



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CIVIL APPEAL NO. 11 OF 2019**

**CROWN BUS SERVICES LTD.....1<sup>ST</sup> APPELLANT**

**PETER KHAKALI .....2<sup>ND</sup> APPELLANT**

**AINUS SHAMSI HAULIERS LTD.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**BM (Minor suing through his mother & Next Friend)SMA).....RESPONDENT**

**[Being an appeal from the Judgment of the Principal Magistrate’s Court at Eldama Ravine PMCC. No. 99 of 2017 delivered on the 26<sup>th</sup> March 2019 by Hon. J. Nthuku, SRM/**

**JUDGMENT**

**Introduction**

1. This is an appeal from the judgment of the Principal Magistrate’s Court at Eldama Ravine (J. Nthuku, SRM) delivered on 26<sup>th</sup> March 2019 in a personal injury claim PMCCC No. 99 of 2017 arising from a motor traffic accident on 27/7/2017 in which the child plaintiff aged 5 years at the time of the accident lost his right leg above the knee by amputation and the trial court entered judgment against the appellants as follows:

**“I therefore enter judgment for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally as follows:**

- 1. General Damages Ksh.3,000,000/-;**
- 2. Loss of earnings – Nil;**
- 3. Cost of artificial limb Ksh.1,300,000/-;**
- 4. Special damages Ksh.243,776/-**

**Total 4,543,776/-**

**The defendants will also bear the costs of this suit together with interests at court rate. The interest on the general damages will start running today until payment in full but the interest on special damages will start running from the date of filing this suit until payment in full.”**

2. The only evidence on the injury supported by hospital discharge summary and P3 form was given by the examining doctor Wellington Kiamba PW1 that on 23/10/2017 examination of the child, he had found him to have sustained amputation of the right leg above the knee and couldn’t walk without crutches; that he needed an artificial limb at a cost of Ksh.100,000/- replaced every 3-5 years; that he had reexamined the child on 30/8/2018 and found him to have healed well after the amputation above the knee and to have been fitted with an artificial limb; and he assessed the disability at 70%.

**The appeal**

3. The Appellants filed a Memorandum of Appeal dated 25<sup>th</sup> April 2019 setting out the grounds of appeal as follows:

1. **The trial magistrate erred in fact and in law, in awarding the respondent Ksh.3,000,000/- as general damages, which award was too excessive in the circumstances.**
2. **The learned trial magistrate erred in law and in fact in failing to consider the injuries sustained by the Respondent, evidence adduced on the same and authorities supplied on similar injuries hence reaching an erroneous decision.**
3. **The learned magistrate erred in law and in fact in awarding Ksh.1,300,000/- for cost of an artificial limb which award was excessive in the circumstances.**
4. **The learned Magistrate erred in law and in fact in ignoring the appellant's submissions on the cost for artificial limb and subsequently arrived at an erroneous decision.**
5. **The trial Magistrate erred in law and in fact in failing to accord due regard to the appellants' submissions and authorities on quantum on applicable principles for assessment of damages."**

4. The Appellants filed the Record of Appeal dated 28<sup>th</sup> July 2020 and the Respondent filed a Supplementary Record of Appeal dated 3<sup>rd</sup> August 2020.

#### **Submissions**

5. The parties filed written submissions on the appeal. As urged by the appellants "the Memorandum of Appeal contains five grounds of appeal that can be summed up into one issue of quantum." The court has considered the respective submissions of the parties – for the appellants dated 9<sup>th</sup> September 2020, filed by M/s Kimondo Gachoka & Co. Advocates and for the respondents dated filed by 25<sup>th</sup> September 2020, filed by M/S Gekongá & Co. Advocates.

#### **Judgment of the trial court**

6. In its Judgment, the trial court found the child, aged 4 years, –

"was involved in the said accident and sustained an amputation of the leg above the knee. I saw him in court with an artificial limb (sic). On general damages, guided by the case of HCCA 163 of 2015 **Macharia Francis Mundi & Another vs. Joel Wanje**, I award Ksh.3,000,000/- for the amputated leg.

For loss of earning capacity, the child's mother simply said the child can't play with other children. The Court hasn't been told what the child wanted to become in life and how that has been changed by this accident. In the case of **Cecilia Mwangi and Another vs Ruth W. Mwangi** Civil Appeal No. 251 /1996. The court held that loss of earning is a special claim and it must be specifically pleaded and proved. This Claim in the Plaint is too vague to understand what the plaintiff is claiming whether it was loss of earning capacity or loss of earnings. I find that this child can still pursue his education and get through employment though not in as a sports person and therefore I can't award a separate sum for loss of earning capacity.

For the artificial limb (sic) the doctor said the limb needs replacement every 3-5 years. If the gods give him a life of 70 years that will mean 13 replacements at a cost of 100,000/- each giving a figure of **Ksh.1,000,000/-** and I award the same. For medical expenses.... He produced receipts for Ksh.243,776/- and I award the same."

7. In their submissions dated 18<sup>th</sup> February 2019 filed before the trial court, the 1<sup>st</sup> and 2<sup>nd</sup> appellants through M/S Kairu & McCourt Advocates had submitted for Ksh.800,000/- general damages for loss of amenities relying on **Kisumu Concrete Products Limited v. Kennedy Onyango Olwa** (2016) eKLR allegedly "where the High Court upheld the trial magistrate's award of Ksh.750,000/- for injuries similar to the plaintiff's." The appellants also urged relying on **Cecilia Mwangi** case, supra, that **loss of earnings** as a special damages was not specifically pleaded and proved for the child who it was submitted "was only 4 years old when the accident occurred", and the general damage of **loss of earning capacity** was not proved on a balance of probabilities. It was concluded that "we acknowledge that the plaintiff suffered after the accident and may not be able to do things including working in the same exact way he did before the accident and before he fully recovers. This however, does not curtail him from making a decent living."

#### **Issue for determination**

8. Whether the awards of Ksh.3,000,000/- and Ksh.1,300,000/- made by the trial court, respectively as general damages for loss of amenities and costs of artificial limb, are excessive in the circumstances of the case.

#### **Determination**

Principles for appellate interference with award of damages

9. The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in **Nance v. British Columbia Electric Railway Co. Ltd.** (1951) A.C. 601, 613 and applied in East Africa by Sir K. O'Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in **Henry H. Ilanga v. M. Manyoka** [1961] EA 705, 713 as follows:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then **before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage** (Flint v Lovell, [1935] 1 K.B.), approved by the House of Lords in **Davies v. Powell Duffryn Associated Collieries Ltd.** [1942] A.C. 601.”

And see Lord Morris in **H. West & Son Ltd. v. Shephard** [1964] A. C. 326, 353 on the first proposition on non-interference.

10. The principles were restated 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) & Another v. Lubia & Another** (1987) KLR 30; (1982-88) 1 KAR 727 where it was said:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage. See **Ilanga v Manyoka**, [1961] EA 705, 709, 713 (CA-T); **Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto**, [1970] EA 414, 418, 419 (CA-K). **This Court follows the same principles.**”

See also **Paul Kipsang & Anor. v. Titus Osule Osore** (2013) eKLR.

### Principles of compensatory Damages

11. The principles for compensation for personal injury are principally three-fold that:

1. Compensation for personal injury suffered, ***so far as money can do so***, to restore the plaintiff to his position before the accident – see Lord Dunedin in **Admiralty Commissioners v. Valeria (Owners)** [1922] 2 A. C. 242, 248:

“If by somebody’s fault I lose my leg and am paid damages, can anyone in his sense say I have had **restitutio in integrum**? The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, ***so far as money can do so***, the loss which he has suffered as the natural result of the wrong done to him.”

See also **Terrell’s Law of Running Down Cases**, 3<sup>rd</sup> ed. London Butterworths (1964) at p.75, and dictum of **Lord Morris Borth-y-Gest** in **H. West & Son Ltd. v. Shephard** (1964) AC 326, 345:

**“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”**

2. Comparative awards for comparative injury – see **Kigaragari v. Aya** (1985) KLR 273 where the Court of Appeal (Hancox, Nyarangi, JJA. and Platt, Ag. JA) 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 be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”

3. Compensation figures should not be so high as to threaten the economy – See **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others** [1986] eKLR where Kneller JA considered the issue of interference with trial court’s award as follows:-

“This court, I remind myself, is only entitled to increase an award of damages by the High Court **if it is so inordinately low**

it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

(a) proceeded on a wrong principle; or

(b) misapprehended the evidence in some material respect.

See Briggs JA in Channan Singh v Channan Singh and Handa (1955) 22 EACA 129; Law JA in Butt v Khan [1982-88] 1KAR 1; Hancox JA in Mariga v Musila (1982-88) 1 KAR 507.

And a member of an appellate court when he naturally and reasonably says to himself ‘what award would I have made?’ and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. West (H) & Son v Shephard Ltd [1964] AC 326, Lord Morris of Borth -Y-Gest.

**And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. Lord Denning MR in Lim Poh Choo v Chamden and Islington Area Authority [1979] 2 All ER 910 (CA); Hancox JA Mariga v Musila (ibid)."**

### Review of Evidence

12. On a first appeal, the appellate court in accordance with *Peters v. Sunday Post Limited* (1958) EA 424 is entitled to review the evidence before the trial court as follows:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; **if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decided.** Watt v. Thomas, (1947) 1 ALL ER 582; [1947] A.C. 484, applied.”

See *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* (1968) EA 123.

13. The court will now examine the evidence before the trial court and make its conclusion before considering whether the conclusions of the trial court should stand, bearing in mind the principles for appellate interference with award of damages set in *Nance v. British Columbia Electric Railway Co. Ltd.* and restated in *Butt v. Khan, Shaban* and *Kemfro* cases.

### Conclusion

14. It is clear from the judgment of the trial court that it duly considered the submissions made by the appellant and the respondents but in the circumstance of the case preferred the authority relied on by the plaintiff as a guide on the general damages. Indeed, as is clear from its judgment the court accepted the submissions on the issue of loss of earnings and loss of earning capacity citing the *Cecilia Mwangi* case offered by the defendants. There is no merit in the ground of appeal that the trial court failed to consider the appellants’ submissions.

### General damages

15. In *C M (a minor suing through mother and next friend M N) v. Joseph Mwangangi Maina* [2018] eKLR, Meoli, J. awarded Ksh.2,000,000/- in general damages for pain and suffering for a child aged 7 at the time of the accident for amputation of the right leg, in addition to damages for loss of earning capacity of Ksh.900,000/-. The court enhanced an award of Ksh.500,000/- to Ksh.900,000/- for damages for loss of earning capacity as follows:

“42. The minor was aged 7 years at the time of the accident, was able to attend school, but by the trial date, his condition had apparently been aggravated to the extent that, he was neither able to attend school nor lived independently of his mother. The trial magistrate observed in her judgment that the proposed global award of Shs. 1 million for loss of earning capacity was “on the higher side considering that the minor was epileptic”. That almost suggests, with respect, that the Appellant minor already had a severe disability. Epilepsy need not be necessarily a disabling condition when managed by treatment, as evidenced by the Appellant’s ability to attend school and get about by his own prior to the accident.

43. The Appellant minor faces a long future of severe disability resulting from the pre-existing condition as exacerbated by the amputation of the right leg. In the *Mumias Sugar case*, the Court of Appeal allowed general damages in the sum of Shs. 500,000/- for a relatively minor (15%) disability sustained by an older plaintiff. In the instant case, I think the trial court ought to have considered the relevant fact that the Appellant minor’s epileptic condition had been medically managed to enable him continue attending school prior to the accident. And that, his situation was dramatically aggravated by the severe injuries leading to the loss of his right leg with the result that, he sustained 40% permanent disability.

44. Thus, while the sum of Shs. 1 million urged as damages for lost earning capacity may have seemed high to the trial magistrate that was due to the failure by the trial magistrate, to put the Appellant’s pre-existing condition in context and to consider it fully within the relevant facts of the case. The award was colored by a misapprehension of the evidence and circumstances surrounding the Appellant’s pre-existing condition and the real impact of the accident injuries to the Appellant’s life. This court feels justified therefore to interfere with the award of Shs. 500,000/- by setting it aside and substituting therefor **an award of Shs. 900,000/- as**

**general damages for loss of earning capacity.”**

16. The court rejected a submission for Ksh.3,000,000/-, properly in my view, for being out of line with the authorities proffered by the plaintiff taking into account the date of reckoning as the date of the judgment of the trial court as follows:

“34. General damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff – see **HALSBURY’S Laws of England 4th Ed. Reissue Vol 12(1)** at page 348, paragraph 883. I note, in that regard that the Respondent did not at the trial court cite some of the recent decisions now cited on this appeal, such as **Joyce Moraa Oyaro v Hussein Dairy Limited (2016) eKLR** and **Nelson Njihia Kimani v David Marwa and another (2017) eKLR** and **David Kigotho Iribe v John Wambugu Ndugu and Another (2008) eKLR**. Despite being an older case, the latter decision reflected an award of Shs. 1300, 000/- for pain and suffering. In all these cases, the main injury was a crushed leg leading to amputation. Thus, it is difficult to justify the Respondent’s submission that the most appropriate award in this case in 2015 was Shs. 800,000/-.

**35. Equally, an award of Shs. 3 million as urged by the Appellants on this appeal appears out of step with their own authorities. The reckoning date must be the year 2015 when the trial magistrate delivered her decision. In view of all the foregoing, I find that by failing to consider carefully the injuries of the instant Appellant, the relevant authorities representing comparable injuries, and by relying on an authority (Mumias sugar) that was not quite relevant, the trial court erred in awarded a sum of Shs.1 million as general damages.**

**36. Considering the relevant awards in the material period, the award was erroneous in so far as it did not take a proper account of the Plaintiff’s injury;** and therefore as it was inordinately low, not high as submitted by the Respondent. In the circumstances, the award of Shs. 1 million in general damages for pain and suffering must be set aside. I accordingly set it aside and substitute therefor an award of Shs.2 million as general damages for pain suffering.”

17. In this case, the trial court relied on to award Ksh.3,000,000/- in its 2019 judgment. However, it would appear, however, that the authority and those relied on by the respondent on appeal relate to slightly more severe injuries and, therefore, may have justified the higher damages for the extensive ***pain and suffering and loss of amenities of life*** in those cases. In ***Catherine Njoroge v. Bernard Njeru*** (2016 eKLR) the injury involved amputation of **the right lower limb at the hip**, fracture of the femur and fracture of the superior and anterior pubic ramus of the right bone all for which an award of Ksh.3,000,000/- was made in general damages. ***James Joseph Rughendo v. Kenya Power and Lighting Co. Ltd.*** (2011) eKLR the plaintiff suffered bilateral electrical damage to the upper limbs radial, ulna and median nerve, third degree electrical burns involving the palms of both hands at 40% burns surface; gangrene right leg just below the knee and gangrene left foot dorsal aspect, big toe and 2<sup>nd</sup> toe; right knee amputated, damages for which he was awarded Ksh.3,000,000/- in general damages. In ***Macharia Francis Mundui & another. v. Joel Wanje*** [2017] eKLR, which was relied on by the trial court, the injuries were clearly more severe as follows:

“(a) Major severe crash injury of the left leg in the region of the thigh and knee. **The leg was amputated above the knee.**

(b) Complete fracture of the left femur. This fracture healed after conservervative treatment.

(c) Extensive avulsion wound on the right thigh. He lost a lot of skin and muscles. X-rays done revealed presence of fracture of the right femur. Surgical toilet was done and later skin grafting of the extensive wounds done.

(d) Deep abrasions on back of the right hand. This wound was done surgical toilet and dressed.”

18. The same for ***Abdi Werdi Abdulahi v James Royo Mungatia & another*** [2019] eKLR of 6<sup>th</sup> November 2019 where general damages of Ksh.3,500,000/- was given for injury as follows:

“a) Multiple fractures on the right lower and upper limb

b) Amputation of the right lower limb

c) Multiple fractures and bruises on the upper right limb leading to affixation of two metal plates

d) Injury to the right eye leading to impaired vision

e) Compressed burst L4 vertebra with retro pulsed fracture fragments

f) Deep bruising on the chest due to dragging on tarmac

g) Head trauma injuries leading to concussion.”

19. On the other hand, the appellant’s authorities were clearly on the lower side. The award of Ksh.1,500,000/- in ***Nelson Njihia Kimani v. David Marwa & Anor.*** (2017) eKLR was on amputation of lower right limb with only 40% incapacity; The Ksh.1,300,000/- award in ***Joyce Moraa Oyaro v. Hussein Dairy Ltd.*** (2016) eKLR was compensation to a 41-year-old woman for loss of her right leg by amputation. The amputee in this case was only five years old with his whole life ahead of him and therefore a long future of disability and loss of amenity occasioned by amputation of his right leg. ***Dancan Kinyua & another v. Boniface Kigunda*** [2020] eKLR in which Ksh.1,800,000/- was

awarded for general damages while post-dating the judgment of the trial court under review primarily involved “*Crush injury of the right lower limb extending from the distal femur to the ankle joint. Traumatic amputation of the right little finger*”. The ***Kisumu Concrete Products Limited v. Kennedy Onyango Olwa*** (2016) eKLR cited by the appellant’s submissions before the trial court was an appeal decision on the special damage nature of the cost of artificial limb rather than the general damage award for loss of amenities. In addition, unlike in ***Olwa*** where in addition to the general damages award of **Ksh.750,000/-**, a further award of loss of earning capacity of **Ksh.2,592,000/-** was made for the 24 year-old mason with a multiplier of 24 years, no loss of earning capacity was awarded for the 5 year old in this case; not to mention that the amputation in the case was **below** and not **above** the knee as in this case. A higher award would take care of the element of loss of earning capacity which was not awarded separately but which, as held by the Court of Appeal decision in ***Shabani v. City Council of Nairobi*** [1985] KLR 516, “*it is right for a court to make a modest award for loss of future earning capacity in the case of a child provided that there is some evidence provided for it.*” In this March 1985 decision, it was held that for the 8-year-old whose arm had been severely injured (but not amputated) in a motor vehicle accident “*the general damages should be increased to Ksh.350,000/- which sum should include the element of loss of earning capacity.*”

20. I consider that an award of **Ksh.2,500,000/-** in general damages for pain and suffering and loss of amenities would meet the justice of this case coming up for judgment in 2019 from whence interest shall run until payment in full.

### **Cost of artificial limb**

21. In their submissions before the trial court, which they reiterate before this court, the appellants urged as follows:

#### **“3. Future Medical expenses and operations and artificial limb expenses**

Doctor Kiamba stated that the plaintiff would require future operations. Costs for the said operations were however neither pleaded nor proved. We urge that this Honourable Court fails to award under future operations.

Save for the artificial limbs, no other future medical expenses were sought and neither was there an attempt to prove the same.

Doctor Kiamba testified that the Plaintiff would require an artificial leg, to be replaced every 3-5 years at a cost of Ksh.100,000/-.

With reference to Dr. Kiamba’s testimony, the plaintiff would require more surgeries when young as opposed to once he has developed as the bones would not need to be operated any more. This means that the main reason the operations are rampant in childhood owing to the fact that growth is ongoing once growth and elongation stops, the surgeries and replacement will not be as necessary one the plaintiff minor attains bone maturity.

We therefore submit for replacement every 5 years until he is 20 when bone growth will stop occurring meaning prosthesis replacement and surgeries will no longer be necessary.

The plaintiff was 5 years old at the accident. He got an artificial leg which ought to serve him for 5 years until he is 10 years. This leaves two replacements which will take him to the age of 20 years old.

Our claim works out as follows:

2 replacements (which will take the plaintiff minor to the age of 20 years X 100,000/-) = 200,000/=

We submit that an award of **Ksh.200,000/-** will sufficiently compensate the plaintiff under this limb.”

22. The submissions by the appellant is not backed by evidence as none was called. It is clearly an attempt to sneak in matters of evidence through written submissions before the court. It is an improper practice among counsel which should stop. There being no rebuttal evidence, the court is bound to accept the evidence given by the witnesses for the plaintiff on a matter as technical as to the period that a prosthesis should be used on a child before the need to replace prosthesis; what is urged by the appellants is not a matter of public notoriety as may be accepted without proof. The argument in the submission that it was only required to have “*replacement every 5 years until he is 20 when bone growth will stop occurring meaning prosthesis replacement and surgeries will no longer be necessary*” was not backed by any evidence, and the attempt to introduce evidential matters through submissions is improper.

23. The Witness before the court Dr. Kiamba PW1 testified in full as follows–

#### **“PW1 Male Adult Duly Sworn States in English**

I am Dr. Wellington Kiamba a Medical Practitioner in Nakuru. On 23.10.2017. I examined one BenueI Makokha who was involved in a road traffic accident o 27.07.2017 while accompanied by the mother: I saw discharge summary from Moi Teaching and Referral Hospital – Eldoret and consultation form from Mercy Hospital Eldama Ravine. I noted he had sustained amputees of right leg above the knee. The wound had healed but scar was tender. He couldn't walk without crutches. He needs artificial limb for Ksh.100,000. Which is to be replaced between 3-5 years. Degree of injury is grievous harm permanent disability is 70%. I re-examined him on 30.08.20 18 and noted the same injuries. He was limping. He had artificial limb. The cost would be Kshs. 100,000 every 3-5 years as an adult. I compiled the two reports which I produce as exhibits.

- Exh 1 a and b

- Exh 2 a and b dated 30.08.2018.
- I charged Kshs.7000 and Kshs.8000 from the reports.

I have charged Kshs.50.000 today. The limp for adults should be changed 3-5 years for a minor the limb should be changed may be yearly or less because of the fact that they are growing. The child can't do normal children play/exercise. He may require revision surgery of the leg if limb gets destroyed.

**Cross examination by Wanjiru for 1<sup>st</sup> and 2nd defendants**

He suffered 70% disability. I used WIBA as well as forensic medicine and medical law of East Africa. The disability is with regard to the whole body. They never gave me the receipts for the artificial limb. I don't know how long he has had it. It's still wearing out but I didn't indicate that.

50% disability for this would be wrong.

**Chesire in Cross-examinations**

No Questions.

**Gekongá in Reexamination**

No questions”

24. The witness was clear that the change every 3-5 years of a prosthesis is for an adult as a child should change hers more frequently as follows:

**“...The limp for adults should be changed 3-5 years for a minor the limb should be changed may be yearly or less because of the fact that they are growing...”**

25. Moreover, even upon attainment of the adult age of 20 years, the plaintiff would still require a replacement of the prosthesis on account of wear and tear. I was unable to take benefit of the decision of *CM*, supra, as a guide with regard to the damages as to cost of the artificial limb because as the court in that case noted **a prayer thereon was amended to removal a prayer for costs after age 18 years**, as follows:

“47. Clearly, the sum of Shs. 150,000/- to cater for the refashioning of the stump to adapt it to a prosthetic limb is not in doubt or dispute. Nor the fact that a temporary prosthetic would be required every 6-12 months at a cost of Shs. 35,000/- until the minor reached the age of majority. The minor was aged 12 years as at 2015, the date of the judgment. Taking the cost of a temporary prosthetic at Shs. 35,000/-, replaced every six months until the Appellant was of the age of majority, the total cost would not exceed Shs. 420,000/-.

48. It appears that the Appellant in his submissions at the trial used the figure of Shs. 35,000/- being the cost of prosthetic and multiplied it 120 times as if the replacement of prosthetic twice a year would remain constant for his full life. That is erroneous. In present submissions, the Appellant has bifurcated the two claims in respect of the temporary and permanent prosthetic limbs.

49. **The record of the trial however shows that during the trial on 2.6.15 while Dr. Wokabi was in the witness stand, the Appellants advocate applied to amend paragraph 6 of the amended plaint as follows:**

**“I wish to make an oral application to amend paragraph 6a of the amended plaint dated 29.4.13. The last 3 sentences by striking out changing of the artificial leg at KShs. 100,000/- and replace it with changing of temporary prosthesis every 6-12 months at Shs. 30,000/- - 40,000/-.”(sic)**

**50. The amendment was allowed with the result that the claim for the adult five year replacement of prosthetic at Shs. 100,000/- was withdrawn. It is disingenuous for the Appellant to attempt to re-introduce that claim during the appeal. The trial magistrate in her judgment correctly considered the live claim in respect of replacement of the temporary prosthetic limb until the Appellant turned 18 years, and not replacement of the permanent prosthetic to the age of 70 years as the Appellant now appears to be suggesting.**

51. Thus, the only pleaded claim under paragraph 6(A) as amended, relates to the change of temporary prosthetic every 6 months until the minor turned 18 years. The trial magistrate accepted the cost of such prosthetic at Shs. 35,000/- each. The total cost for six years would be Shs. 420,000/-. The Appellant was awarded Shs. 500,000/- which no doubt was deemed to include the cost of refashioning of the stump at Shs. 150,000/-. I find no merit in the Appellant's complaint concerning the head in respect of future medical expenses.

52. In view of the foregoing the following awards are substituted, subject to the agreed apportionment ratio of 90:10 against the Respondent, as follows:

General damages for pain and suffering Shs. 2,000,000/-(Two Million).

General damages for loss of earning capacity – Shs. 900,000/- (Nine hundred Thousand).

**The award for future medical expenses is upheld at Shs. 500,000/-.**

Special damages awarded in the lower court amounted to Shs. 25,050/-.”

26. There was in this case simply no evidence to challenge the finding of the trial court on the basis of the evidence availed to it by the plaintiff as regards the need for and frequency of replacement of the artificial limb. There was no evidential basis for adopting as similar guide the 2009 decision in *Stephen Nyakumbe Ndera v. Amina Abid Ikiro & 2 Ors.* [2009] eKLR as offered by the appellants, the same was in any event not presented in submissions before the trial court. The ground of appeal relating to the failure of the court to consider the submissions of the appellants on the issue of the cost of the artificial limb is rejected.

27. Consequently, no serious contest is mounted against the award of Ksh.1,300,000/- as the defendant did not offer any alternative costing of a prosthesis and or of the frequency of replacement thereof given by the plaintiff's Doctor. I would dismiss the objection that the award of Ksh.1,300,000/- for the cost of artificial limb was excessive in the circumstances. The appellant succeeds as regards the quantum of general damages for pain suffering and loss of amenities but fails on the future medical costs of the artificial limb.

### **Orders**

28. Accordingly, for the reasons set out above, the appellant's appeal herein is allowed in terms as follows:

1. The award of general damages for pain, suffering and loss of amenities is reduced to **Ksh.2,500,000/-**.
2. The award of **Ksh.1,300,000/-** for the cost of artificial limb is affirmed.
3. The award of special damages of **Ksh.243,776/-** is affirmed.

29. Consequently, an award of damages for personal injury and, therefore, Judgment is entered in the sum of **Ksh.4,043,776/-** for the plaintiff respondent against the 1<sup>st</sup> and 2<sup>nd</sup> defendants/appellants.

30. The order on interest and costs made by the trial court shall remain in force. There shall, however, be no order as to the costs of the appeal in this court as both parties have partially succeeded in their respective contentions.

Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Kimondo Gachoka & Co. Advocates for the Appellants.

M/S Gekongá & Co. Advocates for the 1<sup>st</sup> Respondent.