**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1015 of 2003**

**A.A. M ……………………………………..PLAINTIFF**

**versus**

**JUSTUS GISAIRO NDARERA……………………………………………1ST DEFENDANT**

**MICHAEL OCHICHI KOROSO…………………………………………2ND DEFENDANT**

# JUDGMENT

By a plaint dated 2nd October 2003 and filed that same date, the Plaintiff instituted this suit as a minor, suing through his father and next friend A. M. H, praying for judgment against the two defendants in this suit, jointly and/or severally for:-

> **"(a) Special damages for Kshs.3,387,032/= plus interest at court rates until payment in full;**
>
> **(b) General damages for pain and suffering and loss of future earnings together with interest at court rates;**
>
> **(c ) Costs of this suit together with interest at court rates;**
>
> **(d) Such further or other relief as this Honourable court may deem fit and just to grant."**

The DefendantS filed a defence dated 17th December 2003 to which the Plaintiff replied in his reply to defence dated 14th January 2004.

The case was first listed before me on 21st May 2007 when it was for hearing and hearing started on that date, with Mr. Evans Thiga Gaturu, Senior Counsel, representing the Plaintiff and Mr. Onyambu from M/s Nyaundi Tuiyot & Co., Advocates, representing both Defendants.

Bearing in mind the date of this judgment, from the commencement date of hearing 21st May 2007 aforesaid, this is the case I have heard for the longest period of time in the history of my Judicial Service in Kenya exercising all jurisdictions I ever had. Several times I considered my option of disqualifying myself from further hearing of the case because it had become impossible for me to manage the pace of proceedings with a view to finalizing hearing without delay. But, thank God, I restrained myself every time till the end, fully aware when it comes to the issue of delay, everybody else in Kenya is, and will be blaming me and only me, a ready and sole scapegoat. May God bless them all.

I was to say, and let me add, that at the time hearing of the suit commenced before me, the minor Plaintiff had become of age and as an adult had taken over as full and competent Plaintiff in the place of his father. The accident,

which interfered with the Plaintiff's studies, had struck when he was in Form II but he subsequently struggled on and manage to complete his education up to Form IV.

According to the evidence, at all material times the 1st Defendant was the driver of a Nissan Van Motor vehicle Registration No. KAN 605 J, which at the time had foreign registration No. VRGE 24569995/DUBAI 38263 when at about 7.30 a.m. on 16th May 2001 along Mombasa road that motor vehicle veered off the road and hit the Plaintiff violently knocking him down to the ground. The Plaintiff alleges that the motor vehicle was being driven and controlled by the 1st Defendant negligently in that the Defendant,

**(a) Drove at a speed which was too fast in the circumstances;**

**(b) Drove motor vehicle KAN 605 J without due care and attention;**

**(c ) Failed to keep any proper look out or to have any sufficient regard for pedestrians standing or walking besides the road;**

**(d) Failed to see the Plaintiff in sufficient time or at all to avoid knocking him down;**

**(e) Failed to heed the presence of the Plaintiff who was standing beside the road;**

**(f) Failed to stop, slowdown or swerve or in any other way so to manage or control his said motor vehicle in such away as to avoid the accident;**

**(g) Failed to keep a proper control of his motor vehicle to prevent it veering off the road and knocking the Plintiff;**

**(h) Drove his motor vehicle off the said Mombasa Road;**

**(i) Drove, managed and or controlled the said motor vehicle No. KAN 605 J in a way that was dangerous to pedestrians and other road users besides the said road so as to cause the said accident;**

**(j) Drove a defective motor vehicle;**

**(K) knocked down and seriously injured the Plaintiff requiring lengthy hospitalization;**

**(l) Deliberately caused the said accident by reason of his negligence in driving off the said road and thus injuring the Plaintiff seriously;**

**(m) Failed to comply with the requirements of the Traffic Act Cap 403 of the Law of Kenya and the Highway Code of the Laws of Kenya.**

Stating the Plaintiff was relying on the doctrine of **"Res Ipsa Loquitur",** the Plaintiff in paragraph 8 of his Plaint enumerated particulars of injuries as

**"a) Fracture of the left Temporal Lobe.**

**b) Left Temporal Lobe Extradural Hematoma with no midline shift.**

**c) Intracelebral Haemorrhage.**

**d) Diffused Brain Oedema.**

**e) Paralysis of the Right Hand especially at the forearm and fingers.**

**f) Shortening of the right leg."**

He gave particulars of what he called **"PRESENT PAIN & SUFFERING"** during that time by 2nd October 2003 when this suit was filed, as follows:

**"i. Frequent migraine headaches which occur several times a week on a daily basis;**

**ii. Reduced memory;**

**iii Reduced cognitive function;**

**iv Right sided weakness**

**v significant speech deficit;**

**vi Severe headaches, seizures and retardation reducing him to a cabbage."**

The 2nd Defendant was sued as the Registered owner of the above mentioned motor vehicle registration No. KAN 605 J and therefore liable vicariously in negligence on the part of the 1st Defendant who was driving the motor vehicle when the accident occurred.

At the time of the accident, the Plaintiff was a student at Highway Secondary School, Nairobi South B, as a day scholar, since the year 2000. When the accident occurred, he was going to school walking on foot when the motor vehicle driven by the 1st Defendant hit the Plaintiff from behind making him fall on the tarmac although he had been walking along the road outside the tarmac. Evidence is that the Plaintiff thereby lost consciousness and only regained it when already admitted at Kenyatta National Hospital, where he remained admitted for a long time before he was first discharged.

<u>During the hearing the Defendants who had filed a defence denying liability conceded liability in full save for a 10% contribution which the Plaintiff conceded to. The trial therefore proceeded on the basis of a consent that the Defendants were 90% liable for the injuries suffered by the Plaintiff on 16th May 2001 due to negligence on the part of the 1st Defendant.</u> With the exception of PW 5 Dr. Kiboi Julius Githinji who was a common witness, the Defendants elected to bring no witnesses, but had their learned Counsel, Mr. Onyambu, rigorously cross examining witnesses who gave evidence in this matter.

The Plaintiff called seven witnesses, including the common witness aforesaid, all adducing evidence for the purpose of assessing damages, general and special, the question of liability having been settled. That being the position, I do look at what learned Counsel on each side said in written submissions starting with Mr. Gaturu.

According to Mr. Gaturu, PW 3, Dr. R.P. Lubanga, testified to the effect that according to his latest Report of 18th June 2007, that the Plaintiff has a permanent right-sided weaknesses and the Right hand maintains a permanent flexed position. He is not able to extend his fingers voluntarily. He also noted a Disuse Alropty in both the right upper and lower limbs. And a Neurological Examination revealed that the central Nervous system and the Murcalosceletal system had no changes such since his earlier examination on 23rd September 2002.

In that report Dr. R.P. Lubanga had found that the Plaintiff had not yet regained complete function of his right hand and even though the fingers exhibited power grade 5, he was still not able to execute the prensision grip. The co-ordination of the fingers and the hand as a whole was still grossly deficient. He also had to continue the use of a splint to prevent deformity of the hand.

The limb was basically useless and cannot take part in activities of daily living. He could not predict how long the hand would take to recover but there was a possibility of the hand never recovering at all.

The Plaintiff had an impaired memory which had affected his ability to perform routine chores. On several occasions, when sent by his parents to pay for utilities, he would go to town and come back in the evening with nothing having forgotten the reason he went to town in the first place.

The headache, poor memory and recrolepsy led to his dropping out of Computer College that he had enrolled after finishing school in 2004.

He concluded that even after re-examining and re-evaluating the Plaintiff he confirmed that his future out look had not changed since he examined him and wrote out a Medical Report on 23rd and 18th October 2002.

PW 2, Dr. Margaret Makanyengo; in her report of 21st June 2007, told the court that the Plaintiff was sent to her

for a Psychiatric evaluation on 20th June 2005 as she is a Psychiatrist and she recommended compensation for the permanent Damage and incapacitation that he acquire

acquired as result of the head injury. She recommended medication, counseling and rehabilitation.

On interviewing him, she found that he was able to communicate but with much difficulty having developed Dysarthria (difficulty in speaking) which was now irreversible after the accident. Even though he can perform basic self care and household choves, he occasionally gets discomfort on the limbs and dumbness.

He was easily angered by his siblings and other household members and he occasionally exhibits irritability and aggression. He was not able to remember things or concentrate easily especially in academics and cannot therefore go back to college. He requires long term medical follow-up and rehabilitation which would cost money hence compensation.

On Examination she found his General Condition stable. On Mental Status examination, the residual psychotic features observed that he would occasionally talk to himself. She found his behavior stable although occasionally aggressive and his mood was stable. His speech was slow with difficult in pronouncing words. His Rapport was fair although difficult to hear all words. His perception was occasionally hallucinatory behavior and thought was normal.

For Cognitive Function his orientation was good but concentration was low. His memory was poor recent memory and insight was present.

She formed the opinion that the Plaintiff had permanent residual effects of brain injury with symptoms that may never resolve. He would therefore need long-term rehabilitation and medication to enable him to cope with daily chores. She recommended at least 40% mental incapacitation because he would never be able to resume college again.

She had treated him soon after the accident on 16th May 2001 and she produced her Medical Report of 20th June 2005 which contained her Report on the Plaintiff as at 16th May 2001 and the type of treatment she gave him until he was referred to Dubai for further treatment in November 2001 after a referral by his Neurosurgeon. Even after intensive treatment in Dubai Residual symptoms seemed more Permanent in nature has permitted. These symptoms seemed to have interfered with his normal functions to such a point that he was incapacitated, to such an extent such that he may never achieve some goals that he may have had if it had not been for the accident.

He requires long-term occupational therapy and Physiotherapy to enable him to cope with his day to day functions and daily use of oral tablets.

P.W. 5 Dr. David Eric Bukusi: produced his Medical Report dated 19th June 2007 and also testified to the effect that Dr. Josephine Omondi, his partner, had examined the Plaintiff on 18th August 2004 and drawnout his Report. During the Evaluation on 8th October 2004, the Plaintiff complained of permanent headaches, weaknesses of the right side of the Body, difficulty with focusing the right eye and getting extremely tired on a minor exercise. He had a ferocious appetite, laughed inappropriately, was very irritable and forgetful though he could read and comprehend. His school performance had reportedly deteriorated and he had a significant discipline problem contrary to what he was before the accident – a humble hard working and helpful person he was before the accident. He had difficulties in mood regulation, poor peer relationships, below average academic progress and disciplinary cases, all combining to be captured as a change personality unlikely to change soon.

On examination on 12th June 2007 it was found that he had right sided weaknesses of the body including the arm and the leg. He had loss of body mass on the right side of the body. He had frequent headaches and poor memory. He got easily tired and had inappropriate laughter. He had variations in appetite from ferocious appetite to amorexia (lack of appetite) continued to have mood swings and inappropriate laughter. He had a clear loss of muscle mass of the right side of the body very marked with the right hand which is now unlimited for support. He had to have a height adjustor in his right shoe for balancing. His concentration is very poor starting from between 30-45 minutes at a time and can hardly jog despite several trials and had to walk with a cane more often than not.

Dr. Bukusi concluded that the Plaintiff continues to have a markedly changed personality with marked mood swings poor concentration, inappropriate laughter and irritability, interfering with his ability to substantially learn new skills and negatively impacting on his social interactions. Physically, he has had body wasting resulting in weaknesses of the whole Right side of the body again negatively impacting on his ability to carry himself around.

Dr. Bukusi recommended that the Plaintiff undergoes continuous physiotherapy to keep up body strength mass

and ability to use his weakening limbs. He also requires regular mental health review to plan for management of his difficulties of mental function and further management of his mood signs. These difficulties would most probably continue for the rest of his life and he will require continuous medical care.

P.W 4, Prof Dr. Eratus O. Amayo: He testified that he reviewed the Plaintiff on 5th June 2007. He got the History of the Plaintiff as having been admitted to Kenyatta National Hospital following a Road Traffic Accident on 16th May 2001 with a diagonosis of severe head injury. C.T. Scan had revealed intracerebral haemorhage and subdural haematoma.

On admission had several issues:-

(a) confusion state and

(b) Generalized seizures.

Due to his violent behavior confusion and disorientation, he was seen by a psychiatrist. He was treated but remained in dysphasic and with right sided weakness. His current complaints were, constant headache, right sided weakness, feeling that his right leg is shorter, mood swing, inappropriate laughter and excessive eating. He was in a fair general condition but his Central Nervous System was oriented in time, space and person. Memory was normal, speech was appropriate and he had a scar on the left frontal region, and right sided weaknesses with increased flexes.

He formed the opinion that the Plaintiff had made major improvement but he was still not able to function to his capacity. He was not able to achieve his academic goals due to an incapacity of a permanent nature and he will require constant medication and follow up. He placed his permanent disability at 30-40%.

**P.W 1 Dr. (Mr) Kiboi Julius Githinji**:- come to give evidence as a common witness by consent of both parties. He had been commissioned by the Defendants but his Medical Report was good and reliable and he thus testified as a witness for both parties and he told the court that the Plaintiff suffered major injuries in the Central Nervous System. Although his speech is short he is able to communicate properly and is fully conscious orientated in time, person, and space. He has a left frontoparnetal scar well healed with prominent skull bore. He has no critical nerves palsy but the neck is supple and none tender. The right upper and lower limb has reduced bulk compared to the left. The forearm 10cm below medical epicondyle diameter is 25 cm while the left is 25.5 cm.

The thigh diameter 20 cms above tibial tuberosity on the right is 38 cm and left 42 cm half muscles 10 cm below tibial luberosily is 30 cms on the right and 34 cms on the left.

He had increased tone on the right upper and lower limb with brisk reflexes of the upper elbow. The right elbow and right knee jerk. Sensation is intact. His lower for the upper limb flexors and extensors upto elbow is power grade 5. He is not able to flex and extend the right upper limb wrist joint. The right had fingers are spastic and in flexion deformity. On passive movements, they extend but with spastivity. There is flexion at the metacarpo and interphalanged joint. The lower limb is lower grade 5 has slight spasticity and brisk knee reflex and reduced muscle bulk but he is able to walk normally. The CT Scan brain performed on 19th December 2001 revealed a hypodeuse lesion at the front peretal area which were post confusion changes. Subsequent scan performed on 23rd June 2003 showed persistence of the hypodence tession. He claims that his speech has been affected but basic lip movements tongue and soft palate movements in relationship to speech are normal. He cannot write or use the right hand due to the flexion deformity of the fingers.

As a result of that he will continue to have a headache and dizziness as part of the post concussion syndromes and persistent right sided weakness remains though he has power grade 5. The right hand is not functional due to spaciticity and flexion deformity of the fingers so he cannot use the right hand. This will hinder most of the functions of daily living.

Due to the hypodense lesion on the left hemisphere there is a possibility of getting confusions in future as part of post traumatic epilepsy. There is a history of use of epamistin while in hospital and after discharge. He needs a follow-up for 3 years since stopping epamition to prognosticate the likehood of epilepsy.

The frontal painetal confusion could also explain his mood effect but this is latter followed up by a psychiatrist to give further outcome. He had aggressive behavior immediately after discharge and the Doctor recommended follow-up.

In nutshell, what all these 5 Doctors were saying was that the Plaintiff had suffered a very severe brain damage which completely affected his bodily functioning to an extent of a permanent disability of over 40% following the Road

Accident on 16th May 2001. The brain damage suffered was so severe that a Young Boy who was an average B student while in Form II dropped so much as to end up with a C- and could not achieve his dream to become a lawyer. His right hand is non-functional and he cannot even manage through a Computer College.

***Dr. Bukusi in his evidence told the court that "through God's Grace, he can eat and remain alive," "but cannot perform any of his bodily functions like working and so on and is therefore not useful to the family and society as a whole because he cannot engage in any type of work at all." He is actually a cabbage and a great liability cause he can never do any type of work for the whole of his life time."***

He therefore requires adequate compensation so as to sustain him for life of not working.

After that evidence from doctors, Mr. Gaturu proceeded to submit on General Damages stating that if the Plaintiff had not met with the accident on 16th May 2001 he would have met his ambition of becoming a lawyer and if he worked in the Civil Service, he would have worked a full-blown legal career upto 55 years and if he went to private practice, he would have earned approximately Kshs.150,000/= per month upto 55 years. A multiplier of 30 years would be fair and reasonable which would mean that his expectation in life for the career of a lawyer would have earned him Kshs.54,000,000/=. There is no possibility that he can earn anything at all for the whole life and therefore a sum of Kshs.54,000,000/= would be fair and reasonable in the circumstances.

He would also be having full use of all his limbs and his brain would be alright and not damaged. The damage done to brain would therefore require adequate compensation for life sustenance.

He said that case Authorities in this area during the eighties and nineties in the Award of General Damages revolved around a figure of Kshs.2,000,000/= considering inflation and the money market, over the years then an award of damages of Kshs.20,000,000/= would be fair and reasonable.

Mr. Gaturu referred to **APPENDIX II NOTER-UP OF GENERAL PRINCIPLES IN AWARD OF GENERAL DAMAGES** stating as follows:-

***"1) Appendix II contains a Note-up of General Damages saying that in assessing general for personal inquiries, "one has to bear in mind and consider the bodily injuries sustained, the paid undergone, the effect on health of the injury suffered according to its degree and its probable duration as likely to be temporary or permanent the expenses incidental to effect and or lessen the amount of paid and pecuniary loss".***

He added that the Law as expounded therein in the Principles of Assessment of Damages is correct and should be followed by this court in its Award of Damages. Following those principles, there are several judgments in the Noter-up dealing with Head injuries some of them very severe.

In **Walter Obala Ogol vs Noor Mbugua Njoroge HCCC 484 of 1989 (Nairobi)**; the Plaintiff had in addition to a fracture of the Right Orbital Margin of the head suffered a rapture of the Cronio and fracture the 4th right rib left 1st and 2nd ribs.

**An award of Kshs.168,770/= was made on 16th October 1993**

In **RAVENNES KAMONZO NZUKI VS RUJI MWANIKI NJUE & 2 OTHERS HCCC 143 OF 1992 MOMBASA:** The Plaintiff suffered head injuries along with fractures of 8 ribs pneumonia, contusion of the lungs and fractures of the pelvis damages of **Kshs.531,000/= were awarded on 16th July 1993.**

In **YWOLONGAR LOSIAMURO VS LOCHAB BROTHERS & ANOTHER MOMBASA HCCC 48 OF 1998:** The Plaintiff suffered head injuries, laceration of right forehead and a crush of the right leg. **General damages of Kshs.824,000/= were awarded on 30th December 1991**.

In **OCHIENG VS AYIEKO (1985) KLR 494:-** A 10% contribution for liability was admitted. The Plaintiff was a child of tender years aged about 10 years at the time of the accident, and he suffered severe brain damage and compound injuries of the left thigh. **General damages awarded were Kshs.700,000/= plus Kshs.630,000/= less Kshs.70,000/= ie Special damages of Kshs.630,473/= giving a total of Kshs.1,260,473/=.**

In **GRACE WANJIRU MBAGA VS MISSION TO SEAMEN AND MOHAMED YUSUF HCCC 4 OF 1992 – MOMBASA:-** The Brain injuries suffered by the Plaintiff was such that the Plaintiff will never be employed for the rest of her life. Even though she was 38 years at the time of the accident a multiplier of 15 was applied and she was

**awarded General damages of Kshs.2,000,000/= plus special damages of Kshs.58,450/40, loss of future earnings or future earning capacity Kshs.368,172/- and Nursing case of Kshs.720,000/= coming to a total of Kshs.3,146,622/40.**

We should not lose sight of the fact that this Award was made on 22nd September 1994 which is more than 15 years ago. Taking into account the rate of inflation of the shilling, this award today could be in the region of 30-40,000,000/= 15 years later.

In **JAMES KATUA PETER VS SIMON MUTUA MUASYA HCCC NO. 135 OF 2001 MACHAKOS:-** The Plaintiff suffered bodily injuries including head injuries. He was **awarded Kshs.2,000,000/= for pain and suffering, and Kshs.5,000,000/= and cost of future operation arising from the injuries suffered. Judgment was delivered on 8th February 2008.**

In **JOHN MASENO NGALA & GENERAL MOTORS LTD. VS DAN NYAMAMBA OMARE A MINOR SUING THROUGH ISSAC JAMES OMARE (NEXT FRIEND) NAKURU HCCC NO. 320 OF 2002:- Damages of Kshs.2,001,100/= were awarded by the High Court sitting at Nakuru for head injuries.** The Defendant appealed arguing that Kshs.2,001,100/= was excessive and should be reduced. On 10th November 2006, the Court of Appeal dismissed the Appeal on the ground that the award of the High Court was fair and reasonable and not considering the nature of injuries suffered by the Respondent (Plaintiff) and his mental capacity was severely affected. It was stated.

Money cannot renew a physical frame that has been battered and shattered and all that courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair to both the Plaintiff" their Lordships observed in dismissing the Appeal against Quantum.

All what these authorities are saying is that injuries suffered must be compensated adequately by way of damages. While it is true that no amount of Damages can restore the Plaintiff to what he/she was prior to the accident, nevertheless the award of damages must try as much as possible to re-assure the Plintiff that efforts are being made, by way of damages to restore him to what he was prior to the accident.

The essence of damages is to keep on trying to re-settle the victim to as much as possible the position he was before the accident by "*repairs'* so as to be back to normal.

