St. Joseph Hospital Nyabondo v Nyambala (Civil Appeal 8 of 2020) [2023] KEHC 18976 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 8 OF 2020

RE ABURILI, J

JUNE 21, 2023

BETWEEN

ST. JOSEPH HOSPITAL NYABONDO ..... APPELLANT

AND

SAMUEL OTIENO NYAMBALA ..... RESPONDENT

(An appeal arising out of the judgement and decree of the Honourable R.S. Kipngeno in the Principal Magistrate's Court at Nyando delivered on the 12th January 2019 in Nyando PMCC No. 12 of 2019)

JUDGMENT

Introduction

1. This appeal is against the judgment and decree of the Principal Magistrate's Court at Nyando in PMCC No. 12 of 2019 delivered on 14th January 2020. The Respondent herein Samuel Otieno Nyambala instituted a suit seeking for general and special damages from the appellant following a road traffic accident that occurred on 27th February 2018.

2. According to the Plaint dated 17th October 2018, the respondent, an employee of the appellant hospital, was a passenger in the appellant's motor vehicle registration number KAY 136C that was transferring a patient from the appellant hospital to Kisumu when the said motor vehicle got involved in an accident along Ahero – Kisumu road at Ayweyo area as a result of which the appellant sustained serious injuries.

3. The Appellant filed a defence denying the respondent's claim in its entirety. It his judgment which is impugned herein, the trial magistrate found the appellant 100% liable and awarded the respondent a sum of Kshs. 1,100,000 as general damages and Kshs. 77,000/= as proven special damages together with costs of the suit plus interest.

4. Aggrieved by the said judgment and decree, the Appellant lodged this appeal vide a memorandum of appeal dated 6th February 2020 and filed on the even date setting out the following grounds:

   a. The learned trial magistrate overally arrived at a finding on liability against the weight of evidence and instead of apportioning blame, proceeded to blame the appellant 100% for the accident.

   b. The overall award of Kshs. 1,177,000 on quantum is inordinately high and no court properly directing its mind to the principles to be considered in cases of similar nature would have arrived at such an award.

   c. On the whole, the entire judgement is against the weight of evidence.

5. The appeal was canvassed by way of written submissions.

Appellant's Submissions

6. On liability, the appellant submitted that the driver of its motor vehicle caused the accident because he was under pressure from the respondent and other medics in the ambulance to drive at a high speed so that the sick person in the ambulance may have his life saved. The appellant thus submitted that liability ought to be apportioned to the respondent and other passengers in the ambulance to at least 30%.

7. The appellant submitted that the award of general damages of Kshs. 1,100,000 was inordinately high as compared to the injuries sustained and that had the trial magistrate given sufficient weight and consideration to their submissions and authority produced in support, he would not have arrived at the decision he made.

8. The appellant suggested that an award of Kshs. 450,000 would be commensurate with the injuries suffered by the appellant. Reliance was placed on the following cases:

   i. *World Concern International & Another v Livingstone T Ragira & Another* [2005] eKLR where the court gave an award of Kshs. 400,000 for injuries in the nature of fractures to the mandible, occipital bone, zygomatic complex, roof of sphenoid sinus, left sucadytar and ethmied.

   ii. *Mombasa Maize Millers (KSM) Ltd & Another v Rengo Joshua Wafula* [2017] eKLR where the High Court substituted an award of Kshs. 600,000 with one of Kshs. 400,000 for facial injury with fracture, injury to the right jaw and teeth, injury to the chest and fracture of the right condylar (mandible).

   iii. *Miriam Njeri Murimi v Kenya Broadcasting Corporation* [2009] eKLR where the court awarded Kshs. 450,000 as general damages for injuries to the Head, fractured ribs, fracture dislocation of the shoulder joint and fracture dislocation of the hip joint with permanent incapacity assessed at 12%.

