



**AA (Suing Through AA as the Next Friend of the Minor AA) v Nderu (Civil Case 129 of 2013) [2024] KEHC 8678 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL CASE 129 OF 2013**

**AN ONGERI, J**

**JULY 4, 2024**

**BETWEEN**

**AA (SUING THROUGH AA AS THE NEXT FRIEND OF THE MINOR AA) ..... PLAINTIFF**

**AND**

**LOICE WANJIRU NDERU ..... DEFENDANT**

**JUDGMENT**

1. The subject matter of this suit AA (A minor) is suing through her next friend AAL seeking general damages and special damages arising from an accident that occurred on 21/4/2010.
2. The minor A. A. was 6 years old when she was hit by the defendant’s motor vehicle registration no. KAK 862H, a Mitsubishi Pajero along a residential road at Kingara court in Lavington Area.
3. As a result of the accident the minor who suffered serious internal injuries was picked up by a good Samaritan and taken to Melchizedek Hospital in Nairobi and later taken by ambulance to Nairobi Hospital where she was admitted at ICU for 22 days.
4. The minor suffered the following injuries;
  - i. Major head injury  
The plaintiff lost consciousness and CT scans revealed presence of brain swelling. She lost consciousness she was unstable due to severe head injuries.  
The plaintiff minor would suffer seizures as a consequence of neuron damage directly arising from the accident.
  - ii. By reason of the admission into the ICU the child had to be kept in a ventilator as her breathing had become deficient.



- iii. Hydrocephalus.
  - iv. Tracheotomy operation (performed by Dr. (MRs) Sonigra so that the minor child could breath.
  - v. By reason of the severe injuries she suffered, the plaintiff minor had to undergo several surgical procedures including a ventriculoperitoneal shunt insertion.
  - vi. The plaintiff minor was placed in the Nairobi Hospital Intensive Care Unit and after admissions from April 21<sup>st</sup> 2010 to July 29<sup>th</sup> 2010, the plaintiff had to attend comprehensive out-patient rehabilitation programme that include (to date) inter alia physiotherapy.
  - vii. Further, due to the severe neurological damage caused to the plaintiff by the accident the minor lost speech control and had to undergo speech therapy and regular evaluations by neurologists and neurosurgeons. The minor's speech thereafter became blurred and incoherent, needing intensive speech therapy.
  - viii. The plaintiff suffered injury to her joints, affecting sensory, integration (balance), joint range of motion, and muscle tone, which all need therapy. The plaintiff minor was unable to work or lift her limbs against gravity, or initiate a differentiating movement.
  - ix. The plaintiff's bowel movements were totally affected, needing further therapy.
  - x. The accident affected the entire mobility of the plaintiff to the point that she could not move her joints, or assume sitting positions without aid or assistance.
5. The plaintiff further avers as follows in the plaint dated 19/4/2013;
  6. That by reason of the accident aforesated, the Plaintiff was admitted at Nairobi Hospital unconscious and incontestably in great pain and distress.
  7. Upon being removed from the ICU (where the minor had been admitted for 22 days) the child was transferred to the HDU where she was in a semi conscious state and on May 7<sup>th</sup> 2010 the child was transferred to the Nairobi Hospital St. Mary's Ward.
  8. On June 28<sup>th</sup> 2010, the Plaintiff minor developed breathing complications as a consequence of which she was moved back to the HDU for 3 days unit for stabilizing. Upon the performance of a CT scan on the minor on 21<sup>st</sup> June 2010, the child underwent surgical procedure on 8<sup>th</sup> July 2010 when a ventriculoperitoneal shunt was inserted.
  9. The Plaintiff stated that the injuries she suffered were major and potentially fatal, and she still suffers to date due to the said injuries as a result of the accident. In particular, when the Plaintiff minor was discharged was still in a semi-coma state and was feeding through nasal NG tube and was unable to recognize anything around her
  10. Further to the foregoing, the Plaintiff states that she also experiences pain on the left wrist and she cannot support with the left hand, nor can she lift or carry heavy objects with the left arm. The Plaintiff also experiences dizziness and headaches, something that she never used to suffer at all prior to the accident.
  11. In particular, as at June 12<sup>th</sup> 2010, the accumulated expense for the admission of the minor child at Nairobi Hospital had risen to Ksh.1,959,202, by reason of which the said Hospital was unwilling to continue its treatment of the child any further without the settlement of the said debt.



12. In aid of the recovery of the minor from the injuries occasioned by the said road traffic accident, the Plaintiff's father and next friend sought the services of trained physiotherapists from inter alia an establishment known as Occupational Therapy Services. The Plaintiff shall at the hearing hereof produce such of the receipts and documents in proof of the services so rendered in aid of the minor child's recovery from the said injuries.
13. By reason of the treatment necessary in the circumstances in treating the severe head and body tissue injuries inflicted on the minor, the Plaintiff's next father and friend was compelled to incur monumental expenses in purchasing medical drugs and which expenses continue arising to date. The said next friend and father of the Plaintiff minor shall at the hearing hereof rely on the receipts issued in respect of the said expenses.
14. Unable to meet the rising medical and drug expenses at the Nairobi Hospital, the Plaintiff minor's father and next friend together with the minor's mother SABIHA A. AZIZ resolved to transfer the minor to a facility they could strain to afford, but as at July 29<sup>th</sup> 2010, the Nairobi Hospital bill arising from the admission of the child as well as related expenses at the said hospital had risen to Ksh.1,324,726.37.
15. The Plaintiff has suffered loss and damage for which the Defendant is to satisfy as hereunder particularized.

Particulars Of Loss And Special Damage

- I. Police abstract..... Ksh.200.00
- II. Medical Report..... Ksh.2,000.00
- III. Motor vehicle records certificate Ksh.500.00
- IV. Hospital expenses
  - Melchizedek Hospital..... Ksh.15,750.22
  - Nairobi Hospital..... Ksh. 4,134,236.00
  - Doctors' fees..... Ksh.1,077,000.00
  - Doctors Consultation fee..... ksh.148,893.00
- V. Nairobi Hospital
  - Emergency Fee..... Ksh.40,000.00
- VI. Diapers & Personal Care..... Ksh.271,876.00
- VII.
  - MRI examinations & Tests... Ksh44,092.00
- VIII. Therapy equipment..... Ksh.200,000.00
- IX. Tickets to India..... Ksh.150,000.00
- X. 2 Wheelchairs..... Ksh.66,000.00
- XI. Occupational/Physio
  - Speech therapy expenses..... Ksh.532,600.00



- XII. Medication expenses..... Ksh115,892.00
- XIII. Special Care..... Ksh.800,000.00
- XIV. Total India Treatment Exp..... Ksh.569,529.00
- XV. Special School Fees..... Ksh.94,835.00
- XVI. Loss of income of Minor's  
Mother at Ksh.120,000/= per month  
From date of resignation to tend to the child  
to date of Judgement (to be supplied at the trial)

16. The Plaintiff relied on the doctrine of res ipsa loquitor in so far as applicable to the facts of this case.
17. Prior to the accident complained of, the Plaintiff minor was a normal, healthy, and playful 7 year old child who loved to play, read, and was jovial in school. The Plaintiff's father and next friend will at the hearing hereof produce evidence to demonstrate the child was a healthy and normal child prior to the said accident.
18. The Plaintiff also states that as a result of the accident complained of, she has had her education and inevitably her ambitions in life greatly compromised as she cannot pursue them as vigorously as she would have or as a normally functional person by reason of the impairment to her tissues, organs and brain damage she has suffered. She will continue to expend money for her future medical expenses which she would have otherwise invested for the betterment of her welfare and career.
19. By reason of the heavy expense incurred in rehabilitating the minor Plaintiff the Plaintiff's father and next friend was compelled to seek medical treatment of the child in India, at SAIFEE HOSPITAL in Mumbai, from January 17<sup>th</sup> 2012 to March 1<sup>st</sup> 2012 in which resulted in additional expenses incurred. The Plaintiff shall at the hearing of the suit refer to and adduce evidence in proof of this averment.
20. And the Plaintiff minor claims damages on account of the loss and pain she has suffered for the loss of normal use of her life, and at her age in particular, as a consequence of the said accident.
21. Demand and notice of intention to sue were given to the Defendant, and the Defendant's insurers were equally notified, but all of them have adamantly refused to make good the Plaintiff's claim, necessitating this suit.
22. The defendant filed a defence dated 27/9/2013 denying the plaintiffs suit and she did not testify in this case.
23. The hearing of this case proceeded from 02/10/2023 to date. A summary of the plaintiff's evidence is as follows;
24. PW1 ABDUL AZIZ testified as PW1. He adopted his witness statement dated 19/4/2013 as his evidence in chief and also supplementary witness statement dated 11/2/2022.
25. PW1 said he is the father of the plaintiff. In the statement dated 19/4/2013, he said that on the early evening of 21/4/2010, he received a call from his brother that the plaintiff who was a minor had been involved in a road traffic accident (RTA) and was in a serious condition.
26. PW1 who was in Mombasa at that time made arrangements to return to Nairobi and upon arrival at the airport he went straight to Nairobi Hospital.



27. He said he was told to make a deposit of Kshs 600,000/ before the minor could be attended. A CT Scan had been done on the minor.
28. The plaintiff was admitted at ICU at Nairobi Hospital until 29/7/2010. In ICU the minor was on ventilator.
29. PW1 said he reported the matter to Muthangari Police Station on 22/4/2010 accompanied by his brother who gave details of the accident.
30. PW1 said the plaintiff suffered major head injuries and she lost consciousness and the CT scan revealed the presence of brain swelling.
31. He said subsequently the plaintiff would suffer seizures as a consequence of nervous damage directly arising from the accident.
32. He said the minor suffered hydrocephalus and had to undergo surgery known as craniotomy operation performed by Dr Sonigra.
33. PW1 said in his statement that the plaintiff had to undergo other surgical procedures including ventriculoperitoneal shunt insertion.
34. The plaintiff's life never returned to normalcy. She has had to attend comprehensive out-patient rehabilitation programme to date which involves physiotherapy and occupational therapy.
35. Due to the severe neurological damage caused by the accident, the plaintiff lost speech control and had to undergo speech therapy and regular evaluations by neurologists and neurosurgeons.
36. The child is unable to work or lift her limbs against gravity or initiate a differentiating movement.
37. The accident affected the entire mobility of the minor to the point that she could not move her joints, or assume sitting positions without aid or assistance. This has taken its toll on the family, as the wife had to quit her employment where she was earning a regular income, in order to take care of the minor fulltime. Additionally they have had to employ extra house help to assist in taking care of the minor as a result of the accident.
38. The injuries the minor suffered were major and potentially fatal, and she still suffers to date due to the said injuries as a result of the accident. In particular, when the minor was discharged from hospital, she was still in a semi-coma state and was feeding through nasal NG tube and was unable to recognize consciously anything around her. He (father) could not believe that this was his very own daughter that he could hug and play with whenever back from work.
39. In aid of the recovery of the minor from the injuries occasioned by the said road traffic accident, PW1 sought the services of trained physiotherapists from inter alia an establishment known as Occupational Therapy Services. In his bundle of exhibits, PW1 has produced receipts and documents in proof of services sought and so rendered to the minor to aid her recovery.
40. Unable to meet the rising medical and drug expenses at the Nairobi Hospital, PW1 and his wife SABIHA A. AZIZ, resolved to transfer the minor to a facility they could no longer strain to afford, because as at 29/7/2010, the Nairobi Hospital bill arising from the admission of the child and other related expenses at the hospital, had risen to Kshs:1,324,726.37.
41. PW1 stated that after a length wait, the driver of the road traffic accident motor vehicle was charged in court and found guilty. She was fined Kshs:10,000/ and her driving license was cancelled for one and a half years.



42. PW1 availed the particulars of loss and special damages as follows:

- i. Police abstract Kshs: 200.00
  - ii. Medical report 2,000.00
  - iii. Motor vehicle records certificate 500.00
  - iv. Melchizedek hospital 15,750.22
  - v. Nairobi hospital 4,134,236.00
  - vi. Doctors fees 1,077,000.00
  - vii. Doctors' consultation fee 148,893,00
  - viii. Occupational/Speech/Physiotherapy 532,600.00
  - ix. Medicine expenses 115,892.00
  - x. Emergency fee 40,000.00
  - xi. Diapers & personal care 271,876.00
  - xii. MRI examinations 44,092.00
  - xiii. Therapy equipment 200,000.00
  - xiv. Tickets to India 150,000,00
  - xv. 2 Wheelchairs 66,000.00
  - xvi. Special care 800,000.00
  - xvii. Total India Treatment Expenses 569,529.00
  - xviii. Special school fees 94,835.00
- Total: 8,263,403.22

43. Prior to the accident complained of, the plaintiff minor was a normal, healthy, and playful 7 year old child who loved to play, read and was jovial in school. PW1 promised to produce evidence to demonstrate that the child was a healthy and normal child prior to the said accident.

44. PW1 provided details of special damages, which excluded expenses that the family have incurred for special school, physio nurse, special food and additional special care, whose expenses are constantly changing and whose details he promised to provide during the hearing.

45. As a result of the accident complained of, the minor has had her education and inevitably her ambitions in life greatly compromised as she cannot pursue them as vigorously as she would have or as a normally functional person by reason of the impairment to her tissues, organs and brain damage she has suffered. The minor will continue to expend money for her future medical expenses, which she would have otherwise had invested for the betterment of her welfare and career.

46. By reason of the heavy expenses incurred in rehabilitating the minor plaintiff, the family was compelled to seek medical treatment for the child in India, at SAIFEE HOSPITAL in Mumbai, from 17<sup>th</sup> January 2012 to 1<sup>st</sup> March 2012 in which additional expenses were incurred.



47. The defendant was convicted by the Kibera Chief Magistrates court of the offence of careless driving and her driving license was suspended as a consequence of the conviction. PW1 relied on this conviction to demonstrate that the defendant was indeed careless and reckless, resulting in the accident which she admitted in her mitigation.
48. PW1 also adopted his further witness statement dated 11/2/2022 as his evidence in chief. In it he gave details of further treatment for the minor in Kenya and in India.
49. He produced a bundle of documents containing receipts, treatment notes and discharge summaries in respect of treatment of the minor both in India and in Kenya.
50. The court admitted the schedule of specific damages on 31/3/2023.
51. PW2 ROBERT PAUL MAVISI ANZAGI who is a private investigator said on the material day he was walking along James Gichuru road going to Bunyala road when he heard braking screeches.
52. PW2 said he looked to the direction of the screeches and saw a small girl had been hit by a motor vehicle.
53. PW2 rushed to the scene and found motor vehicle registration number KAK862H which was being driven by the defendant.
54. PW2 assisted to take the child to the Melchizedek Hospital and later the child was transferred to the Nairobi hospital.
55. PW2 adopted his witness statement dated 19/4/2013 as his evidence in chief.
56. PW3 NAA who was with the plaintiff on the material day of the accident produced his witness statement dated 23/10/2023 as his evidence in chief.
57. PW3 said at the time of the accident, he was 12 years old and the plaintiff was 6 years old.
58. PW3 said the motor vehicle which hit the plaintiff was speeding and it was also overlapping.
59. PW4 SAA said the plaintiff is her only daughter.
60. PW4 said she has been taking care of the plaintiff since she was involved in the accident on 21/4/2010.
61. PW4's evidence was similar to that of PW1 – the plaintiff's father. They did not witness the accident.
62. PW4 said the Nairobi Hospital called Dr. Oluoch Olunya who assessed the plaintiff's case and told them that she required emergency operation.
63. PW4 adopted her written witness statement dated 19/4/2013 as her evidence in chief together with a further statement dated 11/2/2022 detailing further treatment for the plaintiff.
64. PW4 said she resigned from her employment to take care of the plaintiff and currently she is between caring for the plaintiff, she bakes to earn a living.
65. PW4 said the plaintiff was at Riara Kindergarten at the time of the accident.
66. PW5 JACOB ODONGO was working as a houseboy at the home of MINA ASODI, a neighbour to PW1 when the accident occurred.
67. PW5 adopted his witness statement dated 19/4/2013 as his evidence in chief.
68. PW5 said he was in the kitchen which is near the road when the plaintiff was involved in a RTA.



69. PW5 said he heard noise emanating from the road. He rushed to the scene and found the plaintiff had been hit by a car.
70. The plaintiff testified as PW6. She adopted her statement dated 23/10/2023 as her evidence in chief.
71. The plaintiff who is still in a wheelchair, said she was involved in a RTA and that is why she is now in a wheelchair.
72. The plaintiff had difficulties expressing herself. She said she was 6 years old in 2010 when she was involved in the accident and she is now 21 years old.
73. She said she cannot walk or go to school after the accident.
74. PW7 NO.86277 P.C Charles Kihara attached to Muthangari Police station produced a police abstract dated 11/11/2010.
75. PW7 said the report of the RTA was made on 21/4/2010 involving motor vehicle registration number KAK862H Mitsubishi Pajero driven by the defendant in this case.
76. PW7 said the defendant was charged in traffic case No.1772/2010 and fined Kshs 5,000 and her driving license was cancelled for one and half years.
77. PW8 Dr. David Livingstone Oluoch Olunya Prepared a medical report dated 17/3/2022 which he produced as an exhibit in this case.
78. PW8 said the plaintiff sustained severe traumatic brain injury and was admitted at ICU Nairobi Hospital.
79. PW8 said the plaintiff sustained the following injuries;
  - i. Severe traumatic brain injury
  - ii. Right temporal intracerebral haematoma
  - iii. Right temporal parietal laceration complex
  - iv. Degloving scalp injury
80. PW8 said the plaintiff was operated on 24/4/2010 and on 5/5/2010 and also on 8/7/2010.
81. PW8 said the plaintiff was variously treated by the following specialists:
  - i. On 1/3/2012 by Dr. Taral Nagda, paediatric orthopaedic surgeon at Institute of Paediatric Orthopaedic Disorders at Saifee Hospital, India.
  - ii. 16/11/2015 by Dr. Pauline Samia, consultant paediatrician neurologist at Aga Khan hospital, Nairobi.
  - iii. On 1/12/2015 by Dr. Abhistek Srivastava at Kokilaben Dhirbhal Ambani Hospital and research institute.
  - iv. On 24/12/2015 by Dr. Pradiya Godgil at Kokilaben Dhirubhail Ambani Hospital and research institute.
  - v. On 27/12/2016 by Dr. Mren Dorgre and on 25/5/2018 by Dr. Pradiya Gadgil both of Kokilaben Dhirubhail Ambani Hospital and research institute in India.



82. PW8 concluded in his report that the plaintiff who is wheelchair bound sustained severe traumatic brain injury and which was diffused in nature and also neurodeclining following a post convulsive disorder post road crash.
83. PW8 said the plaintiff will be fully dependent on others for all her activities of daily living.
84. PW8 said the plaintiff's intellectual disability has been assessed as moderate (IQ-76). He said her physical disability in terms of the upper limb, trunk and lower limb movement is 30% and total disability of 80%.
85. I have considered the evidence adduced by the eight (8) witnesses who testified for the plaintiff.
86. It is not in dispute that the defendant was charged in the traffic court and found culpable.
87. The defence was a mere denial. The defendant did not adduce any evidence in this case.
88. It is not clear why this case stayed in court from 2013 to 2024, considering that the defendant was charged and found guilty by the traffic court.
89. The issues for determination in this case are as follows;
  - i. Whether the defendant was liable in negligence for the accident.
  - ii. What quantum of damages the minor is entitled to in respect of pain and suffering.
  - iii. What damages the minor is entitled to in respect of special damages.
  - iv. What damages the minor is entitled to in respect of future medical expenses.
90. I find that the plaintiff's evidence was not controverted since the defendant did not adduce any evidence and in view of the conviction of the defendant in a traffic case, I find that the defendant is 100% liable for the accident that occurred on 21/4/2010 involving the plaintiff who was then a minor aged 6 years and the defendant's motor vehicle registration number KAK 862H Mitsubishi Pajero.
91. There is unrebutted evidence that the defendant was charged in court and was detained on 30/1/2012 in Traffic Case no. 1772 of 2010.
92. I find that there is evidence that it was the defendant who was responsible for the accident which occurred on 21/4/2010 and it is not clear why this case has protracted when the defendant was already convicted with a traffic offence.
93. The Court of Appeal in *Robinson -Vs- Oluoch* (1971) EA 376 stated –

“The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent.”
94. I find the defendant 100% liable in negligence. I have considered the submissions filed herein. The plaintiff submitted that following the road traffic accident, the medical report presented revealed that the minor sustained severe traumatic brain injury, right temporal intracerebral hematoma, right temporal parietal laceration complex and degloving scalp injury. The medical report also stated that the minor was left with physical disability in terms of upper limb, trunk and lower limb movement occasioning a permanent disability of 30% and in total permanent disability of 80%



95. The permanent disability has bound the minor to a wheelchair for the rest of her life and is totally unable to do anything for herself thus fully dependent on others.
96. The plaintiff consequently proposed Kshs. 10,000,000 for pain and suffering and in support cited Clement Muturi Kigano v Shengli Engineering Construction Group Limited [2020] eKLR where the plaintiff suffered extensive degloving head/scalp injuries, fracture of the skull and loss of frequency sensory neural hearing of both ears. The court gave the plaintiff an award of Kshs. 8,000,000 being damages for pain and suffering.
97. On loss of earning capacity and future earnings the plaintiff submitted that at the time of the accident the minor was 8 years of age and from the medical report the minor was assessed to have a permanent disability of 80%.
98. The minor will never be able to work and fend for herself as the injuries she sustained have rendered her to be on a wheelchair and fully dependent on others for the rest of her life. The plaintiff proposed Kshs. 9,500,00 under this head and in support cited Benard Mutisya Wambua v Swaleh Hashil [2017] eKLR the court awarded general damages in the sum of Kshs. 6,500,000 to the plaintiff who suffered 80% paralysis of his right limb among other injuries which rendered the plaintiff incapable of working.
99. On special damages the plaintiff submitted that the schedule for specific damages dated 11/3/2022 and further supplementary plaintiff's list of documents dated 11/3/2022 the plaintiff pleaded and proved special damages amounting to Kshs. 16,506,296.34. These were as a result of the medical expenses incurred locally and in India as they sought further medical care.
100. On future medical expenses the plaintiff submitted that the medical report by Dr. Oluoch Olunya disclosed that the minor will be bound to a wheelchair for the rest of her life and her permanent disability of 80%. The plaintiff continues to incur in ensuring that the minor's wheelchair is well maintained and serviced for safe and easy use. The minor also need to use diapers as she does not have full bladder control. The minor needs a special diet to control her weight to avoid constipation, headaches and nausea.
101. Further that the minor speech is slow and unclear and thus needs speech therapy. The minor undergoes occupational therapy and is on anti-convulsion drugs. Under this head the plaintiff proposed Kshs.12,000,000 and in support cited Agatha Wanjiru Njuguna v Mary Wanjiku Ikiki & 3 Others [2003] eKLR where the court used a multiplier of 25 years for a form 3 student.
102. The defendant alternatively proposed Kshs. 2,000,000 under the head of general damages. The defendant argued that this will suffice to indemnify the claimant because in assessing damages the injured person is only entitled to what in the circumstances is fair compensation for both the plaintiff and the defendant.
103. In support the defendant cited Sansora Bakers and Confectioner Limited v. Sospeter Othniel Osemo [2021] eKLR where the high court awarded Kshs. 2,000,000 in general damages to a respondent who suffered severe head injury, periorbital ecchymosis/raccoon eyes, stable fracture of the left pubic ramus, displaced sacroiliac joint, cut wound on the frontal left side and right occipital hemorrhagic brain contusion.
104. On special damages the defendant submitted that the plaintiff under his head is only entitled to that which is strictly pleaded and proven as required by law. It was also contended that from the plaint the plaintiff never pleaded loss of earning capacity and/or future earnings and the same should not be granted. on the prayer for future medical expenses the defendant argued that the same must fail as it was never pleaded and no evidence was led to prove the need for it.



105. I have considered the submissions filed by both parties on the issue of the award of damages. In the case of *Trundell v EWK (Minor suing through mother and next friend WK) (Civil Appeal E57 of 2021)* [2023] KEHC 25275 (KLR) (7 November 2023) (Judgment), the court held as follows;

“The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See *Tayab vs. Kinanu* [1983] KLR 114; *West (H) & Son Ltd vs. Shephard* [1964] AC 326 at 345”.

106. I have also considered similar authorities. In case of *A.A.M V Justus Gisairo Ndarera & Another* [2010]EKLR, the Plaintiff, a minor in Form 2 instituted the suit, suing through his father and next friend A. M. H, suffered the following injuries;

- “ a) Fracture of the left Temporal Lobe.
- b) Left Temporal Lobe Extradural Hematoma with no midline shift.
- c) Intracerebral Haemorrhage.
- d) Diffused Brain Oedema.
- e) Paralysis of the Right Hand especially at the forearm and fingers.
- f) Shortening of the right leg.”

107. He was awarded damages as follows;

- 1) Pain and Suffering ..... Kshs.2,500,000/=
- 2) Loss of Future Earning..... Kshs.1,000,000/=
- 3) Special Damages..... Kshs.1,550,500/=
- Total..... Kshs.5,050,500/=

108. I have considered the lapse of time since that case was decided and also taking into account the inflation and the money market, and the fact that the plaintiff in this case suffered more severe injuries in assessing the damages payable in this case.

109. On loss of earning capacity and future earnings the plaintiff submitted that at the time of the accident the minor was 6 years of age and from the medical report the minor was assessed to have a permanent disability of 80%.

110. The defendant submitted that the plaintiff never pleaded loss of earning capacity and/or future earnings and the same should not be granted.



111. However, at paragraph 22 of the plaint, the same is pleaded as follows;

“And the plaintiff minor claims damages on account of loss and pain she suffered for loss of use of her life, and at her age in particular, as a consequence of the said accident”

112. It is not in dispute that the minor will never be able to work and fend for herself as the injuries she sustained have rendered her to be on a wheelchair and fully dependent on others for the rest of her life.

113. In the case of *Trundell v EWK* (supra), the court further held as follows;

“While the appellants contention is true that reliefs sought ought to specifically pleaded and/or proved, it has been severally held by courts that whilst loss of earning capacity or earning power should be /can be included as an item of general damages, it is not improper to award it under its own heading. In *Butler Vs Butler* (1984) KLR 225 Chesoni Ag . J (As he was then) did consider this issue and stated that;

“whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading.....once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damage’s it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable?”.

114. The plaintiff proposed Kshs. 9,500,00 in respect of loss of earning capacity and future earnings. I have considered similar cases and I find a global figure of Kshs. 3,000,000 reasonable in the circumstances of this case.

115. On the prayer for future medical expenses the defendant argued that the same must fail as it was never pleaded and no evidence was led to prove the need for it.

116. Again, I find that the same was pleaded I paragraph 17 of the plaint as follows;

“Additional medical expenses occasioned on the plaintiff as a consequence due to the constantly changing and an indefinite figure as at the time of filing suit, the figure shall be supplied at the hearing of the suit”

117. In the case of *Geoffrey Kamuki & Another –vs- RKN* (Minor suing through her late father and next friend ZKN [2020] eKLR, the court stated as follows on the issue of future medical expenses;

“...To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it...”



118. On special damages the defendant submitted that the plaintiff under his head is only entitled to that which is strictly pleaded and proven as required by law.
119. I find that the plaintiff was granted leave by the court to file a schedule of specific damages dated 11/3/2022 and the same were not controverted by the defendant and the same are awarded.
120. I award special damages as pleaded and proved.
121. I accordingly award damages as follows;
- i. Liability 100%
  - ii. Special damages ksh.16,506,296.34
  - iii. General damages for pain and suffering ksh10,000,000.00
  - iv. Loss of earning capacity ksh. 3,000,000.00
  - v. Future medical expenses ksh.10,000,000.00
- Total ksh.39,506,296.34
122. Judgment be and is hereby entered in favour for the plaintiff against the defendant in the sum of ksh.39,506,296.34 plus costs of the case and interest at court rates from the date of this judgment in respect of the general damages and in respect of special damages from the date of filing suit until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
4<sup>TH</sup> DAY OF JULY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

