IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 121 OF 2010

PETER BANA.....PLAINTIFF

VERSUS

MALTAURO SPENCON

STERLING JV LTD.....DEFENDANT

JUDGMENT

Kitusi, J.

When the facts giving rise to this case allegedly occurred, that is on 19th February, 2010, the defendant MALTAURO SPENCON STERLING JV LTD. was engaged in major rehabilitation of Mandela Road within the City of Dar es Salaam. During the night of this date the plaintiff PETER BANA was driving from Ubungo towards his place of abode in Tabata. He was therefore driving along the said Mandela Road.

At a place called Tabata Relini along the said road, the plaintiff's car knocked concrete road blocks that had been placed by the defendant on the road. The plaintiff therefore blames the

accident on the defendant while on the other hand the latter denies responsibility.

It is mainly pleaded by the plaintiff that the essence of the accident was absence of any warning signs or reflectors to caution road users of what lay ahead, and consequently he unsuspectingly drove into the concrete blocks. The plaintiff has annexed to the plaint a statement that a Police Constable Musa wrote following the accidents and after visiting the scene. The statement includes a sketch map of the scene and therefore shows how the said concrete blocks had been placed on the road.

The defendant has categorically denied the allegations as regards the absence of road signs to worn road users. The defendant asserts that during the execution of the rehabilitation works all rules governing construction and safety were observed. On the contrary the defendant has associated the occurance of the accident to the plaintiff's failure to observe road signs. The sketch map is disputed by the defendant who alleges that there was no sign of any accident and that the first time the occurance of the accident was brought to its attention was when a formal letter of demand, was served.

The Plaintiff further pleaded on the consequences of the accident. He stated that he suffered serious bodily injuries. It is averred that the plaintiff suffered very serious physical injuries including a ruptured liver which caused internal bleeding. He further suffered a dislocation of the spinal cord as a result of which

he cannot manage consortium or lie on his back or stomach. At the time of filing these pleadings, the plaintiff averred that the medical records to prove these injuries were still in the hands of the medical doctor who was attending him. He therefore craved for leave to tender the said records in the course of trial. The plaintiff alleged continued physical trauma as a result of the accident. He pleaded that he experiences stiff pains causing the ache on whole back as a result of which he tends to have regular fits of paralysis on his legs. Consequently he cannot walk for 100 meters without taking a rest. A medical specialist report on the degree of injury was annexed as 'B' and photographs of the injuries and surgery procedures were annexed and marked C.

Since in their pleadings the defendant were saying they had nothing to do with the alleged accident, they had, naturally, nothing to say on the resultant medical condition of the plaintiff. They wanted proof of the same white denying liability.

Consequently through this suit the plaintiff wants to be compensated by the defendant as follows:

(i) Special damages amounting to Shs. 133,000,000/=.

(ii) General damages amounting to Shs. 300,000,000/= or as may be assessed by the court for the plaintiff's injury and loss of wages resulting from defendant's negligence.

The plaintiff itemized the specific damages as follows:-

(a) *The Plaintiff's car was written off after the accident whose cists amounts to Tshs. 12,000,000/=.*

(b) *The Plaintiff lost a tender which he was ordered a week before the accident of 10th February 2010 to supply materials from Nairobi to Macedonia Nursery and Primary School before 25th February, 2010 namely:-*

(i) *400 pairs of red socks @ Tshs. 10,100/= which amounted to a total of 4,000,000/=.*

(ii) *400 pairs of gray socks @ Tshs. 10,000/= which amounted to a total of 4,000,000/=.*

(iii) *40 Belles (rolls No. 1) of gray colour as materials for shorts @ Tshs. 80,000 which amounted to a total of Tshs. 3,200,000/=.*

(iv) *40 Bells (rolls No. 1) of white colour as materials for shirts @ 50,000/= which amounted to a total of Tshs. 2,000,000/=.*

This order in total amounted to a total of Tshs. 12,2000,000/=, Copies of tender documents and proforma invoice for that regard are herewith annexed and collectively marked as "Annexure D". The plaintiff is craving leave of the Court to refer to the same as part of this Plaint.

(c) *Failure to deliver goods ordered by Makiki General Traders, a Registered Company doing business in Dodoma, who on 16th February 2010, ordered the following goods from the Plaintiff which he had to bring from Nairobi, and that the plaintiff was*

supposed to deliver them within two weeks from the date of order.

(i) 12 Dozens of Ammonia Paper.
1dozen=12 rolls @ 50,000/=. (12x50,000/=) Tshs. 600,000/= as the cost 1 dozen.
Therefore 12 dozens x 600,000/= equal to the total amount of Tshs. 7,200,000/=.

(ii) 10 Dozens of Plotter Paper. 1 Dozen contains 10 rolls @ 150,000/= (10 rolls x 150,000)= Tshs. 1,5000,000 for dozen.

(iii) Ammonis solution 20 gallons @ 20,000/= equal to the total amount of Tshs. 400,000/=.

This order amounted to a total of Tshs. ***22,600,000/=,*** *which the plaintiff lost as a result of the accident suffered that occurred two days from the date of order. Formal Order Documents and Proforma Invoice are herewith annexed and collectively marked* ***"E",*** *where leave of the honourable Court is craved to refer the same as part of this Plaint.*

(d) Since the year 2000, the Plaintiff has been permitted to transact business related into taking and selling photo related products in the Parliament of Tanzania-Dodoma in all Parliamentary sessions whenever they seat in Dodoma except non-parliamentary sessions.
During one Parliamentary session of two weeks the Plaintiff usually generate an average income of Tshs. 5,500,000/=

through his photographs sales, frames and albums as well as picture taking in different occasions during the sessions at the Parliamentary Grounds where his daily average sales range from Tshs. 650,000/= to Tshs. 900,000/=. The Plaintiff only attended a solitary February session before the accident where he gained about Tshs. ***6,500,000/=****, (from 2nd February, 2010 to 12th February 2010).*

(e) The injuries prevented the Plaintiff from attending the budget session in the parliament from July 08th to August 30 2010, where he was to get his average income (as per paragraph (d) above) of Tshs. 5,500,000/= per 2 weeks, which would have amounted to Tshs. 11,000,000/= per month. And from the three (3) months it would have amounted to Tshs. 11,000,000/= times 3 months which would equal ***Tshs. 33,000,000/=.***

(f) The Plaintiff was further prevented from attending the November, Parliamentary session since he was still under the Doctor's directions not to travel in long journeys and he was still suffering from the Spine injury (spinal code and cervical around the neck) and medical checkup at Muhimbili National Hospital. Therefore the plaintiff also lost his average income of Tshs. ***5,500,000/=*** *from the expected November, sessions photographic sales.*

(g) Loss of Income from business of branded Wall Clocks by failing to travel and procure the said wall clocks which he had established with a Registered Company in Kenya known as IDEAS and PLACES, which formerly was known as CLOX LTD,

that used to design and brand the same to the Plaintiff, a business which was expected to be to the tune of Tshs. 40,000,000/= in the following extent:

May 2010 (Tshs. 10,000,000/=)

September 2010 (Tshs. 10,000,000/=)

October, 2010 (Tshs. 10,000,000/=)

December, 2010 (Tshs. 10,000,000).

(h) *Plaintiff's medical and transport costs at Muhimbili National Hospital* ***Tshs. 1.200,000/=.***

It can be concluded, from the pleadings and issues, that this suit is based on an alleged negligence on the part of the defendant.

The parties were represented by learned advocates; Mr. Mkoba for the plaintiff and Mr. Byamungu for the defendant. Four witnesses testified for the plaintiff's case, with the plaintiff's (Pw1) account of the events being the most detailed.

He stated that he is self- employed and runs several companies which deal with a variety of ventures. The plaintiff's companies are Dina Supplies which deals with manufacture of promotional items; Ideas and Places which deals with sale of big Wall Clocks ordered from outside Tanzania; and a Professional

Photo Studio where he was selling cameras and photographing accessories. It is in connection with the latter venture that he had a contract with the Parliament of Tanzania to take photographs of the people and events during Parliament sessions and sell them out. At first it was not clear from PW1 as to what kind of relationship there was between him and the Parliament but when JossyMwakasyuka (PW4) the Director of Information Public Relations testifiedon this aspect he cleared up the confusion. The plaintiff was in fact a holder of a special permit to enter upon the Parliament grounds and take photographs for sale.

He was getting an estimated income of Shs 650,000 to 900,000 per day out of sales of photographs during such sessions. He was expecting other sessions including the April Mini Session, which fact has been confirmed by PW4. However PW1 never attended this Session in April.

On 18/2/2010 the plaintiff was driving a motor vehicle, with Registration Number T 663 AHB from Dodoma after the February Parliament session had been concluded and by 11.30 P.M he had reached Ubungo area, within the City of Dar Es Salaam. PW1 has

testified to seeing at UbungoDarajani area a signboard showing that the road was under construction. The plaintiff's destination was TabataKimanga where he was living, so he took the route towards Buguruni area along Mandela Road.

