REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 18 OF 2018

CROWN PETROLEUM KENYA LIMITED.....APPELLANT

=VERSUS=

ANDERSON SUMATA SAOLI.....1ST RESPONDENT

EPHRAIM KARIANJAHI.....2ND RESPONDENT

PETER KAMAU NDERI.....3RD RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 20 OF 2018

ANDERSON SUMATA SAOLI.....APPELLANT

=VERSUS=

CROWN PETROLEUM KENYA LIMITED.....1ST RESPONDENT

EPHRAIM KARIANJAHI.....2ND RESPONDENT

PETER KAMAU NDERI.....3RD RESPONDENT

AND

CIVIL APPEAL NO. 21 OF 2018

EPHRAIM KARIANJAHI.....1ST APPELLANT

PETER KAMAU NDERI.....2ND APPELLANT

=VERSUS=

ANDERSON SUMATA SAOLI.....1ST RESPONDENT

CROWN PETROLEUM KENYA LIMITED.....2ND RESPONDENT

[Being appeals from the judgment/decree of the Hon. J.N. Nthuku, Senior Resident Magistrate, delivered on 8th May 2018 in Eldama Ravine Principal Magistrate's Court Civil Case No. 116 of 2016]

JUDGMENT

Introduction

1. Before the Court are three first appeals filed by the parties to the trial Court suit against various aspects of the Court's determination by its

judgment dated 8th May 2018. The first appeal, No. 18 of 2018, is by 1st defendant against the plaintiff and the 2nd and 3rd defendants. The second appeal, No. 20 of 2018, is by the plaintiff against the defendants. The third appeal, No. 21 of 2018, is by the 2nd and 3rd defendants against the plaintiff and 1st defendant.

2. By a Plaint dated 25th August 2016, the plaintiff had sued the defendants for personal injury arising from a motor vehicle accident on the 3rd September 2015 involving two motor vehicles owned and or driven by the defendants or their agents, one of which he travelled as a passenger. The 1st defendant was the registered owner of Motor, beneficial owner or the insured of the one vehicle KBR861M and the 2nd and 3rd defendants respectively registered owner and co-owner, beneficial owner and or insured of the other motor vehicle KAZ 450U.

3. The trial Court, upon full hearing, gave judgment for the defendants in the total sum of **Ksh.3,114,050/-**, made up of general damages of **Ksh.1,500,000** and special damages of **Ksh.1,614,050/-**, to be borne in the ratio of 50:50 by the 1st defendant on the one hand and the 2nd and 3rd defendants on the other. All the parties appealed the decision as aforesaid.

Issues for Determination

4. The issues for determination in these consolidated appeals Nos. 18, 20 and 21 of 2018 are, respectively:

a. The liability of the Parties for the motor vehicle accident the subject of the suit;

b. Adequacy of the award of general damages; and

c. The validity of the special damages claim.

Determination

The pleadings

5. By paragraphs 5, 6, 7 and 8 of the Plaint, the plaintiff/appellant in Appeal No. 20 of 2018 had pleaded negligence against the owners/insured of the two motor vehicles as follows:

> *"5. At all material time of this suit, the 1st Defendant was the registered owner of motor vehicle registration number KBR 861M beneficial owner and /or insured.*
>
> *6. At all material time of this suit, the 2nd Defendant was the registered owner of motor vehicle registration number KAZ 450U and the 3rd defendant was the co-owner, beneficial owner and/or insured of the said motor vehicle.*
>
> *7. On 3rdSeptember,2015 or thereabout while the Plaintiff was lawfully travelling in motor vehicle registration number KAZ 450U along Eldoret- Nakuru road the 1st Defendant by itself, servant, agent and/or employee so negligently drove, managed and/or controlled motor vehicle registration number KBR 861M as a result of which it was involved in a collision with motor vehicle registration number KAZ 450U and subsequently caused serious injuries to him….*
>
> *8. In the alternative and without prejudice to the foregoing, the plaintiff's case is that the 2nd and 3rd Defendants by themselves, servant, agent or employee wholly and/or substantially contributed to the cause of the said accident by negligently driving, maintaining and/or controlling motor vehicle registration number KAZ 450U as a result of which it caused the said collision subsequently causing serious injuries to the plaintiff…."*

6. The defendants put the plaintiff to strict proof of the accident and his injury therein. The 1st defendant in its defence dated 25th April 2017 further that the accident, if it ever occurred, was occasioned and or substantially contributed to by the plaintiff's driver's (driver to Motor Vehicle registration KAZ 450U) own acts of negligence.

7. The 2nd and 3rd defendants in their defence dated 16th February 2017 principally denied any negligence on their part and alleged negligence on the part of the driver of 1st defendant's motor vehicle KBR 861M to have solely or substantially contributed to the accident.

Submissions by counsel

8. In urging the appeal, the appellant in NO. 18 of 2018, of course, considers that the trial Court did not properly consider or appreciate the weight or bearing of the circumstances and or probabilities set up by the eye witness evidence of the plaintiff (PW1) and the Defence DW1 and the expert evidence of the Police Officer (PW4) who testified as the expert witness on the accident. Citing In response to the appeal No. 20 of 2018 from the award of damages, the 1st defendant in the suit urged the dismissal of the appeal and urged that awards for damages should be fair in the circumstances citing ***Lim Poh Choo v. Camden and Islington Area Health Authority*** (1979) 1 ALL ER 332.

9. For the Appellant in No. 20 of 2018, who is the plaintiff in the suit, urged that the award of general damages of Ksh.1,500,000/- was too low for the injuries suffered and prayed for an award of Ksh.3,00,000/-, and in addition to an award loss of earnings at Ksh.100,000/-. In response to the appeal in No. 21 of 2018, the plaintiff submitted that the receipts for special damages were proved before the trial Court and the plaintiff may not be punished for errors by judicial officer in failing to mark documents which had been produced as exhibits. Citing

Jacob Mariga v. Obago (2005) eKLR it was urged that proof by certificates is not the only way of proving loss of earning and that the Court has discretion to set how much the plaintiff was earning and the plaintiff had lost a living.

10. The appellant in Appeal No. 21 of 2018 challenged the award of the Court on the special damages and urged that the same had been based on invoices and not actual receipts for payment. Referring to her evidence at pp77-8, it was contended that PW3, the Records Officer at Mediheal Hospital had not receipts for the sum of 1,577,950 that she claimed the plaintiff had paid to the hospital. The appellants cited the Court of Appeal decision in ***Kenneth Nyaga Mwige v. Austin Kiguta & 2 Ors.*** Nairobi Civil Appeal No. 140 of 2008 and urged that documents which are marked for identification and not formally produced did not become exhibits before the trial Court. The appellants submitted that they *"do not dispute the award of general damages as given by the Honourable Court believing it to be fair considering the injuries, it is the award of special damages that the appellant vehemently dispute".* They also did not challenge the apportionment of liability, saying that *"the award of liability is not disputed by the appellants as even though they believe they ought not be held liable at what really happened was as per the first OB, given the conflicting reports, the Court would have no other choice but to award liability as it did and we urge this Honourable Court to uphold the finding on liability."* They therefore opposed the 1st defendant's appeal No. 18 on apportionment of liability.

Principles for appellate review

11. As required of an appellate Court, see *Selle & Another v. Associated Motor Boat Co.* (1968) EA 123 and *Peters v. Sunday Post Ltd* (1958) EA 424, the Court will consider the evidence before the trial Court afresh giving allowance for the fact that the appellate Court did not have the benefit of observing the demeanour of the witnesses.

Accident and how it happened

12. The witnesses PW1 PW4 and DW1 are the eye witnesses who testified as follows:

> "***PW1 Male Adult Duly Sworn states in Kiswahili***
>
> *I am Anderson Sumatia Ole Sauli. I stay in Narok Olorobi. I am a business man for about ten years. I am 38 years old. I no longer do the business I was doing.*
>
> *On 3rd September, 2015 I was coming from Narok going for a child's graduation in Moi University. I attended the graduation and on our way back we got an accident at Timboroa. We had leased KAZ 450 a matatu. We were 13 people. I was seated at the co-driver's seat. At Timboroa Riply there is a corner and we were going uphill, there was a trailer coming downhill. The driver of our vehicle started overtaking but before finishing it realized it cannot manage to overtake before the trailer reaches us so our driver stopped on the lane of the trailer. Our driver overtook the first vehicle and this was the 2nd one he was overtaking when he collided with the trailer head on. The door on my side flung open the trailer stopped in a ditch on the lane of vehicles going to Eldoret. Our matatu turned to face Eldoret but on the lane of vehicle coming to Nakuru. The road has a corner at the scene. The driver of KAZ 450 caused the accident because he overtook at a place where there was a hill and a corner. When a trailer was on coming.*
>
> *I was injured. Two left fingers fractured, right leg lost the five toes and I fractured two ribs. I was taken to Mediheal hospital and admitted for two months and 18 days. I went through surgery three times. I was done skin grafting because the right leg flesh was all gone in the accident.*
>
> ***PW4 Male Adult Duly Sworn States in Kiswahili***
>
> *I am NO. 82760 PC Benson Wambua of Timboroa traffic Sub-base. I was summoned to appear in Court today. I produce the same as Exhibit- exh.12 I have an abstract for an incident which occurred on 3rd September, 2015.*
>
> *I visited the scene of the accident and found a matatu and trailer had collided and several people died while others were injured. We prepared a rough sketch and towed the vehicle.*
>
> *KAZ 450 is Toyota matatu was headed to Nakuru KBR 861 M/ZD 8666 was headed to Eldoret on reaching that corner, the matatu driver overtook while the trailer was oncoming, the trailer tried to swerve to the far left but it was too late. He summed into the trailer wheel and due to impact he turned and faced the directions he was coming from. It's a place with a continuous yellow line (don't overtake).*
>
> *These are the sketch plans rough, fair and covering report. The point of impact was on the lane of the trailer. The trailer tried to avoid the accident that's why he didn't hit the matatu head on but hit the right side of the wheel of the trailer.*
>
> *From the continuous yellow line to point of impact its two metres. Nobody was fined because the matatu driver would have been charged but he died on the spot.*
>
> ***Cross examination by Ms Bett***
>
> *I visited the scene. The accident occurred where there's a sign not to overtake.*
>
> *In two-way traffic road. It's a place with a sharp corner where the accident happened. He was trying to overtake when they collided.*

The trailer was hit on the side/right wheel side. The carelessness of the matatu driver was the cause of that accident.

It wasn't head on.

The trailer driver tried to avoid hitting the matatu but it was impossible. We couldn't charge the trailer driver because he wasn't at fault. The sketch shows that the matatu driver was to blame.

Cross examination by Wanjiru for 2nd and 3rd defendant

It was on 3rd September, 2015.

The OB shows at 2.30pm a report was made by a good Samaritan. At 5am it is when we returned to the station from the scene.

On the date of the accident our report officer visiting the scene was that the accident occurred because the trailer tried to overtake and that's when it hit the matatu.

We didn't find the trailer driver at the scene. He had escaped.

It's after interrogating Anderson and Marion that I got the further follow up report on 8th September 2015. OB No. 5 it's this OB which captured what the witnesses saw that's my evidence.

The rough sketch plan was done on 4th September, 2015 rough sketch can be done immediately on reaching the scene or you mark and come to sketch the following day.

The date 4th has been overwritten.

In the Police file I took witness statements of two passengers in the matatu and the trailer driver.

The further follow report talks of OB 05/08/09/15 myself going to Mediheal hospital and recording statements of victims Anderson Sumatia. Marion Sauli who said that the matatu was overtaking.

We didn't interrogate the crowd which came to the scene because they were rioting and blocking the road. The other survivors didn't record statement because they were children and the rest badly injured. To date I haven't record further statements.

Anderson's statement is 07.09.2019 at Mediheal hospital.

Marion's statement is for 07.09.2017 too she has two statements for the same date. The trailer driver statement is dated 04/09/2015 i.e a day after the incident.

The police file has a Notice of intention to prosecute Cleophas Onyango. Its dated 04.09.2015 the date he recorded his statements.

According to PC Murigi the initial report agrees with his investigation diary.

Cross examination by Gekonga

The OB contains the report after scene visit before investigation so the file contains the findings. Covering report is done after investigation.

The information in the OB can change as investigations continues. *At the scene I didn't record any statements. Notice of intention to prosecute is given any driver who was involved in an accident and doesn't mean he's the person at fault.*

DW1 Male Adult duly Sworn States

I am Cleophas Onyango. I am a truck driver with Crown Petroleum. I stay in Mombasa. I have been a driver for six years. I have my Driving license No. 1627108. I produce a copy as an exhibit D exh-1.

I drive heavy commercial vehicles. On 3rd September, 2015 I was driving from Mombasa to Tororo on reaching Timboroa at a sharp corner I saw a matatu overtake at a high speed. I tried to swerve but it hit me. It was from Eldoret towards Nakuru (opposite direction) I slowed down and swerved but he was at high speed. It hit my trailer on the driver's side. I was hit on my lane. My trailer was damaged on driver's side and matatu was damaged. Police came and took measurements after five minutes. They said the matatu driver was to blame for overtaking at a corner. The motor vehicles were taken to the Police Station and I recorded my statement. I wasn't charged with any traffic offence.

I blame the matatu driver for careless driving. I wish to rely on my statement.

Cross examination by Musili

The matatu was damaged on right side and so was mine. It's a slope so the matatu was going downhill and me uphill. I swerved but it hit my truck. I was driving at 50 km/hr.

Cross examination by Wanjiru

I was driving from Nakuru to Eldoret and matatu was from Eldoret to Nakuru.

The matatu was overtaking a trailer headed to Nakuru. It hit the whole right side of the trailer. Police visited the scene. ***I stopped on my lane i.e left lane as you face Eldoret*** *and that is what the Police found on the road.*

The matatu was also on the left lane as you face Eldoret. I was at the scene when Police came to the scene. One Police officer interrogated me but I was rushed to the hospital so I didn't say much. He asked me whether I was the driver and I said yes, the Police officers all saw me. I can't recall the name of the hospital in Salgaa. I was rushed to the hospital by a small vehicle. I don't have my treatment notes. I never filed suit for compensation. I don't have any OB or Police Station abstract. The vehicles were towed to the station in my absence. I went to the police station the following day. I wasn't admitted in hospital. I was treated and I booked a room in Salgaa and slept there.

I was given notice of intention to prosecute. As Police examined the scene I was there.

None of the vehicles rested outside the road *my trailer could not move so it was towed after the accident. I don't know how people died. The matatu couldn't move. It had to be towed to the station.*

Re-examination by Bii

I have never been charged for the accident."

13. The 2nd and 3rd defendants did not call any witnesses on the accident.

Liability

14. Of course, the evidence of an expert as a police officer who visits the scene of an accident is only an opinion to which the Court is not bound if evidence available to the Court indicates a different result, and I respectfully agree with the Courts in *Choge & Others v. R* (1985) eKLR; *Stephen Kinini Wangondu v. The Ark Ltd*. 2016) eKLR and *David Kajogi M'Mugaa v. Francis Muthomi* (2012) eKLR on the nature of expert evidence as a guide for the Court which must make its own conclusion on the matter on the facts proved in the case. However, in arriving at its conclusion should give consideration to such expert evidence in the light of all other available evidence. Moreover, as held in the criminal case of ***Mutonyi v. R*** (1982) KLR 203 "expert evidence is given by a person skilled and experienced in some profession or special sphere of knowledge from facts reported to him or discovered by him by tests, measurements and the like" and an expert witness need to prove his competence. The Court is entitled to make its mind as to the credibility of an expert witness and not to rely on lack of rebutting evidence (*Muzeyi v. Uganda* (1971) EA 225). In this case, the Police officer PW4 while not demonstrating any special knowledge in scene of accident assessments would have his evidence considered along with other evidence by other witnesses in the case.

15. The entry in the Police Occurrence Book (OB) entry on the accident suggesting the accident was caused by the trailer driver's overtaking is no evidence. Indeed, the report itself does not state its basis as information from eye-witnesses or measurements taken at the scene. It clearly appears to be a surmise as to how the accident may have happened by the police officer at first visit to the scene before any investigations were done.

16. As held by the Court of Appeal in ***Japheth Gituma Joseph & 2 others v Republic*** [2016] eKLR, OB extracts are not Evidence. While considering an OB entry in a criminal case, the Court in ***Gituma*** said:

> *"Reports of commission of alleged crimes are normally made to a duty officer at a police station and may be made by a person who is not the complainant as in cases where the complainant is admitted in hospital.* ***The report is merely a report of occurrence – a bare report of a crime and not evidence of commission of an offence against any person."***

17. The fact that an entry on the OB indicated that the trailer was overtaken when it hit the matatu which the witness PW4 explained as having been made before the investigations were done is no evidence as to how the accident happened. While the plaintiff called PW1 and the 1st defendant called DW1 to relate evidence as to the cause of the accident, the 2nd and 3rd defendants did not call any evidence thereon. The OB entry version of the trailer overtaking is not supported by any other evidence before the Court. The evidence of the witnesses PW1, PW4 and DW1 is consistent that the matatu was overtaking, the scene of the accident was at a sharp corner, the matatu was driving downhill from Eldoret and the trailer uphill towards Eldoret. It is unlikely that a cement laden trailer driving uphill could have been trying to overtake so as to cause a collision with the oncoming matatu. On the rules of evidence on proof on balance of probabilities, (See ***Phipson on Evidence***, 16th ed. 2005, para. 6-54 at p.155), the more unlikely an event, the more cogent the evidence required to prove it. I do not see any evidence in the record to support a version of the accident that the trailer was overtaking and thereby causing the accident.

18. On the evidence before the Court, it is clear that the accident was caused by the action of the driver of motor vehicle KAZ450U seeking to overtake another vehicle while there was an on-coming trailer KBR861M/ZD8666. The driver of the trailer testified that he had swerved to his left extreme left side off the road to give the overtaking Nissan matatu [room] *'but the Nissan Matatu came in my lane and hit my*

trucks right side.'

19. The point of impact on the left lane towards Eldoret where the driver of the trailer was headed and the damage on right side of the two vehicles of course supports the version of the incident that the driver of the 2nd and 3rd Defendant was overtaking and went into the 1st defendant driver's lane. However, as to whether the driver of the 1st defendant contributed to the cause of the accident, more exacting examination of the circumstances of the accident and the accident scene is necessary. If the 1st defendant's driver (DW1) had swerved off road to his left, the point of impact would not have been **two metres** from the continuous Yellow line in the middle of the lanes as testified by the police officer PW4 who also said that "the point of impact was on the lane of the trailer". The driver of the trailer would also have been driving at a speed at which he was unable to control the vehicle by braking so as to give way for the overtaking matatu to complete the overtaking safely. There was no evidence that the off road portion of the 1st defendant driver's lane was unusable for purposes of giving the matatu driver room to overtake. The driver DW1 only alleged to have swerved off the road to allow the driver of the matatu to pass, but as he confirmed in cross-examination by Counsel for the 2nd and 3rd defendants, *"none of the vehicles rested outside the road"* indicating that he had not tried to get off the road to avoid the collision.

20. Drivers owe other drivers on the road a duty of care to avoid collision accidents and lane discipline doe not precluded an obligation to swerve and or otherwise take action to avoid a collision with other vehicles on the one or other lane. In this case, it was not shown that the driver of the trailer did all that he could have done including swerving off road to avoid the accident. He was also partly to blame for the accident.

21. However, this Court, with respect, considers that the finding of the trial Court that the defendants were equally responsible for the accident was made in error in giving undue weight to the first entry in the OB before investigations had been conducted and without giving due consideration to the evidence of PW1, PW4 and DW1 as to how the accident occurred and without considering the 2nd and 3rd defendants did not adduce evidence to rebut evidence of the plaintiff and the 1st defendant. The trial Court also failed to give due weight to the evidence and circumstances of the accident, the point and lane of impact, showing that it as improbable that the cement laden trailer driving uphill towards Eldoret en route to Tororo could have been the motor vehicle overtaking, and yet be on its left lane after impact with the Nakuru bound matatu. If that had been so, the trailer would have been on the right side of the road towards Eldoret, which was not the case here. In this instance, the lane of impact is the *left* lane of the road from Nakuru to Eldoret, which is consistent with the evidence that the Nakuru-bound matatu was overtaking but it was too late to avoid a collision with the oncoming trailer going towards Eldoret. The trial Court did not also consider the evidence of PW1 that they had come from a graduation ceremony at Eldoret's Moi University headed towards Nakuru on their way home to Narok, and it could not properly have been at the point of impact on the *left* lane towards Eldoret, unless it was overtaking.

Notice of Intention to Prosecute

22. There is no merit in the submissions that the 1st driver had also been given a Notice of Intention to Prosecute. As explained by the police officer PW4, the notice is given to all persons who are involved in a road accident pending investigation into the cause of the accident. It is purely a precautionary measure, in compliance with the statutory provisions of section 50 of the Traffic Act cap 403, which requires that a person be *"warned at the time the offence was committed that the question of prosecuting him for an offence under someone or other of the sections aforesaid would be considered…."* The notice means that the person to who the notice is given may be prosecution should investigation reveal the person to have committed a offence in relation to the accident, not indicative of any responsibility for the accident.

23. Taking into consideration all the facts of the case as set out above, I would apportion liability in the ration of ***30:70*** between the driver of the 1st defendant and the 2nd and 3rd defendants.

<u>Injuries</u>

24. Medical Report dated ***16/8/2016*** by Dr. Kiamba produced by the doctor as Exb. 8(a) showed the following injuries on the plaintiff:

> *"Anderson Sumalia Saoli sustained fracture of the proximal phalanges of the left 3rd and 4th fingers, degloving injury on the [right] foot and leg and amputation of all the toes of the [right] foot. There is extensive loss of soft tissue on the sole of the right foot and requires adding several soft soles in the inner foot. The function of the right lower limb is markedly reduced and he cannot walk without support (walking stick). The function of the left hand is also reduced due to restriction of movements of the left 3rd and 4th fingers. I classify the degree of injury as 'GREVIOUS HARM'. He should be awarded a permanent disability of Forty per cent (40%)."*

25. On cross-examination by Counsel for the 2nd and 3rd defendants the doctor (PW2) said that in awarding 40% disability he was guided by *"the schedule for forensic medicine and workman compensation"*. The award of 40% disability and the assessment of the nature of injury as ***grievous harm*** does not, however, agree with the plaintiff's own police medical examination report (P3) signed by Dr. Kanyotu, about the same period, on ***22/9/2016*** which classified the degree of injury as ***maim,*** a degree lower than grievous harm in the definitions set out in the P3 form as follows:

> "<u>*Definitions:*</u>
>
> "*Harm" means any bodily hurt, disease or disorder whether permanent or temporary.*
>
> "*Maim" means the destruction or permanent disabling of any external or internal organ, member or sense.*

> *"Grievous harm" means any harm which amounts to maim or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ."*

26. While I find the plaintiff to have suffered a permanent injury amounting to maim by disabling the plaintiff's toes on the right foot which were amputated and fracturing his two left 3rd and 4th fingers. The degree of disability percentage of 40% of the whole body, as asserted by the doctor (PW2) in cross-examination by Counsel for the 1st Defendant, appears to me exaggerated in view of the fact that other than the right foot and the left hand which are affected, there was no allegation of injury on any other part of the plaintiff's whole body.

27. There was no evidence on second medical examination by a doctor by the 2nd and 3rd defendants as they had indicated and the Court has no basis of assessing the plaintiff's degree of injury at other than 40% given by the plaintiff's doctor.

Damages

28. There was no evidence that the plaintiff (PW1) worked in cattle trade and earned ksh.100,000/- per month there-from, other than an assertion in examination in chief and in cross-examination by counsel for the 1st respondent.

29. For the injuries established by the medical report herein and the Police Medical Examination Report P3 herein I would find general damages in the sum Ksh.1,200,000/- to fully compensate the plaintiff for the pain and suffering and any loss of earning capacity occasioned by the injury. The case law authorities of *Sammy Mugo Kinyanjui & Anor v. Kairu Thuo* (2017) eKLR and *Akamba Public Road Services v Abdikadir Adan Galgalo* (2016) eKLR, relied on by counsel for the 1st defendant, though recent were on lesser injuries of multiple fractures and soft tissue injuries without the debilitating aspect of this case of amputation of all the toes on the plaintiff's right foot, and the award of Ksh.500,000/- therein award for the lesser injuries cannot therefore be considered on the principle of *West (H) & Son Ltd v. Shepherd* (1964) A.C 326 as reasonable compensation by comparable award for comparable injuries.

30. I, however, do not find the trial Court's assessment of the damages as so inordinately high as to amount to an erroneous estimate, and I do not find it necessary to interfere with the award on general damages.

Lost earnings

31. I consider that the loss of earnings before the suit are in the nature of special damages and ought to be specifically pleaded and proved, and the loss of future earnings are in the form of general damages, as observed in ***McGregor on Damages***, 17th ed. (2003) at paragraph 35-047 as follows:

> *"The claimant is entitled to damages for the loss of his earning capacity resulting from the injury: this generally forms the principal head of damage for a personal injury action. Both earnings already lost by the time of trial and prospective loss of earnings are included. While rules of procedure require that the past loss be pleaded as special damage and the prospective loss as a general damage, there would appear to be no substantive difference between the two, the diving line depending purely on the accident of the time that the case comes on for hearing."*

32. The plaintiff pleaded the loss of earnings at Ksh.100,000/-, without distinguishing between the claim as special damages already lost at the time of filing the suit, which amount should have been quantified, and the claim for prospective loss in the future which fell to be considered as a part of the general damages.

33. However, as pointed out above, there was no evidence that the plaintiff was in the cattle trade with proceeds of sale at net Ksh.100,000/- per month. Even if the sum is pleaded at paragraph 11 of the Plaint, in terms ***"that the plaintiff was a farmer at all material times earning Ksh.100,000/- per month which he cannot earn now and he thus claims the same in the form of future earnings from the date he was injured",*** the claim for "future earnings" was not properly conceived as no evidence of earnings after the injury were given and Court is not able to accept that with only 40% disability the plaintiff was unable to generate any income on his cattle trade. The method for assessment of loss of future earnings, **as general damages,** requires evidence of present earnings and the amount that the plaintiff can now earn, as observed in ***MacGregor on Damages***, ibid, paragraph 35-051:

> *"The Courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. The latter figure has long been called the multiplier; the former figure has come to be referred as the multiplicand."*

34. The plaintiff confirmed on cross-examination that he could use hired help to carry out his cattle trade in the future but no evidence on earnings that he could make was given. More significantly, even the plaintiff's present earnings per month before the accident were not specifically proved and the Court rejects the invitation to assume that the plaintiff who as *Maasai* was involved in cattle trade for which he, on account of literacy level, did not maintain records – including MPESA payments or other informal record - of operations of the business. How would the Court then estimate the sum at Ksh.100,000/- or any figure therefor? There was simply no evidence, and the plaintiff on cross-examination by counsel for the 2nd and 3rd defendants said *"I do not have evidence that I was trading in cows. If I plan I can employ someone to buy and sell cows on my behalf".* There was no evidence of the amount of earnings, if any, lost.

35. In the end the plaintiff's claim for loss of earnings is not well founded, both as special damages and general damages, and it is rejected.

Special damages

36. The Plaint pleaded at paragraph 9 thereof a claim in special damages for a total of Ksh.1,614,200/- made up of medial report, police abstract, P3 form, Search Certificate and medical expenses.

37. The submissions of Counsel for the 2nd and 3rd suggest that the plaintiff did not formally produce receipts for any expenditure claimed and that only invoices were referred to by PW3, although marked for identification, the receipts were not formally produced as exhibits before the Court.

38. PW3 the records officer from Mediheal Hospital in Nakuru produced a discharge summary on the plaintiff Ex.1 and confirmed that the plaintiff was admitted for two and half months in the facility and had paid Ksh.1,577,950/- to the hospital. There were submissions as to whether the amount claimed was based on invoices rather than actual receipts based on PW3's answer in re-examination that the figure she cited was derived from the invoices. The Cross-examination and re-examination of the witness was as follows:

> *"**Cross examination by Ms. Bett for 1st Defendant***
>
> *I confirm the plaintiff was admitted for two and half months in Mediheal Hospital. He paid Ksh.1,577,950/-*
>
> ***Cross examination by Wanjiru for 2nd and 3rd defendants***
>
> *I don't know how the payments were made or the source.*
>
> ***Re-examination by Gekonga***
>
> ***I confirm these receipts are from Mediheal Hospital. The amount I stated is from an invoice and not receipt."***

39. In fact, the invoices which are stamped Paid and the distinction is, with respect, immaterial. However, the witness confirmed that the money had been paid, and that "these receipts were from Mediheal Hospital." The Court has cross-checked the invoices all which are stamped PAID and dated the 22/11/2015 the date of the discharge summary (exhibit.1) with official receipts marked exhibits (2a-d) on Record (all indicating payment by cheques whose number are given on their face) for specific amounts – 335,950/- dated11/9/2015; 270,000/- dated 19/9/2015; 800,000/- dated 22/11/2015; 200000/- dated 22/11/2015; and has confirmed that a figure of Ksh.1,605,950/- is accounted for.

40. Evidence of the existence of the receipts is on the Record of Proceedings where at page 70 of the Record, the plaintiff PW1 testifying as follows:

> *"I was injured. Two left fingers fractured, right leg lost five toes and fractured two ribs. I was taken to Mediheal hospital and admitted for two months and 18 days. I went through surgery three times. I was done skin grafting because the right leg flesh was all gone in the the accident.*
>
> *This is the discharge summary and I produce it as an exhibit – PMFI 1. I paid Ksh.1,605,950 bundle of receipts PMFI 2a,b,c,d… "*

41. There is evidence that the plaintiff was hospitalised to two and half months he must have incurred costs for the hospitalisation. He produced receipts which were confirmed by PW3 to have been issued by the hospital. The trial Court was in error in marking them as for identification, when they were clear exhibits having been produced by the plaintiff who was the person who incurred the loss by way of the medical expenses and who now claimed them as special damages. They ought to have been marked (and indeed they were on the originals) exhibits 2a,b,c,d rather than as Plaintiff's marked for identification (PMFI) 2a,b,c,d. The receipts were already properly identified and produced by the person who made the payments, and in addition confirmed as authentic by the hospital records officer PW3. It would be an injustice not to award special damages where receipts or paid invoices for the expenditure had been produced before the Court. I would accept the special damages of Ksh.1,605,950/- as proved.

42. I would, however, find the Ksh.50,000/- claimed for doctor's testimony in Court rather excessive and reject it. I would substitute an award of Ksh.10,000/- for the Court appearance. Medical report fees at Ksh.7000/-, Police abstract 100/-, P3 form 1000/-, and Official Search fees of Ksh.550/- at National Transport and Safety Authority are allowed. I would allow special damages in the sum of **Ksh.1,624,600/-.**

43. The trial Court at page 10 of the Judgment said:

> ***"Medical expenses, he produced receipts for Ksh.1,614,050 and I award the same."***

44. I have no reason to disturb that award on applicable principles of appellate review of damages.

Whether to interfere with assessment of damages by the trial Court

45. As observed by the Court of Appeal in ***Shabani v. City Council Council of Nairobi*** (1985) KLR 516, 518, -

> *"The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in Bhutt v. Khan, Civil Appeal NO. 40 of 1977 … as follows:*
>
> ***'An appellate Court will not disturb an award of damages unless it is so inordinately high or law as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. '"***

46. I do not find that the award of Ksh.1,500,000/- general damages was so inordinately high or as to be an erroneous estimate. I, consequently, do not find merit in the plaintiff's appeal against the award seeking its increase as inordinately low. I will, therefore, not disturb the award of general damages herein.

Conclusion and disposition

47. I find it proved on a balance of probabilities that the plaintiff was injured in an accident involving the collision of the 1st defendant's motor vehicle lorry-trailer registration No. KBR861M/ZD8666 and the 2nd and 3rd defendants' matatu KAZ450U at Timboroa along Nakuru – Eldoret road on the 3rd September 2015, as a result of which he suffered the loss by amputation of his toes on the right foot and fractures on the 3rd and 4th fingers of his left hand and other tissue injuries, all assessed at 40% permanent disability.

48. The accident was caused by the action of the 2nd and 3rd defendants' driver overtaking at a corner and contributed to by the 1st defendant's driver in failing to fully swerve off the road to avoid the accident. On the evidence, I apportion the liability between the 1st defendant's driver and the 2nd and 3rd defendants' driver in the ratio of 30:70. The appellate Court is entitled to interfere with the finding of the trial Court on the evidence for having failed to give due weight to relevant material evidence and circumstances of the accident.

49. As regards general damages, I, however, do not find the trial Court's assessment of the damages as so being inordinately high or low as to amount to an erroneous estimate for the injuries suffered by the plaintiff, and I, therefore, do not find it necessary to interfere with the award on general damages.

50. I would have awarded special damages at the sum of Ksh.1,624,600/-. However, on the same test, as with the general damages, for appellate interference with award of damages by trial Court, I do not find any justification to interfere with the award of Ksh.1,614,050/- therefor.

51. In the result, the Appeals in Civil Appeals Nos. 20 of 2018 and 21 of 2018, respectively on the general damages and special damages, are dismissed, and Appeal No. 18 of 2018 on liability is allowed and the ratio of liability is set at ***30:70*** between the drivers of the 1st defendant and the 2nd and 3rd defendants.

52. The plaintiff's claim for loss of future earnings is rejected as unsupported by evidence.

Orders

53. Accordingly, for the reasons set out above, the Court makes the following order on the consolidated appeals:

> **1. Civil Appeal No. 18 of 2018 is allowed. The judgment of the trial Court on liability that "the first defendant to bear 50% and the second and third defendants to bear 50%" is set aside, and the liability in the case is set in the ratio of thirty to seventy percent (30:70) between the 1st defendant in the suit before the trial Court, on the one hand, and the 2nd and 3rd defendants therein, on the other hand, respectively.**
>
> **2. Civil Appeal No. 20 of 2018 on the issue of quantum of general damages is dismissed.**
>
> **3. Civil Appeal No. 21 of 2018 on the issue of special damages is dismissed.**
>
> **4. The plaintiff shall have the costs of the suit in the trial Court.**

54. As all the parties to the suit filed respective appeals from the judgment of the trial Court, each party shall bear its own costs in the appeals.

Order accordingly.

DATED AND DELIVERED THIS 26th DAY OF JULY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Gekongá, Advocate for the appellant in C.A. NO. 18 of 2018.

Ms. Bett, Advocate for Appellant in C.A. No. 20 of 2018.

Ms. Kibagendi for the Appellants in C.A. NO. 21 of 2018.