



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 86 OF 2008**

**JOSEPH MUSEE MUA ..... PLAINTIFF**

**VERSUS**

**JULIUS MBOGO MUGI..... 1<sup>ST</sup> DEFENDANT**

**KARIMI CHARLES KAMANDA..... 2<sup>ND</sup> DEFENDANT**

**MOSES KHAEMBA..... 3<sup>RD</sup> DEFENDANT**

**RICHARD MURURIA BARIU.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a Complaint dated 4th March, 2008 filed by Mwangangi & Company advocates, the plaintiff **Joseph Musee Mua** filed this suit against **Julius Mbogo Mugi** (1st defendant), **Karimi Charles Kamanda** (2nd defendant), **Moses Khaemba** (3rd defendant) and **Richard Mutura Bariu** (4th defendant). The plaintiff was described as a lawful passenger in motor vehicle Registration No. KAQ 697C on the Thika-Matuu road on the 30th July, 2006 which was driven by the 1<sup>st</sup> defendant and was involved in an accident with a motor vehicle registration No. KAR 061Q driven by the 3<sup>rd</sup> defendant, when the two motor vehicles crashed into each other as a result of which the plaintiff sustained severe injuries. Though there is confusion in the plaint on whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants or the 3<sup>rd</sup> and 4<sup>th</sup> defendants were owners or drivers of the two vehicles, from the particulars in the plaint the 1<sup>st</sup> defendant was the driver of KAQ 697C owned by the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant was the driver of KAR 061Q owned by the 4<sup>th</sup> defendant.

Particulars of injuries and particulars of special damages were listed in the plaint. The plaintiff prayed for judgment against the defendants jointly and severally for general damages for pain and suffering, loss of amenities, future medical care and loss of income. In addition, the plaintiff sought recovery of special damages in the sum of Kshs.302,250/= as well as the costs of the suit and interest.

The defendants filed respective defences to the plaint. The plaintiff filed replies to the defences filed.

In addition to the defence filed by the 1st and 2nd defendants through MS Kairu & McCourt Advocates, they also filed a Notice of Motion dated 15th October, 2009 seeking the following orders -

“1. This Honourable court be pleased to order that this suit

be selected as a test suit for the determination of liability between the plaintiffs and the defendants against co-defendants herein and that such determination of liability be applied to HCCC No. 363 of 2009 Nairobi., PMCC 408 of 2007 Thika, SRMCC No. 61 of 2007, Kithimani, CMCC. No. 4684 of 2007, Nairobi, CMCC No. 8270 of 2007, Nairobi and all other suits that may already be filed or herein after filed pursuant to the accident which occurred on 30<sup>th</sup> July 2006 involving motor vehicles Registration Nos. KAQ 697C and KAR 061Q along Thika-Matuu road.

2. All other related suits be stayed pending the outcome of this suit or until such a time this suit shall have failed to be a real trial of that issue of liability as between the defendants herein.
3. That costs of this application be in the cause.”

On 6th November, 2009, the above application was allowed by the court and prayer 1 and 2 were granted. In effect, the present case was made the test suit on liability relating to cases arising from the said accident.

Before commencement of trial, parties do not appear to have agreed on issues for determination. Therefore, separate issues were filed. The case proceeded to hearing where witnesses testified. The plaintiff called 6 witnesses. The 1<sup>st</sup> and 2<sup>nd</sup> defendants called 2 witnesses. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not call any witness to testify.

The plaintiff testified as PW1. It was his evidence that he lived at Kitui and was employed as a driver until he was involved in this accident. That he had a driving licence No. J662328C of C No. (HRN – 40). He was also authorized to drive commercial vehicles as well as matatus. His public service vehicles licence was No. G235559. He produced both licences in court as exhibits No. 1 & 2. He stated that before the said accident, he was employed as a driver of a motor vehicle by one Titus Nyanzu PW4, and he earned Kshs.20,000/= a month.

On 30th June, 2006, which he later corrected to 30th July, 2006, he was travelling in a matatu from Kitui to Nairobi. The Registration No. was KAQ 697C. He was a fare paying passenger and sat behind the driver. As the vehicle was moving at fast speed, suddenly a saloon car started overtaking them on the right hand side, where he was sitting. This was at Gatwanyaga area. The road had a depression and the matatu vehicle was going downhill towards Thika. It was driven on the left hand side of the road. The saloon car moved very fast and there was a bent ahead.

Suddenly, a lorry approached from the opposite direction also at high speed flashing head lights. He saw the lorry about 100 metres away. The saloon car tried to avoid colliding with the lorry and moved to the side of the matatu. He then heard the sound of impact. According to him, the driver of the matatu did not slow down or swerve to avoid the accident. The time of the accident was about 6 p.m. He became unconscious and regained consciousness on the next day at Thika District Hospital. He experienced a lot of pain. He had cuts on the head, one tooth fell off and one tooth was broken. These were the upper teeth. He felt pain in the right shoulder and the chest. He had difficulty in breathing. He had cuts on the legs, on the left elbow and had a left leg plaster. The left leg was broken and badly cut. The right hand and left leg had a lot of pain. He remained at Thika District hospital for 2 months and 5 days. When he was discharged, he continued treatment at Kenyatta National hospital as an outpatient. He was later admitted at Mariakani Cottage hospital for one week and an external metal fixator was fixed on his left leg. He however did not get better. He continued seeing a doctor at Kenyatta National Hospital.

He also attended St. Mary's hospital, Nairobi and Kikuyu Mission hospital as well as Kijiabe hospital.

His major problem was with the left leg. The leg still had injuries. It had to be supported by a back slab because it could not support itself. He explained that the problem of the left leg was mainly below the knee joint. He used crutches upto September, 2009 when he was put on that back slab. He testified that he could not use the left leg in the normal manner. He could not fold it.

It was his evidence that the accident was reported at Thika Police Station and a police abstract issued in which the vehicle KAR 061Q was entered. The registration number of the matatu was also recorded. He also obtained a P3 form which was filled by a doctor. It was his evidence that a search was conducted on the motor vehicles involved. KAQ 697C was owned by Karimi Charles Kamanda the 2nd defendant. The saloon car KAR 061Q on the other hand, was owned by Richard Mutura Mbariru, the 4th defendant. The matatu was driven by Julius Mbogo Muli, 1st defendant. The saloon car was driven by Moses Khaemba, 3rd defendant. His advocate wrote demand letters on liability to the defendants and their insurers. He was aware that discharge summaries for the treatment in Thika District hospital, Mariakani Cottage hospital as well as Kijabe hospital were compiled. It was his evidence that he incurred expenses of about Kshs.300,000/= on medical treatment. He produced receipts which gave the breakdown totalling Kshs.304,989/92. He also stated that he did searches with KRA totalling to Kshs.1,000/=.

It was his evidence that both the matatu and the saloon car driver were to blame for the accident. The matatu driver did not swerve to avoid the accident and the saloon car moved very fast and attempted to overtake at a blind spot on the road. He stated that his employment as a driver had been discontinued and was unable to find alternative employment. He also suffered severe injuries and pain. Some of the injuries were permanent in nature. He asked the court to compensate him for pain and suffering, medical expenses and loss of earning capacity. He relied on his identity card which showed that he was born in 1975 to establish that he was 31 years when the accident occurred. He also asked for costs and interest.

In cross-examination by advocates for the defence, he stated that he did not have documentary proof on his monthly salary. He maintained that the matatu was driven at more than 80 km per hour, though he did not see the speedometer. He stated that the saloon car was driven at high speed as it was trying to overtake the matatu. He stated that the matatu was driven on the left side of the road throughout. He stated that the saloon car did not hoot or show any sign that it would enter on the left side of the road. He stated that the accident was caused mainly by the driver of the saloon car. He did not know whom the police blamed for the accident.

He stated that he qualified as a driver in 1998 and was employed as a driver in 1999. He had started driving with a saloon car. He started driving a pick-up in 2000 until the date of the accident. He stated that his monthly salary of Kshs.20,000/= included payment of night outs and overtime, and that his basic salary was Kshs.13,000/=. He stated that he had a wife and 2 children and the wife was not working. The children were schooling. He used to save about Kshs.5000/= per month. He also used to do subsistence farming. He stated that it was his relatives who helped him raise money for the medical expenses. Part of the expenses were borne from his savings. He expected the matatu driver to reduce the speed and in his view, if that happened, the accident would not have occurred. He did not know if anybody was charged for a traffic offence.

In re-examination, he stated that he would have to repay the amount of money expended for him by friends because the expenses were high.

PW2 was Dr. Tobias Otenio. He was an orthopaedic surgery consultant. He studied medicine at the University of Nairobi and Makerere University. It was his evidence that in 2008 he was the head of orthopaedic department at Kijabe Hospital. A medical report on the plaintiff dated 10th February 2008 was prepared by many doctors who treated the plaintiff, including the himself. He was the lead doctor.

According to the report, the plaintiff was born in 1975 and was patient No. 480001 at Kijabe hospital. He came there in January 2008 with 1½ year history of sustaining an injury on the left leg. The left tibia and fibula was broken and infected and had nerve injuries. He had foot deformity on the same leg. He was given antibiotics and told to come back after 6 weeks for surgery. He went back to hospital on 3rd March 2008, when external fixators were removed because they were infected. Plaster of paris was applied to the left leg and he was advised to continue with antibiotics after discharge.

On 11th June 2008 he went back for clinic and that his bone had not healed and it was discovered that there was dead bone material in the fracture area. About 2½ months later, he was reviewed. Though it was noticed that the bone had generally healed, the dead bone had to be removed surgically. On 30th

September, 2008 therefore surgery was done and he was given pain killers, antibiotics and dressed and physiotherapy was done. He was told to come back after one month for review.

On 29th October, 2008 it was noticed that the healing was satisfactory. He had however a nerve injury and could not lift his left foot due to the same. That was a permanent injury. He was advised to use a device to support the leg and use crutches. Because of the shortening of the foot, it was not easy for him to drive. The doctor however did not record the shortening of foot in the report.

It was his evidence that when the plaintiff went to Kijabe hospital, he had documents from Thika hospital. It was his evidence also that he signed the discharge summary from Kijabe hospital and the treatment notes from Thika District hospital. The report dated 10 February, 2009 was produced as exhibit. The discharge summary was also produced as exhibit.

In Cross-examination, he stated that he saw the plaintiff on the 24th January 2008. He got the estimate of the time of the injury from the treatment notes. It was his evidence that there were several injuries. He stated that he did not produce x-ray reports because the bone had fully healed. He maintained that the nerve injury was different from bone injury.

He further stated that he could not state with certainty what caused the injuries. He did not see the P3 form and did not specifically state in the medical summary that he referred to the notes. He stated that with a foot drop, patients could walk. They could also drive but with difficulty. Driving automatic vehicle was possible. However, the nerve injury herein was permanent.

In re-examination, he stated that he relied mainly on the history given by the patient and the previous records. He stated that what he presented in court as an exhibit was a mere summary as there was a bigger file.

PW3 was PC Stanley Kosgey attached to Thika Police Station at the time of the testimony. He was instructed by the Traffic Commander to testify with regard to the accident which had occurred in 2006. It was his evidence that from the records, the traffic accident occurred 30th July 2006 along Thika-Matuu road at Katuanyaga. He had in his possession, the OB and the Police abstract. According to him, the incident was reported and entered as OB 14 of 30th July, 2006 at 23.35 hours. It involved KAQ 697C Toyota Hiace matatu and KAR 061Q Toyota corolla saloon. Both vehicles were heading in the same direction. According to him, the matatu tried to swerve to the right in order to avoid collision with the saloon car and rolled several times. It was carrying 7 passengers whose names were recorded in the OB.

It was his evidence that the police abstract report dated February 2007 confirmed the information he was giving. He produced a copy of the police abstract as exhibit. He confirmed that the plaintiff was one of the victims indicated both in the abstract and the OB. He stated that when an accident occurred, the first action was to take the victims to hospital and the reports to police would be made later.

In cross-examination, he stated that he was not stationed at Thika Police Station when the accident occurred. He had just come to court on instructions of the Traffic Officer at Thika Police Station. He stated that the date of the accident was 30th July 2006. He stated that the OB reflected what was in the police abstract. He stated that the abstract shown by the defence did not have the name of the plaintiff in it. He also stated that the matter was still pending under investigations in police records. In his view, the driver of KAQ 697C was also to blame for the accident. He admitted that he had not produced a sketch plan and he did not have the police file. He was also not the investigating officer. He could not confirm how far investigations had proceeded so far. The OB record did not show who to blame for the accident. He stated that because he was not the investigating officer, he did not know who to blame nor did he know the investigating officer though the record indicated that it is PC Mwaka who had been transferred.

