REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CIVIL APPEAL NO. 31 OF 2019

PATRICK MUIRU KAMUNGUNA.....APPELLANT

VERSUS

KAYLIFT SERVICES LTD.....1ST RESPONDENT

NJUGUNA MBUGUA.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. Harrison Adika, SRM delivered on 6th May 2019 in Nyeri CMCC No. 175 of 2008)

JUDGEMENT

1. This appeal arises from the judgment of Nyeri Senior Resident Magistrate in CMCC No. 175 of 2008 involving a claim for damages arising from a road traffic accident which occurred on 21/8/1999 along Naromoru-Nanyuki Road involving the respondent's motor vehicle registration number KAJ 350J whereas the appellant sustained bodily injuries.

2. Being aggrieved by the decision of the honourable magistrate, the appellant lodged this appeal citing eleven(11) grounds of appeal which may be summarized thus:-

a) That the learned magistrate misdirected himself when he found that ownership of the vehicle registration number KAJ 350J had not been proved.

b) That the magistrate failed to appreciate the fact that the issue of ownership was not in contention and that the issue of the respondent being the owner of the vehicle had already been determined in HCC No. 39 of 2002 as consolidated with HCC No. 121 of 2001.

c) That the issue of the typographical error the vehicle's registration number was curable under Section 1A and 100 of the Civil Procedure Act and under Article 159 of the Constitution.

d) That the magistrate assessed damages that were inordinately too low being the amount of which would have been awarded to the appellant had his suit been successful.

e) The learned magistrate erred in law and in fact in awarding the costs of the suit to the respondent.

This appeal was disposed of by way of written submissions.

Appellant's Submissions

3. The appellant submitted that the police abstract indicated that the motor vehicle involved in the accident was KAJ 350L Rover Discovery. On the other hand the plaint indicated that it is motor vehicle registration number KAJ 350J. The appellant stated that he gave oral testimony in court where he stated that the motor vehicle was KAJ 350L. Further, It was argued that the respondent in their defence indicated that the motor vehicle was KAJ 350L.The copy of records of ownership together with payment receipts relate to motor vehicle registration number KAJ 350L.

4. The appellant further submits that the Defendants never raised the issue of identity of the subject motor vehicle in the proceedings or submissions. Further the Appellant produced the judgment in **HCCC No. 39 of 2002** consolidated with **HCCC No. 121 of 2001, Michael Thuo & Jane Njeri Mwikia Vs Kaylift Services Ltd** as evidence in support of his case. The High Court decisions are based on the same facts and resulted from the same accident. The judge in the two cases found that Kaylift Services Ltd, the 1st respondent herein was the

owner of the motor vehicle despite a discrepancy in the evidence.

5. It was further submitted that the court ought to have applied Article 159(2) of the Constitution of Kenya as well as Section 100 of the Civil Procedure Act and corrected the typographical error of the motor vehicle registration number.

6. The appellant submits that he established that the 1st respondent was the beneficial owner of the motor vehicle relying on the insurance policy. On the issue of the 2nd respondent being deceased, it is the appellant's submission that he was only a driver and the fact that he was, did not change the fact that he was an agent or employee of the 1st respondent. The said 2nd respondent did not participate in the proceedings of this case.

7. On the issue of ownership of motor vehicle and the liability of the beneficial owner of the motor vehicle, the appellant made reference to the high court decision **HCCC No. 39 of 2002** consolidated with **HCCC No. 121 of 2001, Michael Thuo & Jane Njeri Mwikia vs Kaylift Services Ltd. Intra Africa Assurance** where the respondent had insured his vehicle and the court invoked the doctrine of estoppel to preclude the appellant from denying that their insured Kaylift Limited had an insurable interest. The appellant made reference to the case of **Kenindia Assurance Company Limited vs New Nyanza Wholesalers Ltd C.A. No. 30 of 2015 [2017] eKLR.**

