REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E189 OF 2024

MOGO AUTO LTD ……
1ST APPELLANT
NYAMWEYA ABEL MICHIRA ……
2ND APPELLANT

VERSUS

EVANS ONSARE ……
RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of Hon. P.C. Biwott, Chief Magistrate, in Ogembo CMCC No. E224 of 2021, delivered on 25.09.2024. The Appellants were defendants in the lower court.

2. The court made the decision to allow the suit and held the appellants jointly and severally liable and awarded general damages as follows:

a. Liability	100%
b. General damages	Ksh.2,500,000/=
c. Loss of earning capacity	Ksh. 1,728,000/=
d. Future medical expenses	Ksh. 400,000/=

e. Special damages Ksh.194,860/=

Total **Ksh.4,822,860/=**

3. The appellant was aggrieved and set forth 12 grounds of appeal. It is unnecessary to set the same out herein verbatim, as they are repetitive and prolix. The appeal raises only two questions; that is lability and quantum. In respect to quantum, the appeal is on general damages, loss of earning capacity, future medical expenses, and special damages. Ground 11 is superfluous and thus dismissed in *limine*.

Pleadings

4. The Respondent filed suit through a plaint dated 12.11.2021 claiming damages arising from an accident involving motor vehicle registration number KCQ 623 Q, and the Respondent, who was a pedestrian, on 11.08.2021 along Tabaka-Ikoba Road at Gesore area. Particulars of negligence were set out in the plaint.

5. The respondent pleaded the following particulars of injuries:
   a. Traumatic amputation of the right leg
   b. Bruises on the right hand
   c. Bruises on the left hand
   d. Bruises on the face

6. Special damages of Ksh. 194,860/= were pleaded. The respondent sought damages for future medical expenses, though this was not indicated. The plaint was amended on

12.08.2022 to claim damages for loss of future earning capacity and costs of fitting the artificial limb. The respondent pleaded that he was 21 years old, meaning 20,000/= per month as a farmer and businessman. He will have been active in business and farming activities for the next 39 years.

7. The appellants filed a defence digitally signed on 22.01.2022 but dated 19.11.2021. They denied liability and attributed negligence to the Respondent. Reliance was placed on the doctrine of *non fit injuria* and *volenti non fit injuria.*

Proceedings

8. Dr. Morebu, Senior Medical Officer, produced a report for the respondent. The respondent suffered a traumatic amputation of the right leg and deep cut wounds on the right hand, and bruises on the right and left hands. The Respondent suffered 60% permanent disability. He stated that the company had the right to report an artificial limb to be revived every 2-4 years in his entire life at Ksh. 400,000/=. He relied on the P3 form, the doctor's summary, and the x-ray report. He charged Ksh. 6,500/=. On cross-examination, he stated that the cost of Ksh. 400,000/= was set by the government.

9. The respondent testified as PW2. He stated that he was walking lawfully off the road when the appellant's vehicle hit him from behind. He stated that he was a matatu driver earning KSh. 20,000/= per month. He produced all exhibits

and receipts for Ksh 187,810/=. On cross-examination, he stated that it was dark and two people and himself were walking off the road. The road was not narrow. The witness stated that he became unconscious after the accident. He blamed the driver for hitting him off the road. He stated that he was a matatu driver and had a license in court. He stated that he could not do the work.

10. PW3 was a Clinical Officer at Hema Hospital. He produced a discharge summary. The respondent was admitted between 11.08.2021 and 27.08.2021 with injuries to the right leg, lower back pains, and pelvic pain. The tenderness of the lower back was indicated. The respondent suffered a fracture of the lower limb, resulting in amputation of the lower limb.

11. PW4 was 70035 PC Alfred Komen of Gucha South Traffic Base. He produced an abstract for the subject accident. He stated that the driver was avoiding an oncoming motor vehicle and, as a result, knocked over three pedestrians. The said accident occurred off-road. The victims could not be blamed.

12. On cross-examination, he indicated that there were no eyewitnesses, though the accident occurred off-road. The appellants did not cooperate and recorded no statement. On re-examination, he stated that the appellant reported the accident and stated that he swerved off the road.

13. The defence did not call any witness.

Analysis

14. This Court has considered the pleadings, evidence, submissions, and authorities relied on by the parties in support and opposition to the appeal. This being a first appeal, the court should evaluate the evidence, consider the parties' arguments applying the law thereto, and make its own determination of the issues in controversy. However, it should take into account that it neither saw nor heard the witnesses' testimony. In the case of **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123**, the court stated as follows:

> The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

15. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In **Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR**, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

16. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

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

17. On liability, the duty of the court is limited to the evidence on record. It is not to consider evidence that has not been tendered. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

18. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR),** where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of

probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

19. When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish in such a defence is to prove that the injured party failed to take reasonable care for their own safety and that such failure contributed, in some degree, to the accident or the damage suffered. The essence of contributory negligence lies not in a breach of duty to the defendant, but in a failure to take reasonable precautions to avoid foreseeable harm to oneself. See **Davies v. Swan Motor Co. Ltd** or **Nance v. British Columbia Electric Railway**) [1949] 2 KB 291. The appellant invited me to apportion liability. On which evidence?

20. The evidence given was that the respondent was off the road. This was corroborated by the police, who stated that the records indicate the three pedestrians were off the road. The court has no duty to read the minds of parties. Its duty is limited to the evidence tendered. There was no evidence on record showing that the respondent was not off the road. There is no requirement that there must be an eyewitness to an accident. In this matter, two parties were involved in the accident, that is; the second appellant as the driver of the accident vehicle and the respondent. The respondent gave evidence on how the accident occurred. The only other person who knew how the accident occurred was the driver. He chose not to testify, leaving the court to rely on Section 112 of the Evidence Act, which provides for proof of special knowledge as follows:

> **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

21. Section 143 of the Evidence Act (Cap 80 Laws of Kenya) provides as follows:-

> **"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."**

22. However, I am equally persuaded by the reasoning of Odunga, J as he then was in **Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR** where the learned judge stated as follows:

> **53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances, one would have expected the Appellant to testify in order to controvert the evidence of PW2, but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.**

23. In the case of **Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR**, Justice G.V. Odunga as then he was stated as doth:

> "In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil

Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:

"Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> …Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

24. Before liability is attributed to the respondent, there has to be fault. That fault must arise from evidence and not pleadings. In the case of **Kiema Muthuku v Kenya Cargo Handling Services Ltd** (1991) 2 KAR 258, the court of appeal posited as follows:

> *There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove*

some negligence against the defendant where the claim is based on negligence.

25. Due to failure to testify, liability cannot be attributed to the Respondent. Contributory negligence could not be shifted to a respondent without evidence to that effect. In the case of **Mac Drugall App V Central Railroad Co. RBR** 63 *CAL 431* the court held that:

> *In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence, and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence.*

26. Consequently, there is no basis laid for attributing liability to the Respondent. The appeal on liability is thus otiose and dismissed for lack of merit.

27. The next question is quantum, which I shall address in four limbs, that is:'

a. General damages
b. Special damages
c. Loss of future earning capacity
d. Future medical expenses

28. Special damages must be particularized and strictly proved. In the case of **David Bagine Vs Martin Bundi [1997] eKLR,** the court of appeal stated as follows: -

> It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it.

29. Special damages must be both pleaded and proved before they can be awarded by the Court. In the case of **Swalleh C. Kariuki & another v Viloet Owiso Okuyu** [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh,

> Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held*:*
>
> "Special damages must not only be specifically claimed *(pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."*

30. In this case, a sum of Ksh. 104,860/= was pleaded. A sum of Ksh 6,500/= was for the medical report. It was produced in evidence. There was a search for Ksh. 550/=, which was also produced in evidence. A sum of Ksh 187,810/= was pleaded as medical expenses. The said sum was paid, and a receipt for the same was produced. The amount was paid in cash. Effectively, it is this court's finding that a sum of Ksh. 194,860/= was pleaded correctly and strictly proved. An appeal on this limb is thus without merit and is consequently dismissed.

31. The next question is loss of future medical expenses. This was pleaded in the body of the plaint. Dr. Morebu indicated that a sum of Ksh 400,000/= will suffice. His permanent disability was assessed at 60%. The court ignored that there was to be a revision every 2-4 years. However, there is no appeal to the said finding. A sum of Ksh. 400,000/= was proved. The only question is whether the loss of future

medical expenses must be pleaded and proved specifically. In this case, the same was pleaded. However, no specific figure was given. The figure that was demonstrated was in the medical report.

32. On future medical expenses, the Appellant was under duty to plead even an approximate amount that would constitute future medical expenses. In the case of **Tracom Limited & Another vs. Hassan Mohamed Adan Civil Appeal Number 106 of 2006**, the Court of Appeal stated:-

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

33. Future medical expenses as special damages should be pleaded and proved. As was held in the cases of ***Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company***

Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98 and Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992, while the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.

34. This approximate sum was not pleaded. However, the need for future medical expenses was pleaded. In the case of **Forwarding Company Limited & another v Kisilu; Gladwell (Third party)** (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment) the Court of Appeal overturned a decision of the High Court not to award future medical expenses on the ground that the plaintiff had attached a specific sum to it. The court of appeal posited as follows:

> 62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among other things. It is not always clear at the time of filing a case what these future

costs may be. The prognosis could change for better or for worse depending on various circumstances."

35. Further, the Court of Appeal [P. K. Tunoi, P. N. Waki, J. W. Onyango Otieno] in the case of **Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR** stated as follows:

> The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-
>
> > "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."

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

36. The award of Ksh. 400,000/= as future medical expenses was proved. An appeal in that respect is thus dismissed.

37. The next question is on loss of earning capacity. The same is not pleaded in the plaint. There was no evidence tendered in regard to it. Even if there was any evidence, it is not one of the claims in the plaint.

38. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in **Butler vs. Butler [1984] KLR 225,** as follows:

a. A person's loss of earning capacity occurs where as a result of 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;

b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

39. This can only be done by the plaintiff pleading the same and then proceeding to prove the same. It is not vice versa. Parties are bound to plead their cases fully. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> *.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……*
>
> *...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues*

as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

40. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition:

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…

41. The tragedy is that the respondent was not coherent in what he did. He testified that he was a driver. It is not clear what he was doing. In the circumstances, I agree with the appellants that the respondent should be treated as a minimum wager. I cannot find the basis for a sum of 10,000/= used. Secondly, the court used 24 years as if the respondent were dead. The court must use a minimum figure to allow the respondent adjust to normal life. Conventionally, 10 years suffices. I set aside the use of 24 years, since the respondent is not deceased.

42. The accident occurred outside the municipality of Kisii. Therefore, the minimum wage applicable to agricultural workers in other areas suffices. It is also essential, in the judgment, to give hope to the respondent that he is not a vegetable and can return to a near-normal life and have a new normal. The minimum wage applicable is Legal Notice No. 2 dated 19th December, 2018, and gazetted on 8.1.2019. It is christened, The Regulation of Wages (General) (Amendment) Order, 2018. The amount applicable is Ksh. 7,240.95/= for a general labourer. This thus works as follows:

60% of 7,240.95 x 10 x 12 = Ksh 521,348.40/=

43. In the circumstances, I set aside the sum of Ksh. 1,728,000/= awarded under the head of loss of earning capacity and in lieu thereof, enter judgment for a rounded sum of Ksh 521,400/=.

44. The last question is about general damages. The court awarded a sum of Ksh. 2,5000,000/=. The authorities used are worlds apart. The authorities used by the appellant in the lower court are irrelevant, and there is no need to regurgitate them. The question before me is to determine whether the court erred in awarding general damages. The question of general damages was addressed in the case of **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR**, where D.S Majanja held as follows:

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

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

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the

> awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

46. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion, the exercise should be done judiciously in the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

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

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

48. This had been further elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is **Nance vs British Columbia Electric Co Ltd, in the decision of Henry**

Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> **"The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."**

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

(a) To ascertain whether the Court applied irrelevant factors or left out relevant factors.

(b) To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

(c) The award is simply not justified from evidence.

50. To be able to do this, I need to consider similar injuries, take into consideration inflation, and other comparable awards. For the appellate court to interfere with the award, it is not enough to show that the award is high or low or even

that had I handled the case in the subordinate court, I would have awarded a different figure.

51. In the case of **Mbatia & another v Maina alias Boniface Karanja Maina alias Boniface Mwangi Maina alias Boniface Mwangi [2025] KEHC 8265 (KLR),** the court awarded a sum of Ksh.2,500,000/= for amputation of the right leg below the knee with a 23 cm-25 cm stump.

52. In the case of **Muchina v Wanjiku & 4 others** [2025] KEHC 1817 (KLR), the court awarded general damages Kshs 3,000,000/= for compound fracture of the left tibia and fibula, fracture of the socket of the left hip joint and amputation of the left leg below the knee.

53. In the case of **Dolphine Freighters Ltd v Shingoli** [2025] KEHC 5216 (KLR), the court affirmed an award of Ksh 2,500,000/= where a claimant's right leg was amputated.

54. In the circumstances, I do not find the award to be inordinately high as to amount to an erroneous estimate of damages. The appeal on this limb is thus dismissed.

55. The remaining issue is costs. This is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and

> incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

56. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

> [18] It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such

> discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.… Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings.

57. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

58. Costs follow the event. The appeal was largely unsuccessful but succeeded on one minuscule issue: loss of future earning capacity. Effectively, I order that each party bears its own costs.

Determination

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

(a) The appeal on liability is dismissed. Appeal on general damages, special damages, and future medical expenses is dismissed.

(b) The appeal on loss of future earning capacity is allowed. Judgment for a sum of 1,728,000/= is set aside. In lieu thereof, judgment is entered for Ksh. 521,400/=.

(c) Each party bear its own costs.

(d) Right of appeal 14 days.

(e) The file is closed.

DELIVERED, DATED, and **SIGNED** at **NYERI** on this **16th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ojonga for the Appellant

Mr. Were for the Respondent

Court Assistant – Michael