In re-examination, he stated that the court witness summons was issued to the Divisional Traffic officer, Thika. He stated that the requirement in the summons was just the production of the police abstract. The summons did not require the giving of evidence on the police file. He confirmed that the

abstract produced in court on behalf of the plaintiff included the name of the plaintiff. However, an abstract copy produced by the defence counsel did not show the name of the plaintiff. He stated that usually the person who applied for the abstract was named in the abstract. He stated that from the OB, the plaintiff was actually involved in the accident.

PW4 was Titus Nyanzu. He stated that he was the employer of the plaintiff. He was a resident of Kitui West and was a businessman. He had two pick-ups, one of which was driven by the plaintiff as an employee for close to 6 years. It was a canter. According to him, the plaintiff stopped working when he was involved in the present accident. He used to pay him Kshs. 20,000/= per month including night outs and overtime. He produced in court a letter confirming that the plaintiff was his employee, which letter he had written in 2009 "to whom it may concern."

In cross-examination, he stated that he knew the plaintiff. He was his employee. At the time of the accident, he had sent him to buy spares in Nairobi and he never came back. He stated that he did not keep records of payments to the plaintiff. He stated that he did not have any documents on the employment of the plaintiff and that he did not have a letter of employment.

In re-examination, he stated that he employed the plaintiff and that that was the truth.

PW5 was Dr. Solomon Njuguna Kirugo. He was a graduate of the University of Nairobi 1986 and 1995. He was a surgeon. He had been working at Kenyatta National hospital in the orthopaedic surgery department since 1996 to-date. On 20th February, 2007, he wrote a medical report on the plaintiff who was 34 years of age. He compiled the report from various sources of information. One source was the history given by the plaintiff. He also saw a report from Thika District hospital and examined the plaintiff. He treated the plaintiff and took him to Mariakani Cottage hospital, Nairobi for further treatment. From the reports, the plaintiff was involved in an accident on Thika road and was admitted in hospital for 2½ months. He suffered unconsciousness, had injuries on the head, an injury on the left leg and a wound. He had a broken tooth and a missing tooth. He had chest pain and injuries on the right shoulder and left elbow. On x-ray examination, no fractures on the skull were noted. The chest had no fractures. The left leg showed a fracture of tibia and fibula bones with an overlying wound over the fracture. The plaintiff had a surgical toilet applied, which was cleaning of the wound at Thika District hospital. The wound however became infected despite him being put on antibiotics.

On 25th February, 2007, he took the plaintiff to Mariakani Cottage hospital and aligned his fixator because the existing fixator to the left leg was infected.

In his opinion, the plaintiff had suffered severe injuries occasioning hospitalization first at Thika District hospital and later Mariakani Cottage hospital, among others. The injury in the left foot was infected causing delay in healing. He had a 3 cm shortening of the left leg due to the injuries.. He also had deformity to the left ankle joint, which needed physiotherapy to correct. Permanent disability was 5%.

In his opinion, if the external fixator was removed at Kenyatta National hospital, it would cost Kshs.500,000/=. According to him, it was the nature of the injuries on the left leg that affected the healing. This was because, the fracture had a wound over it which exposed the bone and killed blood supply and infection set in. The infection was worse on the tibia, than the fibula. This was because the tissue there was usually very thin. He produced a discharge summary from Mariakani Cottage hospital. He also produced a medical report as exhibit. He also produced a summary discharge from Thika District hospital as exhibit.

In cross-examination, he stated that he was not able to say the actual cause of injuries. He was not able to give a specific age of the injuries. He relied on the history given by the plaintiff. He stated that, in his medical report he did not refer to previous reports. He did not produce x-rays to confirm fractures. He could not confirm whether the two teeth were broken due to the accident. When shown a report dated 10th February 2009, he stated that that report was done later. It was stated in that medical report that the injury had fully healed. The report also stated that no further medical expenses would be

incurred. In his opinion however, once a patient had dead bone removed the injury would not heal fully. He stated that 5 years down the line, there could be a fare up.

He reiterated that the accident occurred in 2006 and that he treated the patient in 2007. He could not state when the x-rays were taken. He could not give the exact costs at Kenyatta National hospital. However, it was his position that Kenyatta National hospital private wing, was more expensive than Mariakani Cottage hospital.

In re-examination, he stated that he took x-rays. Secondly, that it was the plaintiff who decided that he should be treated at Mariakani Cottage hospital.

PW6 was Elizabeth Wanjiku Kamau. It was her evidence that she worked at Thika level 5 Hospital (District hospital) as a Health Record officer. She kept the hospital data, which included inpatient and outpatient treatment cards, and registers. She had worked there since 2010. She had been trained at Kenya Medical Training College for 4 years. She had come on behalf of a Doctor Maingi to produce the P3 form of the plaintiff. According to her evidence, the plaintiff's inpatient No. was 65885. The P3 was dated 15/2/2007 and signed and stamped by Dr. Maingi. She confirmed that it was from Thika District hospital. She produced the P3 form which bore the name of the plaintiff as an exhibit.

In cross-examination, she stated that she did not come with the register of the records. She stated that the P3 form was dated 15th February 2007. It was signed on 5th September, 2007 because the doctor finished with the patient on that date. The date of the accident was 30th July but it was not clear if it was 2006 or 2007. The time of the accident was said to be 6.30 p.m. The OB Number was 5/31/7/2006. It was her testimony that a P3 form could be prepared by one person and signed by another doctor. However this P3 form was prepared and signed by Dr. Maingi who was currently on study leave.

She further emphasized that she joined Thika District hospital in 2010. She was merely telling the court what she found in the records.

In re-examination she stated that the hospital got a copy of the P3 form when the doctor finished with the patient. The P3 form originated from the Police who filled the first part of the form. She reiterated that the P3 form was signed by Dr. Maingi.

That was the close of the plaintiff's case.

As stated earlier in this judgment, the 1<sup>st</sup> and 2<sup>nd</sup> defendants called two witnesses. The 3<sup>rd</sup> and 4<sup>th</sup> defendants called no witness.

DW1 was Job N. Nzioka. He testified that he was the National Organizing Secretary of Kenya Taxi Association. He had come to court on behalf of the 1st and 2nd defendants. He stated that before 5th of October, 2009 they got a request from the Managing Director, Directline Assurance Ltd. concerning receipts purportedly issued by the association for services rendered. He gave an example of a receipt No. 1623 which did not have a serial number, though it was issued on 16th September 2007. The name of persons rendered services did not appear on the receipt. According to him, the receipt should have had the name of the person to whom services were rendered. In some receipts, the name of Joseph appeared. He testified that he had a total of 32 receipts some of which appeared in their record while some did not.

He stated that his Association had about 700 vehicles. When he tried to counter-check with Managing Director of Directline Assurance Co. Ltd., only 7 receipts were confirmed. Twenty four receipts did not originate from the association. The 8 receipts were for a total of Kshs.35,600/= only. He stated that their society was registered under the Societies Act and that he signed a letter on behalf of the National Chairman for the said receipts.

In cross-examination, he stated that with regard to a driver called Peter the receipt No. 21495 originated from their association. He did not have a letter from Direct Line Assurance Company. With regard to a driver called Dan, he did not ask him on the genuineness of receipt No. 21498. He maintained

that the Directline Assurance Co. gave only copies of 32 receipts. He could not verify the receipts from Taxi Cab Association because that was not their association. He stated that the record on conduct of drivers was maintained at the station level. He did not have records of all the taxis.

He also stated that he put an X on the receipts whose origin he did not know. He maintained that they were able to verify their own receipts. The only thing they were not able to verify were the charges. They did not call the drivers to verify the receipts marked with x, because the same did not originate from them. He could not produce records of motor vehicles.

DW2 was Sgt. Ahmed Mohammed Sirat. He was a traffic police officer stationed at Thika Police Station. He was a co-investigator with Cpl. Tanui. He stated that on the material day of the accident, two vehicles were travelling from Matuu to Thika. They were KAQ 697C Toyota Matatu and KAR 061Q saloon car. On reaching the location of the accident, there appeared from the opposite direction other vehicles. The driver of the matatu vehicle was avoiding a collision with a lorry, swerved and on negotiating back to the road a saloon car hit it from behind throwing the matatu into a culvert. Due to the impact, several passengers in the matatu sustained injuries. This was what he took note of as investigating officer.

He could however not trace the police file. He knew Stanley Kosgey PW3 who was from Thika Police Station, but maintained that he was not in Traffic Department. He stated that he was in-charge of patrols and was sure that his colleague (PW3) was not a traffic officer. He stated that he was the one who issued the police abstract in which the case was recorded as being under investigation, and that motor vehicle KAR 061Q was to blame. He stated that the driver of the said vehicle was required to keep a distance as it was approaching from behind. In his view, vehicle KAR 061Q was too close and so the driver of the matatu swerved. He stated that pending investigations meant the victims were still under treatment. In addition, the driver of the saloon car did not come back to record a statement to enable the police prefer charges against him. He stated that it was not true as stated by PW3 that he was on transfer. He was merely on studies. He confirmed that none of the two drivers was charged. In his view, the matatu driver was not to blame.

In cross-examination, he stated that he drew a sketch of the scene, but did not have it in court. Some witnesses recorded statements but he did not have any. He stated that the driver of KAR 061Q was named in the abstract as Moses Khaemba, while in truth he should be Andrew Khaemba Natwa. He was waiting for the said driver to come and record a statement and be charged. He confirmed that the police abstract produced by the plaintiff was issued at the station, but by an officer who might not have known the facts of the case. He did not know where his co-investigator was. He admitted that he was transferred from the station in August last year, but was brought back in late August this year. He stated that he did not take any steps to charge anybody. He had not sought the assistance of the court to trace the offending driver because he expected him to come with the P3 form, then he would charge him.

In re-examination he stated that the sketch of the scene was in the file. He stated that the file was missing and that the driver of the saloon car never came back.

Because of unavailability of other witnesses, the defence closed the case there. After closure of the case, counsel i.e M/S Mwangangi & Company Advocates for the plaintiff and M/S Kairu and MacCourt for the 1st and 2nd defendant filed submissions. Muriuki Njagagua & Company advocates for the 3rd and 4th defendants did not file submissions as they had indicated earlier that they were not receiving adequate instructions from their clients. I have perused the submissions and the authorities cited.

This is a civil case. The burden of proof is always on the plaintiff to prove his/her claim against the defendant on the balance of probabilities. Several cases have addressed this issue. It will suffice if I cite the case of **Kirugi & Ano. Vs Kabiya & 3 Others [1987] KLR 347.**

In my view, the issues for determination are as follows -

1. Whether the alleged accident occurred.

2. Who was to blame or liable for the accident?
3. What is the quantum of damages awardable?
4. Who bears the costs of the case?

On the issue as to whether the accident occurred, only the plaintiff as a person who was at the scene as a passenger in one of the vehicles involved, testified in court. He was a passenger in the matatu KAQ 697C. No other witness was called by either side to testify with regard to the occurrence of the accident. Though the 1st and 2nd defendants denied ownership of the said vehicle and the occurrence of the accident in pleadings, no evidence was tendered to disprove what the plaintiff stated. The driver of the matatu was not called to testify and no explanation was given for his absence. With respect to the saloon car KAR 061Q relating to the 3<sup>rd</sup> and 4<sup>th</sup> defendants, no witness was called to testify. No witness controverted the testimony of the plaintiff. Weighing the facts and the evidence placed before me, I find that the accident did occur. The plaintiff established on the balance of probabilities that indeed the accident between the two named motor vehicles did occur at the place and time that he stated. Though DW2 who was a police officer stated that the records showed that the accident occurred after 23.00 hrs, he was not at the scene, and if the police records were wrong, that error could only be blamed on the police including DW2 himself. In any case, 23.00 hrs was the time of the report to the police and not the time of occurrence of the accident. In conclusion, I find that the accident did occur.

Who was to blame or liable for the accident? The counsel for the plaintiff has suggested that the drivers of the two vehicles were equally to blame. That is they were negligent on 50/50 basis. Counsel for the 1st and 2nd defendants put the blame wholly on the driver of the saloon car. Again, with regard to liability, the evidence of eye witnesses on record, is only that of the plaintiff. He described how the road was, the time, how the vehicles were driven and in which direction and how the collision occurred. He stated that the saloon car tried to overtake at a blind slope or depression. A lorry appeared from the opposite direction, and the saloon car driver swerved to the left side where the matatu was and as a result the accident occurred. He stated that the matatu driver did not swerve or slow down to avoid the accident. He stated however that the primary cause of the accident was the saloon car driver in attempting to overtake at a wrong place.

The evidence of DW2 on how the accident occurred is highly suspect, if not dishonest. He said he was the investigating officer. However, he did not produce a sketch drawing of the scene. He did not describe the position he first saw the two vehicles. He did not charge anybody for the accident. He testified in court and I observed him tendering evidence. In my view, he was an outright liar. He gave evidence on how the accident occurred as if he was an eye witness. He could not be able to give the graphic evidence of what happened at the scene, when he was not there, and claim to be saying the truth. He did not state that he got the information from eye witnesses to the accident.

Having reviewed all the evidence on record, I find that both the saloon car driver and the matatu driver were to blame to some extent for the accident. If the matatu driver was not to blame, then at least he or another eye witness should have been called to testify in rebuttal of the plaintiff's evidence. That did not happen. It cannot be said that because the plaintiff became unconscious after the accident, then he could not know how the accident took place. The evidence on record is that he was conscious until the occurrence of the collision between the two motor vehicles. What he described to the court just relates to the sequence of the events until the occurrence of the collision. That evidence was not controverted and in my view, cannot be disbelieved. It is credible evidence.

I find that the accident was caused by the negligence of both drivers of the saloon car and the matatu. From the evidence on record, I find that the driver of the saloon car was 80% to blame or liable for the accident for overtaking at a dangerous place, and the driver of the matatu was 20% to blame for not slowing down or swerving to avoid the accident.

I now turn to quantum of damages. On this, I have to begin with the injuries suffered. The plaintiff gave evidence as to the injuries suffered. Though one of the medical reports indicated that the left leg had fully healed, there does not appear to be a serious dispute on the injuries suffered. He was injured as a result of the accident and was unconscious for about two days. He regained consciousness at Thika

District hospital, where he was admitted for more than two months. He was treated also at Kenyatta National hospital and Kijiabe hospital, Kikuyu Mission hospital as well as Mariakani Cottage hospital. Several operations and procedures were conducted on him. Medical reports were prepared and produced. Treatment summaries were also produced. It was evident that he sustained serious injuries resulting in surgeries in several hospitals and treatment. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow. He was examined and treated by several doctors including Dr. Solomon Njuguna Kirugo, (PW4), Dr. Otieno, (PW2), Dr. Muchiri and Dr. Muteti. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected. This was because he suffered fractures of the tibia and fibula bones of the left leg with a overcast wound. He suffered 5 % disability. I find and hold that the plaintiff proved the injuries he said he had suffered on the balance of probabilities.

If one has to consider the quantum of the general damages for pain, suffering and loss of amenities awardable, consideration of the injuries suffered above is crucial. I have been referred to several cases on quantum of damages. The plaintiff's counsel has relied on the case of **Edward Mzamili Katana vs CMC Motors Ltd. [2006] eKLR** and **Samuel Makumi Githambo vs South Firms Ltd. & others Nkr. HCCC No. 9 of 2008** in which the court awarded Kshs.2,000,000/= in 2006 and Kshs.1,500,000/= in 2009 respectively for pain and suffering and loss of amenities. The injuries in the **Edward Mzamili Katana** case was head injury leading to concussion, cut wound and bruise on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of left 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs and fracture of the left femur. The injuries in the case of **Samuel Makumi Githambo** were fracture distal end of the right femur, fracture distal end of the left femur, fracture inferior pubic remus of the right pelvis, fracture right scapular, multiple cut wounds on the face, closed fracture medial malleolus of the leg, dislocation of the right shoulder, loss of one upper incisor tooth, and loss of lower incisor. The 1st and 2nd defendants counsel relied on cases of **David Okoka Odero vs Killindini Tea Wharehouses Ltd. Mbs HCCA. NO. 78 of 2006** in which judgment was delivered in 2008 with an award of Kshs.40,000/=. They also relied on the case of **Sokoro Saw Mills & Co. Ltd. Vs Grace Nduta Ndungu – Nkr HCCA. No. 99 of 2003** wherein an award of Kshs.30,000/= was granted in 2006 for injuries suffered. In the case of **David Okola Odero** the plaintiff/appellant suffered soft tissue injuries to the lumbar sacral spine. In the case of **Sokoro Saw Mills Ltd.** the plaintiff/respondent suffered soft tissue injuries to the right hip joint and back.

I have considered the authorities cited with regard to the awards of general damages for pain and suffering and loss of amenities. Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive. In particular, courts have stated as follows -

***“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. See the case of Osman Mohammed & Ano. Vs Saluro Bundit Mohammed Civil Appeal No. 30 of 1997.”***

In my view, the cases cited by the counsel for the 1st and 2nd defendants relate to injuries that were very minor. The cases cited by the plaintiff's counsel related to injuries which were more severe than the present. The present injuries were serious and the plaintiff had to be hospitalised at Thika District hospital for a long period and had to undergo a number of specialised surgeries, especially regarding the broken bone injury in the left leg. No two cases can be similar. Decided cases are merely a guide. Taking all the factors in the present case into account, I am of the view that though the plaintiff's advocate asked for kshs.2,500,000/= shillings as general damages for pain and suffering and loss of amenities, that figure is on the higher side. The case of Samuel Makumi Githambo (supra) resulted in a degree of disability of 40%. That decision was in 2009. In the present case the disability has been assessed at 5 %. I am of the view that an award of Kshs.1,300,000/= as general damages in the present case for pain and suffering will be adequate compensation. I so award.

The plaintiff has asked for loss of income of Kshs.6 million using a multiplier of 25 years, due to his age of 31 years at the time of the accident, on the assumption that he would retire at the age of 60. The multiplicand of Kshs.20,000/=, which was said to be his monthly gross salary was used. The age of the plaintiff does not appear to be in doubt. He was said to be a driver of a pick-up. He was said to be employed by PW4 Titus Nyanzu who also testified as a witness. The employer did not provide any documentary evidence of employment for the plaintiff. He did not provide any documentary evidence regarding payments to the plaintiff of salary or allowances. I appreciate that in this country, though the Employment Act provides that a contract of employment should be in writing, many people are employed on verbal communication. Payments might also not be in writing.

The plaintiff had a driving licence as well as a public service vehicle licence. He was however bound to prove on the balance of probabilities that he was indeed employed by PW4 as a driver from 2006 upto the date of the accident. This kind of employment could not be a secret. In my view, at least one independent person should have come to court to confirm knowledge of the fact of the undocumented employment. Besides, at the time of accident the plaintiff was not driving the vehicle of the alleged employee. Having failed to show that he was indeed so employed by PW4, I find that, his request for payment for lost income capacity on the basis of his income as a driver is not tenable. There was also no evidence for the need of future medical care. Therefore no award on the same will be granted.

Special damages have to be pleaded and proved. The plaintiff has asked for special damages of Kshs.302,250/=. These were pleaded. There was evidence from DW1 Job N. Nzioka trying to dispute the receipts for transport relating to the plaintiff. That witness was not the one who issued the receipts. Therefore what he said in discrediting those receipts was hearsay and speculation. Secondly, his taxi Association cannot claim to be the only valid transporter with valid receipts. He also appears to have come to court on initiation of Directline Assurance Ltd. who did not testify. In my view, the evidence of DW1 was meant to divert attention rather than assist the court. In my view, the special damages of Kshs.302,250/= was proved. I award those special damages.

The plaintiff will also get costs of the suit and interest.

In the result, this suit is successful. I award general damages and special damages and costs as above. Special damages will attract interest from the date of filing suit while general damages will attract interest from today's date till payment in full. Costs will attract interest from the time they will be determined. The 1st and 2nd defendants on the one hand, and the 3rd and 4th defendants on the other hand, will bear the liability herein on 20% and 80% basis respectively.

***Dated and delivered at Kakamega this 21st day of November, 2013***

**George Dulu**

**JUDGE**