REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 705 of 2003

BONIFACE WAITI…….....…….....……..1ST APPELLANT

ELLEN WAITHIRA…….....…….2ND APPELLANT

VERSUS

MICHAEL KARIUKI KAMAU…….....……..RESPONDENT

JUDGMENT

The appeal concerns two proceedings filed separately but since they arose from the same set of transactions the proceedings in Thika CMCC 308/02 was on 28.7.2003 deemed to operate for CMCC 309/02. The plaints were common save for the names of the plaintiffs in each. The defences in both had common particulars.

The common averments in both cases are that the common defendant who is the Respondent herein is the registered owner of motor vehicle registration number KRZ 212. On or about 11th August, 2001 the Plaintiffs were lawful passengers in the said motor vehicle when the same was negligently and carelessly driven by the defendant or the defendants authorized driver, servant and or agent along the Nairobi – Thika Road as a result of which the said motor vehicle was involved in an accident. The particulars of negligence attributed to the defence are set out in paragraph 4 of the plaint and these are:-

(a) Driving at an excessive speed

(b) Failing to exercise the duty of care towards the passengers in the said motor vehicles and in particular the plaintiffs.

(c) Failing to break, slow down, swerve or take any other evasive action to avoid causing the accident.

(d) Causing the said motor vehicle to over-turn

(e) Driving a defective motor vehicle.

As a result of the said accident the Plaintiffs suffered loss and damage. The Plaintiff in Thika CMCC 308/02 suffered.

The following injuries:-

(a) Bruises and contusions to the neck

(b) Bruises and contusion to the shoulders

(c) Bruises and Contusions to the back

(d) Bruises and contusions to the upper arm.

In consequence of the above the plaintiff claims special damages, of Shs 2,400.00 being cost of the medical report, medical expenses and cost of abstract. He also claims general damages for pain suffering and loss of amenities.

The injuries suffered by the Plaintiff in Thika CMCCC 309/02 are:-

(a) soft tissue injuries of frontal head.

(b) Fracture of left humerus.

(c) Cut of left extensor tendon.

(d) Laceration of left elbow.

(e) Soft tissue injury of the right leg.

In consequence of the said injuries the plaintiff seeks special damages to the tune of Kshs 2,400.00 being the cost of medical report, medical expenses and cost of police abstract. She also prayed for general damages for pain suffering and loss of amenities. The common defence in both cases is that the defendant denied the allegation that the Plaintiffs were traveling in the said vehicle at the material time or that the same was being driven negligently and or carelessly and put the plaintiffs to strict proof, denied particulars of negligence attributed to him and the particulars of injuries suffered, particulars of loss both special and general and put the plaintiffs to strict proof and then prayed for the suits to be dismissed with costs.

P.W.2 is the plaintiff in CMCC 308/02. The sum total of his evidence is that he was in the accident vehicle seated at the back. On reaching the accident sport the vehicle started meandering on the road for about three times. It then fell on the left side of the road and started sliding. He was seated at the back of the vehicle and he could not see the road ahead. He did not see what was on the road because the vehicle was packed. When cross-examined he stated that he did not see what caused the accident. Neither could he see the front of the road.

The evidence of the defendant is that there was a small vehicle and a lorry ahead of him. The small vehicle started over taking the lorry. He then noticed a Nissan motor vehicle ahead of him. He tried to avoid knocking it and then his vehicle lost control. It is the vehicle, which cut ahead of him which caused the accident. He was charged in Thika Traffic case no 1906/2001 but was acquitted of the offence of careless driving. He denies seeing the Plaintiff in the vehicle. In cross-examination the defendant said the saloon car was 15 meters ahead of him while the lorry was 5 meters ahead of the small vehicle. It indicated that it was going to overtake the lorry but before it did a Nissan came ahead of him suddenly and he was shocked because he did not expect it. He confirmed the Plaintiffs testified in the traffic case against him.

The defence called two witnesses. The first one Jennifer Wayiego said she did not see what caused the accident. The motor vehicle overturned on the left side of the road. She was in the middle and could not see what was happening. She could not see outside from where she was seated. She did not know how the accident occurred.

The second defence witness alleged she was near the scene of the accident. She saw a lorry ahead of small vehicle then a Nissan Matatu behind the canter motor vehicle and it over took it at a high speed. Then the canter started losing control and it over turned. According to her it is the Nissan which caused the accident but it did not touch the canter.

PW.1 in 309/02 recalled that the vehicle had driven for 16 minutes when it started swerving on the road. The driver lost control and overturned off the road. That no other vehicles were involved in the accident. She blamed the owner of the vehicle for the causation of the accident because it was carrying excess passengers and was driving at a high speed when cross-examined she stated that she was seated at the rear of the vehicle. Although the vehicle was speeding she was not able to see the speedometer. The vehicle started swerving on joining the tarmac because the driver joined the tarmac road at a high speed.

On personal injuries the Plaintiff in CMCC 308/02 stated that after the accident he realized that he had pain all over the body. He was treated at Thika hospital, then continued with treatment at JKUAT hospital. In cross-examination he stated that he had no problem when he saw the Doctor. On the other hand the plaintiff in CMCC 309/2002 narrated a fracture of the left hand at the upper arm, injury on fingers, bruises on the same hand. In cross-examination she said she was unconscious for 1 ½ hours, she was treated, attended physiotherapy for one year. She was x-rayed and informed that the injury had not healed. She had not fully recovered at the time of trial.

On medical evidence P.W.1 in CMCC 308/02 was a Doctor who assessed the plaintiff's injuries. He examined him on 22.4.2002. The injuries noted were STI of both shoulders, the back and left upper arm and sternum. The doctor re-examined the P.3, medical notes and the x-ray film and continued that he suffered STIS on the shoulders, chest and back and he was likely to suffer post-traumatic arthritis of the back. The medical report was produced as an exhibit.

The same Doctor examined the plaintiff in CMCC 309/02. The injuries complained of was a fracture of the mid shaft left humerus, laceration wound on the left elbow with cut tendon, soft tissue injuries of the forehead, soft tissue injuries of the left head. When he examined her she was on physiotherapy and she also complained of pain and numbness of the left arm and wrist, she had multiple scars on the forehead, left hand and left elbow, limited shoulder movements especially on elevation, angulated left arm. The Doctor went through her p3 forms medical reports and x-ray films and the Doctor concluded that she sustained multiple injuries from the accident including a fracture of the left humerous bone. She has an angulated deformity on the left arm which is likely to be permanent she has osteoarthritis of the left shoulder and the left elbow she requires regular medications and physiotherapy to control her pain. The soft tissue injuries on the forehead left thigh and hand, had healed completely. The medical report was produced as an exhibit.

In cross-examination on account of the Plaintiff in CMCC 308/02 the Doctor said that as at 27.4.2002 the patient had no complaint at all resulting from the injuries. He had not been to the Doctor for further treatment. But the Doctor was sure of the patient developing post-traumatic arthritic of the back but there was also a possibility that he may not develop it.

As for the patient in CMCC 309/02 the Doctor maintained in cross-examination that left arm is angulated internally i.e. the bones did not join properly at the time of healing, a condition which does not arise from medical mismanagement but a complication of fracture healing process which is normal for completed fractures. Added that the patient was still being followed at Thika District hospital and did not know the condition of the patient as at that point in time. He confirmed that a deformity cannot disappear but it can be corrected and treated. Pain cannot last for ever. Osteoarthritis does not go off for ever but it usually worsens with age. In medicine they do not say 100% disability because there is a chance of recovery.

It is against the foregoing background evidence that the learned trial magistrate made the following findings:-

That the learned trial magistrate had considered evidence of both sides and

(1) It was clear that both plaintiffs did not see how the accident happened.

(2) That the defendant was acquitted in the traffic case No.1906/2001 because he should have been charged with overloading his motor vehicle and not with careless driving.

(3) The defendant's version on how the accident occurred has not been contradicted.

(4) That it was clear to the court that the defendant was driving at a low speed and that there were other motor vehicles on the road and particularly the Nissan matatu which mis-properly over took him and blocked his path causing him to lose control of his motor vehicle.

(5) That unfortunately the Nissan matatu does not seem to have stopped for any one to identity it.

(6) It is the courts view that the Nissan matatu was to blame for entirely causing the accident.

(7) That the plaintiffs should have sued the driver and owner of the said matatu for redress. Unfortunately it was not sufficiently identified to enable action taken against it.

(8) I therefore find that the plaintiffs have failed to establish that the defendant was driving his motor vehicle at an excessive speed and failed to use all reasonable means to avoid the accident on a balance of probability on that account dismissed the two causes with costs.

The appellants were aggrieved by that decision and have appealed to this court citing 6 grounds of appeal. These are that the learned trial magistrate erred in law and fact:-

1). In dismissing the Plaintiffs suits on the sole ground that they did not see how the accident occurred.

2). In failing to apply and or appreciate the doctrine of Res Ipsa loquitor.

3). By misdirecting himself and relying on the facts which were not pleaded by the defendant in his defence.

4). In failing to note the obvious contradictions and discrepancies in the testimony of the defendants.

5). In failing to consider and apply the ratio and finding of the court of appeal in civil appeal no 23 of 1967 EMBU PUBLIC ROAD SERVICES LTD VERSUS RIIMI [1968] E.A.22.

6). In failing to record arises, the quantum of damages due to the plaintiff/appellants. On that basis Counsel for the appellant asked this appellate court to set aside the lower courts judgment dated 25th September, 2003 upon setting aside do proceed to make an assessment of damages due to the Plaintiffs commensurate with the injuries sustained and order the Respondent to pay costs on appeal.

In his oral submissions Counsel for the appellant reiterated the grounds of appeal and then stressed the following.

(1) The appellants who were the plaintiffs in the lower court pleaded that they were passengers in the accident vehicle and as such they had no legal obligation in the vehicle as regards the exercise of care.

(2) It is their stand that the particulars of negligence were given and there was no explanation given by the defendant on the accident as the defendant simply denied the allegations in his defence.

(3) It is their stand that the evidence of the defendant and his witnesses is in consistent with the statement of the defence as in the defence the defendant does not attribute the accident to the unknown vehicle.

(4) There is no dispute that an accident did occur. The defendant admits to have been on a dual carriage way. He was in the left lane while the right lane was clear. Drivers are expected to be vigilant and it is unbelievable how an accident could have occurred on a clear road. The defendant admitted not to have used the rear mirror. In order to escape liability, the defendant is expected to have shown that there is a probable cause of the accident which does not connote negligence or that the explanation of the causation of the accident by the defendant was inconsistent with a question of negligence whose test is a question of

fault a standard which the trial court should have applied.

(5) In terms of Order 6 rule 3,4 the defendant cannot give evidence contrary to his pleading and yet the trial magistrate based his findings on that evidence.

(6) The plaintiffs claim was dismissed because they did not see how the accident happened this is a dangerous finding as it now suits the bound from seeking compensation where they are insured in accelerate as they are incapable of witnessing occurrence of accidents.

(7) Since there is a contradiction on what caused the accident in the defence evidence the same should have been ignored.

On quantum Counsel submitted that on the basis of the evidence on record and authorities relied upon the lower court should have found for the plaintiffs. On that account Counsel urged the court to allow 120,000.00 for the Plaintiff in CMCC 308/2002 and 300,000.00 for the plaintiff in CMCCC 309/2002.

The Respondent's Counsel on the other hand has opposed the appeal on the following grounds.

1. It is their stand that the plaintiffs did not prove their case as pleaded in the plaint as they failed to give evidence as to what caused the accident as it is trite law that he who alleges must prove. The Plaintiff did not indicate the speed at which the vehicle was moving neither did they prove the defects.

2. The defendant was acquitted of traffic charges of careless driving.

3. The Plaintiffs failed to call any independent witness who had been traveling with them at the time where as the Respondent called witnesses who testified that the Respondent was not negligent and that is why one of them did not sue.

4. An eye witness said that a Nissan was to blame and the Respondent tried to avoid knocking the Nissan.

5. The essence of the authority relied upon by the plaintiff is that where no evidence has been tendered as to high speed or negligence the case could not stand.

6. No prejudice suffered as the plaintiff in CMCC 308/07 testified that he had no complaint when he went to see the Doctor. Counsel is opposed to the award of damages to this witness as damages are not awarded for nothing.

7. It is their stand that the appellants did not prove their case in the lower court. This court is urged to rely on the evidence on the record and the authority and confirm the dismissal order of the lower court.

This being an appeal, the role of this court as an appellant court is very clear. It is now trite law that the role of an appellate court is to re-evaluate the evidence that was before the lower court and determine whether that decision is to stand or not. In the case of **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA VERSUS DUNCAN MWANGI WAMBUGU [1982 – 88] 1 KAR 278** the principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles. The powers of the high court on an appellate court are well spelt out. They are set out in section 78 of the Civil Procedure Act. These are:-

(a) to determine a case finally

(b) to remand a case

(c) to frame issues and refer them for trial

(d) to take additional evidence or to require the evidence to be taken

(e) to order a new trial.

78(2) It has the same powers and to perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits constituted therein.

When these are applied to the facts herein it is clear that the issues that this court is to deal with in resolving this appeal are the follow:-

(1) Whether the plaintiff in CMCC 308/02 and CMCC 309/02 were involved in the accident subject of the proceedings in the lower court which is also the subject of this appeal. The plaintiffs have said they were. The exhibits produced in the lower court were not included in the record of appeal. However, since they are contained in the lower court's file, to avoid further delays this court decided to fish them out on its own. A police abstract was produced as exhibit 4A in CMCC 308/02 and 3 B in CM CC 309/02. In 4A Boniface Waiti is listed as a passenger in the said vehicle and he had been injured and suffered harm. In exhibits 3B **ELEN WAITHIRA** MWAURA is listed as a passenger who had suffered grievous harm. The first defence witness said she knew P.W.1 in CMCC 308/02, she was also a passenger but did not see him. That evidence has to be considered in conjunction with the documentary evidence of the abstracts. The Respondents Counsel has not submitted that these documents are fake or a fabrication. They are official government documents and as long as they stand there is proof that the two appellants were passengers in the accident vehicle.

The first defence witness said that she did not usher passengers into the vehicle. Further that the vehicle was full. She was not anticipating an accident and so the possibility of her not having been keen to register the appearance of all the passengers and be able to see all those at the rear of the vehicle cannot be ruled out. As long as they stand their contents cannot be contradicted by oral evidence. They are proof that the witnesses were passengers in the accident vehicle. Further proof is that the two gave evidence in the traffic proceedings produced as exhibit 1 in CMCC 308/02. Both were cross-examined. At no time was it ever suggested to them that they were not in the accident vehicle and that they are impossitors. On the basis of the unchallenged police abstract and traffic proceedings as regards the appellants presence in the accident vehicle. this court makes findings that the two appellants were passengers in the accident vehicle.

The next point to be considered is the effect of the acquittal of the defendant in the traffic proceedings on the weight of evidence in the civil case proceedings. As stated above these were produced as exhibits.

The learned trial magistrate findings in the traffic proceedings are:

(i) That the prosecution produced only three witnesses to court.

(ii) Looking at the evidence so far adduced was too weak to form a basis for a conviction.

(iii) The court was made to believe that what caused the said accident was overloading and not careless driving.

(iv) The prosecution has failed to establish a prima facie case against accused sufficient enough to require his defence. Accused not found guilty as charged and acquitted under section 210 Civil Procedure Code.

The learned trial magistrate in the civil proceedings just made observations at page 3 of the judgment line 4 from the top "*I have perused the proceedings of traffic case 1906 of 2001 CMS Court Thika and it is indeed true that the defendant was acquitted of this offence under section 210 of the Civil Procedure commenting that the defendant should have been charged with overloading his motor vehicle and not with careless driving"*. But does not indicate in the body of the judgment that, that decision had any bearing on the finding in the judgment. It is therefore difficult to tell whether it had any bearing on the

judgment or not. Even if it had this appellate court is able to revisit that evidence for purposes of the appeal because the traffic court is not superior to the civil case court and so that decision was not binding on the civil court. The Civil Court was entitled to re-evaluate the evidence on its own and arrive at its own decision.

The finding of the court is found on the same page. It is set out in the second paragraph and it states "*The defendants version on how the accident happened has not been contradicted. It is clear to the court that he was driving at a low speed and that there were other motor vehicles on the road and particularly the Nissan matatu which misproperly overtook him and blocked his path causing him to lose control of his motor vehicle unfortunately the Nissan matatu does not seem to have stopped for any one to identify it. It is the courts view that the Nissan matatu was to blame entirely for causing the accident and the plaintiff should have sued the driver and owner of the said matatu for redress. Unfortunately it was not sufficiently identified to enable action be taken against it. I therefore find that both plaintiffs have failed to establish that the defendant was driving his motor vehicle at an excessive speed and failed to use all reasonable means to avoid the accident on a balance of probability. I dismiss the causes with costs*"

The key consideration is whether that decision is to stand or not in the light of the evidence on the record as well as the pleadings. The sustainability or non sustainability of the lower courts decision will be determined by the findings on each of the grounds of appeal laid.

Ground 1 deals with dismissal of the suit on the sole ground that they did not see how the accident happened. The undisputed facts on record is that it is true both witnesses said that they were at the rear of the canter, in fact one, the plaintiff in CMCC 309/03 was seated. They could not read the speedometer. All they noticed as per the plaintiff in CMCC 308/03 was that the vehicle started meandering on driving the road. While that in CMCC 309/03 stated that it was swaying. The fact that they did not see what caused the vehicle to meander and sway as submitted by the appellants Counsel does not dis-entitle them to their claim because they were disadvantaged. Having been seated at the rear of the vehicle they could not be expected to see the speedometer or what was going on outside. The learned trial magistrate was therefore wrong to base his findings of failure to prove this fact. It is now trite law that a passenger has no control over the manner of driving of a vehicle in which they are conveyed and they cannot be penalized for the poor workmanship of the control of the vehicle. The explanation on the causation of the accident in such circumstances lay with the driver who was the defendant and the duty of the learned trial magistrate should have been on whether he accepted the defendants version of the skill and efforts he put up in trying to avoid the accident was sufficient to exonerate him of blame or not. In the defence the particulars of negligence were merely denied. In the evidence the defendant said he saw a Nissan emerge from the rear, and came suddenly in front of him. He had a side mirror but he did not use it. He tried to avoid hitting the Nissan and that is why his vehicle lost control and it rolled.

The defendant as a driver was expected to drive prudently and be on the look out for trouble shooters on the road, be vigilant and most importantly to be able to control the vehicle and bring it to a safe stop in the event of an emergency. He did not do so. The standard to be applied on a prudent driver is that set in the case of **EMBU PUBLIC ROAD SERVICES VERSS RIIMI [1968] E.A. 22.** The central theme in this case is that in order to escape liability the driver has to show that:-

(a) There was a probable cause of the accident. Herein the defendant says it is the Nissan a fact not pleaded in his defence and so allegation of it in his evidence and that of his witnesses cannot oust the fact that it was not pleaded. It is what is popularly known as an afterthought.

(b) The explanation should be consistent with the absence of negligence. The fact of the defendant having failed to use his side mirror while on a busy road and having failed to stop or swerve to the right to avoid rolling is consistent with negligence.

(c) It has to be shown that although perfect action is not expected of the driver, nonetheless he has to show that the emergency was so sudden and he could not have taken any amount of corrective measure expected of a competent driver. Herein had the defendant used his side mirror he could have seen the alleged Nissan pull behind him in an effort to overtake. He could then have slowed down to let the

alleged Nissan be able to overtake and in the event of an emergency be able to bring his vehicle to a safe stop or continues safe driving. Failure to do so on the facts displayed herein does not absolve the defendant from negligence.

Ground 2 deals with the doctrine of RESIPSA LOQUTOR. This doctrine shifts the burden of disproving blame on the defendant. No submissions was made on it or by the appellants Counsel. It is trite law that a it has to be pleaded. It was not before the learned lower court's trial magistrate and so it does not assist in the appellant's case. It is trite law that of party is bound by it pleadings. No findings on what was not pleaded and so ground 2 is dismissed.

Ground 3 deals with the lower courts reliance on facts not pleaded. From the findings of the lower court set out herein its is clear that the learned trial magistrate relied mainly on the issue of the Nissan cutting in suddenly and sending the defendant off the road causing him to loose control. The learned trial magistrate further added that it is the Nissan driver to blame for the accident. As submitted by the appellants Counsel, the evidence adduced should have been considered in the light of the party's pleadings. It is the finding of this court that this is the correct position. Evidence cannot exist in a vacuum and a party cannot be allowed to amend his pleading through evidence. Failure to plead the issue of a Nissan makes allegation of it an after thought and this should not have been relied upon this court therefore agrees that it was wrong for the learned trial magistrate to rely on factors not pleaded ground 3 is allowed.

Ground 4 deals with discrepancy arising in the defence evidence. The defendant said he was following a lorry and a small vehicle. The small vehicle indicated to overtake the lorry then suddenly the Nissan cut in front of him suddenly and when it did he was shocked because he did not expect it, tried to avoid and lost control. The first defence witness, witnessed nothing. The second witness testified that it is the Nissan which caused the accident. It was further stated that all the vehicles were the left lane. If indeed the Nissan came from behind when all the other vehicles were in the left lane and the right lane was clear as the road was a dual carriage way, the most sensible thing to be done was for the Nissan to pull out on the right and then proceed to overtake. There was no reason given as to why it would pull out and then cut in front of the canter. This court agrees that this evidence was contradictory and this contradiction was not resolved by the lower court. Further this evidence went to contradict the defence pleading and since the rule is that a party is bound by his pleadings the learned trial magistrate should not have allowed that evidence to stand.

Ground 5 seeks to fault the learned trial magistrates' findings on liability. As per the principle in section 78 Civil Procedure Act and numerous case law of which this court has judicial notice of, this court is entitled to re-evaluate that evidence on liability and form its own opinion. It has already ruled that failure to tell how or see how an accident occurred is not a ground for disentitling one to relief. It has further made findings that the issue of the Nissan having been responsible for the causation of the accident was not pleaded. It was an after thought and so the learned trial magistrate should not have attached any weight on it. It should have been dismissed. Besides the issue of driving a motor vehicle at an excessive speed and driving a defective motor vehicle which the learned trial magistrate rightly found that they had not been proved due to lack of evidence in respect of the same, the learned trial magistrate should have considered the other particulars of negligence pleaded and made findings on them. The issue of duty of care towards the passengers lay with the defendant. It was his duty to safely convey passengers to their destination. The issue of breaking, swerving or take any other evasive action to avoid the accident lay with the defendant. Causing the vehicle to overturn also lay with the defendant. On the facts on record and as pleaded the defendant has not explained on a balance of probability how and why the vehicle over turned. Even if it were to be taken that another vehicle cut in front of him, he was expected to be attentive, vigilant, break and slow down or even stop to avoid the accident. He did not even use the side mirror. It is his own fault. As found passengers do not dictate the manner of driving of their driver and cannot be denied relief on that account. Further even if it can be taken that another or vehicle cut in front of him it is his fault that he panicked, was shocked and the vehicle rolled. He therefore caused it to overturn.

The learned trial magistrate ruled that the plaintiffs should have sued the Nissan matatu. This is an

erroneous finding as passengers have no contract with 3rd party vehicles on the road. They only have a contract with the vehicle conveying them for safe conveyance safely to their destination. It is the defendant who has a contract with 3rd party vehicles on the road for safe driving and where one mis-behaves to his detriment he can call it to count. He should have called the Nissan matatu to count by initiating 3rd party proceedings against it if his change of mind is true. His failure to do so is a matter of free choice and that cannot be allowed to operate to allow him wriggle out of his responsibilities towards his passengers. Failure to bring the Nissan matatu on board is his own funeral and not that of the plaintiffs. He is therefore found to have been 100% to blame for the causation of the injuries suffered by the Plaintiffs.

Having established liability the court proceeds to deal with the issue of quantum. On the evidence on record it is this courts view that had the learned trial magistrate addressed himself correctly to it he should have found liability in favour of the plaintiffs and then gone ahead to assess quantum. Having established liability the court proceeds to assess quantum. In doing so it has to bear in mind the following principles.

(i) An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

(ii) The award should be commensurate to the injuries suffered.

(iii) Awards in decided cases are mere guides and each case should be treated on its an facts and merit.

(iv) Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.

(v) Awards should not be inordinately too high or too low.

The damages claimed fall under two heads. Special damages and general damages. The Plaintiffs produced receipts for specials as required by law. No allegation that those receipts were not genuine and so the amounts on the receipts are to be allowed.

As for general damages for pain suffering and loss of amenities, the Plaintiffs in both cases outlined their injuries, they produced medical records to support them. The Plaintiff in CMCC 308/02 had suffered soft tissue injuries and was treated at Thika District hospital AND AT JKUAT. He produced medical documents which are on record. The Doctor assessed those injuries as harm. He had no complaint when he saw the Doctor and at the trial. In essence they had healed with a without a future complication.

As for the plaintiff in CMCC 309/02 she produced medical documents, the injuries had healed with permanent disability and was still not well even as at the trial. She saw the Doctor and testified in court. She therefore suffered serious injuries.

The medical evidence cannot be attacked from the bar. If the defence doubted injuries they should have send the plaintiffs to be examined by a Doctor of their own choice. In the absence of that this court has no alternative but to go by that medical evidence on record.

On past awards the court was referred to the case of **PHILIP MUNYAO MUSYOKI VERSUS THE KENYA POWER AND LIGHTING CO. LTD NAIROBI - HCCC 1783 of 1989** where the Plaintiff suffered deep cuts on the head and neck, laceration on the chest, back and arms, bruises on both legs and loss of consciousness the court awarded specials of 700,00 and general damages of 100,000.00. The case of **JOHN NJUGUNA MUNGAI VERSUS POSEDON INVESTMENT CO. LTD NAIROBI HCCC 4801 of 1989.** In this case the Plaintiff suffered cuts on the lower ambit of the eye, on the hand and left leg, bruises on the thighs and blunt head injury. Side effects were that the Plaintiff could not do any handwork, could not lift heavy things, he had on and off headaches and could not concentrate on reading. The court rejected current complaints arising from the injuries five years later. The court awarded Kshs 90,000.0p0 as general damages.

The case of **STEPHEN NGINZA MBANDI VERSUS DISMAS K. KIATINE AND 2 OTHERS. Nairobi HCCC No.138 of 1987** where the Plaintiff suffered fracture of the left humerous. He was unconscious on admission to hospital. The fracture did not unite hence an operation for open reduction internal fixation and bone grafting was recommended at a cost of KShs 40,000.00. The court awarded Kshs 200,000.00 as damages for pain suffering and loss of amenities. The case of **NJUGUNA GIKONYO VERSUS KENYA TEA DEVELOPMENT AUTHORITY NBI HCCC 1533 of 1992** where the Plaintiff aged 30 years at the time of accident was involved in a traffic accident and sustained fracture of the left humerous, injury to the neck, major injury to the back and soft tissue injuries to both legs. The plaintiff's permanent disability was assessed at 40%. The court awarded Kshs 300,000.00 as general damages for pain suffering and loss of amenities.

Counsel for the Plaintiff suggest 120,000.00 for the first Plaintiff. This court has taken into account the totality of all the relevant factors, the nature and extend of those injuries and the effect of those injuries on the plaintiffs, considered the injuries and awards in the cases referred to the court, and doing the best I can I make the following assessment for both special and general damages.

(1). **BONIFACE WAITI CMCC.308/2002**

(a) Special damages Kshs 2,400.00 pleaded though amount proved was Kshs 2,570.00

(b) General damages for pain suffering and loss of amenities for injuries fully healed with no permanent disability the court assess

Kshs 85,000.00

FOR ELLEN WAITHERA CMCC 309/2002

(a) Special damages of Kshs 2,200.00 as per the receipts produced.

(b) General damages for pain suffering and loss of amenities taking into account the fact that the injuries suffered by her were multiple, the fracture had healed with an angulated deformity. Similar injuries 993 fetched 200,000.00 and in l992 Kshs 300,000.00 element of inflation taken into consideration. The court finds an award of Kshs 295,000.00 reasonable.

The net result of the foregoing assessment is that the appeal is allowed in its entirety, the lower courts decision is quashed and set aside. It is substituted with the following orders.

(1) The defendant is found to be 100% to blame for the accident and is to compensate the Plaintiffs on both special and general damages.

(2) Boniface Waiti in CMCC 308/02

(a) special damages Kshs 2,400.00

(b) general damages of Kshs 85,000.00

(c) Costs of the appeal and the suit in the lower court.

(d) Interest on (a)(b)(c) at court rates

(3) Ellen Waithera in CMCC 309/2002

(a) Special damages of Kshs 2,200.00

(b) General damages of Kshs 295,000.00

(c) Costs on appeal and the suit in the lower court.

(d) Interest on (a) (b) (c) at court rates

(4). Interest on special damages to run from the date of filing of the suits till payment in full. While interest on general damages to run from the date of delivery of the judgment on appeal till payment in full.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2007.

N. NAMBUYE

JUDGE