TLA & another v Registered Trustees of Loreto Sisters Institute of the Blessed Virgin Mary, Kenya (Civil Suit 96 of 2009) [2024] KEHC 14356 (KLR) (Civ) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14356 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 96 OF 2009

CW MEOLI, J

NOVEMBER 14, 2024

BETWEEN

TLA (FORMERLY A MINOR, HAVING ATTAINED AGE OF MAJORITY) ..... 1ST PLAINTIFF

DOA (FORMERLY, NEXT FRIEND ..... 2ND PLAINTIFF

AND

REGISTERED TRUSTEES OF LORETO SISTERS INSTITUTE OF THE BLESSED VIRGIN MARY, KENYA ..... DEFENDANT

JUDGMENT

1. By a plaint dated 02.03.2009 and amended on 22.11.2018, TLAA, a minor, who has since attained the age of majority (hereafter the 1st Plaintiff) instituted this suit through her father and next friend DOA (hereafter the 2nd Plaintiff). Registered Trustees of Loreto Institute of the Blessed Virgin Mary, Kenya (hereafter Defendant) was named as the Defendant. The Plaintiffs seek inter alia general damages for pain, suffering and loss of amenities, including damages for lost prospects of marriage; damages for lost years and or lost/ diminished future earnings and capacity; damages for future and or further medical and nursing care including physiotherapy, and related accessories and services; special damages in the sum of Kshs. 32,939,365.60/-, costs of the suit and interest.

2. The Plaintiffs aver that at all material times relevant to the suit, Loreto Covent Msongari School (hereafter the School) in which the 1st Plaintiff was enrolled as a lawful student, was a private school owned, managed and controlled by the Defendant. That on or about 03.03.2006, the Plaintiff then aged 13 years was engaged in preparations and practice for a swimming gala, in the course of which she dove into the School swimming pool, and hit the bottom of the pool. As a result of which the 1st Plaintiff sustained severe personal injuries. The Plaintiffs aver that the said accident occurred due to

negligence on the part of the owners and or management of the School and swimming teacher. Further that at the time, the said teacher was a servant and or agent of the Defendant, acting for and on behalf of and for the benefit of the Defendant, thus the Defendant was vicariously liable.

3. The Plaintiffs further aver in the alternative, and without prejudice to the foregoing, that by virtue of the 1st Plaintiff's enrolment as a student at the School pursuant to a contractual obligation between the parties, the accident resulted from a breach of implied terms of contract by the Defendant. That in the further alternative without prejudice to the forestated, the accident occurred due to the faulty design of the pool as the shallow and deep end of the pool were not clearly marked. Hence the accident in which the 1st Plaintiff sustained severe personal injuries, suffered pain, loss of amenities and damages.

4. The Defendant filed a statement of defence dated 06.04.2009 and amended on 13.12.2009 denying the key averments in the amended plaint and averred that the accident was wholly caused by the 1st Plaintiff's negligence and no liability attaches to the Defendant as alleged. It was further averred that the 1st Plaintiff was at the time of the accident aged 13 years and was a good swimmer, duly conversant with rules of swimming, because of which she knew and or ought to have known the dangers of diving at the shallow end of the swimming pool.

5. During the trial, the 1st Plaintiff testified as PW1. It was her evidence that she was 29 years old and working at the African Leadership University as a Centre Manager. She thereafter proceeded to adopt her witness statement dated 22.11.2018 as her evidence-in-chief and produced the bundle of all documents attached to her witness statement, as PExh.3. It is worth noting here that due to an oversight, the Plaintiffs' documents were marked and produced twice in the course of the trial. To avoid confusion, this court has opted to use the marking adopted during evidence by Dr. Bhanji (PW2) and DOA (the second Plaintiff, PW3), subsequent to the testimony of PW1. Now returning to the evidence-in-chief by PW1, she disputed the assertion in the Defendant's lifeguard's witness statement that she was able get out of the pool on her own after the accident, while admitting that she recalled being wrapped in a blanket thereafter and carried to the parking lot and into the back of a taxi.

6. She further stated that because of the accident she was paralyzed from waist downwards inclusive of all her extremities, and hence has no form of sensation below her chest and equally cannot walk or grasp with her hands. Therefore, she cannot perform ordinary tasks and requires assistance in every aspect of her life and moves around by use of an electric wheelchair. She asserted that the swimming coach who oversaw minors at the material time was inattentive and the way she was handled immediately after the accident in all probability occasioned her more harm. Contending that the School ought to have sought professional help or called for an ambulance to deal with the emergency instead of carrying her in the back of a taxi with a stranger. It was her further evidence that at 13 years of age, she was not an experienced swimmer and that two other girls of a similar age who had jumped into the pool before her were not stopped or cautioned by the swimming coach.

7. During cross-examination, she affirmed that at the time of the accident, she was in Form 1 having just joined the School. That she learned how to swim from a young age and continued during her years in primary school where she was involved in competitive swimming at Grade 7 through Grade 8. She stated that that she joined the School early in 2006 and that she had swimming lessons every week, but she could not recall the number of times she had used the pool before the accident, whether the swimming coach was always present during the swimming lessons, or whether there was a notice erected by the pool containing any warning/regulations/rules in respect of the use of the pool.

8. When referred by defence counsel to a photograph of the School pool in the Defendant's bundle of documents, she said she did not recall seeing the notice of rules and regulations appearing to be next to the pool in the said photograph, or the diving board which bore the caution "no diving". She

further maintained not having a recollection of marks in the pool indicating the location of the "deep", "shallow" and "slope" parts of the pool. Admitting that she knew the location of the deep and shallow ends of the pool, she said she did not recall being warned about diving into the pool at the shallow end.

9. It was her evidence that she was an experienced swimmer and careful in the usage of the swimming pool and hence never dove into the shallow end. That on the date in question alongside her were other students who were practicing for a swimming gala that was scheduled for the next day. She could not recall when asked, whether the swimming coach instructed the students prior to the practice session on the material day, as was the norm prior to swimming lessons. Admitting that access to the pool area was restricted, she said that once the students accessed the pool area, they did not require express permission to swim; that on the date in question she dove into the pool after a couple of her friends had already done so; and that she immediately sensed pain and was assisted out of the pool by other students. And once she was out the pool, the swimming coach asked her if she could wiggle her toes, suggesting that she was merely cold and would be fine.

10. She stated that following the accident, she was admitted in hospital for about two weeks and later underwent surgery to insert plates in her neck area. That sometime in 2010 she underwent further surgery in India involving stem cell treatment to assist her recover from the spinal cord injuries. She said that after her surgery in India, and despite her condition, she proceeded to study to master's degree level, which enabled her to secure employment in Rwanda. That she has two constant care givers who assist her in her day-to-day activities, a service that costs her between Kshs. 25,000/- to Kshs. 35,000/- per month; that she attends physiotherapy once a week at Kshs. 1000/- to 2000/- per session; and uses an electric wheelchair whose cost ranges between Kshs. 150,000/- to Kshs. 250,000/- to aid her movement.

11. It was her further evidence that she was not on any treatment regimen at the time of testifying, and that the Aculaser treatment she had received a few years back was intended to aid with the regeneration of her spinal cord. That after her injury, her parents acquired a motor vehicle for her transportation and that she presently lives in Rwanda with her two (2) caretakers. In conclusion she rejected suggestions that she contributed to the accident by failing to exercise adequate care while at the pool.

12. In re-examination, she maintained that she did not dive into the pool from a diving board and that her parents paid for her earlier medical interventions.

13. Dr. Nasir Bhanji testified as PW2. He identified himself as a consulting general surgeon and traumatologist having practiced for thirty-seven (37) years. That having examined PW1 on 03.06.2009, he prepared a medical report, the history being that PW1 had sustained severe injury to her spinal cord as a result of the accident in the School pool. He went on to state that she complained of inability to move her lower limbs, incontinence among other consequences. He noted her surgical scars on her neck and that movement of her fingers and joints was not possible as both hands were fixed as fists, whereas there was total paralysis of lower limbs. He stated that PW1 had a fracture and compression of the C6 vertebrae as revealed by her scan. He highlighted PW1's injuries noted in his medical report to dated 04.06.2009 to include paralysis from her waist downwards; muscular weakness in upper limbs; weak wrist joints due to nerve damage; back aches due to confinement in a wheel chair; bloating in the abdomen; urine and stool incontinence leading to frequent urinary tract infection (UTI) despite catheterization with regular changes; cold in both upper arms due to damage of sympathetic nerves and spinal fracture.

14. He affirmed that PW1 would need 24-hour support due to the incontinence and paralysis and would require three (3) weekly sessions of physiotherapy costing Kshs. 4,000/- in a private hospital; specialist review for incontinence; new wheelchairs every three (3) years; reconfiguration of her living area or

residence because of her confinement to a wheelchair; and psychological support due to isolation. Additionally, that because of her injuries, PW1 may never marry or get children. He however noted that upon her admission to hospital PW1 was not seen by a surgeon until after several days, and that given the nature of the accident, immediate inventions ought to have been done.

15. Upon being referred to a medical report prepared by Dr. Wokabi, he stated that the said report confirmed his findings and that he agreed with Dr. Wokabi's assessment of 100% disability in respect of PW1. Concerning her incontinence, he said it requires regular management and a nurse would be best placed to attend to her twenty-four (24) hours a day. He produced into evidence his medical report dated 04.06.2009 as PExh.1, the receipt in respect of the medical report and Court attendance of Kshs. 30,000/-, were adduced as PExh.2.

16. During cross-examination, he confirmed seeing PW1 for the first time in 2009 and that her disability assessment may not have changed over the intervening period. Admitting being unaware that she had undergone further treatment in India, he maintained that when he examined her, the 1st Plaintiff was paralyzed from waist down. And that PW1 would therefore require a nurse to take care of her needs and note any arising issues on a day-to-day basis.

17. The 2nd Plaintiff testified as PW3. He began his evidence by identifying himself as the father to PW1 and later adopting his witness statement dated 22.11.2018. It was his evidence that on the date in question he received a report that the PW1 had been involved in an accident in School while practicing for a swimming gala, whereupon he rushed to the School and found PW1 being placed into a taxi, which he found improper as the circumstances suggested that an ambulance was more appropriate. He said that PW1 was admitted at Nairobi Hospital for two (2) weeks, having sustained three (3) fractured neck vertebrae and that upon her discharge, she was confined to wheel chair and paralyzed neck downwards.

18. He confirmed that at the time of the incident PW1 was in Form 1 and that after the accident she attended home schooling before she could resume normal school learning, later proceeding to pursue a Psychology degree. He confirmed that PW1 underwent further treatment in India resulting in significant improvement of her condition despite requiring constant care givers. Referring to the bundle of receipts in PExh.3 he explained the expenditure therein as follows: that a sum of Kshs, 136,087.23/- was expended at Nairobi Hospital on PW1's admission and that an additional cost of Kshs. 20,100/- was spent on consultation; Kshs. 120,000/- went to purchase of air tickets to India; 486,978.50 Rupees was the bill paid to Shalby Hospital, India; Kshs. 39,900/- spent on home schooling; Kshs. 179,776/- paid to care givers and equipment from Avenue Home Care; Kshs. 217,000/- for physiotherapy at the Spinal Hospital; and Kshs. 1,620,000/- spent on Laser Therapy.

19. He further stated that since PW1's injury, she has always had a minimum of two (2) caregivers and that the parents had paid for the nursing care since 2006 until 2019 when PW1 secured employment in Rwanda. Further explaining that, on average the parents paid the caregivers between Kshs. 16,000/- to Kshs. 18,000/- pm, and that PW1 equally used diapers and that four (4) wheelchairs each costing about Kshs. 160,000/- had been bought for PW1. He stated that up to four (4) laptops, some specialized, each costing about Kshs. 160,000/- had been purchased to facilitate PW1 in her education. However, he did not have receipts for the purchases. In conclusion he testified that PW1 attends three (3) sessions of physiotherapy weekly and had since 2006 used a specialized motor vehicle for disabled individuals which cost Kshs. 2,000,000/- and its driver hired at a cost of Kshs. 15,000/- per month.

20. Under crossexamination, while admitting not having witnessed the accident , he nevertheless stated that the Defendant was negligent because despite the School's prior commitment to take PW1 to a close hospital in the event of an accident, they failed to do so on the material date. And further rejected his suggestion on the material date that PW1 be rushed to the closer MP Shah Hospital instead of

Nairobi Hospital, while claiming it was best suited to handle her condition. Addressing the bundle of receipts produced as PExh.3, he stated that with respect to monies spent on PW1's treatment in India, the sum pleaded in the plaint was pegged on then applicable Central Bank of Kenya conversion rate. He equally confirmed not having tendered evidence in respect of the Aculaser treatment but asserted that did not mean that the related expenses were not incurred.

21. He re-affirmed that at any given time, PW1 had two (2) caregivers; used diapers; had utilized four (4) wheelchairs; used specialized laptops; and attended physiotherapy three (3) times a week and that all the payments were jointly settled by him and PW1's mother. Further stating that he continues to support PW1 with some expenses such as monthly contributions towards the caregiver even though she is currently in gainful employment. In re-examination, he stated that the care of a quadriplegic is a lifetime endeavor.

22. On behalf of the Defendant, Marren Akoth Awiti testified as DW1. She began by identifying herself as a teacher by profession and proceeded to adopt her witness statement dated 08.08.2020 as her evidence-in-chief. She later produced the documents in the Defendant's list of documents dated 12.08.2020 appearing at Pg. 4 - 18 & 23 as Dexh.1 and the medical report by Dr. Wokabi appearing at Pg. 1-3 as DExh.2. It was her evidence that at the material time, she was the principal of the School and that the swimming coach was well qualified according to her certifications in the said discipline as held in the School's records. While referring to the Defendant's list of documents, she stated that the swimming pool area had a notice in respect of rules and regulations in place, and markings showing the shallow and deep ends of the pool and the slope between the respective ends. Further that, the diving board was clearly marked with a notice stating "no diving". It was her evidence that PW1 at the time was a class prefect and good swimmer.

23. Confirming that on the date of the accident she was not on duty, she said that parents in the School indicated in advance, their preferred hospital in the event of an emergency involving their child, but the School had the discretion to take a child to the nearest hospital in case of an emergency. She further stated the School environment was safe and that the swimming coach explained to all new students the notices and rules in the pool area. Besides, no student would go to the pool area without being in the company of a teacher, also qualified as a lifeguard, who would give instructions. She categorically disputed negligence on the part of the Defendant as asserted by the Plaintiffs, stating that the School provided a safe environment for all the pupils.

24. Under cross-examination, she stated that the notice to the effect "do not dive" positioned at the pool meant that no student could dive without the instructions of the swimming coach. Further confirming that parents in the School had provided names of their preferred hospitals in the event of an emergency, which in PW1's case was M.P Shah Hospital. She maintained that the School had the discretion to choose a different hospital, depending on the emergency at hand. She said that PW3 upon arriving at the School on the material date did not object to PW1 being taken to Nairobi Hospital. She said she could not recall if the School had a spinal board at the pool and that first aid on PW1 was administered by students trained by St. John's, under the supervision of the swimming teacher.

25. She maintained that the School did its best to provide a safe environment by employing a competent swimming coach and or lifeguard and that the swimming pool was properly marked. She contended that the accident was in the circumstance occasioned by PW1 diving into the pool without the instructions of her swimming teacher. And that the incident in question was an accident, and in such event, everyone tried to assist as necessary.

26. In re-examination, she confirmed that PW1's parents preferred MP. Shah Hospital but the choice of referral hospital was based on the presenting emergency. She further reiterated that PW3 did not object

to PW1 being taken to Nairobi Hospital and that the School was not negligent as it had in place safety measures and that despite PW1 being a proficient swimmer, the accident had nevertheless occurred.

27. MS testified as DW2. Adopting her witness statement dated 28.03.2023 as her evidence-in-chief she identified herself as a photographer by profession, residing at Loreto Msongari (the School) since 2013 and hence quite familiar with the pool and area around it. She further confirmed having taken photographs on or around 2019-2020, of the said pool as appearing in Pg. 19 -22 of the Defendant's list of documents, which she produced as DExh.3. It was her further evidence that the pool had always been in the state captured in her photographs.

28. In cross examination, she confirmed being a nun and communications expert involved in the School through her photography. And that she took the photographs in question between 2019-2020, upon a request by the School administration. She admitted that she did not know when the pool was built or its state or appearance in 2006, or when the diving board was erected. Moreover, that while the pool ends were clearly marked, one cannot tell how deep they were.

29. At the close of the trial, directions were taken on filing of submissions. Both parties complied with the said directions.

30. Counsel for the Plaintiffs opened her submissions by restating the evidence before the trial Court in addressing the twin issues of liability and damages. Concerning liability, it was argued that PW1's evidence was uncontroverted whereas DW1's evidence amounted to hearsay. That the totality of evidence tendered before by the Plaintiffs demonstrated the fact that the swimming teacher and by extension the School breached their duty of care and responsibility to PW1. And that consequently, the Plaintiffs discharged their burden of proving the particulars of negligence as itemized in the plaint. Counsel further posited that the swimming teacher on duty was a servant and or agent of the Defendant, acting for, on behalf and for the benefit of the Defendant. The fact that she was lawfully employed by the Defendant being confirmed by DW1.

31. Moreover, the said teacher was acting in the course of her employment, and hence the Defendant was vicariously liable for the negligence of the said swimming coach on duty. It was particularly emphasized that from PW1's evidence, the swimming coach/teacher was negligent, uncaring, dismissive and cavalier in her attitude towards the conduct of the students swimming on the said day, and later concerning the injuries sustained by PW1. That, notably, no first aid was given to PW1 by the swimming coach nor was there evidence to show that a first aid kit was available for use in an emergency.

32. Citing the fact that PW1 was a duly admitted as a student at the School, counsel asserted that the accident arose as a result of breach of an implied contract by the Defendant, and breach of its statutory duty of care towards PW1 under the Occupiers Liability Act. Counsel posited that under the said Act, property owners and occupiers are responsible for ensuring that persons in their premises are not exposed to unreasonable risks. And that the onus was on the Defendant to demonstrate efforts made to ensure that the swimming pool was a safe environment. Which the Defendant evidently failed to discharge. Counsel asserting that it was common ground that the Defendant owed a duty of care both at common law and as an occupier under the Occupiers Liability Act and the standard of care was similar in both circumstances. Here, counsel relying on the definition of "negligence" as captured in Black's Law Dictionary, 8th Ed. at Pg. 1061, and the English decision in Caparo Industries Ltd PLC vs Dickman & Others (1990) 1 All ER, 658 as cited with approval in *Segwick Kenya Insurance Brokers vs Price Water House Coopers Kenya, High Court Civil Appeal No.720 of 2006* (Nairobi).

33. Counsel argued that the Plaintiffs case hinges on the doctrine of duty of care which equally involves the duty to supervise. That the duty arose upon creation of a teacher-student relationship, crystalizing upon the student's enrolment at the school and extending to circumstances where that teacher-student

relationship applies. And that determination of liability in student injuries arising from negligence depends on standard of care, foreseeability and supervision. Relying on the decision in Nakuru Nursery School vs Bilha Wamaitha Maina [2006] eKLR and the English decision in Woodland v Swimming Teachers Association [2014] AC 537, among others, counsel argued that the Plaintiffs had on a balance of probabilities proven that there was indeed a breach of the duty of care owed to PW1; that the Defendant is vicariously liable under common law which implies into the contract of employment, a term to the effect that the employee will perform the contract with reasonable care.

34. Counsel attacked the defence tendered by summarily arguing that no evidence was adduced regarding the level of skill and awareness of pool etiquette by PW1 at the time of the accident; that the term "a good swimmer" in reference to PW 1 was not defined by the Defendant; that the evidence of DW1 did not establish any negligence or contributory negligence on the part of PW1; that no evidence was adduced in proof of instructions given by the swimming teacher on the material date not to dive into the pool nor that PW1 knew or ought to have known the dangers thereof; and that no proof was tendered in demonstrating that PW1 separated from the rest of the class and went on a frolic of her own during the swimming class, or took a risk which she knew or ought to have known, and that being aware of such risk and accepted it. Thus, the particulars of contributory negligence set out in the defence were not proved on a balance of probabilities. The Court was urged to find the Defendant entirely liable for the accident.

35. Regarding damages, counsel anchored his submissions on the applicable principles on assessment of damages as enunciated in the decisions in Mohamed Mahmoud Jabane v High Shine Butty Tongoi CA No. 2 of [1986] KLR Vol. 1, Ugenya Bus Service v Gachuki CA No. 66 of {1981 – 1986} KLR 567, Southern Engineering Co. Ltd v Musinga Muhia {1985} KLR 730, Mbaka Nguru and Another vs James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR and Telkom Orange Kenya Limited vs I S O minor suing through his next friend & mother J N [2018] eKLR. Highlighting the injuries sustained by PW1 as pleaded in the plaint, and restating PW1's evidence and the gist of the medical reports by Dr. Bhanji and Dr. Wokabi, counsel urged the Court to award Kshs.25,000,000/- (Kenya Shillings Twenty-Five Million) general damages . In order to cater for PW1's medical consultations, check-ups, accessories such as diapers, creams, dressings and cost of electric wheelchairs.

36. In support of the above proposal, counsel cited the decisions in PKM (suing on her behalf and as next friend of AJB & GSM v Nairobi Women Hospital & Mutinda [2018] eKLR, JPS (a minor suing through his father and next friend PS) *v Aga Khan Health Service Kenya t/a The Aga Khan Hospital & 2 Others (Civil Appeal 28 of 2012*) [2023] KECA 459 (KLR) and *Odari v County Council of Narok & Another (CIVIL Suit 2 of 2021*) [2023] KEHC 2007 (KLR).

37. Concerning the PW1's need for a caregiver as confirmed by the medical reports and PW1's own evidence, the court was urged despite the absence of evidence of payments made, to apply the basic minimum wage of an enrolled nurse being Kshs. 23,369/-. Therefore, considering contingencies of life a multiplier of 20 years ought to be applied. The Court was urged to award Kshs. 11,217,120/- calculated as follows: - Kshs. 46,738/- x 12 x 20. With respect to a PW1's requirement for a driver, the court was urged to apply the minimum wage of Kshs. 20,117/- thus translating to a total award of Kshs. 4,828,080/- calculated as Kshs. 20,117/- x 12 x 20.

38. On physiotherapy needs, it was reiterated that from PW1's testimony she spent between Kshs. 1,000/- to Kshs.2,000/- per session once a week. The frequency being necessitated by the need to prevent muscle wasting as well as contractures, and to encourage movement in her upper limbs, as PW1 being almost quadriplegic is immobile and confined to a wheelchair. The Court was urged adopt a figure of Kshs. 2,000 per week (Kshs. 8,000 per month) hence awarding a total of Kshs. 1,920,000/- calculated as

Kshs. 8,000/- x 12 x 20. Finally, on special damages the Court was urged to award Kshs. 2,347,863.23/- and Rupees 486,978.50 as pleaded and proved. Counsel urged the Court to equally award damages for pain, suffering and loss of amenities, lost prospects of marriage and motherhood, damages for lost years and or lost/diminished earning prospects and capacity plus costs of the suit.

39. The Defendant's counsel by his submissions also addressed the twin issues of liability and quantum of damages. On whether the 1st Plaintiff's injuries were occasioned by the Defendant's negligence, counsel argued that the School had taken all reasonable measures to employ a trained life coach and or swimming teacher. That the 1st Plaintiff, by virtue of being a participant in preparations for the school's swimming gala, had knowledge of the warnings signs and information displayed at the swimming pool. Thus, she was the author of her own misfortune, and ought to be held 100% for the incident or accident.

40. In the alternative and without prejudice to the above, counsel addressing quantum of damages restated the injuries sustained by the 1st Plaintiff. And cited the decisions in Nihon Complex Ltd & Thomas Njoroge Kirima v Joseph Kiplagat Towett [2019] eKLR, Kenblest Kenya Limited v Musyoka Kitema [2020] eKLR and William Wagura Maigua v Elbur Flora Limited [2012] eKLR . In urging the Court to award Kshs. 2,500,000/- asserted to be reasonable and adequate compensation for pain and suffering. On the other heads of damages claimed by the Plaintiffs, counsel summarily contended that these were not specifically pleaded and proved therefore ought to be denied.

41. Counsel further submitted that the 1st Plaintiff parents had prior to the accident executed a form accepting liability for any hospital treatment costs or incidentals incurred in respect of the 1st Plaintiff's injuries and the said burden could not be shifted to the Defendant. In supporting the proposition, counsel cited the decisions in John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR, Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevans Limited [2015] eKLR and Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR. In conclusion, counsel urged the court to dismiss the Plaintiff's suit with costs.

42. The Court has considered the respective parties' pleadings, the evidence and the submissions on record. The overarching issue for determination is whether the Plaintiffs have established their case against the Defendant on a balance of probabilities, and if so, what damages are to be awarded. For starters, pleadings form the thrust of the respective parties' cases. See Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91. The gist of the respective parties' pleadings has been captured earlier in this judgment.

43. As regards the burden of proof in civil cases, this is spelt out in Sections 107, 108 and 109 of the *Evidence Act*. The import of the said provisions and the standard of proof in civil liability claims in our jurisdiction, that is, on a balance of probabilities, was discussed by the Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR as follows:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

44. Further, the same court in Karugi & Another v Kabiya & 3 others [1987] KLR 347 noted that:

" [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

45. The Plaintiffs' suit against the Defendant is founded on common law negligence, breach of an implied term of contract and statutory duty. The Court of Appeal in SO & JM v Nathan M. Murugu, Lucy Muchiri, Bessie Byakika, Nairobi Hospital, AAR Health Services & Medical Practitioners and Dentist Board [2019] KECA 709 (KLR) observed concerning the tort of negligence that; -

" Negligence is a specific tort whose origin can be traced from the common law jurisprudence. The case of Donoghue v Stevenson [1932] ALL ER 1 established the modern law of negligence, laying the foundations of the duty of care and the fault principle. The elements which constitute a negligent tort are: a person must owe a duty or service to the victim in question; the individual who owes the duty must violate the promise or obligation; an injury then must arise because of that specific violation; and the injury must have been reasonably foreseeable as a result of the person's negligent actions. See Kenya Breweries Ltd. V. Godfrey Odoyo Civil Appeal No. 127 of 2007.

46. Thus, the onus of proving any alleged negligence, breach of statutory obligations and or breach of duty of care under common law, lies with the party alleging the same. As stated in Halsburys Laws of England 4th Edition, Pg. 662:

" The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

47. In Clerk and Lindsell on Torts, 18th Edition, Pg. 600 Para. 4, the authors identify the onus borne by a claimant in an action for breach of statutory duty as follows: -

> "(1) The claimant must show that the damage he suffered falls within the ambit of the statute, mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient to imply that the loss could not have occurred if the defendant had complied with the terms of the statute.
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> This rule performs a function similar to that of remoteness of damages.
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> (2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.
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> (3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event.
>
> (4) Finally there is the question whether there are any defences available to the action."

48. Similarly, where breach of an implied term of contractual duty of care is pleaded, the onus is on the claimant to establish the same. Here, PW1's testimony was the sole version of events immediate to the material accident in question. DW1, confirming that on the date of the accident she was not on duty, while DW2' s testimony relates to taking photographs of the School swimming pool, more than a decade since the accident.

49. Before dealing with the twin issues whether there was breach of an implied term of contract, or of statutory duty by the Defendant, the court applying the test spelt out in the celebrated case of Donoghue v Stevenson (supra) concerning the ingredients of negligence will answer the following questions: -

A. Did the School owe a duty of care to PW1?

B. Was there a violation of the said promise and or duty of care?

C. Whether an injury arose because of the Defendant's specific violation its promise and or duty of care.

D. Whether the injury must have been reasonably foreseeable.

A. Did the School owe a duty of care to PW1?

50. Here, it is common ground that at all material times relevant to the incident in question, PW1 was a minor and student in the School. Further, it is undisputed that within the said School there was a swimming pool where on the date in question, PW1 alongside other students was practicing in preparation for an upcoming swimming gala scheduled for the next day. Thus by virtue of PW1 being a minor and student in School at the time, the School owed her a duty to employ reasonable care, as would PW1's parents', to ensure the School environment was safe for PW1 at all material times when she was within its premises and or using facilities therein.

B. Was there a violation of the said promise and or duty of care?

51. It was PW1's evidence that despite being an experienced swimmer she was careful in her usage of the swimming pool and therefore never dove into the shallow end of the pool. She further stated that after the incident, she was helped out the pool by fellow students who were swimming alongside her. And that once she was out the pool, the swimming coach asked her if she could wiggle her toes stating that she was merely cold and would be fine. According to PW1, the swimming coach who was in charge of minors at the time was inattentive and that the manner in which she was handled after injury, in all probability occasioned her more harm. This evidence was not seriously challenged during cross-examination and the swimming coach herself was not called as a witness, as she was alleged to be ailing.

52. According to DW1's unchallenged evidence, the school seems to have taken the reasonable measure of employing a competent swimming teacher, who also was a certified lifeguard, as can be deduced from Pg. 4, 5, 6 7and 8 of DExh.1. Therefore, for all intents and purposes the swimming coach had the wherewithal to supervise her charges and to address any emergency that may have arisen at the swimming pool. PW1 did confirm in her testimony that alongside her were other students two of whom dove in the pool before her without any contrary instruction or caution being given by the swimming coach who was apparently distracted and inattentive. That PW1's swimming mates who dove into the pool before her were however not injured, despite diving into the pool as she did.

53. The Defendant's case appeared to be that there was a written and general rule forbidding any student from diving into the pool. If such a blanket prohibition existed, there is no explanation offered for the failure by the swimming coach to enforce it on the material date while supervising the students' swimming practice. Which goes to support the assertion by PW1 that the coach was inattentive, and therefore failed to exercise due care.

54. Although there is no dispute that PW1 dove into the pool, what did not come out clearly from the evidence of PW1 is the exact spot where she and her friends were diving at the material time. However, PW1 stated that as an experienced swimmer, she knew the risks of diving at the shallow end. That said, by definition, a swimming pool presents certain risks especially where minors are concerned and the swimming coach ought to have been more attentive to prevent risky behavior, which would not be a remote possibility, given the age of her charges. Including diving at the shallow end of the pool, or diving at the deep end but in a dangerous fashion and in both instances hitting the floor or wall of the pool.

55. Either of these actions could well be a possibility here but PW1 appeared to fend off any suggestion of risky behaviour on her part involving diving at the shallow end, while asserting that indeed she dove into the pool and did not hear or recall any spoken or written warning or instruction prohibiting such action. The Defendant did not rebut that evidence and the fact that the swimming coach was, for whatever reason inattentive to her duties at the time of the accident. Nor attempt was made to demonstrate contributory negligence on the part of PW1 as alleged in the defence statement and alluded to in the evidence of DW1 and DW2. What is not in dispute is that after diving into the pool, PW 1 sustained severe injuries.

56. Indeed, it would seem that the swimming coach was prompted to act after the students called her attention to the accident, and even then, she herself did not enter the pool to rescue PW1, but left it to fellow students to retrieve PW1 therefrom. It was her responsibility as a trained lifeguard to take charge of the situation upon the realization that there had been an incident involving PW1. The Defendant is vicariously liable for the teacher's negligent omissions and or commissions in the course of the duties she was assigned to carry out as the Defendant's employee. In addition, the School's decision to ferry

the injured student to hospital in the back of a taxi rather than an ambulance, more suited for the delicate emergency appears careless and negligent.

C. Whether an injury arose because of the Defendant's specific violation its promise and or duty of care?

57. Both PW1 and DW1 confirmed in their evidence that as a result of the accident, the former was injured. The injuries and attendant sequela are comprehensively captured in the two medical reports by Dr. Bhanji and Dr. Wokabi, and produced at the trial as P.Exh. 1 and D.Exh. 2, respectively.

D. Whether the injury was reasonably foreseeable?

58. As earlier observed, because of the foreseeable dangers associated with the swimming pool, the School ought to have taken all reasonable measures, including effective supervision by the swimming coach, to ensure safety of the pupils using the pool. In addition to employing a trained swimming teacher and or lifeguard, the School was under a duty to ensure that she exercised care in her duties while supervising students at the pool. As regards physical warnings at the pool, PW1 stated that she could not recall a notice containing a warning/regulations/rule in respect of the pool or marks inside the pool indicating "deep" "shallow" and "slope" parts of the pool.

59. DW1 in countering PW1's evidence stated that the swimming pool area had rules and regulations on a notice affixed by the pool, markings showing the shallow and deep ends of the pool with the slope between the respective ends, while the diving board was clearly marked with a notice showing "no diving". To shore up DW1's testimony, the Defendant produced photographs of the pool and pool area as DExh.3, through DW2. Her evidence however did not aid the Defendant's cause, as the witness admitted that she did not know how the area and pool appeared at the material time.

60. Moreover, her photographs captured the pool and surrounding area as it appeared in 2019 – 2020, when DExh.3 was taken. This evidence could not affirmatively answer for the Defendant the question whether the School had taken reasonable steps to properly mark the pool and pool area and or displayed warning/regulations/rules at the pool for the benefit of the students at the time. Significantly, PW1 at the material time was relatively a new student in the School having joined the School in January of 2006. The risk of injury here was foreseeable. And if indeed, as asserted by PW1 and not rebutted by the defence, the School failed to foresee the danger and risk of injury posed by the pool, which was neither properly marked nor students duly instructed by the inattentive swimming coach, the Defendant cannot escape liability.

E. Whether there was breach of an and express and or implied term of contract?

61. Here, the Court reiterates its findings above. Save to add that given the undisputed fact that PW1 was a student at the School, the latter was expected to have taken all reasonable measures to ensure her safety at all material times that she was in its care.

F. Whether the was breach of an implied statutory duty?

62. The Occupiers Liability Act commenced in 1963 and was intended to amend the law as to liability of occupiers for injury or damage resulting to persons or goods lawfully on any land or other property from dangers associated with the state of the property or to things done or omitted to be done there. Section 2(1) of the Act provides: -

> " The rules enacted by Sections 3 and 4 of the Act shall have effect in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in

respect of dangers due to the state of the premises or to things done or omitted to be done on them."

63. Section 3(1), (2) & (3) of the Act deals with the extent of the occupier's ordinary duty, by providing that: -

> "(1) An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> (a) an occupier must be prepared for children to be less careful than adults; and
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so".

64. Githinji JA in Soma Properties Limited v H A Y M [2015] KECA 617 (KLR) while addressing the purport of the Act observed that: -

> " It is clear from the definition that the common duty imposed by the Act is to take reasonable care in all the circumstances of the case to see that the visitor is reasonably safe. The Act neither imposes on the occupier an absolute common duty of care nor guarantees a visitor absolute safety.
>
> The standard or degree of care depends on the facts of each case."

65. The Court has addressed the Defendant's common law duty of care and by extension the School's common law duty to take all reasonable care that PW1 as a visitor and or frequent user of the swimming pool, was reasonably safe. The Defendant did not call credible evidence concerning the material incident and or measures in place in this regard, or in proof of their defences of contributory negligence and or volenti fit injuria pleaded at paragraphs 8 and 9 of the amended statement of defence.

66. Adopting here its earlier findings, the court finds that the Defendant was wholly liable for negligence, breach of implied term of contract and statutory duty.

67. Moving on to the issue of quantum of damages, it is useful at the outset to bear in mind the applicable principles in the assessment of damages, and further, the exhortation by the English court in Lim Poh Choo v Health Authority (1978)1 ALL ER 332 as echoed by Potter, J.A in Tayab v Kinany (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd (1964) AC 326, at page 345 as follows:

> " But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process, there must be the endeavor to secure some uniformity in the 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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional." (Emphasis added).

See also Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd. [2013] eKLR.

68. The Plaintiffs averred at paragraph 11 of the plaint that PW1 sustained a "cervical spine injury involving a fracture dislocation at C6 & C7". In support of the forestated, PW1 produced a discharge summary dated 03.12.2010 from Shalby Hospital, India as part of PExh.3. Dr. Bhanji (PW2) produced his medical report dated 04.06.2009 as PExh.1. The two medical comprise the earliest documentation of the PW1's injuries.

69. PW2's exhaustive evidence which was fundamentally premised on PExh.1. captured the Plaintiff's injuries to constitute an unstable fracture of the cervical spine involving C5/C6 and the C7 vertebral bodies with displacement of the C6, and laceration over the tongue. His twenty-point conclusions and or prognosis of PW1's injuries, explained in detail through his testimony, amply demonstrated the fact that PW1's life had significantly and irreparably been affected by the accident, the consequence being that she would not be able to lead a normal and independent life. The 2nd medical report, prepared at the behest of the Defendant by Dr. Wokabi is dated 11.10.2019 and was produced by consent as DExh.2. Of the medical records before the Court in respect of PW1, this was the most recent of them having been prepared some thirteen (13) years since PW1 was injured.

70. The medical report marked D. Exh.2 not only confirmed PW1's injuries as documented in PW2's medical report, but also confirmed the bleak prognosis found in PExh.1. Dr. Wokabi, stating in D. Exh.2 that: -

> " I can confirm that the diving accident caused her unstable fracture dislocation at the level of C6 and C7 which gave rise to complete irreversible spinal cord damage. She is a quadriplegic. The activities of her hand allow her to undertake limited functions which allows her to operate her electric chair and operate few gadgets. For all practical purposes I assess her disabilities as being 100% (one hundred percent). As a quadriplegic she will miss a lot in her life. To mention a few:
>
> A) Inability to walk. She will be contained to a wheelchair for the rest of her life. As a quadriplegic,she cannot partake in any physical activities, sports etc. She will also require a helper all the time at a cost to her monthly.
>
> B) Lack of social life. She will never marry of have a family of her own. She will also never enjoy sexual experience for pleasure or procreation.
>
> C) She will require special mattresses to prevent development of pressure sores. These are usually expensive items.
>
> D) As a quadriplegic she will be very prone to recurrent infection especially to urinary tract and skin."

71. The two medical reports agree on the grave and adverse nature of PW1's injuries, and irreversible sequela. Particularly, both doctors agree on PW1's 100% disability resulting from her injuries. It is not in doubt based on these reports that PW1's injuries resulted in severe consequences and changed her

life. The Court is satisfied that the Plaintiffs evidence established the pleaded injuries and attendant sequela on a balance of probabilities.

72. Although it is eminently desirable that like injuries ought to attract similar levels of awards in damages, it is impossible to find two cases involving completely matching injuries. The Court must use the most relevant authorities available and apply itself appropriately to arrive at a just award.

73. The Court has considered the rival authorities relied on. As earlier noted, the Plaintiffs relied on the decisions in PKM (supra) wherein the claimant sustained birth asphyxia leading to cerebral palsy and JPS (supra) wherein the claimant sustained injuries culminating in a condition known as erb's palsy, and Odari (supra) wherein the claimant sustained severe spinal injury of the cervical region(neck) causing weakness in legs, Head injury-stitched, Brain injury, fracture of cervical spine number 5 which led to spinal cord compression and paralysis of all limbs.

74. The Defendant on its part relied on Nihon Complex Ltd (supra) wherein the claimant sustained traumatic severance of cervical vertebral column (Burst comminuted fracture of vertebrae C7 and TI with grade 3 spondylolisthesis with resultant quadriplegia, soft tissue injuries to the chest, hip joints and lower limbs, Permanent disability assessed at 40%. Also relied on was Kenblest Kenya Limited (supra) wherein the claimant sustained cervix spine fracture c5-c6, and William Wagura Maigua (supra) wherein the claimant sustained paralysis in all the limbs (quadriplegia), loss of control of urine and stool, loss of ability to perform any sexual function, proneness to frequent chest infection and injury to the spinal cord.

75. Evidently, the decisions in PKM (supra) and JPS (supra) related to comparable injuries albeit sustained in a context quite different from the facts herein, namely, due to post-birth complications by infants. Therefore, they are generally illustrative on damages for comparable injuries. On the other hand, the decisions in Odari (supra) wherein the Court awarded Kshs. 12,000,000/-, Nihon Complex Ltd (supra) wherein the Court awarded Kshs. 1,800,000/- and Kenblest Kenya Limited (supra) wherein the Court the awarded Kshs. 2,000,000/- and William Wagura Maigua (supra) wherein the Court therein awarded Kshs. 3,000,000/-, respectively as general damages for pain and suffering, bear some semblance, with the circumstances and injuries involved herein. All these decisions, though not binding, have been considered in assessing the quantum of general damages.

76. While, as observed, it is nigh impossible to find two cases reflecting injuries that are similar in every respect, the Court's duty is to do its best in the case before it, to assess appropriate damages, based on the most reasonably comparable authorities. Considering all the foregoing, the Plaintiffs' proposal of Kshs. 25,000,000/- as general damages appears a tad too high, while the Defendant's offer of Kshs.2,500,000/- is manifestly too low in the circumstances of this case.

77. There is evidently a dearth of authorities that are readily applicable to PW1's injuries. That said, the court notes the gravely adverse nature and consequences of the 1st Plaintiff's injuries which rendered her quadriplegic, therefore a lifetime dependent relying on others , even for the most delicate and private personal tasks such as bathing, making it virtually impossible to have a family of her own while enduring complications such as frequent infections due to incontinence, all necessitating medical constant interventions, and the fact that this accident occurred just as she entered her teenage.

78. Consequently, the court is of the considered view that a commensurate substantial award in general damages, though not to the level proposed by her advocate, is justifiable in this case. The award may not restore her shattered life but will hopefully represent a reasonable compensation. Thus, doing my best on the facts of this case and considering inflation trends over the years, I am satisfied that an award of Kshs.22,000,000/- (twenty-two million) would be adequate as general damages for past, present and future pain and suffering, loss of amenities and prospects of marriage.

79. Concerning future medical and related expenses, from PW1's testimony and the medical reports presented before the Court, PW1 would require at least two trained caregivers (i.e. nurses) and physiotherapy for the rest of her life. As to the former, the Court was urged to apply the basic minimum wage of an enrolled nurse being Kshs. 23,369/- pm and multiplier of 20 years in respect of the two nurses required, thus award Kshs. 11,217,120/-. With respect to physiotherapy, the Court was urged to adopt a figure of Kshs. 2,000 per week (Kshs. 8,000 per month) thus award a total of Kshs. 1,920,000/- calculated as Kshs. 8,000/- x 12 x 20. At the time of the trial, PW1 was about 31 years old. For their part, the Defendant summarily urged the Court to decline the claim under the head and related claims as pleaded in the plaint. Bearing in mind the vicissitudes of life, a multiplier of 20 years appears reasonable in the circumstance. As with physiotherapy costs, the proposal of Kshs. 23,369/- pm as minimum wage for a nurse was not seriously challenged by the defence and appears reasonable in the circumstance and both are awarded.

80. PW1's need for an electric wheelchair, was confirmed by the medical report of Dr. Bhanji, which however fell short of quantifying the cost of one. At the time of examination by Dr Bhanji, PW1 was on a third wheelchair. While PW3 testified that the cost of an electric wheelchair averages around Kshs. 160,000/-, no evidence was tendered in that regard. The Court applying its mind to relevant facts before it, will award Kshs. 120,000/- per electric wheelchair, with changes every four (4) years thus translating to five (5) purchases totaling Kshs. 600,000/-.

81. Regarding damages for loss of earning capacity, the distinction between lost earnings and diminished earning capacity is now settled. The Court of Appeal in SJ v Francesco Di Nello & Another [2015] eKLR while making the distinction stated that: -

> " Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in FAIRLEY V JOHN THOMSON LTD [1973] 2 LLYOD'S LAW REPORTS 40 at pg. 14 wherein Lord Denning M.R. said as follows:
>
> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

82. The court proceeded to state that: -

> " The correct position as in the Fairley case (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi CA No. 251 of 1996* as hereunder:
>
> "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved."
>
> In the authority of Butler v Butler [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:
>
> "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 damages 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."

83. Based on the dicta in Francesco Di Nello (supra) damages for lost earning capacity can be awarded separately or under the head of general damages if the Court is satisfied that the plaintiff's earning capacity had diminished owing to injuries sustained. What must be specifically pleaded is a claim for lost income. Here, it is not in doubt that PW1 was injured while she was still a minor and consequently rendered totally incapacitated. Despite this grave adversity, and no doubt with her parents' support, she proceeded to attain a master's degree in psychology and is currently gainfully employed in Rwanda. Both Dr. Wokabi's and Dr. Bhanji's medical reports assessed PW1's disability at 100%.

84. The Court of Appeal in Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR restated the findings in Butler v Butler (1984) KLR 225. In that case, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The court stated:

> "The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

85. An award for lost earning capacity may be assessed by way of multiplier method or awarded as a global sum. In this case, PW1 was a minor aged 13 years when she sustained her injuries. It is therefore difficult to apply a multiplier model here. Although PW1 is currently gainfully employed, the fact that PW1 is quadriplegic effectively limited her job opportunities and options, especially in an environment of high unemployment and competition for scarce job openings or suitable jobs offering better remuneration. Once more, considering that, barring the vicissitudes of life, PW1 may have many years ahead of her, and doing my best, I would award a global sum of Kshs. 4,000,000/- (Four Million) as general damages for loss of earning capacity.

86. As concerns special damages, it is trite that the same must be specifically pleaded and proved. The Court of Appeal in David Bagine vs. Martin Bundi [1997] eKLR stated: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the

head of the court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it."

87. Chesoni, J (as he then was) in the case of Ouma v Nairobi City Council (1976) KLR 304 held that: -

> " Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

See also Hahn -v- Singh [1985] KLR 716.

88. The Plaintiffs in their submission urged the Court to award Kshs. 2,347,863.23/- and Rupees 486,978.50 as pleaded and proved. From a review of receipts and bill summary evinced via PExh.3, the Plaintiffs specifically pleaded and proved special damages amounting to Kshs. 2,041,338/-. Equally, they proved the sum of Rupees 489,214 in respect of payments documented in the patient account summary from Shalby Hospital, India where PW1 was admitted between 01.12.2010 to 03.12.2010 & 15.12.2010 to 25.12.2010.

89. With respect to payments made at Nairobi Hospital between 06.11.2008 to 11.11.2008, an invoice and not a receipt for payment was produced. The document does not reveal the person who was to settle the bill and or the amount paid, if any. As observed in David Bagine (supra), the Plaintiffs ought to have demonstrated that Kshs. 126,587/- was expended at Nairobi Hospital. Equally, the claim in respect of hiring a driver, despite being pleaded under special damages was not specifically proved and cannot succeed. Other claims under special damages that were pleaded and not specifically proved in the plaint are also declined.

90. In conclusion, therefore Court finds the Defendant wholly liable for negligence, and enters judgment in favour of the Plaintiffs against the Defendant as follows:-

a. General damages for pain, suffering, loss of amenities and prospect of marriage: Kshs.22,000,000/-.

b. General damages for lost earning capacity: Kshs. 4,000,000/-.

c. Future Medical & Allied Expenses

   i) Cost of nursing care: Kshs. 11,217,120/-.

   ii) Cost of physiotherapy: Kshs. 1,920,000/-.

   iii) Cost of five wheelchairs: Kshs. 600,000/-.

d. Special damages: -

   i. Kshs. 2,041,388/-

[Bringing the total award in Kes. to Kshs. 41,778,508/- (Forty-one Million Seven Hundred and Seventy-Eight Thousand Five Hundred and Eight only)].

ii. Rupees 489,214/- (converted at the Central Bank exchange rate ruling as of the date of this judgment).

91. The Plaintiffs are awarded the costs of the suit and interest. Interest on special damages is awarded at court rates from the date of filing suit until payment in full, while interest on the remaining heads of damages is awarded at court rates from the date of this judgment until payment in full.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

For the Plaintiffs: Mr. Mabachi h/b for Mrs. Ameka

For the Defendant: Mr. Ombati

C/A: Erick