REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 119 OF 2020

MIDANS SERVICES LIMITED.....1ST APPELLANT

DAN MBUGUA.....2ND APPELLANT

VERSUS

RONALD KAPUTE.....RESPONDENT

(Being an appeal from the Judgment of Mmasi, SPM

delivered on 12th February, 2020 in Nairobi CMCC No. 8558 of 2018.)

JUDGMENT

1. This appeal emanates from the judgment in **Nairobi CMCC No. 8558 of 2018** wherein **Ronald Kapute**, (hereafter the Respondent) had sued **Midans Services Limited** and **Dan Mbugua** (hereafter the Appellants) for damages in respect of injuries he allegedly sustained on 24th February, 2017, while lawfully travelling as a passenger aboard motor vehicle registration number **KAW 229M** (hereafter the accident vehicle) along Mombasa Road, Nairobi. The 1st Appellant was sued in its capacity as the owner of the suit motor vehicle whereas the 2nd Appellant was averred to be the authorized driver, servant and or agent in the course of such employment, service or agency of the 1st Appellant. The Respondent had averred the 1st Appellant negligently and/or recklessly drove, managed and or otherwise controlled the said motor vehicle causing it to collide with an "oncoming vehicle", as a result of which the Respondent sustained injuries. The Respondent equally pleaded vicarious liability as against the Appellants.

2. The Appellants filed a statement of defence denying the key averments in the plaint and any liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent. The suit proceeded to full hearing during which evidence was adduced by the respective parties. In her judgment, the learned magistrate found in the Respondent's favour and held both the Appellants wholly liable for the accident. The court thereafter proceeded to award damages in the total sum of Kshs. 581,448/-, made up as follows:

a. General damages: Shs. 300,000/-;

b. Special Damages: Shs. 31,448/-;

c. Future medical expenses: Shs. 250,000/-

3. Aggrieved with the outcome, the Appellants preferred this appeal challenging the finding on liability and quantum, based on the following grounds: -

"1. THAT the Learned Magistrate erred in law and in fact in failing to find that motor vehicle KAW 229M was rammed into from behind by an unidentifiable third-party motor vehicle that fled, which fact was admi9tted by both the 2nd Appellant and the Respondent.

2. THAT the Learned Magistrate erred in law and in fact in failing to find that motor vehicle KAW 229M was not driven in a negligent manner prior to the accident as was confirmed by the Respondent.

3. <u>THAT</u> the Learned Magistrate erred in law and in fact in finding the Appellants 100% liable.

4. <u>THAT</u> the Learned Magistrate erred in law and in fact in awarding excessive general damages of Kshs. 300,000/= for pain and suffering.

5. <u>THAT</u> the Learned Magistrate erred in law and in fact in awarding unwarranted Kshs. 250,000/= for future medical expenses.

6. <u>THAT</u> the Learned Magistrate erred in law and in fact in awarding Kshs. 31,448/= as special damages."

4. The appeal was canvassed by way of written submissions which parties orally highlighted. The Appellants anchored their submissions on the decisions in **Selle & Another v Associated Motorboat Co. Ltd & Others (1968) E.A 123** and **Peters v Sunday Post Limited (1958) E.A 424** regarding the duty of the first appellate court.

5. On liability, counsel for the Appellant argued that the trial court was in error for basing its finding on the Appellants' liability on their failure to disclose the registration number of the third party vehicle that hit the accident motor vehicle or to enjoin the owners or driver in the suit; that the principle of *novus actus interveniens* was applicable on the facts of this case and the proximate cause of the Respondents injuries was the unidentified motor vehicle that rammed into the rear of the accident motor vehicle. Referring to evidence by the respective witnesses before the trial court, counsel contended that the Respondent failed to discharge his burden to prove negligence on the part of the 2nd Appellant. The Court was urged to find that the accident was caused by an unknown motor vehicle; that there is no evidence the suit motor vehicle was driven negligently; and that there was no evidence to establish liability against the Appellants for the Respondent's injuries.

6. Concerning quantum of damages, counsel anchored her submissions on the principles restated in **Dorcas Mututho Ileve v Muithiya Lydia [2018] eKLR**, **Shabani v City Council of Nairobi (1985) KLR 526** and **Denshire Muteti Wambu v Kenya Power & Lighting Co. Ltd [2013] eKLR**. It was submitted that the trial court failed to consider that the Respondent suffered bruises and lacerations and did not appreciate the principle that comparable injuries should as far as possible be compensated by comparable awards. Counsel urged the court to reduce the award of general damages to a sum of Kshs. 100,000/-, citing the High Court decision in **Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR** which authority had been cited in the lower court**,** and **PF (Suing as next friend and father of SK minor) v Victor O. Kamadi & Another [2018] eKLR** the latter which was introduced on appeal. Concerning future medical expenses in respect of a proposed cosmetic procedure, it was argued that award is unwarranted and doubly punishes the Appellants as the Respondent enjoys 'double benefit'. Therefore, the award ought to be set aside. The court was thus urged to allow the appeal and to dismiss the Respondent's suit in the lower Court.

7. For his part, the Respondent also cited the principles in **Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) E.A 123** and **Peters v Sunday Post Limited (1958) E.A 424** as cited in **China Zhongxing Construciton Company Ltd v Ann Akuru Sophia [2020] eKLR** regarding the duty of the first appellate court. Defending the finding on liability, counsel reiterated the Respondent's evidence as to the manner in which the accident occurred, and citing **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & 2 Others [2017] eKLR** pointed out that the Appellants did not attribute any blame on the Respondent but rather a motor vehicle whose owner/driver was not a party to the lower court suit.

8. It was further argued that the proximate cause of the accident was the admitted abrupt braking by the 2nd Appellant while overtaking along a service lane, compounded by the fact he was an inexperienced, and that he admitted that the decision to overtake may have been a lapse in judgment. The Respondent therefore discounted the application of the *novus actus interveniens* principle to the facts of the case.

9. In defending the award of general damages, counsel asserted that the trial court appreciated that the injuries sustained by the Respondent were not merely soft tissue injuries due to residual and permanent facial scars that are of cosmetic significance. Further that, the proposed cosmetic procedure was not intended to improve on his facial appearances but was intended, as far as possible, to put him back in the position he was prior to the accident. In support of the award on general damages and future medical expenses, counsel cited several High Court authorities including in **Kaluki Mwenda & Another v Abdfinazir Hassan Abdirehman & Another [2017] eKLR, Judith Muderegani v Noah Andolo & Another [2005] eKLR** relied on the before the subordinate court and **O (an infant) v Bayete Peugeot Services Limited (1985) eKLR** introduced on this appeal. On special damages it was asserted the same were specifically pleaded and proved as such ought to be allowed. The court was urged to dismiss the appeal with costs.

10. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms: -

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

An appeal to this court from a trial by the High 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.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. That the Respondent was a passenger in the accident vehicle and the occurrence of the accident is not in dispute. Neither is it disputed that following the accident, the Respondent sustained injuries. In the court's view, appeal turns on two issues, namely, whether the finding of the trial court on liability was well founded, and secondly, whether the award of general damages was justified. Pertinent to the determination of issues are the pleadings, which form the basis of the parties' respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters.

13. In **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

> **"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."**

14. The Respondent by his plaint averred at paragraphs 5 and 6 that:

> **"5. On or about 24th February, 2017, the plaintiff being a lawful passenger in motor vehicle registration number KAW 229M along Mombasa Road when the 1st Defendant so negligently and/or recklessly drove, managed and or otherwise controlled the said motor vehicle registration number KAW 229M colliding with an oncoming vehicle thereby causing an accident as a result of which the plaintiff sustained injuries.**
>
> **6. The said accident was caused by negligence of the 2nd defendant, and the 1st defendant is vicariously liable.**
>
> **PARTICULARS OF NEGLIGENCE OF THE DEFENDANT**
>
> **a) Driving motor vehicle registration number KAW 229M without due care and attention.**
>
> **b) Driving at a speed which was excessive in the circumstance.**
>
> **c) Driving in a manner that in the circumstance was careless and in breach of his duty of care to the deceased.**
>
> **d) Failing to stop or apply brakes so as to avoid the said accident.**
>
> **e) Failing to exercise or maintain any or any sufficient or adequate control of the motor vehicle registration number KAW 229M.**
>
> **f) Failing to maintain a proper lookout or in any other way manage and/or control the said motor vehicle so as to avoid the accident.**
>
> **g) Causing the accident." (Sic)**

15. The Appellants filed a statement of defence denying key averments in the plaint, and the particulars of negligence attributed to the 2nd Appellant. It was further averred that the Respondent and an unidentified motor vehicle were to blame for the accident. The pertinent paragraphs of the defence state that:

> **"3……. the defendants deny:**
>
> **(a) that the 1st defendant drove the said vehicle negligently or carelessly.**
>
> **(b) that the said vehicle collided with an oncoming vehicle.**
>
> **The plaintiff is put to strict proof otherwise.**
>
> **4. The averments of paragraph 6 of the plaint are denied and the plaintiff put to strict proof.**
>
> **5. By way of further defence, the defendant aver that on the material date motor vehicle KAW 229M was carefully and lawfully being driven at about 10:00pm. At a point near Gateway mall, the said vehicle was hit from the rear by an**

unidentified motor vehicle that failed to stop after the collision. As a result, motor vehicle KAW 229M lost control and landed in a ditch. The accident occurred without any negligence on the part of the driver.

6. The defendants further aver that the plaintiff contributed to his injuries (if any) due to the negligent manner he conducted as a passenger.

PARTICULARS OF NEGLIGENCE

(a)Flouting traffic regulations.

(b)Remaining aboard a vehicle driven in the manner alleged in the plaint and the defence pleads *"VOLENTI NON FIT INJURIA"*

16. First, on liability, the Respondent testified as **PW 3** and called two witnesses**.** After adopting his brief written statement, he proceeded to state that:

> **"I was a passenger in a friend's car coming from Nairobi towards Kitengela. My friend tried to overtake a trailer ahead of us using service lane. The lane ended abruptly. He braked. The vehicle rolled several times. I lost consciousness".**

17. Under cross-examination he stated:

> **"I was seated in the middle at the back. The vehicle I was in did not collide with any vehicle. I heard screeching of brakes then the vehicle rolled. I was interviewed by an investigator. I signed a statement where I said on reaching Gateway Mall, I heard a bang at rear of vehicle. The vehicle lost control and landed in a ditch. Before the accident, driver was driving at moderate speed. There was a trailer ahead of us. The vehicle was hit from the back before losing control. Before the accident, driver was driving at moderate speed ...I blame the driver as he was using service lane to overtake…He was hit while trying to overtake. If we were not trying to overtake, we would not have been hit from behind".**

18. The 2nd Appellant testified as **DW 1**. He began by adopting his witness statement and proceeded to state that:

> **"I decided to overtake the lorry…. I was driving at 60km/hour. The lorry suddenly switched lanes. I had moved from the inner lane to outer lane. I braked in order to swerve to avoid accident. I heard bang then steering wheel turned. I lost control as I was banged from behind. I do not know the registration number of vehicle that hit me from behind."** (sic)

19. During cross-examination he said that:

> **"The lorry was ahead of me did not indicate. I had to accelerate to start overtaking. It may be a lapse in judgment. I braked so as not to hit the lorry...The vehicle that hit us from behind sped off. I have been a driver since 2016. When I got my driving license, I had one (1) year experience when accident occurred."** (sic)

20. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The duty of proving averments contained in the plaint on a balance of probabilities lay squarely on the Respondent. In **Karugi & Another V. Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated that:

> **"[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof….The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."**

21. The same court stated in **Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR**, that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of **Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258** where the Court of Appeal, reiterating the foregoing stated that:

> **"There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

22. In **Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] eKLR** the Court of Appeal stated that *"determination of liability in a road traffic case is not a scientific affair"* and proceeded to quote **Lord Reid** in ***Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663*** at p. 681 as follows:

> ***"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it …***
>
> ***The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of***

history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

23. It seems in some respects, that the Respondent's evidence was somewhat at variance with his pleaded case that the 2nd Appellant "*so negligently and/or recklessly drove, managed and or otherwise controlled the said motor vehicle registration number KAW 229M colliding with an oncoming vehicle thereby causing an accident*". The Respondent's written statement and evidence in chief made no reference to a collision between the accident vehicle and an *"oncoming"* vehicle, or at all. Indeed, the Respondent was initially categorical during cross-examination that the accident vehicle did not collide with any other vehicle. Only when hard pressed in cross-examination did he admit that indeed another vehicle hit the accident vehicle from "*behind*". A vehicle moving behind another in the same direction as the vehicle ahead cannot be described as an "*oncoming vehicle"* as pleaded. The gist of the Respondent's evidence in chief was that the accident vehicle lost control and overturned after the driver braked suddenly upon finding that the "service lane" he was using had ended abruptly, and his answers in cross-examination at first reiterated that the accident vehicle "*rolled*" soon after the witness heard the "screeching" of brakes.

24. But the Respondent seemed to change tune upon being confronted with his statement recorded by an investigator, in which he asserted hearing a bang at the rear of the accident vehicle, prior to the vehicle losing control. Pressed further, he admitted that the accident vehicle lost control and landed in a ditch *"after it was hit from the back"*. He then stated that he blamed the 2nd Appellant for overtaking on the service lane as they would not have been hit from behind if not overtaking.

25. While the 2nd Appellant admitted having accelerated while overtaking and braking to avoid running into the path of the lorry which suddenly entered his lane as he was overtaking or passing it, he asserted that he was on the outer lane (given the accident vehicle's admitted direction, that would properly be the inner lane) and that he was hit from the rear by a vehicle behind his. Mombasa road is a dual carriage way, and if this version is correct, the driver was not overtaking as such but changing lanes from the lane on which the lorry was travelling ahead of the accident vehicle, to what is properly the inner lane.

26. Two questions arise, first, on what lane was the accident vehicle travelling at the time it lost control, a service lane or the inner lane? And second, what caused the sudden braking: was it the unexpected end of a service lane whose location on the road is unstated, or the sudden encroachment of the lorry onto the inner lane, in the path of the accident vehicle? For indeed, the Respondent all but admitted in cross-examination that the accident vehicle having braked, lost control, and went off the road after it was hit from the rear by the unknown vehicle, thereby seemingly abandoning his initial claims that the accident vehicle lost control after braking suddenly at the end of the service lane.

27. It is difficult to reconcile the conflicting accounts and the evidence of the police officer called by the Respondent **P.C Hussein Mohammed** (**PW 2**) did not help. Apart from erroneously claiming that the accident vehicle was travelling in the opposite direction, from **Mlolongo** to **City Cabanas** (as per the copy of Police Occurrence Book (O.B) abstract marked **Pexh 2(a)**), **PW2** did not tender any sketches or credible evidence to help answer these questions. Besides, whether the 2nd Appellant was driving on the service lane whose location the Respondent did not specify, or the inner lane at the time he braked, it was the responsibility of the driver of the admitted unknown vehicle behind to keep a safe distance from the 2nd Appellant's vehicle, and the said driver should not have rammed into the accident vehicle with such a force as to throw it out of control.

28. Further, mere overtaking as described in this case is not *ipso facto* evidence of negligence on the part of the 2nd Appellant, unless, he is shown to have done so dangerously, hence causing the accident. That the 2nd Respondent was admittedly a relatively new driver of itself is not proof that he necessarily made poor decisions or acted dangerously in respect of the lorry ahead of the accident vehicle. The Respondent agreed that at the time of the accident, the 2nd Appellant was driving at moderate speed.

29. The Respondent cannot bear any responsibility for the occurrence of the accident, as rightly argued by his counsel, but the trial court failed to analyze the evidence tendered regarding the accident in any meaningful way, and appeared to find fault with the 2nd Appellant, not based on any proven fault or blameworthiness, but for his failure to enjoin the driver of the unknown vehicle, or perhaps the driver of the lorry as a defendant. This is how the trial court expressed itself:

"The 2nd defendant...admits that a vehicle rammed into him he lost control and the vehicle rolled. The 1st defendant in his testimony did not disclose the registration number of the vehicle that allegedly rammed into the vehicle he was driving.

Secondly, the defendants have not deemed it fit to bring in the alleged driver of the vehicle that rammed into the accident as a third party. In effect the plaintiff who was just a passenger cannot be blamed for contributing to the causation of the accident. In effect, the defendants are wholly liable for the accident and the injuries sustained to the plaintiff.

The defendants are found wholly liable and held 100% liable for the accident and injuries sustained by the plaintiff." (sic).

30. There was uncontroverted evidence that the other vehicle was not identified as it seemingly sped off after colliding into the accident vehicle. With respect, there was no firm evidence to support a finding of 100% liability on the 2nd Appellant, or at all. Additionally, what the trial court said of the 2nd Appellant could also be said of the Respondent: having admitted that in fact the accident vehicle lost control and overturned after being hit by the unknown vehicle, the Respondent ought to have sued the driver of that vehicle as well.

31. The Court of Appeal in **Timsales Limited v Stanley Njihia Macharia [2016] eKLR** discussing the principles of 'causation' cited with approval the decision by **Musinga J** (as he then was) in **South Nyanza Sugar Co. Ltd vs. Wilson Ongumo Nyakwemba [2008] eKLR** quoting **Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR)** where it was held that:

"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence."

32. Sections 107 to 109 of the Evidence Act provide as follows:

"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 eitherside.
109.
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."

33. The Respondent was under duty to prove his allegations of negligence against the 2nd Appellant as pleaded. He gave contradictory accounts as to the cause of, and manner in which the accident occurred, and was unable to prove fault or blameworthiness on the part of the 2nd Appellant. Had the trial court carefully analyzed the evidence, it would have found that the evidence adduced amounted to inconclusive proof of the negligence pleaded in the plaint against the 2nd Appellant and dismissed the Respondent's suit. The Appellants' complaints in this regard have merit.

34. Regarding quantum, the court stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low".

35. In **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30**, it was held that:

"The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, 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 the damages." see also Butt v Khan (1981)KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR."

36. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *"an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance"*.

37. There is no dispute that the Respondent sustained soft tissue injuries as a result of the accident. The medical report by **Dr. Gilbert M. Munyoki (P. Exh. 5(a)** documented the injuries as comprising multiple facial cuts, lacerations and friction burns, right supraorbital area friction burns and cuts, multiple left cheek cuts and lacerations and multiple scalp, neck, and chest wall cuts. **Dr. Wambugu's** report tendered by consent as **D. Exh. 1** listed frictional burn wound on the forehead, occipital scalp and left cheek, blunt chest trauma and cut wound left side of chest as the injuries sustained by the Respondent. Both reports confirm residual facial scars of cosmetic significance.

38. The trial magistrate awarded Shs. 300,000/- as general damages after observing that:

"Upon considering the evidence adduced and the submissions tendered by both parties and proposals made by both parties and the authorities cited in support of the proposals made, it is my considered view that the plaintiff sustained soft tissue injuries but also sustained blunt injuries, deep cut wounds and lacerations and multiple permanent facial scars but the proposal of Kshs. 500,000/= as general damages for pain and suffering is on the higher side.

The authority cited by the plaintiff in support of the proposal……can be distinguished from the instant case in that the injuries the 1st Appellant sustained were more serious leading to him being unable to completely close the left eye. This is not the scenario in the present and or instant case where the plaintiff only sustained permanent scars on the face. In effect an award on Kshs. 300,000/= (three hundred thousand shillings only) suffices as adequate general damages for pain and suffering."

39. In my considered view, this award cannot be said to be excessive, and I find no merit in the Appellants' complaint in that regard.

However, regarding the claim for future medical expenses, the same was not supported by a professional assessment. While the Court agrees with the Respondent's counsel that a plaintiff who suffers injury is entitled to future medical expenses to undertake any remedial medical procedures necessary to mitigate the adverse sequela arising from such injuries, such plaintiff is duty bound to justify the expenses. In this instance, the Respondent was seeking future medical expenses related to proposed plastic surgery for his scars.

40. However, neither the Respondent's witness **Dr. Munywoki (PW1)** nor the Appellants' **Dr Wambugu** were plastic surgeons or experts in a related field. None of their medical reports recommended plastic surgery or estimated the cost thereof. Equally, the proforma invoice or quotation by the **Aga Khan Hospital (PExh 4)** was clearly issued by the credit control section of the hospital and is not supported by a medical report or professional assessment of the referring plastic surgeon or related expert. Even the trial court appeared to view the estimates in **P. Exh 4** as dubious stating that:

> **"In regard to future medical expenses, the plaintiff avers that he has to undergo reconstructive surgery vide fat stem cell injection to reverse the effects of the accident. They propose Kshs. 450,000/- as the amount needed if the surgery is done at Aga Khan Hospital. On this limb the court finds that the proposed amount is on the higher side and proceeds to award Kshs. 250,000/= (two hundred and fifty thousand shillings only).**

41. The above sum awarded was, in the absence of an expert assessment was literally plucked from the air. The claim for future medical expenses was not properly justified and should not have been entertained. The award of Shs. 250,000/- under that head cannot be upheld. Hence, the only award deserving to be upheld by this Court relates to general damages, but in view of the Court's finding on liability, nothing turns on the matter. In the result, the Court allows this appeal and sets aside the judgment of the lower court and substitutes therefor an order dismissing the Respondent's suit. Parties will bear their own costs in the lower Court and on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH MARCH 2022

C. MEOLI

JUDGE

In the presence of:

For the Appellants: Mrs. Githae

For the Respondent: Mr Mutegi

C/A: Carol