not clear why the Plaintiff did not join him in this suit. However, ***Mr Cowe*** made a statement as to how the accident occurred in the report of the accident to the insurer of the motor vehicle, the 1st Third Party. That report is to be found at pages 52 and 53 of Exhibit "A". He said -

> **"No other vehicle or person involved. Car returned to tarmac after briefly going off the edge. Surface here good and road straight. Tyre marks indicate no braking or skidding here. Car suddenly veered to right across narrow road. Struggling with steering; I managed to turn vehicle back to road, narrowly missing a post. Vehicle overturned."**

21. It is to be noted that ***Mr Cowe*** did not mention any tyre-burst or other tyre failure. His statement

> **"…car suddenly veered to right-across narrow road. Struggling with steering…"**

suggests steering or related failure or malfunction. However, the Defendant tendered no evidence of such steering or other mechanical failure. There was no inspection report of the motor vehicle tendered in evidence to give its condition prior to the accident and show any latent defect or failure just prior to the accident.

22. In these circumstances the Plaintiff was perfectly entitled to plead *res ipsa loquitor*. Motor vehicles do not ordinarily just veer off the road without reason. They may skid off the road given the prevailing conditions of the road surface, the condition of the tyres, the condition of the steering mechanism and related parts, etc.; or they may veer off the road because of momentary in-attention on the part of the driver. The burden therefor shifted to the Defendant to offer a credible reason why the motor vehicle veered off the road and overturned, and why the driver was unable to safely and successfully return it back to the road.

23. The doctrine of *res ipsa loquitor* is triggered by evidence that a plaintiff lays before the court. It is not necessary to plead it upfront. In the case of ***David Nandwa –vs- Kenya Kazi Ltd [1988] KLR 488*** it was held –

> **"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if** *in the course of trial* **there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace the inference." [Emphasis mine]**

Similarly, the ***Court of Appeal*** held in the case of ***Embu Public Road Services Ltd –vs- Riimi [1968] EA LR 22*** –

> **"Where circumstances of the accident give rise to the inference of negligence, the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence."**

At page 24 of the same decision, Sir Charles Newbold stated –

> **"The doctrine of *res ipsa loquitor* is one in which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden by showing negligence on the part of the person who caused the accident. The plaintiff in those circumstances does not have to show any specific negligence; he merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be negligence of the defendant."**

24. In the present case, the fact that the accident occurred as it did, and the statement by the driver as set out above how it occurred, constitute *prima facie* evidence of negligence on the part of the driver requiring a reasonable explanation from the Defendant as to what may otherwise have caused the accident. There was no such explanation. In these circumstances it was not reasonable to expect the

Plaintiff to provide more evidence of the driver's negligence. The Plaintiff was asleep when the accident occurred, and the other passenger, DW1, was also sleeping. The driver's statement as to how the accident occurred, considering that he was driving on dry, straight tarmac in daylight, and considering also that no other motor vehicle was involved, all these are indicative, *prima facie*, of the negligence of the driver.

25. I therefore find on balance of probability, upon the evidence before the court, that the accident was caused by the negligence of the driver of the motor vehicle, ***Mr Cowe.***

26. Was ***Mr Cowe*** driving the motor vehicle as the servant or agent of the Defendant in the course of his duties, or whether he was on a frolic of his own? The evidence before the court in this regard is to the effect that ***Mr Cowe*** had full and an unlimited use of the motor vehicle by authority and permission of the Defendant, in the course of his duties and also in the course of his personal affairs. The Defendant did not place before the court any document showing any limitation of ***Mr Cowe's*** use of the motor vehicle. He may have gone to Nairobi on this particular day to run his errands, but it appears he was entitled to use the Defendant's motor vehicle for this purpose.

27. ***Mr Cowe*** gave the Plaintiff a lift to Nairobi where he was going to attend a meeting as a representative of a football club. It is a tenuous point whether or not this football club was owned by the Defendant. The available evidence is that the Defendant assisted the club materially and financially, and apparently most of its membership ware employees of the Defendant, though membership was also open to non-employees (DW1 being one such member). On the particular day, the Defendant provided an allowance for transport and food to enable the Plaintiff and DW1 to attend the meeting at Nairobi by public means. The Plaintiff was the Defendant's employee and a member of the football club. ***Mr Cowe*** was the patron of the football club; he gave the Plaintiff and DW1 a lift in the Defendant's vehicle which he was authorised to use, apparently without limitation, as he was going to Nairobi anyway. Would the Defendant have raised any issue about the Plaintiff being given a lift in the vehicle by ***Mr Cowe*** if the accident had not occurred? I think not.

28. Furthermore, it is not in dispute that DW1 raised a claim for damages on account of the injuries he suffered in the accident. Apparently his claim was not resisted by the Defendant; it passed the claim on to the 1st Third Party which settled it by payment to DW1. Why is it now sought in this suit to treat the Plaintiff differently in respect to liability? In justice and fairness, the Defendant having apparently admitted liability in respect to DW1 (whom it has used in this case as a witness), surely it is estopped from denying liability in respect to the Plaintiff?

29. I find that ***Mr Cowe*** was driving the motor vehicle as both servant and agent of the Defendant with its full authority. The fact that he may have been attending only to his personal errands on this occasion is not sufficient to lead to the conclusion that he was on a frolic of his own. As already noted, the Defendant did not lay before the court any written authority for ***Mr Cowe*** to use the motor vehicle **only** for purposes connected with his employment as the financial director of the Defendant and not for his own personal purposes. The two cases relied upon by the Defendant, that is ***Hilton –v- Thomas Burton (Rhodes) Ltd and An [1961] I WLR***, and ***Morgans –v- Launchbury and Others [1972] 2 ALL ER 606***, are thus distinguishable from the present case**. I find the Defendant vicariously liable to the Plaintiff for the negligence of** *Mr Cowe***.**

30. The Defendant has also submitted that the Plaintiff's case ought to be dismissed for non-joinder of the driver, ***Mr Cowe***. It has relied upon the ***Court of Appeal*** decision in the case of ***Anyanzwa v Gasperis [1981] KLR TELL***. That case is distinguishable from the present case. The particular holding that the Defendant appears to rely upon is as follows –

> "**3. A third party who has been injured by the negligent act of a driver of an insured motor vehicle of another person may have his damages satisfied by the insurer of that motor vehicle, only if the driver (or if he is deceased, then his personal representative) was joined as a defendant, his negligence established and judgment obtained against (him) or his employer. It is also conditional that the insured motor vehicle was at the material time being driven by the driver as an authorised driver**

within the terms of the policy of insurance."

The case as between the Plaintiff and the Defendant is not about satisfaction of the Plaintiff's damages by the Defendant's insurer. That is a matter to be dealt with at a later stage as between the Defendant and the Third Parties, and, probably more particularly, between the Defendant and the 1st Third Party. The case therefore has no relevance on determining liability as between the Plaintiff and the Defendant.

31. The Defendant introduced in its submissions the plea of ***volenti non fit injuria***. This was not pleaded in its statement of defence as it should have been. In any case, the submission that a person who accepts a lift in a motor vehicle thereby agrees that the driver of the motor vehicle may negligently drive it and cause an accident, and that such person may not have recourse for any injuries thereby suffered, is simply preposterous and contrary to law. A driver (and by extension the owner of the vehicle where appropriate) is not absolved from his duty of care to a passenger he has admitted into the motor vehicle that he has control over. It cannot be said that the act of accepting a lift or ride in an ordinary motor vehicle on normal public roads (as opposed to, say, a special rally car in a special racing track) is inherently dangerous, and that a person so riding must be taken to have known that an accident and injury are highly likely, and to have consented thereby to suffer injury. I reject this plea of *volenti non fit injuria* pleaded by the Defendant at the very last minute.

PLAINTIFF'S INJURIES

32. What injuries did the Plaintiff suffer in the accident, and what is the residual effect thereof on him? The Plaintiff's injuries are captured in the documents at pages 1 to 20 of Exhibit "A". After the accident he was rushed to ***Magadi Hospital*** where preliminary assessment showed that he had a **serve head injury with open skull fracture**. He was **paralysed on both upper and lower limbs**. Surgical toilet and elevation of the skull fracture was done at that hospital. The following day he was transferred to ***St James Hospital, Nairobi*** as he had developed difficulty in breathing and required **ICU** treatment.

33. Apart from the head injury, he had **multiple facial and scalp injuries; cervical spine injury;** and **dislocation of the left 2nd metacarpal phalangeal joint**. At St James Hospital he received further surgical toilet and stitching, skin grafting for his facial injuries and K-wiring of the left metacarpal joint. His treatment also included physiotherapy to try and regain movement in his upper and lower limbs as he was initially quadriplegic after the accident.

34. On 20th August 1998 the Plaintiff was reviewed by one **Dr Musau** who noted that he had made "excellent" recovery. He was up and about and was able to write. The doctor noted that the Plaintiff's right upper limb had a tendency to involuntary spasm when he strained. He also noted the prominent facial scars. He recommended that the Plaintiff resume work on light duties.

35. Eleven months later on 9th July 1999 Dr Musau reviewed the Plaintiff. He complained of persistent neck pain, spasticity of all four limbs, dizziness and weakness of the right leg, and very poor manual dexterity. The doctor noted, however, that though he had suffered severe multiple injuries which had devastated him and was initially completely quadriplegic, he had improved over time. He opined that the Plaintiff would not be able to return to his job as a driver. He recommended that he be retired on medical grounds.

36. On 18th January 2002 the Plaintiff was examined by **Professor Sande** who prepared a very detailed report. I will quote the professors' conclusion and prognosis in full -

> **"Mr Owiti sustained a severe head injury with marked focal injury in the right parietal region as evidenced by a history of initial disturbance of consciousness, open depressed skull fracture and demonstrable post-traumatic amnesia of less than 24 hours.**
>
> **This degree of head injury, at Mr Owiti's age, is associated with a risk of post-**

traumatic epilepsy of about 10% during the first two years post-trauma. The risk of post-traumatic epilepsy diminishes with time so that after two years, in Mr Owiti's case the risk is about 5% and this is a lifelong risk (this is as compared with the a risk of idiopathic epilepsy in the general population of his age of between 0.5% to 1%.

Mr Owiti also sustained a severe injury of the upper spinal cord as evidenced by severe neurological deficit and evidence of diffuse swelling of the upper cervical spinal cord after trauma. All significant recovery of the spinal cord following this type of trauma occurs during the first six months to one year; it is now more than two years since Mr Owiti was injured; it is therefore safe to state that the symptoms and the demonstrable signs I have here described are permanent. About 20% of people who suffer this type of cervical cord injury eventually develop a syrinx which syrinx would progressively make his symptoms worse, and which may ultimately lead to the need for an operation.

The prolapse of an intervertebral disc is a recognised complication of the type of neck injury Mr Owiti sustained.

The bladder dysfunction, the dysfunction of his bowel movement and the compromised libido are directly related to the injury of the cord, and more than two years after injury, these are permanent.

The head injury included multiple scalp lacerations and loss of skin for which a skin graft was necessary. The skin graft from the right thigh is the evident hypo pigmented area on the forehead and right frontal parietal region. Absence of the pigment on the head in the topics is associated with significant risk of developing carcinoma over time – after 15 to 20 years. Given Mr Owiti's age, this risk is significant in his case; Mr Owiti is advised to wear a cap when exposed to the sun.

I categorise Mr Owiti's permanent disability resulting from the complications of his injury as follows:

1. **Risk of post-traumatic epilepsy……..……. .05%**
2. **Diffuse spasticity, compromised grip in both hands**

   and risk of progression…….…..…….. 45%

3. **Urinary bladder dysfunction**

   and compromised libido…….……...……. .05%

4. **Dysfunction of bowel activity……...…… .02%**
5. **Risk of malignant change in the hypo pigmented**

   scars on the head…..……..…… .<u>01%</u>

   Total……...…..……. 58%

<u>(The arithmetic does not appear to add up here!)</u>

37. On 19th February 2007 the Plaintiff was examined by **Dr Andrew Hicks**. He also prepared a detailed medical report. I will reproduce his opinion in full -

"Mr Omwombo endured severe pain and suffering both physical and psychological due to the accident of 28th February 1998.

His main injuries and complications were:

1. **Head injury to his right parietal region with a depressed comminuted skull fracture which may be complicated by post traumatic epilepsy fits although he has not had any to date now, nearly 9 years after the injury.**
2. **Severe injury to the upper part of his spinal cord in his neck which has improved to some extent but he is unlikely to get much more physical improvement now and is liable to late complications in this area which may need operating upon.**
3. **Inter-vertebral prolapsed disc is a recognised complication of this type of neck injury.**
4. **His lack of control of urine and stool and loss of libido are related to the injury of his cervical spinal cord and are likely to be permanent, although with training he may be able to improve his control….**
5. **Mr Owombo had good skin cover of the upper part of the right side of his head and neck. He may get complications of the scars later especially if he does not wear some sort of head gear against the hot tropical sun in Kenya.**
6. **The injury of his left index finger has healed up well with minor deficiency.**

Mr Omwombo had quite good use of his upper limbs and my clinical impression was that he can now with more training do more for himself.

Although he is not likely to get much more improvement I feel he could make better use of the faculties I found on examination. He seems to have improved a little since Prof. Sande's report in January 2002.

On the evidence provided I consider that Mr Omwombo has sustained a permanent medical impairment of fifty percent (50%) loss of total body function due to the accident of 28th February 1998.

....."

38. The last medical report on the Plaintiff is dated 4th May 2009. It is the second report by Professor Sande. The Professors' conclusion and prognosis are in the following words -

"My conclusion of 18th January 2002 remains the same. Mr Owiti's motor function has worsened significantly because he has not been able to undergo regular physiotherapy treatment. He explains that he has not had this treatment because he cannot afford it. It is expensive especially as he stays in Magadi where the facility is unavailable; he has to come to Nairobi for physiotherapy treatment.

Increasing spasticity associated with inability to access physiotherapy treatment prompts me to consider a higher level of permanent disability. Overall, however, his permanent disability remains at 58% (Fifty-Eight per cent)."

DAMAGES

39. In his plaint the Plaintiff has claimed general and special damages under the following heads –

(i) Pain, suffering and loss of amenities.

(ii) Further medical care.

(iii) Lost future earning capacity.

(iv) Total loss of consortium.

(v) Special damages:

- Lost overtime and shift allowance at KShs 11,000/00 per month from date of accident to date of judgment

- Medical reports and

police abstract……..……. KShs 11,600/00

Pain, suffering and loss of amenities

40. The Plaintiff's injuries were very serious and extensive, particularly the injuries to his skull and neck. The de-gloving injury to the face was horrendous; it required skin grafting and has left him with a noticeable skin discoloration at the site of the grafting. He underwent a very long course of treatment and physiotherapy. Though he has healed remarkably well given his injuries, he has been left with a total disability of something in the order of between 50 and 60%.

41. Directly because of the injury he suffered in the accident the Plaintiff was eventually retired from his heavy-plant and machinery driving as he could no longer safely perform as a driver thereof. Though re-training in another occupation is possible, the probability of the same is reduced by advancing age and limited resources so far. It is noted however, that after the accident the Plaintiff was able to work for sometime in some other capacity with another employer.

42. It is not an exaggeration to say that the accident and the injuries he suffered thereby profoundly affected the Plaintiff's life for the worse. That effect included loss of libido and loss of control of urine and stool – a very distressing state of affairs indeed. He has claimed damages for total loss of consortium; however, there was evidence of some consortium as he was able to father a child about four years after the accident. I do not accept that there has been a total loss of consortium. As will appear below, I will not award damages under that head. But in assessing general damages for pain, suffering and loss of amenities I will certainly consider his reduced libido.

43. I have considered the seven cases cited in the Plaintiff's submissions with regard to this head of damages, as I have also the five cited in the Defendant's submissions. Assessment of general damages is not an exact science. I am well guided by the principle set out by the ***Court of Appeal*** in the case of ***Tayab v Kinanu [1983] KLR 114***. That court said –

> **"In awarding damages, the court ought to assess the general picture, the whole circumstances, the effect of the injuries, the particular person concerned and uniformity. The court must also be guided by recent awards in comparable cases in the local courts."**

44. In his submissions the Plaintiff seeks KShs 10 million under this head while the Defendant suggests KShs 1 million. The injuries suffered by the Plaintiff were extensive and debilitating, accompanied by various disabilities and the probability of future complications. He has truly suffered and is entitled to substantial damages under this head.

45. I have considered all the material placed before the court, including the decreasing purchasing power of the shilling. I have also taken into account the modest payments the Plaintiff received as medical retirement benefits (KShs 189,467/00) and for medical retirement benefit (KShs 292,924/00) for temporary total disablement under the group personal policy. Doing the best that I can, and balancing this against that, **I will award KShs 2.5 million for pain, suffering and loss of amenities**.

Further medical care.

46. No evidence was lead in regard to this claim. I will disallow it.

Lost future earning capacity.

47. In his submissions the Plaintiff has stated that he will never be able to work again on account of the spasticity and compromised grip on both hands. That may be true so far as working as a driver of heavy-plant and machinery is concerned. But as already noted, he was able to work for some time after the accident in a different capacity for another employer. He now works as a church pastor, though he says he does not derive any income from that occupation.

48. The Defendant in its submissions does not think that loss of future earning capacity should be awarded separately from general damages. In the present case the only general damages that have been awarded are for pain, suffering and loss of amenities. I see nothing wrong in the separate claim for general damages for loss of future earning capacity.

49. The Plaintiff has submitted that save for the accident and the injuries he received thereat, he would have progressed in his job and would be earning now nearly KShs 70,000/- per month. His gross salary before retirement in September 1999 was KShs 20,026/00. His net pay after statutory deductions was KShs 14,656/00. He was able to earn about that amount per month for a time when he worked for a contractor after the accident. I do not believe that the Plaintiff is totally unable to earn some kind of living, albeit at a reduced capacity. Doing the best that I can I will award a multiplicand of KShs 30,000/00 per month with a multiplier of seven years. That works out at –

KShs 30,000/00 X 12 X 7 =KShs 2,520,000/00.

Total loss of consortium.

50. I have already dealt with this head of damages and declined to make any award specific to it**.**

Special damages:

- **Lost overtime and shift allowance**

51. KShs 11,000/00 per month from date of accident to date of judgment was claimed. In employment, overtime is much more fortuitous rather than a constant. At any rate, this is a claim in special damages, along with the claim for shift allowance, particulars of which should been pleaded and proved. No particulars were pleaded and there was no proof of these claims. I will not allow them.

- **Medical reports and police abstract**

52. KShs 11,600/00 was claimed for medical reports and police abstract. There was no proof tendered in evidence of these special damages. I decline to grant the same.

53. In his submissions the Plaintiff raised another claim which he called "lost earning to date". This is a claim in special damages which was not pleaded or particularized in the plaint. I decline to grant it.

54. In summary I will enter judgment for the Plaintiff against the Defendant as follows -

(a) Pain, suffering and

loss of amenities.....…..KShs 2,500,000/00

(b) Loss of future

earning capacity……..…KShs 2,520,000/00

Total.……...KShs 5,020,000/00

55. This sum will carry interest at court rates from the date of judgement until payment in full. The Plaintiff will also have costs of his suit against the Defendant plus interest thereon at court rates from the

date of filing suit.

THE CASE AS BETWEEN THE DEFENDANT AND THE THIRD PARTIES

56. The main issue here is **who as between the two Third Parties is liable to indemnify the Defendant under their respective contract of insurance for the damages payable to the Plaintiff?** Riding with this issue is the question **whether the Plaintiff was in the accident vehicle in the course of his employment or otherwise?**

57. That the Defendant had a particular interest in the football club cannot be gainsaid. The club drew its membership mainly from the Defendant's employees, though membership was also open to outsiders. The Defendant supported the club financially and materially. The club was domiciled within the Defendant's premises. Its financial director was the patron of the club.

58. It appears to me that the football club, along with other clubs, was sponsored by the Defendant mainly for the welfare of its employees. The football club was undoubtedly part of the Defendant's social welfare to its employees designed to motivate them to better performance of their work, providing relaxation and other opportunities as it did. The Defendant may not have owned the football club as such, but it was certainly one of the social structures it had facilitated for the welfare of its employees.

59. On the material day the Plaintiff was going to attend a meeting called in Nairobi concerning the football club. The Defendant facilitated his transport and subsistence to Nairobi in the form of cash. The Defendant's financial director went one better and gave the Plaintiff a lift to Nairobi and back in the Defendant's motor vehicle driven by himself.

60. In these circumstances, did the Plaintiff travel to Nairobi on a frolic of his own or was his journey intimately connected with the interests of the Defendant? There is no clear cut line here between where the employment of the Plaintiff stopped and his personal interests as a member of the football club started. The welfare of the Defendant's employees manifested in the business of the football club was in the special circumstances of this case also the business of the Defendant. I hold, again in the special circumstances of this case, that the Plaintiff's journey to Nairobi was partly in the course of his employment and partly in the course of his personal interest in the football club, which football club was intimately connected with his employment; the Defendant had a particular interest in the affairs of the football club.

61. I hold the view that both Third Parties should equally indemnify the Defendant under their respective contracts of insurance. I do so hold.

62. There is the issue of costs for this portion of the case. The Defendant was entitled to raise the issue of indemnity. Each of the Third Parties had a serious concern regarding that, as already seen. I hold the view that the Defendant and the Third Parties should bear their respective costs of this portion of the case, and I so order.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF OCTOBER 2014.

H. P. G. WAWERU

JUDGE.