**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 946 of 2004**

**POSTAL CORPORATION OF KENYA……..…… APPELLANT**

**VERSUS**

**JOB GACHANGE NJAGI…….…….. RESPONDENT**

**J U D G M E N T**

On 3/11/04 the appellant, Postal Corporation of Kenya, moved to this court, by way of an appeal, challenging the judgment and decree of the Senior Principal Magistrate, Milimani Commercial Court, in Chief Magistrate's Civil Case No. 562 of 2003, delivered on 4/11/03. The six grounds of appeal are as follows: That:

1. The Learned Magistrate erred in holding the appellant wholly liable for the accident when there was evidence that the said accident was substantially contributed to by the driver of the third party i.e. Sigma Feeds Limited.

2. The Learned Magistrate erred in finding for the Respondent when the Respondent, an unauthorized passenger in the Appellant vehicle at the time of the accident and hence there was no duty owed to him by the Appellant.

3. The lower court erred in failing to appreciate that the Respondent was not an employee of the Appellant but an independent contractor in receipt of irregular income from Appellant and that this income could not form the basis of assessment of loss of future earnings by the Respondent.

4. The Learned Magistrate wrongly assessed the income for loss of future earnings.

5. The lower court awarded general damages and future medical expenses that were so high as to amount to an erroneous estimate of the damages and expenses that the Respondent was entitled to.

6. The Learned Magistrate erred in awarding damages that were beyond his pecuniary jurisdiction.

Wherefore the Appellant prays for the appeal to be allowed and the Respondent's suit be dismissed with costs; or in the alternative, this court do reduce the amount of damages, future earnings, special damages and future medical expenses awarded to the Respondent as are reasonable and were proved.

The facts of the case from which this appeal arose, are, from the pleadings and the evidence on record, that on 21/6/00 the Plaintiff/Respondent, a temporary employee of the Defendant/Appellant was involved in a road accident while traveling as a passenger in vehicle KUL 545 along Embu-Makutano Road. The vehicle was owned by the Appellant and driven, at the material time, by Joseph Maina, an employee of the Appellant – Postal Corporation of Kenya – when the accident occurred, near Wanguru Market, when the vehicle collided head on, with another vehicle, moving in the opposite direction. The other vehicle was a lorry, KAJ 607G.

From the evidence on record, vehicle KUL 545 was being driven at high speed, when it veered from its proper lane to the right lane thereby colliding with the lorry moving in the opposite direction. The evidence by the traffic police was that the accident was wholly caused by the negligence of the Appellant's driver and vehicle. That evidence was uncontroverted. Arising from the accident, the Appellant's driver died on the spot, while the Respondent suffered multiple injuries, leading to hospitalization, permanent injuries which incapacitated him. At the time of the accident, the Respondent was, as a temporary employee of the Appellant, earning K.Shs.1,500/- per month, and he was aged 27 years.

In its ground of appeal No. 1, the appellant challenges the subordinate courts finding that the appellant was wholly liable for the accident. It is the appellant's contention that the accident was substantially contributed to by the driver of the third party that is vehicle KAJ 607G, which belonged to Sigma Feeds Limited.

Careful perusal of the record does not support the appellant's contention. There is no evidence, from the traffic police record that the third party vehicle was in any way to blame for the accident. All the evidence, which is not contradicted, pointed to the appellant's vehicle being driven at high speed, in a zig-zag manner, and on the wrong lane of the road immediately prior to the collision. The record shows that the third party vehicle was on the right lane, and had its lights on, even through it was broad day light, to warn the appellant's driver, but all in vain.

In light of the evidence adduced before the lower court, this ground of appeal has no merit, and I reject that challenge as unsubstantiated.

The second ground of appeal is on the basis that the Respondent was an unauthorized passenger in the appellant's vehicle when the accident occurred. Hence, so submitted the appellant's counsel, no duty of care was owed to the Respondent by the appellant.

This challenge on the lower court's holding is, factually and legally, misplaced, in light of the evidence on record.

The lower court found, as a fact that, even though there was no letter of formal appointment of the Respondent, payment vouchers showed that the Respondent was on monthly pay of K.Shs.1,500/- between 1999 to July 2000, when the accident occurred. Further, the Respondent's duties as a cleaner with appellant corporation was not contradicted, nor the fact that when he met the accident he was assigned, by the Management, to carry out those duties at another of the appellant's stations – Kaburu – The Lower court found, on the evidence, adduced before it, that the Respondent's immediate boss traveled with the Respondent in the vehicle, and the driver, when the accident occurred.

It is, as found by the lower court, not credible that the Respondent was an unauthorized passenger in the Appellant's vehicle at the material time. The Respondent was traveling in the vehicle, in the cause of his employment. And that is not, and cannot be, changed by the employment status of the Respondent by the Appellant. The feable contention by the Appellant that the Respondent was an independent contractor was not, in my view, substantiated. The whole legal concept of an independent contractor, as opposed to a servant/matter relationship, is misconceived under the circumstances. An independent contractor is not under the master's control and directions in the day to day operations. He is, by and large, a professional/expert; his payment mode is not consistent with a monthly salary, as in the present circumstances.

Turning to the contention that there was no duty of care owed to the Respondent by the appellant because the former was a casual, I had alluded to the legal misconception underlying such a notion. Duty of care is not necessarily tied to an employment relationship. Granted, employment may, and often does, create special circumstances upon which the degree and standard of the care expected may vary. In the case before me, the duty of care is in relationship to a passenger in the Appellant's vehicle, driven by the appellant's driver/agent, with the full knowledge of the appellant, of the Respondent's presence in the vehicle.

I have no doubt in my mind that under the above circumstances, whether the Respondent was an employee – casual or otherwise – of the appellant is legally irrelevant in terms of the duty of care owed to the Respondent by the appellant.

In **HASSANALI YUSUF V.JOHN MUHAKI,** Civil Appeal No. 510 of 2001, at Page 6 it was held: **that by virtue of being both the owner of the vehicle and employer/master of the driver of the said vehicle at the time of the accident that, sealed the liability onto the appellant.**

And in MORGANS V LAUNCHBURY & OTHERS [1972] 2 ALL. E.R. at Page 606, the House Lords held:

"In order to fix liability on the owner of a car for the negligence of the driver, it is necessary to show either, that the driver was the owner's servant or at the material time the driver was acting on the owner's behalf as an agent."

In the case before me, there is no dispute that the driver of the vehicle in which the Respondent was traveling at the material time was the appellant's employee/agent, and that the vehicle belonged to the appellant. There can be no escape then that the appellant was vicariously liable for the negligence of his driver. The allegation of the Respondent being an unauthorized passenger in the vehicle, was not proved. As held herein earlier, the Respondent was traveling in the cause of his employment in his employer's vehicle.

Ground of appeal No. 3 is subsumed, in part, in what has already been dealt with in ground of appeal No. 2. There seems to be a misconception however, as to whether what the Respondent was earning as employee of the appellant is necessarily what constitutes an assessment of loss of future earnings.

In the circumstances as in this case where the Respondent suffered as evidenced by the Medical Reports, permanent injuries, the assessment of loss of earning is on the basis of the risk that if he loses the current employment at some time in the future, he may, as a result of his injury, be at a disadvantage in getting another job or an equally well-paid job. While accepting that damages under this heading are by and large speculative, there are guiding principles to limit the quantum. Such guides include the age of the claimant/respondent. What must be underlined here is that whereas there is no mathematical formula in such an assessment, damages are awardable under the heading so long as the court is satisfied that there is a substantial or real risk that the claimant will be subject to the disadvantage before the end of his working life.

It must also be observed that whereas as in this case, the appellant contends that to use the Respondent's salary to calculate the loss of future earning was wrong, there is no precise scientific test to show that the Respondent might not have earned more in future – the remaining part of his life. He could also have earned less. However, what is not disputable from the pleadings is that the Respondent suffered severe permanent injuries, and that has an impact on his future earning capacity.

In brief, there does not seem to exist a better approach to calculate the loss of future earnings than use the claimant's income at the time of the accident, and multiply that by the balance of his life expectancy. And on this, and looking at the average life expectancy of males in Kenya at the time of the accident, statistics from the Bureau show a life expectancy of 48 years, not 43 as used by the Learned Magistrate. Thus, the multiplier should have been 21 not 16 years**. That translates to K.Shs.378,000** at the rate of K.Shs,1,500 per month**.** That is what the Respondent would have earned for the 21 years. But within that

period he would not be saving all that money. He would have his normal expenses, not to mention that the money would not come to him lump sum, and that to award him such a sum now means accelerated acquisition of the sum which he would have worked for over twenty years. I believe such factors must be taken into account, and with all the speculations in what the inflationary trends might or might not be, whether or not even without these injuries, he would live to be 48 years, all these uncertainties make such an award very speculative.

However, doing the best I can, just like in the case of general damages, I would award the Respondent 50% of the above figure, which comes to K.Shs.189,000/- under the heading **loss of earning capacity**. The lower court's award is varied to that extent.

Ground No. 5 of the appeal challenges the Learned Magistrate's award of general damages and future medical expenses that they were so high as to amount to erroneous estimate of the damages and expenses that the Respondent was entitled to. Learned Counsel for the appellant contended that the special damages awarded by the lower court had not been proved.

I begin with general damages, under which heading are included pain and suffering, loss of amenities.

I have looked at the Medical Report by Dr. M. Simiyu, dated 21/11/02, where the injuries sustained by the Respondent are tabulated and explained. They include loss of consciousness for over 7 days while admitted in ICU, Nairobi Hospital; fracture base of skull and brain contusion; multiple deep cut wounds on the scalp. Fracture of the disital and right radius with dislocation of the wrist joint; deep cut wounds at the right ankle region; there is, as a result of the head injuries, paralysis of the hand and forearm muscles. The prognosis is that the Respondent will live with considerable disablement of the right hand, estimated at 45%. Then the Report concludes that there will be no room for further surgery to correct the deformity and weakness, and that the paralysis of the nerves is complete and irreversible.

The learned Magistrate awarded K.Shs.600,000/- under the heading of general damages, which has been challenged as being excessive. I have closely studied the comparables cited at the lower court during the submissions on this issue of general damages. These comparables include **JANE ELSA OUGO VS. LOCHAB BROTHERS & CO. HCCC 5733/1991, ROBINSON NDIRI GACHUHI VS. KTDA, HCCC 1979/92.** Comparing the injuries in the cited comparables to those in the present case before me, even if the issue of passage of time since those cases were decided is ignored, which I can't do, it is my considered view that the general damages awarded by the Subordinate Court are on the lower side. I am aware that no two cases can be exactly identical. However, doing the best I can, I raise the general damages to K.Shs.1,000,000/-.

On special damages, there can be no variance on the sum awarded under special damages because, as held in **ZACHARIA WAWERU THUMBI VS. SAMUEL NJOROGE THUKU,** Civil Appeal No. 445 of 2003, special damages are a reimbursement to the victim of a tort, for what he has actually spent as a consequence of the tortuous act or acts complained of.

All that is required is that they are pleaded and proved. Once that is done, the court's hands are tied and there can be neither an assessment nor variation by the court.

The Subordinate Court on the above basis awarded K.Shs.511,334/- under this heading of special damages. There can be no change on that figure.

Lastly, on damages, the lower court awarded K.Shs.320,000/- on account of future medical expenses. This was on the basis of estimated costs for future medical expenses that the Respondent would need. This award has no legal basis and does not exist in the known heads of damages, within the law of torts.

In the **ZACHARIA WAWERU THUMBI VS. SAMUEL NJOROGE THUKU, supra** this court reviewed the cases where such an award had been given and at the end concluded that there was no legal basis for such an award. This court concluded that no such head of damages exists, and it is unsafe to give an award which is analogous to, but not quite the same as special damages. This is because future

medical expenses are yet to be incurred, and no evidence of such an expenditure can be produced by a claimant. Without such documentary evidence of actual receipts in support of payment, medical prognosis and estimated costs remain estimates, and cannot be proved. As held in the **ZACHARIA** case, **supra**, even invoices, as yet to be paid, do not meet the test of special damage. Further, as held in the above case, there is no knowing what the exact cost of that future medical expense will be when it is actually incurred. It could be more or less. Special damages cannot be based on speculation. All in all, this court reverses the award of K.Shs.320,000/- on account of future medical expenses. The total quantum of the damages in this case are reduced by the said figure.

Finally, I turn to the issue of pecuniary jurisdiction of the Learned Magistrate. This is in ground No. 6 of the appeal. This challenge collapsed, in my view, upon production of Gazette Notice No. 4888 of 23/7/02 which showed that the pecuniary jurisdiction had been increased to K.Shs.2,000,000/- with effect from 1/7/2000.

I am convinced that Learned Counsel for the appellant had not properly concluded his research on the matter. The challenge, I assume, was abandoned in view of the factual evidence on the fallacious submission.

All in all, and for the above reasons, the appeal herein is dismissed with costs to the Respondent and against the appellant.

The appellant is hereby ordered to pay damages as under:

(a) General Damages K.Shs.1,000,000/-

(b) Special Damages K.Shs.511,334/-

(c) Loss of earning capacity K.Shs.189,000/-

(d) Respondent awarded costs and interest at court rate.

(e) Interest on special damages from the date of filing the suit till payment in full; and interest on general and special damages from the date of this judgment, till payment in full.

DATED and delivered in Nairobi this 21st Day of June, 2006.

**O.K. MUTUNGI**

**JUDGE**