Case Number:	Civil Appeal 4,5 & 6 of 2018 (Consolidated)
Date Delivered:	15 Oct 2018
Case Class:	Civil
Court:	High Court at Marsabit
Case Action:	Judgment
Judge:	Said Juma Chitembwe
Citation:	Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A (minor suing through her next friend I A I S) & 3 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Marsabit
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL Nos. 4,5 AND 6 OF 2018

(CONSOLIDATED)

BOARD OF TRUSTEES OF THE ANGLICAN CHURCH OF

KENYA DIOCESE OF MARSABIT.....APPLICANT

VERSUS

N I A (minor suing through her next friend I A I S).....APPEAL NO. 4 OF 2018

AND

A S D & F H W (Suing as the Legal Representative of the

estate of L A S).....APPEAL NO. 5 OF 2018

AND

BENSON BORU JARSO.....RESPONDENT

APPEAL NO. 6 OF 2018.

JUDGMENT

The respondents filed suits before the Marsabit Resident Magistrate court seeking damages arising from a road traffic accident which occurred on the 11th of April 2015 along the Marsabit- Moyale road. The accident victims were passengers in motor vehicle Registration Number. **KBE 518 P**. Parties agreed on liability whereby the appellant was held 80% liable while the respondent took 20% liability in each case. The appellants were not satisfied with the amount awarded as damages by the trial court. The grounds of appeal in all the three appeals are the same save for differences in the figures awarded by the trial court. The grounds are that: -

1) The learned Resident Magistrate erred in law and fact in making an award of general damages that was excessively high that there must be an erroneous estimate of the damages payable to the Respondent herein.

2) The learned Resident Magistrate erred in law and fact and/ or misapprehended the law in arriving at an award which amount is excessively high in the circumstances of this case and way above the monitory jurisdiction of the court.

3) The learned Resident Magistrate misdirected himself into using wrong principles in arriving at an award so inordinately high considering the injuries sustained.

4) The learned Resident Magistrate further misdirected himself by not considering and sticking to the pleadings filed by respective parties herein and awarded issues not pleaded in the plaint.

5) The learned Resident Magistrate erred in law and fact in failing to consider the submissions made by the Appellant on the

issue of Quantum and the Legal Authorities provided thereof.

6) The learned Resident Magistrate erred in law and fact in failing to apply and follow the principle of a ratio decidendi and stare decis thus ignoring the established principles of law applicable in assessment of damages.

7) The learned Resident Magistrate totally misdirected himself into applying unknown and/or wrong principles of law in arriving at his said decision which influenced him into arriving at an erroneous and unreasonably high award.

The three appeals were consolidated. The appeal is only on quantum. Mr. Kariuki appeared for the appellant. In relation to appeal number 4 counsel submit that the deceased was 17 years old and a student in secondary school. The letter from the school was marked as PMFI 5 but was not produced. The same applies to the death certificate. The issue of performance of the deceased in school cannot be determined either from the pleadings or the evidence tendered before the court. It is therefore not clear how much the deceased would have earned. Further, there are several uncertainties in life that render it difficult to estimate a proper multiplicand in the case of a deceased minor. Counsel relies on the case of **P. I Versus ZENA ROSES LIMITED and ANOTHER (2015) eKLR** where the court stated as follows: -

"For the case of minors, it is my view that tabulation for damages for loss of future earnings and lost years can be gauged depending on what evidence is brought before the court. For instance, a good case can be argued where evidence is shown that the minor is in school, well performing and that it is hoped, based on his or her performance, would engage himself or herself in this or that occupation. That is why evidence before a trial court must not be led in a casual manner thinking that the court would make an assumption of what earnings the minor may get in future or what he would become once he grew up. It is not sufficient to just state that the minor was either in kindergarten, primary or secondary school. A good case would be argued when evidence is brought to show or persuade the court that despite the fact that the minor was in the tender years of school, it was hoped that he would have a good future when he grew up."

Counsel also relies on the case of **Moranga ABEL NYAKENYANYA VS JACKSON KICHWEN (1999) eKLR Eldoret HCCC 74 of 1996**. In this case the court made a global award of Kshs. 300,000 for a minor who was aged 10 years old. Counsel maintain that an award of Kshs. 300,000 in this case is sufficient.

It is further submitted that the multiplicand of Kshs. 40,000 and a multiplier of 20 years was made without any bases. Counsel relies on the case of **MWANZIA VS NGALALI MUTUA AND KENYA BUS LIMITED** which is cited in the case of **JOHN WAMAI and two OTHER VS JANE KITUKU NZIVA and ANOTHER (2017) eKLR** where Justice Ringera stated as follows: -

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

In relation to Appeal No. 5 of 2018 it is submitted that the respondent sustained the following injuries

a) Segmental fracture of the right humerus

b) Displaced fracture of the right femur

c) Fractures of left inferior and superior pubic ramous

The complainant was awarded Kshs. 3.2million which is excessive according to Mr. Kariuki. Counsel submit that in the case of **ODINGA JACKTON OUMA VS MOUREEN ACHIENG ODERA (2016) eKLR Kisumu HCCA No. 1 of 2014**, the Court awarded Kshs. 180,000 for fractures of the first and second ribs, fracture on the left metatarsal, shoulder dislocation on the left, loss of consciousness and multiple soft injuries in the upper limb and neck. Counsel also relies on the case of **SIMON MUTISYA KAVII VS SIMON KIGUTU MWANGI (2013) eKLR Mombasa HCCA197 of 2007**. The court award Kshs 200,000 where the medical report indicated permanent incapacity, several fractures and shortening of one leg by 1cm. Mr. Kariuki maintain that an award of Kshs. 200,000 is sufficient as general damages.

It is also submitted that the trial court erred by awarding Kshs 1.5 million for future medical expenses. It is contended that the claim for future medical expenses was not pleaded. The amended plaint has no claim for future medical expenses. The trial magistrate therefore erred in awarding a relief that was not sought to the disadvantage of the appellant. This amounts to the court aiding one party in litigation to the detriment of the other and is contrary to the rules of justice. The respondent testified but did not lay any basis for the court to make such an award. The submissions by the appellant and the authorities were not considered.

In relation to appeal number 6 of 2018, it is submitted that the respondent sustained the following injuries

a) Comminuted fracture of the radius ulna with implants.

b) Right femur with K-nail

c) Right hip with screws and

d) Right lower limb deformity and left hand deformity.

The trial court awarded Kshs. 7,240,000. It is submitted the award is excessive. Counsel rely on the case of **SIMON TAVETA VS MERCY MWITITU NJERU (2014) eKLR** where an award of Kshs. 3.5 million was made in 2014 and the claimant in that case had total paralyses and 100% disability. Mr. Kariuki is of the view that the amount of Kshs 2.5 million awarded as general damages for pain, suffering and loss of amenities was excessive. An award of Kshs. 300,000 is sufficient. Mr. Kariuki rely on the case of **IBRAHIM KALEMA LEWA VS ESTELLE COMPANY LIMITED (2016) eklr**. In this case an award of Kshs. 300,000 was made where the complainant sustained intertrochanteric fracture of the left femur. Physical and psychological pains with 25% permanent incapacity. Counsel also rely on the case of **MWAVITA JONATHAN VS SILVIA ONUNGA (2017) eKLR**. The court of appeal made an award of Kshs. 400,000 where the complainant sustained commuted intertrochanteric fracture of the left hip which required surgery involving insertion of surgical plantings and screws. He also suffered blunt chest injury, dislocation of the right knee joint, sprains at the cervical spine and other injuries.

Counsel for the appellant further submit that the trial court erred by making an award of Kshs. 1.5 million for future medical expenses. There was no claim for future medical expenses in the pleadings. Counsel contend that in the case of **MWAVITA JONATHAN (Supra)** the medical report indicated that the complainant had suffered 85% disability. However, the court held that the medical report is not necessarily binding to the court as it is only an expert opinion.

MR. ORAYO appeared for the respondents in all the three appeals. Counsel submit that the awards by the trial magistrate in all the three cases is reasonable. The figures submitted by the appellant are out of touch with reality and fly on the face of the incident of inflation which was rightly considered by the trial court. The decrees of the subordinate courts were not filed in the appeals contrary to Section 65 of the Civil Procedure Rule. Counsel further submitted that order 42 rule 2 required that a certified copy of the decrees appealed from should be filed with the memorandum of appeals or as soon as possible. This rule has not been complied with. Counsel also relies on the submissions made before the trial court.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. In Appeal No. 4 of 2018 the case before the trial court was number 36 of 2016. Parties recorded a consent on liability on 10th of April 2017. **PW1 N I A**was the complainant. She told the court that she was 16 years old when the accident occurred but had now attend the age of 18 and had been issued with an identity card. As a result of the accident she suffered fracture of the right humerus, fracture of the right femur and fracture of the pelvic joint. She was admitted at **ST. TERESIA MISSION HOSPITAL, KIRUUA** for two and a half months. She was seen by Dr. Mwanzia who prepared a medical report. She was also examined by Dr. Muchai Mbugua. She was a student in form 3 at [Particulars Withheld] Mixed Day school. She had healed but had metallic screws in her right hand and her right leg. They were to be removed later. She was not able to do heavy work. She was depending on her parents.

PW2 I A I is an assistant chief of [Particulars Withheld] sub location and the father to PW1. He testified that the medical bill was Kshs, 287,000. The ACK Marsabit Diocese paid Kshs. 120,800 and part of the bill was paid by NHIF. The appellant did not tender any evidence.

In Appeal number 5 of 2018 the suit before the trial court was number 27 of 2016. On 10th of April 2017 parties recorded a consent of the liability as indicated herein. **PW1 A S D** testified that he works with [Particulars Withheld]], Marsabit branch. On the 11th of

April 2015 he was informed that his daughter had been involved in an accident. He went to Marsabit district hospital and found that she had already passed on. He was informed that she had died on the spot. She was buried on 12th April 2015. The deceased was a form 4 student at [Particulars Withheld] Mixed Day Secondary School. He produced a letter from the school principal dated 12th of July 2015. He spent more than 500,000 for funeral expenses. He slaughtered 4 cows for the mourners and each cow cost Kshs. 40,000. The cows were slaughtered on each of the 4 days of mourning. The ACK church gave him Kshs. 10,000 for funeral expenses and another sum of Kshs. 100,000. That is the only witness who testified in that suit.

With respect to Appeal number 6 of 2018 the case before the trial court was number 37 of 2016. Once again a consent on liability was recorded on 10th of April 2017. The respondent **BENSON BORU JARSO** testified that on the 11th of April 2016 he was travelling to **JIRIME HOTEL** for a photoshoot. He was involved in an accident. He was injured on the left hand, pelvic joint and hip. He was also injured on the right eye and could not see properly. He also had a blunt head injury on the right side of the head. He was rushed to KIJABE mission hospital. And was admitted for two months. The medical bill was Kshs. 527,794/65 cents. He had not healed from the injuries. His left hand is totally incapacitated and cannot work at all. He also has memory loss. He cannot recall anything and has to write everything so as to refresh his mind. He walks very slowly and cannot run. He was a shop attendant at an M-pesa shop. The shop was selling cereals, sugar and other items but he could not work. He relies on friends and relatives for his livelihood. That was the only witness who testified and the appellant did not adduce any evidence.

The appeals are mainly on the quantum awarded by the trial Court to each respondent. In Appeal Number 4 of 2018, N I A was examined by Dr. John Mwanzia. The medical report is undated. The report states that x-rays showed segmental fracture of right humerus, displaced fracture right femur; displaced fracture left inferior and superior pubic ramus (pelvis). A Push Pin was inserted on the humerus and plating was done on the femur. The doctor opined that Kshs. 500,000 – Kshs. 700,000 for refashioning of the fractured limbs per single refashioning. The appellant will require three refashioning procedures.

The trial court observed as follows before assessing damages:

It is trite law that the essence of damages is to argue the pain suffered as a result of the injury. The Quantum of damages must be reasonable, based on the circumstances of each case, guidance by comparable precedents on similar injuries and the incident of inflation within the parameter of the Kenyan Economy. This task has never been an easy one. The above criteria are a persuasive guide, but the discretion lies with the trial court, ultimately.

The respondent was also seen by Dr. Muchai. The doctor's report states as follows:

1) Scalp injury on the right parietal area.

2) Gustilo 3b left radius and ulna fracture, with a segmental fracture on the ulna.

3) Left open distal radius fracture.

4) Right femur intertrochanteric/subtrochanteric fracture.

In the case of **FLORENCE HARE MKAHA Vs PWANI TAWAKAL MIWI COACH & ANOTHER; MOMBASA HCCC NO. 85** of 2012; the Plaintiff suffered a fracture of her right superior and inferior ramus, fracture of right acetabulum, fracture lateral Condyl of femur, dislocation of the left knee with tendon collateral ligament, skin grafting of the left leg and shortening of the leg by 4cm. Justice Mwongo awarded Kshs. 2.4million as damages for pain and special.

In **Marsabit Civil Appeal No. 9 of 2017**, the Respondent sustained: -

i) Closed left humerus mid-shaft fracture

ii) Right clavicle medial end fracture.

iii) Left calcaneal fracture.

iv) Right superior and left inferior pelvic rami fracture.

v) Injury to the 4th toe.

The trial Court awarded Kshs. 3.7million as general damages for pain and suffering. This Court upheld the appeal and reduced the award to Kshs. 2.7million.

In the case of **ROBERT GITAU KANYIRI – VS- CHARLES R KAHIGA & 2 OTHERS; NAKURU HCCC NO. 22 of 2009,** the Plaintiff sustained fracture of the right radius, fracture of the femur, and heed injury. Kshs. 1,000,000 was awarded.

Dr. Muchai made the following conclusion: -

N I A was involved in a road traffic accident and sustained serious skeletal injuries. She was admitted for 3 weeks and underwent surgery (open reduction and internal fixation) of the fractures of the right femur and right humerus with implants. The stable pelvic fracture was managed conservatively. She is recovering well, and currently has pain at the fracture sites. She is also unable to lift up her right arm due to a prominent intramedullary nail which restricts the movements. As such, she is at a risk of right shoulder joint stiffness. She requires a corrective surgery to allow right shoulder joint movements and will further require another surgery to remove the implants which is often an expensive operation. Degree of permanent incapacity is estimated at 30%.

The trial court made reference to several other decided cases before arriving at its assessment of damages. The court also took inflation into account. The authorities relied upon by both counsels were considered. I do find that an award of Kshs. 2.5 million as general damages for pain, suffering and loss of amenities is quite reasonable.

There is the award of Kshs. 1.5million for future medical expenses. It is submitted that the claim was not pleaded. The amended plaint dated 25/11/2016 had the following prayers.

a) Special damages aforesaid.

b) General damages for pain, suffering and loss of amenities and loss of future earning capacity.

c) Interest on (a) and (b) above at court rates.

d) Costs of the suit and such other or further relief the court may deem fit to grant.

The trial court did not deal with the issue of loss of future earning capacity. The entire body of the plaint does not have a prayer for future medical expenses. Both doctors are of the opinion that the respondent will require future medical expenses to remove the implants. The plaint contains a prayer for treatment expenses to be adduced at or prior to the hearing **(paragraph 5 of the amended plaint)**. It is not clear why counsel for the respondent did not include a prayer for future medical expenses despite the opinion by Dr. Mwanzia. There is no cross appeal relating to the black out on future earning capacity. This court cannot dwell on that issue as it is not one of the issues raised in this appeal. I do therefore find that there was no basis for the trial court to award future medical expenses. The trial court relied on **HALSBURY's LAWS of ENGLAND 4th edition** where it is stated that **"the rationale for award of damages is for payment and mental stress caused on the plaintiff both pre-trial and in future as a result of the injury."** That statement has to be backed by proper pleadings. Why would the court award damages that are not pleaded. The appellant could have called for Dr. Mwanzia to be examined on his assessment of future medical expenses had the amount of Kshs. 500,000 – 700,000 multiplied by three sessions had been pleaded. I do find that the claim for future medical expenses was not pleaded and was equally not proved.

In Civil appeal number 5 of 2018, the lower court case was 27 of 2016. This involved a fatal claim. Mr. Kariuki is of the view that a lump sum award of Kshs. 400,000 is ideal in this case. The trial court awarded Kshs. 3,200,000 for loss of dependency, Kshs. 50,000 for loss of expectation of life and Kshs. 50,000 for pain and suffering. A similar amount was awarded as funeral expenses. The evidence in this case is that the deceased died on the spot. She was a form 4 student at [Particulars Withheld] Mixed Day Secondary School. The trial court assessed the deceased's income at Kshs. 40,000 and multiplier of 20 years.

In the case of **GAMMEL – Vs - WILSON (1981) 1 ALL ER, 578** the Court stated as follows at Page 593.

The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr. Picket, will have no difficulty. But in all cases, it is a matter of evidence and a reasonable estimate based on it.

The deceased was a Form 4 student aged 17 years. The issue is whether a global sum would have sufficed or the trial court was correct in awarding damages under both the Law Reform Act and the Fatal Accident Act. In this issue, there are instances where the Courts have awarded a global sum to a student accident victim and there are instances where awards have been made under both statutes.

The trial Court was guided by the decision of Justice Kimaru in **NMG Vs MUCHEMI TERESA (2015) eKLR Nairobi HCCC No. 519 of 2013**. Justice Kimaru observed as follows at page 3 of his Judgment.

I have read the cases cited by the learned counsels for the parties in support of their respective positions on this point. In the cases cited by the Plaintiff the deceased persons were variously aged 5, 12, 16, 17 and 24 years. The case where the deceased was 5 years old was an appeal, Kakamega HCCA No. 107/2007, Joseph K. Chemuren - vs - Alfred A. Mureve. Liability had been agreed in the trial court and the appeal was against quantum only. The appeal was dismissed.

The case where the deceased was aged 12 years old was also an appeal, Nakuru HCCA No. 133/2003. The trial magistrate had awarded Kshs. 720,000/00 for loss of dependency. The High Court (Mugo, J) dismissed the appeal and increased the award for loss of dependency to Kshs. 900,000/00. In doing so the learned judge stated as follows: -

"***The deceased herein was aged 12 years old. He was a bright and confident child, as is demonstrated by the fact he would personally take interest in an Agricultural show and attend the same unaccompanied. His father testified that he was a clever and respectful boy. Clearly therefore, his future prospects can be said to have been quite good. He would probably complete his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents' welfare and probably share his earnings with his siblings as well."***

The judge further stated as follows: -

I do not accept that the Deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional; but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about Kshs. 45,000/00. By the time he would have secured employment he would probably be 25 years old. His and the Plaintiff's expectations he would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation; we live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war.

There is also the issue of the Plaintiff's age as we are essentially considering her loss of dependency upon the Deceased. Although she did not give her age when testifying, she appeared about 40 years as I recall. A multiplier of 20 years would be just, and I award the same. Kshs. 3,600,000 was awarded for the death of a 12 years old student in that case.

The deceased was a form four student. She was 17 years old. My view is that even if it is not proved by evidence that the victim was a bright student or the profession he/she was dreaming to pursue, that alone cannot be a good reason not to award damages on loss of dependency if such a claim is established. The future is always unpredictable. Even those who do not pass with good grades at primary or form four (4) level can make it in future. There should be no discrimination between students in the same level of education. All what the court can do is to give a reasonable estimate. It is true that the deceased was not working. She was a student. However, having endured several years of education and her parents having catered for her education, it was expected that she was going to earn her living. We should not always be guided by the expected future formal employment. Our unemployment rate is quite high. There are no formal jobs readily available. She could as well have engaged in business in future and became a successful business woman.

Mr. Kariuki made reference to the decision of ***Ringera J. (as he then was) in the case of Mwanzia V Ngalah Mutua & Kenya Bus Ltd (Supra).*** My view is that the multiplier approach is closer to the truth than making a random global award which is not guided by any estimates. An award of Ksh.300,000 as proposed by Mr. Kariuki will not be based on any estimates**.** Even those whose income is not known earn their daily income. That is why they are living. No life should be equated to a point of hopelessness to the extent that it is deemed to be worthless. Even an estimated income of Ksh.2000 per month can act as a guide. The period of dependency can be computed as the claimant will be available in Court. The Court can make an estimate of future dependency from its own assessment of the circumstances of the case.

PW1, A S D did not indicate his age. He is the deceased's father. The plaint gives the two parents as the dependants of the deceased. The plaint further indicate that the deceased hoped to become a teacher. I am satisfied that making a global award in a case involving a 17 year old form four student is not prudent. The parents expected their child to cater for them once through with her education. The trial court was guided by the case of **NMG V Muchemi (Supra**) and awarded Ksh.3,200,000 for loss of dependency. The dependency ratio was adopted as 1/3 with a multiplicand of Ksh. 40,000. I find the monthly income of Ksh.40,000 to be quite on the higher side. I hereby reduce it to Ksh.20,000. The multiplier of 20 years is quite fair considering that the deceased was only 17 years. This gives an award of Ksh.1.6 million.

There is no requirement that the award made for loss of expectation of life has to be deducted from the award made for loss of dependency. All what the Court has to do is to take into consideration the award made for loss of expectation of life when making awards for loss of dependency. I see no reason as to why I should subtract the award of Ksh.50,000 for loss of expectation of life from the sum of Ksh.1,600,000 for loss of dependency.

The rest of the award by the trial court shall remain undisturbed. The award shall be:-

(i) Pain and suffering	Ksh. 50,000
(ii) Loss of expectation of life	Ksh. 50,000
(iii) Loss of dependency	Ksh.1,600,000
(iv) Funeral expenses	Ksh. 50,000
(v) Special damages	Ksh. 20,500
Total	**Ksh.1,770,000**

The award shall be subjected to the 20% contribution leaving a net award of Ksh.1,416,400.

In appeal number 6 of 2018 the lower Court file was 37 of 2016. The respondent, Benson Boru Jarso was awarded Kshs. 7,240,000 as general damages for pain and suffering, loss of amenities and loss of earning capacity. Mr. Kariuki submit that the award is excessive. There was no permanent incapacity suffered. The injuries suffered by the respondent are not in dispute. He suffered the following injuries: -

i) Communited fracture of the left radius-ulna with implants.

ii) Fracture of the right femur with K-nails in situ, right lower limps deformed.

iii) Fracture of the right hip with screws insitu.

iv) Squint eyes – pupils reacting to light.

v) Cut wound on the scalp (right parietal area) with a scar.

The trial court awarded Kshs. 2,500,000 for pain and suffering; Kshs. 1,500,000 as costs of future medical treatment and Kshs. 3,240,000 for loss of earning capacity. The trial court evaluated the authorities relied upon by both parties. Counsel for the respondent relied on the case of **SAMUEL THEURI KIBATA VS EPHANTUS NGUGI MWAURA & CHARLES WATUTHO NYAGA; NYERI HCCC NO.27 of 2004**. The Plaintiff sustained fracture of the left leg, multiple fractures of the jaw, fracture of the right hand and extensive cuts on the abdomen. A Plate was fixed on his left leg and a pin was fixed on his right shoulder. The jaw was wired. Kshs. 1,200,000 was awarded on 11/4/2005 for pain and suffering and Kshs. 100,000 for future medical expenses.

Mr. Kariuki referred to the case of **SIMON TAVETA VS MERCY NJERU (2014) eKLR** where Kshs. 3.5million was awarded in a case where the Plaintiff sustained 100% permanent disability and totally paralysis.

In the case of **AGATHA WANJIRU NJUGUNA VS MARY WANJIKU IKIKI & OTHERS; NYERI HCCC NO. 302 of 1999,** the Plaintiff suffered severe injuries including fractures of both legs leading to amputation of the legs above the knees. Kshs. 2.5million was awarded for pain and suffering. Damages for loss of future earnings was also awarded.

The medical report by Dr. Mwanzia indicate that the respondent walked with a limping gait. He will require at least Kshs. 500,000 for a single refashioning of the fractured limbs. The report is undated. It gives the respondent's age as 28 years old. The P3 form categories the injuries as grievous harm.

Given the injuries suffered by the respondent, I do find that the sum of Kshs. 2.5million awarded by the trial Court for pain and suffering is reasonable compensation.

General damages for pain and suffering accrue directly as a result of the accident where the claimant suffered injuries. Other damages such as cost of future medical expenses and loss of earning capacity have to be pleaded and a basis for their award laid. The court should not be called upon to presume that given that the Plaintiff is permanently incapacitated, then damages for loss of earning or earning capacity must be awarded. It is incumbent upon advocates representing the accident victims to analyze their pleadings carefully before filling the cases in Court. There is a tendency to make generalized pleadings in order to avoid paying filing fees for incurred special damages. The medical expenses in this case was fully paid by the appellant. There was no good reason to indicate that amount in the pleadings. The amount indicated in the plaint as treatment expenses is Kshs. 530,000. Only Kshs.3,575 was paid as court filing fees courtesy of crafty pleadings.

Part of the Plaint (Par.4) stated as follows: -

The Plaintiff needs refashioning of the fracture limbs at least three times for full recovery. This will cost at least Kshs. 500,000 for a single refashioning to be done at least three (3) times intermittently and he claims damages and loss of future earning capacity.

The above paragraph falls under the sub heading of particulars of loss of amenities, loss of future earning capacity or future earnings. The respondent testified that he was a shop attendant. He did not indicate how much he was earning monthly. The judgment of the trial court indicate that the respondent was earning between Kshs. 15,000 to 20,000. I have read his evidence but that amount is not indicated to be part of the evidence. He testified that he could no longer work and had to depend on friends and relatives for his livelihood.

The trial court adopted a multiplier of 27 years and a multiplicand of Kshs. 10,000 and arrived at a sum of Kshs. 3,240,000. The award of loss of future earnings or earning capacity raises a challenge in that at times it is not subjected to any dependency ratio. It is an estimate of what the claimant would have earned in future. The element of pay as you earn tax is usually excluded. The sum of

Kshs. 10,000 adopted by the trial court was taken as the trial the minimum wage and can be considered to be falling outside the income tax bracket. It is tax free.

I do take it that the loss for future medical expenses was pleaded. Dr. Mwanzia did not testify to explain as to why the respondent would undergo three refashioning operations or procedures. My view is that once the implants serve their purpose, operations would be done to remove them. The doctor's opinion may not be actually put into action. I do find that a sum of Kshs. 500,000 is sufficient for future medical expenses.

Both the respondent's evidence and witness statement does not indicate how much he was earning monthly. The age is given as 28 years. I do agree with the amount of Kshs.10,000 applied as the respondent's monthly salary by the trial court. He was both a shop attendant and a M-pesa operator. I will however reduce the multiplier of 27 years and replace it with 20 years. This leads to a total loss of income of Kshs. 10,000 x 20 x 12 = 2,400,000.

I do hold that the award of Kshs. 2,500,000 for pain and suffering is reasonable. The award of Kshs. 1.5million for future medical expenses is hereby set aside and replaced with Kshs.500,000. The award of Kshs. 3,240,000 for loss of future earnings is set aside and replaced with Kshs. 2,400,000. This gives a total award of Kshs.5,400,000. The award shall be subjected to the 20% agreed contribution leaving a balance of Kshs. 4,320,000.

Mr. Orayo submitted that the decrees from the Magistrate's court are not part of the record. I have seen the lower court files. The decrees were extracted on 11th April 2018. There was no request to have the appeals struck out. Parties agreed to have the appeals heard on merit. I do find that the position taken by Mr. Orayo is a technicality which is being raised very late after directions have been given. The appeals ought to be determined on merit.

I do observe that the proposals by Mr. Kariuki before the trial court and in this appeal are quite low. Counsels should be able to assist the court by relying on recent decisions which give comparable injuries. Inflations has to be taken into account. The trial court considered the submissions and authorities of all the counsels. The court also took into account the known principles applicable in awarding damages. As indicated herein some of the awards are abit high and that is why the appeal partly succeeds.

In appeal No.4 of 2018 the trial Court stated as follows:

I am persuaded that the quantum of damages of Ksh.2.5million for pain suffering and loss of amenities submitted by the plaintiff is reasonable. It is fair. It is not extravagant. It is not extreme. I award the same.

However in its judgement the trial Court awarded Ksh.4 million for pain, suffering and loss of amenities. This amount was subjected to the 20% contribution and the net award was Ksh.3.2 million. I do find that there is no clarity on the award. It is my view that Ksh.2.5million is sufficient for pain and suffering and loss of amenities. The award of Ksh.4 million is hereby set aside.

In appeal No.4 of 2018 the findings of this court are that the respondent is awarded Kshs.2.5million for pain and suffering. The award of Ksh.1.5million for future medical expenses is set aside. In appeal No.5 of 2018 the respondent is awarded the sum of Ksh.1.416,400 as stated hereinabove. In appeal No.6 of 2018 the respondent is awarded Ksh.4,320,000.

The three appeals are hereby determined in the above terms. Parties shall meet their own costs of the appeal.

Dated, Signed and Delivered at Marsabit this 15th Day of October 2018.

SAID CHITEMBWE

JUDGE