



**Wewa & another v Kamau (Civil Appeal E305 of 2021)  
[2024] KEHC 5340 (KLR) (Civ) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E305 OF 2021**

**CW MEOLI, J**

**MAY 13, 2024**

**BETWEEN**

**ELISHA WEWA ..... 1<sup>ST</sup> APPELLANT**

**GRAIN INDUSTRIES ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GRACE MUTHONI KAMAU ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. A.N. Makau (Ms.),  
PM, delivered on 21st May, 2021 in Milimani CMCC No. E3667 of 2020)*

**JUDGMENT**

1. Before the court are the main appeal lodged by Elisha Wewa and Grain Industries (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Appellants) via the memorandum of appeal dated 3.06.2021, and the cross appeal filed by Grace Muthoni Kamau (hereafter the Respondent) via the notice of cross appeal dated 9.06.2021. Both the appeal and the cross appeal emanate from the judgment of Hon. A.N. Makau, PM delivered on 21.05.2021 in Milimani CMCC No. E3667 of 2020 (the suit).
2. The Respondent instituted the suit against the Appellants by way of the plaint dated 3.07.2020, seeking general and special damages in respect of injuries allegedly sustained by the Respondent on or about 5.06.2020. It was averred that the Respondent was on the material date a lawful passenger aboard the motor vehicle registration number KBA 012N (the first motor vehicle) travelling along Eastern Bypass Road near China Kenya area; that the 1<sup>st</sup> Appellant, being a driver/agent of the 2<sup>nd</sup> Appellant, so carelessly and or negligently controlled and/or managed the 2<sup>nd</sup> Appellant's motor vehicle registration number KCS 053Y/ZF 9691 (the second motor vehicle) that it collided with the first motor



vehicle, occasioning the Respondent serious bodily injuries. The Respondent therefore blamed the 1<sup>st</sup> Appellant for the said accident and averred that the 2<sup>nd</sup> Appellant was vicariously liable.

3. Upon service of summons, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants entered appearance and filed a joint statement of defence denying the key averments in the plaint and liability.
4. When the matter came up before the trial court for hearing on 1.03.2021, the parties recorded a consent on liability in the ratio of 90:10 in favour of the Respondent and against the Appellants and agreed on the production of the Respondent's documents without calling the makers thereof. Thereafter, parties agreed that quantum of damages be canvassed by way of written submissions.
5. Finally, the trial court vide the judgment delivered on 21.05.2021 awarded damages, net of contribution, in the manner hereunder:
  - a. General damages: Kshs. 2,500,000/-
  - b. Future medical expenses Kshs. 600,000/-
  - c. Loss of earning capacity Kshs. 1,500,000/-
  - d. Special Damages: Kshs. 276,532/-
6. Aggrieved with the outcome, the Appellants preferred the present appeal specifically challenging the finding on quantum of damages, premised on the following grounds:
  - “ 1) That the learned trial magistrate misdirected herself in treating the evidence and the submissions on quantum before her and consequently coming to a wrong conclusion on the same;
  - 2) That the learned trial magistrate misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellants, and failed to totally consider the Appellants' submissions and authorities;
  - 3) That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;
  - 4) That the learned trial magistrate erred in awarding a sum of Kshs. 2,500,000 in respect of general damages for pain and suffering in view of the injuries suffered by the Respondent which was inordinately high in the circumstances was excessive in the circumstances, occasioning miscarriage of justice; and
  - 5) That the learned trial magistrate erred in awarding a sum of Kshs. 1,500,000 in respect of loss of earning in view of documents tendered by Respondent without considering the appellants written submissions on the same hence coming to a wrong conclusion on the same;
  - 6) That the learned trial magistrate erred in awarding a sum of Kshs. 276,532 in respect of special damages which was never proved hence greatly prejudicing the Appellant.
  - 7) That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.



