REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI(CIVIL DIVISION)

CIVIL CASE NO. 59 OF 2011

M N K (a minor suing through her father and next friend)

PATRICK KYALO MAUNDU.....PLAINTIFF

VERSUS

JOSEPH MWAURA.....DEFENDANT

JUDGMENT

1. The plaintiff in this case is a female minor whose name for purposes of these proceedings shall be by way of initials only namely M.N.K. She is suing through her father and next friend Patrick Kyalo Maundu. The defendant is Joseph Mwaura.

2. Vide a plaint filed in court on 22nd February 2011 which is dated 17th February 2011, the plaintiff minor was on 22nd April 2010 injured when she fell from the defendant's building Mount Kenya House in Huruma Ngei Phase 11 estate, which was under construction as she allegedly held on loose ropes from the 3rd floor of the 7th floor building which was under construction. The plaintiff attributes her injuries to the negligence of the defendant. She was then aged about 5 years old. She claims for general damages and damages for loss of earning capacity, costs and interest.

3. The defendant filed his defence dated 30th May 2011 on 31st May 2011 denying the plaintiff's claim against him. He denied being the owner of the Mt Kenya House on Plot No. 24B in Huruma Ngei II. He also denied that the plaintiff was residing therein with her parents or at all or that the said building was under construction or that there was any loose rope used for dropping materials for construction which the plaintiff minor allegedly hung on.

4. The defendant also denied any knowledge of or occurrence of any accident as alleged and or that there was any injury or loss occasioned to the minor plaintiff or at all and put the plaintiff to strict proof thereof.

5. Further, the defendant pleaded that if at all an accident did occur in the manner pleaded and on the named date involving the plaintiff minor, which was denied, then the same was solely caused and or substantially caused by or contributed by the negligence of the plaintiff minor and or her guardian or next friend.

6. The defendant particularized the acts of negligence complained of against the plaintiff. He also denied particulars of injuries, loss or damage and prayed that the plaintiff's suit be dismissed with costs.

7. The plaintiff filed reply to defence reiterating contents of the plaint and denying particulars of negligence attributed to the minor and or her guardians.

8. On 14th June 2012 Honourable Waweru J directed that this suit be heard on priority basis.

9. The defendant's counsel withdrew from acting for the defendant and the defendant sought for alternative legal representation. The firm of M/s Mbiyu Kamau & Company Advocates came on record on 5th November 2015 for the defendant. The matter proceeded to hearing on 5th May 2015.

10. The plaintiff testified through her father and next friend Patrick Kyalo Maundu as PW1 and stated that the minor MNK was his second born daughter. He adopted his witness statement filed in court on 4th May 2015. He also produced his bundle of documents filed on 4th May 2015 as his exhibit 1.

11. PW1 stated that the minor was now at the time of hearing this case aged 9 years and in standard 3. That following the accident, she does not comprehend anything.

12. According to PW1, his family and the minor at the material time of the accident complained of lived as tenants in the defendant's premises at Mt Kenya House apartments in Huruma Estate, Nairobi since 2006. That he was the minor's father and that on 22nd April 2010 he was going about his normal duties at his place of work when at 4.30 pm or thereabouts, he received a call from one of his family friends who informed him that the his minor daughter had fallen off from the third floor of the building while playing with friends, when she came across the rope that the developers were using to uplift the bundles of steel bars from the ground to the seventh floor. That he was informed that the minor held the rope not knowing the danger she was exposing herself to and so she lost control and fell on the ground as the developers were lifting he last bundle of bars.

13. It was the plaintiff's further evidence that the Landlord's car was used to transport the injured minor to Kenyatta National Hospital. That the landlord defendant herein dumped the child at Kenyatta National Hospital and left. That the plaintiff arrived at Kenyatta National Hospital at 5.30pm. The minor was admitted in the intensive care unit for 13 days and remained an inpatient for 41 days undergoing medication and treatment. She lost her speech and ability to walk for six (6) months.

14. PW1further testified that before the accident, the minor was joyful and led a normal healthy life. She was then in nursery school. That after the accident, the minor's whole life changed. She developed complications involving; mental confusion, constant and moderate disorientation; unstable gait; mumbled speech; difficulty in walking; could not turn self in bed; relied on use of container to relief herself; bends on her back on sitting.

15. According to PW1, the minor requires to be assisted all her life and that she will have to go to special needs school. That she was unlikely to: lead a normal life, get employed or start her own life. He claimed that the minor had lost her future earning capacity and that she would require physiotherapy throughout her life at shs 5,000 per month. That she also required a nurse at a cost of shs 10,000 per month, medication, specialized treatment, and care. According to PW1, the defendant was to blame for the accident for:

> *a. Allowing construction of the building without taking precautionary measures to protect the lives of innocent people;*
>
> *b. Allowing construction of an occupied building against the law;*
>
> *c. Failure to provide protection to the public while constructing a building; and*
>
> *d. Acting deliberately negligent due to greed.*

16. The PW1 denied being an extortionist and maintained that the photographs he produced showed the status of the construction work at the material time of the accident. He prayed for damages, costs, and interest.

17. The plaintiff also called PW2 Hellen Nduku who testified on oath that she was the mother to the minor plaintiff. She stated that she lived in the defendant's premises with her husband PW1 and their minor daughter the plaintiff herein. She stated that on 22nd April 2010 she send her two daughters, the plaintiff and her sister to the shop and when they returned, she remained in the house to carry out her other chores as they rushed out to play. After a while, she heard a loud thud and followed by wails from her neighbours. She rushed outside to establish what was happening and saw a child lying on the ground next to metal that had been tied and a rope was hanging from above her. She identified the child as her daughter the plaintiff herein. PW2 climbed down and found when a neighbour had picked the child from where she had laid when she fell. They looked for help and the landlord's vehicle came and rushed them to Kenyatta National Hospital and that the Landlord abandoned them at Kenyatta National Hospital. Later her husband PW1 joined her in hospital. She remained in hospital with the minor who had suffered very serious injuries that destroyed her life. She stated that it is the defendant and his caretaker Kennedy Mutua and neighbours who assisted her take the child to hospital. She stated that the child was now a 'vegetable' who cannot do anything for herself and neither can she walk well nor comprehend things. That she is unstable.

18. PW2 maintained that the defendant owed a duty of care but that he was negligent because he left a loose hanging rope which her daughter found and swung on it leading to her near fatal fall. PW2 claimed in her testimony that her child had now become a 'vegetable' she cannot hold a pen well, she cant walk well, she maintained that it was the defendant who took her child to hospital. She denied being negligent or being the cause of her child's accident. She prayed for damages.

19. The plaintiff also called PW3 Mr Kennedy Mutua who testified on oath that he was a farmer in Kathonzweni. He relied on his adopted written witness statement as filed in court as his evidence in chief.

20. PW3 testified that in 2008-2011 he worked for the defendant as his caretaker of the building called Mount Kenya House, Huruma. That he knew the plaintiff PW1 and PW2 who were tenants in the defendant's premises. He also testified that there were workers in the building which had 7 storey's lifting materials from the ground to the 7th floor, using ropes which ropes were hanging loosely. That on the material date pleaded by the plaintiff on 22nd April 2010 children were playing on the balcony when the minor (MNK) fell from the storied building.

21. That at the time, the 7th floor of the building was under construction being supervised by the defendant himself; and that some building materials were being lifted to the 7th floor. That at that time,PW3 was in his shop located on the ground floor of the same building where he sold kerosene. That he heard a loud thud and followed by wails all over. That when he rushed outside, he found people crowding a young child and he realized it was the minor plaintiff(MNK) who lay there unconscious. He also saw the rope which she had been holding still hanging nearby. PW3 testified that one woman picked up the child and himself, the child's mother, jointly with the defendant and PW3 rushed the child to Kenyatta National Hospital and after dropping them there he left. The child's father joined them at the hospital at about 5.30 pm.

22. That the plaintiff was admitted at the ICU. That Pw3 stayed at the hospital until 9.30 and left . According to PW3, the defendant undertook the construction of the suit premises when tenants were in occupation and that six floors of the building were fully occupied. That the defendant did not take any steps to ensure the safety of the tenants as there were no covers on the walls of the building to avoid accidents arising from falling debris from materials being lifted by casual workers. He stated that there was no contractor as the defendant himself acted as the supervisor and contractor of the building and that the defendant was fully to blame for the accident.

23. PW3 confirmed that the child was badly injured as a result of the accident. He identified the photographs taken after the accident showing the then status of the building.

24. According to PW3, Mary Wangari who was also a tenant in the same building witnessed the child fall from the storied building and when shown her written statement on what she had stated, he responded that she was not saying the truth.

25. PW4, Dr Herbert Ojiambo Ong'ang'o testified on oath and stated that he was a medical doctor (an Orthopaedic specialist) based at Kenyatta National Hospital and a holder of Bachelor of Medicine and Bachelor of Surgery from the University of Nairobi. That he also holds a Master of Science in Orthopaedics from the University of London.

26. PW4 testified that in the course of his duties he examined the minor MNK on 2nd December 2010. She was aged 5½ years vide hospital No. 1369925. She was a nursery pupil and he compiled a medical report which he produced in court. It is dated 2nd December 2010 the medial report was produced as PEX2.

27. According to PW4, the minor patient had a history of falling from a storeyed building and sustained severe head injury and shoulder fractures. She had swelling on the brain. She was admitted at the ICU for 13 days and 27 days at the general ward. That the patient had difficulty in walking, could not turn in bed, and bend on sitting. She relied on containers for relieving herself; she had an unstable gait, disoriented and mumbled speech.

28. In the doctor's opinion, the plaintiff/minor suffered a severe injury on the head and right humerus. She had permanent brain damage as a result of the accident and that it could however not be picked by the CT scan.

29. According to PW4, from the time of compiling the report, the plaintiff may never recover from the injury.

30. On being cross examined by Miss Njuguna counsel for the defendant, PW4 responded that he did not expect the child to recover although he had examined her last in 2010.

31. The defendant testified as DW1 and called one more witness. According to the defendant's testimony given on oath adopting his written statement signed on 17th February 2012, and filed on 20th February 2012, he admitted being Joseph Kiige Mwaura, a business man and a landlord of Mount Kenya House at Huruma. He admitted knowing the plaintiff who was his tenant. DW1 testified that his house was constructed in 1998 and that it was as described by the plaintiff's plaint. That it was a 7 storey building. He denied that the minor fell from the balcony of the third floor of the said building as alleged by the plaintiff's pleadings and her witnesses. DW1 also denied that his 7th floor of the said building was under construction or at all in 2010. He stated that since the tenants took possession and occupation thereof, he had never carried out any further construction of the said house save for routine maintenance and repairs. He further stated that in his written statement he had stated that the aforesaid storied house was completed in 2001.

32. According to the defendant, if indeed the minor plaintiff fell from the balcony of his house as claimed, then he could have been notified, since on the material day of 22nd April 2010 he was within the precincts of his said building.

33. The defendant further testified that he only came to know the allegations by the plaintiff of the accident in question when he received the demand notice from the plaintiff's advocates. He maintained that the plaintiff's claim was fictitious and intended to defraud him. Further, that he had several plots and he knew the precautionary measures which he is supposed to take while undertaking construction. Further, that if his house was under construction, he could have taken the requisite safety measures while undertaking the alleged construction. The defendant urged the court to dismiss the plaintiff's suit

with costs.

34. In cross examination by Mr Kivuva counsel for the plaintiff, the defendant responded that he was the owner of Mount Kenya House in Huruma, Nairobi. He also admitted that his defence was filed on 31st May 2011. The defendant stated that he never denied that he was the owner of the subject building. He stated that he was only called after the incident.

35. The defendant further stated that he completed construction works of the building in 2002, after receiving permission to construct the same in 1998. He denied being in possession of documents showing the permit to construct the building. The defendant further stated that he was given occupation licence by the City Council of Nairobi after he completed the construction, although he stated that he did not have that license before court.

36. The defendant stated that his contractor was called Ndungu an approved contractor. When shown the photographs of the building in question as produced by the plaintiff, the defendant confirmed that the photographs were of the building in question and which was his building. He confirmed that the photographs showed another floor above which was incomplete. The defendant stated that the plaintiffs lived on the 4th floor and that there were barriers of upto 4½ feet. He denied being present when the accident occurred. He stated that he had no protective material to protect people from the injury of falling objects while constructing.

37. DW1 stated that his building had 75 houses of single rooms and that it was fully occupied by tenants. He responded that he had nothing to show that materials for construction were being lifted using the staircase. He stated that his building had 6 floors with no lift. He stated that he did not know that he was breaking the law by failing to fix a lift in his building. The defendant further stated that he did not place any barriers to protect the children from injury. He denied flouting any building requirements and stated that he did not find it necessary to enjoin his building contractor as a party to this suit.

38. The defendant stated that he heard that a child fell from 4th floor to the ground. He stated that after the incident, he had never placed extra barriers to the balconies to prevent accidents.

39. On being reexamined by Miss Njuguna, the defendant stated that he completed construction works in 2002 and maintained that he had a permit to build the house, using Ndungu as his contractor. He stated that he never asked for documentation or licences from Mr Ndungu because Mr Ndungu was building other houses in the area. He stated that construction materials were being lifted using a staircase. He denied that there was any accident on his house.

40. On being questioned by the court to clarify, he defendant responded that his building was of six floors, plus the ground floor. The defendant further stated that the upper part of the building was a tank construction. He conceded that the photographs PEX 1(b),(c) and (d) produced by the plaintiff were taken on 6th May 2010 and that the upper part of his house was not included in the floor plan.

41. The defendant also called DW2 M/s Mary Wangare Wathika who testified on oath and stated that she was a small scale business lady. She adopted her written witness statement filed on 20th February 2012 as her evidence in chief. DW2 stated that she knew the defendant as she had lived in his premises from 2001 upto 2012 while trading in table cloth making (embroidery) on a veranda. She also stated that the defendant had constructed a 7 story building and that the plaintiff's father was a tenant in the defendant's house.

42. The defendant's witness evidence in her written statement denied that the plaintiff ever fell from the balcony of the 3rd floor of the defendant's house. She also denied in that statement that the 7th floor or any other floor of the aforesaid house was under construction in April 2010 save for routine maintenance. She further stated in her witness written statement that she only learnt of the allegation when the defendant approached her and informed her that he had received a demand letter from the

plaintiff's advocates concerning the alleged accident. She also stated therein that the plaintiff's claim was fictitious and intended to defraud the defendant since the balconies of the house were properly secured.

43. However, in her oral evidence on oath in court the defendant's witness DW2 testified that on the material day, she started working at her usual place (veranda) in the morning and something fell down from the storey and she thought it was waste. On checking she saw a child in front of her. That a lady came over and picked the child and many people gathered to witness what had happened. She stated that there were no other children. She stated that she knew the parents of the child who fell from the 4th floor. She stated that the House was not under construction but that some minor repairs were being undertaken and that she had lived there for 11 years. She denied ever hearing any accident. She stated that she screamed and the owner of the plot was around and so he came and took the child to hospital and paid her hospital bills. According to DW2, the child who was alone was about 3 years old.

44. On being cross examined by Mr Kivuva counsel for the plaintiff, DW2 stated that she recorded her statement which was dated 17th February 2012, with the defendant's lawyer, and that the incident was still fresh in her mind. She stated that she saw the child when she (the child) fell. That the child's mother came down and gave her (DW2) the young baby to hold as she (mother) went to check on the fallen child. She stated that she was surprised when she saw that it was a child hitting the ground. She stated that there were iron sheets on top of the building under construction and that she had never climbed on top but conceded that there were 7 floors.

