REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 197 OF 2008

GEORGE EFEDHA MADORA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

The plaintiff, **George Efedha Madora,** brings this suit against the defendant, the **Attorney General** of the Republic of Kenya on behalf of the Commandant of the General Service Unit (hereinafter referred to as GSU).

According to the amended plaint dated 13th May 2009, on 29th January 2008 at about 2.00pm the plaintiff was lawfully walking on a non-tarmacked road near his residential house in Kibera Estate in Nairobi when a GSU Officer in company of other officers whose name is unknown to the plaintiff, in the course of his duty negligently, unlawfully, illegally, unjustly and with use of excessive force shot the plaintiff. As a result thereof the plaintiff fell and collapsed and sustained serious injuries. Both the particulars of negligence and injuries are particularised in the plaint as well as medical expenses. It is as a result of this that the plaintiff now claims general damages for pain, suffering and loss of amenities, damages for future medical expenses, home modification and paraplegic equipment as particularised in paragraph 4 of the amended plaint, special damages, loss of earning capacity, costs of the suit and interests.

The defendant filed a defence on 24th October 2008 the filed copy of which is both undated and unsigned. In that defence the defendant while admitting the descriptive paragraphs of the plaint denied that the plaintiff was shot and injured but avers that if the said incident took place then the same was caused or substantially contributed to by the plaintiff who was among the rioting mob who were engaging the police in running battles following the December 2007 disputed presidential elections. The allegations of the injuries sustained as well as damages sustained are however denied as not being within the defendant's knowledge. The injuries sustained by the plaintiff are further attributed to the rioting gangs arising from the same disputed elections. It is therefore the defendant's view that *res ipsa loquitor* does not apply.

The hearing of the case commenced before **Dulu, J** on 19th July 2010. In his evidence, the plaintiff,

George Efetha Madora, as PW-1 testified that on the said date he was at Lindi-Kibera when he was tasked by his aunt **Rose Afwande Enguru** who had gone to work to collect children from Mashimoni in Kibera a distance of about 2½ kilometres where they had gone visiting. Although he was working in jua kali (informal sector), that day he did not go to work. On his way he met General Service Unit Officers who were wearing red cap and slightly green uniform who told him to stop and shot him. It is not clear at what point exactly he was shot because part of his testimony is to the effect that he never saw the officers before he was shot while on the other hand he said that he was told by the officers to stop and they pointed their guns at him at which point he was shot once. He lost consciousness and when he came to he found himself at Masaba Hospital with a bandage on his chest and unable to walk. According to him people were not fighting with the police. He confirmed that he was shot ½ a kilometre from home and he was not armed. He was admitted at Masaba for 3 weeks and later taken to Spinal Injury Nairobi for 6 months after which he was in Kenyatta National Hospital for one month. He was thereafter in Longonot Hospital in Nairobi for the year after which he went home and continued attending clinic. He confirmed that he had submitted his documents which were filed. Before the incident he used to do jua kali work. He was aged 24 and went to Jivogi Primary School where he did his KCPE and passed. His father passed away in 2003 leaving him with his 3 brothers and 3 sisters. According to him he used to be paid per week and was earning Kshs. 450/- per day but since the incident had not been able to work due to his health. He produced Kenya Gazette Supplement No. 48 of 10th June 2011. Although he was till on drugs he was unable to buy all he needed as well as paraplegic equipment. Since his injuries no government official had visited him. According to him he was shot as a result of the negligence of the police.

In cross examination he admitted that the incident took place on 29th February 2008 and that in January 2008 there was post-election violence but not so much. He said there were people fighting and there were many police, GSU and Administration police but no one was fighting at the time and he did not sense any danger. He confirmed that he saw the officers who were about 20 in number ahead and he was told to stop and obliged when he was shot. Although he saw the person who shot him he was not able to identify him. He was shot in the chest and the bullet exited at the scene. Due to his sickness he reported the incident a year later. According to him he did not hear the announcement that people should remain at home. In re-examination he confirmed that he did not see people fighting all the way from home up to where he was shot. By consent, the documents in the plaintiff's list of documents were produced as plaintiff's exhibit 1.

The next witness to take the witness stand was **Taratisias Karimi Mutahi** as PW-2, a resident of Kibera. He recalled 29th January 2008 about 2.00 pm when he left his house to go and visit a friend at Mashimoni in the neighbourhood of Lindi where he stays. Although he had seen the plaintiff before he did not know him by name. On his way he met about 10 GSU Police officers who were walking towards him about 40-50 metres away carrying guns. A boy appeared on the road and he heard one of the officers say something after which he saw the boy fall down. He saw smoke and heard a loud bang after which he ran and hid. When he emerged from his hiding he found the boy lying on the road with blood coming from his back and people looking at him. He collected a bullet shell from the scene. According to him the officers wore red berets, light green trousers, green shirts and jungle green jackets as well as boots. According to the witness before the incident the place was calm and people were going about their business as usual and there was no commotion. The injured person was taken by an ambulance, according to the witness, to a local health facility ran by a **Dr. Wanga**. After being showed the injured person's residence he went to pass the message but was unable to get the person with whom the plaintiff lived until the following day when he did so after getting assistance from a neighbour by the name of **Wanjala**. The following day he met the plaintiff's mother one **Rose Afande** to whom he handed the spent cartridge and also agreed to go and record a statement which he eventually did at Kilimani Police Station on 22nd January 2009 in which he indicated that the plaintiff was shot by police officers.

However, he has since not been interrogated or summoned by the police. He confirmed having identified the plaintiff and said that although there were skirmishes after the General Elections on 27th December 2007, the skirmishes lasted till 29th December 2007. He explained his delay in recording the statement as due to the plaintiff's state of health. In cross-examination the witnesses said that he had lived in Kibera since 1996 and that Kibera is densely populated. He confirmed that the plaintiff had emerged from a side road joining the main road. He confirmed having seen the plaintiff in the estate before though he did not know his name. According to him the only people who were armed were the police officers. In re-examination the witness stated that the smoke came from a gun carried by one of the officers.

PW-3 was **Rose Afwande Owala**. According to her testimony she is a widow having 6 children one of whom is the plaintiff and that she resides in Kibera. She confirmed having gone to Adams Arcade to look for vegetables at 1.30pm. She received the information that the plaintiff was shot from a neighbour at 3.00pm. She found the plaintiff at Dr. Wanga's clinic and the plaintiff was later transferred to Masaba Hospital. When she saw the, he was unconscious. When he returned the following day at 1.00 pm the plaintiff was still unconscious. That same day two people including a neighbour by the name of **Wanjala** informed him that the plaintiff had been shot. The other person was **Karimi** who gave her the bullet shell which she took to the Chief where she was told to take the same to the police. After the plaintiff regained consciousness they went to Kilimani Police Station and recorded their statement and handed over the bullet shell to the police. According to the witness there were neither skirmishes nor commotion in Kibera where she had spent the night and there was no presence of either police officers or GSU officers. Although she left her details with police officers, she has never been summoned in connection with the incident. According to this witness, as a result of the incident the plaintiff's whole body was paralysed and lost consciousness and was treated at **Dr. Wanga's Clinic**, Masaba Hospital, Spinal, Kenyatta National Hospital, Longonot Hospital, St Mary's and then back to Longonot. As a result the witness testified that she has been spending money on the plaintiff's medication and hospital expenses. In cross examination, PW-3 stated that the plaintiff was shot by police officers.

At the close of the plaintiff's case, the defence called Police Corporal **Geoffrey Nduma Mburu**, a police attached to Butere Police Station who was attached to Kilimani Police prior to his transfer to Butere. According to him, on 20th November 2008 a lady called **Rose Afande** reported that her son was shot by police officers at Kibera on 29th January 2008. He recorded her statement together with the statements of her son and her witness. In his testimony the witness stated that during December 2007 and January 2008 there were chaos in some parts of Kenya after the election results were announced. During this period the witness confirmed that the police were patrolling the areas most affected but he never came across any incident of police shooting. According to him, therefore, he could not be certain that the plaintiff was shot by police. In cross examination, the witness stated that Kibera falls within Kilimani Police Station where he was attached. He stated that although they were on patrol within Kibera they were not in Mashimoni area. Apart from them there were other security officers patrolling the area including Administration Police Officers. The General Service Unit, according to the witness, had their own commander to whom they were answerable. He confirmed that the statement given indicated that the persons involved in the shooting were police officers in jungle uniform and red berets and that the officers who adorn this attire are from the General Service Unit. After recording the statements the matter was handed over to the Officer Commanding Police Division (OCPD) and the witness was not aware of what became of the investigations. He could not however, remember whether a bullet shell was surrendered. According to him there was a lot of chaos after the announcement of the elections results which were mostly in the night. The violence, according to him went on for a month up to the end of January 2008 although the intensity was not the same throughout with the most serious being on the day the results were released. He confirmed that the uniformed security officers who were on patrol were armed.