- 8) That costs of this appeal be provided for.” (sic)
7. As earlier mentioned, the Respondent similarly challenged the award of the trial court, by filing a notice of cross appeal dated 9.06.2021 featuring the grounds hereunder:
- “ 1. The Hon. Magistrate grossly misdirected herself by treating the Plaintiff/s/ Respondent’s evidence and submissions superficially and consequently arrived at a wrong conclusion.
  2. The Hon. Magistrate erred in law and in fact by awarding a sum of Ksh 1,500,000 under the head of general damages for loss of earning capacity which award was too low and amounted to an error in the exercise of discretion in the assessment of damages by the Honourable Magistrate.
  3. The Hon. Magistrate erred in law and in fact in failing to take into consideration various factors which she ought to have taken into consideration thus arriving at an erroneous award of damages under the head of general damages for loss of earning capacity.
  4. The Hon. Magistrate erred in law and in fact in failing to have due regard to the authorities cited by the Plaintiff/Respondent as such arrived at an erroneous finding on the issue of damages under the head of general damages for loss of earning capacity.” sic
8. Both the appeal and cross appeal were canvassed by way of written submissions. Counsel for the Appellants for one anchored his submissions on the decisions in *Rahima Tayab & Another v Anna Mary Kinanu*, Civil Appeal No 29 of 1982 and *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR* on the principles applicable in assessing damages. Regarding the award on general damages, counsel for the Appellants argued that it was inordinately high and not commensurate with the injuries sustained by the Respondent. The Appellants therefore urged the court to substitute the award made in the sum of Kshs.2,500,000/- with a sum of Kshs. 850,000/-. Here relying on the case of *Easy Coach Limited v Mary Lossa Aketch [2019] eKLR* where an award of Kshs, 750,000/- was upheld on appeal, in respect of injuries consisting of a displaced fracture of right clavicle, fracture of the right scapular, multiple laceration on both hands, bruises on the forehead, contusion on the left hip, contusion on the left leg laterally and multiple cut wounds on the lower back; and the case of *Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR* in which the High Court sitting on appeal, awarded Kshs. 800,000/- under the same head, at the instance of an appellant who had sustained a fracture of the skull, right clavicle, left 1<sup>st</sup> and 2<sup>nd</sup> ribs and multiple soft injuries.
9. On the damages awarded for loss of earning capacity, counsel firstly argued that no proper evidence was tendered by the Respondent to prove her alleged business earnings. Secondly, that there is a distinction between a claim for loss of future earnings and one for loss of earning capacity, as acknowledged by the court in *SJ v Francesco Dinello & anor (2015) eKLR*, and that in the present case, the Respondent having not proved her claim under this head, was not entitled to any award. On that basis, counsel faulted the trial court for making an award in the sum of Kshs. 1,500,000/- without justifying how it arrived at the amount. Counsel called to aid the decision rendered in *Mary Wambui Mungai v Antony Githinji Kihuga [2020] eKLR* where the court dismissed a plaintiff’s claim for loss of future earnings, in the absence of any medical or other proof to the effect that the said plaintiff was rendered unable to work in the future, owing to her injuries. The case of *Kenblest Kenya Limited v Musyoka Kitema [2020] eKLR* was also called to aid. The Appellants’ advocate went on to submit that should this court



be inclined to make an award under this head, then the same ought to be tabulated using a multiplier of 10 years, as the Respondent was aged 43 years at the time of the accident and a multiplicand of Kshs. 10,000/- . Thus:

$Kshs. 10,000/- \times 10 \times 12 = Kshs. 1,200,000/-$

10. Regarding special damages, the Appellants' advocate faulted the trial court for awarding a sum of Kshs. 276,532/- and yet only the sum of Kshs. 27,770/- was proved by way of evidence. Counsel therefore urged the court to substitute the award under that head accordingly. Ultimately, the Court was urged to disturb the respective awards accordingly.
11. The Respondent on her part challenged the trial court's award solely on loss of earning capacity, as seen in her notice of cross appeal. Her counsel relied inter alia on the decision in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR to argue that resulting from her injuries, the Respondent lost her earning capacity and would not be able to perform her usual work duties as before. Moreover, her counsel contended that sufficient evidence was tendered to prove the Respondent's earnings, namely, M-Pesa account statements and delivery notes. Asserting that it was unnecessary for her to tender certificates to prove her line of work. In that regard, reliance was placed on the case of *Nelson Rintari v CMC Group* [2015] eKLR where it was held that failure by a party to keep a proper book of records in the informal sector of employment does not mean that such a party has no proof of earnings. The Respondent's counsel therefore termed the award of Kshs. 1,500,000/- made by the trial court as being inordinately low. Citing the decision in *SBI International Holdings (AG) Kenya v William Ambuga Ongeru* [2018] eKLR), he urged the court to instead apply a multiplier of 15 years and a multiplicand of Kshs. 72,000/- to be tabulated as follows:  
 $Kshs. 72,000/- \times 15 \times 10 = Kshs. 12,960,000/-$
12. Additionally, the Respondent supported the remaining awards. On the award made under the head of general damages for pain, suffering and loss of amenities, her counsel referenced the decision in *Samuel Makumi Githambo v South Firms Ltd. & others-Nkr. HCCC No. 9 of 2008* in which the court awarded Kshs.1,500,000/- at the instance of fracture distal end of the right femur, fracture distal end of the left femur, fracture inferior pubic remus of the right pelvis, fracture right scapular, multiple cut wounds on the face, closed fracture medial malleolus of the leg, dislocation of the right shoulder, loss of one upper incisor tooth, and loss of lower incisor; and the decision in *Edward Mzamili Katana v CMC Motors Ltd & Shah Punja Hira* [2006] eKLR where the court awarded a sum of Kshs. 2,000,000/- on comparable injuries.
13. Regarding special damages, it was counsel's contention that the sum of Kshs. 276,532/- was rightly awarded by the trial court, the sum having been specifically pleaded and strictly proved, in line with the principles on special damages as set out in the case of *Hahn v Singh Civil Appeal No. 42 of 1983* [1985] KLR 716. Ultimately, counsel urged the court to dismiss the appeal but to allow the cross appeal accordingly.
14. The court has considered original record, record of appeal and the submissions made by the respective parties on both the appeal and cross appeal. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* [1958] EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* [1968] EA 123 and *Williams*



Diamonds Limited v Brown [1970] EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

15. The main contention in the main appeal relates to the quantum of damages awarded by the lower court under all heads, which are viewed by the Appellants as being either inordinately high or erroneous. In contrast, the cross appeal is purely challenging the award made on loss of earning capacity, which the Respondent claims to be inordinately low. That said, the court will consider the appeal and cross appeal under the respective heads of damages.

16. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia [1987] KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”

17. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low”.

See also Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto [1979] EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; [2004] eKLR.

18. In the latter case, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

“An appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”.

19. In Tayib v Kinany [1983] KLR 14, the Court exhorted inter alia that:

“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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added)

20. In respect of general damages under the head of pain, suffering and loss of amenities, the Respondent particularized her injuries in the plaint dated 3.07.2020 as comprising fracture-midshaft right tibia/fibula; fractures superior and inferior right pubic ramii; fractures midshaft right femur; deep



cut wound left foot; and degloving injury right calf legion. The injuries were confirmed in the Respondent's medical report prepared by Dr. Moses Kinuthia and dated 7.04.2010 which report constitutes part of the Respondent's bundle of admitted documents. The doctor noted that the Respondent had been admitted in hospital on two (2) occasions, during which time she received medical attention. The doctor categorized the Respondent's injuries as grievous harm in nature and stated that she would require a surgery in the future to remove the metal implants at the fracture site. The doctor's report stated that meanwhile, the Respondent would require continuous physiotherapy and orthopedic follow-up sessions. Consequently, the doctor estimated that future medical expenses would cost Kshs. 600,000/- and assessed permanent incapacity arising from the injuries at 40%.

21. In her judgment, the learned trial magistrate upon setting out the summary of the pleadings, evidence tendered and proposed awards by the parties, reasoned that the authorities cited therein were decided many years ago and therefore proceeded to award a sum of Kshs. 2,500,000/- under the above head.
22. The Appellants have firstly complained that trial court did not take into consideration their submissions and authorities filed before the trial court. From a perusal of the record and in particular, the impugned judgment, there is no demonstration of the complaint. In fact, reference was made to the proposed award on general damages by the Appellants, in the trial judgment.
23. The Respondent on the one part suggested the sum of Kshs. 5,000,000/- general damages for pain, suffering and loss of amenities relying on the case of Samuel Makumi Githambo v South Firms Ltd. & others (supra) cited in her submissions on this appeal. In that case, the court awarded Kshs.1,500,000/- at the instance of a plaintiff who sustained fracture distal end of the right femur, fracture distal end of the left femur, fracture inferior pubic remus of the right pelvis, fracture right scapular, multiple cut wounds on the face, closed fracture medial malleolus of the leg, dislocation of the right shoulder, loss of one upper incisor tooth, and loss of lower incisor. As well as the case of Edward Mzamili Katana v CMC Motors Ltd & Shah Punja Hira (supra) also cited in her submissions on appeal, where the court awarded a sum of Kshs. 2,000,000/- on comparable injuries.
24. On the other part, the Appellants proposed a sum of Kshs.750,000/- with reference to the cases of Easy Coach Limited v Mary Lossa Aketch [2019] eKLR and Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR both cited in their submissions on appeal.
25. In arriving at her assessment, the learned trial magistrate did not cite any guiding pertinent authorities. That notwithstanding, upon considering the respective authorities cited, the court is of the view that those by the Respondent constituted comparable injuries though decided a number of years ago. Similarly, the court finds that the authorities cited by the Appellants constituted less severe injuries than those suffered here.
26. It is clear from the medical report cited above that although the Respondent's injuries would gradually heal overtime, she would require further medical attention and a surgical procedure to remove the metallic plates. The doctor further noted in his medical report that as at the time of examining the Respondent, she had complained of experiencing pain and numbness on her lower limb, requiring support in walking.
27. In the premises, the court considered the case of Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited [2020] eKLR where an award of Kshs. 1,200,000/- was made on general damages in respect of a degloving injury on both legs, a fracture of the right ankle, dislocation of her left hand, and was in hospitalized for seventy-seven (77) days. The court also considered the case of *Simbe v Nyangau (Civil Appeal E037 of 2012)* [2022] KEHC 3275 (KLR) (19 July 2022) (Judgment) in which an award of Kshs. 2,000,000/- was made on general damages, to a plaintiff who had suffered multiple fractures of the ribs, fracture with dislocation of the tibia and talus bones, extreme degloving injury on the left



ankle and malleolar and dislocation of the left thumb. Considering the comparable decisions above, the serious nature and extent of the injuries sustained by the Respondent herein, and coupled with the degree of permanent incapacity assessed as a result, the court is of the view that the award of KShs.2,500,000/- made by the learned trial magistrate appears a reasonable award in the circumstances. The court therefore sees no reason to interfere with the award under this head.

28. Turning to the award made under the head of future medical expenses, as earlier mentioned, Dr. Moses Kinuthia through his medical report made mention that the Respondent would be required to undergo a surgical procedure to remove the metal implants, upon confirmation that the fractures have united, thus estimating that future medical expenses would cost a sum of KShs. 600,000/-. The learned trial magistrate, while placing reliance on the said medical report, proceeded to award a sum of KShs. 600,000/- under the relevant head. It is apparent therefore that the learned trial magistrate's award was based on the opinion offered by Dr. Moses Kinuthia. In view of this, the court is satisfied that the magistrate's award under the above head is supported by the medical evidence on record. The court therefore sees no reason to disturb such award.
29. This brings us to the award made under the head of loss of earning capacity, which was challenged by both parties herein, with the Appellants submitting that the same ought not to have been awarded, while the Respondent argued that the award made herein was inordinately low and therefore ought to be revised upwards.
30. In her submissions before the trial court, the Respondent argued that during the period of two (2)-year course of her treatment following the accident, she lost her earnings. The Respondent further submitted that previously, she worked as a business lady in the business of sourcing and distributing stones to her clients, a business from which she would earn daily returns of KShs. 3,000/- translating to a sum of KShs. 72,000/- per month, upon working six (6) days a week. The Respondent further submitted that given her assessment of permanent incapacity at 40%, she was entitled to an award under this head. In contrast, the Appellants argued that the Respondent did not demonstrate that as a result of her injuries, she was unable to earn an income. Upon considering the above, the learned trial magistrate awarded her a sum of KShs. 1,500,000/-.
31. Regarding the nature of damages for loss of earning capacity/loss of earnings as contrasted with damages for loss of future earnings, the Court of Appeal in the case of William J Butler v Maura Kathleen Butler [1984] eKLR acknowledged that:

“...compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”
32. A similar position was echoed by the Court of Appeal in the decision rendered in SJ v Francesco Di Nello & Another [2015] eKLR cited in the Plaintiffs' submissions. The Court held:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley V John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows: “It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings



is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

33. These decisions spelt out the difference between damages for loss of future earnings, otherwise referred to as loss of income, and loss of earning capacity. Thus, loss of income/future earnings being in the nature of special damages must be pleaded and proved. Loss of earning capacity on the other hand (which is the head under which damages were sought before the trial court), is in the nature of general damages and need not be pleaded though but must be proved on a balance of probability. See Cecilia W. Mwangi and Another v Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR.
34. Upon re-examining the pleadings and material tendered before the trial court, it is apparent that the Respondent’s asserted work/trade was not necessarily challenged. It is also apparent from the record that the Respondent’s permanent incapacity resulting from her injuries was assessed at 40%, and the assessment was also not challenged/countered by the Appellants. In that case, the court is satisfied that a degree of permanent incapacity would entitle the Respondent to an award of damages under the head of loss of earning capacity, given that a medical assessment of permanent incapacity infers limitation of a person’s ability to work/earn a living in the same way they did before, and therefore loss of some income.
35. That said from the documentation tendered by the Respondent, it was not possible to discern proof of her monthly earnings as asserted at the trial. That being the case, this court considered the earnings of a person whose trade was comparable to the Respondent’s. Under the Regulation of Wages (General) (Amendment) Order 2018 applicable at the time of the accident (being on or about 5.06.2020), the monthly earnings of a person working in a similar trade as the Respondent, namely, stone cutter/miner was Kshs. 14,658.85. The court adopted this figure as a reasonable multiplicand. Regarding the multiplier, the Respondent stated that she was aged 44 years at the time of the accident. Given the general retirement age of 60 years, the Respondent would have expected to work for a remaining period of 16 years. This would constitute the applicable multiplier.
36. Considering the foregoing factors coupled with the permanent incapacity assessed at 40%, the court will calculate damages awardable under this head as follows:

$Kshs. 14,658.85 \times 16 \times 12 = Kshs. 2,814,449.20$

$Kshs. 2,814,449.20 \times 40\% \text{ permanent incapacity} = Kshs. 1,125,799.68$

37. The above would therefore constitute the damages awardable under this head. In the premises, the court is convinced to disturb the award made by the trial court, which award fell on the higher side.
38. This leaves the award in respect of special damages. It is trite law that special damages must be specifically pleaded and strictly proved. This was the position acknowledged by the Court of Appeal in David Bageine v Martin Bundi [1997] eKLR when it stated that:

“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 Part 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.”

39. Further Chesoni, J (as he then was) stated in the case of *Ouma v Nairobi City Council* [1976] KLR 304 that:

“Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court’s view is as laid down in the English leading case on pleading and proof of damages, *Ratcliffe v Evans* [1892] 2 QB 524 where Bowen LJ said at pages 532, 533; -

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (Emphasis added)

See also *Hahn v Singh* [1985] KLR 716.

40. In her pleadings, the Respondent sought a sum of Kshs. 276,532/- and which sum was awarded by the learned trial magistrate. From its re-examination of the record, the court noted that some of the documentation tendered by the Respondent on this claim was illegible and there was therefore no way of ascertaining the sums sought. Moreover, the Respondent tendered invoices which do not constitute proof of payment as a matter of principle and cannot therefore be included in the claim.
41. Reviewing the admissible documentary proof, the court observed that the Respondent’s receipts demonstrate the sum of Kshs. 4,920/- in respect of medical expenses at Kenyatta National Hospital; Kshs. 7,000/- being receipts issued by St. Francis Community Hospital where the Respondent equally received medical treatment; receipts totaling a sum of Kshs. 156,000/- issued by Medical Plaza; a paid invoice dated 23.03.2020 issued by NTSA for a sum of Kshs. 550/-; and a receipt dated 9.04.2020 in the sum of Kshs. 5,000/- constituting payment for preparation of the medical report by Dr. Moses Kinuthia. The proven special damages therefore add up to the sum of Kshs.173,170/- . On that basis, the court finds that the trial court erred in awarding sums not strictly proved. Consequently, the award under this head ought to be substituted with an award totaling the sum of Kshs. Kshs.173,170/-.
42. In the end therefore, the appeal partially succeeds, whereas the cross appeal fails. Consequently, the court hereby sets aside the trial court awards made on general damages for loss of earning capacity and special damages. The awards made under the heads of pain, suffering and loss of amenities; and future medical expenses remain.
43. In the result, the judgment of the lower court is varied only in respect of damages for loss of earning capacity and special damages to read as follows:
- a. General damages:  
Pain, suffering and loss of amenities - Kshs. 2,500,000/-
  - b. Future medical expenses - Kshs. 600,000/-



c. Loss of earning capacity - Kshs. 1,125,799.68

d. Special damages - Kshs. 173,170/-.

Total award - Kshs. 4,398,969.68

Less 10% contribution

Net: Kshs. 3,959,072.71/- (Three Million, Nine Hundred and Fifty-Nine Thousand, and Seventy-Two, and Seventy-One Cents) .

44. The Respondent shall have costs of the suit in the lower court and interest on general damages at court rates from the date of judgment until payment in full, and interest on special damages at court rates from the date of filing suit until payment in full. The cross appeal is hereby dismissed. In the circumstances, parties shall each bear their own costs in respect of both the appeal and the cross appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.**

**C.MEOLI**

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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

For the Appellants: Ms. Njoki

For the Respondent: Ms. Mutheu h/b for Mr. Kibiku

C/A: Erick

