REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO.67 OF 2018

CHINA WU YI LIMITED.....1ST APPELLANT

WILSON GITHU.....2ND APELLANT

VERSUS

IRENE LEAH MUSAU.....RESPONDENT

(Being an appeal from the Judgment of the Hon. L. Kassan Senior Principal Magistrate delivered on 14th May, 2018 in the Senior Principal Magistrate Court at Mavoko in PMCC No. 618 of 2014)

BETWEEN

IRENE LEAH MUSAU.....PLAINTIFF

VERSUS

CHINA WU YI LIMITED.....1ST DEFENDANT

WILSON GITHU.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 15th May, 2014 the Respondent, as the Plaintiff, sued the Appellants as the 1st and 2nd Defendants respectively, claiming special damages, general damages, costs and interests arising from a road traffic accident that was pleaded to have occurred on the 3rd day of January, 2012 along Mombasa- Nairobi Road.

2. On 20th November, 2017 a consent was recorded by which liability was apportioned in the ratio of 70:30 in favour of the Respondent, paving the way for assessment of damages.

3. According to PW1, **Dr. Titus Ndeti,** when he examined the Respondent on 9th January, 2014, he found that the Respondent sustained serious injuries of cracked upper left molar tooth, soft tissue injuries to the left upper limb and fractured left humorous bone, fractured pelvic bone and dislocation of the right hip joint and was admitted at Kenyatta Hospital for one month. At the time of the examination, the Respondent complained of pain in the right hip joint and had a sore ending to the right limb. The Respondent further had restriction of movement in the right limb.

4. It was his opinion that the Respondent suffered grievous harm and was at a risk of developing osteoarthritis. The Respondent would also require plaster at a low cost of Kshs.60, 000/- and at a higher cost of Kshs. 100,000/- and he exhibited his medical report, P3 Form, a receipt of Kshs.2, 000/- and a court attendance receipt of Kshs. 7,000/-.

5. In cross-examination, PW1 stated that at Shalom Community Hospital, the Respondent underwent a surgery but though the P3 Form showed that the Respondent had a crack, this was not indicated in the Shalom Community Hospital and KNH documents. He however confirmed that the clinical notes confirmed the injury to the pelvis.In his view, there was permanent incapacitation although this was not indicated in his report. He further stated that the KNH and Shalom Community Hospital documents did not indicate that an implant

procedure was done but suggested future medical expenses.

6. On his part, the Respondent produced treatment notes from Shalom Community Hospital, discharge summary, Clearance Certificate from Kenyatta National Hospital, KNH Card and a bundle of receipts. It was his evidence that he spent Kshs. 40,000/- though he had not recovered since the accident and was having problems with his back bone and could not run or bend. He stated that sometimes his right leg swells when it is cold. He averred that at KNH he had a surgery on his right hip joint and had an implant on his right leg.

7. In cross-examination, the Respondent insisted that he visited the dentist because of the cracked teeth but did not have documents to prove so. He also did not have documents to prove that the implant was done at KNH and did not have expense receipt for the surgery or any document to prove that he was going for check-ups.

8. In his judgement, the trial magistrate awarded general damages of Kshs. 1,200,000/-, special damages of Kshs.40, 380/-, future medical expenses of Kshs. 110,000/-, cost of preparing a medical report at Kshs.2, 000/-and court attendance costs of Kshs.7, 000/-. The total award of damages was subjected to the Respondent's apportioned liability of 30%. The Respondent was awarded cots of the suit and interest.

9. Aggrieved by the award of quantum of damages, the Appellants appealed against the award on the following grounds:

> ***a. THAT the Honourable learned magistrate erred in fact and in law in awarding general damages to the Respondent amounting to Kshs. 1,200,000/-***
>
> ***b. THAT the Honourable learned magistrate erred in law and fact in awarding future medical expenses to the Respondent amounting to Kshs. 100,000/-.***
>
> ***c. THAT the quantum of damages is excessive and an erroneous estimate of damages that may be awarded to the Respondent considering the circumstances of the case before the surbodinate court and the weight of precedents in similar circumstances.***
>
> ***d. THAT the Honourable magistrate erred in law and in facts in relying on extraneous evidence in arriving at the decision on the general damages.***

10. The Appellants urge this court to dismiss and/or review the quantum of damages downwards and award costs of the appeal and trial court.

11. It is submitted that the total award of Kshs. 1,310,000/-for pain and suffering and future medical expenses is manifestly high. According to the Appellants, there was no medical documentation to support the surgery or any implant. It is submitted that no permanent incapacitation was indicated in the report.

12. The Appellants proposed an award of Kshs. 400,000/- as adequate based on the court decisions of **Joshua Mwaniki Nduati vs. Samuel Muchiri Njuguna [2005] eKLR** where court awarded Kshs. 250,000/-, **Bildad Mwangi Jichuki vs. TM-AM Construction Group(Africa) (2000) eKLR** where court awarded Kshs. 250,000/- and in **Zachariah Mwangi Njeru vs.Joseph Wachira Kanoga [2014]eKLR** where court relied on the case of **Betwel Mutai vs. China Road & Bridge Construction Corp(Mombasa) HCC No.200 of 2007** and awarded Kshs. 400,000/- for general damages.

13. As regards the future medical expenses, it was submitted that Kshs. 60,000/- and Kshs.100, 000/- were plucked from the air since PW1 confirmed that there was no medical documentation to support the surgery or implant and in any case that the expense is legally a general damage claim hence not awardable separately. Reliance was placed on the case of **Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku [2006] eKLR**.

14. In conclusion, the Appellants urged the court to award only Kshs.400, 000/- as quantum.

15. On their part, the Respondents submitted based on authorities that there was no justification for interfering with the award and the Court was urged to dismiss the appeal with costs.

Determination

16. I have considered the foregoing. As indicated the appeal only challenges the award of damages. 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.**

17. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages 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."

18. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** 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…"**

19. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 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."**

20. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** 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."**

21.The principles which ought to guide a court in awarding damages were 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."**

22. In this case, according to the plaint, the Respondent had a cracked Upper left 3rd molar teeth, soft tissue injuries to the left upper limb, fractured left humerus bone, fractured pelvic bone and dislocation of the right hip joint. These injuries were confirmed by PW1, who was the only medical expert to testify at the trial. Accordingly, there is no basis for disbelieving his evidence. As was held by the Court of Appeal in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139**:

> **"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

23. The trial magistrate awarded the Respondent general damages of Kshs. 1,200,000/-. Before the trial court, the Appellants had proposed

an award of Kshs.400, 000/- while the Respondent had proposed kshs.1, 500,000/-.

24. In my view, the Plaintiffs in the court decisions cited by the Appellants suffered similar injuries to the injuries suffered by the Respondent herein. The trial magistrate's award of Kshs.1, 200,000/- in my view is inordinately high for such injuries. On the other hand, Kshs.400, 000/- proposed by the Appellants in my view is low compensation taking into account the inflationary factors.

25. According to **Dr. Titus Ndeti** who examined the Respondent one year later after the accident, opined that the Respondent suffered grievous harm of severe soft tissue injuries and fractured bones. The Respondent complained of pain. Despite lack of documents to establish whether surgery or implant was done on the Respondent, the clinical summaries from the hospitals and P3 Form established the injuries pleaded by the Respondent in then Plaint. The documents were produced as exhibits in support of the Respondent's case. The doctor proposed future medical expenses for implants.

26. The case of **Joshua Mwaniki Nduati vs. Samuel Muchiri Njuguna (supra)** was decided 13 years ago while the case of **Bildad Mwangi Jichuki vs. TM-AM Construction Group(Africa) (2000) eKLR** was decided 18 years ago. The case of **Mwangi Njeru vs. Joseph Wachira Kanoga [2014] eKLR** was decided 4 years ago.

27. In the case of **Joseph Kimanthi Nzau vs. Johnson Macharia [2019] eKLR** the Plaintiff had sustained a fracture of the skull, right clavicle, left 1st and 2nd ribs and multiple soft injuries. This court substituted the trial court award of Kshs. 450,000/- with Kshs. 800,000/- for being too low.

28. The extent and nature of injury, the pain suffered and the residual effects are all important factors in assessing damages. See **Michael Okello vs. Priscilla Atieno [2021] eKLR**.

29. Taking into account the inflationary tendencies, I find Kshs.800,000/- to be a fair compensation for the injuries sustained by the Respondent.

30. As regards the future medical expenses, the trial magistrate awarded the Respondent Kshs. 110,000/-. As regards the award for future medical expenses, authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. **Ringera, J** (as he then was) in **Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002** held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in **Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993,** held that cost of future medical operation is special damages, which must be pleaded. See also **Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246.**

31. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> **"The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."**

32. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> **"In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages…General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since**

the wrong the defendant could be surprised at the trial by the detail of its amount."

33. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269**, **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98**, **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

34. It was therefore held by the Court of Appeal in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** that:

> **"The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."**

35. Similarly, in **Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716**, the Court of Appeal held as follows;

> **"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."**

36. That was the position in **Woodruff vs. Dupont [1964] EA 404** where it was held by the East African Court of Appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them…The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

37. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. However as was appreciated in ***MNM vs. DNMK & 13 Others [2017] eKLR***:

> **"A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea [1970] EA 476)*."**

38. The Court of Appeal in **Magnate Ventures Limited vs. Alliance Media (K) Limited & Others [2015] eKLR** had this to say on the same issue:

> **"In GANDY V. CASPAR AIR CHARTERS LTD [1956] 23 EACA", 139 the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:**
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> > **"…the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."**
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> **And in GALAXY PAINTS CO. LTD. V. FALCON GUARDS LTD. [2000] 2 EA 385, this Court stated that the issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also IEBC & ANOTHER V. STEPHEN MUTINDA MULE & OTHERS, CA No. 219 of 2013).**
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> **The exception to the general rule that parties are bound by their pleadings, expounded in such cases as ODD JOBS V. MUBIA [1970] EA 476 and VYAS INDUSTRIES LTD. V. DIOCESS OF MERU [1982] KLR 114) arises where the parties raise and address unpleaded issues and leave them to the Court to decide."**

39. The same court in **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others [2017] eKLR** reiterated this view in the following terms:

> **"Those therefore were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See Odd Jobs v. Mubea [1970] 476, and Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001)."**

40. Similarly, the same Court pronounced itself in **Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs. Isabella Wanjiku Karanja & 2 others [2017] eKLR** that:

> **"The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants. But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in Chalicha FCS Ltd vs. Odhiambo & 9 Others [1987] KLR 182, that:**
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> > **"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."**
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> **The decision of Odd Jobs vs. Mubia, [1970] EA 476, may also apply where it was held that a court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued and left for the court to determine."**

41. The question for the Court's determination is whether the amount of future medical expenses was left for the trial court to determine based on the evidence. In this case, it is clear that the Respondent pleaded the fact that she required further medical attention which would entail further expenses. What she did not plead was the amount. She was however cross-examined on the same and counsel submitted thereon. Taking a holistic view of the proceedings, I find that the matter was left for determination by this Court and on the evidence of PW1, I find no basis for interfering therewith.

42. As regards special damages of Kshs.40, 380/- the same was pleaded and proved hence cannot be disturbed.

43. The court attendance costs for the doctor of Kshs.7, 000/- are costs not awardable as special damages but ought to be treated as disbursements in the case. See **R.E Aburili, J** in **Duncan Kimathi Karagania vs. Ngugi David & 3 others [2016] eKLR**.

44. In the upshot, I find the appeal succeeds partially. I set aside the award of Kshs 1,200,000.00 given to the Respondent as general damages and substitute thereof with an award of Kshs. 800,000/-. The award for future medical expenses is upheld in the sum of Kshs.110, 000/-. The said sum is to be discounted by 30% contribution. The award for general damages will attract interest at court rates from the date of judgement in the trial court while the special damages will attract interest at the same rate from the date of filing suit till payment in full.

45. As none of the parties has been fully successful, there will be no order as to costs of this appeal but the Respondent will get the costs in the court below.

JUDGEMENT READ, SIGNED AND DELIVERED ONLINE AT MACHAKOS THIS 10TH DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

DELIVERED THE PRESENCE OF:

MR KHAMALA FOR MR KIOKO FOR THE APPELLANT

CA SUSAN