REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 715 OF 2002

PERIS ONDUSO OMONDI…….....……....PLAINTIFF

VERSUS

TECTURA INTERNATIONAL LTD……......…….1ST DEFENDANT

JOHN MUSYIMI…….....……2ND DEFENDANT

JUDGEMENT

The plaintiff, **Peres Onduso Omondi,** brings this suit through her next friend **John Paul Spem Omondi**. According to the plaint, on 16th February 1996, along Arboretum Drive, within Nairobi, the 2nd defendant, as a servant of the 1st defendant, drove motor vehicle registration No. KZT 306, which vehicle is registered in the names of the 1st defendant carelessly and recklessly that the said vehicle collided with the plaintiff as a result of which the plaintiff sustained serious injuries. Although, the plaint did not expressly plead that the said accident was caused by the negligence of the defendants, nevertheless, particulars of negligence and injuries were pleaded. The plaintiff's claim is, therefore, for damages arising therefrom together with costs.

The defendants filed a defence on 5th February 1998 in which they admitted the occurrence of the accident but denied that it resulted from their negligence. They further averred that the plaintiff carelessly and recklessly suddenly ran onto the path of the defendant's said oncoming motor vehicle without ascertaining that it was safe to do so thereby crashing into the same. Accordingly the particulars of negligence as well as those of injuries were denied and instead the defendants blamed the plaintiff for the accident and particularised the plaintiff's particulars of negligence. On their part they prayed for the dismissal of the suit with costs.

That was the state of the pleadings when the hearing of the case commenced before me on 21st May 2012. I will revert to this issue later in this judgement.

Before the hearing commenced it was brought to the Court's attention that the plaintiff had attained the age of majority. According to the provisions of Order 32 rule 12 of the Civil Procedure Rules, the plaintiff was entitled to elect whether to proceed with the suit or not. If such a plaintiff elects to proceed with the suit, the next friend is to be discharged and leave granted for the plaintiff to proceed with the suit. If he does not elect to proceed with the matter he is to apply for the dismissal of the suit on payment of the costs to the other party or next friend. In this case, although the plaintiff had attained the age of majority and therefore the suit could not proceeded in the same manner in which it was instituted, it was brought to the Court's attention that due to the injuries sustained by the plaintiff from the subject accident, the plaintiff was rendered incapable of protecting her interests. In the peculiar circumstances of this case and in the wider interest of justice as required by Article 159(2)(d), the Court directed that the suit proceeds but with the next friend acting in the same capacity.

On the part of the plaintiff four witnesses were called. The first witness, **Dorcas Akinyi Omondi**, who testified as PW-1, told that Court that at the material time she was 12 years old and that they were walking home from Kileleshwa Primary School in the company of her 3 siblings among them the plaintiff along Arboretum Drive. The siblings were **Peris Onduso Omondi**, **Leonard Zablon Omondi, Monica Atieno** and **Stephen Olala**. They decided to cross the road and the boys crossed the road ahead of the girls. When the girls were about to cross the road a car suddenly appeared and knocked the plaintiff after which the driver stopped and took her to M P Shah Hospital where she was admitted for three weeks. She confirmed the registration number of the vehicle as KZT 306. According to her the cause of the accident was the car's over speeding and she said that on the way to the Hospital the driver informed them that he was going to pick someone and was running late. In cross examination by **Ms Akonga**, the witness said that she was the eldest among her siblings and she understood the dangers of crossing the road and knew that to cross the road you look right and left. She admitted that there was no Zebra crossing at that place and stated that the plaintiff was hit on the pavement. According to her, they were three hundred metres from the curve in front.

PW-3, **Leonard Zablon Omondi**, was together with his brother and sisters, **Stephen Olala Omondi**, **Dorcas Omondi**, **Peres Onduso** and **Monica Atieno** on the material day. They were going home from Kileleshwa Primary School and had reached Arboretum Drive. His brother **Stephen**, and himself crossed the road and waited for the sisters to join them when he saw a vehicle approaching very fast and his sister, **Peres Onduso**, was knocked by the vehicle and fell on the road. He also confirmed that the driver stopped and took the plaintiff to M P Shah Hospital. He confirmed the registration number of the vehicle as KZT 306. In cross examination he stated that he was 10 years at the time. He said before he crossed the road he looked at the road. According to him the plaintiff was knocked while crossing the road and that there was no Zebra crossing at the place. At the place of the accident, the road was straight although there was a bend ahead and the vehicle was approaching from the side of the bend.

