



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CENTRAL REGISTRY

CIVIL CASE NO. 145 OF 2010

ROSEMARY WANJIRU KUNGU.....PLAINTIFF

VERSUS

ELIJAH MACHARIA GITHINJI.....1ST DEFENDANT

AUTOPLUS USED PARTS TRADING COMPANY.....2ND DEFENDANT

JUDGEMENT

The Pleadings

1. The plaintiff, **Rosemary Wanjiru Kungu**, filed this suit seeking General damages for pain suffering, special damages in the sum of Kshs 1,048,597/=, Loss of income, Loss of consortium, Future medical expenses, Interest on the foregoing, Costs of the suit and any other/further relief.
2. According to the plaint filed herein on or about the 18th January, 2007 the plaintiff was walking along Waiyaki Way when the 1st defendant who was the driver of motor vehicle registration number KAW 625, owned by the 2nd defendant herein, negligently drove the said vehicle that it lost control, left the road and knocked the plaintiff who was walking on the side walk causing serious injuries to the plaintiff.
3. It was pleaded that the said vehicle was being driven at a high speed in the circumstances, that the driver failed to keep any or any proper lookout or maintain adequate control over the said vehicle, drove the same without due care and attention, failed to apply brakes in time or at all, failed to observe traffic rules, failed to stop, slow down swerve in order to avoid the said accident and/or reversed the said vehicle on a major highway.
4. As a result of the foregoing it was pleaded that the plaintiff sustained a fracture of spine thoracic vertebrae T12, complete paraplegia, large ward on right shoulder, urine retention, dislocation of the right knee, severe spinal injury (fracture) and partial paralytic ileus. The result of the foregoing was that the plaintiff was admitted to future rehabilitation for many years requiring continued physiotherapy, bladder catheters intervention and management of ulcers. The plaintiff also incurred special damages as stated hereinabove.
5. On the part of the 1st Defendant, the allegation that he was the driver of the said vehicle as well as the ownership thereof was denied. The occurrence of the said accident was similarly denied as well as the particulars of negligence. However in the alternative the occurrence of the accident was blame don the plaintiff's negligence particulars whereof were provided.
6. While denying the injuries sustained by the plaintiff, it was averred that the suit was time barred, bad in law and an abuse of the Court process.
7. On the part of the 2nd defendant, it was pleaded that the 2nd defendant is a dealer of motor vehicles

and spare parts. According to the 2nd defendant at the time of the accident it had sold the vehicle to one **Peter William Kinyanjui** on 28th November, 2006 and surrendered the log book and duly executed the transfer form and hence he did not have any interest in the management and/or control thereof at the material time. Accordingly, he was unable to plead to various allegations in the plaint. It however denied being vicarious liable for the accident.

Plaintiff's Case

8. According to the plaintiff, who testified as PW1, she was a single mother with an 18 year old daughter who was under the care of the plaintiff's parents. She testified that she was not born disabled. However on 18th January, 2007 at around 11.00 am she alighted from a matatu on Church Road and wanted to cross over to the other side of the road. She was on the left side of the road as one faces town centre. She waited for the traffic to clear but as she was crossing a matatu registration no. KAW 625U reversed and hit her before she could cross the road and she found herself under the vehicle. She sustained a fracture and burns on one side of the hand caused by the exhaust pipe and although she was conscious the matatu had to be lifted up since she was under it.
9. She was then removed from under the vehicle and was taken to MP Shah Hospital in the same matatu all the while she was conscious. At the Hospital she was given first aid and it was discovered she had sustained spinal injury. She was then transferred to Kikuyu Mission Hospital where she spent one week. She was thereafter transferred to Kenyatta National Hospital where she stayed for 10 days and was then transferred to Menelik Hospital where she spent 2 months. After her discharge she went home to continue with the rehabilitation. She also went to Spinal Injury Hospital for physiotherapy which she testified she was continuing with. She was also visiting **Dr Waithaka** at Karen for the same treatment and ultra sound. According to her she was spending Kshs 9,000/- per month for diapers and needed someone to help her around whom she was paying Kshs 6,000/- per month and for the day person Kshs 9,000/- per month. According to her she was spending Kshs 2,000/- per day on transport from Kangemi to Karen. She also required a lot of filled cushion to help her when seated for long so that she doesn't get tired at the cost of Kshs 15,000/- per year. In her evidence she needs physiotherapy 3 times a week at the rate of 1,500/- per session and daily care for skin and sores at the rate of Kshs 1,000/- per month. She also required a wheelchair at the cost of Kshs 20,000/-with a lifespan of 7 months. She produced her medical documents as Plaintiff Exhibit 1 and receipts as Plaintiff Exhibit 2.
10. The plaintiff conceded that the suit was filed late. And the reason she gave for the late filing was due to the fact that she had instructed another advocate who did not file the suit in time as there were ongoing negotiations going on with the insurance company hence she was not to blame. She produced the order for leave to file the suit out of time as Plaintiff Exhibit 3.
11. The plaintiff testified that she conducted a search of the vehicle which revealed that it was owned by the 2nd defendant herein and produced the certificate of search as Plaintiff Exhibit 4. According to her the name of the driver was one Elijah though she was unable to remember his other names. According to her the vehicle was owned by one **Karimi Kinyanjui** who was her father's neighbour and the vehicle was insured by Direct Line Insurance Company.
12. She testified that her statement was recorded by police officers from Parkland Police Station while she was at MP Shah Hospital and she obtained a police abstract and Inspection Report which were marked as MFI-5 and MFI-6 respectively. She reiterated that though previously she used to take care of her daughter she was no longer able to do so and the said daughter who was at St. Nicholas School, was being taken care of by her parents and she produced a receipt dated 30th September 2008 as Plaintiff Exhibit 7. Before the accident she was running a hair saloon business along Waiyaki Way and produced a sub-tenancy agreement and receipts for the same which were marked as Plaintiff Exhibits 8 and 9 respectively. She also produced the agreement for sale from the previous owner as Plaintiff Exhibit 10.
13. According to her was unable to walk. At the time of the accident she had a male partner but after the accident was no longer able to date the way she used to hence her life had completely changed as she was no longer able to lead a normal life. She therefore sought compensation and future expenses.
14. In cross-examination by **Mr Ndungu**, learned counsel for the 1st defendant, the plaintiff said that

- she was standing at the parking bay at the stage. She asserted that she was conscious even after the accident. She said the reason for the delay in filing the suit was due to her advocate and that she knew the name of the owner of the vehicle who was a neighbour known as Karimi. She reiterated that the police went to MP Shah Hospital on the day of the accident from Parklands Police Station and she collected the abstract in 2007 in which the registration number of the vehicle, the name of the Insurance Company, the name and telephone number of the driver, the policy number were indicated. She confirmed that all along she knew the details of the vehicles and that she spent Kshs 9,000/- on diapers, Kshs 2,000/- on transport per day. She averred that there were negotiations between the insurance and her lawyers and said she had the letters she was given by her lawyers though she did not produce them. She insisted that the registered owner of the vehicle was the 2nd defendant. Although she was engaged in small business to keep herself busy, she was getting very little from it. She said she was admitted at MP Shah where some tests were ran. Apart from this case she said she had not testified in any other case.
15. In re-examination, the plaintiff insisted that her former advocates were negotiating with the Direct Line Insurance and said that she swore an affidavit to which was annexed copies of the correspondences. She said that she knew the said **Karimi** had a fleet of vehicles though she was unable to state their registration numbers. However, when the search was conducted the name which came out was that of the 2nd defendant. Although the business she is conducting is co-owned with her sister she cannot access the place hence still depends on her parents.
 16. PW2 was **Mr Washington Wokabi** a graduate from the University of Nairobi with MBCHB in 1974 and Masters Degree in Medicine in 1978. He testified that he was a consultant surgeon. He examined the plaintiff, who was aged 38 years on 18th October, 2010 and prepared a report dated 7th November, 2011.
 17. According to PW2, the plaintiff was involved in a road traffic accident and sustained spinal injury which left her completely paralysed due to the fracture and compression of spinal cord at the lower thoracic region. The said paralysis resulted in incontinence of urine and stool and motor loss. She was eventually discharged on a wheelchair and had not recovered. She also sustained extensive skin and muscle loss on right arm and fracture of right collarbone.
 18. The examination confirmed the complete paralysis, that she was in a wheelchair with a large scar on the right arm and that she had a fracture of the collarbone. PW2 concluded that her life would change due to her paraplegic state and she would require a wheelchair at the cost of Kshs 50,000/- with a lifespan of 5 years, diapers for personal hygiene at Kshs 50,000/- per year, special mattress to prevent development of sores at Kshs 150,000/- with a lifespan of 10-15 years. According to PW2, the plaintiff is still in child bearing age and can conceive through caesarean section. However, she would not be able to enjoy sexual encounter due to lack of sensation in the genital area. There were other requirements which were included in the report including daily physiotherapy.
 19. PW2 testified that he relied on reports by **Prof Gakuo, Dr. Kilonzo** of Kikuyu Hospital, discharge notes from Kikuyu Hospital and Menelik Hospital. He produced his report as Plaintiff Exhibit 12 and receipt for his charges as Plaintiff Exhibit 13.
 20. In cross examination by **Mr. Ndungu** he explained that the plaintiff would require physiotherapy for the rest of her life once or twice a week.
 21. PW3 was **Dr Lawrence Njogu Chege** from PCEA Kikuyu Hospital. According to him the plaintiff, then 34 years old, was taken to the Hospital following her involvement in a road traffic accident on 18th January 2007 complaining of inability to walk and had multiple injuries on the pelvis, chest, abdomen and soft tissue injuries on the arms. X-rays confirmed a fracture of the clavicle, fracture of the pelvis, dislocation on the right knee, compression fracture of spinal bones T10 and T11 with sensory loss at L1. After initial treatment and stabilisation she was referred to Kenyatta National Hospital for specialised treatment of the spinal injuries. He then produced the bundle of documents from the Hospital which were marked as Plaintiff Exhibit 14. According to him his charges amounted to Kshs 8,000/- and he produced a receipt in respect thereof which was marked as exhibit 15.
 22. In cross-examination PW3 however admitted that he was not the one who personally treated the plaintiff but the same was done by his colleague.
 23. PW4, the last witness for the plaintiff was **Police Constable Justus Shimbevu**, based at the Divisional Traffic Gigiri Division where he had been for 4 years. He clarified that he was not at

- the station at the time of the accident. He however testified that on 18th January, 2007 the station received a report of an injury accident involving Motor Vehicle Reg. No. KAW 625U Nissan Matatu and a pedestrian named **Rosemary Wanjiku Kungu**. The said report was entered by the police as entry no. 14 of the same date in the Occurrence Book and the time of the accident was indicated as 11.45 am. He confirmed that he had the police abstract dated 11th September 2007 filed in respect of the said accident, Motor Vehicle Inspection Report No. 368977 relating to the same accident in respect of motor vehicle Reg. No. KAW 625U. Since the P3 had not yet been filled in the injuries were not indicated in the abstract. However the insurance company was indicated as Direct Line Insurance. He produced the relevant page of the OB, the police abstract and the inspection report as Plaintiff Exhibit 16 and added that this was a serious injury accident.
24. In cross-examination by **Mr. Ndungu** he stated that the circumstances of the accident were that the pedestrian was crossing the road and there was no indication of a zebra crossing at the scene. According to him the driver of the vehicle had not been charged yet. According to the inspection report there were no pre-accident defects noted.
25. In re-examination he stated that the matter was still pending investigation and he could not tell the exact point of impact.

Defence Case

26. On the part of the defence, they chose not to call any witness but by consent the 2nd defendant's bundle of documents was produced as Defence Exhibit 1.

Plaintiff's Submissions

27. On behalf of the plaintiff it was submitted that there was no evidence adduced to contradict the plaintiff's evidence and the cross examination did not reveal any contradiction or untruths in the plaintiff's case. According to the plaintiff the driver owed the plaintiff a duty of care in that he ought to have kept a lookout for pedestrians on the sidewalk and ought not to have reversed thereat. By so doing he broke the traffic rules and was negligent for failure to look out for pedestrians.
28. It was therefore submitted that in the absence of evidence to the contrary, the particulars of negligence were proved hence the court ought to find the defendants jointly and severally liable for the accident at 100%. Since no third party proceedings were taken against the said **Peter William Kinyanjui**, it was submitted that vicarious liability ought to attach to the 2nd defendant based on the certificate of search.
29. On quantum, it was submitted while reiterating the medical evidence that the plaintiff got paralysed at the age of 34 years which was the most productive stage in her life hence the Court ought to adopt a multiplier of 24 years or 504 months. Based on **Isaiah Oduor Achanda vs. Attorney General NRB HCC No. 1051 of 1996**, **Pius Kipkarere K. Mitei vs. Leonard Kiss Ongachi & Bernard Mahungu Kamau ELD HCCC No. 220 of 2001**, **David Maina Njoroge vs. Gingalili Farm Ltd NKU HCCC No. 191 of 2010**, **Francisca Mbithe Nziu & Another vs. Paul Thairu Muiruri NRB HCCC No. 550 of 2002**, **Stephen Malave vs. KPLC MBS HCCC No. 278 of 2006** and **William Mutungi vs. Samwel K. Nyutu & Another NRB HCCC No. 2735 of 1998**, the plaintiff claimed Kshs 63,665,447/-.

1st Defendant's Submissions

30. On behalf of the 1st Defendant it was submitted that since the plaintiff's cause of action arose on 18th January, 2007, as at 11th March, 2010 when the suit was filed, the same stood statute barred pursuant to section 4(2) of the ***Limitation of Actions Act***, Cap 22 Laws of Kenya. In support of this submission the 1st defendant relied on **Rawal vs. Rawal [1990] KLR 275**, **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** and **Iga vs. Makerere University [1972] EA 65**.
31. It was submitted that it is a requirement that once leave is obtained the order must be typed on the body of the plaint at the heading. The plaint filed herein however had no such indication that leave to file the suit out of time was obtained and the said order was never served. It was

- submitted that the failure to serve the order was fatal to the suit. In support of this submission the 1st Defendant relied on In the Matter of **An Application HCCC No. 1725 of 2010**. Based on **Oruta and Another vs. Nyamato [1988] KLR 590** and **Choice Tea Brokers Ltd vs. James Thige Ndegwa & 4 Others [2010] eKLR**, it was submitted that the issue of limitation was properly taken at the hearing of the suit.
32. It was nevertheless submitted based on **Ngari and Another vs. Odero [1999] 2 EA 241** that the requirements for extension of time are stringent and the court must be satisfied that they are met before granting the application. It was submitted that in this case the plaintiff only contended herself by producing an order and explaining that the first advocate was negotiating with the insurance. However, according to the 1st defendant these are not the grounds in section 27(2) of the ***Limitation of Actions Act*** hence the Court ought to find that the said grounds were never met. The 1st defendant relied on **Peter Kimani Ndai & Another vs. Peter Gitau Njoroge [2008] eKLR** and **Francis Mugo vs. Amboseli Court Limited [2008] eKLR**.
33. On liability, it was submitted that the no blame has been laid against the 1st Defendant since PW4 stated that the plaintiff was crossing the road and not walking on the sideway and no traffic charges had been laid against the driver. It was submitted that since the driver was reversing to avoid hitting a trailer the defendant ought not to be held liable since it is trite that he who alleges must prove as there is no liability without fault and reliance was placed on **Eastern Produce (K) Limited vs. Christopher Atiado Osiro ELD HCCC No. 43 of 2001** and **Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd [1991] 2 KAR 258**.
34. On quantum it was the 1st defendant's view that based on Patrick **Mwangi Irungu vs. Charles Macharia Mwangi & Another [2008] eKLR**, an award of Kshs 1,500,000/= would have been adequate. It was further contended that in the absence of books of accounting or bank statement the Court ought to apply the minimum wage of Kshs 5,000/- and use a multiplier of 15 years. In the 1st Defendant's view a total sum of Kshs 1,980,000/- would have been warranted if the plaintiff had proved her case. In the absence of receipts it was submitted that the claim in respect of police abstract ought to be disallowed and since there were no stamp duties the claim in respect of the medical and taxi expenses should be disallowed.
35. In the final analysis it was submitted that the plaintiff's suit ought to be dismissed.

Issues

36. Having considered the pleadings, the evidence and the submissions herein, it is my view that the following issues fall for determination:
1. **Whether the plaintiff's claim is time barred and whether the order extending time was properly granted.**
 2. **Whether the suit motor vehicle was owned by the 2nd defendant.**
 3. **Whether the said vehicle was being driven by the 1st Defendant as agent of the 2nd Defendant.**
 4. **Whether there was an accident as pleaded and if so whether the accident was caused by the negligence of the defendants.**
 5. **Whether the plaintiff proved her case to the required standards.**
 6. **Whether the plaintiff is entitled to damages and if so, what is the quantum.**
 7. **Who should be penalised in costs.**

Determinations

37. The first issue for determination is whether the plaintiff's claim is time barred.
38. The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In **Rawal vs. Rawal** (supra) (as he then was) stated:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on

the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims". See also Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.

39. The same position was taken in Iga vs. Makerere University (supra) in which it was held:

"A plaintiff which is barred by limitation is a plaintiff "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".

40. What this means is, a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya are fulfilled. That section provides as follows:

(1) Section 4 (2) does not afford a defence to an action founded on tort where -

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect -

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

42. The above cited provisions clearly stipulate the circumstances under which the court may extend time for bringing an action barred by limitation statute. **Mbito, J** dealt extensively with the issue in Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989 in which the learned Judge expressed himself as follows:

"When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinise the case to see whether it is a proper one for

leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinised, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to done him by obtaining an order for the trial of a preliminary issue...Section 27 of the Limitation of Actions Act...provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character...Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action".

41. Potter, J in Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104 similarly had this to say:

"The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability...Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances....In section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be...The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done".

42. Therefore extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the

duty exists by virtue of a contract or of a written law or independently of a contract or written law).

43. This was confirmed in **Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000** where the Court of Appeal held:

“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.

44. However, even if the foregoing conditions are satisfied time will not be extended unless the applicant proves that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be”.

45. However in **Gatune vs. The Headmaster, Nairobi Technical High School & Another [1988] KLR 561**, it was held that the Attorney General occupies a crucial role in litigation and protracted negotiations with him in form payment of damages are taken seriously and a reasonable lay claimant would feel that by negotiating with him, the Attorney General had invited him to delay court proceedings and that he would not be prejudiced by the delay. The reason for this is to be found in the fact that the Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief. Therefore where circumstances permit the cause of action which is barred as opposed to being extinguished is capable of being revived. See **Rawal vs. Rawal [1990] KLR 275** and **Iga vs. Makerere University [1972] EA 65**.

46. In the result, where the defendant or his representative such as the insurance company leads the plaintiff to believe that the claim is capable of being settled and in reliance thereof the plaintiff or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of section 27 aforesaid. At the time of the application for extension of time as was held in **Lucia Wambui Ngugi vs. Kenya Railways & Another**, the court assumes that the facts as deposed in the supporting affidavit are true. It was therefore upon the defendant at the hearing to challenge the grounds upon which the order extending time was granted. Whereas the defence concentrated on the provisions of section 27 of the ***Limitation of Actions Act***, no serious challenge was directed to the issue of negotiations. I am therefore unable to find that the order extending time to file the suit was not properly granted.

47. The next issue is whether the suit motor vehicle was owned by the 2nd defendant. It was pleaded by the 2nd defendant that at the time of the accident it had sold the vehicle to one **Peter William Kinyanjui** and surrendered the log book and duly executed the transfer form and hence he did not have any interest in the management and/or control thereof. The Court appreciates that ***Traffic Act*** is an Act of parliament to consolidate the law relating to traffic on the roads; it is not an Act which decides *de facto* or *de jure* ownership of vehicles hence ownership of vehicles passes by sale and delivery and registration books are only evidence of title and property passes in accordance with the ***Sale of Goods Act*** when the contract of sale is made. See **Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996**.

48. However the issue of production of documents without the makers thereof has been the subject of number of decisions. In **Kenya Breweries Limited vs. Abraham Lain Kisii HCCA No. 23 of 2003 Musinga, J** (as he then was) while relying on the Court of Appeal decision in **Mohamed**

Musa & Another vs. Peter M Mailanyi & Another Civil Appeal No. 243 of 1998 expressed himself as follows:

“Under section 35(b) of the Evidence Act the medical report ought to have been produced by the maker thereof. The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendant as well as to the plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court make calculations or to reach a conclusion thereon otherwise the award cannot stand..... In this case the finding of the trial court cannot stand as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases *ex parte*, the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party.”

49. Similarly, Ringera, J (as he then was) in David Ndun’gu Macharia vs. Samuel K Muturi & Another Nairobi HCCC No. 125 of 1989 expressed himself as follows:

“The second issue is that it is only an agreed report that can properly be admitted in evidence without calling the maker. The mere exchange of medical reports does not render such report or reports admissible without calling the maker(s) unless one or both of them have been agreed. A direction that medical reports be exchanged is no more than an order in the nature of mutual discovery of medical evidence. It must be understood that orders that a medical report be agreed and the same be admitted in evidence without calling the maker are made for the purpose, not of hindering the administration of justice, but of assisting it. If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately embarrassed between the two views and the two statements. The whole object of the type of order is to ensure that matters of medical fact, and matters of medical opinion shall if possible be agreed by the medical men and that is the object and the sole object of orders of this kind, and indeed no order could achieve anything more. The practice was certainly never intended to admit of inconsistency and differing medical points of view being put before the judge and described as agreed medical reports. You cannot have an agreement on two inconsistent statements of fact, and the phrase “agreed medical report” means, and means only a report where the facts stated are agreed as true medical opinions expressed and accepted as correct. In the normal case in pursuance of an order of this kind, the doctors on the two sides would meet and embody their views in a document which they both may sign and that is very convenient, and would save a great deal of trouble and expense in many cases, but it is not to be understood that orders of this kind are to be made as a matter of course. It would depend very much on the nature of the case and the nature of the injuries, and whether it will save trouble and expense and in the long run by dispensing with the doctors at the hearing. On an interlocutory application some discretion must be exercised by the master who is making the order as to whether it will be a saving of expenses to make this type of order, but it must not be taken that is all that is necessary. The case may be one where the report of the first doctor is accepted by the other doctor. If on the other hand there are likely to be points of controversy, then if the agreement is to be completed they can only solve them by coming to an agreement, and if they cannot come to an agreement, there can never be an agreed report and that is the object of this procedure..... In short it is for the parties’ doctors (and not the parties themselves, or their advocates) to agree on a medical report and if the doctors have not agreed by either adopting one report or jointly authorising a single report there is no agreed report.”

50. On the weight to be attached to such evidence Warsame, J (as he then was) in Theodore Otieno Kambogo vs. Norwegian People’s Aid Nairobi (Milimani) HCCC NO. 774 of 2000 held:

“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.”

51. It follows that without the defence calling witnesses who could be cross-examined on the documents produced by the defence rendered the same of very little, if any, weight at all. In light of the contents of the certificate of official search produced herein, the only reasonable conclusion is that the suit motor vehicle was owned by the 2nd Defendant.
52. The next issue is whether the suit vehicle was being driven by the 1st defendant as agent of the 2nd defendant. Once again the testimony of the plaintiff that the said vehicle was being driven by the 1st defendant was not controverted. This testimony was corroborated by the police records. Accordingly, based on that evidence I find that the suit vehicle was being driven by the 1st Defendant. On whether it was being driven by the 1st defendant as agent for the 2nd defendant, **Chesoni, Ag. JA** (as he then was) in Mwona Ndoos vs. Kakuzi Ltd. (1982-1988) 1 KAR 523 held:

“It was not established that the employee was on a frolic of his own since there was no evidence as to what he was doing on that road and how far that road was from the estate. Without that evidence the reasonable presumption is that he was on his master’s business.”

53. Similarly, in Kenya Bus Services Limited vs. Humphrey [2003] KLR 665; [2003] 2 EA 519 the Court of Appeal held 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. This presumption is made stronger 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 being driven for the joint benefit of the owner and the driver.”

54. In the premises I find that the 1st defendant was driving the suit vehicle as a servant or agent of the 2nd defendant hence the 2nd defendant is vicariously liable.
55. The next issue for determination is whether there was an accident as pleaded and if so whether the accident was caused by the negligence of the defendants. The only evidence on record on how the accident occurred was the plaintiff’s evidence. The police officer who testified in this case conceded that he was not at the station at the time of the accident. Therefore his evidence on how the accident took place could only be at best hearsay. Without any evidence to the contrary, this Court finds that the accident took place when the driver of the suit motor vehicle was reversing. He ought to have had a proper lookout before reversing and the fact that the accident took place without him noticing the plaintiff can only be explained on the ground of negligence. In Meru Packers Limited vs. Hebert Liatema Omwaka Civil Appeal No. 78 of 2001, it was held that where a moving vehicle crashes against another which is stationary and in a parking bay it is the culprit of the accident. Similarly, where a vehicle crashes a pedestrian in a parking bay, in the absence of an explanation coming from the driver of that vehicle, it is my view that the driver ought to be held liable. It follows that the next issue - whether the plaintiff proved her case to the required standards – must similarly be answered in the affirmative.
56. That now leads me to the penultimate issue and that is whether the plaintiff is entitled to damages and if so, what is the quantum. That the plaintiff sustained serious injuries is not in doubt. She must also have undergone serious pain and suffering taking into account that she was conscious all along. However, as was held by **Potter, JA** in Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 while relying on the oft cited case of H. West And Son Ltd vs. Shephard [1964] AC 326 AT 345.:

“Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

57. From the said case the principles which were formulated were that in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.
58. According to **Dr Wokabi's** report, the plaintiff sustained compression fracture of the T12 and L1 causing irreversible spinal cord damage at that level as a result of which she was completely paralysed and would remain paralysed permanently and would never recover function. As a result of being paraplegic, her life had changed a great deal and to get around she would have to use a wheelchair as well as diapers for her personal hygiene. Although she could conceive by way of caesarean section, she would not be able to enjoy a sexual encounter due to lack of sensation in her external genitalia. The doctor went on to state that there were many other things she would not be able to do though according to the doctor these were too many to enumerate in this report. With due respect to the doctor that was a very casual way of dealing with such a serious matter. A medico-legal report ought to be as detailed as possible and ought not to leave room for speculation.
59. In **Joseph Maganga Kasha vs. Kenya Power & Lighting Company Ltd [2012] eKLR**, the plaintiff sustained serious injuries and became paralysed from his waist downwards. He was rushed to AgaKhan Hospital by the Defendant's vehicle. He was X-rayed, taken for a CT scan and admitted. He was discharged on 4th February, 2005, two months after admission. The medical report revealed that he had sustained very severe and debilitating spinal injuries with burst displaced fracture of thoracic spine; wedge compression fracture of lumbar spine and also on the left transverse process; spinal cord and exit nerve compression leading to total paralysis below L1; bone fragments within the spinal canal; and urine and stool incontinence, erectile dysfunction. He also sustained a fracture of the head of the right and left T12 ribs. The doctor concluded that the injuries were severe and debilitating multiple bone and spinal cord injuries leading to complete paralysis of both lower limbs. In his opinion, the Plaintiff had healed with 100% permanent disability due to the spinal cord injuries but had a ruined working life and would never be able to resume his usual work. Further he had a ruined sexual life while single and with no children of his own and would forever be dependent and in need of full time home based nursing care. He was awarded Kshs 3,000,000.00 on 12th October, 2012. The plaintiff was 22 years at the time of the accident. After taking into account the fact that the award would be a lump sum payable and might therefore, be invested to good return in the future, the Court adopted a multiplier of 38 years to the plaintiff who was a casual worker.
60. In **William Wagura Maigua vs. Elbur Flora Limited [2012] eKLR**, the plaintiff, a carpenter, lost consciousness after the accident. He was rushed to Molo Hospital for first aid where he came to. He was later on treated at the Provincial General Hospital, Nakuru before he was transferred to Kenyatta National Hospital and later to the Spinal Injuries Unit where he was confined for 14 months. According to the doctor who examined him, the plaintiff was suffering from paralysis of the limbs as a result of spinal injuries and was unable to use his limbs and had to depend on other people for mobility. He was awarded Kshs. 3,000,000.00 for general damages on 5th October, 2012.
61. In **Nancy Oseko vs. Board of Governors Masai Girls High School [2011] eKLR**, the plaintiff, a student aged 19 years old sustained Chest injury with accumulation of blood in the chest; head compression fracture of the thoracic spine no 12; loss of sensation from the level T-12 downwards; loss of motor function from same level downwards; loss of control of urine and stool. She testified that she underwent an operation of the spine where metals were fixed to stabilize the spine, an open chest operation to remove blood; under went physiotherapy, occupational therapy; ambulating her on a wheelchair. She developed bed sores which were healed and had to use medication to evacuate stool. The Doctor opined that she had permanently lost ability to walk and was confined to a wheel chair for life and a paraplegic and needed a lapel all her life; inability to control stool; inability to control urine, she was fitted with a catheter rundown, and urine bag, uses diapers or napkins. She also lost the ability to

- engage in sexual life in future though she could conceive and deliver by caesarean section. She was psychologically affected and there was a possibility that she might never engage in any gainful employment. She was predisposed to recurrent chest and urinary tract infections and infections due to the nature of her injuries and required frequent check-ups. She also required a special bed that could be turned by hydraulic or electronic system and a special mattress and regular follow up as an outpatient for life on a three Monthly basis. The doctor's opinion was that her life had completely changed and that she suffered 100% disability. She was awarded Kshs 2,500,000.00 in general damages on 12th June, 2011. The Court adopted a multiplier of 20 years.
62. Taking into account the foregoing I am of the considered view that an award of Kshs 3,000,000.00 in general damages for pain and suffering is reasonable in the circumstances.
63. On the issue of the multiplier, the law is that due regard is to be paid to the expectation of working life and dependency by the named dependants as well as the contingencies of life including the fact that the deceased could have died prematurely of a cause other than the accident that took him as well as the fact that the money will be paid in lump sum. See **Ileri Mugo vs. Githinji Ngari HCA 5087/1990.**
64. With respect to the multiplicand, in determining the multiplicand, the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind in expectation of earning life of the deceased. Taking into account the contingencies of life as well as the fact that the money will be paid in a lump sum, I agree with the Defendant that in the circumstances of this case a multiplier of 15 years is reasonable and I adopt the same.
65. According to the medical report, the plaintiff would need a wheelchair at the cost of Kshs 50,000.00 for every 5 years. In the said fifteen years she would require 3 wheelchairs at the cost of Kshs 150,000.00. According to the same report, the plaintiff requires diapers at the yearly cost of Kshs 50,000.00. The sum required for the diapers would thus be Kshs $50,000 \times 15 = 750,000.00$. Apart from this, the plaintiff needs a special mattress at the cost of Kshs 150,000.00 to last between 10-15 years hence for the said 15 years she would require Kshs 150,000.00.
66. According to the plaintiff she was spending Kshs 15,000/- per month for a helper. I however believe that a sum of Kshs 10,000/- is reasonable hence she would require Kshs $10,000 \times 15 \times 12 = 1,800,000.00$. In respect of transport at the rate of Kshs 6,000/- per week would bring the total amount to Kshs $6,000 \times 15 \times 52 = 4,680,000.00$ while she would require Kshs $4,500.00 \times 15 \times 52 = 3,510,000.00$ for physiotherapy. For daily skin care she would require Kshs $1,000.00 \times 15 \times 12 = 180,000.00$.
67. On special damages, the plaintiff pleaded Kshs 1,048,597/=. However the total sum as per the receipts produced before this Court comes to Kshs 972,157.32.
68. I however, disallow the claim for cushions as that claim was not strictly proved and there is no evidence upon which I can find that the not so trifling claim is warranted.
69. In the result I enter judgement against the Defendants jointly and severally in the following sums to the plaintiff:

1. General damages for pain and suffering – Kshs 3,000,000.00.
2. Cost of wheelchair - Kshs 150,000.00.
3. Cost of diapers - Kshs 750,000.00.
4. Cost of mattress - Kshs 150,000.00.
5. Cost of helper - Kshs 1,800,000.00.
6. Weekly transport - Kshs 4,680,000.00
7. Physiotherapy – Kshs 3,510,000.00.
8. Daily skin care - Kshs 180,000.00.
9. Special damages - Kshs 972,157.32.

Total award – Kshs. 15,042,157.32.

70. The special damages will earn interest from the date of filing of the suit while the rest of the sums will earn interest from the date of this judgement at Court rates till payment in full.

71. The costs of this suit are awarded to the plaintiff.

Judgment read, signed and delivered in court this 2nd day of July 2014.

GV ODUNGA

JUDGE

Delivered in the presence of:

Mr Raballa for the Plaintiff

Cc Kevin