45. When shown the photographs of the said building, DW2 identified/recognized them to be of the defendant's house. She conceded that the photographs showed that there was construction work going on, on top of the building ; and that the building was roofed when she was still the defendant's tenant and that it was roofed in 2010 or early 2011. She also stated that the 7th floor which was the top most floor had tenants occupying it and that water tanks were brought in 2012.

46. DW2 further (recognized) PW1 as the father of the injured child as well as DW1 the defendant owner of the building in question.

47. DW2 also stated that the building had balconies but were not raised and that there were no barriers during construction to protect passerby. DW2 further conceded that if there were barriers, the child could not have fallen. She conceded that the plaintiff lived upstairs and stated that she lived in room 2B.

48. On being shown the photographs the second time, DW2 conceded that there were ropes and wires hanging. She maintained that she was telling the truth, that the child fell from the balcony and that she could not tell exactly how old the child was.

49. On being reexamined by Miss Njuguna counsel for the defendant, DW2 stated that the child fell from the balcony on the material date and that the mother followed her after she had fallen. That the child was about 3 years and that there was construction works which were being finished hence there were no materials which were being lifted. She stated that she could not confirm if water tanks were up. She denied being paid to come and testify in court.

50. On being asked by the court to clarify, the defence witness 2 stated that the building had 7 floors and that she could tell that at the time of the accident, there was a floor being constructed on top of the building which was the 7th floor.

51. The defence closed his case and both parties' advocates agreed to file written submissions within 7 days from 17th May 2016.

52. The plaintiff's counsel filed his written submissions and authorities on 26th May 2016 but as at the time of writing this judgment, the defendant's counsel had not filed his submissions and on 13th

September 2016 when the matter was mentioned to fix a judgment date after lapse of 4 months as I had just been deployed to the Judicial Review Division and as I was not sitting on 26th May 2016 when the matter ought to have been mentioned to fix a judgment date, due to other official engagement, the defence counsel intimated to court on 13th September 2016 that they had no submissions to file and hence the court was called upon to write and render its judgment which I hereby do.

53. In their written submissions dated 24th May 2016 and filed in court on 26th May 2016, the plaintiff's counsel summarized the pleadings and evidence of the parties and framed 3 issues for determination namely:

1. Did the accident occur on 22nd April 2010 involving MNK.

2. Was the defendant's negligence the cause of the accident?

3. What damages are payable to the plaintiff?

54. On whether an accident occurred On 22nd April 2010, it was submitted on behalf of the plaintiff that albeit paragraph 10 of the defence denied any occurrence of the accident, the plaintiffs witnesses testimonies and DW2's testimony clearly disclosed that an accident involving the minor child falling from the balcony of the building did occur. It was submitted that the defendant in his testimony in court admitted that he knew of the accident after it occurred.

55. On the second issue of whether the defendant's negligence was the cause of the accident, it was submitted that the plaintiff's witnesses and the photographs produced in evidence clearly showed that the defendant's building was under construction at the top most 7th floor and that the said evidence was supported by the testimony of DW2. Further, that the defendant's denial and attempt to explain that the incomplete part of the building was for water tank storage was unconvincing since the photographs showed the incomplete and later completed work on the 7th floor, showing windows and doors.

56. Further, it was submitted that the house was not properly secured and that even without holding on the ropes, a minor could easily slip between the metal grills at the corridor to the ground.

57. It was further submitted that the defendant had no occupational licence to show that he was authorized in 2001 to have the building inhabited as alleged.

58. It was submitted that the metal grills in the corridor should have been elevated to cover the entire wall to arrest the accident, and that DW2 confirmed that no additional safety measures were taken to secure the area after the fateful accident to avoid any future similar occurrences.

59. Reliance was placed on **Section 3 of the Occupier's Liability Act (Cap 34 Laws of Kenya**) in the submission that an occupier of any premises has the duty of care to ensure that the premise is not defective and is safe for occupation; which duty is owed by Landlords and contractors in equal measure to the lawful visitors to the premises including trespassers and other non visitors (as per the English Common Law).

60. Further reliance was placed on the **Halsburys Laws of England VOL 48 5th Edition** on the Occupier's Duty of Care and the standard of care. Citing **Section 3(3) of Cap 34 Laws of Kenya**, it was submitted that the defendant was not adequately prepared for children in his premises and allowed construction to continue when the property was occupied without securing the premises.

61. That there was no warning displayed in the house to warn the minor and other tenants of the dangers of the building. It was further submitted that the minor had a right under **Section 17 of the Children's Act** to Leisure and Play and that play is also in the best interest of the child and is

guaranteed under Article **53(2) of the Constitution.**

62. The plaintiff's counsel submitted that **Section 118 of the Public Health Act Cap 242** describes any dwelling or premises or part thereof which is under construction as a nuisance and that therefore the defendant in this case had a duty to ensure that the minor's safety was protected while in the premises. it was submitted, that Instead, the defendant allowed construction to take place while the building was under occupation without securing the corridors to protect young children from hanging on ropes used to pull building materials to the roof of the building or slide through the wide spaced metal grill securing the corridor and fall to the ground, which was a foreseeable fact hence the defendant was to blame for the accident.

63. It was submitted that the minor could not have contributed to the accident. Reliance was placed on the case of **Bashir Ahmed Butt vs Uwais Ahmed B. Khan [1982-88] 1 KLR** where the Court of Appeal held that a child under the age of 10 years cannot be guilty of contributory negligence unless it was proved that he had the capacity to know that he ought not to do the act or make the omission.

64. In this case, it was submitted that at the time of the accident, the minor was only 4 years hence she could not have known the danger of jumping from the 4th floor of a building as she was pure and innocent, owing to her tender age.

65. it was further submitted that Section 126A(vi) of the Public Health Act requires that a certificate of fitness for occupation of premise should be given and a permit must be given by the City Council (now City County Government of Nairobi) before premises are repaired such that even if it is true as contended by the defendant that he was carrying out routing repairs and maintainance in the premises, permission to do so had to be obtained from the City County Government of Nairobi, and that lack thereof is both criminal and nuisance.

66. It was submitted that not only was the defendant in breach of the law, but that he was greedy, inconsiderate and brutal in failing to take reasonable care for the safety of the minor who was lawfully occupying the premises hence he should be held 100% liable for the accident.

67. On the third issue of whether the plaintiff was entitled to damages, it was submitted that the minor sustained serious injuries which have permanently incapacitated and changed her life as testified by the father PW1, the mother PW2 and PW4 Dr. H.O. Ong'ang'o who testified and produced her medical examination report as an exhibit.

68. It was submitted that the minor who attended court exhibited all the conditions indicated by the doctor and could not properly pronounce her name, had mumbled speech, limped, looked paralyzed from the right hand side and as a girl she may never marry and raise a family. The plaintiff's counsel prayed for an award of damages:-

a. Pain and suffering kshs 5,000,000 relying on the authority of **Susan Wanjiru Njuguna Vs Keringet Flowers HCC 64/2001,Martin Kidake vs Wilson Simiyu Siambi[2014] e KLR; Euphania Owino Odego vs Martin Osondo [2009] e KLR.**

b. Loss of amenities – kshs 1,000,000 based on the decision in **Mwaura Muiruri Vs Suera Flowers Ltd & Another [2014] e KLR; Halsburys Laws of England page 348 paragraph 884 VOL. 48 5th Edition 2010.**

c. Loss of future earnings capacity based on the decision in **Butler vs Butler [1984] KLR 225** as applied in **EW (BM) minor vs KPLC & Another [2015] e KLR** by this court. A multiplier of 40 years was proposed to suggest that the minor would have studied upto university and become a lawyer, doctor or engineer and work from age 25-65 if not longer and supported her parents in different ways. Reliance was placed on LN NO. 116 Kenya Subsidiary legislation 2015, Kenya Gazettte Supplement No. 91 of 26th June, 2015 enacted under the Labour

Institution Act No. 12 of 2001 which sets the minimum wage at kshs 10,954.70 per month for a domestic worker which translates to kshs 10,954.70 x 12 x 40= 5,258,286.

d. Costs of a minder (nurse).

69. It was submitted that the child's mother had abandoned her work to take care of the minor hence she lost her earnings to care for the injured child. That the child would not live an independent life hence she requires a monthly cost of shs 10,000 for the next 50 years when she is likely to turn 60. Reliance was placed on **Martin Kidake v Wilson Simiyu Siambi** (supra)where the court in similar circumstances awarded a minor shs 4,200,000 at a monthly rate of kshs 10,000 for a minder for 35 years. A sum of shs 4,800,000 was proposed at 40 x 12 x 10,000.

70. In total, the plaintiff's counsel prayed for damages as follows;

1. General damages for pain & suffering - shs 5 million.

2. General damages for loss of amenities kshs 1 million.

3. Loss of earning capacity – kshs 5,258,256.00

4. Cost of a minder kshs 4,800,000

Total kshs 16,058,256.00.

71. On 13th September, 2016 the defendant being represented by Mr Ocho holding brief for Ms Mbiyu Kamau informed the court that the defendant had no submissions to make and the court reserved this matter for judgment delivery on this 17th January, 2017.

DETERMINATION

72. I have carefully considered the pleadings and evidence tendered by both parties to this suit and their respective witnesses and the documentary evidence tendered by the plaintiff as fortified by her counsel's written submissions and decided cases as well as statute law cited.

73. The defendant never filed any submissions. Nonetheless, submissions are not evidence and therefore the defendant was not disadvantaged in any way. In my humble view, the issues for determination in this matter are:

1. Whether there was an accident involving the plaintiff minor falling from the defendant's building on 22nd April 2010.

2. Who was to blame for the accident?

3. What injuries did the minor sustain as a result of the accident?

4. What is the quantum of damages payable if any.

5. Who should bear the costs of this suit.

74. On the first issue of whether there was an accident involving the plaintiff minor falling from the defendant's building on 22nd April 2010, the minor's next friend and father testified as PW1 and stated that he was away from home at the time of the accident and only found the minor at Kenyatta National Hospital. He received information that the minor had fallen off from the third floor of the building while playing with friends when she came across a rope used by the developers to uplift building materials bundles of steel bars from the ground to the seventh floor and that the minor held the rope

not knowing the danger thereof, lost control and fell on the ground and that the Landlord who was on site came and carried her to Kenyatta National Hospital following the accident.

75. PW1 and his minor daughter lived in the defendant's premises at the material time of the accident. He however did not witness the accident. He was only told of what had happened. He found his minor daughter in hospital, seriously injured.

76. PW2 the minor's mother testified and stated that on the material date she was to be found at the defendant's premises where she lived with her husband, PW1 and the daughter (minor subject of these proceedings). Further, that on that date of the accident she (PW2) send her minor daughter in the company of another daughter to the shops. The children returned and as she continued carrying out her other household chores the children rushed out to play.

77. After a while, she heard a loud thud which was followed by wails from neighbours. She rushed outside to see what was happening and saw a child lying on the ground next to a metal that had been tied and a rope was hanging from above her. She indentified her minor daughter as the one who had fallen on the ground. She climbed down stairs and found when a neighbour had picked her daughter from where she had fallen. They looked for help and fortunately, the Landlord who is the defendant herein was available. He took the child to Kenyatta National Hospital in his car and left them there. She was also in the company of Kennedy Mutua who was the defendant/landlord's caretaker and who testified as PW3.

78. PW3 Kennedy Mutua testified that he was the defendant/Landlord's caretaker and stated that he had worked as the defendant's caretaker of the building from 2008 until 2011 and that he knew the plaintiff and PW2 who were tenants in the defendant's premises. He stated that at the material time there was construction work going on the 7th floor of the building which was occupied by tenants and that the workers used ropes to uplift materials to the 7th floor.

79. He stated that the said ropes were loosely hanging. He stated that on 22nd April 2010 the children were playing on the balcony when the minor(MNK) herein fell from the storeyed building. That he was in his shop which was on the ground floor of the building when he heard a loud thud followed by wails all over. That when he rushed outside, he found a gathering of people around a young child and he noticed (MNK) minor lying unconscious. He noticed a loosely hanging rope which he suspected she must have hung on. He accompanied the mother and one other female neighbour and took the injured minor to Kenyatta National Hospital using the defendant's vehicle and PW1 later followed them at the hospital at or about 5.30 pm.

80. Dr H.O. Ong'ang'o testified as PW4 and stated that he received the history of the minor having fallen from a storeyed building while playing. He administered treatment to the minor who suffered very serious and debilitating injuries.

81. According to DW1's written statement of defence he denied that there was any accident or at all involving a minor(MNK)falling from the balcony of his (defendant's) building as claimed by the plaintiff. He also wrote a witness statement which he adopted as his evidence in chief wherein he maintained that there was no accident of MNK falling from his building, and that he only learnt of an alleged accident when he received a demand letter from the plaintiff's advocate.

82. DW1 stated that if the minor had fallen off the building, and that since he was within the said precincts of the building on the material day of 22nd April 2010, he could have been notified which he was not.

83. According to the defendant, the plaintiff's claim was fictitious and intended to defraud him.

84. However, during cross examination by the plaintiff's counsel, the defendant owned up and admitted being the owner of the material building and conceded that he was only called after the incident. He

also stated that he heard that a child fell from 4th floor to the ground.

85. The defendant's witness DW2 testified that at the material time she was a tenant of the defendant, and was engaged in embroidery. In her written witness statement which she adopted as her evidence in chief, she concurred with the defendant that no accident occurred involving MNK falling on the ground on the named date and stated that the defendant only learnt of the accident on receipt of a demand letter from the plaintiff's advocates. She concluded that the plaintiff's claim was therefore fictitious and intended to defraud the defendant.

86. However, while testifying on oath in court and after adopting her written witness statement as her evidence in chief, DW2 departed from her earlier witness statement and stated that on the material day, she started working at her usual place-veranda during morning hours when something fell down from the storeyed building and she thought it was waste but on checking out she saw a child infront of her. A lady came and picked the child as many people gathered to witness what had happened. That she knew the parents of the fallen child. She screamed. She also testified that the owner of the building was around so he came and took the child to hospital and settled her hospital bills.

87. In cross examination by Mr Kivuva, DW3 emphatically stated that she saw the child fall and that thereafter the child's mother came with a baby and gave to he(DW2) to hold for her as she attended to the fallen child. DW2 also reiterated that the child fell from the balcony.

88. From the exposition of the entire evidence adduced by the plaintiff's side and defence side, it is clear that DW2 was the eyewitness to the minor's fall from the building, although nobody knows or could tell with precision from which floor the child fell and how exactly she fell. The rest of the witnesses only found when the child was down after hearing a loud thud, while DW1 was only called or came to learn of the accident after the fall, and although he tried to deny knowledge of the accident, he eventually admitted that he was informed after the fall. Further, the defence witness DW2 was clear that when she saw the child fall, she thought it was waste only to learn that it was MNK. She screamed and people gathered. DW1 came and took the child to hospital. DW1 never denied taking the injured child to hospital.

89. On the whole, therefore, I find that there was sufficient evidence to show that there was an accident involving the fall of MNK (minor) from the building owned by the defendant but as to how the child fell, whether it was as a result of her hanging on the ropes used to uplift building materials to the 7th floor or by shipping through the balcony grills, was not clear as no witness testified seeing the child hanging on the rope or simply falling from the balcony via the metal barriers.

90. Nonetheless, the undisputed fact is that there was an accident involving the minor (MNK) falling from a storeyed building belonging to the defendant on 22nd April 2010.

91. The second and very important question and issue for determination is who was to blame for the material accident?

92. According to the plaintiff's plaint filed on 22nd February 2011, the defendant was liable for the accident because he caused building materials to be pulled from the ground of the building up to the 7th floor via lose hanging ropes which were not secured when the minor who was about 5 years got hold of one of the loose ropes from the 3rd floor and was pulled by the same, lost control and fell on the ground as a result of which she sustained serious injuries. The particulars of negligence as set out in paragraph 6 of the plaint dated 17th February 2011 are:

> *a. Allowing the construction of a building on the top floor while occupied by other tenants.*
>
> *b. Failing to secure the construction thereby exposing the plaintiff and other tenants and the public as a whole to serious danger of injury;*

c. Failing to use modern construction equipment to carry out the said construction;

d. Failing to use best construction practices while erecting the said building;

e. Failing to give proper supervision on the construction site to avoid accidents;

f. Exposing the plaintiff and other members of the public to grave danger of injury;

g. Acting carelessly, recklessly and without due regard to the dignity of human life;

h. Failing to take any adequate or sufficient precautions as to avoid the accident;

i. Deliberately exposing the plaintiff to the danger of injury;

j. Causing the accident;

93. On the other hand, the defendant while wholly denying the occurrence of the accident by his pleadings also set out what he believed could have caused the accident though denied namely:

i. Allowing the plaintiff minor to play at a construction site while it was dangerous and unsafe to do so.

ii. Using the ropes to jump from the 3rd floor of the building when it was unsafe to do so.

iii. Hanging and or causing to be hanged ropes dangerously on the third floor of the said building.

iv. Exposing the plaintiff to danger and injury and or damage when it was unsafe to do so.

v. Jumping from the 3rd floor of the building when it was unsafe to do so.

vi. And the defendant shall at the hearing hereof seek to rely on the doctrine of Res ipsa Loquitur.

94. As earlier stated while answering the question of whether there was an accident involving the minor falling from the defendant's building, other than DW2, no other witness saw how the minor MNK fell from wherever she was on that building. DW2 saw the child fall from the building but does not state that she saw the child hang on a rope which was loosely hanging. PW1 was only called to the hospital after the accident while PW2 and PW3 found when the child had already hit the ground.

95. The plaintiff and her witnesses in their testimonies blame the defendant for constructing on a building which was occupied by tenants without securing the construction site and or placing barriers to protect the occupiers and or tenants and other members of the public and relies on the provisions of the Occupiers Liability Act, Cap 34 Laws of Kenya and Common Law.

96. My assessment of the evidence as a whole does not reveal that indeed the child fell as a result of hanging on ropes which were loosely hanging and being used to lift construction materials to the 7th floor, which from the photographs produced, as PEX 1a, 1b,1c, and 1e is clear that the top most floor of the building was then under construction and not completed in 2001 or 2002 as the defendant wanted this court to believe.

97. Accordingly, I find that there is no conclusive evidence to show that the cause of the accident was the loosely hanging ropes shown in the photograph produced as PEX 1b, or that the child minor who was either playing on the 4th or 3rd floor of the now completed building as per exhibit PEX 1a

could have pulled the ropes and fallen as a result.

98. Nonetheless, what is apparent from the evidence adduced as a whole and as shown by the produced photographs without any resistance from the defendant is that there are barriers on each floor and the metal grills have wide spaces in between which, if a young child was to climb onto them through the stair case as per photograph produced as PEx 1(d) or push through, they would fall or penetrate through and fall to the ground. That is the logical conclusion that this court can reach upon observing the photographs produced in evidence.

99. In my view, that explains why DW2 testified that the child fell from the balcony.

100. Albeit the plaintiff did not plead the doctrine of *res Ipsa Loquitur*, the doctrine is a rule of evidence, which need not be pleaded. On the other hand, the defendant pleaded the doctrine of *res Ipsa Loquitur*. In **Nandwa v Kenya Kazi Ltd CA 91/1987 Mombasa** Platt, Gachuhi JJA & Masime Ag JA, when confronted with a complaint that the plaintiff did not plead *res Ipsa loquitur*, in dismissing that assertion, the learned Judges of the Court of Appeal observed as follows:

> ***"Mr Oyatsi complained that the plaintiff did not plead res Ipsa loquitur. Evidence is not to be pleaded. As was held in Barkaway V South Wales Transport Company Ltd[1950] 1 ALL ER 392 at 393 B:***
>
> ***" The application of the doctrine of Res Ipsa Loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event, which in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts spoke for themselves, and the solution must be found by determining whether or not on he established facts negligence was to be inferred."***

101. **In Henderson V Henry E Jenkins & Sons [1970] AC 282 at 301,** Lord Pearson a letter D stated:

> " ***In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial, the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants…."***
>
> ***" From these facts it seems to me clear, as a prima facie inference, that the accident must have been due to the default of the defendants in respect of inspection of maintainance or both. Unless they had a satisfactory answer, sufficient to displace the inference, they should have been held liable."***

102. In the instant case, albeit there is no direct evidence of how the minor (MNK) fell from the storeyed building, there is no contradiction or doubt that she was to be found on the storeyed building and that DW2 saw her drop to the ground with a thud.

103. The plaintiff minor, from the doctor's medical report and as was observed by this court during the trial, is incapable of understanding what transpired and or what happened to her. She cannot be her own witness as her injuries are so severe that she could hardly tell her name.

104. The evidence that is uncontroverted reveals that the plaintiff minor and her parents were tenants in the defendant's building. They had no control over the manner in which the building was being constructed or had been constructed.

105. The building, as seen from the photographs taken and produced in evidence, had no adequate secure barriers on the balconies. The defendant owed a duty of care when constructing the 7 storey building, to the occupants, visitors and non visitors to the building. The balcony barriers to the building have wide metal grills which any person and especially children could fall from.

106. There was no evidence that the defendant had obtained certificate of completion of the storeyed building and occupation licence to allow tenants to occupy such a building with no secure balconies. The defendant owed a duty of care to the tenants, visitors, and non visitors alike, to his building.

107. The risk of any person and the plaintiff minor falling from the balcony due to insecure barriers was very foreseeable and therefore preventable by the defendant reducing the gap in the metal grills and elongating the barriers to a level where a child cannot climb over. That was not done in this case.

108. Therefore, in the absence of any evidence to the contrary; this court infers that the accident was caused by the negligence of the defendant developer failing to secure the balconies to prevent children from falling.

109. The plaintiff's evidence as supported by DW2 was emphatic that the child fell from the balcony. The defendant had not displaced the proved facts and so, the defendant should be held responsible in negligence.

110. Although the defendant pleaded contributory negligence against the minor plaintiff and her guardians, in his evidence and testimony tendered in court, he did not attempt to state or prove how the minor or her guardian could have been responsible for the accident. He did not even testify as to how the minor and her guardians were responsible for the accident. Albeit the burden of proof lies on the plaintiff to discharge on a balance of probabilities, the negligence attributed to the defendant, where the defendant alleged contributory negligence on the part of the plaintiff, then it in upon him to prove that which he alleges. Section 107-109 of the Evidence Act, Cap 80 Laws of Kenya stipulates that:

> **107. Burden of proof**
>
> (1) 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 exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> **108. Incidence of burden**
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> **109. Proof of particular fact**
>
> 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.

111. The defendant having pleaded contributory negligence, it cannot be said that he bore no burden of proving it against the minor child. Thus, there was no evidence to support contributory negligence either. It cannot be said that there can be no playing by the children on the balcony of a storeyed

building, so long as it is safe to do so. And the duty to make the balconies a safe place for children to play from is on the defendant developer. This court cannot see any negligence on the children playing from the balconies of their houses.

112. To my mind, the defendant failed to take precautions for the safety of the plaintiff minor and had exposed her to risk of injury or damage which he knew or ought to have known and albeit the plaintiff's evidence on exactly how the accident occurred was not the strongest, but that evidence was supported by DW2 who was the defence witness who saw the minor child fall to the ground infront of her from the storeyed building above (see **Platt JA in Nandwa vs Kenya Kazi Ltd** (supra).

113. I find and hold that the plaintiff discharged the burden of proving her case on a balance of probabilities.

114. Thus, the circumstance which led to the minor child fall to the ground from the balcony of the defendant's premises could not be fully explained, yet the facts spoke for themselves as a prima facie matter of negligence, there being no direct evidence as to cause of the accident thereby circumstances thereof leading the court to infer the cause thereof.

115. Furthermore, the defendant in his defence relied on the doctrine of *res Ipsa Loquitur* meaning, the cause of the accident could not reasonably be explained by direct evidence.

116. In addition, whether or not the minor child hung on the ropes being used for lifting of construction materials on the 7th floor of the building which hanging of ropes were an apparent fact from the produced photographs PEx 1(b) and testimonies of the plaintiff's witnesses and DW2, it is immaterial as the minor nonetheless fell on the ground from the storeyed building.

117. In **Abbay Abubakar Haji Vs Marain Agencies Company & Another [1984] 4 KCA 53** in which all parties to a motor vehicle accident were killed, leaving no witnesses, the Court of Appeal held :

> *"**It is the clear duty of the court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitably point that way."***

118. In the present case, albeit the way in which the evidence came out at the trial did not exactly match the pleading at paragraph 6 of the plaint, especially on the child falling from the balcony and not hanging on the ropes, as the only witnesses who saw the children *"**playing on the buildings balcony and one of them holding on the rope coming down with it, and releasing the rope and falling down next to the steel bar"*** was **Boniface Ndambuki** who wrote a witness statement but never testified; on the authority of **Kenya Meat Commission v Richard Ambogo Reiden CA 40/1989[1990]e KLR** where the appellant argued that the way in which the evidence came out at the trial did not match the pleadings, the Court of Appeal. (Per. A.R.W. Hancox, CJ; JM Gachuhi, JA and R.O. Kwach JA) observed, after examining the plaint and the evidence in support of the pleading found that there was a suggestion in one of the medical reports and in a small part of the evidence, that the plaintiff's injury was caused by a knife, which suggestion was not borne out by any of the evidence, and neither was it put to the plaintiff in cross examination that the accident occurred in that way. The Learned Judges of Appeal stated:

> ***" Though this accident (sic) was at variance with paragraph 5, and was commenced on by Mr Inamdar in the submissions in the High Court, no attempt was made to amend the plaint, except in another minor and probably irrelevant respect. Did that variance therefore, preclude the Learned Judge from reaching a finding based on the plaintiff's evidence that the accident occurred due to the defendant's failure to exercise reasonable care to ensure smooth and safe operations in it's factory ….***
>
> ***I come now to the authorities cited by Mr Inamdar in support of his submissions that the***

plaintiff was limited to the particulars given in the plaint and that the judge was not entitled to rely on evidence which went outside those particulars, all the more so since agreed issue No. 2 reiterated paragraph 5 of the plaint.

In the early case of <u>Blay v Polland & Morris,[1930] AE Rep 69</u> the Court of Appeal held that the trial judge was not entitled to make a finding of non est factum because, as a matter of law, the plea was not open to a person who was not mistaken as to the nature of the document he had signed, even though he might misapprehend its legal effect. That, of course, was a straight forward misdirection of law. However, the way in which that case becomes relevant to the instant one was the second contention put forward by Morris, which was that the agreement could be avoided for fraud. Now fraud at common law has always have special connotations. The allegation being a serious one, it has been rightly held that such an allegation must be strictly pleaded and proved. And this indeed emerges from the following passage in the judgment of Slesser LJ, which to my mind explains the passage from the earlier judgment of Scrutton LJ at page 612 cited to us by Mr Inamdar. Slesser LJ said:

" Fraudulent conduct must be distinctly alleged and as distinctly proved and is not allowable to leave fraud to be inferred from the facts."

The gravamen of that case was, therefore, that the fraud alleged regarding the agreement to pay the rent prior to the dissolution of the partnership could not be raised without having been pleaded. <u>For myself, I would hesitate to apply the rigours of the universal rule of pleading regarding fraud to a case of industrial injury which is an action of a wholly different character, involving, as it does, the recollection of witnesses of a rapid series of events in which there is understandably a risk of confusion, especially by the person injured…."</u>

119. The Court of Appeal in the above case **of Kenya Meat Commission v Richard Ambogo Reiden** and further relying on **Kanti V British Traders Insurance Company [1965] EA 108 Law** JA stated:

"When the parties agree an issue, the court should decide the case upon that issue if it is properly framed, and arises out of the pleadings."

…..it would be unjust for the plaintiffs to be non-suited for having failed to prove something that was never made an issue between the parties at the trial and which was, in law, incorrect……In the instant case, the issues, whether the plaintiff was injured by the saw and whether that was due to the Commission's breach of duty did arise fairly and squarely on the pleadings, particularly on paragraphs 4 and 8 of the plaint….the defendant abstained from calling any evidence directed to the issue as to how the accident did occur, but only generally called the foreman as to the sequence of events that should have occurred. In those circumstances they were not really in a position to refute the evidence that a second Peter Nyamai was working as a saw operator on the killing floor. In this case, I do not think there was any unfairness as regards the defendants knowing what case they had to meet. The plaintiff said straight away in his evidence that he was injured due to the writing or jerking of the animal. I think the defendants should thereupon have objected, if they wished to take the point, that the evidence was at variance with the pleaded particulars of negligence. They should not wait until the end of the case, or the appeal, and then, as it were, huff the other side for not having led evidence in accordance with the plaint. I consider it would be most unfortunate, in a case of personal injury, if a plaintiff, who has otherwise proved his case, is deprived of his remedy due to the niceties of pleading.

Having reviewed the authorities and considered the submissions by the appellant's counsel on the appeal, it would be to my mind unjust to hold the plaintiff to be non suited because while the general allegation is correct, the particular way in which the accident happened was at variance with paragraph 5, when there are, indeed other allegations in paragraph 4

and 8 which make it perfectly clear that the accident happened at work in circumstances which established on the balance of probabilities that the defendants failed in the duty of care which they owed to the plaintiff.

For those reasons notwithstanding the judge's unjustified finding as to the reason for the second losing or watering down taking place, I agree with the finding that the accident occurred in the course of the horn cutting operation and was due to the defendant's failure to take reasonable care to ensure that this was done safely.

120. In the instant case, even if there was no eye witness evidence of whether the child fell when she hung on the ropes being used to lift building materials to the upper most part of the building which was under construction or whether she slipped through the metal bars on the balcony, and albeit the witness who saw the child pull the rope and fall did not testify, the defendant's caretaker and the defendant's own witness DW2 were clear that the minor fell from upstairs. There was also no contrary evidence that indeed the 7 storied building was still under construction when the accident occurred.

121. The photographs produced in evidence without the defendant's objection clearly show that the 7th floor was still under construction at the material time and there are ropes hanging loosely from 7th floor to the ground floor. See PEx 1b.

122. Further, the evidence in the photographs is clear that the balcony barriers are not only short but have wide spaces between the vertical metals and therefore any child playing on the balcony, whether they hang on the ropes or not, are likely to fall through the wide spaces or by climbing through the staircase.

124. The plaintiff clearly pleaded that the defendant, inter alia, failed to secure the construction thereby exposing the plaintiff and other tenants and the public as a whole to serious danger of injury; failed to use modern construction equipment to carry out the said construction; failed to use the best construction practices while erecting the said building; exposed the plaintiff and others to grave danger and injury; acted carelessly, recklessly and without due regard to human dignity; failed to take any or any adequate precautions as to avoid the accident; and deliberately exposed the plaintiff to the danger of injury.

124. In my humble view, all the above stated particulars of negligence establish the circumstances under which the plaintiff minor fell from the balcony which was not secure thereby exposing her to grave danger of injury.

125. The defendant did not deny that deny in his testimony in court that any of the above stated particulars of negligence could have contributed to the pleaded accident.

126. As was correctly submitted by counsel for the plaintiff, at common law, and under Section 2 of the Occupiers Liability Act Cap 34 Laws of Kenya, an occupier of premises has the duty of care to ensure that the premises is not defective and is safe for occupation. This duty is owed by landlords and contractors in equal measure (as per the Occupiers Liability Act of 1957- England) and for lawful visitors to the premises together with trespassers and other non-visitors (Occupiers Liability Act of 1984 of England).

127. The Occupiers Liability Act Cap 34 Laws of Kenya covers all the lawful occupants, visitors, and trespassers. The plaintiff is not expected to plead the law but facts and submit on the law which her counsel did, in this case, to the satisfaction of the court.

128. In **Halsbury's Laws of England (VOL. 48 5th Edition 2010,** it is stated:

" ***The common duty of care is a duty to take such care as in all 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. The relevant***

circumstances include the degree of care; which would ordinarily be looked for in the visitor so that, for example, in proper cases, the occupier must be prepared for children to be less careful than adults….."

129. Paragraph 33 of the above writings of **Halsbury's Laws of England** as cited thereof explains the standard of care as follows:-

*" **In deciding whether there is a danger, regard must be had to the physical and mental prowess of a child visitor, in short, what is not a danger to an adult may be a danger to a child. In determining the standard of care owed to a child who is not accompanied by the guardian, it will be material to inquire, whether, in the circumstances, the occupier could have reasonably have expected the presence of the child unaccompanied."***

130. The above statement is in pari materia with Section 3 of Occupiers Liability Act, Cap 34 Laws of Kenya which states:

3. Extent of occupier's ordinary duty

(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.

(4) In determining whether the occupier of premises has discharged the

common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been

warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty

execution of any work of construction, maintenance or repair by an

independent contractor employed by the occupier, the occupier is

not to be treated without more as answerable for the danger if in all

the circumstances he had acted reasonably in entrusting the work to

an independent contractor and had taken such steps (if any) as he

reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any

purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

131. The Act obliges the occupier, placing upon him a duty, the common law duty to all his visitors, to take care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to the house. And Section 3(3) (a) of the said Act provides that an occupier must be prepared for the children to be less careful than adults.

132. The defendant, by continuing with construction work on premises which were occupied, and in failing to ensure that the balcony was fully secured exposed the plaintiff minor to the risk of injury which was reasonably foreseeable. Children have the unfettered right to leisure and play within the building and which, in this case, was with the proximity of their ordinary habitat. (See Article 53(2) of the Constitution and Section 17 of the Children's Act).

133. Furthermore, Section 118 of the Public Health Act Cap 242 Laws of Kenya recognizes that any dwelling or premises or part thereof which is under construction is a nuisance hence, the defendant was under common law and statutory duty to ensure the minor plaintiff's safety while in those premises wherein her parents were tenants. Instead, the plaintiff continued with the construction works on the 7th floor while tenants occupied the rest of the floors below, and failed to secure the balconies to ensure that children playing thereon would not slide through and fall to the ground. This was a foreseeable risk which the defendant cannot escape liability.

134. Albeit the defendant claimed in his pleadings that the plaintiff and her guardians were negligent or contributed to the accident, in his testimony and that of his witness DW2 , there was no mention of how the plaintiff could have been negligent or even contributed to the occurrence of the accident.

135. Furthermore, the court found the defendant to be too dishonest for denying any knowledge of the accident yet his witness was clear that it was the defendant who took the injured minor to Kenyatta National Hospital.

136. The minor was about 5 years at the material time of the accident. In **Bashir Ahmed Butt vs Uwais Ahmed B. Khan [1982-88] 1 KLR,** the Court of Appeal stated:

" The practice of the Civil Courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence and therefore in so far as a young person is concerned, only upon clear proof that…….he had capacity to know that he ought not to do the act or make the omission."

137. The plaintiff minor aged about 5 years could not have been expected to know the risks of hanging onto a rope and or sliding through the balcony and falling on the ground from a storied building.

139. The Court of Appeal in the above Bashir Ahmed Butt (supra) case further observed:

> " ***It would need a great deal of pursuation before imputing contributory negligence to the child aged 8 years having regard to her tender age. Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness……A young child cannot be guilty of contributory negligence although an old child might be, depending on the circumstances. The test should be whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child……."***

139. In the circumstances of this case, this court is unable to find that the minor child who was of such age of 5 years as the plaintiff herein was to be expected to take precautions for her own safety and therefore no blame could be attached to her. Accordingly, I find that no contributory negligence can be made against her.

140. In addition, Section 126(A)(vi) of the Public Health Act mandates the owner of the building to obtain a certificate of fitness for occupation of a premises and a permit issued by the local authority-in this case the City County Government of Nairobi, before occupation or before repair works such that even if the defendant was carrying out routine works in the premises, which allegation was disproved by the photographs produced in evidence by the plaintiff, then it was upon him to obtain such permission from the Nairobi City County Government authorizing the works, or to allow tenants occupy the premises.

141. Further, the defendant was under a duty to produce to this court evidence that the building as a whole was certified as fit for occupation before the plaintiff minor and her parents were allowed in as tenants. In the absence of such certificate of fitness for occupation of the premises, this court infers that the balconies as constructed were not certified to be safe for the occupants of the storied building.

142. In the end, I find that the defendant was responsible in negligence for the accident which occurred on 22nd April 2010 involving the plaintiff minor wherein she fell from the storied building onto the ground thereby sustaining near fatal injuries.

143. On the next issue of what injuries the minor sustained as a result of the accident, it is not in dispute that after the fall, the minor was picked by PW2,PW3 and DW2 and that DW1, the defendant herein accompanied by PW2 and PW3 took the child in his motor vehicle to Kenyatta National Hospital where the minor was admitted in the Intensive Care Unit.

144. PW4 Dr. H.O. Ong'ang'o a Consultant Orthopaedic & Trauma Surgeon who attended to the minor testified and produced a medical report dated 2nd December 2010 from Kenyatta National Hospital confirming that the minor who was 5½ years was seen from 22nd April 2010 with a history of falling from a storied building while playing and that she sustained the following injuries.

a. Head injuries;

b. Right elbow injuries

145. On examination, the minor was found to have sustained injuries involving the central nervous system: Glasgow come scale 6/15; power grade 2 in the upper limbs; power grade 0 in the lower limbs. That she was in poor general condition, and had locomotor-swollen tender right elbow.

146. The x-rays taken showed:

a. Greenstick fracture of distal right humerus;

b. CT Scan of the head- brain oedema (swelling) with a very small subdural haematoma in the

left cerebellum. The treatment administered to her included a) admission to the ICU; (b)manitol; Epanutin; Zantec(c) analgesics,(d) Antibiotics; (e) Splinting the right upper limb.

147. The minor remained in the Intensive Care Unit for 13 days with progressive improvement and for 27 days in the general orthopaedic ward. She improved as an out patient, regaining moderate speech.

148. On being examined the minor was found to experience the following problems.

a. Difficulty in walking;

b. Confused mentally;

c. Cannot turn herself in bed;

d. Relies on the use of container to relieve herself; and

e. Bending of the back on sitting.

149. She was conscious, looking moderately disoriented, has an unstable gait and mumbled speech. Her locomotor was essentially normal.

150. The doctor's prognosis was that the minor suffered a head injury and a greenstic fracture of the distal right humerus in a fall. The greenstic fracture of the humerus has proceeded to heal uneventfully but the head injury is pointing towards primary brain damage that may be permanent. That the minor may never recover from the injury.

151. On the whole, from the above medical evidence which is uncontroverted as far as the plaintiff/minor's injuries are concerned, I find and hold that the minor sustained very severe head injuries affecting her brain.

152. The court had an opportunity to see, observe and talk to the minor during the hearing of this case. She could hardly say what her name was, she mumbled words which were inaudible, she was very uneasy/restless in court and moved around the court with a limping gait shaking her head.

153. The next question is what damages the plaintiff minor is entitled to. In paragraph 8 of the plaint, the plaintiff pleaded that she was 5 years old at the time of the accident; that she will require assistance all her life; that she will need to attend special school for children with special needs; that her permanent head damage will make her not lead a normal life; That she is unlikely to be employed and to start her own family; that she has lost future earnings and future earning capacity; that she will undergo physiotherapy all her life at the rate of shs 5,000 per month, that her nurse will cost approximately 10,000/- per month; she will need medication and specialized treatment and care. She therefore prayed for general damages and damages for loss of earning capacity; costs and interest.

154. No special damages were pleaded.

155. In the evidence tendered by PW2, the minor plaintiff's mother, she testified that her child was a vegetable. That she cannot do anything for herself. That PW2 lost her business because of attending to the minor and that she cannot even hold a pen well, is unstable and cannot comprehend.

156. Under the heading of pain and suffering, the plaintiff's counsel proposed a sum of kshs 5,000,000 based on the authorities of: (a) **Susan Wanjiru Njuguna vs Keringet Flowers Ltd (HCC 64/2001** where the plaintiff sustained head injuries leading to loss of consciousness, blunt injury to the right hand, loss of 3 upper frontal teeth and blunt injury to his hand. He was admitted at MP Shah hospital for 3 weeks and 3 says. The court on 3rd July 2008 awarded him shs 3 million general damages for pain and suffering. (b) **Martin Kidake vs Wilson Simiyu Siambi [2014] e KLR** where the plaintiff

sustained severe head injuries leading into coma, and remained severely handicapped mentally and physically. Odunga J on 10th April 2014 awarded him shs 3.5 million general damages for pain and suffering.(c) **Euphania Awino Odego vs Martin Osondo [2009] e KLR** where the plaintiff sustained severe brain injury leading to unconsciousness and post traumatic amnesia she was awarded shs 3 million on 28th September 2009 by Justice Ali Aroni.

157. The plaintiff's counsel also prayed for loss of amenities separate from the claim for pain and suffering and relied on **Halsbury's Laws of England** and the case of **Mwaura Muiruri vs Suena Flowers Limited & Another [2014] e KLR** where it was held:

> ***" Damages for loss of amenities are therefore awarded when the ability of the plaintiff to enjoy certain aspects of his life as a result of the accident are diminished. Essentially the quality of life of the plaintiff is reduced due to the inability to do the things he would otherwise have done had it not been for the injuries."***

158. It was submitted that the minor is entitled to loss of amenities separately because she walks with a limping gait, she is paralysed from one side, her chances of marriage are very low, she cannot play with other children since she is not balanced when walking and has slurred speech such that she cannot enjoy life normally. A sum of shs 1,000,000 damages for loss of amenities was proposed.

159. Albeit the minor's counsel had passionately pleaded for separate awards of pain and suffering and loss of amenities, this court hesitates to make the separate awards for reasons that details provided in the submission do not form part of the medical evidence of the plaintiff as adduced by Doctor Ong'ang'o.

160. Furthermore, it cannot be true that in rural areas children are not provided with school report forms even if the minor was taken to school merely for play. The Head Teacher or class teacher of the minor should have given a progress report on how the child was fairing on in school/class and how she relates with others.

161. The philosophy behind the award of damages for pain and suffering is explained in paragraph **883 in Halsbury's Laws of England 4th Edition VOL 12(1) page 348** thus, " *pain and suffering."*

> ***"Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate."***

162. I have no doubt that the plaintiff must have suffered a great deal of pain and the disability suffered is apparent. Although the plaintiff suffered from primary brain damage, the doctor did not go beyond to give an opinion as to what she can or not do in future as a result of those injuries.

163. Accordingly, I would decline to award damages separately under loss of amenities and I would therefore only proceed to award damages under pain, suffering and loss of amenities as one head. In the Muiruri(supra) case, the doctor gave a detailed prognosis of the plaintiff's disabilities unlike in this case where the prognosis was scanty.

164. In the end, considering the serious injuries sustained by the plaintiff and the pain and suffering she has undergone since 2010, and based on the case of **Martin Kidake vs Wilson Simiyu** (supra) and **Euphana Awino Odego**(supra), the inflationary trends and time lapse since those awards were made, I award the plaintiff minor a sum of shs Three Million Five Hundred Thousand only(3.5 million) damages for pain, suffering and loss of amenities.

165. On the claim for loss of future earning capacity and loss of future earnings the plaintiff's counsel

submitted that the plaintiff's injuries are permanent as confirmed by Dr Ong'ang'o and that her mother confirmed that the minor is only taken to school to play since she cannot understand anything and that in rural areas, result slips (sic) are not given indicating performance. Further, that the mother's life has changed as she cannot do her business. The minor is said to have been expected to study law or medicine or Engineering had it not been for her injuries. She would also support her parents in future life.

166. Reliance was placed on **Butler Vs Butler [1984] KLR 225** which sets out principles applicable in claims for loss of earning capacity and loss of future earnings and as applied in **EW(BM) minor vs Kenya Power & Lighting & Another [2015] e KLR.**

167. In claiming for loss of future earning capacity, the plaintiff's counsel urged the court to apply the minimum wage set under legal notice to 116 of 26th June 2015 enacted under the Labour Institutions Act, using a multiplier of 40 years since children are the security of their aging parents. A sum of shs 10,954.70 per month was proposed for a domestic worker which translates into shs 10,954.70 x 12 x 40 = 5,258,256.00.

168. Applying the principles set out in **Butler vs Butler** (supra) case, it is not disputed that the plaintiff was aged about 5 years at the time of the accident and at the time of hearing she was about 12 years with debilitating effects of a head injury arising from a fall from 4th floor of a building, a limping gait, and near paralysis of the left hand. Had it not been for the injuries sustained, nothing would have stopped her from getting education which is now free in primary public schools and highly subsidized in secondary schools, and proceed up to University or College. No doubt, she could have started working from age 25 or thereabouts and retire at age 60 according to the Kenyan Employment Laws, for the public sector,as a minor would not be expected to earn any income until the attain age of majority and as child labour is barred under the laws.

169. In the circumstances, I find that the proposed minimum wage of shs 10,954.70 is reasonable. I therefore award the plaintiff shs 10,954.70 per month x 12 x 20 years taking into account the viscitudes of life which translates in shs 2,629,128.

170. The plaintiff's counsel also pleaded for the cost of a minder/nurse. However, the doctor PW4 did not testify as to how a nurse would assist the plaintiff in life. Furthermore, the minor's mother, PW2 who testified that she was forced to abandon her business and care for the minor due to her medical condition was not party to this suit and therefore I cannot award her any damages.

171. I have examined the **Martin Kidake v Wilson Simiyu** (supra) case. Although the court in that case awarded the plaintiff shs 10,000 the costs of a nurse per month, there was evidence adduced by Dr Wangai and the plaintiff also testified that she had a nurse who was being paid at a cost of shs 8,000 per month.

172. None of such evidence was adduced in this case accordingly; I decline to award any damages for the cost of a minder. There is no evidence for the cost of physiotherapy and medication and specialized treatment and care pleaded. i decline to award the same.

173. In the end, I enter judgment for the plaintiff minor against the defendant as follows:

a. Liability against the defendant at 100%.

b. General damages for pain, suffering and loss of amenities shs 3,500,000

c. General damages for loss of future earning capacity shs 2,629,128

Total damages shs 6,129,128

174. I also award the plaintiff costs of the suit and interest on damages at court rates from the date

of this judgment until payment in full.

Those shall be the orders of the court.

Dated, signed and delivered in open court at Nairobi this 17th day of January 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Githinji h/b for Mr Kivuva for the plaintiff

N/A for the Defendant

CA: George