



**Matundura & another v Oino; Oino (Appellant); Matundura & another (Respondent)
(Civil Appeal E001 of 2022) [2023] KEHC 24814 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E001 OF 2022
PN GICHOHI, J
OCTOBER 31, 2023**

BETWEEN

LIBIAN OMWERI MATUNDURA 1ST APPELLANT

BENARD OUNDO MASESE 2ND APPELLANT

AND

JASPER ONYANCHA OINO RESPONDENT

AND

JASPER ONYANCHA OINO APPELLANT

AND

LIBIAN OMWERI MATUNDURA RESPONDENT

BENARD OUNDO MASESE RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. D.O. Mac'Andere
(RM) dated and delivered on 8th December 2021 in Kisii CMCC NO. 24 of 2020)*

JUDGMENT

1. The summary background of the appeal and cross appeal herein is that through the firm of Ben K. Gichana & Co Advocates, Jasper Onyancha Oino (hereafter referred to as the Respondent) sued Libian Omweri Matundura and Benard Oundo Maseese (hereafter referred to as the Appellants) vide a plaint dated 24th January 2019 claiming general damages for pain and suffering, future medical expenses, special damages of Kshs. 106,500/= together with costs and interest for the severe injuries he sustained on 15th August 2019.



2. He alleged that while riding as a pillion passenger on motorcycle Registration No. KMDV 225Y along the Kisii – Migori road on the said date, the Respondents’ driver/ agent so negligently drove, managed and/or controlled motor vehicle registration number KCU 397Z that he permitted the same to lose control and veer off its lane and collide with the said motorcycle. He pleaded that the Appellants should be held vicariously liable or otherwise for the tortious acts and omissions committed on him.
3. In their defence dated 11th March 2020 and filed through the firm of Omwenga & Co. Advocates, the Appellants denied the entire claim. They denied the occurrence of the alleged accident and the particulars of negligence attributed to them. They further particularized the negligence of the pillion passenger, the contributory negligence of the motorcycle cyclist and the negligence of the owner of the motor cycle. They denied that the doctrine of *res ipsa loquitur*, the Highway Code, the Provisions of the [Traffic Act](#) are applicable. They urged the trial court to dismiss the suit with costs.
 1. After hearing both parties, Hon. D.O. Mac’Andere rendered her judgment dated 8th December 2021 in the following terms:

Liability 100%.

General Damages Kshs. 2,000,000/=.

Special damages Kshs. 70,150/= together with costs and interest at court rates from the date of judgment until payment in full .

The plaintiff to have the costs of the suit.
5. Aggrieved by the said judgment and decree, the Appellants preferred this appeal against Respondent raising thirteen grounds that can be summarised as follows:-
 - a. That the learned trial Magistrate erred in law and in fact by awarding and holding the Appellants 100% liable for the alleged accident.
 - b. That the learned trial Magistrate erred in holding that the Appellants were jointly and severally liable.
 - c. That that the learned trial Magistrate erred in awarding the Respondent a sum of Kshs. 70, 150/= as special damages that were never proved.
 - d. That the learned trial Magistrate erred in law and fact by awarding the Respondent a sum of Kshs. 2,000,000/= as general damages an amount which was excessive in the circumstances.
 - e. That the learned trial Magistrate erred in law and fact in failing to take into account the crucial evidence and particularly of the motor vehicle inspection report and the sketch plan indicating the view of the scene were by the Respondent.
 - f. That the trial court erred in failing to consider the Appellants’ evidence and submissions thereof.
6. The Appellants therefore prayed for orders that :-
 - a. The appeal be allowed.
 - b. The judgment of the lower court delivered on 8/12/2021 be set aside and the same be substituted with a proper finding/judgment.
 - c. The Respondent to pay costs in the lower court and in this appeal.
7. Likewise, Respondent filed a cross appeal dated 4th March 2022 on the following grounds: -



- a. That the learned trial Magistrate erred in law and in fact by in awarding the respondent Kshs. 2,000,000/= as general damages for pain, suffering and loss of amenities which award was inordinately so low as to amount to an erroneous estimate of the pain and suffering.
 - b. That the learned trial Magistrate erred in law and in fact in failing to award the respondent Kshs. 300,000/= for future medical expenses contrary to the overwhelming evidence and exhibits adduced by the Respondent herein to prove the same.
 - c. That the learned trial Magistrate erred in law and in fact by under - assessing special damages at Kshs. 70, 150/= contrary to the evidence and exhibits adduced by the Respondent in prove of the same;
 - d. That the learned trial Magistrate erred in law and in fact whereby she failed to consider the Respondent's evidence, submissions and legal authorities relied upon in support thereof;
 - e. That the trial learned Magistrate's decision on quantum, albeit discretionary one, was plainly wrong.
8. He therefore prayed that :-
- a. The cross appeal be allowed.
 - b. The judgement and/or award on general damages for pain, suffering and loss of amenities and special damages delivered on 8/12/2021 be set aside and substituted with a correct and/or proper finding in his favour as per his submissions dated 21/10/2021 filed in the lower court.
 - c. He be awarded Kshs. 300,000/= for future medical expenses as per as per his submissions dated 21/10/2021 filed in the lower court.
 - d. He be awarded costs of this cross appeal and in the lower court.
9. This appeal was canvassed by way of written submissions filed by Appellants on 21st September 2022 while the Respondent filed his on 8th November 2022.

Appellants' Submissions

10. On liability, counsel for the Appellants submitted that it was the 1st Appellant's evidence before the trial court that motor vehicle registration number KCU 397Z was not at the alleged scene of the accident on 15/8/2019 but was parked at his home Bogiakumu - Bomorenda ward at Suneka and therefore, the burden lay on the Respondent to prove that indeed the said vehicle was at the scene of accident.
11. While relying on the case of Peter Kanithi Kimunya v Aden Guyo Haro [2014]eKLR and Postal Corporation Limited v Dickens Munayi [2016]eKLR, counsel submitted that the evidence in regard to the colour of the accident motor vehicle and occurrence of the accident was contradictory. Further, it was submitted that the causation was inconclusive and that indeed, the Appellants were not charged with any offence. Consequently, this Court was urged to set aside the judgment and dismiss the case for want of proof.
12. On quantum, counsel submitted that the Respondent did not produce the initial treatment notes from the Kisii Teaching and Referral Hospital and therefore such failure was fatal to the Respondent's case. Further, counsel relied on the case of Timsales Ltd vs Wilson Libuywa [2008] eKLR and submitted that the medical report by Dr. Peter Morebu was not sufficient proof that the patient sustained the injuries since the injuries indicated in the medical report were not supported by the discharge summary from the Defence Memorial Hospital. Counsel therefore urged the court to re-evaluated the evidence



- before the trial court , set aside the award of Kshs. 2,000,000/= and substitute it with an award of Kshs. 300,000/= as general damages.
13. In support of this proposal, counsel relied on the Naom Momanyi vs G4S Security Kenya Limited & Another [2018] eKLR where the Appellant sustained fracture of the left - right tibia, blunt injuries, multiple bruises and suffered permanent disability of 30% and the court awarded damages of Kshs. 300,000/=. Counsel therefore submitted that prayer in the cross- appeal for enhancement of the award should fail.
 14. On special damages counsel cited the case of Agnes Wanjiku Ndegwa vs Kenya Power & Lighting Company (2014) eKLR and submitted that the award of Kshs. 70,150/= as special damages ought not have been made as the Respondent failed to comply with Section 19 and 20 of the [Stamp Duty Act](#). Further, counsel submitted that the receipts were not authentic and were not legible except for receipts amounting to Kshs. 62, 760/=. Further, counsel submitted that the Respondent had a medical cover and therefore did not pay the said amount at Defence Memorial Hospital.
 15. On future medical expenses, counsel urged the court to allow the appeal and set aside the judgement and decree of the trial court in its entirety as the Respondent did not adduce evidence to show that he will require a sum of Kshs. 300,000/= for the same.

Respondent's Submissions

16. On liability , counsel for the Respondent submitted that the Respondent was as a pillion passenger and therefore no degree of liability could be apportioned to him as was stated in the case of Paskalia Abuko Shiberu vs George Onyango Orodi [2020] eKLR. Counsel further submitted that the Appellants never took third party proceedings against any other person to demonstrate their innocence in regard to causation of the subject accident. Counsel submitted that this was a hit and run incident and the tortfeasor took steps to elude responsibility and evade liability. It was submitted that the Appellants never objected to the police abstract and which also corroborated the evidence on record.
17. Further, counsel submitted that the Respondent's eye witness confirmed that the motor vehicle which hit them was a grey Isuzu D- Max Pick Up KCU 397Z and the 1st Appellant admitted that their motor vehicle is of the same make and colour. The investigating officer pointed out that said motor vehicle was inspected and the matter referred to the insurance. Counsel therefore submitted that the Appellants merely denied the presence of the suit motor vehicle at the scene but tendered no evidence to substantiate the denials.
18. It was further submitted that the unanimous evidence by the witnesses in the Respondent's case that it is the said motor vehicle that caused the accident by swerving to the path of the motor cycle to avoid to pothole was not controverted and therefore, the trial court's finding on liability was proper.
19. On general damages awarded, counsel submitted that there was no evidence produced to controvert the nature and seriousness of the Respondent's injuries as corroborated and confirmed by Dr. Ephantus Munyoka a doctor at the Defence Memorial Hospital and proved by x-ray and MRI reports. Further, counsel submitted, no evidentiary rule states injuries can only be proved by treatment notes. Counsel therefore urged the court to allow the cross appeal, enhance the award of general damages taking into account the permanent disability which was assessed at 40% and inflation.
20. On failure to award future medical expenses, counsel submitted that the Respondent pleaded future medical expenses to enable him undergo an operation to remove metal implants. While relying the Court of Appeal decision reported as Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) ,



counsel submitted that future medical expenses should only be pleaded but not necessarily proved by receipts. He further submitted that the sum of Kshs. 300,000/= opined by Dr. Morebu was a proper and reasonable estimate.

21. On the award of special damages, counsel submitted that the Respondent pleaded and adduced the original receipts for Kshs. 106,500/= which were tendered in evidence without objection and therefore the trial court ought to have made an independent decision on legibility of each and every receipt before proceeding to award the sum of Kshs. 70,150/= while exclusively relying on oral evidence that copies of sum of the receipts were not legible. Counsel therefore urged the Court to allow the sum of Kshs. 106,500/= as specifically pleaded and proved.
22. As regards the argument by counsel for Appellants on the effect of non- payment of Stamp Duty in this matter, counsel for the Respondent submitted that this issue has since been settled by superior Courts and therefore termed the Appellants' argument misguided, unsound in law and estranged from basic legal rules on admissibility and probative operation of evidence. In support this line of submissions , Counsel cited the High Court decision in George Kigambia vs Buuri Dairy Farmers Co-operative Society [2018] eKLR which quoted the Court of Appeal decision in Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR .
23. On the argument that the Appellants are not liable since the Respondent was covered by an insurance policy, counsel cited the case of Leli Chaka Nodoro vs Maree Ahmed S.M. Lardhib [2017] eKLR and submitted that the argument is misguided and unsound in law. Lastly, counsel urged the Court to dismiss the Appellants' appeal and allow the Respondent's cross- appeal .

Analysis And Determination

24. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See - *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123.
25. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law as held by Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR.
26. I have considered the appeal, the proceedings in the trial court and the submissions by both parties. The main issues for determination are:-
 1. Whether the trial court erred in finding that the Appellants were 100% liable.
 2. Whether the trial magistrate applied the correct principles in assessment of general damages.
 3. Whether the trial magistrate correctly awarded the special damages.
 4. Whether the trial court erred in not awarding future medical expenses.
27. On liability, the Appellants lean heavily on the issue of identity including the colour of the alleged accident motor vehicle. The Respondent (PW2) testified thus: - "I was heading to Rongo. On the way while at Magena I saw a vehicle KCU 397Z coming from the front where we were heading..." When cross examined by Miss Wanjohi, the witness stated: - "...it was a pick - up Isuzu D-Max (grey in colour)."
28. On his part, PW5 Thomas Keuya Otondi who was the eye witness to the accident testified thus:- "On 15/8/2019 I was coming from Suneka going to Kisii. It was at mid night. At Gesonso a certain motor



vehicle was going towards town. It overtook me. It was a pick - up KCU 397Z. It then started going in a zig zag manner then it hit a motor cycle that was coming from Kisii. The driver did not stop. I followed it.” On cross examination he testified:- “The motor vehicle was a pickup grey in colour.”

29. On the other hand, PW3 No. 88300 PC Moses Kasera of Kisii Traffic Base and who was the investigating officer in this case testified:- “We received a report from one Dominic Bwana a cousin to the Jasper... that ...his brother was riding on a motor cycle heading home. On reaching at the scene of accident a motor vehicle cream white ...coming from the opposite direction did hit them...” This Dominic was not an eye witness and did not testify.
30. Be that as it may, a motor vehicle is not just identified by colour but primarily by registration, chassis and engine number. The Police Abstract produced by the investigating officer and without any objection by the Appellants shows that the accident involved motor vehicle registration number KCU 397Z Isuzu Pick-up and the Respondent herein. The Copy of Records also not disputed by the Appellants during trial shows this motor vehicle is Gun Grey in colour. This accident is said to have occurred at night. I see no effect on the evidence by PW2 and PW5 in their reference to the vehicle as grey and not gun-grey or reference to the same as cream white in the circumstances stated by PW3 as regards the identity of this vehicle. The alleged contradictions are not material to this case and the decision in Peter Kanithi and Postal Corporation Limited (supra) do not affect this case.
31. Further, the motor vehicle was registered in the name of NIC Bank Kenya Plc and the 2nd Appellant shows that as at 12th November 2019. The sole defence witness (DW1) is the 1st Appellant herein and told the trial court that he was the only driver of the said motor vehicle and that he lived in Suneka Kisii. The vehicle was recovered from him in Kisii. His alibi that the vehicle was at his home in house on the material night lacks any material in support. The Respondent discharged his burden of proof on a balance of probability that the 2nd Appellant was the owner while 1st Appellant was the driver of the said motor on the material and escaped from the scene with the sole purpose of avoiding liability.
32. Arguments have been raised in several cases over liability of a passenger in a motor vehicle or a pillion passenger in a motor cycle like in the in the instant case or even the effect of taking or not taking out third party proceedings. In Rosemary Mwasya v Steve Tito Mwasya & another [2018] eKLR , the Court of Appeal held:-

“... it is our finding that the production of the Abstract from the police by the maker in the absence of tendering evidence in support of the defence and the taking out of 3rd party proceedings against persons the appellant shifted blame for causation of the accident would not in any way have affected the conclusion reached by the trial Judge when he pinned liability against the appellant at 100%. Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident.”
33. Though the Court in Rosemary Mwasya (supra) was dealing with a passenger in a motor vehicle, I am satisfied that the same would apply to a pillion passenger. The Respondent herein was an undisputed pillion passenger. The Appellants never demonstrated how the Respondent could have been in control of the manner in which the motor cycle was moving so as to be part of the reasons the accident occurred. There were no third-party proceedings taken out against the rider and that notwithstanding, I do not see how the Respondent could have contributed to this accident. I am also persuaded by the holding in Paskalia Abuko Shiberu v George Onyango Orodia [2020] eKLR where J. N. Njagi, J had this to say:- “The appellant was a pillion passenger. A pillion passenger cannot be held liable for the causation of an accident...”



34. I therefore find no fault in the trial magistrate's argument when she stated in her judgment:-
- “The 1st defendant on his part denied the occurrence of that accident. He however did not table any evidence to discount the documentary evidence that showed that the vehicle he was in possession of was involved in an accident. He did not discredit the evidence of the eye witness in any way. It is also noteworthy that the plaintiff was not in control of the motor cycle he was a mere pillion passenger. I find that the plaintiff has on a balance of probability proved that an accident involving the motor vehicle and the motor cycle did occur and that it was the 1st defendant who was in control of the said vehicle. The 2nd defendant being the owner of the motor vehicle is vicariously liable.”
35. On general damages, the plaint, the P3 Form, the medical reports from the Nairobi Memorial Defence Hospital, the medical report by Dr. Morebu Peter Momanyi dated 23/10/2019 and the medical report by Dr. M.S. Malik dated 17/8/2020, show that the Respondent had sustained the following injuries: -
- a. Right bimalleolar fracture.
 - b. Comminuted right lateral tibia plateau depressed fracture.
 - c. Left shoulder dislocation.
 - d. Head injury with loss of consciousness.
 - e. Chest contusion.
 - f. Blunt trauma to the back.
 - g. Comminuted fracture of the greater tuberosity of the left humerus.
36. While arriving at the award under this head, the trial magistrate relied on the case of Sygenta East Africa Limited v Margaret Kemunto [2020]eKLR cited by the Respondent herein as more relevant than the case of Eldoret Steel Mills Limited v Elphas Victor Aspila [2013] eKLR cited by the Appellants which justified the award as follows :- “The Syngenta case supra was decided in the year 2020 and given the rising economic trends coupled with the spiralling nature of the shilling, I find an award of Kshs. 2,000,000/= to be sufficient compensation as general damages.”
37. This Court is now being asked by both parties to interfere with the award. The principles guiding this Court have been settled by the Court of Appeal in the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR, the Court stated:-
- “In order to justify reversing the award of damages, this Court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (See Rook v Rairre [1941] 1 ALL ER 297). This principle was aptly stated in Butt v Khan [1981] KLR 349 as follows: -
- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
38. To start with, the Appellants' contention that the Respondent failed to produce the initial treatment notes from Kisii Teaching and Referral Hospital is not fatal and the case of Timsales Ltd (supra) relied



on by the Appellants cannot aid them as the issue in that case was the treatment notes were not in the name of the of the Respondent unlike in this case and hence a forgery.

39. In this matter, evidence was led that the Respondent was taken there and only stayed there for a few hours for first aid before he was taken to Nakuru Memorial Hospital and finally to Defence Memorial Hospital in Nairobi where he was admitted for 31 days. The documents produced by PW4 Ephantus Mwangi Munyoko of that Hospital reveal the injuries sustained by the Respondent.
40. I have looked at the opinion by Dr. Morebu Peter for the Respondent and by Dr. M.S Malik for the Appellants. Both are in agreement that the Respondent sustained severe injuries. They are also highlighted the effect of the said injuries and that the Respondent suffered permanent disability. Dr. Malik assessed it at 30% while stating: - “The fracture of the head of his left humerus was within the shoulder joint capsule and this will probably result in post-traumatic osteo- arthritis of the shoulder joint...The fracture of the lateral tibia condyle had also involved the articular surface of his right knee joint. This has caused stiffness of the knee and will also result in traumatic osteoarthritis of the joint... Although the fractures of his right ankle joint were reduced and fixed well, he is likely to develop post -traumatic osteoarthritis of the ankle joint.”
41. On the other hand, Dr. Morebu Peter assessed permanent incapacity at 40 %and stated: - “Recovery is expected to take a very long time. He requires physiotherapy with occupational therapy. The dislocation may complicate later with post traumatic chronic osteoarthritis. The head injury may also complicate post traumatic epilepsy or psychosis.”
42. There is no doubt that the injuries sustained by the Respondent in Eldoret Steel Mills Limited (supra) were soft tissue injuries to the right arm, right thigh and right foot and a sub-trochanteric fracture of the right femur. He was awarded Kshs. 300,000/= as general damages. Those injuries are not comparable to those suffered by the Respondent in this appeal. The Appellant in Sygenta East Africa Limited (supra) relied on by Appellants herein and in the lower court had sustained crushed right leg, comminuted fracture of the right ankle , tibia nerve damage and had a history of unconsciousness. The degree of permanent incapacity was stated as 40 %. The High Court substituted the lower court award of Kshs. 2, 500,000/= with an award of Kshs. 1,500,000/=.
43. It is settled law that an award of damages being discretionary, an appellate court is not justified in substituting a figure of its own for an award by the court simply because it would have awarded a different figure if it had tried the case at the first instance. In this case, this Court is satisfied that though the trial magistrate was well guided on the principles to be followed in assessing damages and exercised her discretion in arriving at the award of Kshs. 2,000,000/=, the same. I find no reason to interfere with the said sum as proposed by parties by enhancing or reducing it.
44. On special damages, it is trite law that they have to be specifically pleaded and proved. The Respondent pleaded Kshs. 106,500/=. I have looked at the receipts in support of special damages and confirm that some are not legible at all. Those legible whether original or photocopy are for Kshs. 70,150/=. I find no error in the holding by the trial magistrate.
45. As to some receipts not being in compliance with *Stamp Duty Act*, the issue has been settled by the Court of appeal. In Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR had this to say:-

“...The finding is often made by lower courts that documents which do not comply with the *Stamp Duty Act*, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR where it stated thus:



“Mr. Mbigi submitted that the guarantee document relied on by the respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the Stamp Duty Act. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd v Jaswinder Singh Enterprises CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

“The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of Suderji Nanji Ltd. v Bhaloo [1958] EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram -vs- Raven Chond (2) 1930 A.I.R Lah 854 that: “before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ...The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/respondent and he must be given the opportunity”.

46. In this appeal, it is a fact that the receipts complained of by the Appellants were admitted in evidence without any objection from the Appellants. The only issue raised during cross- examination was that some receipts were not legible. Had there been an issue, the Respondent ought to have been given a chance to have the stamps affixed for compliance. Besides, the receipts ought to be stamped by the receiver of the payment and not the person paying for the services like the Respondent herein. The Appellants’ argument must therefore fail.
47. Further the contention by the Appellants that the Respondent was duly covered by the insurance and therefore did not spend the money is not sound in law and does not affect the claim between in this accident . I am persuaded by the High Court decision in Leli Chaka Ngoro (supra) where S. J Chitembwe, J found that the “Respondent’s liability is not dependent on the Appellant’s wise decision to take up an accident or medical cover. The Respondents are simply liable due to the negligence on their part.”
48. On future medical expenses, the Respondent herein had prayed for judgment for the same though he did not specify the amount. In the present case, the trial magistrate held that: - “Future medical expenses just like special damages have to be specifically proved and the plaintiff did not produce any evidence to prove the future medical costs estimated. I will not award any amount for that.”
49. The Court of Appeal in the case of Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR held:

“We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. Inthe case of Kenya Bus Services Ltd v Gituma [2004] 1 EA 91 , this Court, stated: -

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.



That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.”*

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

50. In this matter , both medical reports put in evidence by the parties agree that the Respondent would need future medical treatment. In his medical report, Dr. S. Malik opined that the Respondent:

“...may require a total knee replacement operation in his old age. The operation will cost him about shs. Five hundred thousand...His metal implants can stay in his left shoulder and right ankle joint indefinitely but he can have them removed if he chooses to do . Such operation would cost about shs. one hundred thousand.”

51. On the other hand, Dr. Morebu Peter opined that the Respondent requires physiotherapy with occupational therapy. He would require to undergo another operation to remove the metal implants costing him approximately Kshs. 300,000/=. Indeed, both parties had submitted on the issue before the trial magistrate and counsel for the Respondent had urged the court to allow this sum under this head.

52. It is instructive to note that these estimates are not backed by the mention of any specific Hospital charges. There is no doubt that the Respondent was entitled to an award for future medical expenses. Guided by the two estimated figures including the possibility of a knee replacement and the Respondent choosing whether or not to remove the implants, the sum of Kshs. 300,000/= for that procedure in future appears to be more reasonable in the circumstances. The trial magistrate therefore fell into error by not making an award under this head.

53. In the circumstances, this Court determines both the appeal and cross appeal in that the Appellants appeal be and is hereby dismissed for lack of merit. The Respondent's cross- appeal partially succeeds. For clarity, the Judgement and Decree of the trial court dated 8th December 2021 be and is set aside and the substituted with the following:

1. Liability.....100%.
2. General Damages.....Kshs. 2,000,000/=
3. Special Damages..... Kshs. 70, 150/=
4. Future Medical Expenses...Kshs. 300,000/=
5. Interest on (b), (c) and (d) is awarded at court rates from the date of judgement by the trial court.
6. The Respondent (cross -appellant) is awarded half costs of this appeal.

Dated, signed and delivered at Kisii (virtual) this 31st day of October, 2023.

PATRICIA GICHOHI



JUDGE

In the presence of;

Ms Wanjohi for the Appellants.

N/A for the Respondent.

Court Assistant- **Aphline**

