



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.232 OF 2002

ALFRED KIOKO MUTETI.....PLAINTIFF

VERSUS

TIMOTHY MIHESO1ST.DEFENDANT

EMBASSY OF CHILE2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated 18th January, 2006 and filed in court on 3rd February, 2006 the plaintiff in this case Alfred Kioko Muteti sued the defendant Timothy Miheso and the Embassy of Chile jointly and severally claiming for general and special damages. In the said amended plaint the plaintiff claims that on or about the 10th day of February 1999, he was lawfully crossing Ngong Road Nairobi when the 1st defendant so negligently drove, managed and or controlled motor vehicle registration No. 70CD2K belonging to the 2nd defendant Embassy of Chile that he caused the said vehicle to violently hit the plaintiff as a result of which the plaintiff sustained serious injuries. It is alleged that the 1st defendant was negligent in that he:
 - a. Drove at an excessive speed in the circumstances.
 - b. Failed to exercise and or maintain any effective control over the said motor vehicle.
 - c. Failed to have any sufficient regard for pedestrians expected in the said road and particularly the plaintiff.
 - d. Failed to stop, apply breaks in time or at all, to swerve, or any other way so as to avoid the accident.
2. As a consequence of the above alleged acts of negligence, the plaintiff allegedly sustained severe injuries and suffered loss and damage. The injuries pleaded involved.
 - a. Multiple injuries to the head.
 - b. Dislocated right shoulder joint.
 - c. Injury to the lower back and trunk.
 - d. Injury to the right leg.
 - e. Injury to the right iliac crest region.
 - f. Loss of consciousness of 4 days.
3. The plaintiff also claimed for special damages thus

a. Medical report - 1,500

b. Medical expenses	- 36,000
c. Police abstract	- <u>100</u>
Total	37,600

4. It was further claimed that the plaintiff was still undergoing physiotherapy at a cost of shs 600/- per session and transport of shs 500/- per session.
5. The plaintiff claimed that the accident motor vehicle belonged to the 2nd defendant hence it was vicariously liable for acts for negligence attributed to the 1st defendant. The plaintiff therefore prayed for judgment with costs.
6. On 20th December 2011, the 2nd defendant filed a defence under protest contending, principally that the accident motor vehicle was not registered in its name; the 1st defendant was not its driver or agent and or servant; and that the court lacked jurisdiction to hear and determine the dispute involving the 2nd defendant as it enjoys full diplomatic immunity from prosecution, pursuant to the provisions of the Privileges and Immunities Act, Cap 179 Laws of Kenya hence the suit was filed in bad faith and contrary to the law, praying for its dismissal with costs.
7. The 1st defendant did not enter any appearance or file defence. By an application dated 6th April 2009, the 2nd defendant had sought to have the suit struck out on account that the Embassy could not be sued in court as it enjoyed full diplomatic immunity but by a ruling dated 5th December 2011, the Honourable K.H. Rawal J (as she was then) dismissed that application on the grounds that the plaintiff's claim could not be struck out at the interim stage as it was not absolutely hopeless with no hope to breathe any life into it, hence the hearing that followed on merits.
8. I had the advantage of hearing the parties. The plaintiff testified as PW1, on oath and stated, relying on his witness statement filed on 15th October 2012 and stated that when he was crossing Ngong Road on 10th February 1999, he was knocked by motor vehicle 70CD2K as a result of which he sustained serious injuries. That the accident motor vehicle was driven by the 1st defendant an employee of the 2nd defendant and he was taken to Masaba Hospital where he received treatment. He produced case summary as his exhibit 1. He was admitted and discharged on 26th February 1999. He also produced a CT scan report as exhibit 2 and schedule of physiotherapy which he continued after being discharged from hospital as an exhibit 3. He continued with physiotherapy in Machakos.
9. The plaintiff also produced a bundle of documents filed including medical report by Dr. Stanley Kimuhu as exhibit 12. The rest of the documents which were all produced by consent are demand notice dated 4th May 1999, P3 form and police abstract dated on 15th March 1999, physiotherapy report of 17th December 1999 by J.W. Karimi, receipts for 1500/- by Fair Care Medical Services for medical report dated 4th May 1999, receipts dated 30th April 1999 and 30th March 1999 for 6600/- and 8400 for physiotherapy, medical report by Fair Care Medical Services signed by Beatrice A. Sidede registered clinician dated 20th April 1999 receipts dated 28th May 1999 for 6000 and 29th June 1999 for 6000/- for physiotherapy services at J.W. Karimi. Other receipts for physiotherapy are dated 30th July 1999 for 5400 and 27th August 1999 for 4800, 28th September 1999 for 4800; 20th October 1999 for 5400' 30th November 1999 for 5400; and 17th December 1999 for 3000/-.
10. The plaintiff stated that the 1st defendant continued to be an employee of the 2nd defendant after the accident as he saw him on various occasions subsequent to the accident ferrying the 2nd defendant's employees to and from the embassy offices located at Riverside Drive, Nairobi in motor vehicle 70CA 2K which knocked the plaintiff on 10th February 1999. He stated that as a result of the injuries on his head, dislocated shoulder joint with permanent disability and injury to the lower back and trunk, injury to right leg, right iliac crest region and loss of consciousness, he lost his capacity to hear and could no longer engage in gainful employment due to the injuries sustained and that injuries on his head affected his mental capacity. He prayed for damages as claimed in his plaint.

