



REPUBLIC OF KENYA



Mbaaru & another v Kenya Bus Services Limited also known as Stage Coach Bus International & another (Civil Appeal 244 of 2013) [2024] KECA 432 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 432 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 244 OF 2013
F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA
APRIL 26, 2024**

BETWEEN

PITTY GATHIGIA MBAARU 1ST APPELLANT

J. GACHERU NDUGI 2ND APPELLANT

AND

**KENYA BUS SERVICES LIMITED ALSO KNOWN AS STAGE COACH BUS
INTERNATIONAL 1ST RESPONDENT**

CHARLES OBIERO OGOLA 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya (Ang'awa, J.) dated and delivered on 14TH July 2005 in Civil Case No. 154 of 1999.)

JUDGMENT

1. Before this Court is an appeal arising from the judgment of the High Court at Nairobi (Ang'awa J.) dated 14th July 2005 in Civil Case No. 154 of 1999.
2. A brief background of the appeal is that Pitty Gathigia Mbaaru and J. Gacheru Ndugi, the appellants, who are wife and husband respectively, commenced the suit in the superior court by a plaint which was later amended on 14th May 2004. The appellants' claim was for personal injury which was hinged on a road traffic accident which occurred on 15th September 1997, when the 1st appellant was aged 42 years. The 1st appellant stated that she was lawfully standing on the pavement along Ronald Ngala Street, Nairobi waiting for the traffic to clear and make it safe for her to cross the road when the 2nd respondent being the agent, servant and/or driver of the 1st respondent negligently drove motor vehicle registration number KAD 553D by suddenly climbing onto the island and violently knocking her down as a result of which she sustained severe bodily injuries.



3. The appellants pleaded the particulars of the 2nd respondent's negligence as, inter alia, driving the motor vehicle without due care and attention and at an excessive speed in the circumstances; failing to heed or observe the 1st appellant's presence along the road; failing to have any adequate regard to the safety and well-being of pedestrians along the road and in particular the 1st appellant; and failing to stop, to swerve, to slow down or in any other way so to manoeuvre and manage the motor vehicle as to avoid the said accident.
4. The 1st appellant particularized the injuries she suffered to include; head injury (cerebral concussion); unconsciousness for one month and thereafter confusion for another one month; multiple cuts and abrasions on the face; abrasion over the chest wall; fracture of the right collar bone (clavicle); crush injury to the right upper limb leading to amputation; and crush injury to the right lower limb leading to an above-knee amputation. The 1st appellant was later diagnosed with renal failure and she was started on dialysis.

She further claimed that due to her injuries she has been unable to resume work as a clerk with the Kenya Power and Lighting Company.

5. In addition, the 1st appellant pleaded her present complaints which included; pain in the amputation stump on the right lower limb; discharge of sinus over the amputation stump in the right shoulder; that she gets easily frightened; was emotionally unstable; had un-cosmetic scars on the face; two scars measuring 5cm x 2cm and another 0.5cm in diameter below the nose; hypo pigmented scarring patch measuring 8.5cm x 6.5cm over the right anterior chest wall; a bony deformity over the right clavicle indicating a mal- united fracture; right arm disarticulated at the shoulder joint level; un-cosmetic surgical scar measuring 20cm in length and a hypo pigmented scarring patch, a sinus over the amputation stump; loss of 51cm length of the left leg together with the joints of the knee, ankle, and the foot and extreme tenderness at the amputation stump; and that healing is nowhere in sight.
6. The 1st appellant averred to future prognosis of 5% chances of developing epileptic fits in future; loss of length of the right leg by 51cm; a prosthesis that has both ankle and knee joints which had been recommended at an estimated cost of Kshs.750,000/=; that her children and husband have lost motherly attention and love, and all have suffered psychological trauma, and permanent incapacity and loss as regards gainful employment, among others.
7. The 2nd appellant's claim was for loss of consortium. He pleaded that prior to the accident, he had been enjoying the company and society of the 1st appellant as his wife but since the accident, he lost the said benefits.
8. The appellants claimed that the 1st respondent is vicariously liable for the wrongful acts of the 2nd respondent who is its employee. Secondly, they sought to rely on the doctrine of *res ipsa loquitur*. For the reasons thereof, the appellants prayed for judgment against the respondents for special damages of Kshs.1,582,970/=, general damages for pain and suffering and loss of amenities, loss of consortium and loss of future earning capacity and psychological problems and future medical care, interests, and any other relief that the court deemed fit to award.
9. The respondents entered appearance and filed their statement of defence dated 30th September 1999. The respondents generally denied the claims by the appellants and particulars of negligence alluded to by the 1st appellant. The respondents contended that the accident was solely caused, or substantially contributed to, by the 1st appellant's negligence. It was averred that the 1st appellant failed to observe and obey the traffic lights; crossed the road recklessly without regard to the heavy flow of traffic on the road; crossed the road when it was unsafe for her to do so; failed to wear reflective clothes at night when



visibility was poor; stopping at the middle of the road; failed to have due regard to the lawful presence of the motor vehicle registration no. KAD 553D on the road; and caused the said accident.

10. The respondents also denied and made no admission to any injuries, loss or damages suffered by the 1st appellant and further denied all and singular particulars of injuries and damages pleaded by the appellants.
11. Lastly, the respondents repudiated the applicability of the doctrine of *res ipsa loquitur* to the facts and circumstances of the case and prayed that the appellants' suit be dismissed with costs.
12. In reply, the appellants filed their reply to defence dated 12th October 1999 and denied every averment put forth by the respondents. They maintained that the contested doctrine applied and prayed that the respondent's defence be struck out and judgment entered in their favour.
13. Prior to the trial the appellants and the respondents were in agreement that the accident occurred on 15th September 1997, the 1st respondent was the registered owner of motor vehicle registration no. KAD 553N, and the 2nd respondent was the servant and/or agent of the 1st respondent.
14. At the hearing thereof, the appellants called seven (7) witnesses in support of their case. The 1st appellant in her testimony reiterated her claim as in the amended plaint. She testified that at around 4.00 p.m. on the date of the accident, together with the 2nd respondent, her husband, they went to visit a patient at Kenyatta National Hospital.

Visiting hours were from 4.00 to 6.00 p.m. When it reached 6.00 p.m. and she could not find her husband who had gone to see another patient in another ward, the 1st appellant decided to leave him and go home. She stated that she boarded a bus and alighted at Ambassador Hotel and proceeded to Diamond Trust Bank, now Family Bank and bought vegetables from the hawkers along the pavement.

15. The 1st appellant gave evidence that she was on the left side of the road as one faces Moi Avenue from Ronald Ngala Street. She admitted that along the Ronald Ngala Street, there were iron barriers or guards to stop pedestrians from coming into the road. She testified that she went around the iron barrier and went to the side of the road on the pavement. It was her testimony that before she could cross, she saw two buses approaching each other at a speed along Ronald Ngala Street and to avoid collision one bus swerved towards her, knocked her down and she lost her consciousness.
16. She further testified that when she regained consciousness one month later, she found herself at Nairobi Hospital with both her right hand and right leg amputated. It was her evidence that after staying in the hospital for some time, she developed kidney failure.
17. The 1st appellant testified that she was discharged on 21st December 1997. However, she could not resume her normal life. It was her evidence that she had to be confined to a wheelchair. It was her evidence that at the time of the accident she had an eight months' old baby and therefore needed someone to take care of her personal needs. The appellant further testified that she had been in and out of hospital severally with further operations being performed on her. Regarding the 2nd appellant, the 1st appellant testified that the accident affected her, with the wounds that kept coming back. That consequently, since then she has been unable to attend to her husband physically, and that there has been no intimate relationship with the 2nd respondent. Furthermore, she went back to work with the Kenya Power and Lighting Company where she worked as a clerk earning a monthly salary of Kshs.20,000/= and later Kshs.40,000/= on promotion.
18. The 2nd appellant testified that he transferred the 1st appellant from Kenyatta Hospital to Nairobi Hospital the next morning following the accident when he received information of her whereabouts. He said that he found his wife at Kenyatta Hospital, on a canvas lying on the floor and she was naked.



- Her right leg was amputated. He said that he organised with Kenya Power, her employer and moved her to Nairobi Hospital where she remained unconscious for a month. Regarding the relationship between him and his wife, he said that the relationship was broken; that she had hatred against him; and that she became moody, kept quiet and blamed him for everything, which was unusual, for which he blames the accident.
19. He said he came to understand that she had suffered psychologically following the accident. He referred to the Report by Dr. F. G. Njenga, a Psychiatrist from Aga Khan Hospital who treated her, dated 25th July 2000. The doctor's finding was that the 1st appellant's relationship with her husband had deteriorated significantly, not just because of her physical limitation due to her traumatic injuries, but emotional and psychological problems proving to be a major strain. The doctor opined that due to her physical appearance and limitation, she constantly worried about the future of their marriage.
 20. The 2nd appellant testified that the 1st appellant had wounds, he had to carry her, wash her, attend to her wounds, settle her on a couch, carry her to bed and basically cared for all her needs. That she developed bleeding in her cervix that was attended to by Dr. Kaggia. He said their relationship changed after the accident due to so much suffering his wife went through. That he became the 1st appellant's primary caregiver. Further that he lost his job with the Central Bureau of Statistics as he had to care of his wife. He lost the intimacy, love and peace he enjoyed from his wife. He therefore claimed damages for loss of consortium and for loss of earnings at Kshs.23,000/- per month.
 21. Dr. Nasir Hashan Bhanji, a Consultant Surgeon and traumatologist based at the Doctors Plaza of the Aga Khan Hospital with a practice experience of 22 years testified that he examined the 1st appellant when she visited his office on 21st August 1998. She was complaining of pain in the amputation stump on the right lower limb, discharging sinus over the amputation stump in the right shoulder, got easily freighted and was emotionally unstable since the accident. In his report dated 22nd August 1998, Dr. Nasir confirmed that the 1st appellant's complaints were valid and were directly as a result of the injuries sustained during the accident.
 22. Regarding the future prognosis, Dr. Nasir in his report noted what, inter alia, the physical examination revealed: that the head injury which the 1st appellant sustained and rendered her unconscious and confused for two months following the accident, was a cerebral concussion. Such an injury may have caused damage to the underlying brain tissue which usually heal by process of scarring. Such scars may predispose the 1st appellant to develop epileptic fits in future. The chance of her developing such fits is about 5%. There was a bony deformity palpable over the middle third of the right clavicle which indicated a malunited fracture. The bony deformity is a feature of permanent nature. The loss of the right arm is permanent in nature; the loss of 51cm in length of the right leg together with the joints of the knee, ankle, and the foot is a feature of permanent nature. He formed an opinion that the four children of the 1st appellant have been deprived of motherly attention and love which she could have given them had she not been injured in the first place; and the 1st appellant not being mobile as she was presently on a wheelchair denied her the chances of getting gainful employment are practically zero. He assessed her permanent incapacity at the time as 100%. In conclusion, Dr. Nasir noted that it is unlikely that the 1st appellant would ever recover from the injuries she sustained during the impugned accident of 15th September 1997.
 23. A second examination was done on 14th May 2004. Dr. Nasir testified that the 1st appellant complained of inability to do house work chores for example cooking, washing clothes, cleaning the house etc; inability to work on her farm; and inability to drive her vehicle. In his report dated 14th May 2004, he noted that the examination of the spine revealed that the 1st appellant had developed a right convex scoliosis of the lumbar spine secondary to the pelvis tilt. Examination of the lower limbs indicated



- that she had been fitted with above knee prosthesis with immovable ankle and knee joints; and there was a heavy limp in her gait but she could walk without support. In his finding he reached the same conclusion as he did earlier.
24. Regarding the future prognosis, Dr. Nasir in his report noted that, inter alia; that the 1st appellant does not have her right arm and is unable to bend the right knee and ankle joints which means that it would not be possible for her to drive a vehicle nor to undertake any work on her farm, neither would it be possible for her to do any of the house chores; that she needed to undergo a thorough renal check-up to rule out any residual damage; change the prosthesis of the right leg; indicated that the amputation stump always changes its size with passage of time and therefore, she may need to change her prosthesis once again after a couple of years depending on the atrophy of the muscles on the amputation stump; and that the right convex scoliosis of the lumbar spine will increase with passage of time and may lead to the 1st appellant developing spinal problems such as osteoarthritis as well as prolapse of an intervertebral disc. He charged for the medical report Kshs.6,000/= each and produced the relevant receipts. One invoice showed a total of Kshs.16,000/= which he explained included Kshs.10,000/= for court attendance fees.
 25. Dr. Nasir further testified that he took the 1st appellant to a hospital in South Germany for further treatment and fitting of the artificial leg, where she was attended to for 3 weeks and they incurred a total of Kshs.1,200,000/= as medical expenses.
 26. Joseph Segera Momanyi, the Credit Officer at the Nairobi Hospital gave his testimony. He produced the invoices from the Nairobi Hospital related to the 1st appellant's medical care and the documents showing payment of the same. He further testified that the invoices were billed to Kenya Power & Lighting Company, the 1st appellant's employer, and the same were paid by the company. He confirmed that the 1st appellant was not self-paying. The production of the invoices by Mr. Joseph was objected to by the respondent's advocates for the reason he was not the maker of the documents or rather he had not been employed by the hospital at the time the 1st appellant was in the hospital. However, by a ruling of Ang'awa, J. dated 3rd May 2005, the learned judge held that Mr. Joseph was the right person to give evidence.
 27. Kenneth Njoroge an eye witness of the accident testified of how the accident occurred. He testified that the accident occurred at night between 7.00 and 8.00 p.m. along Ronald Ngala Street. He stated that before he could cross the road he saw the 1st appellant standing near a grill at the road. Further, that he saw three buses all from Kenya Bus coming at a high speed. One bus slowed down, the third one, a bus registration number KAD 553D, intended to overtake and swerved and that was when its body caught the 1st appellant on the shoulder, pulled and threw her down. He stated that the people started screaming and the driver of the bus held its brake and run over her. Mr. Kenneth indicated that once he saw that, he rushed to the 1st appellant, turned her around as she was hearing. He saw her arm and leg had been run over. He continued to state that the driver of the said bus came and together with him they put the 1st appellant in the vehicle and took her to Kenyatta National Hospital and they left her with the doctors. Thereafter, he recorded his statement with the police. He confirmed that the 1st appellant was standing on one side of the road and was not on the road when she was knocked down. Further, that behind where she was standing there was a grill.
 28. Louis Wachira Mwangi testified that she was employed with the 1st appellant as a house help in September 2004 earning a salary of Kshs.2,000/- and that her work entailed preparing food and taking it to the 1st appellant, heating bathing water for the 1st appellant, making the 1st appellant's hair, preparing children for school, and washing clothes.



29. Prof. Josephat Mulimba, a Consultant Orthopaedic and trained Surgeon at Kenyatta National Hospital attended to the 1st appellant. He testified that he met the 1st appellant in the course of his work after being involved in a road accident. Further, that he examined her for purposes of managing her injuries. He produced a medical report which he prepared dated 5th August 1998. In his report he noted that on 15th September 1997 the 1st appellant, having been involved in a road accident was admitted at Kenyatta National Hospital and both right upper and lower limbs were amputated. Further, that on 16th September 1997 she was transferred to Nairobi Hospital. Prof. Mulimba testified that an operation was performed on the 1st appellant for badly infected leg and upper limb stumps and that she also had a renal problem with renal failure. He stated that the 1st appellant was discharged on 24th December 1997 from hospital for outpatient follow up. She was re-admitted on 26th June 1998 due to bad state of her stumps where she stayed for a month and discharged on 21st July 1998 with follow up in clinic.
30. In his prognosis, Prof. Mulimba noted that the 1st appellant had multiple cuts in the face and scalp which were treated surgically and that they have healed well except for scars which would remain as permanent features; that the 1st appellant's right upper limb was crushed and had to be amputated above the elbow at the level of the shoulder and that the remaining stump would be difficult to fit with a prosthesis or artificial limb hence the loss is permanent; right lower limb was crushed and had to be amputated which left her unable to walk or perform any useful work. Prof. Mulimba's opinion was that the 1st appellant would be unable to work and will need prosthesis costing approximately Kshs.350,000/-. He confirmed that the 1st appellant's disability was 100%. Prof. Mulimba testified that his payments for service delivery with regards the 1st appellant was paid through the Nairobi Hospital.
31. Before closing their case, the advocate for the appellants told the court that he was unable to trace two doctors whom he intended to call for them to testify. By a consent by both parties, the following documents were admitted as evidence without the need to call the makers; 9 documents, 27 receipts, and 28 invoices. Further, the 1st appellant was recalled and she produced additional receipts issued by Dr. L.K. Mungola Mwongera, Prof. Mulumbe from Dr. Sagane L.K. and Dr. Sagane and she confirmed that the amounts were paid. The appellants closed their case.
32. Mr. Charles, 2nd respondent, was the only witness who testified in support of the respondents' case. He stated that he was the driver of the 1st respondent's bus KAD 553E and as he drove along Ronald Ngala Street coming from Tusker House heading to Kencom, he had a knock at the door but the conductor told him there was no one. Further, that he stopped and alighted from the bus only to find a lady lying behind the bus. Mr. Charles testified that he had no idea that the 1st appellant was knocked down and he had not been aware of her since the streets were dark as the traffic lights were not working. However, the bus head lights were on. He testified that he was driving along Ronald Ngala Street. He passed the lights and suddenly he felt a knock. When he came out from his vehicle, he saw a lady under the bus. The respondents closed their case.
33. Parties filed their respective submissions. After hearing the parties and considering their respective rival written and oral submissions, together with the authorities relied upon by them, Ang'awa, J. delivered her judgement on 14th July 2005. On the issue of negligence, the learned Judge placed blame on both the 1st appellant and the 2nd respondent. She noted that the 1st appellant should have taken care by standing behind the pedestrian metal iron barrier and ensured it was safe before attempting to cross the road. That she was indeed trapped not being able to move back. On the other hand, the 2nd respondent, having the lethal machine under his control had indeed a greater duty of care to ensure that his vehicle was driven with due care. The learned judge thus apportioned liability at 75% against



- the 1st and 2nd respondents jointly and severally with the 1st respondent being vicariously liable. She further apportioned 25% against the 1st appellant for contributory negligence.
34. When it came to the 2nd appellant, the learned Judge found that he had no locus standi to sue and accordingly dismissed his suit against the respondents with costs.
 35. On the issue of general damages, the learned Judge noted that the 1st appellant sustained injuries that were traumatic to her. Further, that she indeed underwent much and needed to adjust her life to the new situation she found herself in. In the circumstances, she awarded Kshs.900,000/- under the head of damages of pain, suffering and loss of amenities.
 36. On the claim for special damages, the learned Judge relied on the case of *Perestello vs. United Parts* [1969] WLR 570 and noted that all losses other than those which the law does contemplate resulting from the infringement of a person's legal right should be pleaded. For claims of medical reports, hospital bills and related medical expenses the learned Judge found that the 1st appellant was an employee of the Kenya Power & Lighting Company and that at the time of the accident her bills were fully paid by the employer. Therefore, the 1st appellant could not be permitted to come to court to claim this sum as the same would amount to double enrichment. Further, that the respondents could only pay the sum claimed if the employer or insurance company claimed subrogation in the name of the 1st appellant. For claim of police abstract report and transport to and from hospital, the learned Judge rejected them stating that they were never supported by receipts and evidence respectively. She invoked the decision in the case of *Ouma vs. Nairobi City Council* [1976] KLR 279 to support her finding.
 37. On the 1st appellant's claim for loss of earning of Kshs.23,000/- x 10 months= Kshs.230,000/-, the learned Judge found that no evidence was presented to indicate any loss hence, rejected this claim and entered nil result.
 38. On the 1st appellant's claim for loss of future earnings, the trial Judge noted that the 1st appellant was still in employment as a clerk with the Kenya Power & Lighting Company. Further, that during that period and after the accident she never lost any earnings. That there was evidence on record that she had been promoted to a clerk grade 2 "B" since the accident and her salary adjusted accordingly. The trial Judge thus rejected this claim.
 39. Lastly on the claim for future medical expenses, the learned Judge noted that although the doctor in his report had indicated that the 1st appellant would require a sonogram instigation at Kshs.100,000/-; refashioning of scars in stump at Kshs.200,000/-; and prosthesis costing Kshs.750,000/-, none of these claims were pleaded and particularized and therefore she rejected it. The learned Judge also rejected claims for costs of medical reports, Police Abstract, hospital bills, related medical expenses and transport to and from hospital (locally) for lack of documentary support.
 40. In the upshot, the trial Judge entered judgment for the 1st appellant on the proved sum of Ksh.900,000/- less the 25% liability apportioned to her bringing the total award to Kshs.657,000/- together with interest and costs.
 41. Aggrieved and dissatisfied with the said judgement of Ang'awa, J., the appellants preferred an appeal to this Court by way of a Notice of Appeal dated 17th May 2005. The grounds of appeal relied on by the appellants in their Memorandum of Appeal dated 12th September 2013 are the following:
 - i. The learned Judge erred in law and in fact when she made a finding that the 2nd appellant, a husband of the 1st appellant, should not have sued directly as the co-plaintiff for his claim for damages and loss of consortium.



- ii. The learned judge erred both in law and fact when she failed to assess and to make award for general damages to the 2nd appellant for loss of consortium yet there had been laid, by way of pleading and evidence, a sufficient basis for the award of the same.
- iii. The learned Judge erred in law and in fact when she dismissed the suit by the 2nd appellant with costs yet there was sufficient basis to award him the damages costs and interest thereon.
- iv. The learned Judge erred in law and in fact when she failed to appreciate the extent and gravity of personal injuries, pain, loss of amenities, suffered by the 1st appellant and hence proceeded to assess very low general damages for pain, suffering and loss amenities, contrary to comparable awards on record at the material times.
- v. The learned judge erred both in law and fact when she failed to make a finding and award the special damages suffered by way of amongst others, the medical bills and expenses, yet the same had been sufficiently pleaded, proven, when she decided that since, “her bill was fully paid by her employer, she is therefore not permitted to come to court to claim this sum as it would amount to double enrichment.”
- vi. The learned trial judge, further erred in both law and fact when she misdirected herself so much that she failed to appreciate that it is trite law that the consequences of a legal liability are straightforward and damages paid for under an obligation by third parties, gratuitously, contractually by relatives or other, are not deductible and that the wrongdoers should not take benefit of such, or tortfeasor and should be liable.
- vii. The learned trial judge, erred both in law and fact when she failed to award plaintiff the loss and damage suffered by way of medical expenses, and anticipated further medical care, contrary to the aforesaid principle, the pleadings, the evidence led, and the cited guiding restatement of the law in the landmark decision of *Donnelly Vs. Joyce* (1974) Q.B 454 (C.A).
- viii. The learned trial judge erred both in law and fact when she misdirected herself and made a finding, “ that the defendant can only pay this claim if the employer or insurance company claims a subrogation claim in the name of the plaintiff”, a misdirection that was so grave as it to exhibit, an error that occasioned heavy prejudice to the appellants right to compensation, and recovery of her medical expenses, costs of the medical reports and related medical expenses a clearly erroneous statement of the applicable law.
- ix. The learned trial judge erred both in law and fact when she rejected the appellants claim for special damages for transport to and from the hospital when the same was sufficiently proved, and made a finding that the same could only be awarded if supported by the production of receipts, contrary to the law and the required standard of proof.
- x. The learned Judge erred in law and in fact when she summarily made a finding that the claims for loss of earnings/future earnings, reduced earning capacity, future medical expenses comprising of sonogram investigation and excursion of the amputation stump, the estimated at Kshs.100,000/- stump refashioning and placement then at Kshs.200,000/- and prosthesis then estimated at Kshs.750,000/=, had not been pleaded and particularized, thereby occasioning an error on the face of record, as the same had been sufficiently pleaded, evidenced in their support and prayed for.
- xi. The learned trial judge erred both in law and fact when she erroneously rejected the appellants’ proposal on the various heads of loss and damages, contrary to the weight of evidence led and the appellants having satisfied the principles of law regarding the required standard of proof.



42. Before this appeal was heard, the appellants filed a Notice of Motion application dated 13th November 2018 in this appeal vide which they sought leave to adduce additional evidence by way of an affidavit mainly on ground that the suffering of the appellants had continued to escalate specifically in terms of medical bills, travel expenses and anticipated future medical care, which caused the appellants to travel abroad and seek medical aid in a hospital in Austria in 2014. Further that the magnitude of the information raised in the application had arisen over time and could not be anticipated at the time of trial.
43. The application was allowed by this Court in its ruling dated 19th July 2019. The additional evidence was taken by Onger, J. who directed that the same be submitted to this Court as directed in the ruling dated 19th July 2019, through a supplementary record of appeal. The same is on record and is dated 10th December 2023.
44. The evidential material admitted by Onger, J. comprised the following:
- a. A copy of the appellants' passports stamped with travel details to Austria;
 - b. A copy of medical records from the hospital that provided the prosthesis care, orthopadietechnik sanitat and Gesundheit Buchsbaum Hospital in Austria;
 - c. A copy of electronic air tickets from Turkish Airlines for the 1st appellant and her two (2) primary caregivers dated 25th July 2014 to 7th August 2014 from Nairobi Jomo Kenyatta Airport through Istanbul, Turkey to Vienna in Austria and back;
 - d. A copy of the electronic return air tickets from Turkish Airlines for the 2nd appellant and one (1) primary caregiver of the 1st appellant dated 29th July 2014 to 8th August 2014 from Nairobi Jomo Kenyatta Airport via Istanbul Turkey to Vienna in Austria and back.
 - e. The expenses for the travel and accommodation were tabulated in the supporting affidavit of the 1st appellant paragraph 13, a total of Kshs.1,623,947.66/=.

Hearing of the Appeal And Submissions Of Counsel

45. The appeal proceeded before us through this Court's virtual platform on 30th January 2024, and heard by way of written submissions. Learned counsel Mr. C. N. Kihara appeared for the appellants while learned counsel Mrs Njoroge holding brief for Mr. Mereka was present for the respondents. Mr. Kihara highlighted the appellants' submissions whereas Mrs. Njoroge expressed her wish to rely on the respondent's written submissions without the need to highlight. Both parties filed two sets of written submissions. The appellants' written submissions are dated 13th November 2018 and 26th January 2024 respectively whereas the respondents' written submissions are dated 19th November 2018 and 25th January 2024 respectively.
46. Mr. Kihara, in his written submissions summarized the reasons that compelled the appellants to appeal the assessed award on damages as being the fact that the award was low and not comparable to awards for persons with similar injuries as the 1st appellant; the final judgment of the trial court was delivered in 2015, almost 20 years ago; the effects of inflation on the cost of living; and, the depreciation of the Kenya Shilling.
47. In regard to the claim for loss of consortium, Mr. Kihara urged that the appellants were appealing the decision to dismiss the 2nd appellant's claim for loss of consortium, after the Judge found that he had no locus standi to sue the respondents in the first place. He urged that the claim was pleaded and the 2nd appellant personally testified and offered credible evidence in support. Counsel emphasized



that the 2nd appellant was, prior to the accident, enjoying the comfort and consortium of his wife. In addition, the ugly and un-cosmetic scars of the two amputations of the limbs, being wheel chair bound, the psychological trauma, and the total incapacity of the 1st appellant supported the 2nd appellant's evidence of loss of consortium. Reliance was placed on the case of *Timo Kalevi Jappinen & Another vs. Texcal House Services Station Limited & Another* HCCC No. 220 of 1997 where the Court awarded a sum of Kshs.200,000/- for loss of consortium. However, Mr. Kihara urged that even then the amount suggested was lower than should be considered to satisfy the claim.

48. The respondents' counsel, in rebuttal submitted that the 2nd appellant did not provide adequate particulars in the pleadings for loss of consortium. Further, that it was not clear how the 2nd appellant had lost the company of the wife and yet she was alive. That moreover, it was not claimed that the wife did not love her husband anymore. On the issue of sexual intercourse, it was submitted that it had to be proved that the husband had lost the same out of the accident and not in the normal exercise of consent. Further, that it had to be proved that the wife suffered a deformity that resulted to loss of conjugal rights to the husband. The respondents contended that there was no medical evidence to back the claim for consortium and relied on the case of *James Maina Muriithi vs. My Beauty Transporters Limited & 2 Others* [2018] eKLR where none was awarded for lack of doctor's evidence in support thereof.
49. In regard to the award for general damages for pain and suffering, Mr. Kihara submitted that the 1st appellant has appealed against the award of Kshs.900,000/= awarded by the learned Judge for reason it is not comparable to awards of injuries similar to those of the 1st appellant, urging that it was even lower for less serious injuries. Counsel urged that the learned Judge did not appreciate the extent and the gravity and catastrophic nature of the injuries the 1st appellant suffered. The appellant thus urges this Court to raise the award to a sum of Kshs.20,000,000/- or thereabout and order interest to apply with effect from the date of the high Court judgment until payment in full. Counsel relied on two cases: *Edward Mzamili Katana vs. CMC Motors Group Limited & Another* High Court Civil Case No. 70 of 1997 and *Ahmed Mohamed Adan vs. Jimmy Tomino & 2 Others & 2 Others* [2006] eKLR. The appellants submitted that the cited cases gave comparable awards for similar injuries as those sustained by the 1st appellant herein although the claimants had not suffered double amputation as the 1st appellant had, they were awarded Kshs.2,000,000/- and Kshs.1,800,000/- respectively for single amputation.
50. The respondents in response, whilst relying on the case of *Ken Odondi & 2 Others vs. James Okoth Omburah T/A Okoth Omburah & Company Advocates* [2013] eKLR submitted that it is trite law that the appellate court will not interfere with the award of damages which is a discretionary power of the trial court. It was emphasized that the learned Judge analysed the extent and gravity of injuries of the 1st appellant and that the 1st appellant failed to prove her case before the High Court. In conclusion, it was submitted that no serious arguments have been advanced to disturb the general damages as assessed and awarded, and further that, the learned Judge used comparable authorities analysing the injuries and their extent.
51. On raising of general damages from Kshs.900,000/- to Kshs.20,000,000/=, it was submitted that that was a new issue. Therefore, it was submitted that no evidence was adduced to disturb the award.
52. The counsels next addressed the issue of special damages. Mr. Kihara for the appellants submitted that the learned Judge failed to appreciate and to take into account the principles guiding the assessment and award of proved special damages. The appellants noted that the special damages as pleaded in their amended plaint were:

Medical reports Kshs. 10,000/=



Police abstract Kshs. 100/=

Hospital bills Kshs. 1,224,837.79/= Related medical expenses Kshs. 6,000/= Transport to and from hospital Kshs.140,000/= Totalling to Kshs.1,374,837.40/-.

53. In addition, counsel also argued that they also claimed for costs for future medical treatment and cost of nursing care under the title “Future Prognosis” which included estimated costs of Kshs.100,000/- for surgery and hospitalization, Kshs.200,000/- for re-fashioning and placement of the surgical scar over amputation stump and Kshs.750,000/- for prosthesis that has both an ankle and knee joint. He took issue with the learned Judge finding that as there was no document to prove expenditure, the same were not payable. He urged that additional evidence was admitted by order of this Court which directed the High Court to receive additional evidence, and that on that basis, the claim pleaded as Future Prognosis was payable.
54. The appellants also took issue with dismissal of the 1st appellant’s claim for medical expenses on the grounds that the employer, friends and insurance took care of the bills. Counsel referred to the 1st appellant’s evidence where she told the trial Court that she had a contract with her employer for insurance cover for which her salary was deducted. Placing reliance on the cases of *Bradburu vs. Great Western Railway Company* [1874] LR 10 EX.1 and *Parry vs. Cleaver* [1970] AC 1, the appellants argued that once the respondents were found liable, then they should not be allowed, as tortfeasors, to keep the benefit of the insurance payment where they were not parties, but to meet and compensate their victim to the extent of their liability.
55. Lastly, it was submitted that the learned Judge wholly and erroneously misdirected herself such that she went on a wrong enquiry where it appeared that she belaboured under the wrong and misapprehension view of the law, that special damages can only be proved by the production of receipts, rather than any other of the accepted proof mechanism. Moreover, counsel urged that the learned Judge placed a higher burden of proof on the appellants than that which is required in a civil suit of a balance of probabilities. Lastly, the appellants sought the re-assessment of the special damages and submitted that the same were pleaded to the required particularity and itemization.
56. On the issue of the additional evidence adduced in this appeal, Mr. Kihara submitted that the matter was taken back to the High Court for taking additional evidence, and that the High Court was not supposed to make any finding as the appeal was pending before this Court. Counsel therefore argued that this Court would have to look at the additional evidence and make a finding on the same for the first time as it related to future medical expenses.
57. The appellants submitted that following the admissions of additional evidence, it is now trite law that the subject appeal against an award of damages takes the process of more or less a re-hearing of the case. That the same is done by way of a review and evaluation of the evidence on record as looked at together with the pleadings filed by the parties.
58. Counsel for the respondents in response argued that special damages in the nature of the out of pocket expenses are for reimbursement of what the appellants spent. Therefore, it follows that it must be actual spending of the money as opposed to speculations. Placing reliance on the case of *Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku* [2006] eKLR, the respondents contended that it is trite that a person cannot be reimbursed that which he had not spent, meaning that if the 1st appellant did not spend even a single coin for medical bills then she cannot be reimbursed. Further that to allow the 1st appellant to claim for that which she did not spend is to aid unjust enrichment. In addition, that the said action would be against public policy for the 1st appellant to be reimbursed the money on behalf of the insurance.



59. The respondents submitted that the law creates an exemption to the rule of gratuitous payment where the money will be paid using insurance or government money, then the plaintiff cannot recover. It was argued that the same was settled by the House of Lords in the case of *Dimond vs. Lovell* [1999] 3 ALL ER 1 which case abandoned the principle as set out in the Parry case (supra). The respondents maintained that the 1st appellant having admitted that she did not spend any money for medical expenses, it follows therefore that she cannot claim for reimbursement of amounts which she did not spend. The respondents thus urged this Court to reject the text propounded by the appellants as was rejected by the House of Lords.
60. On claim for transport to and from the hospital, the respondents submitted that the same is special damages which ought to be specifically pleaded and proved and the appellants failed to meet the threshold. The respondents challenged the appellants' submissions that the learned Judge said transport must be proved by receipts. They submitted that the learned Judge rejected the claim, not because of lack of receipts only but inadequate evidence. It was submitted that the appellants were speculating on the amount spent on transport, there was no cogent evidence such as receipts offered and in fact, the 1st appellant admitted that she did not have receipts to prove her claim for special damages.
61. The respondents submitted that the 1st appellant was not entitled to future medical expenses and future earning capacity. The respondents argued that although the 1st appellant had particularized refashioning, the same had already been performed at Kshs.200,000/- as stated by the doctor. On the claim of prosthesis, the respondents contended that by May 2004 it had been done both in Moshi and Nairobi and the doctor confirmed that the prosthesis was fitted at the time of giving evidence. Further, it was submitted that the second prosthesis where she went to Germany was not pleaded, that despite the doctor claiming that it was done in Germany at a cost of Kshs.1.2 million, no receipts were produced since this was an expense already incurred. Lastly, the respondents submitted that once the particularised future medical expenses were undertaken, they ceased from being future to actual expenses. Therefore, the 1st appellant was supposed to amend the plaint and include them as part of medical expenses and was supposed to produce receipts of the medical expenses like any other claim for special damages.
62. In the alternative, the respondents submitted that the 1st appellant prayed for future medical expenses under the prayer for general damages. However, the respondents argued that the same is a special damages claim as settled in this Court decision in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR. The respondents also relied on the Supreme Court of Indian case of *Raj Kumar vs. Ajay Kumar & Another* on 18 October, 2010.
63. On the issue of future earning capacity, the respondents submitted that the 1st appellant did not lose future earning capacity since she remained in the same work. In fact, it was submitted that she was promoted to Grade 2 Clerk. Further, it was contended that on record, the 1st appellant said that she resumed work in 1998, she was promoted to Clerk Grade II 2B and salary was adjusted hence, the learned Judge was justified in holding that no evidence was produced to prove loss of earning capacity.

Analysis And Determination

64. We have considered the two sets of submissions filed for and on behalf of the parties in this appeal, as well as the highlights by learned counsel Mr. Kihara for the appellants.
65. Being a first appeal, it is our duty to re-analyze and re-assess the evidence on record and reach our own conclusions, always bearing in mind that we have neither seen nor heard the witnesses and hence we should make due allowance in this respect. However, we are not bound necessarily to follow the trial



judge's findings of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See *Selle vs. Associated Motor Boat Co.* [1968] EA 123, *Abdul Hameed Saif-vs. - Ali Mohamed Sholan* [1955], 22 EACA. 270 and *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212.

66. Having considered the submissions of counsel and the entire case, we find that the issues that call for our determination are as follows:
- 1) Whether the learned Judge erred in dismissing the 2nd appellant's claim for loss of consortium;
 - 2) Whether this Court can interfere with the learned Judge's exercise of discretion in the award of general damages for pain and suffering;
 - 3) Whether the 1st appellant's claim for loss of earning capacity or reduced earning capacity was fairly dismissed;
 - 4) Whether the learned Judge erred when she dismissed the 1st appellant's claim for special damages; and
 - 5.) Whether the 1st appellant's claim under the heading 'Future Prognosis' was payable.

Whether The Learned Judge Erred In Dismissing the 2nd Appellant's Claim For Loss Of Consortium;

67. The learned Judge dismissed the 2nd appellant's claim for loss of consortium finding that he had no locus standi to bring the claim against the respondents. The learned Judge, in dismissing this claim observed, 'The Plaintiff No. 2 (read 2nd appellant) has no locus in this case and would accordingly dismiss this suit against the two defendants with costs.' The appellants in their proposal for the award relied on the case of *Timo Kalevi Jappinen & Another vs. Texcal House Services Station Limited & Another* HCCC No. 220 of 1997 where the court awarded a sum of Kshs.200,000/- for loss of consortium. The appellants submitted that although the said award was not upheld on appeal to wit, Civil Appeal No. 134 of 1998 due to its own peculiar circumstances, the assessment of the then Kshs.200,000/- remained a useful and persuasive guide.
68. The respondents' counsel attached an article titled 'Loss of consortium claims' by Jeffrey Rolls, Brisbane. The writer opines that 'The common law recognised that a husband had a proprietary interest in his wife, and her services gave rise to a right of action when the interest had negligently been invaded by a third party. Thus, a husband might recover the loss he had suffered by being deprived of the comfort and society of his wife and the services she had rendered to him.' The writer discusses the difference in a claim for loss of society based on deprivation or impairment of consortium as a result of temporal and material and psychological harm of nervous shock, vis a vis a spiritual loss; the former being sustainable, but the latter not.
69. The respondents' counsel supported the dismissal of this claim on grounds that the 2nd appellant could claim loss of consortium as the wife was still alive. In the alternative, the respondents submitted that the claim cannot succeed unless there was medical evidence in support. Cited to support that proposition was the case of *Mwaura Muiruri vs. Suera Flowers Limited & Another* [2014] eKLR, a persuasive authority from the High Court where Emukule,VJ. held:

“Consortium can only be granted to a person who has suffered serious personal injuries which have affected his abilities to provide consortium... The doctor who examined him did not



find the injuries sustained by him hindered his ability to perform his marital duties in any way.”

70. Quite apart from the cited case being merely persuasive, the case is distinguishable from the instant case. The facts are different in that the plaintiff in the cited case was the injured spouse. In the instant case, the claim was brought by the spouse of the injured partner. This Court in the case of *Salvatore De Luca vs. Abdullabi Hemed Khalil & Another* [1994] eKLR awarded loss of consortium in a fatal accident claim; the Justices of Appeal held thus:

“So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs.40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgement in the superior court until payment in full.”

71. We cite the above case to show that loss of consortium is a recognised claim in law, and to show the principles that apply. We know that the award in the cited case was granted in a fatal accident case. The instant case was not a fatal accident. It is nevertheless an appropriate case for such an award. The principles to be considered include proof that the appellant loved the spouse before the accident. Loss of consortium means loss of any or all of the following; companionship, love and affection, comfort, mutual services and sexual intercourse. Since the accident he has lost his wife’s companionship, has suffered an impairment in the social life, lost love, care and devotion of his wife. It is our view that within a marriage situation, the claim for loss of consortium is recognised as sustainable when brought by a spouse who claims loss as a result of injuries caused to his/her partner by a third party, sustainable only in the status of marriage.

72. While a doctor’s assessment to determine whether the affected spouse has suffered the loss of consortium is, no doubt, critical in proving the loss, the gravity and nature of the injuries suffered coupled with the claimant’s direct testimony of the loss will, in certain instances, be sufficient to prove the loss. As we have stated above, loss of consortium includes loss of companionship, love and affection, comfort, mutual services and sexual intercourse, an impairment in the social life, care and devotion. Here, the injuries sustained by 1st appellant were debilitating. Then there was the evidence of the 2nd appellant that their relationship changed since the accident and as a result of the injuries, there was no intimacy, warmth or comfort between them. The 2nd appellant was very clear that his wife totally changed from being a lovely compassionate wife to one full of hate and blaming him for everything. He said he understood it to be psychological trauma as a result of the accident, and he identified the psychiatrist’s report of Dr. F. G. Njenga who saw her for some time.

73. We saw in the record of appeal the evidence of several doctors and several reports relevant to this aspect of the claim. Dr. Nassir in his report dated 21st August 1998 stated that the 1st appellant was complaining of pain in the amputation stump on the right lower limb, discharging sinus over the amputation stump in the right shoulder, got easily frightened and was emotionally unstable since the accident, terming the complaints valid. Report by Dr. F. G. Njenga, a Psychiatrist from Aga Khan Hospital who treated her, dated 25th July 2000 was that the 1st appellant’s relationship with her husband had deteriorated significantly, not just because of her physical limitation due to her traumatic injuries, but emotional and psychological problems proving to be a major strain. The doctor opined that due



to her physical appearance and limitation, she constantly worried about the future of their marriage. We find that there was sufficient evidence to support the 2nd appellant's claim for loss of consortium. We find that the learned Judge clearly erred when she failed to award any damages under this head.

74. As to assessment of damages under this head, we have the *Salvatore De Luca case*, supra, a 1998 case, in which KShs.40,000/= was awarded. In *Timo Kalevi Jappinen & Another*, supra, a 1997 case, KShs.200,000/= was awarded. The judgment in this matter was delivered in 2005. We think that, had the learned Judge properly directed herself to the appropriate award under this head, KShs.300,000/= would have been fair at the time. We so find.

Whether this court can interfere with the Learned Judge's exercise in discretion in the award of general damages for pain and suffering;

75. The 1st appellant has challenged the award of KShs.900,000/= for general damages for pain and suffering. As shown on the body of this judgment, it was the view of the respondents' counsel that the award given was justified and should not be interfered with. Mr. Kihara on the other hand was of the view that the award was excessively low, compared with awards made for similar injuries as those of the 1st appellant in this case. As to whether we can interfere with the learned Judge's exercise of discretion in the award on pain and suffering, we are guided by the principles which were restated in the case of *Kemfro Africa Ltd vs. Lubia & Another* [1982-88] I LR wherein the Court of Appeal stated as follows: -

“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

76. In *Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd* Civil Appeal No 60 of 2004, this Court reiterated the principles under which this Court can interfere with an award of damages as stated in *Kemfro Africa Ltd vs. Lubia & Another*, supra. It also emphasised the need for the Court to ensure that awards make sense and have regard to the context in which they are made, and that they should strike a chord of fairness. In *Arrow Car Limited vs. Bimomo & 2 Others* [2004] 2 KLR 101, it was stated that comparable injuries should as far as possible be compensated by comparable awards.

77. The learned Judge outlined the injuries of the 1st appellant as:

Head injury (Cerebral concussion); Multiple cuts and abrasions; Abrasion over the right chest wall; Fracture of the right collar bone;

Crush injury to the right upper limb leading to amputation of the same;

Crush injury to the right lower limb leading to an above the knee amputation.

78. The learned Judge employed the guidance of two cases to assess damages for pain and suffering. *Mary Ouko Wawiye vs. Attorney General* High Court Civil Case No. 788 of 1998 where the plaintiff sustained injuries to the head, neck, right hand and right hips and was awarded KShs.1,000,000/=. *Samson Mutuku Kimweli vs. Golden Harvest Mills Ltd* High Court Civil Case No. 164 of 2002 where KShs.500,000/= was awarded for an industrial accident. The particulars of the injuries sustained by the plaintiff are not provided. The final order made was an award of KShs.900, 000/=.

79. The appellants counsel relied on very old cases of *Byabalema and Others vs. Uganda* [1975] (1990-1994) Ltd EA 59 and *Byaragable vs. Kilemba Mines Ltd* [1972] EA 341. We find the appropriate



cases to apply in this case as a guide to the award of pain and suffering includes the one cited by the respondents' counsel, albeit in support of a different issue. This is the case of *James Maina Muriithi vs. My Beauty Transporters Limited & 2 Others* [2018] eKLR. The plaintiff in that case was 52 years old and had sustained frictional burns over the lower abdomen; frictional burns on both thighs; crash injury of the right lower limb with eventual amputation below the knee; crush injury left upper limb with eventual disarticulation and pains, blood loss and soft tissue injuries. The court awarded him Kshs.4,200,000/=.

80. The other case we apply to guide us is *Nancy Wanjiku Mwangi vs. Peter Njoroge Ngata* [2005] eKLR, a 1999 case, where the plaintiff was aged 46 years old in 1999 who had 15% disability after suffering deep wound to the forehead with minor head injury; simple comminuted fracture of the right humerus; compound fracture of the right tibia; loss of bone segment; and amputation of right leg below the knee. Ang'awa, J. (same Judge as in this case) awarded Kshs.800,000/=. And in *Kariuki M'Ng'onde alias Kariuki Josphat M'Ng'onde vs. Philip Miriti & 2 Others* [2005] eKLR where for facial and left wrist laceration, fractures of the clavicle and scapular and blood transfusion, the learned Judge awarded Kshs.1,500,000/=. In *Samuel Waruguru Njoroge vs. Kenya Bus Services Ltd* Nairobi HCCC No. 495 of 1998 the plaintiff was awarded general damages for pain suffering and loss of amenities of Kshs.1,300,000/- in a case where he had sustained an amputation of the right leg and the degree of permanent disability was assessed at 35%. In *Samson Omari vs. Simon Kamau & Another* HCCC 157 of 2001 [2007] eKLR which judgment was delivered in 2007 Kimaru, J. (as he was then) awarded the plaintiff Kshs.1,500,000/- where the plaintiff had sustained injuries on the left leg leading to amputation below the knee, fracture and dislocation of the right ankle.
81. The appellant had much more severe injuries, double amputations right leg above the knee and upper right limb at shoulder level, head concussion with one month comma and a second month in confusion, has 100% disability and needs prosthesis, among the other injuries the learned Judge noted. We find that the award given was not comparable to awards made in cases where the injuries were almost similar to those of the appellant in this case. We are satisfied that the learned Judge did not fully appreciate the gravity and the severity of the injuries suffered by the 1st appellant and consequently, the amount awarded was so inordinately low that it was a wholly erroneous estimate of the damage and warrants interference. It is our view that as of 2005 when the judgment in this case was delivered, and award of Kshs.6,200,000/= would have been adequate compensation.

Whether the 1st appellant's claim for loss of earning capacity or reduced earning capacity was fairly dismissed;

82. The learned Judge found that the 1st appellant was not entitled to loss of earnings or to future earning capacity on grounds the 1st appellant was promoted by his employer post the accident and her salary adjusted accordingly. We noted that counsel for the appellants submitted that the 1st appellant retired at 55 years, which was not the normal age for retirement at the time. However, going by her evidence in Court, she did not state that she had been retrenched or forced to retire early. This may have happened post the judgment of the High Court, in which case it does not fall for our consideration. We do not see any reason to disturb the learned Judge's conclusion on the claim under this head.

Whether the learned judge erred when she dismissed the 1st appellant's claim for special damages;

83. We wish to make it clear that there are two prayers which, from the arguments of counsel seem to merge at some points. There was the special damages claim and the claim for future prognosis. For clarity, the claim for special damages was heard and determined by the learned Judge. The prayer for future prognosis falls for determination by this Court by virtue of the ruling of this Court dated 19th



July 2019, allowing the appellants to adduce additional evidence; first as a first appellate Court, and secondly, on a fresh assessment of the amount payable, if we find payment due.

84. First, we shall consider the appeal against the judgement on special damages under this head. In the Amended Plaintiff under paragraph titled 'Particulars Of Special Damages', the following particulars were pleaded:

- i). Medical reportsKshs.10, 000/= ii). Police abstract Kshs.100/=
- iii). Hospital Bills (medical, surgery and treatment expenses) Kshs.1, 224, 837. 40
- iv). Related Medical expenses Kshs.6, 000/=
- v). Transport to and from HospitalKshs.140, 000/=

Total Kshs.1, 374, 837. 40/=

Loss of earnings (23, 000/= X 10 months = 230,000/=) Future earnings and or extinguished earning capacity to be adduced at the hearing thereof.

85. On this claim, the learned Judge relied on the case of *Perestello vs. United Parts* [1969] WLR 570 and of *Ouma vs. Nairobi City Council* [1976] KLR 279 and dismissed the claim under this head. Specifically, the learned Judge ruled that claims of medical reports, hospital bills and related medical expenses were all met by her employer, Kenya Power & Lighting Company. She held that the 1st appellant could not be permitted to claim these sums as it would result in double enrichment. Further, that the respondents could only pay the sum claimed if the employer or insurance company claimed subrogation in the name of the 1st appellant. For the claim of police abstract report and transport to and from hospital, the learned Judge rejected the claims stating that the same were never supported by receipts and evidence respectively.

86. Authorities abound that special damages must be specifically pleaded and strictly proved. That is the proposition in the cases of *Charles C. Sande vs. Kenya Co- Operative Creameries Limited*, Civil Appeal No. 154 of 1992. Much earlier in *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, this Court articulated that:

“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.”

87. See also the decision of this Court in *Daniel Gatthi Gachomo vs. Kenya Union of Teachers Nyeri Branch* [2013] eKLR; *Capital Fish Limited vs. Kenya Power and Lighting Company Limited* [2016] eKLR.

88. The appellants pleaded the special damages. However, for the hospital bills and doctors' charges, what was presented were the reports of the various doctors, invoices and in some cases copies of the payment receipts. None of them were original copies. For the police abstract, claim for transport to and from hospital, no documents were presented to support the claims. In regards to the hospital bills and the doctor's charges, the 1st appellant was categorical that her employer, KPLC paid everything. She however claimed that the same was deducted from her salary.

89. The law is that the expenditure in a special damages claim, must be supported, which counsel for the appellants seemed to appreciate when he urged that receipts were not the only means that can be used to support. For the deductions from the salary, the appellant could have called her employer's representative to support that allegation, since the payslip she adduced in evidence did not show any



deductions of that nature whatsoever. For the transport, an acknowledgement from the person or company hired to offer the transport would have sufficed, as there was nothing else presented showing that she was required at the hospital, during which period and for what purpose.

90. We find that the learned Judge was right when she declined to accept the claim for special damages for the reasons that she advanced.

Whether the 1st appellant's claim under the heading 'future prognosis' was payable.

91. Before we delve into the issues raised under the head, let us mention that it is the claim under the heading 'Future Prognosis' that was the subject of the application dated 13th November 2018, and the ruling of this Court dated 19th July 2019. It was brought pursuant to rules 29, 42 (1) (2) and 43 (1) of the *Court of Appeal Rules, 2010*. Prior to filing of the application, the impugned judgment had been delivered. The learned Judge, in her judgment had this to say regarding the prayer for future medical expenses/future prognosis:

“The doctor in his report indicated that the plaintiff (read the 1st appellant) would require a sonogram instigation at Kshs.100, 000/-. This is to atop the sinus and the right shoulder. Refashioning scars in stump at Kshs.200,000/-; and prosthesis costing Kshs.750,000/-He also advised on psychiatric care. The operation on the sonogram instigation has taken place as has the refashioning of the scars on the stump. None of the claim was pleaded and particularized. A prosthesis is said to cost Kshs.750,000/=. The plaintiff did not plead this. She has one and is on her second prosthesis which she ought to have indeed pleaded and produced receipts purchasing the same. I would reject this claim as having not been particularized and proved as special damages incurred.”

92. In the application, the 1st appellant sought to adduce additional evidence, particularised in the grounds on the face of the application and in the 1st appellant's affidavit in support of her claim for special damages for the following expenses:

- i. Air tickets (in July 2014 at the exchange rate of 1USD=87.741Kshs) Pitty Gathigia Karonji Baaru, Amos Baaru Gacheru and Edith Wanjiru Baaru USD 2930.29 equivalent to Kshs.257,106.57 in July 2014 at exchange rate of 1EUR=120.172Kshs).
- ii. Accommodation Euro 840 equivalent Kshs.100,944.88.
- iii. Transport from Hotel to Hospital Euro 40 equivalent to Kshs.4,946.00/-
- iv. Prosthesis and 2 stockings Euro 4,946.10/- equivalent to Kshs.594,382.73/-
- v. Affidavit of Nicholas Ndege, the bi-lingual translator of from German language into English of all the documents presented.

93. Mr. Kihara submitted that according to the evidence led at the hearing to receive additional documentary evidence, the 1st appellant testified and produced the receipts, passports and aircraft receipts. That the expenses amount to the aggregated sum of Kshs.975,240.66/- with the foreign currencies converted at the rates prevailing as at the time the expenses were incurred. Moreover, counsel urged that the said expenses were incurred as a consequence of the injuries subject hereof, and the treatment recommended by Dr. Nasir many years before. He urged that the respondents, as submitted, are liable to meet the cost.

94. Mr Kihara placed reliance on the English case of *Parry vs. Cleaver* (1970] AC 1, quoted per Lord Reid that: “It would be revolting to the ordinary man's sense of justice and therefore contrary to public



policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of friends and relatives or the public at large and the only gainer would be the wrong doer.” We note that the respondents’ counsel urged that the above statement was abandoned by the House of Lords in the same case as espousing only a general rule, that ‘the fruits of insurance which the plaintiff himself has provided and the fruits of benevolence of their parties as apparent exceptions to the rule against double recovery founded on the special considerations of policy which Lord Reid had explained.” We think that the two arguments are complementary and not opposed.

95. On the issue of particularity of special damages, counsel relied on the *Racliffe vs. Evans* [1892] 2 QB 524 C.A. for the proposition that ‘the character of the acts themselves which produce, 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”. Put simply, the particulars given for special damages, and we dare state also future medical requirements, must relate to the facts of the case, the circumstances of the case and the damage that was caused to the plaintiff.
96. In rebuttal, counsel for the respondents submitted that it is not in dispute that three persons travelled as per the passports and the visas adduced in evidence, hence the amount of Kshs.257,106.57/- is not disputed. However, it was argued that the respondents disputed the amounts on accommodation and transport from the hotel to the hospital as the 1st appellant did not have receipts to show that indeed the same were incurred; and prosthesis and stockings for Kshs.594,382.73/-. The respondents maintained that special damages must not only be pleaded but specifically proved.
97. The respondents further contended that the 1st appellant cannot seek a refund of the amount on prosthesis and 2 stockings which amount she acquired through “harambee” or contributions from friends in Kenya. It was submitted that the purpose of an award of special damages is not to unjustly enrich a claimant but rather to compensate them from the loss incurred.
98. We do not wish to belabour this issue. As this Court observed when it allowed the application for adduction of additional evidence,

“Noting the amended plaint contains a plea and claim for future medical treatment, it is our considered view adducing of the additional evidence neither created nor introduced a new cause of action. A claim for future medical treatment or expenses is anticipatory expenses whose exact figures remain unknown at the time of pleading. It is impractical to plead and claim specific sum as future medical expenses. (Emphasis added).”

99. That the 1st appellant could only list anticipated future medical care and treatment required was quite in order, and there was nothing inappropriate of the claim pleaded as she did. There is a connection between the pleaded future medical expenses, the injuries she suffered in the accident and the prognosis given by her doctors who were taking care of her. The learned Judge had stated that the appellant had already received prosthesis twice and was on the third one.

That is precisely the point. The doctors can only give prognosis of future treatment but the form and the nature it may take may not be ascertainable. That is why, even though one should plead future medical treatment, one cannot be expected to produce proof of the expenses, as they would not have been incurred.

100. In this case, the ‘Future Prognosis’ of future medical expenses changed character to special damages, with the leave of the Court on application, so that the 1st appellant brought documentary proof of actual expenses incurred. That window opened to the 1st appellant because of the delay of 14 years or so between the date of judgment of the High Court and the date the appeal was heard.



101. As to whether the expenses have been proved and can be paid, counsel for the respondent has admitted that the claim for airfare for the trip to Austria as per the documents that were produced to support it was payable. He declined hotel accommodation and travel to and from hospital and the prosthesis the 1st appellant was fitted and the stockings that came with it. He argued that the expenses were met through 'harambee' or in other words through benevolence of friends and would result in double enrichment if it was refunded.
102. We do not buy the argument that a victim who has looked for resources through friends and family, should not get a refund of such funds. We adopt Lord Reid's statement that it is revolting to the ordinary man's sense of justice and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of friends and relatives or the public at large and the only gainer would be the wrong doer. In our view, donations of benevolence from friends and family ought to be regarded as exceptions to the general rule against double recovery or unfair enrichment. The 1st appellant should recover all her expenses in the trip to Austria even though largely paid for by friends.
103. Furthermore, for the contested claim of the accommodation and the transport to and from hospital as well as the costs of the treatment, including prosthesis and stockings, these were all incurred. The air tickets and the visas are proof that the journey was indeed made, for the purpose claimed. We note however that there were no receipts to support Kshs.100,944.88/- for accommodation and Kshs.4,946.00/- for transport to and from hospital. These cannot be refunded. For the sum of Kshs.594,382.73/- for Prosthesis and 2 stockings, we note that the 1st appellant has attached a banking transfer document marked 'NN3'. It shows that the 1st appellant paid to the Recipient Bank BUCHSBAUM GMPH 1 BAN AT 692011100004846885 from account BIC GIBHATWWXXX NO 000004011172, AMOUNT EUR 4946. The interpreter from German to English, Mr. Nicholas Ndege averred in his affidavit dated 1st November 2020 that the bank document was a payment receipt for the prosthesis and stockings. We are satisfied that there is proof that the prosthesis and the accompanying stockings were paid for by the 1st appellant and therefor the cost should be refunded to the 1st appellant as claimed.
104. In the result, we find that the orders that commend themselves to us to make in this matter are as follows:
1. Judgment be and is hereby entered for the 2nd appellant against the respondents for loss of consortium in the sum of Kshs.300,000.00/= with interest from the date of judgment of the High Court, on 14th July 2005 until payment in full;
 2. Judgment be and is hereby entered for the 1st appellant against the respondents for general damages for pain and suffering in the sum of Kshs.6,200,000.00/=, less 25% contributory negligence by the 1st appellant, bringing the total award to Kshs.4,875,000/= with interest from the date of judgment of the High Court on 14th July 2005 until payment in full;
 3. Judgment be and is hereby entered for the 1st appellant against the respondents for Prosthesis and 2 stockings in the sum of Kshs.594,382.73/= with interest from date of filing suit on 29th January 1999 until payment in full;
 4. Judgment be and is hereby entered for the 1st appellant against the respondents for return air fare from Nairobi to Austria in the sum of Kshs.257,106.57 with interest from date of filing suit on 29th January 1999 until payment in full;
 5. The appellants will have the costs of the case in the High Court and half the costs of the appeal.



DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

