IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, M'INOTI & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 177 OF 2012

BETWEEN

BB *(A minor suing through*

***his next friend and father* GON).....APPELLANT**

AND

RAGAE KAMAU KANJA.....RESPONDENT

***(*Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Maraga, J.), dated 14th March, 2011**

in

H.C.C.A No. 124 of 2008)

****

JUDGMENT OF THE COURT

1. On 15th July 2001, the appellant (then a minor aged 11 years old) was knocked down by the respondent's motor vehicle as a result of which he sustained injuries. After recovery, he filed suit vide Nairobi Milimani CMCC No. 12684 of 2003 seeking general damages for injuries sustained and loss of future earnings. Upon hearing the parties, the Chief Magistrate apportioned liability 40% on the part of the minor appellant and 60% on the respondent. The trial magistrate awarded general damages at Ksh.500,000/=. Dissatisfied with the trial magistrate's court award, the respondent appealed and the appellant cross-appealed on the issue of liability and failure by the trial court to award damages for loss of future earnings.

2. Upon hearing the appeal, the High Court Maraga, J. (as he then was) allowed the appeal, dismissed the cross-appeal and apportioned liability at 25% against the minor appellant. The respondent's liability was increased from 60% to 75%. On general damages, the learned judge reduced the award from Ksh. 500,000/= to Ksh. 250,000/=. Special damages were reduced to Ksh.11,700/=.

3. Aggrieved by the judgment of the High Court, the appellant has lodged this second appeal. In ***William Koross -v- Hezekiah Kiptoo Kimue & 4 others*, *Civil Appeal No. 223 of 2013***, this Court stated:

> ***"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."***

4. In this matter, the appellant cited several repetitive grounds of appeal that can conveniently be compressed as follows:

(i) That the judge erred in re-apportioning liability at 75%: 25%.

(ii) The judge erred when he awarded Kshs.250,000/= in general damages and proceeded to reduce it by 25% contributory negligence which is an inordinately low award.

(iii) The judge erred in entertaining the respondent's appeal when the record of appeal had not been filed and served within 90 days as ordered by the High Court.

(iv) The judge erred by casting negative aspersions on the integrity of Dr. Moses Kinuthia, the appellant's medical Doctor.

(v) The judge erred in law when he failed to correct the unfortunate approach adopted by the trial court in failing to award damages for loss of earning capacity and failed to suggest the award the court would have made in any event if the appeal had been successful on that point.

5. At the hearing of this second appeal, learned counsel Mr. N. H. Muturi instructed by Harun Nelson & Co. Advocates appeared for the appellant. Learned counsel Mr. J. H. Ochoki appeared for the respondents. Both parties filed and adopted their respective written submissions and list of authorities filed in the matter.

6. The appellant in his memorandum of appeal urges this Court to set aside the judgment of the High Court as the first appellate court and re-assess general damages and damages for lost capacity to earn in future. Counsel submitted that notwithstanding that this is a second appeal under **Section 72(1)** of the Civil Procedure Act, the two courts below considered matters they should not have considered; that the decisions of the two courts below are perverse and should be set aside.

7. Counsel submitted that the appellant is challenging the re-evaluation of evidence by the High Court; that the judge unadvisedly tore into the professional competence and integrity of Dr. Moses Kinuthia by casting aspersions on the Doctor's honesty as a professional without according the Doctor a hearing and without subjecting the Doctor's medical opinion to an alternative medical opinion. Counsel submitted that this is a compelling reason for this Court to consider matters outside ***Section 72(1)*** of the **Civil Procedure Act**.

8. On substantive merits of the appeal, it was urged that there were two salient issues for determination by this Court namely: (i) the erroneous apportionment of liability by the two courts below and (ii) erroneous assessment of damages by the two courts based on extraneous matters.

9. Counsel urged that whereas the learned judge correctly held that the trial magistrate erred in apportioning liability for a child of 11 years at a whopping 40 per cent, the judge misapprehended the evidence and erroneously re-apportioned liability at 75% to 25%; that re-apportionment of liability was not based on any evidence and should be set aside by this Court and full liability placed on the respondent. Counsel cited the case of ***Ndirangu Githuga -v-Sophie Musembi Njue, HCCC No. 2412 of 1987*** in support urging that this decision was placed before the learned judge who never considered it.

10. Counsel further submitted that the learned judge erred in his re-assessment of general damages and by considering extraneous matters and concentrated on casting aspersions on Dr. Mosses Kinuthia; that the following statement from the learned judge was unfortunate, extraneous, perverse and erroneous.

> ***"Had the learned trial magistrate appreciated that Dr. Kinuthia's conclusions had no basis and were misleading, she would have found that the respondent only suffered minor soft tissue injuries of deep laceration wound to the frontal scalp and bruises on both lower limbs. I am satisfied that the learned trial magistrate was misled by Dr. Kinuthia's report and she therefore took into account an irrelevant fact and her award must be disturbed."***

11. Counsel submitted that in making such negative aspersions, the learned judge erred as he did not accord Dr. Kinuthia an opportunity to be heard and rebut these unfortunate findings; that these findings by the judge are perverse; that in re-evaluating the evidence, the judge ignored the appellant's own testimony on the effects of the injury to his overall wellbeing; the judge ignored the testimony of the appellant's father on the effect of the injury; the judge erroneously dismissed the evidence by the Doctor that the appellant was unconscious; and that the judge ignored the letter from the appellant's school dated 5th April 2002 which stated that the appellant had shown a drastic drop in his academic work. It was submitted that the evidence by the appellant's father and the letter from the School should have been considered as a whole in reaching a just decision on whether or not Dr. Kinuthia's medical report was misleading and baseless. In this regard, counsel recapped that the learned judge's findings were perverse and should be set aside.

12. The appellant further urged that both the trial magistrate and the learned judge erred in failing to award damages for loss of future earning capacity; that the two courts below were under a duty to assess damages for loss of future earning even if they disagreed with Dr. Kinuthia's medical report. It was submitted that on this claim, the trial magistrate erroneously stated as follows:

> ***"The Plaintiff's claim under this limb is on the basis that after the accident, the Plaintiff has dropped out of school. Under cross-examination by counsel both Plaintiff and his father PW2 gave evidence that the Plaintiff dropped out of school due to his embarrassment at suffering fits in the presence of his school mates. Without in any way intending to belittle or minimize the agony of the plaintiff, in this court's view is not a reason to drop out of school. The plaintiff can be counseled to overcome this misplaced embarrassment. There is no evidence that the plaintiff is incapable of academic pursuit. There is no evidence that the accident has affected or diminished his capacity to learn. It is the plaintiff who due to a misguided notion of shame has opted to drop out of school…"***

13. The appellant submitted that the High Court erroneously concurred with the trial magistrate's conclusions when the judge stated:

> ***"I concur with the learned trial magistrate that the respondent dropped out of school due to a misguided notion of shame which unfortunately his father shared."***

14. Counsel submitted that the findings of both the trial court and the learned judge are perverse on the issue of loss of future earnings; the findings are perverse because contrary to the learned magistrate's allegations, there was a letter from the School indicating the appellant's performance had dropped; that there was also Dr. Kinuthia's medical report which stated that the appellant may never be able to attain his academic potential. Counsel submitted that the burden to controvert the medical report by Dr. Kinuthia was on the respondent and the burden

was never discharged as there was no alternative medical report tendered in evidence. On these various grounds, the appellant urged us to allow the appeal and make orders as prayed.

15. The respondent in opposing the appeal urged that the first appellate court did not err in re-apportioning liability on a 75%:25% basis; that the learned judge did not err in refusing to award damages for loss of future earnings.

16. It was submitted that this being a second appeal, the appellant had not demonstrated a compelling reason for the Court to interfere with the concurrent findings of fact by the trial magistrate and the High Court. Counsel urged that apportionment of liability is a matter of evidence and this being a second appeal, this Court cannot determine contestations relating to facts. It was urged that there is nothing on record to show that the two courts below misapprehended or misapplied the evidence relevant to determining liability; that the appellant has not shown that the two courts below acted on wrong principles of law in arriving at their decisions on contributory negligence and apportionment of liability.

17. Counsel urged that the submission that a child of 11 years cannot be held contributorily liable in an accident is not supported in law; there is no blanket rule that children cannot be held liable in contributory negligence in an accident; that each case must be determined on its own facts; that as per the facts in this matter, the appellant child was able to understand the dangers of the road. Counsel relied on the case of ***Livingstone Otundo -v- Naima Mohammoud,*****[1990] eKLR** to illustrate that this Court has found a child of five years wholly liable in contributory negligence. In addition, the case of ***W.K. -v- Ghalib Khan Neer Construction,*** **[2011]** ***eKLR,*** was cited where a child of 11 years was held liable for contributory negligence in a road traffic accident.

18. Submitting on quantum of damages, it was submitted that the learned judge did not err in substituting the trial magistrate's award of Kshs.500,000/= with an award of Kshs.250,000/=; that the judge correctly adopted and applied the principle of comparable injury for comparable award and correctly assessed the quantum of general damages. The respondent urged us to uphold the assessment and award of Kshs.250,000/= by the High Court.

19. On the contention that the judge erred in entertaining the respondent's appeal, the respondent submitted that the learned judge did not err and exercised his discretion properly by invoking the overriding objective in civil litigation. Counsel cited dicta from ***Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*** where it was stated that "the power to strike out pleadings and in the process deprive a party of the opportunity to present his case is a draconian measure which ought to be employed only as a last resort and even then only of the clearest cases." Counsel urged us to find that the respondent's appeal was properly before the High Court.

20. On loss of future earning, the respondent urged that the learned judge did not err as there was no evidence proving that the accident affected the earning capacity of the appellant; that the two courts below correctly evaluated the evidence on record and concurred that the appellant dropped out of school due to his own misguided notion of shame. Counsel submitted that the issue of loss of earning capacity is a matter of fact and this cannot be a ground for consideration in a second appeal; that no evidence was led on the academic records of the appellants; that imputing loss of earning capacity is too remote and a speculative endeavor. Counsel concluded his submission by urging us to dismiss the appeal and find there is no compelling reason for this Court to interfere with the decision of the first appellate court.

21. We have considered the record of appeal, the submissions by learned counsel and the law. As this is a second appeal, ***Section 72(1)*** of the **Civil Procedure Act, Chapter 21 Laws of Kenya** restricts this Court to consideration of matters of law only. In ***Kenya Breweries Ltd -v- Godfrey Odoyo, Civil Appeal No.127 of 2007***, Onyango Otieno, J.A expressed himself as follows:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

22. We shall first deal with the issue of contributory negligence. The learned judge apportioned 25% liability against the minor appellant and 75% against the respondent. The trial court had initially found the appellant 40% to blame for the accident and the respondent 60%.

23. In this appeal, the appellant contends that both the trial magistrate and the learned judge erred in finding contributory negligence on the part of the appellant who was a minor. In the appellant's submission, there should be no liability on a minor in road traffic accident. Conversely, the respondent submitted that the learned judge did not err in finding the minor appellant liable at 25% for the accident.

24. Lord Denning in ***Gough -v -Thorne*** **[1966] WLR 1387** expressed:

> ***"A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy."***

25. In ***Burke -v- Woolley and Maughan*** **[1980] CA No 744, reported in 2** ***Kemp & Kemp*** **(4th edn) at pp 3311 and 3459**, the plaintiff was ten years old. She was injured when struck by a car while crossing a road. She was unconscious for ten days. Two and a half years later she began epileptic attacks. The major attacks were of frequent occurrences. She suffered about six major attacks a month and about eight minor attacks a day. The plaintiff in Burke's case was found to have been 25% to blame for the accident, although only ten years old at the time.

26. In ***Attorney General -v- Vinod*** **[1971] EA 147** this Court's predecessor upheld a finding that a boy aged 8½ years, who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. In his judgment Mustafa, JA said:

"In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration"

27. In ***Tayab -v- Kinanu [1983] eKLR,*** on 21 September, 1976 a girl who was then nine years of age was struck by a motor car whilst crossing a road. Contributory negligence was apportioned at 10% against the child. She was awarded general damages of Kshs.300,000/=. This was in 1983. Of relevance and in comparison to this appeal, the girl was seen by Dr. Mwinzi, a senior consultant physician neurologist at the Kenyatta Hospital on October 1st 1979, some three years after the accident, and the doctor's conclusion is summarized in his report dated October 10, 1979, as follows:

"This girl has grand mal (major) type of seizures that developed eight months after a head injury and therefore can be regarded as post-traumatic in origin, especially in the absence of family history of epilepsy. It is most likely that she will remain epileptic for the rest of her life especially now that the fits have persisted for over two years. Her intellect and behaviour is also bound to suffer partly because of the initial brain injury and partly because of the repeated fits and also as a side effect of the drugs she has to take to control the fits. All these will have a profound effect on her future life as her confidence has been undermined, her capacity for learning reduced, and her future suitability for gainful employment interfered with."

28. In the instant case, in apportioning 25% liability against the appellant, the learned judge disagreed with the sentiments of Madan, JA. in ***Bhutt -v- Khan (1982 – 88) 1 KAR 1*** where Judge Madan stated ***"the practice of civil courts ought to be that normally a person under the age of 10 years cannot be guilty of contributory negligence…"*** In this matter, the learned judge found favour and comfort with the decision in ***Gough -v- Thorne*** (supra) where it was stated that the test for contributory negligence for a child should be whether or not the child is of such an age as to be expected to take precautions for his own safety.

29. On our part, we are of the view that each case should be determined on its own merits and there should be no hard and fast rule that a child cannot be held contributorily negligent in an accident. The appellant has not pointed to our satisfaction facts which absolve the minor from any contributory negligence for the accident. The appellant has simply cited judicial authorities without laying a factual foundation that would support application of these decisions to the facts of the present case. Accordingly, we are satisfied that the learned judge did not err in apportioning 25% contributory negligence on the part of the appellant.

30. We now turn to the issue of quantum of general damages. The trial magistrates awarded the appellant a sum of Kshs.500,000/= with a contributory negligence of 40%. The High Court reduced the award from Kshs.500,000/= to Kshs.250,000/= with a contributory negligence of 25%.

31. In ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini -v-A.M. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** at p. 730 Kneller, JA. said:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the 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 satisfied 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 a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."

32. And in ***Gicheru -vs- Morton and Another (2005) 2 KLR 333*** this Court stated:

"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

33. Assessment of general damages is a question of fact; however, the principle upon which the assessment is made is a principle of law. The legal principle is comparable injury should as far as possible get comparable compensatory award. In this matter, it is our duty to determine whether the High Court applied the proper principle of law in reducing the general damages from Kshs.500,000/= to Kshs.250,000/=. In reducing the award, the judge expressed as follows:

"As was stated by the Court of Appeal in the said Tayab case, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. I agree with counsel for the appellant that in this case, comparable awards are those in George Okumu -v- Mineral Mining Corporation & Another, Nairobi HCC No. 146 of 1989 in which an award was made for laceration in the frontal parietal region of the head and multiple abrasions over the right knee and lumbar region with loss of consciousness for 8 hours. Other comparable injuries were in Ruminjo Kimori Nganga & Others -v- Michael Njoroge HCCC No. 4303 of 1989 in which an award of Kshs.150,000/= was made for lacerations, eye brow and right leg resulting in ugly scars. However, given the age of those injuries, I think a sum of Kshs.250,000/= would be reasonable in this case. For these reasons, I allow this appeal and reduce the award of Kshs.500,000/= to Kshs.250,000/=. Together with the special damages of Kshs.11,700/= the total award works to Kshs.261,700/= which sum shall be reduced by 25% as I have found leaving a net balance of Kshs.196,275/=. I dismiss the cross-appeal in its entirety."

34. On her part, the trial magistrate in awarding the appellant the sum of Kshs.500,000/= as general damages expressed as follows:

"The injuries of the plaintiff in this case were not as severe and the defendant in their submissions have recommend a sum of

Kshs.180,000/= in general damages relying on the two cases of

(i) George Ongalo Okumu -v- Mineral Mining Corporation & another HCCC No. 146 of 1989 and (ii) Ruminjo Kimori Nganga & 3 Others -v- Michael Njoroge HCCC No. 4303 of 1989.

Once again, this court finds these two cited cases to be distinguishable from the present case in that the victims in both cases sustained relatively minor injuries which amounted to lacerations and abrasions. In this court's opinion injuries assessed as grievous harm as per his P3 Form produced as an exhibit P in Exhibit 9 in court. (sic) His injuries required admission into hospital and stitches. Taking all relevant factors into account and taking also into account recent inflationary trend this court awards a sum of Ksh.500,000/= as general damages for pain suffering and loss of amenities."

35. We have considered the reasoning of the two courts below on quantum of general damages. In determining the injuries sustained by the appellant, the trial magistrate relied on the P3 Form that was tendered in evidence; the trial magistrate also distinguished the two cases that the learned judge found to be of comparable to the injuries sustained by the appellant.

36. The injuries sustained by the appellant as per the pleadings are as follows:

(i) Abrasion wound on the forehead.

(ii) Loss of consciousness for 8 hours.

(iii) Bruise wound on the leg resulting in limping.

(iv) Brain concussion.

(v) Brain damage affecting the plaintiff school and future life.

(vi) Increased risk of development of post traumatic epilepsy.

37. Upfront, we observe that what is categorized in the pleading as injury Nos. (v) and (vi) are not injuries *per se;* they are if proved by cogent evidence, consequences of the accident.

38. In this matter, counsel for the appellant did not cite any judicial decision depicting injuries comparable to those suffered by the appellant. The trial magistrate in evaluating the injuries sustained for purposes of ascertaining the general damages relied upon the P3 Form filled after the accident. The learned judge in his evaluation of the injuries sustained by the appellant focused on the medical report prepared by Dr. Kinuthia. The judge correctly discounted this report. However, the judge did not address his mind, as the trial magistrate did, to the injuries sustained by the appellant as disclosed in the P3 Form. For these reasons, we are satisfied that the judge erred in setting aside and reducing the general damages awarded because he, *inter alia*, did not take into account the P3 Form which was a relevant document in assessing the damages. Accordingly, we set aside the general damages of Kshs.250,000/= awarded by the learned judge and substitute it with the sum of Kshs.500,000/= as initially awarded by the trial magistrate.

39. In the memorandum of appeal, it is urged that the two courts below erred in failing to award damages for loss of future earning capacity. There is no evidence on record (and the appellant has not pointed any to our satisfaction) that the injuries sustained resulted into loss of future earning capacity. A School report that the appellant's academic record has dropped is no proof that such drop is due to the accident. There is no scientific or empirical causal link between the appellant's drop in school performance and the accident. Consequently, we see no reason to interfere with the findings of the two courts below in declining to award any damages under this head. This ground of appeal fails.

40. We cannot conclude this appeal without addressing submission by the appellant that the learned judge erred in casting aspersions on the professional integrity and honour of Dr. Mosses Kinuthia. In his evaluation of the medical report tendered in evidence by Dr. Kinuthia, the learned expressed:

"Dr. Kinuthia did not treat the respondent. He only examined him three years after the accident for purposes of preparing a medical report to be used in court proceedings. So what he said about loss of consciousness, severe frontal headaches, epistaxis (nose bleeding) and episodic fainting attacks since the time of accident is what the respondent told him. As a matter of fact, he conceded to that in cross-examination.

The respondent claimed that after he was hit he lost consciousness and came to at Kenyatta National Hospital. It follows that when he was rushed to Highlands Clinic on Gitanga and later to Kenyatta National Hospital he was still unconscious. If these allegations were true, they would definitely have found mention in the respondent's treatment records both at Highlands Clinic on Gitanga Road to which he was rushed soon after the accident and Kenyatta National Hospital where he was taken after a short time but they are not.

If indeed the respondent had suffered brain injury, there is no way he would have been released from hospital after one day. I am satisfied that the respondent did not lose consciousness. If he did, it must have been for a fleeting moment. I am also satisfied that he did not suffer any brain injury……. Had the learned magistrate appreciated that Dr. Kinuthia's conclusions had no basis and were misleading, she would have found that the respondent only suffered minor soft tissue injuries of deep lacerations wound to the frontal scalp and bruises on both lower limbs. I am satisfied that the learned trial magistrate was misled by Dr. Kinuthia's report and she therefore took into account an irrelevant matter and her award must be disturbed."

41. Counsel for the appellant submitted that a medical report tendered in evidence can only be challenged by another medical report; and that the learned judge tore into the professional competence of Dr. Kinuthia without giving the Doctor any hearing and without subjecting the medical opinion of the Doctor to an alternative medical opinion. In support of this submission, counsel cited this Court's decision in ***Charles Agol Sakwa -v- Fanuel Kifna Angote & another*** ***CA 3411/1997*** where it was held *inter alia* that ***"a medical report cannot be impeached by evidence from the bar***."

42. We reiterate the position that a medical report cannot be impeached from the bar. A medical report is an expert opinion and just like any other expert opinion it can only be controverted by another expert opinion. We appreciate that some expert opinion may be manifestly false that they cannot stand on their own. However, a medical does not necessarily bind a trial court. The court must consider the evidence contained in the report in light of all other evidence on record. In this matter, the learned judge made a critical observation that Dr. Kinuthia did not treat the appellant immediately after the accident. The appellant was rushed to Highlands Clinic on Gitanga Road and later to Kenyatta National Hospital. A medical report from Highlands Clinic is the report that was more or less contemporaneous with the time of accident. In this case the learned judge gave very convincing reasons why he did not believe the expert. It was not necessary to call for another expert's opinion.

43. In our considered view, a medical report made three years after an accident by a Doctor who never treated the patient is of less probative value in comparison to a report of a Doctor who examines and treats a patient immediately after an accident. However, the report of a Doctor who subsequently examines a victim of an accident some time later is of a higher probative value as to the extent of recovery and long term effects of the injuries. In this matter, the issue for determination in the Plaint and before this Court is not the professional integrity of Doctor Mosses Kinuthia but the per centum of contributory negligence on the part of the appellant, the quantum of general damages and the question whether the appellant is entitled to damages for loss of earning capacity. We have determined each of these issues that we deem pertinent to this appeal.

44. The upshot is that this appeal partially succeeds on the issue of quantum of general damages. The appeal fails on the issue of liability in contributory negligence and loss of future earning capacity. The final order of this Court is that we hereby vary the judgment of the High Court to the extent that we set aside the sum of Kshs.250,000/= awarded as general damages and substitute in its place an award of Kshs.500,000/= awarded by the trial magistrate. We confirm and uphold liability as apportioned by the High Court at 25% to 75%. We uphold the special damages awarded at Kshs.11,700/=. After taking into account the 25% contributory liability of the appellant, the net award in favour of the appellant for general damages is Kshs.375,000/=.

45. The total award in favour of the appellant is thus Kshs.375,000/= plus special damages of Kshs.11,700/= bringing the total to Kshs.386,700/=. Interest on the said sum Kshs.386,700/= shall run from 18th February, 2008 which is the date of judgment by the Chief Magistrate's Court. This appeal being partially successful, each party is to bear his costs of the appeal.

Dated and delivered at Nairobi this 8th day of February, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR