REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 29 OF 2017

LUCY KINYA.....PLAINTIFF

-VS-

ST. JOHN OF GOD HOSPITAL – TIGANIA

(SUED THROUGH THE ADMINISTRATOR).....1ST DEFENDANT

CATHOLIC DIOCESE OF MERU TRUSTEES REGISTERED....2ND DEFENDANT

J U D G M E N T

1. By a plaint dated 18th September, 2017, the plaintiff sued the defendants seeking general, exemplary and special damages; future medical expenses; loss of earning capacity; and future earning capacity as well as the costs of the suit.

2. She alleged that on or about 25th June, 2016, she delivered twins through a caesarian section at the 1st defendant's facility but that in the cause of the operation, she suffered an injury occasioned by the negligence of the defendants or their employees for which the defendants were vicariously liable. As a result of the said injury she had suffered loss and damage.

3. The defendants denied the allegations vide their statement of defence dated 4th October, 2017. They refuted that they were vicariously liable for the actions of the unnamed doctors and staff. They also denied the particulars of injuries, allegations of the breach of duty of care and the particulars of special damages and future expenses claimed by the plaintiff and put her to strict proof.

4. The plaintiff called three witnesses while the defendant called one. **PW1 Dr. Nicholas Koome Guantai,** a medical officer at Meru Teaching Referral Hospital, told the court that on 14th August 2017, he examined the plaintiff who had sustained post spinal analgesia paraplegia during an emergency caesarian surgery. The injury sustained was a *conus medullaris* (spinal cord injury).

5. That on examination, the plaintiff had paralysis of both lower limbs with total loss of sensation, motor sensation loss of bladder control and relied on indwelling urinary catheter that was changed on a fortnightly basis. She had loss of bowel control and relied on adult diapers on all round the clock basis. Moreover, she was undergoing treatment for bed sores at Chaaria as well as physiotherapy.

6. He told the court that the plaintiff current situation puts her at the risk of recurrent urinary tract infection as well as deep Venus thrombosis for reason of immobility resulting from the inactivity of the calve muscle. She will require physiotherapy, catheter changes and pressure sores which are inevitable. He assessed the degree of permanent incapacity at 100%.

7. **PW2 Charles L. Wangai,** an assistant Chief Physiotherapist at the Meru Teaching Referral Hospital, testified that he had been attending to the plaintiff. When he first met her on 11th July 2016, he did a preliminary assessment which revealed that her both limbs were paralyzed. She had sores on her buttocks. She had bilateral feet drops, stiff ankle and knee joints, stiffness on hip joints and had an indwelling catheter. She was permanently immobilized on a wheel chair.

8. He drew a physiotherapy treatment plan for her which included physiotherapy sessions to re-assure her and uplift her will power. He had continued to attend to her 3 times a week since then. Because of the extent of the injuries, not much had been achieved.

9. **PW3 Lucy Kinya,** the plaintiff told the court how she visited the 1st defendant's facility on 26th June, 2016 to give birth to her twins. While in the theatre, she was given four injections on her spine at 8.00AM. She regained consciousness at about 5PM. But when she tried to rise up, she was unable and no one told her what had happened.

10. She could not move her lower limbs which had turned black and when she told the doctors about it, they told her that she was not serious. Nothing was done to her except that she was told that she will begin physiotherapy at a later date. She thereupon asked to be discharged.

11. On 29th June 2016, she was transferred to Meru General Hospital where she was referred to Kenyatta National Hospital. An MRI revealed that she had sustained an injury in the spine. She blamed the 1st defendant because she went there to deliver but came out disabled.

12. **DW1 Dr. Rudume Jesse,** was the doctor who attended to the plaintiff, the plaintiff came to the facility on 26th June 2016 at 1.30am. Early in the morning, she went into active labor and was taken into theatre for an emergency operation as one of the babies was in breech position. In theatre, she was given spinal anesthesia but she was still able to perceive pain. She was therefore put on general anesthesia in spine position. He operated on her and she delivered the twins. She left theatre stable and was taken to the ward. She was put on pain medication, blood booster and antibiotics.

13. A day after the operation, the plaintiff complained of lower limb numbness and abdominal pain on the surgical site. On examination, her vitals were stable and motor exam of the lower limb showed intact sensation up to the knee level with a power of grade 1 in both limbs. Post anesthesia paralysis was made and a physiotherapist was involved. Their plan was to continue with pain control, nursing care and encourage oral intake.

14. On day two, she still complained of lower limb numbness and examination revealed loss of power and sensation and she had urine incontinence with no bowel movement. They diagnosed it as the lower limb paralysis to rule out spinal injury. The plaintiff still had bilateral lower limb paralysis with loss of sensation and power up to the mid- thigh on day 3.

15. The hospital planned to continue with physiotherapy, do an MRI and consider referral and other management. But on the same day, the relatives of the plaintiff requested for discharge whereby she was referred to Meru Level 5 hospital. In his view, the spinal anesthesia was properly conducted even though the *conus medullaris* was injured.

16. In their submissions, the defendants contended that the plaintiff had not established the relationship between the physician who was allegedly negligent and the defendants. That they could not be held to be vicariously liable.

17. That it was not clear how and where the plaintiff was injured. The location of the injury was not established since the opinions of **Dr. Guantai (PW1)** and **Dr. Raduma (DW1)** differed. That in the premises, no liability could be attributed to the defendants. The case of **Administrator, H. H. Aga Khan Platinum Jubilee Hospital v. Munyambu [1985] eKLR** was cited in support of that submission.

18. It was further submitted that since the history of the plaintiff was unknown, there could be other causes for the injury the plaintiff was complaining of. The cases of **Herman Nyangala Tsuma v. Kenya Hospital Association T/A The Nairobi Hospital [2012] eKLR** and **Philip Wishaminya v. Kenyatta National Hospital Board NBI HCCC No. 522 of 1999 (UR)** were cited in support thereof.

19. That in any event, the plaintiff having signed a consent to be operated on, she had consented to the injury that befell her and the defendants cannot be blamed therefor. They contested that the incapacity suffered by the plaintiff was 100%. They also disputed the amounts claimed by the plaintiff for future medical expenses.

20. On the part of the plaintiff, it was submitted that she had proved her case to the required standard. That she had been treated badly by the defendants. That the plaintiff had gone to the 1st defendant facility expecting no harm but it nevertheless came her way. The case of **PBS & Another V. Archdiocese of Nairobi Registered Trustees & 2 Others [2016] eKLR** was cited on the proposition that a medical institution is expected to professionally deal with its clients and once it deviates from that route, it is liable.

21. That since it had been proved that the plaintiff met her injury in the hands of the staff of the 1st defendant, both the defendants were vicariously liable. The cases of **PKM & GSM v. Nandi Women Hospital & Mutanda [2018] eKLR** and **M (a minor) v. Amulea & Another [2001] KLR** were cited in support of that position.

22. Having carefully considered the testimonies of the witnesses, the submissions of Learned Counsel and the authorities relied on, the issues for determination are:-

a) whether the defendants are liable for the acts of their staff;

b) whether the plaintiff was injured at the defendants' facility and if so, whether the injury was occasioned by the negligence of the defendants;

d) whether the plaintiff is entitled to damages sought;

e) what orders as to costs?

23. The plaintiff pleaded that she was attended to at the defendants' facility by the defendant's staff. The defendants denied this allegation in their defence. According to the defendants, they neither attended to the plaintiff nor did they perform any medical procedures on her. That it was not proved that the person who administered the anesthesia was their employee.

24. In the case of ***P.A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR,*** the Court of Appeal held that, vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority.

25. In the present case, it is not in dispute that on 26th June, 2016, while in good health, the plaintiff presented herself and delivered her twins at the 1st defendant's facility through a caesarean section. The procedure was performed by **DW1** who confirmed that, the anaesthetist was one **Mr. Kamandu.** The plaintiff contended that the procedure was performed at the defendants' facility by the latter's staff. In his testimony, **Dr. Raduma (DW1)** did not deny that **Mr. Kamandu** was in the defendants' employment. Further, **DW1** did not deny that the anaesthetist was performing his duties under the instructions of and/or authority of the defendants.

26. To my mind, when a patient walks into a hospital and finds the staff working there (be it a doctor, nurse, anaesthesia, consultant or any other person performing duties thereon), the presumption is that such a person is performing such duties at the instance and authority of the hospital. It is upon the hospital to prove otherwise. It is not expected that the patient will inquire from each staff he/she finds in such an institution whether or not he/she is in the employment of such an institution. It will be required too much from a patient.

27. In the present case, **Mr. Kamandu,** the anaesthetist, was in the theatre. The plaintiff did not bring him there. All she wanted was to deliver her twins and the defendants offered her the services through personnel unknown to her. It was not for the plaintiff, in my view, to show that the anaesthetist was in the employment of the defendants. The presumption is that the anaesthetist and the other staff at the 1st institution were in the employment of the defendants which presumption was never rebutted.

28. Under ***section 112 of the Evidence Act, Cap 80 Laws of Kenya,*** it is the defendants who had the special knowledge as to who **Mr. Kamandu** was and how he found himself in the theatre where the plaintiff was delivering herself. The defendants did not call the said Mr. Kamandu and neither did they give an explanation how he found himself in the theatre with **DW1** performing Caesarean section on the plaintiff. I hold that **Mr. Kamandu,** who administered anaesthesia on the plaintiff on the material day, was an employee of the defendants and/or did so on their authority.

29. In the case of **M (a minor) v. Amulea & Another [2001] KLR 420,** the court held:-

> ***"Authorities who own a hospital are in law under a self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot of course do it by themselves. They must do it by the staff whom they employ and if their staff is negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him … It is established that those conducting a hospital are under a direct duty of care to those admitted as patients to the hospital. They are liable for the negligent acts of a member of the hospital staff, which constitutes a breach of that duty of care owed by him to the plaintiff. Thus there has been acceptance from the courts that hospital authorities are in fact liable for breach of duty by its members of staff. It is trite law that a medical practitioner owes a duty of care to his patients to take all due care, caution and diligence in the treatment."***

30. It follows therefore that the defendants would be vicariously liable for the acts of their staff.

31. The next issue is whether the plaintiff was injured at the defendants' facility and if so, whether it was as a result of any negligence on the part of the defendants.

32. According to the defendants, there was no evidence to show that the plaintiff was injured at its facility. That there was a difference of medical opinion between **PW1** and **DW1** as to where of spinal analgesia should have been applied for purposes of caesarean section. That the injury could have been as a result of other causes other than medical and that in any event, the plaintiff had consented to the procedure and cannot complain of the consequences arising therefrom.

33. The evidence on record is clear and undisputed that, on the material day, the plaintiff presented herself at the 1st defendant's facility for delivery. She was in good health. From the medical records at pages 76 to 93 of the agreed bundle, the plaintiff did not have any other complaint when she presented herself for delivery as aforesaid. She told the court that she walked on her two feet as she went to the facility.

34. The remarks on the Anesthesia record at page 84 shows that, there was a complication during the administration of anesthesia which was indicated as *failed spinal block.* The plaintiff testified that the anaesthetist injected her on her spine 4 times and it was very painful. **DW1** stated that, the spinal anesthesia failed as a result they had to administer general anesthesia on the plaintiff. The operation took 28 minutes.

35. After the plaintiff gained consciousness, she realized that she had lost the use of her lower limbs. From then to-date, she has been condemned to a life on a wheel chair. The post-operative notes reveal that after day one, the plaintiff lost sensation on her lower limbs and developed paralysis. She has never recovered to-date. The defendant's medical staff proposed physiotherapy and MRI to confirm what may have gone wrong.

36. At the Kenyatta National Hospital, the plaintiff was diagnosed with hemiplegia post anesthesia during caesarian section. The MRI revealed that there was *conus medullaris* injury.

37. **DW1** who conducted the surgical procedure testified that there was no evidence that the injury was as a result of wrong administration of anesthesia. That such an injury could be as a result of other causes other than direct trauma on the spine, such as road traffic accident, congenital disorders, acute infections and polio or TB.

38. The court however noted that from the evidence on record, there is nothing to show that the injury to the plaintiff was caused by any of these other causes other than direct trauma to the spine. In any event, when put to task which of these causes affected the plaintiff, **DW1** could not explain.

39. I am alive to the fact that **DW1** was not an independent witness. He was directly involved in the procedure that resulted in the injury complained of. During the pendency of this case, the plaintiff presented herself to the defendants three times to be examined by their doctors

but they failed to do so. There was no evidence to rebut the plaintiff's testimony and that of **PW1** that she was injured at the 1st defendant's facility on the 26th June, 2016.

40. Accordingly, I make a finding that the plaintiff was injured at the 1st defendant's facility and that the injury was as a result of direct trauma to the spine. The conus medullaris was punctured during the failed spinal anesthesia which led to the paralysis suffered by the plaintiff.

41. As to the alleged difference of opinion between **PW1** and **DW1,** the Court of Appeal in the case of ***Administrator, H. H. The Aga Khan Platinum Jubilee Hospital v Munyambu (1985) eKLR*** made reference to the case of ***Maynard vs. West Midlands Regional health Authority (1983)*** where it was stated:

> ***"Differences of opinion and practise exists, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgement. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."***

42. For one to be liable in negligence, there has to be a breach of duty of care. In the case of **Bolan v. Friern Hospital Management Committee [1957] 2 ALL ER 118,** MC Nair J stated of medical negligence:-

> ***"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."***

*43. The alleged difference of opinion is that **PW1** told the court that spinal anaesthesia should be undertaken between Lumbar 4 and 5 (L4 and L5) while **DW1** stated that it should be between Lumbar 1 and 2 (L1 and L2). To my mind, that does not make any difference. According to the MRI report by Precise Diagnostic Imaging dated 15th July, 2016, the plaintiff's conus medullaris terminated at between Thoracic 12 and Lumbar 1 (T12 and L1). That clearly means that, the spinal anaesthesia that **Mr. Kamandu** administered must have been above Lumbar 1 to have punctured the plaintiff's conus medullaris.*

*44. In any event, the defendants did not call the said **Mr. Kamandu** to testify and tell the court the location where he administered the failed spinal anaesthesia. Neither did the defendants explain why they did not call him. In the circumstances, the court is entitled to infer that had he been called, **Mr. Kamandu** would have given evidence adverse to the defendants.*

45. **PW1** testified that from the medical notes of the defendants', he noticed glaring errors that deviate from standard practice. There was failure on the part of the anaesthetist to review the patient both pre-operatively and within 6 hours of completion of the procedure. It is expected that after 6 hours of the procedure, the aesthetic agents should have worn out and the patient's motor and sensation functions should have resumed. However, the earliest review notes were shown to have been at 10.30am of 27th June, 2016, a day after the procedure.

46. **PW1** also noted that there was a delay in reaching a diagnosis of spinal cord injury, despite a whole 24 hours having lapsed after the administration of spinal analgesia and the effects were still present. That there was delay to institute high dose steroid administration immediately the spinal cord injury was suspected. There was also delay in referral of the patient and lastly, there was no communication on what had happened to the patient in time or at all.

47. All these observations and conclusions made by **PW1** were neither challenged nor denied. To my mind, on the basis of the foregoing, there was negligence on the part of the medical staff of the defendants for which the defendants are vicariously liable. The negligence resulted in the paralysis that the plaintiff suffered.

48. There was an issue as to the extent of the plaintiff's injury. **PW1** assessed it at 100%. **DW1** contested the figure of 100% but did not give his opinion on the extent. From the record, the *conus medullaris* injury resulted in paralysis of both lower limbs, loss of bowel and bladder control, loss of sexual function, pressure sores on the gluteal and lip region, permanent immobility and incapacitation of the plaintiff.

49. I saw the plaintiff in court on the four occasions that the matter came up for hearing. She could barely do anything for herself. She was through out on a wheel chair. From the medical evidence on record and the testimony of the plaintiff, I am satisfied that the plaintiff suffered 100% incapacity.

50. Having found the defendants liable for negligence, the plaintiff is entitled to damages. First, the plaintiff has sought for general damages for pain and suffering and loss of amenities.

51. When assessing damages, certain principles have to be taken into consideration. In ***H. West and Son Ltd v. Shepherd (1964) AC 326*** **it was stated:-**

> ***"…but 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 the 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 conventional….." (Ephasis added).***

52. Apart from the foregoing, the defendants cited the case of **Mohamed Jabane v. Highstone T. Olenja (supra)** wherein it was held that, in assessing damages, each case depends on its own facts; awards must not be excessive. They must take into account the need not to escalate insurance premiums, medical fees and other expenses and that inflation should be taken into account. These then are the guiding principles.

53. I have already found that the plaintiff suffered 100% permanent incapacity. The plaintiff submitted for KShs.10,000,000/-. The defendants submitted for Kshs.2,500,000/-. For similar injuries in **William Wagura Maigua v Elbur Flora Limited [2012] eKLR** the plaintiff was awarded Kshs. 3,000,000/-. The Court of Appeal in the case of **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** set aside the award of Kshs. 4,000,000/- and substituted it with Kshs. 3,500,000/-. In **Ngure Edward Karega v. Yusuf Doran Nassir [2014] eKLR**, the court awarded Kshs.5,000,000/- in 2014.

54. I have considered the injuries suffered by the plaintiff. Based on previous precedence and considering inflation, I make an award of Kshs.6,000,000/- as general damages for pain, suffering and loss of amenities.

55. The plaintiff prayed for exemplary damages for the mistreatment by the defendants. Exemplary damages are awarded with some degree of caution and in limited situations. In the case of **Mikidadi –vs- Khaigan and Another [2004] eKLR 496, Ochieng** J held *inter alia*, that: -

> ***"Exemplary damages are only to be awarded in limited instances namely, (a) oppressive arbitrary or unconstitutional action by servants of government, (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute."***

56. It is clear that the defendants treated the plaintiff callously. First, the defendants' medical staff mocked the plaintiff that she was not serious when she complained of loss of power on her legs. Secondly, the defendants neglected to give the plaintiff expedited medicare after diagnosing paralysis. Thirdly, they failed to advise her what had happened to her only for her to discover it at the Kenyatta National Hospital a week later. Finally, the defendants failed to release to the plaintiff her medical records forcing her to source them from the Medical and Dentists Board. Although this was despicable, I will not award exemplary damages on the authority of **Mikidadi –vs- Khaigan and Another (supra).** The award in general damages is sufficient to address these.

57. On special damages, these should not only be pleaded but specifically proved. The plaintiff had pleaded for special damages under paragraph 8 of her plaint. She has provided receipts of the expenses she has incurred **(See PExh2 to 18).** The defendants were of the view that the plaintiff has not proved that she was paying her helper Kshs. 600/= per day. To them, the booklet that the helper was signing upon receipt of the money was not substantive prove.

58. In ***Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR,*** the Court of Appeal held:-

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

59. I am alive to the fact that it is not likely that many Kenyans in the rural set up would keep proper records of accounts on how they earn their livelihood or incur their expenses I am content that the plaintiff proved that she was paying her helper Kshs. 600/- per day as evidenced by the notebook produced. Therefore, I award the plaintiff Kshs. 891,000/- special damages pleaded in the plaint.

60. It was also pleaded that the expenses were ongoing. As at the date of the hearing, the plaintiff produced further receipts the entire sum totaling Kshs. 1,204,000/-. I award that amount.

61. To calculate future expenses the plaintiff proposed a multiplier of 35 years. The defendants proposed a lessor multiplier relying on the case of ***Simon Mwangi Mureithi v Martin O. Shikuku & 3 others [2005] eKLR*** wherein Maraga J (as he then was) held that:

> ***"Life expectancy in Kenya is said to be around 45 years these days. Life expectancy of a paraplegic is considerably reduced. I consider a multiplier of 20 years reasonable for the plaintiff who is now 21."***

62. In the above case, the the court relied on such a multiplier for it was of the opinion that life expectancy in Kenya then was 45 years. That was in 2005. It is now about 14 years later and the life expectancy in Kenya has grown to about 65 years which is equivalent to the retirement age. According to the World Health Organization, the life expectancy of Kenya is between 64 – 69 years ***(See: https://www.who.int/countries/ken/en/*** as at 30th July, 2019). At the time the plaintiff testified, she was 29 years. I am therefore of the view that a multiplier of 30 years will be reasonable.

63. After assessment of the plaintiff, **PW2** made recommendations of what may be needed by her and gave reasons therefor. He recommended continuous use of thrombo embolic stockings to prevent thrombosis to the limbs and orthopedic materials backs laps to prevent foot drop for both limbs. On the long term to improve mobility and improve her daily living, she requires a care giver for life; an ordinary manual wheel chair; motorized wheel chair; orthopedic bed and mattress; diapers, catheters and urine bags; regular medical/surgical check-ups; drugs for bed sores or any opportunistic infections; dully system, glycerin oil and wheel chair maintenance.

64. **DW1** did not know the extent of the plaintiff's injury. He testified that he could not give an opinion on her incapacity as he had not examined her. Consequently, I am of the view that he could likewise not be in a position to know what exactly the plaintiff's needs were. His criticism of **PW2** on the plaintiff's needs and his opinion is therefore unfounded and without basis.

65. **a) Care giver**

The evidence on record is that the plaintiff will require a caregiver for the rest of her life. Apart from the fact that someone has to take care of her twins who are now 3 years old, the plaintiff will always require someone to take care of her. The sum of Kshs. 20,000/- pm would be reasonable, 20,000 x 12 x 30= 7,200,000/-.

b) Future earning capacity

The plaintiff testified that she was working at a restaurant in Nkubu earning Kshs.9,000/- pm before the injury. The defendants submitted that the plaintiffs never gave the name of the restaurant or hotel and that she did not produce any evidence of such earning. The plaintiff testified on oath. Her evidence on this aspect was not challenged. These issues were never put to her when she testified. On the authority of ***Jacob Ayiga Maruja & Anor .V. Simeon Obayo [2005]*** **eKLR**, to the effect that it is not always necessary to have documentary evidence, I believed that kshs 9000/= per month in a highway town such as Nkubu is reasonable. I award her this claim making it 9000X12X30 kshs. 3,240,000/=.

c) Future medical expenses

The evidence available on what was required was that of **PW2. DW1** attempted to dispute some of the items as well as the prices. The court believed **PW2's** proposals for the reasons that; firstly, his evidence was not contradicted in any material particular; secondly, **DW2** was not an independent witness; thirdly, **PW2** stated that he had consulted the market for the items and the prices and that he had not proposed the best quality for reasons of pricing and fourthly, **DW2** did not offer any alternative and there is none which the court can rely on.

i) Personal hygene – Catheter, urine bags, diaper suppositories and bed pads. Kshs.3,000/- each week. 3,000x4x12x30=4,320,000/-.

ii) Motorised wheel chair. PW2 proposed 4 such chairs in the lifetime of the plaintiff. Since this will be only required in an environment such as town, I think 4 is in the higher side. Undoubtedly, she will require to go to town for various reasons. I propose 2 at Kshs. 250,000/= each for the entire life time. That makes it kshs. 500,000/=.

iii) Ordinary wheel chair. PW2 testified that the plaintiff will require 4 of such. Since the terrain where the plaintiff lives is said to be rough, there will be high wear and tear making a proposal of 4 such wheel chairs in the plaintiff's lifetime reasonable. I will award 4 ordinary wheel chairs at Kshs.25,000/- each making a total of Kshs. 100,000/-.

iv) Orthopedic bed. **PW2** proposed 2 while **DW1** opined that none was required. That these are only required in a hospital set up where adjustment of the positioning of a patient is required. However, I saw the plaintiff in court. She would be completely immobile because of the paralysis. Apart from sitting on the wheel chair, she will require to change positions. It is at this time that she will require to lie on an orthopedic bed which is adjustable to make her sufferings bearable. I will award 1 orthopedic bed at Kshs.150,000/-.

v) Orthopedic mattress. Five 5 pieces were proposed at Kshs.30,000/- a piece. The defendant only submitted that the money for the same would not be required all at the same time. I allow the same at 30000x5= 150,000/-.

vi) Regular medical check ups. **DW1** opined that these were not necessary because the caregiver would be moving the plaintiff regularly. However, the testimony of **PW1 and PW2** was firm that, because of the immobility of the plaintiff, the opportunistic infections for reason of urine retention and immobility was very high. The proposed Kshs.6,000/- quarterly seems reasonable. I will allow this at Kshs. 6,000/- per quarter making it 6,000x4 x30= 720,000/-.

vii) Cost of drugs for bed sores or any opportunistic infections. The defendants submitted that this was unlikely to occur. The plaintiff submitted for Kshs.3,000/- per month for the rest of her life. To my mind, opportunistic infections will likely occur due to the condition the plaintiff finds herself in. Her immobility. However, their occurrence will be minimized by the provision of the caregiver and the periodic medical checkup already provided. I estimate the reduction to be by nearly 70%. Accordingly, I allow the claim at quarterly to make 3,000x4x30= 360,000/-.

viii) Thromboembolic stockings. It was proposed that the plaintiff will require 2 pairs each year. **DW2** was of the opinion that they are not necessary because of physiotherapy. **PW2** testified that although the plaintiff had been in regular physiotherapy since 2016, the same had not so far been successful because of the extent and nature of the injury sustained. For the four times the plaintiff came to court, the court observed that she failed to wear them once. In this regard, because of the physiotherapy services, the plaintiff might require only one pair per year instead of 2 as she currently does. I allow the claim at 3,500x30= 105,000/-.

ix) Pulley System. DW2 told the court that this was necessary to avoid the wasting away of the muscles on the upper part of the body. The one off cost of Kshs.50,000/- was proposed. This is necessary in the condition the plaintiff finds herself in. In the absence of any other price, I allow the figure of Kshs.50,000/-.

x) Back slabs. It was proposed that the plaintiff will require to purchase two back slabs to avoid foot drop. **PW2** stated that two of these were required each year at Kshs. 5,000/- each. I allow the item as there is no evidence that the plaintiff's condition will ever change. This adds to 5,000x2x30= 300,000/-.

xi) Maintenance of the motorized and ordinary wheel chair. The defendants were of the view that **PW2** was not in the business of maintaining such equipment. However, **PW2** told the court that he had made inquiries in the market and stated the amount to be

Kshs.40,000/- pa. I allow the claim to make 40,000x30= 1,200,000/-.

xii) Glycerin oil. This is a component used for massage. I reject the defendants' contention that it is in the charges of the physiotherapist. This was not put to **PW2** when he testified. I allow the item at Kshs. 250/- per bottle per month. This translates to 250x12x30= 90,000/-.

66. Accordingly, I enter judgment in favour of the plaintiff against the defendants and make the following award: -

a) General Damages - Kshs. 6,000,000/-

b) Exemplary Damages - Nil

c) Care giver - Kshs.7,200,000/-

d) Special Damages - Kshs.1,204,000/-

e) Loss of earnings - Kshs. 3,240,000/=

f) Future Medical Expenses - Kshs. 8,045,000/-

Total **Kshs.25,689,000/-**

67. The sum of Kshs. 1,204,000/- shall attract interest at court rate from the date of filing suit until the date of this judgment. Where after, the entire sum of Kshs.25,689,000/- shall attract interest at court rate from the date of judgment until payment in full.

68. The plaintiff will also have costs of the suit together with interest thereon.

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE