



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO 166 OF 2018

ALEXANDER KASANGA KAVUTI.....
.....PLAINTIFF

VERSUS

HEMILTON NYAMAI KING'OO T/A AFRICAN CLASSIC BAKERY.....1ST
DEFENDANT

MANGELI KAMANTHE CAROLINE T/A AFRICAN CLASSIC BAKERY.....2ND
DEFENDANT

EUNITE PRIDE (K) LTD.....3RD DEFENDANT

STANLEY KIMUTAI SIGILAI.....4TH DEFENDANT

JUDGMENT

THE CLAIM

Alexander Kasanga Kavuti (hereinafter referred to as the plaintiff) filed this suit on 13/7/2018 vide a plaint dated 10/7/2018. The plaint was later amended on 1/7/2022 and filed on 4/7/2022. In the amended plaint, the plaintiff sued Hemilton Nyamai King'oo, Mangeli Kamanthe Caroline, Eunite Pride (K) Ltd and Stanley Mimutai Sigilai (hereinafter referred to as the 1st, 2nd, 3rd and 4th defendants respectively) on account of a road traffic accident that allegedly occurred on 27/1/2017 at Manyanga area along Mombasa-Nairobi

road. The plaintiff averred that on the material day, he was travelling in motor vehicle registration number KCJ 134T as an authorized passenger when the 1st and 2nd defendants or their authorized driver drove the said motor vehicle so carelessly and negligently that it rammed into the 3rd and 4th defendants' motor vehicle registration number KCH 588B/ZE 5573 which was carelessly and negligently parked at the middle of the road thereby causing obstruction. That the plaintiff was severely injured.

The 1st and 2nd defendants were sued as the owners of motor vehicle registration number KCJ 134T whereas the 3rd and 4th defendants were sued as the registered owners of motor vehicle (Prime mover) registration number KCH 588B and Trailer registration number ZE 5573 respectively. The plaintiff averred that the accident was solely caused by negligence and/or carelessness on the part of all the defendants and/or their authorized agents. The plaintiff pleaded the following particulars of negligence as against the 1st and 2nd Defendants or their authorized driver:

- a) Drove the said motor vehicle at an excessive speed in the circumstances;
- b) Drove without due care and attention;
- c) Drove without due regard to their passengers and particularly the plaintiff;
- d) Drove without due regard to other road users;
- e) Failed to slow down, to brake, or in any other way control the said motor vehicle so as to avoid causing the accident.

The plaintiff further pleaded the following particulars of negligence as against the 3rd and 4th defendants or their authorized driver:

- a) Parked motor vehicle registration number KCH 588B and trailer registration number ZE 5573 at the middle of the road without any warning and/or indication;
- b) Causing obstruction on the road;
- c) Having a motor vehicle on the road at night when it lacked rear reflectors;
- d) Failing to place warning signs on the road;
- e) Parking without due regard to other road users and particularly the plaintiff;

- f) Failed to give warning by hand, lights or in any way notify other road users of the said negligently parked and/or stalled motor vehicle so as to avoid causing the accident.

The plaintiff pleaded particulars of injuries and those of special damages and prayed for judgment against the defendants jointly and severally for:

- 1) General damages for pain, suffering and loss of amenities;
- 2) Special damages of Ksh. 21,230/=;
- 3) Damages for future treatment, reconstructive surgery and removal of metal plates/internal implants;
- 4) Costs of the suit and interest.

THE 1ST AND 2ND DEFENDANTS' DEFENCE AND COUNTER-CLAIM

The 1st and 2nd defendants entered appearance on 27/11/2018 and filed a written statement of defence on the same day. The defence was later amended and a counter-claim was incorporated. This was filed on 15/3/2021. The 1st and 2nd defendants denied the plaintiff's claim and averred that they employed the plaintiff as a driver under probation for three months and assigned him to drive their motor vehicle registration number KCJ 134T as the sole driver on the material day but the plaintiff abdicated his duty and gave the motor vehicle to an unauthorized person being the Salesman, to drive it. The 1st and 2nd defendants denied the particulars of negligence pleaded against them.

The 1st and 2nd defendants averred that the accident was wholly and/or substantially caused or contributed to by negligence of the plaintiff in assigning an unauthorized person to drive the motor vehicle without the authority and/or consent and/or awareness of the 1st and 2nd defendants. The following particulars of negligence were pleaded as against the plaintiff:

- a) Assigning an unauthorized person to drive the motor vehicle KCJ 134T without the authority or consent or awareness of the 1st and 2nd defendants;
- b) Failing to follow instructions of the 1st and 2nd defendants while on duty;
- c) Abdicating his duty as a driver and failing to notify the 1st and 2nd defendants accordingly;

d) Breach of contract of employment.

In the alternative, the 1st and 2nd defendants averred that the accident was wholly and/or substantially contributed to by the negligence of the driver of motor vehicle registration number KCH 588B, being an agent of the 3rd defendant. They pleaded the following particulars of negligence against the driver of motor vehicle registration number KCH 588B:

- a) Parking motor vehicle registration number KCH 588B in the middle of the road without placing any warning signals to indicate the same was stationary;
- b) Causing an obstruction on the road;
- c) Parking in the middle of a busy road in disregard of other road users as well as the Highway Code and Traffic Act.

The 1st and 2nd defendants averred that the plaintiff was the author of his own misfortune and cannot be heard to seek to benefit from the same. They denied that the plaintiff sustained the injuries mentioned.

Counter-claim

In the counter-claim, the 1st and 2nd defendants reiterated the contents of the defence and averred that as a result of the accident, they suffered loss of user of motor vehicle registration number KCJ 134T and their operations were stopped pending repair of the motor vehicle. That the goods that the motor vehicle was carrying got damaged, thereby occasioning them loss and damage. The 1st and 2nd defendants tabulated the loss amounting to Ksh. 3,178,469.35/= and attributed the same to the plaintiff and 3rd defendant. The 1st and 2nd defendants thus pray for:

- a) The plaintiff's case against them be dismissed with costs;
- b) Liability be apportioned between the plaintiff and the 3rd defendant as the authors of the accident;
- c) Judgment be entered in favour of the 1st and 2nd defendants in the sum of Ksh. 3,178,469.35/= against the plaintiff and 3rd defendant, jointly and severally;
- d) Costs of the counter-claim.

PLAINTIFF'S DEFENCE TO COUNTER-CLAIM

The plaintiff reiterated the contents of the plaint and maintained that he was an authorized passenger in motor vehicle registration number K CJ 134T and not the assigned driver. The plaintiff denied the allegations in the counter-claim in so far as they related to him and further denied the particulars of loss and damage pleaded by the 1st and 2nd defendants. The plaintiff averred that the 1st and 2nd defendants' motor vehicle was comprehensively insured and as such the said defendants cannot claim double benefit as the claim must have been settled by the insurance. The plaintiff prayed for dismissal of the counter-claim with costs.

INTERLOCUTORY JUDGMENT

The record indicates that the 3rd and 4th defendants were served but they failed to enter appearance and not file their statements of defence. Consequently, on 31/1/2023 upon request by the plaintiff, interlocutory judgment was entered against the 3rd and 4th defendants.

THE EVIDENCE***The Plaintiff's Case***

The plaintiff's case was heard by another Magistrate who was subsequently transferred. Two witnesses were called on behalf of the plaintiff. The record indicates that the parties agreed and the court directed that the testimony of one Nzomo Muli given in Makindu SPMCCC No. 165 of 2018 be adopted in this matter. I had to look for that other file so as to obtain the evidence. Nzomo Muli was PW 1 herein. He adopted his statement filed in court as part of his evidence in-chief. His testimony was that on 21/1/2017 at about 4:00 am he was driving motor vehicle registration number K CJ 134T along Mombasa-Nairobi road. That as he approached Manyanga area, he suddenly realized that there was a stationary truck registration number KCH 588B which was in the middle of the lane.

PW 1 stated that there was oncoming traffic on the opposite lane. That he tried to slow down and swerve to the left but rammed into motor vehicle registration number KCH 588B. PW 1 stated that KCH 588B did not have rear reflectors and that there was no warning sign on the road to alert oncoming motorists. That the vehicle's rear lights were also off and as

such, it was difficult to see the motor vehicle from a distance. The witness blamed the driver of KCH 588B for causing obstruction. That had the driver placed warning signs on the road, taken time to signal oncoming traffic by way of light or any other way, had visible rear reflectors and parked the vehicle off the tarmac, the accident could not have happened.

PW 2 was the plaintiff himself. He adopted his statement filed in court as part of his testimony in-chief. The plaintiff stated that on the material day, he was a passenger in motor vehicle registration number KCJ 134T along Mombasa-Nairobi road. That when they reached Manyanga are, there was a stationary truck registration number KCH 588B which was on the road. The plaintiff stated that there were oncoming motor vehicles from the opposite lane. That the driver of the motor vehicle in which the plaintiff was travelling tried to slow down and swerve to the left but rammed into the stationary truck. He stated that the truck did not have reflectors and there were no warning signs on the road to alert oncoming motorists.

The plaintiff stated that he was injured and was taken to hospital for treatment. He blamed the truck driver for the accident as he had caused obstruction, had not placed warning signs on the road and had parked the motor vehicle on the road. The plaintiff produced his claim supporting documents in evidence. On the counter-claim, the plaintiff stated that he would refund any money that the 1st and 2nd defendants spent on his treatment. He further stated that the motor vehicle he was travelling in was driven by PW 1 who was showing him the route.

The Defence Case

The 1st and 2nd defendants called one witness in support of their case. DW 1 was the 1st defendant. He adopted his statement filed in court as part of his testimony and testified on his own behalf and on behalf of the 2nd defendant. His evidence was that the plaintiff had been employed by the 1st and 2nd defendants as the sole driver of motor vehicle registration number KCJ 134T. That on the material day, the plaintiff had been assigned duty to distribute bread using the said motor vehicle, when the accident occurred. DW 1 stated that they were shocked to learn that PW 1 was the driver of their motor vehicle at the time of accident yet he had been employed as a Salesman. DW 1 testified that they had not

authorized PW 1 to drive the motor vehicle nor authorized the plaintiff to delegate his duty to PW 1. The witness stated that the plaintiff was the author of his own misfortune by abdicating his responsibility and as such, he cannot seek to benefit from it. The witness urged the court to dismiss the plaintiff's suit and enter judgment in their favour as per the counter-claim. The 1st defendant produced several documents in support of their case.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

- a) The 1st and 2nd defendants were the owners of motor vehicle registration number KCJ 134T at the material time;
- b) An accident occurred on 27/1/2017 at Manyanga area along Mombasa-Nairobi road involving motor vehicles registration numbers KCJ 134T and KCH 588B/ZE 5573;
- c) The plaintiff had been employed by the 1st and 2nd defendants as their driver;
- d) At the time of accident, the plaintiff was a passenger in motor vehicle registration number KCJ 134T;
- e) The plaintiff was seriously injured as a result of the accident.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

- i. Who was to blame for the accident?
- ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
- iii. Whether the 1st and 2nd defendants are entitled to any relief, and if so, against whom?
- iv. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on his evidence on record and submitted that the same remained unshaken in cross-examination. The plaintiff argued that the 1st and 2nd defendants did not produce any evidence to prove that the plaintiff had allowed another person to drive the motor vehicle on the material day without their knowledge and authority. That since the driver of the 1st and 2nd defendants' motor vehicle was their employee, the said defendants ought to be held vicariously liable. The plaintiff argued that the allegation that he had delegated his duty to another person cannot hold water. He relied on the authorities of *John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] KECA 214 (KLR)* and *Paul Muthui Mwavu v Whitestone (K) Ltd [2015] KECA (KLR)*.

The plaintiff submitted that the 1st and 2nd defendants had not proven that they suffered loss of user of the motor vehicle. That the claim must be specifically pleaded and strictly proved yet the 1st and 2nd defendants did not produce any documents to support the claim. The plaintiff argued that payment for business licences has nothing to do with the plaintiff or the accident. The same applies to insurance expenses and payment of loans. On the part of the 3rd and 4th defendants, the plaintiff submitted that parking the motor vehicle on the road in a manner that caused obstruction contrary to section 53 of the Traffic Act led to the occurrence of the accident. He urged the court to find the defendants 100% liable.

On quantum, the plaintiff proposed a sum of Ksh. 1,500,000/= in general damages for pain, suffering and loss of amenities. The plaintiff relied on the authorities of *Kipkoech v Mella [2025] KEHC 3956 (KLR)*, *George William Awuor v Beryl Awuor Ochieng [2020] eKLR* and *Damaris Wamucii Kagechu v Joseph Kirui & another [2019] eKLR*. The plaintiff urged the court to award Ksh. 550,000/= as future medical expenses and 21,230/= as special damages. The plaintiff also prayed for costs of the suit.

THE 1ST AND 2ND DEFENDANTS' SUBMISSIONS

The 1st and 2nd defendants also filed written submissions. They relied on the plaintiff's evidence and submitted that the 3rd defendant's motor vehicle registration number KCH 588B was to blame for the accident. They urged the court to find the 3rd defendant 100% liable. The 1st and 2nd defendants argued that they were sued simply because they were the plaintiff's employers yet the matter was not brought under the Work Injury Benefits Act. On

quantum, the 1st and 2nd defendants proposed a sum of Ksh. 750,000/= in general damages and relied on the authority of ***Mwangi v Kahoro [2024] KEHC 10577 (KLR)***.

The 1st and 2nd defendants argued that the plaintiff was not entitled to the damages as he had abdicated his duty as the driver of motor vehicle registration number KCJ 134T. That if the court finds that the plaintiff is entitled to damages, then the same should be paid by the 3rd defendant. On the counter-claim, the defence submitted that the same was merited. They urged the court to allow it and award them costs of the suit and counter-claim as against the plaintiff and 3rd defendant.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties as well as the authorities relied upon. It is the duty of the plaintiff to establish or prove negligence on the part of the defendants. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

Liability

There is only one version as to how the accident occurred. This is the version that was given by the plaintiff and his witness. According to the plaintiff's witness, PW 1 was driving motor vehicle registration number KCJ 134T. It was dark and drizzling, meaning visibility was not clear. The evidence shows that motor vehicle registration number KCH 588B was stationary on the road. That there were no signs on the road to show that it had stalled and

that the same had no rear reflectors nor back lights. PW 1 could not see the motor stalled motor vehicle in good time and rammed into it. There is no contrary evidence. In the plaint, the plaintiff blamed the drivers of both motor vehicles for the accident. However, in his testimony, the plaintiff purported to lay full blame to the driver of KCH 588B for the accident. Probably it is because he called the driver of KCJ 134T as his witness herein.

None of the drivers was sued by the plaintiff. The plaintiff opted to sue the owners of the two motor vehicles. Before considering whether or not either of the defendants is liable, the court must determine which of the two drivers was to blame. As already indicated, there is only one version as to how the accident occurred. A driver whose motor vehicle breaks down has a clear duty to other road users to prevent danger. This includes:

- a) Removing the vehicle from the carriageway where possible;
- b) If not possible, giving adequate warning (hazard lights, reflective triangle, etc.);
- c) Taking extra care in poor visibility conditions (like darkness and drizzle).

Failing to put any warning signs in such conditions is generally considered negligence, because it creates a hidden hazard.

Furthermore, section 53 of the Traffic Act provides:

“(1) No vehicle shall be allowed to remain in any position on any road so as to obstruct or to be likely to obstruct or cause inconvenience or danger to other traffic using the road, and, save where the contrary is expressly provided in this Act, every vehicle on a road, when not in motion, shall be drawn up as close to the side of the road as possible.

(2) The driver of any vehicle shall, in case of a break-down, remove the vehicle from the road as soon as possible, and until so removed the vehicle shall be placed as close to the side of the road as possible; and as the vehicle remains on the road between the hours of 6.45 p.m. and 6.15 a.m., its position shall be clearly indicated by a light or lights visible to drivers of vehicles approaching from either direction.

