Forwarding Company Limited & another v Kisilu; Gladwell (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 96 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 344 OF 2018

DK MUSINGA, AK MURGOR & F SICHALE, JJA

FEBRUARY 4, 2022

BETWEEN

FORWARDING COMPANY LIMITED ..... 1ST APPELLANT

DAVID LAWRENCE KIGERA ..... 2ND APPELLANT

AND

TIJAN KISILU ..... RESPONDENT

AND

OTIENO GLADWELL ..... THIRD PARTY

(Being an appeal from the Judgment and Decree of the of the High Court of Kenya at Nairobi (R.E. Aburili, J.) delivered on 19th March 2018 in H.C.C. Suit No. 192 OF 2012.)

JUDGMENT

1. This is an appeal from the judgment and decree of the High Court (Aburili, J.), where the learned judge found the 1st and 2nd appellants here 100% jointly and severally liable for a road traffic accident that led to severe bodily injuries on the respondent.

2. The respondent had instituted a suit against the two appellants seeking the following reliefs:

    a) Special damages in the sum of Kshs.7,400,004.00 together with interest;

    b) General damages for pain and suffering and loss of amenities;

    c) Future medical expenses;

    d) Costs of the suit and interest thereon.

3. The respondent's suit was founded on the tort on negligence. According to the respondent, on the 15th April 2012 he was lawfully travelling as a passenger in motor vehicle registration number KAH 500Y along James Gichuru Road in Nairobi when the 2nd appellant negligently and carelessly controlled motor vehicle registration number KBA 111E leading to a collision between the motor vehicles, as a result of which the respondent was left nursing serious bodily injuries.

4. The respondent argued that were it not for the negligence of the 2nd appellant, the accident would not have occurred. The particulars on negligence pleaded against the 2nd appellant were: failing to keep a proper look out or sufficient regard to other lawful road users; driving at an excessive speed; failing to see the respondent in good time; failing to stop in time or at all to avoid the accident; failing to slow down, swerve or brake or maneuver motor vehicle registration number KBA 111E so as to avoid the accident. Against the 1st appellant, it was pleaded that it was negligent by, inter alia, allowing its driver, employee or agent to drive carelessly without due regard and attention to other road users.

5. The respondent testified and called two witnesses. The respondent (PW1) told the trial court that on 15th April 2012 at around 2:00 a.m. he was in the company of three of his friends aboard motor vehicle registration number KAH 500Y. The respondent and his friends had attended a birthday party of a friend and were headed to Karen area for another function; that while driving along James Gichuru Road, they slowed down near Ramisi Road junction to show a friend's house to Silvano Otieno (Otis) when they suddenly saw bright headlights heading towards them on the left side of the road. Silvano Otieno, who was driving motor vehicle KAH 500Y, steered the vehicle to the extreme left side of the road to avoid the oncoming car and also applied emergency brakes. However, the oncoming vehicle hit their vehicle very hard as a result of which the respondent lost consciousness which he regained while receiving treatment at the Nairobi Hospital.

6. The respondent blamed the driver of motor vehicle registration number KBA 111E for causing the accident which left his three friends, including the driver Silvano Otieno, with fatal injuries and himself with very serious bodily injuries. The accident also denied him the opportunity to pursue an integrated master's degree in mechanical engineering at the University of Nottingham where he had already secured admission.

7. PW2, Fredrick Kisilu testified that he was the respondent's father. He testified that on 15th April 2021 at 4:15 a.m., he received a telephone call from the Nairobi Hospital informing him that his son had been involved in an accident. He proceeded to the Nairobi Hospital where he met his son who was just about to go to theater. His son was with another injured friend known as Kapya. Later that day, he went to the Muthangari Police Station where the accident had been reported. Policemen from Muthangari Police Station accompanied him to the scene of the accident together with families of the injured persons. It was PW1's testimony that the respondent was in Intensive Care Unit (ICU) and High Dependency Unit (HDU) at the Nairobi hospital for 12 days and he was later moved to a general ward; that the total cost of the respondent's treatment came to about Kshs.7,400,004.00, part of which he paid from his pocket and the rest was paid by his insurance company.

8. The last of the respondent's witnesses was No.xxxxx, Corporal Francis Okungu, PW3, who at the time of the accident was attached to the traffic division at the Muthangari Police Station. He testified that he was on duty when he was notified of the accident. He rushed to the scene and found motor vehicle KBA 111E, Land Cruiser on the right side of the road facing the direction of Ngong while motor vehicle registration number KAH 500Y Volkswagen, was on the extreme left side of the road in a ditch facing the general direction of Waiyaki Way.

9. He testified that when he arrived there, the scene had not been disturbed and that two of the occupants of motor vehicle registration number KAH 500Y were already deceased. He drew a sketch plan of the

accident which showed, inter alia, the final resting positions of both vehicles and the position debris was found on the road. The police sketch was part of the Police Investigation File that was produced before the trial court as 'PEX3'. According to PW3, debris was concentrated on the left side of the road which was the rightful lane of motor vehicle registration number KAH 500Y. The position of the debris informed the possible area of impact on the road. PW3 having conducted his investigations concluded that the driver of KBA 111E had swerved into the lawful lane of the driver of KAH 500Y, hence the collision. The driver of KBA 111E was therefore to blame for the accident and PW3 accordingly charged him before the Kibera Magistrates' Court with the offence of causing death by dangerous driving contrary to section 46 of the *Traffic Act*, Cap 403 Laws of Kenya.

10. Before the close of the respondent's case, the respondent was recalled to the stand and by consent of all parties produced the medical reports prepared by Prof. Kiama Wangai and Dr. Wambugu respectively.

11. The 1st and 2nd appellants on their part called four witnesses. However, before the matter could be set down for hearing, the appellants successfully applied for 3rd Party proceedings against the registered owner of motor vehicle registration number KAH 500Y one, Otieno Gladwell, who is also the mother of Silvano Otieno (deceased).

12. The 2nd appellant testified as DW1. He told the trial court that on the day of accident he had attended a friend's wedding at the Jockey Club and left at around 1.00 a.m.; that while driving along James Gichuru Road, he saw a vehicle driving along his lane. He flashed his headlights repeatedly to warn the driver, but the driver did not slow down or get back to his correct lane, forcing DW1 to swerve to the right side of the road which was clear; that his swerve was minimal and hence the collision of the vehicles; that owing to the collision his vehicle turned and faced the direction he was driving from, while KAH 500Y rested in a ditch on the far-right side of the road while facing the direction in which it was headed. According to DW1, the accident occurred 90% on his side next to the dotted line.

13. He further testified that he was taken to Aga Khan Hospital where he received medical attention. He said that he had not taken any alcohol on the night of the accident.

14. Janet Wanjiru, DW2, testified that immediately before the accident, motor vehicle KAH 500Y had overtaken the vehicle she was travelling in at a very high speed and did not return to its lane. She testified that the road was clear and therefore she was able to witness how the accident occurred. However, during cross - examination by the respondent's advocate, she stated that they arrived at the scene of the accident about 4 to 5 minutes after motor vehicle KAH 500Y had allegedly overtaken the motor vehicle she said was travelling at a very high speed.

15. Stephen Ndimu Kariuki, one-time Member of Parliament for Mathare Constituency, testified as DW3. He said that he arrived at the scene after the accident had taken place and began assisting the injured persons. He took the injured persons to the Nairobi Hospital. Although DW3 testified that some of the items recovered from the injured persons included cigarettes and bhang, he could not tell with certainty which item had been recovered from which injured person.

16. DW4, one Cynthia Mumbi Ngugi, testified that on the day before the date of the accident she had attended a wedding ceremony at the Jockey Club. She testified that she sat next to the 2nd appellant at the function. It was her testimony that although no alcohol was being served at the wedding reception, there was alcohol at the evening party, but the 2nd appellant did not partake of any. She testified that she had gone to drop a friend home and on her way back she found that the 2nd appellant who had left the evening party earlier had been involved in an accident. She took the 2nd appellant to the Aga Khan Hospital and later to his house. It was her evidence that the 2nd appellant was neither smelling of alcohol nor was he intoxicated. She also denied stating in her written statement that the 2nd appellant

was taking spirits at the evening party. She stated that she had indicated that the 2nd appellant was taking sprite and not spirit.

17. The 3rd Party, Gladwell Otieno, testified as DW5. The gist of her testimony was that Silvano Otieno was driving motor vehicle KAH 500Y with her consent and that he had not taken alcohol at the time of the accident as was confirmed by the pathologist report.

18. The trial Court after examining the evidence on record found that the respondent had proved on a balance of probabilities that the 2nd appellant had negligently caused the accident which led to injuries on the respondent. Accordingly, the learned judge of the trial Court found the 1st and 2nd appellants 100% liable, jointly and severally, for the accident.

19. The learned judge awarded the respondent Kshs.5,000,000.00 as general damages for pain and suffering as well as loss of amenities. On special damages, the learned judge noted that the only amount proved was Kshs.632,655.00 which the court went ahead to award. The learned judge declined to award the amount of Kshs.5,318,755.00 paid by the insurance company of the respondent's father on the basis that the respondent's father needed to be a party to the suit to successfully claim under this head. With regards to future medical expenses, the trial court noted that the same had not been pleaded with specificity and declined to make an award under this head.

20. The appellants, being dissatisfied with the findings on the trial court, filed the instant appeal. The appellants argue that the learned judge of the trial Court erred in law and in fact in finding that the 1st and 2nd appellants were 100% liable for the accident; in finding that the driver of the 3rd Party motor vehicle did not contribute to the accident; in awarding an excessive sum of Kshs.5,000,000.00 as general damages for pain and suffering and loss of amenities and in the process ignored their submissions on the issue; in failing to base her decision on the facts and evidence in particular the evidence adduced by defence witnesses.

21. The respondent also filed a Notice of Cross-appeal dated 15th October 2018. The respondent faults the learned judge for awarding general damages which were inordinately low taking into account the severity of the injuries sustained by the respondent; in failing to appreciate the medical evidence submitted to ascertain the extent of injuries and damages sustained by the respondent; in holding that the case law cited by the respondent's advocate were not applicable in the case; in failing to find that the respondent shall require future medical expenses; and in failing to appreciate the principle of Collateral Source Rule.

22. The prayers contained in the Cross-appeal include the re-assessment of the general damages upward to Kshs.25,000,000.00, an award of Kshs.2,000,000.00 as future medical expenses, award of Kshs.5,318,755.00 which amount was paid by the insurance company on behalf of the respondent, as well as costs of the main appeal and the cross-appeal.

23. During the hearing of this appeal, Mr. Ochieng for the appellant informed us that parties had filed a consent to the effect that they would all be relying on their respective written submissions without the need of making oral highlights. This position was confirmed by Mr. Kimathi for the respondent and Mr. Manda for the 3rd Party.

24. The appellants vide their written submissions dated 12th April 2019 submitted that motor vehicle KAH 500Y had slowed down so that the driver could be shown a friend's house and the driver's attention was therefore not on the road when the accident occurred. It was submitted that the testimony of the 2nd appellant that motor vehicle KAH 500Y had encroached onto the path of KBA 111E was corroborated by the testimony of Janet Wanjiru (DW2) who witnessed the accident. The learned judge therefore misdirected herself in failing to appreciate the evidence of DW2.

25. It was further submitted that the respondent had not discharged his burden and standard of proof as envisaged under section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. In this regard, it was submitted that the respondent had not demonstrated that the appellants were solely to blame for the accident. Reliance was placed on the cases of *Michael Hubert Kloss & another v. David Seroney & 5 others* [2009] eKLR, *Karanja v. Malele* [1983] KLR 142, and *Berkeley Steward Ltd, David Colte and Jean Susan Colten v. Lewis Kimani Waiyaki* [1982-88] 1KAR 101-108 for the proposition that where there is no sufficient evidence as to who is to blame for the accident liability should be apportioned at 50:50. In this regard, this Court was asked to reevaluate the evidence before the trial court and apportion liability on 50:50 basis as between the appellants and the 3rd Party.

26. On the issue of Kshs.5,318,755.12 paid by the insurance company on behalf of the respondent, the appellant asked us not to interfere with the finding of the trial judge. Similarly, on the issue of future medical expenses, the appellants submitted that the sum was not specifically pleaded and therefore the trial court was right in declining to award the same.

27. On the general damages which had been awarded by the trial court, it was submitted that it was excessive compared to the injuries sustained by the respondent. This Court was asked to re-assess the general damages from Kshs.5,000,000.00 to Kshs.2,000,000.00. The cases of *John Kibicho Thirima v. Emmanuel Parsmei Mkoitiko* [2017] eKLR and *Rebecca Mumbua Musembi v. Lucy K. Kinyua* [2014] eKLR where theclaimants ware said to have suffered injuries comparable to those of the respondent herein were cited in support of the proposition for a reduction of the award made by the trial court.

28. The respondent on his part, vide his written submissions dated 29th April 2019 urged us to find that the trial court had correctly found on the issue of liability that the 1st and 2nd appellants were jointly and severally to blame for the accident. On the issue of Kshs.5,318,755.00 which was paid by the insurance company on behalf of the respondent, the court was asked to invoke the Collateral Source Rule and it was further submitted that it was only equitable to allow the respondent the windfall for his prudence rather than rewarding the tortfeasor with a pass on his obligation to the tort sufferer. He relied on the case of *Leli Chaka Ndoro v. Maree Ahmed & Another* [2017] eKLR to demonstrate that the respondent was entitled to the money paid by the insurance company.

29. On the issue of enhancement of damages upwards to Kshs.25,000,000.00, it was submitted that the trial court did not take into account the special facts of this case while arriving at the figure of Kshs.5,000,000.00. The trial court was faulted for not taking into account the loss of amenities and the emotional distress which the respondent underwent immediately after the accident as well as at the time of hearing of the case. The case of *Catholic Diocese of Meru (Registered Trustee) v. Regina Munene Mutinda* [2009] eKLR were cited to demonstrate that the trial court ought to have considered special circumstances while assessing damages.

30. With regard to the claim for future medical expenses, the respondent relied on the cases of *Sosphinaf Company Ltd & Another v. Daniel Ng'ang'a Kanyi* [2006] eKLR and *Tracom Limited & Another v. Hassan Mohamed Adan* [2009] eKLR in making its argument that future medical treatment was part of the general damages which did not have to be specifically pleaded. In any case, according to the respondent the trial Court had admitted into evidence two medical reports which had enumerated the costs of future medical expenses. The respondent submitted that the trial court erred in declining to make an award under this head.

31. The 3rd Party vide written submissions dated 27th June 2020 submitted that the trial court's finding on liability was the correct finding, and that there was no basis of apportioning any liability on its driver. Accordingly, this Court was urged not to disturb the trial court's finding on liability. On quantum, it

was submitted that no evidence had been adduced by any of the parties to this appeal why the findings of the trial court should be disturbed.

32. The duty of the first appellate court was laid down in the case of *Selle v. Associated Motor Boat Co.* [1968] EA 123 as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he 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 demeanor of a witness is inconsistent with the evidence in the case generally."

33. Having considered the submissions of counsel, the evidence on record and the legal authorities cited, the issues which commend themselves to us for determination in this appeal are as follows:

1. Whether the trial court made correct findings on liability;
2. Whether the general damages awarded by the trial court for pain and suffering were adequate and commensurate to the injuries suffered by the respondent;
3. Whether the respondent was entitled to the claim for future medical expenses;
4. Whether the respondent was entitled to the money paid to offset the medical bills by the Insurance Company.

34. The appellants contest the findings of the trial court on liability and more so the failure by the trial judge to apportion liability on the 3rd party's driver. In essence, what the appellants are alleging is that the respondent did not discharge the burden of proof to the required standard to show that they were in any way negligent and therefore that they should be held liable, jointly and severally for having caused the accident in question and the ensuing injuries on the respondent.

35. Section 107 and 108 of the *Evidence Act* Cap 80 stipulates who bears the burden of proof in a case. Those two sections provide:

> " 107. Burden of Proof
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

36. This Court while rendering itself on the issue of burden of proof in the case of *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* [2015] eKLR, cited Denning, J. in *Miller v. Minister of Pensions* [1947] 2 ALL ER 372 where he stated as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

37. In *Treadsetters Tyres Ltd v. John Wekesa Wepukhulu* [2010] eKLR, Ibrahim, J. (as he then was) cited *Charlesworth & Percy on Negligence, 9th Edition* at pg. 387 in which it is stated that:

> " In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

38. The occurrence of the accident leading to the injuries on the respondent is not a fact in dispute. There is no doubt on the direction of travel of each of the motor vehicles that were involved in the accident. What is contested by both parties is the way the accident took place and more specifically, which vehicle had wrongfully veered into the lane of the other. The respondent testified that the motor vehicle which he was travelling in, (KAH 500Y), was being driven on the left side of the road which was its correct side of the road and that it was the 2nd appellant who wrongfully swerved to their side of the road, hence the collision. The 2nd appellant on his part testified that he was on his correct side of the road, and it is the driver of motor vehicle KAH 500Y who drove on his lane.

39. The trial court found the 2nd appellant liable for the accident and we are inclined to agree with this finding. Although the 2nd appellant and the respondent gave different versions of how the accident occurred, it is our view that the physical evidence left at the scene of the accident spoke volumes as to which motor vehicle was on the wrong. PW3, Corporal Francis Okunga, who attended to the scene of the accident shortly thereafter testified that he found the motor vehicle driven by the 2nd appellant on the right side of the road facing the direction of Ngong Road, while the motor vehicle the respondent was travelling in was on the extreme left side of the road in a ditch facing the North towards Waiyaki Way. PW3 prepared a sketch plan which showed, among other things, the final resting positions of each of the motor vehicles.

40. According to PW3, when he arrived at the scene it had not been disturbed. He observed the debris which consisted of broken parts of the two motor vehicles on the road, which was concentrated on the left side of the road facing Ngong Road. This is the side of the road where the motor vehicle that was carrying the respondent was being driven. The logical explanation from the position of the debris is that this was the possible area of collision on the road. The only logical conclusion in the circumstances is that the 2nd appellant travelled into the path of the motor vehicle the respondent was travelling in, hence the collision. The 2nd appellant was therefore, in our view, liable for having caused the accident.

41. The trial court did not believe the testimony of DW2. We also take the view that DW2 was not a credible witness. She testified that the motor vehicle the respondent was travelling in and which was being driven at a high speed overtook the motor vehicle she was travelling in and remained on the overtaking lane. It was her testimony that she witnessed motor vehicle registration number KBA 111E collide with motor vehicle registration number KAH 500Y that was being driven by the 2nd appellant. However, during cross- examination, she testified that she arrived at the scene of the accident about 4-5 minutes after the accident had taken place. We have difficulties believing DW2's testimony. On one hand she testified that the motor vehicle the respondent was travelling in was being driven at a very high speed and that she witnessed the accident take place, but during cross examination she stated having arrived at the scene 4 to 5 minutes thereafter. The question that lingers is how she witnessed the accident and at the same time arrived at the scene 4 to 5 minutes after the accident had taken place. Additionally, the evidence of DW2 on how the accident occurred does not tally with the physical evidence found at the scene as captured in the sketch plan prepared by PW3.

42. The question that remains on liability is whether the driver of the 3rd Party herein was liable for contributory negligence. In this regard, we note that as per the testimony of the respondent, the driver of the motor vehicle he was travelling in upon seeing the headlights of the on the oncoming motor vehicle steered the vehicle to the extreme left side of the road to avoid the oncoming car and applied breaks, but the oncoming car hit them as it was car being driven at a high speed. PW3 testified that he found skid marks on the side of the road the 3rd party's motor vehicle was being driven, which indicated that the 3rd Party's driver tried to stop hitting the motor vehicle that was being driven by the 2nd appellant. According to PW3, there were no skid marks on the lane of the vehicle being driven by the 2nd appellant. The trial court was of the view that the absence of skid marks on the lane of the motor vehicle being driven by the 2nd appellant meant that the 2nd appellant did not in any attempt to brake or take measures to avoid the accident. We do agree with the finding of the trial court that the absence of skid marks on the lane of the vehicle that was being driven by the 2nd appellant was indicative of the fact that the 2nd appellant failed to take any action to avoid the accident.

43. The appellants did not in any way demonstrate that the 3rd Party's driver either encroached on their lane or was negligent in any way. We therefore do not find any sufficient grounds to apportion liability at 50:50 as urged by the appellants or in any way disturb the findings by the trial court on liability.

44. The appellants have moved this Court to reduce the award by the trial court for pain and suffering on account of it being too high compared to the injuries sustained by the respondent. The respondent on his part sought an upward review of the award up to a sum of Kshs.25,000,000.00. The parameters under which an appellate court will interfere with an award in general damages were set out in *Butt v Khan* [1978] eKLR 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..."

45. 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 J.A. 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 also *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* CA 142/2003 and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).

46. In the instant case, the trial court after taking into consideration the injuries sustained by the respondent, the degree of permanent incapacity as well as comparable authorities awarded the respondent Kshs.5,000,000.00 as damages for pain and suffering.

47. 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."

48. In the case of *Arrow Car Limited v. Elijah Shamalla Bimomo & 2 others* [2004] eKLR, it was stated that: -

> "...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."
>
> (See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR).

49. In *Rahima Tayah & Another v. Anna Mary Kinaru* [1987-88] 1 K A R 90 Potter, JA. gave the following advice: -

> " I would commend to trial judges the following passage from the speech of Lord Morris of Borthy-Gest in the case of West (H) & Son Ltd v Shepherd [1964] A.C. 326 at pg. 345: -
>
> "But money cannot renew a physical frame that has been battered and shattered.
>
> All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

50. As per the two medical reports prepared by Dr. Wambugu and Prof. Kiama Wangai respectively, which were produced by consent of all the parties, the respondent sustained fracture of both femurs, fractured mandible with loss of five (5) teeth, fracture of the left side of the ribs associated with lung contusion, head injury associated with loss of consciousness, bipartition of the tongue, multiple facial wounds and extensive oral laceration. Dr. Wambugu assessed permanent incapacitation at 10%, whereas Prof. Wangai Kiama assessed it at 30%.

51. It is important to point out that although the judgment of the trial court at paragraph 130 refers to the production of three medial reports, our perusal of the court proceedings of 9th November 2016 confirmed that only the reports by Dr. Wambugu and Prof. Wangai Kiama were produced by the

respondent. Although the report by Dr. Kahugu appeared in the respondent's list of documents, the same was not produced.

52. In *Rebecca Mumbua Musembi v Lucy K Kinyua* [2014] eKLR (a decision cited by the appellants), the plaintiff had suffered loss of 12 teeth, compound fractures of the right tibia and fibula in the middle third, compound communized fractures in the upper third of the left tibia and fibula, undisplaced fracture of the right acetabulum and right pubic rami, internal fixation of the fractures and reconstruction surgery with metal plates and extensive surgical scars. In that case, which was decided in 2015, the court assessed damages at Kshs.2,700,000/= for pain and suffering and loss of amenities.

53. Similarly, in the case of *Geoffrey Mwaniki Mwinzi v. Ibero K. Limited & Another* [2014] eKLR, the plaintiff therein sustained extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fracture collar bone. The treatment included internal fixation of the fracture with a metallic plate and subsequent amputation of the left leg. In 2014, HPG Waweru, J. assessed general damages for pain, suffering and loss of amenities at Kshs.2,000,000/=.

54. In a more recent case of *Duncan Kimathi Karagania v Ngugi David & 3 others* [2016] eKLR, the plaintiff hadsuffered blunt head injury with loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fractures of the maxilla bilaterally at the Le Fort 11 level, compound fracture of the mandible, comminuted fracture of the right humerus, articular region of the elbow surface of radio carpal, multiple laceration of the hands and forearms. The court awarded him Kshs.4,000,000.00 as general damages for pain and suffering.

55. In the present case, owing to the gravity of the injuries sustained by the respondent, the degree of permanent incapacity as assessed by both doctors as well as inflationary trends within the country, we are satisfied that the amount of Kshs.5,000,000.00 that was awarded by the trial court was sufficient in the circumstances.

56. We do not find any good grounds to review the award upwards as urged by the respondent. We find the words of Lord Denning in the West (H) & Son Ltd (supra) at page 341 on excessive awards on damages important to replicate herein thus:

> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community.
>
> The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

57. The words of Lord Denning were reiterated by Nyarangi, JA. in *Kigaragari v Aya* [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

58. We agree with the finding of the trial court that the amount of Kshs.25,000,000.00 claimed by the respondent is astronomical compared to the injuries sustained by the respondent. We find no good reason to review the award of damages for pain and suffering upward.

59. With regards to future medical expenses, one of the prayers by the respondent in his plaint dated 22nd May 2013 was for future medical expenses. That claim was not pleaded with specificity, either in the original plaint or in the subsequent amendments thereto.

60. The trial court while addressing this issue in its judgment held inter alia that:

> " Even though the medical reports were produced by consent and both were in agreement that future medical expenses would be required, there was no specific pleading for the future medical expenses and therefore the same is disallowed. The plaintiff did not seek leave of court to amend his plaint to include the actual amounts that the two doctors stated in their respective medical reports, would be necessary future medical expenses. Future medical expenses are in the nature of special damages and the same must be pleaded and proved... Accordingly, the claim for future medical expenses though pleaded generally, there was no specific figure attached to it in the plaint hence this court declines to make any award under this head, for want of specificity and proof. The plaintiff could have sought leave of court to amend the plaint even at the hearing of the suit to specify the claim for future medical expenses. He did not and therefore he gets nothing."

61. This Court in the case of Tracom Limited & v. Hasssan Mohamed Adan [2009] eKLR 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 vs. 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..."

62. In the instant case, we do not agree with the finding of the learned judge that failure to plead future medical expenses would fatally affect this specific claim. To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant's body is responding to treatment, among

other things. It is not always clear at the time of filing a case what these future costs may be. The prognosis could change for better or for worse depending on various circumstances.

63. It is our view that future medical expenses in this matter were not only pleaded but were also supported by medical evidence and proved accordingly. In his medical report dated 27th May 2016, Dr. Wambugu indicated that the respondent would require removal of the metal implant in his right leg at an estimated cost of Kshs.65,000.00 at the Kenyatta National Hospital. The respondent would also require the attention of a dental surgeon to bridge lost teeth at an estimated cost of Kshs.400,000.00. According to the medical report by Prof. Kiama Wangai which is dated 15th June 2016, the respondent would require denture replacement for his teeth at Kshs.215,000.00. The two doctors were in agreement that the respondent would incur medical expenses in the future. What they did not appear to agree on was the cost thereof.

64. Although the medical report by Prof. Kiama Wangai is silent on the cost of removing the metal implant, it is a fact deducible from the two medical reports that the respondent suffered fracture of both femora. As at the time of the respondent's examination by Dr. Wambugu, the implant on the left femur had been removed. The right femur went into a non-union necessitating a repeat surgery. It is a logical expectation therefore that the metal implant would have to be removed once the respondent healed completely, which period was estimated to be roughly one year from the date of his examination. Dr. Wambugu had proposed a sum of Kshs.50,000.00 at Kenyatta National Hospital. We are of the view that putting all factors into consideration such as the date of his report and inflationary rates within the country that this sum is on the lower side. The cost of removal of metal implant in the year 2017 (approximately one year from the date of the respondent's examination) was as per various decided cases at the High Court estimated to be between Kshs.100,000.00 and Kshs.150,000.00. In Mugecha Eliud v. Ndavi Nziu [2018] eKLR, the court substituted an award ofKshs.100,000.00 for the removal of metal implants with that of Kshs.150,000.00. In Mary Maina v. Joseph Maingi Wambua [2020] eKLR, the court upheld a sum ofKshs.300,000.00 for the removal of two implants. It is our view that a sum of Kshs.150,000.00 would be sufficient under this head.

65. With regards to the cost of denture replacement, the proposed amounts by the two doctors differ. Prof. Kiama Wangai proposed an estimate of Kshs.250,000.00 whereas Dr. Wambugu proposed Kshs.400,000.00. The disparity is huge, especially bearing in mind that the two reports were prepared less than a month apart. This disparity, in our view, could have been explained if the makers of the different medical reports had been called to court to testify. Ringera, J. (as he then was) in *David Ndun'gu Macharia v. Samuel K. Muturi & Another Nairobi HCCC No. 125 of 1989* expressed himself, inter alia, as follows:

> " If a judge is confronted with two or more medical reports which are inconsistent with one another and the doctors are not called, he is immediately embarrassed between the two views and the two statements..."

66. Whereas none of the doctors herein gave reasons for their specific estimates, and noting that the medical reports were produced with consent of all the parties, we are of the view that an average of both estimates would be fair on all the parties. We therefore allow a sum of Kshs.325,000.00 as the cost of denture replacement. The findings of the trial court on future medical expenses are hereby set aside and substituted with the sum of Kshs.150,000.0 to cater for the cost of removing metal implants and the sum of Kshs.325,000.00 as the cost of denture replacement, making a total of Kshs.475,000.00.

67. On whether the respondent was entitled to the sums paid to offset the medical bills by the insurance company, the respondent appears to be invoking the doctrine of subrogation. The word subrogation is defined by *Black's Law Dictionary 9th Edition at page 1563* as follows:

> " The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor."

68. The principle of subrogation applies where there is a contract of insurance. If the "insured risk" takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. See Leli Chaka Ndoro v. Maree Ahmed & S.M. Lardhib [2017] eKLR.

69. In "*General Principles of Law" 6th edition* (E.R. Hardy Ivamy), the author states as follows at page 493: -

> " In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of "subrogation' are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.
>
> Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity."

70. In "*Bird's Modern Insurance Law" (7th edition)* - John Birds, the author states as follows in chapter 15 under

> " subrogation": -
>
> " This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The "fundamental rule of insurance law" is "that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified". A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points-: subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance." (Emphasis added)

71. In this case, the respondent's father (PW2) testified that that his insurer paid a sum of Kshs.5,318,755.00 towards the doctor's fees and hospital bill for the respondent. PW2 testified that he

was claiming this money as the respondent's father and that he was entitled to the same although the money was paid was by his insurance company. The trial court after in its judgment stated as follows:

> " In this case the plaintiff did not pay any premiums for the medical insurance, it was his father, PW2 who claimed that his insurance company paid some medical expenses and therefore PW2 or Catherine Kisenga under whose name some bills were issued should have been enjoined to this suit to claim for such reimbursement of special damages incurred on their dependant/son-the plaintiff herein and settled by the insurance company."

72. We agree with the finding of the trial court on this issue. It is PW2 who paid premiums to the insurance company and not the respondent and therefore it is PW2 who could have claimed for reimbursement of the same. PW2 was not a party to the suit but a witness of the respondent. Therefore, there could not have been any basis for the trial court to award the entire sum of Kshs.5,318,755.00 paid by PW2's insurer.

73. We have looked at the *Ndoro case (supra)* cited by the respondent and note that the circumstances therein are distinguishable from those in the instant case. In the //Ndoro case, it was the appellant who had taken out an insurance policy and paid for the premiums. In this case, it is not the respondent but his father who took out the insurance and paid the relevant premiums. Therefore, in the present case even if the respondent's father would have been entitled to any form of reimbursement, the court could not have had any legal basis of awarding the same as he was not named as a party to the suit. We accordingly make the finding that the respondent is not entitled to the sum of Kshs.5,318,755.00 paid by his father's insurance company.

74. In the upshot, we find that the appeal lacks merit and is hereby dismissed. The cross-appeal succeeds partly on the issue of future medical expenses. Accordingly, we allow the cross-appeal in the terms hereinbefore stated and award the respondent Kshs.475,000.00 future medical expenses. The appellants shall bear the cost of the appeal and the cross-appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR