Gichuhi v Kenya Power & Lighting Company Limited (Civil Appeal E033 of 2022) [2025] KEHC 11765 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11765 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E033 OF 2022

DKN MAGARE, J

JULY 28, 2025

BETWEEN

TERESIA NDUTA GICHUHI ..... APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. D.N. Bosibori (Resident Magistrate) delivered on 31.05.2022 at Mûkûrwe'inî in PMCC No. E002 of 2021). The court dismissed the suit for lack of merit and awarded costs of the suit and interest to the Respondent.

2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal on 04.07.2024. The appeal is on the lower court's finding on its judgment and is based on 10 grounds, to wit:

    a. That the trial court erred in law and in fact by dismissing the Appellant's cause against the Respondent despite not finding the Appellant not liable in negligence or contributed to the accident in any way.

    b. The trial court erred in law and fact by finding that the Respondent was wrongfully sued despite there being no cogent evidence in support of that.

    c. That the trial court erred in law and fact in failing to find that the Respondent was duty bound to invoke Order 1 rule 15 of the Civil Procedure Rules and join the Respondent as a third party whom they claimed to be in the accident.

    d. That the trial court erred in law and fact by taking the position that the Respondent ought not to bear the Responsibility to join a 3rd party to the proceedings and thereby disregarded Order 1 Rule 15 of the Civil Procedure Rules.

e. That the learned magistrate erred in law and fact by subjecting the Appellant's case to a standard of proof beyond reasonable doubt and dismissing the Appellant's suit with costs on the basis that she had not proved liability against the Respondent on a balance of Probability.

f. That the trial magistrate grossly misdirected herself failing to take into account case law and submissions filed by parties herein before her and consequently coming to a wrong conclusion on the same.

g. That the learned magistrate erred in law and fact by failing to award the Appellant damages despite having discharged the burden of proof against the Respondent.

h. That the learned magistrate proceeded on wrong principles when arriving at the judgment, ignoring or avoiding to consider damages sustained by the Appellant.

i. That the learned magistrate erred in law and fact by failing to take into consideration evidence on record while considering her judgment hence dismissing the Appellant's claim.

j. That the learned magistrate erred in law and in fact by finding and holding that the Appellant had not proved their case on a balance of probabilities notwithstanding the evidence.

3. The Appellant sought to have the appeal allowed, the lower court's judgment set aside, the Respondent held liable for the damages suffered, and the costs of the appeal awarded to the Appellant.

4. The Appellant initiated the suit via plaint dated 18.12.2020 wherein she stated that on 19.05.2019 she suffered electric shock when she attempted to rescue boys who were being electrocuted when they attempted to air their wet clothes on a clothes line. This was attributed to the respondent's negligence.

5. The nature of the appeal is that the Appellant contends that the trial court erred both in law and fact by dismissing her case despite finding no negligence or contributory fault on her part. She argued that the court wrongly concluded the Respondent was improperly sued without sufficient evidence, and failed to enforce the requirement for the Respondent to join a third party under Order 1 Rule 15 of the Civil Procedure Rules.

6. The magistrate is also faulted for applying an incorrect standard of proof, ignoring case law and submissions, and failing to consider the evidence and damages sustained. The Appellant maintains that the judgment was based on flawed reasoning and calls for its reversal.

7. They particularized the negligence of the Respondent in paragraph 5 of the Plaint and stated that the doctrine of Res Ipsa Loqituor applied. She stated that she suffered injuries as particularized at paragraph 7 of the plaint and claimed special damages at paragraph 8 of the plaint. She prayed for special damages, general damages, costs of the suit and interest.

8. The Respondent filed a defence dated 08.02.2021 wherein they attributed the negligence to the Appellant.

Evidence

9. Jane Nduta, the mother of the deceased boys, testified as PW1. She was in Thika at the time of the incident and was informed of the electrocution by her father-in-law. Upon arrival at the scene, she found a crowd and later identified the bodies at the morgue. She stated that power had only recently been connected in the village and that the house where the incident occurred had no proper wiring, only a hanging wire attached to a meter box. She blamed KPLC for failing to inspect the wiring before energizing the line.

