REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 70 OF 1997

EDWARD MZAMILI KATANA…..……PLAINTIFF

VERSUS

1. **CMC MOTORS GROUP LTD**

2. **SHAR PUNJA HIRA…….……DEFENDANT**

JUDGEMENT

This is a claim for both special and general damages for injuries that the plaintiff suffered in a road accident.

The plaintiff, a corporal in the Kenya Police Force, was on the 24th September 1994 travelling on escort duties in the first defendant's vehicle registration number KZQ 201 to Nairobi along Mombasa/Nairobi road. On reaching Maji ya Chumvi, in an attempt to avoid a pot hole, the driver of that vehicle swerved and collided head on with the second defendant's vehicle registration number KZC 769. The plaintiff was seriously injured and lost consciousness. When he came to he found himself at Pandya Memorial Hospital having suffered the following injuries: -

1. Head injury leading to concussion.

2. Cut wound and bruises of the scalp.

3. Fracture of the left scapula.

4. Compound fracture dislocation of the left elbow.

5. Chest injury with multiple fractures of left 5th, 6th and 7th ribs.

6. Fracture of the left femur upper 1/3 shaft.

He was severely shocked and urgent and emergent resuscitative measures were taken by the administration of intra-venous fluids; the cut wounds were stitched; the left elbow joint was immobilized in a plaster and open reduction operation was done on the femoral shaft by plating and bone graft from iliac crest. He was discharged on crutches on the 28th October 1994 after 32 days of admission. He

resumed light duties on 2nd May 1995.

On 3rd January 1996 the plaintiff stumbled and fell in church refracturing his left femur and breaking the plate and screws that had been implanted after the earlier fracture. He was readmitted to Pandya Memorial Hospital where he underwent a further operation to remove the broken plate and screws, excision of fibrous tissue and regrafting of the cancellous bone from the pelvic bone. Due to financial constraints he could not remain in hospital for long. He was discharged on the 27th January 1996 with hip spica with strict instructions to be on bed rest. He rested in bed for one year after which he started walking slowly. The refracture of the femur has not united well and according to Dr. Hemant Patel it "may turn to non-union." Due to that refracture his left leg shortened by three inches. He now uses a shoe with a thick sole and he walks with a limb. However the fracture of the scapula united well with no disability.

At present he complains of headaches, pain in the left hip which the doctor says has a mild deformity. He says he cannot play football which he used to enjoy playing, he cannot run and can only walk for short distances.

This case was first partly heard by the late Commissioner of Assize Omwitsa who took the evidence of PW 1 – Dr. Hemant Patel, PW2 – Inspector Michael Muriithi of Mariakani Police Station, and the evidence in chief of the plaintiff. I completed the hearing under Order 17 Rule 10 of the Civil Procedure Rules.

Before the hearing commenced before me the parties resolved the issue of liability and recorded a consent on 19th May 2005. The plaintiff is to shoulder 10%, the first defendant 65% and the second defendant 25%. My task therefore is to assess the quantum of damages.

Before I embark on the assessment of damages there is, however, one aspect of liability which the parties did not agree on and I have to decide on it. That is whether or not the defendants are liable to the plaintiff for increased damages arising from the plaintiff's fall in church on 3rd January 1996. Dr. Khaminwa for the plaintiff and Mr. Shah for the second defendant submitted that the two accidents are connected and neither can be separated from the other. Mr. Gor for the first defendant, on the other hand, submitted that the second accident, the fall in church, had nothing to do with the earlier accident. The issue to be decided here is therefore causation, whether or not there is any casual connections between the two accidents.

There is normally no problem in proving a defendant liable for the direct consequences of his act or omission. It has been said that one is presumed to intend the natural consequences of one's act or omission. In this case realizing that the injuries the plaintiff suffered at the accident on the 24th September 1994 were a natural consequence of their acts, the defendants had no problem admitting liability in the proportions recorded in the consent order of 19th May 2005.

A problem, however, arises where the injury or further injury suffered does not appear to all as an immediate and obvious consequence of the defendant's wrongful act or omission. In such case the plaintiff has a greater burden of proving that his injury or further injury, though not appearing as an immediate and obvious consequence of the defendant's wrongful act, is nonetheless attributable to the defendants act and that there was no *novus actus interveniens.* He has to prove that there was no break in the chain of causation and that the defendant's negligence was the effective or proximate cause of his injury. In **Wieland – Vs – Cyril Lord Carpets [1969] 3 ALL ER 1006** the plaintiff, soon after leaving the hospital where she had had a collar fitted to her neck which had been injured two days previously in an accident due to the defendant's negligence, fell as she was descending some stairs with her son, thereby sustaining injury to her ankles. Apart from being in a rather nervous condition at the time due to a combination of her visit to the doctor and the shake-up from the accident, the constriction of the movement of her head caused by the collar deprived the plaintiff of her usual ability to adjust herself automatically to the bi-focal glasses which she had worn for many years, and these factors together produced some unsteadiness. Eveleigh J. held that the plaintiff was entitled to recover damages for the

injury to her ankles because he regarded this further injury as attributable to the original negligence of the defendants. Not only, he said had "it long been recognized that injury sustained in one accident may be the cause of a subsequent injury" but also "it can be said that it foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury."

This case can be contrasted **Mckew – Vs – Hollan and Hannen and Cubitts [1963] 3 ALL ER 1621 (H.L.)** where the house of Lords held against the plaintiff in his claim in respect of a further and severe injury caused by falling down a staircase when his left leg unexpectedly gave way beneath him, which it had a tendency to do on previous occasions as a result of a minor injury for which the defendants were admittedly liable. The circumstances giving rise to the fall were, however, markedly different from those in the **Wieland case.** Nearly a month after the original accident when the plaintiff was holding his child by the hand, he made to descend a steep staircase without a handrail and without the assistance of his wife and brother –in-law both of whom were with him. The court held the plaintiff's act sufficiently unreasonable to break the chain of causation so that the further injury was regarded as caused by the plaintiff's own act.

Here in our country we have the case of **Obwogi – Vs – Aburi [1995 – 1998] EA 255** in which the Court of Appeal held that the respondent was not liable for the increased cost of treatment as that was due to the ***novus actus interveniens*** of the medical team who treated the plaintiff. In that case the appellant sued the respondent for damages arising from the injuries he suffered in a motor accident. Interlocutory judgment was entered in his favour and the suit proceeded solely on the assessment of damages. At the hearing a medical expert testified that during the initial hospitalization a fracture dislocation of the hip joint had been missed and approximately Sh. 500,000/= would be required for an operation. Regarding this aspect of the matter the Court of Appeal said: -

"**Upon a careful consideration of the material before us, we are satisfied that there was a break in the chain of causation and the respondent's negligence was not the effective or proximate cause of his further damage. Clearly, the operation of the original cause ceased and the chain of causation was broken by the intervention of the acts of the medical theatre and such intervention is not a kind of fact which may reasonably have been anticipated. To render the respondent liable in an action for negligence, it must be shown that the negligence found is the proximate cause of the damage. Where the proximate cause is the act of a third person against whom precautions would have been inoperative, the respondent is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it. In the instant case the negligence on the part of the medical team in failing to notice the fracture dislocation of the left hip during the initial hospitalization was not something that the respondent could have foreseen or provided against. Accordingly we are satisfied that the respondent cannot be held liable for this increased cost. The appeal against this aspect of the learned judge's decision calls for no interference on our part."**

It has been said that in a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events. But any attempt to impose liability on such a basis would not only be absurd but would also result in infinite liability for all wrongful acts and inundate courts with endless litigation. As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. The act of the defendant must be the proximate cause of the injury or must be closely connected with it for the defendant to be held liable. What is "proximate cause" of an accident or occurrence?

"Proximate Cause," also termed *direct cause, procuring cause, producing cause* or *primary cause* has been defined by Blacks Law Dictionary, 7th Edition as: -

"**A cause that is legally sufficient to result in liability. A cause that directly produces an event without which the event would not have occurred."**

In this case has the plaintiff shown that the accident he suffered on the 29th September 1994 was the

proximate cause of his fall in church about one year and three months later on the 3rd January 1996?

As I have already said the plaintiff gave part of his evidence in chief before the late Commissioner of Assize Omwitsa. He completed it before me and was cross-examined. I have carefully examined his evidence and that of the two doctors who testified in this case, Dr. Hemant Patel who was called by the plaintiff and Dr. Rasik Patel who was called by the defendant. The plaintiff, I am afraid, has not placed before court evidence to prove that his fall in church on 3rd January 1996 was as a result of the accident injuries he had suffered on 29th September 1994.

To start with, the fall in church finds no mention in his plaint or amended plaint both of which were filed after it. Other than in cross-examination when he said: -

"**On 3rd January 1996 I fell in church. I was on crutches due to the accident injuries… The disability is as a result of the first accident. I cannot remember the doctor saying that if it were not for the fall I could not have suffered the shortening of the leg."**

there is no evidence at all on what caused him to fall. We do not know whether he was tripped or whether the crutches slipped or whether he fell as a result of his own negligence as happened in the **Mckew case (supra).** Both the doctors did not state in their medical reports produced as exhibits in this case that the fall was or was not attributed to the accident injuries. Under cross-examination, however, both of them said that the fall had nothing with the accident injuries. Although Dr. Rasik Patel at one stage said that "I am not in a position to say if the second accident was related to the first," the thrust of his testimony was that it was not. In the circumstances I find that the plaintiff's fall in church on 3rd January 1996 was not as a result of the accident of 29th September 1994.

Although the defendant's act may not be the proximate cause of the plaintiff's further injury or loss the defendant may nonetheless be held liable for aggravation if his act disabled the plaintiff rendering him susceptible to further injury. In this case though I have found that the plaintiff's fall in church on 3rd January 1996 was not caused by the Accident of 29th September 1994, I, nonetheless, find that the fall aggravated the accident injuries and that the plaintiff's resultant disability is attributable to the accident injuries. This is because the accident fracture disabled the plaintiff rendering him unable to cope with the vissititutes of life. The defendants are therefore liable to him for the resultant disability.

H.L.A. Hard and Tony Honore in their book "**Causation in the Law" Second Edition** give a good illustration at page 177 of how aggravation arises. They state: -

"**If the original negligence causes the loss of an eye and the victim later independently loses his other eye, the original wrongdoer is liable only for the additional loss attributable to the fact that the victim was already disabled at the time of the further accident."**

In this case the plaintiff, at the accident on 29th September 1994 suffered a fracture of the left femur upper 1/3 shaft necessitating the plating and bone grafting of that shaft. When he fell on 3rd January 1996 he refractured the same femur leading to the shortening of the left leg by about 3 inches. In my view the accident fracture was aggravated by the refracture resulting from the fall. I say this because as a result of a violent collision of the defendants' vehicles the plaintiff suffered a simple fracture which the doctors said united well with no major disability. I do not think that an ordinary fall, for we are not told that there was a stampede or any form of commotion, would have resulted in such a serious fracture that could have led to the shortening of the plaintiff's leg. In my view, without the earlier fracture the worst the plaintiff could have suffered is a simple fracture which could have uneventfully healed.

Though not the cause of the fall I find that the accident fracture left the plaintiff disabled and the fall only aggravated that fracture resulting in the shortening of the leg. I therefore find that the defendants are liable to the plaintiff for damages as a result of the shortening of the plaintiff's leg. In other words the defendants are liable to the plaintiff as though the fall was caused by the accident.

Having resolved the issue of liability I now wish to assess the damages payable to the plaintiff.

I have already enumerated the injuries the plaintiff suffered and the resultant disability. His advocate Dr. Khaminwa proposes a sum of Sh. 6 million as reasonable compensation for those injuries. Mr. Gor for the first defendant suggests a figure around Sh. 500,000/= while Mr. Shah for the second defendant suggests Sh. 1,500,000/= to Sh. 2 million.

In making these proposals counsel cited authorities ranging from those with minor injuries and decided over a decade ago to those of paraplegia. I am of course not going to be influenced by these figures. As stated by the Court of Appeal in **Ossuman Mohamed & Another – Vs – Saluro Bundit Mohamed, Civil Appeal No. 30 of 1997 (unreported)** quoting from the case of **Kigaraari – Vs Aya [1982 – 88] 1 KAR 768:**

"**Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees."**

No two cases can have exactly the same injuries and disabilities or effects. Each case has to depend on its facts. Past cases therefore only provide a guide. In the case of **Hassan Mohammed Adam – Vs – Tracom Limited & Another Nakuru HCCC No. 508 of 1999** with less serious injuries than those suffered by the plaintiff in this case a sum of Sh. 750,000/= was awarded on 15th July 2003 as general damages for pain and suffering. In **Timon Kalavi Jappinea & Another – Vs – Texcal House Service Station Ltd & Another** with slightly more serious injuries Sh. 1,750,000/= was awarded as general damages for pain and suffering in 1998.

In this case there is no doubt that the plaintiff suffered serous injuries. As stated by Dr. Hemant Patel in his report of 17th June 1999 **Ex. 2** the plaintiff was in an extreme state of shock on admission to Pandya Memorial Hospital. He also suffered a lot of pain. He underwent a total of four operations and ended up with the shortening of his left leg. That has affected his performance. As a policeman he can now only perform office duties. He cannot do field work leave alone play any games he used to enjoy. The injuries have also affected his chances of promotion.

Taking all these into account and the fact that the plaintiff is now about 52 years old I consider a sum of Sh. 2,000,000/= as reasonable compensation for pain and suffering and loss of amenities.

The plaintiff has also claimed special damages. The law is clear on special damages. The same should not only be specifically pleaded but also strictly proved. Authorities for this proposition are a legion and I need not cite any.

In this case the plaintiff claimed Sh. 676,000/= as special damages. He, however, produced receipts for a sum of Sh. 101,042/=. That is the amount I find proved and that is the amount to be awarded to him.

As no other claims were made I therefore enter judgment for the plaintiff against the defendants in the proportions of admitted liability against the first defendant in the sum of Sh. 1,300,000/= and against the second defendant in the sum of Sh. 500,000/= general damages and Sh. 65,677.30 and Sh. 25,260.50 respectively as special damages. Special damages will of course attract interest at court rates from the date of filing the amended plaint and general damages from the date hereof.

The plaintiff's advocate asked for costs for two counsels. I do not see the justification for that in a simple case as this one. This having been a defended case the plaintiff will have costs for one counsel at a higher scale as provided in the Advocates Remuneration Order, with interest thereon.

DATED and delivered this 10th day of May 2006.

D. K. MARAGA

JUDGE