



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 22 OF 2011

EDWARD MUNGAI WAWERU.....PLAINTIFF

VERSUS

SAMSON OCHIENG KAGUNDA.....1ST DEFENDANT

KIMANI MARY.....2ND DEFENDANT

JUDGMENT

Claim: general and special damages for paraplegic injuries following a road traffic accident; doctrine of vicarious liability

1. By a plaint dated 21st January 2011 and filed in court on 21st January 2011, the plaintiff Edward Mungai Waweru seeks against the defendants Samson Ochieng Kagunda and Kimani Mary judgment and orders for general damages, special damages, costs of the suit, interest and any other relief that the court may deem fit to grant.

2. In the plaint it is alleged that on or about the 23rd day of February 2010 at about 10.00a.m the plaintiff was lawfully and carefully cycling along Gataara road when either the 1st defendant acting as the employee, servant, driver and or agent of the 2nd defendant so negligently and recklessly drove, managed and or controlled motor vehicle registration number KBA 252P that it violently hit the plaintiff as a result of which the plaintiff sustained very severe injuries.

3. It is claimed that the defendants were jointly and severally negligent and that the 2nd defendant is vicariously liable for the negligence of the 1st defendant and that the 1st defendant driver committed the following acts of negligence:

- a) *He drove at an excessive speed in the circumstances;*
- b) *He drove on the wrong side of the road onto the plaintiff's path of travelling thereby knocking him down;*
- c) *Drove without due care and attention to the plaintiff thereby knocking him down.*
- d) *Drove without due regard to other road users.*

e) Failing to stop, slow down, swerve or in any other way so as to avoid the accident

f) Failing to apply the brakes effectively in good time or at all so as to avoid the accident;

g) Failing to stop slowly down, swerve or in any way to control, and or manage motor vehicle registration number KBA 252P.

4. It was further pleaded that the plaintiff sustained serious injuries as a result of the said accident. The injuries involved:

a) Dislocation of the spinal column at T₁₂ thoracic vertebra causing complete paralysis.

b) Deep laceration on the left east lope

c) Extensive friction twins on the right upper limb.

5. It is also pleaded that the plaintiff would rely on the medical report prepared by Dr. W.N. Wokabi a consultant surgeon who found, on examination of the plaintiff that the plaintiff suffered debilitating injuries involving dislocation of the spinal column @ 12 levels resulting in twin severing of the spinal cord causing complete paralysis from that level downward. That the plaintiff underwent a stabilization of the spinal column in anticipation of the damaged spinal cord but which was never successful and that therefore he will remain paralyzed for the rest of his life, confined in a wheel chair, having suffered 100% permanent disability.

6. It was further pleaded that the plaintiff who was aged 36 years at the material time of his injuries and employed as a security guard earning a sum of Kshs 10,000 per month and rearing chicken for commercial purposes and earning shs 10,000 per month has as a result of the debilitating injuries been unable to work and or earn a living and now relies on his parents for his daily needs.

7. Further, that the plaintiff has lost 24 years of his ability to work and earn a living and his life expectancy greatly shortened.

8. The plaintiff therefore claimed for damages for pain and suffering; for loss of expectation of life; for loss of earning capacity; loss of earnings from 23rd February 2010 to the date of judgment at shs 16,000 per month; special damages, costs of the suit; interest and any other relief that the court may deem just and fit to grant.

9. The 2nd defendant entered an appearance on 14th April 2011 and filed defence on 4th May 2011 dated 3rd May 2011 denying that an accident occurred on the named date and place mentioned involving motor vehicle registration No. KBA 252P and a cyclist. She also denied the allegation that the 1st defendant was acting as her employee, servant or driver and or agent when he allegedly drove, managed and or controlled motor vehicle registration No. KBA 252P. She further denied any particulars of negligence or vicarious liability attributed to her.

10. According to the 2nd defendant's defence, on 17th February 2010, motor vehicle registration No. KBA 252P was stolen at Ukunda in Kwale District while it was in the custody of a mechanic one Barrack Oguma. That the loss was reported to Diani Police Station on 18th February and that the vehicle was not recovered until 7th March 2010 when it was recovered at Dandora in Nairobi.

11. Further, that two suspects, one being Samson Ochieng Kagunda the 1st defendant herein were apprehended and charged with theft of the said motor vehicle hence she cannot be held liable because on the date of the alleged accident and injury, the said motor vehicle was not being used under her instructions or for her benefit.

12. It was further pleaded by the 2nd defendant that she is not liable as the motor vehicle in issue was at

the material time stolen and under the control of the thieves hence she is not vicariously liable for the negligence of the 1st defendant.

13. The 2nd defendant pleaded that in the alternative and without prejudice to the foregoing denials, if an accident did occur though denied, and if the plaintiff sustained any injuries which was also denied, then the same was solely caused and or substantially contributed to by the negligence on the part of the plaintiff in that:

- a) He cycled carelessly on the road without due care and attention;*
- b) Failed to take any or any affective measures to prevent the bicycle from colliding with motor vehicle KBA 252P;*
- c) Failed to keep any or any proper look out or to see or observe or heed the presence of motor vehicle KBA 252P on the said road in sufficient time or at all to avoid the said accident;*
- d) Cycling onto the path of motor vehicle KBA 252P;*
- e) Failing to take adequate precautions for his own safety;*
- f) Causing and or permitting the accident to occur.*

14. The 2nd defendant further denied that the plaintiff sustained any injuries as particularized and or that he suffered any loss. She also denied being served with demand notice and prayed for dismissal of the plaintiff's suit with costs.

15. The plaintiff filed a reply to the 2nd defendant's defence on 29th October 2014 reiterating the contents of the plaint and denying the defendant's allegations on the circumstances leading to the occurrence of the material accident.

16. On 16th February 2015 the plaintiff sought and obtained leave of court to file an amended plaint which amended plaint was filed on 10th March 2015 providing at paragraph 6 particulars of special damages to include

- a) A helper on a salary minimum was of shs 10,000 per month;*
- b) A wheel chair shs 50,000 changing after every 3 years for the rest of his life;*
- c) A special ripple mattress shs 30,000.*
- d) Diapers weekly for 5years shs 500.*
- e) Hospital bill shs 680,557*

Total special damages shs 890,557.

Which the plaintiff prayed for in addition to the prayers sought in the original plaint.

17. On 18th March 2015 the defendant filed a reply to the plaintiff's amended plaint denying all particulars of special damages pleaded.

18. On 9th April 2015 the plaintiff filed a reply to the 2nd defendant's defence and reply to amended plaint reiterating the contents of the amended plaint and asserting that the issue of a stolen motor vehicle was dealt with fully in Kwale SRM CC NO. 414 of 2010 Republic vs George Omoni Amiino in which the accused was acquitted of the charges of stealing a motor vehicle and that the trial court noted that the

motor vehicle KBA 252P which was allegedly stolen was infact hired out to one Barrack by the defendant's driver, one Peter Mwangi Chege, and that as the vehicle was a taxi, the defence of a stolen motor vehicle could not hold.

19. The 1st defendant did not enter any appearance or file defence. The case against him was withdrawn by the plaintiff as he could not be traced for service.

20. On 7th August 2015 the plaintiff's counsel filed issues. Both parties filed witness statements, further witness statements and a list and bundles of documents to be relied upon at the hearing.

21. The matter was certified as ready for trial on 18th February 2014 by Honourable Hatari Waweru J. The hearing of this suit commenced on 30th September 2015 with the plaintiff Edward Mungai Waweru testifying on oath as PW1 that he lives in Mwirigo, Kiambu County. He relied on his witness statement recorded on 26th March 2012 and further statements filed on 4th October 2012 and 7th August 2013 respectively, as his evidence in chief.

22. According to the plaintiff, on the material day of 23rd February 2010 at about 10.00a.m, he was lawfully and carefully cycling uphill along Gataara road as both sides of the road had a wall made of stones and that the road was muram. A motor vehicle came from the opposite direction in very high speed at a corner, driving into the plaintiff's side of the road. There was no place to escape for the plaintiff because of the wall, so he screamed "God I have died" in Kiswahili. The motor vehicle hit the plaintiff and pushed him under the vehicle. There was a matatu following the accident motor vehicle. The driver of the accident vehicle asked for help and the plaintiff was removed from under that vehicle. The matatu people took the plaintiff to Thika Level 5 hospital where the plaintiff was treated for spinal injuries, a fractured right hand, cuts on the left ear and several bruises on the left hand. He was later transferred to Kenyatta National Hospital where he remained for 4 days before being transferred to a private wing for 1½ months, upon being discharged from Kenyatta National Hospital for physiotherapy.

23. The plaintiff produced medical documents including discharge summaries from both Kenyatta National Hospital and Spinal Injury Hospital as PEx 1 and PEx2 and a further discharge summary as PEx 3. The plaintiff then reported the accident's occurrence to Gatundu Police station. He was issued with a duly filled P3 form which he produced as P E4 and police abstract as PEx 5.

24. The plaintiff testified that the owner of the accident motor vehicle was Mary Wanjiru as per the search certificate produced as PEx 6. He also produced notice of intention to sue send to the 2nd defendant and her insurance company as PE7. The Notice is dated 13th September 2010.

25. The plaintiff testified that he sustained serious injuries and incurred medical expenses for his treatment. He produced a bundle of receipts from various hospitals as PEx 8 for shs 890,557 and stated that he continues with medical treatment hence he continues to incur bills. He stated that he continues to be treated for bed sores and the doctor's charges. He produced further receipts from April 2015 to the date of hearing of the suit for a sum of shs 23950 as PEx 9. The plaintiff also produced as PEx 10 a clearance letter from Kenyatta National Hospital showing that he had paid all his outstanding bills. He also produced a ruling from Kwale SRM's Court cr. Case No. 414/2010 where someone was charged with stealing the accident motor vehicle but that the court found that there was no evidence that the accident motor vehicle was stolen; the exhibit was marked as PE11.

26. The plaintiff prayed for judgment against the owner of the accident motor vehicle. He stated that he could not have prevented the accident and that since the accident; he was confined in a wheelchair. He must be assisted. That prior to the accident, he worked as security guard for Mr Raphael Njuguna earning shs 10,000 per month and that he also kept chicken. However, that the accident had made him unable to earn a living. He suffers from sores and pain whenever he is sited and has to be assisted by his old parents. That he therefore requires a helper all the time and diapers. The latter cost him shs500 weekly, that he requires catheters; a wheelchair changed after 3 years at shs 50,000 for life and a ripple mattress to reduce bed sores at shs 30,000.

27. The plaintiff testified that he was not married at the time of the accident and neither can he marry because he cannot stand and that his libido is very low, which has also affected him traumatically and emotionally.

28. The plaintiff prayed for damages, costs, and interest from the defendants whom he blamed for the material accident.

29. In cross examination by Mr Gizemba counsel for the 2nd defendant, the plaintiff stated that he was now 41 years. That the driver of the accident motor vehicle stopped, carried the plaintiff and reported the occurrence of the accident to the police station. He stated that according to the police abstract report, the driver of the accident motor vehicle was Samson Ochieng Kagunda and that the vehicle was released by the police. The plaintiff responded that the road was narrow and that there were walls and a corner ahead. He maintained that he was on his left side of the road and that the vehicle followed him to his extreme side. He stated that the accused person in the Kwale case was George Omondi charged with the offence of stealing a motor vehicle. He reiterated that he worked for Mr Raphael Njuguna and also kept chicken.

30. In reexamination by Mrs Waiganjo, the plaintiff stated that he withdrew the case against Samson Ochieng on 26th March 2012 because his lawyers could not trace the 1st defendant and that he knew nothing to do with the Kwale case but that he obtained proceedings from the trial court which showed that the motor vehicle was not stolen.

31. The plaintiff also called PW2 Dr. Washington Wokabi, a medical consultant surgeon with a Master's Degree from the University of Nairobi who testified that he examined the plaintiff on 6th September 2016 and prepared medical report which is dated 15th September 2010 and which he signed. Dr. Wokabi testified and produced the said medical report as PEx 12(a) and added that the plaintiff suffered irreversible spinal cord injuries with 100% total permanent incapacity, with the listings on what the plaintiff would require in life. He also produced a receipt for court attendance for shs 5000/-.Dr. Wokabi was not cross examined by Mr Gisemba counsel for the plaintiff who stated that he had no questions for the witness.

32. The plaintiff also called PW3 Raphael Njuguna Muchemi who testified that he lived in Thika, Mangu and a farmer. That he knew the plaintiff whom he had employed in 2005 as his caretaker and also feeding his poultry. That he used to pay the plaintiff Kshs 10,000 monthly salary. That the plaintiff was a very capable person prior to the accident of 23rd February 2010. The witness saw the plaintiff while he was admitted at Thika hospital and later transferred to Kenyatta National Hospital and that he accompanied the plaintiff to Kenyatta National Hospital. That although the plaintiff was talking at the time he saw him after the accident, he had no sensation from the waist downwards. That the plaintiff cannot walk as he is confined and paralyzed in the wheelchair.

33. In cross examination by Mr Gizemba, PW3 stated that he employed the plaintiff as a caretaker and that albeit he had no written agreement with the plaintiff, he paid him shs 10,000 in cash per month.

34. At the close of the plaintiff's case on 29th October 2015 the defendant Mary Wanjiru Kimani testified as DW1 and adopted her written witness statement and a further statement dated 23rd September 2015 as her evidence in chief. She testified that she lives in Mombasa at Mikindani, doing business. That she used to do matatu business. DW1 stated that her motor vehicle KBA 252P was stolen on 18th February 2010. That at the time of the accident, Samson Ochieng Kagunda was driving it but that she had employed Peter Chege to drive the vehicle. That she did not know where the vehicle was at the time of the accident as the police had circulated the information of its loss after she reported the loss to Diani police station. She produced as DEX1 copy of police abstract showing that she had reported the loss of the vehicle.

35. That after some days, the defendant learnt that the motor vehicle was in Kisumu. She reported to her insurance company and was issued with a theft claim dated 24th February 2010 but which the defendant could not produce as she had not filed it in court nor served a copy thereof upon the plaintiff's counsel. The court sustained the objection to its production by the plaintiff's counsel. Mr Onindo, on account of an

attempted trial by ambush, contrary to Order 11 of the Civil Procedure Rules. The defendant prayed for dismissal of the plaintiff's suit with costs.

36. In cross examination by Mr Onindo the defendant stated that the suit motor vehicle belonged to her at the material time of the accident but that it had been stolen although it had a valid insurance cover. That at the material time, the defendant had given the motor vehicle to her driver and that the person who stole the motor vehicle was charged in court but that she heard that he was acquitted by the court.

37. DW1 stated that Samson Kagunda was not a witness. She denied that she had hired out the motor vehicle.

38. In reexamination by Mr Gisemba, the defendant stated that two people were arrested in connection with the theft of the subject vehicle and that one of them was George Amino. She stated that she testified in court. She admitted that her vehicle was a taxi and that she had her own driver Peter Mwangi Chege. She denied giving out the vehicle for hire by other people.

39. On 29th October 2015, the defence sought for an adjournment to call another witness as the driver Peter Chege had died. They also sought for witness summons to issue to Mr John Maina, the investigating in Kwale who investigated the loss of the vehicle. The matter was adjourned and slated for further defence hearing on 10th December 2015. On the latter date, the defence counsel reported that the witness who was the OCS Diani Police Station was unable to attend court and sought for an adjournment. The plaintiff's counsel objected to an adjournment for reasons that there was no evidence that the OCS Diani Police Station had been served with summons. The court granted an adjournment as a last adjournment as it was the second time the defence were seeking for an adjournment. The court also advised parties to fix dates in the registry when the OCS Diani Police station would be available in the new term. The court also directed a hearing date to be given on priority basis and directed the defendant to pay court adjournment fees of shs 3500/- and the plaintiff advocate's attendance costs.

40. On 17th December 2015 both parties' advocates representatives appeared in the registry and fixed a hearing date by consent for hearing on 26th October 2016 which was nearly a year away as the court diary was full. However on 22nd January 2016 the plaintiff's counsel sought and obtained a mention date before me, and requested for an early hearing date because the matter was part heard and that the plaintiff had developed serious health complications that necessitated his return back to the spinal injury hospital. The court allowed the request and fixed the defence hearing date by consent for 8th March 2016.

41. On 8th March 2016, the defence counsel Miss Karanja informed the court that she was not ready to proceed with the slated hearing because the police officer from Coast was attending to official duties and was not in court. Counsel sought for an adjournment which was opposed by Mrs. Waiganjo counsel for the plaintiff, who maintained that the plaintiff was suffering due to the delay and that the defendant had not even served summons upon the said police officer to attend court.

42. The court after hearing the application for adjournment and the opposition thereto declined to grant an adjournment while giving the history of the matter and listing the occasions on which the defendant had sought adjournment but that it was apparent that she was hell bent to delay justice since she had not even obtained the witness summons for service upon the OCS Diani Police Station in October 2015.

43. The defence counsel sought leave to appeal the refusal to grant an adjournment which leave was also declined and the court directed the defence case closed and the plaintiff to file and serve submissions within 14 days and the defendant to file and serve hers within 14 days. The matter was slated for mention on 4th April 2016 to confirm compliance. On 4th April 2016, the defendant's counsel Miss Karanja had filed an application under certificate of urgency for stay of proceedings pending appeal.

44. Parties were directed to fix a date in the registry or the hearing of the application for stay of proceedings on priority basis.

45. In the meantime, I was deployed to the Judicial Review Division from June 2016 and so the matter was only referred to me by Honourable Justice Njuguna on 12th October 2016 and it reached me on 7th December 2016 when I directed parties to appear for hearing of the application for stay of proceedings on 19th December 2016. On 19th December 2016 the said application dated 1st April 2016 for stay of proceedings pending appeal was canvassed inter partes at 11.30 am and I delivered a ruling at 2.30 pm the same day dismissing the application for stay of proceedings pending appeal principally, on the ground that there was no valid notice of appeal as the applicant was denied leave to appeal against the order refusing an adjournment but nonetheless proceeded to file notice of appeal against the same order of refusal of adjournment and not against the order refusing leave to appeal, then proceeded to seek for stay of proceedings pending the intended appeal. I then directed the defendant to file and serve the plaintiff's counsel with submissions on the main suit within 14 days which order the defence counsel did comply with and filed the same on 3rd January 2017. The plaintiff's counsel had filed the submissions on 1st April 2016. The court also ordered that judgment would be delivered today 14th February 2017 hence this judgment.

Submissions

46. The plaintiff's counsel submitted on two issues namely –liability and quantum of damages-

47. On liability, it was submitted that as the plaintiff who was a cyclist was riding uphill, he was moderately slow while the defendant's motor vehicle was in very high speed. Further, that the plaintiff was prevented from taking evasive action by a wall that was on his side of the road and that he was on his lane when the accident happened, with the defendant's driver dragging him for a long distance before it stopped which demonstrates how fast the vehicle was being driven. It was submitted that a slow motor vehicle would have stopped instantly upon breaking. That the plaintiff did not in any way contribute to the accident hence he is not liable in contributory negligence and that the court should hold the defendant 100% liable.

48. The plaintiff's counsel submitted that albeit the defendant testified to the effect that her motor vehicle was stolen at the time of the accident, the criminal charges of stealing of a motor vehicle against one George Omondi Amino vide Kwale SRM No. Cr. 414/2010 the accused was acquitted of the charges of theft of a motor vehicle.

49. That the court found that the motor vehicle KBA 252P was a taxi entrusted by the defendant to her driver Peter Mwangi Chege (alleged to be now deceased) which motor vehicle was hired out to one Barrack Okumu by the said Peter Mwangi Chege hence the motor vehicle could not have been stolen as it was on hire.

50. It was submitted that therefore the plaintiff's evidence remained unchallenged and as there was no appeal against the decision of the Kwale Court, the allegation of the theft of motor vehicle cannot stand, since the defendant's defence is a mere denial. That she did not produce any evidence to show that she had divested herself of any responsibility of negligence or liability in the event of an accident while the vehicle was on hire. That as a pedestrian and not a passenger, the plaintiff was not party to car hire arrangements hence the defendant should bear 100% liability as she is vicariously liable for the negligent acts of her driver.

51. On whether the defendant was vicariously liable for negligent acts of her driver, reliance was placed on **HCCA97/2007 Patriotic Guards Ltd V Great Rift Valley Transporters (2010)e KLR** where the court held that vicarious liability arises where an agent is criminally liable (referring to **Barwick V English joint stock Bank [1867] LR 2 Exch page289** in which the court held that a bank was vicariously liable in a case where fraudulent misrepresentation of a Bank Manager in the cause of his employment resulted in loss to a customer.

52. Further reliance was placed on **HCC 256/2013 Hellen Njengav Dr Wachira Murage & The Mater Hospital** where the court found that the doctrine of privity of contract does not confer rights or impose obligations on strangers who are not party to a contract. That it is only binding to the parties involved.

53. It was therefore submitted that in this case, the defendant acknowledged that the vehicle was used as a car hire. That the defendant had assigned her driver the rights to hire it to third parties. That any such agreements were therefore binding on her and that if there was any criminal action by the hirer then the defendant was bound by that action vicariously and the plaintiff cannot be dragged into any such breach of contract or criminal action.

54. On quantum of damages, it was submitted that the plaintiff's own testimony and that of Dr. Wokabi PW1 and the medical report and medical documents produced show that the plaintiff suffered very serious injuries leading to his being rendered paraplegia and with 100% permanent incapacity and permanently confined into a wheel chair with all the attendant complications as corroborated by Dr. Wokabi in his medical report hence the plaintiff should be compensated in damages.

55. It was submitted that the plaintiff was 36 years at the time of the accident, a farm hand, guard and selling chicken feeds earning shs 10,000 per month from his employer PW3 Raphael Njuguna. That the plaintiff can no longer walk or work or fend for himself. He cannot marry. He suffers from physical and mental agony.

56. On the prayer for general damages for pain, suffering and loss of amenities, a sum of shs 15,000,000 was proposed predicated on **Meru HCC 15/2004 Dorothy Kanyua Mbaka and Mary Syuthi Ngumbau v Permanent Secretary in charge of Department of Defence in The Office of the President and Attorney General** judgment delivered on 2nd April 2014 by Makau J where the plaintiff who sustained total paraplegia was awarded shs 10,000,000 general damages for pain, suffering and loss of amenities.

57. On the claim for loss of earnings, it was submitted that the plaintiff lost his job as a consequence of the accident; that he would have worked until 60 years. The plaintiff's counsel proposed a multiplicand of 19 years thus $10,000 \times 19 = 2,280,000$ and also prayed for general damages for loss of earning capacity at shs 4,000,000. The plaintiff also prayed for special damages totaling shs 10,490,000 for paraplegic needs as pleaded and as contained in the doctor's report. He prayed for damages, costs of the suit and interest at court rates and the doctor's court attendance fees as witness expenses.

58. In the defendant's submissions filed in court on 3rd January 2017 the defendant's counsel submitted on two issues namely, liability and quantum. on liability, it was submitted that according to the police abstract, investigations into the accident's cause were still ongoing and that there was no evidence that the driver of the vehicle was charged with any offence related to careless driving or notice of intended prosecution served upon him.

59. That as the plaintiff chose not to call the investigating officer as to how the accident occurred, then the plaintiff had not discharged his burden of proving that the driver of KBA 252P was wholly liable for the accident.

60. That the point of impact of the accident on the road was unknown as no sketch plans were produced to give the exact point of impact of the accident. That pedal cyclists are supposed to ride off the road and their path yet the plaintiff conceded riding on the road designated for motorists hence he should bear liability 50:50.

61. On quantum of damages, reliance was placed on **Francis Kaguto Munio v John Simiyu Malaba & Others Nairobi HCC No. 1460 of 1990** where the plaintiff was rendered a paraplegic and was awarded shs 900,000 damages for pain, suffering and loss of amenities.

62. Further reliance was placed on **Christine Nandoka Lusweti vKBS Ltd Eldoret HCC 33/2005** where the plaintiff sustained complete paralysis of the lower limbs. The court awarded shs 2million general damages for pain and suffering.

63. Further reliance was placed on **Samuel Njoroge Mburu V Nganga Kamau & another [2006] e KLR** where the plaintiff paraplegia was awarded shs 2 million general damages for pain, suffering and

loss of amenities.

64. On what sum the plaintiff should be awarded, a sum of shs 1million was proposed as reasonable.

65. On loss of earnings and loss of future earning capacity; it was submitted that albeit the plaintiff pleaded that he was a security guard and kept chicken, he only testified that he was a home caretaker hence did not prove his employment status and so he should not be awarded anything for loss of earnings.

66. On the claim for loss of earning capacity it was submitted that albeit the plaintiff was 36 years as at the time of accident, there was no evidence that he would have lived to the retirement age given the uncertainties of life that would have cut short his life hence a multiplier of 10 years would be reasonable.

67. It was submitted that a minimum wage of 5000/- per month would be reasonable as there was no proof of what the plaintiff was earning or doing, hence, $5000 \times 10 = 50,000$.

68. On the claim for nursing care it was submitted that he did not provide any special damages in his pleadings hence he is not entitled to the claim. Reliance was placed on **Agatha Wanjiku Njuguna v Mary Wanjiku & 3 Others Nyeri HCCA 302 of 1999**; and **Christine Nandoka Lusweti** (supra) where the court used a multiplier of 25 years for a 25 year old paraplegic for nursing care. It was submitted that shs 600,000 would be sufficient.

69. The defendant proposed the following awards for each of the following items:

a) *Wheel chair shs 175,000 based on **Rosemary Wanjiku Kungu V Elijah Macharia Githinji & Another Nairobi HCC 145/2010**; and **Christine Nandoka Lusweti** (supra)*

b) *Catheters 1,000 x 3 weekly 5 x 5 years = 15,000*

c) *Ripple mattress – not pleaded hence not entitled to.*

d) *Hospital bill- that it was not proved by receipts hence not entitled to .*

70. On future medical care expenses reliance was placed on **KBS Ltd vs Gituma [2004] EA 91** where it was held that cost of future medical care is a special damage which must be pleaded if evidence is to be led and the court is to make an award in respect thereof.

71. In this case it was submitted that the claim for future medical care was neither pleaded nor proved by evidence of Dr Wokabi hence that claim should fail.

DETERMINATION

72. I have carefully considered the plaintiff's case as pleaded, the evidence tendered and submissions. I have given equal consideration to the defendant's defence as pleaded, her evidence as tendered in court and her submissions.

73. In my humble view, the main issues for determination are:

i. *Who was to blame for the material accident?*

ii. *Whether the 2nd defendant is vicariously liable for negligent acts of the 1st defendant driver.*

iii. *What injuries did the plaintiff sustain?*

iv. *What damages if any would the plaintiff be entitled to.*

v. *What orders should this court make and*

vi. Who should bear costs of the suit herein?

74. On the first issue of who is to blame for the material accident, the plaintiff pleaded and testified that on the material day of 23rd February 2010 at about 10.a.m,he was cycling along Gataara Road from Gatukuyu to purchase chickenfeed and that he was going uphill when suddenly he saw a vehicle coming from the opposite direction in very high speed. Suddenly, the driver lost control and went to the plaintiff's lane. The plaintiff tried to swerve to his left but there was a wall hence the motor vehicle hit him against the wall and dragged him along it for a while before it stopped. He was rescued when a matatu came and stopped and people lifted the offending motor vehicle and removed him from underneath it and he was taken to the Thika Level 5 Hospital and later transferred to Kenyatta National Hospital.

75. On being cross examined, the plaintiff stated that the driver of the motor vehicle was Samson Ochieng Kagunda. That the road was narrow and that there were walls and a corner ahead. That he was on his left side of the road and that the vehicle went to his extreme side.

76. In re-examination, the plaintiff stated that he withdrew the case against Samson Ochieng on 26thMay 2012 because his lawyers were unable to trace him. He also stated that he only obtained proceedings in the Kwale case showing that the vehicle was stolen.

77. On the other hand, the defendant pleaded and testified that she was the owner of accident motor vehicle KBA 252Pwhich was doing matatu business. That at the time of the material accident, the defendant had reported to the police that that her motor vehicle had been stolen on 18th February 2010. That albeit Samson Ochieng was the one driving it at that time, but that she had employed Peter Chege to drive it. That she did not know where the vehicle was and a report was made to Diani Police Station and she was issued with an abstract which she produced as an exhibit. That it was some days after its loss and the report circulated to the police that she heard that it was found in Kisumu. She denied in cross examination that the vehicle had been leased out.

78. On being re-examined, the defendant stated that two people, among them George Amimo were arrested in connection with the loss of the vehicle and that she testified in court. She stated that the vehicle was a taxi and that she had her own driver Peter Mwangi Chege but denied ever giving her vehicle out for hire by other people.

79. From the above evidence, it is not in dispute that the plaintiff's evidence as to how the accident occurred and in broad day light at 10.00 am was never challenged or at all. That he was cycling on his left side of the road and going uphill when the driver of KBA 252P came from the front at a very high speed, lost control and went to hit the plaintiff. That there was a corner ahead, that the road was narrow and that both sides of the road had stone walls hence his efforts to swerve to the extreme left to evade the vehicle did not bear any fruit. That evidence was never controverted by the defendant. The defendant admitted owning the accident motor vehicle but never testified as to how negligent the plaintiff was on the road and or how he could have contributed to the accident.

80. Although in her defence filed on 4th November 2011 she pleaded at paragraph 11 that the plaintiff was negligent and or substantially contributed to the occurrence of the accident, and even set out particulars of contributory negligence on the part of the plaintiff, she never testified or call any evidence to prove any of the acts of negligence pleaded against the plaintiff.

81. It is trite law that he who alleges must prove. In this case, the burden of proof lay on the plaintiff to prove any of the acts of negligence attributed to the defendant's driver, agent, or servant as pleaded in paragraph 4 of the plaint. And for sure, the plaintiff himself survived the near fatal accident to narrate how it all happened, as he never lost consciousness.

82. Equally, where the defendant pleads contributory negligence on the part of the plaintiff, he must adduce evidence to prove those specific acts of contributory negligence. No such evidence was adduced. Instead, the defendant's counsel submitted on how the plaintiff was negligent because he was riding on the road.

83. In my humble view, being found riding on the road is not perse negligent. It was not shown that the plaintiff had left his side of the road and rode into the defendant's motor vehicle or that he cycled on the wrong side of the road. It was also not shown that the road had a designated path for cyclists but that the plaintiff ignored and used the road exclusively meant for use by motorists.

84. In addition, submissions by counsel are not and have never been evidence. Neither can answer in cross examination built a defence case.

85. Furthermore, accidents do not just happen and motor vehicles do not just lose control when they are under the control or management of a driver.

86. The Court of Appeal in **Embu Public Road Services Ltd v Riimi [1968] EA 22** stated:

“where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.”

87. The driver of the offending motor vehicle was driving downhill and at a corner, on a narrow road which was walled on both sides. It was upon him to slow down while approaching a corner and going downhill. The only reason why he lost control of the vehicle and hit the plaintiff who was coming from the opposite direction and on his left lane is that the driver was over speeding and was not driving with due care and attention, having regard to the condition of the road and the safety of other road users; the plaintiff included.

88. Accordingly, I find that on the available evidence, the plaintiff has, on a balance of probabilities proved that the accident occurred due to the negligence of the driver of KBA 252 P and there is no contrary evidence to show that the plaintiff, in any way contributed to the occurrence of the material accident. Contrary to allegations by the defendant's counsel in her submissions, a cyclist going uphill is more likely to walk than ride very fast. Albeit the defendant claimed that nobody was charged with the traffic offence related to the accident, and that the police abstract show case pending, it is trite law that the decision to charge the driver with any traffic offence is taken by the Director of Public Prosecutions and the police investigators, not the plaintiff complainant.

89. Furthermore, the police abstract PEx 3 was issued on 26th August 2010 and there is no evidence that the driver of the accident motor vehicle was traced for purposes of charging him with an appropriate traffic offence for, even the plaintiff, who is not an investigator, despite enjoining the driver to these proceedings, had to withdraw suit against the driver Samson Ochieng Kagunda.

90. In addition, even if the driver was not charged with a traffic offence, the standard proof in traffic (criminal) cases is higher than that which is required in civil claims hence it is not always the case that one must be criminally liable in order for damages for negligence to be sought and obtained from him/her.

91. In a claim based on negligence (tort) which is civil in nature, the standard of proof is that of on a balance of probabilities which I find the plaintiff has discharged.

92. I am therefore satisfied that the driver of motor vehicle KBA 252P was liable in negligence at 100% in the manner in which he drove, managed and or controlled motor vehicle registration No. KBA 252P thereby knocking the plaintiff and injuring him seriously.

93. The other question to be answered on the issue of liability is whether the driver of the accident motor vehicle was an agent, servant and or driver authorized by the defendant at the material time of the accident.

94. According to the defendant, although the accident motor vehicle belonged to her, but that she did not

know or authorize the driver who was to be found in its possession and control at the time of the material accident because the vehicle was reportedly lost on 18th February 2010 when it was in custody of her driver Peter Mwangi Chege (deceased) who had given it to his friend Samuel George Amimo Omondi who was also its mechanic for repair, when the latter stole and escaped with it only for the vehicle to be found after the material accident, by which time, its loss and been circulated countrywide.

95. The defendant further contended that in any event, the said George Omondi Amimo was charged in Kwale Court with stealing a motor vehicle in question albeit he was acquitted.

96. On the other hand, the plaintiff maintained that the vehicle belonged to the defendant who must take responsibility and is therefore vicariously liable for negligent acts of her driver Peter Mwangi Chege because he had authority to lease it out as it was used as taxi for hire.

97. The plaintiff relied on **HCCA 97/2007 (supra) Patriotic Guards Ltd vs Great Rift Valley Transporters Ltd [2010] e KLR** where the court found that vicarious liability arises where an agent is criminally liable, referring to a case where fraudulent misrepresentation of a bank manager in the cause of his employment resulted in loss to a customer.

98. According to the plaintiff, the defendant having conceded that the vehicle was used as a car hire, she had assigned to her driver the rights to lease it out to third parties and therefore any such agreements with third parties were binding on her and therefore if there was any criminal action by the hirer then she was bound by that action vicariously and the plaintiff cannot be dragged into any such breaches of contract or criminal action.

99. The plaintiff produced ruling in **Kwale SRM Cr. 414/2010 Republic v George Omondi Amimo** wherein the latter was charged with theft of motor vehicle KBA 252 P Toyota DX Saloon valued at shs 500,000 the property of Mary Wanjiru, the defendant herein. He denied the charge and the prosecution called witnesses among them, the owner/defendant herein and her driver Peter Mwangi Chege (allegedly deceased). It was the prosecution's case that the said vehicle which was used as taxi for hire was hired for self-drive out to Barrack by Peter Mwangi Chege, its driver. Peter Mwangi Chege also conceded in the Kwale criminal case that he hired out the vehicle to Barrack for self-drive and was to return it same day but did not return it and Barrack went missing hence the report to the police of the loss of the motor vehicle which was found in Nairobi 18 days later.

100. The trial magistrate found that the accused was innocent as there was no evidence that he was the one who hired the vehicle and that neither did the police explain why they never charged the hirer Barrack with stealing the said motor vehicle.

101. The trial magistrate also wondered how the police arrested a person who was allegedly found in possession of the stolen vehicle but failed to charge him or use him as a prosecution witness to determine how he came to possess the complainant's vehicle. the trial magistrate observed thus:

“....The court wonders whether there was a deliberate attempt to withhold certain facts from the court.....”

102. This court notes that during the hearing of this case, the defendant made concerted efforts to have police from Diani Police Station testify in her favour and on the occasions when the court had granted her an opportunity to call the said police who investigated the alleged theft of her vehicle, she had excuses as to their unavailability. Even when the court ordered for witness summons to issue to the said police officer, she never took out the said witness summons and simply believed that the police at Diani had agreed to be available at certain times suitable to them. When the court got weary of the several excuses as to why the witness was not available and declined an adjournment, the defendant made frantic efforts to frustrate the progress of this matter and even after leave to appeal was declined, she went ahead and filed a notice of appeal to the Court of Appeal and sought for stay of these proceedings, which stay was declined.

103. This court, just like the Kwale criminal trial court, reads great mischief in the defendant's conduct which I strongly believe was calculated to delay justice for the plaintiff. This court, after reading the ruling in the Kwale criminal case now realizes that even the police who investigated the complainant regarding the alleged theft of the defendant's motor vehicle never testified in that criminal trial and more so, there is no explanation as to why the hirer of the motor vehicle was never charged with the theft of the motor vehicle or even called as a prosecution witness.

104. One therefore wonders how the police who investigated the theft of motor vehicle case and who never testified in the criminal trial to establish that the motor vehicle was indeed stolen and by who as per their investigations could come all the way from Diani Police station to this court in Nairobi to assist the defendant prove that her motor vehicle had been stolen at the time of the accident and therefore, she could not be held vicariously liable for the negligent acts of its driver whom she had not authorized to drive at the material time.

105. whereas this court empathizes with the defendant on the alleged demise of her driver Mr Peter Mwangi Chege (Rest in peace) while this case was pending, although no death certificate was ever availed to court to verify the claim that he was dead; and whereas the defendant's list of witnesses filed in court on 4th May 2011 discloses that the driver of the material motor vehicle Peter Chege was one of her witnesses and that his statement would be filed 15 days prior to the trial conference and that leave of the court would be sought accordingly in line with Order 7 Rule 5 of the Civil Procedure Rules 2010, no such witness statement written by one Peter Chege was ever filed and neither did the defendant tell the court as to when the said witness died.

106. Furthermore, on 18th February 2014, Honourable Waweru J certified this matter as ready for trial after the plaintiff's counsel had long complied with pre-trial requirements and despite reminders to the defendant BY the plaintiff's counsel (copied to court) to comply, the defendant never complied.

107. Even after the learned judge gave the defendant a window of opportunity to comply and file documents and witness statements at least within 30 days before the hearing date, the defendant never filed the statement of Peter Mwangi Chege her driver. Instead, she filed her own further witness statement on 18th September 2015 which was more detailed than the first one.

108. In her 1st witness statement filed on 4th May 2011, and which was adopted as her evidence in chief, the defendant claims that the vehicle had gone missing after the mechanic Mr Barrack Ogumo who was then attending to it had taken it from her driver Peter Chege and therefore as she was not in control of the vehicle, she could not have authorized anybody to drive or even use the vehicle as it was on 18th February 2010 reported to the police as a stolen vehicle and a suspect had been arraigned in Kwale Court with theft of the said motor vehicle.

109. The court also notes that the defendant's witness statement is dated 15th April 2011 and was written to the Monarch Insurance Company Ltd, her insurer. However, in the further witness statement filed on 18th September 2015 by the defendant, she stated as follows:

“.....That I recall on 18th February 2010 during the morning hours, my driver called to inform me that the vehicle had been stolen by his friend cum mechanic. According to the driver, the said friend namely Barrack Okoth Ogumo who used to work in an open air garage near the taxi base, approached him seeking to use the vehicle to do shopping at Nakumatt Supermarket....”

110. In that latter statement, she also stated that her driver Peter Mwangi Chege who often handled the vehicle was now deceased. Thus in the first statement, the 2nd defendant stated that the driver told her that the mechanic Mr Barrack Ogumo who was then attending to the vehicle had taken the vehicle from her driver, whereas in the later further statement, she claimed that the mechanic had requested the driver to allow him (mechanic) to use the vehicle for shopping at Nakumatt Supermarket.

111. Comparing those two versions in the two statements which were both adopted as the defendant's

evidence in chief, and the ruling by the Kwale SRM in the criminal case, although the full proceedings from the Kwale criminal case No. 14/2010 were not produced, but from the summary of evidence given by the trial magistrate on the second page of the ruling first paragraph, she recorded that PW2's evidence, who was the Peter Mwangi Chege had hired out the vehicle to one Barrack but that the said Barrack disappeared with the vehicle.

112. The evidence on the alleged loss of the defendant's vehicle as summarized on page 1 of that ruling by the learned trial magistrate is that Barrack who was well known to the defendant's driver Peter Chege who worked as a taxi driver had hired the vehicle on a self-drive terms and that it was agreed that he should return the said vehicle at Corner Ya Police area by 6pm.

113. from the above record, one can clearly see the material contradictions in the evidence of the defendant which contradictions create sufficient doubt as to whether the said motor vehicle was ever stolen or at all, or whet it had been hired out as was in the normal cause of business since the driver had full control and management of it most the time operating taxi business.

114. The defendant never denied that she did authorize the driver to hire out the said vehicle for self-drive. She also never denied authorizing self-drive hire for her said motor vehicle. She never stated that her driver Peter Mwangi Chege unlawfully hired out her motor vehicle without her consent. She did not even tell the court why Peter Chege never recorded any statement with regard to this case, or even to her insurance company, which statement could have been admissible under special circumstances, assuming that there was proof of his death and an application to admit his statement made and considered by the court.

115. It is trite law that the burden of proving that the motor vehicle in question was under the control or management of a driver who was an agent, servant or employee of the defendant lay on the plaintiff. However, the ruling in the Kwale criminal trial clearly show that the motor vehicle had been hired out for the benefit of the defendant owner thereof, by her authorized driver and acting in the course of his employment and business and that the said driver, Peter Mwangi Chege, who testified in the said criminal case had full control and management of the vehicle used for taxi hire business.

116. The criminal trial court having found that there was no evidence that the motor vehicle was stolen but that it was hired out, and the fact that the defendant never denied in her evidence that she had authorized her driver to hire out the vehicle, in my humble view, the vehicle was hired out for the benefit of the defendant and therefore the defendant is liable for negligent or criminal acts of the hirer thereof. as a result, i find that the defendant is vicariously liable for criminal acts if any, of the hirer as was held in **HCCA 97/2007 Patriotic Guards Ltd v Great Rift Valley Transporters**: and **Hellen Njenga v Dr. Wachira Murage & The Mater Hospital**.(supra).

117. In **Tabitha Nduhi Kinyua V Francis Mutua Mbuvi & Another**[2014] the Court of Appeal observed that vicarious liability is not limited to employment relationships, citing **Messina Associated Carriers vs Kleinhaus** [2001] 3 ALL SA 285 (SCA), where the court noted:

“ The law will permit the recovery of damages one person for delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment ... or where in the eye of the law the one was in the position of the owners servant.”

118. The Court of Appeal in the above case also observed that, however, the liability placed upon the employer/master due to the master /servant relationship is not absolute. In **Pritoo v West Nile District Administration**, [1968] EA 428, it was held:

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible.”

119. The Court of Appeal has also laid down the test for establishing whether an employer is vicariously liable for his/her servant's negligence in **Joseph Cosmas Khayigila V Gigi & Company Ltd & Another CA 119/1998** as follows:

“ In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

120. In **Morgan vs Launchbury & Others [1972] 2 ALL ER 605** cited extensively by the Court of Appeal in many cases including **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi** (supra); **P.A.Okello & Another t/a Kaburu Okello& Partners V Stella Karimi Kobi & 2 Others CA 183/2003**, it was observed that vicarious liability can be assigned, as follows:

“In assigning vicarious liability, the learned judge appreciated, correctly, that it arises when the tortuous act is done in the scope or during the course of employment.”

121. And in determining whether an employee acted within the scope of employment, the Court of Appeal in the **Tabitha Nduhi Kinyua** (supra) case, citing **Minister of Police v Rabie [1986](1) SA 117 A (Appellate Division)** accepted the holding that the determination of whether an employee acted within the scope of employment incorporates both a subjective and an objective enquiry as follows:

“ It seems clear that an act done by a servant solely for his own interest and purposes, although accessioned by his employment, may fall outside the course and scope of his employment and that in deciding whether an act by the servant does not fall, some reference is to be made to the servant's intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorized provided that they are so connected with the act which he has authorized that they may be regarded as modes- although improper modes- of doing them.”

122. In this case, it is not disputed that Peter Mwangi Chege was the authorized driver of the defendant's motor vehicle which was a taxi used for hire. It is also not denied that the said driver testified in the criminal court at Kwale that he had hired it out to the Mr Barrack for self-drive.

123. In my humble view, the leasing of the motor vehicle in issue to third parties was an authorized act by the defendant and therefore was so linked to the defendant's mode of doing business that she cannot claim that the motor vehicle was stolen when none of the police officers who purportedly recovered the motor vehicle after it was allegedly recovered ever testified in the criminal case or in these particular proceedings as to the circumstances under which the suit motor vehicle was found to be in Nairobi and why the person who was allegedly in its possession was neither charged with the theft nor treated as a prosecution witness.

124. I have no doubt in my mind that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner

125. In **Securicor Kenya Limited vs Kyumba Holdings Ltd CA73/2003** the Court of Appeal defined the doctrine of vicarious liability by quoting with approval a passage from **Winfield and Jolowicz on tort 14th Edition** as follows:-

“ The doctrine may be stated as follows: Where A, the owner of a vehicle expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A,

A will be vicariously liable for B's negligence in the operation of the vehicle."

126. In the case of **Tabitha Nduhi Kinyua** (supra) the Court of Appeal was clear that vicarious liability is not limited to employment relationships citing with approval **Messina Associated Carriers V Kleinhaus** [2001]3 ALL SA 285(SCA).

127. The Court of Appeal in the **Tabitha Nduhi Kinyua** (supra) case further cited with approval **Ormrod & Another vs Cross Ville Motor Services Ltd & Another** 1953 (2) AER 753 CA where Lord Denning L.J stated:

"The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to third party to be used for purposes in which the owner has no interest or concern."

128. And in determining the scope of employment, the case of **Bezuidenhout No v Eskom (399/2001) (2002) ZASCA 152; (2003) 1 ALL SA 411 (SCA)** is instructive. the Supreme Court of South Africa observed that ***"one should not look narrowly at the particular act which causes the delict but rather at the broader scope of which the particular act may represent only a part."***

129. Applying the above principles to this case, there was no evidence that the driver of the motor vehicle acted outside the scope of his employment by hiring out the vehicle to Mr Barrack. There was also no evidence that the motor vehicle in question was ever stolen. The fact that there was a report made to the Police Station of theft of the material motor vehicle is not sufficient evidence of the theft of the motor vehicle, particularly in view of the findings by the criminal court in Kwale that there was more to it than meets the eye, in the evidence which was adduced before her against the suspected thief.

130. Although the standard of proof in criminal cases is much higher than that in civil proceedings, but from the evidence adduced in this case by the plaintiff i can infer prima facie, that on a balance of probabilities, the motor vehicle was being used for hire with the authority of the defendant owner thereof and for her benefit therefore the theft theory is not persuasive enough to displace that inference and conclusion.

131. In **Morgan's V Launchbury & Others, (1972) 2 ALL ER 605** the House of Lords held, inter alia:

"The owner ought to pay, it says because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is on control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorized or requested the act, or if the actor, is acting wholly for his own purposes. The rules have stood the test of time remarkably well."

132. In the end, I have no hesitation in finding that the defendant is vicariously liable for acts of negligence of the 1st defendant driver who was driving her motor vehicle KBA 252 P at the time of the material accident. The defendant is therefore found to be 100% liable for the accident wherein the plaintiff was crushed by her said motor vehicle.

133. The next question for determination is what injuries were sustained by the plaintiff and therefore what damages are awardable to him?

134. According to the plaintiff's pleadings as per the amended plaint, and as per his case discharge summary from Kenyatta National Hospital, dated 15th March 2010, he sustained injuries involving complete T₁₁/T₁₂ spinal cord injury which was a fracture, cut earlobe and was reduced into a total paraplegic. He also suffered extensive function twin on right upper limb. According to Dr. Wokabi's medical report and testimony in court, the plaintiff sustained debilitating injuries involving fracture of T₁₂

of the spinal cord severing causing complete paralysis from the level downward. He was stabilized but no improvement hence he will never recover. He will remain paralyzed in eternity. The plaintiff also testified in court while in a wheel chair. The plaintiff also produced the medical report by Dr. Wokabi, discharge summaries from hospital; and P3 form confirming the above paraplegic injuries. There was no contrary medical report to rebut the injuries sustained by the plaintiff which rendered him paraplegic and confined in a wheel chair. I find that the plaintiff was seriously injured as a result of the material accident and therefore he is entitled to damages.

135. On what damages the plaintiff is entitled to, the court must look at the injuries sustained and the resultant effects thereof.

136. The plaintiff prayed for general damages under three heads –pain and suffering, loss of expectation of life; and loss of earning capacity. He also prayed for special damages.

137. However, in his counsel’s submissions, he prayed for, in addition to the above damages, loss of consortium.

138. From the onset, loss of consortium is not available to the plaintiff because it was not pleaded and secondly, it was never proved. Furthermore, loss of consortium is payable to a spouse of the injured person and not to the injured. In **Best V Samuel Fox & Company Ltd [1951] 2 KB 639** cited with approval in **Kimotho & Others V Vesters & Another [1988]KLR 48** the court stated:

“Companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state.”

139. The court further held that serious injury to any of the components that go to make consortium would seriously affect the others. This claim for loss of consortium can only be granted to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. A plaintiff who has himself suffered any injuries and as a result is unable to perform his marital duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium.

140. In this case, the plaintiff also testified that he was unmarried at the material time of the accident hence he cannot be awarded damages for loss of consortium as he was unmarried. Accordingly, that claim is declined.

141. The plaintiff also prayed for loss of expectation of life. This is a claim that is available under the Fatal Accidents Act. Courts ordinarily give global sums under the head in claims where the injured has died. The award is given to the deceased’s family or dependants, for the sudden death of the deceased thus frustrating the legitimate expectation of his family that fully depended on him for their livelihood and needs.

142. In this case, the injured person is the plaintiff. He is alive. Accordingly, that claim for damages for loss of expectation of life is not available to him. The claim is therefore declined and dismissed.

143. On the claim for pain, suffering and loss of amenities, the rationale behind this award of damages is explained in Halsbury’s Laws of England 4th Edition, VOL 12(1) page 348 paragraph 883 that:

“Pain and suffering: Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of, and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff’s condition may deteriorate.”

144. It follows, therefore, that the award for pain and suffering is intended to compensate the plaintiff for the anguish he has suffered or endured as a result of the accident, whether physical or mental. It is

therefore important and relevant that the plaintiff is aware of his suffering and hence, one who is in comatose form may not be awarded damages under this head.

145. In the instant case, the plaintiff's injuries as pleaded and as enumerated in court by the plaintiff and his Doctor Wokabi were debilitating. He was hospitalized for quite a long time 1½ months and had to undergo a great deal of pain and suffering. He cannot walk or stand, he is confined in a wheel chair with no feelings in the lower part of the body, he has loose stool, he uses napkins/diapers and catheter, he suffers from bed sores which are painful. He feels embarrassed as he has to be assisted by his parents. He also stated that he was unmarried and now he cannot marry because of low libido and that he was emotionally and traumatically affected by the injuries. The plaintiff is a total paraplegic who will never walk again, according to Dr. Wokabi, and there is no contrary medical opinion.

146. Taking all the above into account and the authorities cited by both the plaintiff's counsel and the 2nd defendant's counsel, and while I find that the plaintiff's counsel's proposed damages of shs 15,000,000 are too high, on the other hand, I find that the defendant's counsel's proposal of shs 1,000,000 is too low bearing in mind the serious injuries sustained, the resultant effect, inflationary trends and time lapse from the time the awards in the cited authorities were decided. Accordingly, I award the plaintiff a sum of Kshs 3,500,000 three million five hundred thousand Kenya shillings only damages for pain, suffering and loss of amenities.

147. On the claim for loss of earning capacity, the plaintiff pleaded for damages for loss of earning capacity but in the submissions, his counsel prayed for damages for loss of earnings, albeit the latter was also pleaded separately as loss of earnings from 23rd February 2010 to the date of judgment at shs 16,000 per month.

148. The defendant's counsel on the other hand submitted that the plaintiff is only entitled to shs 50,000 made up of shs 5,000 x 10 = 50,000 as a minimum wage. The plaintiff prayed for shs 2,280,000 for loss of earnings and shs 4,000,000 for loss of earning capacity.

149. In my view, both parties' advocates appear to have been confused and mixed up on how the two heads are calculated. As such, it is therefore important to lay bare the principles applicable in both heads.

150. The claim for loss of earning capacity is a general damages claim as such it is deemed to flow directly from the claim and need to be pleaded. In **Mumias Sugar Company Ltd vs Francis Wanalo [2007]e KLR**, Bosire, O'Kubasu and Githinji JJA stated:

“ The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market; while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

151. In **Butler V Butler [1984] KLR 225 at 232** Kneller JA stated:

*“ Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in **Fairely V John Thompson (Design & Contracting Division)Ltd[1973]2Lloyd's Rep 40,42(CA)**.....Compensation for loss of future earnings is awarded for real assessable loss*

proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

152. Chesoni JA in the same **Butler v Butler** (supra) case stated:

“What a victim whose earning capacity is diminished through an accident loses is an interest which if not sellable in the labour market, has an assessable value. It is therefore, an economic loss of the same class as the “lost years” for which the wrongdoer should fairly compensate the victim”(P. 235) Nyarangi JA echoed the same view of Chesoni JA and stated :

“ I would liken loss of earning capacity to the doctrine of “lost years” whereby a victim, whose capacity us lessened by the negligence of the defendant, is entitled to be compensated for the “lost years” In my judgment, is the decision in the Picket V British Rail Engineering Ltd [1979] 1 ALL ER 774 and Civil Appeal No. 66 of 1982 that is Mariga v Musila (1982-88) 1 KAR 507 provide clear authority for separate compensation for loss of earning capacity which, as I have already observed, is a kin to the loss of the whole period for which a person has been deprived his ability to earn.” Page 237.

153. From the above decision, it is clear that loss of earning capacity is a general damage and once pleaded, the court in assessing what damages to award does so, irrespective of whether the plaintiff was in a salaried employment before the injury or not. The factors to be considered in awarding damages for loss of earning capacity vary with the circumstances of each case. They include the age of the plaintiff, his qualifications, his remaining length of working life, his disabilities, previous service, if any among others.

154. In the instant case, the plaintiff was 36 years at the time of the accident. He was working as a security guard employed by PW3, earning a sum of shs 10,000/- per month. He also stated that he kept chicken for commercial purposes and earned shs 10,000 per month which he could now not do, due to the debilitating injuries. He now relies on his parents for support. PW3 confirmed that he had employed the plaintiff as a home caretaker and paid him shs 10,000 per month.

155. Although the defendant’s counsel took issue with the plaintiff’s pleading and testimony that he was a home caretaker, my judgment is that most home caretakers consider themselves as security guards. Furthermore, the defence counsel did not question the plaintiff in that aspect as to whether being a home caretaker and security guard were different or one and the same person doing the same job. The defendant has not provided any material distinction between a home caretaker and a security guard. It therefore follows that the plaintiff’s claim cannot fail solely on that ground alone as it is only but an issue of use of terminologies which should not deny the plaintiff what he is by law entitled to and particularly when the claim is a general damage and not a special damage as was submitted by the defence counsel.

156. Therefore, taking into account the age of the plaintiff at the time of the accident, his employment with PW3 at shs 10,000/- per month, his disability which is permanent at 100% and the fact that in Kenya the retirement age of majority of the workers is 60 years, and taking into account the vicissitudes of life that could cut short his life, I am of the view that the plaintiff is entitled to the following : Kshs 10,000 x 12 x 15 years = 1,800,000. The plaintiff asked for a multiplier of 15 years which i find reasonable in the circumstances of this case.

157. Although the defendant’s counsel proposed a minimum wage of shs 5000/- x 10 = 50,000, what she did not take into account is that the plaintiff called his former employer PW3 who testified and his evidence on what he used to pay the plaintiff was not controverted.

158. In addition, minimum wage can only be used where one’s actual earnings cannot be ascertained unlike in this case.

159. Also, even going by 5000 per month as suggested by the defence counsel without laying any basis for such a proposition, one has to multiply 5,000 by 12 months in a year and multiply it by the number of years the plaintiff would have been expected to work until retirement, which the defence counsel did not

take into account otherwise her figures would come to Kshs 5,000 x 12 x 10 = 600,000.

160. As earlier stated, both parties' advocates confused the damages for loss of earning capacity and loss of earnings and even interchanged them. I have set out the differences in the two types of damages as settled by the authorities that I have cited above. Thus, whereas loss of earning capacity is a general damage, loss of earnings is a special damage which must be specifically pleaded. In this case, the plaintiff pleaded and proved that he earned shs 10,000 per month as a home caretaker/security guard for PW3. He also proved that the injuries that he sustained are so debilitating that he will never walk again and that he will forever be dependent on others. In my view the approximate financial loss that the plaintiff has suffered as a result of the disability is equivalent to the number of years he would be expected to be in active employment multiplied by the earnings that he was receiving which I find to be proved, shs 10,000 x 12 x 15 years, taking into account the uncertainties of life that would have cut short his life such that he may not have worked until 60 years. This brings the figure for loss of earnings to Kshs. 1,800,000.

161. The plaintiff also pleaded in his amended plaint, special damages of shs 890,557 made up of:

a) A helper on a salary minimum wage of shs 10,000 per month.

b) Wheel chair shs 50,000 after every 3 years.

c) Special ripple mattress -30,000.

d) Diapers weekly for 5 years 500.

e) Hospital bill to date shs 680,557.

162. The doctor's medical report and testimony in court corroborated the plaintiff's evidence that owing to the plaintiff's paraplegic state, he will require the above items among others. The plaintiff's counsel in her submissions sought for more special damages which were pleaded though not contained in the summary of special damages. These include the cost of catheter to drain urine from bladder at a 3 monthly cost of shs 2,000 per session. I disallow it for want of proof.

163. The plaintiff pleaded that he needed a helper and Dr. Wokabi supported that proposal for a paraplegic person since his parents cannot be available all the time.

164. In the premises, I find that a claim of shs 10,000 per month x12 months x 15 years being the cost of a helper is reasonable which totals Kshs. 1,800,000.

165. There was also no contrary view that a wheel chair for a paraplegic at shs 50,000 every 3 years for the rest of his life as pleaded is necessary hence a sum of shs 300,000 will be sufficient for 15 years which I award the plaintiff.

166. The claim for a special ripple mattress as pleaded at shs 30,000/- is also reasonable. I award the plaintiff that sum of shs 30,000.

167. Diapers weekly at shs 500/- for 5 years is also reasonable for the plaintiff. It was pleaded. This translates into 500 x 52 weeks x 5 = 120,000. The plaintiff testified that he still uses diapers = 500 x 4 weeks x 12 x 5 = 2,000 monthly x 12 months x 5 years. Total Kshs. 120,000.

168. I note that the plaintiff's calculations do not add up the figures pleaded and stated in the medical report. On the claim for hospital bills the sum of shs 680,557 was pleaded. Special damages of this nature must not only be pleaded but strictly proved. There is evidence that following the accident, the plaintiff was taken to Thika Level 5 Hospital where he was attended to and transferred to Kenyatta National Hospital. He was admitted for 1½ months and relocated to the Spinal Injury Hospital. He produced medical chits and discharge summaries from those hospitals which are public hospitals. He also produced several receipts as exhibits in bundles as PEx 8 and PEx 9 together with PEx 10 a certificate of clearance

of medical bills from Kenyatta National Hospital . All the receipts produced including those for purchase of drugs all add up to a sum of shs 550,965 excluding invoices which are not receipts. I exclude invoices and award the plaintiff a sum of Kshs 550,965 special damages being cost of medical hospital bills settled.

169. The doctor's court attendance charges which the plaintiff urged the court to grant him are a cost of the suit being a witness expense and not a special damage. I decline to award it.

170. In the end, I enter judgment for the plaintiff **EDWARD MUNGAI WAWERU** against the defendant **KIMANI MARY** on liability at 100%.

171. I award the damages summarized as follows:

Summary of damages:

- 1) Pain and suffering and loss of amenities shs 3,500,000
- 2) Loss of earning capacity shs 1,800,000
- 3) Loss of future earnings shs 1,800,000
- 4) Cost of helper shs 1,800,000
- 5) Wheel chair shs 300,000
- 6) Special ripple mattress 30,000
- 7) Diapers shs 120,000
- 8) Medical expenses 550,965

Total shs damagesKshs. 9,900,965

172. I further award the plaintiff costs of the suit plus interest at court rates on special damages except on loss of earnings and loss of earning capacity, from date of filing suit until payment in full and on general damages from the date of this judgment until payment in full.

Dated, signed and delivered in open Court at Nairobi this 7th day of March 2017.

R.E. ABURILI

JUDGE

In the presence of:

CA: George

Miss Karanja for the defendant

Mr Kasim h/b for Mrs. Waiganjo for the plaintiff