(A Minor Suing Through Next Friend and Father SRP) v Omolo (Civil Suit 146 of 2013) [2025] KEHC 9015 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9015 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 146 OF 2013

TW OUYA, J

JUNE 26, 2025

BETWEEN

(A MINOR SUING THROUGH NEXT FRIEND AND FATHER SRP) ..... PLAINTIFF

AND

SAMUEL NDOLO OMOLO ..... DEFENDANT

JUDGMENT

1. By a Plaint dated 16th April 2023, the plaintiff, suing through his next friend and father instituted the suit herein. Accompanying the Plaint was a verifying affidavit, list of witnesses, witness statements and list and bundle of documents, all dated 16th April 2013. The Plaint was amended on 25th February 2021 and further amended on 11th December 2023. The further amended plaint was filed with leave of court granted on 25th February 2021. The further amended plaint was accompanied with a consolidated bundle of documents, supplementary list of witnesses, supplementary witness statement and a supplementary list and bundle of documents dated 11th December 2023.

2. The Plaintiff's suit is founded on the tort of negligence emanating from a road traffic accident where the defendant allegedly knocked down the plaintiff, thus causing him serious injuries. The plaintiff thus seeks compensation for personal injuries and damages occasioned to him as a result of the said road traffic accident.

3. In his further amended plaint dated 11th December 2023, the Plaintiff avers that the defendant was at all material times the driver and registered owner of the motor vehicle registration number KBH 265W (hereafter the subject motor vehicle). That on 25th September 2011 the Minor was crossing the road along Forest Road near Premier Academy at about 1400hrs when the defendant so negligently drove managed and controlled the subject motor vehicle that it violently collided with the Plaintiff as a

result of which the Plaintiff sustained very serious injuries and has suffered pain, loss and damage and continues to suffer such pain, loss and damage. The Plaintiff thus seeks general and special damages.

4. Upon service of summons, the appellant entered appearance and filed a statement of defence dated 22nd May 2013 in which he denied the key averments made in the further amended Plaint.

5. The Defendant particularly denied liability for the accident, instead, he averred that the Plaintiff's guardian should be held liable for allowing a minor to cross a road without being accompanied by an adult. Accordingly, the defendant urged this honourable court to dismiss the case against him with costs.

6. At the trial, the Plaintiff called one witness while the defendant testified as the sole witness. The parties thereafter filed submissions in support of their cases.

7. On liability, the Plaintiff faulted the defendant for being negligent in that he:

    a. Failed to keep any proper look out or to have due regard for pedestrians and by driving on the wrong side of the road;

    b. Drove without due care and attention

    c. Failed to take any reasonable precaution in avoiding the accident

    d. Drove at an excessive and dangerous speed in the circumstances

    e. Failed to observe the road kerb or drove outside the verge of the road and collided with the Plaintiff;

    f. Failed to steer the subject motor vehicle and to have any proper and sufficient control of the said vehicle

    g. Failed to stop, to swerve, to slow down or in any other way so to manage or control the said vehicle so as to avoid the said accident and driving at an excessive speed at an area which is the vicinity of a school.

8. The Plaintiff alleged that he sustained the following injuries on account of the defendant's negligence:

    a. Traumatic brain injury

    b. Spastic right hemi paresis

    c. Multiple facial scars

    d. Multiple facial bones and skull base undisplaced fractures with bilateral fronto- parietal subdural haematoma

    e. Weakness of all four limbs

9. The Plaintiff's case is mainly hinged on the principle of res ipsa loquitor.

10. As a result, the Plaintiff is seeking judgment against the defendant for:

    a. Special damages as follows:

        i. Abstract Kshs. 200.00

        ii. Search Fee Kshs. 500.00

        iii. United States Dollars 51,255.00

iv. Indian Rupees 15, 408, 123.64

v. Kshs. 8,677,653.97

b. General damages

c. Costs of this suit and interest at Court rates on the general and special damages

11. The defendant denies the applicability of the doctrine of res ipsa loquitor to the instant suit. In his statement of defence, the defendant denies the occurrence of the accident, pleading in the alternative that if an accident did occur, the same was wholly or substantially caused by the negligence of the Minor or the plaintiff as follows:

a. Walking on the road when it was unsafe and dangerous to do so;

b. Failing to keep any or any proper look out or to have any or any sufficient regard for traffic that was/ might reasonably be expected on the said road

c. Walking, crossing or attempting to cross the road without ensuring that it was safe so to do;

d. Failing to walk on the designated pedestrian walk off the road;

e. Exposing himself to the unnecessary risk of injury

f. Jay walking

g. Failing to see motor vehicle registration number KBH 265 W at all or in sufficient time so as to avoid the accident

h. Failing to maintain a safe distance

i. Failing to take care of his own safety.

12. In his statement of defence the defendant on his part has faulted the Plaintiff for allowing the Minor to walk on the road without any adult supervision or clear instructions. He maintains that the accident was inevitable and occurred despite the exercise of reasonable skill and due care on his part. Therefore, he asserts that the plaintiff has failed to meet the requisite evidentiary standard of proof to find him liable for causing the accident.

13. On the issue of quantum, the defendant submits that an award of kshs. 800,000 would be reasonable and adequate compensation as general damages for the injuries sustained by the Plaintiff. The defendant's basis for this proposition is the case of Gerald Ireri Harrison & 2 others v Danson Ngari [2018]eKLR

14. As regards special damages, the defendant avers that the same have not been specifically pleaded. In the absence of authentic receipts of actual expenses incurred by the Plaintiff, the said special damages cannot in law, be awarded to the Plaintiff. Accordingly, the defendant submits that the plaintiff is not entitled to recover any special damages as he has failed to produce any authentic receipts of incurred expenses. Reliance is placed on the case of Wilson Nyamai Ndeto & Another v China Wu Yi Limited & Another [2017]eKLR where the court stated that:

> " it is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

15. At the hearing, the Plaintiff who was PW1 adopted his signed witness statement and further produced his bundle of documents in his evidence-in-chief. In cross-examination, the Plaintiff stated that he did not witness the accident. He stated that the Minor was at the time accompanied by his elder brother, who was also a child at the time.

16. In re-examination, he testified that the minor and his brother were 8 years and 14 years respectively at the time of filing the suit. He further clarified that the bill attached to his bundle of documents from the Aga Khan Hospital was an estimated bill and not the final bill. He also clarified that the said road was under construction therefore there was no pedestrian crossing. He testified that his sons were going to the temple on the day of the accident and it was normal for them to go to the temple on their own.

17. In his oral evidence, the defendant, testifying as DW1 adopted his bundle of documents as part of his evidence in chief. He testified that on 25th September 2011 he was driving from the direction of Thika to Nairobi. As he was moving towards Premier Academy, traffic was diverted towards the lane that was next to the temple as the road was under construction. He could also see that there were children playing under the bridge. All over a sudden one of the children crossed the road and was almost hit by one of the vehicles. He slowed down and within a fraction of a minute he heard a sound from the side of the car. He stopped, looked into the mirror and saw a child who had bumped off the car at the passenger side. He denied hitting the child. He maintains that he could not have avoided the accident. He blamed the guardian and parent of the child for the accident. He confirmed that he escorted the child to hospital and called his guardian from the hospital.

18. In cross examination he confirmed that he was the owner of the subject motor vehicle but had since sold it. He further stated that he reported the accident to Parklands Police Station and was released on police cash bail of kshs. 5000.00. He stated that he had never been charged in any court of law in respect of the said accident. He further clarified that there were three children playing, jumping as they were crossing the road. The older one had crossed when the plaintiff jumped into the road. The children were playing on the main road while he was driving on the diversion. He maintains that he was driving at a speed of about 50-60 kilometers per hour.

19. Counsel for both sides filed written submissions to support their case. Counsel for the Plaintiff raised and focussed on three issues; Whether the Plaintiff has proved his case on a balance of probability, Whether the Plaintiff should be paid General damages, Whether the Plaintiff's claim for special damages is merited and Who bears the costs and interests of the suit?

20. Counsel submitted on the application of the doctrine of res ipsa loquitor implying that the nature of the accident was such that it would not have occurred had the defendant exercised appropriate care. He submits further the balance of probability tilts in favor of the plaintiff and that this court should hold the Defendant 100% liable. The Plaintiff's counsel submitted that an award of kshs.10,000,000.00 as general damages would be justified based on the injuries suffered by the Plaintiff. It was further submitted that the Plaintiff ought to be awarded kshs. 2,000,000 for diminished quality of life as the injuries he has incurred have resulted in lasting cognitive, behavioural and motor deficits. Reliance was placed on the case of KWW (Minor suing through his mother and next friend BNW) v Shajanand Holdings limited & another (Civil Case 1 of 2023 [2024] KEHC 9199 (KLR) where the Plaintiff was awarded Ksh. 1,000.000.00.

21. Counsel for the Plaintiff has further submitted on the damages for diminished quality of life and need for meaningful compensation to address the irreversible alteration in the plaintiff's life's prospect. Counsel proposes an award of kshs. 2,000,000.

22. On special damages, Counsel submits that the same should be awarded as prayed:

23. Counsel urges the court to award costs of the suit to the plaintiff in accordance with section 27 of the *Civil Procedure Act*.

24. Counsel for the Defendant on the other hand, based his arguments on liability and the quantum for damages. Counsel argues that the plaintiff failed to discharge his burden of proof as per the required standard under the *Evidence Act* by failing to prove the Defendant's negligence by giving an account of the circumstances leading to the accident and secondly that both the plaintiff minor and his brother were of age at the time the plaint was amended on 11th December 2023 were not called as witnesses. Counsel urges the court to dismiss the suit for want of proof. Reliance was made on the authorities of: Alfred Kioko Muteti v Timothy Miheso & Another [2015]eklr, Rose Wanjiru Njinga(Suing as the legal representative & Administrator of the Estate of the late Edwin Gachoki Njiga(Deceased) v Packson Githongo Njau& Another [2019]eklr and Ishmael Nyasimi & Another v David Onchango Orioki suing as personal representative of Antony Nyabando Onchango (Deceased)[2018]eklr all of which hold the view that a defendant cannot be held liable in the absence of evidence as to how an accident occurred so as to prove his negligence.

25. Without prejudice to the above, Counsel submits that quantum of kshs. 800,000 would suffice for general damages citing the award in Gerald Ireri Harrison & 2 others v Danson Ngari [2018]eklr.

26. On Special damages, counsel for the Defendant submits that same although pleaded, were not proved by production of receipts and that PW1 confirmed that receipts from Aga Khan Hospital were merely estimated costs and not actual costs. He urges this court to find that the plaintiff is not entitled to any award under this head for want of proof.

27. The Plaintiff attached extensive medical reports outlining the various therapies that he has underwent, none of them demonstrate the degree or percentage of permanent disability, if any, that he suffered. Instead, the medical reports portray that the Plaintiff has shown marked improvement and is likely to get better with the passage of time.

Analysis

28. I have carefully considered the claim before court together with parties' pleadings and evidence adduced alongside the submissions by rival parties through their counsel and the authorities cited. The gravamen of the Plaintiff's case is that the defendant failed to exercise proper duty of care while using the road. Consequently, he knocked down the plaintiff herein thus causing him to sustain the injuries particularized in the further amended Plaint.

29. It is not in dispute that an accident occurred on the material date involving the Defendant, who was driving the subject motor vehicle, and the Minor, the result of which was that the Minor sustained severe injuries. It is apparent that the defendant's ownership of the subject motor vehicle was similarly not controverted. The defendant himself admitted that he was the owner of the subject motor vehicle and was driving it on the material date of the accident.

30. Although the Plaintiff has not called any eye witness to testify on the circumstances surrounding the accident in question this court notes that a case cannot collapse merely on the basis that there were no eye witnesses. The court, on the basis of circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act may infer culpability on the part of the defendant. It is apparent from the evidence tendered that the portion of the road in question had no bumps or pedestrian crossing, as it was under construction. Consequently, it follows that all road users and especially motorists, were expected to exercise even greater caution while using the road to ensure the safety of other road users, and especially pedestrians expected to be on the road.

31. The defendant stated that he was travelling at a speed of 50-60kmph, given the impact and severity of the injuries sustained by the Minor, it is more plausible than not that the defendant was traveling at a high speed.

32. Regarding the question whether to apportion liability arising out of contributory negligence either on the part of the Minor or of the Plaintiff, it is not disputed that the Minor who was aged 7 years at the time of the accident, was a child of tender years. The court is bound that a child of such age, had the degree of maturity necessary to fully comprehend the risks or consequences associated with walking along or crossing the road. Courts have generally held that contributory negligence cannot be apportioned in respect of minors of tender years.

33. The minor Plaintiff was a child of 7 years. That made him a child of tender years. Liability, whether in civil or criminal cases, hardly ever attaches on children of such tender years. In civil matters, liability is only considered for children who are a little older, at least old enough to have the requisite intellectual capacity to take precautions for their own safety. The general principle is that a child can only be found guilty of negligence if he is old enough to be expected to take precautions. When confronted with a minor of tender years, as a party to alleged negligence, the trial court has to consider whether that particular child was old enough to be expected to take precautions for his own safety.

34. There is ample case law on this. In Attorney-General and another v Vinod and another [1971] EA (Duffus P, Law & Mustafa, JJA), it was said that:

> "In dealing with contributory negligence on the part of a young boy ... his ability to understand and appreciate the dangers involved have to be taken into consideration."

35. This position was further elucidated by the Court of Appeal in in Rahima Tayab & others v Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90 where it was held that:

> "The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

36. No negligence was attributed to a child of 6, in Esther Nkudate v Touring & Sporting Cars Ltd & another [1979] eKLR (Platt, J), where it was observed:

> "The determining factor in deciding whether or not a child below the age of 10 years can be guilty of contributory negligence is whether the child is mature enough to be able to take precautions for his or her safety, having in mind that young children do not usually have sufficient experience in these."

37. Moreover, the court held as follows in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] 1 KAR 1; [1981] KLR 349:

> "It would need a great deal of persuasion 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 older 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"

38. Though the defendant has submitted that the plaintiff has failed to prove that he was indeed liable for the accident. The above cited authorities appear to place the burden of proof on motorists to demonstrate that child of seven years had the mental capacity to understand the dangers of associated with the use of the road and take precaution for his safety. In the instant case, the defendant has failed to discharge that burden, instead, he has opted to blame the parent or guardian of the plaintiff for allowing him to cross the road unaccompanied with an adult.

39. This inference was made in NM & another (Suing as Representative of the Estate of LN (deceased) v Ndungu Isaac [2020] eKLR (Odunga, J), it was observed that:

> The law when it comes to accidents involving children of tender years seem to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precautions for his or her own safety.

40. The same holding has carried the day in emerging jurisprudence on child victims that the driver bears the burden of proving that the child is of such an age as to take precaution for his safety. In Attorney General v Vinod [1971] EA 147 the Court upheld a finding that a boy aged 81/2 years, who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. In his judgment Mustafa JA said:

> "In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration"

41. The Defendant has led evidence to show that there were two children crossing the road, the older one, whose age was established at about 14 years was able to cross the road successfully, while the younger one was 7 years suffered the instant accident. PW1 testified that both minors often went to the Temple together on their own. This therefore means that the Plaintiff had knowledge that he needed to exercise due care while crossing the road. He had road sense to know what to do when crossing the road. Therefore, his act of jumping into the road abruptly is blameworthy. In the case of a grown-up person, the proportion of blame would have been substantial, but having regard to the plaintiff's tender years I would follow the precedent of Vinod's case, and assess his degree of liability at 10%.

42. In light of the foregoing, I find that the Defendant has successfully proved contributory negligence and I proceed to apportion liability in the ratio of 90:10 in favour of the Plaintiff against the Defendant.

43. On the issue of quantum, the minor suffered multiple injuries, according to the plaint the doctor's prognosis indicated that the Plaintiff is suffering from a traumatic brain injury since October 2011. Initial CT Scans suggested multiple facial bones and skull base undisplaced fractures with bilateral fronto-parietal subdural haematoma.

44. During the Plaintiff's medical visit on 22nd February 2012 at the pediatric outpatient neurology clinic at the Aga Khan Hospital, it was observed that the plaintiff was fully alert and well oriented but with obvious behavior regression. He had slow speech and some difficulties with articulation. He also had mild weakness of left lower face but no difficulties with eye movements. He had significant weakness of the right upper and lower limbs, more marked over the right upper limb. He could shrug his right shoulder but had only a flicker of movement in the fingers of his rights hand. He could not move the toes of his right foot at all but had some antigravity movements at his right hip. He walked with a hemiplegic gait and relied heavily on both upper and lower limb splints to facilitate ambulation. Dr. Pauline Samia observed that the plaintiff continued to improve but had clearly sustained significant sequala following the road traffic accident.

45. According to the medical report supplied by the defendant and dated 11th July 2014, Dr. Maina Ruga opined that the Plaintiff had suffered grievous harm as he had sustained head injury with loss of consciousness, brain contusion and subdural haematoma and also maxillofacial injuries and fractures. He further observed that the plaintiff developed right sided hemiplegia and had a speech deficit. However, he was in a fair general condition and was on follow up to check for any post traumatic epilepsy.

46. The Plaintiff's counsel submitted that an award of kshs. 10,000,000 as general damages would be justified based on the injuries suffered by the Plaintiff. It was further submitted that the Plaintiff ought to be awarded kshs. 2,000,000 for diminished quality of life as the injuries he has incurred have resulted in lasting cognitive, behavioural and motor deficits. Reliance was placed on the case of KWW (Minor suing through his mother and next friend BNW) v Shajanand Holdings limited & another (Civil Case 1 of 2023 [2024] KEHC 9199 (KLR) where the Plaintiff was awarded kshs. 1,000.000. The defendant on the other hand has urged this honourable court to assess general damages at kshs. 800,000 citing the award in Gerald Ireri Harrison & 2 others v Danson Ngari [2018]eKLR

47. The Plaintiff attached extensive medical reports outlining the various therapies that he has underwent, none of them demonstrate the degree or percentage of permanent disability, if any, that he suffered. Instead, the medical reports portray that the Plaintiff has shown marked improvement and is likely to get better with the passage of time.

48. Courts have established parameters that should help a court determine whether a particular award of damages is an erroneous estimate of the damage suffered. In Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR, the court held:

    1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2. The award should be commensurable with the injuries sustained.

    3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

49. Similarly, in the case of Penina Waithira Kaburu v LP [2019] eKLR, the Court outlined factors that should guide a court in arriving at the correct estimate of quantum of damages. It held:

> " While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial Court must always make

a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar."

50. The basic principle that emerges from the foregoing authorities is the principle that, generally, the Courts should make similar awards for persons who have suffered similar injuries. The principle calls upon the Court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR summarized this principle in the following terms; "comparable injuries should attract comparable awards"

51. In the instant case, the medical report from the Aga Khan Hospital dated 24th February 2012, the Plaintiff was diagnosed with a severe head injury, maxillofacial fractures and sight sided hemiplegia. The report further stated that the child was admitted to the ICU, intubated and put on ventilatory support then later transferred to the ward on 6th October 2011. He was eventually discharged for neuro rehabilitation on 17th October 2011. There is no assessment of disability.

52. The proposal by the Plaintiff is inordinately high and grossly exaggerated as the authorities relied on by the Plaintiff are distinguishable from the instant case as they do not involve minors. Nevertheless, the single authority, KWW (Minor suing through his mother and next friend BNW) v Shajanand Holdings limited & another (Civil Case 1 of 2023 [2024] KEHC 9199 (KLR), that involves a minor has the permanent disability assessed at 75%. Moreover, the liability was apportioned at 15% for the Plaintiff and 85% for the Defendant. It is noteworthy that the Plaintiff in that case was a child of tender years and had suffered the following injuries:

    a. Soft tissue injuries

    b. Crush injury of the right distal forearm

    c. Psychological trauma

53. In PGC (Suing though his father and next friend JC) v Maingi & another (Civil Appeal E012 of 2023) [2023] KEHC 24181 (KLR) where the minor, 9 years old, suffered multiple cranio facial fractures, traumatic brain injury, glascow coma scale 8/15 and blunt chest injury with lung contusion, the High Court on Appeal awarded the sum of Ksh. 950,000.00. Also, in the case of IKM (Suing through Next Friend and Father DMG) v Kamau & another (Civil Appeal E440 of 2021) [2023] KEHC 60 (KLR) where the minor, 8 years old, sustained a fracture of the right maxilla, fracture of the right zygomatic bone, fracture of the right orbit, oral dental injuries with the loss of 2 upper incisors bleeding into the sinuses and blunt injuries on the face, the High Court on Appeal upheld the award of damages of kshs. 350,000.00 for pain and suffering. Similarly, in Mungatia v JM & another (Suing on Behalf of JM – Minor) (Civil Appeal E184 of 2024) [2024] KEHC 14255 (KLR) where the minor sustained injuries, to wit loss of consciousness due to severe head injury, left epidermal hematoma, reduced vision of the left eye, Scalp bruises, and left iliac fossa bruises, where the trial court awarded general damages of kshs. 1,800,000. However, on appeal, the High Court set aside the award and, in its place, awarded kshs. 750,000.00.

54. In light of the above and based on precedent, and the guiding principle in assessing damages for pain, suffering, loss of future earnings and loss of amenities, that is taking into account both the prevailing conditions in Kenya while ensuring that uniformity is sought in the award of damages, is to be taken into consideration. Notably the accident occurred in 2011 and in the interim period the Plaintiff has

undergone intense psychological and physiotherapy rehabilitation that has significantly improved his overall wellbeing. This court is guided by the circumstances of the case as well as the comparable awards. I find that an award of kshs.1,000,000 would be adequate as general damages for pain and suffering.

55. Regarding damages for diminished quality of life, the plaintiff proposed a sum of Ks. 2,000,000 on the basis that the injuries have resulted in lasting cognitive, behavioural and motor deficits. Thus, hampering his ability to perform routine tasks independently including achieving personal and professional goals. Reliance is placed on the KWW case (supra) where a global sum of kshs. 1,000,000 was awarded to the Plaintiff to cater for loss of future earning capacity. The defendant did not make any submission on the aspect of damages for diminished quality of life. Seeing as this limb was also not pleaded in the Plaint, the plaintiff's diminished quality of life can be taken to be part of the general damages.

56. The guiding principles in assessing special damages is now settled in law. The Court of Appeal in David Bageine v Martin Bundi [1997] eKLR stated:

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

57. Further Chesoni, J (as he then was) stated in the case of Ouma v Nairobi City Council [1976] KLR 304 that:

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

58. From the foregoing, a person claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. As a result, a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent out to the party by a third party. In this regard, courts have held that an invoice is not proof of payment and that only a receipt meets the test. Total Kenya Limited Formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR

59. In the instant case, the Plaintiff produced the following documents in his claim for special damages:

    a. Police abstract kshs. 200.00

    b. Search fee kshs. 500.00

    c. Medical and travel payments of:

        i. 51,255 United States Dollars

        ii. 15, 408, 123 Indian Rupees, and

        iii. Kenya Shillings 8,677,653.97

60. I have made the following observations from the documents tendered in support of the claim for special damages:

    a. The document tendered in support of the bill incurred from Aga Khan Hospital are not receipts. They are merely bill estimates. The receipts provided from treatment in Kenya amount to kshs. 388,653.

    b. The documents tendered from the medical facilities in India amount to 676,139.00 Indian rupees.

    c. The receipts for travel expenses have not been provided to ascertain the exact amount spent in flight.

61. In light of the foregoing, I award special damages to the tune of kshs. 388,653.00 and Indian Rupees 676, 139.00

62. The final award will therefore read as follows:

    i. Liability 90:10% as against the defendant

    ii. General damages kshs.1,000,000

    iii. Special damages kshs. 388,000 + Indian rupees 676, 139

    iv. Costs of the suit plus interest. (The interest on the special damages shall be from the date of filing the suit while interest on the general damages shall be from the date of this decision.)

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26th JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Plaintiff.....Anyona HB for Manwa

For Defendant.....Mr. Otieno

Court Assistant.....Brian