

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E207 OF 2024

UNIVERSE FREIGHT SERVICES LIMITED.....APPELLANT
-VERSUS-
PATRICK MUCHIRI NDWIGA..... RESPONDENT

JUDGMENT

1. The respondent was injured in a road traffic accident on 10 May 2022. The accident involved his motor cycle registration no. KMFA 258 A (TVS), which he was riding at the material time, and the defendant's motor vehicle registration number KCZ 506Y (caravan). The accident occurred along Nairobi-Mombasa road near APM area, in Mombasa County.
2. The respondent attributed the accident to the negligence of the defendant's authorized driver, servant, agent or employee and, therefore, he sued the appellant in the magistrate's court at Mombasa in civil suit no. 632 of 2022 for both general and special damages, amongst other reliefs.
3. The appellant contested the respondent's suit and filed a defence to that end. However, at the conclusion of the trial, and in a judgment delivered on 5 July 2024, the court (Gathogo Sogomo, (Principal Magistrate), found and held the appellant to have been solely responsible for the accident.
4. As for the quantum of damages the court held:

“The court finds that the sum of Kshs 1,000,000/= in general damages is an adequate recompense for the injury, pain, loss and damage suffered by the Plaintiff and awards him the same accordingly.

Going by opinions in the medical records aforesaid, the court observes that the Plaintiff suffered 10% permanent incapacity caused by stiffness and arthritis of right knee and ankle, recurrent pains, and weakness at fracture points. Guided by the decision in the case of Mumias Sugar Company Ltd Vs Francis Wanalo (2007) eKLR the court grants the Plaintiff a global sum of-Kshs 100,000/= in damages in diminished capacity.”

5. The learned magistrate also awarded the sum of Kshs. 78, 641/= as special damages which he found to have been specifically pleaded and proved. The claim for future medical expenses was declined as the learned magistrate held that it had not been pleaded.
6. The appellant has appealed against this decision. In the memorandum of appeal dated 13 July 2024 and filed on 15 July 2024, the appellant has appealed on the following grounds:

“1. That the learned judge erred in law and in fact in holding that the plaintiff had proved his case on negligence on a balance of probability.

2. That the learned trial magistrate erred in law and in fact in making an award for general damages for pain, suffering and loss of amenities that was inordinately high after disregarding awards for similar injuries, the doctrine of stare decisis and public interest.

3. That the learned trial magistrate exercised his discretion wrongly in awarding general damages of Kshs. 1,000,000/= for pain and suffering as he took into account extraneous facts and failed to consider relevant ones hence erred in principle.

4. That learned trial magistrate erred in law and in fact in awarding Kshs. 78,641 /= as special damages despite the plaintiff producing receipts worth Kshs. 50,314.50.

5. That the learned trial magistrate erred in his discretion by awarding costs despite service of demand letter not being proved.

6. That the learned trial magistrate erred in awarding damages for diminished earning capacity despite not being pleaded.”

7. The appellant has prayed that the awards made under the heads of general and special damages be assessed afresh and lower awards be made. It has also prayed that the award by the trial court on diminished earning capacity be set aside. The appellant also wants costs of the appeal.

8. On his part, the respondent filed a memorandum of cross-appeal dated 23 July 2024 and in it, he has raised the following grounds:

“1. That the Learned Magistrate erred in law and fact in awarding the Respondent General damages for pain and suffering of Kshs. 1,100,000/= which amount is low and not commensurate with the serious injuries suffered and judicial decisions on similar injuries.

2. That the Learned Magistrate erred in law and principle by finding that the future medical expenses were not pleaded by the Respondent and thus failed to award the future medical expenses.

3. That the learned magistrate ignored the Respondent’s Medical Report dated 27th May 2022 together with the submissions, paid lip service and failed to consider the submissions of the Respondent with respect to the Future medical expenses.

4. That the learned Magistrate erred in law in failing to appreciate the principles governing the award of future medical expenses cited in precedent and rehashed in the Respondent's submissions thus coming to a wrong decision on future medical expenses.”

9. As for the prayers, the respondent has prayed *“for the appeal to be allowed and the judgment of the trial court be set aside in respect of the limbs appealed therefrom together with costs of the appeal.”*

10. At the hearing, the learned counsel for the appellant informed the court that he was abandoning the appeal against liability. Consequently, the appeal by both parties is on quantum of damages only.

11. The appellate court will not normally interfere with the assessment of general damages by the trial court because it is an exercise that squarely falls within the discretion of the trial court. In applying this principle, the House of Lords in **Davies versus Powell Duffryn Associated Collieries Ltd (1942) AC 601** where held (at page 617) that: -

“In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere on the ground of excess or insufficiency.”

12. And this principle has been followed in our local jurisdiction and of the many cases where it has been applied, the oft-cited ones include **Bashir**

Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 and Kemfro Africa Ltd T/A Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 728. In the former decision the Court of Appeal noted:

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

And in the latter case, the same Court said at page 730 that:

“The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages”.

13. Turning back to the respondent’s case in the lower court, Dr. Darius Kiema testified and produced a medical report of his examination of the

respondent. He examined the respondent about four weeks after the accident. In his examination, he relied on treatment notes, x-ray forms and P3 forms. It was his evidence that the respondent suffered bone related and dental injuries. In his opinion, the respondent sustained 10% permanent disability.

14. In his medical report which was admitted in evidence, the injuries the respondent sustained were described as follows:

“1. Compound (open) midshaft right tibia/fibula bones

2. Broken/avulsed three upper incisor/canine teeth.

3. Cut/laceration lower limb/chin.

4. Blunt trauma to the chest and upper limbs.

5. Bruises, abrasions & lacerations both lower limbs.”

15. The report shows that the respondent had previously been treated at Coast General Teaching and Referral Hospital. An x-ray showed that the respondent had sustained a fracture. He was given analgesics and wound care. He was also taken to the theatre for reduction and fixation with external fixator.

16. At the time of examination, he complained of pains in the right lower limb and that he was not able to *“fully bear weight.”* He was on crutches

but his blood pressure and vital signs are said to have been normal. The examination further revealed the following:

- 1. Bandaged right leg with external fixator**
- 2. Bruises, abrasion and laceration wound both lower limbs**
- 3. Sutured wounds lower lip/chin**
- 4. Missing and broken upper incisor teeth and missing upper canine tooth**

17. He concluded that as a result of the road traffic accident, the respondent sustained injuries which he particularised as follows:

- 1. Compound (open) midshaft right tibia/fibula bones**
- 2. Broken/avulsed three upper incisor/canine teeth.**
- 3. Cut/laceration lower limb/chin.**
- 4. Blunt trauma to the chest and upper limbs.**
- 5. Bruises, abrasions & lacerations both lower limbs.**

18. And in his opinion, the respondent suffered from above grievous injuries “which will lead and predisposes to;

- 1. Post traumatic stiffness and arthritis right ankle and right knee.**

2. A lifetime of recurring post-traumatic pains right leg especially when walking/working and during periods of cold weather.

3. Fracture sites are now a point of weakness and can easily fracture in future.

4. Diminished capacity to work and undertake other activities of daily living.

He will incur future medical expenses related to;

1. Purchase of painkillers and joint/bone care medication estimated at KES 3,000 per month for at least one year.

2. Physiotherapy sessions at Coast General teaching & Referral Hospital estimated at KES 650 per sessions for 40 sessions in a year totalling to KES 26,000 per year for at least one year.

3. Provision for removal of metal external fixators right femur in theatre at Coast General Teaching & Referral Hospital estimated at KES 1,000 as per NHIF surgical package or as per previous hospital bill.”

19. According to the doctor, the respondent's permanent disability was assessed at 10%. He recommended a fresh evaluation of the respondent after six. As for the future dental care, the doctor estimated the cost of removal of dentures at Kshs. 20,000/= while a permanent prosthetic

implant was estimated at Kshs. 40,000/= per tooth. Thus, the cost for the three teeth was Kshs. 120,000/=.

20. In his evidence, the respondent testified that he was unable to ride a motor cycle as a result of the accident and that he had not fully healed.

21. By consent of the parties, a second medical examination report by the appellant's doctor was admitted in evidence. The report was by Dr. Udayan R. Sheti who is an orthopaedic surgeon. He examined the respondent on 9 August 2023 and at the time he examined him, the respondent was complaining of pain and had deformity on the right leg.

22. Upon examination, Dr. Sheti established that the respondent walked with a limp "*and one stick*". He noted an 18cm scar over right leg and a mild deformity of the same leg. There was a swelling over the right foot. Movement of right knee was full but the movement of right ankle was mildly restricted. There was no shortening of right leg. The doctor also established loss of 3 upper incisor and canine teeth.

23. Contrary to the respondent's doctor's evidence on permanent incapacity, Dr. Sheti was of the opinion that the respondent had a permanent capacity of 5%. It was also his opinion that the respondent needed a denture for teeth loss which would cost around Ksh. 15,000/- at the Coast General Hospital. He advised the respondent to do an xray of the right knee and ankle to rule out arthritis.

24. The two reports reveal that in their opinions, both the doctors were in agreement that the respondent had suffered some permanent disability although they differed on the extent of the disability. Dr. Kiema's report appears to me to have been more detailed on the nature of the injuries the respondent suffered and, as a result, his report was more certain about the expenses that the respondent was likely to incur as future medical expenses. While, for instance, both doctors acknowledged that the respondent had lost three teeth, Dr. Kiema went further to estimate the cost of the implants to cover for the lost teeth. Nonetheless, the pertinent question is not about which of the two reports is preferable but whether the court could gather from the two reports as much information as was necessary for the assessment of damages which would necessarily include future medical expenses.

25. The respondent's counsel cited three decisions in which it was argued that the claimants had suffered comparable injuries and asked for a global award of Kshs. 1,500,000/= for pain and suffering and loss of earning capacity. These decisions are **Kennedy Ouma Dachi versus Joseph Maina Kamau & Another [2018] eKLR** where an award of Kshs. 1,000,000/= was made by the lower court for a comminuted fractured acetabulum. On appeal, the award was enhanced to Kshs. 1,400,000/=; and, **George William Awuor v Beryl Awuor Ochieng (2020) eKLR** where the plaintiff suffered fractures of the right femur and left tibia

fibula. The doctor also noted that the tibia fibula fractures were compound while the femur fracture was simple. The right thigh had surgical scars and some bruising which had since healed but the nail was still *in situ* and that the claimant would have to undergo surgery to remove the nail. The appellate court awarded Kshs.1,200,000/=.

26.The other decision which the respondent relied upon was **James Gathrwa Nungi versus Multiple Hauliers (EA) Limited & another (2015) eKLR**. Here, the plaintiff is said to have suffered, among other injuries, compound comminuted fracture of the right tibia and compound comminuted fracture of the right fibula. The court awarded him Kshs. 1,500,000/= as general damages for pain and suffering.

27.It was submitted on behalf of the respondent that his capacity to earn had diminished because there was medical proof that he could no longer ride a motor cycle which was his tool of trade. The court was, thus, asked to take this fact into account in the assessment of general damages.

28.The appellant, on the other hand, proposed the sum of Kshs. 350,000/= as general damages and Kshs. 15,000/= for future medical expenses. In so submitting, the appellant's counsel proceeded on the basis, *inter alia*, that the respondent did not lose any teeth as a result of the road traffic accident and, therefore, as I understood him, any damages associated with the loss of teeth including correctional implants or future medical expenses did not accrue.

29. The learned counsel cited **Gladys Lyaka versus Francis Namatsi & 2 Others (2019) eKLR** where the claimant was awarded Kshs. 300,000/= as damages for pain and suffering. The claimant in that case had sustained a cut wound on the anterior part of the scalp; a head injury; a spinal cord injury; neck injury, a fracture of the lower tibia and fibula and a cut wound on the face. There was no permanent disability.
30. Counsel also relied on **Maselus Eric Atieno versus United Services Limited (2017) eKLR** where the claimant was awarded Kshs. 250,000/= for fractures of the right leg, tibia/fibula bones; bruises on the elbow joint; tenderness and swelling on the right knee, injury on the pelvic region, among other injuries but again there was no permanent disability. The other decisions which the appellant relied upon are **Triad Coaches Limited & Another versus Mary Mutheu Kakemu (2020) eKLR** and **Naom Momanyi versus G4S Security Services Limited (2017) eKLR**.
31. In the former case, an award of Kshs. 250,000/= was made for fracture of the distal tibia fibula and soft tissue injuries on the wrist which healed without any incapacity. In the latter case, an award of Kshs. 250,000/= was made for a fracture on the left-right condylar tibia, blunt injuries on the back and multiple bruises. Permanent incapacity was assessed at 30%.
32. Contrary to the appellant's counsel's submissions, the appellant's own doctor established the respondent had lost 3 upper incisor and canine teeth. It is also obvious that the decisions which the appellant's counsel

relied upon were decided more than five years ago. Except for **Naom Momanyi versus G4S Security Services Limited** (supra), none of the injuries sustained in the rest of the cases resulted in permanent disability.

33. Even then, it is rather intriguing that the awards made in those claims where there was no permanent disability were higher than in the case where there was permanent disability. For my part, I would say that an award of Kshs. 300,000/= where the doctor established that that “*the appellant’s right leg was deformed and wasted*” and, therefore, assessed permanent disability at 30%, besides other soft tissue injuries, would be inordinately low.

