Dada v Transmarine Agencies (Civil Appeal E169 of 2022) [2023] KEHC 24138 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E169 OF 2022

DKN MAGARE, J

OCTOBER 24, 2023

BETWEEN

DAWOOD ABDULHAMID DADA .... APPELLANT

AND

TRANSMARINE AGENCIES .... RESPONDENT

JUDGMENT

Background

1. This is an Appeal from the Decision of the Senior Resident Magistrate Hon J Nyariki given on 4/10/2022 in Mombasa CMCC No. 732 of 2021. In that matter the court entered judgment for the Appellant as follows: -

    a. Liability 60 % against the Appellant and 40 % against the Respondent

    b. General damages Ksh. 650,000/=

    c. Special damages Ksh. 340,625

    d. No order as to costs considering that liability has been apportioned.

2. The Appellant, who was the Plaintiff in the lower court raised a whooping 10 Around of appeal. However, they condensed them into 5 grounds, though indicated as 4, in the submissions:-

    a. The Trial Court erred in law and fact in holding the Appellant 60% liable for causing the accident despite the overwhelming evidence to the contrary.

    b. The Learned Magistrate erred in law and fact in awarding the Appellant General Damages for pain and suffering that were inordinately low compared to the injuries sustained?

c. The Trial Court erred in law and fact in failing to award the Appellant the claim for future medical expenses despite the adducing sufficient evidence in that regard?

d. The Learned Magistrate misdirected himself in failing to award the Appellant the claim for loss of earning capacity?

e. The Learned Magistrate erred in law and fact in failing to award the Appellant the costs of suit?

3. The grounds are humongous and prolixious and it should not be so given the guideline in order 42 rule 1, which provides as doth: -

> " Under Order 42 Rule, 1 the law provides are doth: -
>
> 1. Form of appeal –
>
>   (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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>   (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. This aspect has been dealt with by the Court of Appeal in The Court of Appeal had this to say in regard to rule 86 (which is pari materia with order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
>
> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the Appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports*

Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The Memorandum of Appeal raises only three issues, that is: -

   a. Whether the court erred in its finding on liability

   b. Whether the court erred in assessment of damages, general and future medical expenses

   c. Whether the court erred in failing to award costs

7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the Magistrate's Court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the first Appellate court

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

9. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

10. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S Majanja held as doth: -

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

11. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

12. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8 of its well considered judgment: -

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ......is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

13. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

14. The Court of Appeal pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v. A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

15. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

16. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

17. My duty as the Appellate court is threefold regarding quantum of damages: -

    i. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    ii. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    iii. Whether the award is simply not justified from evidence.

    iv. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

Pleadings

18. The Appellant filed suit by a plaint dated 11/5/2021. They were claiming damages from an accident involving Motor Vehicle Registration Number KTCB 141 P ZC 0973. The Appellant was said to be walking lawfully along Nairobi -Mombasa road at APM when the Respondent's tractor/trailer knocked down the Appellant negligently and recklessly. As a result the Appellant suffered multiple injuries and he was left 15% disabled.

19. On injuries he pleaded that he sustained the following injuries: -

    a. Head injury with loss of consciousness;

    b. Contusion of the liver;

    c. Contusion of the lungs;

    d. Blunt trauma to the neck;

    e. Fracture of the pelvic iliac bone with separation of the pubic symphysis;

    f. Bruises and lacerations of the right iliac area.

    g. Fracture of the 2nd metatarsal bone;

    h. Laceration of the right thigh and dorsum of right foot;

    i. Abrasion of right thigh dorsum of right foot;

20. The Special Damages pleaded in the Amended Plaint were as follows: -

    a. P3 form 2,000/ =

    b. Medical treatment 333, 625/=

    c. Medical report 2,000/=

    Total 337,625/=

21. The Defendant filed Defence dated 16/6/2021. They attributed liability to the Appellant for not having a lookout and attempting to cross when it was not safe.

