REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO. 2 OF 2015

NYOTA TISSUE PRODUCTS.....APPELLANT

- VERSUS-

CHARLES WANGA WANGA.....1ST RESPONDENT

THE BOARD OF GOVERNORS NAMBALE SECONDARY.....2ND RESPONDENT

NAMBALE SECONDARY SCHOOL.....3RD RESPONDENT

PASCAL DINDI OMUSA.....4TH RESPONDENT

LYDIA GATURUHU.....5TH RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine CMCC. No. 49 of 2013 delivered on the 3rd day of November, 2013 by Hon. R. Yator, RM]

JUDGMENT

Introduction

1. This is an appeal from the trial court's determination on quantum in the suit for damages for personal injury arising from a motor vehicle accident in which the 1st respondent together with others allegedly suffered injuries. The suit was part of a series of suit in which by a test suit on liability the trial court finally determined the issue of liability and the respective quantum in the thirty suits filed against the defendants. The trial court set Liability at 20:80 between the 1-3 defendants (herein 2-4 respondents) and the 4th-5th defendants (herein the 5th Respondent and the Appellant). The determination on the Liability was set aside and substituted with a 50:50 Liability ratio upon appeal to this court in a related appeal KBT HCCA NO. 27 of 2017. In the suit subject of this appeal the quantum of general damages was awarded at Ksh.1,200,000/- for *"Head injury with open depressed frontal skull fracture."*

The appeal

2. The Appellant filed a Memorandum of Appeal dated 2nd December 2015 setting out the grounds of appeal as follows:

> **"MEMORANDUM OF APPEAL**
>
> The appellant being dissatisfied with the Judgment of Honorable R. Yator Resident Magistrate in ELDAMA RAVINE SPMCC NO. 49 OF 2013 delivered on 3rd November, 2015 therein against the Appellant now appeals against the whole Judgment on the following grounds:
>
> 1. THAT the judgment arrived at by the learned Magistrate was against the weight of evidence by the Investigating Officer.
>
> 2. THAT the learned Magistrate erred in law and in fact by determining the matter without allowing the Appellants to file their submissions of quantum of damages on matters in this series.
>
> 3. THAT the learned Magistrate erred in law and in fact by failing to take into account the evidence and the need for

submissions on Liability given on behalf of the Appellant while considering her judgment.

4. THAT the learned Magistrate erred in law and in fact by failing to appreciate the totality of the evidence before her and in not considering the submissions behalf of the Appellant.

5. THAT the learned Magistrate erred in law and fact by giving an award which is extremely high without regard to decided cases.

6. THAT the Learned Magistrate erred in law and in fact by disregarding the evidence of the Appellants thus failing to judiciously exercise her discretion.

7. THAT the learned Magistrate erred in law and in fact by awarding special damages in the absence of strict proof thereof and proper receipts.

8. THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant and considering extrinsic matters thereby basing her judgment on the same thus failing to judiciously exercise her discretion.

REASONS WHEREOF *the Appellant prays that the appeal be allowed and;*

a. Judgment entered pursuant thereto be set aside.

b. That the appeal be allowed as prayed.

c. Costs of this appeal and of the Judgment in the subordinate Court be awarded to the appellant.

DATED at Nakuru this 2nd day of December 2015.**"**

Submissions of parties on appeal

3. Counsel for the parties filed respective written submissions on the appeal and judgment was reserved. Principally, the point of contention taken by the appellant was that the trial court had erred in not taking submissions on the quantum of damages leading to its error in awarding an inordinately high amount of damages for the person injury herein. For the respondents, the general defence of non-interference with a trial court's discretion in award of damages was taken and the 2-4 respondents particularly raised an objection as to competency of the appeal in view of failure by appellant to attach a formal decree of the trial court appealed from.

Issues for determination

4. From the submissions, two issues arise for determination, namely: (a) whether the appeal is competent; and (b) whether the appellate court will interfere with the award of damages by the trial court.

Whether appeal competent

5. For the 2-4 respondents, an issue of competency of the appeal for failure to attach a certified decree appealed was raised in submission in related appeals nos. 2 and 4 of 2017 citing *Ruth Anyolo v. Agnetta Oiyela Muyeshi* [2019] eKLR. Order 42 rule 2 provides for the filing of a supplementary record of appeal if the memorandum of appeal does not attach copy of the decree indicating that the decree is a crucial component of an appeal. However, the same Order 42 at rule 13 (4) (f) provides for mandatory filing in record of appeal of *"judgment, order or decree appealed from"*, in my view making the filing of a decree where the ***Judgment appealed from*** is filed, unnecessary. The Supreme Court decision cited in *Ruth Anyolo v. Agnetta Oiyela Muyeshi* [2019] eKLR was addressing an election petition appeal from the High Court to the Court of Appeal under section 85A of the Elections Act and Rule 87 of the Court of Appeal Rules, and not from a subordinate court to the High where in accordance with Order 42 rule 13 (4) (f) of the Civil Procedure Rules, which suggests that a copy of the judgment is sufficient for purposes of appeal.

6. The Supreme Court in ***Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*** [2015] eKLR, the decision relied on by Omondi, J. in *Ruth Anyolo v. Agnetta Oiyela Muyeshi* [2019] eKLR, was considering an election petition appeal involving Rule 87 of the Court of Appeal rules, which is different from the Civil Procedure Rules, as follows:

"**[38]** The appellant submitted that the Appellate Court's jurisdiction is as provided in Article 164 of the Constitution, and as conferred by Section 85A of the Elections Act, 2011, and that, therefore, that Court was wrong in declining jurisdiction to consider the appeal for non-compliance with Rule 87(1) of the Court of Appeal Rules.

[39] **Rule 87 prescribes the contents of a record of appeal, such as will render such a cause a competent one before the Court of Appeal. It specifies the requisite documents to form part of the bundle to accompany the memorandum of appeal–all being such material as will enable the Court to make a determination on the issues of law and fact that may be the subject of contest.**

[40] In the case of **Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others** Sup. Ct. No. 4 of 2014, this Court held that:

> **"The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it."**

[41] Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, **Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others,** SC. 11/2012**,** Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:

"A court is competent, that is to say, it has jurisdiction when–

> 1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and
>
> 2. the subject matter of the case is within its jurisdiction, and no feature in the case …… prevents the court from exercising its jurisdiction; and
>
> **3. the case comes before the court initiated by the *(due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction" (emphasis supplied).***

[42] The foregoing passage sets proper context for the Appellate Court's Ruling in the instant matter (at page 14) when it properly concluded that, due to non-compliance with the mandatory provisions of Rule 87(1), it lacked jurisdiction to entertain the appeal.

[43] We understand the learned Judges to have been saying that the omission of the mandatory documents from the record, had the effect of rendering the Court incapable of adjudicating upon the issue placed before it on appeal, as certain conditions set by law had not been met. The Court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled. That conclusion, by no means, imports the inference that the Court of Appeal misapprehended the constitutional or statutory basis of its powers under Article 164 and Section 85A of the Elections Act.

[44] We find, in conclusion, that the petition of appeal dated 8th May, 2014 incorporates no issue involving constitutional interpretation or application under Article 163(4)(a) of the Constitution. Accordingly, we hold that the Court has no jurisdiction to consider any other issue arising for determination in this appeal."

7. Again ***Ndegwa Kamau t/a Sideview Garage v. Fredrick Isika Kalumbo*** [2016] eKLR, which held that failure to attach copy of decree was fatal was considered by the Court (J. Kamau, J.), as noted by Omondi, J. in ***Ruth Anyolo*** case, in ***Kilonzo David t/a Silver Bullet Bus Company v. Kyalo Kiliku & Another*** [2018] eKLR, where the court underlined the draconian effect of a striking out of an appeal on account of failure to attach a copy of decree as follows:

> "15. It was very clear that the Appellant's omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of **Ndegwa Kamau t/a Sideview Garage vs Isika Kalumbo [2016]**(Supra), **Kulwant Singh Roopra vs James Nzili Maswii [2014]** (Supra) and **Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014]**(Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, **this court took a different position that it would be too draconian to strike out the Appeal herein.**
>
> 16. This court's thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own.
>
> 17. Further, the court has power under Order 42 Rule 2 of the Civil Procedure Rules to grant leave to an appellant to file such certified copy of the decree as soon as possible and in any event within such time that it may order.
>
> 18. In addition, the decision of **Kyuma vs Kyema** (Supra) that Ngaah J relied upon in striking out the appeals therein was decided in 1988, way before the promulgation of the Constitution of Kenya, 2010 which mandates courts to administer justice without undue regard to technicalities.
>
> 19. Accordingly, having considered the Written Submissions, it was the finding and holding of this court that although there was merit in the 2nd Respondent's argument that the Appeal herein, it was in the interest of justice that the Appellant be given his day in court."

8. For my part, I would respectfully find that the Supreme Court did not hold that an appeal from a subordinate court to the High Court which did not attach the decree appealed from was incompetent. The Court's observation that "*if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent"* was not the ratio of that decision but rather that an issue of striking out of an appeal for failure to attach a decree appealed from was not a constitutional matter for appeal to the Supreme Court as set out in paragraphs 43 and 44 of the decision as follows:

"[43] We understand the learned Judges to have been saying that the omission of the mandatory documents from the record, had the effect of rendering the Court incapable of adjudicating upon the issue placed before it on appeal, as certain conditions set by law had not been met. The Court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled. That conclusion, by no means, imports the inference that the Court of Appeal misapprehended the constitutional or statutory basis of its powers under Article 164 and Section 85A of the Elections Act.

[44] **We find, in conclusion, that the petition of appeal dated 8th May, 2014 incorporates no issue involving constitutional interpretation or application under Article 163(4)(a) of the Constitution.** Accordingly, we hold that the Court has no jurisdiction to consider any other issue arising for determination in this appeal."

9. The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the *"judgment, order **or** decree appealed from"* and does **not** make it mandatory to attach the judgment **and** the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in ***Silver Bullet Bus*** case on the point, that it would be too draconian to strike out the appeal in these circumstances. With respect, I would agree that the dispensation of justice after the 2010 Constitution which provides for Article 159 (2) (d) principle of substantive justice without regard to technicalities of procedures calls for the court to permit an appeal the determination of which is possible because the Judgment appealed from is attached to the record of appeal but where the formal expression of the judgment has not been reduced into a decree of the court. And section 3A of the Civil procedure Act, which was the predecessor of the constitutional underpinning of the substantive justice provides significantly as follows:

"**3A. Saving of inherent powers of court.**

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

10. Moreover, it is not a case of absent record of appeal in the sense of the premise of the Supreme Court in ***Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*** [2015] eKLR at paragraph 41 set out above, that "*Without a record of appeal a Court cannot determine the appeal cause before it*" as the Judgment of the trial court was attached in the record of Appeal, and in the understanding of the procedure law, a decree is the formal expression of the judgment. In essence, the determination of the trial court which is the decision appealed from is fully set out in the judgment of that court, and it is that essence which the appellate court should consider in hearing the appeal. The court is not hindered by the lack of the formal expression of the decree if the full judgment of the trial court is exhibited in the record of appeal, and this is the essence of the Order 42 rule 13 (4) (f) of the Civil Procedure Rules, which requires attachment only of "***judgment, order OR Decree appealed from.***"

11. The rules of procedure must remain the *maidens*, and not *mistresses*, in the administration of justice, and justice is not a "cloistered virtue" in the words of Lord Atkin ***(Ambard v Attorney-General for Trinidad and Tobago*** [1936] AC 322, 335) that ***"justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful…comments of ordinary men"***. Ordinary men considering the striking of an appeal because of breach of a rule for attachment of the ***decree*** in addition to the **Judgment** of the Court, which is already exhibited in the Record of Appeal would find such a technical requirement a superfluity and an absurdity and make it difficult for them to respect such a position as a justice proposition.

Delay in filing of the appeal

12. It would appear that the 2-4 respondents' objection hereon at para. 38 of their submissions herein was based on the date stamping of a copy of the Memorandum of Appeal filed in the lower court file as 12/1/2016, when the Memorandum of Appeal, **which was already filed in the High Court at Kabarnet on 3rd December 2015 as Appeal No. 02 of 2015,** is shown to have been received by the trial court at Eldama Ravine as part of an affidavit in support of a Notice of Motion dated 12th January 2016 filed in the test suit PMCCC No. 22 of 2013 for stay of execution pending appeal seeking specific orders as follows:

"**NOTICE OF MOTION**

c. THAT this Honourable Court be pleased to stay the execution of the judgment/decree obtained herein pending the hearing and determination of the applicant's appeal **filed at the High Court of Kenya at Kabarnet as Civil Appeal No.02 of 2015, Civil Appeal NO.03 of 2015 and Civil Appeal No.04 of 2015.**

d. THAT this Court be pleased to order stay of execution of the judgment/decree on SPMCC No. 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54 of 2013."

Clearly, the appeals were filed within the 30 days period allowed under the rules of court and I do not find merit in this objection. No objection may also be made that the Memorandum of Appeal is made in reference to suit no. 49 of 2013 instead of the test suit PMCCC NO. 22 of 2013 in which the court's determination of the awards in all the 30 suits particularized therein was made, as that is the suit whose decision made in the test suit is appealed from in this appeal. The object of the notice of appeal and memorandum of appeal is, respectively, to give notice of intention to appeal and the grounds therefor properly identify the decision, or part of the decision, from which the Appeal is preferred. There is no embarrassment in the reference to suit no. 49 of 2013 as it the particular suit of the 30 suits within the test suit PMCCC NO. 22 of 2013 against which this Appeal No. 02 of 2015 was lodged, and the objection thereon has no merit.

Principles for appellate interference with award of damages

13. The interference of an award of damages by a trial court is justified on the well known principle of inordinately high or low award as to amount to an unreasonable estimate or plain error and misapprehension of evidence in the assessment of damages popularized by ***Bhutt v. Khan*** (1981) KLR 349 cited in ***Shabani v. City Council of Nairobi*** (1985) KLR 516, 518-9 as follows:

> "The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in **Butt v Khan**, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:
>
> > **"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**
>
> ***See* also Kemfro Africa Ltd t/a Meru Express Service (1976) v. A. M. Lubia & Olive Lubia** (1982-88) 1 KAR 727.
>
> **Failure to call for submissions on possible awards of damages**

14. The appellant urged the court as follows:

> "5.2 **Whether the learned magistrate erred in law and fact by determining the matter without allowing the appellants to file their submissions on quantum of damages on the matters in this series & whether the learned magistrate erred in law and fact by giving an award which was extremely high without regard to decided cases.**
>
> 5.2.1 The learned magistrate in her judgment stated that the Appellant herein failed to submit on the issue of quantum in the test suit. Your lordship, at the time the matter was being mention for purposes of confirming whether parties have filed their respective submission, the learned magistrate went ahead and delivered her judgment.
>
> 5.2.2 The learned magistrate in paragraph 40 of the said Judgment was quick to note that all parties failed to submit on quantum. My Lord, during trial, Civil suit No. 22 of 2013 was selected as a **test suit for purposes of determining liability only**. The learned magistrate went ahead and determined the matter without allowing the appellant to file their submissions on quantum of damages. It is our humble submissions that by the learned magistrate not allowing the Appellant file their respective submissions on quantum of damages, the Appellant's right to fair hearing as enshrined under Article 50 of the Constitution of Kenya, 2010 was infringed.
>
> 5.2.3 Further, the learned magistrate while delivering her judgment, failed to indicate which authorities she relied on when she awarded the 1st Respondent Kshs.1,200,000/=. We submit that the judgment falls short of the required procedure as the said judgment fails to set out the points of determination, the decision.
>
> 5.2.4 We submit that the learned Magistrate did indeed erred in law and in fact by determine a matter without allowing the Appellants to file their submissions. Your lordship, even though awarding of general damages is in the discretion of the court, the same has to be done with regard to decided cases. This was not the case herein. **It is also our humble submissions that the amount awarded by the learned magistrate was inordinately high and the same should be set aside and substituted with a reasonable amount."**

15. The 1st respondent played down the need for submissions on quantum as follows:

> "As to whether it was necessary to file submissions to guide the magistrate to arrive at a just conclusion we submit that it was not, and the magistrate once she satisfied that indeed the plaintiff's 1st respondent herein suffered injuries and the same were proved in the absence of any other contradicting documents or evidence she was at liberty to exercise her discretion and pronounce a judgment on quantum which she judiciously did." (sic)

16. The 2- 4 respondents responded to the appellant's submission on the point as follows:

> "33. The appellant has argued that the trial court awarded damages which was extremely high and. It is our submission that the trial court took relevant factors which were on the nature of injuries of the plaintiffs and doctors' opinion when it awarded general damages.
>
> 34. It is clear that the judgment of the trial court, referred to the medical report. It is therefore clear us that the trial court considered the evidence on record including the medical report before making a determination.
>
> 35. Although counsel for the appellant faulted the trial magistrate for not taking into account the appellant's submission on quantum, we do not find anything in the doctor's opinion that would have made the trila court arrive at a different decision from the one it reached. The appellant did not adduce other medical evidence to show that he doctor's opinion had changed but which the trial court had failed to take into account or had ignored to warrant this court's interference."

17. As I held in the related appeal KBT HCCA No. 27 of 2017, although it was desirable that the trial court should have invited submissions on quantum to guide it in the assessment of damages is not fatal to the awards because firstly, section 79A of the Civil Procedure Act has insulated the award of the trial court in the words as follows:

> **"79A. No decree to be altered for error not affecting merits or jurisdiction**
>
> No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or **any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.**
>
> [Act No. 10 of 1969, Sch.]"

18. Secondly, the award of the trial court may only be interfered with if there is an error in principle, misapprehension of the relevant evidence or an assessment so inordinately high or low as to be an erroneous estimate thereof. See ***Butt v. Khan,*** supra.

19. Thirdly, in assessment of damages for personal injury the trial court has discretion only bound by need to observe principles for the award of damages set out in ***Southern Engineering Company Ltd. v. Mutia*** (1985) KLR 730 as follows:

> **"The measurement of the quantum of damages is a matter for the discretion of the individual judge which has to be exercised judicially** *and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant [to] the case in question."*

20. And in doing so, the trial court was only obliged to ensure that it gave an comparable to like awards made by court in like injuries, in words of Lord Morris in ***H. West & Son v. Shephard*** (1964) AC 326 –

> "**[I]t is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.**"

See also ***Kigagari v. Aya*** (1985) KLR 273, where it was held that:

> "In awarding damages for personal injury, **the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases** and avoid the effect of making insurance cover and fees unaffordable for the public."

See also ***Arrow Car Ltd -vs- Bimomo & 2 Others*** **(2004) 2 KLR 101 for the same principle.**

21. The appellant cannot complain, unless it can be shown that in making the award herein the measure of damages was erroneous in the circumstances of the case, so that the failure of the court to take submissions on quantum led to an injustice manifested in an inordinately high or excessive award.

The Injury

22. The doctor PW3 testified as regards the injury of the appellant that he had suffered *"head injury with open frontal fracture."* In the medical report prepared by Dr. Obed Omuyoma on instructions by the Plaintiff it was opined, without elaboration by pointing to evidence towards such eventuality that –

> **"These injuries are a very serious condition which can lead to post traumatic epilepsy. This is a lifelong condition which needs permanent anti-convulsant medication for the rest of his life."**

23. The Doctor's report indicated Findings on examination as follows:

> "**Findings on Examination**
>
> He is in fair state of health. His vital signs are within normal limits.
>
> **Head**
>
> **He has a fresh scar on the frontal region of the head. The scar is about 4cm long. Skull X-ray shows depressed racture of the frontal region of the skull.**"

24. In reporting on the CT scan, Radiologist's report of 27/4/2013 concluded:

> **"CONCLUSION: 1. Communited depressed frontal bone fracture with orbital wall blow-out as well as frontal lobe contusion heamorrhages. 2. Moderate cerebral edema." (sic)**

25. The plaintiff was discharged on the 1/5/2013 four days after admission on 26th April 2013. The Discharge Summary showed the patient as **stable** and history and treatment as follows:

> **"The patient was brought unconscious and convulsion after he involved in a road traffic accident along Nakuru Marigat**

Highway. Sustain an open wound at the frontal area, had one episode of projectile vomiting… Patient was taken to theatre for surgical debridement.

CT scan showed depressed bone at frontal part."

26. The discharge summary indicating the condition of the patient and treatment is inconsistent with any serious injury to justify the doctor's conclusion of a propensity to "***lead to post traumatic epilepsy … a lifelong condition which needs permanent anti-convulsant medication for the rest of his life***". There was no evidence that the lifelong condition of post traumatic epilepsy would certainly result or the probability thereof was so high as to warrant an award therefor. This aspect of the report which is without evidential basis must deemed to be speculation inserted only for purposes of supporting an award based on anticipated future medical costs. The trial court appears to have been influenced by the assertion by the doctor that the injury could deteriorate, for which no basis in evidence before the court and was only speculation probably in textbook cases, for which this court does not agree to award compensation. Award of damages must be based on foreseeable loss.

27. As in ***Butt v. Khan***, supra, the trial court herein misapprehended the effect of medical evidence and *"had been unduly influenced by the possibility of epilepsy…."* Shorn of its unfounded conclusion of possibility, as distinguished from probability, of epilepsy, the injury of the plaintiff was one merely one of a depressed fracture on the skull.

28. At paragraph 10 of the Plaint dated 10th July 2013, the Plaintiff/ 1st respondent claimed general damages as follows:

"10. The plaintiff will contend during the hearing hereof that as a result of the accident he sustained serious injuries and has suffered loss and damage which is attributable to the actions and/or omissions of the defendants of which the 2nd and the 5th defendants are held vicariously liable….

Particulars of injury to the Plaintiff

1. Head injury with open depressed frontal fracture.

29. Indeed, the claim for damages is in respect only of "*Head injury with open depressed frontal fracture*" as pleaded.

General Damages

30. In **Mcgregor on Damages**, (2003) 17th ed. at para. 35-043, the function of non-pecuniary heads of damages as here is set out as follows:

"The function of non-pecuniary heads of damage is very different [from the function of pecuniary heads of damage which is to ensure that the recovers, subject to the rules of remoteness and mitigation, full compensation for the loss that he has suffered.]

The concept of full compensation, central to pecuniary loss, cannot operate here. It is not possible to give full compensation as no amount in money can fully compensate for a serious physical injury: indeed with all physical injuries one is not, when arriving at a compensatory figure, comparing like with like. The best the law can do is put a monetary value upon the deprivation which the person has suffered…."

Damages for pain and suffering and loss of amenities

31. The type of damages available here are damages for ***pain and suffering***, which includes loss of amenities as observed by ***McGregor on Damages,*** ibid at para. 35-211, as follows:

"There was once a time when it could be said that there was one head of non-pecuniary damage; this was the all-embracing "pain and suffering". *Then the courts produced two further heads of damage; "loss of expectation of life" was invented in 1934, "loss of amenities of life" was coined around 1950. There were, however, grave damages in conferring an independent existence upon these two other heads of damage, as will be seen, and loss of expectation of life was statutorily abolished as a separate head in 1982. Now, therefore, there remain two heads and even these two tend meld into one another. Thus Crichton J. in* ***Povey v. Governors of Rydal School*** *said:*

"It would be possible to argue that knowledge of complete physical dependence on others is suffering rather than loss of amenity; it could I think, equally well be said that such knowledge amounted to loss of amenity."

And he did not think that in the case before him a serious effort to distinguish the two should be made. Sometimes it seems that the wheel has come full circle and that we are back at the single head of damage represented by pain and suffering. Certainly Lord Lloyd, in dealing in **Wells v Wells** with the award for non-pecuniary loss to a severely brain damaged claimant, spoke throughout only of pain and suffering. Or it may be thought, with the availability of painkilling drugs and advances in medical science generally, that it is loss of amenities that has taken over from pain and suffering as the principle head of damage. This depends upon the emphasis that is given to the term suffering. **In any event the unity of the heads of damage is emphasized by the practice of the courts today to award a single sum for the total non-pecuniary loss."**

Judgment of the trial court

32. In its Judgment in this matter, the trial court at paragraph 24 of its award held as follows:

> "**24. SPMCC No. 49 of 2013 – Charles Wanga Wanga**
>
> Particulars of injuries.
>
> i. Head injury with open depressed frontal skull fracture.
>
> The plaintiff was admitted at Nakuru Provincial hospital from 26/4/2013 to 1/5/2013 as per filed discharge summary. That he has a 4cm scar on frontal region of the head. **The doctor opines that the fracture of the skull is a very serious condition which can lead to post traumatic epilepsy and that it was a life long condition which needs permanent anti condition which needs permanent anti convulsant medication for the rest of his life and degree of injury was classified as grievous harm.**
>
> **Special damages.**
>
> ii. Medical report Ksh.5,000
>
> iii. Police abstract Ksh.200
>
> Receipt of medical report for Ksh.5,000 was duly filled.
>
> …
>
> I hereby enter judgment for the plaintiffs separately against the defendants jointly and severally as hereunder:
>
> **24. SPMCC No.49 of 2013 – Charles Wanga Wanga**
>
> i) General damages Ksh.1,200,000/-
>
> ii) special damages Ksh.5,200/-
>
> iii) costs and interest at court rates."

33. The trial court did not cite any case-law authorities in arriving at the award of Ksh.1,200,000/- in general damages. In the submission of the appellant, the award was inordinately high and the court was urged without citing any case-law precedents to reduce it to a **reasonable amount.**

34. The plaintiff/ 1st respondent on the other hand, without citing any case precedents, urges as follows:

> "It is not in doubt that the 1st respondent suffered a very serious injury which in our respectful view is commensurate with the award of Ksh.1,200,000/- (one million two hundred thousand) that the trial magistrate awarded. This award is in no way inordinately high and therefore satisfies the principle that guides compensation in respect of bodily injuries."

This Court's Award on damages for pain and suffering

35. The question on quantum is, therefore, whether the award of Ksh.1,200,000/- was within compensation awards for similar injuries in decided cases. The trial court did not set out what case law authorities it had considered in arriving at the award, and the counsel for the parties in the appeal did not cite any decisions thereon either.

36. Doing the best I can as required of the court despite failure of the parties to point to comparable awards, I have considered the awards recently made by courts in similar reported cases as follows:

> **1. JULIUS CHELULE & ANOTHER V NATHAN KINYANJUI** [2013] eKLR (A. Mshila, J.) of January 2013 affirming an award of ksh.60000/- for *"a linear fracture to the skull and bruised left knee with a small cut wound."*
>
> **2. Ali Issa Ali v East African Portland Cement Company** [2016] eKLR **(B. Thuranira Jaden, J.) of October 2016 citing *Julius Chelule & another v Nathan Kinyanjui* [2013] eKLR,** and awarding Ksh.600,000/- where the appellant *"had sustained a subdural haematoma … was admitted in hospital for ten (10) days [and] Treatment included "craniology, elevation and evacuation of the haematoma" [and] Appellant healed but he was left with a "crescenteric craniotomy scar on the right frontotemporal scalp" [and] the Appellant was left with a "frontal parietal bony depression" [with] scars and the depression are permanent in nature [and] Appellant was also pre-disposed to post traumatic epilepsy due to the severe head injuries."*
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> **3. Sukari Industries Limited v. Maxwel Omondi Otieno** [2017] eKLR of January 2017 (H. Omondi, J.) affirming an award of ksh.700,000/- for injuries *"a deep cut wound on the left part, swollen limbs, a depressed skull fracture of left libia [and] blunt chest*

injury, dislocation of the left ankle joint and [where] examination also revealed the residual effect i.e. Respondent had a scar on the left ankle joint which also had limited movement and he walked with a limping joint."

4. Kyoga Hauliers (K) & another v. Philip Mahiu Nyingi [2017] eKLR (Mulwa, J.) of January 2017 affirming Ksh.1,000,000/- for **"***Cut wound on the scalp with depressed fracture of the skull and Pain and swelling of the right ankle joint", without any permanent physical disability.*

5. Telkom Orange Kenya Limited v. I S O (minor) suing through his next friend and mother J N [2018] eKLR (Majanja, J.) of December 2018 where an award of Ksh.950,000/- was reduced to Ksh.500,000/- for *"head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg"* for which the doctor had *"concluded that the child sustained serious head injuries* ***which put him at risk of developing seizures*** *as a long term complication together with disfiguration resulting from the scalp and leg scars."*

37. The injuries in ***Kyoga Hauliers (K) & another*** were more severe and the award appears to be a stand-alone award when compared with similar court awards over the same period. I respectfully agree with Majanja, J.'s consideration of the non-aggravated injury in circumstances similar to this case, when he said:

"I find that the trial magistrate erred in not considering the nature and extent of the injuries in light of the decision relied on to reach the award of Kshs.950,000/-. **The child sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future. The child did not suffer any permanent disability. Consequently, I set aside the judgment of the trial court and substitute it with an award of Kshs. 500,000/- as general damages."**

38. On the principle of comparable awards for comparable injuries, I find that the injury herein suffered by the plaintiff being, as pleaded "*Head injury with open depressed frontal fracture"* may compensated by an award of **Ksh.500,000/-,** and accordingly find the trial court's award of Ksh.1,200,000/- to be inordinately high as to amount to an erroneous estimate thereof as to justify the appellate court on the principle of ***Butt v. Khan,*** supra, to interfere with the trial court's award.

39. This court, therefore, makes an award for **Ksh.500,000/-** for pain and suffering and loss of amenities.

Special damages

40. It is trite law that special damages must be specifically pleaded and proved. From the evidence of the Plaintiff PW1, it was clear that a medical report and receipt therefor were produced as Plaintiff's Exhibits 4A & B, and they had specifically been pleaded in the Plaint. The award of special damages in the sum of Ksh.5000/- was properly awarded. A receipt for payment of the police abstract which was pleaded in the sum of Ksh.200/- was not produced and the same will be discounted.

Orders

41. Accordingly, for the reasons set out above, the court sets aside the finding of the trial court on liability and substitutes therefor judgment for the plaintiff 1st respondent against the defendants in the ratio of **50:50** against the 1st - 3rd defendants on the one hand and the 4th and 5th defendants on the other hand, which finding shall apply to all the cases related to this test suit, as determined in the appeal KBT. HCCA NO. 27 of 2017 (formerly KBT HCCA NO. 03 of 2015) from the said test suit.

42. The Court sets aside the award of the trial court for general damages in the sum of Ksh.1,200,000/- for pain and suffering and loss of amenities, and substitutes therefor an award of damages in the sum of **Ksh.500,000/=** only.

43. Special damages although pleaded at Ksh.5,200/= were proved at **Ksh.5,000/=** and the latter sum is therefore awarded in special damages.

44. There shall, therefore, be damages in favour of the 1st respondent in the sum of **Ksh.505,000/=,** together with interest and costs in the trial court.

Costs of the appeal

45. It is clear that it is the trial court that defaulted to take submissions on quantum of damages, and the court therefore, makes an order that each party shall bear its own costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kinyanjui & Co. Advocates for the Appellant.

M/S Keboga & Co. Advocates for the 1st Respondent.

M/S Arusei & Co. Advocates for the 2nd, 3rd and 4th Respondents.