



**Odari v County Council of Narok & another (Civil Suit 2 of 2021)
[2023] KEHC 2007 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT 2 OF 2021
F GIKONYO, J
MARCH 16, 2023
(FORMERLY NAIVASHA HIGH COURT CIVIL SUIT NO. 1 OF 2020)
(FORMERLY NAROK HIGH COURT NO. 4 OF 2015)**

BETWEEN

WYCLIFFE MWAVALI ODARI PLAINTIFF

AND

COUNTY COUNCIL OF NAROK 1ST DEFENDANT

KESIKE OLE WOTUNI 2ND DEFENDANT

JUDGMENT

A brief History of the Matter

1. The suit was first filed vide a plaint dated January 23, 2013 at Kericho High Court.
2. The plaint was amended vide a plaint dated June 11, 2013.
3. The defendants were served with the summons to enter appearance and the plaint. However, the defendants failed to enter an appearance or file a defence in the matter. The plaintiff finally requested judgment in default of defence on March 12, 2013 at Kericho High Court.
4. The parties in the end reached consent on August 27, 2013 wherein they agreed to have the amended plaint admitted and to have ex parte judgment set aside. Later, by consent of the parties, the suit itself was transferred to Narok High Court and given number Civil Suit No 4 of 2015.
5. The matter thereafter commenced hearing before Meoli J at Narok High Court on June 29, 2016 after several adjournments. The plaintiff presented witnesses and prosecuted his case up to October 26, 2016.
6. Thereafter the defense failed and or refused to present its evidence.



7. On September 21, 2017, Ms. Maritim's counsel for the defendants asked for more time to enable parties reach an out of court settlement.
8. On November 29, 2017, the court (Bwonwong'a J) adopted the consent judgment. The consent itself in terms of wording and language was recorded with the assistance of the court including the Deputy Registrar of the court, Hon. H.M. Ng'ang'a.
9. On January 30, 2018, a notice of change of advocates was filed by Kemboy and company advocates on behalf of the defendants. The change came about after the plaintiff served the third and final notice to execute upon the defendants.
10. The firm of Kemboy and company advocates came on record to object to the execution of the consent judgment by the parties.
11. The court (Bwonwong'a J) allowed every prayer by the newly appointed advocate of the defendants and the plaintiff registered his dissatisfaction with glaring prejudice by the court and reported the matter before the judicial service commission.
12. In the end, the court determined that the consent order had been set aside by Bwonwong'a J and this court opened up the case again for the defendants to prosecute its case.

Plaintiff's case

13. PW1- Wycliffe Mwavali Odari. He is the plaintiff herein. He testified that he works with the Narok County Government as a ranger. On 25/8/2011 he was traveling to Londiani for training as ranger. They left in two vehicles. He was in KBG281C belonging to the county government. They reached Bomet at 3.00 P.M. It was raining. The driver lost control and it veered off the road and overturned. The vehicle was being driven fast. When the vehicle overturned he lost consciousness and when he came around at Tenwek he learned that he had to be referred to Eldoret referral hospital. Dr. Koech diagnosed him with a crushed spine. Plates were therefore inserted.
14. During the period of the accident, the county council was running the affairs of the Narok local government. The council paid his first bill and he remained in the hospital for 2 months. He later learned that the accident was not reported to the police and he got an abstract, P3, and treatment notes from Tenwek hospital.
15. He stated that he cannot stand for long because he developed stiffness on the left side. Plates are still in his neck. He cannot dress. He cannot bend or squat, making it difficult to use the toilet. He suffers erectile dysfunction even though he has a wife. He stated that he has not received proper treatment. The therapy is expensive, almost Kshs 17,000/- per session and he has no money.
16. He claimed that the case has taken long and he prays for damages. He stated that he was looking at a recommendation for NBA but he has not claimed these benefits because the case is still in court. He confirmed that he is still employed by the county. He sits in the office at the governor's office because he cannot walk.
17. On 17/2/16, the defendant promoted him to CPL ranger. He produced the work injury benefits forms dated the 28th and 29th May 2015 marked as MFI 1. The defendant referred him to CPL vide the letter (MFI 2). He got a police abstract from Bomet police station dated 29/8/2012(MFI 3).
18. On 17/7/2014, the County Government referred him to the Ministry of Health for tax exemption because of his disability. He produced the form as MFI 4.



19. On 29/8/2012 at Bomet police station he got a p3 form which was completed by a doctor at Tenwek hospital (MFI 5). Following the accident, the police gave him a P3 form.
20. He confirmed that he had receipts regarding his treatment. He produced a receipt for 25/8/2011 at Tenwek hospital (MFI 6), a receipt dated 6/6/2012 by Dr. Koech for 50,000/= for checking (MFI 7), a receipt of 8/11/2012 from Martha's pharmacy for shs. 3,375/=for the medicines (MFI 8). BILL summary of 26/8/2011 from Moi Teaching and Referral Hospital for Kshs 515,142/= (MFI 9).
21. On 29/8/2012 he paid Kshs 1,200/= for the P3 form at Tenwek (MFI 10). He paid Tenwek hospital for the examination and P3 form completed.
22. He produced the report of 18/1/2013 from Dr. Otato who received him and gave a report indicating his condition at the time. He produced his receipt for Kshs 10,000/= (report MFI 11 A, B Receipt).
23. He paid for his police abstract. He made photocopies at shs. 200/= but he did not get a receipt. He lost some medical receipts because his employer asked for the originals and did not return the receipts to him.
24. He produced his pay slips for the month of May 2013 under the county council (MFI 12). He reiterated that he is an employee of the county. He stated that there was no report of an accident at the Bomet police station. He made the first report. He alleged that the report by police an abstract regarding the accident is false.
25. The doctor advised that he needed constant medical attention and therapy. He also needs an assistant. His wife left home and lives with him. He is unable to wash his clothes and also sometimes bath at times his wife baths him. He has 3 children and was hoping for more but now he is incapacitated in that regard. He is straining a lot in working because he cannot walk. He has to hire a vehicle to take him to work. He cannot take care of himself he can walk but after a while he becomes dizzy. Also, his left side is weak and rigid. He can barely use the left arm. He has asked the court for both special and general damages to sustain him with medical and therapeutic expenses. Socially he is disabled because he cannot move about easily. His life is limited.
26. He adopted his statement and produced MFI 1,2,4-10 as exhibits and MFI 11B and 12 as exhibits 11B and 12.
27. On cross-examination, he stated that they were headed for training at Londiani. Names were issued not invitation letters. (shown a graduation program DMFI 1). He stated that that was the list of graduands but He did not go for the training because accident occurred on the way to the training.
28. When referred to police abstract of 26/8/2011(DMFI 2) he stated that no report was made of his accident before his report. The abstract is issued by Bomet police station. The OB did not contain any record of the accident when he reported. The driver of the vehicle thought he died. They left in the vehicle after the accident. Good Samaritans assisted him. They were 12 of them going for the training. They were new recruits. He did not know anyone else who suffered injury. He showed a scar on his head. He claimed the same was a s a result of the head injury he suffered.
29. Presently he does not buy medicines because he has no money. His last visit to doctor was to see Dr. Koech per the receipts tendered which is dated 6/6/2012 and Dr. Otula in 2014. He claimed he has no money to use on physiotherapy. His wife has had to try and do it for him.
30. On reexamination, he stated that DMFI 2 was by Kenya forest services. Recruits were to be trained but he did not train or graduate. He was involved in the accident and he was left at the scene. He stated that he made the first report of the accident at Bomet. The abstract shows the OB No



31. PW2-Consolata Mbone Isinga, the plaintiff's wife testified that she is a house wife but previously a farmer. She married the plaintiff in 1993 and they lived well. They have 3 children. The accident occurred after he rang her to tell her that he was travelling to Londiani on 25/8/2011. She waited for his call to confirm arrival but what she got was a call from Tenwek hospital informing her that plaintiff was in hospital in bad state. She was in shock. She had never travelled to Narok. She travelled to Eldoret Referral Hospital where she was moved. She found the plaintiff lying as dead and immobile. She was required to authorize surgery for neck injuries. He could not move or feed or take himself to toilet. She cared for him, dressing, cleaning up and diapering him. They were in hospital for one month. Thereafter they were going for therapy as referred. In December 2011 they travelled together to Narok because he was required at work. His sick leave was extended. They continued with care until 2012. She had to bathe him, take him to toilet because hands were stiff and to dress him. He continued with physiotherapy but it became expensive. Doctor taught her how to massage him on the left side. She continued to nurse him because the left side was stiff. She cannot have sexual intercourse with her husband. That the same is because of the plates in situ and that his legs and hands get stiff. That the plaintiff has pain especially in cold season and he has to use painkillers. She stated that sometimes there is tension due to lack of sexual intercourse when he suspects her of infidelity.
32. PW2 further testified that the plaintiff had a problem passing urine and bowel movement. She also stated that the plaintiff's legs stiffen while he tries to work. That she wished to have more children but the plaintiff cannot have sexual intercourse. She clarified that at Eldoret referral hospital they stayed from august to October 2011 when they were discharged. She urged the court to order compensation for the plaintiff to assist his life to be bearable.
33. On cross-examination, she stated that the plaintiff cannot care for himself because the left hand is weak. He cannot bend or squat to use the toilet. She has to assist him. The neck is stiff and he must turn fully because of the plates. Children are in school. The youngest is in primary.
34. PW3-Dr. Otulo Carey Francis is a medical doctor, specialist gynecologist, and specialist in fistula surgery. He testified that he compiled the medical report on examining the plaintiff on 18/1/2013.
35. He further testified that in the accident the plaintiff sustained the following injuries;
 - i. Severe spinal injury of the cervical region(neck) causing weakness in legs treated at Tenwek mission hospital.
 - ii. Head injury-stitched. Brain injury and was referred to Moi Teaching and Referral Hospital. Doctors carried out CT scan and MRI-revealed fracture of cervical spine number 5 which led to spinal cord compression and paralysis of all limbs.
36. He stated that spinal surgery done 27/8/11 to repair bones could walk with support after surgery. He was discharged one month since surgery to continue rehabilitation.
37. The plaintiff had a wife and 3 children, worked as clerk at the Narok county government. He had not had any chronic illnesses or surgery before. During medical examination the plaintiff showed him summary showing dislocation of cervical spine and fracture well healed. But he had post traumatic pains requiring on/off medication. He had developed numbness over all the limbs.
38. He concluded that Road Traffic Accident left him with permanent scalp scar and numbness of his lower limbs that caused him to have occasional heart intolerance. Left shoulder was fixed-limited movements could not walk with straight gait. He had also developed occasional urine retention associated with constipation and erectile dysfunction. Erectile dysfunction has consequences on the victim both physically and emotionally. Spouses of such people do leave.



39. He produced the Report marked MFI 11A now tendered as P Exh. 11A.
40. He produced the x-ray taken at Eldoret Hospital as P Exh.13.
41. On cross-examination, he stated that he saw the plaintiff during the examination and also saw all summaries, from Moi Referral Hospital. He did not see him after the report he has produced.
42. The re-examination he stated that the patient remains the same to date.
43. PW4 CPL Daniel Ngeiuywa he was attached to DTO Bomet. He referred to an abstract IRO road traffic accident occurring on 25/8/2011. Abstract dated 29/8/2011 (MFI 3) issued by Bomet Traffic Base. IRO severe injury RTA on 25/8/2011. OB No 11 of 26/8/2011 indicates accident reported that day at 2.30 pm. As a non-injury accident. Reportee was one Kesike Sirere Ole Motuli a driver of KBG 281C Toyota Land Cruiser. In the report, the driver did not mention injury. But the abstract says Mr. Wycliff Mwavali was injured seriously in the same accident. Reference No is MFI 3 is dated 15/8/2012 but he did not find such an occurrence book details on MFI 3 are same as the OB No 11 of 26/8/11 indicating non-injury.
44. The driver gave information that accident caused an injury. It differs from MFI 3. They have tried all means to get OB of 15/8/2012. He had another abstract DMFI 2 issued in respect of the motor vehicle when the accident occurs, they gave owner of motor vehicle and injured an abstract copy. This DMFI 2 refers to OB No 11 of August 2011. All other details corresponded with the OB he had referred to earlier. The same indicates it was a non-injury accident. This OB is for whole of 2011. But they had looked for the OB reference in MFI 2 for whole of 2011. They have looked for the OB reference in MFI 2 being 2012 – they could not find the 2012 OB.
45. The OB indicates the accident reported on 26/8/11 at 2.30 p.m.
46. Accident occurred on 25/8/11 at 5.00 p.m. Accident should be reported within 24 hours. Scene of accident only 4 km from accident scene. He could not explain the delay by the reportee. DMFI 2 the police reference is not complete. at item 8 thereof it is indicated that the accident occurred on 26/8/11. On MFI 3 issued on 29/8/12 date of the report is 15/8/2012 and the accident occurred on 26/8/2011. He confirmed by stamps that documents originated from his base that is the two abstracts – on basis of the stamps. He just reported there recently. They were issued by officers who has since left the base. They had looked for OB for 2012 in vain. It cannot be traced even after speaking to the former base commander. All he could say is that the stamp is theirs. He produced OB as an exhibit (Exh. 13) and the two abstract shows DMFI 3 and DMFI 2 marked P Exh 3 and D. Exh).
47. On cross-examination, he confirmed an accident was reported within 24 hours. OB and abstract show the accident was non-injury. OB of 2012 IRO abstract exhibit 3 cannot be traced. The information placed on abstract will be extracted from OB. Going by exhibit 3, the accident reported one year later. Police base 4 km from scene. He was not at base and could not tell why driver reported accident next day. He recently took over Bomet Traffic Base.
48. On reexamination, he stated that the Accident was reported by driver on 25/8/11 at 5.00 p.m. Police visit scenes round the clock. Report indicated that motor vehicle overturned, the more reasons why the police could have visited. If report was made in time, police could have visited the scene to view motor vehicle and scene so many details cannot be verified.

Defence Case

49. DW1-Mohammed Ali – is base commander Bomet. He was provided with two police abstracts dated 29/8/2012 and 26/8/2011. He was also supplied with a motor vehicle inspection report of 26/8/2011.



- He confirmed the authenticity of the documents by referring to OB No 11 dated 26/8/2011 (P Exh 13.) he has the original OB book. As per OB the correct abstract is the one issued 26/8/2011. The other abstract is not captured in their records. It should be subjected to further investigation. He wishes to produce OB extract (D Exh 3) and abstract dated 26/8/2011 (D Exh 2).
50. On cross examination, he stated that he was the base commander 5 years ago. He was not a base commander when the accident occurred. He does not know whether CPL-Daniel Ngeiywa was at Bomet.
 51. That the accident occurred on 25/8/2011 along Kaplong -Narok road at Kapkwen. Report captured the date. The report was made on 26/8/2011 after 21 ½ hours of the accident. A report should be made within 24 hours. Inspection was after the report was made. If a person is injured, he could stay for 24 hours and that is normal.
 52. The abstract was given to the driver. There are two abstract bearing different details. Time is different. Insurance particulars are also different and so are commencement dates thereof. Policy number is also different. Certificate no is also different. The vehicle number is the same in both abstracts.
 53. IO's are also different in both abstracts. The 2011 one indicates 'non-injury'. The 2012 shows the plaintiff was injured he was a passenger as per the abstract. The inspection report captures it as non-injury accident.
 54. The scene was 4 km from the police station. It took 21 hours to make the report. He later established that the office of county counsel worked their officers to wait before reporting. It is not normal to so wait. That was the information he gathered.
 55. He is not aware county council of Narok paid his medical bill of 700,000/=
 56. On re- examination, he stated that he has no record to back the content of 2012. Police abstract is filled upon information of OB. Abstract of 2011 is based on the information in the OB.
 57. DW2- Kesike Sirere Ole Watuni. He testified that he is a farmer. He retired in January 2021 from county government of Narok as a driver. He is the 2nd defendant. He adopted his statement dated 9/7/2014 as his evidence in chief. He produced the documents in the list of documents dated 9/7/2014 as D Exh 4,5 &6. He also filed a supplementary list of documents dated 24/5/2016. He produced the documents listed therein as D Exh 7(a), (b), (c) and (d).
 58. On cross-examination, he stated that he was driving the vehicle herein on the material date. It was involved in an accident not far from the police station. He reported the accident the following day. He could not have reported since they had lost orientation. They called but they were told to wait for help. They lost consciousness after the accident. They were taken to the hospital. The vehicle was insured. It was from 5/10/2010- 4/10/2011 by Monarch. He gave Mr. Maritim the insurance copy.
 59. He is not sure if the county council made a claim. But the insurance paid the vehicle. The vehicle was insured and taken to Toyota Kenya for repairs. He does not know whether the insurance or county paid for the repairs.
 60. After 1 year he was called to Narok police station and was told Mwavale was injured in his vehicle. He denied as he was not one of the passengers in his vehicle. He could not remember their names as they were new. That they were taken to Tenwek hospital. He did not see him at the hospital. He is not aware of his presence or payment of his hospital's bills.
 61. On re-examination, the vehicle was insured. He has the original insurance certificate. He knew Mwavali in October 2012. He did not know him before. He was not one of the passengers in his vehicle. All



- his passengers were new to him. He did not know the name of any of the 6 passengers. They were 8. Maxwell is the only person he knows. He was his officer in charge. They lost consciousness and were confused. They were taken to the hospital and it got late. He reported the following day.
62. DW3-Koileken Naisho. he is a game warden. He retired in 2020. He adopted his statement dated 24/5/2016 as his evidence in chief.
 63. On cross-examination, he stated that he was a passenger in the vehicle that was involved in the accident. They were 8 of them. 6 of them were visitors. They were new to him. He was not injured. They were taken to Tenwek for checkup and was discharged at midnight. They stayed at the scene until 7:30 p.m. They were confused, passengers rescued them. He was feeling unwell a bit. They encountered a stationery lorry. They volted once. He was seated in front with the driver. He had not fastened his seat belt. He was feeling pain at the back. He does not know what happened but he was seated. They were 6 others on the rear cabin. They had not fastened their seat belts. They were trainees. The plaintiff was not one of them. But he knows the plaintiff as a casual labour at Narok county council. So, he was not one of the 6. He stated that the plaintiff was not a ranger.
 64. On reexamination, he stated that they were taking trainees to a training Centre. They were to become rangers. He was in charge of rangers. The plaintiff was not a ranger. No one had serious injuries. They were all discharged. They were later taken to Londiani for training.
 65. The defense was thereafter to tender evidence by a doctor. The defence required the plaintiff to attend the Narok district hospital for examination by the doctor. Indeed, a doctor attended court and was required to file and serve a report upon reexamining the plaintiff. The defence claimed it would bring various medical experts to testify as to injury claims by the plaintiff.
 66. On October 12, 2022 when the matter came up for further hearing, the defence advocates and their witness/witnesses did not show up.
 67. The defence also had not complied with court orders to reimburse Kshs 7,000/= to the plaintiff's advocates. The defence has also not served or filed a doctor's report after re-examination of the plaintiff.

Submissions

68. The plaintiff filed his submissions. The defendants did not file their written submissions.

Plaintiff's Submissions

69. The plaintiff submitted that the defendants did not bring any documentary proof of what they orally submitted. Thus their claim in court were effectively rebutted by oral and documentary evidence of the plaintiff.
70. The plaintiff submitted that he filed his pleadings for this suit and also brought evidence as to amounts expended on his treatment to court in his exhibits No 6,7,8,9,10,11A&B. thus the plaintiff's claim in the circumstances of this suit has met the standard set by the law to convince this court to award him special damages pleaded in the amended plaint.
71. The plaintiff submitted that this court has discretion to award general damages as prayed since it is evident that the injuries suffered by the plaintiff were severe and the resultant conditions out of the injuries are very consequential.
72. The plaintiff submitted that in the circumstances of the accident subject matter herein, the defendants were individually and severally culpable of extreme negligence and/or inhumanity. The court therefore



ought to consider grounds enumerated below to find it meet and just to award the plaintiff exemplary damages, due to gross negligence on the part of the defendants.

73. That the acts of gross negligence were perpetuated in the following manner;
- i. The County Council allowed its vehicle without insurance to be driven on a public road ferrying passengers.
 - ii. The County Government apparently had control of the driver to the extent of the driver failing to report an accident with injury awaiting instructions from the County Government. The County Government was actually instructing its agent, the driver to defy or act complicit to traffic laws by giving a false report that it was a non-injury accident and they knew it to be otherwise.
 - iii. The driver made a false report of a non-injury accident after 21 hours of the accident, in spite of the fact that the police station was less than 2 kilometers away from the scene of accident.
 - iv. The County Government through its agent abandoned the plaintiff on the road to die, and therefore denied him an opportunity to have received urgent first aid which probably would have made injuries by the plaintiff less grievous.
 - v. After the plaintiff filed suit the County Government refused and/or was reluctant to conduct its case and when a second chance was accorded it by this court the County Government of Narok once again demurred.
 - vi. The 3 witnesses presented by the defendants told utter lies thereby seeking to undermine the court's capability in its judicial duty.
 - vii. Proposing a consent which amounted to a contract, Narok County Government backtracked on the contract thereafter resulting the matter dragging in court for a very long while the Narok County Government knew that the plaintiff needed expensive medical care which he could not afford. This is particularly bad because the plaintiff had been determined a person living with disability after the accident which fact is known to the Narok county government employer of the plaintiff because a county doctor submits a report each year for purposes of tax exemption.
74. In the end the plaintiff submitted that this court should find it in his favour and award him with the special and general damages as prayed in his amended plaint dated June 11, 2013 including exemplary damages with costs of this suit since he established and proved his case.
75. The plaintiff has relied on the following authorities;
- i. Machakos High Court Civil Appeal No 57 of 2017, *Robert Ngande Kathani Versus Francis Kivuv Kitonde*.
 - ii. Court of Appeal at Kisumu Civil Appeal No 278 of 2010, *Richard Okuku Oloo Vs South Nyanza Sugar Co. Ltd* [2013] eKLR.
 - iii. Court of Appeal in *South Engineering Company Ltd Vs Musingi Mutia* (1985) KLR730.



- iv. Nairobi High Court Civil Case No 1805 of 1984, *Grinyamwaya v Nairobi City Commission*

Analysis And Determination.

Twists And Turns

76. The history of this case is long, characterized by twists and turns, applications upon applications, back and forth tendencies by legal counsels, complaints here and there including to the JSC. But a sigh of relief; the matter was heard to logical conclusion.

Issues For Determination

77. Arising from the pleadings, evidence and submissions of parties are the following issues for determination:
- i. Liability; and
 - ii. Quantum of Damages

Liability

78. Liability is assessed upon the evidence and facts of the case. The burden of proof thereof falls on the Plaintiff as the person alleging negligence or breach of statutory duty on the part of the defendants (Section 107 and 108 of the *Evidence Act*). And, proof is on a balance of probabilities.

What does Evidence show?

79. According to the plaintiff, on 25/8/2011 he was traveling to Londiani for training as ranger. They left in two vehicles. He was in KBG 281C belonging to the County Government. They reached Bomet at 3.00 P.M. It was raining. The driver lost control and the vehicle veered off the road and overturned. The vehicle was being driven fast.
80. The defendants did not offer any evidence to rebut the negligence attributed to the driver. DW2 did not provide any useful rebuttal evidence. The accident was self-involving and given the wet conditions on the road and the fact that it was raining, DW2 ought to have been careful to drive slowly. I therefore find that DW2 drove the vehicle at a fast speed without due regard to the wet conditions of the road as well as the fact that it was raining. He caused the accident; he was negligent.
81. The bigger question is whether the plaintiff was in the vehicle and injured in the said accident?
82. The parties herein and their witnesses have given quite varied accounts as to whether the plaintiff was a passenger in the insured motor vehicle and was involved in the accident herein.
83. The effective judicial method in resolving such tension between the account rendered by the plaintiff and the defendants on liability, is by considering both streams of evidence; weigh each one of them, and check all relevant nuances which provides the appropriate probative value in support of the account that is dependable and believable, thereby arriving at a valid and just result (Dissenting opinion of Ojwang SCJ in the Supreme Court of Kenya, Election Petition No 1 of 2017, *Raila Odinga & Another vs. IEBC & 2 others* [2017] eKLR).
84. The plaintiff's account is that; he was injured while traveling in the 1st defendant's vehicle for a training as a ranger at Londiani. The vehicle was driven by the 2nd defendant. They were 8 of them in the vehicle. He also testified that, on 17/2/16, the defendant promoted him to CPL ranger. He produced the work



injury benefits forms dated the 28th and May 29, 2015 marked as P Exh 1. The defendant referred him as CPL vide the letter (P Exh. 2). He got a police abstract from Bomet police station dated 29/8/2012(P exh 3).

85. On 17/7/2014, the County Government referred him to the Ministry of Health for tax exemption because of his disability. He produced the form as P Exh. 4.
86. He produced his pay slips for the month of May 2013 under the county council (P Exh 12). He reiterated that he is an employee of the county. He stated that there was no report of an accident at the Bomet police station. He made the first report.
87. The defendant's account is that the plaintiff was not employed by the 1st defendant at the time of the accident and also aboard the ill-fated vehicle.
88. The 1st defendant vehemently denied the plaintiff was not their employee at the material time. And as custodian of employment records, I find it curious that the 1st defendant did not produce any documents say the master payroll to rebut the plaintiff averments that he was an employee of the 1st defendant. The plaintiff has produced documents and has tendered evidence which proves that he was an employee of the 1st defendant at the material time. I so find and hold.
89. Despite the discrepancies in the police abstracts, it was not disputed that the vehicle, KBG 281C belonging to the 1st defendant was involved in an accident on 25/8/2011. It is not also disputed that the 2nd defendant was the driver of the ill-fated vehicle. Surprisingly, although the driver and other witnesses for the defendants who claims to have been in the vehicle at the material time, none was able to identify all the 8 passengers in the vehicle. They simply denied that the plaintiff was not one of them. That kind of denial is mere denial devoid of any substance or useful detail. The evidence by the plaintiff show that he was an employee of the 1st defendant and was amongst the persons who were travelling in the vehicle concerned for a ranger training at Londiani. He was even promoted to CPL, ranger by the 1st defendant. It is clear he was a ranger with the 1st defendant. Merely denying that he was not one of the trainees aboard the vehicle on the material time without providing list of or names of the trainees aboard the vehicle on the material time is lame.
90. As the vehicle herein belonged to the employer and the plaintiff and others were being ferried as employees, the defendants had a duty to ensure that any person on board the ill-fated vehicle arrived safely at their destination. They owed the plaintiff jointly and severally a duty of care. and, the negligence of the 2nd defendant vicariously made the 1st defendant liable for the accident herein.
91. Accordingly, I find that the plaintiff injured in the road traffic accident of 25/8/2011 involving the vehicle belonging to the 1st defendant which was negligently driven by the 2nd defendant at the material time.
92. There being no other evidence that could lead to any other probability, the Court, on a balance of probabilities test, believe the account as narrated by the plaintiff and his witnesses of the manner the accident occurred and more probable than not the accident so happened. See Civil Appeal No 7 of 2019 Isaac K. Chemjor & Another vs Laban Kiptoo (2019) eKLR. Accordingly, I find that, the accident herein was self-involving. I find the defendants jointly and severally 100% liable.

Quantum

93. Compensation for injuries suffered by the claimant is assessed on the basis of the nature and extent of injuries and comparable awards made in the past (*Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR).



The plaintiff herein sustained the following injuries-

- i. Severe cervical spine injuries causing weakness of his limbs.
- ii. Fracture of C5 with cord compression causing quadriplegia.
- iii. Deep and severe cuts on the right temporal scalp.
- iv. Paresthesia of the left lower limb with associated heat intolerance.
- v. Lately has developed occasional urine retention with associated constipation plus erectile dysfunction.

General Damages

94. The award of general damages is always at the discretion of the trial court, except, however, the discretion is exercised in accordance with the law.

95. The plaintiff sought for general damages as follows;

- i. Future medical care 40,000 x 12 x 20- Kshs 9,600,000/=
- ii. Loss of ability to fully participate and sire more children. Trauma suffered by children. Pain and suffering in upbringing of the children.....Kshs 20,000,000/=
- iii. Trauma and loss of self-esteem.....Kshs 25,000,000/=
- iv. Pain and suffering to wife.....Kshs 5,000,000/=
- v. Physiotherapy 25,000 x 12x 10.....Kshs 6,000,000/=
- vi. Nursing care 400 x 365x 10.....Kshs 1,460,000/=
- vii. 20% permanent injury to spine and including permanent scar and Debilitating of left arm, risk of losing his marriage partner and not being able to procure another marriage 50,000 x 12x20.....Kshs 12,000,000/=
- viii. Exemplary damages because of lack of luster conduct of the defendants in their duty of care. Claim also under owner of occupier liability

96. The Plaintiff asked the court to award him Kshs 12,000,000/= for Pain and Suffering and Loss of Amenities.

Comparable Decisions.

97. In *Samuel Ochieng Muga v Transmara Sugar Company* [2018] eKLR

Muga suffered;

- “(a) Severe damage of the Spinal vertebrae and cord which involve; -
- i. Damage to the nervous system;
 - ii. Damage of the lumbar sacral spine;
 - iii. Paralysis of both lower limbs;



- iv. Sprain of the cervical spine of neck;
 - v. Fracture of the pelvic frame
- (b) Complete dislocation and displacement of the hip joint at the acetabulum.
 - (c) Dislocation of the left shoulder joint.
 - (d) Serious abdominal injury, which involve: -
 - i. Damage of the urinary system including the bladder, urethra and kidney.
 - ii. Damage to the digestive system, which causes faecal incontinence.
 - (e) Chest injury with damage of the left rib cage;
 - (f) Dislocation of the left knee joint.”
98. Muga ended up being paralyzed below the waist, and he lost all motor power and sensory perception in his legs.
99. After undergoing a major operation, Muga regained some muscle power and sensation in the legs, so that he was then able to walk using crutches with support.
100. Those injuries and the impact on Muga are comparable to the injuries sustained by the Plaintiff.
101. The plaintiff was awarded Kshs 12,000,000 in respect of general damages for the injuries sustained.
102. Similarly, in this case I find an award of Kshs 12,000,000/= to be reasonable compensation for pain and suffering. I so award the plaintiff.

Loss of Consortium

103. The claim is based upon the contention that the plaintiff had suffered erectile dysfunction. PW3 stated that erectile dysfunction has consequences on the victim both physically and emotionally. Spouses of such people do leave.
104. The Condition is permanent and not reversible and cannot be fully compensated.
105. The plaintiff sought the following damages under this head.
- i. Loss of ability to fully participate and sire more children. Trauma suffered by children. Pain and suffering in up bring of the children.....Kshs 20,000,000/=.
 - ii. Trauma and loss of self-esteem.....Kshs 25,000,000/=
 - iii. Pain and suffering to wife.....Kshs 5,000,000/=
 - iv. 20% permanent injury to spine and including permanent scar and Debilitating of left arm, risk of losing his marriage partner and not being able to procure another marriage 50,000 x 12x20.....Kshs 12,000,000/=
- Total Kshs 62,000,000/=



106. In the case Maurice Ajuoga Olang vs, Jv Strabag – Bau-Ag –Lima Limited; Civil Case 2299 of 1994 (Etyang J) The Court considered the Plaintiff in similar circumstances; the plaintiff was injured from an accident in a construction site and among other injuries; ‘He complained of difficulty in passing urine, impotence. Back pain and a scar on the nose.’ The Court relied on the case of Zablon Mariga vs. Morris Wambua Musila 1982-1988 1KAR 507, 522 (Nyarangi J.A) who observed the impact of impotence on the Plaintiff’s life as follows;

“The learned Judge did not accord sufficient weight to sexual impotency. It was necessary to relate the defect of impotency to the age of the Respondent and to that of his young wife. That was a consequence of the injuries which merited serious separate treatment and not merely a passing remark. The impotency is a loss of amenity which affects the Respondent’s wife (a third party) in a manner which will have an adverse effect on the husband as much as it will affect his relationship with his wife and have a potentially detrimental effect on the care she can give him.”

107. The court adopts the view expressed in the two (2) judgments on the impact of erectile dysfunction the Plaintiff no 2 suffers as a result of the accident; on him and his family. In 2013, the plaintiff was aged thirty-nine (39) and was married. The impotence has adverse effect on his life that is irreversible. There has been and will continue to be incurrence of medical attention and expenses. The level of productivity will be affected. The court finds that due to all these circumstances the reasonable sum for the Plaintiff is Kshs1, 500,000/= as general damages under this head

Physiotherapy

108. In his testimony PW1 testified that the therapy is expensive, almost Kshs 17,000/- per session.
109. In his plaint, the plaintiff prayed for Physiotherapy at 25,000 x 12x 10..... Kshs 6,000,000/=
110. However, the Plaintiff has not adduced evidence to support his claim for physiotherapy three times every week.
111. He has also not demonstrated how he arrived at the cost of Kshs 17,000/= or 25,000/=.
112. However, I find the Plaintiff is entitled to a reasonable award in that respect.
113. In the circumstances, I will allow physiotherapy, at the rate of Kshs 17,000/= per session.
114. Accordingly I award Physiotherapy at 17,000 x 12x 10.....Kshs 2,040,000/=

Nursing Care

115. Nursing care claimed is 400 x 365x 10.....Kshs 1,460,000/=
116. Whilst it may appear logical that the Plaintiff could benefit from nursing aid, I find no professional underwriting or pronouncement that he requires nursing care.
117. I also find that the Plaintiff has not proved the rate at which a person would be paid, for providing him with nursing care.
118. Once again, it is more than twelve years since the accident happened. If the Plaintiff required nursing care, it should have been manifest by now, and he would have provided the court with actual figures, rather than inviting the court to award an amount of Kshs 400/= daily without providing any basis.
119. I disallow the claim for compensation under the head “Nursing care/Help”.



Special Damages

120. Special damages should be specifically pleaded and proved.

121. In the Pleint, there is a claim for Kshs 758,707/=which is made up as follows:

- i. Medical report.....Kshs 10,000/=
 - ii. Doctor's attendance of court in Kericho from Narok.....
Kshs20,000/=
 - iii. Police abstract.....Kshs200/=
 - iv. Medical expenses incurred to date with receipts available less amount paid back
to plaintiff (Kshs 515,000/=).....Kshs 278,507/=
 - v. Physiotherapy already attended 10x25,000/=.....Kshs 250,000/=
 - vi. Cost of copper plates inserted upon the plaintiff's spine for support.....
Kshs 200,000/=
- TotalKshs 758,707/=

122. Special damages pleaded and proved is Ksh. 758,707/=

123. In the result, the compensation awarded to the Plaintiff is as follows;

- a. Special Damages Kshs 758,707/=
- b. Pain & Suffering..... Kshs 12,000,000/=
- c. Loss of Consortium Kshs1, 500,000/=
- d. Nursing care Nil
- e. Future medical care 40,000 x 12 x20..Kshs9,600,000/=
- f. Physiotherapy17,000 x 12x 10
Kshs.....2,040,000/=

Total Kshs 25,898,707/=

124. The said sum will attract Interest at Court rates from the date of judgment, until payment in full.

125. The plaintiff will also have costs of the suit.

126. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
16TH DAY OF MARCH, 2023.**

F. GIKONYO M.

JUDGE