10. PW2, a police officer who investigated the incident, confirmed that the two boys were electrocuted while hanging clothes and that their grandmother, the Appellant, was also injured while trying to save them. He noted that a naked power conductor connected from a KPLC post was in direct contact with the iron-sheet roof of the house, making it live. He stated that the house had no internal wiring or meter and concluded that KPLC was negligent for allowing power connection without proper inspection or safety compliance.

11. In defence, DW1, a Safety Engineer from KPLC, stated that the electrification project was under the Rural Electrification and Renewable Energy Corporation (REREC), which subcontracted the work and identified beneficiaries. He stated that the house in question was not among the 20 approved homes, had no wiring, no consent, and no proper meter installation. He argued that the transformer was energized illegally by REREC or its contractors, without joint inspection or approval from KPLC. He emphasized that KPLC only distributes power after commissioning and inspection and that they responded to the emergency purely out of public responsibility.

12. He maintained that the connection to the subject house was illegal and unprofessional, likely done as an afterthought. He further stated that KPLC had not been requested to inspect or commission the low voltage section, and therefore, the responsibility lay with REREC. He also confirmed that KPLC filed a report with the energy regulator and disconnected the power to prevent further harm.

13. In short, the Appellant claimed from the injury arising from a tragic incident that occurred on 19.05.2019. On that morning, while preparing breakfast for her grandchildren Stephen Gichuhi Migwi and Stephen Gichuhi Gichuki, she heard a distress call and rushed outside. She found the two boys had been electrocuted while attempting to hang wet clothes on a clothesline, which turned out to be a naked electric wire. In her attempt to rescue them, she too suffered an electric shock and sustained serious injuries. She attributed the incident to the negligence of the Respondent, Kenya Power and Lighting Company, whose agents or employees allegedly left a live wire exposed within the homestead. She relied on the doctrine of Res Ipsa Loquitur and sought general and special damages, costs of the suit, and interest.

14. In essence, the Appellant blamed KPLC for the electrocution, deaths and injuries due to a live exposed power line. KPLC, in turn, denied liability. However, in defence they stated that REREC was responsible for the project and had acted without proper coordination or approval. The dispute according to the Respondent centered on whether KPLC or REREC bore responsibility for ensuring safety and compliance before the power was connected to the said homes. This question is however an idle one since REREC is neither a party or impleaded. The question in the pleadings is whether either of the parties are liable to the accident.

Analysis

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. The accident herein happened on 19.5.2019 and by the testimony of DW1, the area had received a transformer on 18.5.2019. Hardly a day apart had a transformer been installed then tragedy struck on 19.5.2019. It was the contention of the Appellant that the Respondent herein were responsible for the tragedy. The trial court found that the Respondents were not liable and stated that the Appellant had sued the wrong party.

18. For a duty of care to arise, and thus a claim for negligence, the Appellant must show her relationship with the Respondent and flowing from that relationship, a duty of care to have flowed from it. Negligence is defined in the Black's Law Dictionary, 10th Edition as:

> The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation ... The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the Respondent to protect the Appellant from the injury complained of, and (2) an injury to the Appellant from the Respondent's failure.

19. Negligence is a specific tort that comes from the common law jurisprudence. In a claim of negligence, the Appellant ought to establish that the Respondent owed her a duty of care, that there was a breach of the duty of care and as a result of that breach, the Appellant suffered damages. The principles involved in a claim of negligence were established in the case of Donoghue Vs Stevenson (1932) UKHL 100, where it was held:

> "The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty."

20. For a claim to succeed in an action for negligence, the damages alleged must be recognized by law. In the case of Anastassios Thomos Vs Occidental Insurance Company Limited (2017) eKLR, the High Court held that:

> "When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the Respondent's negligence and the damages suffered by the Appellant that is recognisable as a matter of policy that the Respondent should pay the damages."