Plaintiff narrated on what happened at TabataRelini area. He said that he found three big cement blocks which had been placed in such a way that they blocked half the road and that there was a narrow passage on the left for vehicles to go through. The three concrete blocks had neither signs nor reflectors to warn motorists on the impending danger (of driving through) ahead. He deposed that there was no sign of road deviation or a warning that work was on progress, which signs would automatically prompt drivers to slow down.It is the plaintiff's story that because of the defendant's omission to place these warnings, he drove straight onto the concrete blocks in such a force that one concrete block estimated to weigh one tone shifted from one side of the road to another.The impact caused bodily injuries to the plaintiff, the details of which shall be referred to later, and the motor vehicle was also damaged.

When the accident occurred StationSergentOmary (PW2) was on duty at MabiboRelini Police Station. I take MabiboRelini to be a police station near TabataRelini where the alleged accident occurred. This is so because according to PW1, the immediate assistance he got after the accident was from PW2 who he said, was at the station adjacent to the scene of the accident. Also, according to PW2, he heard the sound of the crash as he was at the police station, which suggests the close proximity between the station and the scene.

PW2 testified that when heard the sound he got out and saw dust and that people were running towards the spot where the dust had erupted. He also ran to the scene only to find that a saloon vehicle had rammed onto three concrete blocks on the road. PW2 saw a person behind the steering wheel of the motor vehicle and he instructed him to get out. Before that this passenger had been resisting to get out because of fear forhis safety considering the group of people who had converged.PW2 called the traffic Police control Centre who sent officers to the scene and he proceeded with his night duty at the station.

PW2 testified on how the road at the scene was. He first confirmed that the road was under construction by the defendant Company which had work relations with the police because one of its officers a lawyer known as Skander used to seek Police assistance from time to time when management of traffic wasneeded.Then PW2 said that the fatal concrete blocks had been placed at the scene on the morning of 18/2/2010 because construction had reached that point. The blocks were meant to bar traffic from Ubungo, and this is the direction from which the plaintiff was driving. PW2 further said there were no warning signs placed anywhere near the blocks and he said he did not do anything about it because the Engineers working for the defendant Company and other officers of the Tanzania Roads Agency (TANROADS) were there and PW2 thought these people ought to have known better. It isPW2's story that the effect of placing those blocks at the scene was to slow down the traffic and that every now and then motorists had to apply sudden brakes on reaching the point. PW2 was shown Exhibit P2, photographs of the concrete blocks which PW1 had earlier tendered, and he identified them as the ones which were at the scene, and when he was cross examined

by Mr. Byamungu learned advocate for the defendant he said that the photographs(Exhibit P2) were taken by the plaintiff after the accident. He said that many accidents had occurred along Mandela Road during the construction works, but his duty station was not mandated to take up issues related to traffic.

It was the duty of specialized traffic police officers like Corporal Musa (PW3) to deal with cases of road accidents. On 18/2/2010 PW3 who was with the Traffic Section at Ubungo Police Station in the city of Dar es Salaam, received instructions from Oysterbay Police Station to go to Mandela Road where an accident had occurred.PW3 went to the scene, prepared a sketch map of the scene and towed the damaged car to the police station with the plaintiff who had been injured as a result of the accident. At police station a PF3 was issued to him.

Then PW3 testified on how the scene of the accident was and how the concrete blocks had been placed. He said that the blocks did not bear the reflective red and white paint as they should and confirmed the fact testified to by PW1 and PW2 that the was only a narrow passage left for driving through. PW3 testified further that

the only sign to show that the road was under construction had been placed at Ubungo area, that is at the beginning of Mandela Road. This must be the sign that PW1 referred to in his testimony when he said he saw a big sign at UbungoDarajani. PW1 even photographed the signboard and wanted to tender it in exhibit during the trial, but the prayer was overruled upon an objection by the defence counsel. I have considered the effort to prove this fact very unnecessary because, for one it is not disputed that there was that sign at Ubungo, and for another the issue is whether there were signs at the scene not whether there was one at Ubungo. When answering to questions put to him by the counsel for the defendant, PW3 said that he was not aware of any accident other than the plaintiff's along the Mandela Road and said if any other happened then none was brought to his attention.

As regards the details of the injury which I promised to refer to in the course of this judgment, PW1 testified that when he was given the PF3 he was first taken to Amana Hospital, from where he was referred to Muhimbili National Hospital because of the seriousness of the injuries. At about 2.00 am the plaintiff was

admitted at the National Hospital's Emergency Department and he stayed hospitalized for four days. During the stay at the Hospital a major operation on him was performed in the course of which it was discovered that PW1's spleen and liver had ruptured, causing internal bleeding. When he was finally discharged from hospital PW1 was advised to be on complete bed rest and that he should always lie on his back only as he had many stitches on his stomach. He further testified that he had injuries on his backbone discs, and still experience pains on the neck bones. He said that he cannot take long walks nor travel long distances by buses because he cannot sit for a long time. PW1 testified that even after the hospital treatment he is still unwell todate because he is prone to many deceases subsequent to the accident. He gave an example of an intestine problem which he experienced two years ago which he was told was a result of effect on the stitch wound.

Plaintiff's testimony on the medical condition was materially supported by the evidence of Prof Joseph FestoKahamba (PW5) who attended him in May, 2010. It was after Muhimbili Hospital had referred him to Muhimbili Orthopaedic Institute (MOI) where PW5 a

Neurosurgeon, works. PW5's analysis of the plaintiff was that he had injuries on several parts of his spinal cord from the neck(Cervical Spinal), chest (Thoracic Spinal) down to the loin (Lumber Spinal). PW5 tendered his medical progressive report as exhibit P5. PW5 concluded that the injuries sustained by the plaintiff must have been caused by an accident because it is improbable for a person to get the three kind of disc dislocations in the course of natural human activity. PW5 further said that a person who sustains injuries such as those sustained by the plaintiff is advised to watch against overweight, bending, carrying heavy things or doing any activity that may cause shaking of the body. It is therefore improper for such a person to drive on bumpy roads and to use mattresses which are not orthopaedic.

It is the plaintiff's case that this condition affected his earnings, beginning with the April Parliament Mini Session,to the June – August session which he missed. He also said that at the time of the accident he had been contracted by Macedonia International School of Dar es Salaam to supply it with school material from Nairobi a venture that was going to give him shillings

13,200,000/-. According to the plaintiff, he was also supposed to supply to Makiki General Supplies Company 12 dozens of Ammonia Paper. He said that one dozen has 12 rolls and each roll is sold for shillings 50,000/-. Makiki General Supplies had also wanted 10 dozens of blotting paper. Each dozen has 10 rolls and each such roll was to be sold for shillings 150,000/-. The other item ordered by Makiki was 20 gallons of Ammonia Solution with each gallon selling at shillings 20,000/-. In total the plaintiff lost shillings 22,600,000/ by failing to make those deliveries to Makiki Supplies Company and he associates the failure with the accident. Plaintiff tendered a letter by Macedonia International School (Exhibit P3), and the letter by Makika General Supplies (Exhibit P4) to support his story. Plaintiff concluded his testimony on this aspect by stating that the accident denied him the ability to make business trips to Nairobi in May, September, October and December which he used to make and he lost a total of Shillings 40 million, as he was getting shillings ten million for each such trip. During the final submissions by the defence counsel it was submitted that it is incumbent on the plaintiff to prove that Dina Supplies, the

company he allegedly owns, was legally existing and that the claimed loss of earnings were verifiable by tax records.

In defence two witnesses testified. The first was Ahmed KassimMakula (DW1) who recalled to have worked for the defendant company from 4/6/2008 to 31/9/2011. He started off as a Flagman and wound up at a higher position as Assistant safety Officer. As it shall soon be evident, the duties of both are relevant to the events that are a subject of this case. As a Flagman, DW1's duties included directing motorists on the safe route to be used by them and to warn them on unsafe routes. The other duty was to assist the safety Officer to prepare road signs showing Diversions. DW1 testified that 300 meters away from the diversion there would be placed the first sign showing "SLOW DOWN DIVERSION AHEAD". Then twenty meters after that there would be another sign showing, "30 KPH" meaning that drivers should reduce speed to 30 kilometres per hour. This was followed by another "SLOW DOWN DIVERSION AHEAD" after every twenty meters followed again by the "30 KPH" one hundred meters from the first sign. The sign that came next was "ROAD NARROW FROM THE LEFT" followed by "20

KPH" thirty meters from it. From this point which required drivers to reduce speed to twenty kilometres per hour, the diversion sign with reflective arrows showing the direction, would follow.

DW1 said that apart from those many signs, the defendant company would go out of their way on ensuring security because they had Italian lanterns (makoroboi) which they lit to signify danger. There was also a Flagman who was working round the clock to guard the signs.

DW1 recalled the accident in this case because on the night of 18/2/2010 when it happened, he was on duty from 6.30 PM to 6.30 AM. He said he witnessed rough driving by drivers during that night. Some would manage to stop their cars right at edge of the concrete blocks and others would knock off the signs. So while he was there the plaintiff's vehicle approached the diversion at a very high speed. It stopped at the arrows showing Diversion then the driver took the left turn which was the opposite of where the arrows indicated. He drove off on the wrong direction at a high speed and DW1 heard a bang. He went towards where the sound of the bang

had come from. He found many people there and could just see that the vehicle involved was a white salon.

