Kamau v Kithikii alias Daniel Kithikii (Civil Appeal E118 & 119 of 2023)
[2023] KEHC 27565 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEHC 27565 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E118 & 119 OF 2023

F WANGARI, J

NOVEMBER 24, 2023

BETWEEN

KIIGE KAMAU ..... APPELLANT

AND

DAVID KITHIKII ALIAS DANIEL KITHIKII ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. J.B. Kalo, Chief Magistrate dated 13/4/2023 arising from two lower court suits, Civil Suit No. 2036 of 2021 and Civil Suit No. 2038 of 2021.

2. Civil Suit No. 2038 of 2021 involves the Appellant and the rider of Motor Cycle Registration Number KMFU 397K while Civil Suit No. 2036 of 2021 involves the Appellant and the pillion passenger to the Motor Cycle Registration Number KMFU 397K. The Appeal is on both liability and quantum.

3. The Memorandum of Appeal raises only two issues, that is: -

    a. Liability

    b. The Quantum of Damages

4. The Plaint dated 12th December 2021 in Civil Suit No. 2036 of 2021 which is Civil Appeal No. 119 of 2023 herein claimed damages for an accident that occurred on 7/11/2021 involving Motor Cycle Registration Number KMFU 397K which the Plaintiff was pillion passenger and Motor Vehicle Registration No. KCF 414A owned and driven by the Defendant or his agent. It was pleaded that the Motor Vehicle hit the Motor Cycle form the rear hence the accident.

5. On the other hand, Civil suit No. 2038 of 2021 which is Civil Appeal No. 118 of 2023 herein claimed damages for an accident that occurred on 7/11/2021 involving Motor Cycle Registration Number KMFU 397K which the Plaintiff was the rider and Motor Vehicle Registration No. KCF 414A owned and driven by the Defendant or his agent.

6. The Plaintiff in Civil Suit No. 2038 of 2021 set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Kshs. 2,000/= as Special Damages as well as General Damages and future medical expenses and injuries as follows: Spinal Injury, fracture of the vertebrae L1 with spinal code compression leading to paraplegia which resulted in paralysis of the lower limbs, loss of ability to enjoys conjugal rights and severely diminished earning capacity.

7. The Plaintiff in Civil Suit No. 2036 of 2021 set forth particulars of negligence for the accident motor vehicle. The Plaintiff pleaded Kshs. 34,000/= as Special Damages as well as General Damages and future medical expenses and injuries as follows:

    a. Fracture of the pelvis rumas

    b. Bruises and abrasion to the right flank, buttock and thigh

    c. Blunt trauma to head and back.

8. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint. The Trial Court heard the parties and proceeded to render judgement on 13th April 2023. In the Judgement, the Court found 100% liability against the Defendant and his agent who drove the motor vehicle at the time of the accident and awarded the Respondent Kshs. 1,000,000/- in General Damages, Kshs. 62,000/- for future medical expenses, Kshs. 34,000/- for special damages in Civil Suit No. 2036 of 2021.

9. In Civil Suit No. 2038 of 2021, the court awarded as follows:

    a. General damages Kshs. 5,000,000/=

    b. Loss of earning capacity Kshs. 2,400,000/=

    c. Loss of income Kshs. 225,000/=

    d. Future medical expenses Kshs. 1,230,000/=

    e. Special damages Kshs. 2,000/-

10. Aggrieved by the finding of the Trial Court, the Appellant who is the Defendant in the Lower Court files lodged a consolidated Memorandum of Appeal hence this Appeal. The grounds are para materia for both suits.

The Appellants' case

11. The Appellants called 2 witness, Stephen Kiige confirmed that he was the owner of the accident motor vehicle but was not the one driving it at the time of the accident. Further, the DW2, Dennis Sirima Wangumba relied on his witness statement and documents filed in Court and informed the court that he was driving the motor vehicle at the time if the accident.

12. He testified that the accident was as a result of a bump but the Respondent was also standing with the motorcycle on the road. He admitted hitting the two riders and sandwiching them between a matatu and his driven car. He blamed the riders for failing to wear reflectors when they stopped on the road.

The Respondent's Case

13. The Respondent called 4 witnesses who testified in respect of both suits. Both Plaintiffs in the respective suits pleaded injuries as stated in their respective Plaints and sought to rely on the documents produced in court and their testimonies and witnesses to prove the injuries and liability.

14. PW1 was the Police Officer. He testified in Court that the driver of the accident car was to blame. There were ongoing traffic charges for dangerous driving filed in Shanzu Law Courts. It was his case that the driver escaped from the scene after the accident but was later arrested. He produced the police abstract. He confirmed that the car hit the motor cycle from the rear and the Plaintiff and his pillion passenger suffered the injuries as a result.

15. PW2, Dr. Darius Kiema relied on his Medical Report dated 6th December 2021 and produced in evidence. He testified on cross-examination that the Respondent in Civil Suit No. 2038 of 2021 suffered spinal injury- fracture of the lumbar vertebrae L1 with spinal cord compression leading to paraplegia with 100% disability. He also confirmed the injuries suffered by the Plaintiff in Civil Suit No. 2036 of 2021.

16. PW3, the Plaintiff relied on his witness statement and documents filed in court which he produced exhibits. It was his case that the motor vehicle was speeding and hit the motorcycle from the rear. It was his case that he had not healed from the injuries and was still receiving medication.

17. PW4, the Plaintiff's spouse in Civil Suit No. 2038 of 2021 testified that she no longer had sex with the Plaintiff due to the injuries. Further, that they could not meet family and school expenses with their 5 years old child because the Plaintiff was not working after the accident.

The Appellants' Submissions.

18. The Appellants submitted that the driver of the accident car was nit to blame for the accident because the Plaintiff breached his duty by parking on the road and so surmounted upon himself great risk as held in the case of Bahari Parents Academy v LBZ (2020) eKLR.

19. It was submitted that the Respondent had not proved his case as required under Section 107 of the *Evidence Act*.

20. On quantum, the Appellants submitted that the award of Kshs. 1,000,000/= in general damages was inordinately high and erroneous estimate of damages for the injuries suffered.

21. Counsel cited authorities which I have considered. I however, note that the authorities do largely appear to support the Learned Magistrate's award on General Damages only that the Appellant hold that the Plaintiff had healed and could not deserve the damages.

Respondents submissions

22. On the part of the Respondent, it was submitted that the Respondent proved their respective cases in a balance of probabilities as corroborated by the police officer who visited the scene that it was the Appellant to fully blame for the accident.

23. Counsel submitted that the Respondent had discharged the burden of proof and they cited authorities which I have considered. They urged the court to dismiss the Appeal.

Analysis

24. 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.

25. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the 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..."

26. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

Liability

27. As observed elsewhere in this Judgement, this is an Appeal arising from two lower court suits, Civil Suit No. 2036 of 2021 and civil Suit No. 2038 of 2021.

28. The Appellants urge this court to find that the trial court erred in finding 100% liability against the Appellants because the Respondent was to wholly blame for the accident. They propose that the Judgement of the trial court be set aside and the damages re-assessed.

29. On the other hand, the Respondent's case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed.

30. I have perused the Record of Appeal filed in Court and the written submissions and authorities cited in support and opposition to the Appeal. The duty of this court is to established whether the trial court erred in finding, on a balance of probabilities that the Appellant was wholly liable for the accident.

31. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " 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 case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

32. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court

to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

33. I also agree that the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

34. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

36. Furthermore, in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

37. It is settled that the standard of proof on civil cases is on a preponderance of probabilities. In reevaluating the evidence, I note that the Respondent's case is that the Appellant's driver approached

a bump at high speed. The Appellant's driver conformed in testimony that indeed there was a bump at the accident spot and the Plaintiff and his pillion passenger were ahead of the bump at the time of the accident, in the same direction he was also driving from behind them.

38. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

39. In that case the court further found that:

> " When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ..... 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.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."

40. That was the position in Tart vs. Chitty and Co. (1931) ALL ER Pages 828 – 829 where Rowlat, J had this to say:

> " It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."

41. Further, the police officer who testified on behalf of the Respondent informed the court that the accident motor vehicle was to blame for the accident because it hit the Respondent car from the rear and the driver of the car escaped from the scene only to be later arrested and charged in a pending traffic court case.