21. The Appellant must show that the damages suffered are as a result of the Respondent's negligence. Without proof of causation, negligence cannot be actionable and or sustainable. This was addressed

by Visram J (as he as then) in the case of Elijah Ole Kool Vs George Ikonya Thuo (2001) eKLR, where he stated that:

> "When will an act or omission be said to be the cause of the Appellant's injuries" a Respondent will only be held liable for negligence if his act or omission is either the sole effective cause of the Appellant's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions."

22. The Appellant's claim for negligence is founded on the Respondent's careless connection of a naked power line that ought to have been insulated when accessing the roof of the ill-fated house, which roof was in contact with a metallic clothes line, which conducted electricity and led to the incidents of electrocution causing harm to the Appellant and the death of her grandchildren.

23. It is not in contention that the live wire of Respondent's power lines caused the electrocution of the Appellant. The Respondent stated that it was not their responsibility for connecting electricity, and stated that the mandate fell on Rural Electrification and Renewable Energy Corporation to which the trial court agreed. From PW1's testimony at page 67 of the Record of Appeal, she stated that she did not witness the Respondent connect power to the house yet she stated still on page 67 that KPLC had left a wire hanging on the roof. It was the evidence of PW2 on page 73 that it was the responsibility of KPLC to connect power and affirmed that the same was done on 18.5.2019. The unfortunate incident happened on 19.5.2019, the very next day.

24. The Respondent being the monopolistic supplier of electricity in the country has a duty to ensure that the supply is well maintained and in safe condition. This duty was expounded in the case of Kenya Power and Lighting Company Limited Vs James Muli Kyalo and Another (2020) eKLR, where the Court while discussing Kenya Power and Lighting Company's duties stated:-

> "The appellant's responsibility, as far as the duty to maintain electric supply lines is concerned, is a matter of statutory obligation under the *Energy Act*, 2006. Section 51 required the appellant as licensee, or any person authorized by it, from time to time as it becomes necessary, to enter land on which electric supply lines are laid, for the purpose of inspecting or repairing lines, or removing lines where such electric supply lines are no longer required."

25. The same is mirrored in the *Energy Act* 2019 (revised 2022) at Section 176(1) which states as follows:

After energy infrastructure has been laid in accordance with this Act, the licensee or any person authorized by the licensee may, from time to time as it becomes necessary, enter the land on which the energy infrastructure is laid with such assistance as may be necessary, for the purpose of operating, inspecting or repairing the infrastructure, or removing such infrastructure in case where the infrastructure is no longer required.

26. For the sake of clarification, the *Energy Act* 2006 and *Energy Act* 2019 (revised 2022) deem a license and licensee as:

> "licence" means any document or instrument in writing granted under this Act, to any person or authorizing the importation, exportation, generation, transmission, distribution and supply of electrical energy or the exploration and production of geothermal energy, in the manner described in such document or instrument;
>
> "Licensee" means a holder of any licence issued under this Act;

27. The Respondent is the monopolistic licensee to distribute electricity in Kenya. It cannot be that someone else was distributing power. The allegation that REREC was to be enjoined does not sway this court as Section 176(1) of the *Energy Act* 2019 envisages that there could be a situation where KPLC authorizes other entities such as Rural Electrification and Renewable Energy Corporation to do the same but cannot escape liability as Rural Electrification and Renewable Energy Corporation would only provide electricity when authorized to do so by operation of Section 176(1). As for the duties envisaged for the Rural Electrification and Renewable Energy Corporation, supply of electricity is not listed as its core function at Section 44 of the *Energy Act* 2019.

28. The Respondent had claimed that there was vandalism on the affected transformer that was involved in the accident herein. When one looks at the timeline of installation of electricity on 18.5.2019 and the accident on 19.5.2019, the report of vandalism as raised by the Respondent at evidence level is rather curious. The allegation that the connection was illegal in Ezekiel Migwi's house is in my view an afterthought as the same was not charged for illegal connection and sought to shift liability from itself to not only REREC but also a consumer. All these are not party to the suit. The pronouncement of Mabeya J who in the case of AMK (suing as the mother and friend of JMK-Minor) Vs Kenya Power & Lighting Company Limited (2020) eKLR, held that:

> The Respondent is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under Section 52 of the *Energy Act*. This calls for a higher degree of vigilance on its part in order to avert accidents.

29. Although the Respondent may have collaborated with other entities such as the Rural Electrification and Renewable Energy Corporation (REREC) in the installation of electricity in rural areas, the ultimate responsibility for ensuring safety and proper installation rests with the Respondent. Whether acting directly or through subcontracted agents, the Respondent had a duty to ensure that the electricity connection on 18.05.2019 was properly and safely installed. The failure to insulate the power entry point adequately resulted in the tragic incident of 19.05.2019, in which the Appellant suffered electric shock, though indicated as non- fatal electrocution. Consequently, the Respondent is wholly liable for the poor installation that led to the electrocution and the injuries sustained.

30. On quantum, the court did not assess damages. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

31. It is thus cavalier for the court to avoid assessing damages when it is not the last court in the hierarchy of courts. In the case of Kamau v Coast Bus (Mombasa) Limited (Civil Appeal 76 of 2022) [2024] KEHC 3232 (KLR) (5 April 2024) (Judgment), D.A.S. Majanja held as hereunder:

> On whether the trial court ought to have assessed damages even after finding that the Respondent was not liable for the Appellant's ordeal, the answer is in the affirmative and I

fault the subordinate court for not doing the same. This court has always maintained that it is good practice for the trial court or court of first instance to assess damages even if it finds that liability has not been established. To dismiss a suit and fail to address the issue of damages is a serious indictment on the part of the trial court and both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand.

32. In the case of William Mbugua Ng'ang'a v Mohammed Salim & another [2020] KEHC 5355 (KLR), the court, held as follows:

> 25. It must however be noted that even if the suit was dismissed on the merits, a court of first instance has the unwavering obligation to assess damages. In Lei Masaku V Kalpama Builders Ltd Civil Appeal No. 40 OF 2007[2014] EKLR Mabeya J. held that. ...
>
> 26. In failing to assess damages, the trial court committed an error of law thus call upon this court for rectification as of right. The rectification calls upon this court to now assess the damages.

33. The court is thus obligated to assess damages after the catastrophic failure to assess damages in spite of the court of appeal being very firm on this aspect. This is because, the assessment of damages is a discretionary order. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court of Appeal stated as follows:

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

34. The Court of Appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Services 1957 KLR 27 as follows: -

> The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

35. How could the court then know the correct level of damages when a court that heard the evidence and saw the demeanor of witnesses does not make a decision? In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

36. I will do the best I can to assess damages. The appellant suffered electric burns of the right arm and hand and sepsis of the right hand. The medical report indicated an incapacitation of 50%. Similar

injuries attract similar awards as articulated by the Court of Appeal in Simon Taveta vs. Mercy Mutitu Njeru, Civil Appeal 26 of 2013. The Appellant proposed that for general damages she be awarded Ksh. 2,000,000/= and cited the cases of Agnes Wanjiku Ndegwa vs Kenya Power and Lighting Ltd [2014] eKLR who was awarded Ksh. 1,300,000/= for burns to the neck, upper trunk, thighs, buttocks, lower limbs and lost 5th toe, and permanent disability assessed between 30-35%. She also relied on Makau vs Athi River Mining Ltd [2009] eKLR with 60% burns on his body and 20% disability. He was awarded Kshs. 1.5 million in 2009 for pain and suffering.

37. The court below must have been aware that it is not the last court in the hierarchy of courts. However, the court still chose not to assess damages. It is the cardinal duty of the court below, to assess damages even where the suit is being dismissed. These are not my words but the directive of the court of appeal in several matters. Both the trial court and this court must assess damages as they are not courts of last resort. To casually dismiss the suit without assessment of damages is both cavalier and a serious indictment on the part of the trial court. In Lei Masaku vs Kalpama Builders Ltd [2014] eKLR, the court noted as follows:

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

38. The trial court is under duty to assess damages even where a suit is dismissed. In the case of Christine Kalama v Jane Wanja Njeru & another [2021] eKLR, Justice Nyakundi stated as follows:

> " It is helpful to remind the learned trial magistrate that procedural Law binds her to assess damages even if she is in doubt of proof of liability. As an appeal's Court the principles in Mwana Sokoni v Kenya Bus Services & Others {1982 – 1988} 1 KAR 870 are not applicable on account of the facts of this case where no assessment of damages was never undertaken by the Learned Trial Magistrate."

39. This is also the position taken by HM Nyaga, J, in the case of Amukhuma v Valley Bakery Limited (Civil Appeal 46 of 2008) [2024] KEHC 9151 (KLR) (19 July 2024) (Judgment), where he posited as follows:

> 50. It is trite law that a trial court is under a duty to assess the general damages awardable to the Appellant even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa vs Bhogals Garage Ltd (CA) [1993] KLR 448 where the court held as follows;"The judge was clearly under a legal to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment" ...
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> 51. Also, in the case of Matiya Byabaloma & Others vs Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138 the court held that the judge erred

in not assessing the damage he would have awarded had the appellant been successful in her claim.

40. The court will then have to assess damages but will be flying partly blind as the court neither saw nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. It is the same court that saw the nature of the injuries but did not assess the damages. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR , Justice D.S. Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

41. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows at paragraph 8.

> In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

42. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

43. The task above is mooted when the court fails to assess damages. The court has a task of either assessing or retuning to the lower court to assess. The court will assess the same in view of the reservation already expressed. The injuries suffered are as enumerated above. In the case of Kenya Power & Lighting Company Limited V Matthew Nambeta Wanjohi (suing thro' his uncle and next friend Peter Wanjohi Keingati) [2019] eKLR, the court confirmed an award of Ksh. 1,200,000/= for amputation of right upper limb at the shoulder level, electrical burns on left hand and electrical burns on lower torso.

44. Further, in the case of EW (suing as the next friend and mother to BM (a minor) v Kenya Power and Lighting Company Limited & Another [2015] eKLR, the Appellant that had suffered amputation of the right upper limb and burns on anterior abdomen was awarded general damages for pain and suffering of Ksh. 1,500,000/=.

45. In the case of Agnes Wanjiku Ndegwa vs Kenya Power & Lighting Company [2014] eKLR, the court awarded Ksh. 1,300,000/- for burn wounds on her neck, upper trunk posterior, left arm, right lower limb and both feet and between 30-35% permanent disability.

46. In the case Joseph Kiptonui Koskei V Kenya Power & Lighting Company Ltd [2010] eKLR the Appellant was awarded Kshs. 1,200,000/= for 40% 3rd degree electrical burns covering upper limbs, trunk and back with post burns hypertrophic scars which are of both hypo and hyper-pigmentations on his right upper limb and right shoulder, a contracture on the posterior side of the right limiting movement and required surgery to release the contracture to improve the use of his right arm. The court awarded Kshs. 1,200,000/=.

47. Doing the best I can, the court awards a sum of Kshs. 1,500,000/= taking into consideration the inflation, and 50% permanent functional incapacitation of the upper limb.

48. In respect of special damages, a sum of 18,150/= was pleaded. Ksh 3,000/= for the medical report was proved. A sum of 11,530/= for medical expenses was proved. Two receipts are not legible. No efforts was given to get clear versions. Consequently, only a sum of 14, 530/= was proved. Special damages were addressed in the case of David Bagine V Martin Bundi [1997] eKLR. The court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t.a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Appellants must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

49. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

50. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

51. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Respondent or respondent will bear the costs. However, the vital factor in setting the

> preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

52. In the circumstances the appeal is allowed with costs of Ksh. 185,000/=.

Determination

53. The upshot of the foregoing is that I make the following orders:

    a. The appeal herein is allowed.

    b. The judgment of the lower court is set aside. In lieu thereof, the court enters judgment for the appellant against the Respondent on liability at 100%. General damages for pain and suffering are assessed at Ksh. 1,500,000/=.

    c. Special damages are assessed at Ksh. 14,530/=.

    d. The Appellant will have costs of this appeal assessed at Kshs. 185,000/=.

    e. Appellant will have costs of the lower court.

    f. 30 days stay of execution.

    g. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Macharia for the Appellant

Mr. Bosire for the Respondent

Court Assistant – Michael