



that was ahead, in consequence whereof the plaintiff sustained severe injuries and suffered loss and damage.

The 1<sup>st</sup> defendant was sued as the registered owner of motor vehicle registration number KCF 086J whereas the 2<sup>nd</sup> defendant was sued as the driver thereof at the material time. The plaintiff relied on the doctrine of *Res ipsa loquitor* and pleaded the following particulars of negligence against the 2<sup>nd</sup> defendant:

- a) Driving without due care and attention;
- b) Creating circumstances that precipitated and caused the accident;
- c) Failing to keep and/or maintain any or any proper look out;
- d) Failing to have due regard to the safety and well-being of passengers lawfully travelling in motor vehicle registration number KCF 086J, and in particular the plaintiff;
- e) Failing to exercise the care and skill reasonably expected of a driver in the circumstances;
- f) Failing to brake in time or at all;
- g) Failing to stop, slow down, swerve or in any other way so as to manage and/or control the said motor vehicle and avoid the accident;
- h) Driving at an excessive speed in the circumstances;
- i) Driving a defective motor vehicle;
- j) Failing to have due regard to other traffic using the road;
- k) Failing to keep and/or maintain safe distance between the two motor vehicles and hence causing the accident.

The plaintiff pleaded particulars of injuries and special damages and prayed for judgment against the defendants for:

- 1) Special damages of Ksh. 14,750/=;
- 2) General damages for pain, suffering and loss of amenities;
- 3) Cost of replacement of lost teeth estimated at Ksh. 50,000/=;
- 4) Cost of radiotherapy estimated at Ksh. 300,000/=;

- 5) Costs of the suit;
- 6) Interest on the above.

### **THE DEFENDANTS' DEFENCE**

The defendants entered appearance on 9/7/2019 and filed a joint written statement of defence on 25/5/2021. The defendants denied being the registered owner and driver, respectively of motor vehicle registration number KCF 086J, denied that the plaintiff was a lawful fare paying passenger in the said motor vehicle and denied the occurrence of the accident in the manner pleaded by the plaintiff. The defendants further denied that motor vehicle registration number KCF 086J was driven negligently and denied that the plaintiff sustained injuries. The defendants denied the particulars of negligence pleaded by the plaintiff and denied the applicability of the doctrine of *res ipsa loquitur* and pleaded the doctrine of *volenti non fit injuria*.

In the alternative, the defendants averred that if the accident occurred, the same was solely and/or substantially contributed to by the plaintiff's own negligence. The defendants pleaded the following particulars of negligence as against the plaintiff:

- 1) Failing to take any or any adequate precaution for his own safety;
- 2) Failing to heed the instructions on safety precautions when travelling;
- 3) Failing to heed the traffic rules and regulations when travelling;
- 4) Failing to wear a seatbelt while travelling.

The defendants further averred in the alternative that if the alleged accident occurred, the same was beyond their control. They denied the particulars of injuries, loss and damage pleaded by the plaintiff and prayed that the plaintiff's suit be dismissed with costs.

### **INTERLOCUTORY JUDGMENT**

The record indicates that on 3/6/2019, interlocutory judgment was entered against both defendants. However, on 4/5/2021, the same was set aside following a consent that was recorded by the parties and adopted by the court.

## **THE EVIDENCE**

### **The Plaintiff's Case**

Two witnesses were called on behalf of the plaintiff. PW 1 Police Constable Nicholas Chemesengu testified and confirmed the occurrence of the accident involving motor vehicle registration number KCF 086J. He confirmed that the plaintiff was a passenger in the accident motor vehicle at the material time. The witness stated that the 2<sup>nd</sup> defendant was the driver of the accident motor vehicle and was blamed for the accident. He produced a police abstract in evidence. PW 2 Teresia Kanini David (Plaintiff) adopted her statement filed in court as part of her testimony. She testified that on 11/5/2017 she was a passenger in motor vehicle registration number KCF 086J. That the driver of the said motor vehicle was driving at a very high speed and on reaching the location of the accident, he attempted to overtake a truck ahead but rammed into the truck causing the motor vehicle to overturn.

The plaintiff stated that she was injured as a result of the accident. She was rushed to hospital and later went to Mtitu Andei police station where she recorded her statement and was issued with a P3 form and police abstract. The plaintiff blamed the driver of motor vehicle registration number KCF 086J for the accident. The plaintiff produced the documents filed as evidence. She prayed for orders for compensation and costs of the suit.

### **The Defence Case**

The defence did not call any witness.

## **MAIN ISSUES FOR DETERMINATION**

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

- i. Whether an accident occurred on 11/5/2017 at Kenani area along Nairobi-Mombasa road involving motor vehicle registration number KCF 086J;

- ii. Whether the said motor vehicle belonged to the 1<sup>st</sup> defendant at the material time;
- iii. Whether the 2<sup>nd</sup> defendant was the driver of motor vehicle registration number KCF 086J at the time of accident;
- iv. Whether the plaintiff was involved in the accident;
- v. Who was to blame for the accident;
- vi. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;
- vii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
- viii. Who should bear the costs of this suit?

### **THE PLAINTIFF'S SUBMISSIONS**

The plaintiff relied on the copy of records produced in evidence and stated that the 1<sup>st</sup> defendant was the owner of the accident motor vehicle. That no contrary evidence was adduced by the defendant. The plaintiff relied on the evidence on record and argued that she had proven that the accident occurred. That no contrary evidence was adduced by the defence. On liability, the plaintiff also relied on her uncontroverted evidence and contended that the defendants were to blame for the accident. The plaintiff relied on four authorities and urged the court to find the defendants 100% liable for the accident.

On quantum, the plaintiff submitted a sum of Ksh. 600, 000/= in general damages for pain and suffering and relied on the following authorities:

- a) **IA (Minor suing through next friend and father) AFWK v Kariuki Jane & another [2018] eKLR.**

The plaintiff and respondent in the appeal sustained loss of two upper incisors, degloving injury on the left ankle and a bruise below the left eye. The trial court awarded Ksh. 400,000/= in general damages on 10/12/2014. On appeal, the award was affirmed on 6/7/2018.

- b) **Henry Mbogo Gitau v Edwin Irungu Mukera [2016] eKLR.**

The plaintiff and respondent in the appeal sustained deep cut wounds and lacerations on the upper and lower lips, multiple lacerations of the gum and mouth, loss of lower incisors and molars, loose upper and lower incisors 22, 31 and 32, deep cut wounds on the gums and swollen and tender palm. The trial court awarded Ksh. 500,000/= in general damages on 29/4/2013. On appeal, the award was affirmed on 26/5/2016.

c) **Easy Coach Limited v Emily Nyangasi [2017] eKLR.**

The plaintiff and respondent in the appeal sustained facial injuries, injury to the chest, back and cut wounds to the right hand and right leg. The trial court awarded Ksh. 700,000/= in general damages on 13/5/2015. On appeal, the award was affirmed on 6/4/2017.

The plaintiff prayed for future medical expenses of Ksh. 350,000/= and Ksh. 14.750/= for special damages. The plaintiff also prayed for costs and interest.

### **THE DEFENDANTS' SUBMISSIONS**

The defendants did not file submissions despite being given sufficient time to do so.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the evidence on record and given due regard to the submissions made by the plaintiff as well as the authorities relied upon. On the strength of the testimony of the plaintiff and the police officer, I have no doubt that an accident occurred on 11/5/2017 at Kenani area along Mombasa-Nairobi Highway involving motor vehicle registration number KCF 086J. There is also sufficient evidence to prove that the plaintiff was a passenger in the accident motor vehicle and thus involved in the accident. The copy of records from the Registrar of motor vehicles indicates that the 1<sup>st</sup> defendant was the owner of the accident motor vehicle at the material time whereas the police abstract indicates that the 2<sup>nd</sup> defendant was the driver thereof. There is no contrary evidence. I have no doubt that the 1<sup>st</sup> defendant was the owner of the accident motor vehicle whereas the 2<sup>nd</sup> defendant was the driver thereof at the material time. Section 8 of

the Traffic Act provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

### **Liability**

There is only one version as to how the accident occurred. According to the plaintiff's uncontroverted evidence, she was a passenger in motor vehicle registration number KCF 086J when the driver of the said motor vehicle drove at a high speed and attempted to overtake a truck which was ahead but in the process, he rammed into the rear of the truck. It is the duty of the plaintiff to establish or prove negligence on the part of the defendants. 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 loquitur 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 loquitur* 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 doctrine, in my view, will thus apply.

The uncontroverted evidence of the plaintiff clearly shows that the driver of the accident motor vehicle was at fault. He was reckless in his manner of driving. It does not show that the plaintiff was to blame. There is clear and uncontroverted evidence on how the accident herein occurred. I find that the evidence of the plaintiff as to how the accident occurred was consistent and was not shaken in cross-examination. In view of the evidence on record, there is a sufficiently high degree of probability, that, but for the acts of omission and commission by the driver of the motor vehicle, the accident would have been prevented. It was the 2<sup>nd</sup> defendant who was in control of the motor vehicle. The plaintiff was a mere passenger. A motor vehicle which is being driven by a prudent and careful driver does not just ram into another motor vehicle from the rear. I find that the driver of the motor vehicle was solely culpable as far as the accident is concerned. In my view, there are concrete facts on which a finding would be made that the said driver was solely negligent. Consequently, I find the 2<sup>nd</sup> defendant 100% liable in negligence.

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 has not been denied in evidence that the 2<sup>nd</sup> defendant was driving in the course of his employment with the 1<sup>st</sup> defendant. Consequently, I find the 1<sup>st</sup> defendant **100% vicariously liable** for the accident.

### **Quantum**

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

- i. Multiple soft tissue head injuries;
- ii. Deep abrasion of the right forehead;
- iii. Deep cut on the upper lip;
- iv. Loss of one upper incisor tooth;
- v. Breakage of upper incisor tooth; and
- vi. Deep abrasion on the right upper limb.

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 defendants.

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 & Islington 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.

#### **General Damages for pain, suffering and loss of amenities**

I have considered the injuries sustained by the plaintiff. The plaintiff suffered injuries which were classified as grievous hamr in the P3 form. On my part, I have further considered the following authorities:

##### **1) *Anthony Nyamweya v Dorca Gesare Mounde [2022] KEHC 1353 (KLR).***

The plaintiff and respondent in the appeal sustained swollen knee joint tender on palpation, loss of 3 upper teeth, loss of 3 lower teeth and bruises on the left neck. The trial court awarded general damages of Ksh. 750,000/= on 13/12/2019. On appeal, the award was reduced to Ksh. 600,000/= on 10/3/2022.

##### **2) *Daniel v Kamene [2022] KEHC 11179 (KLR).***

The plaintiff and respondent in the appeal sustained multiple cuts involving the bridge of nose, upper lip, tongue and lower lip, missing teeth, avulsed 3 teeth, 12,13, generalized

chest pain and bruises on both hands. The trial court awarded Ksh. 700,000/= in general damages on 20/3/2019. On appeal, the award was affirmed on 23/6/2022.

**3) Joseph K Gatitika & another v Felista Muthoni & 2 others [2020] KEHC 1733 (KLR).**

The plaintiff and 1<sup>st</sup> respondent in the appeal sustained severe injury on her lips, mouth chest and all her limbs, loss of both upper incisors and canine teeth, injury to left eye, and scarring to the eyelid; permanent poor vision. The trial court awarded Ksh. 700,000/= in general damages on 6/10/2015. On appeal, the award was upheld on 9/3/2020.

Given the nature of the injuries sustained by the plaintiff herein and the age of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. 500,000/= in general damages would suffice. I award the same.

**Special Damages**

The plaintiff pleaded special damages as follows:

- a) Medical legal report (Musyoki).....Ksh. 3,000/=
- b) Medical legal report (Wokabi).....Ksh. 2,000/=
- c) Copy of records.....Ksh. 550/=
- d) Treatment and medical expenses.....Ksh. 9,200/=
- Total.....Ksh. 14,750/=

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. 14,750/=**. I award the same.

### **Future Medical Expenses**

The plaintiff pleaded future medical expenses of Ksh. 350,000/=. The medical report by Dr. Wokabi indicates that the amount of Ksh. 300,000/= is the cost of radiotherapy to remove the scars on the upper lip and both forearms and Ksh. 50,000/= for fitting of a two teeth permanent bridge. I have considered the following authorities with respect to future medical expenses:

**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 Mbaka Nguru &***

*Another - v- James George Rakwar, Court of Appeal Civil Appeal No. 133 of 1998, it was stated that claims for future medical expenses must be pleaded and proved as a special damage claim".*

2) Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR

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) Mbaka Nguru & Anor. v James George Rakwar[1998]eKLR.

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. The plaintiff adduced evidence on the need for future medical expenses. There is no contrary evidence. Dr. Wokabi did not lay a basis for his estimated cost. 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.

According to the rules, revision of multiple scars costs a minimum of Ksh. 120,000/= and a maximum of Ksh. 160,000/=. The rules further provide that the cost of fitting a definitive bridge is a minimum of Ksh. 40,000/= and a maximum of Ksh. 55,000/=. The plaintiff will be required to pay consultation fees and other attendant charges. In the circumstances, and taking into consideration the inflationary trends, I would estimate and award Ksh. 150,000/= for radiotherapy and Ksh. 50,000/= for fitting of the bridge. The total award for future medical expenses is **Ksh. 200,000/=**.

**DISPOSITION**

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

- 1) General damages for pain, suffering and loss of amenities.....Ksh. 500,000/=
  - 2) Special damages.....Ksh. 14,750/=
  - 3) Future medical expenses.....Ksh. 200,000/=
- Total.....**Ksh. 714,750/=**

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 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.....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.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 18<sup>TH</sup> DAY OF  
NOVEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**