At the close of the case counsel for the parties filed submissions. In the plaintiff's submissions, relying on **Peter Omari Ogenche vs. Attorney General Nairobi HCCC No. 196 of 2008** and **Peter Otieno Ouma vs. Attorney General Nairobi HCCC No. 337 of 2008**, it is submitted that the attack was violent, unprovoked, reckless and an act of impunity on the part of the police officers and that the firing of the shot was an act done within the exercise of the policeman's duty for which the Government of Kenya and therefore the Attorney General was liable as master even though it was wanton, unlawful and unjustified. On the authority of **Stephen Iregi Njuguna vs. Attorney General and Another Civil Appeal No. 55 of 1997**, it is submitted that the police do not have unqualified licence to resort to shootings and that they are authorised to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary. Without evidence that the shooting was necessary it is submitted , the Court is left with no alternative but to conclude that their action of shooting the plaintiff was premeditated, reckless and wanton. On the authority of **Sengendo vs. Attorney General [1972] EA 140** and **Muwonge vs. Attorney General of Uganda [1967] EA 17**, it is submitted that the act of shooting the plaintiff even if the Court were to find was wanton, unlawful and unjustified act, was nevertheless the manner in which they proceeded to carry out the duties for which they were armed and hence the Government is liable to compensate the plaintiff. The case of **Bukenya vs. Attorney General [1972] EA 326** is similarly cited for the proposition that by firing in the direction of the Plaintiff, the Defendant took a substantial risk of hitting him, and that it was neither necessary for the purposes of effecting arrest, nor was it reasonable in the circumstances to use a degree of force which could or might probably result in the infliction of the said wounds. Accordingly, it is submitted that there is substantial, credible, reliable, direct, oral, documentary and circumstantial evidence to show that the Plaintiff was shot by a General Service Unit Officer who was in the course of his employment having been deployed to patrol. The shooting was done recklessly and unjustifiably and the Defendant on behalf of the Unit is therefore liable to the plaintiff. On quantum, based on several authorities cited by the plaintiff it is submitted that the plaintiff is entitled to Kshs. 5,000,000.00 towards pain, suffering and loss of amenities, Kshs. 3,600,000.00 as general damages for loss of future earning capacity, Kshs. 6,000,000.00 towards nursing care or Kshs. 1,558,500.00 for domestic servant, Kshs. 900,000.00 towards the purchase of catheters, uridoms and urine bags; Kshs. 1,500,000.00 towards check-ups, Kshs. 3,000,000.00 towards transport to out-patient clinic and physiotherapy sessions, Kshs. 9,000,000.00 towards physiotherapy, Kshs. 240,000.00 being the cost of purchase of strappings, Kshs. 1,725,000.00 for purchase of wheelchair, Kshs. 300,000.00 for the purchase of hydraulic bed, Kshs. 150,000.00 for air filled mattress, Kshs. 326,000.00 for splints, Kshs. 120,000.00 for stool softeners and stool cushions, Kshs. 100,000.00 for modified toilet, modified toilet accommodation and modified bathroom, Kshs. 150,000.00 for modification of the house, Kshs. 53,600 for ankle foot othosis, Kshs. 96,000.00 for back slabs, Kshs. 360,000.00 for nappies, Kshs. 300,000.00 for thigh powder, Kshs. 600,000.00 for reconstructive surgery and a total of Kshs. 835,505 being special damages.

On the other hand the defendant submitted that the plaintiff was injured as a result of a rioting gang and therefore if he was shot by the General Service Unit officers, the plaintiff was among the rioting mob who were engaging the General Service Unit officers in running battles following the disputed presidential election results. It is further submitted that the plaintiff did not heed the Government's warning to stay indoors and hence exposed himself to the danger of being shot and following the decision in the case of **Peter Omari Ogenche vs. Attorney General** (supra) the court is urged to take judicial notice of the events that followed the disputed presidential elections of 2007. It is further submitted that the plaintiff might have been shot by thugs in police uniforms. It is also submitted that there was no evidence that the plaintiff was shot by the said officers. According to the defendant the plaintiff has failed to prove on a balance of probabilities that he was shot by a General Service Unit officer and has not produced a ballistic report or any evidence to prove that the bullet that hit him originated from a gun belonging to one of the said officers. On the authorities cited, it is submitted that the same are not binding on this court. However, should the court be inclined to find the defendant liable,

based on **Kenya Pipeline Company Limited vs. Alex Wakuli Khasewa Civil Appeal No. 56 of 1995**, the defendants view is that the plaintiff should be awarded Kshs. 1,000,000.00 for pain suffering and loss of amenities; that the loss of future earnings should be based on basic minimum salary which stands at Kshs. 6,130.00 per month; the amount of nursing care to be based on Kshs. 5,195/= for an ordinary nurse/domestic servant; Kshs. 45,000.00 for catheters, uridoms and urine bags, Kshs. 453,800.00 for regular medical check-ups and purchase of drugs; Kshs. 450,000.00 for transport; Kshs. 450,000.00 for physiotherapy, Kshs. 240,000.00 for cost of purchase of strappings, Kshs. 69,000.00 for purchase wheelchairs, Kshs. 300,000.00 cost of special hydraulic bed, Kshs, 150,000.00 for air-fitted mattress, Kshs. 13, 000.00 for splints, Kshs. 400.00 per month for stool softeners and stool cushions', Kshs. 100,000.00 for modified toilet etc., Kshs. 150,000.00 for modified house, Kshs. 53,000.00 for ankle foot othosis, Kshs. 96,000.00 for back stabs, Kshs. 360,000.00 for nappies, Kshs. 25,00.00 for thigh powder, Kshs. 600,000.00 for reconstructive surgery and Kshs. 835,505 being special damages.

The following issues were agreed by the parties for determination:

1. Whether the plaintiff was shot on or about 29th January 2008 in Kibera Estate in Nairobi"

2. Whether the alleged shooting was done by General Service Unit Officer in the course of his duty.

3. Whether the alleged shooting was done negligently, unlawfully, illegally and with use of excessive force.

4. Whether the plaintiff sustained injuries as a result of the said shooting.

5. Whether the plaintiff has incurred or is bound to incur future medical expenses as alleged. If so, how much"

6. Whether the plaintiff is entitled to general damages for pain suffering and loss of amenities plus loss of future earnings or earning capacity. If so, how much"

7. Whether the plaintiff is entitled to special damages. If so how much"

8. Who should bear the costs of the suit"

The first issue for determination is whether the plaintiff was shot on or about 29th January 2008 in Kibera Estate. The plaintiff gave evidence that he was walking along an un-tarmacked road in the said area when he was shot. This evidence was corroborated by PW-2 who testified that the plaintiff was present at the place where the shooting occurred, he heard a bang, saw smoke from one of the guns carried by one of the officers and when they checked they found that the plaintiff had been shot. There are medical reports from Masaba Hospital as well as from National Spinal Injury Hospital showing that the cause of injury was gunshot. There is no other evidence on record from which a contrary finding may be made. Accordingly, I find that the plaintiff was shot on or about 29th January 2008 in Kibera Estate in Nairobi.

The second issue is whether the alleged shooting was done by General Service Unit Officer in the course of his duty. The plaintiff's evidence is that he was shot by a group of people who were carrying guns and were in uniform usually worn by the officers serving in the General Service Unit. DW-1 admitted that during the period there were security patrols in the area involving the regular police, the administration police officers as well as the General Service Unit Officers. The latter were under the

control of a commandant. Nobody testified from the unit.The witness was not certain whether the person who shot the plaintiff was a police officer or not. The defendant alleges that the shooting could have been done by thugs in police uniform. First and foremost no evidence was led to support this theory. Secondly, the PW-3 testified that she handed over the bullet shell to the police. This was not expressly denied since DW-1 only said that he could not remember whether the same was handed over or not. The simplest thing would have been for the defence to countercheck from the records whether such important piece of evidence was availed instead of simply telling the Court they could not remember. Since the allegations right from the word go was that the plaintiff was shot by police officers, it was incumbent for the defendant in whose possession the bullet shell had been placed to carry out investigation to rule out the possibility of the ammunition having emanated from its armoury. Whether or not the ammunition emanated from the police armoury was a matter peculiarly within the knowledge of the defendant and under section 109 of the Evidence Act the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. To contend that the plaintiff should have brought ballistic evidence when the bullet shell was in the possession of the police is in, my view, rather mischievous on the part of the police. Whereas I agree that each of the foregoing facts when taken alone might not establish that the culprits were GSU officers, however, when taken together, they leave one with no other reasonable conclusion but that the plaintiff was shot by General Service Unit officers. This is particularly so, taking into account that there was no evidence forthcoming from the said Unit yet it is admitted by the defendant's witness that they carried out the operation in the area. Without any such evidence the court is properly entitled to make adverse inference that the said evidence, if had been availed, would probably have been adverse to the defence case. I, accordingly find that the plaintiff was shot by General Service Unit officers who have chosen not to give evidence. See the case of **Ndungu vs. Coast Bus Co. Ltd [2002] 2 EA 462.**

The second limb of this issue is whether the said officers were acting in the course of their duty. From the plaintiff's evidence, the said officers were in a group and were armed. DW-1 admitted that during this period of post-election violence security officers were patrolling the estate. In **Muwonge vs. Attorney General** (supra) it was held by the then East African Court of Appeal:

"It is not in dispute that the principles of law governing the liability of the Attorney General in respects of acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the act of his servant. That being so the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the scope of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment or, in this case with the exercise of the policeman's duty" The acts may be so done even though they are done contrary to the orders of the master…The test of a master's liability for the acts of the servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. It is dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment as each case must depend on its own facts. All that can be said is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which the master is liable. Therefore the sole principle of law which should be applied in determining whether the Attorney General is responsible for the acts of this policeman is: Were those acts committed in the course of the duty of the policeman,

no matter whether they were committed contrary to the general instructions"...A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one; but nevertheless he is still carrying it out…The policeman who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house, not carrying whom he killed or injured, is merely a wrong manner, a wrong mode, of carrying out the policeman's duty and therefore the Attorney General is liable. In all these cases in which a question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is room for a difference of opinion".

In **Sengendo vs. Attorney General** (supra) it was stated:

"It is stated that the attack on the plaintiff was illegal. In the state of evidence before the court, there is nothing to show that there was any provocation by the plaintiff or any justification for the attack. The attack was a flagrant infringement of the plaintiff's legal rights to personal safety. The description and the details given by the plaintiff of the attack, which the court accepts as truthful, show that the intention of the attack could have been none other than to cause grievous injuries to the plaintiff and for the purposes of this suit it is unnecessary to discuss whether or not the motives and intentions showing the state of mind of a person committing an attack should be enquired into. The evidence before the court has established that the plaintiff was intentionally and illegally attacked by the soldiers…In the circumstances of the case it is fair and proper inference to draw that the soldiers posted at various points and armed with rifles were there to control an emergency which had arisen due to an attempt to assassinate the then President, Dr. Milton Obote. There is evidence that before the plaintiff reached the point where he was attacked, he had been stopped by soldiers at three points on the way where he had been questioned and searched. Therefore it is held that the soldiers were acting in the course of duty when they attacked the plaintiff…The act of the soldiers was clearly wanton, unlawful and unjustified one. An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable. In all these cases in which the question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is a room for a difference of opinion…Upon the facts of this case the act of the soldiers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed with rifles and posted at the place where the attack took place. Therefore the defendant is vicariously liable for the act of the soldiers, and the plaintiff is entitled to claim general and special damages from the defendant".

In the present case similarly, violence had erupted after the elections. The security officers were sent to Kibera to maintain law and order. They were armed. The plaintiff's evidence is that he was told to stop and he obliged. He was then shot. There is no evidence of provocation at all. DW-1 who gave evidence on behalf of the defence was not present at the time of the incident and is not even from the Unit whose activities are in focus. His only contact with the case was when the plaintiff went to report the incident. He could not therefore say under what circumstances the plaintiff was shot. In absence of any other version, the Court has no option but to believe the only version that was supported by evidence. In the foregoing premises I likewise find that upon the facts of this case the act of the security officers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed and assigned to

patrol Kibera Estate where there had been post-election violence. Therefore the defendant is vicariously liable for the act of the General Service Unit officer, and the plaintiff is entitled to claim general and special damages from the defendant.

The third issue is whether the alleged shooting was done negligently, unlawfully, illegally and with use of excessive force. As already stated there was no evidence that the plaintiff provoked the security officers since none of the officers present was called to give evidence. The only evidence on record is that the plaintiff was shot without provocation in circumstances under which the shooting was unwarranted. Even if there was an order for the members of the public to stay indoors- and there is no evidence of this- that did not warrant the use of excessive force. There was no evidence that the plaintiff was armed. Had it been that he was in the process of committing a crime one would have expected the police office to pick him up after the shooting and charge him with the said offence. Despite the plaintiff later reporting to the police, the police do not seem to have commenced an investigation into the mater or if they did no one knows what the results of the investigations were since the OCPD to whom DW-1 handed over the matter was not called to give evidence. In **Stephen Iregi Njuguna vs. Hon. the Attorney General Civil Appeal No. 55 of 1997 [1995-1998] 1 EA 252,** the Court of Appeal expressed itself as follows:

"The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary and that the deceased was shot by them by accident. From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus had shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased, particularly when there is evidence of PW 2 that the people whom the police could have been chasing were not shooting back and were unarmed. As it is there is no evidence on the record to show that the people the police were chasing, if a chase there was, were criminals; that they were dangerous criminals and were particularly dangerous to the police. It is all the learned Judge's own flight of imagination. The easiest thing which these police officers could have done, if they were so minded, was for one of them to appear in court and explain that the shooting was necessary and that the deceased was shot by an unfortunate accident. They chose not to do so. In the event the respondent cannot escape liability."

In the absence of any evidence to the contrary I must find that the shooting of the plaintiff was negligent, unlawful, illegal and with use of excessive force.

However, as already noted, defendant in his defence pleaded in paragraph 2 of the defence that the incident was caused or substantially contributed to, by the plaintiff. Despite this damning averment the plaintiff chose not to file a reply thereto. It is now trite that failure to reply to a defence where allegations of negligence are made against a party may properly be construed to amount to an admission under the provisions of Order 2 rule 11 of the Civil Procedure Rules. See **Mount Elgon Hardwares vs. United Millers Civil Appeal No. 19 of 1996.**

Without evidence of the extent of the plaintiff's liability, I will however, adopt the finding of my learned sister **Justice Ali-Aroni** in the above case and find the plaintiff 30% liable.

The fourth issue is whether the plaintiff sustained injuries as a result of the said shooting. That the plaintiff sustained injuries is supported by both the evidence of the plaintiff himself and his witnesses. He lost consciousness immediately after the incident. The extent of the injuries are confirmed by the various medical documents which were produced in the plaintiff's bundle of documents. According to the said report the plaintiff sustained:

1. **Fracture of thoracic vertebrae T2 with shrapnells still in place**

2. **Complete loss of sensation in both lower limbs**

3. **Loss of bladder control with urinary retention**

4. **Loss of bowel control with constipation**

5. **Loss of sexual function.**

This issue is accordingly, in the affirmative.

The fifth issue is whether the plaintiff has incurred or is bound to incur future medical expenses as alleged. If so, how much" With respect to the first limb, the medical report of **Dr. Dennis Onsinyo Otwori** indicates that the plaintiff would remain a paraplegic with urine and stool incontinence. According to the doctor the approximate costs of future medical treatment are as follows:

a) Nursing car at a cost of Kshs. 20,000/= per month for the test of his life.

b) Catheters, uridoms and urine bags on a weekly basis for the rest of his life at a cost of Kshs. 3,000/= per month.

c) Regular medical check-ups and treatment at an approximate cost of Kshs. 10,000/= per month for the rest of his life.

d) Transport for medical check-ups and treatment at an approximate cost of Kshs.10,000/= per month for the rest of his life.

e) Physiotherapy sessions at least 5 times a week to maintain trunk stability. If it is done at his home, it will cost him approximately Kshs. 1,000/= pr visit but if undertaken at hospital, it will cost him approximately Kshs. 1,500/= per visit.

f) Strapping once per week at a cost of Kshs. 200/= for the rest of his life.

g) Manual reclining wheelchair at a cost of Kshs. 69,000/= every year for the rest of his life or a more convenient motorized wheelchair at a cost of Kshs 220,000/= every 3 years for the rest of his life.

h) Special hydraulic or electric system bed to ease pressure points at a cost of Kshs. 300,000/=.

i) Air filled mattress to ease pressure at pressure points at a cost of Kshs. 150,000/=.

j) Splints to stabilize the spine on a yearly basis at a cost of Kshs. 13,000/= for the rest of his life.

k) Stool softeners and stool cushion at Kshs. 400/= per month for the rest of his life.

l) Modified toilet, modified toilet commode and modified bathroom at a cost of Kshs. 100,000/=.

m) Modification of house to facilitate usage of a wheel chair at Kshs. 150,000/=.

n) Ankle foot othosis at a cost of Kshs. 6,700/= every 3 years for the rest of his life.

o) Back slabs at a cost of Kshs. 12,000/= every 3 years for the rest of his life.

p) Nappies/diapers at a cost of Kshs. 1,200/= per month for the rest of his life.

q) Thigh powder at a cost of Kshs. 500 per month for the rest of his life.

r) Commode chair at a cost of Kshs 12,000/=.

s) Due to extensive sacral and trochanteric bedsores, reconstructive surgery is required at a cost of Kshs. 600,000/= all inclusive depending on the hospital he is operated in.

There was no evidence to contradict the doctor's opinion. In **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988,** the Court of Appeal held that while medical evidence is entitled to the highest possible regard, the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence like other expert evidence must not be rejected except on firm grounds. In this case no firm grounds have been placed before me upon which I would be entitled to reject the said opinion. The defendant's views expressed in the submissions have no evidential value and I don't see the reason why I should disregard the opinion of the Doctor and prefer what is contained in the submission.

The sixth issue is whether the plaintiff is entitled to general damages for pain suffering and loss of amenities plus loss of future earnings or earning capacity. If so, how much" That the plaintiff suffered pain and suffering cannot be in doubt. The residual effects of the said injuries as enumerated by the said doctor in his report paint a grim picture for the plaintiff's future. In **Peter Otieno Ouma vs. The Attorney General** (supra) the plaintiff, a 23 year old student at Nairobi Institute of Business Studies was similarly shot and lost consciousness. He was hospitalised for 5 moths at Kenyatta National Hospital and later transferred to National Spinal Injury Unit where he spent 3 months. His injuries were classified as:

1. **Fracture of Thoracic vertebrae T12 with shrapnells still in place**
2. **Complete loss of sensation in both lower limbs**
3. **Complete loss of lower limbs**
4. **Loss of bladder control with urinary retention**
5. **Loss of bowel control with constipation**
6. **Soft tissue injuries to the left ankle joint**
7. **Loss of sexual function.**

The injuries in these two cases were so similar that one would be excused for thinking it was the same plaintiff. **Ali-Aroni, J** on 11th June 2010 awarded Kshs. 4,000,000.00 general damages. In **Peter Omari Ogenche vs. The Attorney General** (supra), a case which similarly arose from a shooting incident related to the same post election violence, the plaintiff, a 27 year old who was engaged in part

time taxi driving and car washing, was shot and became paraplegic with urine and stool incontinence. He had a residual bullet entry scar L1 region. He had an impaired bladder muscle tone and therefore had to use an indwelling catheter to assist in collecting urine bag due to the loss of urine control. As a result he was unable to walk; control stool and urine; and engage in active sexual life. He was predisposed to recurrent chest and urinary tract, and skin infections and therefore required frequent medical check ups, special bed which can be turned by hydraulic or electric system and regular physiotherapy and splints to stabilise the spine. He was awarded Kshs. 3,500,000.00 by **Muchelule, J** on 10th June 2010 for pain suffering and loss of amenities.

The plaintiff has asked for Kshs. 5,000,000.00 while the defendant has offered a sum of Kshs. 1,000,000.00. Having considered the facts of this matter I would award the sum of **Kshs. 3,500,000.00** for pain suffering and loss of amenities.

With respect to loss of future earning capacity, the plaintiff's evidence was that he was earning Kshs. 450.00 per day and was working 6 days a week. I however would adopt the reasoning of Muchelule, J where the plaintiff was similarly involved in washing of cars and taxi operation and apply Kshs. 6,130.00 as wages per month. At the time of his injury the plaintiff was 22 years old. **Aroni, J** in the above case used a multiplier of 15 years while **Muchelule, J** applied 5 years. Whereas the plaintiff suggested a multiplier of 25 years I would, taking into account lumpsum payment and imponderables adopt a multiplier of 15 years as well with the result that under this head I make an award of Kshs 6,130.00 x 12 x15 = **Kshs. 1,103,400.00.**

With respect to the cost of employing a helper I would adopt Kshs. 5,000.00 x 12 x 15 = **Kshs 900,000.00**

With respect to catheters, uridoms and urine bags, following the decision of **Ali-Aroni, J** aforesaid I award Kshs. 610 x 12 x15 = **Kshs180,000.00.**

With respect to regular check-ups like **Justice Ali Aroni**, I would adopt multiplicand of Kshs. 2,000.00 per quarter. According I would award Kshs. 2,000.00 x 3 x 15 = **Kshs 90,000.00.**

With respect to transport for the visits I would similarly adopt an award of Kshs 2,000 x 3 x15 = **Kshs 90,000.00**.

It was pleaded that the plaintiff requires Kshs. 5,000.00 per month for physiotherapy. Accordingly, I award Kshs. 5,000 x 12 x 8 = **Kshs. 480,000.00** as the frequency physiotherapy is likely to reduce with time.

On the purchase of strappings I would award Kshs. 200 x 4 x 12 x 15 = **Kshs144,000.00.**

With respect to wheelchair I would award a global sum of **Kshs. 300,000.00.**

I would award **Kshs. 300,000.00** for hydraulic bed which is what the evidence shows as opposed to Kshs. 350,000.00 pleaded and Kshs. **150,000.00** for air filled mattress. As for splints it was pleaded that the same would costs Kshs 600.00 per month and therefore I award Kshs. 600 x 12 x 15 = **Kshs 108,000.00.** For stool softeners and stool cushions I would award Kshs. 200 x 12 x 15 = **Kshs 36,000.00**. For back slabs I award Kshs. 12,000.00 x 5 = **Kshs 60,000.00** while for ankle othosis I would award Kshs. 6,700 x 5 = **Kshs 33,500.00**. I also award Kshs. 1,000.00 x 12 x 15 = **Kshs 180,000** for nappies and Kshs 1,000.00 x 12 x 15 = **Kshs 180,000.00** as well as Kshs 4000 x 12 x 15 = **Kshs. 72,000.00** for thigh powder. Having made an award for manual wheelchair there is no reason why

another award should be made for motorised wheelchair. The plaintiff is also awarded **Kshs. 300,000.00** for reconstructive surgery since it is not indicated whether the amount claimed is with respect to private or public hospital.

As there was no dispute over the special damages claimed in the sum of **Kshs. 835,505.00,** the same is awarded. With respect to the claim for modified toilet and modified bathroom as well as modification of the house I decline to award the same since, in my view, the doctor is not competent to testify on the cost of the same.

Accordingly judgement is hereby entered for the plaintiff against the defendant in the total sum of **Kshs. 8,862,405.00** with interests and costs. This sum is to be discounted by 30% according to the finding on liability with the resultant award being **Kshs. 6,203,683.50**. For avoidance of doubt interest on general damages as is the law accrues from the date of judgement while interest on special damages accrue from the date of filing suit.

Judgment read, signed and delivered in court this 17th day of July 2012.

G.V. ODUNGA

JUDGE

In the presence of:

No appearance for the Plaintiff

Ms. Kuchia for Defendant