REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 22 OF 2017

KENJAP MOTORS LTD.....1ST APPELLANT

IAN GITAU.....2ND APPELLANT

-VERSUS-

JAMES KEMOSI NYAIGERO.....RESPONDENT

(Being an appeal against the judgement delivered by Hon P.M. Chesang, SRM

on 3rd February, 2017 in Kangundo PMCC 51 of 2014)

BETWEEN

JAMES KEMOSI NYAIGERO.....PLAINTIFF

-VERSUS-

KENJAP MOTORS LTD.....1ST DEFENDANT

IAN GITAU.....2ND DEFENDANT

JUDGEMENT

1. Vide plaint filed in Kangundo Principal Magistrate's Court in PMCC No. 51 of 2014 by the respondent, the respondent sought General Damages, Special Damages, Costs and Interests. According to the Plaint, on 10th November, 2013, the Respondent was lawfully walking along Kangundo Road opposite Mama Lucy Hospital when the vehicle KBP 902Y registered in the names of the 1st appellant and was being driven by the 2nd appellant veered off the road and knocked the respondent thereby occasioning the respondent severe injuries. Both the special damages and negligence were particularized in the plaint. The respondent also pleaded *res ipsa loquitor* and vicarious liability.

2. In their joint defence, the appellants denied the accident, denied the loss of damages by the respondent, denied the applicability of *res ipsa loquitor* and denied negligence. They pleaded that the accident was caused wholly and or substantially and or contributed by the negligence of the respondent as particularized in paragraph 4 of their joint defence. The appellants averred that the suit was defective and pleaded that they would seek that the same be struck out and they prayed that the suit be dismissed with costs.

3. After hearing the matter, on 3rd February, 2017, the learned trial magistrate returned a verdict in favour of the Respondent in which judgment was entered against the Appellant, wherein the trial magistrate found the appellants 100% jointly and severally liable and awarded General damages of Kshs 1,200,000/-; Special damages of Kshs 2,500/- as pleaded and proved, Future medical expenses of Kshs 150,000/- as well as costs and interests of the suit.

4. The Appellants being dissatisfied with the decision have filed the instant appeal wherein they have taken issue with the award of inordinately high damages and the apportionment of liability. They prayed that the judgement of the lower court on be set aside and that an order be made that the whole judgement awarded was excessively high in the circumstances and that this court proceed to assess the same and that the appellants be awarded costs.

5. Before the trial court, the Respondent relied on his witness statement in which he indicated that on 10th November, 2013 he was walking along Kangundo Road at around 9.00 pm when he was hit from behind by motor vehicle registration no. KBP 902Y. It was his evidence that he was walking on the extreme left of the said road when the said vehicle lost control, veered off the road and hit him. After the said accident, he was taken to Memorial Hospital where he was admitted for approximately 1½ months since he sustained very serious injuries. It was his evidence that he was injured on the leg. He blamed the said vehicle for the accident. He also relied on the documents filed by himself which he exhibited.

6. In cross-examiantuon, he disclosed that he was a businessman selling and buying dry maize for profit. According to him, on the day of the accident, the weather was calm as there was no rain. It was his evidence that he lost consciousness for three hours as a result and was taken to the Hospital by a good Samaritan. In answer to the questions put by him, he stated that he was walking on the road and was waiting for his wife at the stage who had his pick-up but his wife passed because the pick-up was full so he started walking after his wiofe who was about 500 metres away. According to him he was with his labourer who was pulling a handcart. He however added that he was pulling the handcart together with his said labourer. According to him, the handcart was laden with six sacks of cabbage waste meant for feeding animals and had a reflector. It was his evidence that he was doing his business which was thriving.

7. In re-examination, he stated that he was the one puling the handcart besides the road and that by the time he went to the Hospital, he had regained consciousness.

8. After the Respondent testified, the medical report prepared by Dr. Wambugu dated 1st September, 2014 on the instructions of the defence was pproduced as exhibit without calling the maker by consent. The Respondent then closed his case.

9. On behalf of the defence, they called **Ian Gitau** who testified that on 10th November, 2013 he was from the office at Adams Arcade and when he reached Mama Lucy Hospitals, it started drizzling. He then noticed a handcart which had no reflectors on the road. He was however unable to avoid it and hit it on the right wheel. According to him, the handcart was on the road because there was water on the walkway. It was his evidence that ordinarily a handcart is not supposed to be on the road after 6.00 O'clock and if it is to be on the road then it has to have reflectors. It was his testimony that the distance between when he saw the handcart and where he was was s small and had he avoided it, he would have collided with oncoming vehicles. It was his evidence that the Respondent's wife was also at the scene and had taken a slight deviation in order to avoid stepping on the road. They however did not disclose to him, where their business was located. To him there was no pick up around and what was being transported by the Respondent were vegetable waste. He therefore blamed the Respondent for the accident for being on the road without reflectors.

10. In cross-examination, he stated that he had his lights on and that he noticed the handcart which was in the middle of the road on one lane but its width was the same as that of a car. He stated that had the handcart had lights, he would have been warned to stop. He insisted that there were oncoming vehicles.

11. In the Appellants'' submissions this court was reminded of its duty as first appellate court. Learned counsel pointed out to court that it was not in doubt that the respondent's injuries were as a result of him being hit when he was pulling a handcart that was on the road**.** Counsel directed the court to page 67 of the record of appeal where the respondent testified that he was pulling a handcart and that the car hit the handcart and not him; further that the 2nd appellant testified that the car hit the handcart after noticing the same within a very close range at night and more specifically after 9 p.m. According to counsel, the trial magistrate in dismissing the evidence of DW1 was a misdirection for the record was quite clear that the accident occurred on the road and not off the road. It was therefore counsel's argument that under the traffic rules, non-motorized vehicles including handcarts were not permitted on a public road past 6 p.m. The Court was invited to consider the court of appeal case of **Michael Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR** where the following passage by **Lord Reid** from the case of **Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681** was cited:

> **"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."**

12. Learned counsel urged the court to find that there was no basis for the trial court to apportion liability against the defendants jointly and severally at 100%. Counsel directed this court to its submissions in the trial court on liability as well as on quantum and reiterated that the amount awarded by the trial court was excessive considering the injuries suffered by the respondent.

13. In reply, learned counsel for the respondent submitted that the issue for determination was whether the trial court applied the correct principles of law in finding the appellants 100% liable and in assessment on general damages payable to the respondent. On the award of general damages of Kshs 1,200,000/- by the trial court, counsel submitted that as per the medical report of **Dr Cyprianus Okoth Okere** that the respondent's counsel used as the basis to seek compensation of Kshs 2,000,000/-, the respondent suffered the following injuries; bruises on both hands, fracture of the left femur and fractures of the right 7th and 8th ribs.

14. It was counsel's argument that the above injuries were corroborated by the medical report of **Dr P.M. Wambugu** who added that the respondent walked with the left sided limping joint and that the respondent was predisposed to early onset of osteoarthritic changes right hip joint(sic). Learned counsel in agreeing with the finding of the trial court on the award of Kshs 1.2m/- as general damages placed reliance on the court of appeal case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR** where it was observed that;

> **"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 entirely 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages. See Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014] eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5."**

15. It was counsel's strong argument that the respondent testified and produced documents in support of his claim whereas the appellant's called 1 witness who testified as the driver of the suit vehicle as at the time of the accident. According to counsel, the evidence on record supported the fact that the trial court did not err in finding the appellants 100% liable for the following reasons; Firstly, that the occurrence of the accident was undisputed; Secondly that it was undisputed the respondent was knocked from behind by the suit vehicle; Thirdly that the appellant's witness admitted that he saw the respondent before the accident happened; Fourthly that Dw1 testified that he was driving at 40 Kph and finally that Dw1 testified that he had his headlights on hence could see motorists ahead of him but it was out of negligence that he permitted the suit vehicle to knock the plaintiff.

16. Learned counsel submitted that the respondent proved its case on a balance of probabilities and urged the court to dismiss the appeal.

17. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

> **"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong ...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."**

Determination

18. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle –vs- Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

19. In **Coghlan vs. Cumberland (1898) 1 Ch. 704**, the Court of Appeal (of England) stated as follows -

> **"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."**

20. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present 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.

21. However, in **Peters –vs- Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other**

tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given… Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question….it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

22. It was therefore held by the Court of Appeal in **Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. In this appeal, it is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities and if so what ought to have been the quantum of damages. That the burden of proof was on the appellant to prove his case is in doubt. Section 107 (1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

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

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

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

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

25. The two provisions were dealt with in **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

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

26. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

27. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

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

28. I agree that the Court of Appeal's position in **Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR** espouses the correct legal position that:

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

side."

29. The question then is what amounts to proof on a balance of probabilities**. Kimaru, J** in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

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

30. Similarly, **Lord Nicholls** of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> **"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."**

31. In **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

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

32. In his case, it is clear that in his statement which he adopted as his evidence in chief, the Respondent never mentioned that he was pulling a handcart as he admitted later on when confronted in cross-examination. In cross-examination he stated that he was on the road contrary to the contents of his statement. The learned trial magistrate in a rather brief judgement did not deal with the discrepancies between the Respondent's statement and what he stated in cross-examination. Had she done so, I am not certain that she would have arrived at the same decision regarding liability. In **Peter Ochieng vs. Amalgamated Sawmills Ltd Nakuru HCCA No. 22 of 2001 [2005] 1 KLR 151, Musinga, J** (as he then was) expressed himself as hereunder:

> **"The trial Magistrate by not setting out points for determination and reasons for his decision contrary to Order 20 Rule 4 abdicated his judicial responsibility as a judicial officer is under a duty to state in writing the reasons which made him arrive at a particular decision and any judgement that does not contain the essential ingredients of a Judgement as required under Order 20 Rule 4 is not a Judgement and an appellate court will frown at such a Judgement and would most likely set it aside as an aggrieved party who has a right of appeal would be disadvantaged by such a Judgement if he chose to appeal."**

33. That notwithstanding, this Court being a first appellate court has a duty to scrutinize the evidence, re-evaluate the same and arrive at its own decision taking into account the caution set out hereinabove. In this case the Respondent was clearly on the road way past the hour when he would have been lawfully on the road. While he stated that his handcart had reflectors, it is clear that he was unlawfully pulling his handcart on the road at 9.00PM. On the other hand, had the driver of the vehicle in question been driving at 40km/hr nothing would have stopped him from stopping in good time to avoid the accident. The evidence was that the 1st Respondent rammed into a stationary lorry and it was his act that occasioned injury to the Appellant. He did not dispute this. In **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,** it was held that:

> **"Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."**

34. In that case the court further found that:

> **"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ..... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the**

experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."

35. That was the position in **Tart vs. Chitty and Co. (1931) ALL ER Pages 828 – 829** where **Rowlat, J** had this to say:

"It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it."

36. In **Karisa and Another vs. Solanki and Another [1969] EA 318** it was held that:

"The car driver, driving at a speed of about 65mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that aped in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case... We are not satisfied that the car driver could not and should not as a reasonable careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather that run straight into the stationary lorry.... Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently, the car driver found to have contributed to the accident to the extent of 20 per cent."

37. In those circumstances, it is my view that the learned trial magistrate ought to have found the Appellants only 50% liable.

38. As regards the award of general damages, the medical report of **Dr. Cyprianus Okoth** revealed fractures of the left femur and the right 7th and 8th ribs and bruises on both hands. **Dr Wambugu's** medical report revealed fractures of the left femur and the right 7th and 8th ribs.

39. In **Woodruff vs. Dupont [1964] EA 404** 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 case 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 reasonable 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."

40. Considering the award in **Charles Mathenge Wahome vs. Marck Mboya Likanga & 2 Others [2011] eKLR**, it is my view that the award made by the learned trial magistrate cannot be termed to have been manifestly excessive as to warrant interference.

41. The Respondent was also awarded cost of future medical expenses. 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.**

42. 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."

43. 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."

44. In this case the claim for future medical expenses was not pleaded. Accordingly, the same was not awardable.

45. Accordingly, I allow the appeal, set aside the judgement of the trial court and substitute therefor the following:

a) Judgement for the Respondent against the appellants on liability at 50%.

b) General damages for pain and suffering- Kshs. 1,200,000/=

c) Special damages- Kshs. 2,500/=

Total- Kshs. 1,202,500/=

46. Less 50% leaves the balance of Kshs 601,250.00. I also award interest at court rates in respect of the general damages from the date of judgement in the lower court till payment in full while special damages will attract interest at the same rate from the date of filing suit till payment in full.

47. While the costs in the lower court are awarded to the Respondent, there will be no order as to the costs of this appeal

48. Judgement accordingly.

Read, signed and delivered in open court at Machakos this 21st day of July, 2020.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Macharia for the Appellant

Mr Kamanda for Mr Mbiti for the Respondent

CA Geoffrey