42. The principles guiding the Appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs. 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."

43. In the circumstances of this case, I am inclined to find the reasons suggested by the Respondent as leading to the accident more probable than the defence by the Respondent, on a balance of probabilities. I say so because the injuries sustained by the Respondent driver were serious and must have originated from a serious impact. This can only occur when high speed is involved.

44. It was also at a bump and it would be expected that the motor vehicle crosses the bump at such a low speed as not to have caused the impact upon hitting the motorcycle that resulted in such injuries suffered herein. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that;

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

45. I consequently agree with the finding off the trial court that if the car driver were driving at a bump speed, it would have been easier to swerve or stop or maneuver the car to avoid the accident even assuming the Plaintiff had stopped on the road as alleged.

46. However, the Defendant had the burden to proof contributory negligence but they did not. I am consequently in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
>
> > ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

47. After analyzing the trial record and all the evidence tendered in the case. It would appear, from the circumstances of the accident, when all is considered, the fair outcome would be that the appellant had a duty of care towards the respondent. The basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others. Contributory negligence is an objective canon proven by credible and cogent evidence.

48. It is important to note that the evidence in the instant appeal comes out very clearly that the appellant motor vehicle skidded and trespassed into the lane of that other vehicle. The appellant was in a better

position to avoid the accident. The possibility of injustice would be increased were this Court to hold that both drivers were equally to blame for the accident.

49. Stemming from the stated finding of the Learned Magistrate, I find no reason to interfere with the trial court's finding on liability. The liability at 100% as against the Appellant is upheld.

50. However, I note that the Trial Court stated that DW2 was liable 100% for the accident but awarded liability at 75%. This was corrected and reflects in the Amended copies of the respective Judgments. I therefore award liability at 100% in favor of the Plaintiff in Civil Suit No. 2036 of 2021 and the Plaintiff in Civil Suit No. 2038 of 2021 which are respectively Civil Appeal No. 119 of 2023 and Civil Appeal No. 118 of 2021 herein.

Quantum

51. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. 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.

52. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Damages are said to be at large. They must be commensurate with similar injuries.

53. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

54. Furthermore, in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

55. There is no dispute that the Respondent in Civil Suit No. 2036 suffered a fracture of the pelvic ramus, bruises and abrasion to the right flank, buttock and thigh- and blunt trauma to the head and back. This was confirmed by the medical officer called by the respective parties.

56. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

57. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

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

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

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

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

    5) The awards should not be inordinately low or high.

58. I now analyze similar fact cases on quantum. I have considered the injuries suffered by the Plaintiff in the respective suits vis a vis the pleadings and authorities cited and I proceed to address each claim separately as follows;

59. In Civil Suit No. 2038 of 2021, the authorities cited by the parties are largely dissimilar. The Respondent's authorities are pegged on paralysis without strictly focusing on spinal injury as a cause. On the other hand, the Appellant's cited authorities are largely outdated and cannot present a reasonable comparison for the purpose of damages. The injuries therein are also not similar.

60. In the case of Nuru Badi Said v Okumu Paul & Bernard Odhiambo Okumu [2019] eKLR, the court awarded General Damages of Kshs. 8,000,000 for the Plaintiff who suffered 100% incapacity and the following injuries in 2019;Complete paraplegia from T7 with loss of sensation in the lower limbsLoss of bowel functions and urine controlScars on the entire back, gluteal regions and posterior aspect of both shouldersReduction of power in the left upper limbScar in the occipital region

61. In my view, the injuries in the stated Nuru Badi Said (supra) were comparable to this case. They both involved paraplegia resulting from the spinal injury. The Appellant submitted that the Court did not consider the Medical Report by Dr. Udayan. I have not had sight of such a report in the filed Record of Appeal.

62. Therefore, stemming from the Award by the Trial Court of Kshs. 5,000,000/- in General Damages, I do not support the view that this was inordinately high award. It may be low but it was not also inordinately low. Either way, as the Respondent did not appeal against this Award, I will not disturb it.

63. With respect to damages for loss of earning. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that,

> " However, in certain circumstances loss of profits could be included within a claim for general damages...General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages have become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.".

64. Although the Plaintiff stated that he earned Kshs. 1000/= per day as from his job as boda boda rider, he did not produce any evidence. However, it was not in dispute that he was in the business of boda boda rider. He was also on wheel chair and could not engage in this occupation. The Court awarded Kshs. 15,000/= per month. This cannot be said to be excessive.

65. In the case of Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR the court stated thus:

> " ...To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired"

66. The Respondent was 28 years at the time of the accident. He would have reasonably worked up to retirement age. However, due to the vicissitudes of life, the court appears to have awarded a multiplicand of 20 years. I do not see reason to interfere with this. However, the Plaintiff had a wife and a child aged 5 years.

67. It was not pleaded or presented in evidence that he also assisted his parents or other people who could have relied on him in my view, the assessment based on a multiplier of 2/3 was unwarranted. The court ought to have applied 1/3 as reasonable in the circumstances. This would have lead to a more correct estimate of damages for loss of earning capacity as follows:

15,000X20X12X1/3= Kshs. 1,200,000/=. I therefore set aside the award under this head.

68. The Appellant did not appeal against the Award of loss of income, Special Damages and Future Medical Expenses. I will not disturb the award under these heads.

70. Turning to the quantum in Civil Suit No. 2036 of 2021, the Plaintiff suffered fracture of the pelvis rumas and bruises and abrasions. The court awarded Kshs. 1,000,000/= for General Damage.

71. In Lilian Wanja v Cyprian Mugendi Igonga and 2 Others CKA HCCA No. 24 of 2015 [2016] eKLR the plaintiff sustained a fracture/dislocation of the hip and multiple soft tissue injuries and the court awarded Kshs. 500,000/- in 2016. In George Osewe Osawa v Sukari Industries Limited [2015] eKLR the plaintiff sustained a fracture of the pelvis and was awarded Kshs. 400,000/= in general damages in 2015.

72. In Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & Another [2010] eKLR the court awarded Kshs 300,000/ as general damages for a fracture of the right superior and inferior pubic rami of the pelvis; a cut on the right leg and central dislocation of the hip. In Ali Malik Brothers Motor (K) Limited and Another v Emmanuel Oduor Onyango NRB HCCA No. 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs. 700,000/- which was affirmed by the High Court.

73. Lastly in Joseph Njeru Luke & 3 others v Stellah Muki Kioko [2020] eKLR, the Plaintiff sustained pelvic fractures and soft tissue injuries, the High Court reduced the Lower Court's award of Kshs. 1,700,000 to Kshs. 750,000.

74. All these authorities pose similar and comparable injuries and suggest that the award by the Trial Court of Kshs. 1,000,000/= was inordinately high in the circumstances. The Leaned Trial Magistrate could have had in mind loss of conjugal rights as was testified but medical evidence did not allude to this. No wonder the court referred 'general damages for pain and suffering and loss of conjugal activity' while granting the Award.

75. Considering the lapse of time and inflation, an Award of Kshs. 800,000/- for the Plaintiff herein is adequate compensation fir General Damages. I therefore interfere with the award by the Trial Court to this extend.

76. Like in Civil Suit No. 2038 of 2021, the Appellant did not Appeal against the Award of Special Damages and Future Medical Expenses. I will not disturb the award under these heads.

Determination

77. In the upshot, I make the following orders: -

    a. As regards Civil Appeal No. 118 of 2023:

        i. The Appeal on liability dismissed.

        ii. The Appeal on General Damages is dismissed.

        iii. Judgement of the Lower Court on damages for loss of earning capacity is set aside and substituted with an Award of Kshs. 1,200,000/=.

        iv. As the Appeal partially succeeds, each party shall bear their own costs in the Appeal

    b. As regards Civil Appeal No. 119 of 2023:

        i. The Appeal on liability dismissed.

        ii. Judgement of the Lower Court on General Damages is set aside and substituted with an Award of Kshs. 800,000/=.

        iii. As the Appeal partially succeeds, each party shall bear their own costs in the Appeal

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023

F. WANGARI

JUDGE

In the presence of: -

Oloo Advocate for the Appellant

Okeko Advocate for the Respondent

Barile, Court Assistant