Mr. Sikandar Dar (DW2) testified that he was a lawyer and tat during the material time he had been working for the defendant as an Administrative Officer. He had a recollection of the plaintiff approaching him with a Demand Letter claiming that he had been involved in a car accident. At first DW2 said he had not heard about the accident but later he made follow ups and discovered that the plaintiff had ignored the warning road signs and consequently ran into the accident. DW2 said that in construction of busy roads, accidents are inevitable, and that the only thing to do is to maximize on the road signs, supporting the version that there were sufficient road signs at the scene.

In their submissions, the learned counsel for the defendant company have raised an issue which is somehow new, the relevant part of which I wish to quote:

> *"4.1.Before the plaintiff can succeed on any of the issues as framed above and to succeed on any claim arising from a road traffic event as the instant one, the plaintiff must prove*

as a condition precedent that at the time of the accident he was lawfully on the road, that he qualified to drive the vehicle and that vehicle was roadworthy and fully licenced to operate on the road..."

The following issues were raised at the commencement of this trial:

1. *Whether there was an accident involving the plaintiff which occurred on 18th February, 2010 along Mandela Road at a location known as TabataRelini.*
2. *Whether the defendant is responsible for the occurrence of the accident*
3. *Whether the defendant had placed on the road visible signs that the road was closed.*
4. *What damages did the plaintiff suffer as a result of the accident?*
5. *Whether the defendant is responsible for the damages suffered*
6. *To what reliefs are the parties entitled.*

I think logic requires me to first resolve the issue that has been raised by the defence in the course of their final submissions. I am aware of the settled law that it is a violation of the constitutional right to be heard for a court to determine an issue that was not canvassed by the parties during the hearing. My first

assignment therefore is to taste the instant issue against that principle.

The issue seeks to question the plaintiff's competence as a driver and the vehicle's ownership. I have revisited the proceedings, the details of which I should not go into at this moment, and I am satisfied that PW1 and PW3 were cross examined and re- examined on these two points. It is therefore my finding that the parties canvassed the issue now being raised and that it shall be discussed along with the issues that were raised at the commencement of the trial.

I.P. Kitusi

JUDGE

In discussing the issues before me I consider it appropriate and convenient to begin with the new issue which seems to be "*whether the plaintiff's action against the defendant is dependent on*

his proving that he was validly on the road". As I have stated but a moment ago the plaintiff's witnesses were cross – examined and re-examined on the point. The plaintiff stated that he was a holder of a valid driving licence although he did not plead that fact. As regards ownership of the motor vehicle, the plaintiff stated that the same belonged to him he having purchased it from Hassan. He conceded the fact that he had not attached to the plaint the vehicle's registration card which is still in the name of Hassan. He explained that he had not transferred the ownership of the motor vehicle. When PW3 was cross-examined on these points he said he was dealing with an emergency and it did not occur to him that he should have subjected the injured driver to questions regarding his driving licence and motor Registration Card.

It is clear from the pleadings and the issues raised before commencement of the trial, that this suit is based on an alleged negligence. The particulars of the negligence are that the defendant failed in his duty to place working signs to indicate that the road had been closed. While the defendants are saying that they discharged their legal duty, they are also submitting that the

plaintiff has no right to sue because he was not lawfully on the road. At this stage I wish to seek inspiration from the judgment of Rutakangwa J. (as he then was) in the case of **Bamprass Star Service Station Ltd V. Mrs Fatuma Mwale** [2000] TLR 370, where he stated at page 412

> *"What we always have to bear in mind, as rightly submitted by Mr Ojare, is that negligence as a tort is the breach of a legal duty to take care which results in damage, undesired, of course, by the defendant, to the plaintiff.*
>
> *. . . . It is trite law that both in contract and in tort a claim is only maintainable in law if there is a breach of duty owed by the defendant to the plaintiff . . . The duty imposed by law arises from the now legendary principle of proximity, first enunciated by Lord Atkin in his famous question: "Who is my neighbour?" in Donoghve V. Stevenson."*

In raising the instant issue, the advocate for the defendant company has not cited to me any law, and I am aware of none, which pegs an injured person's right to sue on his legitimacy to use a public road as in this case. Writing on injuries sustained by plaintiffs on highways, R.F. V. Heuston and R.A. Buckley in their book SALMOND & HEUSTON ON THE LAW OF TORTS, 9th Edition, London Sweet and Maxwell, 1987, the learned authors say at page 99;

> *"So also if a person climbs upon a stationery vehicle, which is left upon the highway, to see a cricket match and falls off and injures himself, it is not relevant for him to complain that the van was an obstruction to the highway and a nuisance. The accident does not happen because the vehicle is an obstruction to the highway, but because the plaintiff has trespassed upon it. A mere temporary departure from the boundaries of the highway*

will not always, however, disentitle the plaintiff to recover. He may still be regarded as a user of the highway if he has diverged from it accidentally or by reason of necessity."

In this case I think it would not be proper to say the accident was a result of the plaintiff's unlawful, it proven, use of the road, but that it was caused by an alleged failure by the defendant to take care. The consequences of the plaintiff's unlawful use of the road it proven, shall be discussed later in the course of this judgment. Suffice to say and hold at this stage, that I do not accept the defence counsel's proposition that the plaintiff has no right to sue because he has not proved that he was lawful road user. On the contrary it is my finding that the plaintiff's action is based on his allegation that the defendant acted negligently as a result of which an accident occurred, leading to damage.

I now turn to the issue, purely of fact, whether the accident involving the plaintiff occurred on 18/2/2010 at Tabata Relini area along Mandela Road. This is a straightforward issue that is not

passionately resisted. The evidence of PW1, PW2 and PW3 which is supported by the defence witnesses leave me in no doubt that the accident in fact occurred on that date and time at that place. This issue is answered in the affirmative.

The second issue is whether the defendant is responsible forthe accident. This issue is elaborated by a sub- issue whether the defendant had placed on the road visible signs that the road was closed. I think the latter part of this issue covers it all and deserves the first attention. This issue is far from straightforward because it is one's word against the others.

The plaintiff's case through PW1, PW2 and PW3 is that there were no visible signs to warn users of that road. According to PW2, the police officer whose duty station was near the scene of accident, there had been many accidents and narrow escapes for those who were lucky. DW2's version is that on the night of the event he witnessed some motorists halting just some inches before knocking the concrete blocks and others knocking off the signs.

In this case I do not have the benefit of a sketch map drawn by a trained police officer. Under paragraph 5 of the amended plaint the plaintiff had pleaded and attached a copy of the sketch plan prepared by No. E 7670 PC Musa. Although this officer testified as PW3 and alluded to the fact that he prepared the map, no indication was made to tender it in evidence. Annexing a document is not the same way as producing it and that is clear from the provision of rule 1 (1) of Order XIII of the Civil Procedure Code, 1966 which provides:-

> *"1. (1) The parties or their advocates shall produce at the first hearing of the suit all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in Court and all documents which the court has ordered to be produced."*

-Lema's case therefore the sketch plan though annexed to the plaint, is not part of the evidence because it has not been produced

in evidence. As a result it shall be disregarded. Which leaves me with only the testimonies of three witnesses for the plaintiff (PW1, PW2 and PW3) and two witnesses for the defence (DW1 and DW2). I am alive to the settled law in **Juma Magori @ Patrick** that evidence is weighed, not counted.Thus it is not a disadvantage for the defendant's witnesses to be one manless in number as compared to the number of witnesses for the plaintiff.

I will also remain focused on the principle that he who alleges a fact has the duty to prove it. In this case I am inclined to find that the burden is heavier on the defendant to prove that there were visible road signs than it is on the plaintiff to prove that there were none. At this juncture I wish to take a look at and evaluate the evidence of DW1, whose position at the defendant company was materially associated with safety and road signs.

DW1 stated that the first warning sign was placed 300 metres before the diversion followed by a sign of "*SLOW DOWN, DIVERSION AHEAD*" after every twenty meters. I take this to cover a distance of 100 metres therefore there were a minimum of four such warnings.

Then 100 metres from the first signthere was placed a sign requiring drivers to slow down to 30 Kilometres per hour. Thirty metres from this sign there was another sign requiring motorists to reduce their speed to twenty kilometres per hour. And by now there would be remaining fifter metres to the diversion.

I would like to make sense out of this deposition, but it seems that what DW1 stated under oath is only easier said than done. First of all, I take judicial notice of the fact that twenty or thirty metres is such a short distance for a motorvehicle that I cannot figure how the defendant would place a sign of "*SLOW DOWN DIVERSION AHEAD*". After every twenty minutes and expecting drivers to see them. I do not believe that two hundred and fifty metres was covered with reflective road signs after every twenty or thirty metres and yet admittedly by DW1 and DW2 there were many instances of accident.

On the other hand, the version by the plaintiff's witnesses is more probable,in my finding. PW1 stated that the only conspicuous sign he saw was at the beginning of Mandela Road, that is, Ubungo.

PW2 said there were no reflective warning signs near the concrete blocks. Given the instances of sudden brakes and near collisions by motorists as testified to by PW2 and DW1, the plaintiff's account of this issue is, on a balance, more probable.

While discussing the duty of the defendant to place warning signs upon the presence of a stationary object on a public road the East Africa Court of Appeal in the case of **Wakisu Estate Limited** (supra) referred to in **Tangamano Transport Services Ltd** (supra) stated:

> *"It was negligent to leave the lorry unattended and unlighted – the reflectors by themselves were not sufficient warning of its presence on the road . . . . "*

I am now in a position to answer the second and third issues simultaneously but before I do that, I wish to consider an aspect that was raised by the defendant regarding the conduct of the plaintiff as leading to the accident. Under paragraph 5 of the written statement of defence the defendant stated in part:

".. . It is stated that it was the plaintiff who did not observe the road signs this causing the accident, if any."

I take this to be a plea of contributory negligence by the defendant on the part of the plaintiff.

During the hearing the defendant took up the issue of plaintiff's contribution negligence. First by way of questions that Mr Byamungu learned counsel put to the witnesses for the plaintiff. The line of questions suggested that the plaintiff was driving at a high speed and that he was not a competent driver. Then DW1's testimony affirmatively suggested that the plaintiff was driving at a high speed in total disregard to road signs.

It is the plaintiff's case that he was driving at a speed around 80 kilometres per hour which cannot be said to be high and that he did not see any signs except the one at Ubungo.

The law on contributory negligence as laid down in the case of **JONES V. LIVOCK QUARRIES LTD [1952] 2 QB 608** as quoted in the case of **Tangamano Transport Service Ltd** (supra) is that;

> *"A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself and in his reckoning he must take into accourt the possibility of others being careless."*

Now back to the evidence, it is common ground that the plaintiff saw the conspicuous sign at Ubungo intimating that the road was under construction. In his own words, the plaintiff nevertheless proceeded to drive at a speed of 80 Kilometres per hour. It is my finding that this speed was under the circumstances, too high as the plaintiff ought to have reasonably expected road blocks and diversions. It is therefore my finding that the plaintiff acted negligently.

However the negligence on the part of the plaintiff does not relieve the defendant of his duty of care. In the case of **Bow Valley Jusky (Bermuda) Ltd V. Saint John Shipbuilding Ltd,** [1997] 3 S. CR. 1210 quoted in Article titled CONTRIBUTORY NEGLIGENCE by Michael Libby (www. DOLDEN.COM) it was held;

> ". . When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the ..... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. *For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the*

other party to compensate him in full."

(Emphasis mine).

Applying the above principle to the case at hand I am of the settled view that the plaintiff was a co-author of his injury and that deprives him of the right to claim full compensation from the defendant.

I now turn to issue number four, regarding damages. The plaintiff has pleaded special and general damages, praying for compensation of shillings 133,000,000 and 300,000,000 respectively.

I will start with the special damages, and fortunately the law is settled, that they must be specifically proved [see the case of . . . . .] The first special damage pleaded is the cost of the motor vehicle which the plaintiff claims was completely wrecked. It is claimed that the vehicle was worth shillings 12,000,000/= and since it was written off, payment of that amount is claimed for replacement.

The defendant challenged this claim for two reasons. First there is no proof that the plaintiff was the owner of the motor vehicle. This line of defence was apparent in the line of cross – examinations by counsel for the defence. In the closing submission the point is repeated when it is submitted that ownership of a motorvehicle is not the same as ownership of a shirt. No document has been tendered.

Secondly it is submitted that the degree of damage on the motorvehicle has not been proved. The defence wonders why there was no police inspection report if the accident was reported.

I entirely agree with the defence that this claim lacks proof of ownership of the motorvehicle to the plaintiff. I need not discuss the damage on the vehicle since that point is immaterial if ownership is not proved. There is evidence of PW1, PW2 and PW3 that goes to prove that the car had been damaged and had to be towed to the police station. But that is of no relevancy since there is no proof of ownership. Moreover there was no attempt by the plaintiff to prove the purchase value of the motorvehicle so as to

justify the claim of Tshs.12,000,000/=. This claim is rejected for want of proof.

The second specific damage is for failure to deliver goods ordered by Macedonia International School. For this, a total of Shs. 12,200,000/= is claimed. The plaintiff produced in evidence Exhibit P3 a letter by the said Macedonia International School requiring Ms Dina supplies centre to submit quotation for a variety of supplies.

The defendant has attacked the plaintiff again on the question of proprietorship of Dina Supplies Centre submitting that no documentation has been tendered to prove ownership. The other point by the defence is that there is no proof from the plaintiff that he was making that profit out of the business as alleged. Once again I agree with the defendant for the reasons raised, that there is no proof that the plaint was the owner of Dina Supplies Centre. Nowhere is this fact pleaded and the plaintiff seems to have taken this fact for granted. But again, Exhibit P3 is a mere question for submission of quotation. There is no indication that the quotations

were submitted considering the deadline according to that letter was before 18/2/2010. The letter had requested submissions of the quotation within two weeks from 29/1/2010. There is no explanation why there was no witness from Macedonia School to support the plaintiff's story.

The same reasoning as above applies to the plaintiff's claim of Shs.22,600,000/= for his failure to deliver goods ordered by Makiki Traders. No person from Makiki Traders turned up to testify that the company is in existence and made the order as shown in Exhibit P4.

For those reasons, the two specific claims for Tshs.12,200,000/= and Tshs.22,600,000/= are rejected for failure by the plaintiff to provide specific proof.

The third specif claim is in relation to his loss of business as a photographer. On this point the plaintiff testified that he had a permit to enter upon the Parliament grounds during sessions with the view of taking photographs. One Jossy Mwakasyuka working with Parliament as Director of Information and International

Relations testified as PW4 in support of the plaintiff. Nothing has been submitted by the defence on this aspect and on the basis of the evidence of PW1 and PW4 I find as a fact that the plaintiff had a permit to work as a freelance photographer within Parliament grounds during the latter's sessions. I take it as uncontroverted that after the February session, the Parliament was going to have other sessions in April, July/August and November.

The amount claimed under this category is shillings 33,000,000/=. The plaintiff pleaded that he was earning a handsome amount of between Shillings 650,000/= to 900,000/= per day. He has made calculations on the basis of an average of loss of Shs. 5,500,000/= per two weeks which brings about the amount of Shs.33,000,000/= for three months. nothing is said by the defendant about this aspect but still the question is whether the plaintiff should be taken for his word. Every witness is entitled to be believed unless there is a contrary suggestion [Case of . . . . .] In this case there is no suggestion that the plaintiff should not be believed on this point. It is therefore my finding that the plaintiff is entitled to specific damages of Shs.33,000,000/= which is reduced

to Shs.22,000,000/= one third of the amount being the percent contributed by him (plaintiff) in the occurrence of the accident, and thus reduced.

The fourth special damage is in relation to loss of a total of Shs. 40,000,000/= which he would have earned had he made his monthly business trips to Nairobi. I hasten to reject this claim because it has no proof whatsoever, either that he used to make those trips religiously on those months of May, September, October and December, or that he would make a steady profit of shillings 10,000,000/= in each such trip.

Lastly the plaintiff claims shs. 1,200,000/= for medical and transport costs to and from Muhimbili National Hospital. Although there is evidence that he was attending at that Hospital the number of visits and the costs of each remain an illusion, for the same were neither pleaded specifically as required nor strictly proved. Most of the exhibits in this case are photographs; of the concrete blocks, the damaged motorvehicle and of parts of a human body showing stitches. Perhaps it is because the plaintiff himself is a professional

photographer, but these exhibits are far from relevant when it comes to proving special damages including costs for medication and transport. This claim is not granted.

Now for the claim in general damages, and I wish to set out by referring to a passage in the case of **Bamprass Star Service Station** (supra) at page 415;

> *"While special damages may consist of "out-of-pocket expenses and loss of earnings incurred down to the date of trial and is generally capable of substantially exact calculation", general damage is implied by law and may include "compensation for pain and suffering and the like".*

The plaintiff adduced evidence to prove that he sustained serious injuries and went through pains. He stated that he cannot lead a normal active life and has to guard against doing many economic and social activities which he would otherwise be doing if not for his medical condition caused by the accident. Prof.

Kahamba (PW5) supported the plaintiff's story in a testimony that was not controverted by way of cross-examination nor by submissions. It is my finding based on the evidence of PW1 and PW5 that the plaintiff suffered and went through pains.

It is submitted for the defence that the plaintiff is not entitled to any award in general damages. Why? The reason is that, and here I quote from the learned submissions;- *"The defendant is clean and the evaluation of the entire case and evidence adduced by the plaintiff would lead to a conclusion that the entire case is a conspiracy affair"*.

With respect I cannot agree with the defendant. In this case I have made a finding that the plaintiff was involved in a chilling car accident in a circumstance that make one wonder how he cheated death. I cannot therefore accept an invitation by counsel for the defendant that the plaintiff was a party to a conspiracy against his own life.

It is my finding that the plaintiff is entitled to general damages which I assess at Shs.60,000,000/=. The award is reduced to

Shs.40,000,000/= because of the plaintiff's contribution to the occurrence of the accident.

The amount of Shs.22,000,000/= awarded to the plaintiff in special damages and that of Shs.40,000,000/= in general damages shall attract interest at court rate.

Judgment is therefore entered for the plaintiff to the extent shown, with costs.

I.P. Kitusi

JUDGE