Pramukh Group Systems Limited aka PG Security Limited v Mazera (Civil Appeal E17 of 2021) [2023] KEHC 21123 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E17 OF 2021

OA SEWE, J

JULY 11, 2023

BETWEEN

PRAMUKH GROUP SYSTEMS LIMITED AKA PG SECURITY LIMITED ..... APPELLANT

AND

GABRIEL MBWANA MAZERA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Francis Kyambia, Chief Magistrate, delivered on 22nd January 2021 in Mombasa CMCC No. 1784 of 2019)

JUDGMENT

[1] This is an appeal from the Judgment and Decree passed by the Hon. Francis Kyambia, Chief Magistrate, in Mombasa CMCC No. 1784 of 2019: Gabriel Mbwana Mazera v Pramukh Group Systems Limited a.k.a. P.G. Security Limited. The respondent's cause of action was that, on or about the 24th September 2018 at around 0723Hrs or thereabout, as he was lawfully crossing the road along Airport Road, near Appollo Bar Area in Changamwe, the appellant's Motor Vehicle Registration No. KCF 486N Toyota Probox was so carelessly driven by the appellant's authorized driver/agent that it hit the respondent, thereby occasioning him serious injuries.

[2] The respondent contended that the said accident occurred due to the negligent and/or reckless manner in which the driver, agent, servant or employee of the appellant drove or managed the subject motor vehicle. Accordingly, he supplied particulars of negligence at paragraph 5 of the Plaint dated 8th October 2019. The respondent also alleged special damage and furnished particulars thereof at paragraph 6 of the Plaint along with particulars of his injuries. He accordingly prayed for general damages for pain, suffering and loss of amenities, special damages in the sum of Kshs. 301,364/= together with interest and costs of the suit.

[3] The suit was resisted by the appellant and a Statement of Defence filed in that regard dated 28th October 2019. The appellant conceded that a road traffic accident occurred on the 24th September 2018 along Airport Road near Apollo Bar area in Changamwe as alleged and that the accident involved its Motor Vehicle Registration No. KCF 486N. It however denied the allegations of negligence levelled against its driver by the respondent. Instead, it proceeded to allege negligence on the part of the respondent in terms of the particulars set out at paragraph 5 of the Defence. In the same vein, the appellant denied the particulars of special damage claimed by the respondent before the lower court.

[4] The suit was accordingly heard and a determination made by Hon. F. Kyambia, Chief Magistrate, on 22nd January 2021 in which the appellant was found 100% liable to the respondent for his pain, suffering and loss of amenities arising from the accident. The lower court accordingly awarded him Kshs. 2,500,000/= as general damages and special damages of Kshs. 301,364/= together with costs and interest at court rates from the date of judgment until payment in full.

[5] Being dissatisfied with the lower court's decision and decree, the appellant filed this appeal on the following grounds:

(a) That the learned magistrate erred and misdirected himself in law by assessing damages that was manifestly excessive and incomparable with the current judicial awards for analogous injuries.

(b) That the learned magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.

(c) That the learned magistrate erred in law in finding the appellant 100% liable for the accident.

(d) That the learned magistrate erred in law and fact in failing to take into account relevant factors in evaluation the evidence on record on both liability and quantum.

(e) That the learned magistrate failed to exercise his discretion judiciously in determining the issue of liability and quantum.

(f) That the amount of general damages awarded was so inordinately high as to represent an entirely erroneous estimate and in reaching such high figure, the learned magistrate must have acted on wrong principles of law.

[6] On account of the foregoing grounds, the appellant prayed that the judgment of the lower court dated 22nd January 2021 be reviewed and/or set aside to the extent of the court's finding on both liability and quantum. The appellant also prayed that the costs of the appeal be borne by the respondent.

[7] The appeal was urged by way of written submissions, pursuant to the directions given herein on 14th July 2022. Accordingly, the appellant's written submissions were filed herein on 3rd October 2022 by Mr. Mbago. He provided a summary of the evidence presented before the lower court and pointed out that from that evidence, it was clear that the road that would normally have been used by the appellant's driver was closed for repairs. He consequently submitted that the respondent did not give a clear account on which lane/road the vehicles coming from Port Reitz directions were supposed to use to access Changamwe and urged the Court to find that, on this particular day, the Port Reitz-Changamwe Road was turned into a two-way road; and therefore vehicles to Changamwe were using the wrong lane due to the maintenance works that were going on at the time. In the circumstances, he posited, the appellant's driver had little chance of seeing the respondent in good time to avoid the accident; and therefore that the respondent was equally liable for not ensuring his safety before crossing the road.

[8] Thus, Mr. Mbago urged the Court to reverse the finding of the trial court and to apportion liability equally among the parties, or in the alternative, dismiss the respondent's case altogether. He relied on Charlesworth on Negligence, Third Edition which was quoted with approval in Patrick Mutie Kimau & Another v Judy Wambui Ndurumo [1977] eKLR as well as the case of Jane Muthoni Mukabi & 4 Others (suing as the personal representatives of the Estate of David Waithaka Muthoni (Deceased) v Philip Macharia Ndirangu & 4 Others [2020] eKLR.

[9] In support of his submission that the learned magistrate erred in law in failing to appreciate and apply the applicable principles, Mr. Mbago made reference to West (H) & Son Ltd v Shepherd [1964] AC 326 and Hassan v Nathan Mwangi Kamau Transporters & 5 Others, NBI Civil Appeal No. 123 of 1985, for the proposition that awards must be reasonable and in line with awards in cases involving comparable injuries. Thus, counsel was of the posturing that an award of Kshs. 700,000/= would be a fair requital, given the respondent's injuries. He premised his proposal on several authorities, including George Njenga & Another v Daniel Wachira Mwangi [2017] eKLR and Jonathan Junior Nyamasyo Katete v Gideon Muange Muasa [2021] eKLR.

[10] On behalf of the respondent, Mr. Timamy filed his written submissions herein on 3rd February 2023. He proposed the following two issues for determination:

(a) Whether the learned magistrate erred in law and in fact in fact in finding the appellant fully liable for the accident.

(b) Whether the learned magistrate erred in awarding damages which were excessive in the circumstances of the case.

[11] Mr. Timamy made reference to the evidence adduced before the lower court and urged the Court to uphold the finding by the learned magistrate on liability. He referred to Khambi & Another v Mahithi & Another [1968] EA 70, among other authorities, to support the submission that, save in exceptional cases, an appellate court ought not to upset the findings of a lower court on liability. He added that the appellant failed to avail evidence to prove that the outer lane from Port Reitz to Changamwe was converted to a two-way road; and therefore failed to rebut the respondent's evidence that placed the blame on the appellant's driver for driving on the wrong side of the road.

[12] On quantum, Mr. Timamy placed reliance on Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR and submitted that the assessment by the lower court was justified by the nature of the injuries suffered by the respondent and should accordingly be left undisturbed. He pointed out that, although the appellant had attempted to rely on the medical report by Dr. Salim Noorani in which the respondent was assessed to have suffered 5% permanent disability, that report was only marked for identification and was never produced. On the authority of Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR, counsel urged the Court to disregard that report. At paragraph 24, Mr. Timamy made reference to several decisions to demonstrate that the lower court's award was neither excessive nor out of range of the awards for such injuries. He accordingly urged that the appeal be dismissed in its entirety with costs.

[13] This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court and come to its own conclusions thereof, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses. (see Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123)

[14] I have accordingly perused the record of the lower court and noted that the respondent, Gabriel Mbwana Mazera testified before the lower court as PW2. He adopted his witness statement dated 8th

October 2019 in which he stated that he was on his way to work on the 24th September 2018 when, upon reaching Apollo Bar Area along Airport Road he was hit by Motor Vehicle Registration No. KCF 486 Toyota Probox as he was crossing the road. He explained that there was a large and deep pothole on the road and therefore pedestrians had to cross the road to board public service motor vehicles headed for town from Changamwe. The respondent explained that he had successfully crossed all the four outer lanes and was knocked as he stepped onto the pavement. He added that the motor vehicle was being driven on the wrong lane at the time.

[15] The respondent further told the lower court that he suffered severe injuries, including pelvic and hand fractures, for which he was admitted at Coast General Hospital and later at Aga Khan Hospital and Pandya Memorial Hospital. He had to undergo several operations on account of his injuries and thereafter continued to receive treatment as an outpatient. The respondent produced several documents in support of his case. They included treatment notes as well as receipts for expenses incurred in the course of treatment. He blamed the driver of the Motor Vehicle Registration No. KCF 486 for recklessness and confirmed that the accident was reported to Changamwe Police Station. The respondent also mentioned that he was issued with A P3 Form at Changamwe Police Station which was filled at Coast General Hospital and returned to the Police Station.

[16] The respondent called, as his witness, a boda boda rider, Samson Loyo Masha (PW3). Mr. Masha also adopted his witness statement dated 8th October 2019, and confirmed that he was an eye witness to the subject accident; and that the road from the Airport direction to Mombasa Town was closed as there was a manhole on the road. In particular, PW3 testified that he saw the respondent crossing the 4 lanes of the road on the other side when a motor vehicle came from the direction of Port Reitz towards Changamwe and hit him. PW3 further pointed out that the motor vehicle in question was being driven on the wrong side of the road.

[17] Cpl. Lilian Oturi (PW4) was the 4th witness for the respondent. She was then attached to the Traffic Section at Changamwe Police Station. She confirmed that a serious road traffic accident occurred on 24th September 2018 at 7.30 a.m. involving Motor Vehicle Registration No. KCF 486M Toyota Probox and a pedestrian Gabriel Mbwana Mazera. She testified that the accident was reported to their Police Station and was assigned to Cpl. Nyamweya for investigations. PW4 further stated that the investigations established that the driver of the subject motor vehicle, one Jared Otieno Oyong was driving on the wrong lane when the accident occurred and was therefore to blame for the accident. She produced the P3 Form issued to the respondent and an Abstract from the Police on a Road Accident as exhibits.

[18] The respondent also relied on the evidence adduced by Dr. Adede (PW1) who examined and prepared a Medical Report in respect of the respondent, Gabriel Mbwana Mazera. He testified that the respondent presented a history of having been involved in a road traffic accident; and that he suffered a fracture of the urethral structure along with multiple pelvic fractures and injuries to the left elbow and left ankle. PW1 further stated that, to treat the urethral structure, the respondent underwent several operations; and that he would require future medical treatment to repair the intermittent blockage of his urinary pipe. In PW1's estimation, the respondent suffered permanent disability of 12% as a result of the accident.

[19] On behalf of the appellant, its driver, Jared Otieno Oyong (DW1), testified on 16th September 2020. He conceded that he was driving Motor Vehicle Registration No. KCF 486 from Port Reitz heading towards Mombasa; and that as he approached Migadini Roundabout, he noticed that there was some heap of soil on the left lane, and that the road was closed. Consequently, all motor vehicles were sharing the same lane towards town. DW1 further stated that, as he approached the flyover, he saw a man standing on the shoulder of the road; and as he approached, the man decided to cross the road. He

contended that he was doing only 30 kph and had put on the hazard light; and that on seeing the man he hooted and braked, but was nevertheless unable to avoid hitting the man.

[20] DW1 further stated that he immediately stopped after the accident and took the victim to Coast General Hospital, but the victim asked to be taken to Aga Khan Hospital; which request he complied with. He thereafter reported the accident at Changamwe Police Station. In his view that the respondent was to blame for the accident in that he did not exercise proper care before crossing the road.

[21] From the foregoing summary, there is no dispute that the respondent was involved in a road traffic accident on the 24th September 2018 at about 7.30 a.m. in the morning as he was crossing the Airport Road. The accident occurred near Apollo Bar Area in Changamwe and it involved the appellant's Motor Vehicle Registration No. KCF 486N Toyota Probox. It is also common ground that the motor vehicle was then being driven by Jared Otieno Oyong (DW1), an employee of the appellant who was well within the scope of his employment. That the respondent sustained serious injuries in the accident is also not in dispute. In his own version of the events, DW1 conceded thus, per his witness statement dated 26th October 2019:

> "...owing to proximity he was hit by the side left part of the vehicle near the front. Upon impact he landed on the windscreen and eventually he crashed himself against the hard surface of the central refuge...After the accident my colleagues and I alighted and found that he had suffered injuries on his left leg. We loaded him into the vehicle and rushed him to Coast Provincial General Hospital..."

[22] The accident was reported to Changamwe Police Station and in this regard, Cpl. Oturi (PW4) gave uncontroverted evidence before the lower court and produced the Police Abstract in respect of the occurrence as the Plaintiff's Exhibit 7. In the circumstances, the only two issues for determination are whether, in the circumstances, the respondent proved negligence on the part of the appellants; and if so, whether the quantum of damages arrived at by the lower court is defensible.

[23] Needless to say that the legal burden of proof was on the respondent, for, Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is explicit that:

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

[24] Thus, the respondent alleged negligence and set out to prove the particulars of negligence as set out in Paragraph 5 of his Plaint in which he alleged the following:

(a) Failing to stop, slow down, swerve or in any other way manage and/or control the said Motor Vehicle Registration No. KCF 486N Toyota Probox so as to avoid the accident.

(b) Failing to give any adequate and/or proper signals to the respondent to avoid the accident.

(c) Failing to take reasonable precautions for the safety of other road users and especially the respondent;

(d) Driving the said motor vehicle at an excessive speed in the circumstances.

(e) Failing to manage and/or maintain the motor vehicle in the proper working condition to avoid the said accident.

(f) Failing to give due regard to the safety of the respondent.

(g) Driving the said motor vehicle on the wrong lane.

(h) Causing the accident.

[25] A careful consideration of the evidence adduced before the lower court reveals that, although the road in question has 8 lanes, not all of them were in use on the date in question. Thus, the parties were in agreement that the two outer lanes from Port Reitz towards Changamwe were closed because of a manhole that was undergoing repair. Consequently, motor vehicles from Port Reitz direction towards Changamwe, such as the subject motor vehicle, were required to temporarily use the roundabout near the Airport Gate and the inner two lanes from the Airport Gate towards Changamwe.

[26] The respondent availed credible proof which was corroborated by the evidence of PW3 and PW4 that DW1 ignored the temporary directions and was therefore driving on the wrong lane at the time of the accident. In his testimony, DW1 conceded that the road he opted to use was indeed closed to traffic from Port Reitz direction; and that there was a heap of soil on the road. Further to the foregoing, the respondent adduced evidence, particularly through PW3, to show that DW1 was over-speeding in the circumstances. Had he been doing 30 kph as alleged by him, he would have been in a position to brake in good time and avoid hitting the respondent altogether.

[27] I note that the appellant alleged negligence on the part of the respondent, contending that:

(a) He plunged onto the road without due care of himself and other road users and particularly the appellant;

(b) He failed to heed to the warnings by the driver of Motor Vehicle Registration No. KCF 486N;

(c) He failed to adhere to the pedestrian path and/or the designated foot bridge thereby encroaching on the path of Motor Vehicle Registration No. KCF 486N;

(d) He carelessly ventured onto the road thereby confusing the driver of Motor Vehicle KCF 486N;

(e) He obstructed the appellant's motor vehicle on its rightful lane.

[28] It is noteworthy however that PW3, who witnessed the accident explained thus:

> " The plaintiff waited until the road was clear and decided to cross the road. He crossed all the four lanes carefully. After having finished crossing the fourth lane trying to step onto the pavement where people were standing awaiting to board vehicles to town, he was suddenly hit by Motor Vehicle Registration Number KCF 486N Toyota Probox which was being driven so carelessly, negligently and at a high speed in the circumstances. The said Motor Vehicle was in fact being driven on the wrong side of the Road. The Plaintiff was hit at the very rear side of the Road while having fully crossed the Road..."

[29] Taking the foregoing evidence into account, the lower court cannot be faulted for coming to the conclusion that the allegations of contributory negligence were completely refuted by the respondent. I therefore agree entirely with the position take in Amani Kazungu Karema v Jackmash Auto Ltd & Another [2021] eKLR that:

> " ...where a person drives his motor vehicle at a speed in the circumstances which he fails to keep a proper lookout and ran into the lane of another vehicle and a collision occurs that kind of behavior would very unlikely attract contributory negligence."

[30] Additionally, I am persuaded by the expressions of Lord Reid in Stapley v Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681, which have been quoted with approval by the Court of Appeal in Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR that:

> " 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."

[31] From the facts hereof, I am persuaded that liability was properly fixed at 100% against the appellant. In arriving at this conclusion I have taken into account the submission of the appellant that PW4 was not the investigating officer; and that she did not produce the sketch map of the scene of accident. It is noteworthy however that, unlike the case of Evans Mogire Omwansa v Benard Otieno Omolo & Another [2016] eKLR on which Mr. Mbago relied to underscore his point, the respondent's evidence was augmented by the evidence of an independent by-stander, PW3. There was therefore sufficient basis for the lower court's conclusion on liability.

[32] On quantum, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. Hence, in H. West & Son Ltd v Shephard [1964] AC 326, it was acknowledged that:

> " ...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 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."

[33] Indeed, in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal held thus:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR)

[34] Accordingly, the approach taken by Hon. Wambilyanga, J. in HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf, which I find useful, was thus:

> " The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[35] Additionally, in Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

> " ...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

[36] In the light of the foregoing, to determine whether or not the lower court's assessment was reasonable I have given due consideration to the injuries sustained by the respondent. The particulars thereof were pleaded at paragraph 6 of the respondent's Plaint thus:

(a) Multiple pelvic fractures of the left acetabulum, left ilium and left superior pubic ramus;

(b) Traumatic urethral stricture (blockage) with acute urine retentions;

(c) Blunt object injury to the left elbow;

(d) Bruise on the left elbow.

[37] The respondent produced a good number of medical documents in proof of the nature and extent of the injuries he suffered and the treatment received at the various hospitals that he attended. Of particular interest however is the Medical Report prepared and produced by Dr. Adede (PW1). Dr. Adede summarized the treatment received by the respondent to include hip skin traction, left hip metal implant, suprapubic (abdominal) urine tube and repair of the urethra blockage as well as pain and wound care. PW1 further stated that, as at the time he examined the respondent, he was still on crutches and complained of pain in the left hip.

[38] Thus, PW1's conclusion and prognosis was that the respondent had suffered 12% permanent partial disability due to urethral tear, multiple pelvic fractures, stiffness of the left hip, acute urine retention that will require a catheter urine tube for a few days every three years at a cost of Kshs. 10,000/=. He also opined that the hip metal implant would have to be removed after 2 years at a cost of Kshs. 120,000/=. Thus counsel for the respondent defended the general damages awarded by the lower court of Kshs. 2,500,000/= relying on the following authorities:

(a) Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [2012] eKLR in which the plaintiff suffered fractures of the right superior and inferior rami of pubis, fracture of the ischium, fracture of the acetabulum, fracture of lateral condyle of femur, dislocation of left knee with torn collateral ligament; skin grafting surgery on left leg and left leg shortened by 4 cm. She was awarded Kshs. 2,400,000/=.

(b) Peace Kemuma Nyang'era v Micahel Thuo & Another [2014] eKLR in which the plaintiff was awarded Kshs. 2,500,000/= for a fracture of the sacrum bone, fracture of the right superior pubic ramus, fracture of the right ischium/inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumbo-sacral haematoma.

(c) Joseph Kahinda Maina v Evans Kamau Mwaura Ngugi Njenga & Habit Gulam Janet [2014] eKLR in which the plaintiff sustained fractures including fractures of the pelvis, mandible, acetabulum roof of the left hip and other soft tissue injuries and was awarded Kshs. 2,400,000/= as general damages for pain, suffering and loss of amenities.

(d) James Mbugua & Another v John Mbugua Mburu [2020] eKLR in which the plaintiff suffered fractures of the teeth, deep cut wound on the lower lip and chin, comminuted fracture of the left femur, comminuted fracture of the right acetabulum and dislocation of the right hip joint and fracture of the right inferior ramus of the pelvis. The plaintiff underwent surgery with prospects of future medical procedures. The High Court upheld an award of Kshs. 2,263,693 as general damages for pain suffering and loss of amenities.

(e) In Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR, the plaintiff suffered pelvic injuries with fracture of right pubic ramus and diastasis of the symphysis pubis, a small abdominal wall haematoma and minimal hemoperitoneum and was awarded Kshs. 2,000,000/= as general damages.

(f) In Penina Waithira Kaburu v L P [2019] eKLR, the plaintiff suffered from urethral stricture from an accident with possibility of recurrence and danger of impotence. The High Court upheld the award by the lower court of Kshs. 2,000,000/= as general damages.

[39] Mr. Mbago was of the view that the authorities relied on by the respondent involved far more serious injuries than those suffered by the respondent. Accordingly, he made reference to the following authorities to support his proposal of Kshs. 700,000/=:

(a) George Njenga & Another v Daniel Wachira Mwangi [2017] eKLR, in which the plaintiff suffered pelvic fracture, unstable left knee joint, unstable left ankle joint, soft tissue injuries to the trunk and posterior chest, laceration on the anterolateral aspect of the left leg. He was awarded Kshs. 800,000/= in 2017.

(b) George Okewe Osawa v Sukari Industries Limited [2015] eKLR in which the plaintiff suffered a fractured pelvis and was awarded Kshs. 400,000/= in 2015.

(c) Jonathan Junior Nyamasyo Katete v Gideon Muange Muasa [2021] eKLR where the Court of Appeal upheld the trial magistrate's award of Kshs. 1,000,000/= in general damages for the respondent who had suffered a fracture of the right acetabulum, bruises on the right leg as well as blunt injuries on the right hip.

(d) Faith Mumbua Kiio v Patel Devika [2018] eKLR where on appeal, the appellant was awarded Kshs. 300,000= for blunt pelvic trauma with pelvic ring fracture, including fractures of the acetabulum, ischium and left clavicle bone.

[40] It is noteworthy however that, in support of his submissions, Mr. Mbago opted to rely on the Medical Report prepared by Dr. Salim Noorani, a consultant surgeon who estimated the permanent incapacity at 5%. Although Dr. Noorani's report was marked for identification, it was never produced as an exhibit by the appellant. In the premises, the report was of no probative value to the lower court in assessing the damages payable. In Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (supra) in which the central

issue on appeal was the probative value, if any, of a document marked for identification but which was neither formally produced in evidence nor marked as an exhibit. the Court of Appeal held:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; ...Third, the document becomes proved, not proved or disproved when the court applies it judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case...a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness...we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight..."

[41] Likewise, in the case of Finmax Community Based Group & 3 others v Kericho Technical Institute [2021] eKLR, the Court of Appeal reiterated its stance and held:

> " ...As part of that consent the parties were also emphatic that the accounts report would not be produced alongside the other documents but, instead they were to be "Marked for Identification" (MFI. 10).
>
> We understand this to mean that the respondent was to call a witness to prove the accounts report before they could be admitted in evidence. Up to the point the judgment was pronounced, the accounts report had not been produced.
>
> As way back in 1953, in the case of Des Raj Sharma vs. Reginam (1953) 19 EACA 310, it was recognized that the only distinction between "exhibit" and an article or a document "marked for identification" is that an "exhibit" is evidence which has been formally proved and admitted in evidence, while an exhibit "marked for identification" (MFI) is not part of the evidence before the court and cannot, therefore, be used as proof of any fact.
>
> Until a document "marked for identification" is formally produced, it is of very little, if any, evidential value. See Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others [2015] eKLR.
>
> The report in question which we suspect was the genesis of the amount claimed by the respondent was not produced and appears not to be part of this record.
>
> We come to the conclusion on this question that the respondent did not present any proof of how the figure of Kshs. 11,261,901.28. was arrived at. The learned Judge clearly erred in failing to analyze the evidence in respect of proof of the figure claimed.
>
> Having found that the respondent did not discharge its burden of proof, we need not consider the next and final ground...."

[42] In the premises, I find the authorities relied on by the respondent to be more on point. They are in many ways comparable to the injuries sustained by the respondent and therefore go to show that the

award by the lower court was not too far off mark. It is always the course of wisdom to bear in mind the sentiments of Chesoni Ag. JA (as he then was) in Mariga v Musila [1982 – 88] KAR 507 that:

> " No two cases of motor accidents are exactly the same for one to form a suitable precedent of the other. The facts, the injuries or even degree of similar injuries and the effect of such injuries are usually so different that it is necessary to consider each case on its own merit and peculiar facts even where the country, venue and circumstances are the same. For this reason, past decisions in this type of cases are of little assistance in determining the quantum of damages, especially the non-pecuniary damages on pain, suffering and loss of amenities."

[43] The special damage component, which included some Kshs. 130,000 for future medical treatment, was not in contention in the appeal. All in all, I find no reason to interfere with the judgment and decree of the lower court either on liability or quantum. The appeal is accordingly dismissed in its entirety with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF JULY 2023.

OLGA SEWE

JUDGE