



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 319 OF 2013

JOHN KIBICHO THIRIMA.PLAINTIFF

VERSUS

EMMANUEL PARSMEI MKOITIKODEFENDANT

JUDGMENT

1. By a plaint dated 7th August 2013 and amended on 26th August 2013 with leave of court, the plaintiff John Kibicho Thirima sued the defendant Emmanuel Parsimei Mkoitiko claiming for general damages, special damages, costs of the suit, interest and any other relief that the court may deem fit to grant.
2. The plaintiff's claim against the defendant arises from an alleged road accident which occurred on or about the 2nd day of November 2012 along Githigoro – Kiambu by-pass road involving the plaintiff and the defendant's motor vehicle registration No. KBJ 090X Mitsubishi saloon.
3. According to the plaintiff's plaint, he was a lawful passenger in the said motor vehicle which was being driven by the defendant when, due to the negligence and or recklessness of the defendant, the said motor vehicle lost control and violently collided with motor vehicles KBM 410Y, KBN 538R, KAX 419 and KWX 494 thereby seriously injuring the plaintiff.
4. The defendant filed a defence on 22nd August 2013 dated the same day denying all the allegations leveled against him by the plaintiff and attributing the occurrence of the said accident to the negligence of the plaintiff and the drivers of motor vehicles registration No. KBM 410Y, KBN 538R, KAX 419 and KWX 494.
5. The defendant intimated in the said defence that he would seek leave of court to enjoin the drivers of the said named motor vehicles to the suit as 3rd parties. He denied that the plaintiff suffered any damages, injuries or loss as a result of the alleged accident and sought for dismissal of the plaintiff's suit against him with costs.
6. On 26th August 2013 the plaintiff filed reply to the defendant's defence, reiterating the contents of the plaint and denying each and every allegation of negligence attributed to him and or third parties as alleged in paragraph 5 of the defence.
7. The parties complied with the pre trial requirement under Order 11 of the Civil Procedure Rules and filed issues, statements of witnesses, and pre trial questionnaires.

8. The plaintiff testified as PW1 on 22nd February 2016 and stated that he lived in Thika. He relied on his witness statement filed on 7th August 2013 as his evidence in chief which statement was adopted by the court.
9. The plaintiff testified that he was a student at St Paul's University at the material time of the accident but that he was now a pastor. That he also used to be a businessman in books and stationery as per his cash sales receipts filed in court and produced as exhibits. That he was a passenger in the defendant's motor vehicle KBJ 090X coming from the university at midday as they were fellow students at the St Paul's University with the defendant and that the defendant was to drop the plaintiff at Thika, using the Limuru Road.
10. That the defendant who was the driver of the accident motor vehicle was over speeding as he was driving between 120 kilometers per hour and 130 kilometers per hour and that the plaintiff had warned the defendant about the over speeding since the defendant had a challenge in his eye sight even in class during lectures and that he even wore glasses and that on the material day, he told the plaintiff that his glasses had broken.
11. That while driving, the defendant tried to overtake another motor vehicle at a bridge and in the process, he collided with another oncoming vehicle and caused a pile up of accidents involving other motor vehicles.
12. The plaintiff further testified that the defendant was later charged with a traffic offence at City Court and that the hearing of the said traffic case was yet to take place although the plaintiff had been bonded to attend court.
13. The plaintiff denied that the defendant was driving between 60-70 kilometers per hour. That he sat behind the driver so he was able to see the speedometer and that he had a seat belt on throughout from the moment he boarded the vehicle from St Paul's University.
14. The plaintiff further testified that the defendant driver was trying to overtake at a bridge and that the oncoming motor vehicle had no other way and that the road was busy. The plaintiff was injured as a result of the said accident and was admitted and treated at the Aga Khan Hospital and was later examined by Dr Theophilus Wangata on his injuries who also prepared for the plaintiff a medical report. The injuries that he allegedly sustained involved:
- a) Multiple fractures of ribs of the 2nd to 5th ribs of the chest.
 - b) Fracture of the right ulna bone.
 - c) Displaced and comminuted fracture of the right mandible.
 - d) Fracture of right superior and inferior pubic ramus of the pelvis bone.
 - e) Fracture of the left scapula .
 - f) Fracture of left superior pubic ramus of the pubic bone .
 - g) Multiple lacerations and cut wounds on the right forearm and both legs.
 - h) Cut wounds on the head.
 - i) Contusion of the chest.
 - j) Blood loss, physical and psychological pains.

15. The plaintiff further stated that he underwent surgery and implants for his hand and jaw and was still attending clinics and physiotherapy. That he was unable to walk well and that due to the heavy medical bills, he was unable to continue with his book store business hence he had to close down. He prayed for general damages and special damages totaling shs 876,656 for:

a) Search at KRA... shs 500

b) Treatment kshs 871,156

c) Medical report kshs 5000

16. And the plaintiff further claimed for shs 250,000 being the cost of future treatment for surgery to remove the implants in the jaw and right hand. He also prayed for costs of the suit and interest. The plaintiff produced his documents as exhibits which included:

1) Demand letter dated 22nd April 2013 as P Ex 1.

2) Copy of search for motor vehicle KBJ 090X Mitsubishi Saloon & Official receipt as P ex 2.

3) Original and copies of treatment notes and discharge summaries from Aga Khan Hospital P ex 3.

4) P3 form dated 6th February 2013 as PEx 4.

5) Medical invoices and receipts from Aga Khan Hospital and Family Dental and Maxillofacial Clinic as P Ex 6.

6) Notice of institution of suit to Cannon Assurance Company Ltd dated 22nd April 2013 and served on 24th April 2013 as Pex 10.

7) Other documents were marked for identification to be produced by the police. These include police abstract, charge sheet and Dr Theophilus Wangata's medical report.

17. In cross examination by Miss Nyanjui counsel for the defendant, the plaintiff responded that he was given a lift by the defendant and that the defendant had eye sight problems. That the plaintiff did not know that the defendant was not wearing his eye glasses until after he entered into the motor vehicle and as he drove off.

18. That after the accident, he lost consciousness and was admitted in the intensive care unit. That he saw the vehicles ahead coming from the opposite direction as the defendant overtook another motor vehicle at a bridge then he heard a bang and lost consciousness. That there were 4 passengers in the said motor vehicle and that the other passengers sustained even more serious injuries than the plaintiff. Further, that the defendant too sustained very serious injuries and was also admitted at the Aga Khan Hospital where the plaintiff was hospitalized.

19. The plaintiff maintained that he had his seat belt fastened and denied that he was thrown out of the motor vehicle following the accident. He also stated that he was operated on twice to fix the implants and that he was admitted in hospital for 21 days undergoing physiotherapy and other treatments. He stated that he paid for his medical expenses and with the help of his relatives and friends and also borrowed some money while the university paid shs 100,000 under the medical insurance cover. He also stated that he co-owned the book store business with his wife.

20. The plaintiff further stated that he finished attending his classes at midday daily and would join his wife for the business, as per his sales receipts produced as exhibits, but that following the serious injuries sustained, his wife had to close the business and attend to him for 24 hours. Further, that he had to use his savings for specialized treatment and physiotherapy.

21. The plaintiff also stated that he disagreed with Dr PR Shah's medical report. That he lost one teeth, he could not open his jaws as he had implants therein, he could not stand for long or eat hard foods as his right jaw (lower part) was fractured as a result of the accident and that he had difficulties walking.

22. In re-examination by Miss Obaga, the plaintiff stated that before he got into the defendant's car, he did not know that he would be involved in an accident and that he had not fully recovered from the injuries sustained. That he had difficulties chewing food and that Dr Shah's prognosis was not true since the plaintiff still had implants which caused him discomfort and that on average, he used to earn shs 50,000 from his bookshop sales.

23. The plaintiff called PW2 Dr Theophilus Wangata a General Medical Practitioner who had examined him on 4th April 2013 following the road accident. The doctor produced the medical report as exhibit 7 and a receipt for shs 5000/- exhibit 8 and confirmed that he had been paid shs 15,000/- for court attendance whose receipt he produced as P exhibit 12. According to Dr Wangata, he examined the plaintiff on 4th April 2013 and found that the plaintiff sustained serious injuries involving multiple fractures of ribs, right hand, pelvis, jaw bone, scapular(shoulder blade) and had to undergo multiple surgeries and metal plates inserted in the fractured areas which will require future surgeries to remove the same.

24. The doctor also confirmed that the injuries sustained by the plaintiff were as per the medical chits from the hospitals where the plaintiff was treated and that the accident effects were as per his medical report. He confirmed that the plaintiff will require between shs 250,000/- 300,000/- for removal of the implants and that the plaintiff suffered permanent incapacity of 55%.

25. In cross examination Miss Nyanjui, the Doctor stated that he was a general practitioner and that he prepared the plaintiff's medial report after taking his history, examining the medical documents that he had and examining him physically. He denied carrying out any xrays on the plaintiff but confirmed that the plaintiff underwent multiple surgeries.

26. Further, that a tube was inserted in the plaintiff's chest while other fractures in the ribs, pelvis and left scapular were managed conservatively. That when he saw the plaintiff, he was limping on the leg. That the plaintiff had simple fracture not compound fracture. He also stated that healing of the jaw depends on the type of injury and how it takes for removal of implants which is between 1½ - 2 years and that some incapacity still remains. Dr Wangata stated that he examined the plaintiff 5 months after the accident and that albeit he expected some improvements, but with metal implants still insitu, he did not expect significant changes. Further, that physiotherapy helps the movement of joints and not the healing of the bones. He stated that pelvis fractures cause shortening of the limb. That the right hand on examination had weak muscles less by 10%.

27. Dr Wangata stated that he disagreed with Dr R.P. Shah's medical report because the doctor ignored certain facts such as malocclusion of teeth, palpable metal implants in the lower jaw which could not make one eat well and that although the plaintiff could talk, but that he would have problems eating well. That the surgery was to align his jaw.

28. Further that Dr Shah's recommendations did not identify each injury and the problems that each fracture and implants posed to the plaintiff. That although he expected the plaintiff to lift a Bible, he could not lift a 20 litre jerrican with water by his right hand.

29. In re examination by Miss Obaga, the witness stated that on medical examination of the patient – it was not a must that he does an xray. He also explained that permanent means a person having problems related to the accident particularly fractures or serious injuries even after 20 years.

30. The plaintiff also called PC No. 45751 PC Justus Chimbero who testified as PW 3. The police officer was stationed at Parklands Police Station. He testified and produced copy of Occurrence Book abstract , police abstract and charge sheet in the Traffic case file No. 7839/2013. The police officer

testified that according to their police records, on 2nd November 2012 a serious injury accident occurred at about 1.00pm along Githogoro – Kiambu Road which is a bypass, involving 4 motor vehicles namely, KBJ 090X, KBN 410Y, KBN 538R and KAX 491K and another motor vehicle which was stationary on the road was mentioned namely KWX 494.

31. That from the initial investigations report, the accident was caused by KWX 494 a lorry which was stationary on the road and without life savers but that later it was found that that vehicle was not part of the accident motor vehicles. That after completion of the investigations, on 24th May 2013 the driver of motor vehicle KBJ 090X was found to be the cause of the accident and was charged in court with careless driving contrary to section 49 of the Traffic Act, although the witness stated that due to limited time, he was unable to retrieve results of the traffic case.

32. PW3 stated that the driver of the said motor vehicle was called Emanuel Mkoitiko and the traffic case file was Traffic 7839/2013 before Milimani Traffic Court.

33. PW3 confirmed that the plaintiff herein was a passenger in the accident motor vehicle and that the police had issued him with a police abstract on 15th March 2013 which he produced in evidence as P ex 5. He also produced OB extract as PEX 11 and copy of charge sheet in the traffic case as PEX 12.

34. On being cross examined by Miss Nyanjui counsel for the defendant, PW3 stated that he was not the investigating officer in the accident case. That although motor vehicle KWX 494 was mentioned as causing obstruction, but that investigations revealed that the said motor vehicle was never involved in the accident and that as at 15th March 2013 the investigations were not complete. He maintained that the driver of the accident motor vehicle was found to blame that is why he was charged with a traffic offence in court, after investigations were completed, although he did not know the outcome of the traffic proceedings.

35. In re-examination by Miss Obaga, the witness stated that it was after investigations were completed is when the driver of the KBJ 090X was charged in court and that the OB report gives particulars of the vehicles involved in the accident. He stated that the driver of KWX 494 was never charged with any offence. He stated that he had been a traffic police officer for 32 years and that he had experience in traffic investigations.

36. At the close of the plaintiff's case, the defendant testified as DW1 and relied on his witness statement dated 28th October 2013 filed in court on 31st October 2013 which he adopted as his evidence in chief.

37. The defendant denied ever having any problem with his eyesight during the day. He denied that he was overtaking another motor vehicle when the accident occurred. He stated that as he drove along the road a car which was in front of him abruptly stopped so he swerved to the right and an accident happened. He blamed the driver of the lorry KWX 494 who had parked the lorry dangerously on the road.

38. In his detailed statement filed on 31st October 2013 the defendant stated that he was the registered owner of the accident motor vehicle KBJ 090X Mitsubishi Lancer Saloon car and that on 2nd November 2012 at 1.00pm he was driving the said motor vehicle along the new by pass from Ruaka heading towards Kiambu road junction, carrying 4 passengers one of them being the plaintiff herein John Kibicho Thirima who had requested to be given a lift.

39. That the traffic flow was low and that he was driving behind motor vehicle KAX 419K at a speed of about 60-70 kilometers per hour and that suddenly, and unexpectedly, the motor vehicle ahead of him stopped and in a bid to avoid ramming into it, and in the impulse of the moment, the defendant swerved to the right hand side of the road because there were rails on the left hand side of the road. That it was at that point that his motor vehicle collided with motor vehicle KBN

538R which was speeding from the opposite direction. That the impact was concentrated on the front side of the car but because he had seat belts on, he sustained relatively minor injuries. That two other passengers, one on the co-driver's seat and the one behind him on the left side had seat belts fastened hence they sustained minor injuries. However, that the plaintiff who was seated at the rear had not fastened his seat belt on hence he was thrown out of the vehicle following the impact of the accident.

40. That he later discovered that motor vehicle KAX 419K abruptly stopped because of a stationary lorry KWX 494 which was dangerously parked on the road without abiding by the necessary safety requirements such as setting up of life savers hence he blamed that lorry KWX 494 driver for dangerously parking on the road without giving other road users prior notice. That he also blamed the plaintiff for failing to fasten his seat belt on.

41. On being cross examined by the plaintiff's counsel, Miss Obaga, the defendant stated that the accident occurred during the day. Further, that he was in specs because without them, he could have a problem. He however denied that he had an eye sight problem during the night or day time. He denied a suggestion that on the day of accident, he was not wearing his eye glasses. He also conceded that he knew that he was expected to keep distance between his vehicle and the vehicle ahead of him. He stated that he kept some relative distance but that it was too late and that he nonetheless never hit the motor vehicle ahead of him since he swerved into another lane. He conceded that he was charged with a traffic offence and that the case was still ongoing with the next hearing date being 15th September 2016.

42. The defendant maintained that on impact, the plaintiff was thrown out of the car so he could not have been wearing a seat belt. He maintained that the driver of the lorry KWX 494 was to blame for the accident. He however conceded that the said driver was not a party to this case. The defendant also rudely answered that he had not sued the driver of KBN 538R whom he had blamed in his written defence.

43. In re-examination by Miss Nyanjui, the defendant stated that he had been driving since 2006 and that he had used spectacles for 15 years. Further, that the traffic case was still ongoing and that when he recorded his statement with the police, the driver of the lorry had not been found. He also stated that it was not easy to notice an oncoming car. Further, that there were grills on the left side of the road that is why he swerved to the right side of the road and not to the left. The defendant further stated that it was his colleagues who informed him that the plaintiff was not wearing the seat belt.

44. At the close of the defence case on 5th September 2016, the parties agreed to file submissions within 21 days but as at 4th October 2016 no such submissions had been filed. The court extended the period for a further 14 days.

45. The plaintiff's counsel filed submissions on 14th October 2016. The defendant's counsel filed submissions on 17th October, 2016 but were not placed in the court file until a few days to the delivery of the judgment. The court has nonetheless considered those submissions in this judgment.

46. In the plaintiff's submissions supported by authorities, it was submitted that on liability, the defendant should be held 100% liable for the accident and the resultant injuries sustained by the plaintiff because the defendant was driving at a high speed in the circumstances and that despite having been warned of that high speed by the plaintiff, he continued driving at a high speed even when it was clear that he could not see properly as he was not wearing spectacles and that as a result, he failed to slow down when approaching vehicles ahead and swerved into the way of an oncoming vehicle thereby colliding head on.

47. It was further submitted that the police who investigated the accident clearly found the defendant to be at fault that is why they charged him with a traffic offence of careless driving vide traffic case No. 7839 of 2013. It was also submitted that the plaintiff's evidence was never

controverted.

48. Further, that although the defendant in his defence blamed the plaintiff for not wearing a seat belt and also blamed the driver of other motor vehicles named in paragraph 5 of the written statement of defence, he did not enjoin them to the case as third parties as stipulated in Order 1 Rule 15 of the Civil Procedure Rules, 2010. Further, that the plaintiff being a mere passenger, he had no control of the motor vehicles hence he had proved his case against the defendant on a balance of probabilities.

49. On quantum of damages, the plaintiff's counsel submitted that based on the plaintiff's testimony, documents which included hospital treatment notes and Dr Wangata's medical report and testimony in court, the plaintiff sustained very serious injuries which he also pleaded in his plaint and as shown by residual injuries/effects for which he should be paid damages. Reliance was placed on **Peace Kemuma Nyangera V Michael Thuo & Waiganjo Janet [2014] e KLR** where the plaintiff sustained multiple fractures of the sacrum bone, right superior pubic ramus and right ischium inferior bone with multiple soft tissue injuries, she was awarded kshs 2,500,000 general damages for pain, suffering and loss of amenities. Further reliance was placed on **Joseph Kahinda Maina V Evans Kamau Mwaura Ngugi Njenga & Habib Gulam Janet [2014] e KLR** where the plaintiff sustained fractures including fractures of the pelvis, mandible, acetabulum roof of the left hip and other soft tissue injuries, the court awarded him kshs 2,400,000 general damages for pain, suffering and loss of amenities; and **Florence Hare Mkaha V Tawakal Mini Coach & Mohammed Athman [2012] e KLR** where the court awarded shs 2,500,000 for fractures of the iliac crest, fracture of the acetabulum roof and superior ramus on the left pubic and other soft tissue injuries. He was awarded shs 1751904 for loss of earnings. She was aged 43 years.

50. It was submitted that considering that the plaintiff herein sustained more serious injuries he should be awarded kshs 3,500, 000 general damages for pain and suffering.

51. The plaintiff also claimed for loss of earnings in that he suffered 35 % incapacity and he could not continue with his book store business where he earned shs 50,000 per month and that he was aged 39 years hence he should be awarded shs 50,000 per month x 20 years to retirement at age 60 years x 35/100 permanent incapacity= 4,200,000. Reliance was placed on **Butler V Butler [1984] KLR** in calculating loss of earning capacity.

52. The plaintiff also prayed for special damages of shs 876.656.00 as pleaded and proven by receipts. He also prayed for damages for future medical expenses amounting to shs 250,000 to cater for surgery to remove the metal implants as confirmed by Dr Wangata. In total, the plaintiff prayed for judgment against the defendant on liability at 100% and damages amounting to shs 8,826,656 made up as follows:

a) Pain and suffering	shs 3,500,000
b) Loss of earning capacity	shs <u>4,200,000</u>
	<u>Shs 7,700,000</u>
c) Specials	876,656
d) Future medical expenses	<u>250,000- 300,000</u>
	<u>8,826,656</u>

e) Costs and interest at court rates.

53. In the defendants' submissions, his counsel set out the background and evidence adduced in the case. On liability, it was submitted that the plaintiff had not proved his case on a balance of probabilities that the defendant was negligent since the plaintiff and PW3 could not place the vehicles that were involved

in the accident at the scene of the accident as to which car hit which since there many vehicles involved in the material accident. Further, that according to the defendant, it was the car ahead of him KAX 419X which stopped suddenly and in his attempt to avoid ramming into it swerved to the right as there was a bridge to the left side and he collided with KBN 538R which was coming from the opposite direction resulting to the accident.

54. According to the defendant, KWX 494 was to blame for the accident because it had parked dangerously on the road without any warning signs and tat this evidence is corroborated by the report in the entry in the Occurrence Book read out to the court by PW3.

55. It was further submitted that PW3 not being the officer who investigated the case could not even explain why the defendant was charged in court with the traffic offence and not the driver of the Lorry KWX 494 initially entered in the OB as having been responsible for the accident. Further, that in any case, the defendant was only charged with colliding with KBN 538R and not with other vehicles that were involved in the material accident. In addition, that in any case the traffic case was still ongoing.

56. The defendant also submitted that the plaintiff was to blame for the injuries he sustained for failure to wear his seatbelt for his protection and that he was the only one who never wore a seat belt out of all the other passengers.

57. It was further submitted that the plaintiff does not fall under persons entitled to compensation under the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya as he was not fare paying passenger in the defendant's vehicle but that he had taken a lift from St Paul's University to Thika Road thus he is not entitled to compensation.

58. The defendant's counsel urged the court to dismiss the plaintiff's suit with costs.

59. On quantum of damages, the defendant's counsel submitted that should this court nonetheless find the defendant liable then the plaintiff should bear the largest percentage of liability and submitted that on the injuries allegedly sustained by the plaintiff as pleaded, there is no mention of injury involving fracture of the superior ramus of the left pubic bone on the discharge summary issued at Aga Khan Hospital as produced by the plaintiff, yet this is the hospital that operated on him and inserted an implant in the right ulna and the right lower mandible.

60. It was also submitted that in any case, PW2 testified that the plaintiff's injuries were conservatively managed and that the total permanent incapacity was 35%. Further, that the plaintiff had not sought any other treatment elsewhere hence an award of Kshs 1,000,000 would be sufficient damages based on the decisions in : **Auto Selection Ltd & Another v Charity Wanja Kagiri[2015] eKLR** where Nyamweya J on appeal upheld an award of Ksh 800,000 awarded by the trial court for injuries involving fracture of the lower man dibble, fracture of the ribs left side, fracture of the pelvic bone and multiple soft tissue injuries. Further reliance was placed on the case of **Joseph Musee Mua v Julius Mbogo Mugi&3 others[2013]eKLR** where Dulu J awarded Kshs 1,300,000 for injuries involving left leg, head, and face, fractured left leg tibia and fibula, two broken upper jaw teeth one molar and one canine tooth, chest injury, right shoulder injury as well as bruises on the left elbow and had 5% incapacity.

61. The defence counsel urged the court to find that the injuries sustained by the plaintiff are similar to the ones sustained by plaintiffs in the above two cited cases and award a sum of Kshs 1 million as damages being adequate compensation.

62. On special damages, it was submitted that out of Ksh 876,656 pleaded, only Kshs 876,156 was proved and that fees for search at KRA is Kshs 500 and not Kshs 2000 pleaded.

63. on the plea for future medical expenses it was sub mitted that Kshs 250,000 can be awarded for operation to remove the implants.

64. On the claim for loss of earnings and loss of earning capacity reliance was placed on the case of

Henry Moriasi Osiemo v Quid J Mohammed & Merali Mfadhul [2001] eKLR where it was held that one must specifically plead loss of earnings and prove it as it is a special damage, in this case, it was submitted that although Kshs 50,000 were pleaded, and cash sale receipts produced in evidence, there was no evidence that the plaintiff used to draw Ksh 50,000 from the Bookstore sales. It was therefore submitted that the plaintiff had failed to prove the claim for loss of earnings and loss of earning capacity hence the claim should be dismissed. Further reliance was placed on the case of *Butler v Butler* [1984]KLR225 which case set out principles applicable in claims under the head of loss of earning capacity.

65. On the claim for loss of future earning and or diminished earning capacity reliance was placed on *Ndoro Kaka Kakondo v Slt Manufacturers [K]Ltd*[2016]Eklr and submission made that the plaintiff did not demonstrate how his ability to earn income was affected by the permanent disability since he testified that he was a pastor at PCEA Thika and that he could drive on his own. Further, that he did not even call his wife Irene Njoki Thirima to show that the plaintiff owned the Bookstore and that they had to close the Bookstore because of his long hospitalization for 2 weeks and that neither did the plaintiff produce any books of accounts or bank statements to show that he drew a salary of Kshs 50,000 from the said business. The only cash sale receipts for 2012 were produced. It was further submitted that no evidence was adduced to show that the bookstore was never reopened after the accident. The defendant's counsel therefore urged the court to dismiss the claim for loss of future earnings.

66. On the whole, the defendants' counsel urged the court to dismiss the plaintiff's suit in line with the submissions by the defence.

Determination

67. I have carefully considered the plaintiff's claim as per the amended plaint dated 26th August 2013, the defendant's defence dated 22nd August 2013, the evidence both oral and documentary adduced in court by the plaintiff and his two witnesses and the defendant's testimony and documentary evidence, I have given equal attention to the submissions filed by the plaintiff's counsels both on quantum and liability and the authorities relied on. As earlier indicated, as at the time of delivering this judgment, no submissions had been filed by the defendant's counsel despite the court granting them 14 days from 4th October, 2016.

68. Considering the plaintiff's issues dated 2nd October 2013 and filed in court on 3rd October 2013 and the defendant's issues for trial dated 28th October 2013 and filed in court on 31st October 2013, in my humble view, the issues that flow for determination by this court are:

- 1) Who was to blame for the undisputed accident which occurred on 2nd November 2012?
- 2) What injuries did the plaintiff sustain?
- 3) Was there contribution by the plaintiff?
- 4) What reliefs is the plaintiff entitled to?
- 5) What orders should the court make?
- 6) Who should bear the costs of this suit?

69. On the first question of who should be held liable for the material accident which occurred on 2nd November 2012, the plaintiff pleaded and testified that the accident was wholly caused by the defendant who was the owner and driver of motor vehicle registration No. KBJ 090X Mitsubishi Lancer Saloon car. The plaintiff particularized the following acts of negligence on the part of the defendant:

- a. *Driving at a speed which was excessive in the circumstances;*
- b. *Driving and or overtaking without due care and attention;*
- c. *Failure to exercise or maintain any sufficient or adequate control of the said motor vehicle;*
- d. *Causing and or permitting the said motor vehicle registration Nos KBM 410Y; KBN 538R; KX 419K and KWX 494;*
- e. *Failing to keep any or any proper look out or to have any sufficient regard for traffic that was or might reasonably be expected on the said road;*
- f. *Failing to stop or slow down, swerve or in any other way manage the said motor vehicle registration KBJ 090X to avoid the said accident. He also relied on the doctrine of Res Ipsa Loquitur.*

70. In his testimony in court, the plaintiff maintained that the defendant was negligent in the manner in which he drove the accident motor vehicle because he drove at a very high speed and that despite the plaintiff warning the defendant of such high speed, the defendant did not heed. Further, that the defendant was overtaking at a bridge as a result of which he met an oncoming motor vehicle head on. In addition, that the defendant's eyesight was not good yet he drove without spectacles and that the police after investigations charged the defendant with the offence of careless driving which case, as per the charge sheet produced in evidence, was still pending hearing and determination in Milimani Traffic Court.

71. The plaintiff's counsel further submitted that even though the defendant alleged in his defence that other third party motor vehicles were the ones to blame for the accident, he never enjoined them to this suit hence no liability could be split. Further, that the plaintiff as a passenger could not have contributed to the occurrence of the accident.

72. The defendant on the other hand pleaded and testified, conceding that indeed an accident did occur on the material date but denied that he was negligent in that he drove between 60-70 kilometers per hour and that the vehicle he was following stopped suddenly. The defendant was therefore forced to swerve to the right and it was then that he met another oncoming motor vehicle head on. He claimed that he later learnt that there was a lorry which was stationery and which had caused the motor vehicle ahead of him to slow down. The lorry had no sign of life saver to warn motorists that it was stationery.

73. The defendant blamed the plaintiff for:

- a. *Failing to fasten the safety belt;*
- b. *Failing to heed the warning of the driver to sit and fasten the safety belt and causing the accident.*

74. As against the driver of the other motor vehicles, the defendant claimed that they:

- a. *drove without proper care, attention and look out to other road users and especially to the defendant;*
- b. *driving the said motor vehicle into the path of motor vehicle KBJ 090X;*
- c. *failure to adhere to the Traffic Act and Highway Code ;*
- d. *Failure to heed to the warning given by the driver of motor vehicle registration No. KBJ 090X ;*

e. and failing to stop, slow down, swerve or otherwise control motor vehicle KBM 410Y; KBN 538R; KAX 419 and KWX 494 to avoid the said accident.

75. The defendant also pleaded that he would seek leave of court to enjoin the drivers of the named motor vehicles as parties to this suit. In his testimony, the defendant conceded that he never enjoined the said drivers as third parties to the suit herein.

76. It is trite law that he who alleges must prove. Under Section 107 of the Evidence Act,

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

77. Under Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

78. In the instant case, it was incumbent upon the plaintiff to prove to the required standard, on a balance of probabilities any of the particulars of negligent acts attributed to the defendant as pleaded, which would have been responsible for the material accident. The plaintiff was clear in his testimony which was not shaken during cross examination that he was seated behind the driver –defendant and that the driver was going very fast. That he cautioned the driver against over speeding but that warning was not heeded. That the driver while overtaking another motor vehicle ahead and at a bridge met an oncoming motor vehicle as a result of which there was a head on collision.

79. The defendant did not deny the occurrence of the accident. He however explained that while he was driving at 60-70 kilometers per hour he approached a vehicle which suddenly stopped and to avoid ramming into it, he swerved to the right because on the left there was a barrier on the left hence he encountered an oncoming motor vehicle. He later learnt from the scene of accident that motor vehicle KWX 494 had stalled without any warning signs and so the vehicle ahead of the defendant stopped suddenly and as the defendant was close to it, he had to swerve to the right to avoid ramming into it and that is when he learnt that there was another oncoming motor vehicle which he could not avoid hence a head on collision.

80. From the above evidence, it is clear that although the lorry KWX 494 may have stalled on the road and that there was a motor vehicle driving ahead of the defendant which stopped suddenly thereby causing the defendant to swerve to the right, it is clear to me that had the defendant kept the distance between him and the vehicle ahead of him and had the defendant been driving with due care and attention, he would have seen the vehicle ahead of him stop. He would also have slowed down on seeing the vehicle ahead of him stop abruptly.

81. The defendant does not even state that he applied emergency breaks in the circumstances. In my humble view, the defendant's driving fell short of or below the standard of a careful and competent driver which included, driving too close to the vehicle in front of him, and swerving onto the right side of the road without ensuring that there was no oncoming motor vehicle thereby causing a collision.

82. Although the defendant tended to blame the plaintiff for failing to fasten the seat belt, it is clear that fastening of a seat belt cannot prevent the occurrence of an accident. Neither can failure to fasten a seat belt be a cause of an accident. It can only mitigate the injuries. Nonetheless, there was no evidence that the plaintiff was thrown outside the motor vehicle after the accident or that he refused to wear a seat belt while seated in the defendant's motor vehicle.

83. The defendant also tended to blame the lorry driver and the drivers of the oncoming motor vehicles for the occurrence of the accident. However, the evidence on record as per the OB extract is

that although initially the police thought, on receiving the initial accident report, that the lorry driver must have caused obstruction, however, after completion of investigations, they discovered that it is the defendant who was careless in his driving and so they charged him with the traffic offence of careless driving.

84. According to the plaintiff's testimony, the accident occurred at a bridge. A careful and competent driver would, when approaching a bridge, drive carefully by slowing down whether or not there is another vehicle on site.

85. Further, a careful and attentive driver following another motor vehicle ahead would slow down and not attempt to swerve or overtake on or at a bridge. If the defendant did not even see the oncoming vehicles as he swerved to the right while avoiding to ram into the vehicle ahead of him, then, no doubt he was driving without due care and attention. Even by swerving to the right, he was only but jumping from the frying pan into the fire, a fact which he knew or ought to have known to be extremely dangerous.

86. The defendant was carrying 3 people in his vehicle, who included the plaintiff. He owed the passengers whom he had voluntarily carried in his vehicle, a duty of care, to take them safely to their respective destinations.

87. He breached that duty of care and as a result, an accident did occur, injuring the plaintiff seriously. I believe the plaintiff's testimony. I had occasion to see him testify and his demeanor did not show that he could have been lying as he testified that the defendant was over speeding and that he even cautioned him against over speeding.

88. In my humble view, had the defendant not been driving very fast in the circumstances, he would have slowed down on approaching the vehicle ahead of him or even apply emergency breaks and not to just swerve into oncoming motor vehicles. Albeit the charging of the defendant alone, in the absence of a conviction, would not amount to a presumption of guilt, nonetheless, an acquittal in the traffic case would not necessarily mean that on the available evidence, this court cannot make a finding of liability against the defendant, as the standard of proof in civil cases is on a balance of probabilities and lower than that which is required in criminal proceedings which is on beyond reasonable doubt.

89. It is for the above reasons that I find without hesitation that the plaintiff has proved, on a balance of probabilities that the defendant was driving without due and care.

90. Furthermore, albeit the defendant has attempted to claim that it is the plaintiff who was negligent, no evidence was adduced or lead to prove the negligent acts of the plaintiff that would have contributed to the occurrence of the accident.

91. And as earlier stated, failure to fasten a seat belt cannot cause an accident but fastening can only mitigate the injuries. Although the defendant pleaded that he warned the plaintiff and or that the plaintiff failed to heed the warning to fasten the seat belt, in his evidence on oath, he never mentioned that the plaintiff failed to heed the warning to fasten the seat belt. In addition, although the defendant claimed that all other passengers had their seat belts fastened except the plaintiff, and that the other passengers sustained minor injuries because they had their seat belts fastened, nonetheless, he never produced in court the medical reports for himself and the other car occupants to demonstrate that they sustained minor injuries as compared to the plaintiff's injuries, and or that those minor injuries are attributed to the fact of wearing seat belts; and that the plaintiff's serious injuries were attributed to the failure to fasten the seat belt.

92. Fastening a seat belt is a legal requirement and so if the defendant wanted this court to believe his testimony that indeed the plaintiff did not fasten the seat belt as they travelled, nothing prevented him from even calling any one of the other two of his passengers to corroborate his testimony.

93. Furthermore this court did observe the defendant when he was testifying in court and I noted him

to be very hostile when being questioned by the plaintiff's counsel. He appeared very rude and did not even want to answer questions until the court had to call upon him to decide whether he had chosen not to answer questions. The court noted that the defendant's answers in cross examination by Miss Obaga that the plaintiff was thrown out of the car so he could not have been wearing a seat belt were given very rudely.

94. In my view, it is not obvious that if one is not wearing a seat belt then they would be thrown out of the car on impact. There must be evidence to prove that fact which evidence is lacking in this case, and especially when it is the defendant who is alleging that the plaintiff refused to heed the warning to wear a seat belt; and does not call any evidence of the other car occupants to prove that fact or allegation.

95. The only inference I can make is that had the defendant called the other car occupants to testify on that aspect of his allegation of failure of the plaintiff to fasten the seatbelt, the witnesses would have given evidence that is adverse to the defendant.

96. The other aspect of the defendant's defence that I find not proved though pleaded is that the defendant claimed that the accident was caused by the driver of the stationary lorry and or all the other motor vehicles which were on the road at that particular time namely, KBM 410Y; KBN 538 R; KAX 419 and KWX 494. Yet, in all the particulars of negligence particularized against all the named motor vehicles, the defendant never attempted to adduce any evidence to prove how those motor vehicles were responsible for the material accident.

97. For example, the defendant in his own evidence conceded that he drove into the path of the oncoming vehicles hence, it is not clear how those oncoming vehicles drove into his path or how they failed to heed his warning, failing to stop, slow down, swerve or otherwise control their motor vehicles in order to avoid the said accident. The defendant did not even plead that the lorry driver was negligent by parking the lorry on the road without giving any warning signs.

98. The defendant admittedly, was following another motor vehicle ahead of him. I reiterate that it was therefore his duty to slow down as he approached that vehicle, and to keep a safe distance on the road between his vehicle and the vehicle ahead.

99. From his own testimony, it was too late for the defendant to stop when he reached the vehicle ahead of him and when he swerved to the right side of the road because the left side had barriers, he encountered an oncoming motor vehicle and there was a head on collision.

100. Further, although the defendant in his defence pleaded that he would seek leave of court to join the drivers of the other motor vehicles as parties to this suit, he never attempted to issue any third party notices to any of the named vehicle drivers or owners seeking for contribution as stipulated in the provision of Order 1 Rule 15 of the Civil Procedure Rules, 2010, which makes provision for notice to third parties and subsequent parties and the procedure for prosecuting claims against third parties, which was never followed in the instant case, to enable the court pass judgment against the third party.

101. I must however mention that although the plaintiff's counsel alluded to the defendant's poor sight that may have contributed to the accident, there was no medical evidence to prove that without using eye glasses, the defendant was unable to see the road well at that time of the day which was at 1.00pm.

102. In the end, I find that there was no prove that there was any liability or contribution to liability by any other party to the accident in question especially when the police, upon investigations found that not even the owner or driver of the stationary vehicle/lorry on the road had any role to play in the accident and that is why they chose to charge the defendant alone with the offence of careless driving.

103. The defendant has not adduced any evidence to displace the plaintiff's evidence which was never challenged even in cross examination and the defendant having alleged negligence of other persons and even having set out particulars of their negligence, it was upon him to adduce evidence to prove those particulars of negligence. See Section 107-109 of the Evidence Act. In this case, the defendant failed to prove negligence on the part of any other person.

104. In cross examination of the plaintiff and in her submissions, the defendant's counsel attempted to introduce a new issue which was neither pleaded by his client nor formed part of his testimony, that after all, the plaintiff was not a fare-paying passenger and that he had been given a lift by the defendant in the latter's motor vehicle when the material accident occurred.

105. With utmost respect, the plaintiff never claimed that he was a fare paying passenger in the accident motor vehicle. Secondly, he stated clearly that the defendant was his colleague at St Paul's University and there was no evidence that the defendant's motor vehicle was a public service vehicle wherein passengers would be expected to pay fare. Furthermore, there is no law that stipulates that for liability to attach, the vehicle must be a public service vehicle or that passengers must be fare paying in order for them to sue for damages.

106. In addition, the defendant never pleaded or testify that there was any prohibition for him as the owner of the accident motor vehicle, to carry any passengers in that vehicle. And if there was any such silent prohibition then the defendant undertook the risk personally by carrying passengers in his vehicle. He had the option to refuse to carry any passenger in his vehicle.

107. Accordingly, I find that the defendant's counsel's assertion on that aspect of the plaintiff not being a fare paying passenger was misplaced, as it was neither pleaded nor evidence led capable of rebuttal by the plaintiff.

108. Even if the assertion was to be availed through submissions, which, in this case, the court and the plaintiff had no occasion to consider before writing this judgment, trial by ambush through submissions is abhorred. Courts have over time held that submissions are not evidence however well choreographed they may be. And that answers in cross examination do not form a party's case.

109. In this case, the defence counsel filed his submissions on 2nd November, 2016 although the cash receipt shows that he paid for the filing on 17th November, 2016 which was long after the plaintiff had filed his submissions and raised a totally new defence of the plaintiff not being a fare paying passenger and therefore not being a third party within the meaning of Cap 405 Laws of Kenya.

110. In my humble view, that submission which in itself is a form of defence was never pleaded and even if it was, the plaintiff's evidence is clear that the defendant voluntarily carried the plaintiff and that the car was a private personal vehicle. There was no evidence that the plaintiff forced himself into the defendant's car. Further, it is upon the defendant, to carry the burden and risk of carrying the plaintiff and if he was breaching his insurance terms, the plaintiff cannot share in that blame and breach.

111. The Court of Appeal in considering whether a party can rely on unpleaded issue stated in **IEBC & Another V Stephen Mutinda Mule & 3 Others [2014] e KLR** as follows:

“The decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu [1998] MW SC,3 in which the learned Judges quoted with approval from an article by Jack Jacob entitled “The present importance of pleadings.

112. The Malawi decision was published in [1960] **Current Legal Problems**, at page 174 whereof the author had stated:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case

without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculations.

Moreover, in such event, the parties themselves or at any rate one of them might well feel aggrieved; for a decision given on a claim of defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....”

“In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item: “Any other business in the sense that points other than those specific may be raised without notice.”

113. In **Liyan Arab Uganda Bank for Foreign Trade and Development & Another V Adam Vassiliadis [1986] UG CA 6 A Odoki JA** cited with approval the dictum of Lord Denning in **Jones V National Coal Board [1957] 2 QB 55**, where it was held that:

“ In the system of trial which we have evolved in this county, the judge sits to hear and determine the issues raised by the parties ,not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

114. In **Adetoum Oladeji (NIC) Ltd v Nigeria Breweries PLC SC 91/2002** Judge Pius Aderemi JSC expressed himself, and I would readily agree that:

“it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

115. From the above decisions, it is clear that unless an issue was pleaded or if not pleaded, became an issue and which issue was left to the court to decide, one party cannot raise a totally new issue and expect the court to consider that issue and decide it in its favour to the exclusion of evidence or submission by the adverse party. To do so would be tantamount to excluding the adverse party from being heard. (see **Old Jobs v Mubia [1970] EA p. 476** where it was held that:

i. A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

ii. On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it.”

116. In this case, the issue of whether the plaintiff was not a fare paying passenger and therefore not a third party, ought however, to have been specifically pleaded and not left to be subject of written submissions.

117. Furthermore, the term “**third party**” is a term that is normally defined in the insurance policy covers or documents. Most insurance policy documents define ‘**third party**’ to mean

“ Any person other than the insured or the insured’s authorized driver who has been injured or whose property has been damaged.”

118. In other policy documents ***“third party’ excludes any of the insured’s family members.***

119. Black’s Law Dictionary defines ***“third party” as-***

“ A party who is not a party to a law suit, agreement or other transaction but who is somehow implicated in it: Someone other than the principal parties.”

120. Under Section 5 of The Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya it is provided that -

“In order to comply with the requirements of Section 4, the policy of insurance must be a policy which-

Insurers such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this Section shall not be required to cover

Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in purchase of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting in to or alighting from the vehicle at the time of the occurrence of the event out of which the claim arose.”

121. In my humble view, the defendant having voluntarily carried the plaintiff in the former’s car, he was under a duty to take him safely to the destination, whether the plaintiff passenger was a fare paying passenger or not; noting that the plaintiff was neither a party to the insurance contract nor a driver of the accident motor vehicle at the material time of the accident.

122. In my view, it is illogical and irrational and moreso, mischievous for the defendant to claim in his submissions that the plaintiff was not a third party therefore not covered by the insurance policy, which exposes the fact that the defendant’s counsel was submitting on behalf of the insurance company which is attempting to repudiate/avoid liability in respect of a passenger aboard the defendant’s motor vehicle yet there is no suit pending for avoidance of such liability by the said insurance company, against the defendant as required by Cap 405 Laws of Kenya.

123. And if the plaintiff was not a third party because he was not a fare paying passenger, the defendant has not told the court what class of passenger the plaintiff was, and therefore whether in law, a person can be allowed to voluntarily carry passengers in his motor vehicle and make no undertaking as to their safety and when they are injured, he tells them that ***“my insurance company does not know you hence I cant compensate you for your injuries occasioned by my negligence.”*** Even if the defendant’s insurance company does not know the plaintiff, the defendant once found liable would carry the whole burden of compensating the plaintiff for the injury/damage and loss suffered as a consequence of the material accident.

124. In the end, I dismiss the defendant’s submission regarding the category of the plaintiff who was to be found in the defendant’s private car and driven by defendants himself and find those submissions immaterial and irrelevant to this case.

125. I am fortified by the provisions of Sections 8 and 16 of Cap 405 as interpreted in the case of the **Great Insurance Company of India Ltd V Lilian Everlyn Cross & Another [1966] EA 90 at page 97** where Sir Charles Newbold V.P. stated:

“ The effect therefore, of this Section (8) is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under Section 5(b) of the Act and in,

so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however, as the relationship of the insurer and the insured is concerned, then, by virtue of the proviso to the Section, if the policy contains provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in the circumstances in which the condition applies, such a provision is perfectly valid.”

Section 16 deals with an attempt to restrict or limit the insurance to certain specified matters such as age or physical or mental conditions of persons driving the vehicles; or the condition of the vehicle; the number of persons that the vehicle carries or the weight or physical characteristics of the goods that the vehicle carries; or the times at which or the areas within which the vehicle is used; or the horse power or value of the vehicle; the carrying on the vehicle of any particular apparatus; or the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Traffic Act Cap 403.....” shall be of no effect.....”

126. Another serious misplaced submission by the defendant through his counsel was that the plaintiff in his testimony and that of the police officer who produced the OB and police abstract did not place the defendant's vehicle in the accident scene, wherein many vehicles were involved.

127. However, from the evidence of the plaintiff which was not controverted, he pleaded and testified that the defendant was driving fast and that he was overtaking the vehicle ahead of him at a bridge when he met an oncoming vehicle hence a head on collision occurred.

128. On the other hand, the defendant's evidence as a whole is that he was following another vehicle and on approaching it, it stopped suddenly. The defendant was too close to that vehicle. He therefore swerved to the right because on the left were barriers and as he swerved to the right, he met an oncoming motor vehicle hence a head on collision occurred.

129. In my humble view, the defendant's evidence agreed with the plaintiffs testimony in all material particulars.

130. Following a motor vehicle ahead and being unable to stop when that vehicle stops suddenly, and therefore swerving to the right and meeting on coming vehicles head on is a clear manifestation of lack of care and attention while driving. The defendant did not claim that the vehicle ahead of him had no break lights. It was in broad light. He conceded that he was too close to the vehicle ahead of him so he could not break and when he weighed options of either swerving to the left or right, the option to the right is what he took which led to the head on collision with an oncoming vehicle . as earlier stated, the defendant does not say that he even applied any emergency breaks.

131. Further, I find the defendant's submissions that the plaintiff should have joined owners of all the motor vehicles involved in the material accident an act of chasing the wind. The plaintiff never claimed that the other vehicles contributed to the occurrence of the material accident. He was clear in his testimony and pleadings. It is the defendant who pleaded that other motor vehicles were responsible for the accident hence the burden of proof lay on the defendant to enjoin those owners and prove how they contributed to the accident.

132. Although the initial report in the OB showed that the accident was caused by the obstruction of the stationery lorry, PW2 was clear that after investigations were completed is when the police concluded that it was the defendant who was careless in his manner of driving hence they charged him alone with the traffic offence.

133. The defendant wanted this court to believe that the plaintiff could not explain why the defendant was charged with a traffic offence yet the OB blames another person. Further, that since PW2 was not an investigating officer, he could not adduced evidence that was reliable and or credible. However, PW2 was clear that he was producing the OB extract and the police abstract as the investigating

officer was no longer in the station. OB extracts and police abstracts are public documents which can be produced by any police officer serving in a police station, whether he was an investigating officer or not, as it is in the public knowledge that public officers get transferred from their stations from time to time while public records remain.

134. Further, although the abstract showed that the case was still pending under investigations, it is clear that the police abstract was issued before the completion of investigations and before the defendant was charged with a traffic offence of careless driving which he admitted, was pending against him in court.

135. In my humble view, the fact that the police initially believed that the lorry driver had obstructed the road but after investigations they discovered that it was the defendant who was responsible for the accident through careless driving does not vitiate the plaintiff's evidence. That act of charging the defendant with a traffic offence is in the discretion of the police who investigated the accident and gathered evidence of careless driving, and not for the plaintiff who was merely a witness to the accident that nearly took away his life.

136. In the end, I find that on a balance of probabilities the plaintiff has proved that it was the defendant's acts of negligence that caused the accident. I find the defendant 100% liable for the material accident.

137. On the second issue of what injuries the plaintiff sustained as a result of the material accident, the plaintiff pleaded and produced medical documents and called Dr Theophilus Wangata who produced a medical report showing that on examination, the plaintiff sustained injuries involving-

- a) *Displaced and comminuted fracture of the right mandible.*
- b) *Multiple rib fractures of right 2nd - 5th ribs of the chest.*
- c) *Fracture of the right ulna bone.*
- d) *Fracture of the right superior and inferior pubic ramus of the pelvic bone.*
- e) *Fracture of the right scapula.*
- f) *Fracture of left superior ramus of the pubic bone.*
- g) *Multiple lacerations and cut wounds in the right forearm and both legs.*
- h) *Cut wounds on the head.*
- i) *Contusion on the chest.*
- j) *Blood loss, physical and psychological pains.*

138. There were also residual effects of the above stated injuries which include:

- a) *Pains at the injury sites.*
- b) *A right sided limping gait.*
- c) *Bony deformity with teeth malocclusion on the lower jaw.*
- d) *8cm surgical scar on the posterior aspect of the right forearm.*
- e) *Difficulty in walking, sitting or standing for long or doing heavy work.*

- f) *Difficulty in using the right hand.*
- g) *A scar on the chest.*
- h) *Metal implants in the right lower jaw.*
- i) *Sensitivity of teeth to cold and hot food.*
- j) *Difficulty in chewing food.*
- k) *Large scar of great cosmetic significance.*
- l) *Permanent shortening of the right leg.*
- m) *Risk of post traumatic osteoarthritis of both hip joints.*
- n) *Permanent incapacity of 35%.*

139. There was no other medical examination report produced by the defendant to counter any of the above injuries which were confirmed by a qualified Doctor who testified in court and whose testimony was never challenged in cross examination on the injuries sustained by the plaintiff.

140. I find that both authorities cited by the plaintiff's counsel on the injuries sustained by the plaintiffs therein are relevant to this case, when taken all together. In the **Peace Kemuma Nyangera vs Michael Thuo Waiganjo Janet, Nairobi HCC 209/2013** the plaintiff sustained fractures of the sacrum bone, right superior pubic ramus and right ischium/inferior bone with multiple soft tissue injuries. The court awarded shs 2,500,000 general damages for pain, suffering and loss of amenities. However, that suit which was prosecuted before me was heard *ex parte*. The defendants never entered any appearance or filed any defence. In addition, after the judgment was entered, the defendants sought leave to defend the suit and by consent of both parties advocates that judgment was set aside.

141. In **Joseph Maina Vs Evans Kamau Mwaura & 2 Others Nairobi HCC 635/2009 [2014] e KLR** Odunga J awarded shs 2,400,000 general damages for pain, suffering and loss of amenities to the plaintiff who sustained fractures including fractures of the pelvis, mandible, acetabulum roof of the left hip and other soft tissue injuries.

142. And in **Florence Hare Mkaha V Tawakal Mini Coach & another**(Supra) where the plaintiff sustained fractures including fractures of the iliac crest, acetabulum roof and superior ramus on left pubis and other soft tissue injuries. She was awarded shs 2,500,000 in 2012 by Mwongo J.

143. The above decisions are recent and the injuries sustained by the plaintiffs therein are similar to what the plaintiff in this case sustained, which gives a general guide on awarding damages. The issue of inflation of the Kenya shilling does not arise.

144. On the part of the defendant, it was submitted that the plaintiff did not sustain such serious injuries as he wished the court to believe; That there was no mention of fracture of superior ramus of the left pubic bone and that the defendant disputes that injury since the discharge summary issued by Aga Khan Hospital and produced by plaintiff as evidence does not mention that injury. Further, that PW2 stated that the rest of the injuries were conservatory managed; although the plaintiff testified that he was treated at Aga Khan Hospital where the operation and implants were inserted in the ulna and the right lower mandible.

145. This court was also urged to find that in any event, the plaintiff had not sought in any hospital further treated and therefore shs 1,000,000 is adequate compensation for pain, suffering and loss of amenities.

146. I have examined the pleadings and evidence adduced by the plaintiff and Dr. Theophilus Wangata. They were all in agreement as to the injuries sustained by the plaintiff, as pleaded and as contained in the medical report.

147. The defendant's counsel claims that injuries involving fracture of superior pubic ramus are denied by the defendant because they are not contained in the discharge summary from Aga Khan Hospital.

148. However, the defendant did not require the plaintiff to undergo a second medical examination by a doctor of his choice to verify those injuries pleaded and as testified by the plaintiff and his doctor PW2. It is therefore speculative of the defendant to urge this court to find that no such injury was sustained in the absence of any other independent medical evidence. Furthermore, it is not true that the injuries sustained must be enumerated in a hospital discharge summary for, that is why it is called a discharge summary which does not contain a detailed state of the plaintiff's injuries.

149. On the quantum of damages, the defendant relied in **HCCA 150/2013 at Machakos – Auto Selection K Ltd & Another Vs Charity Wanja Kagiri** (supra) where the plaintiff/respondent sustained injuries involving cut wound on the face 10cm on left cheek; fracture of the lower mandible; blunt injury to the mouth with a shattering teeth fracture of the pelvic bone; multiple cuts of the left forearm; injury to the left arm with reduced movement; injury to the lower limbs with reduced movement; shs 800,000 was awarded as general damages for pain, suffering and loss of amenities in 2012 and which award was upheld by Honourable Nyamweya J on appeal on 5th October 2015. The **Joseph Masee Mua v Julius Mbogo** (supra) per Dulu J on 21st November 2013, the plaintiff sustained fractures serious injuries resulting in surgeries in several hospitals and treatment involvement injury to the left leg; on the head, face, fracture of left leg tibia and fibula, two broken upper jaw teeth, one molar and one canine tooth, chest injury; right shoulder injury; bruises on the left elbow; shortened left leg and nerves affected because of fractures permanent disability was assessed at 5%. He was awarded 1.3 million general damages for pain, suffering and loss of amenities in 2013.

150. There was however, no injury on the pelvic bones in the above cases as was the case for the plaintiff herein. Comparing the injuries sustained by the plaintiff and those of the plaintiffs in the cited cases by both parties' advocates, I find that the plaintiff's injuries and the resultant effects were more serious than those of the plaintiffs in the cited cases.

151. I had the opportunity to see and hear the plaintiff as he testified and I am satisfied that indeed he had sustained very serious injuries. Some scars on the mandibles, right hand and right leg were visible, he had a limping gait and he could not open his mouth wide as he spoke.

152. Considering the residual effects of those injuries and the 35% permanent incapacity suffered, and considering that an award of general damages is discretionary, which discretion must nonetheless, having regard to the nature of the injuries the residual effect on the plaintiff, and the fact that damages should never be too high nor too low as to represent an erroneous estimate.

153. I would in the circumstances of this case, doing all I can, award the plaintiff **shs 1,800,000** general damages for pain, suffering and loss of amenities, noting that although the defendant had the plaintiff reexamined by Dr. Shah, the latter's medical report was never produced in evidence as an exhibit by the defendant who did not even refer to it.

154. On the claim for loss of earning capacity, the plaintiff at his paragraph 6 of the amended plaint pleaded for loss of earning capacity, applying the principles set out in **Butler V Butler [1984] KLR 225** where the Court of Appeal observed that-

“A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are issued by his injury”.....“ compensation for diminution of earning capacity is part of

the general damages.....the question is the present value of the risk that at a future dated or time the plaintiff will suffer financial disadvantages in the labour market because of his injuries. The factors to be taken into account will vary with the circumstances of each case such as age, the qualifications of the plaintiff his disabilities.....”

155. The Court of Appeal at Kisumu in CA 91/2003 [2007] e KLR Mumias Sugar Company Ltd vs Francis Wanalo citing several cases including Fairley Vs Thompson Ltd [1973] 2 Llyod’s Reports 40 page 42 stated inter alia:

“ It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss prove by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

“ the characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more comprehensively in Moeliker V Rey rolle & Company Ltd [1977] 1 WLR 132. In that case Browne LJ said at page 140, paragraph B:

“ this head of damages generally only arises where the plaintiff is at the time of trial in employment, but there is s a risk that he may lose his employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.”

156. In the **Butler V Butler** case, the Court of Appeal held that a claim for loss of future earning capacity can be *“ a claim on its own(where the plaintiff had not worked before the accident) or in addition to another(where the plaintiff was in employment then or at the date of trial).”*

157. From the above decision of **Butler Vs Butler** (supra) it is clear that whether or not a plaintiff was in salaried employment, he can be awarded damages for loss of earning capacity. The award serves a dual role- where one was employed, to compensate him for the risk that the disability has exposed him of either losing his job in future or in case he loses his job, his diminution of chances of getting an alternative job in the labour marker; while the justification for the award where the plaintiff is not employed at the time of the accident or trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future.

158. Further, that 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 (see **Nzoia Sugar Company Ltd Vs Francis Wanalo**) (supra).

159. In this case the plaintiff pleaded and testified that he was a businessman (Book seller) and a student cum pastor. As a result of the accident and the serious injuries that he suffered, his business and savings were depleted as they were spent towards his medical care. He was 38 years at the time of this accident and that he lost his earning capacity.

160. In his testimony, the plaintiff stated that he was now a pastor and that his main problem was that he could not feed well. He did not say that as a pastor, he was unable to discharge his duties better when preaching. He did not say that as a result of the injuries, he could not get a better job in the labour market and that he had therefore resorted to being a pastor which was a lesser paying job. The defendant did not suggest that being a pastor was not his calling and that he only resorted to it after the accident.

161. There is no presumption that pastors are engaged in less paying jobs compared to any other job. Furthermore what the plaintiff’s counsel submitted on as quantum for loss of earning capacity was in essence loss of future earnings based on what the plaintiff pleaded and testified that as a book

seller he used to earn about kshs 50,000/- per month which he had now lost and which indeed, is a special damage which must be pleaded and proved strictly.

162. In the premises, I find that in the instant case, the plaintiff being a pastor, he did not demonstrate that having regard to the degree of incapacity that he suffered, the risk of him being able to find suitable employment in the labour market was substantial. It was minimal if any. But that is not to say that he is not entitled to some fair compensation for the diminution of his chances of employment in the labour market.

163. In the **Nzoia Sugar Company Ltd Vs Francis Wanalo** (supra) case the Court of Appeal found that using a multiplier/multicand formula for the claim for loss of earning capacity was erroneous on the part of the trial court and set it aside. However, the court, even after finding that the risk of the respondent not getting a job in the labour market was not substantial but minimal, having regard to the injuries that he sustained, nonetheless, **held that it was appropriate in the circumstances of the case to make a fair award of loss of earning capacity.** The Court of Appeal substituted shs 2,061,000 with shs 500,000 as adequate compensation for the diminution of the respondent's chances of employment in the labour market.

164. Applying the above principles, I would, having regard to the serious injuries which the plaintiff sustained which involved fractures of the pelvis, right hand, leg, ribs and mandibles and their resultant effects, I award the plaintiff a sum of **shs 600,000** compensation for diminution of the plaintiff's chances of employment in the alternative labour market since not all pastors are full time pastors and they could still be engaged in other competitive work and be pastors on a part time basis.

165. On the claim for loss of future earnings which though pleaded and evidence led to prove the same, the plaintiff's counsel confused and substituted this claim for the loss of earning capacity, there is evidence which was uncontroverted that the plaintiff operated a Book store in Juja Town Road. He produced Certificate of Registration of Business Name Form BN/3 dated 17th February 2009 showing that him and his wife Irene Njoki Thirima were the registered owners of the Business name of Juja Bookshop and Stationers BN/2009/1828/as P Ex 9 together with cash sale receipts for various amounts received from sales of the Bookstore products to his customers.

166. However the plaintiff did not produce any cash sale receipt which had a revenue stamp or even the Kenya Revenue Authority cash register for sales and or tax returns showing what he charged, value added tax collected and the income or domestic tax paid to Kenya Revenue Authority.

167. Similarly, the plaintiff did not produce any accounts showing his income, profit and loss account for the period under review, following his injury in the accident. Loss of future earnings is a special damage which must not only be pleaded as was in the case herein, but it must also be strictly proved on a balance of probabilities. There is absolutely no evidence adduced by the plaintiff to show that he earned shs 50,000/- from his Bookstore and stationers shop. It is not even clear how he arrived at that figure as it cannot be deduced from an examination of cash sale receipts which the plaintiff testified on saying **"I used to get an estimate of shs 50,000/- from my bookshop sales."**

168. Loss of future earnings cannot be an estimate. It must be an actual quantifiable and provable figure and not gotten out of speculation or even left to the court to speculate (see **Butler V Butler**) (supra). As was stated in **Nzoia Sugar Company Ltd Vs Francis Wanalo** (supra) citing **Farley V John Thompson Ltd** (supra):

" it is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future earning capacity.

Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

169. In the instant case, the plaintiff did not prove, on a balance of probabilities that he earned shs 50,000/- per month from his Book store and stationers shop and that he lost such earnings. Consequently, I decline the claim for loss of future earnings and dismiss it.

170. On the claim for special damages, the law is that they must not only be pleaded but they must be strictly proved. In this case, the plaintiff pleaded for the following damages as per his amended plaint:

- a) Search – KRA -sh 500.00
 - b) Treatment expenses shs 871,156.00
 - c) Transport expenses shs???
 - d) Medical report shs 5,000
- Total shs 876,656.00

171. The following special damages were proved by production of receipts in evidence

- a) Medical report charges paid to Dr Theophilus Wangata vide receipt No. 4272 dated 4th April 2013 for shs 5,000/-
- b) Receipt dated 31st December 2012 from Aga Khan Hospital shs 2,200
- c) Receipt dated 19th November 2012 from Aga Khan hospital shs 2,200
- d) Receipt dated 1th February 2013 from Aga Khan hospital shs 3000
- e) Receipt dated 19th November 2012 from Aga Khan hospital shs 855,256
- f) Receipt dated 22nd December 2012 from Family Smile Dental and Maxilla Facial Clinic Ltd shs 4000
- g) Receipt dated 25th January 2013 from Family Smile Dental and Maxilla Facial Clinic Ltd shs 4000
- h) Bank slip No.M 219003 dated 18th April 2013 on account of KRA search shs 2000 – only 500 was pleaded.

172. Total special damages proved shs 876,156, which special damages I hereby award to the plaintiff against the defendant. The plaintiff also claimed for shs 250,000/- being cost of future medical expenses involving surgery to remove the metal implants fixed in his mandible and the right ulna bones and subsequent follow up on treatment. As at the time of the trial, it was undisputed that the said implants were still insitu. In the premises, I find the claim merited and reasonable in the circumstances and I award the plaintiff the sum of shs 250,000 for cost of future medical expenses.

173. In the end, I enter judgment for the plaintiff John Kibicho Thirima against the defendant Emmanuel Parsimei Mkoitiko as follows:

- i. Liability at 100%**
- ii. General damages for pain and suffering and loss of amenities shs 1,800,000**
- iii. General damages for loss of earning capacity shs 600,000**

iv. Cost of future medical expenses shs 250,000

v. Special damages shs 876,156

Total damages shs 3,261,156.

174. I also award the plaintiff costs of this suit and interest at court rates. The interest on general damages (except loss of earning capacity which will not earn any interest) shall accrue from date of this judgment until payment in full. The interest on special damages shall accrue from the date of filing suit until payment in full.

Dated, signed and delivered in open court at Nairobi this 8th day of November 2016.

R.E.ABURILI

JUDGE

In the presence of:

Miss Obaga for the plaintiff

Miss Nyanjui for the defendant

CA: Adline