Mariira Secondary School v MWG (Minor suing through her father and next friend JGM) (Civil Appeal E082 of 2024) [2025] KEHC 11859 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11859 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E082 OF 2024

DKN MAGARE, J

JULY 28, 2025

BETWEEN

MARIIRA SECONDARY SCHOOL ..... APPELLANT

AND

MWG (MINOR SUING THROUGH HER FATHER AND NEXT FRIEND JGM) ..... RESPONDENT

(Appeal from the Judgment and decree of Hon. A.G. Kibiru, Chief Magistrate, given on 20.11.2024 in Nyeri CMCC No. E005 of 2024.)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. A.G. Kibiru, Chief Magistrate, given on 20.11.2024 in Nyeri CMCC No. E005 of 2024. The appellant was the defendant in the lower court. The Respondent also filed a memorandum of cross-appeal dated 1.4.2025. The Appellant filed an amended memorandum of appeal dated 1.4.2025. Both the Appellant and Respondent filed humongous 10 paragraph memoranda of appeal and cross appeal.

2. Vide a plaint dated 12.01.2024, the Respondent filed suit over an accident arising from a road traffic accident involving motor vehicle registration number KCD 155G Isuzu bus/Coach. The Respondent is said to have suffered the following injuries:

    a. Very severe crush injury to the left upper limb from the shoulder

    b. Amputation of the left upper limb from the neck of the humerus

    c. Severe soft tissue injuries

    d. Massive blood loss

3. The Respondent's present complaints included phantom limb syndrome and severe pain at the left shoulder joint. At 17 years old, she was reported to be unable to pursue her intended career as a surgeon, thereby significantly diminishing her future prospects. She required an arm prosthesis at an estimated cost of Ksh. 500,000/=, with annual servicing costs of Ksh 20,000/= and replacement every 5 to 7 years.

4. The lower court heard the parties and proceeded to render judgment as follows:

    a. The court found the Appellant 100% liability for the self-involving accident.

    b. General damages Ksh. 2,500,000/=

    c. Special damages Ksh. 4,970/=

    d. Future medical expenses Ksh. 600,000/=

    e. Reduced future earnings Ksh. 1,800,000/=

5. Subsequently, the court corrected the award from the amount indicated at the foot of the judgment, that is, Ksh. 2,000,000/=, to the correct amount of Ksh. 2,500,000/= as awarded in the body of the judgment. The Respondent had prayed for the amendment of the record to reflect this correct figure, which, although properly awarded in the main text of the judgment, had not been transposed to the summary section. The application was allowed on 12.03.2025. This correction triggered the filing of a cross-appeal on 01.04.2025.

6. The appeal and cross appeal are therefore in respect of three aspects of quantum; that is general damages, diminished earning capacity and the cost of future medical expenses in form of an artificial arm prosthesis. Special damages are not part of the appeal herein.

Evidence

7. The Respondent testified as PW1 on 03.07.2024. He stated that the minor was his child. He was informed of the accident and on arrival at hospital he found the minor had been treated and her hand amputated.

8. PW2 was the minor who stated that she was involved in the accident and the hand was chopped off. She was treated in Kitengela and Mbagathi Hospitals. She stated that she wanted to be a surgeon. PW3 was CPL Joseph Cheptoo of Naromoru Police Station, who produced the police abstract.

9. Dr. Patrick Mwangi testified as PW4, stating that he examined the minor and assessed her permanent disability at 65%. He further indicated that the cost of a prosthesis was Ksh. 500,000/=, based on previous cases.

10. The Appellant called Dr. Waithaka Maranga, who also testified and produced a medical report. He assessed the degree of permanent disability at 70%. He also recommended an artificial limb at an estimated cost of Ksh.300,000/=, with maintenance or servicing costs of Ksh. 50,000/=. He stated that artificial limbs do not require frequent replacement, typically needing to be changed every 8 to 10 years. His evidence further indicated that the minor's desire to become a surgeon may be hampered as a result of the injury.

Submissions

11. The Appellant filed submissions dated 7.3.2025. It was submitted that on general damages, Ksh. 1,500,000/= would be adequate compensation. Reliance was placed on Mose & Another v. Ochieng

(2024) eKLR where Ksh. 1,800,000/= was awarded for fracture of the mid femur bone, crash fracture of the left foot and amputation below the left distal of the left foot.

12. They also relied on Ruth v Makau (Civil Appeal E441 of 2021) [2024] KEHC 1411 (KLR) (Civ) (16 February 2024) (Judgment) where the court awarded Ksh. 2,000,000/= in general damages where Respondent sustained severe crash injuries to the right leg which was amounted and a permanent disability of 50% awarded.

