REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 97 OF 2016

(FORMERLY CIVIL APPEAL NO. 80 OF 2015 MURANG'A)

C M (a minor suing through mother and

next friend M N...APPELLANT

VERSUS

JOSEPH MWANGANGI MAINA.......................................RESPONDENT

***(*Being an appeal from the Judgment of Hon. L. Komingoi Makau Chief Magistrate delivered on 3/8/2015 in Thika CMCC No. 878 of 2011)**

JUDGMENT

1. The appeal filed on 20th August, 2015 and what seems essentially a cross-appeal thereto, filed on 2nd September, 2015 emanate from the judgment of the lower court in **Thika CMCC No. 878 of 2011.** In that suit**,** the **Appellan*t*** (minor Plaintiff) sued the Respondent (Defendant) through his mother and next friend **M N** via a Plaint dated 8/12/2011. An amended Plaint was subsequently filed on 29th April 2013 with leave of court. The Appellant sought compensation for injuries allegedly sustained on 20/06/2010. The Plaintiff, it was averred, was lawfully standing off the road along Thika-Matuu Road at Polysack, when the Respondent so negligently drove motor vehicle registration number **KBB 780T** that, it veered off the road and violently knocked down the minor Plaintiff who sustained severe personal injuries as a result.

2. The Respondent filed a Defence. He denied liability for the accident. He also denied ownership of motor vehicle registration number **KBT 780T,** the occurrence of the alleged accident, resulting injuries and the stated particulars of negligence.

3. By a consent recorded before the hearing, liability was agreed at 90:10% in favor of the Appellant. The Plaintiff through his mother M N **(PW1)** and her witness, Dr Wokabi **(PW2)** testified at the trial. The Defendant did not call any witness. Judgment was eventually entered for the Plaintiff against the Defendant as follows:

a. General damages for pain and suffering	Kshs. 1,000,000/ =
b. Loss of future/diminishedearning capacity	Kshs.600,000/=
c. Future medical expenses	Kshs. 500,000/=
d. Special damages	Kshs. 25,050/=
Total	Kshs. 1,912,545/=

4. Both parties were dissatisfied with the lower court's judgment. The grounds of appeal in both cases challenge the quantum of damages. The gist of the Appeal by the Appellant is that the awards under the various heads above were manifestly and inordinately low. The Respondent's grounds of appeal attack not only the quantum of damages under the above heads, but also posit that the trial magistrate, in finding that the Appellant was entitled to damages for diminished earning capacity, erred in fact and in law. The appeals were consolidated, and the parties agreed to canvass them by way of written submissions.

5. The Appellant's submissions highlight the severity of the injuries sustained by the appellant and assert that these adversely affected the appellant's prognosis. That because of this, **PW2** assessed the degree of incapacity at 40% and moreover, the injuries affected the appellant's pre-existing medical condition. The appellant further submitted that the trial court failed to appreciate the extent of these injuries.

6. Counsel for the Appellant was particularly irked that the trial court relied on the authority of **Mumias Sugar Company Limited vs Francis Wanalo (2007) eKLR** which to him was in relation to injuries not comparable to those of the present Appellant. He urged an award of Kshs. 3,000,000/= for pain and suffering. Reliance was placed on the decisions in **Ntulele Estate Transporters Limited & Another-vs-Patrick Omutanyi Mukolwe, Geoffrey Mwaniki Mwinzi vs Ibero (K) Limited & Another.**

7. Counsel also submitted that an award of Kshs. 600,000/= as damages for diminished earning capacity was low. Because, the injuries sustained by the Appellant were debilitating and had adverse effect on the Appellant's pre-existing condition. On this score, the Appellant cited two cases: **Idi Shabani vs Nairobi City Council (1982-88) 1 KAR 683 and O (An Infant) Vs Bayete Peugeot Services Limited (1985) eKLR.**

8. Counsel contended that the fact that the appellant was epileptic prior to the accident could not be taken against him in consideration of quantum of damages, and if anything the injuries had aggravated his pre-existing condition. the case of **Kirti R. Chudasama vs Social Service League & Another (2004) eKLR** was cited in support of this proposition**.** Counsel therefore submitted that an award of Kshs. 1,000,000/= would be reasonable.

9. Lastly, counsel for the Appellant submitted that the award of Kshs. 500,000/= in respect of future medical expenses was too low as the court failed to consider that the Appellant needed surgery to refashion the knee stump at Kshs. 150,000/=, replacement of the temporary prosthesis every six months at the average cost of Kshs. 45,000/= and replacement of the permanent prosthesis at a cost of Kshs. 100, 000/= every five years. It was his submission that on this head a sum of Kshs. 1,490,000/= ought to have been awarded.

10. The Respondent opened his written submissions by stating that in assessing general damages, the court must exercise its discretion judiciously, relying on decisions in the case of **Kigaragari vs Aya (1982-88) 1 KAR 768 and Chege vs Vesters (1982-88) 1 KAR, 1021.** Counsel for the Respondent submitted that the court cannot award damages aimed at sustaining a claimant for life. In the Respondent's view, the cases relied upon by the appellant involved more severe injuries.

11. Counsel referred the court to several authorities to the effect that the appellate court will not interfere with an award of damages unless it was so manifestly and inordinately high or low as to be founded on erroneous principles. It was the respondent's position that for the injuries proved in this case, an award of not more than Ksh. 800,000/= suffices. Reliance was placed in the case of **Silvinus Ondiek Ochola v Delta Hauliage services & Another Kericho (2009) eKLR , Joyce Moraa Oyaro vs Hussein Dairy Ltd (2016) eKLR and Nelson Njihia Kimani vs David Marwa & Another (2017) eKLR.**

12. With regard to diminished earning capacity, the respondent submitted that the appellant was mentally challenged and epileptic before the accident hence the accident did not in any way affect his future earning capacity. Counsel urges the court to set aside the award for loss of future earnings as it was neither proved nor warranted. The case of **Rock Masters Ltd vs Isaac Kabue Miringu (2017) eKLR** was cited.

13. Finally, counsel for the Respondent contended that the award made for future medical costs was not proved and that the appellant had since recovered. It was submitted that the awards sought by the appellant on this appeal amount to unfair and unjust attempt to enrich the Appellant at the expense of the Respondent. The dicta in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku** ***(citation)*** is relied upon. It was pointed out that in the court below, the Appellant had sought an award of Ksh. 500,000/= in that regard and is barred from seeking an enhancement on this appeal. Counsel urged the court to allow the cross –appeal.

14. The appellant's case, as it emerged at the trial was that on 5/12/2010 he was lawfully standing off the road along Thika-Matuu Road at Polysack when the Respondent so negligently drove motor vehicle registration number **KBB 780T** causing it to veer off the road and violently knock down the appellant as a result occasioning him severe personal injuries.

15. **M N (PW1)** testified that the appellant is her son. She testified that she had on the fateful day dispatched the appellant and his sister on an errand, and that, while at the stage the appellant was hit by a motor vehicle. He was rushed to Thika Level 5 hospital where he was admitted for one week. He had sustained crush wound on the right leg which necessitated amputation below the knee. She testified that the appellant suffers from some mental deficiency. She produced the discharge summary and treatment receipts, P3 Form and a police abstract.

16. It was her testimony that the appellant was examined by Dr. Karanja and Dr. Wairoto. She testified that the appellant requires constant care and as such she had to quit her job. She stated that the appellant is mentally challenged, experiences convulsions and is now unable to attend school as his leg was amputated. She prayed for compensation, treatment expenses and costs of the suit and interest. In cross examination she clarified that the Appellant was a normal child before the accident and that the artificial limb has to be changed every 4-6 months.

17. Dr. Washington Wokabi **(PW2**) is a consultant surgeon. He testified that he examined the Appellant on 21/8/2012 and relied on the history from his mother, discharge summary and P3 Form in preparing his report. His findings are that the Appellant had suffered a severe crush injury on the right leg due to motor vehicle accident leading to amputation below the knee. That the Appellant was a known epileptic prior to the accident but that the seizures became more regular after the accident.

18. The doctor observed that the stump being sharp and pointed could not accommodate a limb prosthesis, thus required what he called refashioning-surgery- at a cost of Shs 150,000/- before fitting of prosthesis. He assessed the Appellant's permanent disability at 40%. The doctor stated that every five years the appellant will require a replacement prosthesis at a cost of Kshs. 100,000/=. And that a temporary prosthesis required to be changed every 6-12 months until the Appellant turned eighteen years. The cost of each replacement was estimated at between Kshs. 30,000-40,000/=.

19. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. That duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I.**

20. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"**

21. The point of contention in these appeals is the quantum of damages awarded in the lower court, viewed as inordinately low by the Appellant while the Respondent attacks the awards as too high. I propose to deal separately with each head of damages in contention. While doing so, the court will be guided by the principles enunciated by the Court of Appeal in the case of **Kenfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30.**

22. It was held in that case that:

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

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

General Damages for pain and suffering

24. The Appellant herein complains that the lower court in awarding general damages for pain and suffering relied on an authority which was incomparable to the instant case while relevant authorities cited by the Appellant, including **Ntulele Estate Transporters Limited and Another v Patrick Omutanyi Mukolwe (sopra)** were not considered. That the case relied on by the lower court, namely **Mumias Sugar Company Limited v Francis Wanalo (2007) eKLR** related to the amputation of the plaintiff's finger among other injuries. The Appellant proceeds to surmise that the trial court did not have the advantage of the Respondent's submission at the time of writing judgment. Allegedly because the said submissions were filed one week after the judgment date was set.

25. The Appellant restates the evidence tendered in the trial regarding the injuries sustained by the Appellant and complain that the general damages awarded were inordinately low in light of awards in relevant authorities cited on the this appeal, and in the lower court.

26. The Respondents on their part, assert that damages ought to represent reasonable and fair compensation and that counts cannot possibly award compensation for all the loss and suffering encountered by a claimant. For this proposition, they cite the case of **Denshire Muteti Wambua v Kenya Power and Lighting Company Limited (2013)eKLR**. They urge the court to disregard the authorities cited by the Appellant and to rely on the cases of **Silvinus Ondieki Ochola** and **Joyce Moraa Oyaro (Suspra)** and to substitute the award in respect of general damages for pain and suffering with an award of Shs. 800,000/-.

27. There is no dispute in this case that the Appellant suffered a crash injury that led to the amputation of the right leg below the knee. In her judgment, the trial magistrate did, not explicitly refer to the Respondent's submissions in respect of general and other damages. There was no attempt to compare the injuries of the claimants in the instant case and authorities cited in submissions.

28. Even so, the trial magistrate concluded regarding general damages that the **Mumias Sugar Company Limited** offered guidance in the award of Shs. 1 million as general damages for pain and suffering. The **Mumias Sugar case** had been cited by the Appellant in urging an award of damages for loss of earning capacity. The Respondents brief submissions urged, as now, an award of Shs. 800,000/- as general damages for pain and suffering, based on two decisions namely, **Douglas Erick Nyakundi Masira v Rongai Workshop Limited and Another (2009) eKLR and Jane Otieno v Mombasa Liners Limited and Another (2005) eKLR.**

29. While these authorities did relate to comparable injuries, namely, amputation below the knee, they are relatively old decisions, and if relied on, the trial court ought to have considered inflation over the years, which reference I do not see in the judgment. The trial magistrate did discuss the injuries sustained by the Appellant and mentioned the authorities cited by the Appellant, including **Ntulele Transporters and Ahmed Mohamud Adam v Jimmy Tomino and 2 others Nakuru HCC No. 244 of 1998,** the latter being a rather old decision.

30. It is not immediately clear why the trial magistrate disregarded these authorities, which compared well with this case, at least on injuries sustained by claimants and instead, settled on the **Mumias Sugar** case. The plaintiff in the latter case had sustained traumatic amputation of the small left hand finger, crush injury of the fourth right hand finger and other soft tissue injuries. Clearly, these injuries do not compare well with the main injury sustained by the Appellant herein and it is not possible to tell how the trial magistrate arrived at the decision to rely on the **Mumias Sugar** case in awarding general damages for pain suffering.

31. On my part, I have looked at the medical reports tendered by **Dr. Wokabi** and **Dr. Wairoto**. The Appellant was aged 9 years at the time of examination. **Dr. Wokabi** observed that the "leg below the knee was severely crashed and devitalized." Apart from the pain and suffering occasioned by the crash injury, hospitalization for 3 weeks and amputation, the injury left the Appellant with a 40% permanent disability. That his pre-existing epileptic condition deteriorated due to injury related stress.

32. This evidence was not controverted at the trial. It has been stated in several authorities that the defendant in a suit for damages arising

from negligence must take the plaintiff as he finds him. In this case the Appellant was already epileptic. And while I agree with the Respondent's submissions that general damages cannot compensate all the suffering encountered by a claimant, it is my view that the trial court ought to have relied on an authority that compared well with the instant plaintiff's injuries.

33. The sentiments of the English court in **Lim Poh Choo v Health Authority (1978)1 ALLER 332** cited by the Respondent were echoed by Potter Ja **in Tayab v Kinany (1983) KLR14, quoting dicta by Lord Morris Borth-y-Gest in West (H) v Sheperd (1964)** AC 326, at page 345 as follows:

> **"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. <u>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."</u> (emphasis added)**

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 Dumy 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.

<u>**Damages for Loss of Future Earning Capacity**</u>.

37. The Appellant feels that the award of Shs. 500,000/- under this head was inordinately low, and like the Respondent relies on the principles stated by the Court of Appeal in the **Mumias Sugar Company case**. The award is in respect of diminished earning capacity and not lost earnings. Although it is admitted that the Appellant suffered a debilitating condition (epilepsy) prior to the accident, **Dr Wairoto's** report shows that he had been undergoing treatment, but presented hyper activity on the date of examination.

38. The loss of the right limb and resultant 40% permanent incapacity made the Appellant's bad situation worse, in terms of his capacity to secure a job in the future. The Respondents have emphasized the pre-existing epilepsy as evidence that the Appellant already suffered a disadvantage in that regard. That is correct. But the sequela to the right leg amputation certainly rendered his case worse. The Respondent cannot therefore be heard to say on that basis that there was no proof of lost future earning capacity or that the award was not warranted.

39. In the **Mumias Sugar** case, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in **Butler v Butler (1984) KLR 225,** where, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity.

40. The Court of Appeal stated:

> **"The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future…..The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."**

41. In the instant case, the plaintiff minor was an old epileptic case and hyper active as a result. However, according to her mother **PW1** he was attending Happy Valley School by the time of the accident. He was not a home-bound invalid. There is no evidence however to demonstrate the standard of his school performance. PW1 stated that as a result of the injuries sustained in the accident, the epileptic episodes had become worse, a fact **Dr. Wokabi** (PW 2) attributed to the accident injuries and post-accident stress.

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 exercabated 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.

Future Medical Expenses

45. Turning now to the award in respect of future medical expenses, the matter is a little convoluted. It seems from the Appellant's submissions that the claim under this head was for the refashioning of the amputated stump at Shs. 150,000/-, replacement of temporary prosthesis every 6 to 12 months at between Shs. 30,000 to 40,000 until the age of 18 and, subsequently, change of permanent prosthesis every five years at Shs. 100,000/- upon the Appellant attaining the age of 18 years. This claim was fleshed out in the evidence of **Dr. Wokabi** and the report by **Dr. Wairoto.** The evidence was not challenged.

46. The trial magistrate captured this claim in her judgment as follows:

> **"In paragraph 6A of the plaint (there was an amended plaint) the plaintiff has pleaded future medical expenses. Refashioning of the stump and cost of replacement of prosthesis. Pw2 Dr Wokabi told the court that the stump would require refashioning so as to enable the prosthesis fit properly. The minor is growing and the bone that had been cut during amputation is also growing. The claim of Shs. 150,000/- is uncontroverted …. Dr Wokabi and Dr. Wairotos' medical reports contain that the prosthesis would require replacement every six months. I take the estimate cost of the prosthesis at Shs. 35,000/- to be fair. Dr. Wokabi told the court that as a result of the injury the minor would not be able to play sports…..**
>
> **He told the court that the minor would require a temporary prosthesis every 6-12 months until the age of 18 years. I award KShs. 500,000/- for cost of future medical expenses" (sic)**

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/-.

53. Judgment is therefore entered for the Appellant against the Respondent in the total sum of Shs. 3,425,050/- subject to the apportionment ratio in respect of damages. As the appeal has substantially succeeded, the Appellant is awarded the costs of the appeal against the Respondent. The cross appeal is dismissed with costs.

Delivered and signed at Kiambu this 27th day of July, 2018.

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C. Meoli

JUDGE

In the presence of:

For the Appellant: Mr. Mureithi holding brief for Mr, Ngare

For the Respondent: Mr. Njuguna holding brief for Kairu and MCourt.

Court Assistant: Kevin