The appellant further submits that the trial court misdirected itself by making different findings from the High Court decisions on the same issues before him and thus offending the doctrine of *res judicata*, Section 7 of the Civil Procedure Act. The Appellant further states that once the High Court pronounces itself on the issues of fact and law on matters arising from exactly the same facts, the doctrine of *stare decisis* and precedent enjoins the trial court to follow its lead. The Appellant made reference to the cases of **Rift Valley Sports Club Vs Patrick James Ocholla [2005] eKLR, Okiya Omtatah Okoiti & Another Vs the Hon. Attorney General & 2 Others [2015] eKLR and Dodhia Vs National Grindlays Bank Limited & Another [1970] EA 195.**

9. The appellant concluded his submissions by stating that he was injured and that he produced evidence of the same, made out his submissions and cited authorities however the trial court did not make any comments on the authorities cited. The Appellant states that despite the gravity of the injuries he sustained, the court did not make any reasoned assessment and treated the matter casually.

Respondent's Submissions

10. The respondent denies the appellant's claim and submits that it is apparent that the appellant sued the 1st respondent as the registered owner of motor vehicle registration number KAJ 350J, a point which the 1st respondent denied in its defence.

11. The 1st respondent raises issue with the appellant's submission that the discrepancies in the description of the motor vehicle was an error and a mis-description of the subject motor vehicle. The 1st respondent submits that the said issue is misplaced in that it has been introduced at the appeal level.

12. The 1st respondent further submits that parties are bound by their pleadings and as such the contents of the Plaint rightfully bind the appellant unless an amendment is sought and valid reasons given by the appellant. In this regard the 1st respondent relied on the cases of **Joseph Mbuta Nziu Vs Kenya Orient Insurance Company Limited [2015] eKLR ; Libyan Arab Uganda Bank for Foreign Trade and Development & Another Vs Adam Vassiliadis [1986] UG CA6; Owners of the Motor Vessel Lilian S' Vs Caltex Kenya Limited (1989) KLR 1; Raila Amolo Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 Others [2017] and Independent Electoral and Boundaries Commission & Another Vs Stephen Mutinda Mule & 3 Others [2014]eKLR.**

13. The 1st respondent further submitted that the evidence produced by the appellant was inconsistent with the pleadings. The copy of records point to Stephen Kihoro Thuo being the registered owner of the motor vehicle. The Plaint provides that the 1st respondent was the registered owner of the motor vehicle whereas both the police abstract and the copy of records give a contrary record. It is noteworthy that the appellant, elected to sue the 1st respondent leaving out Stephen Thuo whom he knew was the registered owner of the motor vehicle. According to the respondent, this fact of the death was within the appellant's knowledge before and after filing the suit but he did not seek leave to amend the pleadings.

14. The respondent further submits that ownership cannot be by way of presumptions as submitted by the appellant. Ownership of a motor vehicle can only be proved by producing a search certificate issued by the Registrar of Motor vehicles. In saying so the 1st Respondent relied on the Court of Appeal decisions in **Karauri vs Nchenche (1995-1998) EA 87 and Hermant Kumar Raval vs Jubilee Jumbo Hardware Limited (2016) eKLR.**

15. Additionally, the policy document relied on by the appellant did not show which motor vehicle was being insured and further the same was inadmissible in evidence as the document does not belong to the appellant.

16. The 1st respondent further submits that the 2nd respondent is a non-suited party in these proceedings as he passed on following the injuries sustained in the subject accident.

17. Further, since the 1st respondent did not own motor vehicle KAJ 350L, at the time of the accident, he could not have been its driver as alleged in the plaint. No evidence was tendered by the appellant in form of witnesses to show that the 2nd respondent was an employee or agent or servant or in any way connected with the 1st respondent.

18. The 1st respondent further submits that the appellant's claim for general and special damages have been directed at the wrong party and would therefore not be entitled to such awards against the 1st respondent.

19. Furthermore, the claim for special damages, including the prayer for lost earnings, would not be properly awardable as they are not specifically pleaded and strictly proved as required by law.

20. The 1st respondent submits that an award of Kshs. 500,000/- would have been sufficient for the injuries sustained had the appellant proved his case and as such the learned magistrate did not err in assessing the quantum of damages.

21. The 1st respondent concludes its submissions by making reference to Section 27 of the Civil Procedure Act and submitting that costs follow the event and that in this appeal, the 1st respondent ought to be awarded costs of this suit just as was the case in the lower court case.

Issues for determination

22. The appellant has cited several grounds of appeal which together with the submissions of the parties culminate into three(3) issues for determination as follows:-

a) Whether the appellant proved his case on a balance of probabilities;

b) Whether the appellant is entitled to awards of general and special damages and whether the magistrate erred in assessing inordinately too low quantum of damages.

c) Who between the parties ought to bear the costs of appeal.

The Law

23. Being a first Appeal, the court relies on a number of principles as set out in the case of **Selle and Another Vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

> ***"…..this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."***

24. It was also held in the case of **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

25. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

> ***"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."***

26. Therefore this Court is under a duty to delve into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the Appellant proved his case on a balance of probabilities;

27. This degree of proof is well enunciated in the case **of Miller Vs Minister of Pensions [1947] cited with approval in D.T. Dobie Company (K) Limited Vs Wanyonyi Wafula Chabukati [2014] eKLR.** The court stated:-

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

28. Further, **Section 107 of the Evidence Act Cap 80** places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.

29. On perusal of the Record of Appeal, it is noted that the Plaint indicates that motor vehicle registration number KAJ 350J was the one that was involved in the road traffic accident which occurred on 21/8/1999. The Police Abstract indicates that it was motor vehicle registration number KAJ 350L Rover Discovery whereast the copy of records produced in evidence shows that the motor vehicle registration number KAJ 350L belonged to a 3rd party. The appellant in cross-examination said that the relevant motor vehicle was KAJ 350L. It then follows that the documents and oral testimony of the appellant are inconsistent to the plaint as far as the registration number of the accident motor vehicle is concerned. The 1st respondent in its defence denied ownership of the motor vehicle mentioned in the plaint as having caused the accident.

30. However the appellant during hearing of the appeal stage has explained that this discrepancy was an error and a mis-description of the subject motor vehicle. In my view the explanation cannot cure the pleadings of the appellant which cited the wrong motor vehicle. The appellant's evidence in chief was to the effect that the vehicle registration number KAJ 350J caused the accident in which he was injured. It was during cross-examination that he said that the vehicle was registration number KAJ 350L

31. Parties are bound by their pleadings and therefore the contents of the plaint rightfully bind the appellant. I rely on the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014]eKLR** where it was held:

> **" It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."**

32. To support its contention, the appellant cited the decision of the **Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" the same was published in [1960] Current Legal Problems at p 174 whereof the author had stated:-

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….***
>
> ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."***

33. In **Adetonn Oladeji (NIG) Ltd vs Nigeria Breweries PLC S.C. 91/2002** Judge Pius Aderemi J.S.C expressed himself as follows:-

> ***"…..it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

34. The other judges in the **Adetonn Oladeji(Supra)** case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C rendering himself thus:-

> ***"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avid any surprises by which no opportunity is given to the other party to meet the new situation."***

35. A similar position was taken in the case of **Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR** where the Supreme court held that parties are bound by their pleadings.

36. Applying the above principles from the Supreme Court and the Court of Appeal, in the aforementioned authorities, I am of the considered view that a party is bound by his pleadings. What the appellant pleaded was that the motor vehicle involved in the accident on 21/8/1999 was motor vehicle registration number KAJ 350J. On the contrary, if the appellant was claiming that the motor vehicle was KAJ 350L caused the accident, he ought to have amended his pleadings to reflect the same before the suit was concluded. Contrary to the appellant's contention, this cannot be cured by Section 100 of the Civil Procedure Act or Article 19(2) of the constitution. In my view, the discrepancy is major and not curable except by amendment of pleadings.

37. The appellant also relied on the High court decisions **HCCC No. 39 of 2002** which involved the same accident as evidence in support of his case arguing that the said decision where the High court entered judgement in favour of the plaintiff ought to have been used by the magistrate in this matter so as to determine liability in his favour. I am of the view that each case must be proved on its own facts based on the evidence tendered by the parties. The appellant, therefore could not prove his case using another decided case. Although the appellant produced the judgement of **HCC No. 39 of 2002**, it ought to be appreciated that each case must be proved on its own facts but not with the judgement of another case. To make matters worse, these issues were raised at submission stage and could not save the case of the appellant.

38. The issue of *res judicata* has wrongly been applied in this case by the appellant in that res judicata will be applied in a case that has been decided between the same parties and based on similar facts by a competent court and where the issues in the suit are raised in the subsequent suit. I have no doubt that the appellant did not intend that his case be dismissed, rather his aim was to persuade the court to rule in his favour based on HCC No. 39 of 2002. I find the principle not applicable in this appeal as regards the issue of proof of ownership of the vehicle in question.

39. **Section 8 of the Traffic Act** provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle .This section has been interpreted to mean that the registration of the motor vehicle is not conclusive proof of ownership.

40. Proof of ownership was discussed in the case of **Thuranira Kaururi vs Agnes Mucheche (1997) eKLR** where the Court of Appeal stated:-

> ***"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the Defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."***

41. In this case the 1st respondent in its Defence denied owning motor vehicle registration number KAJ 350J. The police abstract shows that motor vehicle involved in the accident on 21/8/1999 belonged to one Stephen Thuo Kihoro who is not a party to this matter. Further the Copy of Records on motor vehicle KAJ 350L as of 2/11/2011 belonged to Stephen Kihoro Thuo. The date of the copy of records was about two(2) years after the accident. As such the copy of records does not show who owned the vehicle as at 21/8/1999 when the accident occurred. The appellant produced a private car policy which shows that the 1st respondent took out a policy for a motor vehicle KAJ 350L which differs from the registration number in the plaint.

42. Notably, the Appellant on cross examination confirmed that despite the fact that he knew the registered owner as Stephen Thuo, he elected not to include him in the proceedings but decided to sue the 1st Respondent.

43. The appellant further submitted that ownership of a motor vehicle is not a static or rigid concept and could change from time to time. The issue of various ownerships was discussed in the case of **Charles Nyambuto Mageto vs Peter Njuguna Njathi [2013] eKLR** where it was held as follows:-

> **"From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The court recognizes that there are various forms of ownership, that is to say, actual, possesionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract report even, as held in the Thuranira and Mageto cases that the Police Abstract is not, on its own proof of ownership of a motor vehicle. If, however there is other evidence to corroborate the contents of the Police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership."**

44. With various forms of ownership in existence such as actual, possesionary and beneficial, the appellant did not tender any evidence to prove that any of those categories apply to the 1st respondent in respect of the vehicle in question.

45. I am of the considered view that the appellant failed to prove ownership of the vehicle KAJ 350l and also failed to identify which vehicle caused the accident.

46. It is evident that the appellant was aware that the 2nd Defendant in the case before the learned magistrate lost his life due to the injuries sustained in the accident. The Indian case of **C. Muttu vs Bharath Match Works AIR 1964 Kant 293 cited in the case of Viktar Maina Ngunjiri & 4 Others vs A.G & 6 Others [2018] eKLR** was relied on where it was held**.**

> ***"If he (defendant) dies before the suit and a suit is brought against him in the name in which he carries on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summon issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the Defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bonafide and in ignorance of the death of such a person."***

47. In yet another Indian case of **Pratap Chand Melta vs Chrisna Devi Menta AIR 1988 Delhi 267** the court citing another decision observed as follows:-

> ***"….if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person, then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."***

48. The 1st respondent had the option of applying to withdraw the case against the 2nd respondent assuming he learnt of the death after filing the suit. The failure of the appellant to withdraw the case against the deceased or in its entirety with an option to file a fresh suit against the 1st respondent rendered the suit defective. However, this issue was not raised in the lower court.

49. I come to the conclusion that the suit was not proved to the standards required in civil cases and that the learned magistrate's judgement was based on cogent evidence.

Was the quantum of damages inordinately low?

50. The Court of Appeal in **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR,** cited in the case of **Kemfro Africa Limited**

t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia (1982-1988) 1 KAR 727 at p.730 where Kneller JA said:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

51. The Court further makes reference to the case **of Gicheru vs Morton & Another (2005) 2 KLR 333** where the Court stated:-

> ***"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal 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 small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

52. In the case of **Simon Taveta vs Mercy Mutitu Nyeri Civil Appeal 26 of 2013 [2014] eKLR** the Court of Appeal observed thus:-

> ***"The context in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

53. Thus applying the above principles as set out in the Court of Appeal which are binding on this court, the issue that arises for scrutiny herein is whether the award for general damages made by the trial Magistrate were based on the nature and extent of injuries suffered by the appellant and comparable awards made in the past and whether the same was reasonable in the circumstances.

54. On perusal of the record of appeal, it is evident that the appellant sustained injuries as follows:-

a) Head injuries with cerebral concussion to the brain leading to temporary loss of consciousness;

b) Temporary loss of vision with temporary loss of vision of left eye;

c) Fracture of clavicle bone;

d) Multiple fracture of ribs with contusion of the lungs;

e) Soft tissue injuries to right elbow and left hand;

f) Soft tissue injury to the right knee and left ankle joint.

55. It is important to note that permanent disability was assessed at 20%.

56. The appellant relied on several authorities for the assessment of damages. In the case of **Waihiga Kimani vs The Attorney General HCCC No. 193 of 2008,** the plaintiff sustained head injuries with cerebral concussion, scalp and facial wounds, a dislocated right shoulder, fracture of middle right humerus and writ, fracture of right and left femur and injuries to the hip and joints. The court awarded Kshs.1,000,000/-.

57. In **Joseph Musee Mua vs Julius Mbogo Mugi & 3 Others [2013] eKLR** the plaintiff sustained injuries to the left leg, head and face suffered at 5% disability. The court awarded Kshs.1,300,000/.

58. **In Edward Mzamili Katana vs CMC Motors Ltd & Others Nakuru HCCC No. 9 of 2008** the Plaintiff sustained a head injury leading to a concussion, bruise to the scalp, fracture of left scapula, fracture of left elbow and chest injuries with multiple rib fractures. The court awarded Kshs. 2,000,000/-.

59. The 1st Respondent cited the following authorities to guide the court in assessment of damages. In the case of **George Kinyanjui t/a Climax Coaches & Another Vs Hassan Musa Agoi [2016]** where the respondent sustained loss of two teeth, blunt trauma to the neck and chest, fracture of the left clavicle, fractures of the 4th and 5th left ribs, blunt trauma to the spinal column and right scapula area and dislocation of the left shoulder. Kimondo J reduced the award of Kshs. 800,000/- to Kshs. 450,000/- general damages.

60. In **Francis Ochieng and Another Vs Alice Kajima MGR HCCA No. 23 of 2014 [2015] eKLR** the claimant sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjuctual haematoma of the right eye, loss of 5 anterior lower and two upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. The court awarded Kshs. 350,000/-.

61. In **Stephen Muiruri Njenga NRB HCCA No. 689 of 2002 [2008]eKLR** the plaintiff sustained fractures of the 4th and 5th ribs, cuts on the forehead, cut wounds on both legs and fractures and pubic rami. The court awarded Kshs. 100,000/- on appeal.

62. In the instant case, considering the gravity of the injuries suffered by the appellant and in light of the authorities cited above, it is my considered view that the award of Kshs. 500,000/- by the trial court was sound and judicious in the circumstances and was neither

inordinately too high nor too low to warrant this court's interference.

63. **Section 27 of the Civil Procedure Act** provides that costs ordinarily follow the event. In light of the trial court dismissing the claim against the 1st respondent, it follows that the court in its discretion was right in the award of costs to the 1st respondent.

68. In conclusion, I find that the appellant has failed to establish any of the grounds of appeal.

69. Consequently, I find no merit in this appeal and it is hereby dismissed with costs.

70. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 11th day of March 2021.