



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1888 OF 1999

DR. PAUL MACHARIA NDIRANGU

.....**PLAINTIFF**

VERSUS

V.K. PATTNI1

ST DEFENDANT

NELSON MATA.....2

ND DEFENDANT

J U D G M E N T

1. By his Amended Plaintiff dated 11/04/2008 and filed in court on 14/04/2008, the Plaintiff herein, Dr. Paul Macharia Ndirangu prays for judgment against the Defendants jointly and severally for:-

- (a) *The sum of Kshs.1,210,220/=.*
- (b) *General damages for pain, suffering and loss of amenities.*
- (c) *General damages for diminished earning capacity together with interest at court rates.*
- (d) *Special damages for future medical care as prayed for under paragraph 11 of the plaintiff.*
- (e) *Loss of earnings and loss of future earning capacity as prayed for under paragraph 10.*
- (f) *Costs of the suit together with interest at court rates*
- (g) *Such further or other relief as this Honourable Court may deem fit and just to grant.*

2. The Plaintiff's case is that on or about 09/10/1998, he was lawfully walking on the pavement along Dubois Road, Nairobi when the 2nd Defendant so negligently and carelessly and/or recklessly drove, managed and/or controlled motor vehicle registration number KZN 111 belonging to the 1st Defendant that he (2nd Defendant) caused or permitted the said motor vehicle to mount the pavement and thereby collided with and knocked down the Plaintiff. The Plaintiff avers that the said accident was solely and wholly caused by the negligence of the 2nd Defendant in driving, managing and/or controlling the aforesaid motor vehicle on the said date and time. The Plaintiff averred that as a result of the said collusion, he suffered injuries and incurred loss and damage; which he claims from the Defendants jointly and severally.

3. The Defendant filed their Further Amended Joint Statement of Defence dated 25/04/2008 and filed on the 29/04/2008. The Defendants deny each and every allegation made against them concerning the alleged accident and the alleged injuries, loss and damage suffered by the Plaintiff. In the alternative, the Defendants allege that if the accident occurred at all, a fact which the Defendants deny, then the said accident was solely caused or substantially contributed to by the negligence and/or carelessness on the part of the Plaintiff in that the Plaintiff failed to keep any or any proper look out or to have any or any sufficient regard to his own safety while walking along Dubois road. The Defendants also aver that no notice of intention to sue them was ever served upon them. The Defendants pray that the Plaintiff's suit be dismissed with costs to the Defendants.

4. The Plaintiff gave evidence as PW1 and also called six (6) other witnesses. The Plaintiff's case is that on or 09/10/1998, he was lawfully walking on the pavement along Dubois Road in Nairobi towards Lagos Road. He said he was in the company of Hedson Waithaka Waithumia, PW6. He said he was hit by a car from the rear as he walked and he fell down onto the pavement and lost consciousness. When he came to, he found himself at Aga Khan Hospital where he was treated for the injuries he had sustained on impact, namely:-

- *Bleeding from the mouth*
- *swollen right knee*
- *severe pain along the lumbar spine (lower back)*
- *neck and shoulder pain*
- *lacerations on the face and hands*

5. The Plaintiff stated that he was hospitalized for 2 days at Aga Khan. The Plaintiff produced the following documents to support his case:- *P Exhibit 1 – his licence to practice as a doctor – No. 2078 issued on 16/06/1982 by the Medical Practitioners and Dentists Board*

6. The Plaintiff also stated that on being discharged from Aga Khan hospital on 10/10/1998, he was on crutches and continued with treatment at Nairobi City Councils Clinics. He also testified that he was given off duty for 2 months. The Plaintiff further testified that because of the accident, he was not able to carry out operations at the Pumwani Maternity Hospital because he could not stand for long. He also stated he developed high blood pressure as a result of the accident.

7. Eight months after the accident occurred, the Plaintiff underwent a knee surgery on 23/03/2000. The Plaintiff produced as P Exhibit 5 the Histology report dated 25/03/2000. The Plaintiff also produced as P Exhibit 8 certified copies of proceedings in Traffic Case No. 21908 of 1998 in which the 2nd Defendant herein, Nelson Mata pleaded guilty to a charge of driving a motor vehicle without due care and attention contrary to section 49(1) of the Traffic Act, Cap 403 Laws of Kenya. The 2nd Defendant was fined Kshs.4000/= in default four (4) months in detention camp.

8. The Plaintiff also testified that he was seen by other doctors, namely Dr. Munene a dental surgeon and Dr. Wambugu (PW3) general surgeon. He said he also consulted Dr. Wokabi after the operation, and then Dr. Hagembe (PW5), an orthopaedic surgeon. The Plaintiff stated that he had not fully received even at the commencement of the hearing of this case in September, 2008.

9. The Plaintiff stated that as a result of the prolonged treatment, he incurred a huge bill totaling to Kshs.1,186,720/= as per P Exhibit 14 being bundle of receipts.

10. The Plaintiff also testified that before the accident, he was running a successful medical practice which he had established in 1991. He stated that his monthly net income from the practice was 74,000/= which he earned Kshs.45,000/= from his job with the Nairobi City Council. The Plaintiff added that if he put in more hours at Pumwani Maternity Hospital, his salary from the Nairobi City Council would be anything between 70-80,000/= p.m. The Plaintiff produced as PMFI 1-4 his letter of employment with the City Council of Nairobi.

11. The Plaintiff also testified that after discharge from hospital on 10/11/1998, he remained off duty for 2 months and thereafter performed light duty and suffered from hypertension. He remained on crutches for more than 8 months. He said he had to undergo a knee operation due to a fracture of the patella which resulted in heamatonias. The knee operation was done on 23/03/2000 at M.P. Shah Hospital by Dr. Gakuu who prepared the histology report produced as PExhibit 5.

12. The Plaintiff stated that he made a report of the accident on 05/11/1998. The P3 form he was given by the police was produced as PExhibit 6. The Plaintiff produced the police abstract issued to him on 16/11/1998 as MFI-7. The proceedings in the Traffic Case No.21908 of 1998 against one Nelson Mata, the driver of the accident motor vehicle was produced in evidence as PExhibit 8. The Plaintiff stated that on or about 19/04/1999, he consulted Dr. Wokabi. Dr. Wokabi's medical report dated 06/05/2010 was produced in evidence as MFI-9.

13. The Plaintiff also underwent dental check-up by Dr. Munene. The Plaintiff stated that he had to see Dr. Munene because his (Plaintiff's) teeth were loose and painful. Dr. Munene's report was produced as MFI-10. The Plaintiff testified that he also consulted Dr. Wambugu, a Surgeon on 17/01/2002. Dr. Wambugu's report was produced as MFI-11. The Plaintiff saw Dr. Wokabi again on 08/05/2002. Dr. Wokabi's second medical report dated 27/05/2002 was produced as MFI-12. The Plaintiff also said Dr. Hagembe an orthopedic surgeon on 29/08/2005.

14. It was the Plaintiff's further testimony that his injuries had not fully healed and was on continuous medication for pains in the right shoulder, lower back, and loss of libido. The Plaintiff said that the drugs he had used over the 10 years had cost him as much as Kshs.1,186,720/= as per the bundle of receipts produced as PExhibit 14.

15. The Plaintiff stated that as a result of the accident, he lost earnings from his private clinic and the extra income he used to make from the extra work he used to do at Pumwani Maternity Hospital. He testified that because he could not stand for long hours, he lost the opportunity to carry out operations especially at Pumwani Maternity Hospital and that he had to contend with short term assignments at private hospitals such as **May Help of the Sick Hospital, Thika Nursing Home and St. Ursula Catholic Hospital in Meru**. The letter confirming that the Plaintiff had worked at St. Ursula Catholic Hospital was produced as PExhibit 15 while the letters from Mary Help of the Sick was marked as MFI – 17. The Plaintiff testified that due to the accident, he had to turn to tea, coffee and livestock farming from which he eked out a living. The Plaintiff also stated that if he underwent reconstructive surgery on his right knee, chances are that he would regain his health and the ability to continue working as a surgeon. The Plaintiff testified that he would need Kshs.500,000/= for the right knee reconstructive surgery.

16. The Plaintiff was cross examined at length. He denied suggestions put to him that he was hit because firstly he was walking on the road and not on the pavement and secondly that he was trying to cross the road without much care and attention when the Defendant's motor vehicle hit him. The Plaintiff also stated that on impact he fell face down on the tarmac, hitting his right knee on the ground first. The Plaintiff also vehemently denied that he was the one who caused the accident. The Plaintiff admitted that from M.P. Shah Hospital Discharge Summary, it was shown that he had sustained a fracture of the right patella and that the report continued details of no other injuries, such as Soft Tissue Injuries; but stated that his molars were broken and removed because of the accident. In total, the Plaintiff stated that he lost three (3) teeth on the right side of the mouth and one (1) on the left. The Plaintiff however agreed that the P3 Form did not mention any injury to his teeth. He also agreed that the only injuries mentioned in the P3 form were: swollen right knee joint. *fracture of right patella with pieces of bones*

17. In answer to another series of questions, the Plaintiff admitted that he did not lose consciousness when he fell down on impact contrary to what he had stated in his evidence in chief. Regarding the alleged injuries to the spine, the Plaintiff admitted that even the very first x-rays did not show any injuries to the lumbar spine, though they showed a fracture of the right patella. In reference to a report prepared by Dr. R.P. Shah on behalf of the Defendant, the Plaintiff admitted that according to the Radiologist Report, there was no fracture of the patella and that instead there were two bones of the right patella. The Plaintiff stated that Dr. R.P. Shah's view that the Plaintiff had a double patella was in agreement with the findings by Dr. Washington Wokabi as per Dr. Wokabi's report dated 06/05/99 – MFI – 9, although the Plaintiff said he did not agree with Dr. Wokabi's theory of a double patella. The Plaintiff however admitted that until the accident herein, he did not know that he had a double patella of the right knee. The Plaintiff maintained that with or without double patella, he suffered a fracture of the right knee, though he admitted that the plaintiff averred that the injury suffered involved rapture to ligaments and muscles of the knee.

18. In summary, the Plaintiff testified that he suffered a fracture of the right patella and also lost three (3) molars on the right upper jaw and one tooth on the left side of the mouth because of the accident although he said that the tooth on the left side of the mouth was removed in the very recent times. He also stated that he developed hypertension as a result of the accident. When questioned about the drugs allegedly bought for his various conditions over the years, the Plaintiff denied that he had produced some receipts which were bought for other members of the Plaintiff's family. The Plaintiff denied that some of the receipts could be forgeries. The Plaintiff was also unable to provide details of moneys he earned from Pumwani Maternity or the St. Ursula Hospital.

19. PW2 was No. 72948 Police Constable Johnson Njonjo Mwangi. His evidence related to the report of the accident in which the Plaintiff was injured. The report was made to Central Police Station under OB No. 13 of 23/10/1998. The accident involved motor vehicle Registration No. KZN 111. PW2 stated that pursuant to the accident report, the Plaintiff was issued with Police Abstract No. A337019 on

16/11/1998. A certified copy of the Police Abstract was produced as PExhibit 7.

20. In his further evidence, PW2 stated that he could not say whether or not the Plaintiff was hit while cross the road or whether he (Plaintiff) was walking off the pavement. PW2 also stated that according to the OB report, the Plaintiff suffered slight injuries.

21. PW3 was Dr. Washington Wokabi, a holder of an MB CHB and MMed from the University of Nairobi and PW3 stated that he examined the Plaintiff on or about 19/04/1999 who was found to be experiencing pain on the right shoulder joint, pain in the right knee, swelling on the right knee low backache and neck pains. According to PW3, the following were his findings on examination of the Plaintiff:-

- *Painful movements of right shoulder joint*
- *Right eye muscles showed partial tear*
- *Fractures of right knee cap*
- *Wasting of right leg muscles*
- *Missing 2nd right upper molar*
- *Spasms of back muscles*
- *Abnormality on upper margin of 4th lumbar vertebrae*

22. PW3 also stated that the Plaintiff had sustained serious during the accident which would result in permanent pain in the right shoulder joint with the possibility of future surgery to remove fragments from the right knee at a cost of Kshs.80,000/=. He also testified that the torn muscles would require repair to restore vitality at a cost of Kshs.150,000/= and further that the Plaintiff would need post-operative maintenance drugs at a cost of about Kshs.25,000/=. PW3 stated that the lost molars would not require replacement, but that the Plaintiff was likely to suffer from muscle spasms for a long time to come. PW3 assessed the Plaintiff's permanent disability due to the accident at 25%. PW3 produced his report dated 06/05/1999 as PExhibit 9.

23. PW3 also gave testimony regarding the further medical examination of the Plaintiff carried out on 08/05/2002. PW3 stated that as of that date, the Plaintiff still had complaints similar to those made in 1999 and that the x-rays taken after the 1999 examination, showed spondylosis of the lumbar spine with stiffness in the right shoulder. PW3 also testified on further examination on 08/05/2002, he noted arthritis of the right knee and that the Plaintiff walked with a limp of the right leg. In PW3's opinion the Plaintiff's condition had deteriorated with time and that he would need replacement of the knee cap at a cost of Kshs.500,000/=. PW3 produced his further medical report dated 08/05/2002 as PExhibit 12.

24. PW3 was cross-examined at length during which he stated that he and the Plaintiff hail from the same place. PW3 stated that according to the Discharge Summary from the Aga Khan Hospital, the injuries shown to have been suffered by the Plaintiff were fracture of the right knee cap and unspecified soft tissue injuries. Regarding the injury to the Plaintiff's vertebrae PW3 stated that his first report showing that there was possibility of a fracture of the lumbar vertebrae. However, PW3 testified that according to his findings, the major injury suffered by the Plaintiff was soft tissue injury. PW3 added that the Plaintiff's teeth were compacted; although it was clear from the Discharge Summary from Aga Khan Hospital nothing was said about injury to the teeth. PW3 also testified that it did not occur to him while examining the Plaintiff that the Plaintiff had a bi-partite patella of the right knee, though there was no doubt that even a bi-partite patella can suffer injury in an accident. PW3 also made a statement to the effect that a knee cap that is bi-partite can mistakenly present itself as a fracture. He also said that the Discharge Summary from the Aga Khan Hospital was very conclusive and consistent with his own observations as to the injuries suffered by the Plaintiff as a result of the accident; that is to say that the two major injuries suffered by the Plaintiff were fracture of the right patella and soft tissue injuries.

25. PW4 was Jeremiah Mac Francis Mugambi an accountant by profession. His evidence related to the Plaintiff's audited books of accounts for the years 1996, 1997 and 1998. PW4 testified that the Plaintiffs net profits for the years under review were as follows:-

·	1996	-	<i>Kshs.85,650.00</i>
·	1997	-	<i>Kshs.72,228.00</i>
·	1998	-	<i>Kshs.64,050.00</i>

The three (3) sets of accounts were produced as PExhibits 16A, B and C respectively. PW4 testified that from the audited accounts, the trend of the Plaintiff's business known as Mount Kenya Medical Clinic was on the decline. He also stated that the audited accounts had not been signed by the Plaintiff and that the effect of non-signature as regards third parties would be negative.

26. PW5 was Dr. Peter Felix Hagembe, a Member of the Royal College of Surgeons of England with specialization in orthopedics. PW5 stated he examined the Plaintiff on 29/08/2005 and that on examination, he established that the Plaintiff had suffered:-

- *Fracture of the right patella*
- *Blunt trauma to the back*
- *Blunt trauma to the chest*
- *Blunt trauma to the mouth*

PW5 stated that he made the following findings on examination of the Plaintiff:-

- *A limp in the right knee*
- *Surgical scar on conterior aspect of the right knee*
- *Inability to flex right knee beyond 90⁰ as compared to the normal flexibility of 120⁰*
- *Right knee was slightly swollen*

27. In the opinion of PW5, the Plaintiff suffered serious injury to the right knee, which necessitated surgical intervention. PW5 also stated that the Plaintiff had suffered injury to the shoulder which may need operation in the future. PW5 put the Plaintiff's disability from the accident at 38%. The report prepared by Dr. Hagembe was produced as PExhibit 13.

28. During cross examination, PW5 stated that if the Plaintiff had been unconscious on admission to hospital as alleged by the Plaintiff, that fact would definitely have been included in the Discharge Summary from the Aga Khan Hospital. PW5 also stated that though he saw some foreign bodies on the x-ray of the knee, he could not conclusively say that these were from the accident. PW5 also stated that he did not examine the Plaintiff to confirm the latter's allegation that he (Plaintiff) had lost 3 teeth as a result of the accident. The witness also confirmed that there was no fracture of the lumbar spine and especially L4. PW5 also stated that the disability given (38% in his case) could go down depending on the treatment of received and on the dynamics of a patient's body.

29. PW6 was Henson Waithaka Waithima, a friend of the Plaintiff. His testimony was that on the 09/10/1998, he was in the company of the Plaintiff as they walked along Dubois Road from the direction

of Accra Road. PW6 stated that the Plaintiff was waling next to the road while PW6 testified that the Plaintiff was hit by a car from behind and that as a result of the impact, the Plaintiff fell down on the road that PW6 assisted the Plaintiff to get up and thereafter the very vehicle which had hit the Plaintiff took the Plaintiff to the Aga Khan Hospital in Nairobi. PW6 also stated that he assisted the Plaintiff to be admitted at Aga Khan Hospital. PW6 stated further that the motor vehicle that hit the Plaintiff was registration number KZN 111 which was being driven by an African driver who was in the company of an Asian passenger.

30. In his further testimony in cross-examination, PW6 stated that the Plaintiff was about four inches away from the road as the two of them walked on the kerb. PW6 also stated that after the collision, the Plaintiff was unable to talk until they reached the hospital. PW6 denied allegations that the accident occurred when the Plaintiff was trying to cross the road. PW6 also stated that the Plaintiff was unconscious because he (Plaintiff) was not talking until he got to the hospital. PW6 also stated that the accident occurred as a result of the vehicle veering towards the kerb as the drive tried to avoid another vehicle that was coming from the opposite direction. He said that after the impact, PW6 saw a small injury on the Plaintiff's mouth, but he could not say anything about the Plaintiff's other injuries.

31. PW7 was Patrick Kiilu Munyao, administrator at the Thika Nursing Home in Thika Town. PW7 stated that at one time, the Plaintiff was hired as a doctor to work at the facility between April and September 2005 but that the Plaintiff's services were terminated on 20/10/2005 due to the Plaintiff's poor health. PW7 testified that due to the Plaintiff's poor medical condition, the Plaintiff could not perform emergency theatre cases since he could not stand for more than 30 minutes continuously, and that even when he was in the theatre, he too an inordinately long time to do even the simplest operations like caesarean sections. That the Plaintiff always complained. The Plaintiff's dismissal letter dated 20/10/2005 was produced as PExhibit 16. PW7 also testified that the Plaintiff sometimes used a metal crutch as he walked in and out of the hospital.

31. At the close of the Plaintiff's case, the defence called 2 witnesses. DW1 was Dr. R.P. Shah, a Fellow of the Royal College of Surgeons of England. Dr. Shah recalled seeing the Plaintiff on 14/12/2001 and thereafter prepared a medical report. According to DW1, the Plaintiff suffered injuries to the right knee right shoulder, lower part of back, chin, teeth and chest. DW1 said he relied on the following documents when he examined the Plaintiff on 14/12/2001:-

· *Discharge Summary from Aga Khan Hospital which showed that the Plaintiff had suffered the following injuries:-*

§ *Right knee injury*

§ *Soft tissue injuries*

with no mention of any other injuries suffered by the Plaintiff or any fracture

- *Discharge Summary from M.P. Shah Hospital for an admission in March 2000*
- *Medico-Legal reports of Dr. Wokabi, Dr. Wambugu and Dr. Hagembe*

32. DW1 testified that according to the Radiologists' report, the Plaintiff's right knee had two parts in it. He also said that the Discharge Summary from the Aga Khan Hospital did not mention any state of unconsciousness on the part of the Plaintiff on admission, nor did the Summary say anything about bleeding from the mouth; injury to the chest of the back.

33. In his opinion, DW1 stated that the only major injury suffered by the Plaintiff was soft tissue injury to the right knee and that if there were any other injuries, then such injuries were minor and of no consequence. DW1 also stated that according to his observation, the Plaintiff was born with a bi-partite patella in his right knee which predisposed the Plaintiff to osteoarthritis due to friction. On whether or not the Plaintiff's hypertension could have been caused by the accident, DW1 stated that such an eventuality was unlikely and that hypertension was a very common condition among persons aged over 40 years with or without accident. DW1 produced his report dated 14/12/2001 as DExhibit 1.

34. In his further testimony, DW1 cast some doubt on the cost of medication taken by the Plaintiff over the years, the reason being that the type of injuries suffered by the Plaintiff being soft tissue injuries would have been cured in a time of 2-4 weeks. He also stated that he was not assisted by any x-rays when making up his opinion about the injuries suffered by the Plaintiff; but he admitted that the Discharge Summary from Aga Khan Hospital talked of a fracture of the right patella. He also agreed that by the time he saw the Plaintiff, the Plaintiff had already undergone surgery of the right knee to remove bony particles from the right knee. Regarding Dr. Hagembe's report, DW1 stated that his own opinion differs from that by Dr. Hagembe for the reason that Dr. Hagembe did not give a basis for the conclusions reached. DW1 also maintained that there was ample evidence, including evidence given by Dr. Wokabi (PW3) that the Plaintiff had a bi-partite patella, in the right knee. It was also DW1's testimony that if the Plaintiff had suffered trauma hypertension that condition would have been temporary and not permanent as appeared to be the case with the Plaintiff.

35. DW2 was Nelson Chege Mata, the 2nd Defendant herein. He testified that as he drove motor vehicle registration number KZN 111 along Dubois Road from the direction of Accra Road, the Plaintiff who was in the company of two people emerged suddenly from the left side of the road onto the road; that though he applied emergency brakes, he could not avoid the impact with the Plaintiff's back part of

the right knee. DW2 stated that on impact the Plaintiff fell on the tarmac with both knees and hands on the tarmac. DW2 alleged that the Plaintiff's face did not touch the tarmac. DW2 also stated that after the Plaintiff was assisted to his feet by his friend and after asking his friend to take details of the car, the Plaintiff asked DW2 to take him to hospital. DW2 stated that a week from 09/10/1998, he was charged with the offence of careless driving. He said he pleaded to the charge on being advised to do so by police. He denied that he drove carelessly on the day of the accident. He also denied that he caused the accident by letting the vehicle veer off the road to the kerb. DW2's contention was that the accident was caused by the Plaintiff himself by appearing suddenly into the road in the path of the vehicle that was being driven by DW2. DW2 also stated that after the collision, he never saw any lacerations on the Plaintiff's face because the Plaintiff's face never touched the ground.

36. In his further testimony on cross-examination, DW2 stated that Dubois Road was a very busy road, with both human and motor vehicle traffic. He also said that he was driving slowly, between 5-10 kph. He admitted that on impact, the Plaintiff was pushed ahead by the vehicle. He said he did not report the accident to the police because to him, the accident appeared minor. DW2 also stated that he pleaded guilty to the charge of careless driving because his boss told him to do so and that it was his boss who paid the fine.

37. The parties filed their written submissions together with the relevant authorities. It is not in dispute that the accident occurred. The only dispute is whether it was the Plaintiff or DW2 who caused the accident. Counsel for the Plaintiff submitted that from all the evidence as above given, it was also that DW2 was solely responsible for the accident.

38. It was not also disputed that the Plaintiff suffered some injuries as a result of the accident. The only dispute is on the extent of those injuries. Counsel for the Plaintiff submitted that the Plaintiff sustained serious injuries which have subsisted to date, the said injuries being:-

- *a fracture of the right knee cap*
- *a painful right shoulder*

- *impact to the teeth and*
- *injury to the back*

which injuries necessitated surgery on the right knee to remove bony bodies from the said knee. Counsel for the Plaintiff urged this court to agree with the findings by Dr. Hagembe (PW5) that the injuries suffered by the Plaintiff as a result of the accident complained of were serious injuries and not insignificant injuries as Dr. R.P. Shah (DW1) would have this court believe.

39. On quantum, counsel for the Plaintiff asked for a sum of Kshs.1,000,000/= for pain suffering and loss of amenities. Counsel cited 2 authorities to assist the court in making this award. The first case is ***Nrb HCCC No. 1743 of 1994 – David Muendo Makusu –vs- J.V. Strabag Bau – AG – Lima Ltd.*** in which the Plaintiff sustained comminuted fracture of the right knee joint (tibia plateau) which resulted in restricted movements of the right knee joint and shortening. General damages for pain suffering and loss of amenities were assessed at Kshs.450,000/= on 23/07/1997.

40. The second authority was ***Nrb HCCC No. 436 of 1999 – Bernice Muthea Maingi & Another –vs- Joseph Ndome & Another.*** The Plaintiff suffered loss of consciousness, injury to the knee, left shoulder, left waist injury and injury to the head. General damages for pain suffering and loss of amenities were assessed at Kshs.400,000/= on 03/10/2001.

41. On loss of business, counsel for the Plaintiff urged the court to assess the same at Kshs.825,000/= based on the rate of an average of Kshs.75,000/= per year for 11 years; based on the audited accounts and net profits recorded in the years 1996, 1997 and 1998 as per the evidence of Patrick Kiilu Munyao (PW7).

42. Counsel for the Plaintiff also submitted that the Plaintiff is entitled to compensation for diminished earnings due to poor health resulting from the accident. Counsel contended that before the accident, the Plaintiff was making about Kshs.59,278/= per month. Counsel also contended that because of the accident, the Plaintiff had to close down his private clinic which would have run beyond the mandatory retirement age. Counsel urged the court to consider the Plaintiff's age at time of accident (47 years) and to adopt a multiplier of 20 years and a multiplicand of Kshs.59,278 which would work out as follows:-

$$\text{Kshs.59278} \times 20 \times 12 = \text{Kshs.14,222,720/=}$$

43. Counsel for the Plaintiff also submitted that the Plaintiff is entitled to aware of future medical

expenses for corrective surgery in the sum of Kshs.766,580/=. Counsel also asked the court to award special damages in the sum of Kshs.1,186,720/= being the cost of medication. In total, the Plaintiff seeks damages as follows:-

(i)	<i>General damages for pain, suffering and</i>	
	<i>Loss of amenities</i>	<i>Kshs. 1,000,000.00</i>
(ii)	<i>Loss of earnings</i>	<i>Kshs. 825,000.00</i>
(iii)	<i>General damages for loss of future earnings ...</i>	<i>Kshs.14,222,720.00</i>
(iv)	<i>Cost of future medical care</i>	<i>Kshs. 766,500.00</i>
(v)	<i>Special damages</i>	<i><u>Kshs. 1,186,720.00</u></i>
	<i>Total</i>	<i><u>Kshs. 18,000,940.00</u></i>

44. The Defendants written submissions are dated 07/04/2010 and filed in court on 12/04/2010. On the issue of liability, counsel for the Defendant submitted that the Plaintiff had failed to prove ownership of the motor vehicle Registration No. KZN 111 allegedly knocked him down; that the Plaintiff ought to have placed before this court a certificate of search to establish ownership of the motor vehicle. Counsel submitted that the Plaintiff's failure to adduce such evidence renders this suit a nullity which ought to be dismissed with costs.

45. On this issue, counsel placed reliance on the Court of Appeal decision in the case of ***Thuranira Karauri –vs- Agnes Ndeche – Civil Appeal No. 192 of 1996***. In the case, the Defendant denied ownership of the motor vehicle. The court held that it was incumbent upon the Plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry and that the information contained in a police abstract that the lorry belonged to the Defendant was not sufficient proof of ownership. To this contention, counsel for the Plaintiff submitted that the Defendants' have not denied that the 1st Defendant was the owner of the subject vehicle. Counsel submitted that in the absence of denial of ownerships by the 1st Defendant, there was no obligation upon the Plaintiff to adduce documentary evidence in the form of a Certificate of Search signed by the Registrar of Motor Vehicles since ownership of the subject motor vehicle was not in contention.

46. Secondly, counsel for the Defendants submitted that the Plaintiff was the author of his own

misfortune by virtue of having suddenly entered the main road and into the direct path of the motor vehicle Registration No. KZN 111 without first ascertaining that it was safe for him to do so. That the accident occurred when the Plaintiff was crossing Dubois Road. That the Plaintiff's testimony that he was hit while walking on the pavement was a figment of the Plaintiff's own imagination and a mere afterthought. In this regard, counsel for the Defendant urged the court to reject the version of what happened as given by Hedson Waithaka Waithima (PW6) and accept the version of the story as given by Nelson Chege Mata (DW2) the latter of which clearly showed that on collision the Plaintiff fell onto the road. Counsel submitted that in the circumstances, the Plaintiff failed to keep a proper lookout for other users of the road and in particular for motor vehicles using Dubois Road, among them motor vehicle KZN 111. Counsel urged this court to apportion the primary responsibility for the accident to the Plaintiff. Counsel also urged the court to disregard the Plaintiff's attempts to present a grossly aggravated picture of his injuries, which injuries were not even visible to PW6 who was present with the Plaintiff when the accident occurred. The court was urged to reject the picture pointed by the Plaintiff and to accept that given by DW2. Counsel asked the court to hold the Plaintiff 100% liable for the accident or in the alternative to hold the Plaintiff substantially to blame at 70%:30% against the Plaintiff in favour of the Defendants. In support of this position, counsel relied on the case of **Peter Okello Omedi –vs- Clement Ochieng (Kisumu HCCC No. 196 of 2003) [2006] e KLR** where the court observed in part as follows:-

“The Plaintiff being a pedestrian owes a duty of care to other road users to move with dire care and in a manner that would not endanger safety of other road users.”

(Also see **Nrb HCCC No. 1863 of 2001 – Mori Chacha –vs- Richard Arap Koech**).

47. Counsel for the Defendant also submitted at length on the question of quantum. Taking all the expert opinions into account, counsel for the Plaintiff suffered only minor injuries since he was kept at the hospital for only one day; that the Plaintiff could not have suffered unconsciousness because both PW6 and DW2 testified that the Plaintiff was talking as they drove to the hospital and that the Plaintiff's allegations about injuries to the teeth, neck pain or shoulder pain were not recorded in the Discharge Summary from Aga Khan Hospital. Counsel also submitted that the Plaintiff's evidence on his (Plaintiff's) hypertension state should be ignored since the Plaintiff did not place evidence before the court to prove that he had become hypertensive after the accident; and therefore that all the special damages being moneys expended on buying drugs were an extreme exaggeration of what the actual state of the injuries suffered by the Plaintiff was.

48. Counsel for the Defendant also submitted that the Plaintiff's plea for future medical expenses should be refused because such expenses were not specifically pleaded in the plaint. Counsel urged the court to reject the Plaintiff's prayer for the sum of Kshs.1,186,720/= in special damages as per PExhibit

14. Counsel contended that since the Plaintiff had admitted that most of the drugs bought by the Plaintiff were for the treatment of high blood pressure, the said costs should be reflected because the Plaintiff failed to establish a nexus between his hypertensive condition and the accident.

49. On general damages for pain, suffering and loss of amenities, counsel for the Defendant proposed that a figure of Kshs.120,000/= would be reasonable compensation for the Plaintiff's injuries. Counsel based this argument on the contention that the only injuries suffered by the Plaintiff were injury to the right knee joint (fracture patella) and soft tissue injuries. The authorities cited by counsel to support the position taken by the Defendants' counsel were:-

1. **NBI HCCC No. 1973 of 1992 – Nephath Mururi –vs- Geoffrey Gathira & Another** where the Plaintiff suffered the following injuries:-

- *a strain of the right knee joint*
- *a sprain of the right hip joint and*
- *multiple facial injuries*

The court awarded the sum of Kshs.100,000/=. The Plaintiff had been hospitalized for 5 days.

2. **NBI HCCC No. 331 of 1990 – Petronilla Lumiti –vs- Gerald Njogu**. Plaintiff who was aged 35 years at time of accident. She sustained the following injuries:-

- a tear of the medical collateral ligaments
- a tear of the cruciate ligaments
- rapture of the medical meniscus

General damages for pain, suffering and loss of amenities were assessed at Kshs.150,000/=.

50. Regarding Future Medical expenses in respect of corrective dental procedure, counsel for the Defendant submitted that the sum of Kshs.266,500/= asked for by the Plaintiff should not be allowed due to lack of objective evidence on how and when the Plaintiff sustained the injuries which might have resulted in the alleged loss of teeth. Counsel also submitted that the Plaintiff is not entitled to the sum of Kshs.500,000/= for future surgery to the knee.

The reason given for the position taken by the defence on this issue of future costs for knee surgery is that if indeed the Plaintiff had suffered a fracture of the knee as alleged, then he should have been operated on at the very beginning of his hospitalization at Aga Khan Hospital and that there is no documentary evidence on what line of treatment was pursued by the Plaintiff after the 1 days in hospital. Counsel relied on the opinion by Dr. R.P. Shah as given in DExhibit 1 where the doctor stated as follows:

“The abnormality of double knee caps from his birth led to further complications of osteoarthritis in the months and years following the accident and that led him having an operation for loose bony bodies in the knee caused by the osteoarthritis.”

51. Counsel for the Plaintiff also submitted that particulars of special damages under paragraph 8 of the plaint have not been proved by the Plaintiff. Counsel contended that since Plaintiff suffered only soft tissue injuries, a fact admitted by the Defendants, the Plaintiff should not be paid for drugs purchased to reign in the Plaintiff's hypertension which has not been shown to have a nexus with the accident. Counsel also submitted that there are receipts for purchase of Viagra in large quantities which evidence that the Plaintiff suffered from a lower libido on account of the accident. Counsel wants the whole claim of Kshs.1,210,220.00 under special damages disallowed and dismissed.

52. On costs for medical reports, counsel submitted that the Plaintiff proved a payment of only Kshs.2000/= as per receipt dated 14/05/1999 from Dr. Wokabi. Counsel further submitted that there are no receipts to support the sum of Kshs.120/= and 100/= spent on court proceedings and police abstract accordingly.

53. On diminished diminished earning capacity and loss of earnings, counsel submitted that the claim under this head should be refused and dismissed because the Plaintiff has not laid a proper basis for the same; namely that the Plaintiff failed to produce a witness from the Aga Khan Hospital to testify on the Plaintiff's condition following his admission at the hospital on 09/10/1998 to produce MFI-2 – Discharge Summary and Clinical Abstract Sheet. Counsel argued that all the evidence laid before this court points only in one direction – that the Plaintiff suffered a right knee injury and soft tissue injuries. Accordingly, counsel submitted that the Plaintiff's claim ought to be dismissed because it is not sufficiently pleaded. Counsel relied on **Nrb HCA No. 535 of 2002 – Kenya Bus Services Ltd. –vs- Festus B. Kibe** in which the court held that “the damages under the head of Loss of Earning capacity can be classified as general damages but those have also to be proved on a balance of probability --- and *“that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to ----”*. That there is no documentary evidence to prove that Plaintiff worked for the Nairobi City Council and was earning Kshs.45,000/= per

month or that he was running a clinic which earned him certain sums of money.

54. Counsel also submitted that the Plaintiff is not entitled to these amounts for reasons that:-

(i) *The Plaintiff admittedly continued working with the City Council of Nairobi even after the accident.*

(ii) *The Plaintiff also worked in several other medical establishments even after leaving the City Council of Nairobi where he earned a net of Kshs.100,000/= p.m.*

(iii) *The Plaintiff's clinic in Nyeri did not close as a result of the accident since the clinic was, from the audited accounts on a downward spiral*

(iv) *The Plaintiff closed the clinic partly because of the new job offer he got with the City Council of Nairobi and not solely because of the accident.*

55. Further, counsel submitted that the basis of the amounts sought by the Plaintiff for diminished earnings/loss of earnings is erroneous. Counsel proposed the following average monthly drawings for each of the three (3) years as follows:-

. 1996 - Kshs.26,924.80

. 1997 - Kshs.26,582.60

. 1998 - Kshs.26,939.15

Counsel also proposed a multiplier of 6 years to take the Plaintiff to normal retirement age, taking into account the vicissitudes of life, the Plaintiff's natural physical/health conditions, the economic down turn and natural calamities. Counsel therefore proposed payment as follows:-

$Kshs.26815.50 \times 12 \times 6 = 1930716.00$

Which he said should be reduced to Kshs.1,500,000.00 to accommodate the benefit of receiving a lump sum payment.

56. On loss of earnings, counsel for the Defendants submitted that the Plaintiff did not suffer any disability to warrant compensation under this head. In the alternative, counsel submitted that loss of earnings should be computed for the average of the 3 years – 1996 – 1997 and 1998 as follows:-

	<i>Kshs. 85,650.00</i>	<i>(1996)</i>
<i>Add</i>	<i><u>Kshs. 72,228.00</u></i>	<i>(1997)</i>
	<i><u>Kshs.157,878.00</u></i>	
<i>Less</i>	<i>Kshs. 64,050.00</i>	<i>(1998)</i>
	<i>Kshs. 93,828.00</i>	
<i>Average =</i>	<i>Kshs.93,828.00 x 1/3</i>	<i>= Kshs.31,276.00</i>
<i>For 11 years =</i>	<i>Kshs.31,276.00 x 11</i>	<i>= Kshs.344,036.00</i>
<i>which sum is to be reduced by 35% to cater for taxation, resulting into</i>		
<i>Kshs.344036.00 x 65 = Kshs.223623.40</i>		

In summary, the Defendant's counsel proposed the following amounts:-

- General damages for pain, suffering and loss of amenitiesKshs.120,000.00*
- General damages for dimunited Diminished earningsKshs.1,500,000.00*

·	<i>Loss of earnings</i>	<i>Kshs.</i>	<i>223,623.00</i>
·	<i>Special damages</i>	<i>Kshs.</i>	<i>2,000.00</i>
·	<i>Cost of future medical care</i>		<u><i>Nil</i></u>
			<i>Kshs.1,845,623.40</i>
	<i>Less Plaintiff's contribution of 70%</i>		<u><i>Kshs.1,291,936.38</i></u>
			<u><i>Kshs. 553,687.02</i></u>

57. I have now considered the pleadings and all the evidence that has been placed before the court. I have also carefully considered the submissions made by counsel and the authorities cited to the court. The first issue for determination is on liability. After considering all the evidence, I find that both sides did everything possible in their power to ensure that the other party carried the whole burden for the accident. The Plaintiff and his witness said that the Plaintiff was about 4 inches from the road, while the Defendant alleged that the Plaintiff was crossing the road when he was hit by the Defendants car. The finding I make on this is that the injuries sustained by the Plaintiff and the point of impact (from behind between the hip and the knee) is inconsistent with a person who was crossing the road. The Plaintiff was hit from behind and I therefore accept the Plaintiff's testimony that he was not crossing the road when the accident occurred. The point that must be decided is whether the Defendant's car veered off the road onto to the pavement where the Plaintiff was walking along" The evidence that is before me including the point of impact and where the Plaintiff fell on impact informs me that the Plaintiff was infact walking on the road and not on the pavement. What does this mean" That the Plaintiff was not paying due care and attention as he walked along the busy Dubois Road. The Plaintiff will therefore bear 30% contributory negligence.

58. The next issue is the issue of injuries. From all the available evidence on record, the Plaintiff suffered a fracture of the right patella and some soft tissue injuries. Any other injuries talked of by the Plaintiff in my view, are not directly attributable to the accident. If that were so, the Discharge Summary from Aga Khan Hospital, where the Plaintiff was admitted for one day immediately after the accident would have shown those other injuries. The Plaintiff's case of hypertension may or may not have been due to the accident but the Plaintiff's evidence does not show that it was due to the accident.

59. I am satisfied that as a result of the accident and the injury to the right knee, the Plaintiff was unable to stand for long and to carry out operations as he had been doing in the past. I am also satisfied that the Plaintiff suffered loss of earning capacity as a result of the accident. I am also satisfied that the Plaintiff spent some money on drugs for the knee injury and for the soft tissue injury. I am also satisfied that on the evidence before me, the Plaintiff will require future surgery for the knee. This is regardless of whether or not he had a bi-partite patella in the right knee from birth.

60. In the circumstances, I am of the considered view that a sum of Kshs.500,000/= would adequately compensate the Plaintiff for pain, suffering and loss of amenities. For future medical operation to remove the bony bodies from the knee, a sum of Kshs.150,000/= would suffice. I make no award for corrective dental procedure because the Plaintiff did not establish a nexus between the injury to his molars and the accident.

61. On the diminished diminished earning capacity, I am persuaded by the position taken by the Defendants on this issue but will apply a multiplier of 8 years to come to the following

$$\text{Kshs.}26,815.50 \times 12 \times 8 = 2,574,288.00$$

The same amount is reduced to Kshs.2,000,000.00 to accommodate the benefit of receiving a lumpsum payment.

62. For loss of earnings, I have taken the average earnings for the years 1996, 1997 and 1998 which is Kshs.93,828.00 less 1/3 which works out to:-

Kshs. 85,650.00 (1996)

Add Kshs. 72,228.00 (1997)

Kshs.15,878.00

Less Kshs. 64,050.00 (1998)

Kshs.93,828.00

Average = Kshs.93,828.00 x 1/3 = Kshs.31,276.00

For 11 years = Kshs.31,276.00 x 11 = Kshs.344,036.00

Less 35% tax works out to

Kshs.344,036.00 x 65 = Kshs.223,623.40

63. As for special damages, I assess the cost for drugs at Kshs.200,000/= for the period over which the Plaintiff should have nursed his soft tissue injuries and the injury to the right knee.

64. In summary, I enter judgment for the Plaintiff as against the Defendants as follows:-

Liability - 70% to 30% in favour of the Plaintiff

· *General damages for pain, suffering and*

Suffering and loss of amenities.....Kshs. 500,000.00

· *General damages for diminished*

Diminished earning capacity.....Kshs.2,000,000.00

· *Loss of earnings.....Kshs. 223,623.40*

· *Special damagesKshs. 202,000.00*

· *Cost of future medical careKshs. 150,000.00*

Kshs.3,075,623.40

Less 30% contributionKshs. 922,687.02

Kshs.2,152,936.40

65. The Plaintiff will also have the costs of the suit plus interest at court rates.

It is so ordered.

Dated and delivered at Nairobi this 17th day of December, 2010.

R.N. SITATI

JUDGE

In the presence of:-

M/s Mukuru (not in court, Plaintiff in court) For the Plaintiff

Mr. Ombati (present) For the 1st and 2nd Defendants

Jane Omasaba - court clerk



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