11. In cross examination, the plaintiff stated that he was going to Lenana School when he was knocked and that he was not a resident of Nairobi. That he took time to return to Nairobi for check up and that he got details of the motor vehicle from the police station albeit he did not conduct an official search to establish its ownership. He confirmed that according to the search done by the 2nd defendant the motor vehicle in question was owned by H.E. Jose Manuel O. But confirmed that he did not sue the registered owner thereof. He also admitted that he had not enjoined the registered owner thereof to the proceedings. He stated that he went to the Chilean Embassy to search for the 1st defendant albeit he had no evidence that the said 1st defendant was an employee of the 2nd defendant. He also stated that he did not write to the Chilean Embassy requesting for waiver of its diplomatic immunity to enable him sue it.
12. In reexamination the plaintiff stated that the copy of records he had been shown was dated 19th May 2008 whereas the accident occurred on 10th February 1999. Further, that he had met the 1st defendant at the 2nd defendant's premises when he visited there in 2002 and saw him driving the same motor vehicle that injured him. The parties' advocates agreed to have the police abstract and medical report by Dr. Kimuhu produced by consent.
13. At the close of the plaintiff's case, the advocates for the parties agreed and had the documents filed by the defendant on 14th December 2012 and a statement of Ambassador Konrad Paulsen produced by consent and the defence case was closed. The documents produced by the 2nd defendant were the 1st schedule of the Privileges and Immunities Act, Cap 179 Laws of Kenya, copy of the records dated 19th May 2008 for motor vehicle 70CD 2K and the witness statement by Ambassador Konrad Paulsen.
14. The parties' advocates filed written submissions. The 2nd defendant's counsel filed her client's submissions on 27th February 2015 whereas the plaintiff's counsel filed on 10th March 2015. The parties' advocates also agreed to highlight the submissions, which highlights were made on 19th May 2015.
15. Mrs Mbugua counsel for the 2nd defendant submitted that the 2nd defendant did not own the motor vehicle in question as shown by the copy of records produced by her client. Further, that the plaintiff had not proved possession and control of the accident motor vehicle in order for vicarious liability to attach to the 2nd defendant. She maintained that the court could not confer ownership of a motor vehicle. She also contended that albeit interlocutory judgment was entered against the 1st defendant in default of appearance and defence, there was no evidence that the said first defendant had conceded to being the driver, agent or servant of the 2nd defendant as claimed by the plaintiff, especially with the 2nd defendant denying the fact of being an employer of the 1st defendant as alleged. The 2nd defendant further contended that it was being forced into a non existing relationship with the 1st defendant. On the issue of diplomatic immunity, the 2nd defendant's counsel submitted that the Privileges and Immunities Act and the Vienna Convention on Diplomatic Relations are clear on the rationale for Diplomatic Immunity, and that Article 31(1) and 37 of the Convention confers immunity to diplomats and their family members. It was further submitted that by dint of Article 2(6) of the Constitution of Kenya, 2010, the Vienna Convention is applicable to our Kenyan situation. Similarly it was submitted that an Embassy enjoys diplomatic privilege and that Article 43 of the Convention refers to consular officers and employees.
16. It was submitted further by the 2nd defendant's counsel that the plaintiff had not proved that there was a consular officer or employee involved in the material accident to waive the immunity; and that the registered owner of the accident motor vehicle who could be a consular employee was not sued hence the Embassy could not be liable for acts of the owner of a motor vehicle who was not a party to the suit.
17. Mrs Mbugua also submitted that the cases cited by the plaintiff all related to commercial transactions and had nothing to do with Embassies. She submitted that under Section 16 of the Privileges and Immunities Act, there was no need to avail a certificate to prove immunity of the Embassy since the question had not arisen as to whether or not a person is entitled to the benefit of immunity or privileges and as an Embassy was not a person mentioned in Section 16 of the Act. Counsel for the 2nd defendant further submitted that if judgment was entered against the Embassy,

it would be impossible to execute that judgment as the process of executing a judgment against an Embassy or High Commission it involves a lot of protocols and relationships with a foreign state. She relied on the English case of **Thai Europe Tapioca Service Ltd V Government of Pakistan Ministry of Food and Agriculture Supplies Imports and Shipping Wing [1975] 3 ALL ER 1961** cited in **Ministry of Defence of United Kingdom Government V Ndegwa[1982] CA 31/82** where Lord Denning stated that;

“except by consent, the courts in this country will not issue process so as to entertain a claim against a foreign sovereign as they could be called to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee.”

18. Mrs Mbugua further submitted that under Article 32 of the Vienna Convention, the waiver of Diplomatic Immunity must be express. She relied on the case of **Ministry of Defence of Government of United Kingdom V Ndegwa** (supra) to fortify that position. The 2nd defendant counsel maintained that the Privileges and Immunities Act grants unrestricted immunity to Embassies and which immunity must be respected and upheld by courts. She urged the court to dismiss the plaintiff's suit with costs.
19. The plaintiff's counsel, Mr Adipo submitted, relying on his written submissions filed on 10th March 2015 and supported by various decided cases and statute law. On the issue of diplomatic immunity, Mr Adipo submitted that Section 16 of the Privileges and Immunities Act uses the term “person” and that the ‘person’ named therein is a legal person and not merely an individual hence the 2nd defendant was under an obligation to produce a certificate from the Minister pursuant to Section 16 of the Act but in this case, opted not to benefit from immunity before complying with the requirements of the law. Further, it was submitted that diplomatic immunity is not blanket immunity as Article 43 of the Vienna Convention excludes matters of road accidents from the doctrine of Diplomatic Immunity.
20. On the issue of ownership of the subject motor vehicle, it was submitted that the case of **Nancy Ayemba Ngaira V Abdi Ali [2010] e KLR** was relevant. In that case, it was held that ownership of a motor vehicle is not just confined to registration but there are various categories of ownership of motor vehicles. In this case, it was submitted that the 2nd defendant had the beneficial ownership of the accident motor vehicle while the 1st defendant drove it in the course of his employment with the 2nd defendant. According to counsel, the plaintiff relied on what he saw the 1st defendant drive out of the 2nd defendant's compound offices in Nairobi with the latter's officials in the material accident vehicle.
21. On the issue of the effect that the of default judgment entered against the 1st defendant had on the 2nd defendant it was submitted that the plaintiff's claim against the defendants is jointly and severally and which issue is settled and cannot be relegated.
22. On the issue of vicarious liability, it was submitted that since the 2nd defendant was a beneficial owner of the accident motor vehicle, it was vicariously liable for the acts of the 1st defendant, its driver. Counsel for the plaintiff relied on the case of **KBS Ltd V Humphrey [2003] KLR 665**. The plaintiff also relied on **Mohamed & Muigai advocates V Samuel Kamau Macharia & Another [2008] e KLR**; **Bingham and Benyman's Motor Claims Cases, 11th Edition' page 267**; **McKean V Raynor Bros Ltd Nottingham [1942] 2 ALL ER 650, 167 LT 369,86 Sol. Jo 376** **Tabitha Nduhi Kinyua V Francis Mutua Mburi & Another [2014] e KLR** & **Jane Wairimu Turanta V Githae John Vickery & 2 Others [2013] e KLR**.
23. On quantum, the plaintiff's counsel submitted that his client sustained injuries as contained in the medical reports and as pleaded in the plaint. He prayed for kshs 800,000 taking into account inflation. He relied on the authority of **Phillip Kipkorir Cheruiyot V Nebco (K) Ltd & Another [2006] e KLR** where the plaintiff sustained fracture of the right hand and dislocation of the shoulder and was awarded kshs 600,000. The plaintiff also prayed for shs 60,300 special damages, Costs and interest.
24. I have carefully considered the plaintiffs claim against both defendants, the defence, the evidence, submissions and the law both case law and statutory enactments, together with the relevant international treaty instruments ratified by Kenya and relied on by both parties.

25. The 2nd defendant's list of issues filed on 24th April 2014 are 7 in number namely:

1. Whether the 2nd defendant was the owner of the motor vehicle registration No. 70CD 2K?
2. Whether or not the 1st defendant was under the instructions or employment of the 2nd defendant at all material times to this suit.
3. Whether or not motor vehicle 70CD2K was being used for the official business of the 2nd defendant.
4. Whether or not the present suit as against the 2nd defendant is sustainable under the law.
5. Whether or not the plaintiff has a cause of action against the 2nd defendant.
6. Whether or not the 2nd defendant can be held vicariously liable for the actions of the 1st defendant and the registered owner of motor 70CD2K.
7. Whether or not the suit as against the 2nd defendant should be dismissed with costs.

26. In its submissions, the 2nd defendant compressed the above issues into 2 namely: Ownership of motor vehicle 70CD2K and Diplomatic Immunity.

27. In my own assessment of the case herein, the following are the main issues for determination

1. Who was the owner of the accident motor vehicle?
2. Was the 1st defendant the servant/agent or employee of the 2nd defendant? and if so, whether the 2nd defendant is vicariously liable for acts of the 1st defendant .
3. Who was to blame for the accident?
4. Does the 2nd defendant enjoy diplomatic immunity in our Kenyan courts and if so, can the suit herein be sustained against the 2nd defendant?
5. What orders should the court make
6. Who should bear costs of this suit

28. On the first issue of ownership of the accident motor vehicle the plaintiff produced police abstract no. A339046 issued on 13th March 1999 showing that an accident did occur on 10th February 1999 along Ngong Road involving motor vehicle 70CD2K and a pedestrian Alfred Kioko Muteti at about 2.30p.m. The driver of the accident motor vehicle was recorded as Timothy Miheso of Box 45554 Nairobi. The motor vehicle was insured by Lake Star Insurance Company Ltd policy no. 07/070/01558-98-2 expiring on 15th February 1999. The owner of the accident motor vehicle was not reflected on the said police abstract. The plaintiff herein did not produce any other document, whether by way of a registration book or a sale or user agreement proving legal or beneficial ownership of the accident motor vehicle. Nonetheless, the 2nd defendant produced a copy of records from the Registrar of Motor Vehicles showing that the accident motor vehicle was not owned by the Embassy of Chile, but by H.E. Jose Manuel who was not a party to this suit. According to the plaintiff, the vehicle belonged to the second defendant because he saw the 1st defendant driving it in and out of the Chilean Embassy long after the accident. To the plaintiff, it therefore follows that the 2nd defendant must be the one beneficiary owning or possessing or using the accident motor vehicle, hence the owner thereof.

29. Section 8 of the Traffic Act, Cap 403 Laws of Kenya provides that the person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle. In this case, the 2nd defendant denied ownership of the accident motor vehicle and went to the extent of availing copy of records to show who the owner thereof was at the time of the accident. That registered owner is not a party to these proceedings. The burden of proving that the vehicle belonged to the 2nd defendant lay on the plaintiff. He was expected, as stipulated in Section 8 of the Traffic Act, to prove that either the 2nd defendant was the registered owner of the accident or the beneficial owner of the subject accident motor vehicle, at the time of the accident. Thus, the burden of proof lies on the party who would fail if no evidence at all were given by either party. It was therefore not the duty of the 2nd defendant to prove who the owner of the accident motor vehicle was, whether by registration or by possession or beneficial use. It was the duty of the plaintiff to prove on a balance of probabilities that the accident motor vehicle

belonged to the 2nd defendant. The evidence adduced by the plaintiff fell short of that. in **Nancy Ayiamba Ngaira V Abdi Ali CA 107/2008 [2010] e KLR** , the court observed that:

“ There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication this shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the defector owners of the motor vehicle and so the Act has an opening or any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership; beneficial ownership; possessory ownership. A person who enjoys any such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it has been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of police abstract showed on a balance of probabilities that the 1st defendant was one of the owners of the matatu in question.”

30. In the instant case, the police abstract did not indicate that the 2nd defendant was the owner of the accident motor vehicle. In addition the plaintiff vide his amended plaint filed on 3rd February 2006 did not specify what kind of ownership was attributed to the 2nd defendant. He simply pleaded “motor vehicle registration No. 70CD2K belongs to the 2nd defendant”. It was therefore not clear whether ‘ownership’ thereof was by registration or by alternative means set out in the above cited **Nancy Ayiamba Ngaira case (supra)**. The police abstract also provided the insurance company and policy number for the accident motor vehicle. There is no evidence adduced by the plaintiff to show that the 2nd defendant was the insured of the accident motor vehicle. With a copy of records produced by the 2nd defendant showing a different person being its owner as at the time of the material accident, it was cast upon the plaintiff to prove otherwise. In this case, the plaintiff settled for the 2nd defendant as the owner thereof simply because he had seen the vehicle leaving the offices of the 2nd defendant and being driven by the 1st defendant.
31. In my view, that kind of wayside evidence was and is not sufficient proof of the 2nd defendant being the owner thereof. Furthermore, not all diplomatic number plates belong to Embassies or High Commission or consulates. Even diplomatic staff who enjoy diplomatic immunity own motor vehicles and use diplomatic number plates and albeit they are permitted to use those diplomatic number plates as staff, those vehicles do not necessarily belong to the Embassies. The registered owners thereof register and insure those vehicles in their own names and it cannot be assumed that every vehicle that leaves an Embassy with a diplomatic number plate is an embassy motor vehicle. In this case it is trite that the material motor vehicle was not registered in the Embassy of Chile’s name, and neither was it proved that the Embassy of Chile was the beneficial or other owner thereof. The plaintiff did not even Endeavour to produce evidence from the motor vehicle’s insurance company, Lakestar Insurance Company which evidence would indicate who the insured of the accident motor vehicle was, which would have discounted the presumption under the 1st part of Section 8 of the Traffic Act, noting that the police abstract did not name the owner thereof. The Court of Appeal in the case of **Joel Mugo Opija V EA Sea Food Ltd CA 309/2010 [2013] e KLR** held inter alia that:

“.....we agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied”.

32. Thus, had the police abstract produced named the 2nd defendant as the owner of the accident motor vehicle or the copy of records then in the absence of any other records or evidence to the

- contrary this court would take it that the person named therein would be the owner thereof. The plaintiff in this case failed to prove, on a balance of probabilities that the 2nd defendant owned whether by registration or beneficially, the accident motor vehicle.
33. Having found that there was no evidence of the 2nd defendant being the owner of the accident motor vehicle, the other question therefore would be, whether the 2nd defendant can be held vicariously liable for the acts of omissions of the 1st defendant who, undisputedly, was the driver of the accident motor vehicle.
34. This court notes that the 1st defendant neither entered appearance nor filed defence to this claim by the plaintiff. As a result, ex parte interlocutory judgment in default of appearance and defence was entered against him on 30th September 2008.
35. The plaintiff submits that the entry of judgment against the 1st defendant settles the issues of whether the 1st defendant was the servant, agent or driver of the 2nd defendant at the time of accident, as well as the liability of the first and second defendants in the suit. He relied on the case of **Mohammed & Muigai Advocates V Samuel Kamau Macharia & Another & Black's Law Dictionary**. On vicarious liability, he relied on **Kenya Bus Services Ltd V Humphrey** where the Court of Appeal cited **Kansa V Solanki [1969] EA 318** that :

“ 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 for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”

36. The plaintiff also contended that even if the 2nd defendant was not the registered owner of the accident motor vehicle, given that the 1st defendant was their employee/driver and was in the cause of his duty, the 2nd defendant would still be liable for the negligence of the first defendant. He relied on **Bingham and Benyman's Motor Claims Cases 11th Edition page 267** where it was held, citing the decision in **Mckean V Raynor Bros Ltd Nottingham [1942] 2 ALL ER 650, 167 LT 369, 86 Sol Jo 376** that:

“ a servant who was a general utility hand was instructed by his employer to take and drive one of the employer's lorries and meet a convoy and deliver a message to them. Without permission from his employer, he used his father's private car and was involved in an accident. He had used a private car on other occasion on the employer's business and had never been told not to use a private care for that purpose.”

It was also held that the workman was doing an authorized act in an unauthorized but not a prohibited way, and the employer was liable. The plaintiff further referred the court to **Hilbey J cited in Bayley V Manchester Sheffield and Licdnshire Rly Co. [1873] LR 8CP 148, 42 LJCP 78 28LT 366 Par [6.56]** that:

“ Where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the done may be the very reverse of that which the servant was actually directed to do.”

The plaintiff also cited **Limpus V London General Omnibus Company [1862] 1 H & C 526, 32 LJ EX 34, 7LT 641:** that

“The law casts upon the master a liability for act of the servant in the cause of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.”

37. On the other hand, the 2nd defendant was emphatic that since it was not the owner of the accident motor vehicle, and as there was no proof that it was an employer of the 1st defendant or that it authorized him to drive the accident motor vehicle which it never owned in the first place, it could not be held liable for acts of the 1st defendant. The 2nd defendant relied on the case of **Joseph Khayigila V Gigi & Company Ltd & Another CA 119/86** cited in **Tabitha Nduhi Kinyua V Francis Mutua Mbuvi & Another [2014] e KLR** where it was held that :

“ In order to fix liability on the owner of a car for 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.”

38. The 2nd defendant also cited the case of **Morgan Launchbury [1972] 2 ALL ER 606** cited in **Jane Wairimu Turanta V Githae John Vickery & 2 others [2013] e KLR** where it was stated that to establish agency relationship it was necessary to show that the driver was using the car at the owner’s request, express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. The 2nd defendant concluded that since the motor vehicle in question was neither the property of the 2nd defendant nor was it being driven/used either officially or unofficially by the Embassy of Chile at any time, the 2nd defendant cannot be held vicariously liable for the actions of the 1st defendant.

39. I have perused the defence filed by the 2nd defendant under protest. There is no admission that the 1st defendant was its employee, let alone driver, servant or agent at the material time of the subject accident. As stated earlier, the burden of proof lies squarely on that person who alleges the existence of a particular fact. In this case, the plaintiff’s authorities relied on touching on vicarious liability would only be applicable if there was proof that the motor vehicle belonged to the 2nd defendant and secondly, that the 1st defendant was its employee/servant/agent and drove the motor vehicle in question for the benefit of the 2nd defendant, in the ordinary course of his duties.

40. In my view, and as was expounded in the **Morgan Vs Lauchbury** case and **Kenya Bus Services Ltd V Dina Kawira Humphrey** case (supra), it is the existence of master and servant relationship which gives rise to vicarious liability. See **Pritoo West Nile District Administration [1968] EA 428**. In **Kansa V Solanki** cited by the plaintiff herein, the former Court of Appeal for Eastern Africa was clear that:

“The motor vehicle must have been driven for the joint benefit of the owner and the driven for vicarious liability to attach.” Further, the case of **Tabitha Nduhi Kinyua V Francis Mutua Mbuvi & Another** is instructive that *“in order to fix liability on the owner of the 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.”* The court went further to state, citing **Joseph Cosmas Khayigila V Gigi & Company** case (supra) that *“to establish the existence of the agency relationship it was necessary to show that the driver was using the car at owner’s request, express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner.”*

41. In this case, there is no proving that the accident motor vehicle was owned by the 2nd defendant. Further, there is no evidence that the 1st defendant was an employee or servant or agent of the 2nd defendant. There was also no evidence that the vehicle as driven on that day was on authority of or for the benefit of the second defendant. That being the case, it cannot hold to state that the 1st defendant was using the motor vehicle at the material time for the benefit of the 2nd defendant or at the 2nd defendant’s request, express or implied.

42. I therefore find that the plaintiff has completely failed to establish the master/servant or principal/agent relationship between the two defendants to warrant a determination that the 2nd defendant is vicariously liable for acts of the 1st defendant. In other words, the evidence on record does not support that the 1st defendant was the driver, agent or servant of the 2nd defendant.
43. Further, neither does that evidence support that the motor vehicle subject of the accident was in any way owned or was being used for the benefit or official business of the 2nd defendant or that the 1st defendant was under instructions or employment of the 2nd defendant at the material time. In that regard, therefore, the interlocutory judgment entered against the 1st defendant cannot therefore pass liability on the 2nd defendant.
44. The above exposition therefore settles issues No. 1, 2, 3 and 6.
45. On who was to blame for the accident, the plaintiff testified that he was on the material day of 10th February 1999 lawfully crossing Ngong Road Nairobi when he was violently hit by a car registration number 70CD2K thereby sustaining serious injuries. He was going to Lenana School. He was then taken to Masaba Hospital. He got details of the accident from the police.
46. In the pleadings/plaint, the plaintiff pleaded that he attributed the occurrence of the accident to the negligence of the 1st defendant in the manner in which he drove, managed and or controlled the accident motor vehicle. He also outlined what he considered to be particulars of negligence on the part of the 1st defendant, namely:
- a. Driving at an excessive speed in the circumstances.
 - b. Failing to exercise and or maintain any effective control over the said motor vehicle.
 - c. Failing to have any sufficient regard for pedestrians expected on the said road and particularly the plaintiff.
 - d. Failing to stop, to apply brakes in time or at all, to swerve or any other way so as to avoid the accident.
47. A part from the above pleadings which set out the particulars of negligence on the part of the 1st defendant, there is no other evidence on record to show how the material accident occurred apart from the statement that the plaintiff was lawfully crossing Ngong Road / Nairobi when the 1st defendant violently hit him while driving motor vehicle 70CD 2K thereby sustaining serious injuries.
48. The plaintiff did not even rely on the doctrine of *res ipsa loquitur*
49. Albeit interlocutory judgment in default of appearance and defence was entered against the 1st defendant, and therefore the case proceeded by way of formal proof against him, the burden of proving that the 1st defendant was liable in negligence for the occurrence of the accident still lay on the plaintiff. Pleadings are not evidence and it is not enough to plead particulars of negligence and make no attempt in one's testimony in court to demonstrate by way of evidence how the accident occurred and how the 1st defendant was to blame for the said accident. It is trite law that he who alleges must prove and that burden does not shift to the adverse party even if the case proceeds by way of formal proof and or undefended. This was not a fatal accident witnessed by no one, where the court would be entitled to infer negligence on the part of the 1st defendant especially where interlocutory judgment was entered against him. And nothing prevented the plaintiff from testifying on how he came to be knocked by the accident motor vehicle.
50. The plaintiff being the affected party was under a duty to place before the court evidence to sustain those averments in his plaint. Since the pleadings and written submissions are not evidences, unless liability was agreed upon by consent which is not the case here. In **Daniel Toroitich Arap Moi & another v Mwangi Stephen Murithi and another [204] KLR** the Court of Appeal held that:

***“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it.*”**

Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

Black's Law Dictionary 8th Edition defines a pleading as:

"A formal document in which a party to a legal proceeding especially a civil law suit sets forth or responds to allegations, claims denials or defenses."

51. It therefore follows, and I reiterate, that a pleading is not evidence. Further, Section 3 of the Evidence Act Cap 80 Laws of Kenya defines evidence as:

"Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity."

52. I am further fortified by the Court of Appeal's decision in the case of **Douglas Odhiambo Appeal & Another V Telkom Kenya Ltd CA 115/2006** Nambuye, Ouko & Kiage JJA. In addition, there was no evidence that the 1st defendant was even faulted by the police for the occurrence of the accident. The police abstract produced does not show that anyone was charged with a traffic offence. The abstract showed that the matter was pending under investigations.

53. Thus even where there is no rebuttal, in a matter that requires proof, Section 107 of the Evidence Act applies, that whoever desires the 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.

54. It was therefore, in my view, not sufficient for the plaintiff to merely assert that since the 1st defendant did not file any defence or controvert the pleadings or rebut the statement that the plaintiff was lawfully crossing Ngong Road when the 1st defendant violently knocked him, then he needed not prove how the accident happened and hence the liability of the 1st defendant. Madan JA in **CMC Aviation Ltd V Cruis Air Ltd (1) [1978] KLR 103** observed:

"Pleadings contain the averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."

55. Averments are matters the truth of which is submitted for investigation until their truth has been established or otherwise they remain unproven. Averments in a plaint in no way satisfy for example, the definition of Evidence under Section 3 of the Evidence Act. Since those averments as to the particulars of negligence against the 1st defendant were not admitted, which admission would have become evidence and as evidence is normally given on oath or by affirmation, averments depend on evidence for proof of their contents (see **Cassells English Dictionary page 394**).

56. In view of the above, the plaintiff ought to have testified on how the accident occurred and proved each or any of the acts of negligence attributed to the 1st defendant. He failed to do so. Consequently, there is no material before this court upon which liability on the part of the 1st defendant can be founded. Furthermore, the plaintiff did not rely on the doctrine of *res ipsa loquitur*.

57. On the issue of whether the suit against the 2nd defendant is sustainable in law and or whether the plaintiff has a cause of action against the 2nd defendant, first and foremost, I have found that the 2nd defendant was not on the evidence adduced, proved to be the legal or beneficial other owner of the accident motor vehicle and neither was it proved to have been the 1st defendant's employer for vicarious liability if any to attach. The second aspect to the above twin issue is

that, according to the 2nd defendant, no suit lay against the 2nd defendant because it enjoys diplomatic immunity under the Privileges and Immunity Act Cap 179 Laws of Kenya and the Vienna Convention on Diplomatic Relations of 1961, which latter Convention is applicable in Kenya as part of the Laws of Kenya under the 2010 Constitution by virtue of Article 2(6) of the Constitution that “ ***Any Treaty or Convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.***”

58. The 2nd defendant also relied on Article 2(5) of the Constitution that the general rules of International Law shall form part of the Law of Kenya. It was submitted on its behalf that Articles 31, 32 and 37 of the Vienna Convention prohibits the receiving state from instituting any civil or criminal proceedings against a diplomatic agent unless the immunity was waived expressly. The plaintiff countered those submissions by contending that Article 43 of the Convention excludes the 2nd defendant from immunity in respect of damages to the plaintiff arising from the motor vehicle caused by its employees in the cause of duty. The plaintiff also submitted that under Section 16 of Cap 179, only a certificate by the Minister is conclusive evidence as to whether a party is entitled to immunity or privilege under the Act and that in the absence of the certificate the 2nd defendant has not shown requisite evidence to be entitled to the benefit. Further, that under Article 43(3) (b), there is no immunity where the claim is by a third party for damages arising from an accident in the receiving state caused by a vehicle, vessel or aircraft. He relied on several decisions and distinguished those decisions relied on by the 2nd defendant.

59. My determination on the above issue of diplomatic immunity is that state immunity is a rule of customary International Law under which municipal courts are prevented from exercising their jurisdiction in disputes where a foreign state is named as a defendant or where a foreign state intervenes by means of interpleader proceedings (**see Public International Law, 4th Edition by Alina Kaczorowska. the above authors’ justification for state immunity are:**

1. The principle of Sovereign Equality states;
2. The practical impossibility of enforcing judgments against foreign states; in particular in a situation where the foreign states’ assets are located outside the jurisdiction of the forum state; and;
3. The principle which is now obsolete though technically not in the UK, that as a sovereign could not himself be sued before his own municipal courts, so the sovereign of another state was similarly exempt from the jurisdiction of the local law.

60. The authors set out three aspects of the evolution of the doctrine of state immunity over time namely; -I. initially, a state enjoyed virtually absolute immunity from proceedings in Municipal Courts; ii. Subsequently, the immunity was recognized with regard to sovereign or public acts (Jure Imperil) of a state but not with respect to private acts (jure gestionis).

61. The writer also identified the following challenges to the doctrine of state immunity:-

- I. It is incompatible with the development of criminal law as it shields Heads of State and other high ranking officials from being accountable for grave human rights abuses before otherwise competent courts;
- II. The recognition by the International Community that some rules of International Law are of *jus cogens* character ie they are superior to any other rules, including the rules on state immunity entails that the prohibitory of crimes having the character of *jus cogens* such as genocide, crimes against humanity, war crimes, tort we should prevail over the rules on state immunity which do not enjoy the status of *jus cogens*.
- III. It clashes with basic human rights as the right of access to a court, the right to a remedy and or the right to effective protection.

62. In Kenya, state immunity is covered by the application of Article 2(5) and 2(6) of the Constitution which import the application of the Vienna Convention on Diplomatic Relations, 1961 as well as the Vienna Convention on Consular Relations which have been domesticated before 2010 vide the Privileges and Immunities Act and the 1st and 2nd Schedules to the Act.

Article 31(1) of the Vienna Convention on Diplomatic Relations grants immunity to any diplomatic agent and diplomatic mission from the criminal jurisdiction of the receiving state. Such an agent shall also enjoy immunity from civil jail and administrative jurisdiction except in the following cases:

- a. A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission;
- b. An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;
- c. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

2. Consular officers and employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

3. The provisions of paragraph 1 of this Article shall not, however, apply in respect of civil action either (a) arising out of a contract concluded by a consular employee in which he did not contract expressly or impliedly as an agent of sending state or

(b) by a third party for damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft.

63. In **Skeen V Federative Republic of Brazil 566 F Supp 1414 [1983]**, it was held that Brazil could not be held liable for injuries caused by the grandson of the Brazilian Ambassador to the USA who was entitled to immunity as a member of the diplomat's family arising out of a shooting outside a night club in Washington DC. **Kaczorowska** in her book (supra) also states that:

“ Arguments based on violations of rights other than relating to court e.g. the right to effective remedy, the right to effective protection and the right to non- discrimination have all failed to challenge the rule on state immunity. Further, even if Municipal Courts , including Supreme Court of a state, refuse to grant immunity to a foreign state, the victims of International crimes are unlikely to be compensated because a foreign state enjoys almost absolute immunity from enforcement.”

64. From the above analysis, I am persuaded that even in cases of enforcement of human rights, state immunity in our realm must be given its due place and must prevail over all claims save where a restriction to it is proved e.g. in commercial transactions.

65. It is worth noting that the 2nd defendant herein is not a diplomatic agent, official, employee, members of the mission, members of staff of the mission, members of the diplomatic staff members of the administrative and technical staff; members of the service staff or a private servant as defined in Article 1 of the Privileges and Immunities Act Cap 179.

63. The 2nd defendant was sued in its own capacity as the Embassy of Chile. Would therefore Article 43 of the Convention which refers to consular officers and consular employees be relevant as far as the inviolability of the Embassy of Chile is concerned? I think not.

64. This court adopts the decision of the Court of Appeal in the case of **Ministry of Defence of the Government of the United Kingdom V Ndegwa [1982] CA 31/82** wherein Lord Denning was categorical that:

“ The general principle is undoubtedly that, except by consent, the courts of this country will not issue process so as to entertain a claim against a foreign sovereign they could be called upon to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee.”

65. I further do not agree that Section 16 of the Privileges and Immunities Act with reference to **a person** in proceedings entitled to immunity relates to the Embassy /Mission or consular post.
66. The Embassy of Chile in my humble view is different from the agents, employees or officers. It enjoys inviolability as a sovereign state with all privileges and Immunities to which its status as a sovereign state entitles it. There is no evidence that the Government of Chile consented to the jurisdiction of the Kenyan Courts with regard to the matters raised in the plaint. There would therefore, be no cause of action disclosed against the 2nd defendant.
67. I hold that the principle that no state can claim jurisdiction over another state so that as a rule states cannot be sued in a foreign courts unless it voluntarily submits to the jurisdiction of municipal courts of the receiving state. (*Par in parem non Haber jurisdiction*). That principle was espoused in the case of **Twictor Investments Ltd Vs The Government of the United States of America [2003] e KLR** **Petition No. 393 of 2014. Talaso Lepalat V Embassy of the Federal Republic of Germany & Others; and Karen Njeri Kandie V Alssane Ba & Shelter Afrigue**. Given the expositions and findings made above, I conclude that the immunity that attaches to the 2nd defendant Embassy of Chile finds recognition and legitimacy from International treaties ratified by Kenya including the Vienna Convention which is expressly validated by Article 2(6) and (5) of the Constitution thereby completely immunizing the Embassy from criminal or civil proceedings before Kenyan Courts no matter how desirable or expedient such proceedings may seem. Thus in the absence of an express waiver of the diplomatic immunity, this court is bound by the rules of International Law that our own Constitution has imported. It cannot ignore such important rules of International Law regarding state/diplomatic immunity as that would jeopardize this country's relations with the Government of Chile and lead to repercussions impossible to foresee. I therefore find that the plaintiff's claim discloses no cause of action against the 2nd defendant, even assuming that it was the owner of the accident motor vehicle or it was the 1st defendant's employer and I would accordingly proceed to strike out that claim.
68. On quantum, the law requires that even if the plaintiff who has sued for damages does not prove liability this court not being the final court must assess what it would have awarded him, had he proved his case on a balance of probabilities. The plaintiff pleaded that as a result of the material accident, he sustained multiple injuries on the head, dislocated right shoulder joint, injuries to the lower back and trunk; injuries to the right iliac crest region and loss of consciousness for 4 days. His statement which was adopted as his evidence in chief also enumerated the same injuries which were confirmed by the medical treatment notes, case summary from Masaba Hospital and Dr. Stanley M. Kimuhu's medical report dated 5th July 2012.
69. At the time of examination, the plaintiff complained of weakness of the right arm and periodical headache and backache. He had been left with scars on the injured sites of cuts and bruises. He also had a shift right shoulder joint with severe limitation of movement. The scars are said to be permanent and disfiguring. He is likely to suffer from osteoarthritis in the right shoulder joint. He will require periodical medical attention, such as drugs and physiotherapy. He was left with a permanent incapacity of 40%.
70. The plaintiff's counsel prayed for shs 800,000/- general damages for pain, suffering and loss of amenities. He relied on the case of **Philip Kipkorir Cheruiyot V Nebco K. Ltd & Another [2006] e KLR** where Kimaru J awarded the plaintiff shs 600,000 for general damages for fracture of the right hand and dislocation of the shoulder.
71. The 2nd defendant made no submission on quantum.
72. I have considered the plaintiff's evidence and proposals on quantum of damages in line with that decision in **Philip Kipkorir Cheruiyot**. Albeit the injuries sustained by the plaintiff were much more serious, involving fractures and dislocation of femur and right shoulder and wasting of all muscle to his arm, nonetheless, they were more the less similar to the ones sustained by the plaintiff herein. The doctor in that case found the plaintiff to have suffered 30% permanent incapacity. Accordingly, I accept that decision as being relevant, taking into account inflation and the ever weakening trend of the Kenyan shilling and considering that damages are not intended to enrich an injured party but to put him in as nearly as possible the position he was in before the injury I would award the plaintiff kshs 800,000 proposed by his advocate Mr Adipo.
73. On special damages, the law is clear that not only must they be pleaded, but that they must be

specifically proved. The plaintiff pleaded a sum of kshs 37,600 being special damages made out as follows:

- I. Medical report -1,500
- II. Medical expenses 36,000
- III. Police abstract -100
- IV. Physiotherapy per session at 600
- V. Transport at 500 per trip for physiotherapy.

74. In his evidence /statement on oath, the plaintiff asked for:

- I. Medical report from Fair Care Medical Services -shs 1500
- II. Physiotherapy costs shs 55,800
- III. Medical report from Dr. Stanley M. Kimuhu -shs 3,000

Total shs 60,300/-

75. I have seen the receipts produced in evidence. The plaintiff has proved shs 1500/- for medical report from Fair Care Medical Services, which was also pleaded. I would allow it. The kshs 3000/- for medical report from Dr. Stanley M. Kimuhu was proved but not pleaded. I would disallow it. There is no receipt for police abstract as pleaded so I would disallow it. On the claim for physiotherapy and or medical expenses, kshs 36,000 was pleaded as medical expenses but physiotherapy charges were set at sh 600 per day. The receipts produced for physiotherapy amount to kshs 55,800. There is no other receipt for medical expenses produced. Since physiotherapy cost was pleaded separately and there is an attendance sheet showing all the days he attended plus the charges, I would award him kshs 55,800 for physiotherapy. There is no evidence of any other medical expenses as pleaded so I would reject that claim as unproved. In the end, I would award the plaintiff special damages in the sum of kshs 57,300/-.

76. The plaintiff also pleaded damages for loss of earnings but he did not tell the court what he was doing for a living at the material time of accident and the alleged loss. He did not prove that claim. I would disallow it.

77. I would allow interest on the general damages from date of judgment while interest on specials would accrue from date of filing suit.

78. However, as the plaintiff did not prove his claim against any of the defendants, I dismiss his case for the reasons that I have given above. I order that each party bears their own costs of this suit.

Dated, signed and delivered in open court at Nairobi this 15th day of October, 2015.

R.E. ABURILI

JUDGE