(3) If any part of the vehicle remains on or near the road in a position so as to obstruct or to be likely to obstruct or to cause or to be likely to cause inconvenience or danger to other traffic using the road, the driver shall place on the road not less than fifty metres from the

vehicle two red reflecting triangles of such construction and dimensions as may be prescribed, one ahead of the vehicle and one behind it so that each is clearly visible to drivers of vehicles approaching from ahead or behind, as the case may be.

(4) Any person who leaves any vehicle on a road in such a position or manner or in such a condition as to cause or to be likely to cause any danger to any person shall be guilty of an offence and liable—

(a) for a first conviction, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year; and

(b) on a second or subsequent conviction, to a fine not exceeding seventy-five thousand shillings, or to imprisonment for a term not exceeding eighteen months, and the court shall exercise the power conferred by Part VIII of canceling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified from holding or obtaining a driving licence for a period of two years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.” (Emphasis supplied)

If the plaintiff's evidence is anything to go by, it would mean that the driver of the stationary motor vehicle did not comply with the provisions of section 53 of the Traffic Act. Failure to comply with the above stated provisions is a traffic offence and for purposes of civil proceedings, it is a breach of the duty of care by the driver. Where there is such a breach of duty of care and damage is caused, the person acting in breach is said to have been negligent.

On the other hand, PW 1 or the driver of KCJ 134T, who rammed into the stalled motor vehicle also owes these duties:

- i. To drive at a speed that allows stopping within the visible distance ahead;
- ii. To keep a proper lookout;
- iii. To adjust driving to conditions (darkness, rain, slippery road).

There is a strong presumption that a driver who collides with the rear of another vehicle has likely failed to keep proper control or lookout. However, this presumption is rebuttable,

especially where the obstruction was unexpected, there were no warning signs or visibility was poor. In conditions of darkness and/or rain, there is an increased duty of care on both drivers. The approaching driver must also drive more cautiously.

I have no doubt that the driver of the stalled motor vehicle was negligent. PW 1 was aware that it was dark and drizzling. No proper reason was given to explain why he could not see the stalled motor vehicle in good time. There is no evidence to show that the obstruction was sudden, such as on a bend. In the authority of *Orioki v Kevian Kenya Limited* [2025] KECA 780 (KLR), the Court of Appeal held:

“Under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. (See: Njuguna v Chogo [1985] KLR 452). In this case, the appellant admitted that he collided with the respondent’s vehicle from behind. This fact alone placed the burden on the appellant to prove that the collision was not due to his negligence.”

PW 1 blamed the driver of the stalled motor vehicle for leaving the motor vehicle on the road, failing to put in place warning signs, as well as the poor visibility. It was not disputed that KCH 588B was dangerously positioned on the road and that there were no warning signs. Where a vehicle creates a dangerous obstruction on the road, liability may attach even if another driver collides into it. A driver must not leave a vehicle in a position that amounts to a trap to other road users. On the other hand, a driver must anticipate foreseeable hazards. It is common for motor vehicles to break down on the road. PW 1 ought to have driven in a manner that would have enabled him to avoid the accident.

Lord Reid in *Stapley v Gypsum Mines Limited* [1953] AC 663 at page 68, stated that:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection in a court of law as this question must be decided as a properly instructed and reasonable jury would decide it ...” and “...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault but that if one of them had acted properly the accident would not have happened, but that does not mean that the

accident must be regarded as having been caused by the fault of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.

Having analysed the evidence on record, I find that both drivers were negligent. Whereas the driver of KCH 588B was negligent in causing obstruction, the driver of KCJ 134T was negligent in not observing a proper lookout and failing to drive with due care and attention, given the prevailing circumstances. The police abstract produced by the plaintiff in evidence indicates that the police blamed the driver of KCJ 134T for the accident. It is not clear whether PW 1 was charged in respect of the accident. However, I find the driver of KCH 588B substantially to blame. Had he put in place warning signs, given that it was dark and drizzling, meaning that there was poor visibility, the accident would most probably not have occurred. Consequently, I apportion liability at 30% against the driver of KCJ 134T and 70% against the driver of KCH 588B.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

In the case of *Morgan v Launchbury* [1972] ALL ER 606, it was held, *inter alia*, that:

"To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

Similarly, In *Kaburu Okelo & Partners v Stella Karimi Kobia & 2 Others* [2012] eKLR the Court of Appeal held that:

“Vicarious liability arises when the tortious act is done in the scope of or during the course of one’s employment or authority.”

Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of *Kenya Bus Services Ltd v Humphrey* [2003] KLR 665; [2003] 2 EA 519, the Court of Appeal cited *Kansa v Solanki* [1969] EA 318 wherein it was 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 (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.”

The 1st and 2nd defendants pleaded that the plaintiff was negligent in assigning PW 1 to drive the motor vehicle yet he (plaintiff) was the designated driver. That the plaintiff did so without the knowledge and consent of the 1st and 2nd defendants. For that reason, the 1st and 2nd defendants argued that the plaintiff was not entitled to damages as he was the author of his own misfortune. The plaintiff admitted that he was employed by the 1st and 2nd defendants as a driver. However, he indicated that he was six years old in the employment and that PW 1 who was also employed by the 1st and 2nd defendants as a driver was showing him the business routes. PW 1 corroborated the testimony of the plaintiff. He denied being a Sales person.

The 1st defendant produced in evidence a copy of the letter of offer dated 20/1/2017 indicating that they had offered the plaintiff a job as the sole driver of the accident motor vehicle. A letter of offer is not an employment or appointment letter. The 1st and 2nd defendants did not adduce evidence to show that the plaintiff accepted the offer. Furthermore, they did not produce evidence to show that PW 1 had been employed as a Salesperson and not a driver. There is also no evidence to show that on the material day, the plaintiff had been assigned duties as the designated driver of motor vehicle registration

number KCJ 134T. The 1st and 2nd defendants were in the business of baking and distributing bread. For such a business, it is expected that there would be records for the movement of the motor vehicles(s) as well as the driver(s) and Salesperson involved.

The 1st defendant produced in evidence extracts of messages he exchanged between himself and PW 1 and the plaintiff. In one of the messages, it is indicated in part:

“.....You have not only absconded duty after recovery but as well went ahead and resumed driving job elsewhere.”

From the above message, one would infer that PW 1 had been employed as a driver and had absconded then secured a job elsewhere as a driver. The phrase, *“resumed driving job elsewhere”* would mean that driving was PW 1’s designation while in the employment of the 1st and 2nd defendants. No wonder the defence failed to produce evidence of PW 1’s employment and designation. On a balance of probabilities, I find that PW 1 was the 1st and 2nd defendant’s authorized driver and that on the material day, he was acting in the course of his employment with the 1st and 2nd defendants. It cannot therefore be said that the plaintiff abdicated his duties by assigning PW 1 to drive the accident motor vehicle. No negligence can attach to the plaintiff. Consequently, I find the 1st and 2nd defendants **30% vicariously liable** for the accident. There is already interlocutory judgment against the 3rd and 4th defendants. In view of the foregoing, the 3rd and 4th defendants are held **70% vicariously liable** for the accident.

Quantum

The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:

- i. Cut wound on the right periorbital region ;
- ii. Fracture of the right tibia and fibula;
- iii. Fracture of the left tibia and fibula.

Doctor Kimuyu, a senior medical officer who examined the plaintiff on 6/11/2017 assessed total permanent disability at 40%. There is no contrary evidence with respect to the plaintiff’s injuries. I find that there is sufficient evidence to prove that the plaintiff

sustained injuries as a result of the accident. Given the finding on liability, the plaintiff is thus entitled to damages as against the defendants.

It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in *West (HI) and Sons Ltd v Shepherd [1964] AC 326* where Lord Morris said:

“But 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. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional”.

I am also guided by Lord Denning’s decision in *Kim Pho Choo v Camden & Islington Area Health Authority, [1979] 1, ALL ER 332* which was adopted in the case of *Nancy Oseko v Board of Governors Masai Girls High School [2011] eKLR* where Wendoh, J stated that:

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.”

The Court of Appeal in *Southern Engineering Company Ltd v Musingi Mutia [1985] KLR 730* held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions

which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

The following principles are germane in assessing damages for personal injury claims:

- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
- ii. The award should be commensurate to the injuries suffered;

- iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
- iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
- v. Awards should not be inordinately too high or too low.

Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

The plaintiff suffered injuries which were classified as maim. In my opinion, the authorities relied upon by the parties are comparable. On my part, I have further considered the following authorities:

1) *Julie Akoth Onyango v Daniel Otieno Owino & another [2020] eKLR.*

The plaintiff and appellant in the appeal sustained a compound fracture of the tibia and fibula of the left leg, cuts on both legs, pain in the thighs and left hand. Ksh. 600,000/= was awarded in general damages on 19/6/2019. On appeal, the award was reduced to Ksh. 500,000/= on 29/5/2020.

2) *Tirus Mburu Chege & another v JKN (minor suing through the next friend and mother DWN & another [2018] eKLR.*

The minor plaintiff and respondent in the appeal sustained fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken front tooth, nose bleeding and consistent loss of consciousness. The trial court awarded Ksh. 800,000/= on 20/5/2015. On appeal, the award was reduced to Ksh. 500,000/= on 3/10/2018.

3) *Ngare v Kiai [2023] KEHC 24212 (KLR)*

The plaintiff and respondent in the appeal sustained compound bilateral fracture of tibia/fibula, compound fracture of the proximal end of the right tibia and compound fracture of the left distal tibia. On appeal, an award of Ksh. 1,600,000/= in general damages was made on 25/10/2023.

Given the nature of the injuries sustained by the plaintiff herein, whose permanent disability was assessed at 40% and the age of some of the awards in the above authorities

coupled with the vagaries of inflation, I find that an award of Ksh. **1,200,000/=** in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

- a) Police abstract.....Ksh. 200/=
- b) Filling P3 form.....Ksh. 1,500/=
- c) Medical legal report.....Ksh. 3,000/=
- d) Cost of search.....Ksh. 1,100/=
- e) Treatment expenses.....Ksh. 15,430/=
- Total.....Ksh. 21,230/=

It is trite law that special damages must be **specifically pleaded** and **strictly proved**. In *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* the court said: -

"It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"

In *Ouma v Nairobi City Council [1976] KLR 304* after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J's Judgment on page 532 and 533 in *Ratcliffe v Evans [1832] 2Q.B. 524* an English leading case on pleading and proof of damage:

" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The claims for the police abstract, copy of records and filling of P3 form were not proven. The claim for the medical report was sufficiently proven. The proven medical expenses amount to Ksh. 4,830/=. Some receipts produced in evidence are illegible. I cannot

award what I cannot see. Consequently, I award special damages in the sum of **Ksh. 7,830/=** only.

Future medical expenses

The medical report by Dr. Kimuyu indicates that the plaintiff would require removal of implants at a total costs of Ksh. 550,000/=. In addressing this issue, I will highlight some Court of Appeal authorities on the subject.

1) Simon Taveta v Mercy Mutitu Njeru [2014] eKLR

In a judgment delivered on 5/2/2014, the court held as follows on the issue of future medical expenses:

"The issue for our consideration is whether the pleadings as stated above in the plaint include a claim for future medical expenses. In the case of Kenya Bus Services Ltd. - v Gituma, (2004) EA 91, this Court stated:

'And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded'.

We observe that the trial judge correctly held that the plaint did not contain a pleading for future earnings or the need for employment of a house help and nurse and that these ought to have been pleaded and proved as special damages..... In Mbaka Nguru & Another - v- James George Rakwar, Court of Appeal Civil Appeal No. 133 of 1998, it was stated that claims for future medical expenses must be pleaded and proved as a special damage claim".

2) Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR

In a judgment delivered on 9/10/2009, the court observed as follows:

"The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no proof.....Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of the required amounts for future

treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in McGregor on Damages, 16 Edition at page 1654 in relation to medical expenses:

'Both expenses already incurred at the time of the trial and prospective expenses are recoverable and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident of the time the case comes on for hearing, implies no substantive differences.'

We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard".

3) *Mbaka Nguru & Anor. v James George Rakwar [1998] eKLR.*

Judgment herein was delivered on 23/12/1998. The court held as follows:

"We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head...."

4) *Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees Of Eldoret & another [2016] eKLR.*

In a judgment delivered on 14/6/2016, the court held that prospective medical expenses that have not crystallized as disbursements may be claimed as general damages but the same cannot be awarded without evidence.

From the above authorities, I gather that damages for future medical treatment are awardable but there must be evidence for the need for future medical treatment as well as an estimate of the same. There is divided opinion in the Court of Appeal as to whether such damages are in the nature of general or special damages. However, recent decisions of the

Court of Appeal indicate that such damages need not be specifically pleaded as in special damages. For instance, in the authority of *Forwarding Company Limited & another v Kisilu; Gladwell (Third party) [2022] KECA 96 (KLR)*, the Court of Appeal held:

“In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances. It is our view that future medical expenses in this matter were not only pleaded but were also supported by medical evidence and proved accordingly”.

Similarly, in *Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v Jarso [2025] KECA 2169 (KLR)*, the Court of Appeal affirmed an award of future medical expenses that had not been specifically pleaded and strictly proved as in special damages. There is medical evidence to show that the plaintiff will require removal of the implants. Dr. Kimuyu did not lay a basis for her estimates. I am aware of the existence of the **Medical Practitioners and Dentists (Professional Fees) Rules, 2016**. Rule 3 thereof stipulates that the fees specified under the Schedule to the Rules shall be the fees charged by practitioners offering medical or dental services, or both and that the fees shall be adhered to by all practitioners and institutions registered under the Act and no practitioner may agree or accept fees above that which is provided under the Rules.

Accordingly, the Rules provide that for removal of implants in respect of long and short bones, the minimum charge shall be Ksh. 24,000/= whereas the maximum shall be Ksh. 60,000/=. The fees are subject to the annual inflation rate. Being guided by the Medical Practitioners and Dentists (Professional Fees) Rules and bearing in mind the vagaries of inflation, I award **Ksh. 250,000/=** as future medical expenses for removal of the implants.

The Counter-claim

Given the finding on liability, the counter-claim cannot lay against the plaintiff. As for the 3rd and 4th defendants, there is no evidence to show that the 1st and 2nd defendants served their defence and counter-claim upon the 3rd and 4th defendants. A counter-claim is a

suit and any party affected or upon whom a claim is laid must be served. In as much as the court has apportioned liability against the 3rd and 4th defendants, the court cannot make orders against them as they were not served. Consequently, the counter-claim cannot hold against the 3rd and 4th defendants. The counter-claim is thus dismissed with costs to the plaintiff.

DISPOSITION

In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendants. Consequently, I make the following awards:

- 1) General damages for pain, suffering and loss of amenities.....Ksh. 1,200,000/=
 - 2) Special damages.....Ksh. 7,830/=
 - 3) Future medical expenses.....Ksh. 250,000/=
- Total.....**Ksh. 1,457,830/=**

The 1st and 2nd defendants shall pay **Ksh. 437,349/=** whereas the 3rd and 4th defendants shall pay **Ksh. 1,020,481/=**. The plaintiff is also awarded interest on the damages as well as costs of the suit. The defendants shall pay costs according to their degree of liability.

The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

In the case of *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR*, the court stated that:

“First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate

Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of *Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4 (8th April 2015)* stated in part, as follows:

“It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment.” (Emphasis supplied)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see *Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR)*. Consequently, interest on general damages shall accrue at court rates from the date of judgment/decree until payment in full and on Special damages and future medical expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED VIA CTS THIS 17TH DAY OF APRIL, 2026.

Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.