Jane Auma Eshuti, testified as PW-4. She is the plaintiff's mother. She was called on the material day at about 5.00 pm and informed of the news of the accident. On receiving the information she went to the said Hospital and found the plaintiff in the Intensive Care Unit, unable to talk since she was unconscious. She was in this unit for three days after which she was transferred to the ward where she stayed for about one month during which time she could neither talk nor recognise anybody and was being fed through the tubes. After being discharged from the hospital she was unable to look after herself and continued going back to the same Hospital for about three weeks when the tubes were removed and later continued with treatment at Kenyatta National Hospital due to her parents' inability to afford the charges at M P. Shah Hospital. Her attempt to resume her education in 1997 were in vain due to her frequent loss of memory and forgetfulness. The same problem persisted despite attempts to teach her in the house. According to the mother, the plaintiff's health has not been restored; she gets easily upset; cannot perform any household chores due to her weak limbs. Although now twenty seven years old, she needs assistance when bathing and when in her monthly periods. At one point she attempted to cook on her own but that ended in a disaster when the house caught fire and instead of calling for help she started crying. She suffers from convulsions and forgetfulness. In support of the plaintiff's case, the witness produced the copies of the documents filed in this suit as exhibit 2. In cross-examination the witness confirmed that her husband, **John Paul Omondi** was unwell and had just left the hospital and was therefore unable to attend the Court. She confirmed that the plaintiff can barely speak.

PW-2, was **Dr. Walter Jaoko**, a medical practitioner holding a Bachelor of Medicine and Surgery, Masters and PhD in medicine. He examined the plaintiff on 31st July 1996. The

plaintiff had a history of having sustained fracture on the right tibia, and blunt injury to the head which resulted in loss of consciousness. She also had a blunt injury to the right hand and the upper front teeth. These injuries were sustained in a road traffic accident on 16th February 1996. The plaintiff was admitted at M P Shah for three weeks where she was treated and thereafter attended Kenyatta National Hospital as outpatient. When seen by this witness, the plaintiff was complaining of forgetfulness and was absent minded, had a staggering walk as well as inability to write while exhibiting an abnormal behaviour in form of excessive laughter on her own. She had a slurred speech with poor memory and very poor co-ordination of the right hand hence unable to write. Apart from scattered scars on the wrist, the doctor formed the opinion that the injuries were quite serious especially the head injury which resulted into the loss of consciousness hence the cause of forgetfulness as well as inability to write and staggering gait. This, according to the doctor would require long time follow up by a neurologist and a physiotherapist the cost of which at the time of the examination was estimated at between Kshs. 90,000/- and Kshs. 100,000.00 though a recovery to the pre-accident state would not be guaranteed. In addition there was the risk of developing post traumatic epilepsy in which case she would require lifelong drugs to control the fits. In his evidence the doctor testified that he would not be surprised if the plaintiff did not manage to continue with her education and that she had developed convulsions. His fees for the medical report was Kshs. 800/- while for Court attendance he was charging Kshs. 5,000/-. He produced the receipt as exhibit 1. In cross examination the doctor stated that whereas the epilepsy can be controlled, the plaintiff may not be able to go back to the pre-accident condition.

On behalf of the defence, **John Musyimi Vai**, the second defendant testified as DW-1. According to him, the fateful day, the 16th February 1996, he was at his place of work at the first defendant's premises when he was sent to Adams Arcade to pick some documents. On his way back, while on Arboretum Road, he encountered a traffic jam after which he increased speed abit. At the corner he saw some children chasing one another and suddenly a child jumped onto the road. He swerved to the right, hooted and applied emergency brakes when the child was knocked. According to him he was driving at 40 km/hr. He stated that there was a sharp corner ahead but that he saw the children just before the sharp corner. According to him, the child had already crossed and the point of impact was in the middle of the road. The time was 3.45 pm. He got out and took the child to M P Shah Hospital. The weather, according to the witness was clear. He reported the accident to Parklands Police Station but was not charged. The inspection of the vehicle revealed no pre-accident defects. In cross examination by **Mr Owino**, DW-2 said that the child had not crossed the road although she entered the road suddenly. He said that she was knocked after the bend. He admitted that before completing the bend one cannot tell what is ahead and that one is expected to drive carefully on a bend. He reiterated that the children were chasing each and the plaintiff was already on the road. When he reached the corner he saw the children and the plaintiff came running onto the road suddenly. According to him he was driving at 40 km/hr which was not over speeding or that he was driving at excessive speed. He denied that he was distracted. He said he tried to avoid the accident and admitted that a driver must be on the lookout. In re-examination, he reiterated that he was driving at 40 km/hr. He said that he was well versed in the road. He said that he entered the bend then saw the children.

At the close of the case counsel for the parties agreed to file written submissions. According to the plaintiff's counsel on the authority of **Butt vs. Khan [1981] KLR 349** and **Geoffrey Mburu Theuri vs. Board of Trustee Arch-Diocese of Nyeri & Another Nyeri HCCC No. 81 of 2002**, the a child of tender years cannot be found contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. In this case the child was a minor of tender years and it has not been proved that the plaintiff had the requisite road sense to be held negligent. The 1st defendant, as employer of the 2nd defendant, it is submitted, is vicariously liable for the negligence of the 2nd defendant.

On quantum, Counsel relied on **Susan Wanjiru Njuguna vs. Keringet Flowers Ltd & 2 Others Nakuru HCCC No. 64 of 2001** in which an award of Kshs. 3,000,000.00 was awarded as damages for pain and suffering in 2008 and prayed for a similar award as well as Kshs. 500,000.00 for loss of future earning capacity, Kshs. 350,000.00 for future medical care as well as special damages in the sum of Kshs. 5, 900.00 with costs of the suit.

On their part, the defendants, relying on **Jamal Ramadhan Yusuf & Another vs. Ruth Achieng Onditi & Another Kisii HCCA No. 234 of 2005** submitted hat it is always necessary that the plaintiff proves negligence with cogent and credible evidence since the mere fact that an accident occurs does not follow that a particular person has driven negligently. The fact that PW-1 and 3 testified that there was no Zebra crossing at the scene of the accident and that they knew what precautions they were supposed to take revealed that they had the requisite road sense and were capable of being contriburorily negligent. The plaintiff's conduct by crossing the road without ensuring that it was safe to do so, failing to see the vehicle as well as crossing at the wrong place, it is submitted shows that the plaintiff was the author of her own misfortune. An issue was also taken with respect to the failure of the next friend to give evidence in light of the fact that no evidence was adduced to prove his indisposition. The evidence adduced by DW-1, it is submitted has satisfied the particulars of negligence alleged against the plaintiff, it is submitted. As no evidence was adduced with respect to police investigations and findings, the same should be taken note of. With respect to the ownership of the vehicle it is submitted that no evidence was led and reliance is placed on **Thuranira Karauri vs. Agnes Ncheche Nyeri HCCC No. 192 of 1996**. It is further submitted that contrary to the mandatory provisions of Order 32 rule 1(2) of the Civil Procedure Rules, there was no consent of next friend filed and the case of **Stephen Gachethire Ranjau vs. Robert Muchai Meru HCCC No. 85 of 2003** was cited in support of this submission. It was further submitted that there was no evidence from a neurologist that the plaintiff on attaining the age of majority did not have the capacity to testify on her own behalf contrary to the requirement of Order 32 rule 12 of the aforesaid Rules. On damages, it is submitted that apart from the evidence of examination on 31st July 1996, there was no evidence of the plaintiff's conduct after the accident. According to the defendants the plaintiff ought to have been re-examined by a Neurologist to establish her current status. It is further submitted that the doctor's findings were not pleaded and on the authority of **Associated Electrical Industries Ltd vs. William Otieno Nairobi HCCA No. 421 of 1998**, it was submitted that without amending the pleadings, the Court cannot award more than the disclosed damages. In the defendants' view, an award of Kshs. 150,000.00 would be adequate on the authorities of **Douglas Mwangangi Ngutu vs. Chrles Maingi Njeri & Another Nairobi HCCC No. 1853 of 1998** and **Francis Mwangangi Muchine vs. Francis Kimani Mbugua Nairobi HCCC No. 2637 of 1994.** With respect to claim for future medical treatment it is submitted on the authority of **Joseph Suri Nyateng & Another vs. H P Mashru Limited** that without quantification of the same in the body of the plaint the plaintiff is not entitled to the same. Without claim for loss of future earnings, it is submitted on the same authority that the same cannot be sustained. On the claim for special damages, it is submitted that a revenue stamp must be affixed to the receipts and since there was no proof that a demand was made and a notice sent, no costs should be awarded.

In reply to the defendant's submissions, the plaintiff submitted that the issue of zebra crossing and crossing the road abruptly did not come out at the hearing. It is also submitted that the requirement of next friend or guardian is for security for costs while there is no legal requirement that the next friend must testify. Since ownership of the vehicle was admitted that was nolonger an issue and that there was an authority of next friend and in any case the issue was not raised in the defence. It is submitted that the doctor's competence was never raised and that the plaintiff cannot be expected to plead every resultant condition whose main cause has been pleaded. With respect to future medical expenses it is submitted these are expenses to be incurred in time to come and are not actual damages which must be pleaded and proved. Since the receipts were not objected to their objection at submissions stage cannot be sustained.

The following issues were filed after the same were executed by the advocates for the parties:

1. **Whether the accident that occurred on the 16th February 1996 was caused by the negligence of the defendants.**

2. **Whether the said accident was inevitable.**

3. **Whether the plaintiff sustained injuries as a result of the said accident.**

4. **Whether the plaintiff is entitled to any damages, general or special.**

5. **If the answer to paragraph 4 is in the affirmative, what is the quantum of the damages.**

6. **Who shall bear the costs of the costs.**

The first issue is whether the accident occurred on the 16th February 1996 was caused by the negligence of the defendants. That the accident occurred on 16th February 1996 is not in issue since that is admitted in the pleadings as well as in the evidence. As to whether the accident occurred as a result of the negligence of the defendant, both parties adduced confliction evidence as to how the said accident occurred. As long ago as the case of **Simpson vs. Peat (1952) 1 All ER 447** it was held that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention.

However in **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349** the Court of Appeal held as follows:

"It would need a great deal of persuasion before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness...A young child cannot be guilty of contributory negligence although an older child might be depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child...Clearly each case must depend on its peculiar circumstances. In the instant case the learned judge was right in finding that the defendant had been negligent, and that the plaintiff was struck when almost half-way across the road and that at the most the plaintiff had committed an error of judgement for which contributory negligence should not be attributed to him...The practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do that act or make the omission...High speed can be prima facie evidence of negligence in some cases. A person travelling within or at the permitted speed limit may be immune from prosecution for traffic offence. It is another matter as far as the question of negligence is concerned. Even 15 m.p.h may not be a safe speed in the early hours of the morning when children go to school along and cross a road which known to the driver as in the instant case, serves an area with several schools in it. In the manner of speaking there would be children here, children there and children everywhere. The safe speed on an occasion like this is that which will bring the driver out of the area unscathed and free from accident. The speed limit fixed under the Traffic Act is for general good conduct on the part of the drivers. If an accident happens, in the absence of provable circumstances which will exonerate the driver, even travelling at half that speed may not afford a defence in a case of negligence.

Later the Court of Appeal considered the above case in **Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90** and expressed itself as follows:

"Since the learned judge found that the plaintiff paused on the side of the road before beginning to cross, the defendant should have seen the plaintiff before the moment of impact and had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. Therefore the finding that the defendant was negligent is correct...The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission...The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligence unless he or she is blameworthy... In the present case, the trial judge held in clear terms that the plaintiff had the requisite road sense and therefore her failure to see the approaching car was blameworthy. In the case of a grown-up person the proportion of blame would have been substantial, but having regard to the plaintiff's tender years the degree of liability assessed at 10%...In determining what is a reasonable standard of care, the four factors, *inter alia,* that have to be considered are: (1) the likelihood of a pedestrian crossing the road into the motorist's path (2) the nature of the pedestrian, whether a child or adult (3) the degree of injury to be expected if the pedestrian was struck (4) the adverse consequences to the public and to the defendant in taking whatever precautions were under considerations...In the instant case, there were no obstructions like parked cars and the defendant had a clear immediate field of vision. At the time of the day and with known schools in the vicinity the motorist is put on notice that he or she must exercise particular care for keeping an eye out for children and anticipating that they might cross without looking, and who passed across the front of her car, and her failure to stop or swerve, must construe negligence on the part of the defendant".

In the present case although the age of the plaintiff was not disclosed in the evidence, from the medical documents adduced in court, the plaintiff seems to have been 12 years at the time of the accident in1996. The medical report of **Dr. Jaoko** shows that she was in standard 3. PW-1 testified that she was also 12 years at the time of the accident but knew that before crossing the road one has to look left and right.

It has not been alleged that the plaintiff before the accident was of a lesser intelligence then PW-1. Even PW-3, who was 10 years old at the time appreciated the necessity of looking out before crossing the road. Accordingly, the present case is distinguishable from the case of **Butt vs. Khan** on two fronts. First, the evidence shows that the plaintiff was over ten years old so the general presumption applicable to a child of ten years and below does not apply. Secondly, the evidence on record shows that her siblings appreciated the danger of crossing the road.

The evidence on record is that the plaintiff and her siblings did not notice the vehicle in good time before the accident. PW-3 said he saw the vehicle before the plaintiff was hit. The vehicle was coming from a corner. From the evidence adduced by PW-3 the plaintiff was knocked while crossing the road and not on the pavement as was alleged by PW-1. If the plaintiff and PW-1 were together on the pavement, one wonders how PW-1 missed being hit by the same vehicle. At least no evidence was offered to explain this. From the evidence especially that of PW-3, who had crossed the road and was waiting for his sisters, I am prepared to believe that the plaintiff was actually hit on the road. The next issue is whether the plaintiff was running across the road as alleged. From the evidence on record, it is clear that the plaintiff was not together with either with the brothers or the sisters. The brothers had already crossed the road while the sisters were still on the other side of the road. The question then would be why the plaintiff would alone be crossing the road while her siblings were on either side of the road. Without any reasonable explanation coming from the plaintiff, I am prepared to believe that the plaintiff was running across the road.

It is, however, not disputed that the 2nd defendant was approaching a bend. In his own evidence, a driver approaching a bend is required to be cautious. Although his initial evidence was that the accident occurred before he reached the bend, he later changed this and said that it actually as soon as he took the bend and admitted that when one takes a bend one may not know what lies ahead. He said he saw the children chasing one another but did not indicate how far he was from the children when he saw them. The only evidence with respect to the distance, is that of PW-1, who testified that they were 300 metres from the curve. If that was the position (and the defendant did not adduce evidence to the contrary) then the Court does not understand why the defendant who had seen the children playing and was driving at 40 km/hr was not able to stop in good time to avoid the accident. Although it was admitted that there was no Zebra crossing at the place where the accident occurred, the 2nd defendant admitted that he was well versed with the road in question. Being so well versed with the road, he must have been aware that at that time of the day chances were that it was very likely that children would be going home from school, and hence the need to be extra careful. Taking the foregoing into question coupled with the 2nd defendant's evidence that after the traffic jam eased he increased the speed "a bit" as well as PW-1's uncontroverted evidence that the 2nd defendant told them that he was in a hurry, leads me to the inevitable conclusion that the speed at which the 2nd defendant was driving was too high in the circumstances.

Taking into account the foregoing and doing the best I can in the circumstances I find that the 2nd defendant was 80% liable while the plaintiff will shoulder the remaining 20% liability for the accident. My finding on the plaintiff's contribution is reinforced by the fact that there was no reply to the defence which alleged contributory negligence on the plaintiff.

The next question as agreed by the parties is whether the said accident was inevitable. I must confess that I did not quite understand what this issue exactly meant. From the pleadings I did not see any plea of inevitable accident. The law as I understand it is the defence of inevitable accident must be pleaded. See Kimeu vs. Kasese (No. 2) [1990] KLR 35. The essence of inevitable accident is that where the circumstances are such that a prima facie case of negligence is made out against party, it is for that party to show that the misfortune occurred by an accident, the cause of which was such that he could not, by any act of his, exercising proper care, caution and skill, have avoided its result. In other words a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. It is not mere want of reasonable care and skill. See Dewshi vs. Kuldip's Touring Co. Civil Appeal No. 29 of 1968 [1969] EA 189.

Therefore if what the parties meant by inevitable accident was that the plaintiff's sudden dash onto the road was unavoidable, that in my view is not the legal meaning of the legal defence of inevitable accident. Inevitable accidence is not the same as shifting negligence to the plaintiff. Nevertheless if that was what was meant, that issued has been dealt with in my findings on the fist issue above.

The third issue in the parties' view was whether the plaintiff sustained injuries as a result of the said accident. That the plaintiff sustained injuries cannot be disputed since the mere fact that the 2nd defendant stopped and took the plaintiff to hospital is a clear indication that he appreciated that the plaintiff was injured. The plaintiff's injuries are supported by the documentary evidence that was adduced most notably the evidence of **Dr. Walter Jaoko**. Whereas he stated in the history that the plaintiff sustained a fracture of the right tibia, his conclusion seems to state something different when he concludes that the plaintiff sustained a fracture of the right fibula. According to the report by **Dr. Wambugu**, the fracture was in fact the right tibia. This is also confirmed by the report from M P Shah which shows a fracture of the upper third of the shaft of the Tibia. **Dr. Jaoko** in his oral testimony however indicated that the fracture was on the tibia. Accordingly, I find that the plaintiff actually sustained a fracture of the tibia. Apart from that she suffered head injury resulting into loss of consciousness, blunt injury to the right hand and the loss of three upper frontal teeth, bruises. She was admitted at M P Shah Hospital for 3 weeks 3 days of which were spent in the

Intensive Care Unit followed by further treatment at Kenyatta National Hospital. As a result of the foregoing the plaintiff has become very forgetful and absent-minded, and developed a staggering walk with inability to write properly coupled with an abnormal behaviour. She has also developed a slurred speech which is mostly incoherent with very poor co-ordination of the movements of the right hand hence inability to write as well as poor gait. According to **Dr. Jaoko** the development of post-traumatic epilepsy later in life could not be ruled out with the result that the plaintiff would require life long use of anti-epileptic drugs to control the fits. According to the mother the plaintiff has in fact developed convulsions and is unable to take care of herself her education having been completely ruined. Whereas it would have been better if an up to date medical report would have been availed, I am not prepared to disbelieve the plaintiff's mother. I am however, unable to agree with the defendant's submissions that the evidence of a neurologist was critical. In **Charles Agoi Sakwa vs. Fanuel Kifuna Angote & Another Civil Appeal No. 34 of 1997** the Court of Appeal held inter alia that a medical report cannot be impeached by evidence from the bar. Again in **Arrow Car Limited vs. Elijah Shamalla Bimomo & 2 Others Civil Appeal No. 344 of 2001 [2004] 2 KLR 101** the same Court held that while a party is bound by his own pleadings, what the parties agree by consent to go on record cannot be ignored such as medical reports as there is no element of surprise.