Appellant's submissions

22. In the defence filed, the Defendant denied negligence on their part and blamed the plaintiff for the loss that occurred. What I understand is that there is dispute whether the court ought in the circumstances of this case, where the defendant did not testify to have apportioned liability.

23. It was their submission that under sections 107 & 109 of the *Evidence Act*, Cap 80, whoever alleges must prove. Therefore it was incumbent upon the Respondent's driver or their expert to attend court and rebut all the allegations of negligence that were leveled as against them by the Appellant They relied on the decision of *Edward Muriga (suing through Stanley Muriga v. Nathaniel Schuster & others* Civil Appeal Number 23 of 1997 where the learned Judges of Appeal observed:-

> " In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations.

Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

24. The sections referred above provide as doth: -

> " 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.

25. Indeed section 109 of the *evidence act* provides as doth; -

> " 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."

26. It was the Appellant's case that by failing to discharge this burden of proof, the said averments in the defence remain mere allegations and not evidence. On this position they relied on the case of *CMC Aviation Limited v. Kenya Airways Limited* Civil Appeal Number 12 of 1978 where Madan CJ (as he then was) stated: -

> " The pleadings contain averments of the three parties concerned. Until they are proved, or disproved or there is an admission of them by any of the parties, they are not evidence and no decision could be founded upon them. Proof is found on evidence."

27. They submitted that the court went out of his way to find evidence on liability. They relied on the case of *Jones v. National Coal Board* (1955) QB 55 where Lord. Denning stated:-

> " In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens we believe, in some foreign countries."

28. They state that Dr. Darius Kiema awarded the plaintiff 15% permanent disability with adverse impact on his mobility and productivity. They relied on the case of *Joseph Njeru Luke & others v. Stella Muoki* High Court Civil Appeal Number 40 of 2019 where Majanja J, awarded the Respondent Ksh. 750,000 after sustaining almost similar injuries.

29. They stated that court below, relied heavily on the conclusions of Dr. Udayan Sheth by virtue of being an expert and overlooked the evidence of Dr. Darius Kiema. Nonetheless, Dr. Kiema who attended court and gave evidence and was thoroughly cross examined. It was their view that the fact that the medical report by Dr. Udayan Sheth was mutually admitted by consent, it diminished its probative value.

30. They state that legal conundrum was expounded upon in *Theodore Otieno Kambogo v Norwegian People's Aid* HCCC Number 774 of 2000 where Warsame, JA stated:-

> "The fact that the Defendant would not get an opportunity to cross-examine the deponent greatly reduces the value and weight of that evidence. The Court is not in any way saying that the Affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.

31. They pray that the court enhances damages to Ksh. 1,200,000. They did not rely on any authority for the said amount.

Future medical expenses

32. They impugned the court for not awarding this despite prove of the same. The Appellant submitted on an authority of Tracom Limited & Another v. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, where the Court of Appeal stated:-

> "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.

33. They prayed to be awarded the following: -

    a. Mathematically speaking, the overall computation under this prayer stands at:

    b. Physiotherapy- Ksh. 50,000

    c. Pain Killers- Ksh, 3,000 x 12 x 2 – Ksh. 72,000

    d. Purchase of braces - Ksh. 40,000

    Total- - Ksh. 162,000

Loss of earning capacity

34. The Appellant relied on the principles governing the award of loss of earning capacity were well discussed by the Court of Appeal in *William J. Butler v. Maura Kathleen Butler* Civil Appeal Number 49 of 1983 as follows:-

> "A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of

each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can."

35. They pointed Section 2 of the *Insurance (Motor Vehicle Third Party Risks) Act* 2013 defines earnings as follows:-

> " Earning means revenue gained from labour or service and includes the income or money or other form of payment that one receives from business, employment or occupation or in the absence of documentary evidence of such revenue."

36. He submitted that he is entitled to the claim for loss of earning capacity. He relied on the case of *Mumias Sugar Co. Ltd v. Francis Wanalo* Civil Appeal No. 91 of 2003. They state that the case held that whether the plaintiff was employed or unemployed at the material time of the accident they are entitled to damages for loss of earning capacity. They submit that a sum of Ksh 500,000/= will suffice under this head.

37. It is the Appellant's submissions submit that the he is entitled to the following awards: -

    i. The Respondent be held 100% vicariously liable for causing the accident.

    ii. General damages for pain & suffering - Ksh. 1,200,000.

    iii. Loss of earning capacity - Ksh. 172,000.

    iv. Future Medical Expenses- Ksh. 500,000

    v. Costs and interests.

Respondent's submissions

38. The Respondent filed submissions dated 5/7/2023. They raised technical issues related the lack of decree and non-compliance with Order 42 rule 14(3) of the *civil procedure rules*. The same provides as doth; -

> " 13. Directions before hearing [Order 42, rule 13.]
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> (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the Appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.
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> (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
>
> (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

39. They relied on the case of *Kenya Power & Lighting Company Ltd v E K O & another* [2018] eKLR, where, Justice Pro Joel Ngugi as then he was stated as doth:

> " 9. The appropriate standard of review established in these cases can be stated in three complementary principles:
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> a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.
>
> 10. These three principles are well settled and are derived from various binding and persuasive authorities including *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); *Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* (Kisumu High Court CC No. 88 of 2002).

40. I agree that this is the correct elucidation of the duty of this court. I shall revert on this in the analysis. I wish to note that most of the authorities relied on by the respondent were outside the question being addressed by the court. Further the respondent went to great length to scan the decisions making them lose metadata. I did not read them and I had to down load same authorities.

41. It is my sincere hope that advocates should either not file reported authorities. However, if they are sufficiently philanthropic to file the should just combine the pdf authorities to be useable in submission writing. This is in contrast with the appellant's authorities which maintained their metadata and were readable. In short, it is not easy to authenticate scanned authorities.

42. The Respondent further relied on the case of *Kenya Power & Lighting Co. Ltd v Mathew Kabage Wanyiri* [2016] eKLR, where Justice John M. Mativo, as then he was stated as doth; -

> " It is also important to bear in mind the meaning of negligence. Negligence is defined in *Charleswoth & Percy on Negligence* as:-
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> "Three meanings of negligence. In current forensic speech, negligence had three meanings, They are: (a state of mind, in which it is opposed to intention; (2)

careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."

It is important to recall the holding in the old English case of *Blyth v The Company of Proprietors of the Birmingham Waterworks* where it was held inter alia:-

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do....."

In *Halsbury's Laws of England* it is stated as follows: -

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established."

43. The Respondent posits that the Appellant did not discharge a burden of proof placed upon them. They are buttressed by the case of Patrick Omutere v Accurate Steel Mills Limited [2019] eKLR, where the court, C. Kariuki held as doth; -

> " 18. This position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited* Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held:
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> > "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be case on the person who wishes the court to believe in its existence."
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> 19. As was held in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000 [2005] 1 EA 334:
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> > "As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112 of the Act. In this case the Appellants' case was that they were never notified of the meeting at which the resolution was passed. The Respondents while insisting that there was in fact such a notice were unable to produce the same. In effect the Appellants were alleging a negative. Since it was the Respondents who were

alleging a positive, pursuant to section 109 of the *Evidence Act*, it was upon them to prove that there was in fact such a notice. As was held by Seaton, JSC in the Uganda case of *JK Patel v Spear Motors Ltd* SCCA No. 4 of 1991 [1993] VI KALR 85:

> "The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons… As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings,
>
> (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and
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> (2) the burden of proof in the sense of adducing evidence….. The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced." See *Constantine Steamship Line Ltd v Imperial Smelting Corp* [1914] 2 ALL 165 (H.L); *Trevor Price v Kelsall* [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson at para 95."

44. On liability, Respondents relied on the case *Rosemary Kaari Murithi v Benson Njeru Muthitu & 3 other*s [2020] eKLR, where R.K. Limo J held as doth: -

> " I am also inclined to find that a person who voluntarily gets on a boda boda when he/she finds that there are more than one should equally be held accountable and hence culpable. To that end this court finds that the trial court apparently misdirected himself on that score and had he done so certainly he would have attributed more liability to the Respondent.

45. They urged me to dismiss the case.

Analysis

46. Before proceeding, I note that the Appellant pleaded Special Damages totalling Ksh. 337,625/=. However, he was awarded Ksh. 340,625. There was no basis for the same.

47. As stated by the Court of Appeal, specials must first be pleaded before being awarded. It is not enough to produce receipts. There must be pleadings to that effect. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal stated as follows: -

> " 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 Park 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"

48. The correct amount of Special Damages are not the ones in the receipts but those pleaded and then proved. Only Ksh 337,625/= was pleaded and proved. The rest of the receipts were superfluous. The court has no jurisdiction to award special damages not prayed for. That part of the judgment is consequently corrected to read specials of Ksh. 337,625/=.

49. The Appellant amended their plaint after evidence had been closed. In that they fundamentally changed their claim form having been a road traffic accident to an accident within the depot. They changed from walking to standing.

50. However, the evidence that had already been admitted in terms of the witness statement indicated that the Appellant was lawfully walking as a pedestrian along old Mombasa road. In the case of *Aloyce Mariera v Kenya Bus Services (Msa) Ltd* [1987] eKLR, the court of Appeal, Miller Cj, Nyarangi & Platt JJ A, held as doth: -

> " I agree with the learned judge, with respect, that it is necessary to plead the complaint fully. If a contract is to be relied upon, it is to be pleaded, whether oral or in writing, and especially the clauses which have been breached or are otherwise to found a claim. Order VI Rule 3(1) of the *Civil Procedure Rules* requires this. Rule 3(2) of those Rules requires the substance of a document to be set out if relied upon. (See also Order VII Rule 6 of the *Rules*). What happened in this case is that the plaintiff relied on provisions about pay in lieu of leave and notice. General damages claimed must be restricted to the period of notice.

51. There was no evidence tendered by the plaintiff to support the new averments in the plaint. The plaint was as such bare and had no support. It was an admission of what the defence was stating all along that no accident occurred in a manner provided. By changing the substance of the plaintiff's case, the Plaintiff was under duty to tender evidence to prove their case. They did not do so. The court had no power to power grand in the circumstances of the case. He ought to have dismissed the Appellant's case. However, he did not.

52. The court found the Respondent 40% laible. There was no basis from the evidence I have evaluated. However, the Respondent did not appeal against the finding of 40%. The court cannot interfere with the same in the absence of an appeal. The complaint that the Appellant could not be 60% liable is true, to the extent that the appellant ought to have been 100% liable. Nevertheless, there being no

cross appeal, the Appellant should thus thank the heavens for the same. The finding of 60% against the Appellant should as such stand.

53. The Appellant has a duty to prove their case notwithstanding lack of defence evidence. In *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR, the court, justice A. Mabeya, FCIArb stated as doth: -

> "In *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -
>
> > "....... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

54. Any failure to tender evidence by a Party with a burden of proof has immediate and dire and catastrophic consequences. In In *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

> "In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

55. In this regard, even in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth. The defendant had nothing to rebut, the pleadings having been changed downstream.

56. More fundamentally the evidence of the police officer placed blame squarely on the Appellant. This was a busy depot. The Appellant was standing at the gate. The Respondent's motor vehicle was reversing. The Appellant was extremely reckless and had a false sense of security to stand at the gate knowing that the driver could possibly not see him.

57. The Appellant's own witness stated that the Appellant stood at the tractor was reversing. In the case of *Bash Haulers Limited v Anastacia Ndinda Kimonye* [2020] eKLR, Justice G V Odunga stated as doth-

> "28. From the evidence on record, it is clear that DW1 was reversing when the Respondent was hit by the vehicle. It is also clear that the Respondent did not notice the said vehicle reversing before she was hit by the vehicle. While DW1 stated that it was not possible for him to know that the Respondent was behind the vehicle due to the length of the vehicle, in *Zarina Akbarali Shariff and*

Another v. Noshir Pirosesha Sethna and Other [1963] EA 239 the East African Court of Appeal opined that:

> "A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take... it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other party may be."

58. The Court continue in the above case as doth: -

> " In *Masembe v. Sugar Corporation and Another* [2002] 2 EA 434, the Supreme Court of Uganda held that
>
> > "Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently."
>
> In *Isabella Wanjiru Karangu v. Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142, Potter, JA held that:
>
> > "There can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa....The doctrine of last opportunity is obsolete as no distinction can be drawn between negligence after seeing danger and negligence in not seeing it beforehand. The two causes of the accident cannot be severed and so the trial Judge was right to find both were at fault."

59. No reason person, sitting, being in a busy depot, with vehicles reversing could not anticipate that the driver of such a humongous monster will not see him. Liability can only be apportioned according to the fault that has been proven. Decision of liability is also discretionally. It is not a scientific precision

measurement. Unless the award is off the marks the Appellate court cannot upset the exercise of discretion by the trial court. In the case if *Khambi and Another v. Mahithi and Another* [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

60. In the circumstances I do not find any fault with the court's finding on liability.

Quantum

Loss of earning capacity

61. The main dispute is whether to belief the expertise of Dr. Darius Kiema who awarded the Plaintiff 15% permanent disability with adverse impact on his mobility and productivity. Or to believe that of Dr. Udayan Sheth who did not find any permanent disability. The court below believed the evidence of Dr. Udayan Sheth. According to the Appellant the court overlooked the expertise of Dr. Darius Kiema. Nonetheless who attended court and gave evidence and was thoroughly cross examined as opposed to Dr. Udayan Sheth whose report was admitted by consent.

62. Their argument was that the fact that the Medical Report by Dr. Udayan Sheth was mutually admitted by consent, it diminished its probative value. They relied on the case of *Joseph Njeru Luke & others v. Stella Muoki*(*supra*). The admission of a medical record by consent has different an effect on its value. Different courts have viewed the reports admitted by consent differently.

63. My take is that the parties are looking at the wrong side of the prism. The two reports do not relate to the same cross section of time. The first report was done before healing and the second months later. It is the refection of the current status. The second report also reflected the evidence on record.

64. The court below may have used a different criteria that, which I do not agree with. It is not the experience of the doctor that counts but the consistence of evidence. The court had its discretion, which I may not interfere with if it was judiciously exercised. The aspect of discretion was settled in *Mbogo & Another v. Shah* [1968] E.A. 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder:

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...."

65. In spite of no need to lie, the Plaintiff stated that his salary was reduced from 38,000/= to 37,000/=. He continued working. He chose not to tender evidence of any absence from work due to the injuries. It is not the salary that we are interested in but the working capacity. Otherwise, the rest should be dealt under loss of earnings, which was not pleaded.

66. The court will treat the expert report as part of the evidence and analyze its soundness. The Court of Appeal, quoted with approval a high court decision on expert evidence in the case of

> " Also taken into consideration among numerous others is the case of *Stephen Kinini Wang'ondu v. The Ark Limited* [2016] eKLR from which the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows: -
>
> > "In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

67. The Court in the above matter continued as doth: -

> " In *Shah and Another v. Shah and Others* [2003] 1 EA 290 wherein Ombija, J. expressed himself on this issue, inter alia, as follows:
>
> > "One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other,

> is the responsibility of the court…Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

68. The two reports were equally sound they looked at different prisms of the case. I am satisfied from the injuries doctor Kiema was more succinct in his findings. He was cross examined and defended his report. Other than the general believe or prior knowledge, we have no evidence of the throughness and the demeanor of Dr Udaya Seth. I am therefore satisfied on the evidence by Dr. Kiema. He was in court and examined. Where I stand, I have nothing on the expertise of Dr. Seth except what is indicated on the report itself.

69. I therefore hold and find that the plaintiff suffered 15% disability as per Dr. Kiema's report. The court had no reason to priorities Dr Seth over Dr. Kiema when Dr. Kiema was a witness and the Dr. Seth at large. The claim for loss of earning capacity is a special claim. It must be proved. In the case of *Nguku v Kiria-ini Farm* (Civil Appeal 267 of 2020) [2022] KEHC 342 (KLR) (Civ) (5 May 2022) (Judgment), Justice Cmeoli stated as doth: -

> " The court proceeded to state that: -"The correct position as in the *Fairley case* (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* CA No. 251 of 1996 as hereunder:
>
> > "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. "In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:
> >
> > > "Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading … Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

70. I agree with the postulation by the Court of Appeal in *William J. Butler v. Maura Kathleen Butler* Civil Appeal Number 49 of 1983, which was referred by the Appellant as follows: -

> " A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can."

71. I equally agree with the Appellant in their submission that the claim for loss of earning capacity is applicable whether the plaintiff was employed or unemployed at the material time of the accident as was held by the Court of Appeal in *Mumias Sugar Co. Ltd v. Francis Wanalo* Civil Appeal No. 91 of 2003.

72. However, the catch is always that there should be a diminished working capacity, which is always based on the degree of permanent disability. The other pains and temporary incapacitation are taken care of by the General Damages for pain and suffering.

73. In the circumstances, the Plaintiff was indicated to have been a supervisor. Though he indicated to earn 38,000/= or 37,000/- he did not find it in his heart to produce evidence or even deal with his qualification. I take the minimum wage of 20,517.80 at 15% disability for 10 years. This works out as: -

20,517.80 x 12 x 15% x 10 = 369,306

74. I therefore set aside the dismissal of this limb of loss of future earnings and substitute therewith a sum of Ksh. 369,306/=

75. On future medical care, the Appellant had submitted that they will need further treatment. They relied on the case of *Tracom Limited & Another v. Hassan Mohamed Adan* Civil Appeal Number 106 of 2006 where the Court of Appeal stated:-

> "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."

Future medical expenses

76. The plaintiff pleaded that he will need to have future medical treatment of Ksh 162,000/=. This kind of loss are special damages but at large. It is not proved by receipts but expert opinion and the court's own assessment. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, the 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 thereof 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 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…"

77. On the aspect of future medical expenses, I note that the same were properly pleaded and proved. They should have been awarded treatment for two years to put a person in a good frame. There was no reason to differ with the primary expert on the need for the future medication. I am satisfied that the claim for future medical care was proved as aforesaid.

78. In *Forwarding Company Limited & Another V Kisilu; Gladwell (third Party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR), the court stated as follows

> " In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

79. It is therefore my considered finding the claim on future medical expenses was pleaded and proved. The medical report by Dr Kiema was succinct on this. It is the assessment of the various aspects that the court must make specific findings on.

80. The Appellant submitted that Dr. Kiema attended court and expounded as to why recommended this claim independent of the general damages for pain and suffering and how it would assist his recovery. Indeed, Dr. Kiema computed this claim as follows: -

    a. Physiotherapy for one year @ Kshs. 50,000 p.a

    b. Purchase of pain killers assessed at Kshs. 3,000@ month for two years;- 72,000/=

    c. Purchase of lumbar/pelvic brace/cosset for 6 months for at least two years- 40,000/=

    d. Total Kshs. 162,000

81. The amount of Ksh 162,000/= was pleaded and proved. Dr Seth was concerned with what has not happened and forgot that future medical expenses are in future.

82. I therefore set aside the order dismissing claim for future medical expenses and in lieu thereof, I award future medical expenses of Ksh. 162,000/=. These being in a nature of special damages, they will not be subjected to contribution.

General damages

83. The court awarded Ksh 650,000/=. The Appellant beseeches the court to award 1,200,000/=. The Respondent filed long submissions on this aspect. The Respondent did not address the court on this aspect. They concentrated on technicalities that have neither space nor room in the current dispensation. I am sure the court will not get confused for not being supplied with a decree as formally extracted.

84. The Appellant relied on the decision of in *Joseph Njeru Luke & others v. Stella Muoki* High Court Civil Appeal Number 40 of 2019 where Majanja J, awarded the respondent Kshs. 750,000 after sustaining almost similar injuries. Using this, they asked for 1,200,000/=.

85. However, I note that there were similar cases which are in all fourts with the injuries herein. In the decision of *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Naomi Galma Galgalo* [2019] eKLR, Justice S Chitembwe stated as doth: -

> " The respondent was examined by Dr. Steve Sureti on 27.3.2018. The doctor summarized the injuries sustained as pelvic fracture and open back facial bruises. She complained of pain when walking or running. She was 33 years old and the doctor opined that she may have complication during pregnancy and delivery.".. do set aside the award of Kshs. 2,000,000 and replace it with an award of Ksh.1,400,000.

86. Further in the case of *Barnabas v Ombati* (Civil Appeal E43 of 2021) [2022] KEHC 12136 (KLR) (28 July 2022) (Judgment), Justice R.E. Ougo found that an award of Kshs 800,000/- awarded by the trial magistrate was not excessive warranting interference the court. The injuries healed well without disability. The injuries he sustained were on the head, right limb, and hand and had pain around the waist. After an x-ray, it was established that she had sustained fractures of the femur, humerus and pelvis. 5% disability was found by one of the doctors.

87. It is therefore my considered finding that an award of Ksh 650,000/= is inordinately low as to amount to an erroneous estimate of damages. In the case of *Mbogo and Another v. Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

88. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows: -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

89. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

90. The injuries were fairly serious. An award of Ksh 1,000,000/= will thus suffice on the basis of awards for injuries and the percentage of permanent disability.

91. The consequence of the foregoing is that I set aside the amount of Ksh 650,000/= and in lieu thereof award a sum of 1,000,000/=.

92. Costs follow the event. The Appellant shall have costs of Ksh 105,000/=. The appellant was not awarded costs in the lower court. The same was because the Appellant was substantially to blame. By

not awarding him costs the Appellant bears the entire costs as if he was 100% to blame. The percentage blame is sufficient to reduce his money. The court failed to use its discretion judiciously.

93. I therefore award 40 % costs in the lower court.

94. Specials damages only to attract interest from the date of filing. The rest of the claims including future medical expenses to attract interest from the dated of judgment in the lower court

Determination

95. The upshot of the foregoing is that I make the following orders: -

a. The entire Appeal on liability is dismissed in limine.

b. The refusal of future medical expenses is set aside and in lieu thereof I award a sum of Kshs. 162,000/=. This is not subject to contribution.

c. Save as a foresaid, the Special Damages awarded by the Trial Court is corrected to read Ksh. 337,625/= in lieu of Ksh. 340,625. This is not subject to contribution.

d. An award of Ksh 650,000/= is set aside and in lieu thereof, I enter judgment on general damages for pain, suffering and loss of amenities at Ksh 1,000,000/=.

e. Loss of earning capacity -Ksh. 369,306/=

f. This works out as doth: -

i. General damages Ksh. 1,000,000/=

ii. Loss of earning capacity -Ksh. 369,306/=

Sub-total -Ksh.1,369,306/=

Less 60% contribution Ksh. 821, 583.60

Total Ksh. 547,722.40

iii. Special Damages Ksh. 337,625/=

iv. future medical expenses Ksh. 162,000/=

Grand total Ksh. 1,047,347.40

v. Costs of 105,000/= to the Appellant

vi. The appellant shall have 40% costs in the lower court.

g. Specials damages only to attract interest from the date of filing. The rest of the claims including future medical expenses to attract interest from the dated of judgment in the lower court

h. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Adede for the Respondent

No appearance for the Appellant

Court Assistant - Brian