In **PAUL BECKINGHAM, MARY BECKINGHAM AND AARON BECKINGHAM VS THE ATTORNEY GENERAL AND HARET ABDI HCCC 2268 OF 1998 NAIROBI** The 1st Plaintiff together with his wife and son met with an accident at about 6.00 p.m. in the evening along Limuru Road.

The 3rd Plaintiff Aaron who was then aged 10 years suffered soft tissue injury to the right side of the head soft tissue injury in the right lower arm was found 4 years later to have post traumatic disorder as a result of the accident manifesting itself in anger, volatile words, insecurity and dropping academic performance. The Doctor recommended family and individual psychotherapy for the next five (5) years.

The 2nd Plaintiff who had serious head injuries had psychotherapy and was recommended family and psychotherapy and was awarded of General Damages of Kshs.600,000/= on 18th April 2002. General damages awarded to the 1st Plaintiff were 4,000,000/= including damages for the head injuries.

The judge took into account both inflation and the nature of the injuries in awarding damages.

In **SCOPHINAF & COMPANY LTD AND JAMES GTIKU NDOLO V DAVID NG'ANG'A KANYI HCCC 315 OF 2001 (NAKURU)**:- The Plaintiff sustained a compound depressed skull fracture of the right frontal bone and was admitted in Hospital in a confused state. After surgery was carried out and he was admitted for 4 ½ months, he was left with an unsightly scar on the frontal region of the head (the size of a Duck's egg) and a large depression. Due to the brain injury he was unlikely to engage in gainful employment.

The Court of Appeal refused to reverse the Award of Damages of Kshs.3,020,000/= on the ground that it was fair and reasonable in the circumstances taking into account the nature and extent of the injuries suffered by the Plaintiff to his brain and body.

Young Abdirazak had his life interfered with by the accident at the age of only 15 years and today at 25, he has never come back to normal again. As per the Doctors' Reports, he is completely incapacitated and will never be able to work at all throughout his life. According to one Doctor, ***he is alive by the Grace of God! "he can eat!" "but beyond that he is a nobody" because he cannot work at all!. "Life is not just about being alive and eating! "There is work***

***to do and the poor young man cannot do any work!"***

In that respect he is a cabbage and just a figure moving around and therefore he needs to be adequately compensated.

Mr. Gaturu further submitted on **SPECIAL DAMAGES** saying that the Appendix II Noter-up of general Principles of Assessment of Damages has got a write-up also on Special Damages.

Injured person is entitled to Loss of earnings/profits upto the date of the trial. They must be both specifically pleaded and proved.

The Plaintiff through PW 7 produced documents and evidence in support of his claim for special damages amount to Kshs.2,528,884/75 made up as follows:-

**Special Damages:**

**1. Medical Expenses incurred at**

**Kenyatta National Hospital………………………………. Kshs. 22,500/=**

**2. Dr. R.I. Lubanga ……………………………………………….. Kshs. 22,500/=**

**3. Dr. Margaret Makanyego…………………………………… Kshs. 11,600/=**

**4. Dr. David E. Bukusi…………………………………………….. Kshs. 3,000/=**

**5. Dr. Modi……………………………………………………………. Kshs. 1,000/=**

**6. Eratus O. Amayo……………………………………………….. Kshs. 8,000/=**

**7. Medical Expenses at Nairobi Hospital………………… Kshs. 3,720/=**

**8. Medicines bought by the Plaintiff………………………. Kshs. 104,463/=**

**9. Payments to Chinese Doctor………………………………. Kshs. 8,600/=**

**10. CT Scan carried out at MP Shah…………………………… Kshs. 8,000/=**

**11. Physiotherapy at Mater Hospital……………………….. Kshs. 13,650/=**

**12. GYM Costs…………………………………………………………… Kshs. 2,150/=**

**13. A 2nd CT Scan ……………………………………………………. Kshs. 7,000/=**

**14. EMS Speedpost Charges…………………………………….. Kshs. 1,914/=**

**15. Dr. Micheal LP Groves's Fees for a**

**Medical Report………………………………………………….. Kshs. 34,500/=**

**16. Taxi Costs while at Dubai to and from Dubai**

**Hospitals………………………………………………………………. Kshs. 72,160/=**

**17. 3 Air Tickets to and from Dubai for Treatment and**

**3 visas to Dubai………………………………………………….. Kshs. 187,780/=**

**18. Hotel Accommodation while at Dubai…………………. Kshs. 321,000/=**

**19. Medical expenses at Dubai Hospital……………………… Kshs. 71,625/=**

**20. Treatment and Speech therapy…………………………… Kshs. 5,500/=**

**21. Purchase of Special shoes at Dubai……………………… Kshs. 4,000/=**

**22. Costs of Scratch Cards used at Dubai…………………… Kshs. 24,150/=**

**23. Food used in Kenyatta National Hospital……………. Kshs. 15,914/=**

**24. Food eaten at Dubai during treatment……………….. Kshs. 379,452/75**

**25. Payment to 4 men who guarded the Plaintiff**

**While undergoing treatment……………………………… Kshs. 33,600/=**

**26. Additional Medicines at Dubai…………………………… Kshs. 5,525/=**

**27. Expenses and food bought at both Uchumi and**

**Nakumatt Supermarkets……………………………………. Kshs. 20,459/=**

**28. Petrol expenses when taking the Plaintiff to Kenyatta**

**National Hospital, Nairobi Hospital and Mater**

**Hospital…………………………………………………………. Kshs. 12,183/=**

**29. Grand Total…………………………………………………….. Kshs.2,528,884/75**

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It is true that some Receipts in Item No. 24 above (Exh. 48) were written in Arabic both the Items charged and the money charged. Such receipts are coming to a total of Kshs.118.190/=. But the said sum of money is still claimable because there is clear evidence that the money being claimed under the receipts in question because:- long before the case started and Demand Letters were sent to the Defendant in 2002/03, by even their lawyers on request, the receipts in question were forwarded to both the Defendants directly and to his lawyers while still in Arabic and the figures therein claimed from the Defendants and no issue was then raised by the Defendant and/or their Counsel regarding the fact that the same were in Arabic. The total receipts in Arabic out to Item 27 (Exh 48) amount to Kshs.118,190/=. If the Defendants were sincere in objecting to the receipts in Arabic they should have objected from the beginning in 2002/2003 when correspondence started being exchanged and photocopies supplied to the Defendant by the Plaintiff's then Lawyers MS Ibrahim & Ishaak Advocates and later M/s Muthoga Gaturu & Company, Advocates, and Evans Thiga Gaturu, Advocate but the issue was raised during Cross-examination.

There is no good faith on the part of the Defendant's Counsel in objecting to the production of receipts that he has never objected to in the past and only raised it during cross-examination. The receipts being objected to come to Kshs.118,190/= and the balance of Kshs.261,262/75 is already proved by way of Receipts written in English. But the Plaintiff claims the entire amount of Kshs.379,415/75 as it is fair and reasonable and there is no problem in the Court awarding the whole amount.

The Defence Counsel raised an issue of the receipts from Dubai not bearing Revenue Stamps under the stamp Duties Act Cap 480 of the Laws of Kenya. In answer to that, the Plaintiff responded that he was not aware that all receipts from Dubai needed to be stamped and he informed the court that he was never told to have then stamped within 30 days of arrival from Dubai in January 2002.

It would be extending the provisions of the Stamp Duties Act too far to claim that all Receipts from Dubai be stamped because it is not practical in that the Plaintiff could not have anticipated in 2002 when he brought in the receipts that the Defendants would invoke the provisions of the Stamp Duties Act 7 years later in 2009 when the case was being heard, in Cross-examination. Quite clearly the issue of failure to stamp the Receipts from Dubai is an afterthought and should not be used to deny the Plaintiff Justice that he is properly entitled.

The Defendants are stopped from raising an issue they should have raised SEVEN (7) years ago.

Section 19 of the Stamp Duties Act is not usually enforced and claim for Special Damages where Receipt from overseas are tendered in Evidence in a suit for damages has been allowed by the High Court in the past.

In the case of **Paul Beckingham & 2 Others vs The Attorney General & Another HCCC 2268 of 1998 Nairobi High Court, the Hon. Justice A. Visram J., (as he then was) admitted Receipts for a Medical Report issued in Canada** during a hearing before him here in Nairobi. The issue of Stamp Duties did not arise in that case and no issue was raised.

The judge held "***the authenticity of the Receipts was not disputed and there can be no possible prejudice cause to the Defendants only because they were produced by the Doctor to whom the Payment of the sums sought to be proved was made and not the persons charged" "and it would beat logic to require the Plaintiffs to increase traveling all the way from Canada to come and prove such a small claim for Kshs.9,000/=". "I therefore dismiss Mr. Rotich's objection to the production of the receipts", the judge held.***

Likewise it would beat logic in this case to deny the Plaintiff his right to Special Damages which he has incurred, just because of not stamping the Receipts 7 years ago.

In a nutshell, the Plaintiffs claim for special damages amounts to Kshs. made up as follows:

1. Total Special Damages enumerated above…………. Kshs. 2,528,884/75

2. Add Police Abstract……………………………………………… Kshs. 100/=

3. Add Future Medical Expenses for Physiotherapy Kshs. 600,000/=

4. Add future Medical neurorehabilitation………………. Kshs. 600,000/=

5. Add Costs of Specialised House help for

   5 years @ 3,000 x 12 x15…………………………………… Kshs. 540,000/=

6. Grant Total………………………………………………………….. Kshs.4,268,984/75

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And the ***Plaintiff claims Special Damages of Kshs.4,268,984/75 plus General Damages for Loss of Earnings of Kshs.54,000,000/= as stated above and General Damages for loss of use of his hand limbs and brain and other parts that were severely affected in the Road Accident.***

The total Package for his expectation of Damages is as follows:-

1. Total special Damages…………………………………………. Kshs. 4,268,984/75

2. Add General Damages for loss of earning

   For the rest of his life…………………………………………… Kshs.54,000,000/=

3. Add General Damages for loss of use of his limbs,

   Hand and brain…………………………………………………… Kshs.20,000,000/=

4. Grand Total………………………………………………………… Kshs.78,268,984/75

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In addition to the said General Damages of Kshs.74,000,000/= and Special Damages of Kshs.4,268,984/75 the Plaintiff prays for costs of the suit on the Higher Scale and Interest for defending a suit which should not have been defended in

first place. The 10% Contribution will affect only General damages and not Special Damages. 10% of Kshs.74,000,000/= is Kshs.7,400,000/=. The final award then will be Kshs.70.868,084/75 made up as follows

1. Total General Damages…………………………………….. Kshs.74,000,000/=

2. Less 10% Contribution………………………………………. Kshs. 7,400,000/=

3. Balance thereafter……………………………………………. Kshs.66,600,000/=

4. Add Special Damages……………………………………….. Kshs. 4,268,984/=

5. Grand Total………………………………………………………. Kshs.70.868,984/75

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The Plaintiff's entire Package therefore is Kshs.70,868,984/75 plus costs and interest as aforesaid. And the Plaintiff prays for judgment against the Defendants, jointly and/or severally for that amount plus costs.

For the Defendants, Mr. Onyambu said, starting with medical evidence and the Plaintiffs condition, that it is agreed that the Plaintiff suffered serious injuries as a result of the road traffic accident of 16th November 2001. The medical evidence herein attests to that fact.

The Defendants' contention is that the Plaintiff's present condition is not as extreme as the Plaintiff would wish the court to believe. Right from the Plaint to his submissions the Plaintiff seeks to create an extreme impression that:-

i. The Plaintiff is retarded and reduced to a cabbage (paragraph 8 (iv) of the Plaint);

ii. The Plaintiff is "severely impaired" (paragraph 9 of the Plaint);

iii) The Plaintiff "will require a specialized helper for the rest of his life"

(paragraph 9 of the Plaint);

Iv The Plaintiff cannot possibly do "anything at all for his whole life" (Plaintiff submissions p.6)

To sustain this extreme impression the Plaintiff's submissions, rather than analyze the evidence, consist mainly of a verbatim reproduction of the contents of the initial medical reports produced by the doctors when giving their evidence and producing their respective reports, the doctor (PW1-PW5) testified as follows:

Dr. Kiboi J. Githinji – PW 1 examined the Plaintiff on 20th July, 2006. PW 1 testified that:

***"On examination I found a young man in good general condition. The major finding was in the Central Nervous System. He was fully conscious oriented in time, in person and in space, was able to communicate well, but his speech was slow."***

Dr. Kiboi further stated at the close of his examination that he had seen previous medical reports by Dr. Lubanga made four (4) years earlier and **"was able to see the progress"** of the Plaintiff. On further examination, Dr. Kiboi (PW 1) further gave evidence that:

- The Plaintiff was able to communicate fully with other people;

- The Plaintiff's claim at paragraph 8 (iv) that the Plaintiff was a "cabbage" was not true

The doctor said the Plaintiff had "good outcome" and expounded by explaining the standards used in assessment of a

patient’s outcome as follows (i.e. in reducing degrees of severity):

1. “Death”

2. “Vegetative”

3. “Severe Disability”

4. “Moderate disability”

5. “Good outcome”

This ratings, as the doctor explained, is known as the “Glasgow Outcome scale” and is a standard used internationally.

Dr. Kiboi Githinji (PW 1) was a common doctor whose report had been accepted by both the parties and the doctor rates the Plaintiff’s condition as the least severe according to the “Glasgow Outcome Scale”.

Dr. Kiboi’s findings are very much collaborated by the Plaintiff’s own condition as was manifest from his conduct before the court. The Plaintiff testified as PW 6. The Plaintiff testified without any assistance whatsoever. He was of very lucid mind and recollection. The court record of his verbatim testimony bears out that the Plaintiff has very good speech and presentation. Aside from the apparent right side weakness (which cannot be contested) there is nothing at all to suggest that the Plaintiff is a “cabbage” or a retard, as is being shown to the court in the Plaintiff’s pleadings and submissions.

In his evidence-in-chief, the Plaintiff gave a seamless and unaided historical recount of all the facts leading to his claim herein, right from the moment of the accident in 2001 up until the time he was standing in court in 2008

The defence, in cross-examination, sought to deliberately demonstrate the Plaintiff’s lucidity. The Plaintiff without any difficulty could recollect his birth date and those of his siblings “His birth date was 13th October 1985 and that of his sister Fatuma was 4th October 1987” the Plaintiff stated.

The Plaintiff (PW6) further testified that he recovered his speech when he went for treatment in Dubai and in his own words

> **“I am now able to speak and communicate effectively”;**

The Plaintiff further stated that the only reason why he does not go to many places alone is “due to security” otherwise he is able to make his way home alone

With regard to the condition of the right side of this body, the Plaintiff speaking of his own condition stated to the court

**“I am not saying that the right hand side of my body is useless, it is only weak in strength and coordination but my right hand, for example, can give some assistance in lifting objects.”**

Nobody can claim to better know the Plaintiff’s condition than the Plaintiff himself The Defendants humbly submit that Dr,. Kiboi Githinji’s (PW 1) evaluation of the Plaintiff was professional and truthful and the same is collaborated by the current presentation of the Plaintiff.

PW 2 Dr. Margaret Amondi Makanyango, produced the medical reports- Plaintiff’s Exhibits 2 and 3, with regard to the Plaintiff’s performance in school. The doctor conceded, on cross-examination that

> **“When I say he did not perform as well as he should have performed, that is not my opinion; that is what I was told and that is how as a psychiatrist I get information and associate that information with a psychiatric problem.”**

Dr. Makanyengo further stated,

**"What I said about the Plaintiff's performance at school I did not see a report from the school."**

**(**Note" the Plaintiff's own evidence on his performance in school is Plaintiff's Exhibit No. 11 which shows an average performance of **C-** both before and after the Plaintiff's injuries).

Dr. Makanyengo concluded her medical report dated 21st June 2007 (Exhibit No. 3) with a recommendation that:

> **"The family need to be compensated at least 40% mental incapacitation because the Plaintiff will never be able to resume college again"**

In light of the foregoing, the Defendants humbly submit that, although PW 2 was testifying as an expert in her field, her opinion is clearly subjective. She made conclusions and prepared her report on the basis of casual information from the Plaintiff's father who is an interested party-without calling for basic evidence (which could have been easily availed) to collaborate. Dr. Makanyengo's conclusion about the Plaintiff's school performance are clearly embarrassing in light of the Plaintiff's own testimony and the school performance records (Exhibit No. 11).

It is also apparent that the overriding (if not the primary) objective of her report (Exhibit No. 3) is based on her perception of "need" for compensation for "The family".

Her proposition on degree of disability is also unprofessionally imprecise. The doctor recommends that the family's need to be compensated at least 40% due to mental incapacity. It is unclear whether the words ***"The family need to be compensated at least 40% mental incapacitation"*** are an emphasis of the family's need for compensation or a professional assessment the Plaintiff's actual mental ability.

The Defence humbly submits that PW 2 lost objectivity in her role as expert without which her expert opinion is of little probative value.

On cross-examination, PW 3 Dr. Reuben Paul Lugango, was categorical that the Plaintiff cannot be said to be "A cabbage" as pleaded in the Plaint.

The doctor (PW 3) described the differences between his findings and those of Dr. Kiboi (P W 1) as "differences of opinion". (He however did not fault or hold Dr. Kiboi's (PW1) opinion as wrong.)

After PW 3 endevavoured to distinguish between "orientation" and "intelligence" the Defence confronted him with the findings of Dr. Makanyengo (PW 2) who had found that the Plaintiff's intelligence as "average". PW 3 rather unprofessionally rubbished Dr. Makanyengo (PW 2)'s findings. He did not consider them as mere differences of opinion."

The good doctor (PW3) pompously (and perhaps correctly) observed that there is always subjectivity in objectivity". The Defendant humbly submits that from the demonstrated disdain PW 3 showed to the other experts called by the Plaintiff and from observation of the actual condition of the Plaintiff as manifest in his presence and conduct before the court, it is apparent that Dr. Lubanga leaned towards exaggeration of the Plaintiff's condition. His "subjectivity" was obviously wagging his "objectivity".

PW 4, Dr. Eratus Amayo, a neurologist, testified that in his examination of the Plaintiff, he concentrated on the Neurosystem and made the following observation:

a) The Plaintiff's memory was normal

b) Speech was appropriate

c) Scan on the left frontal region

d) Right handed weakness

The doctor observed that the Plaintiff

**"had made a lot of improvement from his condition at the discharge time" but he required further rehabilitation, physiotherapy and counseling**

On cross-examination, Dr. Amayo (PW 4) reiterated,

**"I am saying that at the time I examined him his memory was normal, his speech appropriate; means he was able to answer questions correctly using the right kind of words."**

PW 4 was emphatic that the Plaintiff is neither "a cabbage" nor retard as pleaded in the Plaint (paragraph 8(iv) of the Plaint).

The Defendant again humble submits that PW 4's expert evidence does not support the suggestion that the Plaintiff is the hopeless case that is made out in the Plaint and in the Plaintiff's submissions.

Like Dr. Makanyengo (PW 2), Dr. Dr. David E. Bukusi (PW 5), is also a psychiatrist. PW 5 was simply called to salvage PW 2's testimony. There is no other explanation as why a second psychiatrist was required to testify in this matter. Dr. David E. Bukusi recommended that the Plaintiff would require continuous medical care. However, from the record of evidence received by the court, besides the doctor's medical reports produced as evidence, there is no evidence at all of any further medical treatment to the Plaintiff. The evidence shows that after the Plaintiff was discharged from Kenyatta National Hospital on 18th June 2001, he attended treatment in Dubai until he returned to Kenya sometime in January 2002. Besides physiotherapy sessions, there is no evidence at all that the Plaintiff has needed or been undergoing any further psychiatric treatment.

On assessment of damages, like Mr. Gaturu, also Mr. Onyambu divided them into general and special damages. Starting with General damages, Mr. Onyambu said that the principles for the assessment of damages are now well settled . They have been captured in numerous decisions of courts.

The court of Appeal in **MOHAMMED JABANE V HIGHSTONE T. OLENJA (**Case No. 2 of 1986 [Vol. 1 KAR 982] [Authority No. 11 –

Defendants' Supplementary list of Authorities], the court restated the principles for the correct approach in assessment of damages as follows:

i) Each case depends on its own facts;

ii) Awards must not be excessive and must take into account the need toavoidescalation of insurance premiums, medical fees, expenses in the body policy;

iii) Comparable injuries should attract comparable awards;

iv) Inflation should be taken into account

The Defendant humbly submits that the Plaintiff's proposition for general damages cannot be brought within the definition of "fair and reasonable compensation" for the injuries the Plintiff has suffered. The proposition of assessment of total damages in the sum of Kshs.78,268,984.75 takes flight in the light of the principles for assessment of damages above stated.

The highest award in the most generous of the authorities cited in the Plaintiff's submissions (i.e. **John Maseno Ngala & General Motors Ltd. Vs Dan Nyamamba Omare ( a minor) – Nakuru HCCC No. 320 of 2002,** is Kshs.2,001,100.00. Upon what precedent has the Plaintiff's submission for assessment of general damages in the colossal sum of Kshs.74,000,000/= been based?

The Defendants fully agree with the first of the principles for assessment above stated, i.e. that indeed each case must be considered in the light of its own facts and circumstances, they however submit that no peculiar facts and/or circumstances have been shown in the evidence before the court to justify such an unprecedented award.

There can be no denying that the injuries suffered by the Plaintiff herein were serious. The Defendants have already conceded to substantial responsibility for the injury e.i. 90% liability but an award in the range of Kshs.74 million would most certainly be manifestly excessive in the circumstances of this case. Such an amount would be inconsistent with all known principles of assessment of damages and comparable case law. An astronomical assessment on damages such as herein proposed can only be intended as punitive.

Any award in general damages of any range near what is now proposed by the Plaintiff will send shock waves in the body politic with far reaching implications. It will also heavily impact on the cost of medical care, cost of premiums, and cost of business and ultimately have an undesirable inflationary pressure on the cost of living.

The Defendants further submit that the proposition of such an astronomical sum may be with the mischievous intent of merely weighing the court's mind with a colossal sum so as to secure an inordinately large award. A closer examination of the separate heads under which the proposed assessment of general damages has been based exposes such intent. A review of comparable awards for similar injuries shows the range of awards this court has considered as "fair and reasonable compensation."

The Plaintiff's submissions for **General damages** have been made under the following sub-heads:-

a. Pain and Suffering and Loss of Amenities

The Plaintiff has submitted for an award of Kshs.20,000,000/=

b. **Loss of Future Earnings**

the Plaintiff has submitted for an award in the sum of Kshs.54,000,000/=

On (a) the Defendants invite the court to consider the following previous awards for comparable injuries:

**JANE G. MWANGI VS SIMON SABUZI & ANOR- NAIROBI HCCC NO. 1550 OF 1999 [Authority No. 4 – Defendant's list of Authorities**

This is a recent High Court decision delivered on 19th October, 2000. The Plaintiff had suffered the following injuries:

a) Fractured skull right panatela bone

b) Head injury concussion

c) Fractured right distal clavicle bone

d) Subdural haematoma

e) Multiple soft tissue injuries

The Plaintiff in that case had the following residual problems:

a) Post head injury headache syndrome

b) Post traumatic fibromyalgia

c) Post traumatic stress syndrome

The injuries were highly similar to the injuries pleaded at paragraph 8 of the Plaint herein. The court made an award of Kshs.500,000.00 for pain, suffering and loss of amenities.

**ROGERS AYUYA OGONDA VS NJUGUNA BUILDERS & DRAINAGE CONTRACTORS NAIROBI HCCC NO. 1807 OF 1998 [Authority No. 7 – Defendants' List of Authorities]**

This decision was delivered on 12th February, 1999. A wall had collapsed on the Plaintiff resulting in the following injuries:

a) Major back injury to the spinal cord

b) The entire left side of the body was paralysed

Injuries in this case were very similar to the instant case. The Plaintiff suffered weakness to the right side of his body; he could not walk without support; could not stand; had wasting right thigh muscles due to long periods of disuse; weakened strength to right side limbs; was not able to grasp tightly- disability was assessed at 75%. (the Plaintiff in that case had submitted for an award of Kshs.2 million in general damages).

The court, after considering various decisions cited, made an award of Kshs.450,000.00

**JAMES KYULE VS ELIJAH MUSYOKA – MACHAKOS HCCC NO. 254 OF 1999 (Authority No. 5 – Defendants' List of Authorities)**

The High Court decision was delivered on 4th March, 2002.

In this case the Plaintiff had suffered:

a) A cracked skull

b) Deep cut to the right side of the head

c) Depressed nose bridge

d) Fracture to the mid-shaft of the left humerus

In addition, the Plintiff suffered serious head injury; developed post-traumatic epilepsy requiring drugs and medical review for the rest of his life.

The court assessed general damages at Kshs.988,247.00

Because the Plaintiff has made a greatly exaggerated proposition for the award for General damages for pain, suffering and loss of amenities it is necessary to demonstrate that even for more serious injuries the courts have not contemplated awards as colossal as now proposed by the Plaintiff. Consider the following;

MBAKA NGURU & ANOR VS JAMES RAKWAR – Court of Appeal Civil Appeal No. 133 of 1998

The Claimant in that case had suffered significantly for more serious injuries, namely:

i) Paraplegia resulting from a fracture of the T12 thoracic vertebra with spinal cord damage;

ii) Severed distal phalanx of the left index finger

iii) cuts on the right cheek

The Plaintiff in that case was confined to a wheel chair and had

suffered 100% incapacitation. (The High Court had made an award of

Kshs.2.5 million in general damages for paid, suffering and loss of

amenities).

On Appeal the Court of Appeal revisited the guiding principles including its own statement in Ossuman Mohammed & Anor vs Saluro Bundit Mohammed Court of Appeal Case No. 30 of 1997, that;-

> ***"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance premiums or increased fees."***

For these manifestly more serious injuries the Court of Appeal proceeded to review the award by the High Court downward to Kshs.1.5 million.

**ELDORET HCCC NO. 118 OF 1996 – PRISCA CHERONO KITICHERUIYOT VS KIARA & KIPKENEI SONGOK & ANOR [Authority No. 12 – Defendants' supplementary List of Authorities]**

High Court decision delivered on 27th May, 2004

The Plaintiff in that case had suffered much more serious injuries in comparison to the Plaintiff herein. i.e;-

i) Fractured skull (in ICU for 6 days)

ii) Severe primary brain injury with left extradural haematoma

iii) Spastic paralysis of left arm and left leg

iv) Slurred speech and poor memory

v) Temperamental

vi) Weakness of right arm

Due to these conditions she was considered "a complete invalid"

For these manifestly more serious injuries than those herein, the court made an award of Kshs.1.7 million in general damages:

Considering the applicable principles for assessment of general damages for pain and suffering and loss of amenities, the comparable awards in comparable injuries and taking into account the previous assessment of damages by the court in even more serious injuries than those of the Plaintiff herein, the Defendants humble submit that an award of Kshs.750,000.00 for pain, suffering and loss of amenities would be fair.

At paragraph 8 of the Plaint the Plaintiff states- "And the Plaintiff claims general damages for pain and suffering, loss of future earnings and loss of enjoyment of life" (underlining added). This claim is carried at prayer No. (b) of the reliefs sought in the Plaint. On the basis of the above, the Plaintiff proposes in his submissions that if the Plaintiff had not met with the accident of 16th May 2001 **"he would have met his ambition of being a lawyer and if he worked in the civil service, he would have worked a full blown legal career of 55 years, and if he went into legal practice he would have earned approximately Kshs.150,000.00 per month up to 55 years. A multiplier of 30 years would be fair and reasonable which would mean that his expectation in life for a career of a lawyer would have earned Kshs.54,000,000.00!"**

In addition to the general principles applicable in assessment damages i.e. fair and reasonable compensation; not to be excessive; comparable injuries to attract comparable awards, e.t.c., the following additional principles have been settled with regard to loss of earnings:

Concerning loss of earnings, the Court of Appeal restated the principles (at page 6) in the case of Mbaka Nguru (Authority No.1 – Defendants List of Authorities) as follows:

**"We come now to the award of Kshs.1,943,760.00 for loss of <u>future</u> earnings. It is noted that such damages were not pleaded. The court in the case of Cecilia Mwangi & Another vs Ruth W. Mwangi, civil Appeal No. 251 of 1996 (unreported) said**

> ***<u>Loss of earnings is a special damage.</u> <u>It must be specifically pleaded and strictly proved</u>. The damages under the head of "Loss of earning capacity" can be classified as general damages <u>but these have also to be proved on a balance</u> of probability. The Plaintiff cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Ltd. Vs Mayende (1992) 2 KAR at p. 235 where this court referred to the cases of Ali v Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Shabani vs City Council of Nairobi (1985) 1 KAR 684 and the statement by Lord Goddard C.J in the case of Bonham Carter vs Park Ltd. (1948) 647 T.L.R 177 was approved."*** (underlining added for emphasis)

The Court of Appeal continued

> "***We need not set out here the statement of Lord Goddard C.J it will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them."***

The court of Appeal was here restating that:

3 "Loss of earnings" is a special damage to be <u>specifically</u> pleaded and <u>strictly</u> proved.

4 **"Loss of earning capacity"** is classified as general damages but <u>must be proved on a balance of probability</u>.

5 <u>If loss of earnings are not properly pleaded and proved the Claimant will not get the damages no matter how much sympathy the court may have to their plight</u>

6 The principles have held fast and been applied in a long chain of numerous decisions that they have become firmly settled as the law applicable.

**<u>What is the Plaintiff claiming in the instant case – "loss of earnings" or Loss of earning capacity"?</u>**

The answer can only be supplied by the pleadings of the party by which he must be bound. At paragraph 8 (after particulars of injuries) the Plaintiff pleaded, "And the Plaintiff claims general damages for pain and suffering, loss of <u>future</u> earnings and loss of enjoyment of life". The same is prayed for in prayer (b) of the reliefs sought in the Plaint. <u>So also in his submissions the Plintiff reiterates that he is seeking to recover a specified amount (i.e. Kshs.54,000,000/= as "Loss of future earnings</u>"

This brings us to the question of whether "Loss of future earnings" is a cliam in <u>special damages</u> (in the same manner as "Loss of earnings") or whether it is <u>general</u> damages (in like manner as "Loss of earnings capacity')? The matter was addressed in the classic case of **<u>BUTLER VS BUTLER CIVIL APPEAL NO. 49 OF 1983 [1984] KLR 225</u>** – [Authority No. 13 – Defendants' supplementary List of Authorities]. The Court stated at page 232 concerning "loss of earning capacity';-

**"It is a different head of damages from an actual loss of <u>future</u> earnings which can readily be proved at the time of the trial. The difference was explained in this way"**…… (and the Court proceeded with approval to quote Lord Denning MR in *<u>Fairley vs John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40, 42 (CA)</u>* as follows:-

> ***"…….compensation for <u>loss of future earnings</u> is awarded for <u>real assessable loss proved by</u>***

***evidence*. Compensation for *diminution of earning capacity* is awarded *as part of the general damages*."**

See also statement by JUSTICE NYARANGI Pages 236-237 (as then was)

> **"There was no evidence before the trial judge that the respondent had before been in salaried employment. There could therefore be no claim for 'loss of future earnings'.**

The Plaintiff in the instant case has never been in employment and had no "real assessable loss proved by evidence."

See also the **MOHAMED MOHMOUD JABANE VS HIGHSTONE T. OLENJA** (unrepresented), Civil Appeal No. 2 of 1986 at Kisumu where the Court of Appeal stated (page 6)

> **"Loss of future earnings had not been pleaded and should not have been quantified. They were an actual loss and must be proved as part of the special damages."**

In Submissions the Plaintiff refers to the claim as "general damages for loss of earning of Kshs.54,000,000.00" clearly the Plaintiff is claiming for "loss of earnings" or Loss of future earnings" but seems to have wrongly assumed that this claim lay in general damages. The Defendants respectfully submit that to the extent any claim for "loss of earnings" and "loss of future earnings" is a special damage the Plaintiff ought to have specifically pleaded the same in his Plaint and strictly proved the same as required, failure of which the claim must fail in the dictum of the Mbaka Nguru case And Another vs James George Rakwar (unreported), Civil Appeal No. 133 of 1998 at Nairobi Evidence required to proof of loss of future earnings or earning capacity.

However, even assuming that the words "General Damages for Loss of earning capacity" the Plaintiff would still be required to prove the claim on the "balance of probability". The Plaintiff cannot, as stated in the Mbaka Nguru case *"throw figures" at the judge and ask him to assess such damages"*

In NAIROBI HCCC NO. 1202 OF 1992 – KINYOSI KITUNGI VS SIMON OKOTH & ANOR (unreported) a minor aged 16 years had been fatally knocked down by a bus. The court in the judgment delivered on 19th November 2003 stated (p.8):

> **"This is the correct claim to be made for a minor; the case of Sheikh Musthtaq Hassan vs Nathan Mwangi Kamau Transporters & Others (supra) deals with this in depth. The Plaintiff is required to bring the evidence of a career person who is able to describe what the deceased would have embarked on in future. Did she want to be a teacher? A doctor? A pilot? Then the respective career person would come to give evidence to be able to know how much she is required to earn in future."**

The court in that case however proceeded to base assessment on the minimum wage and awarded Kshs.840,000.00.

The same principle is restated by the High Court in **MORI CHACHA VS RICHARD ARAP KOECH NAIROBI HCCC NO. 1863 OF 2001 - (**unreported) where Justice Ang'awa stated:

"I note that the deceased is said to wish to be a teacher/professor. I believe the advocate for the Defendant is correct by stating that a person who indeed is in the said profession should appear to court to give evidence on how much they may earn. I have had other cases where this is done in order to determine a multiplier . There is the Case Law of Sheikh Mushtaq vs Nathan Mwangi & Others (1982-1988) KAR 946 where the minor aged 17 years was

aspiring to be an architect, Evidence was called in which proof of such earing was given.

See also PIUS MUINDE NDOSI VS THE HEADMISTRESS MACHAKOS GIRLS HIGH SCHOOL AND ANOR MACHAKOS HCCC NO. 458 OF 1998 [AUTHORITY NO. 15 (unreported).

This judgment was delivered recently on 27th March 2003 Page 13

> **"On lost years I find that indeed the deceased was a student 16 years old. She aspired to be a future lawyer taking after her elder sister. It is however not possible for anyone to say that she could not have opted for something else. It is also the finding of this court that it is not possible to say exactly when she would have commenced her earning and retire from employment. It is also not possible to know whether she would have opted to join the civil service in order, to retire at the age of 55 years as suggested by the Plaintiff's counsel or go into private practice and work beyond the age of 55. Further both counsels have made suggestions to the court as possible monthly earnings. The Plaintiff suggests 35,000/= while the defence suggested 10,000/= per month. There is no back up evidence to support the figures suggested. It is the finding of this court that suggestion of what the deceased would have earned in future along the lines suggested by both counsel is mere speculation."**

The Plaintiff has based his claim of "loss of future earnings on the supposed income of a lawyer. Oddly, not once in his entire testimony did he mention or make any reference to any desire to become a lawyer. The Plaintiff called no evidence whatsoever to prove what a lawyer would earn as income. Such evidence cannot just materialize in the Plaintiff's submissions and be admitted. This would be speculative. Moreover, it would have unfairly denied the Defendants the right to test the veracity of the evidence through cross-examination. Further, no evidence was called to demonstrate that with an average score of "C" before his injury the Plaintiff was well on course and within eligibility to join university to study law. To the contrary the evidence shown to Court (Exhibit 11 and 12) shows little interference in the Plaintiff's academic performance. There is no evidence to support claims of diminished academic performance in the Plaintiff. He was an average "C" student both before and after the accident. The Defendants submit that the Plaintiff's presumption of a career in law is not supported by the evidence tendered and is merely speculative.

In the circumstances, the Defendants submit that the Plaintiff failed to prove this claim on the balance of probability.

In NAIROBI HCCC NO. 335 OF 1996 – HENRIETTA MAHERO KAIAMATI VS TERRY BELL & ANOTHER in a judgment delivered on 22nd June, 2000 the court factored taxation, living expenses and possibility of premature termination of career. Justice Aluoch stated,

> "*The Plaintiff's Counsel urged me to find that the deceased would have been earning a sum of Kshs.25,000.00 per month which I find to be too high for the government scale for lawyers. Further, the sum would have to be reduced by monthly taxation and further still, monthly savings by the deceased, which I would put at about 1/3; age at which the deceased would have started work is also relevant ……. There is also further possibility that the deceased could hve been prevented from becoming a lawyer by the factors, either death by natural causes or ill-health or whatever".*

In that case for the deceased who was 15 years at the time of death, the court assessed and applied a multiplier of 15 years and a multiplicand of Kshs.15,000.00 to arrive at an award of Kshs.900,000.00 The Defendants humbly submit that the Plintiff did indeed suffer serious injury with some residual consequence. But the Plaintiff

has neither Pleaded nor proved his claim for loss of earnings to the standards expected by the law; should the court nonetheless contemplate an award of loss of future earnings in favour of the Plaintiff the court should apply the minimum wage as multiplicand and multiplier of 15 years (See **HENRIETTA MAHERO KHAMATI VS TERRYBELL & ANOTHER HCCC NO. 335/1996** at Nairobi where the deceased aged 17 years multiplier of 15 years used), less taxation and expenses (40%) and discount on account of accelerated lump sum payment. The current minimum wage affected on 20th May 2009 by the Minister for Labour provides for minimum wage of Kshs.6,130/=. Expenses and taxation should be deducted at 2/3 (See **KINYOSI KITUNGI** Case and also **MORI CHACHA.** Hence the Defendants submit for assessment as follows;-

Kshs.6130/= (multiplicand) x 15 years (multiplier) x 12 (monthly) x 60% (40% expenses and taxes) = Kshs.662,040/=

II As for Special Damages, on 4th November, 2009 during the course of the hearing of this matter, the Plaintiff made an amendment to the Plaint on the special damages pleaded. He revised the figure of special damages from Kshs.7,847, 032.00 downwards to Kshs.3,387,030.00

The law on assessment of special damages has long been settled. Special damages are to be specifically pleaded and strictly proved.

**In Kenya National Library Services vs Abdulfatah Noorien – Civil Appeal No. 109 of 1988 [Authority No. 19 – Defendants' Supplementary List of authorities];** the Court of Appeal stated;

> **"(But) whenever the Plaintiff has suffered any special damages" this must be alleged in the statement of claim with all necessary particulars, and the Plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly in his statement of claim or particulars. Special damage in the sense of a monetary loss which the Plaintiff has sustained up to date of trial must be pleaded and particularized, otherwise it cannot be recovered."** Page 60 – emphasis ours)

See also **MARY MUKIRI VS NJOROGE KIANIA Civil Appeal No. 48 of 1996 [Authority No. 16 Defendants' Supplementary list of Authorities];**

The Plaintiff by his Plaint pleads for Special damages in the sum of Kshs.3,387,030/= but has in submissions submitted for assessment of special damages in the sum of Kshs.4,268,984.75/=. The court cannot award special damages beyond the sums pleaded.

Turning to the specific items of special damages claim per the "Particulars Special Damages" pleaded at paragraph 8 of the Plaint:

a) **Medical Expenses in Nairobi – pleaded Kshs.210,006.00**

Under this head the Plaintiff produced the Exhibits No. 16-34

| | | |
|---|---|---|
| Exhibit 16 | Kenyatta National Hospital receipt (bill) | Kshs.111,039.00 |
| Exhibit 17 | Kenya National Hostial receipt (medicines) | Kshs. 11,560.00 |
| Exhibit 18 | Receipt (Dr. Lubanga) | Kshs. 22,500.00 |
| Exhibit 19 | Receipt (Dr. Makanyengo) | Kshs. 11,600.00 |
| Exhibit 20 | Receipt (Dr. Amayo) | Kshs. 8,000.00 |
| Exhibit 21 | Receipt (Dr. Bukusi) | Kshs. 3,000.00 |
| Exhibit 22 | Receipt (Dr. Modi) | Kshs. 1,000.00 |
| Exhibit 23 | Receipt (Nairobi Hospital) | Kshs. 3,720.00 |
| Exhibit 24 | Bunch of Receipts | Kshs. 18,544.00 |
| Exhibit 25 | Another Bunch of Receipts | Kshs. 29,165.00 |
| Exhibit 26 | Another Bunch of Receipts | Kshs. 18,703.00 |
| Exhibit 27 | Another Bunch of Receipts | Kshs. 21,986.00 |
| Exhibit 28 | Another Bunch of Receipts | Kshs. 18,545.00 |
| Exhibit 29 | Another Bunch of Receipts | Kshs. 8,955.00 |

| | | |
|---|---|---|
| Exhibit 30 | Receipt Dr. Huo Juan-Nairobi Hospital | Kshs. 8,600.00 |
| Exhibit 31 | Receipt M.P. Shah Hospital | Kshs. 8,000.00 |
| Exhibit 32 | Receipt Mater Hospital | Kshs. 13,650.00 |
| Exhibit 33 | Receipt Physiotherapist | Kshs. 3,100.00 |
| Exhibit 34 | Receipt Bedrock (gym) | Kshs. 2,000.00 |
| Total amount under this head | | Kshs.323,667.00 |

It is apparent that the amount shown in the exhibits under this head is in excess of the pleaded sum and cannot be awarded. No amendment was made to the Plaint to plead the excess amount. At the time that Exhibits 13-34 were introduced, Counsel for the Defence raised the following objections:

i) That the receipts were not compliant with Section 19 of the Stamp Duty Act Cap 480;

ii) That Exhibit 22 a receipt for a medical report by Dr. Modi is not payable because no such report was produced in court nor shown to exist neither did the doctor testify in this matter;

iii) That the "bundles" of receipts produced as Exhibits 24 to 29 included receipts which do not indicate the party paying. The mere possession of the receipts does not prove that the Plaintiff made the payment.

The Defence recognizes that the Plaintiff must have incurred expenses for rehabilitation for which he deserves fair compensation. However in the absence of any concessions by the Defence, the law requires that the Plaintiff specifically plead and strictly proves his claim for special damages.

On the 20th November 2008 at the hearing of this matter the parties requested the court for time to come up with an agreed bundle of receipts or documents so as to save the court's time on production of evidence. The Defence, in spite of legal objections reserved, had indicated willingness to concede to the Plaintiff's exhibits No. 16, 19,20,21,23,30,31,32,33 and 34 all amounting to Kshs.172,709/=. However, on resumption of the hearing on the 25th November 2008 the Plaintiff proceeded with his evidence without any agreed bundle. The Defence shall not be going back on the conceded amounts Kshs.172,709/=

STAMP DUTY ACT-CAP 480

On Stamp Duty, Section 19 (1) of the Stamp Duty Act, Cap 480 Laws of Kenya provides that

**"Subject to the provisions of sub-section (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except**

**a) In criminal proceedings; and**

**b) In proceedings by a collector to recover Stamp Duty, unless it is duly stamped."**

The receipts produced as Exhibits by the Plaintiff have not been exempted from Stamp Duty under Section 106 or 117 of the Stamp Duty Act.

The Stamp Duty is required to be denoted in accordance with Rule 2 of Stamp Duty Regulations, i.e. by an adhesive stamp affixed or a revenue stamp impressed by a franking machine on the instrument or by embossed stamp.

Part No. 29 of the 11th Schedule to the Stamp duty Act specifically prescribes duty for "Receipts".

Foreign Receipts: Section 6 of Cap 480 requires that receipts obtained outside Kenya be stamped within thirty (30) days of being received in Kenya to comply with Section 86 of the Stamp Duty Act which defines "receipt" for purposes of stamp duty to include

"any note, memorandum or writing whereby any money amounting to one hundred shillings or upwards ….is acknowledged or expressed to have been received or deposited or paid……"

This court, in WEETABIX LIMITED VS HEALTHY U TWO THOUSAND LIMITED – Nairobi HCCC No. 283 of 2006 stated:

> **"With respect to the objection raised against the annexure at pages 7(a) to 7(e), i.e. the Assignment, it is not disputed that the same is not stamped. But does the annexure attract Stamp Duty? I think it does under the Eleventh Schedule of the Stamp Duty Act Cap 480 Laws of Kenya. The instrument is chargeable with Stamp Duty under Section 23 of the Act. As the instrument was not stamped, it is clearly inadmissible under Section 19(1) of the same Act."** (underlining added for emphasis)

See also TRUST BANK VS PORTWAY STORES (1993) LTD [2001] EA 296 [Authority No. 18 – Defendants' Supplementary List of Authorities];

The Defendants, having at the trial raised objections to the admission of unstamped receipts the Plaintiff ought to have seized the opportunity to rectify the position; the defense submits that the court should reject all receipts submitted for non-compliance with Section 19 of the Stamp Duty Act Cap 480.

The Cost of Caretakers: is another contentious issue. The Plaintiff claims Kshs.33,600/=.

This item is pleaded under particulars of special damages however no proof whatsoever was given in support of this claim.

Three Air Tickets to Dubai: Kshs.187,870.00 The Plaintiff produced Exhibit 13, 35 and 36 in proof of this head. The Defendants reiterate submissions on grounds of Section 19 of the Stamp Duty Act-Cap 480 and submits that the court rejects this claim.

Medical & Sundry Expenses in Dubai: Kshs.754,583. In proof of this claim, the Plaintiff produced Exhibit No. 37(a) – 37(1) and Exhibit 39, 40 and 41 which he claims as expenses in Dubai totaling Kshs.86375.00 In proof of sundry expenses in Dubai the Plaintiff produced the following exhibits; No. 43, 46, 48, 49 and 50 all totaling Kshs.623,787.50. The total face value of the exhibits under this head is Kshs.701,416.50 Several of the exhibits produced by the Plaintiff are in a language unknown to the court.

Language of the Court: Section 86 (1) of the Civil Procedure provides that "**The language of the High Court and the Court of Appeal shall be English and the language of the subordinate courts shall be English and Kiswahili"**

The Plaintiff had a duty to ensure that his exhibits can be comprehended both by the court and the defence. The Defence raised the issue of language, both as an objection at the time of production of the documents and in the cause of cross-examination. As it is, the Defendants have been deprived of their right to effectively interrogate the veracity of the exhibits and cross-examine on the same. The figures on these exhibits are expressed in foreign currency. The Plaintiff stated that I Dirham is equivalent to Kshs.25.00 but no evidence was adduced by the Plaintiff to prove the exchange rate applicable.

Physiotherapy Expenses up to 31st July 2003: pleaded Kshs.285,950.00

This is Item (e) of the Particulars of special damages; The Plaintiff has pleaded Kshs.285,950.00 for physiotherapy expenses incurred up to 31st July 2003. Looking at the evidence i.e. the disputed Exhibit 15, as at end July 2003 the total of the alleged Physiotherapy expenses is Kshs.372,000/=. By the time he filed suit (October 2003) he had already incurred this particular expenses and he presumably was already making entries in Exhibit 15. Why would there be such discrepancy? This goes to the point that little or no reliance should be placed on Exhibit 15 with regard to expenses.

The Plaintiff produced Exhibit 15 in proof of physiotherapy expenses. He stated that the total sum computed in Exhibit 15 was Kshs.1,019,700.00 Exhibit 15 is a hand written notebook made in the hand of the Plaintiff's father; purporting to have recorded payment made for physiotherapy sessions between; February, 2002 to October, 2008 As the author of its contents he could competently produce the notebook. The Defendants however submit that Exhibit 15 is not proof of payment. No receipts were produced to collaborate and prove that payments were actually made to a physiotherapist for the services. In lieu of receipts, the least the Plaintiff ought to have done was to call the physiotherapist/s to testify that they did indeed provide services to the Plaintiff on the dates stated in Exhibit 15 and to acknowledge that he/they were indeed paid the amounts stated in Exhibit 15. No such evidence was called.

The Defendants respectfully submit that on the question of whether or not the Plaintiff paid a sum of Kshs.1,019,700.00 for physiotherapy sessions; Exhibit 15 is of little probative value. At its best Exhibit 15 is and remains a historical record of activity and not proof of payment of the substantial sum of money.

Moreover, Exhibit 15 is wrought with errors that erode its reliability as prove of payment. The Plaintiff in the course of cross-examination on 20th November, 2008 stated;

> **"The last time I received physiotherapy was early last year and that was from the gym. But I do continue with the exercises I learnt from the gym in Nairobi West. I do the exercises myself. Otherwise the whole of 2007 I was going to the same gym."**

The father also testified that some of the entries on Exhibit 15 have derived from notes made on some wall calendar. The calendar itself was never produced as evidence. It would in the circumstances have been the primary evidence, if at all all it was true.

From the Plaintiff's own testimony it emerges that entries made in Exhibit No. 15 from early 2007 to October 2008 were false. Little else needs to be added about Exhibit 15. The Defendants submit that Exhibit 15 be rejected as proof of any payment at all let alone as "strict proof" of the payment of Kshs.1,019,700.00

Telephone Expenses in Dubai-pleaded Kshs.24,150 To support this claim, the Plaintiff produced Exhibit 42 which was a bundle of used scratch cards which he valued at Kshs.18,780.00 (and pleaded a sum of Kshs.24,150.00). No receipt was produced to prove purchase of the cards and to show that the same were purchased by the Plaintiff. It is common knowledge that anybody can collect any number of used scratch cards and bring them to court. The Plaintiff's father (and he testified as much) had been carefully gathering his evidence for purposes of use in this suit. Whereas the ordinary customers may not commonly ask for receipts upon purchase of airtime; the onus remained on the plaintiff to prove that these particular scratch cards were indeed purchased by him and for uses related to this course. The defendants submit that the Plaintiff has not discharged that onus.

Transport Expenses in Dubai-pleaded Kshs.72,160.00 This is item (e) of the Particulars of Special Damages in the

Plaint.  The Plaintiff's father produced Exhibit 47 in support of this claim, i.e. a receipt from Al Uruba which he said was for Kshs.60,000.00  The Defendants have objected to admission of exhbit 47 on grounds of non-compliance with Section 19of the stamp Duty Act Cap 480 (read with Section 6 and pargraph 29 of the Eleventh Schedule to the said Act).

Costs of CT Scan-pleaded Kshs.7,000.00  This amount was conceded before as above said.  The exhibit No. 31 is for the sum of Kshs.8,000.00 i.e. exceeds the amount pleaded.

Postage Expenses-pleaded Kshs.1,914.00  This is referred to in Exhibit No. 45.  The Defendants submits that no proof or relevance has been established in respect of this claim.  Dr. Michael Gross's report which is claimed to have been the subject of this expenses as never shown to exist.

Medical Report of Dr. Michael Gross-pleaded Kshs.28,060  he Plaintiff produced a receipt – Exhibit No. 44 for the sum of Kshs.34,500.00 purporting to be in respect of a medical report by Dr. Michael Gross.   The existence of such a report was never established neither did the doctor testify.  The amount pleaded and the amount on the exhibit is inconsistent.  The defendants submit for the rejection of this claim as having not been proved to the required standards.

Fuel Expenses- pleaded Kshs.33,000.00  These were pleaded at park (k) of the Particulars of Special Damages.  No proof whatsoever was given of this claim.

Police Abstract-pleaded Kshs.100.00    The Defendants do not contest this claim.

Future Medical Expenses for Physiotherapy-pleaded Kshs.600,000.00  These were pleaded as paragraph (m) of the Particulars of Special Damages.  The Plaintiff's father associated Exhibit No. 15 to the claim under this part.  The defendants reiterate their earlier submission on Exhibit No. 15, i.e. that the same does not constitute proof of payment; is not reliable and is inconsistent with the amounts pleaded in the Plaint.  Moreover, in the Plaintiff's own testimony the | physiotherapy sessions ceased in early 2007.

Future Medical Neuro Rehabilitation-pleaded Kshs.600,000.00  This is itemized at paragraph (n) of the Particulars of Special Damages.  Although Pleaded as a "Special damage" no proof was provided as required in respect of this claim.  In his evidence PW 7 (the Plaintiff's father said in respect of this claim, "*That is not going on, only physiotherapy under item (m) is going on in the form of gym.*

Cost of Epanutin from August 2003 to May, 2004-pleaded Kshs.8,640.00

This amount is included in 'Bundles' of receipts produced under paragraph (a) of Particulars of Special Damages, i.e. Medical Expenses in Nairobi.

Cost of Specialized House Help for 5 years-pleaded Kshs.540,000.00

This item of the Special Damages, i.e. paragraph (p) was amended from the sum of Kshs.5,000,000.00 to Kshs.540,000.00  this amount is pleaded as a Special Damage but no proof was presented for this claim

No specialized nurse was called to testify that he.she was providing any services to the Plaintiff. Indeed in his testimony the Plaintiff stated that he has not been attended to by any other maid except the ordinary house help that the family has had over the years. In addition, the Plaintiff's present condition as observed in the course of his conduct before the court did not show he was a person in actual need of any "specialized" help.

**Guidelines on "Sundry" Living Expenses**

The substantial amounts claimed in 'Sundry Expenses' in Dubai – Exhibit 48 and also in Nairobi Exhibit No. 51 ("Uchumi" receipts) deserve particular mention.

The Plaintiff appears to make claims on sundry expenses without regard to the fact that ordinary living expenses would still have been incurred whether or not the unfortunate accident of 16th May, 2001 would have occurred.

If any amount is to be claimed in respect of general expenses, it can only be such expenses, above the ordinary living expenses, shown as having been incurred as a result of the accident. In McGREGOR on DAMAGES [16TH Edition] page 1079 paragraph 1659 it was stated that

***"Increased living expenses constitute a familiar category of recoverable expenses outside the strictly medical. While ordinary living expenses are not included in the recoverable expenses as these would generally continue to be incurred whether the injury had been inflicted or not, extra or increased living expenses resulting from the injury are. There would be increased expenses if, for example, the plaintiff could no longer live on the top floor but was compelled to move to the ground floor, or was compelled to live in hotels or guest-houses instead of his home. The increased expenses may be temporary as where the injury occurs when the plaintiff is travelling and has to live away from home for some time"***

The Plaintiff did not demonstrate or document how and to what extent such amounts claimed as "sundry" expenses are "extra or increased living expenses resulting from the injury". It is only the difference above the Plaintiff's ordinary living expenses that is recoverable

In summation, the defendants submit for assessment of damages herein as follows:

| | | |
|---|---|---|
| 1) | Pain, suffering and Loss of amenities | Kshs. 750,000.00 |
| 2) | Loss of Future Earnings | Kshs. 662,040.00 |
| 3) | Special Damages (conceded) | Kshs. 172,709.00 |
| | Total | Kshs.1,584,749.00 |
| | Less 10% contribution | Kshs. 158,474.90 |
| | Total Due | Kshs.1,426,274.10 |

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I must say I am very grateful to Mr. Gaturu and Mr. Onyambu for what each learned Counsel has done in this suit to enable the court see where justice is positioned for the court to try to reach it, unfortunately, through predicaments as the only way, hence the difficulty in satisfying each side. But it is good where we reach be known to everybody.

I will therefore repeat that there can be no denying that the injuries suffered by the Plaintiff herein were serious. The Defendants have already conceded to substantial responsibility for the injury being 90% liability. But definitely the Defendants did not foresee an award in the range of Kshs.74 million which they are now referring to as manifestly excessive in the circumstances of this case as they say that such an amount would be inconsistent with all known principles of assessment of damages and comparable case law; adding that an astronomical assessment on damages such as herein proposed by the Plaintiff can only be intended as punitive; and they remark:

**"Any award in general damages of any range near what is now proposed by the Plaintiff will send shock waves in the body politic with far reaching implications. It will also heavily impart on the cost of medical care, cost of premiums, and cost of business and ultimately have an undesirable inflationary pressure on the cost of living."**

Similar remarks can be extended to special damages where same trend is manifested by the Plaintiff. Here it may be added that though recognizing that the Plaintiff must have incurred expenses for rehabilitation for which he deserves fair compensation, the law requires that the Plaintiff specifically pleads and strictly proves his claim for special damages unless conceded by the Defendant.

Further, the Defendants having at the trial raised objections to the admission of unstamped receipts the Plaintiff ought to have seized the opportunity, especially since this trial took long, to rectify the position.

On this issue, however, I should remind the parties that while the learned Defence Counsel was raising objection where there was lack of stamp duty, he used to let such a document be admitted in the evidence so that the court would note the objection, followed by admission of the document in evidence.

Similar treatment was extended to documents in Arabic language, not translated into English or Kiswahili and having no stamp Duty paid. Objection raised but relevant document left to go into the evidence.

Thus the question of admissibility of such evidence was being decided at the hearing. It is not being decided now. The learned Counsel for the Defendants should therefore have been addressing me at this stage on the legal effect of having admitted such evidence. It was not the court which was ordering admission after Mr. Onyambu had insisted on not having the evidence admitted. He was merely pointing out the defects and thereafter letting Mr. Gaturu's witnesses produce the evidence.

Let me now get down to figures and I will go by prayers in the Plaint stating with General Damages which is under prayer (b). That has been split by the parties into two parts so that they have

(i) General Damages for Pain and Suffering;

And

(ii) General Damages for Loss of Future Earnings

For Pain and Suffering, the Plaintiff has raised a figure of Kshs.2,000,000/= he gets from case authorities to Kshs.20,000,000/= for himself. The Defendants are prepared to accept paying Kshs.750,000/=

I will allow Kshs.2,500,000/=

General Damages for Loss of Future Earnings the Plaintiff has put the figure at Kshs.54,000,000/= on the basis that he would have been a lawyer in private practice earning Kshs.150,000/= per month for 30 years until the age of 55 years. The Defendants are prepared to pay a total of Kshs.662,040/=

But first agree on what we are talking about as words are used interchangeably without regard to their real meanings. Prayer (b) is talking about "Loss of Future Earnings". Counsels in their respective written submissions talk of "Loss of Earnings" interchangeably with the words "Loss of Future Earnings". I will assume the two statements in quotes mean the same thing.

It can therefore be said the claim was specifically pleaded. But it has to be strictly proved like Special damages. The Plaintiff put it in General Damages and therefore found it convenient to pick on a figure Kshs.150,000/= salary per month.

But here we have a Plaintiff who can be likened to a person who died before he was employed. He may have

wished, before he died to be employed as a doctor. Has it to be assumed, after his death, that he was necessarily going to be a doctor? Would it be proper to pick a particular salary scale, among doctors, and assign it to him? This was not a person who was taking a law course. He was in a secondary school where most students wish to go to university to pursue certain courses which they never manage to do without even having been involved in an accident like the Plaintiff was here. The accident occurred when the Plaintiff was in Form II in secondary school and no evidence was adduced to show that at any stage during his secondary school studies, the Plaintiff exhibited the academic standard suggesting he was only destined to work as a lawyer.

In his evidence the Plaintiff never told the court he intended to be a lawyer. He called no evidence to that effect and/or to show what a lawyer would earn and whether as a lawyer he would work in the public sector or in the private sector. It is impossible for anybody to say the Plaintiff could not have opted for something else all together. It is also impossible to say when he will have commenced earning and retire from employment.

Further more, and as Mr. Onyambu points out, the Plaintiff's present condition is not as extreme as the Plaintiff would wish the court to believe that the Plaintiff is retarded and reduced to cabbage, that he is severely impaired; that he will require a specialized helper for the rest of his life and that he cannot possibly do anything at all for his whole life. He is just completing his early twenties and it is possible things can get brighter with the Plaintiff who was able after the accident while in Form II, to successfully complete Form III and VI attaining a mean grade of C in the Kenya Certificate of Secondary Education.

In these proceedings, evidence is that the Plaintiff has never been employed and therefore if he has to be assigned a salary, there is no basis, in the circumstances for placing him anywhere else above the minimum wage in this country. Both Counsel are not mentioning that minimum wage although Mr. Onyambu says the Court in Nairobi HCCC No. 1202 of 1992 – KINYOSI KITUNGI VS SIMON OKOTH & ANOR a sum of Kshs.840,000/= based on the minimum wage was awarded, while in NAIROBI HCCC No. 335 of 1996 HENRIETTA MAHERO KAJAMATI VS TERRY BELL & ANOTHER, a sum of Kshs.900,000/= based on minimum wage. Why should the Plaintiff in this suit get less suggested to be Kshs.662,040/=? Conversely, why should he get Kshs.54,000,000/=? I will give him Kshs.1,000,000/= bearing in mind possibility of obtaining additional future earnings the Plaintiff herein being a live unlike deceased Plaintiffs in the cases referred to above, and further bearing in mind failure by the Plaintiff to sufficiently prove this part of his claim.

Looking at special damages, it is surprising that these retained a number of foreseeable problems which could have been easily eliminated. Out of a total claim of Kshs4,268,984.75 the Defendants are therefore conceding Kkshs.172,709/= only.

Originally, a total sum of Kshs.7,847,032/= was pleaded. That was reduced to Kshs.3,387,032/= during the hearing. But at the end of hearing the Plaintiff was endeavouring to prove a total of Kshs.4,268,984.75.

Otherwise documents required to be stamped for stamp duty were not so stamped. But Plaintiff brought them to be admitted in evidence and had them so admitted. So were documents in Arabic Language; no proof for Kshs.33,600/= said to be cost of Care taker; discrepancy in total figure for physiotherapy expenses; Exhibit 15 a book containing hand written entries claimed to be payments for physiotherapy sessions. No better evidence to support the claim in Exhibit 15, telephone expenses in Dubai Kshs.24,150/= claimed on the basis of used scratch cards allegedly used in connection with Plaintiff's medical treatment in Dubai, yet it is common knowledge anybody can collect any number of used scratch cards and bring them to court; proving amount in excess of amount pleaded; claiming money for Report of Dr. Michael Gross never seen in court; Kshs.33,000/= pleaded but not proved; future medical expenses for physiotherapy pleaded to be connected with Exhibit 15 which in view of comments by Mr. Onyambu, not acceptable. Moreover Plaintiff himself in his evidence said that physiotherapy session, ceased in year 2007; pleading Kshs.600,000/= for future medical care; but no proof provided and even PW 7 said such treatment not going on; cost of specialized house help for five years – total Kshs.540,000/=. No sufficient proof.

From what I am saying, I will have to deduct the following from what the Plaintiff is claiming as special damages:

Physiotherapy no evidence………………..……………………………….. Kshs. 600,000/=

Future Medical Neurorehabilitation no evidence…………….. Kshs. 600,000/=

Cost of special House Help not proved……………………………………. Kshs. 540,000/=

Cost of Care Taker at Hospital (KNH) Not proved……………………. Kshs. 33,600/=

Mr. Michael Gross's Unseen Report……………………………………….. Kshs. 29,974/=

Fuel pleaded item (k) not proved…………………………………………… Kshs. 33,000/=

Total………………………………………………………………………. Kshs.1,836,574/=

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Balance Special Damages to be paid

Kshs.3,387,032 - less Kshs.1,836,574/=

Kshs. 1,550,458/=

Rounding up Kshs.1,550,500/=

To conclude therefore, judgment on damages is hereby entered for the Plaintiff against the Defendants jointly and/or severally as follows:-

1) Pain and Suffering ……………………………………………………… Kshs.2,500,000/=

2) Loss of Future Earning………………………………………………… Kshs.1,000,000/=

3) Special Damages…………………………………………………………. Kshs.1,550,500/=

Total……………………………………………………………………… Kshs.5,050,500/=

Less 10% Contribution……………………………………………….. Kshs. 505,050/=

**TOTAL DUE…………………………………………………………………… Kshs.4,545,450/=**

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In addition, Defendants to jointly and/or severally pay costs of this suit to the Plaintiff plus interest on the decretal sum at court rate from date of this judgment till payment in full.

Dated this 5th day of February 2010.

**``J.M. KHAMONI**

**JUDGE**

**In the Presence of**

M/s E.T. Gaturu, Advocates for the Plaintiff.

M/s Nyaundi Tuiyott & Co., Advocates for the Defendants

Court Clerk: Kabiru

**Court:**

Further order uopon oral application by Mr. Onyambu:

There be a stay of execution for 30 days from to-day.

J.M. KHAMONI

JUDGE

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1015 of 2003**

**A.A. M ……………………………………..PLAINTIFF**

**versus**

**JUSTUS GISAIRO NDARERA…………………………………………..1ST DEFENDANT**

**MICHAEL OCHICHI KOROSO………………………………………2ND DEFENDANT**

**JUDGMENT**

By a plaint dated 2nd October 2003 and filed that same date, the Plaintiff instituted this suit as a minor, suing through his father and next friend A. M. H, praying for judgment against the two defendants in this suit, jointly and/or severally for:-

> **"(a) Special damages for Kshs.3,387,032/= plus interest at court rates until payment in full;**
>
> **(b) General damages for pain and suffering and loss of future earnings together with interest at court rates;**
>
> **(c ) Costs of this suit together with interest at court rates;**
>
> **(d) Such further or other relief as this Honourable court may deem fit and just to grant."**

The DefendantS filed a defence dated 17th December 2003 to which the Plaintiff replied in his reply to defence dated 14th January 2004.

The case was first listed before me on 21st May 2007 when it was for hearing and hearing started on that date, with Mr. Evans Thiga Gaturu, Senior Counsel, representing the Plaintiff and Mr. Onyambu from M/s Nyaundi Tuiyot & Co., Advocates, representing both Defendants.

Bearing in mind the date of this judgment, from the commencement date of hearing 21st May 2007 aforesaid, this is the case I have heard for the longest period of time in the history of my Judicial Service in Kenya exercising all jurisdictions I ever had. Several times I considered my option of disqualifying myself from further hearing of the case because it had become impossible for me to manage the pace of proceedings with a view to finalizing hearing without delay. But, thank God, I restrained myself every time till the end, fully aware when it comes to the issue of delay, everybody else in Kenya is, and will be blaming me and only me, a ready and sole scapegoat. May God bless them all.

I was to say, and let me add, that at the time hearing of the suit commenced before me, the minor Plaintiff had become of age and as an adult had taken over as full and competent Plaintiff in the place of his father. The accident, which interfered with the Plaintiff's studies, had struck when he was in Form II but he subsequently struggled on and

manage to complete his education up to Form IV.

According to the evidence, at all material times the 1st Defendant was the driver of a Nissan Van Motor vehicle Registration No. KAN 605 J, which at the time had foreign registration No. VRGE 24569995/DUBAI 38263 when at about 7.30 a.m. on 16th May 2001 along Mombasa road that motor vehicle veered off the road and hit the Plaintiff violently knocking him down to the ground. The Plaintiff alleges that the motor vehicle was being driven and controlled by the 1st Defendant negligently in that the Defendant,

**(a) Drove at a speed which was too fast in the circumstances;**

**(b) Drove motor vehicle KAN 605 J without due care and attention;**

**(c ) Failed to keep any proper look out or to have any sufficient regard for pedestrians standing or walking besides the road;**

**(d) Failed to see the Plaintiff in sufficient time or at all to avoid knocking him down;**

**(e) Failed to heed the presence of the Plaintiff who was standing beside the road;**

**(f) Failed to stop, slowdown or swerve or in any other way so to manage or control his said motor vehicle in such away as to avoid the accident;**

**(g) Failed to keep a proper control of his motor vehicle to prevent it veering off the road and knocking the Plintiff;**

**(h) Drove his motor vehicle off the said Mombasa Road;**

**(i) Drove, managed and or controlled the said motor vehicle No. KAN 605 J in a way that was dangerous to pedestrians and other road users besides the said road so as to cause the said accident;**

**(j) Drove a defective motor vehicle;**

**(K) knocked down and seriously injured the Plaintiff requiring lengthy hospitalization;**

**(l) Deliberately caused the said accident by reason of his negligence in driving off the said road and thus injuring the Plaintiff seriously;**

**(m) Failed to comply with the requirements of the Traffic Act Cap 403 of the Law of Kenya and the Highway Code of the Laws of Kenya.**

Stating the Plaintiff was relying on the doctrine of **"Res Ipsa Loquitur",** the Plaintiff in paragraph 8 of his Plaint enumerated particulars of injuries as

**"a) Fracture of the left Temporal Lobe.**

**b) Left Temporal Lobe Extradural Hematoma with no midline shift.**

**c) Intracelebral Haemorrhage.**

**d) Diffused Brain Oedema.**

**e) Paralysis of the Right Hand especially at the forearm and fingers.**

**f) Shortening of the right leg."**

He gave particulars of what he called **"PRESENT PAIN & SUFFERING"** during that time by 2nd October 2003 when this suit was filed, as follows:

**“i. Frequent migraine headaches which occur several times a week on a daily basis;**

**ii. Reduced memory;**

**iii Reduced cognitive function;**

**iv Right sided weakness**

**v significant speech deficit;**

**vi Severe headaches, seizures and retardation reducing him to a cabbage.”**

The 2nd Defendant was sued as the Registered owner of the above mentioned motor vehicle registration No. KAN 605 J and therefore liable vicariously in negligence on the part of the 1st Defendant who was driving the motor vehicle when the accident occurred.

At the time of the accident, the Plaintiff was a student at Highway Secondary School, Nairobi South B, as a day scholar, since the year 2000. When the accident occurred, he was going to school walking on foot when the motor vehicle driven by the 1st Defendant hit the Plaintiff from behind making him fall on the tarmac although he had been walking along the road outside the tarmac. Evidence is that the Plaintiff thereby lost consciousness and only regained it when already admitted at Kenyatta National Hospital, where he remained admitted for a long time before he was first discharged.

During the hearing the Defendants who had filed a defence denying liability conceded liability in full save for a 10% contribution which the Plaintiff conceded to. The trial therefore proceeded on the basis of a consent that the Defendants were 90% liable for the injuries suffered by the Plaintiff on 16th May 2001 due to negligence on the part of the 1st Defendant. With the exception of PW 5 Dr. Kiboi Julius Githinji who was a common witness, the Defendants elected to bring no witnesses, but had their learned Counsel, Mr. Onyambu, rigorously cross examining witnesses who gave evidence in this matter.

The Plaintiff called seven witnesses, including the common witness aforesaid, all adducing evidence for the purpose of assessing damages, general and special, the question of liability having been settled. That being the position, I do look at what learned Counsel on each side said in written submissions starting with Mr. Gaturu.

According to Mr. Gaturu, PW 3, Dr. R.P. Lubanga, testified to the effect that according to his latest Report of 18th June 2007, that the Plaintiff has a permanent right-sided weaknesses and the Right hand maintains a permanent flexed position. He is not able to extend his fingers voluntarily. He also noted a Disuse Alropty in both the right upper and lower limbs. And a Neurological Examination revealed that the central Nervous system and the Murcalosceletal system had no changes such since his earlier examination on 23rd September 2002.

In that report Dr. R.P. Lubanga had found that the Plaintiff had not yet regained complete function of his right hand and even though the fingers exhibited power grade 5, he was still not able to execute the prensision grip. The co-ordination of the fingers and the hand as a whole was still grossly deficient. He also had to continue the use of a splint to prevent deformity of the hand.

The limb was basically useless and cannot take part in activities of daily living. He could not predict how long the hand would take to recover but there was a possibility of the hand never recovering at all.

The Plaintiff had an impaired memory which had affected his ability to perform routine chores. On several occasions, when sent by his parents to pay for utilities, he would go to town and come back in the evening with nothing having forgotten the reason he went to town in the first place.

The headache, poor memory and recrolepsy led to his dropping out of Computer College that he had enrolled after finishing school in 2004.

He concluded that even after re-examining and re-evaluating the Plaintiff he confirmed that his future out look had not changed since he examined him and wrote out a Medical Report on 23rd and 18th October 2002.

PW 2, Dr. Margaret Makanyengo; in her report of 21st June 2007, told the court that the Plaintiff was sent to her

for a Psychiatric evaluation on 20th June 2005 as she is a Psychiatrist and she recommended compensation for the permanent Damage and incapacitation that he acquire

acquired as result of the head injury. She recommended medication, counseling and rehabilitation.

On interviewing him, she found that he was able to communicate but with much difficulty having developed Dysarthria (difficulty in speaking) which was now irreversible after the accident. Even though he can perform basic self care and household choves, he occasionally gets discomfort on the limbs and dumbness.

He was easily angered by his siblings and other household members and he occasionally exhibits irritability and aggression. He was not able to remember things or concentrate easily especially in academics and cannot therefore go back to college. He requires long term medical follow-up and rehabilitation which would cost money hence compensation.

On Examination she found his General Condition stable. On Mental Status examination, the residual psychotic features observed that he would occasionally talk to himself. She found his behavior stable although occasionally aggressive and his mood was stable. His speech was slow with difficult in pronouncing words. His Rapport was fair although difficult to hear all words. His perception was occasionally hallucinatory behavior and thought was normal.

For Cognitive Function his orientation was good but concentration was low. His memory was poor recent memory and insight was present.

She formed the opinion that the Plaintiff had permanent residual effects of brain injury with symptoms that may never resolve. He would therefore need long-term rehabilitation and medication to enable him to cope with daily chores. She recommended at least 40% mental incapacitation because he would never be able to resume college again.

She had treated him soon after the accident on 16th May 2001 and she produced her Medical Report of 20th June 2005 which contained her Report on the Plaintiff as at 16th May 2001 and the type of treatment she gave him until he was referred to Dubai for further treatment in November 2001 after a referral by his Neurosurgeon. Even after intensive treatment in Dubai Residual symptoms seemed more Permanent in nature has permitted. These symptoms seemed to have interfered with his normal functions to such a point that he was incapacitated, to such an extent such that he may never achieve some goals that he may have had if it had not been for the accident.

He requires long-term occupational therapy and Physiotherapy to enable him to cope with his day to day functions and daily use of oral tablets.

P.W. 5 Dr. David Eric Bukusi: produced his Medical Report dated 19th June 2007 and also testified to the effect that Dr. Josephine Omondi, his partner, had examined the Plaintiff on 18th August 2004 and drawnout his Report. During the Evaluation on 8th October 2004, the Plaintiff complained of permanent headaches, weaknesses of the right side of the Body, difficulty with focusing the right eye and getting extremely tired on a minor exercise. He had a ferocious appetite, laughed inappropriately, was very irritable and forgetful though he could read and comprehend. His school performance had reportedly deteriorated and he had a significant discipline problem contrary to what he was before the accident – a humble hard working and helpful person he was before the accident. He had difficulties in mood regulation, poor peer relationships, below average academic progress and disciplinary cases, all combining to be captured as a change personality unlikely to change soon.

On examination on 12th June 2007 it was found that he had right sided weaknesses of the body including the arm and the leg. He had loss of body mass on the right side of the body. He had frequent headaches and poor memory. He got easily tired and had inappropriate laughter. He had variations in appetite from ferocious appetite to amorexia (lack of appetite) continued to have mood swings and inappropriate laughter. He had a clear loss of muscle mass of the right side of the body very marked with the right hand which is now unlimited for support. He had to have a height adjustor in his right shoe for balancing. His concentration is very poor starting from between 30-45 minutes at a time and can hardly jog despite several trials and had to walk with a cane more often than not.

Dr. Bukusi concluded that the Plaintiff continues to have a markedly changed personality with marked mood swings poor concentration, inappropriate laughter and irritability, interfering with his ability to substantially learn new skills and negatively impacting on his social interactions. Physically, he has had body wasting resulting in weaknesses of the whole Right side of the body again negatively impacting on his ability to carry himself around.

Dr. Bukusi recommended that the Plaintiff undergoes continuous physiotherapy to keep up body strength mass

and ability to use his weakening limbs. He also requires regular mental health review to plan for management of his difficulties of mental function and further management of his mood signs. These difficulties would most probably continue for the rest of his life and he will require continuous medical care.

P.W 4, Prof Dr. Eratus O. Amayo: He testified that he reviewed the Plaintiff on 5th June 2007. He got the History of the Plaintiff as having been admitted to Kenyatta National Hospital following a Road Traffic Accident on 16th May 2001 with a diagonosis of severe head injury. C.T. Scan had revealed intracerebral haemorhage and subdural haematoma.

On admission had several issues:-

(a) confusion state and

(b) Generalized seizures.

Due to his violent behavior confusion and disorientation, he was seen by a psychiatrist. He was treated but remained in dysphasic and with right sided weakness. His current complaints were, constant headache, right sided weakness, feeling that his right leg is shorter, mood swing, inappropriate laughter and excessive eating. He was in a fair general condition but his Central Nervous System was oriented in time, space and person. Memory was normal, speech was appropriate and he had a scar on the left frontal region, and right sided weaknesses with increased flexes.

He formed the opinion that the Plaintiff had made major improvement but he was still not able to function to his capacity. He was not able to achieve his academic goals due to an incapacity of a permanent nature and he will require constant medication and follow up. He placed his permanent disability at 30-40%.

**P.W 1 Dr. (Mr) Kiboi Julius Githinji**:- come to give evidence as a common witness by consent of both parties. He had been commissioned by the Defendants but his Medical Report was good and reliable and he thus testified as a witness for both parties and he told the court that the Plaintiff suffered major injuries in the Central Nervous System. Although his speech is short he is able to communicate properly and is fully conscious orientated in time, person, and space. He has a left frontoparnetal scar well healed with prominent skull bore. He has no critical nerves palsy but the neck is supple and none tender. The right upper and lower limb has reduced bulk compared to the left. The forearm 10cm below medical epicondyle diameter is 25 cm while the left is 25.5 cm.

The thigh diameter 20 cms above tibial tuberosity on the right is 38 cm and left 42 cm half muscles 10 cm below tibial luberosily is 30 cms on the right and 34 cms on the left.

He had increased tone on the right upper and lower limb with brisk reflexes of the upper elbow. The right elbow and right knee jerk. Sensation is intact. His lower for the upper limb flexors and extensors upto elbow is power grade 5. He is not able to flex and extend the right upper limb wrist joint. The right had fingers are spastic and in flexion deformity. On passive movements, they extend but with spastivity. There is flexion at the metacarpo and interphalanged joint. The lower limb is lower grade 5 has slight spasticity and brisk knee reflex and reduced muscle bulk but he is able to walk normally. The CT Scan brain performed on 19th December 2001 revealed a hypodeuse lesion at the front peretal area which were post confusion changes. Subsequent scan performed on 23rd June 2003 showed persistence of the hypodence tession. He claims that his speech has been affected but basic lip movements tongue and soft palate movements in relationship to speech are normal. He cannot write or use the right hand due to the flexion deformity of the fingers.

As a result of that he will continue to have a headache and dizziness as part of the post concussion syndromes and persistent right sided weakness remains though he has power grade 5. The right hand is not functional due to spaciticity and flexion deformity of the fingers so he cannot use the right hand. This will hinder most of the functions of daily living.

Due to the hypodense lesion on the left hemisphere there is a possibility of getting confusions in future as part of post traumatic epilepsy. There is a history of use of epamistin while in hospital and after discharge. He needs a follow-up for 3 years since stopping epamition to prognosticate the likehood of epilepsy.

The frontal painetal confusion could also explain his mood effect but this is latter followed up by a psychiatrist to give further outcome. He had aggressive behavior immediately after discharge and the Doctor recommended follow-up.

In nutshell, what all these 5 Doctors were saying was that the Plaintiff had suffered a very severe brain damage which completely affected his bodily functioning to an extent of a permanent disability of over 40% following the Road Accident on 16th May 2001. The brain damage suffered was so severe that a Young Boy who was an average B student while in Form II dropped so much as to end up with a C- and could not achieve his dream to become a lawyer. His right hand is non-functional and he cannot even manage through a Computer College.

***Dr. Bukusi in his evidence told the court that "through God's Grace, he can eat and remain alive," "but cannot perform any of his bodily functions like working and so on and is therefore not useful to the family and society as a whole because he cannot engage in any type of work at all." He is actually a cabbage and a great liability cause he can never do any type of work for the whole of his life time."***

He therefore requires adequate compensation so as to sustain him for life of not working.

After that evidence from doctors, Mr. Gaturu proceeded to submit on General Damages stating that if the Plaintiff had not met with the accident on 16th May 2001 he would have met his ambition of becoming a lawyer and if he worked in the Civil Service, he would have worked a full-blown legal career upto 55 years and if he went to private practice, he would have earned approximately Kshs.150,000/= per month upto 55 years. A multiplier of 30 years would be fair and reasonable which would mean that his expectation in life for the career of a lawyer would have earned him Kshs.54,000,000/=. There is no possibility that he can earn anything at all for the whole life and therefore a sum of Kshs.54,000,000/= would be fair and reasonable in the circumstances.

He would also be having full use of all his limbs and his brain would be alright and not damaged. The damage done to brain would therefore require adequate compensation for life sustenance.

He said that case Authorities in this area during the eighties and nineties in the Award of General Damages revolved around a figure of Kshs.2,000,000/= considering inflation and the money market, over the years then an award of damages of Kshs.20,000,000/= would be fair and reasonable.

Mr. Gaturu referred to **APPENDIX II NOTER-UP OF GENERAL PRINCIPLES IN AWARD OF GENERAL DAMAGES** stating as follows:-

***"1) Appendix II contains a Note-up of General Damages saying that in assessing general for personal inquiries, "one has to bear in mind and consider the bodily injuries sustained, the paid undergone, the effect on health of the injury suffered according to its degree and its probable duration as likely to be temporary or permanent the expenses incidental to effect and or lessen the amount of paid and pecuniary loss".***

He added that the Law as expounded therein in the Principles of Assessment of Damages is correct and should be followed by this court in its Award of Damages. Following those principles, there are several judgments in the Noter-up dealing with Head injuries some of them very severe.

In **Walter Obala Ogol vs Noor Mbugua Njoroge HCCC 484 of 1989 (Nairobi)**; the Plaintiff had in addition to a fracture of the Right Orbital Margin of the head suffered a rapture of the Cronio and fracture the 4th right rib left 1st and 2nd ribs.

**An award of Kshs.168,770/= was made on 16th October 1993**

In **RAVENNES KAMONZO NZUKI VS RUJI MWANIKI NJUE & 2 OTHERS HCCC 143 OF 1992 MOMBASA:** The Plaintiff suffered head injuries along with fractures of 8 ribs pneumonia, contusion of the lungs and fractures of the pelvis damages of **Kshs.531,000/= were awarded on 16th July 1993.**

In **YWOLONGAR LOSIAMURO VS LOCHAB BROTHERS & ANOTHER MOMBASA HCCC 48 OF 1998:** The Plaintiff suffered head injuries, laceration of right forehead and a crush of the right leg. **General damages of Kshs.824,000/= were awarded on 30th December 1991**.

In **OCHIENG VS AYIEKO (1985) KLR 494:-** A 10% contribution for liability was admitted. The Plaintiff was a child of tender years aged about 10 years at the time of the accident, and he suffered severe brain damage and compound injuries of the left thigh. **General damages awarded were Kshs.700,000/= plus Kshs.630,000/= less Kshs.70,000/= ie Special damages of Kshs.630,473/= giving a total of Kshs.1,260,473/=.**

In **GRACE WANJIRU MBAGA VS MISSION TO SEAMEN AND MOHAMED YUSUF HCCC 4 OF 1992 – MOMBASA:-** The Brain injuries suffered by the Plaintiff was such that the Plaintiff will never be employed for the rest of her life. Even though she was 38 years at the time of the accident a multiplier of 15 was applied and she was **awarded General damages of Kshs.2,000,000/= plus special damages of Kshs.58,450/40, loss of future earnings or future earning capacity Kshs.368,172/- and Nursing case of Kshs.720,000/= coming to a total of Kshs.3,146,622/40.**

We should not lose sight of the fact that this Award was made on 22nd September 1994 which is more than 15 years ago. Taking into account the rate of inflation of the shilling, this award today could be in the region of 30-40,000,000/= 15 years later.

In **JAMES KATUA PETER VS SIMON MUTUA MUASYA HCCC NO. 135 OF 2001 MACHAKOS:-** The Plaintiff suffered bodily injuries including head injuries. He was **awarded Kshs.2,000,000/= for pain and suffering, and Kshs.5,000,000/= and cost of future operation arising from the injuries suffered. Judgment was delivered on 8th February 2008.**

In **JOHN MASENO NGALA & GENERAL MOTORS LTD. VS DAN NYAMAMBA OMARE A MINOR SUING THROUGH ISSAC JAMES OMARE (NEXT FRIEND) NAKURU HCCC NO. 320 OF 2002:- Damages of Kshs.2,001,100/= were awarded by the High Court sitting at Nakuru for head injuries.** The Defendant appealed arguing that Kshs.2,001,100/= was excessive and should be reduced. On 10th November 2006, the Court of Appeal dismissed the Appeal on the ground that the award of the High Court was fair and reasonable and not considering the nature of injuries suffered by the Respondent (Plaintiff) and his mental capacity was severely affected. It was stated.

Money cannot renew a physical frame that has been battered and shattered and all that courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair to both the Plaintiff" their Lordships observed in dismissing the Appeal against Quantum.

All what these authorities are saying is that injuries suffered must be compensated adequately by way of damages. While it is true that no amount of Damages can restore the Plaintiff to what he/she was prior to the accident, nevertheless the award of damages must try as much as possible to re-assure the Plintiff that efforts are being made, by way of damages to restore him to what he was prior to the accident.

The essence of damages is to keep on trying to re-settle the victim to as much as possible the position he was before the accident by "*repairs'* so as to be back to normal.

In **PAUL BECKINGHAM, MARY BECKINGHAM AND AARON BECKINGHAM VS THE ATTORNEY GENERAL AND HARET ABDI HCCC 2268 OF 1998 NAIROBI** The 1st Plaintiff together with his wife and son met with an accident at about 6.00 p.m. in the evening along Limuru Road.

The 3rd Plaintiff Aaron who was then aged 10 years suffered soft tissue injury to the right side of the head soft tissue injury in the right lower arm was found 4 years later to have post traumatic disorder as a result of the accident manifesting itself in anger, volatile words, insecurity and dropping academic performance. The Doctor recommended family and individual psychotherapy for the next five (5) years.

The 2nd Plaintiff who had serious head injuries had psychotherapy and was recommended family and psychotherapy and was awarded of General Damages of Kshs.600,000/= on 18th April 2002. General damages awarded to the 1st Plaintiff were 4,000,000/= including damages for the head injuries.

The judge took into account both inflation and the nature of the injuries in awarding damages.

In **SCOPHINAF & COMPANY LTD AND JAMES GTIKU NDOLO V DAVID NG'ANG'A KANYI HCCC 315 OF 2001 (NAKURU)**:- The Plaintiff sustained a compound depressed skull fracture of the right frontal bone and was admitted in Hospital in a confused state. After surgery was carried out and he was admitted for 4 ½ months, he was left with an unsightly scar on the frontal region of the head (the size of a Duck's egg) and a large depression. Due to the brain injury he was unlikely to engage in gainful employment.

The Court of Appeal refused to reverse the Award of Damages of Kshs.3,020,000/= on the ground that it was fair and reasonable in the circumstances taking into account the nature and extent of the injuries suffered by the Plaintiff to his brain and body.

Young Abdirazak had his life interfered with by the accident at the age of only 15 years and today at 25, he has

never come back to normal again. As per the Doctors' Reports, he is completely incapacitated and will never be able to work at all throughout his life. According to one Doctor, ***he is alive by the Grace of God! "he can eat!" "but beyond that he is a nobody" because he cannot work at all!. "Life is not just about being alive and eating! "There is work to do and the poor young man cannot do any work!"***

In that respect he is a cabbage and just a figure moving around and therefore he needs to be adequately compensated.

Mr. Gaturu further submitted on **SPECIAL DAMAGES** saying that the Appendix II Noter-up of general Principles of Assessment of Damages has got a write-up also on Special Damages.

Injured person is entitled to Loss of earnings/profits upto the date of the trial. They must be both specifically pleaded and proved.

The Plaintiff through PW 7 produced documents and evidence in support of his claim for special damages amount to Kshs.2,528,884/75 made up as follows:-

**Special Damages:**

**1. Medical Expenses incurred at**

**Kenyatta National Hospital………………………………. Kshs. 22,500/=**

**2. Dr. R.I. Lubanga ……………………………………………. Kshs. 22,500/=**

**3. Dr. Margaret Makanyego…………………………………… Kshs. 11,600/=**

**4. Dr. David E. Bukusi…………………………………………….. Kshs. 3,000/=**

**5. Dr. Modi………………………………………………………………. Kshs. 1,000/=**

**6. Eratus O. Amayo……………………………………………….. Kshs. 8,000/=**

**7. Medical Expenses at Nairobi Hospital………………… Kshs. 3,720/=**

**8. Medicines bought by the Plaintiff………………………. Kshs. 104,463/=**

**9. Payments to Chinese Doctor………………………………. Kshs. 8,600/=**

**10. CT Scan carried out at MP Shah…………………………… Kshs. 8,000/=**

**11. Physiotherapy at Mater Hospital……………………….. Kshs. 13,650/=**

**12. GYM Costs………………………………………………………… Kshs. 2,150/=**

**13. A 2nd CT Scan …………………………………………………. Kshs. 7,000/=**

**14. EMS Speedpost Charges…………………………………….. Kshs. 1,914/=**

**15. Dr. Micheal LP Groves's Fees for a**

**Medical Report………………………………………………….. Kshs. 34,500/=**

**16. Taxi Costs while at Dubai to and from Dubai**

**Hospitals……………………………………………………………. Kshs. 72,160/=**

**17. 3 Air Tickets to and from Dubai for Treatment and**

**3 visas to Dubai……………………………………………….. Kshs. 187,780/=**

**18. Hotel Accommodation while at Dubai…………………. Kshs. 321,000/=**

**19. Medical expenses at Dubai Hospital……………………… Kshs. 71,625/=**

**20. Treatment and Speech therapy…………………………… Kshs. 5,500/=**

**21. Purchase of Special shoes at Dubai……………………… Kshs. 4,000/=**

**22. Costs of Scratch Cards used at Dubai…………………… Kshs. 24,150/=**

**23. Food used in Kenyatta National Hospital……………. Kshs. 15,914/=**

**24. Food eaten at Dubai during treatment……………….. Kshs. 379,452/75**

**25. Payment to 4 men who guarded the Plaintiff**

**While undergoing treatment……………………………… Kshs. 33,600/=**

**26. Additional Medicines at Dubai…………………………… Kshs. 5,525/=**

**27. Expenses and food bought at both Uchumi and**

**Nakumatt Supermarkets……………………………………. Kshs. 20,459/=**

**28. Petrol expenses when taking the Plaintiff to Kenyatta**

**National Hospital, Nairobi Hospital and Mater**

**Hospital………………………………………………………………. Kshs. 12,183/=**

**29. Grand Total…………………………………………………………….. Kshs.2,528,884/75**

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It is true that some Receipts in Item No. 24 above (Exh. 48) were written in Arabic both the Items charged and the money charged. Such receipts are coming to a total of Kshs.118.190/=. But the said sum of money is still claimable because there is clear evidence that the money being claimed under the receipts in question because:- long before the case started and Demand Letters were sent to the Defendant in 2002/03, by even their lawyers on request, the receipts in question were forwarded to both the Defendants directly and to his lawyers while still in Arabic and the figures therein claimed from the Defendants and no issue was then raised by the Defendant and/or their Counsel regarding the fact that the same were in Arabic. The total receipts in Arabic out to Item 27 (Exh 48) amount to Kshs.118,190/=. If the Defendants were sincere in objecting to the receipts in Arabic they should have objected from the beginning in 2002/2003 when correspondence started being exchanged and photocopies supplied to the Defendant by the Plaintiff's then Lawyers MS Ibrahim & Ishaak Advocates and later M/s Muthoga Gaturu & Company, Advocates, and Evans Thiga Gaturu, Advocate but the issue was raised during Cross-examination.

There is no good faith on the part of the Defendant's Counsel in objecting to the production of receipts that he has never objected to in the past and only raised it during cross-examination. The receipts being objected to come to Kshs.118,190/= and the balance of Kshs.261,262/75 is already proved by way of Receipts written in English. But the Plaintiff claims the entire amount of Kshs.379,415/75 as it is fair and reasonable and there is no problem in the Court awarding the whole amount.

The Defence Counsel raised an issue of the receipts from Dubai not bearing Revenue Stamps under the stamp Duties Act Cap 480 of the Laws of Kenya. In answer to that, the Plaintiff responded that he was not aware that all receipts from Dubai needed to be stamped and he informed the court that he was never told to have then stamped within

30 days of arrival from Dubai in January 2002.

It would be extending the provisions of the Stamp Duties Act too far to claim that all Receipts from Dubai be stamped because it is not practical in that the Plaintiff could not have anticipated in 2002 when he brought in the receipts that the Defendants would invoke the provisions of the Stamp Duties Act 7 years later in 2009 when the case was being heard, in Cross-examination. Quite clearly the issue of failure to stamp the Receipts from Dubai is an afterthought and should not be used to deny the Plaintiff Justice that he is properly entitled.

The Defendants are stopped from raising an issue they should have raised SEVEN (7) years ago.

Section 19 of the Stamp Duties Act is not usually enforced and claim for Special Damages where Receipt from overseas are tendered in Evidence in a suit for damages has been allowed by the High Court in the past.

In the case of **Paul Beckingham & 2 Others vs The Attorney General & Another HCCC 2268 of 1998 Nairobi High Court, the Hon. Justice A. Visram J., (as he then was) admitted Receipts for a Medical Report issued in Canada** during a hearing before him here in Nairobi. The issue of Stamp Duties did not arise in that case and no issue was raised.

The judge held *"**the authenticity of the Receipts was not disputed and there can be no possible prejudice cause to the Defendants only because they were produced by the Doctor to whom the Payment of the sums sought to be proved was made and not the persons charged" "and it would beat logic to require the Plaintiffs to increase traveling all the way from Canada to come and prove such a small claim for Kshs.9,000/=". "I therefore dismiss Mr. Rotich's objection to the production of the receipts", the judge held.***

Likewise it would beat logic in this case to deny the Plaintiff his right to Special Damages which he has incurred, just because of not stamping the Receipts 7 years ago.

In a nutshell, the Plaintiffs claim for special damages amounts to Kshs. made up as follows:

1. Total Special Damages enumerated above…………. Kshs. 2,528,884/75

2. Add Police Abstract……………………………………………… Kshs. 100/=

3. Add Future Medical Expenses for Physiotherapy Kshs. 600,000/=

4. Add future Medical neurorehabilitation………………. Kshs. 600,000/=

5. Add Costs of Specialised House help for

   5 years @ 3,000 x 12 x15……………………………………… Kshs. 540,000/=

6. Grand Total………………………………………………………….. Kshs.4,268,984/75

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And the ***Plaintiff claims Special Damages of Kshs.4,268,984/75 plus General Damages for Loss of Earnings of Kshs.54,000,000/= as stated above and General Damages for loss of use of his hand limbs and brain and other parts that were severely affected in the Road Accident.***

The total Package for his expectation of Damages is as follows:-

1. Total special Damages…………………………………………. Kshs. 4,268,984/75

2. Add General Damages for loss of earning

For the rest of his life…………………………………………… Kshs.54,000,000/=

3. Add General Damages for loss of use of his limbs,

Hand and brain…………………………………………………… Kshs.20,000,000/=

4. Grand Total………………………………………………………… Kshs.78,268,984/75

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In addition to the said General Damages of Kshs.74,000,000/= and Special Damages of Kshs.4,268,984/75 the Plaintiff prays for costs of the suit on the Higher Scale and Interest for defending a suit which should not have been defended in first place. The 10% Contribution will affect only General damages and not Special Damages. 10% of Kshs.74,000,000/= is Kshs.7,400,000/=. The final award then will be Kshs.70.868,084/75 made up as follows

1. Total General Damages…………………………………….. Kshs.74,000,000/=

2. Less 10% Contribution………………………………………. Kshs. 7,400,000/=

3. Balance thereafter……………………………………………. Kshs.66,600,000/=

4. Add Special Damages……………………………………….. Kshs. 4,268,984/=

5. Grand Total………………………………………………………. Kshs.70.868,984/75

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The Plaintiff's entire Package therefore is Kshs.70,868,984/75 plus costs and interest as aforesaid. And the Plaintiff prays for judgment against the Defendants, jointly and/or severally for that amount plus costs.

For the Defendants, Mr. Onyambu said, starting with medical evidence and the Plaintiffs condition, that it is agreed that the Plaintiff suffered serious injuries as a result of the road traffic accident of 16th November 2001. The medical evidence herein attests to that fact.

The Defendants' contention is that the Plaintiff's present condition is not as extreme as the Plaintiff would wish the court to believe. Right from the Plaint to his submissions the Plaintiff seeks to create an extreme impression that:-

i. The Plaintiff is retarded and reduced to a cabbage (paragraph 8 (iv) of the Plaint);

ii. The Plaintiff is "severely impaired" (paragraph 9 of the Plaint);

iii) The Plaintiff "will require a specialized helper for the rest of his life"

(paragraph 9 of the Plaint);

Iv The Plaintiff cannot possibly do "anything at all for his whole life" (Plaintiff submissions p.6)

To sustain this extreme impression the Plaintiff's submissions, rather than analyze the evidence, consist mainly of a verbatim reproduction of the contents of the initial medical reports produced by the doctors when giving their evidence and producing their respective reports, the doctor (PW1-PW5) testified as follows:

Dr. Kiboi J. Githinji – PW 1 examined the Plaintiff on 20th July, 2006. PW 1 testified that:

***"On examination I found a young man in good general condition. The major finding was in the Central Nervous System. He was fully conscious oriented in time, in person and in space, was able to communicate well, but his speech was slow."***

Dr. Kiboi further stated at the close of his examination that he had seen previous medical reports by Dr. Lubanga made four (4) years earlier and **"was able to see the progress"** of the Plaintiff. On further examination, Dr. Kiboi (PW 1) further gave evidence that:

- The Plaintiff was able to communicate fully with other people;
- The Plaintiff's claim at paragraph 8 (iv) that the Plaintiff was a "cabbage" was not true

The doctor said the Plaintiff had "good outcome" and expounded by explaining the standards used in assessment of a patient's outcome as follows (i.e. in reducing degrees of severity):

1. "Death"
2. "Vegetative"
3. "Severe Disability"
4. "Moderate disability"
5. "Good outcome"

This ratings, as the doctor explained, is known as the "Glasgow Outcome scale" and is a standard used internationally.

Dr. Kiboi Githinji (PW 1) was a common doctor whose report had been accepted by both the parties and the doctor rates the Plaintiff's condition as the least severe according to the "Glasgow Outcome Scale".

Dr. Kiboi's findings are very much collaborated by the Plaintiff's own condition as was manifest from his conduct before the court. The Plaintiff testified as PW 6. The Plaintiff testified without any assistance whatsoever. He was of very lucid mind and recollection. The court record of his verbatim testimony bears out that the Plaintiff has very good speech and presentation. Aside from the apparent right side weakness (which cannot be contested) there is nothing at all to suggest that the Plaintiff is a "cabbage" or a retard, as is being shown to the court in the Plaintiff's pleadings and submissions.

In his evidence-in-chief, the Plaintiff gave a seamless and unaided historical recount of all the facts leading to his claim herein, right from the moment of the accident in 2001 up until the time he was standing in court in 2008

The defence, in cross-examination, sought to deliberately demonstrate the Plaintiff's lucidity. The Plaintiff without any difficulty could recollect his birth date and those of his siblings "His birth date was 13th October 1985 and that of his sister Fatuma was 4th October 1987" the Plaintiff stated.

The Plaintiff (PW6) further testified that he recovered his speech when he went for treatment in Dubai and in his own words

> **"I am now able to speak and communicate effectively";**

The Plaintiff further stated that the only reason why he does not go to many places alone is "due to security" otherwise he is able to make his way home alone

With regard to the condition of the right side of this body, the Plaintiff speaking of his own condition stated to the court

**"I am not saying that the right hand side of my body is useless, it is only weak in strength and coordination but my right hand, for example, can give some assistance in lifting objects."**

Nobody can claim to better know the Plaintiff's condition than the Plaintiff himself The Defendants humbly submit that Dr,. Kiboi Githinji's (PW 1) evaluation of the Plaintiff was professional and truthful and the same is collaborated by the current presentation of the Plaintiff.

PW 2 Dr. Margaret Amondi Makanyango, produced the medical reports- Plaintiff's Exhibits 2 and 3, with regard to the Plaintiff's performance in school. The doctor conceded, on cross-examination that

> **"When I say he did not perform as well as he should have performed, that is not my opinion; that is what I was told and that is how as a psychiatrist I get information and associate that information with a psychiatric problem."**

Dr. Makanyengo further stated,

> **"What I said about the Plaintiff's performance at school I did not see a report from the school."**

**(**Note" the Plaintiff's own evidence on his performance in school is Plaintiff's Exhibit No. 11 which shows an average performance of **C-** both before and after the Plaintiff's injuries).

Dr. Makanyengo concluded her medical report dated 21st June 2007 (Exhibit No. 3) with a recommendation that:

> **"The family need to be compensated at least 40% mental incapacitation because the Plaintiff will never be able to resume college again"**

In light of the foregoing, the Defendants humbly submit that, although PW 2 was testifying as an expert in her field, her opinion is clearly subjective. She made conclusions and prepared her report on the basis of casual information from the Plaintiff's father who is an interested party-without calling for basic evidence (which could have been easily availed) to collaborate. Dr. Makanyengo's conclusion about the Plaintiff's school performance are clearly embarrassing in light of the Plaintiff's own testimony and the school performance records (Exhibit No. 11).

It is also apparent that the overriding (if not the primary) objective of her report (Exhibit No. 3) is based on her perception of "need" for compensation for "The family".

Her proposition on degree of disability is also unprofessionally imprecise. The doctor recommends that the family's need to be compensated at least 40% due to mental incapacity. It is unclear whether the words ***"The family need to be compensated at least 40% mental incapacitation"*** are an emphasis of the family's need for compensation or a professional assessment the Plaintiff's actual mental ability.

The Defence humbly submits that PW 2 lost objectivity in her role as expert without which her expert opinion is of little probative value.

On cross-examination, PW 3 Dr. Reuben Paul Lugango, was categorical that the Plaintiff cannot be said to be "A cabbage" as pleaded in the Plaint.

The doctor (PW 3) described the differences between his findings and those of Dr. Kiboi (P W 1) as "differences of opinion". (He however did not fault or hold Dr. Kiboi's (PW1) opinion as wrong.)

After PW 3 endevavoured to distinguish between "orientation" and "intelligence" the Defence confronted him with the findings of Dr. Makanyengo (PW 2) who had found that the Plaintiff's intelligence as "average". PW 3 rather unprofessionally rubbished Dr. Makanyengo (PW 2)'s findings. He did not consider them as mere differences of opinion."

The good doctor (PW3) pompously (and perhaps correctly) observed that there is always subjectivity in objectivity". The Defendant humbly submits that from the demonstrated disdain PW 3 showed to the other experts called by the Plaintiff and from observation of the actual condition of the Plaintiff as manifest in his presence and conduct before the court, it is apparent that Dr. Lubanga leaned towards exaggeration of the Plaintiff's condition. His "subjectivity" was obviously wagging his "objectivity".

PW 4, Dr. Eratus Amayo, a neurologist, testified that in his examination of the Plaintiff, he concentrated on the Neurosystem and made the following observation:

a) The Plaintiff's memory was normal

b) Speech was appropriate

c) Scan on the left frontal region

d) Right handed weakness

The doctor observed that the Plaintiff

**"had made a lot of improvement from his condition at the discharge time" but he required further rehabilitation, physiotherapy and counseling**

On cross-examination, Dr. Amayo (PW 4) reiterated,

**"I am saying that at the time I examined him his memory was normal, his speech appropriate; means he was able to answer questions correctly using the right kind of words."**

PW 4 was emphatic that the Plaintiff is neither "a cabbage" nor retard as pleaded in the Plaint (paragraph 8(iv) of the Plaint).

The Defendant again humble submits that PW 4's expert evidence does not support the suggestion that the Plaintiff is the hopeless case that is made out in the Plaint and in the Plaintiff's submissions.

Like Dr. Makanyengo (PW 2), Dr. Dr. David E. Bukusi (PW 5), is also a psychiatrist. PW 5 was simply called to salvage PW 2's testimony. There is no other explanation as why a second psychiatrist was required to testify in this matter. Dr. David E. Bukusi recommended that the Plaintiff would require continuous medical care. <u>However, from the record of evidence received by the court, besides the doctor's medical reports produced as evidence, there is no evidence at all of any further medical treatment to the Plaintiff</u>. The evidence shows that after the Plaintiff was discharged from Kenyatta National Hospital on 18th June 2001, he attended treatment in Dubai until he returned to Kenya sometime in January 2002. Besides physiotherapy sessions, there is no evidence at all that the Plaintiff has needed or been undergoing any further psychiatric treatment.

On assessment of damages, like Mr. Gaturu, also Mr. Onyambu divided them into general and special damages. Starting with General damages, Mr. Onyambu said that the principles for the assessment of damages are now well settled . They have been captured in numerous decisions of courts.

The court of Appeal in **MOHAMMED JABANE V HIGHSTONE T. OLENJA (**Case No. 2 of 1986 [Vol. 1 KAR 982] [Authority No. 11 –

Defendants' <u>Supplementary</u> list of Authorities], the court restated the principles for the correct approach in assessment of damages as follows:

i) <u>Each case depends on its own facts;</u>

ii) <u>Awards must not be excessive and must take into account the need to avoid escalation of insurance premiums, medical fees, expenses in the body policy;</u>

iii) <u>Comparable injuries should attract comparable awards;</u>

iv) <u>Inflation should be taken into account</u>

The Defendant humbly submits that the Plaintiff's proposition for general damages cannot be brought within the definition of "fair and reasonable compensation" for the injuries the Plintiff has suffered. The proposition of assessment of total damages in the sum of Kshs.78,268,984.75 takes flight in the light of the principles for assessment of damages above stated.

The highest award in the most generous of the authorities cited in the Plaintiff's submissions (i.e. **John Maseno Ngala & General Motors Ltd. Vs Dan Nyamamba Omare ( a minor) – Nakuru HCCC No. 320 of 2002,** is Kshs.2,001,100.00. Upon what precedent has the Plaintiff's submission for assessment of general damages in the colossal sum of Kshs.74,000,000/= been based?

The Defendants fully agree with the first of the principles for assessment above stated, i.e. that indeed each case must be considered in the light of its own facts and circumstances, they however submit that no peculiar facts and/or circumstances have been shown in the evidence before the court to justify such an unprecedented award.

There can be no denying that the injuries suffered by the Plaintiff herein were serious. The Defendants have already conceded to substantial responsibility for the injury e.i. 90% liability but an award in the range of Kshs.74 million would most certainly be manifestly excessive in the circumstances of this case. Such an amount would be inconsistent with all known principles of assessment of damages and comparable case law. An astronomical assessment on damages such as herein proposed can only be intended as punitive.

Any award in general damages of any range near what is now proposed by the Plaintiff will send shock waves in the body politic with far reaching implications. It will also heavily impact on the cost of medical care, cost of premiums, and cost of business and ultimately have an undesirable inflationary pressure on the cost of living.

The Defendants further submit that the proposition of such an astronomical sum may be with the mischievous intent of merely weighing the court's mind with a colossal sum so as to secure an inordinately large award. A closer examination of the separate heads under which the proposed assessment of general damages has been based exposes such intent. A review of comparable awards for similar injuries shows the range of awards this court has considered as "fair and reasonable compensation."

The Plaintiff's submissions for **General damages** have been made under the following sub-heads:-

a. Pain and Suffering and Loss of Amenities

The Plaintiff has submitted for an award of Kshs.20,000,000/=

b. **Loss of Future Earnings**

the Plaintiff has submitted for an award in the sum of Kshs.54,000,000/=

On (a) the Defendants invite the court to consider the following previous awards for comparable injuries:

**JANE G. MWANGI VS SIMON SABUZI & ANOR- NAIROBI HCCC NO. 1550 OF 1999 [Authority No. 4 – Defendant's list of Authorities**

This is a recent High Court decision delivered on 19th October, 2000. The Plaintiff had suffered the following injuries:

a) Fractured skull right panatela bone

b) Head injury concussion

c) Fractured right distal clavicle bone

d) Subdural haematoma

e) Multiple soft tissue injuries

The Plaintiff in that case had the following residual problems:

a) Post head injury headache syndrome

b) Post traumatic fibromyalgia

c) Post traumatic stress syndrome

The injuries were highly similar to the injuries pleaded at paragraph 8 of the Plaint herein. The court made an award of Kshs.500,000.00 for pain, suffering and loss of amenities.

**ROGERS AYUYA OGONDA VS NJUGUNA BUILDERS & DRAINAGE CONTRACTORS NAIROBI HCCC NO. 1807 OF 1998 [Authority No. 7 – Defendants' List of Authorities]**

This decision was delivered on 12th February, 1999. A wall had collapsed on the Plaintiff resulting in the following injuries:

a) Major back injury to the spinal cord

b) The entire left side of the body was paralysed

Injuries in this case were very similar to the instant case. The Plaintiff suffered weakness to the right side of his body; he could not walk without support; could not stand; had wasting right thigh muscles due to long periods of disuse; weakened strength to right side limbs; was not able to grasp tightly-disability was assessed at 75%. (the Plaintiff in that case had submitted for an award of Kshs.2 million in general damages).

The court, after considering various decisions cited, made an award of Kshs.450,000.00

**JAMES KYULE VS ELIJAH MUSYOKA – MACHAKOS HCCC NO. 254 OF 1999 (Authority No. 5 – Defendants' List of Authorities)**

The High Court decision was delivered on 4th March, 2002.

In this case the Plaintiff had suffered:

a) A cracked skull

b) Deep cut to the right side of the head

c) Depressed nose bridge

d) Fracture to the mid-shaft of the left humerus

In addition, the Plintiff suffered serious head injury; developed post-traumatic epilepsy requiring drugs and medical review for the rest of his life.

The court assessed general damages at Kshs.988,247.00

Because the Plaintiff has made a greatly exaggerated proposition for the award for General damages for pain, suffering and loss of amenities it is necessary to demonstrate that even for more serious injuries the courts have not contemplated awards as colossal as now proposed by the Plaintiff. Consider the following;

MBAKA NGURU & ANOR VS JAMES RAKWAR – Court of Appeal Civil Appeal No. 133 of 1998

The Claimant in that case had suffered significantly for more serious injuries, namely:

i) Paraplegia resulting from a fracture of the T12 thoracic vertebra with spinal cord damage;

ii) Severed distal phalanx of the left index finger

iii) cuts on the right cheek

The Plaintiff in that case was confined to a wheel chair and had

suffered 100% incapacitation. (The High Court had made an award of

Kshs.2.5 million in general damages for paid, suffering and loss of

amenities).

On Appeal the Court of Appeal revisited the guiding principles including its own statement in Ossuman Mohammed & Anor vs Saluro Bundit Mohammed Court of Appeal Case No. 30 of 1997, that;-

> ***"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance premiums or increased fees."***

For these manifestly more serious injuries the Court of Appeal proceeded to review the award by the High Court downward to Kshs.1.5 million.

**ELDORET HCCC NO. 118 OF 1996 – PRISCA CHERONO KITICHERUIYOT VS KIARA & KIPKENEI SONGOK & ANOR [Authority No. 12 – Defendants' supplementary List of Authorities]**

High Court decision delivered on 27th May, 2004

The Plaintiff in that case had suffered much more serious injuries in comparison to the Plaintiff herein. i.e;-

i) Fractured skull (in ICU for 6 days)

ii) Severe primary brain injury with left extradural haematoma

iii) Spastic paralysis of left arm and left leg

iv) Slurred speech and poor memory

v) Temperamental

vi) Weakness of right arm

Due to these conditions she was considered "a complete invalid"

For these manifestly more serious injuries than those herein, the court made an award of Kshs.1.7 million in general damages:

Considering the applicable principles for assessment of general damages for pain and suffering and loss of amenities, the comparable awards in comparable injuries and taking into account the previous assessment of damages by the court in even more serious injuries than those of the Plaintiff herein, the Defendants humble submit that an award of Kshs.750,000.00 for pain, suffering and loss of amenities would be fair.

At paragraph 8 of the Plaint the Plaintiff states- "And the Plaintiff claims general damages for pain and suffering, loss of future earnings and loss of enjoyment of life" (underlining added). This claim is carried at prayer No. (b) of the reliefs sought in the Plaint. On the basis of the above, the Plaintiff proposes in his submissions that if the Plaintiff had not met with the accident of 16th May 2001 **"he would have met his ambition of being a lawyer and if he worked in the civil service, he would have worked a full blown legal career of 55 years, and if he went into legal practice he would have earned approximately Kshs.150,000.00 per month up to 55 years. A multiplier of 30 years would be fair and reasonable which would mean that his expectation in life for a career of a lawyer would have earned Kshs.54,000,000.00!"**

In addition to the general principles applicable in assessment damages i.e. fair and reasonable compensation; not to be excessive; comparable injuries to attract comparable awards, e.t.c., the following additional principles have been settled with regard to loss of earnings:

Concerning loss of earnings, the Court of Appeal restated the principles (at page 6) in the case of Mbaka Nguru (Authority No.1 – Defendants List of Authorities) as follows:

**"We come now to the award of Kshs.1,943,760.00 for loss of future earnings. It is noted that such damages were not pleaded. The court in the case of Cecilia Mwangi & Another vs Ruth W. Mwangi, civil Appeal No. 251 of 1996 (unreported) said**

> ***Loss of earnings is a special damage. It must be specifically pleaded and strictly proved. The damages under the head of "Loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability. The Plaintiff cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Ltd. Vs Mayende (1992) 2 KAR at p. 235 where this court referred to the cases of Ali v Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Shabani vs City Council of Nairobi (1985) 1 KAR 684 and the statement by Lord Goddard C.J in the case of Bonham Carter vs Park Ltd. (1948) 647 T.L.R 177 was approved."*** (underlining added for emphasis)

The Court of Appeal continued

> ***"We need not set out here the statement of Lord Goddard C.J it will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them."***

The court of Appeal was here restating that:

· “Loss of earnings” is a special damage to be <u>specifically</u> pleaded and <u>strictly</u> proved.

· **“Loss of earning capacity”** is classified as general damages but <u>must be proved on a balance of probability</u>.

· <u>If loss of earnings are not properly pleaded and proved the Claimant will not get the damages no matter how much sympathy the court may have to their plight</u>

· The principles have held fast and been applied in a long chain of numerous decisions that they have become firmly settled as the law applicable.

**<u>What is the Plaintiff claiming in the instant case – “loss of earnings” or Loss of earning capacity”?</u>**

The answer can only be supplied by the pleadings of the party by which he must be bound. At paragraph 8 (after particulars of injuries) the Plaintiff pleaded, “And the Plaintiff claims general damages for pain and suffering, loss of <u>future</u> earnings and loss of enjoyment of life”. The same is prayed for in prayer (b) of the reliefs sought in the Plaint. <u>So also in his submissions the Plintiff reiterates that he is seeking to recover a specified amount (i.e. Kshs.54,000,000/= as “Loss of future earnings</u>”

This brings us to the question of whether “Loss of future earnings” is a cliam in <u>special damages</u> (in the same manner as “Loss of earnings”) or whether it is <u>general</u> damages (in like manner as “Loss of earnings capacity’)? The matter was addressed in the classic case of **<u>BUTLER VS BUTLER CIVIL APPEAL NO. 49 OF 1983 [1984] KLR 225</u>** – [Authority No. 13 – Defendants’ supplementary List of Authorities]. The Court stated at page 232 concerning “loss of earning capacity’;-

“**It is a different head of damages from an actual loss of <u>future</u> earnings which can readily be proved at the time of the trial. The difference was explained in this way”**…… (and the Court proceeded with approval to quote Lord Denning MR in *<u>Fairley vs John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd’s Rep 40, 42 (CA)</u>* as follows:-

> ***“…….compensation for <u>loss of future earnings</u> is awarded for <u>real assessable loss proved by evidence</u>. Compensation for <u>diminution of earning capacity</u> is awarded <u>as part of the general damages</u>.”***

See also statement by JUSTICE NYARANGI Pages 236-237 (as then was)

> **“There was no evidence before the trial judge that the respondent had before been in salaried employment. There could therefore be no claim for ‘loss of <u>future</u> earnings’.**

<u>The Plaintiff in the instant case has never been in employment and had no “real assessable loss proved by evidence.”</u>

See also the **<u>MOHAMED MOHMOUD JABANE VS HIGHSTONE T. OLENJA</u>** (unrepresented), Civil Appeal No. 2 of 1986 at Kisumu where the Court of Appeal stated (page 6)

> **“Loss of <u>future</u> earnings had not been pleaded and should not have been quantified. They were an actual loss and <u>must be proved as part of the special damages.</u>”**

In Submissions the Plaintiff refers to the claim as “general damages for loss of earning of Kshs.54,000,000.00” clearly the Plaintiff is claiming for “loss of earnings” or Loss of future earnings” but seems to have wrongly assumed that this claim lay in general damages. <u>The Defendants respectfully submit that to the extent any claim for “loss of earnings” and “loss of future earnings” is a special damage the Plaintiff ought to have specifically pleaded the same in his Plaint and</u>

strictly proved the same as required, failure of which the claim must fail in the dictum of the Mbaka Nguru case And Another vs James George Rakwar (unreported), Civil Appeal No. 133 of 1998 at Nairobi Evidence required to proof of loss of future earnings or earning capacity.

However, even assuming that the words "General Damages for Loss of earning capacity" the Plaintiff would still be required to prove the claim on the "balance of probability". The Plaintiff cannot, as stated in the Mbaka Nguru case *"throw figures" at the judge and ask him to assess such damages"*

In NAIROBI HCCC NO. 1202 OF 1992 – KINYOSI KITUNGI VS SIMON OKOTH & ANOR (unreported) a minor aged 16 years had been fatally knocked down by a bus. The court in the judgment delivered on 19th November 2003 stated (p.8):

> **"This is the correct claim to be made for a minor; the case of Sheikh Musthtaq Hassan vs Nathan Mwangi Kamau Transporters & Others (supra) deals with this in depth. The Plaintiff is required to bring the evidence of a career person who is able to describe what the deceased would have embarked on in future. Did she want to be a teacher? A doctor? A pilot? Then the respective career person would come to give evidence to be able to know how much she is required to earn in future."**

The court in that case however proceeded to base assessment on the minimum wage and awarded Kshs.840,000.00.

The same principle is restated by the High Court in **MORI CHACHA VS RICHARD ARAP KOECH NAIROBI HCCC NO. 1863 OF 2001 - (**unreported) where Justice Ang'awa stated:

"I note that the deceased is said to wish to be a teacher/professor. I believe the advocate for the Defendant is correct by stating that a person who indeed is in the said profession should appear to court to give evidence on how much they may earn. I have had other cases where this is done in order to determine a multiplier . There is the Case Law of Sheikh Mushtaq vs Nathan Mwangi & Others (1982-1988) KAR 946 where the minor aged 17 years was aspiring to be an architect, Evidence was called in which proof of such earing was given.

See also PIUS MUINDE NDOSI VS THE HEADMISTRESS MACHAKOS GIRLS HIGH SCHOOL AND ANOR MACHAKOS HCCC NO. 458 OF 1998 [AUTHORITY NO. 15 (unreported).

This judgment was delivered recently on 27th March 2003 Page 13

> **"On lost years I find that indeed the deceased was a student 16 years old. She aspired to be a future lawyer taking after her elder sister. It is however not possible for anyone to say that she could not have opted for something else. It is also the finding of this court that it is not possible to say exactly when she would have commenced her earning and retire from employment. It is also not possible to know whether she would have opted to join the civil service in order, to retire at the age of 55 years as suggested by the Plaintiff's counsel or go into private practice and work beyond the age of 55. Further both counsels have made suggestions to the court as possible monthly earnings. The Plaintiff suggests 35,000/= while the defence suggested 10,000/= per month. There is no back up evidence to support the figures suggested. It is the finding of this court that suggestion of what the deceased would have earned in future along the lines suggested by both counsel is mere speculation."**

The Plaintiff has based his claim of "loss of future earnings on the supposed income of a lawyer. Oddly, not once in his entire testimony did he mention or make any reference to any desire to become a lawyer. The Plaintiff called no evidence whatsoever to prove what a lawyer would earn as income. Such evidence cannot just materialize in the Plaintiff's submissions and be admitted. This would be speculative. Moreover, it would have unfairly denied the Defendants the right to test the veracity of the evidence through cross-examination. Further, no evidence was called to demonstrate that with an average score of "C" before his injury the Plaintiff was well on course and within eligibility to join university to study law. To the contrary the evidence shown to Court (Exhibit 11 and 12) shows little interference in the Plaintiff's academic performance. There is no evidence to support claims of diminished academic performance in the

Plaintiff. He was an average "C" student both before and after the accident. The Defendants submit that the Plaintiff's presumption of a career in law is not supported by the evidence tendered and is merely speculative.

In the circumstances, the Defendants submit that the Plaintiff failed to prove this claim on the balance of probability.

In NAIROBI HCCC NO. 335 OF 1996 – HENRIETTA MAHERO KAIAMATI VS TERRY BELL & ANOTHER in a judgment delivered on 22nd June, 2000 the court factored taxation, living expenses and possibility of premature termination of career. Justice Aluoch stated,

"*The Plaintiff's Counsel urged me to find that the deceased would have been earning a sum of Kshs.25,000.00 per month which I find to be too high for the government scale for lawyers. Further, the sum would have to be reduced by monthly taxation and further still, monthly savings by the deceased, which I would put at about 1/3; age at which the deceased would have started work is also relevant ……. There is also further possibility that the deceased could hve been prevented from becoming a lawyer by the factors, either death by natural causes or ill-health or whatever".*

In that case for the deceased who was 15 years at the time of death, the court assessed and applied a multiplier of 15 years and a multiplicand of Kshs.15,000.00 to arrive at an award of Kshs.900,000.00 The Defendants humbly submit that the Plintiff did indeed suffer serious injury with some residual consequence. But the Plaintiff

has neither Pleaded nor proved his claim for loss of earnings to the standards expected by the law; should the court nonetheless contemplate an award of loss of future earnings in favour of the Plaintiff the court should apply the minimum wage as multiplicand and multiplier of 15 years (See **HENRIETTA MAHERO KHAMATI VS TERRYBELL & ANOTHER HCCC NO. 335/1996** at Nairobi where the deceased aged 17 years multiplier of 15 years used), less taxation and expenses (40%) and discount on account of accelerated lump sum payment. The current minimum wage affected on 20th May 2009 by the Minister for Labour provides for minimum wage of Kshs.6,130/=. Expenses and taxation should be deducted at 2/3 (See **KINYOSI KITUNGI** Case and also **MORI CHACHA.** Hence the Defendants submit for assessment as follows;**-**

Kshs.6130/= (multiplicand) x 15 years (multiplier) x 12 (monthly) x 60% (40% expenses and taxes) = Kshs.662,040/=

II As for Special Damages, on 4th November, 2009 during the course of the hearing of this matter, the Plaintiff made an amendment to the Plaint on the special damages pleaded. He revised the figure of special damages from Kshs.7,847, 032.00 downwards to Kshs.3,387,030.00

The law on assessment of special damages has long been settled. Special damages are to be specifically pleaded and strictly proved.

**In Kenya National Library Services vs Abdulfatah Noorien – Civil Appeal No. 109 of 1988 [Authority No. 19 – Defendants' Supplementary List of authorities];** the Court of Appeal stated;

> **"(But) whenever the Plaintiff has suffered any special damages" this must be alleged in the statement of claim with all necessary particulars, and the Plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly in his statement of claim or particulars. Special damage in the sense of a monetary loss which the Plaintiff has sustained up to date of trial must be pleaded and particularized, otherwise it cannot be recovered."** Page 60 – emphasis ours)

See also **MARY MUKIRI VS NJOROGE KIANIA Civil Appeal No. 48 of 1996 [Authority No. 16 Defendants' Supplementary list of Authorities];**

The Plaintiff by his Plaint pleads for Special damages in the sum of Kshs.3,387,030/= but has in submissions submitted for assessment of special damages in the sum of Kshs.4,268,984.75/=. The court cannot award special damages beyond the sums pleaded.

Turning to the specific items of special damages claim per the "Particulars Special Damages" pleaded at paragraph 8 of the Plaint:

a) **<u>Medical Expenses in Nairobi</u> – pleaded <u>Kshs.210,006.00</u>**

Under this head the Plaintiff produced the Exhibits No. 16-34

| | | |
|---|---|---|
| Exhibit 16 | Kenyatta National Hospital receipt (bill) | Kshs.111,039.00 |
| Exhibit 17 | Kenya National Hostial receipt (medicines) | Kshs. 11,560.00 |
| Exhibit 18 | Receipt (Dr. Lubanga) | Kshs. 22,500.00 |
| Exhibit 19 | Receipt (Dr. Makanyengo) | Kshs. 11,600.00 |
| Exhibit 20 | Receipt (Dr. Amayo) | Kshs. 8,000.00 |
| Exhibit 21 | Receipt (Dr. Bukusi) | Kshs. 3,000.00 |
| Exhibit 22 | Receipt (Dr. Modi) | Kshs. 1,000.00 |
| Exhibit 23 | Receipt (Nairobi Hospital) | Kshs. 3,720.00 |
| Exhibit 24 | Bunch of Receipts | Kshs. 18,544.00 |
| Exhibit 25 | Another Bunch of Receipts | Kshs. 29,165.00 |
| Exhibit 26 | Another Bunch of Receipts | Kshs. 18,703.00 |
| Exhibit 27 | Another Bunch of Receipts | Kshs. 21,986.00 |
| Exhibit 28 | Another Bunch of Receipts | Kshs. 18,545.00 |
| Exhibit 29 | Another Bunch of Receipts | Kshs. 8,955.00 |
| Exhibit 30 | Receipt Dr. Huo Juan-Nairobi Hospital | Kshs. 8,600.00 |
| Exhibit 31 | Receipt M.P. Shah Hospital | Kshs. 8,000.00 |
| Exhibit 32 | Receipt Mater Hospital | Kshs. 13,650.00 |
| Exhibit 33 | Receipt Physiotherapist | Kshs. 3,100.00 |
| Exhibit 34 | Receipt Bedrock (gym) | Kshs. 2,000.00 |
| Total amount under this head | | Kshs.323,667.00 |

It is apparent that the amount shown in the exhibits under this head is in excess of the pleaded sum and cannot be awarded. No amendment was made to the Plaint to plead the excess amount. At the time that Exhibits 13-34 were introduced, Counsel for the Defence raised the following objections:

i) That the receipts were not compliant with Section 19 of the Stamp Duty Act Cap 480;

ii) That Exhibit 22 a receipt for a medical report by Dr. Modi is not payable because no such report was produced in court nor shown to exist neither did the doctor testify in this matter;

iii) That the “bundles” of receipts produced as Exhibits 24 to 29 included receipts which do not indicate the party paying. The mere possession of the receipts does not prove that the Plaintiff made the

payment.

The Defence recognizes that the Plaintiff must have incurred expenses for rehabilitation for which he deserves fair compensation. However in the absence of any concessions by the Defence, the law requires that the Plaintiff specifically plead and strictly proves his claim for special damages.

On the 20th November 2008 at the hearing of this matter the parties requested the court for time to come up with an agreed bundle of receipts or documents so as to save the court's time on production of evidence. The Defence, in spite of legal objections reserved, had indicated willingness to concede to the Plaintiff's exhibits No. 16, 19,20,21,23,30,31,32,33 and 34 all amounting to Kshs.172,709/=. However, on resumption of the hearing on the 25th November 2008 the Plaintiff proceeded with his evidence without any agreed bundle. The Defence shall not be going back on the conceded amounts Kshs.172,709/=

STAMP DUTY ACT-CAP 480

On Stamp Duty, Section 19 (1) of the Stamp Duty Act, Cap 480 Laws of Kenya provides that

> **"Subject to the provisions of sub-section (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except**
>
> **a) In criminal proceedings; and**
>
> **b) In proceedings by a collector to recover Stamp Duty, unless it is duly stamped."**

The receipts produced as Exhibits by the Plaintiff have not been exempted from Stamp Duty under Section 106 or 117 of the Stamp Duty Act.

The Stamp Duty is required to be denoted in accordance with Rule 2 of Stamp Duty Regulations, i.e. by an adhesive stamp affixed or a revenue stamp impressed by a franking machine on the instrument or by embossed stamp.

Part No. 29 of the 11th Schedule to the Stamp duty Act specifically prescribes duty for "Receipts".

Foreign Receipts: Section 6 of Cap 480 requires that receipts obtained outside Kenya be stamped within thirty (30) days of being received in Kenya to comply with Section 86 of the Stamp Duty Act which defines "receipt" for purposes of stamp duty to include

"any note, memorandum or writing whereby any money amounting to one hundred shillings or upwards ….is acknowledged or expressed to have been received or deposited or paid……"

This court, in WEETABIX LIMITED VS HEALTHY U TWO THOUSAND LIMITED – Nairobi HCCC No. 283 of 2006 stated:

> **"With respect to the objection raised against the annexure at pages 7(a) to 7(e), i.e. the Assignment, it is not disputed that the same is not stamped. But does the annexure attract Stamp Duty? I think it does under the Eleventh Schedule of the Stamp Duty Act Cap 480 Laws of Kenya. The instrument is chargeable with Stamp Duty under Section 23 of the Act. As the instrument was not stamped, it is clearly inadmissible under Section 19(1) of the same Act."** (underlining added for emphasis)

See also TRUST BANK VS PORTWAY STORES (1993) LTD [2001] EA 296 [Authority No. 18 – Defendants' Supplementary List of Authorities];

The Defendants, having at the trial raised objections to the admission of unstamped receipts the Plaintiff ought to have seized the opportunity to rectify the position; the defense submits that the court should reject all receipts submitted for non-compliance with Section 19 of the Stamp Duty Act Cap 480.

The Cost of Caretakers: is another contentious issue. The Plaintiff claims Kshs.33,600/=.

This item is pleaded under particulars of special damages however no proof whatsoever was given in support of this claim.

Three Air Tickets to Dubai: Kshs.187,870.00 The Plaintiff produced Exhibit 13, 35 and 36 in proof of this head. The Defendants reiterate submissions on grounds of Section 19 of the Stamp Duty Act-Cap 480 and submits that the court rejects this claim.

Medical & Sundry Expenses in Dubai: Kshs.754,583. In proof of this claim, the Plaintiff produced Exhibit No. 37(a) – 37(1) and Exhibit 39, 40 and 41 which he claims as expenses in Dubai totaling Kshs.86375.00 In proof of sundry expenses in Dubai the Plaintiff produced the following exhibits; No. 43, 46, 48, 49 and 50 all totaling Kshs.623,787.50. The total face value of the exhibits under this head is Kshs.701,416.50 Several of the exhibits produced by the Plaintiff are in a language unknown to the court.

Language of the Court: Section 86 (1) of the Civil Procedure provides that "**The language of the High Court and the Court of Appeal shall be English and the language of the subordinate courts shall be English and Kiswahili"**

The Plaintiff had a duty to ensure that his exhibits can be comprehended both by the court and the defence. The Defence raised the issue of language, both as an objection at the time of production of the documents and in the cause of cross-examination. As it is, the Defendants have been deprived of their right to effectively interrogate the veracity of the exhibits and cross-examine on the same. The figures on these exhibits are expressed in foreign currency. The Plaintiff stated that I Dirham is equivalent to Kshs.25.00 but no evidence was adduced by the Plaintiff to prove the exchange rate applicable.

Physiotherapy Expenses up to 31st July 2003: pleaded Kshs.285,950.00

This is Item (e) of the Particulars of special damages; The Plaintiff has pleaded Kshs.285,950.00 for physiotherapy expenses incurred up to 31st July 2003. Looking at the evidence i.e. the disputed Exhibit 15, as at end July 2003 the total of the alleged Physiotherapy expenses is Kshs.372,000/=. By the time he filed suit (October 2003) he had already incurred this particular expenses and he presumably was already making entries in Exhibit 15. Why would there be such discrepancy? This goes to the point that little or no reliance should be placed on Exhibit 15 with regard to expenses.

The Plaintiff produced Exhibit 15 in proof of physiotherapy expenses. He stated that the total sum computed in Exhibit 15 was Kshs.1,019,700.00 Exhibit 15 is a hand written notebook made in the hand of the Plaintiff's father; purporting to have recorded payment made for physiotherapy sessions between; February, 2002 to October, 2008 As the author of its contents he could competently produce the notebook. The Defendants however submit that Exhibit 15 is not proof of payment. No receipts were produced to collaborate and prove that payments were actually made to a physiotherapist for the services. In lieu of receipts, the least the Plaintiff ought to have done was to call the physiotherapist/s to testify that they did indeed provide services to the Plaintiff on the dates stated in Exhibit 15 and to acknowledge that he/they were indeed paid the amounts stated in Exhibit 15. No such evidence was called.

The Defendants respectfully submit that on the question of whether or not the Plaintiff paid a sum of Kshs.1,019,700.00 for physiotherapy sessions; Exhibit 15 is of little probative value. At its best Exhibit 15 is and remains a historical record of activity and not proof of payment of the substantial sum of money.

Moreover, Exhibit 15 is wrought with errors that erode its reliability as prove of payment. The Plaintiff in the course of cross-examination on 20th November, 2008 stated;

> **"The last time I received physiotherapy was early last year and that was from the gym. But I do continue with the exercises I learnt from the gym in Nairobi West. I do the exercises myself. Otherwise the whole of 2007 I was going to the same gym."**

The father also testified that some of the entries on Exhibit 15 have derived from notes made on some wall calendar. The calendar itself was never produced as evidence. It would in the circumstances have been the primary evidence, if at all all it was true.

From the Plaintiff's own testimony it emerges that entries made in Exhibit No. 15 from early 2007 to October 2008 were false. Little else needs to be added about Exhibit 15. The Defendants submit that Exhibit 15 be rejected as proof of any payment at all let alone as "strict proof" of the payment of Kshs.1,019,700.00

Telephone Expenses in Dubai-pleaded Kshs.24,150 To support this claim, the Plaintiff produced Exhibit 42 which was a bundle of used scratch cards which he valued at Kshs.18,780.00 (and pleaded a sum of Kshs.24,150.00). No receipt was produced to prove purchase of the cards and to show that the same were purchased by the Plaintiff. It is common knowledge that anybody can collect any number of used scratch cards and bring them to court. The Plaintiff's father (and he testified as much) had been carefully gathering his evidence for purposes of use in this suit. Whereas the ordinary customers may not commonly ask for receipts upon purchase of airtime; the onus remained on the plaintiff to prove that these particular scratch cards were indeed purchased by him and for uses related to this course. The defendants submit that the Plaintiff has not discharged that onus.

Transport Expenses in Dubai-pleaded Kshs.72,160.00 This is item (e) of the Particulars of Special Damages in the Plaint. The Plaintiff's father produced Exhibit 47 in support of this claim, i.e. a receipt from Al Uruba which he said was for Kshs.60,000.00 The Defendants have objected to admission of exhbit 47 on grounds of non-compliance with Section 19of the stamp Duty Act Cap 480 (read with Section 6 and pargraph 29 of the Eleventh Schedule to the said Act).

Costs of CT Scan-pleaded Kshs.7,000.00 This amount was conceded before as above said. The exhibit No. 31 is for the sum of Kshs.8,000.00 i.e. exceeds the amount pleaded.

Postage Expenses-pleaded Kshs.1,914.00 This is referred to in Exhibit No. 45. The Defendants submits that no proof or relevance has been established in respect of this claim. Dr. Michael Gross's report which is claimed to have been the subject of this expenses as never shown to exist.

Medical Report of Dr. Michael Gross-pleaded Kshs.28,060 he Plaintiff produced a receipt – Exhibit No. 44 for the sum of Kshs.34,500.00 purporting to be in respect of a medical report by Dr. Michael Gross. The existence of such a report was never established neither did the doctor testify. The amount pleaded and the amount on the exhibit is inconsistent. The defendants submit for the rejection of this claim as having not been proved to the required standards.

Fuel Expenses- pleaded Kshs.33,000.00 These were pleaded at park (k) of the Particulars of Special Damages. No proof whatsoever was given of this claim.

Police Abstract-pleaded Kshs.100.00 The Defendants do not contest this claim.

Future Medical Expenses for Physiotherapy-pleaded Kshs.600,000.00 These were pleaded as paragraph (m) of the Particulars of Special Damages. The Plaintiff's father associated Exhibit No. 15 to the claim under this part. The defendants reiterate their earlier submission on Exhibit No. 15, i.e. that the same does not constitute proof of payment; is not reliable and is inconsistent with the amounts pleaded in the Plaint. Moreover, in the Plaintiff's own testimony the | physiotherapy sessions ceased in early 2007.

Future Medical Neuro Rehabilitation-pleaded Kshs.600,000.00 This is itemized at paragraph (n) of the Particulars of Special Damages. Although Pleaded as a "Special damage" no proof was provided as required in respect of this claim. In his evidence PW 7 (the Plaintiff's father said in respect of this claim, "*That is not going on, only physiotherapy under item (m) is going on in the form of gym.*

Cost of Epanutin from August 2003 to May, 2004-pleaded Kshs.8,640.00

This amount is included in 'Bundles' of receipts produced under paragraph (a) of Particulars of Special Damages, i.e. Medical Expenses in Nairobi.

Cost of Specialized House Help for 5 years-pleaded Kshs.540,000.00

This item of the Special Damages, i.e. paragraph (p) was amended from the sum of Kshs.5,000,000.00 to Kshs.540,000.00 this amount is pleaded as a Special Damage but no proof was presented for this claim

No specialized nurse was called to testify that he.she was providing any services to the Plaintiff. Indeed in his testimony the Plaintiff stated that he has not been attended to by any other maid except the ordinary house help that the family has had over the years. In addition, the Plaintiff's present condition as observed in the course of his conduct before the court did not show he was a person in actual need of any "specialized" help.

**Guidelines on "Sundry" Living Expenses**

The substantial amounts claimed in 'Sundry Expenses' in Dubai – Exhibit 48 and also in Nairobi Exhibit No. 51 ("Uchumi" receipts) deserve particular mention.

The Plaintiff appears to make claims on sundry expenses without regard to the fact that ordinary living expenses would still have been incurred whether or not the unfortunate accident of 16th May, 2001 would have occurred.

If any amount is to be claimed in respect of general expenses, it can only be such expenses, above the ordinary living expenses, shown as having been incurred as a result of the accident. In McGREGOR on DAMAGES [16TH Edition] page 1079 paragraph 1659 it was stated that

***"Increased living expenses constitute a familiar category of recoverable expenses outside the strictly medical. While ordinary living expenses are not included in the recoverable expenses as these would generally continue to be incurred whether the injury had been inflicted or not, extra or increased living expenses resulting from the injury are. There would be increased expenses if, for example, the plaintiff could no longer live on the top floor but was compelled to move to the ground floor, or was compelled to live in hotels or guest-houses instead of his home. The increased expenses may be temporary as where the injury occurs when the plaintiff is travelling and has to live away from home for some time"***

The Plaintiff did not demonstrate or document how and to what extent such amounts claimed as "sundry" expenses are "extra or increased living expenses resulting from the injury". It is only the difference above the Plaintiff's ordinary living expenses that is recoverable

In summation, the defendants submit for assessment of damages herein as follows:

1) Pain, suffering and Loss of amenities Kshs. 750,000.00

2) Loss of Future Earnings Kshs. 662,040.00

3) Special Damages (conceded) Kshs. 172,709.00

| | |
|---|---|
| Total | Kshs.1,584,749.00 |
| Less 10% contribution | Kshs. 158,474.90 |
| Total Due | Kshs.1,426,274.10 |
| | ============== |

I must say I am very grateful to Mr. Gaturu and Mr. Onyambu for what each learned Counsel has done in this suit to enable the court see where justice is positioned for the court to try to reach it, unfortunately, through predicaments as the only way, hence the difficulty in satisfying each side. But it is good where we reach be known to everybody.

I will therefore repeat that there can be no denying that the injuries suffered by the Plaintiff herein were serious. The Defendants have already conceded to substantial responsibility for the injury being 90% liability. But definitely the Defendants did not foresee an award in the range of Kshs.74 million which they are now referring to as manifestly excessive in the circumstances of this case as they say that such an amount would be inconsistent with all known principles of assessment of damages and comparable case law; adding that an astronomical assessment on damages such as herein proposed by the Plaintiff can only be intended as punitive; and they remark:

**"Any award in general damages of any range near what is now proposed by the Plaintiff will send shock waves in the body politic with far reaching implications. It will also heavily impart on the cost of medical care, cost of premiums, and cost of business and ultimately have an undesirable inflationary pressure on the cost of living."**

Similar remarks can be extended to special damages where same trend is manifested by the Plaintiff. Here it may be added that though recognizing that the Plaintiff must have incurred expenses for rehabilitation for which he deserves fair compensation, the law requires that the Plaintiff specifically pleads and strictly proves his claim for special damages unless conceded by the Defendant.

Further, the Defendants having at the trial raised objections to the admission of unstamped receipts the Plaintiff ought to have seized the opportunity, especially since this trial took long, to rectify the position.

On this issue, however, I should remind the parties that while the learned Defence Counsel was raising objection where there was lack of stamp duty, he used to let such a document be admitted in the evidence so that the court would note the objection, followed by admission of the document in evidence.

Similar treatment was extended to documents in Arabic language, not translated into English or Kiswahili and having no stamp Duty paid. Objection raised but relevant document left to go into the evidence.

Thus the question of admissibility of such evidence was being decided at the hearing. It is not being decided now. The learned Counsel for the Defendants should therefore have been addressing me at this stage on the legal effect of having admitted such evidence. It was not the court which was ordering admission after Mr. Onyambu had insisted on not having the evidence admitted. He was merely pointing out the defects and thereafter letting Mr. Gaturu's witnesses produce the evidence.

Let me now get down to figures and I will go by prayers in the Plaint stating with General Damages which is under prayer (b). That has been split by the parties into two parts so that they have

(i) General Damages for Pain and Suffering;

And

(ii) General Damages for Loss of Future Earnings

For Pain and Suffering, the Plaintiff has raised a figure of Kshs.2,000,000/= he gets from case authorities to Kshs.20,000,000/= for himself. The Defendants are prepared to accept paying Kshs.750,000/=

I will allow Kshs.2,500,000/=

General Damages for Loss of Future Earnings the Plaintiff has put the figure at Kshs.54,000,000/= on the basis that he would have been a lawyer in private practice earning Kshs.150,000/= per month for 30 years until the age of 55 years. The Defendants are prepared to pay a total of Kshs.662,040/=

But first agree on what we are talking about as words are used interchangeably without regard to their real meanings. Prayer (b) is talking about "Loss of Future Earnings". Counsels in their respective written submissions talk of "Loss of Earnings" interchangeably with the words "Loss of Future Earnings". I will assume the two statements in quotes mean the same thing.

It can therefore be said the claim was specifically pleaded. But it has to be strictly proved like Special damages. The Plaintiff put it in General Damages and therefore found it convenient to pick on a figure Kshs.150,000/= salary per month.

But here we have a Plaintiff who can be likened to a person who died before he was employed. He may have wished, before he died to be employed as a doctor. Has it to be assumed, after his death, that he was necessarily going to be a doctor? Would it be proper to pick a particular salary scale, among doctors, and assign it to him? This was not a person who was taking a law course. He was in a secondary school where most students wish to go to university to pursue certain courses which they never manage to do without even having been involved in an accident like the Plaintiff was here. The accident occurred when the Plaintiff was in Form II in secondary school and no evidence was adduced to show that at any stage during his secondary school studies, the Plaintiff exhibited the academic standard suggesting he was only destined to work as a lawyer.

In his evidence the Plaintiff never told the court he intended to be a lawyer. He called no evidence to that effect and/or to show what a lawyer would earn and whether as a lawyer he would work in the public sector or in the private sector. It is impossible for anybody to say the Plaintiff could not have opted for something else all together. It is also impossible to say when he will have commenced earning and retire from employment.

Further more, and as Mr. Onyambu points out, the Plaintiff's present condition is not as extreme as the Plaintiff would wish the court to believe that the Plaintiff is retarded and reduced to cabbage, that he is severely impaired; that he will require a specialized helper for the rest of his life and that he cannot possibly do anything at all for his whole life. He is just completing his early twenties and it is possible things can get brighter with the Plaintiff who was able after the accident while in Form II, to successfully complete Form III and VI attaining a mean grade of C in the Kenya Certificate of Secondary Education.

In these proceedings, evidence is that the Plaintiff has never been employed and therefore if he has to be assigned a salary, there is no basis, in the circumstances for placing him anywhere else above the minimum wage in this country. Both Counsel are not mentioning that minimum wage although Mr. Onyambu says the Court in Nairobi HCCC No. 1202 of 1992 – KINYOSI KITUNGI VS SIMON OKOTH & ANOR a sum of Kshs.840,000/= based on the minimum wage was awarded, while in NAIROBI HCCC No. 335 of 1996 HENRIETTA MAHERO KAJAMATI VS TERRY BELL & ANOTHER, a sum of Kshs.900,000/= based on minimum wage. Why should the Plaintiff in this suit get less suggested to be Kshs.662,040/=? Conversely, why should he get Kshs.54,000,000/=? I will give him Kshs.1,000,000/= bearing in mind possibility of obtaining additional future earnings the Plaintiff herein being a live unlike deceased Plaintiffs in the cases referred to above, and further bearing in mind failure by the Plaintiff to sufficiently prove this part of his claim.

Looking at special damages, it is surprising that these retained a number of foreseeable problems which could have been easily eliminated. Out of a total claim of Kshs4,268,984.75 the Defendants are therefore conceding Kkshs.172,709/= only.

Originally, a total sum of Kshs.7,847,032/= was pleaded. That was reduced to Kshs.3,387,032/= during the hearing. But at the end of hearing the Plaintiff was endeavouring to prove a total of Kshs.4,268,984.75.

Otherwise documents required to be stamped for stamp duty were not so stamped. But Plaintiff brought them to be admitted in evidence and had them so admitted. So were documents in Arabic Language; no proof for Kshs.33,600/= said to be cost of Care taker; discrepancy in total figure for physiotherapy expenses; Exhibit 15 a book containing hand written entries claimed to be payments for physiotherapy sessions. No better evidence to support the claim in Exhibit 15, telephone expenses in Dubai Kshs.24,150/= claimed on the basis of used scratch cards allegedly used in connection with

Plaintiff's medical treatment in Dubai, yet it is common knowledge anybody can collect any number of used scratch cards and bring them to court; proving amount in excess of amount pleaded; claiming money for Report of Dr. Michael Gross never seen in court; Kshs.33,000/= pleaded but not proved; future medical expenses for physiotherapy pleaded to be connected with Exhibit 15 which in view of comments by Mr. Onyambu, not acceptable. Moreover Plaintiff himself in his evidence said that physiotherapy session, ceased in year 2007; pleading Kshs.600,000/= for future medical care; but no proof provided and even PW 7 said such treatment not going on; cost of specialized house help for five years – total Kshs.540,000/=. No sufficient proof.

From what I am saying, I will have to deduct the following from what the Plaintiff is claiming as special damages:

Physiotherapy no evidence………………..……………………………….. Kshs. 600,000/=

Future Medical Neurorehabilitation no evidence…………….. Kshs. 600,000/=

Cost of special House Help not proved……………………………………. Kshs. 540,000/=

Cost of Care Taker at Hospital (KNH) Not proved……………………. Kshs. 33,600/=

Mr. Michael Gross's Unseen Report……………………………………….. Kshs. 29,974/=

Fuel pleaded item (k) not proved…………………………………………… Kshs. 33,000/=

Total……………………………………………………………………………. Kshs.1,836,574/=

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Balance Special Damages to be paid

Kshs.3,387,032 - less Kshs.1,836,574/=

Kshs. 1,550,458/=

Rounding up Kshs.1,550,500/=

To conclude therefore, judgment on damages is hereby entered for the Plaintiff against the Defendants jointly and/or severally as follows:-

1) Pain and Suffering ……………………………………………………… Kshs.2,500,000/=

2) Loss of Future Earning………………………………………………… Kshs.1,000,000/=

3) Special Damages………………………………………………………. Kshs.1,550,500/=

Total………………………………………………………………………… Kshs.5,050,500/=

Less 10% Contribution…………………………………………….. Kshs. 505,050/=

**TOTAL DUE………………………………………………………………… Kshs.4,545,450/=**

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In addition, Defendants to jointly and/or severally pay costs of this suit to the Plaintiff plus interest on the decretal sum at court rate from date of this judgment till payment in full.

Dated this 5th day of February 2010.

**``J.M. KHAMONI**

**<u>JUDGE</u>**

**In the Presence of**

M/s E.T. Gaturu, Advocates for the Plaintiff.

M/s Nyaundi Tuiyott & Co., Advocates for the Defendants

Court Clerk:  Kabiru

**Court:**

Further order uopon oral application by Mr. Onyambu:

There be a stay of execution for 30 days from to-day.

**J.M. KHAMONI**

**JUDGE**

v