Accordingly I find that the plaintiff sustained the foregoing injuries.

Before I deal with the fourth issue, there are other issues which were raised in the submissions. One of them is the issue of the failure by the next friend to testify. I agree with the plaintiff's advocates that the mere fact that the next friend does not testify does not render the claim unsustainable. A next friend is not necessarily a witness in the case but is that a medium through whom a claim is presented to Court for determination. If the plaintiff can prove his case without necessarily calling him to give evidence, I do not see the necessity for calling him to testify. It was further submitted that the authority of next friend was not filed. I have gone through the file and I have to admit that I have failed to see an authority of next friend which is required under Order 32 rule 1(2) of the Civil Procedure Rules to be filed. Instead a copy of a letter dated 12th August 1997 is annexed to the submissions filed on behalf of the plaintiff in reply to the defendants' submissions. With due respect I must state that submissions is not an avenue for adducing evidence. The Court of Appeal in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997** disapproved written submissions as the mode of receiving evidence.

Assuming, however, that there was in fact no authority of next friend filed, what would be the consequences of such omission? In the Ugandan case of **Loi Bagyenda & Another vs. Loyce Kikunja Bagyenda Kampala HCCS No. 424 of 1989** dealing with a similar situation, the High Court of Uganda stated as follows:

"Order 29 rule 11 of the Civil Procedure Rules provides that every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor and goes on to say that where a suit is filed by an advocate he shall at the time of filing the plaint file an authority of the next friend of the minor. Such was not the case here since there was no next friend of the minor and consequently no authority from him was filed with the plaint. This was a mistake of law, which can be amended...The court has the power to dismiss an action brought by a minor in his own names or to allow proceedings to be amended by adding the next friend for the fact that there has been non-joinder of necessary parties does not mean that the plaint discloses no cause of action. Procedural rules are intended to serve as handmaidens of justice, not to defeat it...Proceedings instituted by a minor and not by a minor's next friend in his names are not void. The policy of the legislature in enacting the Order was that where a minor had instituted a suit in his own name the proceedings in normal cases should be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner. The rule is intended for the benefit of the defendant for it has been held that when a defendant waives his benefit and protection the suit may proceed without a next friend. Whereas rules and regulations are necessary, and useful when sensibly applied, let there too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance, to the detriment of justice, and the consternation of litigants and that ought not to be...The reason why no proceedings can be taken by an infant without the assistance of next friend is on a account of the infant's discretion and his inability to bind himself and make himself liable for costs. The laws and customs of every country have fixed upon particular period, at which persons are presumed to be capable of acting within reason and discretion...Whereas Order 29 makes it quite clear that the written authority of next friend must be signed and filed together with the plaint, however what is lacking here is not that the said plaintiff has no next friend".

While appreciating that the above case was a Ugandan case, in my view the views expressed therein accord with the principles of our overriding objective as enunciated in sections 1A and 1B of the Civil Procedure Act as well as Article 159(2)(d) of the Constitution. Taking into account the fact that the issue was not even pleaded so as to be considered as an issue in this matter, it would be too harsh in my view, to dismiss this matter due to such procedural lapse. The decision in **Stephen Gachethire Ranjau**, I have noted was delivered on 3rd February 2005 before the advent of the overriding objective. Dealing with the said overriding objective in **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009** it was stated as follows:

"On 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. *All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective…The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner.* If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible". (Emphasis mine).

On the issue of ownership, I agree with counsel for the plaintiff that on the pleadings, that issue does not fall for determination since the ownership of the subject motor vehicle was expressly admitted in paragraph 1 of the defence. Accordingly the case of **Thuranira** is inapplicable to the circumstances of this case. It must, however, be pointed out that **Thuranira's Case** has since been the subject of judicial consideration by the Court of Appeal. In **Wellington Nganga Muthiora vs. Akamba Public Road Services Limited & Another Civil Appeal No. 260 of 2004** the Court of Appeal held:

"As the plaint had alleged that the 2nd respondent was the registered owner of motor vehicle and as that had been emphatically denied in the statement of defence, the appellant was pre-warned of the defendant's intention to challenge the allegation and should have prepared to provide conclusive proof of that allegation. The court also agrees that in a scenario where that warning was carried to fruition, production of police abstract could not provide a conclusive proof of ownership of the subject vehicle…However, in the case before the court all that pre-warning was only in the pleadings and not carried out at the time of the hearing. The appellant produced a police abstract which stated that the first respondent was the owner of the vehicle and that was *prima facie* evidence. The first respondent did not challenge the production of the police abstract by the appellant on the basis either that he was not the maker of it or that the contents were not admissible or were not correct. The first respondent let it be produced without raising a finger. In cross-examination by the learned counsel for the first respondent, the allegation in the police abstract that the first respondent was the owner was not challenged, though the other contents of the abstract such as whether indeed the appellant was a passenger in the same bus were challenged by clear questions as to whether the appellant's name was in the passenger manifest and whether he had a ticket as evidence that he was in the passenger bus. In such a situation where the police abstract's contents pertaining to ownership of the vehicle was not challenged, it remained *prima facie* evidence and when the respondents offered no evidence in their defence, such prima facie evidence was not rebutted and it remained valid, unrebutted evidence before the court…Thus had the issue whether proof of ownership of the subject vehicle through police abstract in this case been the only issue before the court, the court would have faulted the decisions of the two courts below and the court is of the view that where police abstract is produced and there is no evidence adduced by a defendant to rebut it and not even cross-examination challenges it as was the case here, the police abstract being a *prima facie* evidence not rebutted can be relied on as proof of ownership in the absence of anything else as proof in civil cases is within the standards of probability and not beyond reasonable doubt as in criminal cases. However, where it is challenged by evidence or in cross examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of evidence to the contrary".

See also **Lake Flowers vs. Cila F O Ngonga Civil Appeal No. 210 of 2006; Ndungu vs. Coast Bus Co. Ltd Civil Appeal No. 177 of 1999.**

On the issue of the attaining of the age of majority by the minor, it is true that on attaining the age of majority, the plaintiff was entitled to proceed with the suit or not. However, the Court considered the plaintiff's disability and directed that the matter proceeds. It is now clear from the evidence that the plaintiff is not in a position take care of her own affairs leave alone prosecuting legal proceedings.

The next issue for determination is whether the plaintiff is entitled to any damages, general or special. Having made a finding on liability, I am satisfied that the plaintiff is entitled to an award of damages and that leads me straight to the next issue which is what is the quantum of the damages.

The principles guiding the award of damages in these kind of cases are now well settled. In **Rahima Tayab's Case** (Supra) the Court of Appeal stated that whereas in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.

It is manifestly clear from the evidence of PW-2 that the plaintiff sustained serious injuries to the head apart from the fracture of the tibia. In **Susan Wanjiru Njuguna vs. Keringet Flowers Ltd & Others** (Supra) the plaintiff sustained severe head injuries resulting in permanent brain damage, severe dislocation of the elbow joint, multiple lacerations on the dorsal surface of the right hand and bruises to the forehead. As a result of the severe brain damage the plaintiff in that case suffered loss of speech and hemiplegia or weakness of the right upper limbs. Although the plaintiff had been discharged from clinics he could not improve. The Court on 3rd July 2008 awarded Kshs. 3,000,000.00 in general damages for pain and suffering and loss of amenities

The similarities in that case and the present case are striking. An issue was raised with respect to the state of pleadings in respect of the particulars of injuries. Whereas I appreciate that the pleadings would have been better drafted, I am not prepared to hold that the particulars pleaded were so bad as to render the pleadings in the plaint at variance with the evidence adduced.

Following in the footsteps of the above case I am similarly of the view that an award of Kshs. 3,000,000.00 in general damages is reasonable. I have considered the cases cited by the defendants in support of it opinion and with due respect, I must say that the opinion is not based on cases similar to the present one. With respect to loss of earning capacity, the law, as stated by the Court of Appeal in **Mary Mukiri vs. Njoroge Kiania Civil Appeal No. 48 of 1996,** loss of earnings or earning capacity must be pleaded. Again in **Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246** the same Court held that loss of earnings is special damages while loss of earning capacity is general damages but must be pleaded and proved.

Similarly in **Idi Ayub Omari Shabani & Another vs. City Council of Nairobi & Another Civil Appeal No. 52 of 1984 [1985] 1 KAR 681** the Court held:

"In claims for loss of earning capacity by a child it is impractical to get a precise or even a general idea of the infant plaintiff's capabilities of earning, say, ten years hence. It may be self-evident that the appellant would at the very least have an impaired working capacity but that does not relieve a person alleging from proving every aspect of his case, which is not admitted…Plaintiffs must understand that if they bring actions for damages it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages. They have to prove it".

In the present case, the plaintiff was a minor at the time of the accident. No evidence at all was led to show the basis upon which the award for loss of earning capacity could be based. No school reports before the accident were produced. Although there was no express mention of "loss of earning capacity" the plaintiff claimed general damages under which that head of the award falls. Ideally the plaintiff must support any claim for loss of earning capacity by evidence. No mathematical calculation is possible in assessing this kind of claim and damages under this head must, if possible, be separately quantified. There ought to be evidence to cover such relevant factors as the salary of the plaintiff at the time of the injury, if he is earning less at the time of the trial, if he has lost his job, if there is any substantial risk that he will at some future date before his retiring age lose his job and be caused to look for another job, the plaintiff's age and qualification, length of service and of course the nature of the plaintiff's disability. So that in assessment for loss of earning capacity. All sorts of factors need to be considered. See **Mawji Govind & Company vs. Munga Civil Appeal No. 161 of 1989.**

However, it is not in doubt that the plaintiff would have made some earnings in her life. The plaintiff has asked for an award of Kshs. 500,000.00 this head which award in my view is not unreasonable. I accordingly award the same.

With respect to future medical care, although paragraph 7 of the plaint stated that the plaintiff required future medical care of a neurologist, no indication was given as to the likely cost in that regard. This suit was filed on 14th November 1997 after the date of **Dr. Jaoko's** medical report dated 2nd August 1996. Accordingly the claim in respect of future medical care or treatment should have been properly pleaded and particularised. In **Sosphinaf Company Limited & Another vs. Daniel Ng'ang'a Kanyi Civil Appeal No. 315 of 2001** the Court of Appeal was of the view that the claim for future medical treatment was part of the general damages, which did not have to be specifically pleaded. However, this seems to be contrary to the holding by the same Court in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of1993** where the Court had held that the cost of future medical operation is special damages, which must be pleaded.

Faced with these two conflicting positions and taking into account the fact that the evidence by PW-2 on the said expenses was not objected to by the defence, I am inclined to adopt the position in **Sosphinaf's Case**. Accordingly, I also award the claim for future medication at the cost of Kshs. 110,000.00 as stated in the said medical report taking into account the time lapse since the said report was prepared. I have not been addressed on how the plaintiff's counsel arrived at the Kshs. 350,000/- claimed in the submission. It would have been prudent if a further medical report would have been prepared to show the current estimated costs of the said medication.

On special damages, Kshs. 1,100.00 was claimed in respect of police abstract and medical report. There was a receipt in respect of medical report and though there was no receipt for police abstract it is common knowledge that the same attracts the sum claimed. The defendant, however, took issue with lack of revenue stamp on the said receipt. On this issue I can do no better than quote **Makhandia, J** in **Bishop Henry Paltride vs. James Mugo Mbuthu & Another Nyeri HCCC No. 65 of 2001** where the learned Judge said:

"in regard to non-admissibility of unstamped instruments in evidence, although the law under section 19(1) of the Stamp Duty Act is that receipts not having a revenue stamp may not be admitted in evidence, it is noteworthy that the defendant's lawyer did not object to their production in evidence during the hearing. He cannot now take the objection in his written submissions".

The plaintiff also claims Kshs. 5,000/- in form of court attendance by the doctor. In my view this is not the right forum to claim such expenses. Such expenses should be included as an item in the Bill of Costs and claimed as disbursements.

On costs it has been submitted that the plaintiff is not entitled to the same due to failure to send a demand notice. The law, as I understand it is that the decision whether or not to deprive a party of costs for failure to send a demand notice is discretionary. Where the Court finds that the litigation would not have been necessary had a demand been made, the Court my well deprive the plaintiff, even if successful of the costs of the suit. Here no allegation has been made that this suit would have been unnecessary had the demand been made. I, accordingly decline to disregard the provisions of section 27 of the Civil Procedure Act which stipulate that costs follow the event.

In the final analysis I enter judgement for the plaintiff against the defendants jointly and severally, as follows:

a. General Damages for pain, suffering and loss of amenities….Kshs 3,000,000.00.

b. General Damages for loss of future earning capacity…Kshs 500,000.00.

c. Costs of future medication Kshs. 110,000.00.

d. Special damages Kshs. 900.00.
e. Costs of the suit.

f. Interests on (a), (b) and (c) above at court rates from the date of judgement till payment in full. Interests on (d) at the same rate from the date of filing suit till payment in full.

For avoidance of doubt this sum is to be discounted by 20% pursuant to my finding on liability.

Judgment read, signed and delivered in court this 19th day of July 2012.

G.V. ODUNGA

JUDGE
In the presence of:

Mr. Kirungi for Mr. Owino the Plaintiff

No appearance for Defendant