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Gichuki & 2 others v Obuche (Civil Appeal E097 of 2020) [2024] KEHC 12799 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 12799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E097 OF 2020

SM MOHOCHI, J

AUGUST 8, 2024

BETWEEN

PATRICK GICHUKI .... 1ST APPELLANT

PETER MUIGAI NJOROGE .... 2ND APPELLANT

HANNAH WANJIKU NJENGA .... 3RD APPELLANT

AND

GAITANO MAJWANDA OBUCHE .... RESPONDENT

(Being an Appeal against the Judgement by the Honourable F. Munyi (Principal Magistrate) in Nakuru CMCC NO.78 of 2017 delivered on the 31st January, 2020)

JUDGMENT

Introduction

1. This appeal arises from the judgement of Honorable F. Munyi PM, in Nakuru CMCC No. 78 of 2009 delivered on 31st January, 2020. It mainly challenges the trial magistrate's judgment on the twin issues of liability and quantum.

Trial Court Case

2. By a Plaint dated 31st January 2017, the Respondent sued the Appellants for being liable for a road traffic accident and thus praying for Judgement:

    i. Special damages of Kshs. 16,100;

    ii. General damages for pain, suffering and loss of amenities b) Damages for dimunition and or loss of future earning capacity;

    iii. Costs of the suit;

iv. Interest on all the above at court rates; and

v. Any other relief that the court might deem fit to grant.

3. The claim arose from an accident that occurred on the 22nd day of August 2016 as the Respondent was lawfully riding motor cycle registration no. KMDJ 075A King-horse along Nakuru - Elementaita road when the driver of KAR 095N Toyota matatu drove it negligently that he caused it to hit the motor cycle violently as a result of which the Respondent sustained a fracture of the right tibia: mild head injury: lacerations on the right forearms; lacerations on the right hand; soft tissue injuries of the left shoulder joint; soft tissue injuries of the left leg: Abrasions on the left knee.

4. The Respondent paid Kshs. 16,100 in treatment costs and further alleged that his productivity was adversely affected by the injuries following substantial/partial loss of the use of the limbs. The Injuries impacted negatively on his personality, way of life, happiness, pride and/or esteem.

5. In their defence dated 14th March 2017, the Appellants denied the allegations in the Plaint, pleaded the defence of inevitable accident and sought that the suit be dismissed with costs.

6. The p3 form exhibited demonstrated that, the Respondent was found to have had tenderness on the scalp (generalized). According to Dr. Kiamba, there was reduced movements of the joints. In the basis the court found for the respondent to have suffered 10% permanent disability. The Respondents leg shortened by 1.5 Cm a fact confirmed by the Appellants defence witness basis of which informed an award of Kshs. 800,000 as general damages for pain, suffering and loss of amenities.

7. With regards to damages for diminished/less of future earnings an argument arose as to whether the award head constituted special damages which the Respondent must be specifically have pleaded and strictly prove or if this was a general damage. The court considered and held that Damages under the heading loss of earning capacity can be classified as general damage but those have also to be proved on a balance of probability.

8. After conclusion of the trial, the trial court found both parties equally to blame for the accident and entered the judgment for the Respondent against the Appellants jointly and severally as follows;

i. General damages at Kshs. 800,000.

ii. Damages for diminishing/Loss of future earnings at Kshs 50,000/-

iii. Special damages at Kshs. 16,000.

iv. Liability at 50%.

The Appeal

The Appellants being dissatisfied by the decision of the trial court lodged this appeal vide a Memorandum of Appeal dated 27th May 2020 and filed on 28th May 2020.

9. The Appeal is premised on two grounds THAT: -

i. The trial Magistrate erred in fact and in law in awarding general damages in the sum of kshs. 800,000/= and costs to the plaintiff which is manifestly excessive and or ordinately high as to be unjust.

ii. The Learned Magistrate erred in law and in fact in falling to accord due regard to the Appellants submissions on quantum on applicable principles for assessment of damages.

10. The Appellants therefore seek that the appeal herein be allowed with costs and that the lower court's judgment in respect of the liability and quantum be set aside and substituted with a reasonable amount.

11. The Appeal was disposed by way of Written Submissions.

Appellant's Submissions

12. The Appellants in their Written Submissions dated 10th May 2023 submitted reiterating the contents of their submissions in the lower Court, that the awards on damages should be revised downward and that the award of Ksh. 866,000 is inordinately high and ought to be disturbed.

13. That, it is trite law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. However, the law has set dimensions for an exercise of discretion, must be exercised judicially, with wise circumspect and upon some legal principles. The said dimensions are vital such that when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court.

14. That, the discretion in assessing the amount of general damages payable will be disturbed if the trial court;

    a. Took into account an irrelevant factor or.

    b. Left out of account a relevant factor or, short of this

    c. The amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

15. That, it is trite law that awards must be within consistent limits and court awards for damages must be made taking into account comparable injuries or similar injuries and awards. In Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR [as quoted in Michael Okello v Priscilla Atieno [2021] eKLR] it was held that;

> " the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases".

