REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 450 OF 2011

BEATRICE ANYANGO OKOTH.....PLAINTIFF

VERSUS

1. RIFT VALLEY RAILWAYS (KENYA) LIMITED

2. KENYA PORTS AUTHORITY.....DEFENDANTS

J U D G M E N T

Outline of the case

1. The undisputed facts are that on the 29/01/2011 the plaintiffs was lawfully present at the Port of Mombasa carrying out her duties as a port clerk and armed with a valid **port pass** when a train operated by the 1st defendant knocked her occasioning to her bodily injuries leading to a consequent computation of both lower limbs.

2. The suit was commenced by a plaint dated 8.8.2011 and subsequently amended on the 22.2.2013. The 1st defendant filed statement of defense dated 6.9.2011 while the 2nd defendant filed two different statements of defense dated 1.9.2011 and another of 5.9.2011.

Plaintiffs pleadings and claim

3. In the amended plaint dated 22/2/2013 and filed in court on 27/2/2013, the plaintiff blamed both defendants for negligence and breach of statutory duty to have led to her injuries and resultant damages. Particulars of such negligence and breach of statutory duty were set out at paragraphs 7 & 8 of the plaint. Against the 1st defendant, the particulars of negligence and breach of statutory duty were pleaded to include operating the wagon without due regard to operation proceedings; failing to hoot to warn other port users of its approach; driving the wagon in reverse without the help of a points-man; failing to avail personnel with appropriate signals and tools and generally failing to exercise effective and proper control and to keep due and proper lookout to avoid damage to other persons at the port. It was also pleaded that there was failure to break in time and at all or control the wagon to avoid the collision, failing to keep prayer yard markings to keep point users at a safe distance and failing to provide for the safety of other points users and members of the public to avoid injuries.

4. For the 2nd defendant the particulars alleged to attach liability were set out to include failure to keep and maintain visible yard markings and set distance for railway lines, including personnel to enforce safe work conditions for port users like the plaintiff and failing to keep and observe the statutory rail reserve distance of 30 meters to ensure safe working by port use away from the railway lines. It was additionally pleaded that being the occupier of the premises the 2nd defendant owed a duty to the plaintiff under section 3 occupies liability act.

5. The plaintiff then particular her injuries as traumatic disarticulation of the left lower limb at hip joint; traumatic amputation of the right lower limb above the knee joint, and friction burns on the left upper limb on the hand, forearm and upper arm based on such injuries she sought general damages for pains, suffering and loss of amenities future medical costs including orthopedic treatment, purchase of artificial limbs renewable every 2-3 years, costs of purchase of wheel chair, nursing and associated expenses, diminished earning and loss of earning capacity, lost earnings and special damages of Kshs.2,559,250/=.

6. On the measure of loss earnings diminished earning capacity and loss of earning capacity, it was contended that the plaintiff was prior to the accident, a widow, mother of one minor who was her responsibility and was gainfully employed at a monthly income of Kshs.100,000/=. Ultimately it was pleaded that the plaintiff would rely on the doctrine of *res ipsa loquitor*.

7. Towards the proof of her case the plaintiff filed a witness statement together with a list and copies of documents and at trial gave own evidence and called three other witnesses; two doctors and the care giver.

Pleadings and defense of the 1st defendant

8. For the 1st defendant, there was a defense which was later amended by the amended defense filed on 23/04/2013. In that defense all pleadings by the plaintiff including her position and engagement as a port clerk were denied; it was equally denied that the plaintiff was hit without notices together with the particulars of negligence and breach of statutory duty and therefore any injury damage and loss were all denied including the pleaded monthly income and strict proof was invited.

9. There was then advanced an alternative and without prejudice pleading that if any accident ever occurred, it was due to contributory negligence of the plaintiff and was wholly occasioned by the sole negligence and breach of statutory duly by the second defendant.

10. As against the plaintiff the particulars of contributory negligence were pleaded to the effect that she crossed the railway line and placed her foot thereon without regard to her own safety and that she crossed the railway line while reading a newspapers and while under the influence of intoxicating drugs and failing to give way despite warnings and alerts of the approaching wagon; failing to keep a proper look out and failing to observe the 30 meter railway reserved and voluntarily taking the risk of being hit by the wagon.

11. Against the second defendant it was pleaded and particulars given to the effect that it failed to ensure safety of the plaintiff by failure to keep visible yard makings with regard to railway lines and by positioning containers too close to the railway line thus breaching the 30 meter railway reserve among others alleged failures.

12. Additionally, it was pleaded that as a regular and experienced port user, the plaintiff was obligated to keep the 30 meters railway reserve and ought to have appreciated the operations at the port including the presence of moving railway wagons. The first defendant equally filed two witness statements and then issued a notice of indemnity against a co-defendant.

Pleadings and defense by the 2nd defendant

13. The second defendant's statement of defense is dated 1/9/2011 and in that defense the 2nd defendant admitted the description of the parties but denied all other facts including the fact that the plaintiff had a port pass, that she was hit and injured by a train and that she suffered any loss or damage and strict proof was invited. It was then averred that the 2nd defendant at all times kept a safe workplace system which addresses the safety of all employees and port users.

14. Without prejudice to the denials of any fault, it was pleaded that, if ever the plaintiff was injured, it was as a result of being hit by a wagon operated by the 1st defendant for which only the plaintiff and the 1st defendant and not the 2nd defendant were to blame.

15. As against the 1st defendant it was pleaded and particulars of negligence and breach of statutory duty of care given to include propelling the wagon without due regard to the surrounding, without appropriate number of points men and without keeping a proper lookout. It was also pleaded that there was failure to brake in time or otherwise control the wagon to avoid the accident and for failure to have regard for the safety of the plaintiff.

16. As against the plaintiff, it was pleaded and particulars of negligence given to include failure to adhere to safety systems in place; failing to heed warnings; failing to have proper lookout at an operation area; failing to have appropriate reflective gear and failing to keep a safe distance and being on the railway line without regard to own safety. A technical point was taken that the suit was bad for failure to observe the provisions of Section 62 of the Cap 391. The assertion that the plaintiff earning Kshs.100, 000.00 per month or that she maintained a care giver at Kshs.15, 000 per month and a notice was given that if any judgment be entered against the 2nd defendant, the said defendant would seek indemnity against the 1st defendant pursuant to the provisions of Cap 391 and an agreement between the parties executed in the year 2004. The second defendant also issued a notice against a co-defendant, the 1st defendant, seeking indemnity in full.

Evidence offered by the plaintiff

17. As said before the plaintiff's side called 3 other witnesses, besides the plaintiff herself, who gave evidence as PW 2, 3 & 4. On liability and causation of the accident, only the plaintiffs own evidence was availed. She gave evidence that on the material day, she was lawfully at the port to perform her duties as a dully recognized port clerk. For that reason she produced a port pass issued on 1/7/2009 to expire on 30/6/2011 as exhibit Page 6.

18. As a port shipping clerk, she said, her duties entailed establishing if containers belonging to her clients had been discharged from the vessels and to have it taken to the verification area.

19. On the material day the plaintiff said she was at area no. 5. She had documents against which she was to identify containers with numbers on the physical containers. At that area the containers were stacked 5 high and so close to the railway line. Being so high, she was compelled to move backwards to be able to see the container numbers and that it was in the course of such endevour that she was knocked by a reversing wagon. She blamed the 1st defendant's driver for having moved the wagon in a reverse direction without the aid of a points' man at a corner with vision hindered by the stacked containers. She blamed the 1st defendant for failure to keep their markings beyond which the 2nd defendant would not have stacked their containers. She denied having heard any hooting by the wagon prior to the accident.

20. Against the 2nd defendant, the plaintiff blamed them for staking their containers too close to the railway line without observing the 30 meter statutory reserve. She then enumerated her injuries the treatment she underwent and the experts she saw to prepare medical reports and opinion on her medical needs. She identified the reports and produced the receipts for the expenses met by her. The exhibits were marked as follows:-

- Bills of Kshs.1,569,582 Exhibit P1
- Discharge summary Exhibit P2
- Receipts for payment to Dr. Norani Exhibit P3
- Receipt for artificial limbs Exhibit P4
- Air tickets Exhibit P5
- Port Pass Exhibit P6
- Bank statements Exhibit P7
- Rent Receipts Exhibit P8
- School fees receipt for son Exhibit P9
- School fees receipt from other children Exhibit 10.

22. The rent and school fees receipts were produced to show that she had an income to be able to pay the same. Since the accident, she said, she lost income and having lost her limbs she said she was compelled to hire a caregiver at a monthly salary of Kshs.15,000/=. She then produced a demand letter to the 2nd defendant and a reply by the said defendants as exhibit P11.

23. Based on such evidence she prayed that the court grants to her prayers for general and special damages.

24. On cross examination the plaintiff said she was a clearing agent by experience and not by formal training and that she did not operate a company but operated under companies in which she was not a director.

25. On her monthly income she said the sum was arrived at by working on averages for the period of 38 months. On knowledge of port operations and the handbook thereof the witness denied being conversant with the same while maintaining that the authority did not train people on the use of the port and that the hands book could have been issued to port users recently. She however admitted that the port pass was issued pursuant to the handbook and regulations and obligated port users to take reasonable precaution and strictly adhere to safety signs and posters. On the material day she said she had a helmet, closed shoes and a reflector jacket and that at that particular area there were no posters. She reiterated that since the containers were stalk 5 high it was not possible to check the numbers while standing close by and that one had to move back to be able to read the numbers.

26. She approximated the distance between the containers and the railway line to be about 5 meters and that such had never happened during her 2-3 years of working there. She admitted having assumed some risk by being close to the railway line albeit not on the railway line itself. She said she could not hear the sound of the train engine because it was pushing the wagons in reverse hence the wagons were in front and the engine at the back and far-off. She said there were points' men within vicinity but at the time of the accident the train was not directed by any. On her artificial limb purchased at Kshs.930,000/= she said she was not using then on the date of court attendance because she had increased in size and therefore they were not fittings. She said that they required change every 2 -3 years according to the doctor who prescribed them.

27. When cross examined by Mr. Ouma Advocate from the second defendant the witnesses respected that she was not formally trained as a clearance agent but that she had a valid port pass.

That morning, she said, the weather was fine. She admitted having had three phones but denied the same detracted her concentration because she was not using them but they were in her pockets. On the train approaching, she said it did not hoot and it was reversing and therefore she could not hear the engine sound. She said the wagon and the train were all the time there stationary but she did not notice it begin to move.

28. On her income she said she had a pin number but was not making tax returns. On medical costs he denied having medical cover and that she had not been making monthly remittances to NHIF.

29. On re-examination, he said even though the 2nd defendant had introduced an electronic/online system of identifying containers, it was new and with teething problems hence it was a must she does it in person and physically. She reiterated not having been on phone at the time of the accident. She denied having been warned by anybody of the train approaching and repeated that had the point men been there, she could have been warned.

30. PW 2 DAVID F WANGILA, was the orthopedic technologies practicing in Nairobi and being such practitioner since 1992, he said his work entails assessing patients with physical impairment and to prescribe, fabricate and provide prosthesis appliances to them. He confirmed having assessed the plaintiff and came to the conclusion that she could be assisted with the use of left hip disarticulation prosthesis and right transmural prosthesis hence prescribed same for her. He saw the plaintiff after 5 years and observed that she had outlined the prosthesis earlier on fitted and was back on a wheel chair. In his opinion prosthesis should last up to 4 years with good maintenance by-annually. He recommended a new set of prosthesis adding that the use of prosthesis improves the health and life of a person so that one does not appear more disabled. For the improved set he gave a figure of Kshs.1, 000,000/= if procured locally and noted that if imported it would go up to 3 times that costs.

31. He added that such prosthesis would require replacement every 4 years. For the plaintiff who was then 37 years old, he gave her a life expectancy of 60 years and gave a sum of 5,000,000/= for 5 replacements. When one factors in maintenance costs of Kshs.50,000/= per year, the total costs for the 23 years would be Kshs.6,150,000/=. He said that cost was arrived at after inquiries from suppliers and prepared a report which was then produced as Exhibit P12. He said that he charged Kshs.10,000/= for which he issued a receipt produced as Exhibit 13. He gave further evidence that he saw the plaintiff in her house in Mombasa and spent the sum of Kshs.18,940/= for the journey for which he produced an air ticket as exhibit P14. For his attendance he spent Kshs.25,635/= and produced the ticket as exhibit P15. For attendance in court he charged Kshs.10, 000/= for which a copy of a cheque was produced and remarked Exhibit P16.

32. On cross examination, the witness said he was a member of National Orthopedic Technologists Of Kenya and that he qualified form KMTC having undergone a three year course. He said he was referred to the patient by Dr. Kerio who was then in Syria. When shown the report by Dr. Kerio, he said the doctor had formed the opinion that maintenance would costs Kshs.21,000/= per session and the costs of prosthesis would be Kshs.950,000/= for the set.

33. When cross examined by Mr. Wafula advocate from the second defendant, the witness said that in preparing his report he was not aware that Dr. Ndegwa had also prepared another medical report but said his opinion on prosthesis and orthosis would carry the day over Dr. Ndegwa's report because to cost same a medical practitioner would have to consult with him. He admitted that an institution like Kenyatta National Hospital would charge less because labour is free but even in that event it would still costs about 850,000/=.

34. In re-examination, he said he knew Dr. Kerio well and that he had not exaggerated the costs adding that the opinion given to court was professional one.

35. PW 3, was DR. RONALD KAALE, a consultant Orthopedic surgeon practicing in Mombasa who saw the plaintiff on 1/2/2011 with a history of having been injured on the 29/11/2011. He gave the details of treatment given at Aga Khan Mombasa where the patient was initially admitted and treated till the 28/2/2018 when she was discharged home or crutches. He formed the opinion that the plaintiff had lost the use of lower limbs at 100% and 80% respectively for the left and right limbs. He also formed the opinion that the plaintiff required physical and psychological rehabilitation that would force her to change occupation from that of a port clerk to a more sedentary occupation. He produced his report as exhibit P3 and a receipt as exhibit P16.

36. On cross examination by Mr. Oloo from the1st defendant, the witness said he did not treat the plaintiff but saw her at the instance of the 1st defendant for purposes of preparing the medical report which was based on physical examination and medical documents availed. On residual effect of the injuries on the plaintiff the witness said the scars would be permanent but the prosthesis would increase her mobility up to 50%.

37. When cross examined on behalf of the 2nd defendant, the witness denied having mentioned sexual and reproductive life because he formed the opinion that same would not be affected.

38. The 4th and last witness on behalf of the plaintiff was WILSON MWAURA, who said he worked for the plaintiff as a driver and caregiver at a monthly salary of Kshs.15, 000/=. He said his duties involved moving the plaintiff between the house, car and wheel chair. He said he was introduced to the plaintiff by Mr. Mbugua and that their employment contract was oral not written.

39. On cross examination by Mr. Oloo, the witness said he was initially a taxi driver but left to drive the plaintiff. He said he did not carry any document to prove employment and salary. On the evidence by the plaintiff that she had a caregiver called TOM NGUKU MUTAJI the witness said on that day he had gone to Nairobi and somebody step in for him.

40. When cross examined by Mr. Wafula, the witness reiterated to have had no document to show employment or payment of a salary and added that he lived in same neighbourhood with the plaintiff and that the plaintiff calls him as and when she needs him. With that the plaintiff's case was closed.

Evidence by the 1st defendant

41. After the plaintiff closed her case and when matter came for defense hearing, the first defendant did not readily avail its witnesses hence to save time the second defendant's evidence led by two witnesses came first as PW1 & PW2. For clarity, PW3 gave evidence for the 1st defendant while the witnesses for the 2nd defendant were PW1 & PW2.

42. The evidence of PW1 was essentially the facts stated in the witness statement dated on 27.6.2014 and filed in court on the same day. It was to the effect that he worked for the 1st defendant in 2011 and was still in its employ stationed at Kilindini at the date of giving evidence. He gave his employment number and showed to court his port pass and a pay slip to prove employment with the 1st defendant. On the material day, the witness said, he was a shunter driver collecting wagons and containers into the marshaling yard from the sidings. The weather was fine but there were several stacks of container, stacked in fours, and kept very close to the railway line on both sides.

43. The witness said that in his work he had to be assisted by point's men. On that day he said he had three of them and gave their names as Julius Ndungu, Kilonzo Kiema and Shaban Hamad . He added that his train was in good and perfect working condition him having tested the brakes, horn and lights. For shunting he said the maximum speed achievable by the train was 15kph and that at the time the accident occurred he was doing a mere 5kph. He said that at the time he was moving six wagons to Roro area and was only able to see only Shaban and Kiema but not Ndungu. It was at the point of entering the yard, and after both Shaban and Kiema had signaled him to move did he see Kiema signal him to stop and ran to him to move the train forward because somebody had been knocked by the train. He stopped and moved the train where it had come from and did not disembark from the train because there was a lot of commotion and some people threatened to beat him.

The witness blamed the plaintiff for not being observant to notice the approach of the train and for failing to observe the 30 meter railway reserve. To the witness had the plaintiff acted otherwise she would not have been injured.

44. In cross-examination by Mr. Thyaka for the plaintiff, the witness said that the duty of point's men is to assist him see areas hidden from him. The point's men were identified as Shaban and Kiema while Julius Ndungu was the supervisor whose duty was to give instructions. He was pushing six wagons each holding two 20 foot containers and was therefore unable to see ahead. His instructions were from the foreman through the point's men. At the point of the accident the rail had a bend. He admitted that he had nothing to show that the 1st defendant had placed markings as required by the law.

45. On cross-examination by the second defendant, the witness said he had been a train driver for a period spanning 13 year as at the date of the accident . For that length of time the conditions of the railway had not changed and that the communication with the point's men was always by show of hands and that had an alternative mode of communication ben employed, say radio call, it would have been more effective. He conceded that it was not safe to move the train when he did so and that he was misled by the point's men themselves employees of the 1st defendant. He was further unable to confirm that the point's men were where they ought to have been but said that it was imperative that the point's men be present before the locomotive is moved.

46. In re-examination the witness confirmed that in his entire experience, he had not been misled and this was the very first time while reiterating that when a train moves it makes noise and can be detected even when 10 meters away and that the horns when sounded can be heard at a far. When asked a question by the court the witness said the premises and even the rail belong to the 2nd defendant.

Evidence by the 2nddefendant

47. The second defendant called two witnesses; Benson Muyanga Mbiwa (PW1) the lead fire fighter and Rophus Mwambu Mwadembo (PW2), a senior safety office. Both did not witness the accident occur but went to the scene after the event and in execution of official duties as employees of the second defendant.

48. DW1 said he reached the scene and found the plaintiff lying next to the train and writhing in pain with the wagon appearing to have been moved backwards. The witness confirmed that the rail track is ran by the second defendant and used by the 1st defendant. The witness adopted his witness statement as evidence in chief the crux of which was that he was summoned on phone to proceed to RoRo yard where there had been an accident and when he reached the scene the plaintiff was lying next to the rail truck with amputated lower limbs but was fully oriented and was able to communicate by giving relative's telephone contacts. He evacuated the plaintiff to Aga Khan Hospital for treatment.

49. In cross-examination by Mr. Thiaka for the plaintiff, the witness told the court that the plaintiff had valid port passes and was delivered at the premises owned but the second defendant and by a train operated by the 1st defendant. When cross-examined by counsel for the 1st defendant on the handbook on port safety, the witness confirmed that according to article 7 of the handbook it was the duty of the 2nd defendant to maintain facilities including the rail track and to carry out investigation and advice on remedial steps to ensure safety at the port. He however could not confirm if that defendant ever carried any investigations on the accident. He also could not remember if there were any yard or rail markings at the site of the accident. In re-examination the witness asserted that there was nothing prohibiting the 2nd defendant from stacking containers besides the rail track, the containers did not block the way of the train and that the concrete blocks were to control vehicular traffic but not pedestrians.

50. DW2, the port safety office gave evidence based on his witness statement dated 7th June 2016 to the effect that the rail track at the site of the accident is concreted hence the train movement is smooth making very little noise and the 1st defendant were obligated to have point's men but did not deploy any to guide and warn the driver of any infringement on the track during shunting thereby forcing the locomotive driver to move blindly. He further blamed the 1st defendant's personnel of failing to have hand signal flags as is mandatory. He confirmed that there were container stacked both sides of the track with no access route in between and that the train did not hoot as it moved the wagons. He said that investigations blamed the accident on either lack of communication between the train driver and the point's men and alternatively on a contribution by the plaintiff in failing to heed possible danger from oncoming wagons.

51. In cross-examination by the counsel for the plaintiff, the witness said the plaintiff was lawfully at the place discharging her duties at the port and that train horns are very loud. When cross-examined by the 1st defendant's counsel the witness said he was part of the team which conducted investigations but did not have the resultant report. He also confirmed that was not present as the accident occurred and could not confirm the presence or absence of point's men. He asserted having interviewed the three named point's men of the 1st defendant and confirmed that they were indeed on duty but not at the rear of the train to guide the driver. He added that the place was an operation area and everybody being there was expected to exercise extra caution. On re-examination the witness told court that to his knowledge no area within the port has track line fenced off and that being an operation area involving loading and offloading it was impracticable to have boulders on both sides of the line. When put to a question by the court the witness said that that the expression the train was moving blindly meant it was not being directed at the rear. With the two witnesses that 2nd defendant's case was closed and the parties then sought to address the court by way of written submission to be highlighted orally.

Analysis of the fact and issues.

52. I have had the benefit of reading the pleadings filed, the record of proceedings and evidence taken before Kasango J and those before me together with the exhibits produced as well as the submissions offered by the parties. I have also had the benefit of having observed the witnesses who appeared before me and I have deduced that a number of foundational facts are not denied and the facts in issue are reconcilable from the evidence led.

53. The occurrence of the accident, the fact that the plaintiff was lawfully present at the port for gain, the ownership of the premises as well as the control of the train and the wagons involved and the injuries suffered by the plaintiff are all admitted by both sides. The disputed fact and therefore issues for determination would strictly revolve around and beg the following questions:-

i. Whose fault was it that caused the accident?

ii. Is the plaintiff is entitled to any damages?

iii. What is the measure of such damages?

iv. What orders should be made as to costs?

Causation of the accident.

54. The evidence led by the plaintiff herself and corroborated by the DW2 is that on the material day there were many containers staked by the rail track among which the plaintiff was obligated to physically identify container belonging to her client. It was also common ground by all the defense witnesses that owing to traffic at the port it was a mandatory safety and procedural dictate that the train be moved with the direction of point's men. The point of departure is however that while the plaintiff asserted the absence of the point's men, the 1st defendants witnesses were adamant that indeed there were three point's men assigned duty at the particular area.

55. In her evidence the plaintiff maintained that she did not hear the train hoot or any noise as it moved while approaching her. She said she was suddenly hit and fell by an extension on the wagon and crushed by the train wheels. This evidence goes hand in hand with that by the DW2 that within that yard the grounds are concreted and rail track laid on the concrete hence the train movement is smoother. Such evidence when added to that by DW3 that the train was doing averagely 5kph leads me to the conclusion that there might not have been pronounced noise or vibrations occasioned by the train movement as would be if the ground was of natural earth or paved on loose gravel or ballast. Having been to the port in person and with the evidence that the place was an operation area with vehicles and heavy machinery moving about while ships could also have been within vicinity some with engines running, it was not a serene environment and unruffled environment that would enable a person preoccupied with the task of reading number printed on containers to easily appreciate the movement of a train unless it was approaching from here view side. However the plaintiff was also not a newcomer to the port. She had worked there for some three or so years. She must have been conversant or just expected to be conversant with the fact that there were rail tracks used by trains. With such knowledge and even with the congestion with stacked containers she needed to have steered clear of the track. Had she done so she would not have been injured. I do find that the plaintiff had a share of the blame and contributed to the accident. Here contribution must be weighed against those by the defendants.

56. Throughout the proceeding and even in evidence, the train diver DW3 did not indicate to court what direction or signals he ever received from the point's men on duty until the accident had occur. I am prepared to accept the evidence by DW3, while on the witness box, that indeed there was at least one point's man Mr. Kilonzo Kiema who stopped him after the event. It must however be noted that in his written witness statement the witness never alluded to the presence of any point's man on that day. He merely said that some unidentified person stopped him with a word that he had knocked a pedestrian. Either way, whether there was a point's man who did not do his duty or whether there was never a point's man, there was an unreasonable conduct for which the 1st defendant is liable. If there was no point's man, the evidence is direct upon the 1st defendant for allowing its train to be moved blindly.

57. If However there was a point's man on duty then the question that proceeds from that reliance on the evidence by DW3 is whether the said Mr. kilonzo discharged the duty of a point's man as regards warning the train driver of the presence of the plaintiff at the point of being knocked and crushed. One may ask why the point's men said to have been on duty where never called to give evidence that they were indeed on duty. Without drawing any adverse inference as the law permits and thanks to the provisions of order 7 rule 5 Civil Procedure Rule, I have read the witness statements by kilonzo and Shaban, filed with the 1st defendants defense and it is clear that both were indeed on duty but did not witness the accident and were only alerted by other persons not on duty with them. that alone is enough to conclude that they failed on their duty to direct the driver. I do find that in failing to notice the presence of the plaintiff near the railway line and warning her or the driver of eminent collision was the negligence that led to the collision and therefore the plaintiff's injuries and damage. A reasonable person deployed and detailed to direct a driver of a train, pushing wagons extending some 240 feet long, in the circumstances revealed by evidence should have acted otherwise and better. His action led or just misled the driver to drive blindly and thereby occasioned the accident and injury. In his own words, DW3 regretted having been misled by the point's man. Him, Mr Kilonzo, and the driver having been in the employment of the 1st defendant executing their duties as such employees and within the scope of authority make their employer, 1st defendant, vicariously liable.

58. The evidence availed was to the effect that the track is operated by the 2nd defendant, who is the occupier of the premises where the injury occurred, but used by the 1st defendant. By virtue of section 3 of the occupiers liability act, an occupier is liable to every person who enters the premises, whether by invitation or otherwise, for injury suffered out of breach of common duty of care. The test of whether an occupier has met his duty or breached same is dependent on whether the visitor had been warned of the danger but the occupier is absolved from liability if the visitor willingly assumes the risk. In this matter all sides appreciated the fact that the track needed to be clear for all port users to obviate the danger of being knocked by moving trains. There was also evidence that on that day container were stack very high and close to the line thereby necessitating that those seeking to identify and verify container work close to the track. That was the evidence of PW1 and DW2. That evidence shows that the 2nd defendant did not meet his duty under sections 3 Occupiers Liability Act as well as section 18 of the Occupational Safety and Health Act.

59. In that regard the evidence of DW1 is of important note when he said there were neither markings nor warnings at the yard where the accident occurred. The sum total of the evidence is thus even the second defendant was in infringement of the duty owed to the plaintiff I do find that both defendants are liable to the plaintiff equally.

60. Having considered the entirety of the evidence I do find that each of the parties contributed to the accident. I find the plaintiff to have contributed by being too close to the rail track but that was necessitated by unsafe and risky environment created by the second defendant's breach of statutory duty and aggravated by the 1st defendant's employees' act of moving the locomotive blindly. I apportion to the plaintiff 20% of the liability and to the defendants 80% jointly and severally.

In coming to this conclusion, let it not be understood that I have failed to give regard to the 2nd defendant's submission on section 66 of the Kenya Railways Corporations Act. Far from it. I have given all the due regard thereto together with the decision cited to me. However, there was never any evidence that the plaintiff was on the rail track. The evidence was that she was nearby and was hit by an extension of the wagon. Secondly the decision of the court of appeal in **Standard Chartered Bank ltd vs intercom services ltd** does explains the application of the ***ex turpi causa non aritur actio*** as applicable in Kenya in the following words:-

> **"It is clear from that case that if illegality is on the face of the contract upon which a claim is based, then the Court will deal with that question of illegality irrespective of whether it is raised in the statement of defence or not but if illegality is to be discovered from some evidence that the defendant has knowledge of, then illegality should be pleaded so that the plaintiff is pre-warned on the issue and it is only then that the Court can act on it".**

61. In this matter the basis of the plaintiff claim was not that she was on the rail track and wanted to insist on same as founding her cause of action. Her claim was on alleged negligence and breach of common duty of care by the defendants. Additionally, the pleadings by the 2nd defendant (two defenses filed on 1st and 15th September 2011 by Muthoni Gateere and Munyao ,Muthama and Kashindi advoctes, respectively) never pleaded any illegality against the plaintiff. Parties also throughout the trial never made that an issue for court's determination only for the 2nd defendant to spring it up by submission. That cannot pass the test of a fair trial anticipated in civil proceeding. In the same decision cited by the second defendant to court, the court of appeal cited with approval the decision in ***Galaxy Paints Co Ltd vs Faccon Guards Ltd*** **[2000] 2 EA 385**, where that Court stated as follows:-

> **"It is trite law, and the provisions of order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the Court's determination."**

62**.** I would have ignored the submission for being at variance with the pleadings but for the sake of the law I have considered same and find that the same were improperly made and are of no assistance to the court.

General damages for pains suffering and loss of amenities.

63. The particulars extent and residual effects of the injuries on the plaintiff are not in dispute. It remains a settled principle of law that comparable injuries ought to attract comparable awards[1]. The 1st ad second defendants have proposed awards of Kshs 2,000,000 and 2,715,000 respectively while the plaintiff has proposed a sum of Kshs 8,000,000.

64. In making their proposal, the 1st defendant's counsel has relied on the decision in **James M Mugo Vs Francis K Muni (2007) eKLR** in which the court, in November 2007, awarded a sum of Kshs. 2,000,000 to the plaintiff who had suffered amputation of both legs. I do note that in that decision the degree of permanent disability was assessed at 70%, it was made in 2007, more than 11 years ago, and circumstances and value of money have not remained the same.

65. For the second defendant, the proposed sum was informed by the decision in ***Ntulele Estates Transporters Ltd Vs Patrick Omutanyi Mukolwe (2014)eKLR*** in which they submit the sum was awarded for comparable injuries. Even though no copy of that decision was given to court, I have had a chance to read the decision and I do not think it is of comparable injuries. In it the respondent in the appeal suffered an amputation of a single leg unlike our case here. Additionally the sum awarded for pain and suffering was Kshs 1,800,000, which the High court, on appeal, declined to interfere with.

66. For the plaintiff reliance was placed on the decision in **Peninah Mbonje Mwabili Vs KPLC (2016) eKLR** where a sum of Kshs 5,000,000 was awarded for amputation of both legs coupled with electrocution injury and electric burns. It is evident, as it often happens, that counsel at times, in offering submissions, forsake duty to court in favour of the interests of the client. That is a tendency to be discouraged. In this matter the decisions cited by the defendants are clearly not comparable to those in the present case. I do find the injuries suffered by the plaintiff as pleaded and proved to be very grave and debilitating with life- long physical disability and thus loss of amenities of life. I also take note that the plaintiff was in hospital admitted for a considerable period of time and that the plaintiff is unlikely to continue leading the life she led before the accident. With those factors in mind, while noting that money cannot restore a battered and shattered human body, the incidence of inflation all around us and being persuaded by the decision of Judge Kamau in Peninah Mbonje's case, above cited, I do award to the plaintiff a sum of Kshs 6,000,000 for pains suffering and loss of amenities.

Diminished earning capacity

67. Damages under this heading are awarded where is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered. It must be differentiated with loss of earning capacity which occurs where there chances of earning are literally erased.

68. The evidence led by the plaintiff was that as a port clerk her work entailed moving around. With the use of bank statements and payment made for rent and school fees, it was sufficiently proved that the plaintiff was gainfully employed. With the injury that kind of engagement as means to earn livelihood is curtailed. That however is not to say that she is totally unable to engage in any other gainful employment. This court takes notice that ours is an equal opportunity economy where no discrimination is expected on at any front and disability is thus not a disadvantage at seeking gainful engagement. However I do take note that the plaintiff made a voluntary and conscious choice to be a port clerk which she may be unable to engage in after the accident. I do find that the plaintiffs inflicted disability has the effect of reducing her earning capacity.

69. In **Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR** the court said of assessment of damages for diminished earning capacity:-

> **"To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the**

future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired".

70. According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period OF BANKING shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage[2]. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages[3]. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity [4] provided the judge takes into account relevant factors. In this matter, the fact that the plaintiff has been rendered legless for life, her age at the time of accident and therefore the period she has been consigned to live with reduced mobility, her qualification at the time and that she might not effectively fit back into the job of a port clerk, are relevant factors to be taken into account. I have taken all into account together with the fact that this head of damages is essentially a general damage component, and having awarded damages for pain suffering and loss of amenities, I do now award **Kshs 2,500,000** for diminished earning capacity.

Special damages

71. These have been pleaded and particularised at paragraph 11 of the amended plaint. They are divided into:-

i) Medical expenses Kshs 1,568,251.

ii) Cost of artificial limbs Kshs 930, 000 every 2-3 years

iii) Cost of hiring a caregiver Kshs 15,000 per month for period deemed just by the court.

iv) Cost of two wheelchairs Kshs 30,000

v) Air tickets Kshs 30,000

72. These being special damages and having been specifically pleaded there was still a duty upon the plaintiff to prove same. To establish if the plaintiff discharged her burden of proof I propose to deal with each sub-head separately.

Medical costs.

73. During trial and in the submissions filed by defendants there was no challenge that the plaintiff incurred a total of kshs 1,569,582 being hospital and doctor's fees while both defendant agree that that sum is awardable, the plaintiff in own evidence said she only paid Dr Nurani Kshs 331,000 out of Kshs 545,000 and that the difference was waived and given as a discount. That difference of Kshs 211,000 even though incurred was written of and not made payable, was never paid, will not be payable and therefore not recoverable as part of special damages. The sum thus payable for hospital and Dr Nurani's bills is Kshs 1,318,582.

74. There was evidence that the plaintiff paid Kshs 20,00 for preparation of the medical report and for court attendance by David F Wangila ,PW2, of City Orthopaedic Tecnology services as well as Kshs 5,000 paid to Dr Ronald Kaale, PW3. Those sums were adequately proved to have been spent by the plaintiff and are therefore awarded to her. The total of the two sums is **Kshs 1,348, 582** which the court awards to the plaintiff.

Cost of artificial limbs and maintenance thereof.

75. The evidence of the plaintiff and PW2 were consistent that the plaintiff needs the prosthesis to improve her mobility and reduce the appearance of over disability. The orthopedic technologist produced a report on the plaintiff detailing her need for the prosthesis and the cost thereof. He gave the cost of one pair at Kshs 1,000,000 every five year, an annual maintenance cost of Kshs 50,000 and an opinion that the plaintiff would require five sets for a period of 23 year the 23 year was based on a life expectancy of 60 year for the plaintiff then aged 37 years. His evidence based on arithmetic calculation put the cost at Kshs 6,150,000.

76. I take note that the first set of the prosthesis was bought in May 2011 according to Exhibit P4 and by the date the plaintiff and PW2 gave evidence four years had lapsed and it was said that she was not using them because she had outgrown them. I also note that since I took their evidence three years have gone by and no evidence has been availed that in the intervening period a set of prosthesis has been bought and put into use by the plaintiff. I have also appreciated that even though the plaintiff pleaded that she would require replacements every two years the expert position and opinion is that replacement every five years is adequate. In assessing the plaintiff need for prosthesis I will take regard of the set already bought and outgrown and the requirement for the future after this judgment. If the plaintiff was 37 years old in 2015, she is now 40 years old. I will take a period of 20 years during which time she will require the artificial limbs and find that she will need four sets at Kshs 5,150,000 being cost price and maintenance. That sum when added to the sum of the first set bought earlier gives a total of **Kshs 6,080,000** which I hereby award.

Air tickets

77. PW2 produced two copies of email and air-ticket showing that the witness travelled to Mombasa twice at the request of the plaintiff's counsel and spent a total of Kshs 44, 075. Those are sum properly incurred and having not been contested by the defendants, I do award same to the plaintiff.

Cost of two wheelchairs.

78. No strict proof was led for purchase of two wheelchairs but the court saw the plaintiff in court being wheeled in on dot in one such wheelchair. While the law is that special damages must be strictly proved, that requirement is intended to do justice between the parties and never to defeat the ends of justice. In any event strict proof does not mean proof by receipts only. Having seen the plaintiff on a wheelchair I am convinced that she bought it and being Kenyan, I hold the view that a price of **Kshs 30,000** for two wheelchairs is not an exaggeration and accordingly I find the same reasonable and award the sum to the plaintiff.

Cost of hiring a care giver.

79. As the trial court I have seen the plaintiff get wheeled in and out of court on a number of occasions the matter came for hearing. I also took the evidence of PW4 and had the benefit or reading evidence of the plaintiff as recorded by Kasango j. I do not doubt that the plaintiff needs and in fact deserves a caregiver. What may be in contention is the costs thereof and the length of time such costs will be necessary. While there is no evidence that that the plaintiff pays the sum of Kshs 15, 000 per month to PW4, that sum for a person who gave evidence that he doubles up as a driver to the plaintiff may not be deemed outrageous or jus unmerited. While the 2nd defendant has offered no submissions in this regard, the 1st defendant contends and relies on the decision in Peninah Mbonje's case for the proposition that such must be proved by way of document. That may be true but Judge Kamau had these words in that very judgment:-

> **"…as the plaintiff was amputated on both legs, it was obvious that she would need assistance from third parties to ensure her chores were done. She would not be able to rely on relatives throughout her life."**

80. I have found that the plaintiff has the need for a caregiver and a person to help with her chore. That there was no documentary evidence doesn't not negate the plaintiff's need and the need to do justice to her and between her and the defendants. The Court Of Appeal in ***Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR*** *said of the need to insist on documentary proof:-*

> **But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed…"**

81. I do accept that a sum of Kshs 15, 000 per month is not too high for salary to a caregiver like PW4 who double up as a driver. However in awarding a sum under this heading, I do take regard of the fact that I have made an award for artificial limbs said to be able to ameliorate the plaintiff's ability to move. I equally take the view that once fitted the plaintiff may be trained or train herself on how to drive using the prosthesis. I also appreciate that the award I am to make may amount to an accelerated payment made in lump sum and can be invested to yield own income and that damages are intended to compensate and not to enrich. All those consideration have influenced my choice of the multiplier which I fix at 14 year rather than the remainder of the plaintiff's life expectancy. This choice leads me to calculate the sum under this heading as follows:-

> **15,000 X12 X14= Kshs 2,520,000**

RENDITION

82. The upshot and summary of all above is that i enter judgment for the plaintiff against the defendants jointly and severally as follows:-

i. On liability, the plaintiff bears 20% while each of the defendants bear 40% but on joint and several basis.

ii. General damages for pains suffering and loss of amenities **Kshs. 6,000,000**

iii. General damages for diminished earning capacity **Kshs 2,500,000**

iv. special damages:-

a. medical costs **Kshs 1,348, 582**

b. artificial limbs and maintenance **Kshs 6,080,000**

c. air ticket **Kshs 44, 075**

d. Cost of two wheelchairs **Kshs 30,000**

e. Cost of hiring a care giver **Kshs 2,520,000**

TOTAL Kshs18,522,657

Less 20% contribution Kshs(3,704,531)

Net due **Kshs14,818,125**

83. I therefore enter judgment for the plaintiff against the defendant jointly and severally for **Kshs14,818,125** together with costs and interests. Interest on special damages will be calculated from the suit will those on special damages from the date of judgment.

Dated and signed at **Mombasa** this **6th** day of **December, 2018**

P J O OTIENO

JUDGE

Signed and delivered at **Mombasa** this **6th** day of **December 2018**.

D O CHEPKWONY

JUDGE

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[1] Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR

[2] **Richard Okuku Oloo Vs South Nyanza Company Ltd,(2013) Eklr**

[3] **Hussein Ahmed Hanshi another v Peter Gichuru Njoroge & 2 others [2016] eKLR**

[4] **Butler v Butler (1984) KLR 225,**