



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 169 OF 2000

ANNE MURIITHI PLAINTIFF

(Suing thro' her father and next frined Joseph Muriithi)

VERSUS

- 1. THE HEADMISTRESS MKS GIRLS**
- 2. THE CHAIRMAN, BOARD OF GOVERNORS**
- 3. WAMBUA MAKAU DEFENDANTS**

CONSOLIDATED WITH

CIVIL CASE 167 OF 2000

LILIAN KATHOKI..... PLAINTIFF

(Suing thro' her father and next friend Michael Kalanzo Ndei)

VERSUS

- 1. THE HEADMISTRESS MKS GIRLS**
- 2. THE CHAIRMAN, BOARD OF GOVERNORS**
- 3. WAMBUA MAKAU DEFENDANTS**

CONSOLIDATED WITH

CIVIL CASE NO. 168 OF 2000

NAOMI NZISA PLAINTIFF

(Suing thro' her father & next friend Robert Makau Nzioki)

VERSUS

- 1. THE HEADMISTRESS MKS GIRLS**
- 2. THE CHAIRMAN BOARD OF GOVERNORS**

3. WAMBUA MAKAUDEFENDANTS

CONSOLIDATED WITH

CIVIL CASE NO. 55 OF 2001

MARY NZOMO PLAINTIFF

(Suing through her father and next friend Wilson Nzomo)

VERSUS

1. HEADMISTRESS MKS GIRLS

2. THE CHAIRMAN BOARD OF GOVERNORS

3. WAMBUA MAKAU DEFENDANTS

CONSOLIDATED WITH

CASE NO. 165 OF 2000

ANNE NJERU PLAINTIFF

(Suing thro' her father & next friend Fredrick Njeru)

VERSUS

1. THE HEADMISTRESS MKS GIRLS

2. THE CHAIRMAN BOARD OF GOVERNORS

3. WAMBUA MAKAU

CONSOLIDATED WITH

CIVIL CASE NO. 166 OF 2000

JANE SYOMBUA SAMMY PLAINTIFF

(Suing thro' her mother and next friend Rosaita Mune Mwangangi)

VERSUS

1. THE HEADMISTRESS MKS GIRLS

2. THE CHAIRMAN BOARD OF GOVERNORS

3. WAMBUA MAKAU

J U D G E M E N T

Liability in these cases was agreed upon at 100% in favour of the plaintiffs. The matter proceed by way of assessment of damages. The files HCCC no. 169 of 2000 for Anne Muriithi HCCC no. 167 of 2000 for Lilian Kathoki HCCC no. 168 of 2000 for Naomi Nzisa suing through her father as her next friend Robert Makau Nzioki, HCCC 55 of 2001 for Mary Nzomo suing through her father Wilson Nzomo, HCCC no. 165 of 2000 for Anne Njeru suing through her father and next friend Fredrick Njeru, HCCC 166/2000 for Jane Syombua Sammy suing through her mother Rosaita Mune Mwangangi were consolidated and heard together.

All the plaintiffs had one common defendant who is the Headmistress, the Chairman board of governors Machakos girls high school and Wambua Makau the driver of the accident vehicle registration number KWK owned by the second defendant school and driven by the 3rd defendant who was an agent or employed by the defendant school. **FOR THE PLAINTIFF IN HCCC NO. 160 OF 2000 ANNE WANJIRU MURIITHI** she gave evidence as PW 1. The injuries she sustained were a fracture of the left femur and dislocated knee of the same leg. She was admitted at Naivasha general hospital and then the next day she was air lifted to Nairobi hospital where she was operated on and fixation done she was discharged from Nairobi hospital after one week. Her complaints as at the time of the trial were:-

1. she cannot run.
2. cannot walk long distances.
3. cannot bend her leg
4. cannot kneel down
5. cannot carry heavy loads.
6. gets pain when it is cold.

She confirmed the school paid to the hospital her hospital expenses Kshs.158,094.00 she has no objection if the said money is paid directly to the school concerned as shown in exhibit 2. The abstract exhibit 3 shows that she was named as a victim who was injured in the said accident.

The P3 exhibit 4 lists the following injuries:-

1. Deep cut left lower limb lateral aspect of the knee 20cm long 2cm deep. Fracture of the lower end femur displaced and she was bleeding profusely. The medical report was prepared by Professor J. A. O. Mulimba and it is dated 21.4.1999. upon examination the Doctor observed a longitudinal surgical scar lateral aspect of the distal right thigh. Flexion in the knee was 90 degrees with extension being full and no other abnormalities were seen. The report talks of the right leg but the P3 says it is the left leg.

The x-rays showed the fracture dislocation of the distal femoral epiphysis reduced and well healed. In the Doctors opinion this plaintiff sustained the injuries of fracture dislocation at the distal right femoral epiphysis. It was well reduced and fixed and it was healing well. There will be pain and swelling for some time but this will eventually subside. Permanent disability assessed at 8%. PW 2 Joseph Muriithi confirmed that he did not pay for hospital expense and so the school can be refunded the same.

Counsel for the plaintiff put in written submission and relied on the case of **Omar Musa Hassan and another versus Rashid Salim and another Nairobi HCCC no. 239 of 1995 where the second plaintiff sustained a comminuted fracture of the right femur and several tissue injuries over** various parts of the body the court awarded Kshs.700,000.00 for this 2nd plaintiff Kshs.135,000.00 as future medical expenses and Kshs.52,130.00 as special damages total Kshs.887,130.00.

None of the authorities cited by the defence counsel refer to a fracture of the femur and dislocation of the knee. The plaintiffs counsel suggested an award of 1,200,000.00 as damages for pain suffering and loss of amenities and special damages of Kshs.149,594.60 while the defence counsel suggested an award of Kshs.100,000.00 and that the specials cannot be awarded as they were not proved to have been incurred.

The courts assessment of the facts on injuries is that the plaintiff had healed well save for the complaints raised. Unlike in the case of the authority cited by the plaintiffs counsel there were no additional injuries and there is no evidence of long hospitalization. However it cannot be ignored that these injuries altered the life of the plaintiff as she has to live with the complaint raised such as being unable to walk long distances, not being able to run and not being able to kneel down. These are permanent injuries which she has to live with although their incapacitation is very small only 8%. I have considered all the relevant factors and I award the plaintiff Kshs.420,000.00 as general damages for pain suffering and loss of amenities.

2. special damages of Kshs.149,594.60 to be paid out to the defendant.

The plaintiff was hospitalized and so medical expenses were incurred.

It is on record they were paid by the school. They have to be refunded.

3. costs of the suit.

2. For the Plaintiff in HCCC No. 165 of 2000 Ann Njeru she gave evidence as PW 3. She says she suffered spinal cord injury and developed stress. She was unconscious after the accident taken to Naivasha general hospital and then air lifted to Nairobi hospital.

Her major complaints are that she suffers from loss of memory. She used to perform very well as shown by exhibit 6(a) (b) and 7. She obtained a D+ in her form 4 examination and she attributed that to the accident. The abstract exhibit 10 shows that she was seriously injured in the accident. She had wanted to be a pilot but the accident robbed her of that chance. Her complaints as at the time of trial are:-

1. forget fullness - loss of memory.

2. Headaches when she reads too much, walks for long, when it is sunny and when she sits for long.

She produced medical reports and P3 form showing the injuries she sustained PW 6 the father of PW 3 confirmed that he did not pay the medical expenses and an award for the same should be paid to the school. The figure is Kshs.73,393.95 as shown in exhibit 9 dated 16.3.1999.

The first medical report is dated 1.12.98 exhibit 5 by Dr. Patrick Akuku Okoth. The report shows that she was admitted to the hospital on 9th April, 1998 and discharged on 15th April, 1998. She sustained head injury as well as cervical spine injury. There were no obvious external injuries. C.T. scan brain and cortical spine x-rays were normal. She however developed stress ulcers and was unable to retain feeds but she was managed with anti acids, intravenous fluids as well as analgesics she was seen again on 27.4.1998 when she complained of headaches after walking for long. She was also feeling nauseated and had epigastric pain she was thus put on anti acids and spasmodics and was advised on diet.

The second medical report is dated 4.10.2000 . It is noted that the patient had memory loss and she had to stay at home the whole of 1998. She resumed school in 1999 but performed very poorly. The Doctors findings on examination are that there was pain in the neck, she complained of epigastric pain from time to time, epigastric tenderness in the abdomen. The doctors observation of her was that she appeared withdrawn and took long to answer simple questions. Many times she seemed lost in her thoughts and one had to repeat simple questions to get her to talk. She had difficulty in remembering things such as date of accident (her sister had to be called to confirm some things). The Doctors opinion is that before the accident she was a bright outgoing and ambitious student but following the accident she has become forgetful withdrawn and lacks ambition. Her academic performance suffered greatly after the accident.

She had to repeat form 3 and there was a clear deterioration in her grades with her final form four grade being very poor D+. This has hampered her future and is making her depressed (withdrawn lack of interest). It is apparent at that stage that the accident has interfered with Anne's future and she needs a lot of counseling, social support and also medication to get her from her current state. The stress ulcers she developed in 1998 are still symptomatic and need to be treated concurrently with her depressed state.

The plaintiffs counsel referred the court to the case of **Racheal Mohamed versus Florence Furah Mkadi and 2 others Mombasa HCCC no. 51 of 1996** where the plaintiff was involved in a road traffic accident. The plaintiff suffered multiple injuries involving cortical fracture of the thoracic spine, lumbar vertebrae resulting in chronic back pain requiring intermitted medication head injury and fracture of proximal phalanx of the left thumb.

The injury to the head fully healed without any permanent disability. The court awarded Kshs.500,000.00 as general damages. On the basis of that counsel suggested an award of Kshs.850,000.00 as general damages for pain suffering and loss of amenities and special damages for Kshs.76,693.00 inclusive of cost of abstract Making a total award of Kshs.926,697.

The defence counsel referred to the **case of Bethseba Dorcas Mukolwe and another versus Evans Ngure Ndirangu Nairobi HCCC no. 1791 of 1989** where the plaintiff a minor aged 13 years at the time of the accident sustained injuries in a road traffic accident. She sustained a blunt injury to the forehead with swelling and bruises. She bled from the ears and was consequently admitted to the intensive care unit for 4 days. The neuro surgeon diagnosed cranial 11/nerve damage and also preliminary stem injury. She has been intellectually affected by the injury. There was no consensus among several neuro-surgeons as to the long time effect to the injuries on the plaintiffs intelligence and future schooling career, general damages assessed at Kshs.250,000.00.

The case of Sarah Wanjiku (minor) versus Kenya Bus Services Ltd.

Nairobi HCCC 2765 of 1991 where the plaintiff was pushed out of a moving bus by the defendants agents and as a result sustained severe contusion to the scalp resulting into loss of consciousness for about 3 hours. Also had laceration on the back of the head and superficial abrasions on both elbows and the right side of lumbar region. She was attended to as an out patient and discharged. Complained of headaches on and off buzzing sounds in the right ear and inability to hear in the right ear latest medical report confirmed loss of hearing in the right ear. General damages assessed at Kshs.280,000.00.

The case of Mercy Rangoma (Minor) versus Patrick Maganga Muindi and another MSA HCCC no. 491 of 1992 decided on 10.9.1993. The plaintiff a minor aged 8 years at the time of accident sustained injuries when she was knocked down by a vehicle. She sustained fracture of the left side of skull and laceration of the frontal part of the head. She was unconscious on admission to hospital and remained in the intensive care unit for 4 days.

She underwent a craniotomy operation and evacuation of the subdural hematoma. She has been left with post concussional headaches and fractures of the tibia and fibula of the right leg, abrasion on the lumbar spine and contusion of the face. The right leg was put in plaster for 6 months the fracture healed with a bony swelling and has been left with weakness in the leg. She walks with some abnormality. Damages assessed at Kshs.350,000.00 for pain and suffering, Kshs.144,000.00 for loss of earning capacity using a multiplier of 12 years and Kshs.48,000.00 for lost earnings.

The defence counsel submitted that considering that the injuries sustained in the authorities referred to above were more serious than those sustained by the plaintiff, herein counsel suggested an award of Kshs.200,000.00 for this plaintiff. He further submitted that the specials were not paid and so these cannot be paid to the plaintiff.

On the courts assessment of the facts herein it is clear that indeed the injuries in the cases cited had fractures and were severe. But the age of those awards have to be considered. It also has to be considered that in some of these authorities or at least one the neuro surgeons were not sure of the effect of the

injuries on the academic performance or intelligence effect of the child were going to be. Herein the effects have already been displayed as the plaintiff performed dismally in the final exams below her expectation. She suffers from serious memory loss and that hinders her career development she said she had aspired to be a pilot which she cannot now achieve due to the serious memory loss and low grades. It is evidently clear that her life style has been altered due to the serious memory loss. I have considered all the relevant factors herein and doing the best I can I find that the award suggested by the defence is too low, while that suggested by the plaintiffs counsel is slightly on the high side. I therefore assess Kshs.700,000.00 as general damages for pain suffering and loss of amenities Kshs.76,693 as specials. The Kshs.76,593.00 to be paid out to the defendant and 100/= for abstract to be paid out to the plaintiff. It is on record that the plaintiff was hospitalized and so medical expenses were incurred and have to be paid.

3. Costs of the suit.

3. **For the plaintiff in HCCC 55 of 2001 Mary Nthenya Nzomo** she says she sustained a compound fracture of the left femur.

2. Dislocation of the digital radial Ulna. She showed to the court a protruding bone at the wrist joint and the left leg has a long surgical scar and it bows inside. Her current complaints are:- 1. she feels pain in the wrist joint when she bends it.

2. The left hand aches when she works with it but she is not left handed.

3. she cannot put the leg straight.

4. she cannot fold the leg back wards. (it can only slightly fold up.)

5. The leg aches when it is cold.

6. The leg aches when she stands for long.

7. she cannot do any heavy work.

8. she cannot walk long distances.

9. she has been forced to wear long trousers because of the crooked leg and the scar.

She recalls that they were taken to Naivasha District Hospital for one day and then airlifted to Nairobi Hospital the following day where she was admitted for 15 days and then operated on the leg and hand. She was on crutches for 4 days she attended physiotherapy and when the leg developed complications as it had boils she was forced to be seeing the Doctor every now and then. She still has metal plates in the femur which they have not yet removed. These will be removed when the Doctor is satisfied that she can use her bone again without plates and that will call for future medical expenses as shown by the medical reports. When cross examined she said that she cannot participate in sports like netball, Tennis and Hockey but she is not a member of any club. She confirmed she feels a lot of pain during cold days, that she can dash out in time of danger. She has knowledge that her parents paid hospital fees.

PW 5 Wilson Nzomo is the father of PW 4 and he confirmed that him and his wife paid the hospital expenses and the same should be refunded to them as shown by exhibit 13(a), b, c, d, e, 12a, b, c, d.

The medical report by professor B.S. Mbindyo was produced as exhibit 11.

The injuries noted by the Doctor are compound fracture of the left femur.

2. Fracture of the left radius.

3. Fracture of the left ulna.

4. Dislocation of the left distal radio ulna joint. The Doctor observed a pronounced surgical scar on the lateral aspect of the thigh 24 centimeter long. She had an injury on the interior aspect of the mid thigh centimeter in diameter. The fracture of the femur was healed and she had full range of the knee movement. On the upper limbs she had a healed fracture of the distal end of the radius, healed fracture of the distal third of the ulna, she had subluxation of the distal radio – ulna joint which was also slightly tender, she had a weak limp grip. In the doctors opinion the plaintiff sustained severe injuries resulting in fracture of the left femur and the left radius and ulna with dislocation of the left distal radio – ulna joint. She was hospitalized for 16 days lost schooling for 88 days and was on treatment for over seven and a half months. The fracture of the left femur healed in a fair anatomical position after the internal fixation but will remain a cause of off and on pains and disability due to fibrosis that ensued. The disability limited her in all heavy and demanding jobs and activities of the limb. she will need to undergo another surgical operation in about one years time for the removal of the plates and screws at an estimated cost of eighty thousand shillings Kshs.80,000.00 at current rates. The surgical and the injury wounds healed leaving permanent scars that will at times be a cause of much social cosmetic concern.

The fracture of the distal end of the left radius and the ulna healed in a fair anatomical position but the dislocation of the distal radio – ulna joint healed leaving her with a subluxation of the joint. The deformity was a cause of notable disability of the hand. She would benefit from surgical repair of the joint at an estimated cost of sixty thousand shillings with no further surgical treatment she will be left with a notable hand disability that will progressively get worse as she will develop osteoarthritis of the joint. The disability will eventually interfere with nearly all the functions of the arm with no further surgical treatment of the left distal radio ulna joint the Doctor reckons she stands to suffer forty two (42%) total body disability.

There is second medical report by Dr. Nimrod J.M. Mwang'ombe which I failed to trace on the record although it was produced by consent. In his submissions to court counsel for the plaintiff referred the court to the case of Julian Mumo Kisimbi versus Mohamed Sheikh Omar Bindahman Mombasa HCCC no. 8 of 1997 decided on 13.11.1998 where the plaintiff a young woman at the time of the accident suffered multiple injuries involving comminuted fracture of the right femur, fracture of the left femur, left fibula, Avulsian fracture of the right tibia spines, fracture of the right and left mandible, one broken upper canine tooth, laceration on the face and all the limbs with hemorrhage shock. The plaintiff was rendered unconscious for 4 hours. The fracture of the left femur resulted in infection (post traumatic osteomyelitis). The avulsions fracture of the right tibia/condyles left lax cruciate ligaments and a slight instability of the knee joint limiting her in all activities that demand a stable knee including sports social and many other pleasure activities. The plaintiff is required to undergo other surgical operations for the removal of the plates, screws, wires in both femoral and control of infections in the left femur at an estimated cost of Kshs.200,000.00. The scars from the injuries and surgical operation left her with permanent ugly scars that will remain a cause of much social cosmetic embarrassment and may require plastic surgery. The lost tooth requires a good tooth as a replacement. General damages for pain suffered and loss of amenities assessed at Kshs.1,300,000.00. On the basis of that authority counsel for the plaintiff suggested Kshs.1,800,000.00 as general damages 140,000.00 as future medical expenses and special damages of Kshs.447,328.00 total Kshs.2,387,328.00.

The defence referred the court to the case of **Margaret ochieng versus David M. Njihia and Patrick N. Katuma** where the plaintiff was a business woman aged 36 years and received the following injuries:-

1. Fracture of both radius and ulna of the lower third.
2. paralysis of the left hand poor grasp in the left hand swelling tenderness and crepitations and inability to handle objects with the left arm.
3. contusion to the right side of the chest, haematoma and swelling in the right side of the chest, knocked on the right side of the chest and experienced a cute right sided chest pain and difficulties in breathing.
4. Injury to the left ankle in which she complained of pain and had difficulties in stepping down on

left foot where there was swelling and tenderness in the left ankle joint. She complained of wasting of interosseous muscles of left hand associated with weakness of left hand right chested pain on lifting weights or performing heavy manual work. She was awarded 20% permanent physical disability due to paralysis of the left hand. The court awarded general damages of Kshs.250,000.0 and special damages of Kshs.1,100.00. Judgement was on 15.5.1995.

On the basis of that authority counsel for the defence suggested an award of Kshs.180,000.00. On special damages counsel for the defence submitted that the same should not be awarded on the courts assessment of the evidence relating to special damages it is on record that the receipts covering that medical expense were produced as exhibit 13(a) (b) (c) and (d) 12, a), b), c) and d). The objection raised by the defence was on the basis that the receipts were for large amounts of money but no revenue stamp had been affixed on them. This objection should have been raised when the receipts were being tendered in evidence by the witness in order for him to explain why they do not have a revenue stamp on them and find out whether the same can be affixed after wards. The receipts having gone in without objection there is no way they can be rejected during submissions. They will have to be paid. There is proof that the witness and his wife took loan from their employers to pay for the same. The claim is genuine and the same are awardable. They total Kshs.386,620.00 which I allow. On general damages it is on record from the Doctors finding that this plaintiff will have to under go a future medical operation to remove the metal plates both in the femur and hand. They will cost a total of Kshs.140,000/=. This is what has been asked for by the plaintiff. There was no comment from the defence on the same. It is the finding of this court that the metal plates will have to be removed and so the claim is to be allowed at 140,000.00.

On general damages for pain suffering and loss of amenities counsel for the defence suggested Kshs.180,000.00 while the plaintiff counsel suggested a figure of Kshs.1,800,000.00. On the courts assessment I find that the plaintiff was awarded 42% disability if the correction is not done but no percentage was given if the correction is done. It is clear that the plaintiff received severe injuries during the accident and although she may undergo corrective surgery and she appears to be in fair condition her life will never be the same again. Considering the suggested awards I find that those suggested by the defence is too low while that suggested by the plaintiff is slightly on the high side. It is my considered opinion that an award of Kshs.1,250,000.00 will be an adequate compensation for the severe injuries sustained by this patient.

4. For the Plaintiff in HCCC No. 168 of 2000 Naomi Nzisa Makau. She gave evidence as PW 7. She sustained the following injuries.

(i) broke her left arm and they put a metal shown by surgical scars.

(ii) Deep cut on her face.

(iii) Dislocated collar bone – clavicle bone swelling on the right side of the chest. She was operated on after the accident and metal plates put which have not been removed because she has no money to pay for those medical expenses. She might also be required to under go another medical operation to correct the collar bone which is crookedly conspicuous.

Her only complaints are the correction of the collar bone and the removal of the metals. That she cannot work with the hand and she has been having follow up treatment for chest pains. When cross examined she agreed that correction of the collar bone is not indicated in the medical report but it is her wish that it be correct.

PW 8 Robert Makau Nzioka is the father of PW 7. He confirmed the daughter was involved in an accident. She was admitted at Aga Khan hospital where she was operated on. He confirmed that he personally paid 48,253.00 of the medical bills incurred and gave the original of the receipts to the headmistress of Machakos girls high school. He produced copies marked as exhibit 15(a), (b) (c), (d), (e), (f), (g) which total Kshs.39,253.00.

He further added that out of 124,514.00 demanded vide exhibit 16 the school paid 80,000.00 while the

rest were paid by him but the receipts produce only total Kshs. 39,253.00.

The medical report for this witnesses is exhibit 14 dated 16.2.2001 by Dr Nimrod J.M. Mwangombe.

The findings of the doctor on examination are that she has two surgical scars on the left fore arm each 6cm long. She has another surgical scar on the left jaw. Movements in the left elbow and left wrist joint are satisfactory. She has mild deformity at the left sterno clavicular joint consistent with a previous subluxation of the joints. Movements in the left shoulder joint are satisfactory. In the doctors opinion the plaintiff had injuries on the left fore arm and the left collar bone following a road traffic accident. She was treated at Naivasha hospital and Aga Khan hospital Nairobi. She stayed in hospital for one week. She had fracture of the left radius and ulna bones.

She underwent surgery open reduction and internal fixation with metal plates and screws was done. The metals are still inside. They will need to come out after the fracture has healed. This will cost 60,000.00 in a medium cost hospital.

In his submissions in court counsel for the plaintiff invited the court to consider the fact that the plaintiffs dislocation of right sterno clervicular joint collar bone has a serious post treatment trauma in that the particular bone has healed while bend inward the chest and posed a cosmetic concern bearing in mind that the plaintiff is a young lady aged 17 1/2 years of age.

2. That it was agreed that the plaintiff under goes a second medical examination on the issue of correction of the collar bone which was done on 24.4.2002 by Dr. Mwangombe as shown by a receipt attached to the submissions. That the Doctor recommended that correction would be done at a cost of Kshs.150,000.00. Production of the second medical report was deferred to enable the defence lawyer get instructions from the insurance company but he never mentioned anything about that report when the case came up for hearing next and they submit that this court should infer that silence means consent. Although it was indicated that the second report was being exhibited for this courts perusal non was exhibited only the receipt was availed. The plaintiffs counsel referred the court to the case of **Dr. Woifang Farrugia versus the Hon. The Attorney General and another Nairobi HCCC 472/1988** where the plaintiff suffered a fracture ole cranion and compound comminuted fracture of the lower end of the humerus. He was initially treated in Nairobi and later in Germany. The injuries hand capped his profession as a physician due to loss of right hand. General damages for pain suffering and loss of amenities assessed at Kshs.500,000.00. On the basis of the foregoing the plaintiffs counsel suggested Kshs.900,000.00 as general damages for pain suffering and loss of amenities, Kshs. 150,000.00. In future medical expenses, cost of second medical report 3,000.00 and special damages of Kshs.73,393.95.

In respect to this plaintiff the defence lawyer referred the court to the **case of Peter Kithikii Kitunguu versus Josephat Paul Otieno Inda Nairobi HCCC No. 2273 of 1989** where the plaintiff sustained compound comminuted fractures of the left radius and ulna. The plaintiff was admitted in hospital for 11 days during which the fractures were immobilized with plate and screws.

Bone grafting was also done using the iliac bone as the doner. On being discharged from hospital the plaintiff remained on sick leave for a period of 145 days. The fracture healed well but there was significant decree of stiffness and weakness in the arm and pains. He would undergo another operation to remove the plates and screw. This is expected to ease the pain. There were permanent scars on the arm which will remain a permanent social problem. General damages for pain suffering and loss of amenities were assessed at kshs.150,000.00. On the basis of that counsel suggested Kshs.130,000.00 as general damages for this plaintiff. The courts assessment on the specials claimed is that the receipt for the second medical report for Kshs.3,000/= was not produced in evidence either through the plaintiff or by consent and so it will not be considered in evidence. As noted earlier on the receipts produced by PW 8 and bearing his name total Kshs.39,253.00 which will be paid to the plaintiff. The balance of Kshs.75,261.00 will be paid to Machakos girls high school. There is evidence that the plaintiff was hospitalized and so medical expenses were incurred and the same are payable. On general damages I find that the plaintiff still has the metal plats which will have to be removed at a cost of 60,000.00.

As for the correction of the collar bone the cost is alleged to have been included in the second medical report which was not produced in evidence and so that will be left out.

As regards damages for pain suffering and loss of amenities I note that the authority cited by the plaintiffs counsel had far more disabling injuries than those of the plaintiff herein as they involved the loss of one hand which was disabling to the plaintiff therein as a physician. Herein the plaintiff does not have such disabling injuries although the injuries cannot be minimized as she cannot use the hand now as she used to use it before.

As regards the defence authority it is clear that it has relevant injuries.

Counsel for the defence failed to consider the fact that the decision was made in 1989 almost 14 years ago and so an element of inflation was to be considered. It is this courts considered view that an award of Kshs.340,000.00 will be adequate compensation for damages for pain suffering and loss of amenities. This takes into account the inflationary trend and the value of the Kenyan shilling today.

5. For the Plaintiff in HCCC 167/00 Lilian Kathoki Kalonzo. She gave is evidence as PW 9. She says that she broke her right leg and she had no other injury. She was treated at Naivasha hospital and Nairobi hospital. She was operated on and a metal plate fixed. She there after used to attend physiotherapy for 2 months. The metal plates have not been removed.

Her complaints are pain in the affected leg especially on cold days. There is a long scar from the ankle upto the knee which bothers her very much forcing her to wear long trousers to hide the scar. She informed the court that she is not fully recovered as the wound is healed but the bone is not fully healed. Her other complaints are that she cannot carry heavy loads or walk fast.

PW 10 her father (father of PW 9) confirmed she was involved in an accident and she was injured. That the hospital demanded Kshs.149,233.15 from him. He had only paid 10,000.00. He has no objection if the entire sum is paid out to the school who will in turn refund to him what he had paid to the school. A medical report by professor J. A.O. Mulimba dated 21.4.1999 was produced as exhibit 17. The findings of the doctor are that the plaintiff has an anterolateral longitudinal scar on the right leg. Function in both knee and ankle is good. The x-rays of the right tibia and fibula show fractures of tubla which has been plated and is healing well. In the doctors opinion the patient will undergo another operation for the removal of the metals. She will have pains in the leg on and off especially when the whether changes.

Permanent disability will be little as she still has considerable ability to remodel. It will be in the region of 5%. The next operation will cost Kshs.70,000.00.

The plaintiffs counsel referred the court to the **case of Omar Musa Hassan and another versus Rashid Salim and another Nairobi HCCC no. 2391 of 1995** where the first plaintiff suffered minor injuries while the second plaintiff suffered a comminuted fracture of the right femur and several tissue injuries over various parts of her body. The court awarded kshs.100,000.00 as general damages for the first plaintiff plus specials of 40,781.00 making a total of Kshs.140,781.00.

For the second plaintiff Kshs.700,000.00 as general damages Kshs.135,000.00 for future medical expenses and special damages of Kshs.52,130.00. Total award Kshs.887,130.00. On the basis of the foregoing the plaintiffs counsel suggested Kshs.850,000.00 as general damages for pain suffering and loss of amenities, Kshs.70,000.00 for future medical expenses and Kshs.149,233.15 as specials.

The defence counsel referred the court to **the case of Maingi Muteru versus Peter Ngungi Kenya Nairobi HCCC no. 400 of 1989** where the plaintiff aged 75 years at the time of accident was knocked down while attempting to cross the road. He suffered fractures of the right leg tibia and fibula and multiple bruises on the scalp and neck. The right leg was put in plaster for a period of 3 months during which time he walked with the aid of crutches. The fracture healed with deformity and was un able to walk or stand for long. There is pain in the right knee due to the deformity in the knee which is related to the angulation in the right tibia and fibula.

Osteoarthritis is likely in the right knee and permanent physical disability has been assessed at 20%. General damages for pain suffering and loss of amenities assessed at Kshs.150,000.00

On the basis of the foregoing the defence counsel suggested an award of kshs.150,000.00 for this plaintiff. I have considered the claim of special damages and I find that the same is awardable but will be paid straight to the school as it is on record that the plaintiff was admitted and operated on.

The plaintiff still has the metal plates in her leg which have to be removed and so cost of future medical expenses is also awardable of Kshs.70,000.00.

As for damages for pain suffering and loss of amenities it is clear from the doctors findings that the injuries are likely to heal well if not completely.

There is an award of 5% disability, the plaintiff is likely to adjust well. I have also considered the authority referred to the court by the plaintiffs counsel and find that it related to unrelated injuries of a fracture of a femur and not to tibia and fibula. The authority for the defence is most appropriate save that the defence counsel failed to consider the value of the Kenyan shilling in 1990 and now 2003 a period of 14 years later and also failed to consider the element of inflation over the period. I have considered all the relevant factors and I assess Kshs.320,000.00 as general damages for pain suffering and loss of amenities

. **6. For the plaintiff in 166/00 Jane Syombua Sammy** she gave evidence as PW 11 she was involved in the accident and she sustained uncomplete fracture of the left tibia and left hip and a blunt injury to the left hip. A plaster was applied on the whole leg from the foot up to the hip. She came back to school after 1½ months on crutches. The injuries were medically assessed as shown in exhibit 20. Her current complaints are that she cannot play basket ball which she used to play, she cannot fetch water, cannot walk for long distances, the hip is painful when it is cold and usually has problems when it is cold as her home area experiences cold spells at times.

PW 12 her mother Rosaita Mwangangi. She confirmed the daughter was involved in the accident subject of these proceedings. She was informed of the accident and when she went to school she found her daughter on crutches and she was advised to take her home which she did. She PW 12 confirmed that all the expenses demanded vide exhibit 2 were paid by the school totaling Kshs.22,136.00.

The medical report was prepared by professor J. A. O. Mulimba and it is dated 21.4.1999. It shows that the plaintiff was discharged from hospital after 3 days in a plaster cast. The findings on examination are that the patient has residual swelling in the left leg. Movement in the knee and ankle was normal. Both hip and groin were within normal limits. Clinically fracture was healed.

In the doctors opinion the patient sustained an incomplete fracture of the left tubla which was treated conservatively in a dynacast. She has healed well.

There will be pain in the leg over along time before she eventually settles.

Permanent disability will be small in the order of 3%.

In his submission to court counsel for the plaintiff talked of a medical report by Dr. Ochieng which was produced by consent which I do not have on record. The doctors report produced in evidence is that prepared by professor J. A. O. Mulimba which I have already referred to.

The plaintiffs counsel referred the court to the case of Patrick Muturi Kangundu versus David Mwanza Musili and Pearl Dry Cleaners Ltd. Nairobi HCCC No. 1204 of 1990 where the plaintiff a fracture of the leg, facial cuts and injuries on the right hand. The resultant disabilities noted were inability to stand for a long time.

(b) In ability to hold heavy objects. The count ended Kshs. 400,000.00 for pain suffering and loss of amenities, Kshs.100,000.00 for future medical expenses. Total Kshs.500,000.00 less 15% contribution.

On the basis of the foregoing counsel for the plaintiff suggested an award of Kshs.850,000.00 as general damages for pain suffering and loss of amenities, special damages of Kshs.19,136.00 and 100.00 for police abstract total Kshs.869,136.00.

In respect for this plaintiff the defence counsel referred the court to the case of Maingi Muteru versus Peter Ngugi Kenye Nairobi HCCC No. 4009 of 1989 where the plaintiff aged 75 years at the time of accident was knocked down while attempting to cross the road. He suffered fractures of the right leg tibia and fibula and multiple bruises on the scalp and neck. The right leg was put in plaster for a period of 3 months during which time he walked with the aid of crutches. The fracture healed with deformity and was unable to walk or stand for long. There is pain the right knee due to the deformity in the knee which is related to the angulation in the right tibia and fibula. Osteoarthritis is likely in the right knee and permanent physical disability has been assessed at 20%. General damages for pain suffering and loss of amenities assessed at Kshs.150,000.00.

On the basis of the foregoing counsel for the defence suggested an award of Kshs.150,000.00 for this plaintiff. On the courts assessment on special damages it is on record that this plaintiff was admitted in hospital and treated and so medical expenses must have been incurred by the school. The mother PW 12 confirmed that the school paid the same. The amount claimed in the plaint was Kshs.22,236.00 while in his submissions counsel for the plaintiff asked for 19,136.00 to be paid to the school. I will allow Kshs.22,136 as pleaded and 100.00 to the plaintiff for the abstract.

On general damages for pain suffering and loss of amenities I note that the authority cited by the plaintiffs counsel had more serious injuries than those suffered by the plaintiff herein while that one cited by the defence counsel had similar injuries to those suffered by the plaintiff herein. The decision was made on 26.10.1990 about 13 years ago and so an element of inflation has to be taken into consideration when assessing an award herein. I have also considered the fact that the plaintiffs injuries have healed and she has been awarded a permanent disability of only 3%. She is not to undergo any future operation and is likely to remodel her activities to suit her current condition. I have taken all the relevant factors into consideration and so I make an award of Kshs.250,000.00 as general damages for pain suffering and loss of amenities. Also costs of the suit . Before I conclude I would like to state that the defence counsel submitted that medical expenses were not to be refunded because no receipts had been produced to prove payment of the same. This court has already allowed the claim as shown earlier on in this judgement and the reason for allowing the same is that the defence counsel was party to the production of the demands notes from the concerned school Machakos girls high school whose contents show that the school paid those expenses on behalf of the parents who were being called upon to refund the same. The parents who gave evidence with the exception of two of them stated that they did not pay the same to the hospital concerned neither had they refunded the same to the school. Those who paid produced receipts as proof. It follows that the concerned parents could not produce what they did not have. On the other hand it is the Headmistress of Machakos girls high school the first defendant who issued the demands notices exhibit 2, 9, 16, 18, 19 and 21 claiming that they had paid this money on behalf of the parents. If anything it is the defence who have possession of these documents and they are the ones who should have produced them to court. The defence lawyer cannot therefore demand proof for that which his clients have possession of. Lastly if not allowed it is the defence who will suffer loss and not the plaintiffs. The court is therefore satisfied that the awards in respect of medical expenses have been rightly allowed. I note that at times there was discrepancy between the amount pleaded and the figure demanded. In the absence of an amendment to harmonize the figures the court will go by the figures demanded.

I therefore enter judgement for the plaintiffs separately against the defendants jointly and severally as here under.

1. Ann Wanjiru Muriithi HCCC No. 169/20000

- (i) Special damages of Kshs.149,594.60 with interest at court rates from the date of filing till payment in full. To be paid to the defendants.
- (ii) General damages for pain suffering and loss of amenities Kshs.420,000.00 (four hundred and

twenty thousands) with interest at court rates from the date of judgement till payment in full.

(iii) Costs of the suit.

2. Ann Njeru HCCC 165/2000

(i) Special damages of Kshs.78,593.00 with interest at court rates from the date of filing till payment in full. To be paid to the defendants.

(ii) General damages for pain suffering and loss of amenities Kshs.700,000.00 (seven hundred thousand only) with interest at court rates from the date of judgement till payment in full.

(iii) Costs of the suit.

3. Mary Nthenya Nzomo HCCC 55/2001

(i) special damages of Kshs.386,620.00 with interest at court rates from the date of filing till payment in full to be paid to the plaintiff.

(ii) General damages for pain suffering and loss of amenities Kshs.1,250.00.

(iii) cost of future medical expenses Kshs.140,000.00. Total Kshs.1,390,000.00 (one million three hundred and ninety thousand only) with interest at court rates from the date of judgement till payment in full.

(iv) Costs of the suit.

4. Naomi Nzisa Makau HCCC 168/2000

(i) Special damages of Kshs.123,514.00 with interest at court rates from the date of filing till payment in full.

(a) Kshs.39,253.00 to be paid to the plaintiff

(b) Kshs.84,261.00 to be paid out to the defendants.

(ii) General damages for pain suffering and loss of amenities Kshs.340,000.00.

(iii) Cost of future medical operation Kshs.60,000.00. Total Kshs.400,000.00 (four hundred thousand only) with interest at court rates from the date of judgement till payment in full. (iv) Costs of the suit.

5. Lilian Kathoki Kalonzo HCCC 167/2000

(i) Special damages of Kshs.149,233.15 with interest at court rates from the date of filing till payment in full to be paid to the defendants.

(ii) General damages for pain suffering and loss of amenities Kshs.320,000.00.

(iii) Cost of future medical operation Kshs.70,000.00. Total Kshs.390,000.00 (three hundred and ninety thousand only) with interest at court rates from the date of judgement till payment in full.

(iv) Costs of the suit.

6. Jane Syombua Sammy HCCC no. 166/2000

(i) Special damages of Kshs.22,136.00 with interest at court rates from the date of filing till payment in full. To be paid to the defendant.

(ii) General damages of Kshs.250,000.00 (two hundred and fifty thousand only) with interest at court rates from the date of judgement till payment in full.

(iii) Costs of the suit.

Dated, read and delivered this 27th Day of April, 2003.

R. NAMBUYE

JUDGE