16. Similarly, in the case of Kigaraari vs Ava (1982-88) 1 KAR 768, as quoted by Kamau I in Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR it was stated as follows:-

> " Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees".

17. The Appellants urged this Court to uphold the appeal and disturb the award of Kshs. 866,000 in general damages, that the learned Magistrate did not consider their submissions and especially the matter that reflected the exact same injuries suffered by the Respondent herein.

18. That, absolutely no satisfactory explanation was rendered by the trial Court in arriving at the overly inflated figure of Kshs. 866,000.

19. The Appellants recognize that the Respondent suffered a fracture injury and further wish to rely on the following cases;

i. In Harun Muyoma Boge v Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012 [as quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR], the Plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 150,000/- and substituted it with an award of Kshs. 300,000/-.

ii. In Naomi Momanyi vs. G4S Security Services Kenya Limited [2018] eKLR [as quoted in Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR], the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm and was awarded Ksh. 300,000.

iii. In Wakim Sodas Limited vs. Sammy Aritos [2017] eKLR [as quoted in Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR), the respondent had sustained a fracture of the fourth rib and a compound fracture of the left tibia/fibula. The trial court awarded Kshs. 400,000, which was upheld on appeal.

iv. In Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR, the appellant had sustained a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The injuries reflected in the plaint were extracted from medical records that are in the trial court's file. The injuries reflected in the P3 Form, and filled by the doctor were a cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibia fibular.

It was reflected that the appellant had suffered head injury and lower limb fractures. She was hospitalized for nine days. The injuries detailed in the report are head injury, cut wound on the scalp, spinal cord neck injury, and fracture of the left lower limb. X-rays and CT scans were done, together with an operation to fix a plate on the tibia fracture. The soft tissue injuries were cleaned and dressed and she was put on antibiotics, analgesics and sedatives for the head injury. She was left with scars on the face and on both lower limbs, and mild headaches from the head injury. The soft tissues were said to have had fully healed. Ultimately, an award of Kshs. 300,000 was made and which award, the High Court declined to enhance upon Appeal citing;

> "From the review of the recent decisions on the comparable injuries, it would appear to me that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend is to award general damages in the range of Kshs 300,000 to Kshs. 500,000. I am not persuaded that I should interfere with the outcome at the trial court. As a consequence of the above, the appeal herein fails, and it is hereby dismissed.
>
> Each party shall bear their own costs."

20. That, the injuries suffered by the Respondent are definitely in the ranges specified above, hence our submission that an award of Kshs. 866,000 is wholly sufficient and should be awarded in place.

21. That, the following cases highlight much more serious injuries and are listed herein to reinforce our submission that the award of Kshs. 866,000 should be disturbed;

i. In Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR Majanja J set aside the lower court award of Kshs 1,000,000.00 for general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture

of the right tibia/fibula, segmental distal fracture of the right femur and substituted with Kshs. 450,000.00.

ii. In the case of *Zachariah Mwangi Njeru v Jospeh Wachira Kanoga, Nyeri HCCA No. 9 of 2012* [as quoted in Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR], the Plaintiff sustained comminuted fracture of the tibia and fibula and the court set aside an award of Kshs. 800,000/- and substituted it with an award of Kshs. 400,000/-.

iii. In Mbithi Muinde William v Rose Mutheu Mulatia [2019] eKLR [as quoted in DG (Minor suing through her next friend MOR v Richard Otieno Onyisi [2021] eKLR], the respondent was awarded a sum of Kshs. 400,000/= as compensation for a swollen, tender left wrist and left leg, fracture of the left 5th metacarpal bone and fracture of the right tibia.

22. That Appellants submit that, the trial Magistrate did not consider that comparable injuries should be compensated by similar awards of general damages and that an award of Kshs. 300,000 would totally suffice for the injuries sustained going by the comparable awards highlighted and the award should be subjected to liability as apportioned by the trial Court at 50:50%.

23. That, it is trite law that costs follow the event, the Appellants pray for costs of this Appeal based on Section 27(1) of the *Civil Procedure Act* which provides;

> " 27. Costs
>
> 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."

24. That, in view of the foregoing, the Appellants urge this court to uphold the Appeal and disturb the Judgment of the trial court in terms of quantum.

25. The Appellants pray that the Appeal herein be upheld and that they be awarded costs of this Appeal.

Respondent's Submissions

26. The Respondents filed his written submissions dated 3rd October 2023, submit that, the award for general damages was fair and deserving and therefore the Appellants contention to the contrary is erroneous.

