



**REPUBLIC OF KENYA**

**IN THE HGH COURT OF KENYA AT NYERI**

**HIGH COURT CIVIL CASE NO. 39 OF 2002**

**(CONSOLIDATED WITH HCCC NO. 121 OF 2001)**

**MICHAEL THUO (SUING AS THE PERSONAL REPRESENTATIVE AND**

**ADMINISTRATOR OF THE ESTATE OF THE DECEASED**

**JORAM THUO WAIREGI).....1<sup>ST</sup> PLAINTIFF**

**JANE NJERI MUIKIA SUBSTITUTED FOR SAMUEL MBUGUA.....2<sup>ND</sup> PLAINTIFF**

**SHELMITH WAITHERA KAMUNYA (SUING AS THE PERSONAL**

**REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED**

**PETER KAMUNYA KIBOI(DECEASED).....3<sup>RD</sup> PLAINTIFF**

**V E R S U S**

**KAYLIFT SERVICES LTD..... DEFENDANT**

**J U D G M E N T**

By a plaint filed on 19/3/2002 by the firm of Chege Wainaina & Co. Advocates the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs filed a suit against the defendant seeking judgment against the defendant for; -

- a) General damages for pain, suffering and loss of amenities including conjugal pleasure
- b) Special damages
- c) Loss of earnings
- d) Costs of future medical treatment and care.
- e) Costs of the suit
- f) Interest on (a) (b) and (c)

The cause of action arose out of a road accident at Mureru on the 21/8/1999 when the plaintiffs were travelling in motor vehicle Reg. No. KAJ 350L Landover Discovery, along the Naromoru Nanyuki Road. The plaintiffs claim they were lawful passengers, and defendant by its agent/or servant so negligently,

recklessly, and carelessly drove the said motor vehicle that it was involved in an accident whereof the plaintiffs sustained severe injuries.

The plaintiffs accused the defendant of negligence in the following particulars; -

- a) Driving too fast in the circumstances of the case
- b) Driving without care and regard to other road users
- c) Failing to slow down, stop, swerve or act in any other way to avoid the collision.
- d) Causing the accident
- e) Res Ipsa loquitur

Each plaintiff set out the particulars of injuries and particulars of special damages.

**For the 1<sup>st</sup> plaintiff –**

Particulars of injuries were set out as; -

1. Injuries to the
  - Head
  - Leg
  - Hip and pubic region
  - Spine and back
  - Neck
  - Chest and ribs
  - Genital urinary system
2. Pain and suffering
3. Further and better particulars of injuries to be proved at the hearing

**Particulars of injures for 2<sup>nd</sup> plaintiff – injuries to the**

- Chest and ribs
    - tibia and fibula bones
    - humerus
2. Pain and suffering
    - further and better particulars to be proved at the hearing

Particulars of special damages:

	1 <sup>st</sup> plaintiff	2 <sup>nd</sup> plaintiff
Police Abstract	Ksh. 100	Ksh. 100
Medical Report	15,000	10,000

Medical Expenses	13,000,000	8,000,000
Future medical care	5,000,000	3,000,000
Future domestic care	<u>2,000,000</u>	<u>2,000,000</u>
Total	<u>20,015,000</u>	<u>13,010,000</u>

Each plaintiff averred that further and better particulars of damages would be proved at the hearing of the suit, the plaintiffs averred that despite persistent demands and reminders the defendant had failed, refused and/ignored to admit liability and settle the plaintiffs' claim.

The 3<sup>rd</sup> plaintiff Shelmith Waithira Kamunya filed suit vide a plaint dated 13/7/2001 through the firm of Wangari Mucheru and Company Advocates

In response to the plaintiff's suit the defendant filed defence on 22/4/2002 through F.N. Wachira & Co. Advocates. The defendant made no admission of the claims of ownership and driving of the motor vehicle Reg. KAJ 350L and the particulars of the accident and negligence as laid out by the plaintiffs.

The defendant without prejudice to the above averred that the plaintiffs solely/substantially contributed to the accident by the negligence of the plaintiffs in failing/refusing to buckle up safety belts – the particulars of negligence were set out as; -

- a) Failure to keep any/proper heed for their own safety
- b) Failing to wear safety belts provided in the motor vehicle for use
- c) Failing to have any sufficient regard for their own safety
- d) Causing injuries to themselves.

The defendant denied that plaintiffs had suffered any loss/damage and contended that the suit was bad in law, misconceived and did not disclose any reasonable cause of action, against the defendant.

The defendant prayed that the suit be dismissed with costs.

Vide an application filed on 2/12/05 the plaintiff sought to amend the plaint.

On 14/3/06 – the court granted the orders to the effect that the amended plaint filed with the application be deemed as filed and served. According to the plaint amended on 12/10/2005, the plaintiff brought the suit as the personal representative and administrator of the Estate of Peter Kamunya Kiboi (deceased).

The suit was brought for the benefit of the dependents of the deceased under the Fatal Accidents Act Cap 32 Laws of Kenya, and the benefit of the deceased Estate under the Law Reform Act Cap 29 Laws of Kenya. She described the defendant as the lawful, beneficial and insured owner of motor vehicle Reg. No. KAJ 350L Land Rover Discovery whereas the driver (deceased) was the defendant's driver and/servant employee/agent.

The cause of action came out of a road traffic accident on 21/8/1999 – when the deceased was travelling on motor vehicle Reg. No. KAJ 350L which the plaintiff averred was so negligently driven, managed/controlled by the defendant's servant(agent) driver/employee as a result of which the motor vehicle veered off the road and violently hit the ground causing the accident. The plaintiff particularized the defendant's negligence as follows; -

- a) Driving at a speed that was excessive in the circumstances.

- b) Driving along the road in dangerous manner
- c) Failing to apply brakes sufficiently
- d) Failing to stop, slow down, swerve or act in any way so as to void the accident.
- e) Failing to observe traffic rules and regulations in the circumstances.
- f) Causing/permitting the motor vehicle to skid on the said road/or failing to take any adequate measures to correct the skidding of the said motor vehicle.

As a result of the road traffic accident Paul Kimunya Kiboi sustained severe injuries from which he died.

That the Fatal Accidents Act Cap 32 of the Laws of Kenya – and Law Reform Act – Cap 26 Laws of Kenya the persons to benefit from the cause of the action were listed as: -

Shelmith Waithira Kamunya - Widow 53

Michael Kiboi Kamunya son - 27

Sammy Muchiri Kamunya " - 25

Alex Ndungu Kamunya " - 22

Pauline Wanjiku daughter - 20

MaryAnne Wangu daughter - 12

It is also averred that at the time of his death the deceased was aged 56 years old, a business man earning ~ 8,000,000 *per annum* as Land Estate Agent. That the family was wholly dependent on him for their welfare and school fees locally and abroad and that his death had resulted in the family's loss of the said support, and they had suffered loss and damage.

Particulars of special damages were listed as funeral expenses and loss of income.

The plaintiff's prayer was for judgment against the defendant for; -

- a) Special damages to be proved at the hearing
- b) General damages
- c) Cost of the suit
- d) Interest on (a) and (b) and (c)
- e) Any other further relief this court may deem fit.

In response to the amended plaint the defendant filed an amended defence on 8/9/2006 through the firm of F.M. Wachira & Co. Advocates.

The defendant made no admissions as to the claims of beneficial/actual ownership or being the insured of the motor vehicle reg. no. KAJ 350L or that it was driven by the deceased Mr. Njuguna. The defendant denied the particulars of negligence.

The defendant contended that motor vehicle reg. no. KAJ 350L was not on the material date, place and time driven for the attainment of any of its business interests/or objectives and denied that the deceased

drove the same as its servant/agent or for its benefit. Without prejudice to the above contention. The defendant averred that the late Peter Kamunya Kiboi was negligent and caused/permitted the injury to himself by failing to wear safety belt. The defendant particularized the deceased negligence in the following terms; -

- a) Failing to keep any proper heed for his own safety
- b) Failing to wear safety belt provided for use by passengers
- c) Failing to have any sufficient heed for his own security/safety
- d) Causing fatal injuries to himself.

The particulars under Cap 32 and Cap 26 of the Laws of Kenya were also denied and the defendant's prayer was that the suit be dismissed with costs.

On 21/3/07 there was a change of advocates for the defendant and Mbuga Njuguna& Co. advocates came on record. They filed an application dated 28/3/2007 for consolidation of the two suits. This was allowed on 26/6/2007.

The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' suits were through some metamorphosis. The 1<sup>st</sup> plaintiff died in March 2005. Vide an application dated 29/7/2006 the firm of Kilonzo & Co. advocates sought to substitute the 1<sup>st</sup> plaintiff who died on 12/3/2005. The court allowed the application by orders issued on 31/10/06 substituting the deceased with Michael Mwangi Thuo who had obtained grant of letters of administration ad litem for the estate of the deceased 1<sup>st</sup> plaintiff.

After the grant of the orders the matter was listed for hearing on 20/6/07, 13/11/08, 11/6/09 when it was adjourned for one reason or the other.

On 26/11/09 the suits were dismissed as the witnesses were not availed. The parties thereupon filed applications to reinstate the suits. These were granted on 28/6/10 and the two suits were reinstated and the matter proceeded for hearing before Justice Wakiaga on 28/6/12.

Five witnesses testified before him.

**P.W.1 was Samuel Mbugua Mutahi the 2<sup>nd</sup> plaintiff.** He told the court that on the material day he was in the company of Thuo Stephen, Joram Thuo Wairegi, Stephen Kiboi and one Eugene, travelling to Nanyuki from Nairobi for a wedding function. He was seated at the back of the motor vehicle. At some point the motor vehicle was being driven too fast as they approached Naromoru and one of them told the driver to slow down. The next thing was the motor vehicle he was in rolling about three times. Thuo and Eugene Kiboi died. He found himself in Cottage Hospital.

He said he had his seat belt on. That the motor vehicle rolled, it must have been on high speed. He blamed the driver for the accident.

He sustained, fractures to the right hand, right leg, four ribs on the right side and a ruptured diaphragm. He had to undergo several operations, physiotherapy and treatment abroad.

On cross examination he told the court the vehicle belonged to his friend Stephen Thuo. He did not see anything on it to show it belonged to Kay Lift Ltd. The P3 was filled 10 years after the road traffic accident, his children took him to the USA for treatment. At the time of hearing he had not healed well and had metal plates. He produced a lot of documentary evidence to support his treatment expenses.

**P.W.2 Shelmith Waithera Kamunya** told the court that the late Peter Kamunya Kiboi was her husband. On the material day he was travelling with his friends to a wedding in Nanyuki. She learned about the

road traffic accident after receiving a phone call from someone who claimed to have “found” her husband’s ID card.

She said they had 5 children. She produced the grant to the estate of her deceased husband. She produced a police abstract, postmortem report, and documents to support the claim for funeral expenses for Ksh. 219,424. She also produced a bank statement to support claim for loss of earnings saying that he was 56 years old of good health and earning ~ 400,000 a month – 8,000,000 a year.

When cross examined she told the court she did not have any evidence to show that the car was owned by Kay Lift as Kay Lift was not indicated as the driver. She said that the search she had from KRA showed that the motor vehicle was registered in the name of Stephen Thuo, that Kay Lift was insured by Intra Africa and the driver was an employee of Kay Lift.

She was recalled on the 26<sup>th</sup> of May 2016 and produced bank statements from 1997 to 1999. Under cross examination she said it was a joint bank account and money came from rents. That her role was only as a signatory. She had no evidence to show how much was hers or his or how much the balance was.

PW6 Pauline Wanjiku Kamunya testified to confirm that her father provided for their education. That following his death family and friend had to fundraise, and her mother had to sell some family property for her education in the UK.

The next hearing was on 2/4/2014.

**P.W. 3 Francis Thuo** testified he was one of the four administrators of his father’s estate, **Joram Thuo Wairegi** (the original 1<sup>st</sup> Plaintiff) who died in March 2005 before he could testify. He sustained injuries to his spinal cord from the injuries. He was treated locally and in the UK and was paralyzed as a consequence of the accident. The family also incurred great expenses. building a new house, buying new tyres for his motor vehicle. He produced a host of documents to support the claim.

Under cross examination he told the court that he knew motor vehicle reg. no. KAJ 350L belonged to Thuo Kihoro. He did not have the exact figure of the medical expenses but he said it was between Ksh 15-20,000,000

**P.W.4 Joseph Ngera no.53765** told the court he was a police officer at Nyeri Traffic Base. He produced the police abstract issued on 14/9/2001 which indicated that there was a road traffic accident on 21/8/1999. It showed that the owner of motor vehicle was Kaylift Ltd and the insurer as Intra Africa Insurance Ltd. On cross examination he said he was referring to notes made by P.C. Kituyi who was the investigating the case. That ownership of motor vehicle could be found through a search at the Registrar of motor vehicles but that the insurance on the motor vehicle showed that the motor vehicle belonged to Kay Lift Ltd. He said that an inquest no.26/03 was opened but he was not aware of the outcome. That the investigations into the traffic accident were not conclusive.

**P.W.5 was Dr. James Karanja Kimani** – a consultant physician based at Garissa General Hospital produced the medical report on Joram Wairegi Thuo the 1<sup>st</sup> plaintiff dated 25/1/02. It showed that the medical examination was conducted on 28/11/01. The victim was 73 years by then. He had sustained injuries.

- closed head injury with reported loss of consciousness for unknown duration of time.
- Cervical cord injury at C4 and C5 paraplegia. At the time of the examination he complained of weakness and pain on the lower limbs; stool and urine incontinence
- Loss of libido and impotence.

He was confined to a wheel chair, had upper limb mild general muscle waste both hands were moderately deformed. Permanent disability was assessed at 90%.

He also produced a report by Mr. V.P. Gardina, a spinal injury consultant at Nairobi. On cross

examination the witness stated that he had never worked with Dr. Kuria therefore could not verify his signatures. He said the patient's head injury had healed but the spinal cord injury had implications from the rest of the body.

At the next hearing of 7/7/15 the court was informed that the 2<sup>nd</sup> plaintiff had passed away on 15/2/15 and Jane Njeri Muikia had been appointed as the legal representative of his Estate on 21/10/14. Jane Njeri Muikia was allowed to take over the suit on behalf of the 2<sup>nd</sup> plaintiff.

On 26/5/2016 the matter went on before Justice Mativo.

P.W. 5 was called as P.W.6 in the 2<sup>nd</sup> plaintiff's case.

He told the court that the road traffic accident happened on 21/8/1999, involving motor vehicle reg. KAJ 350, and was caused by a tyre burst. That the passengers on board together with the driver died. Inquest file No. 26/03 was opened in Nyeri C.M.'s court, and was later closed. A police abstract was issued on 25/9/01 to Samuel Mbugua Mutahi that the owner of the motor vehicle was Kay Lift Limited. Another police abstract was issued to the family of Peter Kamunya Kiboi. He produced them as Exhibit 14 and 7 respectively.

When cross examined he gave a list of 5 names as the passengers in the motor vehicle;

- Joseph Njuguna Mbugua – died
- Peter Kamunya Kiboi – died
- Stephen Thuo Kihara – died
- Joram Thuo
- Patrick Muiruri

He told the court that more than three police abstracts could have been issued, that in the two of the ones he produced there was a discrepancy as to who the driver was. He however confirmed that the driver was one Joseph.

He also confirmed that in the abstract PEx 14 was the owner was indicated as Kay Lift Limited but in PEx 1 it showed the owner as Stephen Thuo Kihoro.

The plaintiffs closed their case.

The defendants called one witness **Paul Kihoro Thuo**. He told the court he was a director of Kay Lift Services Limited. He denied that the motor vehicle reg. No.KAJ 350L belonged to Kay Lift Ltd at the time of the road traffic accident but that the salvage was later owned by the defendant.

He responded that at the time of the road traffic accident the motor vehicle belonged to one Stephen Thuo Kihoro. To support this, he produced a document from KRA dated 5/5/2003. He also produced a police abstract issued on 8/12/09 showing the owner to be Stephen Kihoro Thuo. In addition, he produced the importation papers for the said motor vehicle.

The witness said Stephen Kihoro Thuo was his father, and had retired from the company, the defendant herein as a director due to illness which had rendered him blind. Consequently, he had hired Joseph Njuguna Mbugua as his driver, and hence this was not an employee of Kay Lift Limited. He produced a copy of records showing that as at 22/8/99 the motor vehicle belonged to Stephen K. Thuo.

When cross examined the witness had no evidence to support his allegation that his father was sick at the time of the accident. He also confirmed that documents showed that the motor vehicle bought by the defendant was yellow, while the one involved in the road traffic accident was green. He produced no evidence to support the claim and the driver was his father's and not an employee of the company. He produced no evidence to show that the company had been invited by Intra Africa Insurance to buy the salvage.

The defence closed its case.

Directions were taken on the filing of submissions.

When I took over the matter, and noting that it had been heard by two different judges and concluded by the last one, the presiding judge was of the view that the latter judge should write the judgment. However, the judge who was on transfer declined, citing pressure of work in his new station.

That explains the reason for the lengthy restatement of the testimony of the witnesses as in the process I was able to process the same since I never heard a single witness.

Each Party filed their written submissions. Each filed its own issues.

For the defence the issues for determination were;

- 1) Whether the defendant was the actual, beneficial and insured owner of motor vehicle reg. No. KAJ 350L.
- 2) Whether the driver of motor vehicle reg. No. KAJ 350L causing the road traffic accident was the defendant's servant/agent
- 3) If (2) is in the affirmative whether he caused the accident by negligently driving the vehicle.
- 4) Whether the plaintiffs were entitled to the awards of special and general damage; and if so, the quantum.
- 5) What orders should be made on costs.

The 1<sup>st</sup> plaintiff's issues were: -

- a) Whether the defendant's servant/agent negligently drove motor vehicle reg. No. KAJ 340L causing the road traffic accident on 21/8/99.
- b) Whether the defendant was the actual, beneficial or insured owner of motor vehicle reg. No. KAJ 350L
- c) Whether the 1<sup>st</sup> plaintiff was a passenger in the motor vehicle at the time of the road traffic accident.
- d) Whether the 1<sup>st</sup> plaintiff sustained injuries and incurred damages as a result of the road traffic accident.
- e) Whether the estate of the 1<sup>st</sup> plaintiff is entitled to costs of the suit, special, general damages as a consequence of the road traffic accident of 21/8/99 and if so what is the quantum.

The 2<sup>nd</sup> plaintiff list of issues was;

- a) Whether the defendant was the registered owner of motor vehicle reg. No. KAJ 350L and 21/8/99 the time of the road traffic accident.
- b) Whether the defendant was liable for negligence.
- c) Whether the 2<sup>nd</sup> plaintiff suffered damage and if so what is the quantum
- d) Who should bear the costs

The 3<sup>rd</sup> plaintiff raised the following issues;

- 1) Whether the defendant was the lawful insured, and beneficial owner of the motor vehicle reg. No. KAJ 350L on 21/8/99 at the time of the accident
- 2) Whether the plaintiff is the administrator of the Estate of the late Peter Kiboi Kamunya and who were the dependents.
- 3) Whether the deceased was travelling as a passenger in motor vehicle KAJ 350L on 21/8/1999
- 4) Whether the deceased Peter Kiboi Kamunya sustained fatal injuries arising from the accident involving motor vehicle reg. No. KAJ 350L
- 5) Who was to blame for the accident
- 6) Whether there was any attempt by the insurers to settle the plaintiff's claim.
- 7) Whether the plaintiff contributed to his fatal injuries.
- 8) What quantum of damages is appropriate to the plaintiff's claim?

For the determination of this suit the four sets of issues can be collapsed into the following;

- 1) Whether the defendant was the lawful, actual, beneficial and or insured owner of the motor vehicle reg. No. KAJ 350L at the time of the road traffic accident.**
- 2) Whether the driver of the motor vehicle KAJ 350L at the time of the accident was an employee of the defendant.**
- 3) Whether the plaintiffs were passengers in the said motor vehicle at the time of the road traffic accident.**
- 4) Whether the accident was caused by the negligence of the driver of the defendant and if so whether the defendant is liable.**
- 5) Whether the plaintiff's contributed to their injuries in any way.**
- 6) Whether the plaintiffs suffered pain, suffering, loss and damage, whether they are entitled to special and general damages if so, what is the quantum.**
- 7) Who would bear costs of the suit.**

I have considered the submissions by counsels of the parties. I have read the authorities cited. I have perused through the huge bundles of documents submitted in support of the individual plaintiff's case and the defendant. I now turn to the determination of the issues.

On **the 1<sup>st</sup> issue the bone of contention is whether the defendant was the registered, beneficial, actual or insured owner of the motor vehicle.**

It was argued for the defence that no evidence was tendered to prove that the defendant was the actual/beneficial owner of the motor vehicle, that all the witnesses confirmed that it belonged to Stephen Kihoro Thuo, that the connection with the defendant was clearly explained by the defendant, and that after the road traffic accident the defendant, bought the salvage and the same company continued to insure the motor vehicle.

Kay Lift Ltd needed to explain its relationship with Stephen Thuo.

The defendant relied on **Karuri vs. Nchenche (1995-1998) E.A. 87** where the Court of Appeal stated that once the defendant denied ownership of the motor vehicle it was upon the plaintiff to place evidence of certificate of search signed by the Registrar of Motor Vehicles and that the information in a police abstract could not be sufficient proof of ownership.

The defendant also relied on **Hermat Kumar Rawal vs. Jubilee Jumbo Hardware Ltd. [2016] eKLR** where the Court of Appeal held that where a police abstract was relied on by a plaintiff as proof of ownership and that evidence not rebutted by other evidence or in cross examination, the plaintiff would have to prove by way of certificate of search from the Registrar of Motor vehicles as the conclusive proof of ownership.

The defendant submitted that the police abstract evidence was challenged by cross examination and that D.W.1 produced exhibits to prove that it was owned by Stephen Thuo and not the defendant.

The three plaintiffs each submitted that the motor vehicle was owned by the defendant and that the defendant did not produce any evidence to rebut that position. That whatever document he produced showed the ownership as at 22/8/99.

I was referred to **Section.8 of the Traffic Act Cap 403 of the Laws of Kenya** to the effect that the person is whose name a motor vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the motor vehicle.

This position was interpreted in **General Motors East Africa Limited vs. Eunice Aula Ndeswa and Another [2015] eKLR** where the court adopted the holding in **Nancy Njeruba Ngaira vs. Abdi Ali – [2010] eKLR** – that though the certificate of search is proof of ownership S.8 of the Traffic Act recognises that the fact that a different person /persons may be the *de facto* owner(s) of the said motor vehicle, in there the judge explained the concepts trashed by the defendant stating that;

“...in judicial practice concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership, possessory ownership. A person who enjoys any such whether categories of ownership may, for practical purposes, be which more relevant than that person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership...”

See also **Securicor Kenya Ltd. Vs. Kyumba Holdings Ltd. [2005] eKLR, Jothan Mugalo vs. Telkom (k) Ltd KSM HCCC 166/2001** and **Francis Mutito Mwangi vs. MM [2016] eKLR** where it was held that a certificate of search is not the only way to prove ownership of the motor vehicle, it can be proved by police abstract and it is incumbent upon the defendant to rebut that evidence.

The plaintiffs pleaded the alternative ownership. The elephant in the room so to speak, is why Kay Lift Ltd would insure a motor vehicle they did not own.

That question was never answered by the defendant. Despite the evidence that the motor vehicle was registered in the name of Stephen Kihoro Thuo Kay Lift Ltd was the insured – a fact that was confirmed by Intra Africa Insurance Company Limited. The only reasonable conclusion that can be drawn from this set of facts is that Kay Lift Limited is the one who had an insurable interest in the motor vehicle, it is Kay Lift who needed to insure itself against risks of liability to third parties – it is Kay Lift Ltd who was either the actual/beneficial owner.

Hence from the testimony of each of the plaintiffs and the police abstracts issues to the plaintiffs and from the holdings in the various case there is room to prove an alternative category of ownership of a motor vehicle.

**In this case I am persuaded that Kay Lift Ltd was the owner of the motor vehicle.**

With the affirmative answer to the 1<sup>st</sup> issue, **the 2<sup>nd</sup> issue as to whether the driver was the**

**servant/agent of the defendant immediately falls into view.**

No evidence was tendered before me that on the material day the driver of the motor vehicle drove the same without authority. Or that the person in whose name the motor vehicle was registered had the motor vehicle without the insured's authority. Neither did the defendant provide any evidence to show that the driver was an employee of the Stephen Kahoro Thuo.

In **Kenya Bus Services Vs. Humphrey [2003] eKLR** 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 was not challenged by the defendant. The said Stephen Thuo was its director the presumption is that the driver was also an employee of the defendant. - The defendant would have disputed that presumption by providing evidence of who its employees were as at the time of the road traffic accident.

I am persuaded that the driver of the motor vehicle at the time of the road traffic accident was a servant/agent of the defendant.

On the **3<sup>rd</sup> Issue** there is no doubt from the police abstracts that the plaintiffs were passengers in the said motor vehicle on the material date.

**The 4<sup>th</sup> issue: Was the driver negligent?** There is evidence on record that at some point one of the passengers told him to reduce speed. This was not challenged by the defendant. The plaintiffs were travelling in that motor vehicle an accident occurred as a result of no fault of theirs and the driver was said to have been speeding resulting in loss of control. The evidence on record clearly indicates to negligence on the part of the driver while driving motor vehicle KAJ 350L with the plaintiffs on board.

There is sufficient proof that all the plaintiffs were passengers in the said motor vehicle supported by the police abstracts that were issued

The accident was self-involving. The defendant did not provide evidence that the plaintiffs had not belted up and that remains an allegation.

I am satisfied, on the evidence before me that the driver was negligent.

On the **5<sup>th</sup> Issue**, the allegation by the defendant that the plaintiffs contributed to the accident by failing to belt up was not supported by any evidence. DW1 only addressed the issue of the ownership of the motor vehicle at the time of the accident.

Having found that the driver of the KAJ 350L was an agent/servant of the defendant at the time of the accident – and that he drove negligently causing the accident I find that the defendant is responsible for his negligence.

**The 6<sup>th</sup> issue; Did the plaintiffs suffer injuries, loss and damage? What is the quantum of damages?**

The defendant did not address itself specifically to this issue except to state that the claim was directed at the wrong party and they did not deserve the general/special damages they are seeking.

The answer to this issue can only be in the affirmative. The evidence before me shows that the plaintiffs suffered injuries, harm, loss and damage. The only thing is that two of them, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs died before matter was concluded.

Counsel for these parties approached the issues as though the plaintiffs were still alive and would still require future and domestic medical care. It was imperative that the present evidence as to the actual cost up to the date of

The heads of future and domestic medical care are then not in issue.

I have considered the authorities cited in support of the special and general damages for pain and suffering and loss of amenities.

The 1<sup>st</sup> plaintiff JORAM WAIREGI THUO sustained the following injuries;

- closed head injury with reported loss of consciousness for unknown duration of time.
- Cervical cord injury at C4 and C5 paraplegia. At the time of the examination he complained of weakness and pain on the lower limbs; stool and urine incontinence
- Loss of libido and impotence.
- He was confined to a wheel chair, had upper limb mild general muscle waste both hands were moderately deformed. Permanent disability was assessed at 90%.

He died on the 12<sup>th</sup> May 2005 before this case could be finalized.

In the submissions filed by counsel he sought special damages of Ksh. 20,015,000

General damages for pain, suffering and loss of amenities of Ksh. 5,000,000.

Loss of earning, capacity at Ksh. 2,000,000

The 1<sup>st</sup> plaintiff did particularise special damages and expenses as;

Spend damages and expenses as; -

Police abstract.....100

Medical report.....15,000

Medical expenses.....13,000,000

Future medical expenses.....5,000,000

Future domestic care.....5,000,000

Total.....23,015,000

I have carefully read the record – to see how the specials were proved specifically. The 1<sup>st</sup> plaintiff filed 2 volumes of documents 879 pages mostly made up of letters, receipts from purchase of medicines, receipts for purchase of fuel and assorted motor vehicle needs for KYS 627 and KAR 291Y, invoices and bank documents both local and UK Hospitals.

P.W.3 Francis Njoroge Thuo testified as the administrator of his father's Estate.

He told the court that his father sustained injuries to his spinal cord and was taken to many hospitals both in Kenya and the U.K. Upon his return to Kenya he continued with treatment at the Aga Khan Hospital and went for physiotherapy and chemotherapy daily. He produced a bundle of documents in support of the claim.

On cross examination he said he did not have the total of his father's medical expenses. He said his father

passed on in 2005 from the injuries he sustained in the road traffic accident that he had a doctor's report to confirm the same in the bundle of documents. He did not point out what that letter was, or who had authored it. He would sometimes drive his father to hospital and have a driver do it. Some of the documents in the bundles were expunged – others did not bear his father's name/indicate the relationship with his father's claim.

It is noteworthy that he simply took over his father's case and did not amend the suit to fall under the Fatal Accident's and Law Reform Acts, respectively.

It is trite that special damages must not only be specifically and pleaded they must also be specifically proved. These 2 bundles of documents were thrown in the face of the court.

I have perused them – but I do not think it is the role of the court to decide without supporting testimony what a document stands for. A receipt for fuel issued by a petro station is simply that until the story behind it is told by a witness connecting it to the claim. So is a receipt from a chemist, or a receipt for a tyre.

There are payment receipts from various hospitals – there was no narrative attached to them in P.W.3's testimony. The submissions made no effort to analyze/discuss the documentary evidence.

The witness said they spent between 20-15,000,000. He was not certain of the claim amount. No evidence was led to support the claim for future medical care or for domestic care.

Special damages in addition to being pleaded must be strictly proved.

Lord Goddard C.J. mad this very clear in **Benham Carter vs. Hyde Park Hotel Ltd. [1948] 64 T.L.R. 177-**

"plaintiff must understand that if they bring .....for damages, it is for them to prove damage, it is not enough to write down particulars and so to speak, throw them at the head of the court saying "this is what I have lost, I ask you to give me these damages. They have to prove it"

PW3 FRANCIS NJOROGE THUO who testified on his behalf made general statements in support of the special damages.

"I wish to produce documents in support of my dad's claim. We had to build him another house. We had to buy new tyres for the motor vehicle when he was going to Njoro...he would buy oil because he had bed sores...the road to Nakuru was very bad we had to repair the car...Mr. Kimani was the nurse to my father..."

On cross examination regarding the treatment abroad he said,

"in the UK in the first hospital he was admitted for one year then he went to another hospital and was thereafter discharged to my sister's home in the UK. He did not stay for long. I do not Know when he came back...I do not have the exact total of the figure of expenses."

Clearly there was no effort made to prove the special damages. The court had made a determination that as the administrator of the estate PW3 could produce documents on behalf of the deceased plaintiff. It would be expected therefor that since he was there in the place of the plaintiff, he would testify as much as possible in a manner that would go towards proving the plaintiff's claim.

For instance, when he said that the plaintiff was admitted in hospital, it was his duty to point out which hospital, for how long and what it cost. It was also his duty to place evidence on record that in deed a new house had been constructed, and the cost of the same. In fact, he did not identify any of the documents

It was very frustrating trying to connect the P.W.3's testimony and the documentary evidence. The 1<sup>st</sup>

plaintiff simply placed before the court two big bundles of documents - no explanations – no narrative. I am not in any doubt that the 1<sup>st</sup> plaintiff attended hospital and incurred medical expenses an approximate figure was pleaded.

The documentary evidence could have been better organized, and accompanied by narratives. Without the luxury of a legal researcher, or other assistant, I examined the two volumes bundles of documents, mostly receipts and invoices totaling 879 pages. It took me hours. I noted that even the person who had prepared them gave up on adding up the figures after Volume 1. In Volume 2 there was no effort to add up the figures of the sums claimed. How do you just throw a long list of documents at the court and expect the court to come up with the narrative that is the evidence?

With regard to proof of special damages the court of Appeal in **Douglas Odhiambo Apel & Another vs. Telkom Kenya Limited Civil Appeal No. 115 of 2006 (Nairobi)** stated the following:

The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved. See **Ratcliffe vs. Evans [1892] 2QB S24; Kampala City Council vs. Nakaye [1972] E.A 446** and **Hahn vs. Singh [1985] KLR 716**.

The learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annexures to the plaintiffs' submissions. Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur. The necessity of the rule becomes immediately clear where, as in this case, the respondent contends that receipts for legal fees in defence of the appellant's criminal case seem to have been issued prior to their arrest. Special damages were not proved and the claim for Ksh. 130,000 was properly rejected. (emphasis added)

Among the 1<sup>st</sup> plaintiff's documents were invoices from hospitals in the UK, from the Aga Khan Hospital. An invoice is not proof that money has been expended. A receipt for paid. It cannot be the basis for a special damage claim

In **Great Lakes Transport Co. (U) Ltd vs. Kenya Revenue**

**Authority, (2009) KLR 720**, the Court of Appeal, considered how proof of payment, in a claim for special damages may be established and distinguished an invoice from a receipt in the following terms:

“Although the claim was pleaded at paragraph 7(b) of the amended plaint and prayed for in the prayers, the proof advanced in respect of it did not meet the required standard. There was no receipt produced to show that actual cash was paid, or any payment made for the alleged purchase of tyres. A mere invoice as the one produced in evidence was incapable of proving purchase. The claim could have been proved very easily by producing either a receipt from M/s General Tyres Sales Limited which was alleged to have supplied the alleged tyres or a witness from that company to confirm that indeed money changed hands when the alleged new tyres were acquired by and delivered to the appellant... [T]here was no evidence that the appellant bought new tyres for the subject vehicle. Mr. Gikandi has endeavoured to show that an “invoice” is different from a “proforma invoice” and has made effort to persuade us that an invoice should be treated as a “receipt”. With respect, we see no merit in that argument and take cognizance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word “paid” on the invoice and that would

turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of the goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case, neither of the two documents amount to a receipt.”

I find therefor that none of the numerous invoices placed in the 1<sup>st</sup> plaintiff’s bundle of documents which PW3 purported to produce can be treated as proof of payment, and the amounts claimed thereby will not be allowed.

There were also numerous receipts in the bundle of documents on fuel from various petrol stations.

Again there was no attempt to give evidence connect them with the accident.

After scouring through the documents I added up all the receipts for hospital, and those for medicine that bore the 1<sup>st</sup> plaintiff’s name. The total amount came to Ksh 972, 688. Add the Ksh 15000 for medical report, and Ksh 100 for police abstract= 987,788/=

On general damages for pain, suffering and loss of amenities- I would allow a sum of Ksh 4,000,000. See **William Wagura Maigwa vs. Elbur Flora Ltd [2012] eKLR, Joseph Maganga Kasha vs. KPLC Ltd [2012] eKLR**

No evidence was led to assist the court to assess loss of earnings or earning capacity.

For the 2<sup>nd</sup> plaintiff SAMUEL MBUGUA MUTAHI was 70 years at the time of the Accident. He sustained fractures to the right 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ribs, right humerus, right elbow and right ankle. The last medical examination report dated 25<sup>th</sup> January 2002 for the exam done on 18<sup>th</sup> December 2001, indicated that though the fractures had ‘achieved ‘adequate union’ he suffered from residual stiffness of the right elbow joint for which he was still undergoing treatment. The chest injuries had healed satisfactorily. He remained with permanent and cosmetically unsightly scars.

Permanent disability was at 10%. He would require between Ksh 80,000 and 100,000 for the operation to remove the plates and screws fixing the fractures.

The P3, indicates that it was issued to the 2<sup>nd</sup> plaintiff on the 14<sup>th</sup> September 2001. However, it was completed on the 10<sup>th</sup> June 2009, 10 years after the RTA. The Dr. simply confirmed what was in the medical reports. There was no update as to the actual status of the plaintiff. For instance, whether the plates and screws had been removed by then.

To prove special damages, he produced the following exhibits as documentary evidence.

1. After the accident he was taken to Cottage hospital in Nanyuki. He produced receipt Exhibit 1 from the hospital – **Invoice for Ksh 9260**

2. Invoice from Amref flying Doctors for USD 928.68

3. Bundle of documents – Invoices from Nairobi hospital and Receipts for- Ksh 59,000 +Ksh 23,501+ Ksh 50,000+ Ksh 100,000= Ksh 232,501

5. Bundle of receipts from Dr. Atinga for Ksh 160,000

6. bundle of receipts from Nairobi Heart clinic for Ksh 108,500

7. KNH invoice for Ksh 62, 798, receipt for Ksh 30,000

8.Mr. J. D Patel receipt for Ksh 50,000

9. Dr. N Ng'ang'a receipt for Ksh 25,500

10. Mr. Robin Mogere receipt for Ksh 60,000

11. Ministry of health receipts Ksh 1250

12. Invoice for \$ 3055, demand for \$22, 827.49 (no evidence of payment) an undated (year not shown) receipt for \$505, Receipts for X-rays and others Ksh 19,670 and a bunch or air tickets for Ksh, 275,005 + 279 960, +297 427, +294510, +279, 960=1,426,862+19,670=1,446,532

13. .Invoice medical report Ksh 1000

14. Receipt medical report Ksh 1500

Total = **2,1485,81**

Clearly without evidence that the invoices or demands were paid, I could not award the same as special damages.

For pain, suffering, loss of amenities I find that Ksh **3,000,000** would suffice. **Sabina Nyakenya Mwanga v Patrick Kigoro and Anor [2015] eKLR.**

Special damages Ksh as proved Ksh **2,148,581**

The claim for future medical examination or care was not established.

The 3<sup>rd</sup> Plaintiff **SHELLMITH WATHERA KAMUNYA produced** a certificate of conformation of grant to the estate of **PETER KAMUNYA KIBOI (deceased)**. In addition, she produced the certificate of death and Pathologists report showing that the deceased's cause of death was head and chest injuries due to motor vehicle accident.

1.The postmortem expenses were Ksh 11,000.

2. Announcement of the death in the Nation Newspapers cost Ksh 48,120,

3. KBC radio announcements cost Ksh 23,100

4. Police abstract Ksh 300

5. Receipts for other funeral expenses (casket Ksh 35,000, Lee funeral Ksh 33000, Jamii Hospital Mortuary Ksh 500, tents Ksh 15,120 programmes Ksh 12000, Transport Ksh 12000, assorted items Ksh 1574) =Ksh 109, 194

Total **191, 714.**

With regard to the deceased's earnings, she testified that he was a retired banker. That he was not on pension and was doing business of land estate agent. However, she produced a bunch of bank statements for a current joint account in both hers and his names. It was submitted that he earned Ksh 400,000 per month from his business.

No evidence was tendered to show that the deceased had a land estate agent business. No business licences, or tax returns etc. The bank statement 's produced were in his and his wife's name. There was no audited report of the business to confirm that indeed he earned Ksh 400,000 per month from the same. In short the 3<sup>rd</sup> plaintiff did not prove the claim that the deceased had a land estate business from which

he earned Ksh 400, 000 per month.

The deceased had retired from the bank, and the unchallenged evidence is that he was doing business although as I have indicated herein above the requisite documents were not provided by the wife. Be that as it may it can be seen from the bank statements that the deceased was earning some income from someplace as there is evidence of deposits. The evidence of his wife and his daughter on dependency was uncontroverted. I would assess the deceased's income at Ksh 40,000 per month. He was 56 at the time of death. I would apply a multiplier of 9 years.

Pain and suffering- Ksh 50,000

Loss of expectation of life- Ksh 150,000

Loss of dependency  $40000 \times 12 \times 9 \times 2/3 = \text{Ksh } 2,880,000$

Funeral expenses Ksh 191, 714

Total=Ksh 391, 714

## **FINAL ORDERS**

**1. On liability I find the defendant 100% liable for the accident.**

**2. Awards;**

**i. The 1<sup>st</sup> plaintiff**

**General Damages for pain, suffering and loss of amenities**

**Ksh 4,000,000**

**Special damages Ksh 972, 688**

**Total Ksh. 4,972,688**

**ii. The 2<sup>nd</sup> plaintiff**

**General damages for pain, suffering and loss of amenities**

**Ksh 3,000,000**

**Special damages Ksh 2,148,581**

**Total Ksh. 5,148,581**

**iii. The 3<sup>rd</sup> plaintiff**

**General damages for pain and suffering Ksh 50,000**

**Loss of expectation of life Ksh 150,000**

**Loss of dependency Ksh 2,880,000**

**Special damages Ksh 191 714**

**Total Ksh. 3,271,714**

**3. Costs: the plaintiffs will have costs and interest at court rates.**

**4. Right of Appeal 30days**

**Dated, delivered and signed at Nyeri this 18<sup>th</sup> day of October 2017**

**Teresia Matheka**

**Judge**

**C/A Harriet**

**Uvyu h/b for Kieti Ndolo for Kilonzo and Co Advocates for 1<sup>st</sup> Plaintiff**

**Chege Wainaina and Co advocates for 2<sup>nd</sup> plaintiff**

**Wangari Muchemi and Co. Advocates for 3<sup>rd</sup> plaintiff**

**Waruhiu K’Owade and Ng’ang’a advocates for defendant**