REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E179 OF 2022

ANTONY NTHIANI WAMBUA ALIAS ANTHONY NTHIANI WAMBUA ALIAS WAMBUA ANTONY NTHIANI………………………………………………………..……..……………………………………………....PLAINTIFF

VERSUS

KENYA FOREST SERVICE……………..DEFENDANT

JUDGMENT

THE CLAIM

Antony Nthiani Wambua (hereinafter referred to as the plaintiff) filed this suit on 1/11/2022 vide a plaint dated 27/10/2022. The plaint was later amended and filed on 12/2/2024. He sued Kenya Forest Service (hereinafter referred to as the defendant) on account of a road traffic accident that allegedly occurred on 5/12/2020 at Kiunduani area along Nairobi-Makindu road. The plaintiff averred that on 5/12/2020, he was lawfully riding motor cycle registration number KMCL 896S along the aforementioned road when the defendant's driver so carelessly and negligently drove motor vehicle registration number KBR 872U that he lost control and permitted the said motor vehicle to ram into the motor cycle that the plaintiff was riding. As a result, the plaintiff sustained severe injuries, loss and damage.

The defendant was sued as the registered owner of motor vehicle registration number KBR 872U at the material time. The plaintiff relied on the doctrine of *Res ipsa loquitor* and pleaded the following particulars of negligence as against the driver of motor vehicle registration number KBR 872U:

a) Driving without due care and attention;
b) Driving at an excessive speed in the circumstances;
c) Creating circumstances that precipitated and caused the accident;
d) Failing to keep and/or maintain any or any proper look out;
e) Failing to exercise the care and skill reasonably expected of a driver of a motor vehicle in the circumstances;
f) Failing to brake in time or at all;
g) Failing to have due regard to riders lawfully using the said road and in particular the plaintiff;
h) Failing to have due regard to other traffic lawfully using the said road, and in particular motor cycle registration number KMCL 896S;
i) Failing to stop, to slow down, to swerve or in any other way so as to manage and/or control the said motor vehicle and avoid the accident;
j) Failure to swerve and/or take any evasive action;
k) Failing to keep and/or maintain safe distance between motor vehicle registration number KBR 872U and motor cycle registration number KMCL 896S and hence causing the accident;
l) Driving a defective motor vehicle.

The plaintiff pleaded the particulars of injuries and those of special damages and averred that as a result of the accident, he sustained incapacitating injuries and could no longer engage effectively in any economic venture. That his ability to compete effectively in the labour market had been severely curtailed. The plaintiff thus prayed for judgment against the defendant for:

1) General damages for pain, suffering and loss of amenities;
2) Special damages of Ksh. 114,870/=;
3) General damages for diminished/reduced earning capacity;

4) Costs of the suit and interest.

THE DEFENDANT'S DEFENCE

The defendant entered appearance and filed a written statement of defence on 14/11/2022. The defendant denied being the registered owner of motor vehicle registration number KBR 872U, denied that the said motor vehicle was driven by its driver, denied the occurrence of the accident and involvement of the motor vehicle and motor cycle and denied that the plaintiff was riding the motor cycle on the material day. The defendant denied that the motor vehicle was driven negligently and denied the particulars of negligence pleaded by the plaintiff. In the alternative, the defendant averred that if the accident occurred, which was denied, then the same was caused solely and/or substantially contributed to by the negligence of the plaintiff.

The defendant pleaded the following particulars of negligence as against the plaintiff:

a) Failing to see motor vehicle registration number KBR 872U at all or in sufficient time so as to avoid the accident;
b) Failing to keep any or any proper look out or to have any sufficient regard for traffic that was/might reasonably be expected on the said road;
c) Failing to take necessary steps to avoid the accident;
d) Riding a defective vessel which was roadworthy (sic);
e) Operating a road vessel without having the requisite qualifications;
f) Failing to adhere to traffic regulations on safety on travel;
g) Riding at an excessive speed in the circumstances;
h) Failing to wear helmet and a reflector;
i) Riding the motor cycle without any due care and attention;
j) Failing to maintain a safe distance;
k) Ramming into motor vehicle registration number KBR 872U;
l) Failing to drive motor cycle registration number KMCL 896S in its designated path;
m) Putting himself in harm's way;

n) Failing to stop, brake, slow down and/or swerve or to act in any other way so as to avoid the accident and thus causing the accident;
o) Causing the accident.

The defendant further averred in the alternative that if the accident occurred, then the same was inevitable and occurred despite the exercise of reasonable skill, due care and attention on the part of the defendant and/or driver in control of motor vehicle KBR 872U. The defendant denied the applicability of the doctrine of *Res ipsa loquitor* and relied on the doctrine of *volenti non fit injuria*. The defendant further denied the particulars of injury and loss pleaded by the plaintiff and prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The Plaintiff's Case

Two witnesses were called on behalf of the plaintiff. PW 1 was the plaintiff himself. He adopted his statement filed in court as part of his evidence in-chief. The plaintiff testified that on 5/12/2020 at about 11:00 am he was lawfully driving motor cycle registration number KMCL 896S at Kiunduani area along Mombasa-Nairobi highway when a speeding motor vehicle registration number KBR 875U hit the plaintiff's motor cycle from the rear. The plaintiff stated that he sustained injuries and was taken to hospital where he was admitted. It was the evidence of the plaintiff that as a result of the injuries, he is unable to perform numerous economic and social activities. The plaintiff blamed the driver of motor vehicle registration number KBR 872U for the accident. He produced several documents in support of his case. PW 2 Police Corporal Timothy Kilonzo produced the police abstract in evidence.

The Defence Case

The defendant called two witnesses in support of its case. DW 1 Sergeant Benson Muema produced a police abstract in respect of the accident. DW 2 Renson Miriti Mwiti testified that he was the driver of motor vehicle registration number KBR 872U at the material time. The witness admitted the occurrence of the accident and the involvement of the motor vehicle as well as the motor cycle and the plaintiff. According to DW2, the plaintiff was off the road on the left but suddenly turned right to join the road. That DW 2

swerved to avoid the accident but the plaintiff's motor cycle rammed into the left side of the motor vehicle. DW blamed the plaintiff for the accident.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

a) The defendant was the registered owner of motor vehicle registration number KBR 872U at the material time;
b) An accident occurred on 5/12/2020 at Kiunduani area along Mombasa-Nairobi road involving motor vehicle registration number KBR 872U and motor cycle registration number KMCL 896S;
c) The plaintiff was the rider of motor cycle registration number KMCL 896S at the time of accident;
d) The plaintiff was seriously injured as a result of the accident.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

i. Who was to blame for the accident?
ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
iii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on the evidence on record and submitted that he had proven his case on a balance of probabilities. The plaintiff further submitted that both the motor vehicle and motor cycle were moving in the same direction with the latter being ahead. The plaintiff argued that his version on how the accident occurred was more plausible and had probative value. That the evidence of the plaintiff was consistent and supported by evidence whereas that of the defendant was evasive, inconsistent and of little probative value. It was submitted that the defendant deliberately failed to call evidence that would have shed more

light. That the driver testified that he had three passengers in the motor vehicle but none of them were called to testify.

The plaintiff contended that the inspection report on the defendant's motor vehicle would have shed more light on the point of impact. The plaintiff urged the court to draw an adverse inference on the defendant for failing to call the passengers in the motor vehicle at the material time and for failing to produce the inspection report. The plaintiff argued that the defendant's account of attributing liability to the plaintiff based on the police abstract is of little probative value. The plaintiff pointed out that the police abstract was inconsistent as at one point it indicated that the plaintiff was to blame for the accident and also indicated that the matter was pending under investigation. That the police abstract was issued on the day of the accident and before the plaintiff recorded his statement. Further, the indication of blame in the police abstract by the investigating officer is not conclusive proof of blameworthiness.

The plaintiff urged the court to disregard the defence evidence as it was evasive. The plaintiff argued that DW 2 failed to keep a safe distance. That the motor vehicle behind had a greater duty to avoid collision. The plaintiff argued that the fact that the DW 2 was unable to avoid the accident indicates that he was driving at a high speed. That DW 2 had in his possession a lethal machine and therefore had a greater duty of care. The plaintiff urged the court to find the defendant 100% liable. The plaintiff relied on several authorities to support his position. On quantum, the plaintiff submitted a sum of Ksh. 2,500,000/= in general damages for pain and suffering and relied on the following authorities:

a) ***Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another [2015] KEHC 5180 (KLR),*** wherein Ksh. 2,000,000/= was awarded to an appellant who sustained multiple soft tissue injuries, blunt injury to the head, fracture of the radius/ulna, compound fracture of the right tibula/fibula and compound fracture of the left tibia/fibula;
b) ***Mary Wanjah Gachomabah v Josintah Adhiambo Ogana [2021] eKLR,*** wherein Ksh. 2,000,000/= was awarded to a victim who sustained bruises on the scalp, chest contusion, fracture of the right humerus, deep cut wound on the left arm, cut wound on the right lower limb, fracture of the right tibia and fibula;

c) ***Otieno v South Sioux Farms Ltd [2023] KEHC 21083 (KLR),*** wherein Ksh. 3,000,000/= was awarded to a victim who sustained compound fracture of the right tibia and fibula, fracture of the left ulna, fracture of the left radius, chest contusion and blunt trauma to the back.

On the issue of general damages for diminished earning capacity, the plaintiff proposed an award of Ksh. 500,000/=. For future medical expenses, the plaintiff proposed a sum of Ksh. 150,000/=. He further urged the court to award Ksh. 114,870/= as special damages.

THE DEFENDANT'S SUBMISSIONS

The defendant also filed written submissions. The defendant submitted that it was the duty of the plaintiff to prove his case on a balance of probabilities. The defendant argued that the plaintiff had failed to prove his case. The defendant relied on the testimony of their driver and the police abstract which indicated that the plaintiff was to blame for the accident. The defendant urged the court to dismiss the plaintiff's claim with costs.

On quantum, the defendant proposed general damages to the tune of Ksh. 400,000/= and relied on an alleged authority whose copy was not annexed. For future medical expenses, the defendant urged the court to award the average of Ksh. 100,000/= and Ksh. 150,000/=. On special damages, the defendant merely submitted that the same must be pleaded and proved. The defendant argued that the claim for damages for diminished earning capacity was speculative. That the claim would hold if the plaintiff had lost his employment or lacked the ability to continue working as a driver.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties as well as the authorities relied upon by the plaintiff.

Liability

There are two versions as to how the accident occurred. It is agreed that both the plaintiff's motor cycle and the defendant's motor vehicle were moving in the same direction. It is also agreed that the plaintiff's motor cycle was ahead of the motor vehicle.

According to the plaintiff, his motor cycle was hit from the rear. On the other hand, the defendant's driver alleged that the plaintiff was off the road but suddenly joined the road and in the process, rammed into the defendant's motor vehicle. It is the duty of the plaintiff to establish or prove negligence on the part of the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, the Court of Appeal held thus:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

The plaintiff relied on the doctrine of *Res Ipsa Loquitor*. Is the doctrine applicable in this case? In the leading case of ***Scott v London and St Katherine Docks Co (1865) 3 H & C 596***, Erle CJ at page 600 held as follows:

"There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

In Black's Law Dictionary 9th Edition page 1424, the principle is defined as follows:

"[Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."

The Dictionary goes further to explain the circumstances the Court will infer negligence as follows:

"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."

"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability … The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

Kennedy L.J. in ***Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548*** at p. 551 as follows:

"….that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

The Learned Judge then continued:

"Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."

In ***Henderson v Henry E Jenkins & Sons [1970] AC 282*** at 301 Lord Pearson stated:

"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

In the case of ***Embu Public Roads Services Ltd v Riimi (1968) EALR 22***, the Court of Appeal held as follows:

"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident".

From the foregoing, it is clear that the doctrine of res *ipsa loquitor* applies only where circumstances are established which afford reasonable evidence, in the absence of explanation by the defendant, that the incident leading to the injuries arose from their negligence. In an appropriate case, the plaintiff establishes a *prima facie* case by relying upon the fact of the incident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the

defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the incident. Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case.

On the basis of the evidence on record, a *prima facie* case of negligence has been established as there is a causal link between the driver of the accident motor vehicle and the injuries that were sustained by the plaintiff. The plaintiff's evidence established a *prima facie* case of negligence against the defendant's driver. In my view, the doctrine of *Res ipsa loquitor* would apply in the absence of any explanation from the defendant. The question that needs to be answered is whether the defendant has succeeded in rebutting the plaintiff's evidence. The defendant relies on the testimony of its driver as well as the police abstract which indicates that the plaintiff was to blame for the accident. I will start by addressing the issue of the police abstract. I agree with the submissions by the plaintiff that the information in the police abstract concerning who was to blame for the accident is of no probative value.

The police officer who produced the police abstract was not the investigating officer. In fact, he knew nothing concerning the accident. The information in the police abstract was not supported by any evidence. It is not known why the investigating officer found that the plaintiff was to blame for the accident. It is worth noting that the police abstract was filled on the date of the accident even before investigations were concluded. The plaintiff had not even recorded his statement at the police station. The evidence reveals that it was DW 2 who reported to the police and gave his version on how the accident occurred. For reasons best known to him, the investigating officer hurriedly issued a police abstract without conducting investigations into the matter.

No sketch maps were produced to show the point of impact. No inspection reports in respect of both the motor cycle and motor vehicle were produced in evidence. I agree with the plaintiff that the inspection report for the motor vehicle would have revealed the damage, from which the version of DW 2 would have been corroborated or contradicted.

Without such evidence as indicated hereinabove, the police abstract has no probative value. If indeed the plaintiff was to blame and was to be charged, why was he not charged? The evidence of DW 2 was that the plaintiff was off the road and was having a conversation with bystanders who were on the opposite side of the road. This means that when DW 2 saw the plaintiff, the latter was stationary. That the plaintiff suddenly made a right turn into the road. This implies that the plaintiff attempted to cross the road and in the process, there was a collision. According to DW 2, it was the plaintiff's motor cycle which rammed into the defendant's motor vehicle.

If the version by DW 2 is anything to go by, then the inspection report for the motor cycle would reveal more damage to the front of the motor cycle and damage to the left side of the motor vehicle. If the version given by the plaintiff is anything to go by, then the inspection reports would reveal damage to the front of the motor vehicle and to the rear of the motor cycle. Unfortunately, the inspection reports for both the motor cycle and the motor vehicle were not produced in evidence.

The fact that the motor vehicle and motor cycle collided is not in dispute. It is also not in dispute that the collision occurred on the tarmac road. In the English case of ***Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR 1472***, there was a collision in the centre of the road between two vehicles driven in opposite directions. In two hearings, judges had taken different views of the facts. The court was sympathetic to the judge who had found that the cause of the accident was so speculative on the meagre facts available that the plaintiff, who was an innocent third party, had failed to prove her case. However, the court took the view of the other judge that blame should be apportioned equally as between the two drivers. Romer L J stated that a finding to that effect was "the reasonable and probable inference to draw from the facts as found".

This reasoning was adopted in the Kenyan case of ***Lakhamshi v Attorney General [1971] EA 118*** in which Spry V P stated that where two vehicles collide in the middle of the road and there is no explanation, both the drivers should be held equally liable. If one is negligent in driving over the centre of the road, the other is also negligent for not taking any evasive action. A similar finding was made in the case of ***Caroline Anne Njoki Mwangi v Paul***

Ndung'u Muroki [2004] eKLR. In Lakhamshi's case (*supra*), Spry VP observed in part as follows:

"It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame.....I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it."

Even in Baker's case, ROMER L J was prepared to envisage that circumstances could exist where the evidence was so meagre that any explanation would be purely speculative, and thus the plaintiff's case could not be said to have been proven.

The cases of Baker and Lakhamshi were considered and analysed by the Court of Appeal in the case of ***Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd [1984] eKLR*** in which there was an alleged collision between two motor vehicles caused by cows which were crossing the road. The plaintiff's case was dismissed by the High court. On appeal, the Court of Appeal unanimously affirmed the order of dismissal. Kneller JA observed as follows:

"A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if

negligence on his part cannot properly be inferred from the circumstances of the accident".

The court further held that where it is proved by evidence that both parties to the accident are to blame and there is no means of making a reasonable distribution, the blame can be apportioned equally on each. In this respect, the court considered the case of Baker (*supra*). It was the further holding of the court that the position must however be different where there is no evidence to establish that any party was negligent. In that case it cannot be right to apportion blame there being no evidence on which apportionment could be based. In making that finding, the court considered the case of Lakhamshi in which Spry V P stated that it is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.

Apportioning liability equally would be easier when the collision is between two motor vehicles moving in opposite directions and the collision occurs at the centre of the road. For vehicles moving in the same direction, the principle may be difficult to apply. DW 2 testified that he was driving at a speed of about 100km/hr. The accident occurred at a trading centre. DW 2 admitted in cross-examination that while approaching a trading centre, the maximum speed ought to be 50km/hr. 100km/hr was quite high a speed in the circumstances. It is not clear from DW 2's evidence, at what point the plaintiff joined the road. It is also not clear how far DW 2 was from the plaintiff when the latter suddenly joined the road.

In the authority of ***Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR),*** the Court of Appeal held that under common law, a driver who hits another vehicle from behind is generally presumed to be at fault, unless there is sufficient evidence to rebut this presumption. A driver is required to maintain a safe distance between his motor vehicle and the motor vehicle ahead to prevent accidents, especially in emergencies. Failure to do so can lead to a finding of negligence if it results in a collision. In my considered view, if there is a motor vehicle behind another, the driver of the motor vehicle behind owes a greater duty of care to the one in front. I say so for the following reasons:

a) The driver behind has a clearer view of the motor vehicle ahead and can control their own speed, distance and reaction. The driver in front cannot easily monitor what happens behind them;
b) Traffic laws and road safety regulations require that the driver behind should keep or maintain a safe distance so as to be able to stop or react in time if the vehicle ahead slows down or stops suddenly. Failure to maintain a safe distance often constitutes negligence;
c) When a rear-end collision occurs, the law presumes that the driver behind was negligent unless there is strong evidence to the contrary;
d) The driver behind must anticipate that the vehicle ahead may slow down, stop or turn and should drive in a manner that prevents a collision even if that happens.

I have already pointed out that since it is agreed that the motor vehicle was behind the motor cycle, and there is evidence from the plaintiff that his motor cycle was hit from the rear, the defendant had a duty to rebut such evidence. The question to be answered is whether DW 2 successfully rebutted the plaintiff's evidence. As already indicated, both parties rely on oral testimony. The testimonies of both the plaintiff and DW 2 were not corroborated by any other evidence such as independent witnesses, sketch plans and motor vehicle inspection reports. The version given by each party is probable. I have no reason to totally disregard the version given by the plaintiff and in the same breath, I would have no reason to totally disregard the evidence given by DW 2.

What happens in circumstances where the court is unable to ascertain which of the two drivers was to blame for the accident? In the case of ***Mwatha v Owuor [2024] KEHC 4489 (KLR)***, the court was faced with a similar situation. Aburili J held as follows:

"The law is also trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another, Majanja J, vide Kisii HCC.A 29/2016 cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR where it is cited with approval the decision in

Baker v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

'Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them.'

The learned Judge in the above case stated that where the court is unable to determine who is to blame, it apportions liability equally as illustrated by the Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it was observed that –

'In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.'

In the end he held that –

'I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party.'

In the instant case, it is clear that an accident occurred on the 20.3.2019 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him from the front while the respondent claimed that he was hit from behind. <u>No sketch plan of the accident scene was produced and apart from the statement of the appellant and the respondent, no other person testified on how they saw the accident happen.</u> Obviously, it is not always the case that there are eye witnesses to an accident and I take cognizance of that fact. It is also a well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong......................<u>I set aside the finding on liability and as there were different</u>

<u>versions of how the accident occurred, thereby making it impossible for the court to find with certainty that one party was more to blame than the other, I find and hold that each of the parties was equally to blame for the accident</u>". (Emphasis supplied)

In the case of ***Embu Public Road Services v Riimi [1968] 1 EA 22***, the Court of Appeal observed that where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence". I have already pointed out that generally, if a motor vehicle collides with another from the rear, the driver in the motor vehicle behind is presumed to be negligent. In this case, the starting point should be that the defendant's driver is to be presumed negligent. DW 2 who was the defendant's driver at the material time gave his version of how the accident occurred.

As already pointed out, the gist of DW 2's evidence was that he was faced with an emergency when the plaintiff suddenly joined the road. DW 2 ought to have shown that there was no time for him to take evasive action. His speed was about 100km/hr within a trading centre. He did not state at what distance the plaintiff joined the road. DW 2 admitted that he had already seen the plaintiff prior to him (plaintiff) joining the road. While approaching or entering a trading centre, a prudent driver is expected to slow down so as to be able to control the motor vehicle in case of any eventuality. Even assuming that the plaintiff had suddenly entered the road, without evidence on how close the defendant's driver was before the plaintiff entered the road, it would be difficult to find the plaintiff wholly or substantially liable.

I have already mentioned that the defendant's driver owed a greater duty of care to other road users, given the circumstances of the case. Depending on the evidence on record, the court can either apportion liability equally between the defendant's driver and the plaintiff or find the defendant's driver more culpable. My view is that had the defendant's driver been driving at a moderate speed, the accident could have been avoided even if the plaintiff had suddenly joined the tarmac. Being guided by the above authorities and noting the circumstances of this case based on the evidence on record, I am inclined to apportion liability at 80% against the defendant's driver and 20% against the plaintiff.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

In the case of ***Morgan v Launchbury [1972] ALL ER 606***, it was held, *inter alia*, that:

"To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

Similarly, In **Kaburu *Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR*** the Court of Appeal held that:

"Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of ***Kenya Bus Services Ltd v Humphrey [2003] KLR 665; [2003] 2 EA 519***, the Court of Appeal cited ***Kansa v Solanki [1969] EA 318*** wherein it was held that:

" Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises* that it was driven by a person for whose negligence the owner is responsible *(See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

It was not denied and was actually admitted in evidence that the driver of motor vehicle registration number KBR 872U (DW 2) was driving in the course of his employment with the defendant. Consequently, I find the defendant **80% vicariously liable** for the accident.

Quantum

The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:

i. Soft tissue injuries on the face and scalp;
ii. Fracture of both humerus;
iii. Compound fracture of the right tibia and fibula.

Doctor Wokabi, a consultant surgeon who examined the plaintiff on 19/8/2023 assessed total permanent disability at 22% whereas Doctor Wambugu, also a consultant surgeon who examined the plaintiff on 19/9/2023 assessed permanent disability at 6%. The two examinations were conducted exactly a month apart and the findings of the two doctors are greatly at variance. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the finding on liability, the plaintiff is thus entitled to damages as against the defendant.

It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in ***West (HI) and Sons Ltd v Shepherd [1964] AC 326*** where Lord Morris said:

"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 constant, 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*".**

I am also guided by Lord Denning's decision in ***Kim Pho Choo v Camden & Islingtom Area Health Authority, [1979] 1, ALL ER 332*** which was adopted in the case of **Nancy Oseko *v Board of Governors Masai Girls High School [2011] eKLR*** where Wendoh, J stated that:

"In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. …………………..the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant."

The Court of Appeal in ***Southern Engineering Company Ltd v Musingi Mutia [1985] KLR 730*** held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and

to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

The following principles are germane in assessing damages for personal injury claims:

i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
ii. The award should be commensurate to the injuries suffered;
iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
v. Awards should not be inordinately too high or too low.

Based on the above principles, I proceed to assess the damages payable as follows.

<u>General Damages for pain, suffering and loss of amenities</u>

The plaintiff suffered injuries which were classified as maim or grievous harm. In my opinion, the authorities relied upon by the plaintiff are comparable. On my part, I have further considered the following authorities:

1) ***<u>James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] KEHC 5586 (KLR)</u>***

The plaintiff herein sustained compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and pathological /re-fracture of the right leg. The court awarded Ksh. 1,500,000/= in general damages on 13/2/2015.

2) ***Ngare v Kiai [2023] KEHC 24212 (KLR)***

The plaintiff and respondent in the appeal sustained compound bilateral fracture of tibia/fibula, compound fracture of the proximal end of the right tibia and compound fracture of the left distal tibia. On appeal, an award of Ksh. 1,600,000/= in general damages was made on 25/10/2023.

Given the nature of the injuries sustained by the plaintiff herein, whose permanent disability was assessed at between 6% and 22% and the age of some of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. **2,000,000/=** in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

a) Medical reports………………………………………………Ksh. 6,000/=
b) Treatment and Medical expenses…………………Ksh. 108,320/=
c) Copy of records…………………………………………………Ksh. 550/=
Total…………………………………………………………………Ksh. 114,870/=

It is trite law that special damages must be **specifically pleaded** and **strictly proved**. In ***Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** the court said: -

"It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"

In ***Ouma v Nairobi City Council [1976] KLR 304*** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J's Judgment on page 532 and 533 in ***Ratcliffe v Evans [1832] 2Q.B. 524*** an English leading case on pleading and proof of damage:

" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The special damages were sufficiently proven to the tune of **Ksh.114, 870/=.** I award the same.

Future medical expenses

Both parties agree that the plaintiff will need to have the implants removed. The defendant proposed Ksh. 100,000/= whereas the plaintiff proposed Ksh. 150,000/=. In addressing this issue, I will highlight some Court of Appeal authorities on the subject.

1) ***Simon Taveta v Mercy Mutitu Njeru [2014] eKLR***

In a judgment delivered on 5/2/2014, the court held as follows on the issue of future medical expenses:

"The issue for our consideration is whether the pleadings as stated above in the plaint include a claim for future medical expenses. In the case of Kenya Bus Services Ltd. - v Gituma, (2004) 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 damages 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 rights should be pleaded'.

We observe that the trial judge correctly held that the plaint did not contain a pleading for future earnings or the need for employment of a house help and nurse and that these ought to have been pleaded and proved as special damages............ In <u>Mbaka Nguru & Another - v- James George Rakwar, Court of Appeal Civil Appeal No. 133 of 1998</u>, it was stated that claims for future medical expenses must be pleaded and proved as a special damage claim".

2) ***<u>Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR</u>***

In a judgment delivered on 9/10/2009, the court observed as follows:

"The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no proof...........Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of the required amounts for future treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in McGregor on Damages, 16 Edition at page 1654 in relation to medical expenses:

'Both expenses already incurred at the time of the trial and prospective expenses are recoverable and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident of the time the case comes on for hearing, implies no substantive differences.'

We think the cost of future treatment, where pleaded and reasonably estimated, ought to be awarded and in this case, the doctors' reports were produced with the consent of the parties and without challenge on the reasonableness of their estimates for future medical treatment costs in respect of the three respondents. We reject the complaint made in that regard".

3) ***<u>Mbaka Nguru & Anor. v James George Rakwar[1998]eKLR</u>.***

Judgment herein was delivered on 23/12/1998. The court held as follows:

"We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical

report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head...."

4) ***Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees Of Eldoret & another [2016] eKLR.***

In a judgment delivered on 14/6/2016, the court held that prospective medical expenses that have not crystallized as disbursements may be claimed as general damages but the same cannot be awarded without evidence.

From the above authorities, I gather that damages for future medical treatment are awardable but there must be evidence for the need for future medical treatment as well as an estimate of the same. There is divided opinion in the Court of Appeal as to whether such damages are in the nature of general or special damages. There is medical evidence to show that the plaintiff will require removal of the metal implant.

Doctor Wokabi estimated the entire cost at Ksh. 150,000/= at a medium cost hospital. On the other hand, Dr. Wambugu estimated the entire cost at Ksh. 100,000/=. None of the doctors laid a basis for their estimates. I am aware of the existence of the **Medical Practitioners and Dentists (Professional Fees) Rules**. Rule 3 thereof stipulates that the fees specified under the Schedule to the Rules shall be the fees charged by practitioners offering medical or dental services, or both and that the fees shall be adhered to by all practitioners and institutions registered under the Act and no practitioner may agree or accept fees above that which is provided under the Rules.

Accordingly, the Rules provide that for removal of implants in respect of long and short bones, the minimum charge shall be Ksh. 24,000/= whereas the maximum shall be Ksh. 60,000/=. The fees are subject to the annual inflation rate. Dr. Wokabi's report indicates that the implant in the left humerus was removed in early 2021. This was before the suit was filed. Therefore, only two implants remain. Being guided by the Medical Practitioners and Dentists (Professional Fees) Rules and bearing in mind the vagaries of inflation, I award **Ksh. 120,000/=** as future medical expenses for removal of the implant.

Damages for diminished/reduced earning capacity.

In the authority of ***William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)***, the Court of Appeal held:

"A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in Ashcroft v Curtin [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction………………It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way:

'… compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.'- Lord Denning MR in Fairley v John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40, 42 (CA).

These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were 'plucked from the air'. Later, in England, damages under this head had to be separately quantified: Jefford v Goe [1970] 2 QB 130, and no interest is recoverable on them: Clark v Rotax Aircraft Equipment Ltd [1975] 1 WLR 1570. (Emphasis supplied)

In the case of ***Tile & Carpet Center Warehouse v Okello [2022] KECA 5 (KLR)***, the Court of Appeal held that loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. The court further rejected the argument that it was improper for the lower court to award damages for loss of earning capacity which damages were neither pleaded nor prayed for. In as much as it is not mandatory to specifically plead for such damages, there must be a basis for the award.

The medical report by Dr. Wokabi indicates that the plaintiff suffered 22% permanent disability whereas that of Dr. Wambugu indicates that he suffered 6% permanent disability. The plaintiff testified that he was a mechanic but could not do his work as he used to before the accident. The fact that the plaintiff's injuries had an impact on his earning capacity cannot be overlooked, especially considering the nature of his work. There is no evidence to show that the plaintiff was completed locked out of earning any income as a result of the injuries.

In ***Mumias Sugar Company Limited v Francis Wanalo [2007] KECA 485 (KLR)***, the Court of Appeal held:

"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. 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." (Emphasis supplied)

Having regard to the degree of incapacity that the plaintiff suffered, the risk of the plaintiff not being able to find employment in the labour market was not substantial. It was minimal. Consequently, I find an award of **Ksh. 200,000/=** under this head to be reasonable. I award the same. As already indicated, this amount will not attract any interest.

DISPOSITION

In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendant. Consequently, I make the following awards:

1) General damages for pain, suffering and loss of amenities...........Ksh. 2,000,000/=
2) Special damages……………………………………………………………………..…..Ksh. 114,870/=
3) Future medical expenses……………………………………………………….…..Ksh. 120,000/=
4) Damages for diminished earning capacity…………………………………..Ksh. 200,000/=

Total…………………………………………………………………………..Ksh. 2,434,870/=

Less 20% contribution………………………………………………………………………..Ksh. 486,974/=

Balance due to the plaintiff………………………………………….……………….**Ksh. 1,947,896/=**

The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

In the case of ***Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR***, the court stated that:

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of ***Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4*** (8th April 2015) stated in part, as follows:

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that <u>for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment</u>.........Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see ***Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR).*** Consequently, interest on general damages shall accrue at court rates from the date of judgment/decree until payment in full and on Special damages and future medical expenses, from the date of filing suit to the date of judgment/decree. No interest is awardable on damages for diminished earning capacity.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 16TH DAY OF OCTOBER, 2025.

Y.A SHIKANDA

<u>SENIOR PRINCIPAL MAGISTRATE.</u>