27. That the guiding principles of an appellate court were espoused in The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 which set out the circumstances under which an appellate court interferes with an award of damages:-

> “It is trite law that the assessment of general damages is at the discretion of the trial court and 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 at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

28. That, an Appellate Court always starts with the working presumption that any decision appealed against is right in every aspect unless it is demonstrably wrong and therefore it will not interfere with the same unless it is demonstrated to be erroneous. See Judicial Hints on Civil Procedure by R. Kuloba at page 256:-

> “A court of appeal does not readily interfere with the estimate of damages made by the trial judge as assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and unless an appeal court comes to the conclusion that the judge below took an erroneous view of the evidence as to the damage suffered by the Plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, it ought not to interfere.”

29. Further reference is made to the case of John Wambua v Mathew Makau Mwololo & another [2020] eKLR: -

> “The assessment of damages is more like an exercise of discretion and the appellate court is slow to reverse a lower court's decision on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for this or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles.”

30. And lastly the case of *Ufrah Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021)* [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment):-

> “It is the true if I was sitting as the trial Court I could have awarded a different figure. However, the issue is not whether I could have awarded a different figure. The question is whether the award is so excessively high or inordinately low as to amount to an erroneous estimate.”

31. That, on the other hand and given that an appeal is not a new trial but rather a process intended to correct the errors made by the trial court, an Appellate court is duty bound to consider the Appeal within the same context that the trial court dealt with the matter and hence it will not receive and or use new materials/evidence that was not placed before the trial magistrate to determine the Appeal.

See the case of Sila Tiren & another v Simon Ombati Omiambo [2014] eKLR where the court held as follows in similar circumstances: -

> "…In my understanding of the law, an appeal process is intended to correct the errors made by the trial court. And in order for the appellate court to be fair to the trial court, it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court. The first appellate court is enjoined by law, to re-evaluate all the evidence on record, and to draw its own conclusions. The appellate court is not, ordinarily, expected to receive new or further evidence."

32. Further reference is made to the case of Monicah Wanqui Mundia v Simon Njuguna [2020] eKLR:-

> "This being appeal on quantum only, I will re-evaluate evidence adduced in the trial court in respect to injuries suffered by the appellant/plaintiff and authorities cited to establish whether the trial magistrate misapprehended evidence adduced and relied on the wrong principles. I do agree with counsel for the appellant that in so doing! should deal with the matter in the context it was dealt with in the lower court. I will therefore look at evidence adduced in respect to injuries suffered and authorities cited to find whether the figure awarded is comparable to awards in cases with similar injuries."

33. That therefore and in the conduct of its appellate jurisdiction, an Appellate court will not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises. See case of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR:-

> "The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods… The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the judges in the courts below."

34. This is to avoid abuse of appellate jurisdiction by allowing a party to introduce new evidence/materials to fill in the gaps in its case as was held in the above cited case of Kenya Hotels Limited-

> "…It is not in accordance with public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party. hitherto successful, litigate the matter again at the risk of having topay costs not only below, but in this court…

35. Reference is made to the Judicial Hints on Civil Procedure by R. Kuloba at page 256:-

> "…it should not be supposed that because an appellate court is hearing such a case by way of rehearing, therefore it would be ready to re-assess damage according to what the court of appeal, if it had been trying the case, might have given as damages, and not what the judge below gave. It is incumbent on the parties wishing to disturb the damages awarded to satisfy the court of appeal that the judge at the trial had acted upon an erroneous estimate-meaning thereby something in which the error had so tinged the proceedings that it was a proper case for the appellate court to assess the damage."

36. That, most importantly and even if a party is able to demonstrate to the Appellate court that the trial court applied the wrong principles (such as taking into account some irrelevant factor or leaving out of account some relevant one or even misapprehended the evidence), an Appellate court will not interfere with the award of damages unless it is shown that such an error led to the trial court arriving at a wholly erroneous estimate the Respondent relies on the case of Intra-Health International INC v Charles Musembi Munyao [2019] eKLR where the court held that:-

> " In this case it is clear that the Learned Trial Magistrate based her award of damages on each head of the injuries sustained by the Respondent. That was clearly an error of principle. However, to justify this court in interfering with the quantum of damages awarded by the trial court only, this court must be satisfied not only that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence, but as a result of the same the award arrived at was so inordinately high or low as to represent an entirely erroneous estimate...though I find that the learned trial magistrate made an error of principles in making separate awards for each injury, I am not satisfied that in the end she, as a result, arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate and in the premises, this appeal fails and is dismissed."

37. On the appellate court's approach when considering an appeal on quantum the respondent refers to the case of Susan Munyi v Keshar Shiani [2013] eKLR where The Court of Appeal held as follows: -

> " As a first appellate court, our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common-sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them. The general rule is that an appellate court will not interfere with a finding of fact made by a trial court unless the court is satisfied that the finding of the trial court is plainly wrong... An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand but this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion... The Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial judge who saw and heard the witnesses and that the judge was in a better position to assess the significance of what was said and equally important what was not said."

38. That It was held by the same Court in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47 as cited with approval in the case of John Wambua v Mathew Makau Mwololo & another [2020] eKLR;

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a

question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them… The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the Plaintiff."

39. And further buttressed in the case of Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730:-

> " It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairty or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion, This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

40. That, in view of the fact that an Appellate court will only interfere with an award of damages where the trial court has made a wholly erroneous estimate, then it goes without saying that an Appellate court will not interfere with an award for any other reason be it on account of opinion or preference of one award over the other See Kemp and Kemp, The Quantum of Damages Volume 1 Para 19-004:

> " Before an Appellate court interferes with an award of damages, it should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference of one award over the other. The scale must go

down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency... Though to some the award of $ 7,000/= may seem low, it is not so low as to support the inference that the judge's estimate was wholly erroneous. In a task as imprecise and immeasurable as the award of damages for non-pecuniary loss, a preference of $10,000/= over $7,000/= (or vice-versa) is a matter of opinion, but not by itself evidence of error (Emphasis supplied)."

41. Reference is made to Judicial Hints on Civil Procedure by R. Kuloba at page 256:-

> "In order to justify reversing a trial judge on the question of the amount of damages it will generally be necessary that the appellate court should be convinced either that the judge at the trial acted upon some upon some wrong principle of law, or that the amount was so extremely high or so very small as to make it, in the judgment of the appeal court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled."

42. The case Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-921 2 KAR 288; [1990-1994] EA 47(Supra)

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere whether on the ground of excess or insufficiency."

43. And lastly the case of Mariga vs. Musila (1984) KLR 251 as cited with approval in the case of Wambua (Supra):-

> "The assessment of damages is more like an exercise of discretion and the appellate court is slow to reverse a lower court's decision on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for this or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

44. That learned treatise Kemp and Kemp further postulates as follows in regard to what the phrase 'a wholly erroneous estimate' means:-

> "The phrase "a wholly erroneous estimate" is the one which in recent years appears to have been most frequently used by appellate courts when describing an award with which the court has interfered on the grounds of excess or insufficiency. But that still leaves the difficult question, namely what is a wholly erroneous estimate of damages?... a judge makes a wholly erroneous estimate when his award falls above or below the bracket within which awards of the appropriate standard are contained... The width of this bracket will vary according to the nature of the case The more imponderable the elements involved in making the assessment, the wider the bracket will be."

45. That the foregoing definition of 'a wholly erroneous estimate' is informed by the fact that assessment of damages is not 'an exact science' but rather a matter for the discretion of the individual Judge. As such, it is inevitable that there will be disparity in awards made by different courts for similar injuries. Therefore, the Appellate court will not interfere with the trial courts award so long as the same is within

the range/bracket of both limits set by the decided cases for similar injuries. See the case of *Wanyonyi v Kikuvi & another (Civil Case 13 of 2020)* [2022] KEHC 12686 (KLR) (21 July 2022) (Judgment):-

> "The appellant's counsel has complained about the figure awarded for loss of expectation of life under the *Law Reform Act* of Kshs.250,000/=. Counsel proposed an amount of Kshs.100,000/= in the trial court, while the respondents' counsel proposed Kshs.300,000/ =. They both relied on decided court cases. The magistrate awarded Kshs.250,000/= which in my view, is within the range that had previously been awarded by trial courts for persons within that age range. I will not interfere with this award on loss of life expectancy."

46. That, of most important and so long as the award is within the, range/bracket of the limits set by decided cases of similar injuries, it matters not whether the award is 'on the floor (lower part) or roof (upper part) of the range/bracket the Appellate court will not interfere with the same. Reliance is placed on the case of Municipal Council of Nakuru & another v David Mburu Gathiaya [1993] eKLR where The Court of Appeal held 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 respects, and so arrived at a figure, which was inordinately high or low. The question is this was the award of Kshs. 1,200,000/= inordinately high or disproportionate to the injuries suffered by the respondent to warrant disturbance by this Court? We think not... The comparable current awards show an upward trend. The award in this case is within the range of the up-ward trend. This upward trend is explained by the inflationary trend and the decline of the value of the Kenya Shilling... The award of Kshs. 1,200,000/ was not inordinately high to warrant our disturbing it...Ground 6 of the appeal also fails."

47. Further reference is made to the case of Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR where the court held that; from the review of decisions on the comparable injuries, the trend was to award general damages in the range of Kshs 300,000 to Kshs. 500, 000 and therefore upheld an award of Kshs.300,000/= since it was still within the bracket though on very lower side of the bracket.

48. Lastly and even as the court adheres to the limits of the range/bracket of decided cases, it must also take into account inflation/passage of time since the relevant cases were decided and where justice demands, a court will not shy away from making an award that also accords with effect of inflation on the range/ bracket of decided cases. We rely on the case of Afro Sugar Co. Limited & Another v. Levi Juma Eliud [2009] eKLR where the court held as follows:-

> "It is trite law that in awarding damages, the Court has to take into consideration comparable awards and effect of inflation. The awards should not be too high or too low, so as not to reasonably provide the injured person with something for pain, suffering and loss of amenities. In the instant case the cases cited by both Counsel are within the same bracket. They range between Kshs.80,000/- and Kshs. 180,000/=. My understanding of the bracket is that it does not fix a sum certain to which, like a prosecution bed, all awards for similar or almost similar injuries must fit. The bracket only provides a range, Despite the fact that the highest award in the cited case by both Counsel was KShs. 180,000/-, the trial Magistrate awarded Kshs. 280,000/- for general damages which was too high and hence in my view erroneous. Accordingly, the award of general damages is reduced from Kshs 280.000/ to Kshs 210,000/= and not Kshs. 180,000/= on account of inflation (emphasis added.)"

49. As to whether the award of general damages was erroneous / inordinately high the Respondent contends that the award was not inordinately high in that; Firstly, it is not true that the award in respect to general damages was Kshs.866,000/=. As the record will bears us out, the award for General Damages was Kshs.800,000/= as reflected in the lower court's judgement at page 62 of the record and hence Appellants contention to the contrary is misplaced.

50. Secondly, the award of Kshs.800,000/= made by the learned trial magistrate was within the limits/ range of Kshs. 1,000,000/= and Kshs.400,000/= set by decided cases for similar/Comparable injuries that parties relied upon in their respective submissions. This fact is clearly reflected in the learned trial magistrate's judgement at page 61-62 of the record where the court highlighted the same. As such and the learned trial magistrate's award of Kshs.800,000/= being within the limits set by decided cases for comparable/similar injuries that parties relied upon in their respective submissions, the Respondent humbly submit that, the said award cannot be said to be inordinately high, erroneous and or excessive. We rely on the case of Gladys Lyaka Mwombe v. Francis Namatsi & 2 others [2019] eKLR:-

> " The appellant was aggrieved by the award and lodged this appeal. Her principal case is that given the nature and extent of the injuries that she suffered the award by the trial court (kshs.300,000/=) was manifestly low....From the review of the recent decisions on the comparable injuries, it would appear to me that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. The trend is to award general damages in the range of Kshs 300, 000.00 to Kshs. 500, 000. I am not persuaded that I should interfere with the outcome at the trial court. As a consequence of the above, the appeal herein fails, and it is hereby dismissed."

51. That in the case of George Kiboi Waithaga v. Kevin Oino Simba [2011] KLR:-

> " The learned magistrate, I would observe that she did not take into account irrelevant factor or left out of account a relevant one when she awarded the plaintiff kshs.500,000/= as general damages for pain, suffering and loss of amenities. At the time when the award was made, those kind of injuries attracted awards ranging from as low as Kshs. 180,000/ to as high as Kshs.700,000/-, What the plaintiff was awarded, being Kshs. 500,000/= cannot by any stretch of imagination be deemed to be so inordinately high that it must be a wholly erroneous estimate of damages."

52. That in the case of Wellington Odhiambo Owara & another v Isaac Konye Muiruri [2021] eKLR where the court held as follows:-

> " The scenario given by the above authorities cited by the appellants and the respondents show that damages for amputation of one's leg would range from Kshs. 1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 22nd February 2017. I have considered the above stated comparative authorities and the principles for assessment of damages stated above. It is my considered view that the award of Kshs. 2 million by the trial magistrate in the case under consideration was not excessive. The award was supported by recent comparative authorities from the High Court. Taking into consideration the case of John Kipkemboi & Another v Moris Kedolo (2019) eKLR (supra) the respondent who had sustained similar injuries as those of the respondent herein was awarded Kshs. 2,500,000 in 2019. Therefore, an award of Kshs. 2,000,000 in 2017 cannot be excessive."

53. That in the case of George Kiboi Waithaiga v. Kevin Oino Simba [2011] eKLR:-

> "Having evaluated the pleadings, the evidence adduced, the medical reports and the conclusions reached by the learned magistrate, I would observe that she did not take into account irrelevant factor or left out of account a relevant one when she awarded the plaintiff kshs. 500,000/= as general damages for pain, suffering and loss of amenities. At the time when the award was made, those kind of injuries attracted awards ranging from as low as Kshs. 180,000/= to as high as Kshs. 700,000/=. What the plaintiff was awarded, being Kshs. 500,000/= cannot by any stretch of imagination be deemed to be so inordinately high that it must be a wholly erroneous estimate of damages. It was definitely within the range for those kind of injuries at the time. The special damages awarded had been proved to the required standard. The end result of this appeal is that it lacks merit and is accordingly dismissed with costs to the plaintiff."

54. And lastly the case of Phillip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR where the court held that: -

> "Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the Trial Judge who has enjoyed the advantage not available to the appellate court becomes of the paramount importance and ought not to be disturbed. The Trial Magistrate had the advantage of hearing witnesses in this case. The opinion he formed as a result was not outrageous. I therefore see no reason to disturb it."

55. Thirdly, the Respondent urge the court to note that the Appellants have introduced and relied on new authorities/materials to challenge the decision of the learned trial magistrate and which authorities/materials were not presented/availed to the learned trial magistrate at the time of making the award herein. As a matter of fact, none of the authorities cited/relied upon by the Appellants to challenge the learned trial magistrate's award in this appeal were cited/availed to the learned trial magistrate in the lower court In our humble view and as highlighted hereinbefore, an Appeal is not a new trial but a process to correct errors made by the trial court and hence it is only fair and just that parties do challenge the decision of the trial court within the same context that the learned trial magistrate dealt with the matter. However, and by the Appellants introducing and relying on new materials/authorities at this stage which were not presented to the trial magistrate, this amounts to requesting this honourable court to consider this Appeal outside the context that the trial magistrate dealt with the matter and while using a different yardstick and which in our view is plainly wrong. We rely on the case of Sila Tiren & another v Simon Ombati Omiambo [2014] eKLR mentioned hereinbefore where the court held as follows in similar circumstances: -

> "...In my understanding of the law, an appeal process is intended to correct the errors made by the trial court. And in order for the appellate court to be fair to the trial court, it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court. The first appellate court is enjoined by law, to re-evaluate all the evidence on record, and to draw its own conclusions. The appellate court is not, ordinarily, expected to receive new or further evidence... Those authorities have been cited by the respective parties, in their submissions before this court. None of those 3 cases were placed before the trial court...In effect, the learned trial magistrate was not given the benefit of the case-law which has now been placed before me, on this appeal. That means that this court has been invited to assess the decision arrived at by the trial court, using a yardstick that was not made available to that court. To my mind, the exercise of parties

placing wholly new authorities before the appellate court, and using them to either challenge or to otherwise support the decision of the trial court, is not a proper use of the mechanism of an appeal."

56. Reference is made to the case of Aloise Mwangi Kahari v Martin Muitya & another [2020] eKLR where it was held as follows:-

> " ...authorities cited by the appellant in this appeal were not cited in the submissions filed in the lower court. They were not placed before the trial magistrate for consideration and in my view the court should consider the matter as dealt with by the trial court, reasons that, if different authorities were placed before the trial court, decision would be reached on the basis on the materials placed before the court. I will therefore look at the authorities placed before the trial court to arrive at a finding as to whether the trial magistrate acted on the wrong principles or misapprehended evidence in assessing damages herein."

57. And also, case of Daniel Muchemi & another v Rosemary Kawira Kiambi [2018] eKLR-

> "The appellant has complained that the trial magistrate erred in failing to consider conventional awards for damages in similar cases. In assessing damages, the trial court relies on similar decided cases from superior court submitted by the parties. It is now too late in the day to rely on cases that were not cited before the trial magistrate to test whether the trial magistrate erred. The appellants have not shown how the trial magistrate erred in light of the principles of Butt v Khan."

58. And lastly the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR: -

> "It was the duty of the advocates to guide the court by citing relevant cases to enable the court arrives at a fair decision. H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR now cited by the appellant was not cited before the trial court and an appellate court cannot be expected to fill in the gaps left by inadequate guidance given to the trial court. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of general damages and I dismiss the same as not disclosing an inordinately high award as to be disproportionate to the evidence on injuries suffered."

59. Most importantly, the Respondent urges the court to note that, apart from using new authorities to challenge the lower court's award, the Appellants have not in their entire submissions faulted any of the authorities placed before the trial court and relied upon by the court when making its award herein and hence in the circumstances, the learned trial magistrate cannot be said to have erred. Reliance is placed on the case of *Letayoro & another v JK (Suing as the Legal Representative of the Estate of the CK (Deceased (Civil Appeal 13 of 2020*) [2022] KEHC 10309 (KLR) (28 June 2022) (Judgment) :

> "From the judgement of the trial court it is clear that reliance was placed on an authority cited by the respondent. It has not been argued by the appellants that the cited decision was irrelevant maybe because the deceased in that case did not die on the spot or a few hours after the accident. The authorities referred to by both sides in this appeal shows that awards for pain and suffering range from Kshs 100,000 to Kshs 200,000 and the award by the trial court was within this range. In the circumstances, the amount awarded to the estate of the deceased in the matter before this Court cannot be said to be inordinately high. The appellants have

therefore not established any ground that can make this court interfere with the decision of the trial magistrate."

60. Fourthly, the Respondent submits that, the Appellants have failed to consider and or take into account the present complains resulting effects of the Respondent's injuries while dealing with the appropriateness of the award given by the trial magistrate. As the record will bear us out, the learned trial magistrate in her judgement at page 61 & 62 of the Record made the following key observations in regard to the nature and seriousness of Respondent's injuries and which matters have not been disputed by the Appellants herein: -

    a) The court dismissed Appellants' medical report by Dr. Kahuthu as in court's view, she had downplayed the Respondent's injuries to fracture of the Right Tibia only whereas other documents including p3 form, treatment notes and her own report stated otherwise and the court found Dr. Kiamba's report to have been factual which was to the effect that the Respondent suffered the following injuries:-Fracture of the right tibia.Mild head injury.Lacerations on the right forearm. Lacerations on the right hand.Soft tissue injuries of the left shoulder joint.Soft tissue injuries of the left leg.Abrasions on the left knee.

    b) The court also found that as a result of the said injuries:-The Respondent was occasioned 5 months temporary disability and 10% permanent disability:

       His right leg had become shortened with 2 centimeters and he now walks with a limb.

61. That the court will note, nowhere have the Appellants herein either in their submissions, arguments and or authorities considered/alluded to the resulting effects of the Respondents injuries while addressing the appropriateness of the award herein despite such issues being central/key when assessing damages as was held in the case of John Kamore & another v Simon Irungu Ngugi [2014] eKLR:-

> " ...this court is alive to the relevant factors considered in making awards. Normally courts consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual incapacity if any, the inconvenience or deprivation encountered by the plaintiff..."

62. The case of CM (a minor suing through mother and next friend MN v Joseph Mwangangi Maina [2018] eKLR:-

> " ...damages (sic) are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff."

63. As such and in the Respondents view that, the Appellants argument in their submissions herein that the learned trial magistrates award was inordinately high on the basis of Respondent's injuries ONLY without taking into account the present complains/resulting effects of the Respondents injuries is totally erroneous and without a proper basis and hence we urge the court to disregard the same.

64. Fifthly and without prejudice to the foregoing, we humbly submit that the proposed award of Kshs.300,000/= under this head by the Appellants herein is not only inordinately low, undeserving but also unmerited and untenable taking into account all the circumstances of this case. In our humble

view, the injuries that attract awards in this region are very different and minor/less serious than those suffered by the Respondent herein as can be demonstrated by the following cases:

> The case of Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi [2005] eKLR where the 1st and 4th Plaintiff's suffered multiple soft tissue and blunt injuries without any fracture and The High Court in its judgment of the year 2005 awarded Kshs.300,000/= and Kshs.350,000/= under this head respectively. The Respondent herein is entitled to a higher award than the Plaintiffs in the above case since he suffered more severe injuries than them; among them fracture of tibia and mild head injury which resulted into shortening of the leg and permanent disability of 10% and also on account of passage of time and inflation as the said case was decided about.12 years prior to the lower court's judgement in this case,
>
> The case of Joseph Wambura v Joseph Mwangi Obai [2018] eKLR where the Respondent suffered cut wounds only without any fracture, and The High Court in its decision of the year 2018 upheld an award of Kshs.300,000/= under this head. The Respondent herein suffered more severe injuries than the Respondent in the above case among them fracture of tibia and mild head injury which resulted into shortening of the leg and permanent disability of 10% and hence he deserves a higher award:
>
> The case of Easy Coach Limited v Emily Nyangasi [2017] eKLR where the Respondent suffered soft tissue and degloving injuries only without any fracture and The High Court in its decision of the year 2017 upheld an award of Kshs.700, 000/= under this head. The Respondent herein suffered more severe / injuries than the Respondent in the above case among them fracture of tibia and mild head injury which resulted into shortening of the leg and permanent disability of 10% and hence he deserves a higher award;

65. That, in view of the foregoing authorities the Respondent humbly submits that, the proposed award of Kshs.300,000/= under this head by the Appellants herein is not only inordinately low. undeserving but also unmerited and untenable and hence we urge the court to uphold the award of Kshs.800,000/ = made by the trial court under this head.

66. That Assessment of damages is a question of fact and the trial court is best placed to determine the same especially in a case such as this one where there was conflicting evidence as to the nature and extent of the injuries suffered by the Respondent herein. In such cases, an Appellate court cannot fault the findings of the Trial Court even if it was of the view that it would have arrived at a different conclusion so long as there is evidence on the basis of which the findings of the Learned Trial Magistrate could be justified like in this case. See the case of Stephen Psiwa Cheprot v Mary Mutheu Muia & Another [2018] eKLR:-

> "Therefore I cannot fault the findings of the Trial Court even if it was my view that I would have arrived at a different conclusion if there is evidence on the basis of which the findings of the Learned Trial Magistrate could be justified. In this case upon my own analysis and re-evaluation of the evidence on record, I am satisfied that the said decision should not be disturbed. There was abundant evidence to support his findings. Moreover, it is quite clear that while he believed the Respondents' evidence he disbelieved that of the Appellant and the reason for his disbelief appears quite sound...It is trite that where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court hardly interferes with the conclusion made by the trial court after weighing the credibility of the witnesses."

67. Respondent's submissions in the lower court are reiterated where he substantially submitted on each and every aspect of this case and which he urge the court to also consider. Most importantly, we humbly submit that an appellate court will not disturb an award merely because it is either 'high or low. One must go a step further and demonstrate that such an award is either 'inordinately high or inordinately low to warrant interference by the Appellate court as was held in the case of George Njenga & anothers v Daniel Wachira Mwangi & another [2017] eKLR:-

> "It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interest for which a delicate balance must be found... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of, his own assessment... It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived as figure which was either inordinately high or low."

68. That the word/Prefix "inordinate' is synonymous with among others 'preposterous', 'devilish' out of proportion' 'outrageous' and most importantly, that which no reason can bear. As such and even when an award is 'high or low, an appellate court will not disturb the same so long as the same is not inordinately high or low. See the case of *Ufrah Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021*) [2023] KEHC 1285 (KLR) (27 January 2023) where the court held as follows:-

> "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... 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 and not capriciously. It is not my duty to substitute the lower court discretion with my discretion. The court cannot disturb damages unless the award is too high or too low as to be an erroneous estimate of damages... The injuries from the authorities above show damages of between Kshs. 150, 000/= to Kshs, 200,000/=. The same depend on the nature of the soft tissue injuries and the degree of permanent of the injuries. It may thus be well that the damages are high. The Appellant suggested that I award between Kshs. 100, 000 to Kshs. 150,000/=. Unfortunately, that is not my duty as the first Appellate Court. My duty is to considers the award given vis-à-vis comparable awards as aforesaid. It is the true if I was sitting as the trial Court I could have awarded a different figure. However, the issue is not whether I could have awarded a different figure. The question is whether the award is so excessively high or inordinately low as to amount to an erroneous estimate. I therefore find and hold that although the award is slightly high if is not inordinately nigh to warrant my setting aside of the same all circumstances considered, being the nature of the injuries. I am satisfied that the award of Kshs.220,000/= as general damages as ordered by the Court will

adequately compensate the Respondent...I cannot find fault with the decision of the court below. Consequently, I dismiss the appeal with costs."

69. And also the case of John Wambua v Mathew Makau eKLR:- Mwololo & another [2020]

> "The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them... The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things.. On my part I have considered the award and even if I was to find that sitting as the trial court, I would have awarded a different figure, that per se is not a justification for interfering with the award."

70. The Respondent thus urges the court to dismiss the Appeal with costs and uphold the lower court Judgment.

Determination

71. Upon Considering the injuries occasioned upon the Respondent this is convinced that the Trial Court was in error to award to 800,000/- in general damages which this Court finds was inordinately high as the same to be erroneous.

72. The injuries occasioned upon the Respondent that can be summarized as;

    a. a fracture of the right tibia;

    b. mild head injury; lacerations on the right forearms;

    c. lacerations on the right hand;

    d. soft tissue injuries of the left shoulder joint;

    e. soft tissue injuries of the left leg; and

    f. Abrasions on the left knee

73. The above injuries are a simple fracture, multiple lacerations and soft tissue injuries that are comparable to injuries awardable to general damages award of between Kshs 150,000/- and 300,000/=.

74. In the case of *Kihara & another v Mutuku (Civil Appeal 27 of 2018)* [2022] KEHC 15626 (KLR), the Court held that:

> "Loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability."

75. In Butler v Butler [1984] KLR 225 the Court of Appeal held as follows:

> " A plaintiff's loss of earning capacity occurs where, as a result of his 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. ... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages. ..."

76. Diminished earning capacity is decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.

77. In case of Alpharama Limited vs. Joseph Kariuki Cebron [2017] eKLR it was stated as follows on the method of awarding diminished earning capacity.: -

> " The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors."

78. This Court accordingly dismisses the Appellants Appeal that, the award of Damages for diminished or future earnings, ought to have been specifically pleaded and that they constitute special damages to be strictly proven.

79. Taking all factors into account, I am of the considered view that, the appeal is partially of merit.

80. The judgment dated 31/01/2020 is hereby set-aside and the award of General damages of Ksh 800,000- under the head of pain and damage is hereby varied to Kshs 250,000/-.

81. The award of damages for diminished future earnings of Kshs 50,000/- remain unaffected and undisturbed.

82. The special damages of Ksh 16,000/- remain unaffected.

83. For avoidance of doubt this court enters judgment in favor of the Respondent against the Appellant's for the sum of (Ksh 316,000/- less 50%) Plus Costs and interest at Court rates.

84. The Costs of the Appeal are awarded to the Appellants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 8TH DAY OF AUGUST, 2024.

MOHOCHI SM

JUDGE