



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 658 OF 2006**

**A K (Minor suing through his next friends**

**S I K and A N W).....PLAINTIFF**

**VERSUS**

**1. FRANCIS KIOI WAMBUI**

**2. CHANCERY RESTAURANT LIMITED.....DEFENDANTS**

**J U D G M E N T**

1. The Plaintiff (a minor) sued the Defendants through his next friends (mother and grandmother respectively) for general and special damages on account of injuries he received in a road accident which occurred on or about 9th January 2004 along *Gitanga Road* in Nairobi. The accident involved motor cycle registration number **KAQ 727 L**. the Plaintiff was a pedestrian when he was hit by the motor cycle. It is pleaded that the motor cycle veered off the road before hitting the Plaintiff. Particulars of the injuries he received are pleaded.

2. It is the Plaintiff's case as set out in the **plaint dated 23rd May 2006** that the 1<sup>st</sup> Defendant was driving the motor cycle as servant or agent of the owner thereof, the 2<sup>nd</sup> Defendant. It is the Plaintiff's further case that the accident was caused by the sole negligence of the 1<sup>st</sup> Defendant as more particularly pleaded at paragraph 4 of the plaint.

3. In their **statement of defence dated 18<sup>th</sup> August 2006**, the Defendants did not deny the occurrence of the accident, or that the 1<sup>st</sup> Defendant was the driver of the accident motor-cycle, or that the 2<sup>nd</sup> Defendant owned it; they denied, however, that the accident was caused by the negligence of the 1<sup>st</sup> Defendant. In the alternative and without prejudice, the Defendants have pleaded that if an accident occurred as alleged, the same was caused, or the occurrence thereof substantially contributed to, by the Plaintiff and/or his guardians as more particularly set out at paragraphs 5 and 6. The Defendants further pleaded that the Plaintiff did not suffer any injury and loss in the accident as claimed.

4. In a **reply to defence dated 22<sup>nd</sup> August 2006**, the Plaintiff reiterated the contents of the plaint and put the Defendants to strict proof of their allegations.

5. On 10th May 2010, consent on liability was recorded by in the following terms -

**"Judgment on liability is as follows:**

- i. **Defendants to bear 80% and**
- ii. **Plaintiff to take 20%...."**

6. The matter proceeded to hearing for purposes of assessing the damages due to the Plaintiff. At the beginning of the hearing, two medical reports were by consent admitted in evidence without the necessity to call the makers thereof -

**Exhibit P1** - Medical report by Dr. Thomas O. Kwasia dated 28th February 2006

**Exhibit P2**- Medical Report by Dr. Yusuf Kodwawwala dated 22nd July 2005

7. Three witnesses testified for the Plaintiff. **Lorna Muthamia** (PW1), a speech and language pathologist stated that she assessed the Plaintiff on 7<sup>th</sup> November 2012 and prepared a report, which she produced in evidence as **Exhibit P3**. She produced a receipt for KShs 7,500/00 being the amount she charged for preparation of the report. For court attendance she said she charged KShs 27,000/00.

8. In cross-examination she stated that since speech pathology is new in Kenya she is not registered as there is no body to register her as a professional. She said however that she is registered in **New Zealand** and **Australia**. Her practise is registered as a normal business. After noting the Plaintiff's medical history, the witness asserted that she assessed his speech and language abilities or lack therefore. His vocabulary was about 20 words and he could not form even a simple sentence. As the report had been compiled about a year before the testimony, his language skills would likely have become worse as there was no therapeutic intervention. She stated that therapy would aid the Plaintiff to acquire limited functional ability, and that immediate intervention after the accident would have made the Plaintiff's prospects better.

9. On re-examination she defended her qualifications insisting that major hospitals, embassies and schools refer patients to her. She maintained further that lack of a regulating body does not minimise her professional expertise in her field. The witness noted that from the history she received of the Plaintiff, his condition could not have been congenital.

10. The second witness for the Plaintiff, **A N W** (PW2), was the Plaintiff's maternal grandmother. She adopted as her testimony-in-chief her **witness statement dated 22<sup>nd</sup> July 2013**. She produced the Plaintiff's birth certificate as **Exhibit P5** which showed that he was born on 7<sup>th</sup> July 2000. She explained that when the Plaintiff was born his mother was 17 years old and lived with her. She was emphatic that when the Plaintiff was born he was a normal child who grew up as such until the accident.

11. PW2 further testified that the Plaintiff's mother subsequently got married and left the Plaintiff with her. They live in a one-room. She takes full-time care of the Plaintiff as he is totally helpless and cannot move on his own. She also has to turn him in bed frequently and take him out for sunshine. Due to his epileptic fits he falls down often; he lost all his front teeth in one such fall. He is ferried around in a wheelchair which has to be replaced every year. Despite being advised to take him for regular physio- and speech therapy, she has been unable to do so due to lack of funds. The Plaintiff cannot control his bowels but diapers are only occasional when she can afford to buy them; otherwise she has to use pieces of rug on him. A packet of diapers costs her KShs 1,000/00. She asserted that she left her casual job in order to take care of the Plaintiff and sought reliefs prayed for in the plaint. Out of the hospital bill of KShs 305,000/00 she and the Plaintiff's mother only managed to pay 5,000/00.

12. In cross-examination, she maintained that the wheelchairs she previously bought for the Plaintiff cost KShs 25,000/00 and 15,000/00 respectively but she did not get receipts; that the accident occurred on 9<sup>th</sup> January and not 19<sup>th</sup> January 2004; that she gave up on physio- and speech therapy after attending two

or three sessions at ***Kenyatta National Hospital*** due to lack of funds and that she could not recall the last time she took the Plaintiff for speech therapy.

13. In re-examination, PW2 she affirmed that the current cost of a wheelchair is KShs. 25,000/00, that she buys diapers from hawkers who don't issue receipts, and that the accident occurred on 9<sup>th</sup> January 2004.

14. The Plaintiff's mother, **S I K**, testified as PW3. She adopted her **witness statement dated 22<sup>nd</sup> July 2013** as her testimony-in-chief. She confirmed that when the Plaintiff was born he was normal without any health problems, and that his health problems began after the accident. Though she is married, she still assists her mother by giving her some money to take care of the Plaintiff. She sought reliefs as set out in the plaint.

15. In cross-examination she stated that she sometimes buys diapers for the Plaintiff at KShs. 1,000/00 for a packet of six. He uses three diapers per day. Her mother buys the diapers sometimes.

16. The Defendants did not call or lead any evidence.

17. Parties filed written submissions. Those of the Plaintiff were filed on **5<sup>th</sup> March 2014** while those of the Defendants were filed on **18<sup>th</sup> March 2014**. I have considered those submissions, including the cases cited.

#### **What injuries did the Plaintiff suffer in the accident?**

18. The medical reports (Exhibit P1 and P2) confirm that the Plaintiff suffered the following injuries -

- i. **Depressed fracture of the skull with a large haematoma.**
- ii. **Irreversible damage to the brain leading to paralysis of the left side of the body.**

19. The medical reports (Exhibit P1 and P2) are detailed. They disclose that the Plaintiff underwent long and difficult treatment which included elevation of the depressed fracture of the skull and tracheostomy where a tube was put in his windpipe to aid in breathing. As there was narrowing of the upper end of the windpipe, he required further surgical intervention. He was in the ward for six months. After hospitalization he was to be rehabilitated but it did not happen due to lack of finances.

20. The doctors observed that he was **permanently disabled** to the extent of **75% functional disability**. Dr. Yusuf noted that the Plaintiff is a physical and mental wreck who will totally be dependent on a care-giver for the rest of his life. He cannot sit or walk without support, had an appearance of gross mental deficiency as he constantly rolled his tongue during the examination and his eyes were askew, he could hardly move any of his limbs (especially apparent on the left side of the body), he has multiple scars and a fungal infection on the scalp, and has an unsightly scar on the front of the neck left behind by the tracheostomy.

21. The doctors further noted that the Plaintiff had incontinence of urine and stool and was wearing a diaper; that he is predisposed to recurrent chest infections requiring antibiotics and cough treatment; and that he requires prolonged regular physio- and speech therapy to improve his condition.

22. According to Exhibit P3, the Plaintiff would require ongoing speech and language therapy three times a week for at least three years, preferably with a tutor. His care-giver would also need to learn language stimulatory and behaviour modification techniques to use with the Plaintiff. It also emphasized on the need for occupational therapy and physiotherapy.

#### **What damages are due to the Plaintiff?**

23. In the plaint the following damages are sought –

- a. General damages for pain, suffering and loss of amenities.
- b. Cost of future and specialized medical care.
- c. Special damages of KShs 600/00.

Pain, Suffering and Loss of Amenities

24. The pain and suffering that the Plaintiff had to undergo during his treatment and since were great. His distress At his very tender age, not forgetting that of his mother and grandmother, cannot be gainsaid. He will be completely dependent on them for his every essential need for the rest of his life. Because of his condition, he will be prone to recurrent infections. Whatever monetary award he may get, his battered and shattered mental faculties and wasted frame cannot be renewed; but the money will certainly go some way in making his life that much more tolerable.

25. While being sensitive to the Plaintiff’s condition, there is always need to keep general damages in negligence cases at manageable levels because of attendant consequences like increased costs of insurance. In this case, after considering all material placed before the court, including the cases cited in the parties’ submissions, and doing the best that I can, I will award KShs 2,200,000/00 for pain, suffering and loss of amenities. This sum will be reduced by 20% to leave **KShs 1,760,000/00**.

Future Medical Expenses and Needs

26. The Plaintiff is now aged 14 years. None of the medical reports has opined on his life expectancy. However due regard must be had to his condition, particularly his recurrent infections, and other vagaries of life. In the circumstances I will award a **multiplier of 16 years**. I must also take into account the fact that payment made in lump sum and in advance can be invested for a steady income.

27. I will now assess the Plaintiff’s future medical needs and expenses. In doing so I note that not sufficient material was placed before the court in respect to speech and occupational therapy, particularly how much it might cost. Doing the best I can I will award as follows -

(i) Wheelchair every 2 years for life @ KShs 15,000/00.....	KShs 120,000/00
ii. Diapers @ KShs. 3,000/00 monthly for life.....	576,000/00
ii. Physiotherapy @ KShs 1,000/00 monthly for life.....	192,000/00
iii. Speech and occupational therapy @ KShs 10,000/00 monthly for 5 years.....	600,000/00
iv. Care-giver @ KShs 15,000/00 monthly for life.....	2,880,000/00
Total KShs..... 4,368,000/00	
Less 20%.....873,600/00	
<b>Amount awarded.....KShs 3,494,400/00</b>	

Special Damages

27. The Plaintiff claimed and proved special damages of KShs. 600/00. I will award that sum. Expert witness expenses are matters of costs that will be eventually taxed.

**Summary**

28. In the event I will enter judgment for the Plaintiff against the Defendants as follows –

- (i) Pain, suffering & loss of amenities.....KShs 1,760,000/00
- (ii) Future medical expenses and needs.....3,494,400/00
- (iii) Special Damages .....600/00

The general damages will carry interest at court rates from the date of judgment until payment in full. The specials will carry similar interest but from the date of suit until payment in full. There will be judgment accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2014**

**H P G WAWERU**

**JUDGE**