



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 43 OF 2015**

**BONIFACE NZIOKA MALUNDU.....APPELLANT**

**VERSUS**

**JEREMIAH KARIUKI MWANIKI.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The respondent herein was the plaintiff in the trial court and the appellant was the defendant. The respondent by way of plaint filed in the trial court on 16/01/2015 initiated a claim against the appellant which claim was based on tort of negligence arising out of a road traffic accident which occurred on 16/10/2012 involving the appellant's motor vehicle and wherein the respondent sustained physical injuries and suffered pain, loss and damage.

2. The appellant filed statement of defence denying any acts of negligence on his part in respect of the injuries and blamed the Respondent herein for contributory negligence.

3. On 3/08/2015, the parties herein recorded consent where liability was apportioned at 15%:85% in favour of the Respondent herein. In his judgment delivered on 5.10.2015, the trial court (Hon. M.N. Gicheru - C.M) awarded the respondent herein a sum of Kshs 4,720,934.85/- that was made up as follows: -

- Special damages of - Kshs. 345,989.49
- Special damages directly to AIC Kijabe Hospital –

Kshs. 1,548,052.18

- General damages for pain, suffering and loss of amenities- Kshs. 1,500,000/=
- Loss of amenities- covered in (c) above
- Loss of earning capacity

Kshs. 9,000/= (minimum wage) x12 X 20 years = 2,160,000/=

- TOTAL Kshs. 5,554,041/=
- Less 15% - **Kshs. 4,720,934.85/=**

The Respondent was awarded costs of the suit at the same ratio as the liability and interest at the court's rate.

4. Being dissatisfied with the Judgment of the said Learned trial Magistrate, the appellant instituted the instant appeal vide the Memorandum of Appeal dated 16/10/2015 and which appeal is premised on the grounds that: -

*1) The Learned trial Magistrate erred in law and in fact by awarding Kshs. 1,548,052.18 for special damages for medical expenses incurred in Kijabe Hospital when the same was not specifically pleaded or proved.*

*2) The Learned trial Magistrate erred in law and in fact by awarding an inordinately high amount for general damages for pain, suffering and loss of amenities without considering the medical reports produced in court, evidence adduced during hearing and award in cases involving similar injuries.*

3) *The Learned trial Magistrate erred in law and in fact by erroneously adopting Kshs. 9,000/= as a multiplicand and 20 years as multiplier in computing damages for loss of earning capacity contrary to the evidence adduced in court and without proof as to the earnings of the respondent.*

5. The appeal was canvassed by way of written submissions wherein the appellant submitted in support of the above grounds of appeal. The Respondent in his submissions sought for dismissal of the appeal and the trial court's judgment to be upheld.

## **B. Issues for determination**

6. The role of this court (first appellate court) is well settled and the said role is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). In **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs. Dancun Mwangi Wambugu [1982-88] KAR 278** a principle was laid that a court on appeal will not normally interfere with a finding on fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles.

7. As I have indicated hereinabove, the instant appeal is on award of general and special damages by the trial court. The issues which this court is invited to decide upon are: -

i. *Whether the trial court erred in awarding the special damages.*

ii. *Whether the trial court erred in assessing the general damages.*

## **C. Determination of the issues**

### **I. Whether the trial court erred in awarding the special damages**

8. The appellant raised a ground to the effect that the learned trial Magistrate erred in law and in fact by awarding Kshs. 1,548,052.18 for special damages for medical expenses incurred in Kijabe Hospital when the same was not specifically pleaded or proved.

9. The Appellant in support of this ground submitted that special damages must be specifically pleaded and strictly proved. Reliance was made on **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR** and the appellant proceeded to submit that medical expenses incurred by the Respondent at Kijabe Hospital were special damages which ought to have been specifically pleaded and strictly proved but which was not the case before the trial court (as what was pleaded (as special damages) was only Kshs. 809,500/= and "future treatment expenses to be adduced at the hearing of". It was submitted that the said Kshs. 1,548,052.18 was not pleaded and that the same could not be left for speculation. That the invoices were issued in 2013 and 2014 and ought to have been included in the pleadings. The said amount was from invoices not paid for and no receipts were issued.

10. The respondent submitted that he could not plead for them yet he had not paid for the same. But since it will be paid, it should be awarded since it arose out of the negligence by Appellant. Reliance was made on **Thomas Kabaya Ngaaruiya & 2 others -vs- David Chepsisor (2012) eKLR** and **Cosmo Plastics Ltd -vs- Stephen Kiamba Nzuva (2007) eKLR** where the courts ordered payment of medical bills to hospitals.

11. I have perused the trial court's records. The respondent herein pleaded the particulars of special damages as follows (paragraph 5); -

- *Medical report charges- Kshs. 3,000/=*
- *Doctor's court attendance fees- 3,500/=*
- *Treatment and transport expenses- Kshs. 8000,000/=*
- *Expenses incurred to attend 2<sup>nd</sup> Medical – Kshs. 3,000/=*
- *Future treatment expenses to be adduced at the hearing*

He thus prayed for special damages aforesaid.

12. As I have already stated, the appellant challenged the award of Kshs. 1,548,052.18 for special damages for medical expenses incurred in Kijabe Hospital. This means that there was no appeal on the special damages to the Plaintiff being Kshs. 345,989.49.

13. At the hearing of the case before the trial court, the respondent herein testified that he spent over Kshs. 800,000/= and that was what the invoices and receipts showed. The relevant documents he produced are: -

- i. Invoice No. 133715 for 548,611.78
- ii. Invoice No. 136699 for Kshs. 127, 168.23
- iii. Invoice No. 139292 for Kshs. 181,010.29
- iv. Invoice No. 143501 for Kshs. 270,249.28

14. The total amount in the invoice is Kshs. 1,127,039.58. The above invoices were annexed to the plaint at the time of filing the suit. In my opinion, it means that the amount indicated therein and the sum total of the same (Kshs. 1,127,039.58) is the amount which the Respondent owed to the Hospital as medical bill (as at the date of filing the suit).

15. I note that the said invoices indicate the amount paid by the respondent herein and also the amount paid by NHIF. Out of the said amount, the invoices indicate that NHIF paid Kshs. 228,000/=. The respondent at the hearing of the suit testified that he paid a total of Kshs. 183,390/= and which evidence was not controverted. This amount was proved by way of receipts produced before the trial court. The said amount in my opinion formed part of the special damages which was awarded to the respondent herein. It is my opinion therefore that out of the pleaded special damages (in paragraph 5 of the plaint) the respondent was able to prove strictly the amount which was awarded by the trial court as special damages and which amount is not challenged. It is my opinion that the appellant's submissions that the said special damages were never pleaded and proved are unfounded.

16. As I have noted above, the total amount in the invoice is Kshs. 1,127,039.58 and out of which amount, NHIF paid Kshs. 228,000/= and the respondent paid a further amount totaling to Kshs. 183,390/=. It therefore means that the balance which was owed to the hospital as at the date of filing of the suit was Kshs. 715, 649.50. As such, the same is the amount which the trial court ought to have awarded as special damages to Kijabe Hospital. The court in my opinion erred in finding that the hospital was owed Kshs. 1,548,052.18 and hence awarding the said hospital Kshs. 1,548,052.18 as special damages.

17. The appellant in his submissions submitted that the amount of Kshs. 1,548,052.80 arose from various invoices from Kijabe Hospital which had not been paid and no receipts issued and as such the same did not meet the test of specifically proved special damages. Reliance was made on **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR**. The question which then needs to be answered is whether the said amount needs to be paid to the hospital as special damages.

18. As I have already opined, the respondent had pleaded special damages and which included medical expenses. In the course of trial, the respondent tendered invoice in court and which production the appellant never objected to. What these invoices mean is that the respondent herein had already spent the amount therein in the course of treatment. The said treatment was as a result of the injuries which he suffered due to the accident and which was caused by negligence on the part of the appellant (liability was admitted and apportioned). It is my opinion that in that case, the said invoices can be taken as evidence of an expense on the part of the respondent.

19. The invoices in my opinion were sufficient prove that services were rendered to the respondent and which needs to be paid for. The amount in the said invoices was never disputed by the appellant and neither was the fact that the respondent owed the said amount to the Hospital. There is also uncontroverted evidence that there is a title which was placed as security for the said balance. In my opinion the respondent proved that there was a debt owed to the Hospital and which debt the appellant was ordered to pay not to the respondent but to the hospital (creditor). If it was to be paid to him directly, it is my opinion that that would have been the instance when prove of payment for the same was required.

20. The instant case can be distinguished from **Christine Mwigina Akonya v Samuel Kairu Chege (supra)** in the sense that the respondent herein was not awarded the said amount and which would have required him to prove that he paid for the same. What happened in the instant case is that the trial court ordered payment (by the appellant and to the hospital) an amount which the respondent would have paid and then proceeded to claim from the appellant. It would beat logic to have him prove what he had not paid. In **Cosmo Plastics Ltd –vs- Stephen Kiamba Nzuya (2007) eKLR**, the award by the trial court, of Kshs. 217,500/= for special damages of which Kshs. 213,000/= was to be paid directly to Kenyatta National Hospital against the hospital bills incurred at the hospital for treatment of the respondent was upheld by the Court of Appeal. In **Thomas Kabaya Ngaaruiya & 2 others –vs- David Chepsisor (2012) eKLR**, M. K. Ibrahim J (as he then was) in determining on award of special damages allowed by the trial court held as this: -

***“.....The case of the respondent was that he was liable to pay the debt. Was the debt a special damage claim? This I think is the question of concern to the appellant. Special damages are so called because they are not the direct natural or probable consequences 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 acts themselves. (Ratcliffe V Evans (1892) 2 QB 524. No case was cited to me to the effect that proof of special damage necessary means payment. It has been understood that special damages connote out of pocket expenses. The argument goes that it must be an expense where money has been paid to constitute special damages. I think this would be taking the construction of the term special damages to far. The respondent produced a document showing that he owes Moi Teaching Referral hospital Kshs. 266,000/=. I do not find the argument that the sum of Kshs. 266,000/= must have been paid first before the respondent could sue to be amenable to common sense and principles of justice. The appellants had caused injury to the respondent. They do not pay his bills. He is unable to pay and is released on a guarantee that he still owes the hospital Kshs. 266,000. When the appellants are sued can they successfully resist the claim on the basis that the respondent had not paid. I do not think that payment is a conditional precedent to claiming special damages. As long as they are pleaded and proof is provided they are recoverable. I do not read the Court of Appeal authorities cited as advancing the proposition that special damages cannot be recovered unless the claimant has first paid. I therefore find the ground on special damages of Kshs. 266,000/= to be without merit in the circumstances of this case.”***

21. I am persuaded by the above authority in that respect. In my opinion, the medical expenses owed by the respondent did not require prove by way of receipts in the circumstances of this case.

22. The appellant submitted that the trial court erred in awarding damages which were speculative and which amounted to award of special damages in relation to future medical expenses. I have perused the trial court's judgment and in my opinion, there were no special damages awarded to the Respondent. The award to the Hospital was not on future medical expenses but on what had been offered already. The special damages awarded to the Respondent personally further were not in relation to future medical expense. As such, it is my opinion that submissions in that respect were misguided.

## **ii. Whether the trial court erred in assessing the general damages**

23. The principles upon which an appellate court can disturb assessment of damages by the trial court were set out by the Court of Appeal for East Africa, and subsequently adopted by the Court of Appeal, and restated and applied in Gitobu Imanyara & 2 others v Attorney-General [2016] eKLR, where the court of Appeal cited the case of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. AM Lubia and Olive Lubia (1982 –88) 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 that 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 damage. See Ilango vs. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd vs. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles.’*

24. The Court further made reference to the case of Gicheru Vs Morton & Another [2005] 2 KLR 333 where it was stated: -

*‘In order to justify reversing the trial judge’s finding 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.’*

(See Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR).

25. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 in setting out the circumstances under which an appellate court can interfere with an award of damages held that: -

**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. Further, that 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. (See also Gicheru vs. Morton and Another (2005) 2 KLR 333).**

26. The burden is thus on the appellant to satisfy the appellate court as to the above.

27. Bearing this in mind, I will then proceed to examine damages awarded in each of the limbs so as to determine whether each of the same ought to be disturbed. I will do this bearing in mind the difficulties that confront a court in assessment of general damages in the context of personal injuries claims as were appreciated by the court in Ugenya Bus Service V Gachiki (1976-1985) EA 575, at page 579

*‘General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.’*

28. In Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR, D.S Majanja J expressed himself as such: -

*“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”*

29. The trial court awarded Kshs. 1,500,000/= as general damages for pain, suffering and loss of amenities. I have perused the trial court records and more so the medical reports produced therein. I have further considered the evidence by the parties before the trial court. It is not in dispute that the respondent was admitted to hospital for long. The nature of the injuries sustained by the respondent cannot be washed away. The medical report by Dr. P.M Wambugu opined that the respondent sustained skeletal and soft tissues injuries which occasioned him pain and prolonged morbidity. He opined that the fractures were complicated by bone infection and bone loss and had undergone several surgical procedures. There was another report by Dr. Njiru G.N. Both reports indicate that the respondent herein suffered compound fracture on right tibia and fibula, lacerations/abrasions on the forehead, right hand and left wrist and extensive soft tissue and loss right leg. Both reports were produced in court. The respondent underwent other surgical procedures including bone transplant and skin grafting.

30. The appellant submitted that the award was excessive and invited this court to review the same to Kshs. 600,000/-. Reliance was made on Civicon Limited –vs- Richard Njomo Omwancha & 2 others (2019) eKLR, Jitan Nagra –vs- Abednego Nyandusi Oigo (2018) eKLR and Godfrey Wamalwa Wamba & another–vs- Kyalo Wambua (2018) eKLR. The respondent relied on the authority by Dulu J in Joseph Musee Muia –vs- Julius Mbogo Mugi & 3 others (2013) eKLR to justify the award by the trial court (of Kshs. 1,500,000/=).

31. I have considered the authorities cited with regard to the awards of general damages for pain and suffering and loss of amenities. Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive. They must be within limits set out by decided cases and also within limits the Kenyan economy can afford. (See Osman Mohammed & Ano. –vs- Saluro Bundit Mohammed Civil Appeal No. 30 of 1997).

32. The authorities relied on by the appellant herein related to award of damages for injuries not comparable to the ones sustained by the respondent. For instance, in **Civicon Limited –vs- Richard Njomo Omwancha & 2 others (supra)**, the court observed that the 2<sup>nd</sup> respondent sustained a single fracture of the tibia and fibula and dislocation of the hip joint. The fracture was treated by POP. The court differentiated the said injuries with injuries in other authorities cited in the said appeal.

33. On the other hand, the court in **Joseph Musee Muia –vs- Julius Mbogo Mugi & 3 others (supra)** which the appellant relied on, the court held thus: -

*‘The present injuries were serious and the plaintiff had to be hospitalised at Thika District hospital for a long period and had to undergo a number of specialised surgeries, especially regarding the broken bone injury in the left leg. No two cases can be similar. Decided cases are merely a guide. Taking all the factors in the present case into account, I am of the view that though the plaintiff’s advocate asked for Kshs. 2,500,000/= shillings as general damages for pain and suffering and loss of amenities, that figure is on the higher side..... In the present case the disability has been assessed at 5 %. I am of the view that an award of Kshs. 1,300,000/= as general damages in the present case for pain and suffering will be adequate compensation. I so award.’*

34. The two medical reports on record indicate a disability of 80% and 35%. Considering this, it is my opinion that the trial court did not err in awarding Kshs. 1,500,000/= as general damages for pain, suffering and loss of amenities. It is my opinion that the award by the trial court under this limb was justified and sufficient. The same ought not to be disturbed.

35. The appellant raised a ground to the effect that the Learned Trial Magistrate erred in law and in fact by erroneously adopting Kshs. 9,000/= as a multiplicand and 20 years as multiplier in computing damages for loss of earning capacity contrary to the evidence adduced in court and without proof as to the earnings of the respondent.

36. In his submissions, it was submitted that loss of future earnings and loss of future earning capacity were separate and distinct and that loss of future earnings is a special damage claim which must be specifically pleaded and strictly proved while loss of earning capacity can be classified as general damages and which have to be proved on a balance of probabilities. Reliance was made on **SJ –vs- Francesco De Nello & Another (2015) eKLR, Cecilia W. Mwangi & another –vs- Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 (1997) eKLR** and **Douglas Kalafa Ombeva –vs- David Ngama (2013) eKLR** which were all cited with approval in **Kenblest Kenya Limited –vs- Musyoka Kitema (2020) eKLR** in that respect. It was submitted that the respondent did not prove (in the trial court) to the balance of probabilities that he was a miraa trader and making Kshs. 1,000/= per day and no evidence was tendered in that respect and to prove the said earnings and to prove that as a result of the said injuries, he was exposed to losing the work which he was engaged in, prior to the accident or that the chances of getting an alternative job were slim.

37. It was thus submitted that award of general damages for loss of future earning capacity was not applicable. It was submitted in alternative that if this court was to find that the respondent deserves damages for loss of future earning capacity, then the court ought to apply the minimum wage applicable for general labourer in the year 2012 for a party based in Embu in 2012 and which was Kshs.4,577.20 instead of Kshs. 9,000/= as was applied by the trial court. Further, that the respondent did not suffer permanent disability and invited the court to use 35% as was assessed by Dr. Wambugu. As such, he will most probably look for alternative work and was not to remain a miraa broker for the rest of his life. The court was invited to apply a multiplier of 10 years. As such, the damages to be awarded were suggested to be Kshs. 549,264/= calculated as follows: - Kshs. 4,577.20 x 12 x 10.

38. The respondent submitted that he tendered evidence to the effect that he earned Kshs. 1,000/= per day but the trial court used Kshs. 9,000/= per month and the appellant did not give reasons as to why the same ought to be reviewed downward.

39. The trial court in its judgment held that: -

*“Firstly, I find that the plaintiff was aged 23 at the time of the accident and his evidence that he was a miraa trader is not controverted by any evidence to the contrary by the defendant. Secondly, I find that he suffered a severe injury that has not completely healed almost three (3) years after the accident. Thirdly, I find that he incurred huge medical bills especially at Kijabe which have been proved by receipts and invoices. Fourthly, I find that the plaintiff suffered loss of earning capacity and this being a general damages claim need not to be proved specifically pleaded to be awarded. See Mumia Sugar Company –vs- Francis Wanalo C.A 91/2003. The fact that the plaintiff is on crutches and has a delicate right limb predisposed to refracture means that he cannot do the work that he used to do before and since that work is manual, he has a diminished capacity to work. It is noteworthy that the plaintiff suffered the injuries at the tender and prime age of 23 years which means that he will be crippled for most of his life. Given his young age, it may also mean that he will be able to recover his handicap. Dr. Wambugu in his report of 15/7/14 is clear that the plaintiff is unlikely to ever fully exert himself using the right leg and assessed his permanent incapacity at 35%.....”*

40. In **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR**, which the trial court cited with approval, the Court of Appeal held as thus: -

*“From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future (emphasis mine). Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial*

***depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”***

41. It is my opinion that the trial court properly applied the legal principles and exercised its discretion over the matter in determining the multiplier of twenty years. The trial court indeed considered the relevant factors being the age, level of incapacity as assessed by the doctor and the ability to seek alternative opportunities in future. The said multiplier ought not to be interfered with.

42. From the evidence on record, the Respondent was a miraa trader. He testified that he used to earn Kshs. 1,000/= per day. That would have translated to Kshs. 30,000/= per month on average. However, as it was well submitted, the same was not proved as there is no evidence as to the earning of the said amount by the respondent.

43. It is settled law that where the amount a person has been earning is not proved, the courts ought to apply the basic minimum wages applicable as at the time of the accident.

44. The Appellants prayed that the court do use the multiplicand of Kshs. 4,577.20 being the minimum wages payable as at 2012 (the time of the accident). Though there was no evidence attached to prove this, it is trite law that a court can take judicial notice of a provision in law/legislation. Minimum wages are always gazetted after review.

45. As per Regulation of Wages (General) (Amendment) Order, 2011 (L.N. No. 64) which commenced as from 1/05/2011, the minimum wages for general labourer in places such as where the respondent was, was set at Kshs. 4,047.00/=. The Regulation of Wages (General), (Amendment) Order, 2012 (L.N. No. 71) which came into operation on 1/05/2012 sets the minimum wages at Kshs. 4,577.20. The accident herein occurred on 16/10/2012. As such, the minimum wages ought to be Kshs. 4,577.20.

46. It is my opinion that the trial court applied the wrong principles of law *and left out of account a relevant factor (as to the amount applicable as multiplicand)*. As such the said award ought to be disturbed for that reason and be substituted with an award of Kshs. 1,098,528.00 made up as follows: - 4,577 x 20 x12.

47. Taking all the above into consideration, it is my opinion that the trial court did not err in awarding Kshs. 1,500,000/= as general damages for pain, suffering and loss of amenities. The said award was justified and sufficient and ought not to be disturbed. However, it is my opinion that the trial court applied the wrong multiplicand as it ought to have applied the minimum wages. However, the court applied the correct number of years. As such, the general damages for loss of earning capacity ought to be disturbed by substituting the Kshs. 9,000/= being the multiplicand which was applied by the trial court with Kshs. 4,577.20, the minimum wages obtaining at the material time. This makes the computation of the general damages under that limb Kshs. 1,098,528.00/= made up as follows: - 4,577.20 x12x20.

#### **D. Conclusion**

48. It is my opinion therefore that the appeal partly succeeds. The award by the trial court ought to be set aside and in its place, the following award be made: -

***a) Special damages to the Plaintiff - Kshs. 345,989.49***

***b) Special damages directly to AIC Kijabe Hospital - Kshs. 715, 649.50***

***c) General damages for pain, suffering and loss of amenities - Kshs. 1,500,000/=***

***d) Loss of earning capacity***

***Kshs. 4,577.20 (minimum wage) x12 X 20 years - Kshs. 1,098,528.00/=***

***TOTAL = Kshs. 3,660,164.99***

***e) Less 15% (Kshs. 549,024.75) = Kshs. 3,111,139.25***

49. Each party to bear its own costs of the appeal.

50. It is so ordered.

**Delivered, dated and signed at Embu this 2<sup>nd</sup> day of December, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent