



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ombati v Mainda & another (Civil Appeal E153 of 2024)  
[2025] KEHC 15491 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15491 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E153 OF 2024  
DKN MAGARE, J  
OCTOBER 27, 2025**

**BETWEEN**

**NAFTAL ONCHONGA OMBATI ..... APPELLANT**

**AND**

**JOHN ABUGA MAINDA ..... 1<sup>ST</sup> RESPONDENT**

**C MOTORS GROUP LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment of Hon. B.O. Omwansa (SPM)  
delivered on 13.08.2024 in Kisii CMCC No. E795 of 2022.)*

**JUDGMENT**

1. This is an appeal from the judgment of Hon. B.O. Omwansa (SPM) delivered on 13.08.2024 in Kisii CMCC No. E795 of 2022. The Appellant was the plaintiff in the lower court.
2. The Appellant is said to have suffered the following injuries:
  - a. Right tibia plateau fracture
  - b. Right fibula fracture
  - c. Bruises on the right elbow
  - d. Blunt trauma to the back
  - e. Blunt trauma to the right parietal region of the head
  - f. Chest contusion
3. Upon hearing the parties, the court delivered its judgment as follows:
  - a. The Respondent was held 100% liable



- b. General damages of Kshs. 250,000/=
  - c. Special damages of Kshs. 7,050/=
  - d. Costs and interests of the suit
4. The Appellant filed this appeal vide a Memorandum of Appeal dated 19.08.2024 and set forth the following grounds:
- a. That the learned magistrate grossly misdirected himself in treating the evidence and submission on quantum before him superficially and consequently coming to a wrong conclusion on the same.
  - b. That the learned magistrate grossly misdirected himself in ignoring the principal (sic) application in awarding quantum of damages and relevant authorities cited in written submissions presented by the appellant.
  - c. That the learned magistrate proceeded on wrong principles when assessing damages to be awarded to the appellant and failed to apply precedents and tenets of law applicable.
  - d. That the learned magistrate erred in law in awarding a sum on respect of damages which was so inordinately low in the circumstances that it represented an entirely erroneous estimate vis-à-vis the appellant's claim.
  - e. That the learned magistrate failed to apply himself judicially and adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unstustainable in law (sic).
5. The appeal is thus entirely on quantum. The appellant sought the following:
- a. Reassessment of general damages of Ksh. 250,000/=
  - b. Award of Ksh. 350,000/= as medical expenses that was pleaded and proved.
  - c. Costs.
6. The appeal is a bit difficult to understand due to a confused nomenclature where the cost of future medical expenses is pleaded but submissions deal with other issues. There is also the question of principal assessment of damages (sic) and principles of assessment of damages. The court had to re-interpret the most proximate meaning of the grounds. The appellant is pleaded to have suffered 20% disability.

## **Evidence**

7. Given that the appeal is on quantum, it is unnecessary to proceed on the evidence of all witnesses. Only medical evidence and related evidence will be dealt with. The appellant in his statement set forth the injuries set out in the plaint. The P3 showed the said injuries. Degree of injury was classified as grievous harm. There was tenderness to the right parietal swelling, chest and back tenderness and right lower limb above the knee, and had a POP in place. The X-ray films showed right tibia plateau fracture and right fibula fracture.
8. Dr. Morebu prepared a report dated 26.09.2022. He stated that the appellant was treated at Oresi sub-county hospital. The good doctor concluded that there was a need for corrective surgery to include implants at a cost of Ksh. 350,000/=. He assigned 20% permanent disability.



## Submissions

9. They relied on the case of *Mwangi v Siloma & another* (Civil Appeal E102 of 2022) [2023] KEHC 26140 (KLR) (27 November 2023) (Interim Judgment). They also relied on the case of *Mwaura Muiruri v Suera Flowers Limited & another* [2014] eKLR, *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR, and *Kiwanjani Hardware Ltd & another V Nicholas Mule Mutinda* [2008] eKLR. It was their submissions, as they submitted in the lower court, that a sum of Ksh. 750,000/= will suffice.
10. The Respondent took a diametrically opposite direction in the appeal. They stated that the amount awarded was sufficient. Reliance was placed on several authorities to persuade the court on the duty of the first appellate court on damages. In the case of *Catholic Diocese of Kisumu v Tete* [2004] KECA 154 (KLR), the court of appeal posited as follows:

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles,

As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.

11. In *Meya Agri Traders Ltd v Elgon House (2010) Ltd* (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) (Judgment), the court stated as follows:

This Court is alive to the principle that as an appellate court, our interference with the exercise of judicial discretion is limited. For our intervention to be granted, we must be satisfied either that the lower court misdirected itself in some matter hence arrived at a wrong decision or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that as a result there has been miscarriage of justice. This Court reiterated these principles in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR where it was stated:

Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93.

12. They relied on the case of *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] KEHC 4447 (KLR), where the court, SN Riechi, J reiterated on the principles for award of damages. Further reliance was placed on the case of *Mohamed Mahmoud Jabane V Highstone Butty Tongoi Olenja* [1986] KECA 71 (KLR), where the court of appeal sitting at Kisumu [Kneller, Hancox and Nyarangi, JJ A] considered the duty of an appellate court and in earlier decisions in *utt v Khan* CA Civil Appeal 40 of 1977; *Southern Engineering Company Limited v Musingi Mutia*, C A Civil Appeal 46 of 1983, Nairobi; *Idi Ayub Omari Shabani & Yusuf Juma v City Council of Nairobi & Daniel Nachela Kahungu*, CA Civil Appeal 52 of 1984 Hancox and Nyarangi, JJ A and Platt, Ag JA.



13. They submitted that should the court arrive at a different finding, a sum between 300,000/= to 800,000/= is sufficient. Reliance was placed in the case of *Kiama v Mutiso* [2024] KEHC 5135 (KLR), where D.A.S. Majanja, set aside the award of Kshs. 700,000.00/= awarded as general damages and substitute it with an award of Kshs 400,000.00/= for a claimant who suffered a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries.
14. Further reliance was on the case of *Mikua v Nthiga* (Civil Appeal E001 of 2023) [2025] KEHC 12439 (KLR) (4 September 2025) (Judgment), where HM Nyaga, J found an award of Ksh. 800.000/= was fair, reasonable and based on correct principles. This was for Compound tibia fibula fracture of the right lower limb, degloving injuries to the distal third of the right leg and ankle and extensive tissue injuries to the right lower limb.
15. On future medical expenses, it was stated that it was neither pleaded nor sufficiently proved. The latter statement is evasive. Reliance was placed on *Tracom Limited & another v Hasssan Mohamed Adan* [2009] KECA 48 (KLR), where the court of appeal [PK Tunoi, J Wakia CA Otieno], posited as follows regarding future medical expenses:

We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this Court, stated:

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded.”

16. The court was urged to dismiss the appeal on this limb.

### **Analysis**

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. The duty of the first appellate Court was settled by *Clement De Lestang, VP, Duffus and Law JJA*, in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the Judges in their usual gusto, held as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular



circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

19. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

20. In *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S. Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

21. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured must be at the back of the mind of the trial court. The foregoing was settled in the case of *Butter Vs Butter* Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows in paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.

22. The sad part of this appeal is that the lower court denied this court a chance to know the reasoning behind the award of general damages. The court only considered in his mind the arguments by counsel. Those were not on record and there is no finding of fact. Secondly, the court was plainly wrong on the findings in the P3. There was no authority used in the case. It is practically a two page judgment. It fell far short of the requirements of a judgment that edifies the court and answers a losing party why they lost.

23. It is not the duty of the appellate court to read minds of the court below. It must be faced with proper analysis so as to give this court an understanding that enables it to carry out its duty. This court got an impression that this was a standard template judgment and not what is required in Order 21 Rule 3 of the *Civil Procedure Act* as follows:

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

24. It must be remembered that in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion, the exercise should be done judiciously and conclusively in the circumstances to ensure that the award is not too high or too low as to be an



erroneous estimate of damages. The court gets it plainly wrong when it does not judiciously get the facts correct and rely on decided cases. There is no place for intuition or guesswork.

25. The appellant sustained multiple injuries, including a fracture of the right tibial plateau and fracture of the right fibula. There were other injuries such as bruises on the right elbow, blunt trauma to the back, blunt force injury to the right parietal region of the head and a contusion to the chest. These injuries were classified as grievous harm. The grievous harm is defined in the concise oxford English dictionary, 12th Edition as:

Serious physical injury inflicted on a person by the deliberate action of another, considered more serious than actual bodily harm.

26. There is thus no stretch of imagination that a fracture can be said to be harm. The court was plainly wrong in finding that the injuries were classified as harm. Secondly, award of Ksh. 250,000/= as damages had no scientific or legal basis. It is arbitrary and abstract figure.

27. The Court of Appeal pronounced itself succinctly on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

28. Law JA (as he was then) in *Butt versus Khan* [1982-88] 1KAR, 1, posited that the court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. The said law Lord posited as follows:

“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 must have apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

29. Therefore, for me to interfere with the award it is not enough to show that the award is low or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
- c. To ascertain whether the award is simply not justified from evidence.

30. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. This was ably elucidated by the case of *Butler vs. Butler* Civil Appeal No. 43 of 1983 (1984) KLR, where Keller JA stated the following regarding the award of damages.

“This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders*[1971]EA(CA-K); *Tayab and Ahmed*



*Yakub & Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA) March 30, 1983. The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also *Hancox JA in Tayab* (1983 KLR, 114).

31. In assessing injuries arising from a road traffic accident, consistency in awarding damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.

32. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry and the economy. In the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....”

33. In the case of *Otieno v Mega Wholesalers Limited* [2025] KEHC 13569 (KLR), Nyakundi awarded a sum of Ksh 800,000/= on 30.09.2025 for head injury with loss of consciousness for some hours, blunt



injury to the chest, bruises on both upper limbs, fracture of the left tibia, fracture of the left fibula and lacerations on the left knee.

34. In the case of *Ndwiga & An.-vs-Mukimba* (Civil Appeal E006 of 2022) (2022) KEHC 11793 (KLR) (13 July 2022) (Judgment), a claimant sustained tenderness and swelling of the left leg and a fracture of tibia and fibula of the left leg. The trial court award of Kshs 1,200,000/= which was set aside and substituted with Kshs 500,000/=.
35. In *Tirus Mburu Chege & Another v. JKN* (Minor suing through the next friend and mother DWN & Another) [2018] eKLR, the first respondent sustained multiple injuries, including fractures of both tibia and fibula, a blunt injury to the forehead, a broken upper right second incisor tooth, a nosebleed, and a brief loss of consciousness. The trial court had awarded general damages of Kshs. 800,000/=, which on appeal was set aside and substituted with an award of Kshs. 500,000/=.
36. It is not lost on the court that the Respondent submitted for a sum of Ksh 300,000/= in the court below. They further submitted between Ksh. 300,-800,000/= as general damages. Reliance had been placed on the case of *Gladys Lyaka Mwombe v Francis Namatsi & 2 others* [2019] KEHC 4800 (KLR), where Musyoka J posited that the trend is to award general damages in the range of Kshs 300,000.00 to Kshs. 500,000/=. This was for a claimant who suffered a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face. The injuries reflected in the plaint were extracted from medical records that are in the trial court's file. That decision is over 6 years old.
37. The appellant had submitted for a sum of 1,400,000/= in the lower court. Reliance had been placed on the case of *Mwangi v Siloma & another* [2023] KEHC 26140 (KLR).
38. It is therefore unfathomable where the court got a sum of Ksh. 250,000/= to award and for which injuries. It does not appear that the court had a glance at the parties' submissions.
39. In *Civicon Limited v. Richard Njomo Omwancha & 2 Others* [2019] eKLR, the claimant had sustained a single fracture of the tibia and fibula, together with a dislocation of the hip joint, which was managed by application of a POP cast. The trial court's award of Kshs. 1,000,000/= in general damages was on appeal reduced to Kshs. 450,000/=. This was 6 years ago.
40. In the circumstances, I set aside the award of Ksh 250,000/= as being inordinately low and a plainly wrong award. In lieu thereof, I substitute with an award of Ksh 700,000/=. This is based on the 20% disability and comparable injuries. The authorities relied on by the parties were for more serious injuries.
41. The next issue for consideration is the cost of future medical expenses. Although this claim was submitted to the court, no determination was made on it. There is no basis why the court could not make a finding either way. The amount was specifically pleaded at paragraph 7 of the plaint.
42. Dr. Morebu suggested this amount as the cost to finally treat and align the fracture. The amount was not disputed at all.
43. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in *Shah and Another vs. Shah and Others* [2003] 1 EA 290:

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”



44. Further, the Court of Appeal, on its part in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001* [2007] 1 EA 139 held that:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

45. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in *Parvin Singh Dhalay vs. Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-  
“Because this is the evidence of an expert, I believe it.”

46. On future medical expenses which was the cost of metal plates, the same is a special damage. In the case of, *Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006*, the Court of Appeal stated:-

“We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount. It will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

47. Future medical expenses as special damages should be pleaded and proved. As was held in the cases of *Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001* [2003] KLR 425; [2003] 1 EA 98 and *Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992*;

While the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were one.



48. In the circumstances the amount is due and owing. I award a sum of Ksh. 350,000/= as future medical expenses.
49. There was no appeal on special damages.
50. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
51. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:
- “It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
52. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
53. In the circumstances, the appeal is accordingly allowed with costs of Ksh. 115,000/=

### **Determination**

54. In the upshot, I make the following orders:



- a. The appeal is merited and is accordingly allowed.
- b. The award of Ksh. 250,000/= as general damages is set aside and substituted with an award of Ksh. 700,000/=
- c. The failure to award costs of future medical expenses is set aside. In lieu thereof, I award a sum of Ksh. 350,000/=.
- d. The appellant shall have costs of the appeal of Ksh. 115,000/=.
- e. The foregoing works as follows”
  - a. Judgment for the appellant on 100% liability as entered by the court below.
  - b. Special damages – Ksh. 7,050/=
  - c. General damages – Ksh. 700,000/=
  - d. Future medical expenses – Ksh. 350,000/=
  - e. Interest
- f. The appellant shall have costs in the lower court.
- g. A sum of Ksh 7,050 /= as special damages is retained.
- h. 30 days stay of execution.
- i. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Gogi for the Appellant

Mr. Ochang for the Respondent

Court Assistant – Michael