13. The Appellant also submitted that the cost of artificial limb of Ksh. 1,000,000/= was excessive and not supported as the Appellant's doctor suggested Ksh. 250,000/= as the cost and Dr. Wokabi Ksh. 300,000/= as cost, whereas Dr. Ating'a proposed Ksh. 1,000,000/= as current cost of prosthetics.

14. On damages for diminished earning, the Appellant submitted that Ksh. 500,000/- would be adequate compensation. Reliance was placed on Mbasu v Swaka (2024) eKLR where it was submitted Ksh. 300,000/= was awarded for loss of earning capacity due to below knee amputation.

15. The Respondent filed submissions dated 26.3.2025 in which it was submitted that award of damages was proper and the findings of the lower court should be upheld. He cited Abdi Werdi Abdullahi v James Royo Mungatia & Another (2019) eKLR where an award of Ksh. 3,500,000/= was made for amputation of the right tibia and fibula, and fractures right femur in 2019.

16. Similarly, he relied on Paul Gachina v Mohammed G Awale & Another (2018) eKLR where the High Court upheld Ksh. 3,000,000/= for traumatic amputation of the right leg, and compound comminuted fracture of the right tibia.

17. It was submitted that the damages for loss of earning capacity of Kshs. 1,500,000/= was proper and should be upheld. Similarly, that Dr. Ating'a as Consultant Orthopedic was the most suited to give an opinion on the cost of prosthetics and so Ksh. 1,000,000/= was the most accurate figure under this head.

Analysis

18. 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 subordinate 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 set out in the 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-subordinate and the Court of Appeal is not bound to follow the subordinate 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."

19. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate 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 in the lower court as parties cannot read into those documents matters extrinsic to them. This court's jurisdiction to review the evidence should be exercised with caution.

20. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In the cases 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..."

21. Before I proceed, I need to address the issue where, both the Appellant and Respondent filed humongous 10 paragraph memorandum of appeal and cross appeal. It is unnecessary to set out in extensio the said monoliths as there is neither time nor space for repeating repetitions. This is in deference to Order 42 Rule 1 of the Civil Procedure Rules, which provides are doth:

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

22. The Court of Appeal had this to say about compliance with Rule 86 (now rule 88) of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

23. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports*

Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.

24. The court will be dealing with only one issue in this appeal, that is, whether the quantum of damages were inordinately low or inordinately high as to amount to an erroneous estimate of damages. Liability is not a factor in this matter. It is unnecessary to interrogate the pleadings relating to liability, in the circumstances. In dealing with quantum the following subsets will be addressed:

    a. General damages -Ksh. 2,500,000/=

    b. Reduced earning capacity -Ksh. 1,800,000/=

    c. Future medical expenses Ksh. 600,000/=

25. On quantum, the lower court awarded Kshs. 2,500,000/= in general damages though it did not cite any authority as basis for the award. The Respondent's main injuries were:

    a. Very severe crash injury to the left upper limb from the shoulder, Amputation of the left upper limb from the neck of the humerus.

26. It is the compound fractures on the tibia and fibula that caused the amputation of the right leg below the knee. The Respondent also suffered fracture of the right femur. There is general consensus on the medical reports that the Respondent suffered a fractured right femur with amputation of the right leg below the knee. The percentage of Permanent disability is generally agreed to be at least 45% and the cost of prosthetics at least Ksh. 250,000/=, to the maximum of Ksh.1,000,000/=.

27. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

28. A court is entitled to reject the opinion of an expert if upon consideration alongside all other available evidence, the court is of the view that the opinion is not one of sufficient probative value to establish the fact under judicial consideration. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

29. Therefore, it is settled that expert evidence must be considered along with all other available evidence in arriving at a justifiable outcome. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: "Because this is the evidence of an expert, I believe it."

30. On future medical expenses which was the cost of prosthetics, the same is a special damage. In the case of Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006, the Court of Appeal stated:-

> " We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount. It will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

31. Future medical expenses as special damages should be pleaded and proved. As was held in the cases of Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.

32. The court indicated in the body of the judgment that a sum of Ksh. 400,000/= was awarded as cost of artificial limb and Ksh. 100,000/= as servicing fee twice, while at the end indicated Ksh 400,000/= was awarded. This figure does not arise from any of the doctors. It appears to be an average. This is not what is required. The court must pick the most appropriate figure to meet the medical requirements. The percentage of disability ranged between 45% to 60%.

33. The court considered the three reports. The court arrived at Prof. Ating'a as having been more convincing. This court cannot differ with the court below simply because it could have arrived at a different conclusion. 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. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...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 evaluation of evidence by the court and its discretion on which court report to believe was well within the discretion of the court. I do not find the finding to be without regard to relevant factors. The court equally relied on the three reports and came to the inevitable conclusion that was correct. Indeed the Appellant deviated from their own doctor's findings and requested that Dr. Wokabi's figure be used. If that is to be done, it will result to an award of between Ksh. 900,000/= to Ksh. 1,200,000/=. This is buttressed by the decision of Matheka J, in the case of Geoffrey Kamuki & another –vs- RKN (Minor suing through her late father and next friend ZKN [2020] eKLR, where she posited as doth:

> This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it.

35. In effect the appeal on the question of prosthesis lacks merit and is accordingly dismissed.

36. On general damages, this court has to establish similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR. However, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

37. The principles governing the award of damages is settled. In Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] KEHC 4447 (KLR), Riechi J, enunciated the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

38. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

39. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

40. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> 'The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.'
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> We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:
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> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

41. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover as set out in the words of Lord Denning, which were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> "I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

42. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> "The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

43. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

44. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

45. I proceed to determine similar fact cases in relation to damages as applicable to this appeal. This will be on basis of similar cases, having regard to the extent of the injuries, the age of the decision, the permanent nature of the injuries and other relevant factors.

46. In Umoja Rubber Products Limited v Bobson Rimba Lewa [2015] eKLR the court, Chitembwe J awarded general damages of Ksh 2,200,000/=. The Plaintiff sustained amputation of the left arm below the elbow. In Roba Doti Guyo v Jiang Zhongemei Engineering Company [2015] eKLR the Plaintiff suffered a crushed hand which was amputated. He was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities in 2015.

47. In the case of Simba Platinum Limited v Nicholas Auma Wandera [2021] eKLR, the plaintiff sustained injury to the left hand with wounds and fractures leading to amputation at the shoulder joint, injury to the left eye with a cut wound, injuries to the leg, chest and back. The High Court on appeal upheld an award of Kshs 2,000,000/= as general damages for pain, suffering and loss of amenities.

48. Similarly, in James Musyoka Nzeke v Kenya Power and Lighting company [2019] eKLR, an award of Kshs.2,500,000/= was made for amputation of left arm amongst other injuries sustained by the plaintiff.

49. Lastly, in JMM (minor suing through Mother and next friend MMM) v Board of Governors Kithingiisyo Secondary School (Civil Appeal E045 of 2021) [2024] KEHC 4537 (KLR) (19 April 2024) (Judgment), the court set aside an award of Ksh. 3,000,000/= for the plaintiff who sustained a crush injury of the right upper limb, and loss of the right upper limb below elbow level and substituted with Ksh. 2,000,0000/=.

50. Based on the above authorities, Ksh. 2,500,000/= for general damages for pain and suffering was not inordinately high and I uphold it.

51. On diminished earning capacity, the lower court awarded Ksh. 1,800,000/=. The principles to be considered in making an award for loss of earning capacity were set out by the Court of Appeal in Butler vs. Butler [1984] KLR 225, as follows:-

    a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

    b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

    c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

    d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

    e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

    f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

52. The Appellants proposed Ksh. 500,000/= as appropriate award for loss of earning capacity. Loss over earning capacity is compensated by an award in general damages, once proved. In this case, the minor was 17 years old and a student in the Appellant school. I am unable to interfere with the award of Ksh. 1,800,000/= under this head as the lower court correctly exercised its discretion in granting the award. I do not find it excessively high or low. I have taken into consideration the permanent disability

following amputation. The Respondent is incapacitated and largely reliant on others for assistance. It was also the Respondent's case that the minor's vision of pursuing a course in surgery were shuttered and the medical reports supported this conclusion.

53. It is hoped that as much as is possible, the injured person in an accident might, by way of an award of the most reasonable estimate of damages, get well and be restored to his or her original health status prior to the accident. However, this is largely not always the case. As a general rule, an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the magistrate proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. In the cases of Butt v Khan (1981) KLR 470 and Kitavi v Coastal Bottlers Ltd (1985) KLR 470 the court held thus:

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on these areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

54. Consequently, the appeal in this respect fails.

55. There was no appeal on special damages.

Determination

56. In the upshot, I make the following orders: -

    a. The appeal is not merited and is dismissed.

    b. The cross appeal is dismissed.

    c. Each party to bear own costs in the appeal.

    d. 30 days stay of execution.

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. Olunga for the Appellant

Ms. Gachango for the Respondent

Court Assistant – Michael