34. Against the foregoing background, I would not fault the learned magistrate for the award of Kshs. 1,000,000/= as general damages for pain and suffering. I am not persuaded that in making the award, the learned magistrate took into account an irrelevant factor, or left out of account a relevant one, or that, the award is so inordinately high that it is wholly an erroneous estimate of the damages under this head.

35. As far as the damages under the head of diminished earning capacity are concerned, unlike in damages under the head of loss of earnings or future earnings which are based on ascertained figure representing actual earnings, diminished earnings are ordinarily made without any proof that the claimant was in gainful employment or has a regular income. This distinction was explained in **SJ v Francesco Di Nello & another (2015)**

eKLR and Mumias Sugar Limited v Francis Wanalo (2007) eKLR which were cited with approval in **Nyatogo v Mini Bakeries Limited [2023] KEHC 1593 (KLR)**. In **SJ v Francesco Di Nello & another** the court held that:

“Claims under this (sic) heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award of general damages once proved...”

36. And in **Mumias Sugar Limited v Francis Wanalo** the court held thus:

“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 of the award when the 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 the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future...”

37. The Court of Appeal also had occasion to address the distinction between loss of future earnings and compensation for diminution of earning capacity in **William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)**. The court held as follows:

“Now, there was no evidence of what the respondent had earned before the accident either as an unqualified nurse or the wife of a farmer at Nakuru, so this was not a claim for ‘loss of future earnings’. It was, as the learned judge described it, for a ‘loss of earning capacity’ which she suffered and this should be part of the general damages for her disabilities and not compensation, for future loss of earnings. The respondent would be at a considerable disadvantage or, indeed, without any hope in the labour market because of her injuries. There are no reported decisions of any court in this part of the world for all this.

*The English law on the issue is this: The respondent brought this action for damages and she had to prove her damages. Lord Goddard CJ in **Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177.***

Sometimes it is impossible, though the justice of the case requires some award to be made or as Holroyd LJ said, in Daniel v Jones [1961] 1 WLR 1103, 1109:

“... Arithmetic has failed to provide the answer which common sense demands.”

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.

Ashcroft was a skilled precision engineer who, at the age of 57, was injured by Curtin in a traffic accident. He was left with tinnitus and disturbance of his balance for the rest of his life. ‘He was no man at keeping accounts’ so he could not quantify his private company’s loss but had he had to find work outside his company, for which he had been trained since he was 14, which was a real risk, he would be greatly handicapped and he was entitled to compensation, which was put by the Court of Appeal, in late July, 1971, at Pound Sterling 2,500.

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.

Guidance on the principles for assessing such damages were given by the same Court of Appeal in Moeliker v Reyrolle & Co [1977] 1 WLR 132 by Brown LJ in this form.

The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment

then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can.” (Emphasis added).

38. Thus, an award under the head loss of earning capacity is only resorted to in the absence of any proof of regular earnings or income that ordinarily would inform the calculation of loss of earnings or future earnings. Against the foregoing legal background, and in the absence of proof of any regular income, the respondent would be entitled to damages for loss of earning capacity. While the award may be made as a component of general damages Chesoni, JA **in William J Butler v Maura Kathleen Butler (supra)** did not rule out the possibility of these damages being awarded under a separate and distinct head, though bearing in mind that these damages are always general damages. The learned judge held:

“Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in Fairley v John Thomson [1973] 2 Lloyd’s Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it

under its own heading as the learned judge in this case did. Indeed, the judge should have said “general damages” for pain, suffering including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of the result of the injuries suffered in this case, I would not consider too excessive as to justify this court’s interference.”

39. Going by the medical reports by the respective doctors for the appellant and the respondent, there is no doubt that the respondent sustained injuries some of which have impacted negatively on his motor-cycle transport business. It was his evidence at the time of the trial that he could not ride because he had not healed. And even if he will ride in future, he probably might not be as effective as he used to be before because he has suffered some degree of permanent incapacity. Generally, his earning capacity whether as a motor-cycle rider or not, has been diminished. Accordingly, I would not disturb the learned magistrate’s award of Kshs. 100,000/= in diminished earning capacity.

40. On special damages, the amount represented in the receipts provided in evidence by the respondent does not add to the amount that was awarded. The receipts from the Coast General Hospital show that the respondent made payments of up to Kshs. 48,315. The only other receipt I can see is the receipt of payment of Kshs. 2000/= to a hospital called My Clinic, bringing the total expenses to Kshs. 50,315. In the absence of any

evidence to the contrary, there is no basis for the award of Kshs. 78, 641/= which the learned magistrate made under this head.

41.As for the future medical expenses, it is obvious from the learned magistrate’s judgment that no award was made under this head. According to the learned magistrate, he could not make any award under this head because it had not been specifically pleaded.

42.But the appellant did not contest the award under this head. In his submissions, the learned counsel for the appellant submitted that:

“It is the defendants (sic) humble submission that if the plaintiff has proved his case, he is entitled to the following: -

i) General damages of Kshs. 350,000/=

ii) Special damages of Kshs. 50,314.50

iii) Costs of future medical expenses Kshs. 15,000/=

(Emphasis added)

43.With this submission, there ought not to have been any dispute that damages under the head of future expenses ought to have been awarded. But more importantly, contrary to the learned magistrate’s conclusion that the claim for future medical expenses was not pleaded, the respondent expressly pleaded for damages under this head. To be precise, in paragraph 9 of the plaint, it was pleaded as follows:

“9. The plaintiff shall need future medical expenses as particularized in the medical report dated 27th May 2022 for sufficient recovery as recommended and shall claim award under that head.”

And in the prayers in the plaint, the respondent prayed for future medical expenses as a distinct prayer.

44. The circumstances under which damages can be made under this head is a question that was discussed by the Court of Appeal in **Tracom Limited & another v Hassan Mohamed Adan [2009] KECA 48 (KLR)**. In that case, the Court of Appeal relied on medical reports as sufficient proof of the need of future medication and, therefore, future medical expenses. An award can be made on this basis. To quote the learned judges of the Court of Appeal:

“It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e, that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will need future medication is not in our mind in dispute. Of the two reports suggesting amounts needed, the Kenyatta Hospital report which suggests approximate figure of Ksh.100,000/= per year was prepared on 23rd December 1999.

It is instructive that Dr. Shah's report made about three months later said the left hip was fusing and Osteomyelitis was settling down such that in his mind respondent was unlikely to need any further operation. Dr. Wangai's report made three years later suggested only Ksh.50,000/= for future medical expenses. Thus there was some evidence of progressive drop in the need for future medication. The amount of Ksh.50,000/= that the learned Judge of the superior court used as the amount that would be required every year was an amount suggested by the respondent's counsel in her submission. The learned Judge referred to it as a reasonable and fair amount in the circumstances. He, with respect did not consider that that was the amount as at the time the report was made in May 2003. He also did not consider that it reflected a 50 per cent decrease from the amount in Kenyatta Hospital report made in December 1999. In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or

too high that it must have reflected improper award – see the case of Henry H. Ilanga vs. M. Manyoka [1961] EA 705 at page 713. In this case, as we have stated, the learned Judge failed to consider what he should have considered. Hence we are entitled to interfere with the award of Ksh.50,000/= per year on this head. We reduce it to Ksh.40,000/= per year.”

45. Similarly, in the respondent’s case, the two doctors who examined him were of the opinion that the respondent may need future medical attention. While Dr. Sheti advised the respondent to undergo an x-ray of the right knee and ankle to rule out rule out arthritis, Dr. Kiema was more particular and detailed in his report on the nature, extent and the cost of future medical attention that the respondent would require. In his report he was particular that:

“He (the respondent) will incur future medical expenses related to;

1. Purchase of painkillers and joint/bone care medication estimated at KES 3,000 per month for at least one year.

2. Physiotherapy sessions at Coast General teaching & Referral Hospital estimated at KES 650 per sessions for 40 sessions in a year totalling to KES 26,000 per year for at least one year.

3. Provision for removal of metal external fixators right femur in theatre at Coast General Teaching & Referral Hospital estimated

at KES 220,000 as per NHIF surgical package or as per previous hospital bill.

4.Provision for dental care as follows depending of choice;

a.Temporary removal dentures estimated at KES 20,000

b.Permanent prosthetic implant estimated at KES 40,000 per tooth for three teeth totalling 120,000/=”

46.The total cost for future medical expenses was estimated at Kshs. 322,000/=. Dr. Kiema’s report was dated 27 May 2022 while Dr. Sheti examined the respondent 9 August 2023, more than year later. The assumption is that having examined the respondent more than a year after he was examined by Dr. Kiema, Dr. Sheti must have had the opportunity to consider the report by Dr. Kiema.

47.Just like he had a contrary opinion on the extent of the respondent’s permanent disability as a result of the accident, nothing stopped the appellant doctor from commenting on the future medical attention that the respondent would require and the estimated cost. In these circumstances, the trial court would have been properly in order to award the sum of Kshs. 322,000/= under the head of future medical expenses.

48.For the reasons I have given, I allow the appellant’s appeal to the extent that the sum of Kshs. 78, 641/= awarded under the head of special damages is reviewed downwards to Kshs. 50,314.50. The cross-appeal is

