



**JPS (A minor suing through his father and next friend PS) v Aga Khan Health Service Kenya t/a The Aga Khan Hospital & 2 others (Civil Appeal 28 of 2012) [2023] KECA 459 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KECA 459 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 28 OF 2012  
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA  
APRIL 20, 2023**

**BETWEEN**

**JPS (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND PS) ..... APPELLANT**

**AND**

**AGA KHAN HEALTH SERVICE KENYA T/ATHE AGA KHAN HOSPITAL ..... 1<sup>ST</sup> RESPONDENT**

**DR. OSUR ODUOR ..... 2<sup>ND</sup> RESPONDENT**

**JWS ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of the High Court at Nairobi (Angawa, J.) delivered on 6th April 2006 in H.C.C.C NO. 807 of 2003.)*

**General damages for pain, suffering and loss of amenities of Kshs.15,000,000 awarded as a result of the negligent actions which led to a child being born with Erb's palsy**

Reported by Kakai Toili

***Civil practice and Procedure** - damages - assessment of damages - factors to be considered by courts when assessing general damages in respect of pain and suffering.*

***Jurisdiction** - jurisdiction of appellate courts - jurisdiction to interfere with an award of damages by a trial court - when would an appellate court interfere with an award of damages by a trial court?*

**Brief facts**

On March 12, 2003, the appellant alleged that the 3<sup>rd</sup> respondent presented herself for a medical check-up at the 1<sup>st</sup> respondent's hospital, being two weeks past her expected delivery date. According to the appellant, the medical personnel at the hospital—acting as servants or agents of the 1<sup>st</sup> respondent—negligently induced labor without conducting a scan or requisite medical examination. During the delivery, they allegedly forcefully



extracted the appellant from the birth canal, resulting in nerve damage on the right side and the development of Erb's Palsy, leaving his right arm immobile.

The appellant claimed that a caesarean section would have been the appropriate mode of delivery in the circumstances. He attributed negligence to the 1<sup>st</sup> respondent and specifically to the 2<sup>nd</sup> respondent, who conducted the delivery, for failing to exercise reasonable care and skill. The appellant further contended that he had endured prolonged pain, suffering, and hospitalization, requiring constant care, therapy, and corrective surgery abroad. He sought special damages, general damages for pain and suffering, and future medical expenses.

The trial court held the 1<sup>st</sup> and 2<sup>nd</sup> respondents fully liable, jointly and severally, and found the 1<sup>st</sup> respondent vicariously liable for the negligent acts of its agents. On quantum, the court awarded Kshs 800,000 as general damages, 115,823 Indian Rupees as special damages for medical expenses in India, Kshs 70,000 for hospital expenses in Kenya, and a nominal sum of Kshs 50,000 for future medical costs. Dissatisfied only with the quantum of damages, the appellant lodged the instant appeal.

### Issues

- i. What circumstance would necessitate an appellate court to interfere with an award of damages by a trial court?
- ii. What were the factors that guided courts when assessing general damages in respect of pain and suffering?

### Held

1. On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it and draw its conclusions, though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. The responsibility of the court was to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.
2. There were apparent errors and omissions in the record of appeal. However, the errors and omissions were not so grave as to render the record of appeal irredeemably defective or to infirm the court in the determination of the appeal. If indeed it was so, the 1<sup>st</sup> and 2<sup>nd</sup> respondents ought to have invoked the provisions of rule 84 of the Court of Appeal Rules, 2010, and have the record of appeal struck out. The errors and omissions had not occasioned any material prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Accordingly, the court declined to strike out the appeal.
3. An appellate court would not disturb an award for general damages unless it was so inordinately high or low as to represent an entirely erroneous estimate. It had to be shown that the trial court proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.
4. In assessing general damages in respect of pain and suffering, the court was guided by, *inter alia*, the gravity of the injuries sustained by a claimant and the awards made in the past in respect of the same or comparable injuries. From an analysis of a few decisions where the claimants/plaintiffs suffered almost similar or comparable injuries to the appellant, the award by the trial court was inordinately low.
5. The injuries sustained by the appellant were grave. The gravity of the injuries sustained by the appellant, the pain and suffering he underwent, and the degree of incapacity, as well as his young age, called for a higher award than the Kshs 800,000.00 awarded to him by the trial court.
6. Special damages had to be pleaded and proved before they could be awarded. The appellant in the further amended plaint pleaded special damages, albeit in different currencies. In the circumstances, the special damages were not only pleaded but were also proved by way of evidence. The trial court erred by making a finding that only Rs 115,823 and Kshs 70,000.00 had been proved. The appellant specifically pleaded for the cost of future medical expenses. One of the prayers in the further amended plaint (prayer No. c) was for the award of future medical costs.



7. A consent order was generally binding on the parties thereto. The consent entered into by the parties on February 24, 2020, had not been challenged by the respondents, nor were there any good grounds upon which the same could be set aside. The costs of the appellant's future medical expenses incurred between the date of delivery of the impugned judgment and the date of collection of the additional evidence as directed by the court were freely consented to by the parties.
8. The respondents did not strongly challenge the evidence by the surgeon, who was the chief surgical specialist in the Ministry of Health (the surgeon), that the appellant would require physiotherapy for life at a cost of Kshs 3,000.00 per week. No medical evidence to the contrary was led to show that the appellant would not require physiotherapy for the period stated by the surgeon or that the cost quoted for each of the physiotherapy sessions was inordinately high. In the circumstances, the appellant would require physiotherapy for life at a cost of Kshs 3,000.00 per week.
9. The impugned judgment was delivered when the appellant was barely 3 years old. The life expectancy period of 63 years proposed by the appellant was reasonable, save that the appellant, just like any other human being, was bound to get exposure to vagaries and vicissitudes of life, which in their very nature could bring down his life expectancy. The court therefore adopted a life expectancy period of 50 years.
10. The surgeon recommended four surgeries at an estimated cost of between Kshs 2,000,000.00 and Kshs 3,000,000.00. However, during cross-examination, he stated that if there were no deformities, the appellant might not require any surgery in the future. He also stated that, if physiotherapy was done well, the appellant might not require surgery. If the appellant attended physiotherapy weekly and the same was done well, then he would not require any surgery in the future. Having allowed the cost of physiotherapy, and in light of the surgeon's testimony during cross-examination, it was not necessary to award any sum on account of future surgery.

*Appeal partly allowed.*

#### **Orders**

1. *The trial court's awards of damages set aside and substituted therefor the amounts as stated herein, which were tabulated as follows:*
  - a. *General damages for pain, suffering and loss of amenities: Kshs 15,000,000.*
  - b. *Special damages: medical expenses - Kshs 78,735; travel expenses- Kshs 160,016, Rs 1836, Usd 3112.10, accommodation, meals and other expenses - Kshs 60,331, Rs 49,259.*
  - c. *Further medical expense as agreed by consent: Rs 550,350.69, Kshs 506,368, Usd 1,107.*
  - d. *Future medical expenses (physiotherapy) Kshs 7,800,000.*
  - e. *Interest on (a) and (d) to accrue at court rates from the date of the judgment until payment in full. Interest on (b) and (c) would accrue at court rates from the date of the trial court's judgment until payment in full.*
  - f. *Appellant to have costs of the appeal as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents only.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Explained)
2. *Arrow Car Limited v , Elijah Shamalla Bimomo & 2 others* Civil Appeal 344 of 2004; [2004] KECA 136 (KLR) - (Explained)
3. *Butt v Khan* Civil Appeal 40 of 1977; [1978] KECA 24 (KLR); [1978] eKLR - (Explained)
4. *Hahn v Singh* Civil Appeal 42 of 1983; [1985] KECA 129 (KLR); [1985] eKLR - (Explained)
5. *HKN v Kenafriic Bakery Ltd & another* Civil Case 100 of 2006; [2010] KEHC 2464 (KLR) - (Explained)



6. *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Olive Lubia & another* Civil Appeal 34 of 1982; [1983] KECA 61 (KLR); [1987] KLR 27; [1982 – 88] 1 KAR 727; [1983] eKLR - (Explained)
7. *Kigano, Clement Muturi v Shengli Engineering Construction Group Limited* Civil Case 212 of 2011; [2020] KEHC 3067 (KLR); [2020] eKLR - (Mentioned)
8. *Kivuti, Patrick Kithaka v John Mwangi* Civil Appeal 5 of 2014; [2017] KEHC 299 (KLR); [2018] eKLR - (Explained)
9. *Maweu (Suing as Legal Representative of the Estate of Felix Mutie Muthini (Deceased)) v Misheck* Civil Appeal 54 of 2018; [2020] KEHC 10487 (KLR) - (Explained)
10. *Mbithuka, Benson v Nzuki Muthama alias Charles Nzuki Muthama & another (Suing as the personal representative of the estate of Sharon Mueni-deceased)* Civil Appeal 38 of 2017; [2020] KEHC 3099 (KLR) - (Explained)
11. *Ndungu, Daniel Gatana & another v Harrison Angore Katana aka Harrison Angore aka Harrison Ngumbao* Civil Appeal 72 of 2019; [2020] KEHC 6806 (KLR) - (Explained)
12. *Odeyo, Charles Oriwo v Appollo Justus Andabwa & Kenmar Limited* Civil Appeal 99 of 2014; [2017] KEHC 4447 (KLR) - (Explained)
13. *PKM (Suing on own behalf and as next friend of AB) & GSM v Nairobi Women Hospital & Mutinda* Civil Case 186 of 2009; [2018] KEHC 6967 (KLR) - (Explained)
14. *Shreeji Enterprises Limited v John Mungai Chai* Civil Appeal 71 of 2019; [2020] KEHC 1385 (KLR) - (Explained)
15. *Simon Taveta v Mercy Mutitu Njeru* Civil Appeal 26 of 2013; [2014] KECA 755 (KLR) - (Explained)
16. *Tracom Limited & another v Hassan Mohamed Adan* Civil Appeal 192 of 2006; [2009] KECA 48 (KLR) - (Explained)
17. *United Finance Ltd v Joel Muthui Kyambu* Civil Appeal 252 of 1999; [2000] KECA 346 (KLR) - (Explained)
18. *Wasike v Wamboko* [1982-88] 1 KAR 625 - (Explained)

#### **United Kingdom**

*H West & Sons Limited v Shepherd* [1963] 2 All ER 625; [1963] UKHL J0527-2 - (Explained)

#### **Regional Court**

1. *Kenya Bus Services Ltd v Gituma* [2004] EA 91 - (Explained)
2. *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] EA 212 - (Explained)

#### **Jamaica**

*Frank Phipps & Pearl Phipps v Harold Morrison* SCCA 86 of 2008 - (Explained)

#### **Statutes**

#### **Kenya**

1. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 87, 87(5); rule 29(1)(b) - (Interpreted)
2. Stamp Duty Act (cap 480) In general - (Cited)

#### **Advocates**

None mentioned

## **JUDGMENT**

1. This is an appeal against the judgment of the High Court of Kenya at Nairobi (Ang'awa, J) delivered on April 6, 2006 in HCCC No 807 of 2003.



2. The brief background is that the appellant, a minor, suing through his father and next friend, PS, filed suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents by way of a plaint dated August 1, 2003, which was subsequently amended on September 22, 2003 and further amended on November 23, 2005. The appellant's case was that the appellant's mother, who is the 3<sup>rd</sup> respondent herein, was admitted at the 1<sup>st</sup> respondent's hospital for ante-natal care and treatment when she was 7 months pregnant with the appellant. On March 12, 2003, the 3<sup>rd</sup> respondent went for check-up at the 1<sup>st</sup> respondent's hospital as she was 2 weeks overdue the expected delivery date.
3. According to the appellant, the 1<sup>st</sup> respondent's employees, servants, agents or consultants had a duty of determining the safest method of delivery, one which would least harm the baby. However, the 1<sup>st</sup> respondent's employees, servants or agents, without conducting a scan or any requisite examination whatsoever, proceeded to negligently and recklessly induce labour to facilitate spontaneous vaginal delivery, and thereafter proceeded to forcefully pull out the appellant from the birth canal, as a result of which he sustained injuries culminating in a condition known as Erb's palsy. It was stated that the appellant was born with damaged nerves of the right-hand side, as a result of which the right hand does not move at all.
4. The appellant stated that owing to the prolonged labour and struggle coupled with the birth weight of the appellant, which was 3.9 Kgs, the appropriate method of delivery in the circumstances would have been caesarean section. The appellant contended that the 1<sup>st</sup> respondent, through its servants and agents who it engaged and, in particular, the 2<sup>nd</sup> respondent, who delivered the appellant, were negligent as they failed to use reasonable care and skill in the treatment which they gave to the appellant. The particulars of negligence enumerated as against the 1<sup>st</sup> respondent were, *inter alia*:
  - i. failing to conduct the requisite scans and tests before deciding on the method of delivery;
  - ii. inducing labour without due regard and consideration and in apparent ignorance of the attendant risks;
  - iii. failing to assist the appellant's mother in the ways possible and accepted to alleviate her pain and suffering during the prolonged labour;
  - iv. favouring spontaneous vaginal delivery due to its ease without considering the option of caesarean section, which was necessary, more favourable and advantageous method of delivery in the circumstances;
  - v. failing to designate and appoint professionals to attend to the appellant's mother, even upon noticing that the birth was a difficult one in view of the prolonged labour;
  - vi. failing to diagnose or conduct an investigation that would have revealed the exact injuries sustained by the appellant at birth and the ramifications thereof; and
  - vii. wrongly advising that the appellant's failure to move the right hand was a mild problem and, in the process, wrongfully diagnosing that failure to use the right hand was as a result of strained stretched muscles or dislocation.
5. The appellant pleaded a different set of particulars of negligence as against the 2<sup>nd</sup> respondent, which were, *inter alia*:
  - i. pulling out the appellant from the birth canal forcefully using hands, thus causing the injury on his right shoulder;



- ii. acting hurriedly and recklessly in pulling the appellant out of the birth canal without proper consultation, consideration and/or examination;
  - iii. mishandling the appellant at birth when he was most delicate;
  - iv. failing to take reasonable steps to alleviate the pain experienced by the appellant's mother;
  - v. failing to call for more specialized and skillful person to attend to the appellant's birth and the resultant injuries; and
  - vi. wrongly advising for the discharge from hospital of the appellant and his mother despite full knowledge that the appellant had sustained some injuries at birth.
6. It was pleaded that, at all times, the 1<sup>st</sup> respondent was vicariously liable for the acts of its employees, servant and agents, who included the 2<sup>nd</sup> respondent.
7. In his particulars of loss and damage, the appellant stated that he had undergone prolonged pain, suffering and hospitalization, and required constant nursing attendance and therapy and correctional surgery abroad. The appellant enumerated the particulars of special damages consisting of medical expenses, travel expenses, accommodation, meals and other expenses for the correctional surgery. He stated that he would also incur future medical costs and particularised those costs in his further amended plaint. Consequently, the appellant prayed for:
- “special damages as pleaded; general damages for pain and suffering; future medical costs; costs of the suit; interest on the same; and any further relief that the court deemed fit to grant.”
8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, in their defence and amended defence dated September 5, 2003 and February 1, 2004 respectively, stated that the appellant and his mother were both skilfully and properly handled at the hospital, and that the appellant's delivery was managed in the best possible manner. They denied all allegations of negligence, loss, injury and damage, and the particulars thereof in toto. The 1<sup>st</sup> respondent denied being vicariously liable as alleged or at all. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the matters complained of by the appellant, if at all caused, were unavoidable and wholly inevitable in the circumstances. In the alternative, they contended that the matters complained of, if at all caused, were wholly caused, or substantially contributed to by the negligence of the appellant's mother, the 3<sup>rd</sup> respondent. They enumerated the particulars of negligence of the 3<sup>rd</sup> respondent, which were, inter alia, failing to disclose her medical history to the respondents, and for withholding vital information from the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents sought indemnity and/or contribution from the 3<sup>rd</sup> respondent in the event that they were held liable to the appellant.
9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also took out a third-party notice against the appellant's mother, the 3<sup>rd</sup> respondent. Pursuant to an order of the trial court dated November 14, 2003, the appellant's mother was joined in the suit as a third party. Her defence as laid out in the third party's defence dated March 8, 2004 was that she presented herself to the said hospital for assessment and examination so that the hospital could determine the safest acceptable mode of delivery, but that her admission was not specifically for normal vaginal delivery. She averred that she had no medical skills, and, therefore, she submitted herself to the care of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, whose duty it was to advise her on the safest method of delivery for her and the baby. She further averred that her full medical and gynaecological history was available to the 1<sup>st</sup> respondent, and that the 2<sup>nd</sup> respondent, as a servant, agent, or employee of the 1<sup>st</sup> respondent, took notes of her medical and gynaecological history in a question-and-answer



session before admitting her to the full maternity cover in the hospital. According to her, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were negligent in not carrying out sufficient medical examinations which would have saved the appellant from the disabling injury during childbirth. She enumerated the particulars of negligence against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

10. At the hearing of the suit before the trial court, several witnesses, including the appellant's father and next friend, as well as various medical doctors, testified in the appellant's favour. The 1<sup>st</sup> respondent called its Administrator and three other witnesses, all of whom had medical background, who testified on its behalf. The appellant's mother testified as a sole witness for the third party. Upon conclusion of the hearing, the trial court delivered its judgment on April 6, 2006. The learned judge's findings in brief were as follows:

- a) The appellant's mother did attend ante-natal clinic, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents had her full records of previous ante-natal visits with another health provider, (AAR); that the records showed that she disclosed that she had undergone two previous miscarriages; that the miscarriages were an indication that vaginal delivery should not have been undertaken.
- b) The 1<sup>st</sup> respondent accepted the appellant's mother as a patient and thus a duty of care was created. Within the terms of the contract, the appellant's mother would have been provided with a team of professionals to attend to her.
- c) There was no evidence that the hospital conducts drills to cater for emergencies such as this type of difficult delivery; or that there was a team of doctors on standby to assist the senior house officer, namely, an obstetrician, a gynaecologist, and an aesthetician.
- d) At the time of the delivery, the 2<sup>nd</sup> respondent was not a specialized gynaecologist, and was thus not capable of dealing with such an emergency. He should have been in the next room waiting to be called.
- e) The 2<sup>nd</sup> respondent owed a duty of care to the appellant and his mother to ensure that there was a safe delivery. That duty of care was breached, and as a result the appellant sustained irreparable injuries.
- f) The 1<sup>st</sup> respondent was negligent by offering a maternity package that was inadequate in the circumstances; and that the mother consented to a vaginal delivery on the advice of a doctor who was assigned to her by the 1<sup>st</sup> respondent.
- g) The 1<sup>st</sup> and 2<sup>nd</sup> respondents were 100% liable, jointly and severally, for the injuries loss and damage suffered by the appellant; the 1<sup>st</sup> respondent was vicariously liable for the negligent acts of its agent and or servant; and there was no contributory negligence against the 3<sup>rd</sup> respondent, who had provided all the relevant information to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
- h) On quantum, the learned judge awarded Kshs 800,000 as general damages for pain, suffering and loss of amenities. As for special damages, the learned Judge found that the appellant had proved Indian Rupees 115,823 as expenses incurred in India, and Kshs 70,000 as hospital expenses incurred in Kenya. In respect of future medical costs, the learned Judge awarded a nominal sum of Kshs 50,000.



- i) Regarding costs and interest, the learned judge held stated: “I award the cost of this suit to the plaintiff. I award the cost of this suit to the 3<sup>rd</sup> party that is to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendant. I award interest on special damages to the plaintiff to be paid by 1<sup>st</sup> and 2<sup>nd</sup> defendant jointly from the date of filing suit and interest on general damages of this suit from the date of this judgment. (*sic*)”

11. Dissatisfied with the impugned judgment on the aspect of quantum of damages only, the appellant filed this appeal. The grounds as listed in the memorandum of appeal dated February 21, 2012 are that the learned judge erred in law and in fact by: awarding an inordinately low amount on general damages; failing to appreciate the nature, magnitude and consequence of the permanent disability that the appellant was consigned to for the rest of his life; failing to consider relevant factors in the award of damages in the circumstances; failing to make an award for future loss of earning capacity; failing to award special damages that had been specifically pleaded and proven; and by making a nominal and inordinately low award for future medical expenses.
12. The appellant urged this court to enhance the award on general damages; award special damages as pleaded and proved; enhance the award on the head of future medical expenses; and grant costs of the appeal and of the suit before the trial court.
13. At the hearing of this appeal, the appellant was represented by Mr Khaseke, learned counsel, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr Zulfikar Mohammed, learned counsel. There was no appearance for the 3<sup>rd</sup> respondent. Highlighting the appellant’s written submissions dated April 19, 2021 and May 24, 2022 respectively, Mr Khaseke stated that the award on general damages in respect of pain and suffering was not commensurate with the injuries sustained by the appellant. He submitted that the principles for assessment of damages were elaborately enunciated in *H West & Sons Limited v Shepherd* [1963] 2 All ER 625, which was cited with approval in *Daniel Gatana Ndungu & another v Harrison Angore Katana* [2020] eKLR. The appellant also relied on *Charles Oriwo Odeyo v Apollo Justus Andabwa & another* [2017] eKLR, where the court outlined several principles as a guide in assessing damages. The principles are that an award of damages is not meant to enrich the victim, but to compensate such victim for the injuries sustained; that the award should be commensurable with the injuries sustained; that previous awards in similar injuries sustained are a mere guide, but that each case must be treated on its own facts; that previous awards ought to be taken into account to maintain stability of awards, but that factors such as inflation should be taken into account; and that awards should not be inordinately low or high.
14. Counsel submitted that an award of Kshs 20,000,000.00 on account of general damages would be reasonable compared to the injuries sustained by the appellant. The case of *Clement Muturi Kigano v Shengli Engineering Construction Group Ltd* [2020] eKLR was cited for comparative purposes.
15. Counsel also submitted that the trial court erred in law in its assessment of future medical expenses; that a claim for future medical expenses is a special damage claim that was specifically pleaded through the further amended plaint; and that sufficient evidence was adduced in proof of the same. He cited this court’s decision in *Tracom Limited & another v Hassan Mohammed Adan* [2009] eKLR.
16. On the calculation of future medical expenses, it was submitted that, according to the medical report prepared by Dr Kibosio, the appellant would require physiotherapy for life at a cost of Kshs 3,000.00 per week. Dr Kibosio assessed the appellant’s life expectancy at 66.342 years. The proposed award by the appellant for physiotherapy is as follows:

Kshs 3,000.00 x 52 weeks x 63 years = Kshs 9,828,000.00



17. Mr Khaseke cited the decisions of this court in *Sbreeji Enterprises Limited v John Mungai Chai* [2020] eKLR; *Mbithuka Benson v Nzuki Muthama & Another* [2020] eKLR; and *Daniel Muthini Maweu vs. Gideon Misbeck* [2020] eKLR where, according to World Bank data, life expectancy in Kenya was said to be between 64 and 69 years.
18. It was further submitted that, according to the medical report prepared by Dr Kibosio, the appellant would require corrective surgery at a cost of Kshs 3,000,000.00. Further, that after delivery of the judgment by the trial court, the appellant incurred medical expenses of Indian Rupees 550,350.67 and USD 1,107.00. That additional evidence was taken in respect of the additional expenses as ordered by this court vide a ruling dated March 22, 2013. According to the appellant, the documents supporting these amounts were admitted by consent of all parties and form part of the supplementary record of appeal. The appellant submitted that he should be awarded these additional costs.
19. On his part, Mr Mohammed, highlighting the 1<sup>st</sup> and 2<sup>nd</sup> respondents' written submissions dated April 28, 2021 and June 8, 2022 respectively, stated that the record of appeal in its present form was incurably defective. He submitted that the proceedings appearing at pages 722 to 1011 of the record of appeal were full of errors and omissions. According to counsel, the record of appeal offends the provisions of rule 87 of the *Court of Appeal Rules, 2010* and therefore ought to be struck out. In support of this argument, counsel cited the case of *United Finance Ltd v Joel Muthui Kyambu* [2000] eKLR where this court struck out an appeal by reason of errors and omissions in the record of appeal.
20. With regard to the award of general damages, counsel submitted that the same were reasonable and ought not to be interfered with. He added that the threshold for disturbing an award as set out in *Butt v Khan*, [1978] eKLR had not been met.
21. With regard to the nominal award on future medical expenses, the 1<sup>st</sup> and 2<sup>nd</sup> respondents took the view that the same was in order. It was submitted that future medical expenses must, in their very nature, be specially pleaded and proved by way of evidence. The case of *Kenya Bus Services Ltd v Gituma* [2004] EA 91 was cited in support of this argument. Learned counsel argued that this court, vide a ruling dated March 22, 2013, remitted the matter to the trial court so that the appellant could provide evidence on future medical expenses. However, the appellant was now trying to introduce additional expenses through its supplementary record of appeal of Indian Rupees 550,350.67 and USD 1,107.00 which was not part of the application before this court, and which did not form part of the ruling of this court.
22. As regards the amount awarded as special damages, learned counsel submitted that the same was in order as that was the only amount proved by the appellant.
23. The role of this court in a first appeal was succinctly defined in the case of *Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR where the court cited its earlier decision in *Kenya Ports Authority v Kuston (Kenya) Limited* 2 EA 212 that:

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make do allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
24. The following three issues commend themselves for our determination:
  - i. whether the amount awarded as general damages for pain and suffering were reasonable and commensurate with the injuries sustained by the appellant;



- ii. whether the trial court erred in law in its findings in respect of special damages; and
  - iii. whether the trial court erred in law in awarding the appellant nominal damages in respect of future medical expenses.”
25. Before delving into the merits of the appeal, we deem it necessary to address the concern raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the defect of the record of appeal. It was argued that the typed proceedings at pages 722 to 1011 are muddled with errors and omissions, hence rendering the record of appeal incurably defective; that the errors in the record of appeal are not just typographical, they go to the substratum of the appeal; that the record of appeal in its present form is prejudicial to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and offends the provisions of rule 87(5) of the *Court of Appeal Rules, 2010*.
26. We have perused the entire record of appeal. We agree with the 1<sup>st</sup> and 2<sup>nd</sup> respondents that there are apparent errors and omissions thereon. However, we are of the view that the errors and omissions are not so grave as to render the record of appeal irredeemably defective, or to infirm the court in the determination of the appeal. If indeed it was so, the 1<sup>st</sup> and 2<sup>nd</sup> respondents ought to have invoked the provisions of rule 84 of the Court of Appeal Rules, 2010 and have the record of appeal struck out. The ruling in *United Finance Limited v Joel Muthui Kyambu* [2000] eKLR that was cited by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was a direct consequence of such an application to strike out a defective record of appeal. It is also our view that the errors and omissions have not occasioned any material prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Accordingly, we decline to strike out the appeal.
27. On the first ground, the appellant submits that the learned trial judge gave an inordinately low award on general damages for pain and suffering compared to the injuries that he sustained; that the appellant was a minor, who, the first thing he experienced in this world, was excruciating pain occasioned to him by the negligence of the respondents, which pain he would carry on for the rest of his life; that the injuries occasioned the appellant permanent disability, and in their very nature, prevented the appellant from leading an ordinary and healthy life. Before the trial court, the appellant proposed an award of Kshs 20,000,000.00 but, in this appeal, he seeks an enhancement of the Kshs 800,000.00 awarded to him to Kshs 20,000,000.00, which he opines would be reasonable and commensurate to the injuries that he sustained.
28. The parameters under which an appellate court will interfere with an award in general damages were set out in *Butt v Khan* [1978] (*supra*) thus:
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low ....”
29. Similarly, in *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia* [1982 –88] 1 KAR 727 at p 730 Kneller, JA stated thus:
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be that either 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 wholly erroneous estimate of the damage.” [Emphasis added]



30. This court observed in *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR that:
- “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.” [Emphasis added]
31. In *Arrow Car Limited v Elijah Shamalla Bimomo & 2 others* [2004] eKLR, the court stated:
- “... But even a more important aspect which has led us to interfere is that the learned Commissioner appears to have misapprehended the general principles in assessment of damages in personal injury cases. It is our view that in assessment of damages the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.” [Emphasis added]
- (See also *Denshire Muteti Wambua v Kenya Power & Lighting Co Ltd* [2013] eKLR).
32. From the above case law, it is clear that in assessing general damages in respect of pain and suffering, the court is guided by, *inter alia*, the gravity of the injuries sustained by a claimant and the awards made in the past in respect of the same or comparable injuries.
33. In the present case, the appellant suffered injuries that culminated in a condition known as Erb’s Palsy or Brachial plexus injury. This condition, as observed by the trial court at paragraph 84 of its judgment, and according to medical journals, ought to be treated and/or dealt with within 12 months of its manifestation, failing which it becomes permanent. Dr DM Enstwislee, a Paediatrician attached to Kijabe Hospital and who examined the appellant, initially formed the opinion that the appellant would never be able to recover, and that the injuries were now permanent. However, when he saw him in court, the appellant was able to lift the affected arm to a 160-degree range instead of 180 degrees. This, according to the trial court, was possible due to the various operations and treatment the appellant had been undergoing abroad in India to try and restore the nerves.
34. Was the sum of Kshs 800,000.00 awarded to the appellant by the trial court commensurate with the injuries he sustained and in tandem with past decisions of the court? We have analysed a few decisions where the claimants/plaintiffs suffered almost similar or comparable injuries as the appellant, and we are persuaded that the award was inordinately low.
35. In *PKM (Suing on own behalf and as next friend of AJB) & GSM v Nairobi Women Hospital & Mutinda* [2018] eKLR, the 1<sup>st</sup> plaintiff was induced into labour without positive result, but the process was alleged to have been left without any proper attention or attention at all. She alleged that the hospital’s agents and or servants did not monitor her labour with due care and attention, and was left alone in the delivery room, which was grossly negligent. This caused her severe, physical, mental and psychological anguish. The child delivered by the 1<sup>st</sup> plaintiff suffered a major cerebral palsy likely from Asphyxia and would remain dependant for life. The trial court (Mboghli, J) (as he then was,) observed that the injury leading to the child’s condition had denied him everything one may call life and consequently made an award of Kshs 8,000,000.00 for pain, suffering and loss of amenities in his favour.
36. In *Patrick Kithaka Kivuti v John Mwangi* [2018] eKLR, one of the injuries sustained by the appellant (aged 23 years) was described as loss of use of the right upper arm due to severed nerves with dislocated right shoulder joint (severe brachial plexus). In the opinion of the medical doctor, the appellant had suffered paralysis of the upper limb, dysuse atrophy of the muscles and loss of sensation distal to the



elbow joint. He concluded that there was permanent functional loss of the right limb. The trial court awarded the appellant Kshs 600,000.00 for pain and suffering, which was overturned on appeal and substituted for an award of Kshs 2,000,000.00.

37. In *HKN v Kenafri Bakery Ltd & another* [2010] eKLR, the plaintiff, (16 years old), was knocked down by a motor vehicle and sustained, inter alia, an injury described as motor and sensory deficit of left brachial plexus (C5-T1) distribution characterized by complete lack of sensation of the lateral upper arm and whole of forearm. The muscle on her shoulder had weakened. The elbow joint of her upper limb had lost extension of 15%. In the opinion of the medical doctor, the plaintiff had weakness of the left arm associated with muscle wasting, sensory loss and absent or weak tendon reflexes. This was likely to be due to nerve injuries of the brachial plexus, which supplies the upper limb. According to the medical doctor, the weakness was likely to remain a permanent feature, and the plaintiff's level of disability was assessed at 60%. The trial court *vide* its judgment delivered on May 21, 2010 held as follows:

“The plaintiff in this case in her submissions sought an award of Kshs 2 million. In my view, considering the severe injuries the plaintiff suffered and considering that Doctor Ruga assessed her incapacity to be 60%, the amount that would fairly compensate the plaintiff who is still very young and still in great need of help from her members of family would be Kshs 2.5 million.”

38. There is no doubt in our minds that the injuries sustained by the appellant herein were grave. The birth of a child is, on most occasions, a joyous event to the parents of the child. We cannot describe the pain the appellant underwent during birth and in the course of his various surgeries, both as an infant and a toddler. The appellant will never, in the opinion of the medical doctors who testified on his behalf, be able to attain full function of his right hand. He will require physiotherapy and surgery in future. The gravity of the injuries sustained by the appellant, the pain and suffering he underwent, the degree of incapacity as well as his young age called for a higher award than the Kshs 800,000.00 awarded to him by the trial court. We are of the view that an award of Kshs 15,000,000.00 would be reasonable compensation under this head. Accordingly, we set aside the Kshs 800,000.00 awarded to the appellant by the trial court and substitute therefor an award of Kshs 15,000,000.00.
39. With regard to special damages, the law is well settled that they must be pleaded and proved before they can be awarded. Suffice it to quote from the decision of this court in *Hahn v Singh* [1985] eKLR where it was held thus:

“... special damages must not only be claimed specifically (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.”

40. The appellant in the further amended plaint pleaded the following special damages, albeit in different currencies:
- Medical Expenses: Kshs 78,735.00, Rs 115,823.
  - Travel Expenses: Kshs 160,016.00, Rs 1836, Usd 3112.10.
  - Accommodation, meals and other expenses: Kshs 60,331.00, Rs 49,259.00.



41. The trial court in its judgment found that only Rs 115 823 and Kshs 70,000.00 was proved by way of evidence. At paragraph 94 of the judgment, the court held that

“the other claims have been either abandoned, or the original documents were not shown, or the documents are not in compliance with the *Stamp Duty Act*. There are payments taken on credit (and where this occurs it must first be paid before a claim is made).” (*sic*)

42. The documents in support were contained in a bundle of documents marked as B3 which appears at pages 151 - 250 and pages 687 - 751 of the record of appeal. The documents were produced before the trial court by the appellant’s father and next friend (see pages 825 - 829 of the record of appeal). Prior to this, parties had recorded a consent (page 803 of the record of appeal) allowing the appellant’s bundle of documents marked as B3 to be produced without calling the maker thereof. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not adduce any evidence to controvert the said expenses. In the circumstances, we agree with the appellant that the special damages were not only pleaded but were also proved by way of evidence. The trial court erred by making a finding that only Rs 115,823 and Kshs 70,000.00 had been proved. Accordingly, we allow this ground of appeal and award the appellant the following additional special damages:

- a) Medical expenses: Kshs 78,735.00;
- b) Travel expenses: Kshs 160,016.00, Rs 1836.00, Usd 3112.10;
- c) Accommodation, meals and other expenses: Kshs 60,331.00, Rs 49,259.00.

43. On the question of future medical expenses, the trial court addressing itself on this issue held as follows:

“(97) As to the future medical care a doctor required to give evidence as to the costs of such care and further treatment. The plaintiffs’ victims stated that there are further treatment but there was a necessity for exercise to the limbs at all times. I make award under this claim at nominal sum of Ksh 50,000/- to cater for future exercises.” (*sic*)

44. This court in the case of *Tracom Limited & vs. Hassan Mohamed Adan* (*supra*) held as follows:

“.. We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* [2004] 1 EA 91, this court, stated: -

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof 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 infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the



time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require .... ”

45. The question that comes to mind is whether the appellant pleaded for the award of costs of future medical expenses in his pleadings before the trial court. In his further amended plaint, the appellant under paragraph 13 pleaded in part as follows:

“ And will incur future medical costs as follows:

- i. Cost of second corrective surgery - Rs 171,527.00
- ii. Air fare to India - Kshs 85,760 per visit for 15 visits=  
Kshs 1,286,400.00
- iii. Accommodation costs for all visits - Rs 7494 per day for 55 days = Rs  
412,170.00
- iv. Visa fees from the Indian Embassy - Kshs 9,360 per visit for 15 visits = Kshs  
140,400.00
- v. Doctor’s consultation costs - Rs 2,000.00 per visit for 15 visits = Rs 30,000.00
- vi. Cost of physiotherapy - Kshs 500.00 per day for 5 days a week expected to go  
on for the next 18 years = Kshs 2,340,000.00
- vii. Nursing care - Kshs 200 per day= Kshs 730,000.00.”

46. There is therefore no dispute that the appellant specifically pleaded cost of future medical costs. In fact, one of the prayers in the further amended plaint (prayer No c) was for the award of future medical costs.

47. Subsequent to the filing of this appeal, the appellant moved this court by way of an application that was brought under rule 29(1)(b) of the *Court of Appeal Rules, 2010* seeking directions as to the taking of additional evidence in support of his claim for future medical expenses. The appellant’s father and next friend, by way of a supporting affidavit, deponed, *inter alia*, that he did not lead evidence of the cost of future medical expenses before the trial court because he, and local doctors did not know that the appellant’s condition could be reversible through surgery; that subsequent to the judgment, and after the improvement of his financial position, he consulted various surgeons in India and was advised that substantial, if not full utility, of the applicant’s right hand could be restored by certain procedures and surgeries; that the applicant had since undergone surgeries in India at a cost of Rupees 379,726.42, USD 1930.00, and Kshs 796,995.00 as of March 19, 2012; that the evidence was not available and could not have been reasonably obtained at the trial, and that the additional evidence was material, weighty and credible.

48. This court (Githinji, Koome & Maraga, JJA) (as they then were), vide a ruling dated March 22, 2013 found in favour of the appellant/applicant and directed that additional oral and documentary evidence relating to future medical expenses be taken by the High Court on priority basis, and that the High Court does certify such evidence to this court.

49. We have perused the proceedings contained in the supplementary record volume-2 and note that, at page 269 thereof, parties appeared before Njuguna, J on February 24, 2020 for purposes of taking additional evidence pursuant to the orders of this court and recorded a consent in the following terms:



- a) The appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents agree that the documents listed in the appellant’s revised schedule of expenses dated February 24, 2020 be produced as the documentary evidence collected by the High Court as ordered by the Court of Appeal.
  - b) The appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondent agree that the total special damages evidenced in the appellant’s revised schedule of expenses dated February 24, 2020 amounts to:
    - i. Indian Rupees - 550,350.69
    - ii. Kshs 506,368.00
    - iii. USD 1,107
  - c) This will be in addition to evidence given by Dr Kibosia on October 2, 2019.
  - d) The appellant to prepare a consolidated bundle of documents within two weeks which shall contain the documents listed in the appellant’s revised schedule of expenses dated February 24, 2020. Thereafter the file to be remitted back to the Court of Appeal for hearing.”
50. The above consent was entered into by the parties through their then advocates on record, to wit, Ms Angwenyi for the appellant and Mr Mativo for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and was subsequently adopted as an order of the trial court. A consent order is generally binding on the parties thereto. In *Frank Phipps & Pearl Phipps vs Harold Morrison* SCCA 86 of 2008, Harris, JA stated:
- “As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. *Kinch v Walcott and others* [1929] AC 482 “The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation.”
51. In *Flora N Wasike vs Destimo Wamboko* [1988] eKLR, Hancox, JA observed thus:
- “It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *JM Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v FC Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676:
- “It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”
52. In the present circumstances, the consent entered into by the parties herein on February 24, 2020 has not been challenged by the respondents, nor are there, in our view, any good grounds upon which the same can be set aside. We fully agree with the appellant that the costs of the appellant’s future medical expenses incurred between the date of delivery of the impugned judgment and the date of collection of the additional evidence as directed by this court were freely consented to by the parties. We therefore allow these additional costs in terms of the consent recorded in 2020 and award Indian Rupees 550,350.69; Kshs 506,368.00 and USD 1,107.



53. Dr John Kibosia, a Surgeon and the Chief Surgical Specialist in the Ministry of Health, testified on behalf of the appellant on October 2, 2019. He examined the appellant on June 26, 2018 and prepared a medical report which he produced as Exhibit 1. According to the witness, when he examined the appellant, he noted the following: right upper limb in neutral position but smaller and shorter (right limb - 70 cm, left limb - 80cm); shoulder - there was an abduction 45 degrees, no active external rotation, there was subluxation of shoulder joint; elbow - 15-20 degrees fixed flexion deformity with full active full flexion range after that; forearm - supinated at 30 degrees. No active rotation of the forearm; wrist - extended no active wrist flexion. Active wrist extension; hand - atrophy of thenar eminence. His conclusion was that the right upper hand was weak and could not carry any useful function like eating and writing. It could only be used to support the left limb, if and when required.
54. Dr. Kibosia testified that before he examined the appellant, the appellant had undergone many medical procedures, such as nerve transplant surgery, several osteotomies, Botox injection, all of which were necessary as the appellant now had a good limb position which could carry out some basic hand functions.
55. His prognosis was that there was no chance of the appellant regaining full use of his right hand. On future medical interventions, he testified that the appellant would require physiotherapy for life at a cost of Kshs 3,000.00 per week. He would require about four surgeries to correct the half - dislocated shoulder, which was necessary to prevent pain at an estimated cost of between Kshs 2,000,000.00 to Kshs 3,000,000.00 at a local hospital. This cost would, however, come down if the surgery was performed in India.
56. The appellant has moved this court to award him Kshs 9,828,000.00 as the cost of physiotherapy for life, which sum is computed as follows:
- $$\text{Kshs } 3,000.00 \text{ (cost per week)} \times 52 \text{ weeks} \times 63 \text{ years (life expectancy)} = \text{Kshs } 9, 828,000.00$$
57. We note that, during cross-examination, Dr Kibosia stated that during his examination of the appellant, the appellant informed him that he was undergoing physiotherapy but did not state to him specifically how regularly he was doing it. Further, the appellant told Dr Kibosia that he was active in football and played golf using the right hand.
58. The respondents did not, in our view, strongly challenge the evidence by Dr Kibosia that the appellant would require physiotherapy for life at a cost of Kshs 3,000.00 per week. No medical evidence to the contrary was led to show that the appellant would not require physiotherapy for the period stated by Dr Kibosia, or that the cost quoted for each of the physiotherapy sessions was inordinately high. In the circumstances, we are prepared to agree with the testimony of Dr Kibosia that the appellant will require physiotherapy for life at a cost of Kshs 3,000.00 per week. On the life expectancy aspect, we note that the impugned judgment was delivered when the appellant was barely 3 years old. We are of the view that the life expectancy period of 63 years proposed by the appellant is reasonable, save to state that the appellant, just like any other human being, is bound to get exposure to vagaries and vicissitudes of life, which in their very nature may bring down his life expectancy. We therefore adopt a life expectancy period of 50 years. We compute and allow the cost of physiotherapy as follows:
- $$3,000 \text{ per week} \times 52 \text{ weeks} \times 50 \text{ years} = \text{Kshs } 7,800,000.00.$$
59. On the cost of corrective surgery, Dr Kibosia recommended four surgeries at an estimated cost of between Kshs 2,000,000.00 to Kshs 3,000,000.00. However, during cross-examination, he stated that if there would be no deformities, the appellant might not require any surgery in future. He also stated that, if physiotherapy is done well, the appellant might not require surgery. What we understand Dr



Kibosia to be saying is that if the appellant attends physiotherapy on a weekly basis and the same is done well, then he would not require any surgery in the future. Having allowed the cost of physiotherapy, and in light of Dr Kibosia's testimony during cross-examination, we do not deem it necessary to award any sum on account of future surgery. Accordingly, the claim for cost of future surgery fails.

60. In the upshot, this appeal is partly successful. We hereby set aside the trial court's awards of damages and substitute therefor the amounts as stated herein, which we now tabulate as follows:

- (a) General damages for pain, suffering and loss of amenities: Kshs 15,000,000.
- (b) Special damages: medical expenses - Kshs 78,735; travel expenses - Kshs 160,016, Rs 1836, USD 3112.10, accommodation, meals and other expenses - Kshs 60,331, Rs 49,259.
- (c) Further medical expense as agreed by consent: Rs 550,350.69, Kshs 506,368, USD 1,107.
- (d) Future medical expenses (physiotherapy) Kshs 7,800,000.

61. Interest on (a) and (d) shall accrue at court rates from the date of this judgment until payment in full. Interest on (b) and (c) shall accrue at court rates from the date of the trial court's judgment until payment in full. The appellant shall have costs of the appeal as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents only.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY APRIL, 2023.**

**D. K. MUSINGA, (P).**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*Signed*

**DEPUTY REGISTRAR**

