REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E197 OF 2024

REBECCA KEMUNTO KIBWAGE .....

APPELLANT

VERSUS

CHARLES OMBUI KEMUMA ..... 1ST RESPONDENT

NAFAS WORLD ..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. W Kugwa, Resident Magistrate in Kisii CMCC No. E398 of 2021 delivered on 07.10.2024. the appellant was the plaintiff in the matter. the court delivered judgment on the said date as follows:
    a. General damages -350,000/=
    b. special damages 176,500/=
    c. costs of the suit.
2. The appellant raised the follow prolix grounds:
    a) That the learned trial magistrate erred in law and in fact by failing to find that the appellant sustained more serious injuries.
    b) The learned trial magistrate erred in law and in fact in finding that the plaintiff was entitled to general

damages of Kshs.350,000/= which was too low on the lower side in view of the injuries suffered by the plaintiff that it presented a miscarriage of justice.

c) That the said award is in the circumstances so inordinately low that it amounts to a wholly erroneous estimate of damage suffered by the respondent.
d) The said award is altogether disproportionate and is not in keeping with other comparable awards made in respect of similar injuries.
e) The learned trial magistrate erred both in law and in fact by giving a low award in quantum contrary to the evidence given in court.
f) The learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
g) The learned trial magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.
h) The learned trial magistrate erred in law and in fact when making her award by failing to consider the passage of time and incidence of inflation.

i) The learned trial magistrate erred in law and in fact in failing to find that the plaintiff sustained open fracture of the right tibia and fibula and she underwent 2 operations in a row for the same condition and she was likely to undergo another surgery to remove the implants at an approximate cost of Kshs. 200,000/=, and that permanent disability was assessed at 30%.

j) The learned trial magistrate erred in law and in fact by failing to give due weight to the evidence of Dr. Daniel Omayio Nyameino during the trial hearing.

k) The learned trial magistrate erred both in law and in fact in making an award of Kshs. 526,500/= without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately low, erroneous, and which amounts to a miscarriage of justice…..

3. The appeal is only on one issue, that is, quantum of damages. I shall address the issue shortly. However, the record of appeal is one of the ways not to file a record of appeal. It is multicoloured with a font that is not pleasing to the eye.

4. The appellant argued that the court underestimated the severity of her injuries, which included an open tibia-fibula

fracture, multiple surgeries, and 30% permanent disability. this results in a law inordinately low, arbitrary, and unsupported by evidence.

5. The appellant pleaded the following injuries;
    a. Chest contusion
    b. laceration to the right knee area.
    c. open fracture of the right tibia and fibula
    d. abdominal contusion
6. The doctor stated that bone grafting at approximately Ksh 200,000/=, based on KMD council. The appellant testified that she spent a lot of money she was admitted at Nyangena Hospital for 6 days. Produced a bundle of documents. She stated that she used clutches and had not healed when she went to see the insurance doctor. Several documents were filed. Submissions were filed running into tens of paragraphs.

7. They had proposed a sum of Ksh 4,000,000/= in the lower court. However, reliance was placed on authorities that were irrelevant or the case. On special damages they submitted on a sum of Ksh. 751,362.

8. They further reiterated the same submissions in the appeal is a prolix manner. They also submitted on future medical expenses and los of earning. Capacity. The lower court submissions were 44 pages.

Analysis

9. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

10. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely,

without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success

> of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs. The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…

11. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the Kenya Ports Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court.

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.

12. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind

that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where the Court stated:

> *...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.*

14. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to

> this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…

> But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…

17. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.

18. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

19. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> In awarding damages, a Court should consider the general picture of all prevailing circumstance and

> effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration.

20. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

21. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by

> the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

22. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not

> justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…

23. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

24. So my duty as the appellate court is threefold regarding quantum of damages: -

i. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

ii. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

iii. The award is simply not justified from evidence.

25. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

26. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and

> that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

27. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

28. It is not edifying to file a thesis and purport the same to be submissions. They introduce new facts and other irrelevant matters without regard to the pleadings in the file. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. There presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case,

> the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.

29. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' *marketing language*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed,

there are many cases decided without hearing submissions but based only on evidence presented.

30. It is unnecessary to set out all the evidence except as it relates to quantum of damage.

31. The court awarded all the damages of Ksh 176,600/=. a total sum of Ksh 378,365 was pleaded. the judgment did not separate, which of the times the court awarded. the court will thus separate and deal with an amount of Ksh. 178,365 pleaded and Ksh 200,000/= separately under the future medical expenses. To be able to do so, the court has to set aside the award and then separate the two. under different heads.

32. My understanding is that special damages except future medical expenses. must be pleaded specially and proved. Consequently, a party must understand that special damages cannot be at large. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

" It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera

store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

33. The search was paid for a sum of Ksh. 550/=. there is no evidence of payment for the P3. An amount of Ksh 300/= is declined. The prayers for house helper were not sought therefore declined. A receipt for medical report for Ksh 6,500/= was proved.

34. The next question is pleaded as medical expenses. All receipts which are not medical in nature and including

transport were neither pleaded nor proved. I note that most receipts are duplicated, including the production both the credit/debit card receipt and the ETR receipt. The amounts falling under medical expenses that were provided were:

Ksh. 20/=

Ksh 3,000/=

Ksh 3125

i. Ksh. 2,000/=
ii. Ksh 4,7000/-
iii. Ksh. 1,000/=
iv. Ksh. 3,000/=
v. Total Ksh.16,845/=.

35. The court notes that the accident occurred on 16.3.2019. Payment of the court fees for 2000 is not part of medical expenses and is disallowed. The appeal on special damages is consequently allowed. the court enters judgment for special damages (separate from future medical expenses of Ksh. 16,845/=.

36. This leaves two questions that is special future medical expenses and general damages.

37. The court shall not deal with a question loss of earning capacity as he same is not pleaded. Parties must set out their cases in full. Parties are bound to plead their cases fully. In

the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > *.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……*

> *…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

38. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> *As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own*

character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

39. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the

case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…

40. Daniel Omayio Nyameino, a criminal officer indicated that there was need to remove implants(ORIF), this means that the patient was involved in open reduction internal fixation surgery, where the surgeons repaired severely broken bones by surgically realigning the fragments and stabilizing them with internal hardware. This hardware was to be removed at a cost of Ksh. 200,000/=. This amount was pleaded. Prof. L.N. Gakuu indicated that the plates are in situ with non-weight bearing clutches. The estimate for removal was also indicated as Ksh. 200,000/=.

41. This amount was proved. There was no raison d'être for not awarding this amount. The amount was proved. The same is accordingly allowed. The omnibus award of Ksh 176,500/= is set aside and replaced with:

i. Ksh. 16,845 as special damages.

ii. Ksh. 200,000/= as future medical expenses.

a. Total Ksh 216,845/=.

42. On general damages the court awarded a sum of Ksh. 350,000/=. The court relied on the decision of J. K. SERGON in the case of Martin Mutuku & another v SN (Suing through his mother and next friend DC) [2021] KEHC 2650 (KLR). In that case the claimant suffered abrasions on the scalp, blunt injuries to the chest, blunt injuries to the abdomen and degloving injuries on the left foot. the decision has no relationship with the injuries suffered.

43. In the case of Charles Kipkoech Leting v Express (K) Ltd & another [2018] KECA 187 (KLR), the court of appeal[Nambuye, Sichale & Kantai, (JJA)] reinstated an award of Ksh 600,000/= for a compound fracture of the right tibia and fibula.

44. An open fracture, is also known as compound fracture. The marker is that the skin is broken and the broken bone breaks through the skin, or has a deep wound that exposes the bone to the outside environment. This type of fracture exposes the skin to infections and other effects. The appellant suffered 30% disability. In the case of Juma v Makanga [2025] KEHC 4220 (KLR), Musyoka J set aside an

award of 700,000 as general damages, and substituted with a sum of Ksh 600,000/= for a communited fractures of the right tibia and fibula.

45. In the case of **Mutua alias Kamene Ngwae v Mutui & 2 others (Civil Appeal E008 of 2020) [2023] KEHC 17953 (KLR) (22 May 2023) (Judgment), Limo j upheld an award of** Kshs 1,000,000, as General damages for Compound (open) fracture of the right tibia and fibulac.Angulation deformity, severe tenderness and a wound with bones exposed over the right leg. Further a sum of Kshs 1,000,000 was confirmed for more severe injuries that is, right shoulder dislocation, fracture of the right radius/ulna and fracture of the right tibia and fibula in the case of City Gas East Africa Ltd v Omagwa [2025] KEHC 16200 (KLR). considering the authorities, an award of Ksh 850,000/= will suffice. Therefore, I set aside the award of Ksh 350,000/= and in lieu thereof enter judgment for Ksh 850,000/=.

46. The next issue is that of costs. They are governed by section 27 of the civil Procedure Act, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law

> for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

47. Costs are generally discretionally. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> "It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either

> partially or wholly from a successful party for good cause to be shown.

48. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

> 18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion.

It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

49. The appellant is successful. In the circumstances they are entitled to costs. The appellant shall have costs of 95,000/= for the appeal.

Determination

50. In the upshot, I make the following orders:

a) The appeal is merited and accordingly allowed. the judgment on quantum is set aside and in lieu thereof, judgment on quantum is entered against the Respondents as follows:

i. Special damages -Ksh 16,845/=

ii. Future medical expenses – Ksh. 200,000/=

iii. General damages – 850,000/=

subtotal 1,066,845/=.

iv. The appellant shall have costs in the lower court

b) The special damages shall attract interest from the day of filing,06.04.2021.

c) The general damages and cost of future medical expenses shall attract interest from the date of judgment in the lower court, 7.10.2025.

d) Costs of Ksh. 95,000/= for the appeal.

e) 30 days stay of execution.

f) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **19th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Respondent

Mr. Angwenyi for the Appellant

Court Assistant – Michael