REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 30 OF 1986

LYDIA CHAO …… PLAINTIFF

VERSUS

DHANJAL BROTHERS LTD

MUNGA MUHASO

HASSAN ISMAEL ABDALLA

PAUL WAMBUA MUSILA…….....DEFENDANTS

JUDGMENT

The plaintiff claims special and general damages for the injuries she sustained in a road accident on 18/9/85.

The first defendant is the owner of caterpillar tractor registration No KJS 540 model 920. The second defendant was an employee of the first defendant and the driver of the said tractor. The third defendant is the owner of a *matatu* minibus registration No KSP 670 which was being driven by his employee, the fourth defendant.

The plaintiff was one of the twenty five passengers travelling in the *matatu* from Mwembe Tayari in Mombasa Island to Changamwe. The road to and from Changamwe at Kibarani is a dual carriageway with two lanes on either side. The carriageways are segregated by a central island which is 9 feet wide. The *matatu* was going up-hill towards Changamwe roundabout. The tractor was travelling from Mazeras towards Mombasa Island and after Changamwe round-about it was descending a slope along the right lane near the right kerb and next to the central island. The second defendant (DW 1) states that while so driving the steering wheel of the tractor suddenly turned to the right and was unable to turn it left. The tractor then climbed the central reservation and crossed to the right of the road but before it touched the tarmac, DW 1 jumped out to save his life and the tractor hit the *matatu* on its right side causing it to overturn. The *matatu* was wrecked and many passengers in the *matatu* injured.

The plaintiff pleads that the accident was caused by negligence of the tractor driver, or *matatu* driver or the negligence of both drivers and has set out the acts of negligence of each of the two drivers in para 7 of the plaint.

On behalf of the owner and driver of the tractor, it is pleaded that the accident was caused by a latent

defect in the tractor from the hydraulic pipe to the distribution pipe which latent defect was not known and was not discoverable by exercise of due care and attention in the maintenance of the tractor and which pipe burst causing loss of control over the steering mechanism of the tractor.

The owner and driver of the tractor further plead that the accident was caused or contributed to by the driver of the *matatu* as per particulars of negligence stated against the *matatu* driver in para 7 of the plaint. The owner and driver of the tractor have consequently issued a third party notice to the owner and driver of the *matatu* for contribution and or indemnity.

The owner and driver of the *matatu* on the other hand, in their amended defence deny negligence and attribute the accident to the negligence of the owner and driver of the tractor. The particulars of negligence against the owner and driver of the tractor are set out in para 5 of the amended defence.

Four of the relevant agreed issues regarding liability are:-

1. So far as the first and second defendants are concerned, was the accident caused by the caterpillar machine which was latent and undiscoverable by the exercise of ordinary care and attention on the part of the first and second defendants in the maintenance of the said caterpillar machine.

2. If not, was the second defendant guilty of any negligence in causing the said accident.

3. Regardless of the answers to issues 1 and 2 above, was the fourth defendant guilty of any negligence in causing the said accident.

4. If the answers to both issues 2 and 3 above are in the affirmative, what proportion of blame is attributable to the second and fourth defendants respectively.

The tractor was examined by Mr Jassec Sherwin (DW 5) an engineer on 19/9/85 at the request of Concord Insurance Co Ltd. The tractor was at the premises of the first defendant.The tractor is 7 tons heavy with lifting capacity of 2 1/2 tons. On examination, DW 5 found the steering system inoperative and the hydraulic fluid tank empty. One hydraulic pipe was leaking oil and he instructed DW 2 to remove it. That was the right side pipe which is located below the driver’s seat, but underneath the tractor. The pipe is wholly visible from outside but one has to go underneath in order to see it. Indeed Mr Sherwin had to lie on a cradle put underneath the tractor to enable him to see it.

When Mr Sherwin subsequently examined the pipe (D Ex4) he found that it had burst but the other pipe on the left hand side was in good working order. Mr Sherwin explained in detail the steering and bucket loader working mechanism but as there is no dispute about how the system works I need only refer to it very broadly.The steering system and the mechanism for the bucket loader are controlled hydraulically. The hydraulic tank has a capacity for 120 litres of oil.Both the hydraulics for the steering and for the mechanism on the bucket loader are operated under hydraulic pressure of 180 1b per square inch. The hydraulic fluid is pumped at the rate of 45 gallons per minute and when the engine is running the system is pressurised. If the steering is turned right, the distribution valve feeds the fluid into the left hand side ram. The piston then comes forward and causes the steering to automatically turn to the right. If any of the pipes like Ex D 4 which is connected to the distribution centre bursts, the oil will be emptied from the hydraulic tank, there will be no pressure in the hydraulics and the steering system and bucket system will not work.

Mr Sherwin concluded that in this case, the pipe burst and the hydraulic failed and due to that failure, the steering locked on the right hand causing the tractor to turn right immediately and stay on the right lock

and it is this right lock which caused the tractor to cross the central island and eventually hit the *matatu*.

Further Mr Sherwin stated that where the pipe burst suddently, the steering control will fail instantaneously and the driver would not know before the burst that there is anything wrong.

The pipe which allegedly burst is both visually and from the evidence of Mr Sherwin made of several layers.

From the inside of the pipe, there is a special rubber pipe specially treated so that it does not leak out oil. It is then protected by a fibre wrapping of nylon cloth. The fibre wrapping is then covered by woven stainless steel. That is then covered with an outer rubber covering. The pipe is then vulcanized to a steel. Mr Sherwin is of the view that the bursting of the pipe would start from the inside rubber and the other outer coverings would give way. According to him as the wire mesh gives way the oil would flow between the wire mesh and the outer rubber creating pressure which would blow the outer rubber into pieces.Mr Sherwin is however unable to know what went wrong from the inside. He is also not sure if the defect would occur instantaneously or over a period of time but thinks that the defect developed over a period of 2-3 days and states that, provided the outer rubber remained intact, there would be no outward tell tale sign that the defect is developing from inside.

Mr Regrinder Singh Dhanjal (DW 2) is a director of the first defendant and states that he is the one in-charge of maintenance of the particular tractor among other vehicles and that he has 30 years experience on the job. According to him, the particular tractor used to be serviced in their workshop and when at the site it used to be serviced at the site every week after 100 hours when there was a major breakdown, it used to be taken to their workshop. The service included testing the steering hydraulic system according to manufacturers service manual.

DW 2 states that he had done general service on the tractor the weekend before the accident including checking the particular pipe and did not find anything wrong.

Mr Sherwin states that the tests of steering hydraulics which DW 2 used to conduct is the same test recommended in the manufacturers manual; that there is no manufacturers recommendation to remove the pipe periodically and test it off the tractor and that the weekly checks that DW 2 used to conduct are sufficient.

That is briefly the substance of the defence of latent defect. Mr Juma for the plaintiff argues that in the absence of service records which were not produced, there is no evidence that tractor was being serviced as required by the manufacturers and the defendant has failed to discharge the burden of proof placed on it.

Mr Satchu for the owner and driver of the *matatu* disputes that the steering failed because according to the evidence of the tractor driver whom Mr Sherwin did not interview, the tractor’s bucket was up and should have dropped if the steering hydraulics had failed.

Mr Satchu also submitted that the first defendant did not exercise sufficient care in the maintenance of the tractor. He referred to the absence of service records, the fact that tractor never used to be taken to authorised dealers and to the neglect to replace a worn out tyre as indicators lack of sufficient care in the maintenance of the tractor.

Mr Inamdar for the first and second defendant on the other hand submitted among other things that, evidence of DW 1, DW 2 and DW 5 discharge the burden of proof of a latent defect which was not

discoverable by reasonable examination of the pipe and that the defect arose without negligence of the first defendant; that in the circumstances of Kenya it is not necessary nor required that service records be kept; that in any case the pipes could not be serviced and physical examination and pressure testing were sufficient to ensure that the pipes were in reasonable good condition, and that once the hydraulic system failed the tractor's bucket would drop and would be hanging loose.

The law applicable in this case is agreed. It is that "where the circumstances of the accident gives rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with an absence of negligence."

Consequently, it is equally agreed that where the defendant as in this caserelies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred inspite of the defendant having taken all reasonable care to prevent it.

I will deal first with the issue raised by Mr Satchu that the pipe did not in fact burst. In doing so, I am supposed to consider all the evidence presented in court and decide whether or not the first defendant has proved on a balance of probability that the pipe in fact burst. I have also to be guided by the principles from English cases which the court in *Muhhiddin v Nazzor & Anor* [1960] EA 201, adopted and applied that; the defendant is not required to prove how and why the accident occurred, that in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out to such specific cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that defendant was not negligent, the plaintiff's case must fail.

I do not believe the evidence that the right hand pipe burst immediately before the steering wheel turned right for the following reasons:-

(a) The pipe was not inspected immediately after the accident and by an independent person. DW2 is a director of the first defendant and he states that on arrival at the scene he found that hydraulic oil leaking from the steering ram but it is on the following morning when he examined the pipe and found it to have burst. Mr Singh Hussein Gulam (DW 4) of Coast Accident Investigators Ltd was instructed by Concord Insurance the insurers of the tractor to investigate the circumstances of the accident and he went to the premises of the first defendant on 19/9/ 85 at 8.30 pm. This was the day after the accident. DW 4 took the photographs of the tractor.

If DW 2 had discovered the burst pipe by the morning of 19/9/85 why didn't he show the burst pipe to DW 4 so that he could take photographs of the pipe while still fixed to the tractor"

From DW 2's evidence he knew how the steering hydraulic system operates and the effect of leakage of oil.

DW 4 was stopped by Concord Insurance to proceed with further investigations on 20/9/85

Mr Sherwin was engaged by Concord Insurance Ltd on 19/9/85 at 3.45 pm and he visited the premises of first defendant on 20/9/85. He felt the pipe and found it burst. He ordered it to be removed. He returned to the premises of the first defendant when he found the pipe already removed and examined it and found the burst.

The pipe was produced in court (Ex D4). The part covered by rubber is about 6" long. It has two big holes where the pieces of rubber have been removed. If DW 5 could only know on 19/9/85 by feeling that the pipe had burst, it is a mystery why he could not visually see the two big holes on the pipe now produced in court.

Further, if DW 5 could only discover the burst by feeling the pipe, DW 2 does not say how he then discovered that the pipe had burst. Mr Sherwin had not seen the pipe between 18/9/85 and 20/9/85 and even after it was removed until examination on 22/9/85, it was not under his control. He would not know if it was interfered with or not. The tractor was in the hands of the first defendant from the time of the accident to the time the pipe was removed. No good reason has been given why like the *matatu* it was not taken to the police station an independent place after being involved in such a serious accident. Lastly, the tractor was not examined by an independent person like a Government Motor Vehicle Examiner.

The evidence we have about the burst is from DW 2 the owner of the tractor and Mr Sherwin who was commissioned by the insurance company – an interested party.

(b) The pipe is strongly reinforced and there is no explanation why it developed weaknesses from the inside while the left pipe was intact. It is not necessary that the defendant proves why the pipe burst but the cause is a relevant factor, in considering the probabilities. In the circumstances of this, a plausible reason would make the defence case more credible.

All Mr Sherwin could say is "I cannot be able to state what went went wrong from inside but something went wrong". He however rules out the possibility, that the defect occurred instantaneously and states that the defect occurred over a period of 2 – 3 days. If he does not know what went wrong from the inside then that time limitation is highly speculative. The pipe on the left side was used as much as the one on the right. There is no suggestion that the pipe on the right had a manufacturer's defect. That would not be so because the tractor had been used for 10 years with no problem. The undulations on the road would not have caused the defect. According to Mr Sherwin, the condition of the road could only have made the pipe burst if it already had a defect.

Both DW 2 and DW5 were cross-examined about the state of the pipe by Mr Satchu. It is painted yellow but the colour is faint. At one end of the outer rubber covering, there is a very black patch which is held in place by cellotape. The outer rubber covering around the black patch is cracked and another patch is about to come off. DW 2 states that he is the one who tied the black patch with cellotape to hold it in place. The meshed steel beneath the black patch is intact. The pipe has not burst where the black patch is.

Sherwin states that the burst is not located there but at the other end of the pipe. It is true that at the other end of the pipe, the outer rubber covering has come off and the steel mesh is exposed and it is clear that the wire mesh is twisted and cut but one cannot visually see any hole running down to center of the pipe. On the other side of the pipe where the wire mesh is twisted and cut the rubber outer cover has come off on the other side of the bust. As there is no burst underneath the uncovered area, then the rubber was not blown off in those places by any burst. What I am trying to say is that the rubber which have come off or cracked on the surface of the pipe could be due to outside impact. Yet Mr Sherwin discounted the theory that the pipe may have burst at the impact and he says the reason is because there was no impact where the pipe was situated. We have no direct evidence as to how the collision occurred. He has not discounted the possibility that a very heavy impact as in this case by the bucket which is hydraulically controlled would not have anything to do with the bursting of the pipe.

Further, this was a very violent collision. DW 2 visited the scene before the vehicles were removed. He is unable to remember how they were lying. Mr Sherwin visited the scene after the vehicles were removed. He cannot therefore be able to say with any certainity that there was no impact where the pipe is located.

(c) There is no evidence that the oil was emptied from the hydraulic tank after the burst.

The evidence of DW 2 is that the burst on the pipe is a large burst and with such a burst it would not take more than one minute to empty the oil from the hydraulic tank. Mr Sherwin agrees that after a burst as in the pipe, all the oil would pour out within about half a minute. He states that within that time, the tractor would travel a distance of about 200 ft with oil spurting out before the oil completely poured out.

Both DW 2 and DW 5 have discounted the theory that there was a pin hole puncture of the pipe in which case oil would pour out slowly over some distance. Their theory is that this was a sudden burst in which case all the oil would pour out within one minute.

The accident occurred at about 4.30 pm and according to DW 2 the tractor was removed from the scene by crane at about 8.30 pm. DW 2 was informed of the accident at about 5 pm. and went to the scene. This must have been after 5 pm. He states that after he went to the scene, the engine of the tractor was started and he found that the hydraulic oil was leakingfrom the steering ram. DW 4 found a large oil spillage as in photo D of Ex

D5. This large oil spillage was on the nearside lane of the carriage-way towards Changamwe but Mr Sherwin states that the oil spillage started at the middle of the carriage-way and extended to the nearside lane. DW 4 candidly states that he does not know whether the oil spillage is from the *matatu* or the tractor.

DW 2 on cross-examination by Mr Satchu stated that when he went to the scene, he found the tractor partly lying on the central island and partly on the right lane of the carriage way to Changamwe while the *matatu* was lying partly on the right lane with the greater part on the left lane.

The tractor according to evidence of DW 5 is divided into two parts – front half which contains the bucket and wheels and the second half where the driver sits and which houses the engine and hydraulic system. Between the two halves is a central shivel. The central island is 9ft wide. DW 4 found a gauge mark which was 7ft 7” from the right side kerb of the right lane of the carriage way to Changamwe. Mr Sherwin considers the gauge marks as the point of impact and forms the opinion that they were made by brake assembly of the *matatu*.

The case for the first defendant is that the bucket of the tractor collided with the right side of the *matatu* when the *matatu* was travelling in the right lane. There was a very heavy impact on the *matatu* between the driver’s door and the rear wheel and parts including brake assembly which has oil came off. The wheels also came off. Mr Sherwin does not suggest that the large oil spillage came from the tractor.

In the above circumstances, it is highly improbable that the large oil spillage is from the tractor. If there was a sudden burst of the pipe and if the accident happened on the right lane and vehicles were lying in the position described by DW 2 and considering that the oil tank had capacity for 120 litres, then all oil could have spilt between the central island and the right part of the right lane close to the right kerb. There was no oil spillage between the two points.

The theory of sudden burst with immediate pouring of all oil from the tank within one minute is

discredited by the evidence of DW 2 and DW 5. I say so because if the theory is true, then DW 2 who came to the scene most probably within an hour could have found all the oil having poured out and therefore could not have found oil still leaking as the tank would be empty.

Photos 1 and 3 of Ex D8 taken by Mr Sherwin show large oil deposits underneath the tractor which oil he states was still leaking from the pipe. Mr Sherwin first visited the premises of the first defendant on 20/9/85 – two days after the accident. That oil was leaking from the pipe two days after the accident and there was oil deposits underneath the tractor is inconsistent with the evidence that upon the sudden burst all oil would pour out within half a minute.

(d) The inference from the evidence of the tractor driver (DW 1) is that the tractor bucket was working and it was up. When cross-examined by Mr Juma, DW 2 testified that as he was driving, the front bucket was raised up to a degree and that it did not occur to him to release the bucket to come down and stop the tractor because of confusion.

The evidence of DW 2 and DW 5 is that if the pipe bursts and as the steering system and bucket system are controlled by the same hydraulic system, the bucket would drop down, hang loose and start bumping on the ground.

On cross-examination by Mr Satchu, Mr Sherwin stated that the bucket would drop to the surface of the road. He stated categorically that if the bucket is up 2 – 3 ft from the ground that would indicate that the steering system is functioning.

The *matatu* driver (DW 6) testified that after the impact he was thrown inside the bucket of the tractor and had to jump from the bucket into the road and fell on the detached axle of his *matatu*. The front bucket has slight curve at the end and below the lowest curve there are three pieces of metal welded to stop the bucket from wearing out. As Mr Sherwin explained in case of loss of pressure, the leaking edge of the bucket does not touch the ground, but would be slightly above it.

Photographs of the *matatu* Nos M,N,O,P and Q, in Ex D5 show that the *matatu* was in fact a minibus with passenger cabin. The photographs show that the damage to the *matatu* extended up to the right side roof of the driver's cabin and also up to the roof of the front passenger cabin. DW2 on cross-examination by Mr Satchu stated that the raised height of the bucket depends on the position the driver has fixed it and that when the tractor is travelling the driver would normally fix it at about 1ft from the ground.

The marks on the central island were in the opinion of Mr Sherwin made by the tyres of the tractor. The first defendant's case is that the gauge marks were made by the brake assembly of the *matatu*. So, there is no evidence that the bucket left any marks either on the island or on the road. The inference being that it was not bumping on the surface.

The tractor driver (DW 1) has driven the same tractor for 10 years and knows when the bucket is up or down. The credibility of Mr Sherwin's theory has been challenged because he did not interview the tractor driver to find out how the accident occurred.

It is admitted that the bucket of the tractor hit the *matatu* from the right side. It has been argued that when DW 2 said that it did not occur to him to release the bucket he refers to the period before the pipe had burst. That is not so because before saying that he had said that the bucket was up and also because those words were an answer to the question why he did not stop the tractor by dropping the bucket after the tractor lost control. The damage to the *matatu* shows that the impact was over 2ft from

the ground. That fact coupled with the absence of bumping marks of the tractor bucket and the evidence of the *matatu* driver that he had to jump out of the bucket and fell on the road lends support to the evidence of the tractor driver that the bucket was raised up thereby indicating that the pipe had not burst and the hydraulics were operating.

(e) The evidence that the tractor driver escaped from the scene and that he was eventually dismissed by the first defendant is a strong probability that he was to blame for the accident.

That finding is sufficient to dispose of the first issue in favour of the plaintiff but I may be wrong. Further, a lot of effort has been made to show that the defect could not have been discoverable by exercise of reasonable care. It is right that I should proceed to consider this defence. DW 2 stated that the bursting of the pipe is a rare occurrence and that he had not experienced it before. He gave evidence that the tractor was being regularly serviced and checking of the leak in the pipe was being done as recommended by the manufacturer. Both he and DW 5 stated that the pipe was externally visible and that the manufacturer does not recommend the removal of the pipe for testing outside the tractor. DW 2 states that the manufacturer does not also recommend the life of such a pipe.

There is also the evidence of DW 2 that the tractor was being put to normal use. The pipe is wholly visible from outside but one has to go under the tractor to see it.

The court viewed a similar tractor. Mr Sherwin on cross-examination by

Mr Juma accepts that the pipe in that tractor was oily and muddy due to working conditions but states that in case of leak one would see a jet of oil despite the fact that it is oily and muddy.

The tractor had no speedometer but has a devise for recording mileage. It is accepted by Mr Jaswant Singh Dhanjal (DW 3) and DW 2 that the tractor was not being serviced by the manufacturers' agents in Mombasa but by the staff of the first defendant.

It is further accepted by DW 3 that the pipe which allegedly burst has never been replaced for the 11 years the tractor has been in use. DW 1, DW 2 and DW 3 gave evidence indicating how the tractor used to be serviced. DW 1 in his evidence in cross-examination by Mr Juma stated that whenever he noticed something wrong, he would inform DW 2 who would bring the mechanics and that in all those years, the tractor used to be checked at the site. He went on to say that if the mechanics found a defect which they were unable to repair, they used to call caterpillar agents to repair it at the site.

According to DW 2 the tractor used to be serviced at the first defendant's workshop as well as at the site when it was at the site but when there was a major breakdown it used to be taken to the workshop.

DW 3 stated that for major repairs, the tractor used to be taken to the workshop but minor repairs used to be done at the site. In crossexamination by Mr Juma, this witness contradicted himself, he stated that the tractor has never been involved in major repairs and has never been taken to the workshop since it was bought.

It is apparent that the evidence of the three witnesses is contradictory. DW 1 says that agents of the tractor used to repair it at the site while DW 2 and DW 3 say that tractor was wholly maintained by the first defendant's staff. DW 1 says that the tractor has always been serviced at the site while DW 2 says that it sometimes used to be taken to the workshop. DW 3 says that it has never been taken to the workshop. The case of *Henderson v Henry E Jenkins & Sons & Anor* [1969] 3 All ER 756 and the case of *Rees v Saville*, [1983] RTR 332 were referred to me by Mr Inamdar.

No general principle can be derived from the two cases for what is reasonable care in the maintenance of a vehicle will depend on the facts of each case.

Mr Inamdar sought to show that the first defendant has proved what the respondent in *Henderson's* case failed to prove – that is the use the tractor had been put to. In *Henderson's* case, the lorry was 5 years old. It was a fact that the brakes failure was due to a large hole due to badly corroded back part of the pipe which was not visible in site. The corrosion was due to chemical action. The evidence which lacked in the case related to whether the lorry had been used to carry corrosive chemicals or whether it had been used frequently when exposed on its underside to salt or salt air. In the present case the cause of the defect is not known nor is there any evidence of what is abnormal use of the tractor or that abnormal use could cause the defect. There is no evidence on which one can relate the defect to the use the tractor was put to and the evidence of the use offers little, if any assitance to the first defendant's case.

The circumstances of *Rees* case are not comparable. The defendant had bought a second hand car which 3 – 4 months before the accident had been examined by authorised examiner as required by law and the defect in the knuckle joint which caused failure of steering mechanism could have been discovered by examination or servicing. The defendant had no mechanical knowledge of cars and the car from its appearance and performance appeared to have been satisfactorily maintained. In this case, the tractor has been in possession of the first defendant since new. It has never been examined by a Government Motor Vehicle Examiner and found to be mechanically fit.

It is a fact that one of the rear wheels of the tractor was badly worn out. It is admitted by DW 1, DW 2 and DW 3 that they do not know the hours the tractors has worked. There are no service records of the tractor. I agree that the mere absence of service records is not indicative that the tractor was not being maintained properly but their absence adversely affects the credibility of the first defendant's case. The pipe D Ex 4 appears old. I earlier pointed to lack of any explanation why the outer rubber has come off or cracked in some parts and yet there was no burst in those places.

It would appear from the evidence of DW 2 that he is not the one who was personally servicing the tractor but his mechanics. He however claims to have been present whenever the tractor was being serviced. Those mechanics could have given better evidence. Even if the tractor was being serviced at site, that service in view of the location of the pipe and the conditions of work which was bound to make the pipe oily and muddy could only have been cursory. If the evidence of DW 1 and DW 3 is true that the tractor has never been taken to the workshop for proper inspection and service for the 11 years, then it is clear that no proper attention was given to this monster to make it safe for use in public roads.

It has been argued that the manufacturer does not recommend for removal of the pipe for inspection. Rather the service manual is silent about the removal of the pipe. If that argument is taken to its logical conclusion, the meaning is that regardless of the conditions and the period in which the tractor has been used, the first defendant has no duty to remove it and inspect it. That is not so for the first defendant has a common law duty to ensure that the pipe was safely maintained and remove it, at reasonable intervals to check its fitness.

The contradictory evidence of DW 1, DW 2 and DW 3 coupled with all the above circumstances show that the first defendant has not proved on a balance of probability that it exercised all reasonable care and was negligent in failing to discover the defect in the pipe.

The second issue is whether or not the tractor driver was negligent. The plaintiff states in para 7 of the plaint that she would rely on the doctrine of *res ipsa loquitor*. The particulars of negligence stated against

the second defendant include driving at an excessive speed, failing to keep to his correct side of the road, to swerve, stop or take any evasive action. The driver of the *matatu* (DW 6) states that the tractor was moving very fast – at a speed of more than 100 kph while the driver of the tractor states that he was driving at a speed of 10 (KPH or MPH"). Tractor had no speedometer and the speed the tractor driver mentions must be based on his intuition.

The tractor was going down a slope and the driver was driving on the right lane (overtaking lane). He states that he was driving at the right lane because there was a slow container vehicle on the left lane and other vehicles ahead of it. But he states that he did not overtake the container vehicle because it was moving at a higher speed. The other reason that he gives is that further down on the left lane there were more corrugations than on right lane. On cross-examination by court, he stated that he traveled a distance of about 100 yards on the right lane before the steering turned right.

The evidence of DW 6 as to the speed of the tractor is unreliable because it is unimaginable how such a heavy tractor could manage such a high speed and also because he saw the tractor after it had lost control. At the same time the answers that DW 1 gives as to why he was driving on the right lane suggests that the traffic on the left lane was slow and obstructive. He nevertheless states that even when he crossed to the right lane he did not pass the container vehicle because it was moving at a higher speed than his tractor. If the container vehicle was moving at higher speed on the left lane than the tractor and at the same time relatively slow and obstructive, then the strongest probability is that when the tractor crossed to the right lane and drove on the right lane to avoid obstruction, it must have been at high speed in the circumstances.

There is evidence which is admitted by both DW 1, DW 2 and DW 5 that the brakes mechanism of the tractor are independent of the steering and bucket system and that the brakes of the tractor were working. DW 5 states that the tractor had in fact two foot brake pedals. It has also park brake (hand brake). DW 5 on cross-examination by Mr Juma stated that an experienced driver or a good driver if the steering system fails would switch off the ignition and slam on the brakes and the tractor would stop in a few metres.

In further cross-examination by Mr Satchu, DW 5 said that a perfect driver could have switched off the ignition and apply emergency brakes with both feet and that if the driver had merely applied the emergency brakes, the tractor could have stopped at such a low speed.

The tractor driver was an experienced driver and has had an acquaintance with the same tractor for about 10 years. He agrees that there was nothing to stop him from applying the brakes and that if he did so, he would have avoided the accident. The tractor driver states in his evidence in chief that when the steering failed to turn left, he got frightened and did not think of applying brakes. He instead jumped out of the tractor to save his life just before collision. In cross-examination by Mr Satchu, he seems to say that he did not apply the foot brakes because he was struggling with the steering wheel. But the fact that he was struggling with the steering wheel could not have stopped him from applying the foot brakes.

Am asked to find that in the situation the tractor driver found himself a reasonable driver could have similarly panicked and that the tractor is not required to display the standards of a perfect driver.

In *Embu Public Road Services Ltd. v Riimi* [1968] EA 22; the then court of Appeal for Eastern African held among other things that, the duty of a driver is not to drive perfectly but to show that standard of care which a competent driver (of a bus) should show in the circumstances. At the same time the court adopted a passage from the judgment of Lord Blackburn in *Stoomvaat's* case (1880) 5 App CAS 876, that "when a man is suddenly and without warning thrown in a critical position, due allowance should be

made for this, but not too much".

In the *Embu Public Road Services Ltd* case, the court found in the circumstances that the emergency (breaking of the buses spring) as there was sufficient time between the breaking of the spring and the overturning of the bus for a reasonably skilled driver to have taken some action to bring the bus under control.

In the present case, it has not been argued that even if the brakes were applied, there was no sufficient time to bring the tractor to a stop before the collision. On the contrary, the evidence is that the tractor was moving slowly and that had the ignition been switched off and tractor driver slammed on the brakes, the tractor could have stopped before the collision and the accident could have been avoided.

A skilled and attentive tractor driver should not have panicked and jumped out in the circumstances of this case. Instead, he should have switched off the ignition and slammed on the brakes to bring the tractor to a halt.

So, even if I had found that the pipe burst creating an emergency, I nevertheless would have found and I find that the second defendant has not shown that the emergency was so sudden as to have been impossible to apply brakes as expected of a competent driver of such a huge tractor. Mr Inamdar argues that the inferences which can be drawn from all the evidence and circumstances are that; the fourth defendant, driving on the right lane, that the *matatu* was moving in excess of 25 kph which was excessive and that if the fourth defendant was keeping proper look out, he would have seen the tractor in sufficient time and would have brought the *matatu* to a halt before the collision.

The only direct evidence that the *matatu* was moving on the right lane is from the plaintiff (PW 1). The fourth defendant (DW 6) denies that and states that he was driving on the left lane. The fourth defendant in crossexamination states that he was driving on the left lane about 1 foot from the edge of the road and that the *matatu* was about 6 ft wide.

Both DW 4 and DW 5 agree that the large oil spillage started at about the middle of the carriage-way to Chamgamwe and spread to the left lane. The evidence of DW 4 is that the broken glasses, debris and oil were all on the left side lane. Photo D of D Ex 5 shows clearly that this was so. There were no debris, oil spillage etc on the right lane which would indicate that the impact was on the right lane. The two gauge marks on which the First and second defendants heavily rely on are not wholly on the right but about at the middle of the carriage-way. The carriage-way is 23ft wide and therefore each lane would be 10' 5" wide. According to DW 4, the nearest gauge mark to the right edge of the right lane was 7' 7" from the right edge.

As Mr Sherwin says that the gauge marks are the point of impact, then the point of impact was 3' 10" from the middle of the carriage-way. As the *matatu* is about 6" wide the inference is that it was partly on the left lane and partly on right lane at the time of collision. That nearly supports the evidence of fourth defendant that he was driving on the left lane.

Mr Sherwin formed the opinion that the two gauge marks were made by the brake assembly of the *matatu* as it was being pushed by the tractor. The longest gauge mark is 10' 5" and finishes 5ft from the left edge of the left lane. If the *matatu* was pushed that far before it overturned then it would have overturned outside the carriage-way. More importantly, Mr Sherwin did not view the *matatu* at the police station and measure the width of the brake assembly or even ascertain from their condition that they would have made the gauge marks. He did not similarly take measurements of the width of the bucket or the width of the metal supporters underneath the bucket, to rule out the possibility of the gauge marks

having been made by them.

Furthermore, the gauge marks lie horizontally and as DW 4 accepts start from the direction taken by the tractor.

Mr Sherwin did not explain how the brake assembly are aligned in the *matatu*, what part of brake assembly could have made the gauge marks" Is it possible for the brake assembly to make such deep gauge marks without disintegration" In short, Mr Sherwin's opinion is not founded on concrete facts and I regret to say that it is not an inference which can be drawn from any proven facts. The gauge marks area indeterminate and their presence at the middle of the road does not prove that the *matatu* was moving on the right lane. I do not find any conclusive evidence that the collision occurred in the right lane.

The fourth defendant stated that he was going up-hill at a speed of 20 kph. It is a fact that his *matatu* was fully loaded and was going up hill. As against that, there is the evidence of the plaintiff that the *matatu* had not slowed down considerably and the evidence that *matatus* normally pick up speed before reaching the hill to be able to climb the hill. Plaintiff, however, says that she does not remember if the *matatu* had picked up speed before climbing the hill. Mr Sherwin says that if he takes the hypothetical speed of the tractor as 7- 8 kph and that of the *matatu* as 25 kph, then the combined speed would be 30 kph.

Mr Inamdar vehemently argues that on the assumption that the tractor was travelling at a speed of 8 kph; that the *matatu* was being driven on the right lane at 20 kph; the *matatu* driver would be 60 ft from the point of impact the moment the tractor started to climb on the central island and if he braked, his *matatu* could have stopped 20ft before reaching the point of impact and the accident could have been avoided.

These ingeneous deductions from combined speed and braking distances however correct ignore the question of fourth defendant's duty of care. The central issue is whether or not the fourth defendant had a duty to keep a look out and to stop or slow down.

According to Mr Satchu it does not matter on which lane he was driving and he would not ordinarily be concerned with traffic on the other side driving on opposite direction and by a long central island.

The law is stated clearly by Newbold J.A. (as he then was) in *Zarina A. Shariff v Noshir P Settna*, [1963] EA 239 at page 252,

"It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other part may be."

That passage was adopted in *Usha v Bachubhai & Another*, [1965] EA 433.

In *Suleiman Ali Mdigo & Anor v Abdulhamid Ebrahim* – CA No 68 of

1984 (unreported), Madan JA (as he then was) stated:

"Apart from keeping a proper look out a reasonable driver is not required to entertain extraordinary apprehension when driving lawfully under ordinary, normal conditions".

The fourth defendant described the circumstances under which the accident occurred. He was driving on the left lane on the carriage-way to Changamwe. I have found no conclusive evidence to disprove that. There were many vehicles travelling in same direction as his as it was rush hour. He was going up hill. He was following a slow lorry and there were vehicles overtaking on the right lane. There was a ditch on his left side. His bus was heavily loaded and had a speed governor limiting speed to 50 kph. He was driving at a speed of 20 kph. That evidence is not rebutted by any evidence nor is it improbable. He states that the lorry on the right lane passed the *matatu* and it is then he suddenly saw the tractor on the central island about 6 paces away moving at high speed and it hit the *matatu* at right angles. He further states that he was not looking on the right as he was observing the lorry ahead of him. According to him, when he saw the tractor for the first time, its bucket was emerging into the right lane.

It is evident that the driver did not do any manouvre which indicates that he was thrown into an emergency and had not time to react.

The scene is outside the island and is not in a built up area. There was no intersection which could have put the fourth defendant on alert. The two carriage-ways are separated by 9ft wide central island and are wide apart. There is no evidence that vehicles travelling on the carriage-way at the scene usually lose control and cross to the carriage-way to Chamgamwe.

If an occurrence such as in this case is common, the guard rails would have been erected along the central island. The dual carriageways by their very nature provide relaxed driving conditions to facilitate speedy unobstructed movement of traffic and to reduce risks of accidents occurring. There is no speed limit on the carriage-way to Chamgamwe.

In the circumstances, I conclude that the fourth defendant was lawfully driving in the correct carriage-way under ordinary normal conditions; that the danger of the tractor losing control and crossing into the right carriage-way was not reasonably apparent and that the fourth defendant discharged his duty by having a look out for the traffic in his carriageway.

Even assuming that the fourth defendant had a duty to look out for vehicles in the carriageway to Mombasa; that he was driving in the right lane and that he could have brought his vehicle to a halt a few feet from the point of impact, I would still conclude in the circumstances of this case that the fourth defendant was thrown into an emergency and had no time to react as a reasonable *matatu* driver.

For those reasons, I find that the fourth defendant was not negligent. I also find that the accident was solely due to the negligence of the first and second defendants.

I will now proceed to assess the damages.

Plaintiff a girl in Form IV was aged about 18 years at the time of the accident. She was first examined by Mr Rasik Patel 3 1/2 months after the accident. She was found to have sustained:-

1. Cut lacerated wound left side face starting over the left eye-brow passing medially from the left eye to over the bridge and nose 2” long and bone deep.

2. Multiple – about 20 small cut lacerated wounds and abressions over both legs and pacella areas.

3. Severe abdominal pain in intra-abdomen haemorrhage.

4. Communited fracture of the shaft of right femur. All the cut wounds were stitched. At laparatomy, she

had severe bruising of the small bowel and perforation at one point which was stitched.

She had a second operation a few days and a K-nail was fixed in the right femur to imobilise the fracture. She was admitted in hospital for 3 months and walked with crutches for one month thereafter. At the time of first examination she was walking without aid of crutches but with a limp due to inability to flex knee joint properly.

The scar on the face had signs of early keloid formation. She had multiple scars on front of both legs due to healed deep bruises and cut wounds. She had an 8” long linear scar on abdomen due to laparatory. She had also a T-shaped liner scar on the lateral side of right thigh 8” x 4” and 2 scars 1” on the upper and lower side of the thigh and also a 2” scar on the left gluteal area.

The last examination was on 11/5/88. Plaintiff was now 20 years old and in Form VI. The fracture of the right femur was found to have fully united and the fracture site was not painful. She had minimal limp and the Knail had not been removed.

The scar on the face was not very visible. The other scars were still visible but none of the scars had become keloid. She was complaining of limitation of knee flexion (knee could flex up to 90° only) which was making her limp a little. She was also unable to squat on the ground. Her permanent disability was diagnosed as limitation of flexion of right knee joint and the various scars.

Mr Rasik Patel gave evidence regarding his first examination of 18/9/85 but later his medical report for last examination of 11/5/88 was produced as exhibit. According to him, plaintiff sustained two injuries – fracture of the femur and perforation of the small intestine. The intestine was stitched and abdomen closed but she fully recovered from the abdominal injury other than the operation scar. It is also his evidence that the plaintiff had multiple fractures of the shaft of the right femur but there is now no limping. When the plaintiff gave evidence on 11/5/88, the scar on the nose was still visible. Five scars on the front of right leg and five scars on the back of right leg were also still visible.The left leg had also 5 visible scars on the front and two at the back. The K-nail had not been removed. She explained that she did the examination while still admitted in hospital and she could not do the practicals in science subjects. She failed the science subject and had to repeat the whole examination in 1986. Indeed her result slip (Ex 2) shows that she was absent at the examination for physics, chemistry and biology.

Her result slip for 1986 (Ex.4) shows that she sat for the whole examination, passed in Biology, failed in Physics and Chemistry.

She stated that she could not be able to squat and that she had to give up hockey, volley-ball, running, as she could not be able to run. She also had to give up swimming because the scars on the legs and abdomen made her feel embarrassed.

For those injuries, Mr Juma suggest an award of shs 400,000/=. Mr Inamdar while not suggesting any sum, cited two cases where the awards were between shs 130,000/= and shs 200,000/=.

The plaintiff sustained three distinct injuries viz: communited fracture of the shaft of the right femur which was the major injury; extensive scarring and abdominal injury.

It is appropriate to note that plaintiff was admitted in hospital in a state of severe shock and she had to be resuscitated and blood transfused. As the fracture and scarring are both main injuries, it is appropriate to treat each injury separately instead of making a global award.

As regards the leg injury, it is clear that the injury was serious and the operation to fix a K-nail was a major operation. It appears that this is the injury which prolonged the hospitalization to 3 months and caused her to use crutches for a month after discharge. It is the same injury which caused limitation of the flexion of knee joint causing a painful limp. She still had a painful limp during the first examination 3 1/2 months after the accident. The limitation of movement of the knee joint was found to be a permanent incapacity. When she was examined last in May 1988 – over 21/2 years after the accident, she still had minimal limping.

She did examination while still admitted and could not do some subjects. That injury caused her to repeat school one year.

The limitation of flexion of knee joint makes her unable to run and squat and she had to abandon games.

The K-nail has not been removed. She will undergo another operation for removal of the K-nail which operation would cost about shs 10,000/=. It is clear that plaintiff suffered a lot of pain and though the fractures have united there is residual permanent incapacity – limitation of flexion of knee joint.

Mr Juma referred to the case of *Master Salim Matano Salim v JM Said & Anor*, HCCC No 17/87 (MBS). In that case plaintiff (child) sustained a fracture of upper 1/3 of left femur among other injuries. Fracture was treated by traction and was admitted in hospital for 6 week. He was walking with a limp. The fracture healed with 1/2" shortening of the leg. Shs 80,000/=general damages was awarded in 1988. The injuries and incapacity to the plaintiff in the present case are more severe. HCCC NO 58/85 (NRB) at page 74 of 1988 Inmadar's Digest (supplement). In that case plaintiff suffered a fracture of right femur which was treated with a K-nail. He was hospitalized for 4 weeks. He complained of inability to walk or run or lift heavy objects. There was no shortening of the leg or angulation. Shs 70,000/= was awarded in May 1985.

In *Joseph SM Kibe v Kenya Bus Services & Anor*, HCCC 2711/86 (NRB) – 1988 Inamdar's Digest (Supplement) p 79, plaintiff aged 23 suffered a complete fracture of the right femur requiring a major surgical operation to fix a metallic plate. Another operation was required to remove the plate. No disability expected other than a weak leg. Court awarded shs 80,000/= in October 1987.

In *Fredrick Peter Wambua v AG* HCCC No 114/86 (MBS) plaintiffsustained a compound fracture of upper shaft of left femur and multiple abrasions. He was hospitalized for 3 weeks. Fracture was treated by plaster. He used crutches for 4 1/2 months. The fracture healed with mal-union tearing 3/4 shortening which caused limping and inability to walk fast. Court awarded shs 120,000/= in November 1987.

In *Alaxander Muhati v AG & Anor*, HCCC. 629/86 (MBS), plaintiff sustained a compound communited fracture of the shaft of tibia/fibula. He was hospitalized for 4 days. Fracture treated by plaster of Paris. He was in crutches for about 8 months. Fracture healed with 1/2 cm shortening of the right leg causing limping and pain at ankle joint. Court awarded shs 120,000/= general damages in July 1989. In *Fredrick Peter Wambua's* and *Alexander Muhati's* case, though there was minimal shortening, there was no major operation and the period of hospitalization was short.

Using the above cases as a guide, I assess general damages in respect of fracture of the femur and residual incapacity at shs 150,000/=.

Plaintiff has extensive scarring on both of her legs due to lacerations, wounds and abressions. There was also two big scars on the thigh and a scar on the left gluteal area. In all, she had about 20 scars. The doctor found the scars permanent. The scar on the face (nose) is still visible. The right leg has five

visible scars on the front and five scars on the back. The left leg has also five visible scars at the front and two at the back. The large scars on the thigh must still be there as doctor found the scars permanent.

She is a young unmarried girl.

She left swimming because of the scarring.

In *Lucy Nyambura Wairiuko v John Warui Wanyoike & Another*, HCCC 386/87 (NRB), Joseph Butler-Sloss, J in October 1987 awarded shs 70,000/= to the lady who sustained bruising of dorsal spine, bruising of the lower front chest, bruising of right thigh, abrassion with bruising of right leg and bruising of the left leg. Her lower right leg would remain permanently scarred. The pain on the back was temporary. She was treated as an out-patient.

The plaintiff in the present case sustained more extensive scarring than Lucy Nyambura. The award in Lucy Nyambura case was made over 21/2 years ago. Needless to say, those extensive scars are a blemish to her beauty and are likely to narrow down the choice of prospective husband.

I would assess general damages at shs 100,000/=.

No evidence was led to prove the special damages claimed. But there is no doubt that the plaintiff was examined twice by Mr Rasik Patel who prepared to medical report. Shs 2,200/= are claimed for the two medical reports. That is a reasonable sum

The abdominal injury involved perforation of the bowel at one point and severe bruising of the small bowel. A major operation – caparatomy was done and intestines were stitched and bowel closed. The first examination showed that she had severe abdominal pain and intra abdomen haemorrhage. That injury healed with no permanent incapacity except the 8” long linear operation scar.

In *Simon Mwinzi v Mwithi Musee*, HCCC 3160/ (NRB) 1988 Inamdar’s Digest (supplement) p109, plaintiff sustained 3 perforations of mid small gut as a result of a chest stab wound – 4 cm. He underwent operation of caparatomy. The only disability was pain from surgical scars and abdominal discomfort after eating. Court awarded shs 55,000/= in May 1987.

That case is comparable to the present one and I think a fair award would be shs 60,000/=.

The plaintiff had a right to join the third and fourth defendants as parties though her claim against them has not succeeded – Order 1 rule 7 CPR. Indeed after joining them the first and second defendants alleged negligence against them and went ahead to issue a notice to claim contribution and or indemnity from them.

The result was that the suit degenerated into a dispute regarding liability between the first and second defendant on one hand and third and fourth defendants on the other hand. The third and fourth defendants have won the case. It is right therefore that the first and second defendans pay the costs of the third and fourth defendants.

In conclusion, I allow the plaintiff’s claim against the first and second defendants jointly and severally with costs and enter judgment for plaintiff as follows:

1. General damages for fractureof the right femur and residual

incapacity……..shs 150,000=

2. General damages for extensive scarring

.....…….shs 100,000=

3. General damages for abdominal injury

.....……..…….shs 60,000=

4. Special damages…….....…..shs 2,200=

TOTAL ……shs 312,200=

I dismiss the first and second defendants' claim for contribution and or indemnity against the third and fourth defendants. The first and second defendants to pay the costs of the suit to the third and fourth defendants. The plaintiff's claim against the third and fourth defendants dismissed.

Dated and Delivered at Mombasa this 9th Day of July, 1990

E.M.GITHINJI

……..

JUDGE

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