REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 2 OF 2015

ROSE MAKOMBO MASANJU ……..…………..........………APPELLANT

AND

NIGHT FLORA alias NIGHTIE FLORA………..….………1ST RESPONDENT

TOTAL PLUS BUREAU ……………………….….…...2ND RESPONDENT

(Being an appeal from the Judgment of the Honourable Senior Principal Magistrate Mr S.M. Wahome delivered on 15th day of December 2015 at Voi Law Courts in PMCC No 150 of 2014 (sic)

BETWEEN

ROSE MAKOMBO MASANJU …………………………........PLAINTIFF

VERSUS

NIGHT FLORA alias NIGHTIE FLORA.………………....…1ST DEFENDANT

TOTAL PLUS BUREAU…………………………........2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 15th December 2014, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts awarded the 1stAppellant herein a sum of Kshs 300,000/= general damages, pain and suffering and loss of amenities. However, the Learned Trial Magistrate deducted a sum of Kshs 20,700/= from the 1st Respondent's part of the award in favour of the Appellant herein as he found that the 2nd Respondent had paid her the said sum for treatment.

2. The Learned Trial Magistrate determined that the Appellant herein only proved special damages in the sum of Kshs 3,000/= which he awarded her. He apportioned liability at 15%, 45% and 40% as against the Appellant, 1st Respondent and the 2nd Respondent herein respectively.

3. The computation of the award was as follows:-

As against the 1st Defendant

45/100 x 300,000 = 135,000/=

Less 20,700/=

114,300/=

As against the 2nd Defendant

40/100 x 300,000 = 120,000/=

And Kshs 3,000/= as special damages together with costs and interest until payment in full.

4. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed her Memorandum of Appeal dated 13thJanuary 2015 on 14thJanuary 2015. The grounds of appeal were as follows:-

> **1. THAT the Learned Magistrate erred in law and in fact in considering issues which he ought not to have considered and in holding the appellant to be 15% liable.**
>
> **2. THAT the Learned Magistrate erred in law and fact in awarding damages that were very low in view of the injuries sustained by the appellant.**
>
> **3. THAT the Learned Magistrate erred in law and fact in making a finding and arriving at an award which was inordinately low so as to represent an erroneous estimate of damages payable.**
>
> **4. THAT the Learned Magistrate erred in law and fact in failing to give due consideration to the contents of the appellant's submissions and more specifically the authorities on quantum.**
>
> **5. THAT the Learned Magistrate erred in law and fact by deducting Kshs 20,700/= from the award of general damages on the basis that the 1st Respondent had proved paying the appellant Kshs 20,700/=.**
>
> **6. THAT the Learned Magistrate erred in law and fact in failing to award special damages of Kshs 50,901.44 as pleaded in the plaint and proved by the appellant by way of receipts.**

5. On 5th September 2016, both the Appellant's and the 2nd Respondent's advocates asked this court to consolidate theAppeal herein with **HCCA No 3 of 2015 Total Plus Bureau vs Rose Makombo Masanju & Night Flora Alias Nightie Flora**for purposes of disposing of the two (2) appeals as they had both emanated from the same matter in the Trial Court. The 1st Respondent never appeared in court despite having been served with Mention Notices several times to attend court.

6. Notably, the 2nd Respondent herein did not file any Record of Appeal in **HCCA No 3 of 2015 Total Plus Bureau vs Rose Makombo Masanju & Night Flora Alias Nightie Flora** as a result of which this court dismissed the same. However, both the Appellant and the 2nd Respondent filed their respective submissions in the Appeal herein.

7. The Appellant's Written Submissions were dated and filed on 26th September 2016 while those of the 2nd Respondent herein were dated 14th September 2016 and filed on 16th September 2016. The parties requested this court to render its judgment based on the said Written Submissions without highlighting the same, which it hereby proceeds to do.

LEGAL ANALYSIS

8. Having looked at the Appellant's grounds of appeal and to the respective Written Submissions, it was clear that the issues that were really before this court for determination were:-

> **1. Whether or not the apportionment of liability as fair, reasonable and justifiable; and**
>
> **2. Whether or not the quantum that was awarded was manifestly low as to warrant disturbance by this court**.

