Nirma Holdings Limited v Mugodo (Civil Appeal E580 of 2024)
[2025] KEHC 13099 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13099 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E580 OF 2024

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

NIRMA HOLDINGS LIMITED ..... APPELLANT

AND

MORRIS MUGODO ..... RESPONDENT

JUDGMENT

1. Being an appeal from the judgment and decree of Hon. C.K. Cheptoo (PM) delivered on 15.12.2023 in Nairobi CMCC No 2686 of 2017. The Appellant was the Defendant in the court below. The lower court awarded liability as follows:

    a. Liability 80:20

    b. General damages Ksh 2,600,000/=

    c. Loss of earning capacity Ksh. 1,200,000/=

    d. Future medication Ksh.2,000,000/=

    e. Special damages Ksh. 12,000/=

    Sub-total Ksh. 5,812, 000/=

    Less 20% liability Ksh. 1,162,400/=

    Total award Ksh. 4,649,600/=

2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal on the 08.05.2024. The appeal is on the lower court's finding on its judgment and is based on 5 grounds, to wit:

a. That the trial court erred in fact and in law in its award for general damages for Ksh 2,600,000/=, Loss of earning capacity Ksh. 1,200,000/=; Future medication Ksh.2,000,000/= Special damages Ksh. 12,000/= as being inordinately high, being erroneous estimation of damages in the circumstances

b. That the trial court erred and misdirected himself in law when he misapprehended and misunderstood the applicable principles and the law in assessing general damages arriving at an award manifestly high in the circumstances of the case.

c. That the trial court erred in law and fact in disregarding the submissions and decisions filed by the Appellant on applicable and similar decisions with similar injuries.

d. That the learned magistrate erred and misdirected herself in law, principle and facts when she misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that was inordinately high as to constitute an entirely erroneous estimate of the damages.

e. That the award of general damages was inordinately excessive in the circumstances.

3. The Appellant urges the court to allow the appeal and set aside the judgment of the lower court on quantum. They further seek a revision of the award on general damages to reflect amounts that are commensurate with the evidence and submissions on record.

Evidence

4. The Respondent filed suit vide an amended plaint dated 19.07.2018 wherein he stated that on 24.11.2015 he was in the course of employment of the Appellant when the Appellant exposed him to unsafe working environment in that while the Respondent was washing the concrete mixer his hand was caught up in the mixer causing him to suffer severe injuries, loss and damages.

5. The Respondent particularized the negligence of the Appellant in paragraph 6 of the Plaint. He prayed for special damages, general damages, loss of earning capacity, future medical expenses and interests thereon. The defence is not relevant in the circumstances where liability is not an issue.

Submissions

6. The Appellant filed submissions dated 10.03.2025, identifying the main issue for determination as being the quantum of damages. It was contended that the award of Ksh. 2,600,000/= for pain and suffering was inordinately high. Reliance was placed on the case of Morris Mugambi & Another v Isaiah Gitiru [2004] KECA 83 (KLR), where the Court of Appeal cited with approval the words of Lord Morris of Both-y-Gest in H. West and Son Ltd v Shephard [1964] AC 326 at p. 345 as follows:

In so saying, we adopt fully what was said by Lord Morris of Both-y-Gest in H. West and Son Ltd V. Shephard [1964] AC 326 at p. 345.

> "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."

7. The Appellant relied on the case of Karisa vs Motrex Limited & another [2025] KEHC 753; KWW (Minor suing thru His mother and next friend BNW) vs Shajanand Holdings Limited 2014 and Kenya Power and Lighting Company Limited v IO (minor suing through next friend and father GIO [2020] KEHC 9322 (KLR)

8. The Appellant also addressed damages under loss of earning capacity, proposing an award of Ksh. 500,000/= and relying on the decisions in Karisa v Motrex Limited & Another [supra] and Esther & Another v Kinyua [2025] KEHC 27 (KLR), maintaining that this amount would be sufficient.

9. Regarding the claim for Ksh. 2,000,000/=, the Appellant contended that the doctor had not provided a quotation to support the assertion that a prosthesis could cost Ksh. 5,000,000/=. The Appellant proposed a global sum of Ksh. 150,000/=, citing Kamuya v Elgon Kenya Limited [2022] KECA 1404 (KLR) and Kenya Builders & Concrete Company Limited & Another v Kasuli [2024] KEHC 13940 (KLR).

10. The appellant submitted that the respondent pleaded only Ksh. 10,000/= but was awarded Ksh.12, 000/=. In that context they maintained that a sum of Ksh. 12,000/= was excessive.

Analysis

11. Before proceeding, the court has to satisfy itself of jurisdiction to determine the matter. This is on the basis of the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the Supreme Court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

12. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. This was WIBA matter. The court dealt with a preliminary objection and dismissed the same. The matter then proceeded for hearing. The Chief Justice gave directions on hearing of WIBA matters filed in our courts. This matter found itself in this court as at the time of the directions.

13. The court thus has jurisdiction to handle the same. With jurisdiction dealt with, the court has to proceed with the question of the appeal itself. It raises four limbs, that:

    a. Special damages

    b. Loss earning capacity

    c. Future medical expenses

    d. General damages

14. 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 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."

15. 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. 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..."

16. The best route is to deal with each limb separately. A sum of Ksh. 2,000/= was pleaded. Thereafter it was changed to Ksh. 10,000/=. Special damages must be both pleaded and proved before they can be awarded by the court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth:

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

Special damages

17. The court stated that the Appellant proved the special damages of Ksh. 12,000/=. This may be true but irrelevant. The test is the pleading followed by proof. The pleading was for Ksh. 10,000/=. Any proof beyond 10,000/= is baseless, it cannot be awarded.

18. In the case of David Bagine Vs 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:

> " Plaintiffs 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"

19. Consequently, the award of Ksh. 12,000/= is set aside. In lieu thereof, I entered judgment on special damages for Ksh. 10,000/= which was both pleaded and proved.

Loss of Earning Capacity

20. The principles to be considered in making an award for loss of earning capacity were clearly 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.

21. Having regard to the principles applicable in assessing damages for loss of earning capacity, the factors to be considered will vary depending on the circumstances of each case. These include the claimant's age and qualifications, the remaining length of his working life, the extent of any disabilities, and his previous service, if any. In the present case, the Respondent was previously employed as a concrete mixer, earning Kshs. 13,000/= per month, as evidenced by the DOSH Form 1.

22. The degree of permanent incapacity was assessed at 65% as per DOSH 1. Dr. Madhiwalla assessed disability at 65%. Dr. D.O. Mudenyo assessed disability at 65%. Dr. Titus Ndeti Nzina assessed disability of the hand at 85%. He did not assess permanent total disability. The hand may be 85% unusable, but what is the disability as regards the whole body and the nature of work. The court has to have basis for a decision.

23. The 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."

24. 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."

25. 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 as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, where 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:-
>
> > "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."

26. In that connection 65% was consistent with other evidence. Using 65% disability, the loss of earning capacity works out as follows:

> 13,000 x 12 x 10 x 65% = 1,014,000/=.

27. The court awarded a sum of Ksh. 1,200,000/=. The award may be high but not inordinately high as to amount to an erroneous estimate of damages. The same is within range. It cannot be said to be inordinately excessive. 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."

28. The appeal on loss of future earning capacity is accordingly dismissed for lack of merit.

Future Medical Expenses

29. These are decidedly special damages. They need to be pleaded even if they are not exact and have not been incurred. Dr. Titus Ndeti Nzina stated that the cost of prosthesis was to be Ksh 5,000,000/=. It was raised in the evidence only. This was neither pleaded nor basis set in the pleadings. An amount of Ksh. 5,000,000/= must be such that a specific pleading ought to have been made.

30. In the case of Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal in overturning the decision of the High Court posited as follows regarding the decision of this court declining to award future medical expenses:

> 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. 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 the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances."

31. The aforesaid position is binding on this court. However, the issue in the court of appeal was that there were no specifics. The claimant in that matter had set out in the plaint that future medical expenses were required and the extent but could not fix the figures. In this matter, there was no single pleading on what could constitute this future medical expenses.

32. In the case of Kenya Power & Lighting Company Limited v AMK (Suing as the mother and next friend of JMK - Minor (Civil Appeal 58 of 2020) [2021] KECA 52 (KLR) (8 October 2021) (Judgment), the Court of Appeal [R.N. Nambuye, W Karanja & P.O. Kiage, JJA] posited as follows:

> 28. As has been held above, inasmuch as future medical expenses are in the realm of special damages, it may not be practical for the parties to be able to fully ascertain the exact amount that will be required in the future, it therefore suffices to give an estimate as the respondents did during their testimony.
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> 32. On the challenge to the award on future medical expenses which the appellant says had not been specifically pleaded and proved, this does not turn on much as the respondent had in their plaint stated that the minor requires additional and medical care. In our view, the functional prosthesis (artificial limbs) and their maintenance costs are covered under that prayer and as held in Tracom Limited & another v Hasssan Mohamed Adan (supra) it was not mandatory for the respondent to delve into detail of the future expenses at that stage thus that ground of appeal fails.

33. Further, in the case of Tracom Limited & Another v Hasssan Mohamed Adan [2009] eKLR, the Court of Appeal [P. K. Tunoi, P. N. Waki, & J. W. Onyango Otieno JJA] addressed the question of pleadings related to future medical expenses:

> The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to

be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-

> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."

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.

34. The foregoing is the position of the law. The Respondent pleaded as follows in the amended plaint:

> The plaintiff shall be claiming loss of future earnings and future medical expenses....
>
> .....the plaintiff avers that being right handed, he will need to undergo surgery for attachment of a functional bionic arm.

35. The court is satisfied that the pleadings were sufficient in terms of future medical expenses. The next question is quantum therein. In the lower court, the Respondent submitted for a sum of Ksh. 5,000,000/=. They relied on the report by Dr. Titus Nzina. The Appellant submitted that a sum of Ksh. 5,000,000/= is speculative. They raised questions regarding the good doctor's qualification as an expert. The Respondent's submissions in the lower court is not useful since they did not cross examine the good doctor. They accepted his opinion as true and not subjected to cross examination. This was suicide by laziness. A party cannot challenge evidence that they opted not to challenge by way of cross examination.

36. The court went an extra mile to analyse other cases and find that an award of Ksh.2,000.000/= is sufficient. However, it used recent cases where awards of between 1,200,000/= to Ksh.1,500,000/= were awarded. The lower court relied on the case of Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA) [2020] KEHC 1817 (KLR), where an award of Ksh.1,300,000/= for the cost of artificial lower limb was affirmed by Edward M. Muriithi, J. The court also relied on the case of Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR. In the latter case, L. W. Gitari affirmed an award of Ksh. 1,500,000/= for costs of artificial prosthesis of the lower limb.

37. There was no indication from the report by Dr. Titus Nzina that the limb was to be a functional prosthesis or aesthetic prosthesis. There was also no evidence of a bionic arm being required. The Respondent's case was not fully prosecuted in this respect. The court cannot understand the basis of not having the doctor testify to justify his position. The court then went ahead to award Ksh 2,000,000/= after considering recent authorities on the lower limbs. The court finds that the question of bio arms was not proved. The doctor who dealt with the issue of artificial arm, Dr. Titus Nzina did not choose one or the other. An award of Ksh .2,000,000/= is thus excessive. An award of Ksh. 1,500,000/= will suffice.

38. The court therefore sets aside the award of Ksh 2,000,000/= and in lieu thereof awards a sum of Ksh. 1,500,000/= for artificial arm.

General damages for pain and suffering

39. 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 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."

40. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured public must be at the back of the mind of the trial court. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as 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."

41. 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 in the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 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.

42. The principles of making awards in personal injury claims were fortified by the Court of Appeal in Cecilia W. Mwangi & Another V Ruth W. Mwangi [1997] eKLR, where the Court of Appeal [P.K. Tunoi, A.B. Shah And G.S. Pall], stated as follows:

It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.

43. The injury suffered was amputation of the right forearm with 65% disability. In the case of KWW (Minor Suing through His Mother and Next Friend BNW) v Shajanand Holdings Limited & another (Civil Case 1 of 2023) [2024] KEHC 9199 (KLR) (26 July 2024) (Judgment), D K Kemei awarded Ksh 2,000,000/= for amputation of his right hand and distal forearm with a permanent disability of 75%.

44. In the case of JM (A minor suing through the father and the next friend CMK v Githuya Transporters (K) Ltd [2022] eKLR, R. K. LIMO J awarded a sum of Ksh. 1,500,000/= for traumatic amputation of the right arm below the elbow, with 65% disability.

45. Taking into consideration the submissions of the parties, degree of permanent disability, and comparable awards, I find an award of Ksh. 2,600,000/= is excessive in the circumstances. Therefore, I set aside the same and award a sum of Ksh. 2,000,000/=.

46. The net effect is that the appeal is partly allowed.

47. The next issue is costs. Costs are 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.

48. 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.

49. 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 defendant 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.

50. The award was partly reduced. The reduction is not significant. It was a narrow victory. Given the state of the Respondent, I direct that each party bears its own costs.

Determination

51. The upshot of the foregoing is that the appeal is partly allowed. I make the following orders:

    a. Appeal on general damages for pain and suffering of Ksh 2,600,000/= is set aside. In lieu thereof, I enter judgment for the Respondent for a sum of Ksh. 2,000,000/=.

    b. Appeal on loss of earning capacity is dismissed and an award of Ksh. 1,200,000/= is affirmed.

    c. Appeal on future medical expenses is allowed. The sum of Ksh 2,000,000/= it is substituted with a sum of Ksh. 1,500,000/=.

    d. Appeal on special damages is allowed. The sum of Ksh. 12,000/= is set aside and substituted with a sum of Ksh. 10,000/=.

    e. The Respondent shall have costs of the suit in the lower court.

    f. Each party to bear its own costs herein.

    g. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mwangangi Nzisa & Associates Advocates for the Appellant

S.K. Kamani & Associates Advocates for the Respondent

Court Assistant – Michael