



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 436 OF 2013**

**JANE WANJIKU NG'ANG'A.....PLAINTIFF**

**VERSUS**

**BIN COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**MOSES MWITI KIGUNDA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In her Complaint dated 14<sup>th</sup> October 2013 and filed on 15<sup>th</sup> October 2013, the Plaintiff sought judgment against the Defendants herein, jointly and severally, for the following reliefs:-

- a. **Special damages**                      **Kshs 5,670,046/=**
- b. **General damages**
- c. **Costs of this suit**
- d. **Interest on (a), (b) and (c) above**
- e. **Any other relief that this Honourable Court may deem fit to grant.**

2. Her List and Bundle of Documents and Witness Statements were attached to the said Complaint. Her Statement of Issues was dated 27<sup>th</sup> March 2017 and filed on 29<sup>th</sup> March 2017. She filed her Further List of Documents dated 10<sup>th</sup> September 2018 on 19<sup>th</sup> September 2018.

3. On the same date of 19<sup>th</sup> September 2018, she filed a Notice of Motion application also dated 10<sup>th</sup> September 2018 seeking to amend her Complaint. Initially, the Defendants had opposed the said application. The same was subsequently allowed unopposed on 11<sup>th</sup> October 2018. The Plaintiff filed her Amended Complaint on 18<sup>th</sup> October 2018 itemising the particulars of the special damages.

4. Pursuant to the court's directions of 14<sup>th</sup> October 2019, on 8<sup>th</sup> November 2019, she filed further Witness Statements cross-referenced to the indexed and paginated bundle of documents.

5. On their part, the Defendants entered appearance on 20<sup>th</sup> November 2013. Their Statement of Defence, List of Witnesses and List of Documents were all dated and filed on 2<sup>nd</sup> December 2013. Their Amended Statement of Defence was dated 31<sup>st</sup> October 2018 and filed on 14<sup>th</sup> November 2018. They did not file any additional documents pursuant to the aforesaid court's directions of 14<sup>th</sup> October 2019.

6. The Plaintiff's Written Submissions were dated and filed on 26<sup>th</sup> February 2020 while those of the Defendants were dated 12<sup>th</sup> May 2020. The Judgment herein is based on the said Written Submissions which they both relied upon in their entirety.

**LEGAL ANALYSIS**

7. The Plaintiff's Statement of Issues for determination by the court were as follows:-

a. Did an accident occur on 1<sup>st</sup> November 2016 involving the Plaintiff's Motor Vehicle Registration Number KBH 876K and the 1<sup>st</sup> Defendant's Motor Vehicle Registration Number KAG 380R?

b. Was the 2<sup>nd</sup> Defendant the driver of Motor Vehicle Registration Number KAG 380R and if so, was he an agent, servant and/or employee of the 1<sup>st</sup> Defendant?

c. Was the 2<sup>nd</sup> Defendant negligent in the manner he drove, managed and/or controlled Motor Vehicle Registration Number KAG 380R?

d. If so, did the same result in the injury or loss to the Plaintiff?

e. Was the Plaintiff contributory negligent to the accident (sic), and if so did such negligence substantially contribute to the accident?

f. Does the doctrine of *res ipsa loquitur* apply in the circumstances of the subject matter of this suit?

g. Are the allegations in both the Plaintiff and the defence of negligence, loss, injury and damage caused and the particulars hereof connect, and if so, who is responsible?

h. Is the 1<sup>st</sup> Defendant vicariously liable?

i. Is the Plaintiff entitled to the prayers sort (sic) regarding special damages/

j. Is the Plaintiff entitled to general damages and if so what is the quantum (sic) thereof?

k. Who should be condemned to meet the costs of this suit?

8. The issues that had been placed before this court were really to determine:-

a. Who was liable for the material accident?

b. What the quantum that was awardable to the Plaintiff herein as compensation for loss of her Motor Vehicle Registration Number KBH 876K, the bodily injuries that she sustained and the special damages, if at all?

c. Who was liable to pay the costs of the suit herein?

9. The court therefore deemed it prudent to address the said issues under the following distinct and separate heads shown hereunder.

## **I. LIABILITY**

10. The Plaintiff herein called Gichambire Gikenya (hereinafter referred to as "PW 1"), No 58516 PC Fairfax Masinde Sindani (hereinafter referred to as "PW 2") and Stephen Mbugua (hereinafter referred to as "PW 3") as witnesses to support her case that the accident did indeed occur on 1<sup>st</sup> November 2016 as she had contended. Together with her witnesses, they adopted their respective Witness Statements as their examination-in-chief.

11. The Defendants did not call any witnesses to testify in the matter herein. The Plaintiff's evidence and that of her three (3) witnesses regarding the occurrence of the accident herein remained uncontroverted and/or unrebutted by the Defendants herein. In any event, in their Written Submissions, the Defendants conceded that the occurrence of the subject accident was not contested.

12. The Defendants did not also rebut the evidence that was adduced by the Plaintiff that the 2<sup>nd</sup> Defendant was the driver of Motor Vehicle Registration Number KAG 380R (hereinafter referred to as the "1<sup>st</sup> subject Motor Vehicle") and/or that the 1<sup>st</sup> Defendant having been the owner of the said 1<sup>st</sup> subject Motor Vehicle, it was thus vicariously liable for the 2<sup>nd</sup> Defendant's negligence.

13. As Issue Nos (a), (b) and (h) of the Plaintiff's Statement of Issues had now been answered in the affirmative, no value would be added in analysing the evidence relating to the same.

14. Issues Nos (c), (e) and (f) of the Plaintiff's Statement of Issues on the question of who was liable for the accident herein, were dealt with together as they were related.

15. The Plaintiff submitted that the failure by the Defendants to call any witnesses to rebut her case was tantamount to throwing a wet towel in the ring. It was her submission that the Defendants ought to be held hundred (100%) per cent liable for the loss that she suffered.

16. On their part, the Defendants argued that the Plaintiff's failure to file a Reply to their Amended Statement of Defence meant that she had admitted the contents of Paragraph 6 therein where they had attributed the causation of the accident solely on her and/or that she substantially contributed to the said accident as a driver of Motor Vehicle Registration Number KBH 876K (hereinafter referred to as the 2<sup>nd</sup> subject

Motor Vehicle).

17. In this regard, they placed reliance on the case of **Mount Elgon Hardware vs United Millers Ltd [1996] eKLR** where the Court of Appeal held that as the appellant therein had failed to traverse the particulars of negligence that had been averred in the respondent's defence, the learned judge therein was perfectly entitled to conclude that the appellant therein had admitted to the negligence that was attributed to it in the said respondent's defence.

18. It was therefore their submission that the Plaintiff's suit ought to be dismissed on this ground and/or in the alternative, liability be apportioned at 50%: 50% between them and her.

19. According to the Plaintiff, on the material day, at about 9.00 pm, she was driving the 2<sup>nd</sup> subject Motor Vehicle along Outer Ring Road when the 2<sup>nd</sup> Defendant drove the 1<sup>st</sup> subject Motor Vehicle on her lane while overtaking other motor vehicles and collided head on with her said 2<sup>nd</sup> subject Motor Vehicle. Her evidence was that she could not have swerved to avoid the collision with the 2<sup>nd</sup> Defendant herein because there were other oncoming vehicles in the opposite lane and there were guard rails at the bridge where the accident occurred.

20. She testified that she was issued with a Police Abstract Report. The same was adduced in evidence by PW 2. It showed that the 2<sup>nd</sup> defendant was charged at Makadara Law Courts in **Traffic Case No 2274 of 2012** for dangerous driving. He was found guilty, was convicted and fined Kshs 30,000/= and in default, to serve eighteen (18) months imprisonment.

21. PW 2 told this court that he took over investigations from the traffic police officer who initially visited the scene of the accident on the material date. His testimony was that after he completed his investigations, he charged the 2<sup>nd</sup> Defendant with the offence of dangerous driving contrary to Section 47(1) of the Traffic Act.

22. During cross-examination, he stated that he did not come with the police file as it had been locked by the DTO who on the day of trial was covering a Presidential function.

23. Whereas as the Defendants had argued that the Plaintiff had admitted the contents of Paragraph 6 of their Amended Statement of Defence, the understanding of this court was that such admission was qualified. The fact that a plaintiff had failed to file a reply to a defence did not automatically imply that he or she had admitted the facts in a defence if there was strong evidence such as proof of a conviction that had been adduced in evidence to demonstrate that the defendant was indeed culpable of the assertions that had been made by a plaintiff.

24. It was the considered view of this court that despite the Plaintiff not having filed a reply to the Defendants' Amended Statement of Defence, the Defendants could not escape liability as it was not contested that the 2<sup>nd</sup> Defendant was in fact charged, found guilty, convicted and fined Kshs 30,000/= or in default to serve eighteen (18) months imprisonment. There was no proof that was furnished to this court to show that the said conviction and sentence was appealed against and set aside and/or vacated. For all intents and purposes, the judgment of the Traffic Court remained in force.

25. Notably, Section 47A of the Evidence Act Cap 80 (Laws of Kenya) provides as follows:-

**“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”**

26. Having said so, such conviction does not in turn imply that the complainant in a traffic case would escape liability. Indeed, the standard of proof in criminal cases is beyond reasonable doubt and it is higher than in civil cases which demand that the standard of proof be on a balance of probability. In civil case, courts are called upon to interrogate if a complainant in such traffic case contributed to the causation of the accident.

27. Upon interrogation and analysis of the evidence that was adduced during trial, this court came to the conclusion that the Plaintiff could not have taken any evasive action to avoid colliding head on with the 1<sup>st</sup> subject Motor Vehicle for the reason that the accident occurred at a part of the road where there was a bridge which had guard rails and there were oncoming vehicles in the opposite lane. The Plaintiff was a lame duck and her fate was sealed due to the lack of options to take any evasive action to avoid the causation of the accident herein.

28. The fact that the Defendants did not adduce any evidence to rebut the Plaintiff's assertions on how the accident on the material date occurred persuaded this court to find and hold that the accident was solely caused by the 2<sup>nd</sup> Defendant and that the 1<sup>st</sup> Defendant was vicariously liable for the 2<sup>nd</sup> Defendant's negligence. This court therefore attributed liability against the Defendants on a hundred (100%) per cent basis.

## **II. QUANTUM**

29. Issues Nos (d), (g), (i) and (j) were dealt with under the following distinct sub-heads.

### **A. MATERIAL DAMAGE CLAIM**

30. In her testimony, the Plaintiff stated that her motor vehicle, the 2<sup>nd</sup> subject Motor Vehicle was extensively damaged as a result of the accident. She averred that she engaged a private surveyor who she paid to assess the loss. She added that as at the time of recording her

statement, the said Motor Vehicle had never been repaired and was out of use.

31. During cross-examination, she stated that by the time she had claimed Kshs 2,500,000/= for the said 2<sup>nd</sup> subject Motor Vehicle, she had not seen the Assessor's Report.

32. PW 3 was an Assessor, a City & Guild Part 2. He stated that the insured's name had been given as Jane Wanjiru Ng'ang'a. He admitted that he was not given any documents such as a logbook to show that the Plaintiff was the owner of the subject 2<sup>nd</sup> Motor Vehicle. He gave a pre-accident value of Kshs 500,000/= and a salvage value of Kshs 80,000/=. He explained that the total loss value of the said Motor Vehicle was Kshs 420,000/= being the difference of the pre-accident and salvage values.

33. On their part, the Defendants submitted that the Plaintiff did not produce either a logbook or a Copy of Records from the Registrar of records to prove her ownership of the 2<sup>nd</sup> subject Motor Vehicle and consequently, she failed to prove ownership of the said 2<sup>nd</sup> subject Motor Vehicle. In this regard, they placed reliance on the case of **Thuranira Karauri vs Agnes Ncheche [1997] eKLR** where the Court of Appeal held that as the defendant therein had denied ownership, it was incumbent upon the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry therein.

34. It was their argument that the Assessment Report named Jane Wanjiru Ng'ang'a as the insured while the Police Abstract Report described the Plaintiff as the driver of the subject 2<sup>nd</sup> Motor Vehicle. They were categorical that both documents did not prove her proprietary rights over the said Motor Vehicle.

35. They added that in any event, the claim of Kshs 1,500,000/= as shown in the Plaintiff had not been proved for the reason that PW 3's testimony and Report, it showed that the pre-accident value was Kshs 500,000/= while the salvage value was Kshs 80,000/= giving a total loss value of Kshs 420,000/=. They pointed out that the Plaintiff had in fact disowned the said figure of Kshs 1,500,000/= when she was cross-examined. They submitted that if she had proved that she was the owner of the said Motor Vehicle, she would have been entitled to Kshs 420,000/= as aforesaid but because she had not, they urged this court to dismiss the said claim.

36. In her Written Submissions, the Plaintiff conceded that she was entitled to the sum of Kshs 420,000/= and not the sum of Kshs 1,500,000/= that she itemised under Particulars of Special damages. This was the legal and factual correct position. Having said so, the question that arose was whether or not she proved that she was the owner of the 2<sup>nd</sup> subject Motor Vehicle.

37. The Assessment Report (Plaintiff's Exh 6 pg 151) which the Plaintiff she relied upon to prove that she owned the 2<sup>nd</sup> subject Motor Vehicle showed that the insured was Jane Wanjiru Ng'ang'a. There was no Insurance Certificate to confirm who the insured of the said 2<sup>nd</sup> subject Motor Vehicle was. The name of the insured therein and the Plaintiff's name were different. Further, the name showed in the Police Abstract Report (Plaintiff's Exh 3 pp 1-2) was Jane Wanjiku.

38. It was incumbent upon the Plaintiff to have adduced evidence to prove that she indeed owned the 2<sup>nd</sup> subject Motor Vehicle. Neither the Police Abstract Report nor the Assessment Report could prove her proprietary rights of the 2<sup>nd</sup> subject Motor Vehicle. It was her case and the burden of proof was on her to demonstrate the same as required under Section 107 (1) of the Evidence Act that stipulates as follows:-

**“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.”**

39. Without belabouring the point, this court found and held that the Plaintiff had not discharged her evidentiary and legal burden of proof and as a result her claim for loss of the 2<sup>nd</sup> subject Motor Vehicle and loss of user was not merited and could not be sustained. The same is hereby dismissed.

## **B. INJURY CLAIM**

40. The Plaintiff testified that she sustained fractures of the leg, dislocated hip, fracture of ribs, chest breast and injuries on the face as was evidenced in Plaintiff's Exhibit 6 pg 21. She was treated at Jamaa Mission Hospital and subsequently transferred to India for further treatment. She was admitted at Jehangir Hospital on 27<sup>th</sup> June 2011 and discharged on 29<sup>th</sup> June 2011. She was then admitted at Indraprastha Apollo Hospital on 17<sup>th</sup> July 2011 and discharged on 22<sup>nd</sup> July 2011. She was re-admitted in the same hospital on 10<sup>th</sup> August 2011 and discharged on 16<sup>th</sup> August 2011.

41. She added that PW 1 had also noted that she sustained injuries to her breast and she therefore underwent surgery at Ladnan Hospital. She stated that PW 1 had put her permanent incapacity at forty (40%) per cent. She tendered in evidence receipts showing payment of the medical expenses and air tickets for her travel and that of her care giver to India. These were marked as Plaintiff's Exh 6 pp 3- 60 and 64-150.

42. PW 1 was the medical doctor who prepared the Medical Report. He had also taken care of the Plaintiff while she was undergoing treatment. He tendered in evidence his Medical Report and receipt showing payment of his costs for attending court. The same were marked as Plaintiff's Exhibit 1 pp 61-63 and Plaintiff's Exhibit 2 respectively.

43. On being cross-examined, he conceded that he had not indicated the number of ribs that had been fractured and that he had not specified which bone in the hand had been fractured. He testified that the figure for hip replacement in the sum of Kshs 500,000/= was not a quotation but rather it was an estimate of the number of hip replacements that the Plaintiff might require. He pointed out that he had used the word “may” to connote that the hip replacement would only be done if it became necessary. He opined that it was unlikely that her disability would improve because there was nothing to make it improve.

44. The Plaintiff quantified her claim as follows:-

<b>a. Future medical expenses</b>	<b>Kshs 3,000,000/=</b>
<b>b. Loss of earning capacity</b>	
<b>200,000 x 12 x 3</b>	<b>Kshs 7,200,000/=</b>
<b>c. Damages for pain and suffering</b>	<b>Kshs 5,000,000/=</b>
<b>d. Damages for loss of amenities</b>	<b>Kshs 3,000,000/=</b>

45. In support of her claim, she placed reliance on the cases of **Duncan Kimathi vs David Ngugi & 3 Others [2016] eKLR**, **Bernard Mutisya vs Swaleh Hashil [2017] eKLR**, **Rosemary Wanjiru vs Elijah Macharia & Another [2014] eKLR** amongst other cases. She did not, however, analyse the said cases to demonstrate their relevance to the circumstances of her case.

46. On their part, the Defendants submitted that special damages must be specifically proven. They pointed out that the Plaintiff did not provide proof of payment for the Police Abstract Report, Medical Report and several other expenses and added that despite having claimed a sum of Kshs 4,373,118.72, she had only adduced in evidence receipts in the sum of Kshs 2,694,674/=.

47. They averred that her injuries were not well set out in the Medical Report making the assessment of damages difficult and that the Police Abstract Report was clearer as it showed her injuries as separation of pubic symphysis, fracture distal part of the left radius, fracture mid shaft of right femur and fracture left acetabulum.

48. It was their further submission that it was improper and irregular for the Plaintiff to have claimed for loss of amenities and pain and suffering separately and that the amounts claimed were grossly exaggerated. They argued that a sum of Kshs 450,000/= was reasonable compensation. They relied on the cases of **Civicon Limited vs Richard Njomo Omwanja & 2 Others [2019] eKLR** and **Jitan Nagra vs Abidnego Nyandusi Oigo [2018] eKLR** where the appellate court reduced the quantum of Kshs 1,000,000/= to Kshs 450,000/= for similar injuries that had been suffered by the Plaintiff herein.

49. They also submitted that parties are bound by their pleadings and could not depart from them. They therefore submitted that in view of the fact that the Plaintiff had not pleaded for loss of consortium, future medical expenses and loss of earnings in her Plaint, no damages could be awarded under those heads.

50. Notably, the Plaintiff had claimed under several awards. The court found it prudent to address its mind to the claims that had been pleaded in her Plaint first.

51. Whereas the Defendants had submitted that the Plaintiff had not provided proof of Kshs 200/= for the Police Abstract Report, this court took judicial notice that that was the amount that was normally incurred for obtaining the said Police Abstract Report. Notably, PW 2 had also made reference of the said Police Abstract Report. The court therefore accepted the said figure as having been proven despite there not having been a receipt.

52. There was no evidence that the Plaintiff incurred a sum of Kshs 5,000/= in respect of the expenses for obtaining the Medical Report. The same could not therefore be awarded as all special damages must be specifically proven as was correctly pointed out by the Defendants.

53. On the issue of medical and transport expenses, the court noted that the Plaintiff had claimed a sum of Kshs 5,664,846/=. She did not, however, tabulate the same making the task of knowing how the same was computed very onerous and difficult on the part of the court. She just annexed copies of receipts and invoices that ran into tens of pages and failed to separate the same. On the other hand, the Defendants itemised the expenses as against the invoices that were submitted which went a long way in assisting the court to compare what it found to have been payable and what the Defendants had submitted would be payable.

54. Having looked at Plaintiff's Exhibit 6 pp 67, 68, 69, 70 and 72, the court found the total amount paid at Kenyatta National Hospital to have been Kshs 1,506,000/=. The amounts in Plaintiff's exhibit 6 pp74, 76, 82, 83, 84, 100, 101, 102, 115, 116, 117, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 141 and 143 came to Indian Rupees 1,701,650/=. The Plaintiff did not give the court the exchange rate. The court therefore adopted the exchange rate of 2.16 that was used by the Defendants bringing the amount to Kshs 3,675,564/=. The court also adopted the amount of air tickets at Kshs 114,331/= as had been given by the Defendants as the Plaintiffs never gave any exchange rate for the dollar. The total of these expenses came to Kshs 5,295,564/=.

55. The court did not insist on the correlation between the invoices and the receipts as what was proof of having expended the monies were the receipts and not the invoices. Having said so, it noted that the Plaintiff was also treated for breast abscess during her trip to India. It was difficult to ascertain if the said breast abscess was as a result of the material accident and/or to establish what expenses were for the injuries that she sustained in the road traffic accident and those that she incurred in the treatment of the breast abscess. Indeed, neither the Plaintiff nor PW 1 adduced any evidence to connect the said breast abscess to the said accident.

56. Further, the court had difficulties in establishing what tests went towards the treatment following the said accident as there were tests conducted for HIV, Liver, Echo cardiograph amongst other tests. This court was therefore not satisfied that the Plaintiff had proved that all the expenses she incurred in India were solely for the injuries that she sustained at the material time of the accident.

57. Notably, when she was cross-examined, she confirmed that National Insurance Hospital Fund (NHIF) paid Kshs 200,000/= out of her

KNH hospital bill. Doing the best in the circumstances of this case, this court found that a sum of Kshs 2,647,782/=, being fifty (50%) per cent Kshs 5,295,564/=, which was almost the same amount of Kshs 2,694,679/= the Defendant had proposed was awardable, was most reasonable to compensate the injuries the Plaintiff sustained herein. However, as the Defendants had conceded that Kshs 2,694,679/=, which sum was slightly higher than the figure the court arrived at, had been specifically proven, this court adopted the same.

58. Turning to the question of general damages, the court agreed with the Defendants that the Plaintiff could not claim for loss of amenities and for pain and suffering separately. The normal practise is to award general damages for loss of amenities, pain and suffering.

59. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

60. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

61. Taking into account the serious injuries that the Plaintiff suffered, it was the considered view of this court that a sum of Kshs 1,500,000/= would be reasonable compensation for general damages for loss of amenities, pain and suffering. She was admitted in several hospitals for a long period and underwent several surgeries. She was also left with forty (40) per cent permanent incapacity.

62. In arriving at the said figure, this court had due regard to the following cases:-

1. In the case of **Gilbert Nicholas Otieno -vs- Oil Crop Development co. Ltd (2009) e KLR**, the 3<sup>rd</sup> plaintiff therein sustained fracture dislocation of the patella bone, fracture of the right hip joint, superior and interior pubic *rumia* and fracture of the right humerus. He was awarded Kshs 500,000/= damages for pain and suffering in 2009.

2. In the case of **Jeniffer Jebichi Komen v Norah Nambuye Wasike [2017] eKLR**, the respondent therein had sustained displaced fracture of the left acetabulum, left iliac fracture, oblique fracture of the proximal phalanx of the left 4<sup>th</sup> finger. She was admitted in hospital for about ten (10) days. She was found to have reduced function of the left finger, restrictions in the left hip joint movements, developed arthritis of the left hip joint due to pain. She would require arthroplasty (hip replacement at a cost of Kshs.500,000/=). Permanent disability was assessed at forty (44%) per cent. In 2017, the appellate court reduced the award of general damages from Kshs 1.000,000/= to Kshs 700,000/=.

3. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of the femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

63. All the other claims for future medical expenses, loss of consortium and loss of earning capacity were not payable because they were not only not pleaded in the Plaint, they were also not proven. They are all therefore hereby dismissed.

#### **DISPOSITION**

64. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's claim was partially successful. It is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendants herein, jointly and severally, for the sum of Kshs 4,194,879/= made up as follows:-

<b>General damages</b>	<b>Kshs 1,500,000/=</b>
<b>Special damages</b>	<b><u>Kshs 2,694,879/=</u></b>
	<b>Kshs 4,194,879/=</b>

Plus interest thereon on general damages at court rates from date of judgment and interest on special damages from the date of filing suit until payment in full.

65. As the Plaintiff only partially succeeded in her claim with the Defendants having been able to disprove several claims, it is hereby directed that each party will bear its own costs. The court wishes to point out that if any costs were to be awarded to the Plaintiff herein, then the same would have been on the lower court scale as this was a matter that was within the pecuniary jurisdiction of the lower court.

66. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of September 2020**

**J. KAMAU**

**JUDGE**