9. The court therefore addressed its mind to the said issues under the following heads.

I. LIABILITY

10. The Appellant referred this court to the cases of **Sumaria & Another vs Allied Industries Ltd (2007) KLR1**and that of **East African Portland Cement Company Ltd vs Tilikia Keloi [2016] eKLR** which in the latter case, it was held as follows:-

> **"…The position of the law as regards a first appeal is that as the first appellate court, this court has a duty to re-consider the evidence, evaluate it and draw its own conclusions while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing witnesses…"**

11. She submitted that the Learned Trial Magistrate erred when he found her to have been fifteen (15%) per cent liable for the accident yet no evidence was adduced to demonstrate that she had contributed to the causation of the accident in any way.

12. On its part, the 2nd Respondent herein argued that the evidence that was adduced showed that the 1st Respondent's MotorVehicle veered off the road and rammed into its Motor Vehicle which was stationary and parked in a designated parking lot and hence, it could not be held to have contributed to the said accident. It added that the 1st Respondent was in fact charged with and convicted of the offences of careless driving and driving an insured motor vehicle.

13. As the Appellant rightly pointed out, being the first appellate court, this court is mandated to re-analyse and re-assess the evidence that was adduced in the Trial Court. It is expected to do so and come up with its own independent decision but it must bear in mind that it did not have the advantage of hearing the evidence or observe the demeanour of witnesses as the Learned Trial Magistrateherein did.

14. In re-assessing and re-evaluating the evidence on record, this court noted from the Appellant's Plaint that was dated and filed on 7th November 2013, that on 7th January 2012, she was a lawful passenger in the 1st Respondent's Motor Vehicle Registration KAP 822V along Voi- Caltex Road at Voi Township when the 1st Respondent and the driver of the 2nd Respondent Motor Vehicle Registration Number KBF 964- ZD 0128 drove, managedand/or controlled the said Motor Vehicles negligently that they permitted them to violently collide as a result of which she sustained serious bodily injuries.

15. She itemised the particulars of negligence against both Respondents in Paragraph 5 of the said Plaint and averred that both the 1st and 2nd Defendants were jointly and severally vicariously liable (sic).

16. Notably, the contentions in the Plaint were different from what she had stated in her Witness Statement which she adopted as her testimony before the Trial Court. In her evidence, she testified that she was a lawful passenger in the 1st Respondent's Motor Vehicle when the 1st Respondent negligently drove the said Motor Vehicle causing it to collide with the 2nd Respondent's Motor Vehicle that was negligently parked beside the road. She pointed out that the 1st Respondent was charged with and convicted of the offences of careless driving and driving an un-insured vehicle and fined Kshs 1,000/= and Kshs 2,000/= respectively.

17. During her Cross-examination, she admitted that the 1st Respondent was speeding at the material time and that she had even asked the 1st Respondent to stop but she refused. She said that the 1st Respondent's Motor Vehicle had no seats beats. It was her evidence that the 1st Respondent deliberately rammed into the 2nd Respondent's Motor Vehicle which she said had been wrongly parked beside the road. She denied having seen a Tuk Tuk which could have confused the 1st Respondent herein leading her to ram into the 2nd Respondent's Motor Vehicle.

18. In her testimony, the 1st Respondent stated that she was driving at a speed of 40 km/h when a Tuk Tuk came into her path as it was trying to overtake a trailer. She said that she veered off the road as she tried to avoid a head on collision with the said Tuk Tuk, a fact he reiterated when she was Cross-examined.

19. No 87299 PC Fredrick Kyalo (hereinafter referred to as "DW 1") gave evidence on behalf of the 2nd Respondent herein. He confirmed that charges that were preferred against the 1st Respondent herein and was categorical that she was the one who rammed into the 2nd Respondent's Motor Vehicle which had been parked in the parking lot. He said that he did not have the police file and admitted that he never visited the scene and that the evidence he had tendered in court was given to him by someone else.

20. In apportioning liability in the manner that he did, the Learned Trial Magistrate stated that the Appellant was not wearing a safety belt at the material time, she entered the 1st Respondent's voluntarily and the 2nd Respondent's Motor Vehicle had been wrongly parked with part of it being on the road.

21. This court perused the Record of Appeal and found no photographs or sketch plan of the scene of the accident. It therefore resorted to the evidence that was adduced by the witnesses with a view to establishing liability and extent of liability of the parties herein in the causation of the accident herein.

22. The legitimate expectation of any passenger being carried and/or ferried in a motor vehicle is that the driver of such motor vehicle will manage, control and/or drive the said motor vehicle in a manner that will not cause such passenger. It is therefore well established in common law that a driver such motor vehicle ought to be held wholly liable for any loss, damage or injury that such passenger suffers in case of an accident.

23. For such a passenger to be found liable, it must be demonstrated that he acted and/or omitted to act in a particular manner as a result of which the accident in which he suffered loss, damage or injury, occurred. In this instance, the Learned Trial Magistrate found the Appellant herein to have been liable for the injuries that she sustained to the extent of fifteen (15%) per cent. He attribute this contribution of negligence to the fact that the Appellant boarded the 1st Respondent's Motor Vehicle voluntarily and that she had failed to wear a safety belt.

24. Undoubtedly, the Learned Trial Magistrate misdirected himself on the law and on the principles of contributory negligence. This is because the Appellant's failure to wear a safety belt or voluntarily boarding the 1st Respondent's Motor Vehicle had nothing to do with the 1st Respondent veering off the road and ramming into the 2nd Respondent's Motor Vehicle.

25. In fact, failure by the Appellant to wear a safety belt or her entering 1st Respondent's Motor Vehicle voluntarily were irrelevant for all purposes of apportioning liability in the case herein. In the mind of this court, failure to wear a safety belt could only have been a factor if parties were engaged in a negotiated out of court settlement.

26. Having said so, for the reason that there was no evidence that was placed before the Learned Trial Magistrate to demonstrate that the Appellant voluntarily put her life at risk by boarding the 1st Respondent's Motor Vehicle which, if it was proven, would have brought her within the ambit of the doctrine of *volenti non fit injuria*and thus bear some degree of contributory negligence,the Learned Trial

Magistrate clearly erred when he found the Appellant herein ought to bear fifteen (15%) contributory negligence.

27. The court disregarded the evidence of DW 1 as it was mere hearsay. On her part, the Appellant was categorical in her evidence that the 1st Respondent was speeding when she veered off the road and hit the 2nd Respondent's Motor Vehicle that had been parked by the road.

28. The 1st Respondent also confirmed that the 2nd Respondent's Motor Vehicle was stationary and was parked beside the road. It was irrespective that the 2nd Respondent's Motor Vehicle was wrongly parked, if at all. She was expected to exercise care, diligence and manage her Motor Vehicle in such a way that it was not going to be a danger to other road users who were not on her path on the road.

29. The fact that she veered off the road to the side of the road was indicative of the excessive speed she was driving in at the material time. This made it difficult for her to control and/or manage her Motor Vehicle that collided with the 2nd Respondent's Motor Vehicle which was stationary. There was no doubt in the mind of this court that the Appellant herein sustained injuries due to the 1st Respondent's reckless driving.

30. This court therefore found that the Learned Trial Magistrate to have erred both in law and fact when he made a conclusive finding that the 2nd Respondent's Motor Vehicle had been wrongly parked on the road with part of its body on the road because no evidence was adduced in that respect.

31. The fact that the Appellant asserted that fact was not conclusive evidence. She ought to have supported her evidence with facts which in this instant case was negated by the fact that the 1st Respondent was charged with and convicted of the offence of careless driving, a fact that she did not deny in her evidence.

32. Consequently, this court found that the Learned Trial Magistrate erred when he concluded that the 2nd Respondent ought to bear forty (40%) contributory negligence for the accident herein.

II. QUANTUM

A. GENERAL DAMAGES, PAIN & SUFFERING & LOSS OF AMENITIES

33. In her Submissions before the Trial Court, the Appellant had prayed for a sum of Kshs 2,200,000/= in respect of general damages, pain and suffering and loss of amenities. In support thereof, she relied on three (3) cases.

34. In the first case of **George Kingoina Maranga & Another vs Lucy Nyokabi [2006] eKLR**, the plaintiff therein had sustained a dislocation of the left wrist, fractures of the radius and ulna and soft tissue injuries to the face. In 2006, the Court awarded general damages, pain and suffering and loss of amenities in the sum of Kshs 420,000/=.

35. In the second case of **NAIROBI HCCC No 2428 of 1999 James Njuguna vs Fredrick Githinji Ndegwa** (unreported), the plaintiff therein had sustained a depress skull fracture and soft tissue injuries. In 2008, the court awarded general damages, pain and suffering and loss of amenities in the sum of Kshs 1,500,000/=.

36. In the third case of **Bayusuf & Sons vs Grace Adhiambo Opondo [2008] eKLR,**the plaintiff thereinsustained a concussion and soft tissue injuries. In 2008, the court awarded general damages, pain and suffering and loss of amenities in the sum of Kshs 200,000/=.

37. Save for stating that the sum of Kshs 300,000/= that she was awarded by the Learned Trial Magistrate was inordinately low so as to give a wholly erroneous estimate warranting interference by this appellate court in line with the holdings in the cases of **East African Portland Cement Company Ltd vs Tilikia**

Keloi (Supra)and **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M. Lubia & Olive Lubia (1982-88) 1 KAR 727**that she relied upon, she did not indicate what she thought was fair and reasonable at this appellate stage. This court therefore made an assumption that she was still claiming a sum of Kshs 2,200,000/= in respect of general damages, pain and suffering and loss of amenities.

38. The 1st Respondent had submitted that a sum of Kshs 110,000/= would be adequate to compensate the Appellant herein for general damages, pain and suffering and loss of amenities. In view of the injuries that the Appellant sustained, the Learned Trial Magistrate termed as "contemptuous." This court agreed with the said Learned Trial Magistrate that the said proposal was not anywhere near what would be termed as a reasonable award.

39. On its part, the 2nd Respondent placed reliance on the case of **NAIROBI HCCC No 1321 Mulwa Musyoka vs Wadia Construction** (unreported) where 2004, the court awarded the plaintiff therein Kshs 150,000/= general damages, pain and suffering and loss of amenities.

40. The Learned Trial Magistrate noted that although the said case of **Mulwa Musyoka vs Wadia Construction** (Supra) was old, the proposed amount was reasonable and proceeded to award the same for general damages, pain and suffering and loss of amenities.

41. Strangely enough, in the present Appeal, the 2nd Respondent submitted that the sum of Kshs 237,000/= that the Learned Trial Magistrate awarded the Appellant herein was quite exorbitant This was quite baffling to this court because in its Written Submissions in the Trial Court, it had urged the Learned Trial Magistrate to award the Appellant herein a sum of Kshs 300,000/= for general damages, pain and suffering and loss of amenities. This court did not therefore take its contestation that the sum of Kshs 237,000/= awarded to the Appellant by the Learned Trial Magistrate was manifestly excessive to have been a serious and thus rejected the same right at the outset.

42. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko[2004] eKLR.**

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

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

45. Indeed, in the case of **Kigaraari vs Aya(1982-88) 1 KAR 768**, it was stated as follows:-

> **"Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."**

46. Remaining faithful to the doctrine of *stare decisis,* this court therefore looked at recent cases with comparable awards to come to a fair and reasonable assessment of the general damages that ought to be awarded herein. It found it necessary to look at several cases dealing with different injuries to give the parties a sense of awards that are been given by the courts in the recent past as it has noted that there is a tendency by advocates dealing with injury claims to rely on very old cases and propose outrageous figures.

47. This is despite there being a dearth of recent jurisprudence in this area. Reliance on such obsolete cases does little in the development of jurisprudence. It is highly recommended that parties try as much as possible to submit on comparable cases to avoid the courts wasting time doing research for them.

48. In the case of**Agnes Wakaria Njoka v Josphat Wambugu Gakungi [2015] eKLR,**the plaintiff therein sustained two (2) deep cut wounds on her hand, fracture of the skull, deep compound fracture on the right forearm and loss of left hand at wrist which was cut off. In 2015, Limo J awarded a sum of Kshs 650,000/= forgeneral damages, pain and suffering and loss of amenities.

49. In the case of **Zachary Kariithi v Jashon Otieno Ochola [2016] eKLR,** the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th 5th ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. In 2016, Majanja J awarded a sum of Kshs 1,500,000/= general damages, pain and suffering and loss of amenities.

50. In the case of **Margaret T. Nyaga vs Victoria Wambua Kioko**(Supra)the plaintiff therein had sustained ruptured urinary bladder, fracture of the fibula and superficial injuries to the right axle, left hand and both knees. In that case the trial court therein had awarded a sum of Kshs 450,000/= which on appeal was reduced to Kshs 300,000/= as the appellate court had found the sum of Kshs 450,000/= to have been excessive.

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

52. Having said so, this court perused the Plaintand noted that the Appellant herein had sustained a fracture of the left wrist, comminuted fracture frontal bone with Hemosinus, concussion with loss of consciousness for three (3) hours, two (2) deep cut wounds on the forehead and right eye nerve injury-Trigeminal Neuralgia,

53. There was a Medical Report dated 13th January 2012 that was prepared by Dr Lucy Senganya, Consultant Radiologist which showed that the Appellant herein sustained Comminuted fractures of the frontal bone with associated hemosinus. However, the brain scan was normal.

54. Dr Hanif Mohamed (hereinafter referred to as “PW 1”) testified that the Appellant sustained injuries to the eyes, fracture of the left wrist, deep cut wound on the forehead with fracture of the frontal bone. At the time of the medical examination, the Appellant had been complaining of persistent headaches, pain on the left wrist and reduced movement of the fingers. He did not note any permanent disability.

55. Evidently, the injuries the Appellant sustained could not be termed to have been minor. They were serious in that she sustained fractures to the wrist and head. Bearing in mind the recent awards and the injuries that the Appellant herein sustained, it was this court’s view that the award of the sum of Kshs 300,000/= was manifestly low warranting interference by this court.

56. In the assessment of this court, it was its considered opinion that an award of Kshs 500,000/= as general damages, pain and suffering and loss of amenities would be fair and reasonable to compensate the Appellant herein for the injuries that she sustained as PW 1 had opined that she never suffered any permanent disability as a result of the said injuries.

B. SPECIAL DAMAGES

57. The Appellant claimed a sum of Kshs 50,901/= made up as follows:-

Medical expenses	**Kshs 46,401.44**

Medical Report	**Kshs 3,000.00**
Copy of Records	**Kshs 1,500.00**
	Kshs50,901.00

58. The Learned Trial Magistrate only awarded her a sum of Kshs 3,000/= as he found that that was the only amount the Appellant specifically proven. Notably, the Appellant did not copies of the receipts in support of her claim for Special damages in her Record of Appeal This court was forced to look into the original court record for the same.

59. This court opted to go out of its way to so as it had at the back of its mind the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandate courts to administer justice without due regard to procedural technicalities. The Appellant's counsel is, however, warned that not all courts may wish to take the route that this court did in poring over documents that ought to have been filed in the Record of Appeal in the first instance.

60. There was no Report from Metropolitan Diagnostic and MRI Centre from where a receipt for CT Scandated 13th January 2012in the sum of Kshs 5,000/= had been issued. If the same related to the Report by Dr Lucy Senyagwa, no evidence was tendered to show a nexus between the two (2) documents.

61. There were also receipts from Jocham Hospital, two (2) of them for 13th January 2012 bearing the same amount of Kshs 5,000/= and another dated 17th January 2012for Kshs 30,905/=. There was another receipt was dated 13th January 2012 for the sum of Kshs 700/= andhandwritten receipt showing a figure of Kshs 4,796.44. The same was illegible and this court could not make head or tail what it was all about.

62. The Receipt from KRA dated 18th July 2013 in the sum of Kshs 1,500/= tallied with the three (3) Copies of Records in respect of KAP 822V showing the 1st Respondent as the registered owner and those of KBF 964 and ZD0128 Trailer showing the 2nd Respondent herein as the owner. These were necessary documents to establish in whose names the vehicles were registered for purposes of the hearing.

63. PW 1tendered in court his Medical Report and a receipt in the sum of Kshs 3,000/= which were marked as Pexh 1 (a) and (b) respectively. It appears that it was this amount that the Learned Trial Magistrate found to have been specifically. PW 1 also tendered in evidence two (2) other receipts that were marked Pexh 1(c) and 1(d) respectively. The court did not see any of these receipts or his Medical Report in the Trial Court file.

64. It was also not clear how the said Learned Trial Magistratecame to the conclusion that the 1st Respondent had paid the Appellant a sum of Kshs 20,700/=. In fact, he did not explain or give a computation of how this figure had been arrived at.

65. However, it did appear that when the 1st Respondent contended during her Cross-examination that she had paid the Appellant this amount of Kshs 20,700/=, the Appellant's counsel did not pursue this line of questioning further but seemed to merely accept that 1st Respondent's assertions that she paid the Appellant herein the said sum for treatment costs. Notably, the issue of this amount was not even canvassed in the Appellant's Written Submissions before the Trial Court.

66. In view of the documentation that the 1st Respondent submitted andin the absence of any evidence to the contrary by the Appellant, the said Learned Trial Magistrate may very well have been justified in coming to the conclusion that he did.

67. It is, however, important to point out that it was not clear from the proceedings in the Trial Court file at what point Pexhs 7, 8, 9, 10, 11, 12, 13(a), 13(b), 13 (c) and 13(d), which were the only receipts in the Trial Court file,were produced as exhibits in the said Court. The Appellant's Witness Statement that she

adopted as her examination-in-chief made no reference to any documents in support of her claim. There was also no indication as to the time when the Appellant tendered in her evidence of the Bundle of Documents she was relying to. This was in sharp contrast to PW 1and the 2nd Respondent who specifically tendered documents in support of their assertions as shown in the proceedings in the Trial Court file.

68. It is not sufficient that a party files a List and Bundle of Documents in support of his or her case. If one wishes to adopt a witness statement as evidence- in –chief, the witness statement must be correlated to the documents such person wishes to rely upon. It must be specifically tendered in evidence and not merely left on the Trial Court record without any reference to the same. Until such a bundle of documents or documents is tendered in evidence, it merely remains a document on the Trial Court file and does not constitute evidence that has been adduced.

69. Although this court found that certain receipts were payable, in the absence of any court record that any receipts were relied upon as evidence by the Appellant, this court was hesitant to allow the same at this appellate stage. As the Learned Trial magistrate may have had the benefit of seeing the receipt of Kshs 3,000/= that he awarded as special damages, which this court had no benefit of seeing, this court left the said award undisturbed.

CONCLUSION

70. Accordingly, having considered the Appeal herein, the Written Submissions in support of the respective parties' cases and the case law, the court was not persuaded that this was a suitable case for it to exercise its discretion and interfere with the Trial Court's finding in respect of the sum of Kshs 20,700/= and Kshs 3,000/= being treatment costs and special damages respectively.

71. It, however, found that there was need to interfere with the award of Kshs 300,000/= that was given for general damages, pain and suffering and loss of amenities.

DISPOSITION

72. For the reasons foregoing, the upshot of this court's judgment isthat the Appellant's Appeal was partly successful in that Judgment for the sum of Kshs 300,000/= general damages, pain and suffering and loss of amenities is hereby set aside and replaced with the sum of Kshs 500,000/= general damages for pain and suffering and loss of amenities.

73. However, as this court did not disturb the Learned Trial Magistrate's finding in respect of the sum of Kshs 20,700/=, it is herebydirected that judgment be and is hereby entered in favour of the Appellant herein against the 1st Respondent herein for the sum of Kshs 482,300/= made up as follows:-

General Damages	**Kshs 500,000/=**
Less sum paid for treatment	**Kshs 20,700/=**
	Kshs 479,300/=
Special Damages	**Kshs 3,000/=**
	Kshs 482,300/=

together with costs and interests therein until payment in full.

74. Apportionment of liability at 15%, 45% and 40% as against the Appellant, the 1stRespondent and the 2nd Respondent respectively is hereby set aside. This court hereby replaces the same with liability at hundred (100%) per cent as against the 1st Respondent herein.

75. As this court found the 2nd Respondent not to have contributed to the causation of the accident herein in any way, the Appellant shall pay its costs for the proceedings in the Trial Court and those of this court.

76. It is so ordered.

DATED and **DELIVERED** at **VOI** this **22ND**day of **NOVEMBER** 2016

J. KAMAU

JUDGE