



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 52 OF 2020**

**HUSSEIN SAMBUR HUSSEIN.....APPELLANT**

**VERSUS**

**1. SHARIFF A. ABDULLA HUSSEIN**

**2. ALWI A. HASSAN SHARRIF**

**3. ALI SHARIFF ALWI.....RESPONDENT**

*(Being an Appeal from the Amended Judgment delivered on the 24<sup>th</sup> April, 2020 of*

*Hon. J. Nyariki at Mombasa in CMCC No. 319 of 2019)*

**J U D G M E N T**

1. The Appellant was the Plaintiff in the case of **Mombasa CMCC No.319 of 2019**. He sued the Respondents for an accident that occurred on or about the **8<sup>th</sup> November, 2018** at 5.00pm when he was lawfully walking at the Mombasa Port, when the 3<sup>rd</sup> Respondent so negligently drove, managed and/or controlled **Motor Vehicle Registration Number KCG 414K**, that he caused and or permitted to lose control and violently knocked down the Appellant, a consequence whereof he sustained severe personal injuries. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were sued as registered owners of the said motor vehicle and employers of the 3<sup>rd</sup> Respondent.

2. The particulars of the negligence on the part of the 3<sup>rd</sup> Respondent were listed at **Paragraph 4** of the **Plaint** as:-

*i) Driving without due care and attention.*

*ii) Creating circumstances that precipitated and caused the accident.*

*iii) Failing to keep any or proper look out.*

*iv) Failing to have due regard to the safety and well-being of pedestrians, and in particular the Plaintiff.*

*v) Failing to brake in time or at all.*

vi) *Failing to stop, to slow down, to swerve or in any other way so to manage and/or control the said motor vehicle and avoid the accident.*

vii) *Driving at an excessive speed in the circumstances.*

viii) *Driving a defective motor vehicle.*

ix) *Failing to control motor vehicle registration number KCG 414K, and hence causing the accident.*

x) *Failing to warn the Plaintiff by hooting or otherwise so as to avoid the accident.*

xi) *Overtaking or attempting to overtake when it was not safe to do so.*

xii) *In so far as is reasonably practicable under the circumstances the plaintiff will rely on the doctrine of res ipsa loquitur*

3. The Appellant's case was that the accident occurred due to the negligence of the 3<sup>rd</sup> Respondent, an authorized driver, servant and/or agent of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Appellant stated that due to the said negligence, he suffered; *fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and he complained of pain in the injured areas and a permanent incapacity of 18%.*

4. The Appellant thus sought that the trial court awards him *general damages for pain, suffering and loss of amenities, general damages of diminished earning capacity, special damages of Kshs.111, 098/=, costs of removal of metal implants estimated at a cost of Kshs.180,000/= and costs plus interest.*

5. In response to the **Plaint**, the Respondents filed a Defence dated the **15<sup>th</sup> March, 2019** and denied that any accident occurred. However, the Respondents averred that if there was any such accident, the occurrence was wholly caused and/or substantially contributed to by the Appellant's own negligence and sought that the suit be dismissed with costs.

6. The Appellant called three (3) witnesses while the Respondents called one(1) witness.

7. **PW1** was the Appellant, **Hussein Sambur Hussein** who testified that the accident happened on a straight road where he was walking alongside the road. He testified that he sustained injuries on the leg and ankle that he cannot walk for long. He told the court that he cannot carry any luggage and is unable to go to work.

8. He testified that before the accident he worked at the port and his duties were to park containers for a salary of Kshs.50,000/= per month. He stated that after the accident, he had not resumed work and has left the responsibility of taking care of his family.

9. It was PW1's further testimony that there was a metal plate in his leg that needed to be removed for Kshs.180,000/=. He denied going to the road or using his mobile phone. He told the court that he was walking along a pedestrian path when he was knocked by this vehicle and that he totally blamed the 1<sup>st</sup> Defendant for the accident.

10. On cross-examination PW1 testified that he was not walking along the zebra crossing, but along the machine lines. He maintained that he was a driver who used to earn Kshs.50,000/=.

11. **PW2** was **Dr. Ajoni Adede** who examined **PW1** on the **21<sup>st</sup> November, 2018**. He stated that **PW1** was involved in a road traffic accident on **8<sup>th</sup> November, 2018** and suffered fractures of the right tibia and fibula leg bones as well as a dislocation of the right ankle and a bruise on the right leg. He testified that he examined PW1 thirteen days after the accident.

12. It was **PW2's** testimony that **PW1** was admitted at Mewa Hospital for two days and metal implants were inserted at the tibia and fibula. He stated that **PW1** had gone to his office in crutches and the injured leg was bandaged.

13. He also testified that he found two surgical scars on the surgical legs and it had a leg brace. He stated that the bruises were 4cm by 4cm dry wounds. He told the court that PW1 showed him one X-ray report dated **9<sup>th</sup> November, 2018** and treatment notes from Mewa Hospital and a duly filled P3 form.

14. **PW2** went on to testify that the two metal implants needed to be removed after two years at the cost of Kshs.180,000/= at a mid-level hospital like Mewa. He then stated that **PW1** was expected to heal with a permanent disability of 18% because the fractures and dislocation had led to stiffness of the right ankle joint and joint instability due to the dislocation. He also opined that fractures can still break if subjected to impact.

15. On cross-examination, **PW2** testified that the removal of the implant in a middle level hospital costs Kshs.180,000/= but would cost 1/3 in a public hospital. He explained that with 18% of disability, one would walk for only three (3) kilometers or stand for only one (1) hour. He stated that it is ideal but not mandatory that the metals be removed by a qualified personnel.

16. **PW3** was **No.95885 PC Sylvester Wabore** attached at the Port Police Station performing traffic duties. He stated that he reported at the scene of the accident on the **8<sup>th</sup> November, 2018** within Kenya Port Authority involving **Motor Vehicle Registration No.KCG 414K, Toyota Vanguard** driven by **Ali Shariff** and a pedestrian **Hussein Sambur Hussein**. He testified that according to the police abstract, the driver of **Motor Vehicle Registration No.KCG 414K** was to blame for driving without due care.

17. **DW1** was **Ali Shariff Alwin** the 3<sup>rd</sup> Respondent who was the driver of **Motor Vehicle Registration No.KCG 414K**. He told court that on the **8<sup>th</sup> November, 2018** he was at the Kenya Port Authority when at about 5.30pm, he heard a bang on the right side of the vehicle. He stated that he looked at the side mirror, but it had fallen down. He went on to state that he stopped the vehicle, went out to check on what had happened and found **Mr. Hussein** was lying on the ground. He stated that **Mr. Hussein** was okay and even greeted him.

18. It was **DW1**'s testimony that **Mr. Hussein** was holding his leg and right hand, and the port officials called an ambulance which took him to Mewa Hospital. He stated that the matter was reported to Port police where he paid Kshs.10,000/=.

19. **DW1** testified that he has not been charged with any traffic offence and that it was **Mr. Hussein** who was to blame because he was walking at a narrow space that a vehicle could not even turn. He testified that he was not the one to blame as alleged, his car was inspected and found to be in good condition.

20. After hearing the parties, the trial court delivered its Judgment on **24<sup>th</sup> April, 2020** and awarded the Appellant *Kshs.40,000/= as general damages for pain & suffering, Kshs.700,000/= for reduced earning capacity, special damages of Kshs.50,548/=, Kshs.50,000/= for future medical expenses and costs plus interests.*

21. The Appellant being dissatisfied with award on general damages for pain, suffering and loss of amenities, the Appellant filed an appeal before this Court and raised the following grounds: -

*a) That the learned Magistrate erred in law and in fact in awarding general damages for pain and suffering of Kshs.40,000/= which is manifestly and inordinately low bearing in mind the injuries sustained by the Appellant and the effect of the injuries;*

*b) That the learned Magistrate misdirected himself in law and in fact by failing to appreciate the evidence by both the plaintiff and the doctor adduced during trial on 3<sup>rd</sup> September, 2019 and 28<sup>th</sup> October, 2019 and placed more reliance to the Respondents' witness in terms of quantum.*

*c) That the learned Magistrate erred in law and in fact by failing to appreciate the Appellant's submissions and authorities attached thereto in respect to awards granted by other judicial officers in cases where the victims with similar injuries with the Appellant have been granted.*

*d) The learned Magistrate erred in law and in fact by failing to be guided by the general principle in assessing damages which is that similar injuries should attract similar award and also taking into consideration the peculiar nature of the injuries in each*

*case, effect of inflation in the value of money and sequel of the injuries.*

22. The Appellant has prayed that the appeal be allowed and that the amount of general damages awarded in pain, suffering and loss of amenities be substituted with a higher sum that this Honourable Court deems fair and just. He has also prayed for the cost of the appeal and suit before the trial court to be borne by the Respondent.

23. The Respondents were equally dissatisfied with the decision on the award of Kshs.700,000/= on reduced earning capacity and they filed a cross-appeal dated **4<sup>th</sup> November, 2020** and put forth the following grounds of appeal:-

*a) THAT the Learned Magistrate erred in Law and in fact in awarding excessive damages on reduced earning capacity in the sum of Kshs.700,000/= which is manifestly excessive and inordinately high in the circumstances.*

*b) THAT the Learned Magistrate erred in Law and in Fact in failing to hold that the Plaintiff failed to discharge his burden of proof on the issue of reduced earning capacity in absence of evidence to prove that he was earning no salary or reduced income as claimed.*

*c) THAT the Learned Magistrate erred in Law and in fact and in Law in failing to consider all the evidence and the Defendant's Submissions on record.*

24. The Respondent prayed that the cross-appeal be allowed and the Judgment and decree issued on **24<sup>th</sup> April, 2020** be varied and/or set aside.

#### **Directions of the Court**

25. On the **2<sup>nd</sup> June, 2021**, the court indicated that the Appeal be canvassed by way of written submissions. The Appellant's submissions are dated **3<sup>rd</sup> May, 2021** and filed on **6<sup>th</sup> May, 2021** while the Respondent's submissions are dated the **19<sup>th</sup> May, 2021** and filed on the **20<sup>th</sup> May, 2021**.

#### **The Appellant's submissions**

26. The Appellant submitted the amount of Kshs.40,000/= was inordinately low as the said assessment was not based on any evidence and was a misapprehension of the evidence on record. It was submitted that the Court of Appeal in the case of **Catholic Diocese of Kisumu –vs- Sophia Achieng Tete, Civil Appeal No.284 of 2001 [2004] 2 KLR 55** held that the appellate court is justified to interfere with quantum of damages awarded by the trial court only if it is satisfied that the trial court had applied the wrong principles.

27. It was submitted that the Appellant sustained serious injuries and an award of Kshs.500,000/= would be sufficient for such injuries and an 18% disability sustained.

28. The Appellant submitted that award of Kshs.40,000 was inordinately low and does not abide by comparable precedents available. The Appellant relied on the case of **Stephen Kamau Wanderi & Another –vs- Gladys Wanjiku Kungu [2006] eKLR** where the Respondent was awarded Kshs.600,000/= for a compound fracture of the left tibia and fibula with permanent disability assessed at about 20%.

29. The cases the Appellant has considered to be relevant and applicable to his injuries are as follows:-

*a) Ahmed Mohamed –vs- Abdulhafidh Mohamed Banragah HCCC No.319 OF 2001. Plaintiff suffered fracture left femur sub trochanteric and comminuted compound fracture left tibia and fibula. The court awarded him Kshs.750,000/= for pain, suffering and loss of amenities.*

*b) Joseph Musee Mua –vs- Julius Mbogo Mugi & 3 Others [2013]eKLR. The Plaintiff sustained fractures of the right tibia and*

*fibula, 2 broken upper jaw teeth and a chest injury. The injury left the Plaintiff with a permanent injury of 5% and the court awarded Kshs.1,300,000/= general damages for pain, suffering and loss of amenities.*

*c) Mwaura Muiruri –vs- Suera Flowers Limited & Another [2014]eKLR wherein the Plaintiff sustained compound fractures of the right tibia and fibula, comminuted fractures of the right humerus, and soft tissue injuries. The court awarded him Kshs.1,450,000.00/= for pain and suffering and Kshs. 300,000/= for loss of amenities.*

*d) Alphonse Muli Nzuki –vs- Brian Charles Ochuodho [2014] eKLR wherein the court maintained an award for Kshs. 800,000/= for a compound comminuted fracture of the tibia and fibula and degloving injury on the medical aspect of the right leg and foot.*

30. It was submitted that the learned Magistrate did not take into account all the relevant facts, evidence and law in assessing damages in the Appellant's case.

### **Respondents' Submissions**

31. The Respondents submitted the award of Kshs.40,000/= was correct and they urged the court to consider **Dr. Udayan's** assessment who found the Appellant had suffered 3% permanent disability. However, the Respondent submitted that if the court is inclined to change the said amount, Kshs.500,000/= would be appropriate. The Respondents relied on **Tirus Mburu Chege & Another –vs- J K N (minor suing through the next friend and mother D W N & Another [2018] eKLR**, where the Respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court lowered the award for general damages from Kshs.800,000/= to Kshs.500,000/=.

32. In the case of **Daniel Otieno Owino & Another –vs- Elizabeth Atieno Owuor[2020]eKLR** the court gave an award of Kshs.400,000/= for a compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg and reliance was further placed on the case of **Civicon Limited –vs- Richard Njomo Omwancha & 2 Others [2019]eKLR**, wherein the 22<sup>nd</sup> Respondent was awarded Kshs.450,000/= for deep cut wound on the left earlobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation of the left hip joint with 30% permanent disability while the 3<sup>rd</sup> Respondent was awarded Kshs.500,000/= for fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation of the left shoulder, bruises on right knee, fracture of the right tibia and fibula with 30% permanent disability.

33. On the cross-appeal dated **4<sup>th</sup> November, 2020**, the Respondent submitted the award of Kshs.700,000/= for reduced earning capacity was awarded without proof by way of documentary evidence. The Respondent stated that the Kshs.50,000 as claimed by the Appellant to be his salary was not proved by way of pay slips.

34. The Respondent submitted that loss of earning capacity in its nature is a special damage which should be strictly pleaded and proved. The Respondent has referred the court to the Court of Appeal cases of **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997]eKLR** and **Douglas Kalafa Ombeva –vs- David Ngama [2013]eKLR** which held that loss of earnings is a special damage which must be strictly pleaded and proved.

35. According to the Respondent, no evidence was tendered to establish and prove the Appellant's earnings and thus the trial court erred in awarding the sum of Kshs.700,000/= as reduced earning capacity.

### **Analysis and determination**

36. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying to see their demeanor. (See the Court of Appeal case of **Gitobu Imanyara & 2 Others –vs- Attorney General [2016] eKLR**).

37. I have carefully considered the pleadings and submissions filed herein and find the issues arising for determination being as

follows: -

*a) Whether the award on general damages was inordinately low;*

*b) Whether the Appellant was entitled to an award of reduced earning capacity*

*a) Whether the award on general damages was inordinately low*

38. The Appellant has raised issue with the award of Kshs.40,000/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it.

39. The court in the case of **Butt –vs- Khan [1981]KLR 349** sets the guiding principle of when an appellate Court can interfere with an award of damages that:

*“... An appellate court will not disturb an award of 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...”*

40. The trial court stated that it had assessed the nature of injuries sustained by the Appellant and found an award of **Kshs.40,000/=** was sufficient for the same.

41. In the case of **Boniface Waiti & Another –vs- Michael Kariuki Kamau [2007]eKLR**, Lady Justice Nambuye (as she then was) stated the following principles should guide the court in awarding general damages: -

*a) An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.*

*b) The award should be commensurate to the injuries suffered.*

*c) Awards in decided cases are mere guides and each case should be treated on its facts and merit.*

*d) Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.*

*e) Awards should not be inordinately too high or too low.*

42. In this case there were two medical reports that were produced before, one was by **PW2**, who examined the Appellant on the **21<sup>st</sup> November, 2018**, thirteen (13) days after the accident occurred and a report by **Dr. Udayan R. Sheth, Consultant Orthopedic Surgeon** was also produced by consent of the parties, and it was dated **25<sup>th</sup> June, 2019**.

43. PW2 indicated that the Appellant suffered fractures of the right tibia and fibula leg bones (lower 1/3<sup>rd</sup> bimalleolar ankle), dislocation of the right ankle and a bruise on the right leg. He stated that treatment included X-ray; tibia (screws) and Fibula (plate) metal implants, crutches, leg brace and bandage, wound and pain care. He assessed permanent disability at 18%.

44. The report of **Dr. Udayan R. Sheth, Consultant Orthopedic Surgeon**, was done on the **25<sup>th</sup> June, 2019**, seven (7) months after the alleged accident. He observed that the Appellant had faint scar mark about 15 cm x 4 cm over the right leg; 12 cm healed scar mark over lateral aspect of the right ankle; 5 cm over medial aspect of the right ankle, and that movement of the right ankle was mildly restricted and that the Appellant walked with the aid of a stick. He further assessed that the Appellant had suffered three (3%) permanent disability due to mild stiffness.

45. In this case the Magistrate in the Judgment indicated that he considered the injuries, but he did not indicate which report he

relied on to award Kshs.40,000/= as general damages.

46. This court was urged by the Respondents to give more merit to **Dr. Udayan R. Sheth's** report as he was the expert in orthopedic injury cases. In the case of **Stephen Kinini Wang'ondou –vs- The Ark Limited [2016]eKLR**, the court had the following to say on expert opinion:

*“...Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less....This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.*

*Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision*

*Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

*Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

*Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones*

47. Further, the Court of Appeal in the case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros –vs- Augustine Munyao Kioko, Civil Appeal No.203 of 2001 [2007] 1 EA 139** held that:-

*“...Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so...”*

48. I have looked at the report dated **25<sup>th</sup> June, 2019** by **Dr. Udayan R. Sheth**, and it does not indicate that he relied on any documents that the Appellant was issued with after the accident being the police abstract; P3 form and X-ray scans. He only made observations from what he could see at the time, which was seven (7) months after the accident occurred.

49. This is quite unlike the medical report of **Dr. Ajoni Adede** dated **21<sup>st</sup> November, 2018** which shows he relied on x-ray report dated **9<sup>th</sup> November, 2018**; treatment notes and P3 form from Mewa Hospital. He even indicated that his assessment concurred with the findings indicated in the P3 form. It is evident that this report is more thorough than that of **Dr. Udayan R. Sheth** and thus this court will place more reliance on it.

50. The injuries suffered are therefore fractures of the right tibia and fibula leg bones (lower 1/3<sup>rd</sup> bimalleolar ankle fracture); dislocation of the right ankle and bruise on the right leg. The court has also taken note that the Appellant was walking with the assistance of crutches and that he suffered a permanent disability of 18%.

51. Taking these injuries into account and applying the principles that compensation ought to be for the injuries found to have been suffered, I find that the award of Kshs.40,000/= was manifestly low and proceed to set it aside.

52. I have looked at the authorities cited by both parties in the case herein, whereas it is impossible to find authorities with exact

injuries. It is my view that the cases cited by the Respondents are more applicable to the injuries herein. In the circumstances, this court finds the sum of Kshs.600,000/= as general damages for pain, suffering and loss of amenities and proceed to award the same. The same to be calculated to the apportioned liability of the Appellant and 3<sup>rd</sup> Respondent at the ratio of 30:70.

***b). Whether the Appellant was entitled to an award of reduce earning capacity***

53. The Respondent contends that the learned Magistrate erred in law and in fact when he awarded Kshs.700,000/= to the Appellant for a claim on reduced earning capacity. The Respondent claims that for an award to be made under the head of reduced earning capacity, one must produce documentary evidence to show that they were earning a salary, a reduced income or they were not paid as claimed.

54. The Court of Appeal in the case of **S J –vs- Francesesco Di Nello & Another [2015] eKLR** held that:-

***“...Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.***

***This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40 at pg 14 wherein Lord Denning M. R. said in part as follows:***

***“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”***

***Learned counsel for the Respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings...”***

55. In the case of **Beatrice Anyango Okoth –vs- Rift Valley Railways (Kenya) Limited & Another [2018] eKLR**, Justice P. J. Otieno on diminished earning capacity held: -

***“...Damages under this heading are awarded where is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered. It must be differentiated with loss of earning capacity which occurs where there chances of earning are literally erased...”***

56. It is evident that reduced earning capacity in its nature is awarded under general damages which ought to be proved on a balance of probabilities. It was therefore not necessary for the award to be calculated against the Kshs.50,000/= which ought to have been specifically proved as a special damage.

57. In this case, the Appellant sought before the trial court to be awarded general damages for diminished earning capacity as a result of the accident. The Appellant pleaded that being a driver, he sustained incapacitating injuries and that at the age of 43 years he could not engage effectively in any economic venture and his ability to compete effectively in any economic venture and labour market had severely been curtailed. The Appellant indicated that before the accident occurred, he was employed as a driver by Caribbean Freight Limited.

58. The evidence of **Dr. Adede** showed that the Appellant suffered a fracture that could still break, he suffered an 18% disability, further, it was stated that the Appellant could not walk for three (3) kilometers nor stand for one (1) hour and will have difficulty conducting his daily activities. I therefore find that there is merit in the Appellant’s claim and maintain the award of Kshs.700,000/= awarded by the trial court.

59. In conclusion, the orders of the court are as follows:-



*i. The Appeal dated 22<sup>nd</sup> May, 2020 is allowed and the Appellant is awarded Kshs.600,000/= to be calculated at the liability set by the trial court of the ratio 30%:70%.*

*ii. The Cross-Appeal filed by the Respondents dated 4<sup>th</sup> November, 2020 is hereby dismissed.*

*iii. Costs of the Appeal be borne by the Respondents.*

**DELIVERED VIRTUALLY, DATED and SIGNED at MOMBASA this 27<sup>th</sup> day of JANUARY, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

**No appearance by either parties.**



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