REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 522 OF 2011

JOSEPH KARANJA WANJIRU.....APPELLANT

VERSUS

1. **GRACE WANGARE NYORO**

2. **NJAU RAHAB.....RESPONDENT**

(Appeal from the original judgement and decree of Hon. C.W. Meoli (CM)(as she then was)

in Kiambu CMCC No. 232 of 2010 delivered on 15th September, 2011)

JUDGMENT

1. This appeal by **JOSEPH KARANJA WANJIRU** arises *from the original judgement and decree of Hon. C.W. Meoli (CM)(as she then was) in Kiambu CMCC No. 232 of 2010 delivered on 15th September, 2011and* sets out the following grounds:-

a. That the learned magistrate erred in law and fact in finding that the Plaintiff was 100% liable for the accident subject matter that occurred on 4th March, 2009.

b. That the learned magistrate erred in law and in fact in making a finding on the issue of liability that was totally against the weight of the evidence adduced at the trial.

c. That the learned magistrate fell into error by adopting an untenable position solely aimed at improperly exonerating the first Respondent from blame in the face of solid proof and unmistakable evidence of PW1, 2, 3 and 4 which amounted to a travesty of justice.

d. That the learned magistrate while dealing with the evidence of PW1 and 4 in her judgment completely misdirected herself and erred in law and fact in failing to appreciate the Appellant's legal position in the entire case.

e. That the learned magistrate erred in law and fact in failing to give any weight to the cardinal rule of evidence while considering the issue of the standard of proof required in civil litigation.

f. That the learned magistrate in her judgment fell into grave error by purporting to abdicate her privileged position of an arbitrator and falling into the arena of the controversy between the litigants.

g. That the learned magistrate again fell into grave error in failing to assess the quantum of damages awardable to the Appellant in her judgment as required by law.

2. From the said grounds arise the following issues for this court's determination. First, is the issue of liability wherefrom the following ancillary issues emerge: whether or not the magistrate erred in finding the Appellant 100% liable; whether or not the magistrate made a finding on liability against the weight of evidence adduced at the trial; whether or not the magistrate adopted untenable position against evidence of PW1, 2,3 and 4 in exonerating the 1st Respondent; whether or not the magistrate misdirected herself while dealing with the evidence of PW 1 and 4; whether or not the cardinal rule of evidence was not given due regard while considering the standard of proof and whether or not the magistrate abdicated her position as an administrator and fell into the arena of the controversy.

3. Secondly, is the issue of whether or not the magistrate failed to assess damages, and if so found the effect of such failure?

4. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re evaluate and re examine the lower court record and the evidence before it and arrive at its own independent conclusion taking into account the fact that it never saw or heard witnesses as they testified and give an allowance to that. This principle of law was espoused in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:-

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

5. And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

6. The Plaintiff's case as per the amended plaint dated 29th November, 2010 was that he was on 4th March, 2009 lawfully cycling along Kiambu- Banana Road. That on the material day, he was knocked down by motor vehicle registration number KBF 728U (***'subject motor vehicle'***). That as a result of the said accident, he sustained facial oedema with a left sub-conjuctival haemorrhage and infra-orbital par aesthesia, fractured left side of the mandible, fractured left le-forte 1, fractured left zygomatic complex, fracture left orbital rim and mid palatal split. He thereby sued the 1st Appellant and the 2nd Appellant as the driver and registered owner of the subject motor vehicle respectively for recovery of damages. He claimed that his injury to the jaw requires surgical repair at an estimated cost of KShs. 232,000/= being costs for future medical expenses. That he incurred medical and transport of KShs. 399,389/=. That prior to the accident, he used to work as a taxi driver earning a monthly income of KShs. 15,000/= but due to the injuries he can no longer engage in any gainful occupation and claimed loss of earnings at KShs.15,000/= per month from the date of the accident to the date of filing of this suit and also loss of earning capacity at KShs. 15,000/= per month.

7. The plaintiff pleaded special damages of KShs. 3,000/= for medical report, KShs. 200/= for police abstract, KShs. 500/= for search fee at Kenya Revenue Authority and KShs. 399,389/= for medical and transport expenses. The Appellant sought damages as follows:-

a. General damages for pain and suffering and loss of amenities.

b. Special damages of KShs. 403,089/=

c. Costs of the suit

d. Interest on a, b, and c above at court rates.

e. Any other relief that this court may deem fit to grant.

f. Loss of earning from the date of the accident subject matter (4th March, 2009) to the date of filing the plaint in court (2nd September, 2010) at KShs. 15,000/= per month i.e. KShs. 250,000/=.

g. Loss of earning capacity from 3rd September, 2010 to a date to be determined by this court at KShs. 15,000/= per month.

h. Costs of future medical care of KShs. 232,000/=.

8. The Defendants filed an amended statement of defence dated 13th January, 2011 in which they denied the Appellants. They in the alternative attributed the occurence of the accident to the Appellant's negligence.

9. The Appellant availed five (5) witnesses. Dr. Kennedy Koech (PW1) stated that when he saw the Appellant in the year 2009, he complained of inability to eat, he had blurring of vision in the left eye and swollen face following severe facial injuries sustained in the accident. That on examination, he was distressed and sick looking with generalised facial swelling, inability to bite due to displaced fractured law bones with severe pain, speech impaired by pain in jaw, the left eye was red due to bleeding in conjuctiva without lateral posterior limit (the eye did not have limit) which is usually sign of fracture of zygomatic bone-cheek bone, there was palpable step deformities of bone surrounding left eye consistent with fractures, altered sensation in left eye due to entrapment of the orbital nerve (infra orbital parasthesia), fractured left lower mandible, upper jaw fracture, left zygomatic complex fracture, left orbital rim fracture and mid parietal split-bone forming roof of mouth. PW1 stated that the said injuries were consistent with severe trauma to the head. That he referred the Appellant for CT scan to confirm the injuries which scan was done. That as a result of the injuries, the Appellant was admitted for treatment on 24th March, 2009. That the Appellant underwent an open reduction surgery and fixation of the mandible bones. That the procedure involved surgical exposure of bones, fixation of bones and stabilising by screws. That he discharged the Appellant on 27th March, 2009 after satisfactory recovery and reviewed him on 30th March, 2009 and in April, 2009. PW1's prognosis was that fractures usually heal when well aligned. That nerve recovery unpredictable scars may become less conspicuous but may not disappear fully. That the plates and screws still need to be removed after six months and the estimated cost in a private would be KShs. 232,000/=. He stated that the items he used i.e. titanium screws and plate which costs KShs. 238,954/=. He stated that he charged KShs.3,000/= for the medical report and KShs. 20,000/= for court attendance.

10. The Appellant (PW2) recounted that he was on the material day cycling along Banana- Kiambu when he saw a vehicle approaching from the opposite direction and that ahead of it was another vehicle. That the vehicle behind pulled out to overtake and in the process came to his side and knocked him off. That the said vehicle was registration number KBF 728 U. That he was rushed to Nazareth Hospital but later referred to Kenyatta National Hospital because he had internal bleeding. That he was unconscious at the time he was being taken to Nazareth Hospital. He stated that at Kenyatta National Hospital he was treated and discharged but upon a CT scan being done later, he was admitted for three (3) weeks and was operated on. He produced a referral letter from Nazareth Hospital (P. Exhibit 3), a discharge summary (P. Exhibit 5) and a receipt from Kenyatta National Hospital (P. Exhibit 6). He stated that he was operated on by PW1 who he paid KShs. 259,954/= and produced a bundle of receipts and prescriptions to that effect as P. Exhibit 7. He stated that he thereafter went for review and spent KShs. 1,500/=. He produced

receipts to that effect as P. Exhibit 8 and bundle of prescriptions and Kenyatta National Hospital card (P. Exhibit 9). He testified that he reported the matter to Karuri Police Station and was issued with a p3 form (P. Exhibit 10). That he conducted a search which revealed that the 2nd Appellant was the owner of the subject motor vehicle. He produced the copy of records and receipt to that effect as P. Exhibit 11 (a) and (b). He stated that he was issued with a police abstract at the police station at a cost of KShs. 200/= and produced the police abstract and receipt as P. Exhibit 13 and 14 respectively. He stated that he did not suddenly cross over the oncoming vehicle and stated that he was cycling in a straight path and the subject vehicle veered into his path. He stated that he still had the metal implants and that he experiences memory loss and feels pain in the jaws. On cross-examination, the Appellant stated that one of the oncoming vehicles was a matatu which had stopped to pick passengers. That the collision occurred after the subject vehicle overtook. That he was cycling on the left side of the road but not at the edge of the road. He denied having crossed the path of the subject vehicle and emerging from behind a vehicle in front of him.

11. Jane Kanyi Gathu (PW3) who stated that she is a tailor at Kaspat stage along Banana-Kiambu road. It emerges from her evidence that she was on the road on the material day. That there were three vehicles on the road heading towards Laini Banana from Kiambu direction. That the vehicle in front (1st Vehicle) stopped at the bus stop. That while the second vehicle started to pass the vehicle which has stopped at the bus stop, the subject vehicle overtook it. That the subject vehicle went to the other side of the road completely and it is at that point that it knocked down the Appellant. PW3 denied that the Appellant was crossing in front of the incoming traffic when he was hit and stated that the Appellant was on the left side of the road. PW3 affirmed her statement as in the examination in chief. Particularly that the subject vehicle had left its correct lane completely while overtaking and hit the Appellant who was on the left lane but that the said vehicle did not go out of the road completely after the collision. She however stated that she could not tell whether or not the Appellant was overtaking another vehicle but that there were vehicles behind the Appellant. She stated that the Appellant was bleeding profusely after being knocked down that she thought he was dead.

12. Boaz Cherua (PW4) a police officer attached at Karuri traffic base produced the police records on behalf of P.C. Monyoncho who was the investigating officer. P.C. Monyoncho was said to be out attending to other duties. He stated that the accident occurred along Karuri-Kiambu road on 4th March, 2009 but was reported the following day. That the accident involved the subject motor vehicle and the Appellant. That the said vehicle was being driven by the 1st Respondent. Investigations were conducted and statements were taken from an eye witness (PW3), the 1st Respondent and the Appellant's mother, Jane Wangui Ngugi. That a covering report was prepared and the 1st Respondent was blamed for overtaking dangerously. He however stated that he was not aware whether charges were preferred against the 1st Respondent. He went ahead and produced the investigation diary (P. Exhibit 15) and the police abstract (P. Exhibit 13). On cross-examination, PW4 acknowledged that the covering report and the recommendations were neither dated nor signed. He confirmed that line No. I0 J of the investigation diary stated that the Appellant was evading a matatu which was picking passengers.

13. Sammy Monyoncho (PW5) who was the investigating officer confirmed the occurence of the accident and indicated that after conducting investigations, he recommended that the 1st Appellant be charged with careless driving. He confirmed that the accident was reported on 6th March, 2009 although it occurred on 5th March, 2009. He later stated that the accident occurred on 4th March, 2009. He stated that the 1st Respondent was never charged because she never went back to the police station. That when she was reached on phone she stated that she was abroad. He acknowledged that the diary did not show the efforts he made to trace the 1st Respondent. He stated that when he visited the scene six days after the accident thus on 10th March, 2009 he found blood stains which were on the extreme left side of the road. On the side the Appellant was cycling. On being asked why his report and recommendation were never signed, he stated that he intended to consult the base commander but that his findings were conclusive.

14. DW1 stated that she was on the material day driving her vehicle (subject vehicle) when an oncoming vehicle stopped in the middle of the road. That as she got close to the said vehicle, the Appellant emerged from behind the said vehicle and hit her vehicle near the side mirror. That the Appellant hit the side

mirror which is at the front of the vehicle. She stated that she was at the time driving at 60KPH and that there was no bus stop at the area rather there was a roadside shop. She stated that when she first saw the Appellant, he was close and he suddenly passed in front of her. That she was not close to the vehicle so the Appellant came suddenly. She stated that she took the Appellant to Nazareth Hospital at her expense of KShs. 1,200/= and escorted him to Kenyatta National Hospital for an x-ray. She stated that she paid the charges at KNH which cost her about KShs. 3,000/=. She denied ever being contacted by the police. On cross examination, DW1 denied overtaking. That the other vehicle stopped in the middle lane and that it was not true that it was close to the middle lane. That the other vehicle was on its side. She confirmed that the road is two way.

15. Jane Wangui Ngugi (DW2) stated that on the material day, she was travelling aboard the subject vehicle. That they found a vehicle that had stopped on the opposite lane then a boy emerged from behind the vehicle that had stopped and hit the subject vehicle on the side. That the Appellant caused the accident by crossing in front of the subject vehicle. On cross examination, she stated that the Appellant hit the right side panel and side mirror of the subject vehicle.

16. The Appellant's submissions before the trial court were as follows:- That his evidence was fully corroborated by the evidence of an independent witness (PW3). That both he and PW3 were categorical that the collision was on the Appellant's side and both blamed the 1st Respondent for the accident. That although PW5 did not charge the 1st Respondent, he stated that the option to charge her was still open. It was contended that the defence witnesses testified that Appellant was hit while overtaking a vehicle which had stopped to pick passengers but that the inspection report indicated the vehicle had dents on the front right hand side of the bumper and bonnet and there was no mention of the side mirror. That with the said contradiction, the Respondents cannot be found to be telling the truth. It was argued that the Appellant produced receipts in relation to the special damages incurred. On quantum, the Appellant referred court to PW 1's prognosis and cited **Nairobi HCCC No. 954 of 2000 Nzilani Ndari v. Boniface Musyoka Ndoo & Another, Nyeri HCCC No. 81 of 2002 Geofrey Mburu Theuri v. Board of Trustee Arch-Diocese of Nyeri & Another** in which the courts considered the issue of future medical expenses and urged the court to award the said costs of KShs. 232,000/=. For general damages, the Appellant urged court to award KShs. 700,000/= and medical and related expenses of KShs. 394,049/=.

17. The Respondents' submissions before the trial court were that the Appellant's witnesses exhibited inconsistencies and were doubtful on most crucial part of the testimonies. It was particularly submitted that the while the Appellant stated that he was cycling on the left side of the road from the middle, the sketch indicated that blood was near the middle of both roads hence on the extreme right of the Appellant's lane. That the Appellant claimed for treatment charges at Nazareth Hospital without acknowledging that the 2nd Respondent paid the bills. That the Appellant did not know where the p3 form was filled and that he only talked of two vehicles while PW3 talked of three vehicles. That PW3's statement in court contradicts her statement to the police since, in court she stated that there were three vehicles at the scene while in her statement she indicated that there were two vehicles. That PW4 did not know much about the accident and had to be stepped down. That PW5 failed to date the covering report and recommendations, that he failed to charge the 1st Respondent because he could not trace her, yet he did not indicate the efforts of tracing her in the report, that he failed to give a notice of intended prosecution like he did to the 1st Respondent, that he visited the scene 6 days after the accident which is a sign of shoddy investigation and that he did not indicate the reasons why he chose to blame the 1st Respondent. That on the other hand the Respondent's evidence was unshaken since they explained everything clearly. That the investigation report indicated that the damage was on the front bumper which runs from the front to the sides of the vehicle. That that explains why the Appellant fell at the point indicated on the sketch map. On general damages, the Respondents cited **Nairobi HCCC No. 1309 of 2002 Pamela Ombiyo Okinda v. Kenya Bus Services Ltd**, **World Concern International & Another v. Livingstone T. Ragira Mogaka & Another (2005) eKLR** and **Nairobi HCCC No. 2561 of 1998 James Ngugi Gakunju v. William Njau Kamau & Another** and suggested a sum of KShs. 50,000/=.

18. On special damages, the Respondent urged that it be awarded subject to proof and revenue stamp. On future medical expenses it was argued that it being a prospective expense, the Appellant ought to seek to

mitigate losses and court was urged to disallow the claim of future medical expenses, On loss of earning capacity, it was argued that the Appellant testified that he is a taxi driver and still does his job, therefore he has not lost out and that due to the said, the claim must fail. On costs, it was argued that the costs followed the events. That the Appellant must show a demand notice duly posted and a certificate of postage and must also show a served notice to admit document necessitating the attendance of witnesses for him to get costs.

19. In this appeal, the Appellant argued that it was apparent that the trial magistrate misdirected herself. That she delivered herself that two issues were serious extended and required determination thus who was to blame for the accident and whether the Plaintiff's injuries were proximate to the accident. That the trial magistrate proceeded to consider evidence and concluded that the evidence on PW2 and PW3 were inconsistent and therefore untruthful unlike DW1 and DW2's which she found to be consistent and thereby truthful. That she failed to bear in mind that the standard of proof in civil cases is on a balance of probabilities. That even after noting of PW3 that had a quiet and confident demeanour in testifying and answering questions, the trial magistrate still did not find weight in her evidence. Even considering that she was the only independent witness while the Respondent's witnesses were related. It was argued that the Appellant would not access the police records and the failure of not signing and dating was the concern of the police and could not be visited on the Appellant. That for the said misapprehension, this court has the duty to interfere with the trial court's finding. On the said point, the Appellant cited **Ephantus Mwangi v. Mwangi Wambugu (1984) eKLR**. It was also argued that there was failure by the trial court to assess damages which was considered to be a grave error. That the trial court rubbished PW1's evidence for no apparent reason. The trial court's statement that *"what better medical evidence could we possibly have than the first hand evidence of the doctor who treated the Appellant?"* was referred to. That this was a pointer that she took into account irrelevant facts in reaching her determination. That the trial court failed to take into account that PW1 was a consultant doctor at KNH, that it is him who operated on the Appellant and prepared the medical report and therefore had access to the original treatment records of the Appellant.

20. The Respondent on the other hand argued as follows:- That the Appellant ought to prove negligence as alleged to the required standards. **Court of Appeal at Nyeri Civil Appeal No. 215 of 1995 M'iruanji Muchai v. Broadways Bakery** was cited where in the court re-stated the provisions of section 107 (1) of the Evidence Act as follows:-

> ***"Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts, he must prove those facts exist."***

The Respondent emphasised again on the contradictions between the Appellant and PW3's evidence as to the number of vehicles that were on the road. That PW5 could not explain why he never charged the 1st Respondent. That on the other hand, the Respondent's version corroborated the circumstances of the occurence of the accident and outweighs the Appellant's evidence. It was contended that the injuries that were pleaded were not sufficiently proved to the required standard. That there were no x-rays/ radiology reports before court to prove the gravity of the injuries. That the initial treatment notes did not indicate suspicion of fractures. That the Appellant could not have been treated and discharged at KNH if he indeed had fractures. That the injuries proximate to the accident were minor soft tissue injuries and that the fractures were not as a result of the accident. The Respondents cited **Sokoro Saw Mills Ltd v. Grace Nduta Ndungu (2006)eKLR**, **Menengai Oil Refineries Ltd v. Jeremiah Mwaura Wandeto (2012) eKLR** and **World Concern** (supra) and urged that an award of KShs. 50,000/= as general damages suffices. On special damages, future medical expenses and loss of earning capacity were reiterated as submitted before the trial court.

21. This being a first appeal this court has had to re-evaluate the evidence and come up with its independent findings having in mind though that it did not have the benefit of seeing and hearing the witnesses. See ***Peters v. Sunday Post (1958) E.A. 424 at 429*** *where it was stated:-*

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.***

An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

22. The 1st Respondent acknowledged being the driver of the subject vehicle on the material day. Although she stated that she was the owner of the suit vehicle, she did not tender evidence to that effect. She is therefore found to have been the driver on the material day. The Appellant produced a copy of record which revealed that the 2nd Respondent was the registered owner of the vehicle which fact was not contested. The 1st Respondent and 2nd Respondent are thereby found to be the driver and registered owner of the suit vehicle respectively.

23. I have analysed the evidence on record and it emerges from the Appellant's and PW3's evidence that the subject motor vehicle while overtaking a matatu which had stopped veered to the Appellant's lane and knocked him down and that the Appellant was cycling on the left lane but not to the extreme edge of the said road. The aforesaid facts are to me most relevant to the circumstances under which the accident is said to have occurred than the number of vehicles that were on the road considering the fact that it was alleged that the 1st Respondent was overtaking at the material time. On the issue raised by the Respondents on contradictions in the Appellant's and PW3's testimony as to the number of vehicles, it ought to be noted that unless the testimonies of the witnesses are inextricably interwoven on all the vital matters to which they spoke that it is impossible to separate the truth from untruth with any reasonable certainty, the contradictions will not call for disregarding their testimonies. I say so because of the consistencies in their testimonies that the subject vehicle was overtaking a matatu that had stopped when it veered to the Appellant's lane.

24. The 1st Respondent and DW2's evidence on the other hand was that it is the Appellant who crossed over the path of DW1 and hit the front right hand side mirror and the front bumper of the subject vehicle. That it so happened when the Appellant was overtaking a matatu that had stopped. Up to this point, it is the Appellant's word against the Respondent's. However, analysing PW5's evidence, I draw an inference that his findings corroborate the Appellant's case. This is from his evidence that when he visited the scene on 10th March, 2009 which I do not find to be a long time after the accident and there was a possibility that the blood was still at the scene, that he found blood stains on the Appellant's side of the road closer to the middle of the lane. PW5's finding on the position of the blood stain was not challenged by the Respondents. Bearing in mind that it is not contended that the Appellant and the 1st Respondent were travelling in opposite directions, and PW5's testimony that blood was found on the Appellant's lane, not on the respondent’s lane, the only inference that can be drawn there from is that it is the 1st Respondent that left her lane for the other lane i.e. she must have been overtaking. Had the blood been found on the 1st Respondent's correct side of the lane then it would be inferred that it was the Appellant who was overtaking.

25. From my analysis of the evidence on record, it is clear that the 1st Respondent was overtaking without proper look out and that is why she knocked down the Appellant. The Appellant is thereby found to have on a balance of probabilities proved that the 1st Respondent was carelessly overtaking. Overtaking without proper look out is an attribute of negligence. Accordingly, the respondent driver of the suit accident motor vehicle is found to be liable. Even if I am to be found wrong on my inference on the aspect of overtaking, taking note that there was no contention on the point of collision, I would still find the 1st Respondent liable for the reason that she was driving a lethal machine and ought to have so driven with due care and attention. Had she been driving at a reasonable speed, she would have been in a position to slow down swerve or stop the vehicle to avoid the collision. In my humble view, therefore, the trial magistrate misdirected herself in exonerating the 1st Respondent from any blame.

26. The other facet on the issue of liability is the extent to which the 1st Respondent is liable. PW5's who is a police officer attached to traffic division stated that cyclists ought to cycle on the extreme side of the road. The Appellant's own evidence was that he was not on the extreme edge of the road. Consequently,

he too should shoulder some liability. Considering that the 1st Respondent was overtaking carelessly and without ensuring that it was safe to do so, she should shoulder a higher percentage and ratio of liability. Here too the trial magistrate erred in finding the Appellant wholly liable for the accident.

27. It was also contended that the trial magistrate failed to assess damages. A look at the record reveals that although the trial magistrate analysed the evidence she did not assess damages. I agree that the trial magistrate was in error in failing to assess damages that she would have awarded the appellant had she found in his favour on liability. Iam fortified by the decision in the case of **GLADYS WANJIRU NJARAMBA - Vs- GLOBE PHARMACY & ANOTHER [2014]eKLR** the Court stated-

> ***"It is trite law that the trial Court was under duty to assess the general damages payable to the Plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993 [1993]KLR 4448 where the Court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment and in the case of MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL NO. 10 OF 1993 IV KALR 138 where the Court held that the Judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.***

28. From the above authorities it is clear that the trial Court fell into error by not assessing the award of general damages he would have awarded to the Appellant had she been successful in proving her case. I would therefore proceed to assess damages for the appellant.

29. The principles of awarding damages in cases such as the instant case were laid down in **Rahima Tayab & Others v. Anna Mary Kinanu, Civil Appeal No. 29 of 1982 (1983) KLR; 1KAR 90** where the Court of Appeal held that:-

> ***"whereas in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concern must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect."***

30. In her assessment, the trial magistrate found no substance in PW1's evidence for the reason that there was no initial treatment documents on record and x-rays reports to support the Appellant's case on the severe injuries he sustained. That considering the fact that the Appellant was treated and discharged at Kenyatta National Hospital, the Appellant could not be found to have suffered the injuries as alleged. On the future medical expenses, it was the trial magistrate's opinion that PW1's evidence was that it would cost the Appellant KShs. 238,954/= in a private hospital while he did not know the cost at Kenyatta National Hospital. For that reason, she found it hard to believe PW1 who was said to be a consultant at KNH. That it was only after being pressed that PW1 stated that it would cost KShs. 20,000/=. The other reason why PW1's evidence was not found to be of much substance is because he could not remember when he examined the Appellant. I have re-considered the evidence on injuries. Although it may be said that the Appellant was treated and discharged, there are occasions when patients have been discharged on the mistaken but honest belief that they did not have severe injuries only to find out later that they had internal injuries. To my mind, since not all possible tests and or examination had been carried out on the appellant on the material day when he was taken to Kenyatta National Hospital to rule out any possibility of him having sustained more severe injuries, and further, the fact that the Nazareth Hospital found it necessary to refer the Appellant to Kenyatta National Hospital for neurological assessment and management is a clear pointer that they could not handle the type of injuries that he had sustained and that he required better facilities to handle his situation.

31. Then there is evidence that the Appellant went back for treatment at Kenyatta National Hospital a few

days later and after a scan, it was discovered that he had sustained more severe injuries. From the treatment documents on record, which documents I find authentic, it is clear that the Appellant sustained the alleged injuries in the material accident. There was no other contrary evidence to suggest that the appellant could have, after the material accident, suffered injuries from other causes or that he was an impostor. The documents produced i.e. discharge summary and medical report confirmed the Appellant's injuries on a balance of probabilities. The mere fact of failure by the doctor to remember the date of examination of the Appellant is not enough to rubbish PW1's evidence. I take judicial notice that medical practitioners meet a number of patients and it is very easy to miss a specific or particular date especially with time lapse. In any case, the date of examination of the patient/appellant was clearly stated on the medical report as 10th November 2010. In the circumstances, I find that PW1's evidence was of substance and credible.

32. On quantum I have given careful consideration of the nature and scope of the Appellant's injuries and the authorities relied on. I have also considered the decision in **Ahmed Mohamud Adam v. Jimmy Tomino & 2 Others (2006) eKLR** where the plaintiff had an amputation of the left limb below the knee joint, multiple fractures of the tarsal bones of the right foot and burns on the planter aspect of his foot, compound fractures of the right malleolus and dislocation of the right ankle joint and stiffness of the ankle joint and was awarded KShs. 1.9 Million in 2006 and **David Kigotho Iribe v. John Ndung'u & Another (2008) eKLR,** the plaintiff suffered amputation of the right lower limb and partial amputation of the right lower leg with 70% permanent disability and was awarded Kshs. 1.3 Million in 2008. In view of the seriousness of the injuries suffered by the Plaintiff comprising multiple fractures and the long term effect that the injuries sustained will have on his health as per the prognosis of the doctor, Koech that fractures heal after treatment but the recovery of the injured nerves cannot be predicted, and the resultant scars which cannot disappear completely, and the effect of inflation on the Kenya Shilling, I find the sum of KShs. 1,000,000 One Million as general damages to be reasonable ans i so award the appellant.

33. For loss of earning capacity, account ought to be taken not only to the present loss but also the capacity of the Appellant to earn a future or improved income. The Appellant in his own evidence stated that he is working as a taxi driver; he can therefore not claim for loss of earning capacity. I therefore reject the claim as presented and quantified by the appellant.

34. On the claim for future medical expenses which were pleaded, at the time of trial, the Appellant had not fully recovered from the injuries he had sustained from the accident and was bound to incur future medical expenses as confirmed by Doctor Koech. The Appellant is entitled to Kshs. 232,000/= which was pleaded.

35. The Appellant also pleaded for special damages including police abstract- Ksh 200/, search certificate fee 500/, transport to hospital, cost of drugs, treatment costs which included surgery expenses, review and other medical expenses paid to Kenyatta National Hospital and Nazareth Hospital and Hurlingham Dento Facial Centre, and pharmacy as per the record of exhibits produced which I have examined in detail and which had stamp duty appended thereto. The appellant had pleaded **Kshs 403,089.** What has been proved under that head is **Kshs. 386,139** which I also award him.

36. The doctor's attendance fee of Kshs 20,000/ is a witness expense not special damage hence the same is not awardable at this stage.

37. In the end, I allow this appeal to the extend stated herein, set aside the judgment of the trial magistrate dismissing the appellants' suit and substitute it with judgment for the appellant on liability in the ratio of 80:20 in favour of the appellant against the respondents jointly and severally.

38. I award the appellant general damages in the sum of Kshs. 1,000,000 ONE Million for pain, suffering and loss of amenities subject to 20% contribution

39. I also award the appellant the cost of future medical expenses in the sum of Kshs 232,000/

40. I further award the appellant special damages in the sum of **Kshs. 386,139**/ as pleaded and proved

which figure is actual expenditure incurred hence, not subject to any level of contribution.

41. I decline to award him damages for loss of earning capacity.

42. The appellant is also awarded 80%costs of the suit in the court below and of this appeal.

43. General damages and cost of future medical expenses shall attract interest at court rates from date of judgment in the lower court until payment in full

44. Special damages shall attract interest at court rates from the date of filing suit until payment in full.

Dated, signed and delivered in open court at Nairobi this 30th day of November, 2015.

R.E. ABURILI

JUDGE