   iv. *David Kiplangat Sang v Richard Kipkoech Langat & Another* [2006] eKLR where the Court awarded Kshs. 550,000 for general damages for injuries of severe head injuries with loss of consciousness for four days, blunt chest with fracture of two ribs, fracture of tibia fibula and left acetabulum with hip dislocation, fracture of left medial malleolus and permanent incapacity accessed at 30%.

   v. *George Kiptoo Williams v William Sang & Another* [2004] eKLR where the court awarded Kshs. 560,000 as general damages for injuries of cut wound on the occipital region with lacerations on the left temporal region of the head, fracture of the skull on the occipital region,

subluxation of the cervical vertebrae C1, C3 and C4, fractures of the ribs, left scapula and cut wound on the left arm with permanent incapacity assessed at 30%.

The Respondent's Submissions

9. On behalf of the respondent, his counsel submitted that there was no reason why the respondent would be said to have contributed to the material accident as no evidence was adduced in the lower court by the appellant calling for apportionment of liability and further that three other persons were also injured in the accident and the appellant proceeded to pay them therefor it would be an injustice to have the respondent bear part of the liability.

10. The respondent relied on the case of *Philip Wachira Mwaniki v Blue Shield Insurance Company Limited* HCC Number 1799 of 1991 (Nairobi) where the court stated *interalia* that liability was an issue for the lower court. Reliance was further placed on the case of *Karanja v Malele* [1983] KLR pg. 142 where the Court of Appeal stated *interalia* that apportioning of blame represents an exercise of discretion with which the court only interferes when it is clearly wrong or based on no evidence or application of a wrong principle.

11. It was further submitted that the respondent was a passenger in the ambulance and not a driver and thus could not be held responsible for causing the accident and further, that the allegations of his contributory negligence were brought too late in the day as it was an afterthought, baseless and not supported by any law.

12. On quantum, the respondent's counsel urged this court to sustain and uphold the general damages of Kshs. 1,100,000 awarded by the trial court. Reliance was placed on the case of *George William Awuor v Beryl Awuor Ochieng* Siaya Civil Appeal No. 1 of 2020.

13. The respondent urged this court to dismiss the appeal herein with costs and let the lower court judgement remain undisturbed together with costs and interest.

Analysis and Determination

14. I have considered the grounds of appeal and submissions by both counsel for the parties. It is trite law that the duty of the first appellate court is to re-evaluate the evidence adduced before the subordinate court both on points of law and facts and arrive at its own independent conclusions bearing in mind that unlike the trial court, the appellate court had no opportunity of seeing and hearing witnesses as they testified hence give an allowance for that. This is what was stated by the Court of Appeal for Eastern Africa in *Peters v Sunday Post Limited* [1958] EA 424 and reiterated by the Court of Appeal in several cases including the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

15. In this appeal, it is clear that the determination of the appeal revolves around the question of liability and what ought to have been the quantum of damages. In both instances, the burden of proof lay on the respondent/ claimant / plaintiff to prove his case on a balance of probabilities as espoused in Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya which provides that:

> "Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

16. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

17. The two provisions were considered by the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 and held as follows:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*."

18. It follows that the general rule is that the initial burden of proof lay on the plaintiff, the respondent in this appeal, but the same may shift to the appellant/defendant depending on the circumstances of the case.

19. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

20. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR the Court of Appeal espoused the correct legal position and stated that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

21. The question then is what amounts to proof on a balance of probabilities? Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

22. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. However, as was stated by the Court of Appeal in *Micheal Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) AC 663 at p. 681 as follows:
>
> 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...'"

24. Applying the above principles of law and revisiting the evidence adduced before the lower court, the Respondent's case was that he was directed by his superior to accompany the ambulance driver of the appellant as they transferred a patient from the appellant's hospital to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) but that they did not arrive safely as an accident occurred on the way. It was the respondent's evidence that the appellant's driver overtook suddenly and a coca cola van emerged and there was a head-on collision after which he lost consciousness. It was his testimony that the oncoming coca cola van could not have slowed down so as to avoid the accident as the road at the scene was steep.

25. PW3, PC Rono who investigated the accident and testified that investigations into the accident revealed that the appellant's driver was to blame for the accident and thus he charged the driver to which the appellant's driver pleaded guilty and was fined Kshs. 10,000.

26. The appellant did not call any evidence in support of its defence. In the case of *Kenya Horticultural Exporters Ltd v Julius Munguti Maweu* Civil Appeal No. 9 of 2004 the Court of Appeal stated as follows:

> " On a first appeal, the Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and bearing in mind that unlike the trial court it neither saw nor heard the witnesses...As regards the cause of the accident, there is evidence on record that the driver was over-speeding and that at some stage he cautioned him to no avail. He negotiated a bend at high speed. That evidence clearly showed the driver was to blame for the accident. It was immaterial that there could have been a tyre burst. If the burst arose while the motor vehicle was being driven at high speed, that can be inferred from the evidence. The accident vehicle was found after the accident with a tyre burst. There is no basis for interfering with the Superior Court judgement on liability."

27. The Court of Appeal in *Joyce Mumbi Mugi v The Co-Operative Bank of Kenya Limited & 2 Others* Civil Appeal No. 214 of 2004 opined that:

> " If a "matatu" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle...Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of on-coming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other."

28. In *Chao v Dhanjal Brothers Ltd & 4 Others* [1990] KLR 482 it was also held that:

> " Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred inspite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

29. Therefore, if the accident occurred due to the respondent's negligence as submitted before this court by the appellant, then it was upon the appellant to adduce evidence to demonstrate how the respondent contributed to the said accident. The appellant only filed a defence which it did not support at the hearing with any evidence. It did not call any evidence in support of its defence. The driver of the accident motor vehicle never testified.

30. This Court acknowledges that the appellant filed submissions in which It urged the trial court to apportion liability in the ratio of 80:20 and award the respondent Kshs. 500,000 in general damages.

31. As was stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

32. Further, accident and the injuries sustained by the respondent occurred in the course of his duties with the appellant. There is no evidence on record to show that the respondent compelled the driver of the appellant to drive carelessly or to overtake another motor vehicle ahead of them when it was not safe to do so. In all cases, the driver of the motor vehicle is expected to be alert and to have a better view of the road such that overtaking would only be allowed if and when the road was clear.

33. Accordingly, this Court cannot interfere with the decision attributing negligence to the appellant's driver. The issue is however whether the said driver ought to have been found 100% liable. In this case, this court is being called upon to interfere with the trial court's finding of liability.

34. In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

35. That was also the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

36. Taking into consideration the circumstances of this case, I find that the appellant has failed to demonstrate that the trial magistrate in declining to apportion liability, did so in a wrong manner or based on no evidence or on application of a wrong principle.

37. I therefore find that the appeal challenging the judgment on liability is devoid of any merit. It is declined. I uphold the trial magistrate's finding on liability.

38. On Quantum of damages, the appellant laments that the general damages award made in favour of the respondent was inordinately high and that no court would award the same. The appellant submitted

that an award of Kshs. 450,000 would be sufficient to compensate the respondent for the injuries sustained.

39. On its part, the appellant submitted that the award by the trial court was proper and that the same ought to be upheld.

40. The general principle applicable on consideration of awards of damages by an appellate court is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see *Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK)* [2019] eKLR, *Butt vs Khan* [1982-88] 1 KAR 1 and *Mariga vs Musila* [1982-88] 1 KAR 57).

41. General damages are damages at large and the court does the best it can in making an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR). The Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:

> "The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."

42. In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (see *Kigaraari v Aya* [1982-88] 1 KAR 768, *Ugenya Bus Service v Gachoki* [1982] eKLR and *Jabane v Olenja* [1986] KLR 661).

43. The medical report by Dr. Roger Hannington Kayo revealed that the respondent suffered the following injuries which were also pleaded:

    i. Bilateral mandibular fractures

    ii. Fracture left shoulder

    iii. Multiple deep cut wounds on the head

    iv. Deep cut wound on the left elbow

    v. Blood loss

    vi. Soft tissue injuries

    vii. Physical and psychological pains

44. The report further revealed that the respondent would need finances for eventual removal of the plates, replacement of the lost tooth and follow up at the orthopaedic and maxilla facial clinics. It was further stated that the post traumatic osteoarthritis was a long term complication that would require regular orthopaedic follow up and medication.

45. I have considered the authorities cited by both parties and note that those relied on by the appellant are of similar injuries but are relatively old. On the other hand, the authority relied on by the respondent though with some injuries similar to those suffered by the respondent, the injuries sustained by the respondent are more serious.

46. In the case of BK Suing Thro' His Mother and Next friend EM v Wilson Gitari Mburugu [2020] eKLR where the Plaintiff suffered multiple injuries to the face; soft tissue injury to the thorax, abdomen as well as on his upper and lower limbs; severe injuries to the maxilla and mandible resulting to loss of five (5) teeth with cut on the lip. The injuries left him with cosmetic damage to the mouth. The Court made an award of Kshs. 400,000/- in February 2020.

47. In the case of *Anne Nyachomba Gitau & another v Paul Muigai Murigi* [2019] eKLR the High Court upheld the award of Kshs. 600,000/- for extreme and severe craniofacial injuries, fractures of the jaw and fractures of facial bones as a result of an accident that occurred in 2006.

48. Considering that comparable awards ought to be made for comparable injuries and further taking into account the effect of inflation and the overall state of the economy, it is my opinion that the award by the trial court was inordinately high. In my view, an award of Kshs. 700,000 would sufficiently compensate the respondent for the injuries sustained. The reason for the reduction of the award made is that I note that the respondent's evidence that he would need finances for eventual removal of the plates, replacement of the lost tooth and follow up at the orthopaedic and maxilla facial clinics and further that the post traumatic osteoarthritis was a long term complication that would require regular orthopaedic follow up and medication, were all future medical expenses which were not pleaded and proved.

49. It is an established principle that future medical expenses fall under the category of special damages and must thus be specifically pleaded and strictly proven. The Court of Appeal in *Capital Fish Limited v The Kenya Power and Lighting Company Limited* (2016) eKLR while relying on the case of *Provincial Insurance Company East Africa Limited vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (UR) held that:

> " ... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."

50. In the case of *David Bagine v Martin Bundi* (283 of 1996) [1997] eKLR, the Court of Appeal, citing the judgement by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), observed that:

> " It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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."

51. In the case of *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* (2006) eKLR the court in declining to grant a claim for future medical expenses stated that:

> " It is on the foregoing basis that in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment,

estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. [See *Winfield & Jolowicz on Torts*, 17th Edition 2002, at Page 760]

On the basis of the foregoing authorities and reasons, I hold that the Learned Magistrate was right in not awarding the claim for future medical costs. The claim was made – pleaded – as per the Amended Plaint filed in Court on 12/11/02. But the claim was not proved. What was mentioned – the figure of K.Shs.100,000/-; - was purely guesswork by the Medical Doctor which may or may not be the exact figure at the time, and point of expenditure, when that future time comes."

52. The Court of Appeal in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P.717, and 721 per – Kneller, Nyarangi JJA, and Chesoni Ag JA – held that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

53. The respondent in his plaint dated 17.10.2019 did not plead for future medical expenses. For that reason, I find that it was erroneous for the trial magistrate to take into consideration future medical expenses in the award of general damages as he did. Accordingly, the this appeal is partially successful as regards the quantum of damages of kshs 1,100,0000 awarded by the trial court which is hereby substituted with an award of Kshs. 700,000 general damages. The special damages of kshs 77,000 are sustained as no issue was raised. The general damages attract interest at court rates from the date of judgment in the lower court until payment in full whereas the special damages attract interest at court rates from the date of filing suit in the lower court until payment in full.

54. As the appeal is only partially successful, I order that each party bear their own costs of the appeal herein.

55. This file is now closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2023

R.E. ABURILI

JUDGE