REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E122 OF 2024

JACKTONE ONYANGO OUYO……

APPELLANT

VERSUS

OMOCHA ENTERPRISES LIMITED……

RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. B.O. Omwansa, SPM, delivered on 25.06.2024, arising from Kisii CMCC No. E273 of 2021. The appellant was the plaintiff in the court below.

2. The appeal is only on the quantum of damages, that is, special damages and general damages. The court below awarded a sum of Ksh. 250,000/= and special damages of 12,750/=. The poignant part is that, in all matters I have handled in court, whether soft tissue or fractures, there has been a standard award of Ksh 250,000/= as general damages. The other strange coincidence is that no authorities are cited.

3. It could be more prudent for the learned magistrate, at least, to show the raison d'être for an award. Stating that he has considered submissions without doing so, is not edifying and places the first appellate court in a quandary when understanding its role as the court that must reevaluate the evidence, come to its independent conclusion, without unnecessarily differing with the court below on the findings of fact. As the judgment standard, the court cannot know whether the appellant's injuries were all proved or not. This makes the first appellate court, not a court that re-evaluates the evidence, but evaluates. This is a retrial, not a trial. Without findings of fact and reference to authorities, the judges remain bereft without anchoring.

4. The Plaint dated 4.02.2020, prayed for special damages of Ksh. 64,700/= and general damages arising from an accident that occurred on 13.12.2020 in which the Respondent's motor vehicle **Registration Number KBL 673M** is said to have negligently collided with motor vehicle **Registration No. KCQ 572B** along the Kisii-Migori Road.

5. The appellant set forth particulars of negligence for the accident motor vehicle. He pleaded the following injuries:
    a) Head injury with loss of consciousness with Glasgow Coma Scale
    b) Chest contusion
    c) Bruises on the right hand

d) Bruises on the left hand
e) Blunt trauma to the back.
f) Right-hand ethmoid, left-hand sphenoid sinuses, acute hematoma.
g) Right orbital lateral wall, right posterior ethmoid and sphenoid body fracture
h) Right parietal bone depressed skull fracture with associated scalp soft tissue injury.

6. To contextualize the injuries, for the layman, I will translate them into a non-medical language. The appellant pleaded that he suffered a serious head injury that caused loss of consciousness, accompanied by a bruised chest, bruising on both hands, and injury to the back due to blunt force. He also sustained internal bleeding into the brain, fractures to the bones around the right eye and the inner parts of the skull, and a depressed fracture on the right side of the head with associated injury to the scalp and surrounding soft tissues.

7. This is the approximate understanding of this court on the injuries suffered. These are pretty serious injuries, by any approximation. after listening to the parties, the court entered judgment as follows:
    a) General damages Ksh. 250,000/=
    b) Special damages Ksh 12,750/=

<u>Evidence</u>

8. Dr. Morebu Peter Momanyi testified on 38.3.2023 that he examined the appellant and found the following injuries
    a) Head injury with loss of consciousness,
    b) Multiple skull fractures involving the right parietal, right orbital bone, right ethmoid and sphenoid bone.
    c) Internal bleeding into the brain
    d) Multiple deep cut wounds on the head
    e) Blunt injuries on back and chest
    f) Bruises on both hands.
9. The appellant suffered grievous injuries and was treated at Nyangena Hospital. Permanent injury was anticipated, with a likelihood of future complications, including post-traumatic epilepsy or psychosis. PW1 produced the discharge summary, the P3 form, the medical report, and a receipt for Ksh. 6,500/=. On cross-examination, he stated that he only examined the patient who had severe head injuries and had not healed.

10. The appellant testified on the injuries stating that he had not healed. PW3 confirmed the occurrence of the accident. PW4 produced the treatment notes and discharge summary from Nyangena hospital. He pointed out the injuries suffered as set out in the treatment notes/ discharge summary.

11. On cross-examination, he stated that he was the treating clinician. He said the appellant had a skull fracture and two facial bone fractures.

12. The court was transferred, after which witnesses testified before Honourable B.O. Omwansa. Dr. Tobiso Otieno Ondiek testified and stated that he examined the plaintiff and his findings were normal. On cross-examination, he said that he relied on the medical reports from the appellant.

Submissions

13. The appellant filed comprehensive and beautifully written submissions dated 4.09.2024 On the duty of the court, reliance was placed on the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR)**, where the court of appeal [EM Githinji, R. N. Nambuye & MK Koome, JJA, as they then were] posited as follows:

> This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held inter alia that:
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> > **On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility**

of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

14. On the principles governing quantum, reliance was placed on the case of **Savana Saw Mills Ltd V George Mwale Mudomo [2005] KEHC 372 (KLR)**:, where this court, George Dulu, Ag. J held as follows:

> There are several case authorities on this position. It will suffice if I cite what was stated by the Court of Appeal in the case of Catholic Diocese of Kisumu –vs- Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001 in which the Court of Appeal reiterated what it had earlier held in the case of Kemfro Africa Ltd Vs Meru Express Service V A.M Lubia & Another **(1982-88**) that:
>
> > … the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate of damages.

15. They posited that this court cannot interfere with the discretion of the court below. Reliance was placed on the case of **Butt v Khan [1978] KECA 24 (KLR),** where the court of appeal [Madan, Wambuzi & Law JJA] held as follows:

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

16. They submitted that the court heard the matters and observed the witnesses. The court considered submissions. It was their submissions that, in any case, submissions are not binding on the court. They placed reliance on the case of **Moi v Muriithi & another [2014] KECA 642 (KLR):**

> **Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "***marketing languages* **each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.**

17. The record should reflect that an appeal from the above decision was dismissed vide a majority decision in *Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) v Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another (Petition 41 of 2018) [2023] KESC 61 (KLR) (30 June 2023) (Judgment) (with dissent - MK Ibrahim & N Ndungu, SCJJ*):

18. They submitted that, regarding the injuries, no X-ray or CT scan was produced. They stated that it was the appellant's duty to produce an expert report to that effect. They submitted that the appellant miserably failed in that respect. Reliance was placed on the case of **Hassan Noor Mahmoud V Tae Youn Ann [2001] [2001] Kehc 44 (KLR).**

19. They submitted that X-rays must be submitted to prove fractures. They relied on the case of **Dhiraj Manji v Tyson Ouma 2021] KEHC 7409 (KLR)**, where the court stated as follows:

> "I am also in agreement that a radiology request is not sufficient proof of the existence of a fracture. Ordinarily, after a request is made, an X-ray is conducted, and the doctor who conducts the X-ray does a comprehensive report on the outcome of the X-ray. In this particular case, such a doctor's report has not been produced.

> Further still, no x-ray film was produced in court to confirm that indeed the respondent herein sustained a fracture. No expert and/or specialist in fractures was called to adduce evidence in Court to the effect that the respondent had sustained a fracture. In the absence of such a crucial piece of evidence, it is hard for the Court to rule out the presence or otherwise of a fracture.

20. They submitted that there was no skeletal injury. The injuries suffered were soft tissue injuries. Reliance was placed on the case of **Onsase v Omosa (Civil Appeal 11 of 2017) [2022] KEHC 13953 (KLR) (14 October 2022)** (Judgment) (R. L. Korir, J). They concluded that the appellant failed to prove that the lower court proceeded on wrong principles. They posited that the court was actually generous, as the injuries were not proved.

21. They stated that only a sum of Ksh 6,500/= and 2,700/= were proved. The remaining receipts were not legible. Never mind that the three admitted receipts did not add up to 12,750/=. Reliance was placed on a persuasive case of **Easy Coach Limited v Emily Nyangasi [2017] KEHC 5131 (KLR),** where TW Cherere J held:

> The learned trial magistrate awarded special damages in the sum of Ksh. 21,335/- on the basis of a bundle of receipts that did not bear stamp duty which was contrary to the Stamp Duty Act Cap 480 Laws of Kenya.

Section 19 of the Stamp Duty Act provides:

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped

As correctly submitted by the appellant, the bundle of receipts marked PEXH. 5 for Ksh. 21,335/- ought not to have been received in evidence and the sum thereof is hereby set aside.

22. This submission does not relate at all to any of the matters before the court. The court did not make any finding on the said section. It is a submission in vacuo. Had the respondent wished that the court deal with the issues regarding the Stamp Duty Act, then an appeal to that extent would have sufficed. There is no finding on stamp duty and no appeal to that extent. The Respondents prayed for costs.

23. The appellant filed submissions dated 8.9.2025. They submitted that a total of 2 fractures were sustained. These

were the right orbital lateral wall, right posterior ethmoid, and sphenoid body fracture, and right parietal bone depressed skull fracture with associated scalp soft tissue injuries. They submitted that the respondent's doctor admitted to have relied on PW1 treatment documents, among them a CT Scan Investigation report, and further admitting to not performing an independent X-ray/CT scan, then on what basis did he make a finding that the appellant had no skeletal fractures? Reliance was placed on the decision of R. Ougo. J. in the case of **Zoa Taka Limited & another v Kyalo** (Civil Appeal E031 of 2022) [2025] KEHC 1606 (KLR) where the learned judge held as follows:

> **The argument by the appellant that the respondent only sustained soft tissue injuries is unmerited in the face of the discharge summary which indicates that the respondent sustained a fracture. Therefore, the report by Dr. Mwaura captures an accurate picture of the respondent's injuries.**

24. The appellant submitted that in the face of the CT Scan investigation report and discharge summary, the injuries as captured by Dr. Tobias Otieno were inaccurate, having relied on PW2's treatment notes in examination, and must therefore be rejected.

25. They buttressed their submissions with the finding of the court to the effect that:

> The plaintiff avers that he suffered injuries as a result of the accident. To buttress his averments, he produced the P3 form, treatment notes, and medical report as exhibits. Therefore, I find that indeed the plaintiff has proved this issue as required by law.

26. It was his case that the produced treatment notes by a witness from Nyagena Hospital, the institution being the maker of such documents. He decried the ill-placed submissions by the respondents that 'where a party alleges fracture, he must call an expert to testify on the nature of the alleged fracture…' It was their submissions that the burden and standard of proof are discharged by either direct or indirect evidence by a witness. The direct or indirect evidence may include documentary evidence that may be produced by the author or any other lawful witness.
27. They submitted that even for soft tissue injuries without fractures, the damages as awarded were still inordinately low. They submitted that even soft-tissue injuries alone, without fractures, attract about Ksh 350,000/=. Reliance was placed on the court's cases in **Gekari v Nyaberi** (Civil Appeal E033 of 2021) [2025] KEHC 9682 (KLR) (7 July 2025).

28. On the matter at hand, he submitted that he suffered 2 fractures. He relied on the case of *D Light K Company & another v GK alias Baby GK (Suing Through The Next Friend And Mother, BCC) [2025] KEHC 11483 (KLR),* where a

claimant suffered scalp lacerations, right eye brow abrasions, depressed skull fracture/right frontal skull fracture with depressed fragment and bruising of both forearms, in which JK Ng'arng'ar, J awarded a sum of Ksh. 600,000/=

29. It was further submitted that the respondent admitted that the appellant was admitted for 4 days as per the discharge summary and corroborated by DW1's medical report at page 42 of the record of appeal.

30. On special damages, the appellant submitted that the Respondent admitted that PW2 produced a receipt of Ksh. 54,000/= from Nyangena Hospital. They submitted that PW2 produced a Receipt from Nyagena Hospital of Ksh. 54,400/= from Nyangena hospital Receipt No. RCPT26287 and the invoice, right from pages 12 to 17 of the record of appeal. They submitted that the only objection to the receipt was that it was non-compliant with the Stamp duty Act. They sought refuge in Article 159 of the Constitution, 2010, as that is just a procedural technicality.

31. They prayed for award of Ksh. 64,700 as special damages and Ksh 1,00,000/= as general damages.

Analysis

32. This being a first appeal, the court is under a duty to re-evaluate and assess the evidence and make its own

conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. It cannot do so, where the court below did not express itself on the facts and the comments on demeanor. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where the Court stated:

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

33. The foregoing was echoed in the case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the court(Law JA) held as follows:

> **".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.**

34. The question of sanctity of findings of fact by the court below was addressed in the case of **Peters vs Sunday Post Limited [1958] EA 424**, 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…**

35. However, the court notes that the court did not hear the appellant and his witnesses. Therefore, this court has wide latitude, as it has not seen the proceedings and has formed an opinion on demeanor. This was the scenario addressed in the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment), where, Kiage JA stated as doth:

> I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the

> advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard, having taken up the case when it was already halfway heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge.

36. The appeal being on quantum only, the court need not set out facts of the case. They shall be subsumed. The court will deal only with facts relating to the two aspects of the appeal, that is, general damages and special damages. The court notes that the parties were pigeonholing documents in one category or another, that is, general damages and special damages. However, the documents must address the totality of the appeal. The injuries must have been treated and injuries raised. It will not make sense to allow expenses for clutches and plaster of Paris, and find that there was no injury requiring immobilization of the skeletal muscles. This also applies to authorities. Submissions citing authorities on one point do not mean those same authorities cannot be used for other aspects. The words of Bowen L.J, in Ratcliffe v. Evans [1892]2QB 524, Bowen L.J. will be handy:

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much 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.

…Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counter checked and either accepted or disproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged and we think Onyancha J. was right in describing him as an expert, and his report as being opinion evidence. The court had the right to accept or reject his opinion if the circumstances so dictated. The respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to.

37. The duty of the court regarding damages is settled that the state of the Kenyan economy and the people generally, and the welfare of the insured and the insured public must be at the back of the mind of the trial Court.

38. The Appellant submitted that the lower court misapprehended evidence and arrived at an erroneous award of damages and special damages. Fact finding is primarily the duty of the lower court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in **Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001**, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

39. The duty on the appellant was outlined in the case of *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by *Lord Goddard CJ.* in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he that:

> ***[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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.

in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell),* Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

40. The court is aware of the duty regarding special damages. They must be both pleaded and proved before the Court can award them. In the case of **Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR,** Kimaru, J as then he was, stated:

> 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 [1985] KECA 129 (KLR), 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.**

41. The appellant must first plead special damages and then proceed to prove. It is not based on estimates. The Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** stated that:

> "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.

42. However, we ran into deep waters when there was no finding of fact. For example, in respect of special damages, a sum of Ksh 64,700/= was pleaded. It is wholly inexplicable how the Court arrived at the figure of Ksh. 12,750/=. The sum is neither anchored in the pleadings nor supported by the evidence on record. The amount defies any known mathematical, legal, or logical computation. The figure is plainly arbitrary and bears all the hallmarks of guesswork.

Indeed, absent any demonstrated reasoning or calculation, the award appears to have been conjured out of thin air. This is even though the Appellant expressly pleaded as follows:

a) Medical bills 57,100/=
b) Police abstract 550/=
c) Motor vehicle records 550/=
d) Medical report 6,500/=.

43. The inevitable question that then arises is which, if any, of the four pleaded categories, namely medical bills, the police abstract, motor vehicle records, and the medical report, were actually allowed by the Court. No factual findings were made in this regard. The court merely stated that it had "perused the receipts", without identifying which receipts, their source, or their evidentiary value. Such a sweeping statement is devoid of analytical content and renders the decision opaque and incapable of being sustained by the appellate court. A perusal of the medical invoices and supporting documents from Nyangena Hospital alone reveals a total of Ksh. 57,100/=, a figure that finds no reflection whatsoever in the impugned judgment. The question of receipts that are ineligible should and must be settled by the court by making such a finding.

44. The appellant produced a medical receipt of Kshs. 6,500/= together with medical invoices and corresponding receipts from Nyangena Hospital amounting to Kshs. 54,400/=, and a

further receipt dated 13.12.2020 for Kshs. 2,700/=, bringing the total medical expenses to Kshs. 57,100/=. There was also evidence of a motor vehicle search receipt in the sum of Kshs. 550/=. Cumulatively, the proved special damages amounted to Kshs. 64,150/=. The police abstract, as appears on the face of the record, was issued free of charge and is therefore not awardable.

45. Crucially, there was no challenge whatsoever to the pleaded special damages, either on cross-examination or in submissions. The law is settled that special damages must be specifically pleaded and strictly proved, and once so proved, they are awardable as of right. In **HAHN V SINGH [1985] KECA 129 (KLR)**, the Court of Appeal held that special damages, once pleaded and proved, cannot be ignored. Similarly, in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] KEHC 2976 (KLR),** O.K. Mutungi, J, reaffirmed that a trial court has no discretion to arbitrarily reduce or disregard strictly proved special damages, by statin as follows:

> If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent

> the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test.

46. In the present case, the Court made no factual findings as to which receipts were accepted or rejected, nor did it provide any reasons for departing from the proved figure. The failure to award the sum of **Ksh. 64,150/=,** which was strictly proved and uncontroverted, amounts to a clear misdirection on the evidence and an improper exercise of judicial discretion. The impugned award is therefore unsustainable and calls for interference.

47. The court has no discretion once special damages are proved. Proof means that these costs were reasonable and incurred as a result of the accident. Costs arising from over caution and unnecessary expenditure cannot be awarded. In this case, the costs were shown to be necessary, related to the injuries, and actually incurred by them ought to be awarded. There is a misnomer that receipts prove payment. An invoice with a memorandum showing payment is sufficient. The court of Appeal [Kneller, Nyarangi, JJA and Chesoni, Ag JA], had this to say about extravagant expenditure in the case of HAHN V SINGH [supra], or the duty to mitigate:

> So must the third fail because the judge could not do anything else but find that the appellant did not take reasonable steps to mitigate the loss which he sustained consequent upon the negligence of the respondent and Pinto so the appellant could not claim for the airport charges, aircraft charges, aircraft flights, hotel bills and loss of pay which he ought reasonably to have avoided by driving it into Zambia and having it repaired there once the tail light had been replaced and covered with appropriate coloured plastic or glass. The respondent and Pinto said this was what he ought to have done so they had to prove it. Whether or not they did was a question of fact and not of law depending on the circumstances of the case before Mr. Justice Brar. One test of reasonableness is whether a prudent man would have acted in the way the appellant did if the damage had been the result of his own negligent driving? The answer in this case would be that the prudent man would have driven it home to Zambia and ordered the metallic paint by telephone if it were not available there. The judge set out the relevant law in this from Halsbury's Law of England 4th edition (1982), pages 477 and 478, which is the law here, and applied it to the circumstances of the case before him, correctly.

48. There was a challenge at the submissions level relating to the Stamp Duty Act. This was not a question raised during the hearing. The court below did not deal with this aspect. In any case, there were no submissions stating that receipts for medical evidence are dutiable. Further, the Respondent was

under a duty to object to the production of receipts to enable the court make a decision. To the extent I agree with the decision in of **EASY COACH LIMITED V EMILY NYANGASI [SUPRA]** Insofar as the same was raised in that court.

49. The respondent was under a duty that the appellant failed to mitigate losses; they failed to do so. There was nothing to show a failure of mitigation of loss. Consequently, the award on special damages is set aside and in lieu thereof substituted with a sum of Kshs. 64,150/=, which was proved as aforesaid.

50. On the other hand, the principles governing award interference with general damages were addressed in the case of **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [**1986] KECA 42 (KLR), where the court of appeal, sitting in Mombasa [Kneller, Hancox and Nyarangi, JJ.A], posited as follows:

> This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:
>
> (a) Proceeded on a wrong principle; or
>
> (b) Misapprehended the evidence in some material respect.

(…)

> And a member of an appellate court when he naturally and reasonably says to himself ‘what award would I have made?’ and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. West (H) & Son v Shephard Ltd [1964] AC 326, Lord Morris of Borth -Y-Gest.

51. This was a rendition of an earlier decision of the court of appeal [Madan, Wambuzi & Law JJA] in the case of Butt v Khan [1978] KECA 24 (KLR), where they posited as follows:

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

52. This was the position of the court of appeal differently constituted [Hancox, Nyarangi JJA & Gachuhi Ag JA], in the case of Southern Engineering Company Ltd v Mutia [1985] KECA 49 (KLR), where it was stated as follows:

> … 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 to prior decisions which

are relevant to the case in question. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in H West & Son v Shephard, [1964] AC 326 at page 353, and reads as follows:-

> The difficult task of awarding money compensation in a case of this kind is essential a matter of opinion of judgment and of 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 an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that this sphere there are inevitably 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.

53. General damages are awarded at the discretion of the court, which must exercise the same judiciously, guided by the nature and extent of the injury, comparable awards in similar cases, and the overarching principle of fairness. In **Nyambati**

Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice 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.

54. The court awarded a sum of Ksh. 250,000/=. It is not clear which injuries the court found to have been suffered and which ones were not. However, the court stated that the pleaded injuries were proved. There is no appeal on this particular finding. However, the two medial reports differed significantly. The report by Dr. Otieno relied on an earlier report. There is no indication why the good doctor differed with the predecessor.

55. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> ***"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of***

an expert if it finds good reasons for not doing so."

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

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

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

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

the Court said with regard to the evidence of experts:-

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

58. Analyzing the evidence from the two documents, doctor Otieno's report appears shallow and is not consistent with the rest of the evidence. The treatment notes and discharge summary show fractures. The appellant pleaded, mainly Head injury with loss of consciousness with Glasgow Coma Scale, Right-hand ethmoid, left-hand sphenoid sinuses, acute hematoma, right orbital lateral wall, right posterior ethmoid, and sphenoid body fracture, right parietal bone depressed skull fracture with associated scalp soft tissue injury. These injuries were in the P3 and the discharge summary. The good doctor classified the injuries as grievous harm.

59. The depressed skull was shown on the P3, where the court recommended that the appellant had a depressed skull

fracture, which was the same finding as the CT scan (Computed Tomography scan). The fracture of the skull did not have an associated intracranial hematoma. It also showed that the fracture to the sphenoid extended to the right ethmoid sphenoid bone posteriorly. The award must be guided by comparable authorities. In the case of **Moiz Motors Limited & another v Harun Ngethe Wanjiru** [2021] KEHC 8702 (KLR), a claimant who suffered a depressed frontal bone fracture of the skull, among other injuries. The court, R. Mwongo J, awarded a sum of Ksh 500,000/= in 2021.

60. In the case of **Ndorongo v Ouma** [2024] KEHC 9045 (KLR), B.M. Musyoki, J set aside an award of Kshs 1,200,000.00/= and substituted for a sum of Kshs 500,000.00/= as general damages where a claimant therein had suffered blunt injuries to the head resulting in loss of consciousness for an unknown duration, blunt injuries to the head resulting in loss of an upper tooth, blunt injuries to the left shoulder, a cut on the forehead, and a non-depressed fracture of the skull.

61. In **Nyota Tissue Products v Charles Wanga Wanga & 4 Others** [2020] KEHC 6207 (KLR), the Plaintiff sustained head injury with open depressed frontal fracture court substituted an award of Kshs. 1,200,000/= with that of Kshs. 500,000/=.

62. In **Mbeva v Kenya Malik Limited & another** [2023] KEHC 23269 (KLR), the court reduced the award of Kshs 2,500,000/= to Kshs 500,000/= for calvarian and facial comminuted minimally depressed fractures, tension pneumocephalus, cerebral oedema, axillary and ethmoid hemo/CSF pneumosinuse, scalp and facial soft tissues oedema and emphysema, lacerations behind the left ear and above the right eye, recurrent headaches and loss of memory.

63. In the case of Pet**er Robert Kinuthia & another v Jackline Atieno Otieno [2022] KEHC 1512 (KLR**), the court upheld an award of Ksh. 900,000/= for the Respondent who had suffered the following injuries:

- Bilateral frontotemporal non-haemorrhagic cerebral cortical contusions;
- Multiple facial bone fractures and
- Bilateral maxillary, ethmoid and frontal haemosinus

64. In the case of **Danki Adventures Limited v Gitau** (Civil Appeal E047 of 2023) [2025] KEHC 13468 (KLR) (30 September 2025) (Judgment), the court upheld an award of Ksh. 900,000/= for the Respondent who had suffered the following injuries:

- Deep cut on the left supraorbital area
- Orbital wall and zygomatic fractures

- Fracture of the left radial head displaced
- Soft tissue injuries to the left hip
- Friction burns on the anterior aspect of the left knee

65. The injuries are more severe in this matter than in the matters referred above. Taking into consideration the extent of the injuries, the degree of permanent disability, inflation, and the circumstances of the case, an award of Ksh. 800,000/= will suffice. Therefore, the award of Ksh. 250,000/= is set aside and substituted with an award of Ksh. 800,000/= in general damages for pain, suffering, and loss of amenities.

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

> (1) Subject to such conditions and limitations as may be **prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless**

the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

67. Costs are generally discretionary. However, the discretion is not arbitrary. 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.

68. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, 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, prior to, during, and subsequent to the actual process of litigation.
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

69. In the circumstances, the appeal is allowed. Judgment on quantum is set aside as aforesaid with costs of Ksh. 95,000/=.

Determination

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

a) The appeal is allowed. Judgment on both general damages and special damages is set aside; in lieu thereof, I enter judgment as follows:

(i) General damages for pain and suffering and loss of amenities is entered for a sum of Ksh. 800,000/=.

(ii) Special damages of Ksh. 61,150/=.

(iii) The Appellant shall have costs of the appeal of Kshs. 95,000/=.

b) Stay of execution for 30 days.

DELIVERED, DATED, and **SIGNED** at **NYERI** on this **3rd** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael