REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO 65 OF 2018

MUTINDA MATHEKA……PLAINTIFF

VERSUS

BERNICE MBITHE MATILIKU……1ST DEFENDANT

KUNGU NJAGU GIDEON……2ND DEFENDANT

JUDGMENT

THE CLAIM

Mutinda Matheka (hereinafter referred to as the plaintiff) filed this suit on 20/3/2018 vide a plaint dated 19/3/2018. The plaintiff sued Bernice Mbithe Matiliku and Kungu Njagu Gideon (hereinafter referred to as the 1st and 2nd defendants respectively) on account of a road traffic accident that allegedly occurred on 11/1/2017 along Kibwezi-Kitui road. The plaintiff averred that on the material day, he was a pillion passenger on motor cycle registration number KMCE 566E along Kibwezi-Kitui road when the 2nd defendant carelessly and negligently drove the 1st defendant's motor vehicle registration number KCC 070N from the opposite direction and caused the said motor vehicle to veer off its lane and rammed into motor cycle registration number KMCE 566E, as a result of which the plaintiff sustained serious injuries. The 1st defendant was sued as the beneficial owner and/or insured of motor vehicle registration number KCC 070N whereas the 2nd defendant was sued as the driver thereof at the material time.

The plaintiff averred that that the accident was caused by the negligence of the 2nd defendant for which the 1st defendant is vicariously liable. The plaintiff pleaded the following particulars of negligence as against the 2nd defendant:

a) Driving at an excessive speed;
b) Failing to slow down, swerve or in any other way manage and/or control the said vehicle to avoid it from causing the said accident;
c) Being careless in the circumstances;
d) Failing to take heed of other road users on the said road;
e) Driving a defective vehicle without proper or any proper brakes;
f) Failing to steer in a clear and proper cause;
g) Failing to apply brakes in sufficient time to avoid the said accident;
h) Veering off its lane to the lane of motor cycle registration number KMCE 566E when it was dangerous to do so.

The plaintiff further pleaded the particulars of injuries and those of special damages. That he would require a good quality multifunctional leg prosthesis with a life span of 12 years and an annual maintenance of Ksh. 1,000/=, which will cost Ksh. 600,000/=. He further averred that he would also need a wheelchair at a cost of Ksh. 400,000/=which shall be replaced after every ten years. The plaintiff averred that as a result of the accident, the 2nd defendant was charged and convicted of careless driving in Makueni Traffic case No. 80 of 2017. The plaintiff prays for judgment against the defendants for:

1) General damages and future medical expenses;
2) Special damages of Ksh. 106,000/=;
3) Costs of the suit and interest.

THE DEFENDANTS' DEFENCE

The defendants entered appearance on 28/3/2018 and filed a written statement of defence on the same date through the firm of Mutinda Kimeu & Company Advocates. Later, another memorandum of appearance and statement of defence for both defendants were filed on 16/8/2018 through the firm of Muchui & Company Advocates. The firm of Mutinda Kimeu was later allowed to cease acting for the defendants. It was explained that the said

firm had been instructed by the defendants themselves whereas the firm of Muchui & Company Advocates was instructed by the Insurance company.

The record indicates that on 6/11/2024 the defence counsel filed an application dated 4/11/2024 seeking to amend the notice of appointment as well as the statement of defence on the ground that the appointment and statement of defence was to be in respect of the 1st defendant alone. The draft notice of appointment and statement of defence were attached to the affidavit in support of the application. The parties filed a consent to have the application allowed but did not move the court to have the consent adopted as an order of the court. An amended statement of defence was later filed pursuant to the letter of consent. In the interest of justice, I will adopt the consent as an order of the court and deem the amended defence as duly filed.

It therefore follows that only the 1st defendant filed a statement of defence. The 1st defendant admitted being the owner of motor vehicle registration number KCC 070N but denied that the 2nd defendant was her driver. The 1st defendant further admitted the occurrence of the accident involving her motor vehicle and the motor cycle in issue but denied that the plaintiff was one of the pillion passengers on the motor cycle. The 1st defendant denied that the accident occurred in the manner pleaded in the plaint or that it was caused by negligence, carelessness or recklessness of the 1st defendant or her authorized driver. She further denied the particulars of negligence pleaded in the plaint.

The 1st defendant averred that the accident was wholly caused and/or substantially contributed to by the negligence and/or carelessness of both the rider of the motor cycle and his two pillion passengers. She pleaded the following particulars of negligence against the rider of the motor cycle:

a) Rode at an excessive speed in the circumstances;
b) Attempted to overtake an unidentified motor vehicle ahead before first ensuring that the road was clear of oncoming motor vehicle;
c) Left his lane and path of travel and encroached onto the direct path of travel of motor vehicle registration number KCC 070N which was lawfully and carefully being driven on its correct lane;

d) Rode in a zig-zag manner;
e) Failed to have due regard for other motor vehicles on the said road and in particular motor vehicle registration number KCC 070N;
f) Failed to keep proper look out for motor vehicles on the said road and in particular motor vehicle registration number KCC 070N;
g) Failed to stop, brake, swerve, slow down or in any other manner manage motor cycle registration number KMCE 566U so as to avoid the accident;
h) Ferried two pillion passengers on the motor cycle beyond its authorized capacity;
i) Failed to have due regard for his own safety and that of his pillion passengers;
j) Rode without due care and attention;
k) Failed to wear reflective clothing while riding in the dark.

The 1st defendant further pleaded the following particulars of negligence against the two pillion passengers:

a) Rode as two pillion passengers beyond the motor cycle's authorized carrying capacity;
b) Failed to wear helmets and reflective clothing while riding as pillion passengers on the motor cycle at night;
c) Failed to have due regard for their own safety;

The 1st defendant denied that the plaintiff sustained injuries or suffered any loss or damage, denied the claim for a multifunctional leg prosthesis and denied the claim for a wheelchair. The 1st defendant denied that the 2nd defendant was charged and convicted of careless driving and averred that a conviction for a traffic offence does not preclude one from pleading and proving contributory negligence against the counterpart. The 1st defendant prayed that the suit be dismissed with costs.

THE EVIDENCE

The Plaintiff's Case

The witnesses testified on behalf of the plaintiff. The plaintiff testified as PW 1. He adopted his statement filed in court as part of his testimony. His evidence was that on 11/1/2017 he was a pillion passenger aboard the motor cycle in issue when the 1st

defendant's motor vehicle which was being driven from the opposite direction veered off its lane and rammed into the motor cycle. As a result, the plaintiff was injured. The plaintiff blamed the driver of the accident motor vehicle and its owner. It was the plaintiff's evidence that his leg was amputated. He denied having contributed to the accident, nor the motor cyclist.

PW 2 Doctor Stephen Ndegwa testified that he examined the plaintiff on 20/7/2017. That the plaintiff sustained injuries which necessitated the leg to be amputated just below the hip. That the amputation site was still dressed and healing when he examined the plaintiff. The doctor assessed permanent disability at 70%. He indicated that a prosthetic limb costs about Ksh. 600,000/= and has a life span of about 12 years. That it has annual maintenance of about Ksh. 1,000/=. He produced his medical report and payment receipts in evidence. PW 2 stated that he relied on the physical examination of the plaintiff, treatment notes and the P3 form. PW 3 Chief Inspector of police Peter Kinyua testified that he was the Base Commander at Makindu. He confirmed the occurrence of the accident, the involvement of the motor vehicle and motor cycle as well as the plaintiff as a pillion passenger. That the motor vehicle was driven by the 2nd defendant who was subsequently charged and convicted of the offence of careless driving.

The 1st Defendant's Case

The 1st defendant did not attend court to testify but called Dr. Wambugu Mwangi. The doctor testified that on 28/1/2019 he examined the plaintiff and prepared a medical report. He produced it in evidence.

FACTS NOT IN DISPUTE

From the pleadings and evidence from both parties, the following facts are not in dispute:

a) An accident occurred on 11/1/2017 along Kibwezi-Kitui road involving motor vehicle registration number KCC 070N and motor cycle registration number KMCE 566U;
b) The 1st defendant was the owner of motor vehicle registration number KCC 070N at the material time;
c) The plaintiff was involved in the accident;

d) The plaintiff sustained injuries as a result of the accident.

MAIN ISSUES FOR DETERMINATION

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

i. Whether the 2nd defendant was to blame for the accident;
ii. Whether the 1st defendant is vicariously liable for the accident;
iii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
iv. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on the evidence on record and urged the court to find the defendants 100% liable in negligence and for the accident. He submitted that his evidence was unrebutted. The plaintiff relied on the authority of ***Moses Theuri Ndumia v IG Transporters Limited & another [2018] eKLR.***

On quantum, the plaintiff submitted a sum of Ksh. 3,000,000/= in general damages for pain and suffering and relied on the following authorities:

a) ***Muthee v Njagi [2025] KEHC 11669 (KLR),*** wherein an award of Ksh. 3,000,000/= made on 23/5/2024 to a plaintiff who suffered traumatic amputation of the lower right limb, abrasion of the hand and phantom pain, was reduced to Ksh. 2,500,000/= on 30/6/2025. The injuries resulted in permanent disability of the affected limb which required prosthesis;
b) **Mbatia & another v Maina alias Boniface Karanja Maina alias Boniface Mwangi Maina alias Boniface Mwangi [2025] KEHC 8265 (KLR).** In this case, the plaintiff and respondent in the appeal was awarded Ksh. 3,500,000/= in general damages on 24/4/2023 for amputation of the right leg below the knee and fracture of the right femur. Permanent disability was at between 45% and 60%. On appeal, the award was reduced to Ksh. 2,500,000/= on 10/6/2025.

The plaintiff further proposed a sum of Ksh. 106,000/= as special damages and Ksh. 600,000/= as costs of the artificial limb for four cycles at Ksh. 150,000/=.

THE 1ST DEFENDANT'S SUBMISSIONS

The 1st defendant also filed written submissions. She submitted that the plaintiff had not proven liability against her and her authorized driver. The 1st defendant argued that there was no evidence to show that the 2nd defendant was her driver. That there was no proof of employment nor earnings nor a driving licence. The 1st defendant submitted that the plaintiff admitted that he did not have reflective gears not a helmet. That there were two pillion passengers on the motor cycle, which was against the traffic rules. The 1st defendant argued that the plaintiff should shoulder some blame. She relied on the authorities whose copies were not annexed.

The 1st defendant argued that the evidence indicated that the plaintiff was a rider and not a pillion passenger. That the plaintiff did not call an eye-witness and that the police officer who was called to testify did not witness the accident nor produce the occurrence book and the relevant police investigation office. The 1st defendant argued that the testimony of the police officer did not contain information on how the accident occurred and who was to blame. That even if the police abstract contained information blaming the motor vehicle's driver for the accident, such indications would be of no consequence without corroborating evidence.

The 1st defendant attempted to mislead the court as to what DW 1 stated in evidence. DW 1 who was the only witness that was called by the defence was a doctor who merely examined the plaintiff but the 1st defendant submitted as if the witness gave an account as to how the accident occurred. It is unprofessional for counsel to mislead the court in that manner. The 1st defendant urged the court to hold the plaintiff 100% liable for the accident. The 1st defendant cited several alleged authorities but none were filed for the court's reference.

On quantum, the 1st defendant urged the court to adopt the medical report by Doctor Wambugu and proposed a sum of Ksh. 800,000/= in general damages. She relied on the following authorities:

a) ***Charles Oriwo Odeyo v Apollo Justus Andabwa & another [2017] eKLR***. In this case, the plaintiff and appellant in the appeal sustained injuries leading to amputation of

his right leg below the knee, injuries on the left leg leading to inability to walk, injuries to the head leading to concussion and bruises and lacerations on the legs and hands. The trial court awarded Ksh. 450,000/= in general damages on 15/8/2014. On appeal, the award was enhanced to Ksh. 800,000/= on 15/4/2017;

b) ***Bayusuf Freighters Limited v Patrick Mbatha Kyengo [2014] eKLR***. In this case, the plaintiff and respondent in the appeal sustained a crush injury with traumatic amputation of the right leg, fracture of the radius, fracture of the right ulna, severe degloving injuries on the right forearm and hand and a laceration would on the right gluteal region. The trial court awarded Ksh. 1,600,000/= in general damages on 6/6/2003. On appeal, the award was affirmed on 30/7/2014.

The 1st defendant did not file a copy of the other authority that she relied upon in which Ksh. 1,000,000/= was allegedly awarded. For special damages, the 1st defendant urged the court to award what was specifically pleaded and strictly proved.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties as well as the authorities relied upon. I have already pointed out the facts that are not in dispute. Let me deal with the issues in controversy.

Liability

There is only one version as to how the accident occurred. According to the plaintiff's uncontroverted evidence, on 11/1/2017, he was travelling as a pillion passenger aboard motor cycle registration number KMCE 566U (wrongly indicated as 566E in the plaint and statement) along Kibwezi-Kitui road when motor vehicle registration number KCC 070N which was being driven from the opposite direction veered off its lane and rammed into the motor cycle. It is the duty of the plaintiff to establish or prove negligence on the part of the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability.

The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who

alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, the Court of Appeal held thus:

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

The uncontroverted evidence of the plaintiff clearly shows that the driver of the accident motor vehicle registration number KCC 070N, was at fault. He was reckless in his manner of driving. There is clear and uncontroverted evidence on how the accident herein occurred. I find that the evidence of the plaintiff as to how the accident occurred was consistent and was not shaken. The 1st defendant, in her statement of defence attributed negligence to the plaintiff and the Rider of the motor cycle but did not attend court to give evidence nor institute third party proceedings against the Rider of the motor cycle or even the owner. The 1st defendant attempted to peddle a narrative that the plaintiff was the rider of the motor cycle but the uncontroverted evidence indicates that he was a pillion passenger. Allegations in pleadings remain mere allegations unless backed by evidence.

The 1st defendant further raised allegations that the plaintiff was an excess pillion passenger on the motor cycle and that he did not wear a helmet and reflective jacket. This was an allegation made from the bar without evidence. In as much as the evidence indicates that the motor cycle had two pillion passengers contrary to law, there is nothing to show that the plaintiff, and not the other pillion passenger was the excess one. Furthermore, the 1st defendant did not demonstrate that the act of carrying two pillion passengers was the cause of the accident. Carrying two pillion passengers could not have been the reason for the driver of the accident motor vehicle to lose control. It was alleged in evidence that the driver of the 1st defendant's motor vehicle was charged and convicted of the offence of careless driving. The information is contained in the police abstract that was produced in evidence.

The plaintiff relied on section 47A of the Evidence Act which provides as follows:

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged".

In the case of ***Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende [1982-88] 1 KAR 1036***, the Court of Appeal held as follows:

"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even prima facie case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages".

It has largely been held by the superior courts that a conviction in respect of a traffic offence does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant. In the case of ***Francis Mwangi v Omar Al-Kurby Civil Appeal No. 87 of 1992*** the Court of Appeal was of the view that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence. There

is nothing to show that an appeal was preferred against the conviction and that the conviction was overturned.

The 1st defendant argues that the information on the police abstract concerning the conviction is not conclusive. The conviction of the driver of the accident motor vehicle is an indication that he was negligent. I rely on the Court of Appeal authority of ***Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] KECA 167 (KLR).*** In the authority of ***Moses Theuri Ndumia v I G Transporters Limited & another [2018] KECA 297 (KLR)***, the Court of Appeal observed:

".....the Police Abstract form that indicated the driver of the 1st respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence..... In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondent."

Further, in ***David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] KECA 434 (KLR)***, the Court of Appeal had this to say:

"When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent.....In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle."

31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the

respondents did not lead any evidence to demonstrate that the 2nd respondent, as the driver of motor vehicle KAY 718S, was not negligent."

Similarly, in ***Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR***), the Court of appeal held:

"The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision."

Being guided by the above authorities, I find that there is no evidence to prove that the plaintiff was negligent. As already indicated, the 1st defendant did not take out third party proceedings against the motorcyclist or owner of motor cycle registration number KMCE 566U. Furthermore, the police abstract clearly indicates that the 1st defendant's driver was charged with careless driving and convicted. The contents of the police abstract were not challenged in any way. No contrary evidence was given by the 1st defendant's driver. Consequently, I find the driver of the accident motor vehicle registration number KCC 070N 100% liable for the accident.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner. In the case of ***Morgan v Launchbury [1972] ALL ER 606***, it was held, *inter alia*, that:

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

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

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

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

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

The 1st defendant denied in her statement of defence that the 2nd defendant was the driver of the accident motor vehicle at the material time. The plaintiff's evidence through the police officer and the police abstract clearly indicates that the 2nd defendant was the driver of the 1st defendant's motor vehicle at the time of accident. The 1st defendant did not call for evidence to rebut the fact. I do not think it was a prudent idea for whoever instructed counsel for the 1st defendant to withdraw from acting for the 2nd defendant. The acts and/or omissions of the 2nd defendant shall bind the 1st defendant. Consequently, I find the 1st defendant 100% vicariously liable for the accident. The result is that both defendants are jointly and severally held **100% liable** for the accident.

Quantum

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

i. Fracture of the neck of the right femur;
ii. Intertrochanteric fracture of the right femur;
iii. Compound fracture of the right tibia-fibula bones;
iv. Compound bi-malleolar fracture of the right ankle joint.

The plaintiff's right lower limb was amputated below the hip. The injuries were classified as grievous harm. Both the plaintiff's and 1st defendant's doctors assessed permanent disability at 70%. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the finding on liability, the plaintiff is thus entitled to damages as against the defendants.

It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in ***West (HI) and Sons Ltd v Shepherd [1964] AC 326*** where Lord Morris said:
"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional".

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

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

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

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

similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

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

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

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

General Damages for pain, suffering and loss of amenities

I have considered the injuries sustained by the plaintiff. The plaintiff suffered injuries which were classified as grievous harm in the P3 form. In my opinion, the authorities relied upon by the parties are comparable. On my part, I have considered the following authority:

1) ***Ibrahim v Durage & another [2025] KEHC 8743 (KLR)***

The plaintiff sustained a crush injury on his left leg that led to its amputation below the knee. The court awarded Ksh. 3,000,000/= in general damages on 19/6/2025.

Taking all these comparative awards into account and taking into consideration the degree of permanent incapacity suffered by the plaintiff, as well as the age of the awards in the authorities and vagaries of inflation, it is my opinion that the award of Kshs. 3,000,000/= suggested by the Plaintiff's counsel is, indeed, a reasonable award. I have taken into consideration the long term effects of the amputation including its effects on mobility and

dexterity (even after prosthesis); the limitation on economic activities the plaintiff can engage in, as well as the traumatic and psychological effects. An award of Ksh. **3,000,000/=** in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

a) Medical expenses……Ksh. 98,000/=
b) Medical report by Dr. A. Kyalo……Ksh. 6,000/=
c) Medical report by Dr. Ndegwa……Ksh. 2,000/=
Total……Ksh. 106,000/=

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

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

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

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

The proved medical expenses amounted to Ksh. 50,000/= only. The plaintiff produced receipts for transport charges but the same were not pleaded. They could not be part of medical expenses. There is no receipt for the medical report by Dr. Kyalo. There is a receipt

for the medical report by Dr. Ndegwa. Consequently, I award special damages in the sum of **Ksh. 52,000/=** only.

Future medical expenses

Under paragraph 7 and 8 of the plaint, the plaintiff pleaded costs of a wheel chair at Ksh. 400,000/= and cost of an artificial limb at a total cost of Ksh. 600,000/=. However, from the evidence and submissions, the plaintiff appears to have abandoned the claim for a wheelchair. In addressing this issue, I will highlight some Court of Appeal authorities on the subject.

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

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

"The issue for our consideration is whether the pleadings as stated above in the plaint include a claim for future medical expenses. In the case of Kenya Bus Services Ltd. - v _ Gituma, (2004) EA 91, this Court stated:

'And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded'.

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

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

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

"The final complaint raised by Mr. Wasonga was that awards were made for costs of future medical treatment, which were in the nature of special damages, but there was no

proof.....Those awards were made on the basis that the medical reports in respect of those respondents specifically made estimates of the required amounts for future treatment. Logically no receipts could be produced for services which were yet to be rendered. However, as stated in McGregor on Damages, 16 Edition at page 1654 in relation to medical expenses:

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

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

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

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

"We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head...."

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

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

From the above authorities, I gather that damages for future medical treatment are awardable but there must be evidence for the need for future medical treatment as well as

an estimate of the same. There is divided opinion in the Court of Appeal as to whether such damages are in the nature of general or special damages. However, recent decisions of the Court of Appeal indicate that such damages need not be specifically pleaded as in special damages. For instance, in the authority of ***Forwarding Company Limited & another v Kisilu; Gladwell (Third party) [2022] KECA 96 (KLR)***, the Court of Appeal held:

"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. It is our view that future medical expenses in this matter were not only pleaded but were also supported by medical evidence and proved accordingly".

Similarly, in ***Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v Jarso [2025] KECA 2169 (KLR)***, the Court of Appeal affirmed an award of future medical expenses that had not been specifically pleaded and strictly proved as in special damages. There is medical evidence from both parties to show that the plaintiff will require the use of an artificial limb.

Doctor Ndegwa estimated the cost at Ksh. 600,000/= with a life span of about 12 years. On the other hand, Dr. Wambugu estimated the cost at Ksh. 150,000/= with a life span of about 8 to 12 years. The only issue is the cost. In his submissions, the plaintiff appears to have conceded to the cost of Ksh. 150,000/= but submitted that he would require changing the prosthetic limb four times. This will bring the figure to Ksh. 600,000/=. I am aware of the existence of the **Medical Practitioners and Dentists (Professional Fees) Rules**, **2016**. Rule 3 thereof stipulates that the fees specified under the Schedule to the Rules shall be the fees charged by practitioners offering medical or dental services, or both and that the fees shall be adhered to by all practitioners and institutions registered under the Act and no practitioner may agree or accept fees above that which is provided under the Rules.

Accordingly, the Rules provide that for fitting surgery for prosthesis, the minimum charge shall be Ksh. 180,000/= whereas the maximum shall be Ksh. 300,000/=. The fees are

subject to the annual inflation rate. Dr. Wambugu's report was made on 28th January, 2019. Both doctors agree that the limb ought to be changed utmost after every 12 years. Some medical documents produced by the plaintiff indicates he was 32 years in 2017 when the accident occurred whereas others show that he was 38 years. The conflicting evidence will work against him and as such, I will find that the plaintiff was 38 years at the time of accident. This implies that the plaintiff is about 47 years old now. Human life is not permanent and given the vicissitudes of life, I will award the cost for two cycles. This is not to say that I expect the plaintiff to die early. Far from it. An award of damages ought not to be too speculative. There appears to be no dispute as to the maintenance fee of Ksh. 1,000/= per year. The total maintenance costs with thus be Ksh. 24,000/=. Given the age of the Rules which were made in 2016 and the vagaries of inflation, I will estimate the cost of fitting an artificial limb at Ksh. 200,000/=. Two cycles will be Ksh. 400,000/= plus the maintenance costs of Ksh. 24,000/=. The total award is **Ksh. 424,000/=.**

DISPOSITION

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

1) General damages for pain, suffering and loss of amenities.....Ksh. 3,000,000/=
2) Special damages.....Ksh. 52,000/=
3) Future medical expenses (Artificial limb).....Ksh. 424,000/=

Total.....**Ksh. 3,476,000/=**

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

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

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

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

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

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

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

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

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

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

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see ***Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina***

Transporters [2020] KEHC 618 (KLR). Consequently, interest on general damages shall accrue at court rates from the date of judgment/decree until payment in full and on Special damages and future medical expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 7TH DAY OF APRIL, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.