REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NO.83 OF 1998

JOHN MWANGI KINYANJUI (DECEASED)

SUBSTITUTED WITH JANE MWIHAKI NJUGUNA.....PLAINTIFF

-VERSUS-

CARTUBOX INDUSTRIES (EA) LTD.....DEFENDANT

JUDGMENT

1. The plaintiff was seriously injured in an accident involving Motor Vehicle Registration number KAA 496H Ford tractor, the property of the defendant on the 15th June 1996 wherein he was a passenger and an employee of the defendant. He blamed the driver of the vehicle for negligence and sought for compensation.

2. The initial plaint is dated the 4th March 1998 which was amended on the 11th March 1998 and further Amended on the 8th March 2001.

The particulars of negligence, injuries and special damages are stated as well as the damages sought in various sub-heads being general damages for pain and suffering, loss of amenities future medical expenses, nursing care and loss of income.

Special damages are stated as Kshs.451,110/=.

3. In its statement of defence dated 21st May 2001 and filed on the 24th May 2001, the defendant denied the occurrence of the accident, ownership of the accident vehicle as well as the injuries sustained by the plaintiff and therefore culpability in negligence.

In particular the defendant stated, in the alternative to the denials that if the accident did occur then the driver was not authorized to carry or ferry passengers in the said vehicle and attributed contributory negligence to the plaintiff, and further that the claim as stated in the Amended plaint dated the 8th May 2001 is statute barred, misconceived, bad in law and discloses no cause of action against the defendant.

4. The case was heard by the Hon. Justice S. Ondeyo (as she then was) and closed on the 16th December 2002.

The plaintiff died on the 11th March 2003 before judgment could be delivered.

5. On the 1st November 2005, Musinga J (as he then was) allowed substitution of the deceased plaintiff with **Jane Mwihaki Njuguna** a co-holder of a Grant of letters of Administration *Ad Litem* in Nairobi P&A 2391 of 2003.

In that respect, the current plaintiff is the said **Jane Mwihaki Njuguna** as the personal representative of the Estate of John Mwangi Kinyanjui.

6. The advocates representing the plaintiff are **Ndumu Kimani & Co while M/S Mirugi Kariuki & Co. Advocates**, by an Order of the court dated the 19th November 2019 upon application came on record for the Defendant in place of **M/S Kiburi Kamonjo & Co Advocates.** They both have filed submissions to urge their respective rival positions.

7. This court (Mulwa J) did not hear or take any proceedings in the case. It will therefore rely entirely on the evidence on record, the pleadings and submissions to write the judgment.

The plaintiff's submissions are dated 25th May 2016 and filed on the 26th May 2016 while the defendants are dated 9th March 2019, and filed on the 11th March 2019.

8. **Plaintiffs Evidence**

PW2 was the plaintiff **John Mwangi Kinyanjui**. His evidence was that at all material times, he was an employee of the defendant, that on the 15th June 1996 the defendant, by it tractor registration number KAA 497H (the accident tractor) together with other seven employees were being transported aboard the said tractor to the forest to load logs and timber onto the tractor and that while going back from the forest, aboard the same at about 2.00p.m., it hit a pothole on the rough road throwing him up and down causing him to land on the road from which he was seriously injured.

9. It was his testimony that prior and at the material times, the tractor was used by the employer for ferrying the employees to and from the forest to carry logs and timber. It was his testimony that it had no place for passengers to sit, was open and had no railings for the employees to hold onto. He produced photographs of the tractor by order of the trial court as **PExt 5**, upon which the court observed that the plaintiff was sitting on the same position as the other men in the photograph, at the base of the tractor.

10. He testified that he was hospitalised for ten months and twenty days at the Nakuru Provincial Hospital but had not recovered, was unable to walk, was paralysed including urine and stool incontinence and pains that he was under medication that go with such injuries, including employing a nurse to take care of and assist him in feeding, clothing, bathing, due to the paralysis that confined him to a wheel chair.

11. A medical report was produced by **PW7 Dr. Angelo D'cunha** who stated the injuries and post injury incapacitation at 100% and future medical concerns.

12. As a result of the injuries, the plaintiff testified that he has suffered loss and damages and thus the prayers sought in the plaint. It is important to state here that the trial court observed and noted that the **plaintiff was completely disabled, that his hands were folded in fists and they could not flex, and was on wheel chair**.

13. Upon cross examination, the plaintiff testified that the tractor was the mode of transport to and from the forest for the 1½ years he worked for the company, a distance of eight Kilometers from the company offices. He further testified that the **supervisor one Paul Chege** too used the same tractor and on the material day he was in the same tractor with him and six other employees going back to the offices.

14. **PW4 Duncan Gichugu** confirmed having been the driver of the accident tractor on the 15th June 1996. He testified that he used to ferry the employees to and from the forest aboard the tractor including the plaintiff, and that they used to sit at the base of the open trailer. He stated that the plaintiff fell off from the tractor on the material date, and that the road was rough and had potholes. He testified that he had not been told by the employer or the supervisor not to carry the employees on the tractor-trailer to and from the forest.

15. He however denied having been negligent in the manner of driving the tractor as he was familiar with the road having used it since 1977.

He confirmed that the plaintiff and other employees were sitting on the steel bars of the tractor, and that there was no place or rails to hold onto.

16. In his further evidence, the driver stated that his employer had instructed him to carry the employees on the tractor even when it had no protective bars on the sides, and further that he could not fail to do so as he would have been dismissed. He agreed having received a letter dated 5th January 1995 requiring him not to carry passengers in the tractor, but that the notice referred to non-employees of the company.

17. He testified that on the material date. The manager of the company one Michael instructed him to ferry the plaintiff and seven other employees to and from the forest, and that the supervisor one **Chege** (DW1) too was in the tractor, and seated with the employees when the accident occurred.

PW5 a brother to the plaintiff testified to the expenses incurred from the time the plaintiff was discharged from hospital to the date of hearing of the suit.

I shall come back to this item later in this judgment.

18. The investigating officer one **PC Richard Maina[LO1]** testified as **PW6**. He visited the scene of the accident led by Michael Njoroge, the manager. He issued the police abstract that he produced as PExt 6, but stated that the police file in respect of the accident went missing and could not be produced to the court.

19. **Defence Evidence**

DW1 was **Paul Chege** then working for the defendant as a supervisor in the logging department. He knew the plaintiff as a loader and confirmed having been ferried back from the forest with the accident tractor. He denied authorising the driver (PW4) to ferry employees.

He confirmed that the accident tractor/trailer was not safe for carrying passengers but nevertheless he also used the tractor himself to his work place.

20. Michael Wanjai Njoroge DW2was the manager at the Defendant Company. He confirmed that the plaintiff was an employee of the company as well as the driver, **PW4**.

He denied authorising the driver to carry/ferry the employees or the supervisor on the tractor/trailer. He confirmed having issued the letter dated 5th January 1995 forbidding the drivers from carrying passengers on the tractors.

21. **DW3** a farm hand at the defendant's company testified to have used the accident tractor in the morning of the accident with with the plaintiff and at time of accident, and were all sitting on the bars of the tractor.

He confirmed that the plaintiff fell off from the tractor. He denied seeing his supervisor Paul Chege (DW1) in any of the tractors further stated that the employer told employees not to use the tractors but nevertheless continued using them, as the supervisor never stopped them from using them.

22. **Issues for Determination**

(1) Whether the driver of motor vehicle tractor No. KAA 496 H was authorized to ferry the plaintiff in the tractor at the material date, the 15th June 1996.

(2) Whether the said driver was negligent in the manner of driving of the tractor, and if so, whether the Defendant is vicariously liable for the sequel damages arising from the injuries plaintiff sustained, and whether the plaintiff contributed to the occurrence of the accident by his negligence.

(3) If the answer to (1) and (2) above are in the affirmative, what is the quantum of damages awardable to the plaintiff in view of the injuries.

(4) Costs.

23. **Facts not in dispute**

(1) That the plaintiff and the driver of the motor tractor were employees of the defendant at the material times, and that the driver was the authorised driver of the said motor tractor.

(2) Occurence of the accident and injuries to the plaintiff and his subsequent hospitalisation at Nakuru Provincial hospital.

(3) Plaintiff died before conclusion of the case and was substituted by a court order on the 26th January 2012.

24. **Issue No. 1**

There is no dispute that the driver of the motor tractor PW4 was the duly authorised driver, and used to ferry employees of the defendant including the plaintiff and the supervisor since his employment 1½ years prior to the accident and therefore his testimony that was the normal mode of transport for employees of the defendant company.

25. I discount the evidence of **DW1** and **DW3** that the driver was not authorized to ferry the workers in the tractors, and even if a letter barring the drivers from carrying passengers, in 1995 such letter was only served upon the drivers and not to the workers/employees and therefore without their knowledge, a fact confirmed by the **supervisor (DW1)** they cannot be held liable for that which was not within their knowledge. The letter 1995 - **DExt 1**- spoke of "unauthorised transportation of passengers on company tractors/Trailers."

26. The above as testified to by the driver (PW4) did not include employees of the company, as no alternative means of transport was provided for the employees from the company premises, eight kilometers to the forest and back. This position was buttressed by the fact that the supervisor too used the same tractors to go to the forest and indeed was in the tractor with the plaintiff when the accident occurred as testified to by the plaintiff's former employees.

27. **DW1** evidence that he was in a different tractor whose registration number was not disclosed, and evidence of the other employees DW3 – who were ferried in the accident tractor cannot be truthful but meant to mislead the court, and even then it did not disapprove the fact that the employees were being ferried in the tractor.

28. The Evidence of **DW2**, the Manager of the Defendants company bears no evidential value. It is against all rational, legal, and common practice and sense that he could expect the employees to walk for 16 kilometers a day to their work place- the forest – without providing them with a safe and conducive transport. No wonder his supervisor and the company drivers ignored the letter, which in any event was not specific as to who it referred to as "unauthorised passengers."

29. The conduct and actions of the employees including their evidence evidence **support the contention that they were authorised** to use the company tractors as their only means of transport, which for all intent and purposes was their authorised mode of transport as affirmed by their supervisor (**DW1**), and **PW4**.

30. The manager (DW2) acquiesced to the above and cannot now come complaining that they had no authority only because an accident occurred.

The above is supported in the case **Antony Francis Warehani t/a AF Warehouse and 2 Others –vs- Kenya Post Office Savings Bank (2004) e KLR** when it was stated that

"The burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue….."

31. Without an iota of doubt, the evidence on record by both the plaintiffs and the defendant witnesses speak of implied authority for use of the tractors of the company by the employees of the company including the plaintiff.

32. In the Supreme Court of Uganda in the case **No 4/2001 LLR NO 162(SCU**) the **Court rendered**

> ***" …. In order for the appellant to fix liability on the respondent for negligence of Kawuwa it was necessary to show that the driver was using the vehicle at the owners request, either express or implied or on his instructions and was doing in the performance of the task or duty thereby delegated to him by the owner."***

33. Further it is now trite that unauthorised actions of a driver while in the cause of his authorised duty binds the owner of a vehicle, - See **Ndoo t/a Ngomeni Bus Service –vs- Kakuzi Ltd (1984) e KLR, Charlesworth & Perey** on negligence at 2-226 Page 163 which talk of on employee's disobedience of the employer's orders; and **Muwonge –vs- A.G. of Uganda (1967) EA 187 and cited in Kiambu C.A No. 110 of 2016** when **Newbold P** rendered that:

> ***"… The law is so long as the driver's act is committed by him in the cause of his duty, even if he is acting deliberately, wantonly, negligently, or criminally or even if he is acting for his own benefit or even if he act is committed contrary to his general instructions, the master is liable."***

34. Considering the above learned decisions, and the unequivocal evidence that the employees were by implication and by long practice, authorised to use the tractors for their transport, and the driver having agreed, as part of his duty, and in the course of his employment ferried the employees and the plaintiff, the defendant cannot escape liability for the driver's negligent actions whether authorised or not, having been committed in the course of his duty as assigned by the employer, facts that are not controverted.

35. That settles the issue with a finding that the plaintiff, as an employee of the defendant was an authorised passenger in the defendants motor tractor/trailer when the accident happened.

36. **The next** item is whether the **defendant's** driver was negligent whether the plaintiff contributed to the occurrence of the accident.

37. Contradictory evidence was tendered that the plaintiff was sitting at the base of the tractor, on iron bars with other employees while the defendant gave contrary evidence that he was standing.

The trial Judge upon examination of the photographs tendered as PExt 5 – was satisfied that the plaintiff was sitting together with the other employees.

38. This evidence was corroborated by **PW4** – the driver, and defence witness – **DW3**, and **DW1** who had seen the plaintiff sitting with other employees in the tractor. The only conclusion is that the plaintiff was indeed sitting on the bars of the tractor at the base, there having no place for the employees to sit, another fact confirmed by **PW3** the manager, that he was not standing on the tractor when the accident happened.

39. It is pleaded that the driver drove too fast in the circumstances without due care and attention, and failing to take adequate safety measure of his passengers.

It was the plaintiff's evidence that the driver hit a pothole on the rough road causing him to be pushed up and down and thrown out of the tractor to the road.

The evidence is consistent with that of the witnesses both for the plaintiff and defendant that the road was potholed and that the tractor/trailer had no support rails upon which the passengers could hold onto.

40. This is evidence of negligence by the employer, by its failure to take all means possible to ensure the safety of its employees – The court **Visram J (as he then was) in StatPack Industries –vs- James Mbithi Munyao (2005) e KLR** re-emphasised the employers duty to ensure its employees safety, in reasonably foreseeable or anticipate circumstances which would endanger safety of the employees, and provision of safe transport to the employees.

41. The employer in my view failed in this respect miserably and must take the blame for exposing the plaintiff to foreseeable danger.

The plaintiff was a passenger. He had no control of the manner the tractor was being driven. The road has potholes. The driver failed to drive the tractor in moderate speed, in the circumstances, knowing well the condition of the road, and being aware that the employees and plaintiff, sitting at the open tractor, and not holding onto any rail for protection should it jack, would throw them out and would cause injuries failed to do so.

42. The plaintiff in the circumstances cannot be held to have contributed to the occurrence of the accident. No evidence was tendered in what manner he is alleged to have done so.

I absorb the plaintiff from liability **Phillip Njoroge Ngugi –vs- Charles John Museee (2017) e KLR, (Nairobi), Brian Wahihenya –vs- Jubilee Hauliers Ltd & 2 Others (2017) e KLR (Nakuru)**, among others.

43. By the above, I find the defendant vicariously liable for the negligent acts of its authorised driver and by its negligence in the manner stated above.

44. I agree with the court holding in **Kiema Muthungu –vs- Kenya Cargo Handling Services Ltd (1991) EA 2 that**

> ***"there can be no liability without fault and a plaintiff must prove some negligence on the part of the Defendant where the claim is based on negligence."***

Had the driver of the tractor being more careful knowing the state of the road, the accident would not have happened.

45. Consequently I find that the plaintiff has sufficiently proved his case against the defendant to the required standard, beyond reasonable doubt. The Defendant is found wholly liable for the consequential damages and loss occasioned to the plaintiff following the accident.

46. ***Quantum* of damages**

The plaintiff 32 years old claimed damages for

> ***(1) Pain and suffering, and loss of amenities***
>
> ***(2) Special damages***
>
> ***(3) Future medical expenses, nursing care and loss of income***.

The court is minded that the plaintiff died on the 11th March 2003, 6 years after the accident. These damages will therefore be limited to the period from date of accident to the date of death.

47. **The medical evidence is stated in the medical report dated 28th October 1997** by **Dr. Angelo D'cunha** and a supplementary report dated the **15th March 2001** by the same doctor.

The injuries are stated, as

- Compression fracture of the cervical VI Vertibral body with paraplegia
- Paralysis of both hands and fingers
- Incontinence of urine and faeces
- Confined to a wheel chair observations
- Paralysis of both lower limbs
- Tone of muscles flaccid with wasting due to the muscles.
- Deformities on both knees and ankles
- Normal power in the muscles of the shoulders, arms and forearms, can flex and extend both wrists and joints
- Both hands, the fingers ae flaccid and held in a completely fixed position with no Palmovements of the thumbs possible.
- Paralysis of both hands and both lower limbs
- Life expectancy been reduced by at least 40%
- Likely to develop marked osteoporosis of the ones in both lower limbs
- Award of 100% permanent disability.

48. On the review report on the 15th March 2001, the doctor observed further complications being

- Diagnosed with pulmonary tuberculosis
- Frequent urinary infection, causing pain over the bladder region
- Constant backs of cough and difficulty in breathing
- Pressure sores over both hips.

Without any gainsaying, the above are extremely serious injuries with **total paralysis** of the plaintiff's body with which he lived and managed upto his demise on the 11th March 2003.

49. **Damages for Pain and Suffering and Loss of amenities**

In his submissions the plaintiff proposed a sum of Kshs.5,000,000/= for pain and suffering and loss of amenities.

The defendant on its part proposed a sum of Kshs.2,000,000/=.

The plaintiff's life was severely shortened and indeed the succumbed on the 11th March 2003

I shall endeveaour to access damages under the various sub-heads being alive to the fact that

"money cannot review a physical frame, that has been shattered and all what court can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair…" stated in **Nairobi HCCC No.1015 of 2003 – A.A. M.V. Justus Gaisaro Ndarera & Another (2010) e KLR.**

50. The plaintiff cited one case in support of his proposal **Nairobi HCCC NO. 531 of 2004 Jackson Wahome Ngatia –vs- Agri Dutt (K) Ltd & Others** where the plaintiff a paraplegic was awarded Ksh.4,500,00/= all-inclusive for similar injuries.

The defendant cited one authority for its propositions – **Patrick Mwangi Irungu –vs- Charles Macharia Mwangi & Another (2008) e KLR.** The injuries sustained were paraplegia secondary to fractures on the vertebrate T-12 and LI, and needed all the conveniences and assistance to make his life bearable. Damages under the various sub-heads all taken together added upto Ksh.4,008,100/=.

51. In a more recent case **Nakuru HCCC No. 34 of 2014 (2017) e KLR Brian Michiri Waihenya –vs- Jubilee Hauliers Ltd & 2 Others** for very similar injuries on a young man of 19 years and a University student, and total paraplegic, the court awarded a sum of Kshs.8,000,000/= damages for pain and suffering.

In **Ngure Edward Karega –vs- Yusuf Dorab Bassur (2014) e KLR,** a sum of Kshs.6,000,000/= was awarded for 100% permanent incapacity, a complete paraplegic in 2004.

In **Regina Mwikali Wilson vs- Stephen M. Gichuhi & Another (2015) e KLR**, for a paraplegic the court awarded general damages of Kshs.2,500,000/= for pain and suffering (Mabeya J) yet again in **Caroline Endorelia Mugayilwa –vs- Lucas Mbae Muthara (2016) e KLR.**

52. Thus the general thread across the above decisions on paraplegic persons, and depending on the age and degree of permanent incapacitation, the sums of Kshs.2,500,000/- to Kshs.8,000,000/= have been awarded for pain and suffering. In the present case the plaintiff is paralysed on all his limbs and immobile with urine and stool incontinence. He was 32 years old at the date of the accident.

Doing the best I can do **I shall ward a sum of Kshs.4,000,000/= for pain and suffering and loss of amenities.**

53. **Loss of Earnings and Earning Capacity**

The plaintiff testified that his salary was Kshs.11,290/= per month. The defendant concedes to the salary component. At 32 years, he would have worked for another 28 years to get to 60 years the official Government retirement age of civil servants, and a longer period for private and self-employment persons. No evidence was tendered of ill health before the accident.

54. I am persuaded that a **multiplier** of 22 years would be reasonable, loss of income would work out to 1290 X 12 X 22 =340,560/= having taken into account servitudes of life.

55. **Future medical Care and medical equipment Nursing aid care and equipment**

- Both the plaintiff and the defendant agree that the plaintiff required urine bags and trappings for a cost of Kshs.49,305/= in a year. Thus for the six years the plaintiff lived after the accident, a sum of Kshs.49,305 X 6 = 295,830/=.

56. **PW4** the brother of the deceased testified that he used to spend Kshs.1,500/= to pay a nurse/maid for the plaintiff.

This continued for a period of 6 years. The defendant proposed Kshs.1,000/= per month. I am satisfied that a sum of Kshs.1,000/= is fair and reasonable. Thus or the period it would work out to 1,000 X 12 X 6 = 72,000/=.

57. The doctor did not state at what period or times the wheel chair needed a change.

Numerous decisions of the superior courts have held that such wheel chairs need a change, depending on the type, would need a change after every five (5) or so years. Taking into consideration that the deceased died 6 years after, I shall allow one change of the wheel chair at kshs.63,260/=.

58. **Transport to hospital**

PW5 the plaintiff's brother (PW4) stated as Kshs.2,800/= per visit. The plaintiff testified of the necessity to visit for regular clinics. In his condition he required private transport. As I have stated earlier that the expense for visits to the doctor was an expense to the defendant, being the cause of the accident. The defendant did not submit on this item.

59. I am persuaded to allow the same, but reduce the cost of visits to a more reasonable sum of Kshs.1,500/= per visit and limit the same to one visit per week. Thus for four weeks in a month would be **Kshs. 4 X 1000 X 12 X 6 = 288,000/=.**

60. The matter of the **wheel chair** changes is a matter of future medical equipment that is a necessary expense. The plaintiff lived for 6 years after the accident. He was discharged with a wheel chair. A first change would reasonably be expected at the 5^{th} year, at the cost of Kshs.63,260. Thus for the two I would award a sum of Kshs.126,520/= but one under special damage at Kshs.63,260/= and the other as a future medical expense at kshs.63,260/=.

61. **Special Damages**

A sum of Kshs.145,110/= is pleaded in the plaint. It is trite law that special damages must not only be pleaded but also strictly proved.

Christine Mwigina Akonya –vs- Samuel Kairu Chege (2017) e KLR and **Capital Fish Kenya Limited –vs- the Kenya Power & Lighting Co. Ltd (2016) e KLR.**

The plaintiff was wheeled to court in a wheel chair, a necessary equipment to ease his movement. **PW1** testified of the need to have it changed from time to time and produced receipt – PExt 7 – for the price of the wheel chair at Kshs.63,260/= that was purchased for the plaintiff upon discharge from hospital.

62. I find the receipts produced in support, being receipts for medical report fees Kshs.3,550/=, 1st wheel chair purchase price Kshs.63,260/= and others for Medical purchases for nursing items from the period of discharge from hospital to date of filing suit being nine months, being - Kshs.103,782/= as duly proved, as special damages.

63. **Special Damages**

In summary, the final awards in general and special damages are as follows:

a) Damages for pain and suffering – Kshs.4,000,000/=

b) Loss of earnings and earning capacity - Kshs. 340,560/=

Future Medical expenses

(c) Nursing equipment -

(Urine bags and trappings –

(after filing of suit) - Kshs.295,930/=

(d) Nurse/aid expenses - Kshs. 72,000/=

(e) Transport to and from Hospital after discharge to time of death - Kshs.288,000/=

(f) Special Damages

- Initial wheel chair - Kshs. 63,260/=
- Urine bags and trappings
- From date of discharge To date of filing suit - Kshs. 36,972/=
- Other medical

Expenses - Kshs. 3,550/=

Grand total - **Kshs. 5,100,172/=**

64. Accordingly judgment is entered for the plaintiff against the defendant on 100% liability, and an award of

- damages of Kshs.5,100,172/= all inclusive.
- The sum of Kshs.**103,782/=** being **special damages** shall accrue interest at court rates from the date of filing suit until payment in full.
- The award on general damages stated in the various sub-heads, amounting to Kshs.4,996,390/= shall earn interest at court rates from the date of this judgment.
- Costs of the suit shall be borne by the defendant.

Dated, delivered and signed at Nakuru this 4th Day of July 2019.

……

J.N.MULWA

JUDGE

[LO1]