



REPUBLIC OF KENYA



**MNN (Suing as Next of Kin to JNN a Minor) v Mwae & another (Civil Case E005 of 2021) [2025] KEHC 4540 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL CASE E005 OF 2021  
GL NZIOKA, J  
MARCH 4, 2025**

**BETWEEN**

**MNN (SUING AS NEXT OF KIN TO JNN A MINOR) ..... PLAINTIFF**

**AND**

**STEPHEN MWAE ..... 1<sup>ST</sup> DEFENDANT**

**STARSHINE BLUE INVESTMENT CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 31<sup>st</sup> March 2021, the plaintiff sued the defendants seeking for judgment for:
  - a. General damages for pain and suffering and loss of amenities
  - b. Special damages of Kshs. 319,265.00
  - c. Damages for diminished/loss of future earning capacity
  - d. Future medical expenses/myoelectric prosthetic arm
  - e. The costs of the suit
  - f. Interest on (a) (b) (c) above at court rates. From the date of filing till payment in full
  - g. Any other relief that the court may deem fit and just to grant
2. The plaintiff's case is that on the 14<sup>th</sup> June 2018, the minor was lawfully travelling as a passenger aboard motor vehicle registration number KCP 780Z. That the vehicle was being driven by the 1<sup>st</sup> defendant along the Nairobi – Naivasha Highway.
3. That at Karai area the vehicle was involved in a road traffic accident and as a result of the accident, the minor sustained the following injuries:



- a. Deep cut wounds on the occipital region
  - b. Crush injury on the right forearm with eventual amputation above distal humerus multiple soft tissue injuries
  - c. Crush injuries
  - d. Blood loss
  - e. Pains and soft tissue injuries
4. The plaintiff avers that, the 1<sup>st</sup> defendant was negligent in driving the vehicle in that; he was drove the vehicle at an excessive speed, without due care and attention, heed to warnings of an unusual smell in the vehicle just before the accident and concerns raised by pupils and teachers, slow down and/or control the vehicle so as to avoid the accident, observe the provisions of the *Traffic Act* and Highway Code and maintain the subject vehicle in good condition in that it had no safety belts.
  5. The plaintiff pleads the doctrine of res ipsa loquitur and pleads that the 2<sup>nd</sup> defendant is vicariously liable for the actions of the 1<sup>st</sup> defendant as it is the beneficial owner of the vehicle.
  6. The plaintiff further avers that, prior to the accident the minor enjoyed good health, was intelligent and belonged to several academic clubs and participated in many extracurricular activities. That due to the injuries he has suffered loss of amenities, expectation of life, and future earning capacity has been compromised.
  7. However, the defendants opposed the claim vide a statement of defence dated 22<sup>nd</sup> July 2021 and denied each and every allegation in the plaint and put the plaintiff to strict proof thereof.
  8. The defendants denied the allegations that the 1<sup>st</sup> defendant is the registered owner of the subject vehicle and/or the 2<sup>nd</sup> defendant was driving it on the material date. The allegation that the minor was a lawful passenger on the said vehicle and/or was travelling therein on the material date was also denied.
  9. Furthermore, the averments that the 2<sup>nd</sup> defendant drove the vehicle negligently and the particulars of negligence attributed to him were denied and so was the fact that he was driving the vehicle with the authority of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant also denied the fact that the doctrine of vicarious liability is applicable herein.
  10. However, on a without prejudice basis the defendants aver that if at all an accident occurred, it was solely caused by or substantially contributed to by the minor and/or his guardian. That the minor exposed himself to unnecessary risk of injury by failing to wear and fasten his safety belt as instructed, standing, walking or attempting to walk in a moving vehicle, alighting or attempting to alight from a moving vehicle, and distracting the attention of the driver thus occasioning the occurrence of the accident.
  11. That further, in the alternative and without prejudice, that if the accident occurred, it was inevitable and occurred despite the exercise of reasonable skill, care and attention of the driver, and that the doctrine of Res Ipsa Loquitur does not apply.
  12. At the close of proceedings, the case proceeded to full hearing. The plaintiff's case was supported by the evidence of the minor whose witness statement was admitted in evidence by consent of the parties and he was not subjected to cross-examination.
  13. Be that as it were, the minor's evidence is that, on the date of the accident he arrived at school at 6:45 am and boarded the school bus at around 7:55 am for a school trip. That, he sat on the seat behind



- the driver and did not wear a seat belt as there was none. That a total of six (6) teachers and forty-seven (47) pupils were on and.
14. That the bus left the school at 8.30am and after travelling for about one (1) hour, there was a strange smell in the vehicle and the occupants informed the driver but he ignored their concerns. However, after a while the smell subsided.
  15. That a short while later there was a loud sound followed by shaking before the bus lost control and he was thrown out of the bus through the left side window and landed on his right hand which scratched the tarmac and was among the last people to be rescued from underneath the bus.
  16. The minor states that he was rushed to Naivasha district hospital where he was given first aid before being transferred to Kijabe AIC hospital. That, he was informed that his right hand would be amputated and stayed in hospital for four (4) days.
  17. The minor states that, since the accident it has been a struggle to carry out daily activities such as; bathing and dressing and has to rely on his parents for assistance. Further, he experiences headaches while combing his hair and it's a challenging to go to the barber.
  18. Furthermore, that it took a full school term and a half to learn how to write with one hand and has difficulty keeping up with the learning speed which affected his school grades. That he no longer plays with his siblings and friends or football as a goalkeeper as he used to do. Additionally, he gets emotional when people stare at his hand.
  19. The plaintiff (PW2) Moses Njiri Nyutu adopted his witness statement wherein he stated that, on 14<sup>th</sup> June 2018, the minor herein who is his son left home for a school trip at Lake Nakuru National Park. That at around 10a.m he received a call from his sister that the school bus the minor was travelling in was involved in an accident near Karai and the children had been rushed to Naivasha General Hospital.
  20. That, he found the minor in the casualty room on blood transfusion drip as he had lost a lot of blood and bandaged on the head and the right arm. That he learnt the minor was seriously injured and required more specialized treatment and was advised to transfer him to Kijabe AIC Hospital, which he did. That the minor was admitted at the hospital for four (4) days and his right hand was amputated.
  21. That, the minor resumed classes in October one (1) week to the end of the third term and he has been training and encouraging the minor to write with his left hand but has resulted in slow speed in doing his school work. Furthermore, the minor's performance in school has declined.
  22. Similarly, the minor is assisted to bath by his mother from time to time and is slow at doing his chores. That, the minor has also been registered as a person living with disability and issued with card No. MCPWD/P/XXXXXX.
  23. PW2 Nyutu stated the 1<sup>st</sup> defendant paid off the hospital bill but he managed to raise some money and reimbursed the whole amount.
  24. In cross-examination PW2 Nyutu confirmed that, the investigations on who was to blame for the accident was not indicated in the police abstract. He also conceded that the records of the minor's performance were not produced although he had given to his advocate.
  25. He confirmed that the school paid the hospital expenses of Kshs. 79,065 directly to the hospital but has refunded the money in cash although he did not produce proof thereof.



26. The plaintiff's case was further supported by the evidence of (PW3) Dr. Moses Kinuthia who examined the minor and noted that he complained of pain and numbness of the stump right upper limb, painful right scalp especially while combing the hair and in cold weather.
27. The doctor indicated that he relied on the P3 form, discharge summary dated 18<sup>th</sup> June 2018 and medical report dated 7<sup>th</sup> February 2020 both from AIC Kijabe Hospital and the police abstract in preparing his report.
28. That on examining the minor, he found that the minor's right arm was mangled beyond surgical repair and in order to save his life it was deemed necessary to amputate it and it was amputated 4cm above the elbow with the remnant stump about 16cm long well terminated and refashioned (well closed).
29. Further, there were multiple scars on the right side of the head temporoparietal and occipital scalp region and the same were consistent with road traffic accident and he classified them as grievous harm and assessed permanent incapacity of 68%.
30. According to PW3 Dr. Kinuthia, the minor will not attain full physical, social or economic potential and has lost confidence and shuns from playing with other children. He recommended the minor be fitted with a fully functional myoelectric prosthetic arm at the mid-upper arm at a cost ranging between Kshs. 2,500,000 to Kshs. 20,000,000 depending on the components with an average cost of Kshs. 6,000,000. That it will require to be replaced at least four (4) times.
31. That, other additional costs include; the prosthetics at a cost of Kshs. 4 million, physiotherapist at Kshs. 1,000,000 and occupational therapist at Kshs. 1,000,000. He estimated the total costs of the arm and medical care at Kshs. 30,000,000.
32. PW3 Dr, Kinuthia produced the minor's medical report dated 19<sup>th</sup> February 2020 and attached thereto research material on the myoelectric prosthetic arm. He testified he was paid Kshs. 60,000 for the report as per receipt No. 65892 and Kshs. 20,000 for court attendance.
33. During cross-examination, he stated that the information on the myoelectric arm was from online research and current publications from the University of California, USA. Further, there are no hospitals in Kenya that provide the electric arm and that it will have to be ordered for and an orthopaedic surgeon have it attached. He conceded that there were other prosthetic arms available in Kenya such as split-hook that can be used at a cost of Kshs 1,000,000 to Kshs. 2,000.
34. The parties agreed to have the discharge summary from AIC Kijabe Hospital and the second medical report by Dr. Wambugu produced without calling the makers and the defendants closed their case without calling any witness.
35. Subsequently, the parties filed their final submissions. The plaintiff in undated submissions filed on 16<sup>th</sup> May 2023, argued that the minor was a passenger and therefore cannot be penalized for the negligence of the 1<sup>st</sup> defendant who was the driver.
36. That, in the case of, Boniface Waiti & another vs Michael Kariuki Kamau [2007] eKLR the High Court held that, a passenger has no control over the manner a vehicle is driven and cannot be penalized due to poor control of the vehicle and it is the duty of the driver to explain what caused the accident. That, the doctrine of res ipsa loquitur was pleaded.
37. That, the 1<sup>st</sup> defendant was expected to drive the subject vehicle prudently, vigilantly and able to bring it to a safe stop in case of an emergency but failed to do so and therefore did not meet the standard of a prudent driver as set out in Embu Public Road Service Ltd vs Riimi (1968) EA 22 as cited in Boniface Waiti & another vs Michael Kariuki Kamau (Supra)



38. The plaintiff further submitted that, the 2<sup>nd</sup> defendant is vicariously liable for the negligence of the 1<sup>st</sup> defendant. Firstly, the subject vehicle was owned by the 2<sup>nd</sup> defendant as proved through the production of a document from the Registrar of Motor Vehicles showing the 2<sup>nd</sup> defendant as the registered owner. Section 8 of the *Traffic Act* was cited which provides that, “the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
39. Further, reliance was placed on the cases of; Joseph Wabukho Mbayi vs Frida Lwile Onyango [2019] eKLR the High Court relied on the case of Joel Muga Opija vs East African Sea Food Limited Civil Appeal No. 309 of 2010 where the Court of Appeal stated that the best way to prove ownership was through the production of a document from the Registrar of Motor Vehicles showing the registered owner.
40. The plaintiff further submitted that, on the material date of the accident, the 1<sup>st</sup> defendant was driving the subject vehicle with the authority of the 2<sup>nd</sup> defendant and performing a task/duty delegated to him by the 2<sup>nd</sup> defendant.
41. That, the Court of Appeal in Khayigila vs Gigi & Co Ltd & another [1987] eKLR while considering the liability of the owner of a motor vehicle for the negligence of its driver cited with approval the case of Morgans vs Lanchbury and Others [1971] 2 All ER 606 where the House of Lords stated that it was necessary to show that the driver was a servant of the owner, or that at the material time the driver was acting on the owner’s behalf as an agent at the owner’s request expressly or impliedly or on his instruction and was therefore performing a task delegated to him by the owner.
42. Furthermore, that in the case of; Karisa v Solanki [1969] EA 318 the Court of Appeal stated that where a car causes damage it is presumed the negligence of the driver is attributed to the owner.
43. On general damages payable, the plaintiff submitted that, they should not be punitive but are meant to compensate the injured and relied on the case(s) of Cecilia W. Mwangi & another vs Ruth W. Mwangi (1997) eKLR, Kim Phoo Choo vs Camden & Islington Area Health Authority (1979) 1 ALL ER 322, and Halsbury’s Laws of England where it was stated that money cannot renew a physical frame that has been shattered but a court shall endeavour to compensate the plaintiff fairly and reasonably and not punish the defendant and that comparable injuries be compensated with comparable awards.
44. The plaintiff relied on the medical report and the testimony of PW3 Dr. Kinuthia that classified the injuries suffered as grievous harm and placed disability 68%. The plaintiff then submitted that an award of Kshs. 5,600,000 was adequate taking into consideration the extent of disability and inflation factors.
45. He relied on the case of; Charlene Njeri Kuria vs Gitu Geoffrey & another [2016] eKLR where the plaintiff suffered an injury to the spine with transient alteration in the level of consciousness due to the spine injury, inability to walk because of profound weakness on both legs with sensory loss – paraplegic, fracture dislocation at the level of L1 to L2 (complete anterolisthesis of L1 and L2 and wedge fracture of L2) with cord injury, loss of sensation on the lower limbs, lower abdominal (lap belt) bruising, lower back deformity, flaccid paralysis from the waist down with permanent disability at 60% and the High Court awarded general damages of Kshs. 5,000,000 for pain, suffering and loss of amenities.
46. On diminished/loss of future earning capacity, the plaintiff relied on the case of; Njuga Consolidated Co. Ltd & another vs Lineth Chemutai Moritim [2019] eKLR where the High Court cited the case of Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR where the Court of Appeal distinguished loss of earnings from diminished earning capacity and stated that an award for loss of earning can be made where the plaintiff is employed at the time of trial or not employed. That, the



justification for the award where the plaintiff is not employed is to compensate him/her for risk that he will not get employment or a suitable employment in future.

47. Further, reliance was placed on the case of; P I vs Zena Roses Ltd & Another [2015] eKLR, the High Court stated that the court in awarding general damages for loss of future earnings and lost years for minors will depend on the evidence before court to persuade the court that despite the minor's tender years of school (s)he would have a good future, for instance evidence to show that the minor was performing well in school and that based on his/her performance it is hoped (s)he will engage themselves in a certain profession.
48. The plaintiff submitted that, he had produced the minor's school progress reports that indicated he is a bright student who can achieve his dreams to be a computer engineer. However, he may face difficulty in performing tasks that require the use of both hands.
49. The plaintiff proposed that the court adopt the multiplier approach to calculate diminished future earning capacity with the minimum wage of Kshs. 15,120 and a multiplier of 25 years assuming that he would start earning at the age of 25 years and urged the court to award him Kshs. 4,536,000 calculated as follows:  
$$\text{Kshs. } 15,120 \times 12 \times 25 = \text{Kshs. } 4,536,000$$
50. The plaintiff relied on the case of, Njuga Consolidated Co. Ltd & another vs Lineth Chemutai Moritim [2019] eKLR where the High Court in considering damages for loss of earning capacity adopted the minimum wage of Kshs. 7,916 per month and a multiplier of 30 years and awarded damages of Kshs. 2,849,760 to the respondent/plaintiff who was a casual labourer.
51. The plaintiff further relied on the case of; EW (suing as the Next Friend and mother to BM (a minor) vs Kenya Power and Lighting Company & another [2015] eKLR where the plaintiff at the time of the hearing of the case was 9 years old and the High Court adopted a minimum wage of Kshs. 10,954 and a multiplier of 20 years taking into account the uncertainties of life and awarded Kshs, 2,628,960 as damages for loss of earning capacity.
52. On future medical expenses for the myoelectric prosthetic arm, the plaintiff relied on the medical report and testimony of PW3 Dr. Kinuthia and urged the court to award a sum of Kshs. 30,000,000.
53. It was submitted that the minor will require domestic assistance for the rest of his life due to the disability as even on getting the myoelectric prosthetic he would not be able to perform all the chores by himself since it cannot come into contact with water. The plaintiff proposed domestic care of Kshs. 1,200 per week with a life expectancy of 70 years old and urged for a total of;  $\text{Kshs } 1,200 \times 4 \times 12 \times 61 = \text{Kshs. } 3,513,600$ .
54. The plaintiff relied on the case of Charlene Njeri Kuria vs Gitu Geoffrey & another (supra) where the High Court considered that the plaintiff would require a house help at a modest salary of Kshs. 6,000 but for half a day and adopted a multiplier of 30 years and awarded Kshs. 1,080,000.
55. The plaintiff argued that special damages have been proved to a tune of Kshs, 139,265. Finally, he submitted that the defendants being 100% liable should bear the full costs of the suit.
56. However, the defendants in response submissions dated 6<sup>th</sup> June 2023, argued that the plaintiff bore the duty to prove his case on a balance of probabilities and cited section 107 of the *Evidence Act* (Cap 80) Laws of Kenya that lays the burden of proof on the person who desires a court to give judgment in his/her favour.



57. The defendant submitted that, the plaintiff failed to discharge his burden of proof as the police abstract produced indicated that the matter was pending investigations and did not blame the defendants' vehicle for causing the accident. Further, the investigating officer was never called to establish whether investigations were ever concluded and therefore the plaintiff's allegations have not been substantiated.
58. The defendants relied on the case of; David Ogol Alwar vs Mary Atieno Adwera & another [2021] eKLR where the High Court stated that, the burden of proof lay with plaintiff/appellant to prove the acts of negligence attributed to the defendant/respondent and that one can only prove liability by production of evidence to the effect, or where the defendant admits liability.
59. That, the plaintiff further failed to discharge his burden of proof as he did not call an eye witness considering that he did not witness the accident and therefore the allegations on the circumstances of the accident and particulars of negligence are hearsay. That, the High Court in the case of Peter Kanithi Kimunya vs Aden Guyo Haro [2014] eKLR stated that, the appellant had the onus to demonstrate to the court how the respondent was negligent in the manner he drove and managed the accident vehicle and found that the evidence adduced at the trial court was well below the required standard on a balance of probabilities.
60. It was submitted that the plaintiff did not adduced evidence that, the 1<sup>st</sup> defendant was blamed and charged with any traffic offence arising from the accident and therefore the circumstances of the accident remained a mystery. The case of Palace Investment Limited vs Geoffrey Kariuki Mwendu & another [2015] eKLR was cited where the Court of Appeal cited with approval the case of Miller vs Minister of Pensions [1947] 2 ALL ER 372 where Denning J stated that, where a tribunal cannot decide on which evidence to accept where explanations by both parties are equally (un)convincing, the party bearing the burden of proof will fail for not attaining the requisite standard.
61. On the award of general damages, the defendants submitted that the court should base the award only on two injuries being; a deep cut wound on the head, and amputation above the distal humerus as confirmed by the medical reports of (PW3) Dr. Kinuthia and Dr. Wambugu.
62. Furthermore, despite Dr. Kiunthia assessing permanent disability at 68% and Dr. Wambugu assessed it at 50% the same was not pleaded and further, due to the inconsistency in the degree of disability, the court should not consider permanent disability while assessing damages.
63. The case of; John G. Mbuthia & another vs Stephen Muiruri Njenga [2008] eKLR was cited where the High Court faulted the trial court for taking into account injuries that had not been pleaded and stated that a judgment cannot be given for an item that was not pleaded.
64. The defendants further cited the case of Charles Owino Odeyo vs Appollo Justus Andwaba & another [2017] eKLR where the High Court set out the principles to be considered in assessment of damages for personal injuries being that; an award is not meant to enrich the victim but compensate for injuries sustained, such award should be commensurable with the injuries sustained, previous awards for similar injuries are a guide however each case is determined on its own facts, and such previous awards be taken into account to maintain stability but factors such as inflation should be considered.
65. The defendants submitted that the award suggested by the plaintiff was excess as he had erroneously relied on the case of Charlene Njeri Kuria vs Gitu Geoffrey & another (supra) where the plaintiff had more severe injuries. They proposed general damages of Kshs. 600,000 as sufficient and relied on the case of JM (a minor suing through the father and next friend CMK) vs Githuya Transporters (K) Ltd [2022] eKLR where appellant suffered traumatic amputation of the right arm below the elbow, and bruises on the forehead and knees with permanent disability assessed at between 60 – 65% and the High Court maintained the general damaged of Kshs. 1,500,000 awarded by the trial court.



66. Further, reliance was placed on the case of; Grace Belinda Adhiambo vs Bowers Okelo & another [2017] eKLR where the plaintiff sustained an amputation of the left arm at the level above the elbow, extensive abrasions on the right elbow treated by skin grafting, fractures of the pelvic bone and upper incisors were rendered loose with permanent disability assessed between 68% and 75% and the High Court awarded Kshs. 1,500,000 as general damages for pain and suffering.
67. On diminished/loss of future earning capacity, the defendants argued that, the plaintiff had not proved the same. That, considering the tender age and early education stage of the plaintiff minor, it was not possible to ascertain prospects of his earning capacity as an adult and would amount to speculation.
68. Further, PW2 Jesse Nyutu in cross-examination confirmed that he had not produced the minor's academic records before and after the accident to substantiate the allegations that his performance had dropped. Furthermore, no leave was granted for him to produce any academic record after the close of the trial and therefore any such record sneaked into the court should be expunged from record.
69. However, if the court was to consider awarding damages under this head, it should adopt a global award approach and that a sum of Kshs. 300,000 would be sufficient as his future prospects were uncertain. That, the plaintiff minor can end up achieving more success than his peers who have all their limbs intact.
70. That in the case of, JM (a minor suing through the father and next friend CMK) vs Githuya Transporters (K) Ltd (supra) the High Court relied on the case of Mumias Sugar Company Limited v Francis Waraho [2007] eKLR where the Court stated that it was not possible to ascertain the income of a minor aged 5 years old at the time of the accident would make and awarded a token award of Kshs. 500,000 as damages for future earning capacity. The High Court awarded the plaintiff minor a token award of Kshs. 800,000 for loss of future earnings.
71. On future medical costs, the defendants submitted that the sum of Kshs. 30,000,000 put forth by (PW3) Dr. Kinuthia on behalf of the plaintiff for a single arm was exorbitant and was based on unverified online resources. That, (PW3) Dr. Kinuthia stated that the costs of the proposed prosthetic varied depending on the brand and manufacturer but he did not specify which brand and manufacturer he proposes nor did he get any quotations from recognized health institutions for the actual costs.
72. Furthermore, the unverified online sources relied on by Dr. Kinuthia were inconsistent and contradictory on the number of times the proposed prosthetic will need to be replaced, with one claiming that if the prosthetic fitted well in the socket, one would only require to change liners and sock limbs regularly.
73. That in addition, the costs of Kshs. 30,000,000 put forth by (PW3) Dr. Kinuthia included additional costs for prosthetics, physiotherapist and occupational therapist without stating where such specialists were to be found and obtaining quotations from health institutions.
74. The defendants urged the court to reject the opinion of (PW3) Dr. Kinuthia due the inconsistencies and unsubstantiated claims and cited the case of; Apex Security limited vs Joel Atuti Nyarui [2018] eKLR where the High Court quoted the Court of Appeal decision in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Aunyao Kioko [2007] EA 139 where it was stated that expert medical opinions are not binding and the court is entitled to reject the opinion if upon consideration alongside other evidence there is proper and cogent basis for doing so.
75. The defendants further submitted that, (PW3) Dr. Kinuthia admitted in cross-examination that no hospital in Kenya fitted the myoelectric prosthetic but that cosmetic prosthetics were available at a



cost ranging between Kshs. 300,000 – Kshs. 600,000. They urged the court to adopt a figure of Kshs. 300,000 as an award for future medical expenses.

76. Lastly, on the issue of special damages the defendants submitted that the invoices produced did not amount to Kshs. 139,265. That, during cross-examination, the plaintiff admitted that the school had paid Kshs. 79,065 out of what is claimed and there was no evidence he had repaid the school. In the circumstances, the amount of Kshs. 79,065 ought to be deducted from the total pleaded.
77. That the pleaded special damages were not proved by authentic receipts and therefore should be abandoned. They relied on the case of Total (Kenya) Limited formally Caltex oil (Kenya) Limited vs Janevams Limited [2015] eKLR where the Court of Appeal held that a pro-forma invoice was a commitment purchase goods at a specified price and was therefore not satisfactory and/or sufficient proof of special damages.
78. At the conclusion of the case, I have considered the evidence on record alongside the submissions. I shall first deal with the issue of liability. In that regard, I find that there no dispute that the plaintiff was a student at the 1<sup>st</sup> defendant’s institution at the time of the accident and that he was lawfully travelling in the subject vehicle.
79. Similarly, it is not in dispute that the subject vehicle is owned by the 2<sup>nd</sup> defendant and was being driven by the first defendant at the time of the accident. Indeed, the police abstract confirmed that the accident occurred and it involved inter-alia the minor and the vehicle driven by the 1<sup>st</sup> defendant. Furthermore, the records from the Registrar of Motor vehicles clearly nailed down the 2<sup>nd</sup> defendant as the owner of the vehicle.
80. As such the allegations by the 1<sup>st</sup> defendant that he was not driving the vehicle and 2<sup>nd</sup> defendant that it doesn’t own the vehicle is not tenable.
81. It noteworthy that the 2<sup>nd</sup> defendant has been sued under the principle of vicarious liability. In the case of; Amalgamated Logistics International Ltd & another v MMK (2020) eKLR the Court of Appeal stated as follows: -

“Vicarious liability has been well elucidated in Salmond on Torts, 1<sup>st</sup> ed at Pg 83 as;

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.”

This Court in JOSEPH COSMAS *KHAYIGILA V GIGI & CO. LTD & ANOTHER, Civil Appeal No. 119 of 1986* established a clear test for vicarious liability as follows: -

“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

82. The 1<sup>st</sup> defendant having been authorized by the 2<sup>nd</sup> defendant to drive the subject vehicle herein, renders the 2<sup>nd</sup> defendant vicariously liable.
83. However, the key question is who caused the accident. The plaintiff’s case is that the 1<sup>st</sup> defendant was alerted of a strange smell in the vehicle but ignored. It suffices to note that the defendants did not call



- any evidence to support their statement of defence nor rebut the evidence adduced by the plaintiff. In the circumstance, the plaintiff substantiated the allegation of negligence against the defendants.
84. Further, the plaintiff was a lawful passenger on the vehicle and all the allegations of negligence against him are not supported by any evidence. Furthermore, the plaintiff as a passenger, would not have contributed to the cause of the accident, he was not in control of the vehicle. Indeed, it must appreciate the plaintiff is a minor and there is evidence that there was six (6) teachers, and 47 students abode. The defendant avers that the minor was jumping up and down in the vehicle, but how did that cause an accident and what was the role of the teachers on board?
85. The resultant of the afore and finding of the court is that the defendants are fully liable for the accident. The plaintiff did not plead for jointly and/or several liability of the defendants. In my considered opinion where more than one party is sued as a defendant, the pleadings must clearly state in the prayers whether they are jointly and/or severally liable. As such, I award liability as pleaded, that the defendants are 100% liable.
86. On quantum the plaintiff proposed a sum of Kshs. 5.6 million as general damages, and relied on the case of; Charlene Njeri Kuria vs Gitu Geoffrey & another [2016] e KLR on the ground that injuries in both cases are comparable. But the comparability is not explained or demonstrated.
87. Be that as it may, the plaintiff in the afore case suffered an injury on the spine fracture on levels one and two, loss of sensation on the lower limb, and deformation of the back. Notably these injuries are more serious than the injuries the minor suffered herein as such that decision does not help the court at all.
88. On the other hand, the defendants proposed a sum of Kshs, 600,000 and cited the case of; In JM (a minor suing through the father and next friend CMK) vs Githuya Transporters (K) Ltd [2022] eKLR in comparing the matter therein and the matter herein I note that the minor therein was five (5) years old while the minor herein is twelve (12) years old. Further, in afore matter, the minor was amputated on the right arm below the elbow and in this case above the elbow.
89. The defendants further cited the case of; Grace Belinda Adhiambo vs Bowers Okelo & another [2017] eKLR which I find comparable with this matter in almost all aspects. Firstly, the amputation in that case was above the elbow joint albeit the left arm, which difference is minimal. Secondly, in that case the disability was pegged at 68% and could go up to 70% at the shoulder level. In the matter herein, disability was assessed at each 68% which is very comparable.
90. However, the decision relied was rendered almost seven (7) years ago and as sum of Kshs. 1,500,000 awarded. Therefore, for consistence and comparability, and taking into account inflation I make an award of Kshs. 2,000,000 as general damages.
91. On the issue of diminished future earnings, the plaintiff proposes that the court consider the minimum wage method to assess the same. However, I note that the plaintiff was a student and not working. How will the court ascertain his job description? Therefore, that approach is not tenable. In that case, the global sum approach is more appropriate.
92. The defendants proposed a global sum of Kshs. 300,000 and cited various authorities which I have considered. In the case of In JM (a minor suing through the father and next friend CMK) vs Githuya Transporters (K) Ltd (supra) and Mumias Sugar Company Limited v Francis Waraho [2007] eKLR, where the court awarded Kshs. 800,000 and 500,000, respectively and taking into account that the first matter where Kshs. 800,000 was given, this child was 5 years and the child herein is 12 years, obviously, then the 5 years would benefit more than the 12 years. In the circumstances I award of Kshs. 700,000



as compensation for diminished loss of income, noting that even with disability the minor has equal opportunities and can still earn more than a person with all limbs.

93. On the issue of future medical expenses, I note that plaintiff simply extracted material from the internet without obtaining any quotation of the price for the artificial arm from any service provider such as the manufacturer. On the other hand, the defendants did not even bother to speak to the same.
94. Further, the materials presented to court relate to cost of the artificial arm in the USA and it is important a quotation be obtained also from a local dealer if any. Similarly evidence of the cost if the procedure is to be done abroad and the minor has to travel and/or if the equipment is imported and the procedure carried out locally. However, there was very, very little effort made by the parties in this area which is rather disappointing.
95. Be that as it may, the court was left with no choice but to consider the previous decisions on similar matter.
  - a. In the case of; CK v Kenya Power & Lighting Ltd [2021] KEHC 9462 (KLR) the court had the benefit of a very detailed quotation from both overseas and in Kenya and observed as follows:

“The appellant gave evidence and produced medical reports on the case of artificial hand.

He testified “that he has not known to feed himself properly. I have to feed him myself. He cannot do some carriers like engineering where he needs the use of 2 hands. He needs better education facilities to achieve his dream. He needs a prosthetic hand. I have consulted a hospital in London and I was given a scheme for rehabilitation dated 31.7.2014. He will need \$10,000 to be charged every 2 years which makes it \$30,000 up to age 12 when he will need \$28000 for 1st option Otto Bock mechanical elbow or \$50,000 Electric elbow.

Expenses traveling to and from London also need to be met. I contacted Moi teaching & Referral hospital who also gave me a scheme where they could fix the prosthetic if it was procured from London prosthetic Centre. I produce the letter from London Prosthetic (P.Ex. 10) and the letter from Moi teaching Hospital (P.Ex 11). I am comfortable with the Kenya option. I wish that the Court assists me with educating the child by providing between infrastructure, provide a hand, helper and in providing a medical cover and care, costs of the case. Much of the bill was covered by NHIF but not much really. The boy was referred for a 2nd Medical opinion by Tobia Otieno on 5/5//2012.”

The plaintiff further evidence gave the Kenyan Option as hereunder:

1. COSTS OF PROSTHETIC HAND

- i. At age 5-12 the prosthetic hand will cost £10,000/- i.e Kshs 1,600,000/-
- ii. At age of 12-18, the prosthetic hand will cost £18,000/- i.e Kshs 2,880,000/-
- iii. At age 18 the prosthetic hand will cost £44,000/- i.e Kshs 7,168,000/-

Hence total cost of the prosthetic hand will be Kshs 11,648,000/-



2. Cost of the socket for adjustment and replacement Kshs 30,000/- x3 = Kshs 90,000/-
3. Repair of the Prosthetic hand approximated at 10% of the nature which will be at least Kshs 160,000/- x 3 stage 3 = Kshs 480,000/-
4. Air transport for DHL Global is approximated at Kshs 5,000/- x3 = Kshs 15,000/-
5. Cost of fitting the prosthetic hand at Moi Teaching and Referral Hospital approximated at Kshs 50,000/- x3 = kshs 150,000/-

Both the medical report by Dr. Tobias Otieno the Orthopaedic Surgeon and Moi Teaching & Referral Hospital recommended the use of the prosthetic hand by the plaintiff for his day today activities. The respondent has given the cost options from London and Moi Teaching & Referral Hospital.

I find the Moi Teaching & Referral Hospital option practicable as it does not involve expenses of travelling to the countries. I therefore allow the expense of prosthetic hand to be replaced twice before he is 18 years and after he is eighteen (18) years.

I therefore allow Kshs 1,600,000 for first placement and 2,888,000 for 2nd placement all totalling Kshs 4,488,000 (four million, four hundred and eighty-eight thousand only).”

96. Based on the afore it clear that the court was given a tabulation of the amount claimed. However, the plaintiff herein simply pleaded for a sum of Kshs. 30 million without indicating how it was arrived at for example the cost of fitting the prosthetic arm if done locally or out of the country.
97. Additionally, I note, with a lot of respect to the doctor who gave the quotation herein, when a party is seeking specialized treatment of this nature, the court requires the testimony of an orthopaedic doctor and not a general practitioner as he does not have the competence and experience in this field.
98. Be that as it may, in *Guardian Coach Ltd & another v Kiptoo* [2022] KEHC 12397 (KLR) the respondent provided a quotation which was not contested to by the appellant and the High Court affirmed the trial court award of Kshs. 3,000,000 for a myoelectric arm.
99. In *KWW (Minor Suing Through His Mother and Next Friend BNW) v Shajand Holdings Limited & another* [2024] KEHC 9199 (KLR), the High Court was faced with two conflicting medical reports with the appellant seeking to import an prosthetic arm while the respondent proposed the use of locally available prosthetic arm. In awarding future medical expenses of Kshs. 4,000,000 the court decided as follows:

As regards future medical expense, the Plaintiff has specifically claimed USD. 690,000. He presented a report by Dr. Mulianga Ekesa which demonstrates both the need for the treatment – purchase of a forearm/hand prosthesis and psychological rehabilitation. The doctor quoted the figures for the forearm/hand prosthesis as USD 5000 to USD 10,000 for the functional prosthesis and USD 20,000 to USD 100,000 for myoelectric arm. The defence submitted their own medical report by Dr. Oketch who quoted the figures for the forearm/hand semi-functional prosthesis as ranging between Kshs. 200,000/= to Kshs. 600,000/= and functional (myogenic) prosthesis as ranging from Kshs. 600,000/= and



above. It is elaborate from the evidence of both expert witnesses that the Plaintiff requires a functional prosthesis which will require to be changed as the Plaintiff grows and that both medical experts concurred that the Plaintiff will require intensive psychological and physical rehabilitation. The Defendant's doctor Okech (DW1) did indicate in his testimony that functional prosthesis which costs around Kshs 600,000/ is appropriate for the Plaintiff. Learned counsel for the Plaintiff submits that the said prosthesis will have to be replaced after every ten years and that since the Plaintiff was aged 16 years then it will be about five times. Counsel for the Plaintiff has proposed a total of Kshs 89, 700, 000/ whereas counsel for the Defendant submitted that the sums are outrageous since no document has been availed to support the outrageous amounts and further that the Plaintiff is already above 18 years and unlikely to require replacement of the prosthesis. Learned counsel for the Defendant has proposed a modest sum of Kshs 500, 000/. From the two medical reports and the evidence of the doctors, it is clear that indeed the Plaintiff requires the functional prosthesis and which, in my view, will require replacement about five times before the Plaintiff hits the age of 60 years old. I am persuaded by the Defendant's doctor that the functional prosthesis is suitable and which costs Kshs 600,000 and that the same will be required five times thus bringing the sums to Kshs 3,000,000. Due to the effects of inflation on the Kenyan shilling, I find an award of Kshs 4,000,000/ would be adequate for the purchase and replacement of the functional prosthesis.

100. Furthermore, in *DA v Kenya Power & Lighting Company Limited* [2021] KEHC 8911 (KLR) the High Court in awarding Kshs. 8,000,000 was stated that:

(38) PW2 in his report recommended a functional prosthesis (artificial limb) at a value of Kshs. 8,000,000/-. The prosthesis proposed therein would require annual maintenance of Kshs. 100,000/- every five years. He stated that the proposed artificial arm would enable the plaintiff to meet his needs. That a cheaper artificial limb will cost kshs 1,000,000/= but would do limited work for the Plaintiff. According to PW2, these are ordinarily purchased from abroad. That he had sourced the information on the quotation from Ottobok (Germany).

[40] Contrary to the submission by the defendant, the expert opinion is that the nature of the injuries sustained requires future medical treatment and management of the plaintiff. The expert opinion herein was specific to the nature of injuries suffered by the plaintiff. The prosthesis recommended is of an advanced version which will ensure the plaintiff resumes his normal life and even going back to school. The proposed prosthesis provides the plaintiff with an opportunity to resume almost normal operations; such is the object of compensation. The court should not deny him the opportunity. See *Hezron Waitthaka Ndarwa & another v Ezekiel Ruheni Maina* [2019] eKLR.

(41) In light thereof, I find the cases relied on by the defendant to be distinguishable or inapplicable. The quotation produced as P. exh.4 was sourced by a professional the efficacy of the prosthesis thereto has been clearly articulated by the doctor. No other or appropriate quotation or proposal was provided for comparison by or to assist the court. Accordingly, I find the quotation and the kind of proposed prosthesis to be appropriate for the plaintiff's situation. I award Kshs. 8,000,000/- for purchase of the prosthesis.

101. Furthermore, in *EW (Suing As the Next Friend and Mother to BM (A Minor) v Kenya Power and Lighting Company Limited & another* [2015] KEHC 531 (KLR) the High Court stated as follows:

The plaintiff also pleaded for damages for future medical expenses in the sum of kshs 5,000,000 being the cost of a bionic arm. According to Dr Moses Kinuthia, the plaintiff will



need such arm replaced at least three times in his life time and that the bionic arm would be functional unlike prosthetic arm. Dr Kinuthia did not avail any evidence of the exact cost now and in future taking into account inflationary trends. This court expected the manufacturers or dealers price list since it is expected that the arm that the minor would use now as a minor would be different from the arm that he would use as an adult. It is however clear from the Doctor's medical report and testimony that the plaintiff will require a bionic arm to function. In the premise and in the absence of any evidence to the contrary, I award the plaintiff Kshs 5,000,000 to cover the cost of three bionic arms in his lifetime.

102. Finally, in the case of CK v Kenya Power & Lighting Ltd (supra) the plaintiff gave a breakdown of the costs and stated that for a child who is age 5 to 12, it would cost Kshs.1.6 million, and made provision for replacement at a cost of about Kshs. 4 million, giving a total cost of about Kshs. 6,000,000.
103. Guided by the afore, I award an all-inclusive cost of Kshs. 6,000,000 for future medical expenses, that is, the purchase of the prosthetic arm, its fitting and all associated costs.
104. The plaintiff in his submissions further prays for Kshs. 4,000,000 for a prosthetic, Kshs. 1,000,000 for a physiotherapist and Kshs. 1,000,000 for an occupational therapist, which costs were not pleaded. I note that these additional costs are based on the evidence of the doctor, but are completely unsubstantiated. The doctor cannot speculate on these costs.
105. The subject services will be offered by professionals and nothing would have been easier than to get them to provide a quotation as to how much they will charge. In the circumstances I make no award on the same.
106. Similarly, the claim for a care taker, I dismiss it on the ground that the minor is going to get an electronic prosthetic arm that will enable him to do as much as a normal person and so it is not possible to assess the cost of the caretaker. But even more, that additional cost was not pleaded and the court cannot award a sum that was introduced at the hearing.
107. On special damages, the receipts produced by the plaintiff were illegible and the costs of Kshs. 139,265 was not explained. Furthermore, I note that the documents allegedly showing that the amounts paid by the 2<sup>nd</sup> defendant were refunded were in the bundle of documents that the court rejected and expunged.
108. However, the documents produced by the plaintiff reveal a tabulation of receipts amounting to Kshs. 79,065 but not supported by eligible receipts, and in my opinion, the only legible receipt is dated 14<sup>th</sup> June 2018 from AIC Kijabe for Kshs. 62,234, which I award as special damages. Similarly, there is no receipt for Kshs. 60,000 for the medical report and therefore I cannot award.
109. The upshot of the afore is that, I make an award:
  - a. General damages-----Kshs 2,000,000.
  - b. Diminished future earning-----Kshs. 700,000
  - c. Future medical expenses-----Kshs. 6,000,000.
  - d. Special damages-----Kshs. 62,234
  - e. Total-----Kshs. 8,762,234
  - f. Interest from the date of judgment till payment in full
  - g. Costs to the plaintiff



110. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 4<sup>TH</sup> DAY OF MARCH 2025.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of: -

Ms. Nyakinyua for the appellant

Ms. Aol for the defendant

Ms. Hannah: court assistant

