Kirakou v Abdi & another (Civil Appeal E049 of 2022)
[2023] KEHC 20622 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E049 OF 2022

FROO OLEL, J

JULY 19, 2023

BETWEEN

LINAH CHEMURON KIRAKOU ..... APPELLANT

AND

ABDIGANI OMAR ABDI ..... 1ST RESPONDENT

DAYAH EXPRESS LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgement/decree of the Honourable E.Kelly (SRM) delivered on 7th June 2022 in Naivasha CMCC no 34 of 2017)

JUDGMENT

1. This appeal arises from the judgment and decree dated 07.06.2022 by Honourable Eunice Kelly (SRM) in Naivasha CMCC no 34 of 2017 where she awarded the appellant Ksh.500,000 as General damages, and Ksh.313,196/- as special damages plus costs of the suit and interest.
2. The appellant who was the plaintiff before the trial court being aggrieved by the said judgment/decree filed this appeal on 06.07.2022 basically challenging the quantum awarded. The grounds of appeal were that;
    a. That the learned trial magistrate erred in law and in fact in making a finding and arriving at an award of Ksh.500,000/- being general damages while award is inordinately too low as to represent and erroneous estimate of damages payable.
    b. That the learned trial magistrate erred in law and fact in applying wrong principles and failing to take into account relevant facts in arriving at an erroneous award of ksh.500,000/- being general damages.

c. That the learned trial magistrate erred in law and in fact in failing to apprehend and consider the appellant's submissions.

d. That the learned trial magistrate erred in law and in fact in failing to award interest on special damage from the date of filing suit.

3. The appellant prayed that this appeal be allowed, the trial court judgment be set aside, reviewed, revised and/or be substituted with a judgment of this court.

Brief Facts

4. The appellant had filed a claim wherein she averred that on 09.02.2016 she was a lawful fair paying passenger in motor vehicle registration number KBX 748G (herein after referred to as the 1st suit motor vehicle) which was being driven along Gilgil-Naivasha road near St. Mary's hospital when the 2nd Respondent authorised driver and/or employee negligently and carelessly drove motor vehicle registration Number KBS 404D Nissan Bus (herein after referred to as the 2nd suit motor vehicle) that he permitted it/caused it to violently collide with the 1st suit motor vehicle thereby causing the appellant to suffer serious bodily injuries. The appellant specified the injuries suffered in the plaint and sought compensation for injuries suffered and special damages of Ksh527,900/= plus costs and interest.

5. The Respondent did file their joint statement of defence on 11.07.2017 wherein they did admit at paragraph 3 that indeed an accident did occur but denied that they were negligent and/or careless. Further they also pleaded in the alternative that the accident was caused and/or substantially contributed too by the negligence of the appellant and negligence of the driver of the 1st suit motor vehicle. They put the appellant to strict proof regarding all other issues pleaded.

6. PW1 Linah Chemuron Kirakou testified that she stays in Kapenguria and adopted her witness statement which was to the effect that on 09.02.2016 she was travelling from Nairobi to Eldoret and had boarded the 1st suit motor vehicle. At about 4.00pm, while enroute at St. Mary's hospital area, the 2nd suit motor vehicle came from the opposite direction, while overtaking several motor vehicles, the driver of the said motor vehicle tried to manoeuvre back to it lane but failed, thereby crushing into their motor vehicle (the 1st suit motor vehicle). She lost consciousness and regained the same after one and half months. She was informed that after the accident, she was taken to St. Mary's hospital and later transferred to War Memorial Hospital. A CT SCAN did reveal that she had suffered brain haemorrhage and other fractures in her limbs. The injuries resulted to her having a condition known as Brain Oedema.

7. The appellant further testified that she had not fully healed from the injured sustained. She still had a numbness on her leg, poor memory and loss of consciousness from time to time. The appellant produced as exhibits, several documents to support her claim apart from the police abstract and the doctor's report. She prayed for compensation.

8. In cross examination the appellant blamed the driver of the 2nd suit motor vehicle as he was over speeding at more than 180km/hr and did not consider other road users while overtaking. She reiterated that she had not fully healed from her injuries.

9. PW2 PC Komen stated that he was based at Gilgil police station and had been summoned to attend court. He had the OB in respect to the accident in which the appellant was involved. The OB NO was 05/9/2/2016. Before he could continue with his testimony. The advocate of the respondent applied to be supplied with a copy of the OB and the witness was stood down.

10. PW3 was Dr. Mohammed Shabir Malik. He testified that he was consultant Surgeon and had examined the appellant on 20.09.2016. She had been involved in a road traffic accident on 09.02.2016 and after conducting the Medical examination he did author a medical report which he produced as exhibit P13 together with receipts of his consultation fee. Further PW2 stated the report by Dr. Jenipher Kahuthu had made the same recommendations as his report though there was a possibility that the level of disability which he had awarded had diminished.

11. In cross examination PW2 stated that he examined the plaintiff seven (7) months after the accident and she had sustained several injuries to the forehead and left forearm. She had suffered from loss of memory, loss of stability, and was forgetful of past events. Her response to questions was also slow. At the time of examination, the appellant did not complain of any fits or traumatic convulsions. There was also a possibility that she had healed 5 years after the accident.

12. PW4 PC Paul Komen (who was also PW2) from Gilgil police station had the OB in respect to an accident which occurred on 09.02.2016 and it was reported as OB - No5, which stated the 2nd suit motor vehicle KBS 404D bus was heading towards Nairobi direction from Nakuru. On reaching St. Mary's hospital area he started to overtake motor vehicle KAU 527F Toyota matatu and in the process he collided with an oncoming motor vehicle KBX 748G Toyota matatu which was headed in the opposite direction. The driver of KBS 404D UD bus (the 2nd suit motor vehicle) was to blame for the accident as he was overtaking carelessly without proper look out for other road users and oncoming traffic.

13. In cross examination the witness confirmed that he was not the investigating officer and that the appellant was not listed in the OB but was later issued with police abstract after seeking medical attention. He could also not verify if the appellant was involved in the accident. The investigating officer had visited the scene of the accident immediately after it occurred and recorded the same in the OB, but the OB did not indicate who was to blame for the accident. In re-examination PW3 confirmed that the OB indicated that some of the injured were unknown and the appellant possibility was amongst the unknown passengers who were injured.

14. PW5 Dr. Omuyoma testified and produced his medical report and receipts as exhibit 19 and 20. He confirmed that he personally and physically examined the appellant and opined that she had suffered30% permanent disability, while Dr. Kahuthu had opined that the appellant suffered 10% permanent disability. In his opinion, the appellant had healed but, in his assessment, she had healed at 70% and not fully recovered.

15. DW1 was Dr. Ruth. She presented the medical report of Dr. Jeniffer Kahuthu as exhibit D1. The said report stated that the appellant did not suffer any level of permanent disability. In cross examination she confirmed that she did not examine the plaintiff and both her and Dr. Jeniffer Kahuthu work for the insurance company of the defendant. Dr. Jeniffer Kahuthu was not a neurosurgeon nor was she an orthopaedic surgeon. She physically examined the appellant five months after the accident and formed her opinion, though she did not do a repeat CT Scan. In re-examination the witness stated that Dr. Jeniffer Kahuthu was a general practitioner and had examined the appellant two and half years after the accident.

16. The parties did file their respective submission which was considered by the trial court and vide its judgement dated 07.06.2022, the appellant was awarded Ksh.813,196/= as general and special damages plus costs and interest of the suit. Being dissatisfied with the same, the appellant opted to file this appeal.

Appellant Submissions.

17. The appellant filed her submission on 19.01.2023 and stated that she was challenging the award for it was extremely low and the court had relied on the wrong principles and failed to take into account relevant factors while arriving at the said decision. She sought for the award be enhanced. Reliance was placed on Hellen Waruguru Waweru vrs Kiarie Shoes Stores Limited (2015)eKLR.

18. The appellant submitted that the trial court failed to consider the medical report of Dr. M.S Malik and Dr. Omuyoma which clearly set out the injuries sustained; severe closed head injury, fracture of the lower third ulna, punctate haemorrhages in the cortex with intra cerebral clot in the right frontal lobe, diffuse axonal injury to the brain and severe injury to the left forearm. The CT scan showed that the appellant had multiple punctate bleeding in the brain and her left arm was also immobilised by the fracture. The doctors had to apply above the elbow plater cast to hold it. Dr. Obed Omuyoma had also confirmed that the appellant suffered grievous harm and, in his assessment, she had 30% permanent disability. Dr. M.S Malik too came to the same conclusion that the appellant had suffered total incapacity of a temporary nature for a period of one month followed by partial incapacity of a permanent nature. He awarded permanent and mental disability of 10%.

19. The appellant submitted that given the grievous nature of injuries sustained the trial court ought to have awarded between Ksh.3,500,000/= to Ksh.5,000,000/= .The appellant invited the court to rely on Civil Appeal no. 197 of 1994 CA at Nakuru Samuel Osoro Nyamwaro and 3 others versus Boniface Kamau and another.

Respondent submissions

20. The Respondent filed their submissions on 30.01.2023 and stated that the appellant got injured as a result of a road traffic accident, which involved motor vehicle KBX 748G and KBS 404D along Gilgil – Naivasha road. As a result of the accident the appellant sustained injuries specified in the plaint. From the injuries pleaded and the medical report of Dr. Obed Omuyoma dated 18.07.2016, the appellant had a deep cut would on the head at hairline and ulna fracture on the arm. The award of Ksh.500,000/= was thus high considering the injuries sustained. Reliance was placed on Kenya power and Lighting Company Ltd and Another versus Zakayo Saitoti Naingola and another (2008) eKLR where the court laid down principles on assessment of damages.

21. The Respondent also relied on Rose Makombo Masanju versus Night Flora alias Nightie Flora and another (2016)eKLR, Agnes Wakaria Njoka versus Josephat Wambugu Gakungi (2015)eKLR and Gladys Lyaka Mwomba versus Francis Namatsi, Peter O Ogot and another where various court's awarded between Ksh.500,000 – 650,000/= from similar injury.

22. In conclusion, the Respondent submitted that the award/judgement was more than adequate as the appellant ought to have been awarded Ksh.350,000/=. The appeal was thus unmerited and prayed that it be dismissed with costs.

Analysis and Determination

23. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

24. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues

arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

25. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316.

26. The appellant in her memorandum of appeal raised four (4) grounds of Appeal, which can be summarised as follows;

    a. The quantum of damages as awarded by the trial court. Which the appellant has submitted to be too low and seeks that it be increased, based on other similar injury awards. {which constitute ground 1-3}.

    b. The second issue, at ground four (4) of the appeal the appellant avers that the trial magistrate erred in failing to award interest on the special damages from the date of filing the suit.

27. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 AT 345.

28. In Mbaka Nguru and Another vs. James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR, the court of appeal held that 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."

29. Since the decision on the quantum of damages is an exercise of discretion, barring the failure to adhere to the foregoing principles the decision whether or not to interfere with an award by the appellate court must necessarily be restricted. The circumstances under which an appellate court can interfere with an award of damages were therefore restated by Court of Appeal in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 where it was held that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions

so that their figures are not necessarily wrong if they are not the same as his own..." The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."

30. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [198892] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " 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."

31. It is therefore not the amount that the appellate Judge would have awarded had he been sitting as the trial court that determines whether or not to interfere with the award. As was appreciated by the Court of Appeal in Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

32. The position was restated by Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 in the following terms:

> " 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."

33. The principles which ought to guide a court in awarding damages were also set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

> " 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 fairly 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."

34. In the plaint filed, the appellant did plead that she sustained severe closed head injuries, fracture of the lower third ulna, punctuated haemorrhage's in the cortex with intra-cerebral clot in the right frontal lobe, diffuse axonal injury to the brain and sever injury to the left forearm. PW3, DR Mohammed Shabir Malik (A consultant surgeon), did examine the appellant and noted from the X ray done on 09.02.2016, that the appellant did not suffer a future of the skull, but suffered a fracture of the lower third of the ulna of her left hand, which had a slight displacement.

35. Further the results of the CT SCAN carried out on 11.2.206 did show that the appellant suffered a diffused axonal injury to her brain, lost consciousness and was admitted in hospital. At the time of admissions at Nakuru war memorial Hospital, her level of consciousness on a Glasgow coma scale was 9/15. A normal person would be assessed at 15/15, whereas a comatose patient would have a score of 8/15. The appellant was semi-comatose due to her closed head injuries which had resulted in multiple punctate (small) haemorrhage's in the brain and a blood clot on the right frontal lobe. There was also concomitant post traumatic swelling (oedema) of the brain. The patient was unable to feed and had to be feed through a tube. She was treated conservatively with appropriate medication and when her condition improved, she was transferred to a hospital near her home.

36. Further PW3 stated that as at the time of examination, which was seven (7) months after the accident, the patient still had poor memory, impaired vision and numbness of the right leg. On physical examination she was physically quite normal but her mental status seemed to have been affected by the head injuries. She also has slurred speech and her response to questions was slow. In conclusion PW2 stated that the appellant had suffered total incapacity of Temporary nature for a period of One Month followed by Partial incapacity of Permanent Nature Todate. He was inclined in his opinion to award the appellant permanent physical and mental disability of ten (10) percent.

37. The appellant was also examined by Dr Obed Omuyoma (PW5), who produced his medical report dated 18.06 2016 as Exhibit 19 and Dr Jenipher Kahuthu, whose medical report dated 23.07.2018 was

produced by Dr Ruth (dw1) as Exhibit -D1. Both of the Medical doctors, where general practitioners. Dr Obed Omoyuoma's findings were that the appellant was in affair state of health. her vital signs were within normal limits. She had a permanent scar on the forehead, which was 8 cm long. After the accident she was unconscious for two weeks and CT SCAN had revealed that she suffered multiple punctuated bleeding of the brain. X RAY also revealed that she had a fracture on her left ulna bone. In his opinion, the patient might in the future develop post traumatic Epilepsy and will have to be on Anti-convulsant therapy for the rest of her life.

38. Dr Jenipher Kahuthu examined the appellant on23.07.2018, which was almost two years and five months after the accident. She was in general fair condition and walked with a normal gait. She present complainants was occasional amnesia. From the X ray seen the patient had a fructure of the ulna, which in her opinion had healed, her central nervous system was normal and she had not suffered from any epileptic fit nor was she on any anti-epileptic medication. In the doctor's opinion the patient suffered Diffused axonal injury (moderate head injury) and fracture of the left ulna.

39. The appellant counsel did submit that "Diffuse Axonal injury (DAI) was a kind of injury where there was shearing of the brain. (Tearing of the brains long connecting nerve. Which occurs when the brain is injured and it shift's and rotates inside the bony skull. This kind of injury usually causes a coma and was a serious type of traumatic brain injury, which could be fatal. Those who recovered needed intense rehabilitation and full recovery was also in doubt.

40. The appellant urged the court, to find that the trial magistrate erred in his assessment of the damages as he ought to have assessed the quantum relying on authorities of similar injuries. The appropriate award should have ranged from between Kshs 3,500,000/= and Kshs 5,000,000/=. Before the trial court, the appellant had claimed a sum of Kshs 7,000,000/=. Reliance was placed on; Civil Appeal no. 197 of 1994 CA at Nakuru Samuel Osoro Nyamwaro and 3 others versus Boniface Kamau and another.

41. The Respondent on the other hand stated that from the medical reports filed, the respondent sustained a deep cut wound on the forehead leading to severe soft tissue injuries, severe head injury with diffuse axonal injury and fracture of the ulnar. The P3 dated 09.02.2016 listed the injuries as deep cut on the head at hairline and ulna fracture. The respondent submitted that the award of Kshs 500,000/= was high and an appropriate award should have been Kshs 350,000/=, which would have been sufficient and reasonable. The respondent placed reliance on Rose Makombo Masanju versus Night Flora alias Nightie Flora and another (2016) eKLR, Agnes Wakaria Njoka versus Josephat Wambugu Gakungi (2015) eKLR and Gladys Lyaka Mwomba versus Francis Namatsi, Peter O Ogot and another where various courts awarded between Ksh.500,000 – 650,000/= from similar injury.

42. In order to justify reversing the trial magistrate/judge finding on the question of the amount of damages awarded, it will generally be necessary that the appellate Court should be convinced either that the Judge/Magistrate acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

43. I have carefully considered submissions by the rival parties, the pleadings filed and paid special attention on all the three medical reports filed to prove the appellants injuries. I am alive of the principle's applicable in awarding damages as set out in Hcca No 29 Of 1982 (nairobi) Tayab Vs Kanani, by the court of Appeal, where it was stated that awards must be proportional to awards in other similar cases. That comparable injuries should attract almost similar awards however each case must be decided on its own facts as no compensation can be adequate compensation for a plaintiff for a loss of limb or memory or brain as money cannot be enough to give one loss health or sufficiently reduce the pain and suffering following injuries; however, in awarding general damage's the court is required to assess the

general pictures, the whole circumstances, effects of injuries sustained by the plaintiff, as well as taking into account the high rate of inflation.

44. In considering various similar authorities; CA No 315 of 2001(Nakuru) Sosphinaf Co Ltd & James Gatuku Ndolo Vs Daniel Ng'an'ga Kanyi , the plaintiff therein suffered similar injuries and developed post- traumatic epilepsy and had to take anti-epileptic drugs. He was awarded Ksh 2,000,000/=. In Terry Kanyua Marangu VS Wells Fargo Ltd Civil Suit No 19 of 2013, the plaintiff suffered head injury and was unconsciousness with Glasgow coma scale of 9/15, cut wound on the left upper lip, loss of two left incisors and multiple lacerations on the dismal surface of the head, depressed fracture on the left frontal region. Peli orbital left eye swelling with ecchymosis. The plaintiff was awarded Ksh 3,500,000/ =.

45. In Prem Gupta & Another Vs Grimley Otieno & 3 others (2018) eKLR, the plaintiff therein suffered moderate head injury with loss of consciousness and brain oedema, loos of memory and poor slurred speech and was awarded Ksh.1,000,000/=.

46. The respondent on the other hand urged the court to consider Rose Makombo Masanju versus Night Flora alias Nightie Flora and another (2016) eKLR, where the plaintiff was awarded Ksh 500,000/= for a fractured left wrist, commuted fracture, frontal bone with hemosinus, concussion with loss of consciousness for three hours, deep cut wound on the forehead.

47. In Agnes Wakaria Njoka versus Josephat Wambugu Gakungi (2015) eKLR , in this suit the plaintiff sustained two deep cut wounds on the hand, fractured of the skull, deep compound fractured of the right hand and cut wounds on the wrist and was awarded Ksh 650,000/=.

48. Finally, in Gladys Lyaka Mwomba versus Francis Namatsi, Peter O Ogot and another the plaintiff suffered cut wound on the anterior part of the scalp, head injuries, fractured of the lower tibia and fibula and cut wounds on the face and was awarded Ksh.500,000/=.

49. Having considered all the facts herein and the evidence presented, I find that the trial court erred in awarding damages that were inordinately low and not commensurate to the injuries sustained and similar injury awards and thus there is proper justification to interfere with the same. The injuries sustained by the appellant were severe. She was admitted to hospital unconscious and/or semi-conscious for three weeks. The comprehensive medical report of Dr M.S Malik and the CT SCAN findings elaborated therein, accurately captures the appellants injuries, which scan and findings was not considered by Dr Jenipher Kahuthu in her medical report. She only considered the x ray, which did not capture much detail.

50. I hold and find that the appellant suffered Total incapacity of Temporary nature for a period of One Month followed by a Partial incapacity of Permanent Nature as at the date of examination and suffered physical and mental disability of about 10%. Further Dr Jenipher Kahuthu did refer to the head injury (Diffused axonal injury- as moderate head injury). This description obviously cannot be true given the length of time the appellant was hospitalised while unconscious and/or semi-conscious for a period of one month or there about.

51. Diffuse axonal injury is medically defined as shearing (tearing) of the brain's long connecting nerve fibres (axions) that happen when the brain is injured as it shifts and rotates inside the bony skull. The level of consciousness on the Glasgow coma scale was 9/15, which means she was in a semi-comatose due to her closed head injury which resulted in multi punctuated (small) haemorrhage in the brain and a blood clot on the right frontal lobe. There was also concomitant post traumatic swelling {oedema} of the brain. The appellant also suffered soft tissue injuries and a fracture of the lower third ulna with slight displacement on the left arm.

52. Having considered similar injuries for similar award, the extensive nature of the appellants injuries and the time it took for her to recovery, and also considering the inflationary trends I do find that the award of Ksh.500,000/= award as General damages is extremely low. The same is set aside and increased to a sum of Ksh.1,500,000/=.

53. The appellant also did appeal as against the order of the trial magistrate in awarding interest on special damages from the date of judgment instead of from the date the suit was filed. This too was an error, as standard practise dictates that special damages should be awarded from the date of filing the suit and not the date of judgment. See;Lei Masaka Vs Kalpana Builders Ltd (2014) eklr, Olouch Eric Goga Vs Universal Builders Corporation Builders ltd (2015) eklr.

54. The court of Appeal in the case of sheriff salim & Another Vs Malunda Kivaka (1989) Eklr also rendered itself as follows;

> " There is no gainsaying the fact under section 26 of the *civil procedure Act*, the award of interest on a decree for payment of money from the date the suit is filed or from the date of the decree is a matter entirely within the discretion of the court. But discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. In the case or Prema Lata Vs Peter Musa Mbiyu (1965) EA 592, the appellant in the suit for damages for personal injuries was awarded Kshs 24,000/= as general damages and Kshs 1,742.80/= as special damages but the judge refused an application to award interest on the two awards from the date of filing the suit. On Appeal to the court of Appeal of East Africa, it was held that in personal injury claims, interest on general damages should not be awarded for the period between the date of filing suit and judgment but interest should normally be awarded on special damages if the amount is claimed had been actually expended or incurred as at the date of filing the suit".

55. The appellant did prove that she expended Ksh 313,196/= on treatment and medication and thus unless for express reasons to be stated in the judgment, interest on the same ought to have been awarded from the date of filing the suit.

Disposition

56. The final order issued herein are as follows;

    a. The judgment of Honourable Eunice Kelly (SRM) dated 7th July 2022 issued in Naivasha CMCC No 34 of 2017 with respect to quantum awarded to the appellant of Ksh.500,000/= is set aside and the same is substituted with an award of Ksh.1,500,000/=

    b. The appellant is also awarded interest on special damages (which was awarded at Ksh.313,196/=) as from the date of filing the primary suit.

    c. The appellant is also awarded costs of this appeal which is assessed at Ksh.200,000/= all inclusive.

    d. Stay of execution of this Judgment is granted for 30 days.

57. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant