Gichuhi v Nzuve & another (Civil Appeal E1055 of 2022)
[2024] KEHC 9290 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9290 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1055 OF 2022

S MBUNGI, J

JULY 30, 2024

BETWEEN

PETER GIKURUMI GICHUHI ..... APPELLANT

AND

STEPHEN NAMYOO NZUVE ..... 1ST RESPONDENT

INVESCO ASSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

(Appeal against the Judgement and Decree of Hon. E. M. Kagoni–PM delivered on the 1st December 2022 at Milimani CMC. Case No. 6485 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with Judgement and Decree of Hon. E.M. Kagoni–PM delivered on the 1st December 2022 at Milimani CMC. Case No. 6485 of 2020 between Peter Gikurumi Gichuhi versus Stephen Namyoo Nzuve & Invesco Assurance Company Limited, filed the Memorandum of Appeal dated 29th December 2022; and the Record of Appeal dated 10th February 2023 seeking the following orders:

    i. This appeal be allowed and the judgement of the learned trial magistrate on general damages for pain and suffering, future medical costs for hip replacement, and loss of future earning capacity and/or diminished earning capacity be set aside.

    ii. This Honourable Court does proceed and re-assess the general damages for pain and suffering payable to the appellant.

    iii. This Honourable Court does proceed and assess the loss of future earning capacity and/or diminished earning capacity payable to the appellant.

iv. This Honourable court does proceed to award the appellant the pleaded and proved future medical costs for hip replacement of Kshs. 500,000.00

v. the costs of this appeal be awarded to the appellant.

vi. This Honourable Court does issue such orders for directions as may be fit in the circumstances.

2. The Appeal was premised on the following grounds: -

i. The learned trial magistrate erred in law and fact in the way he misconstrued the testimony of Dr. Washinton M. Wokabi in so far as it related to mode of treatment of the fractures by arriving at an erroneous finding that it contradicted the medical report dated 11th November 2020 when in fact the learned magistrate had failed to recognize the unequivocal distinct mode of treatment administered for the different sets of fractures suffered by the appellant to wit communicated multiple fragment fractures of the left femur were treated non-Surgically and multiple fractures within the pelvis region were treated non-surgically and conservatively consistent with the expert testimony of D. Washington M. Wokabi and by doing so arrived an erroneous decision.

ii. The learned trial magistrate erred in law and fact in the manner that he evaluated and analysed the medical evidence tendered thereby arriving at an erroneous finding which trivialized the injuries suffered and their repercussions on the appellant's life notwithstanding unequivocal, corroborative, and complementary evidence from the medical report dated 11th November 2020 and direct testimony by Dr. Washington M.W. Wokabi that the appellant had suffered different sets of injuries to it lacerations on the forehead, communicated multiple fragment fractures of the left femur which were treated surgically and multiple fracture within the pelvis region which were treated non-surgically and/or conservatively and by doing so arrived at an erroneous decision.

iii. The learned trial magistrate erred in law and fact in his evaluation and analysis of the evidence relating to future medical costs for hip replacement thereby dismissing the claim in entirety on account of his erroneous finding that the medical report dated 11th November 202 by Dr. Washington M. Wokabi is unreliable and/or inaccurate and misconstruction of the medical reports by Dr. John Chege and Dr. Juma T. which were for specific medical purposes and by doing so arrived at an erroneous decision,

iv. The learned trial magistrate erred in law and in fact in his evaluation and analysis of the evidence relating to future medical cost for hip replacement thereby dismissing the claim in entirety notwithstanding absence of an alternative contrary expert opinion in that and by doing so arrived at an erroneous decision.

v. He Learned trial magistrate erred in law and fact in his evaluation and analysis of the evidence tendered relating to loss of the appellant's future earning capacity and/or diminished earning capacity thereby dismissing the claim in entirety on the basis of his own erroneous finding that the medical report dated 11th Novemebr 2020 BY Dr. Washington M. Wokabi was incomplete and insufficient and by doing so arrived at an erroneous decision.

vi. The learned trial magistrate erred in law and in fact in disregarding the Medical report by Dr. John Chege dated 1st February 209 which form the basis of termination of the appellants employment as a motor vehicle truck driver on account of permanent incapacitation simply because the medical report had been requested by appellant's employer and by doing so arrived at an erroneous decision.

vii. The Learned Trial magistrate erred in law and in fact in failing to rely on the totality of evidence that had been tendered in relation to the claim for future medical costs for hip replacement and loss of future earning capacity and/or diminished earning capacity and by doing so arrived at an erroneous decision.

viii. The learned trial magistrate erred in law and in fact in awarding inordinately very low general damages for pain and suffering in comparison to the injuries sustained by the appellant.

ix. The learned trial magistrate erred in law and in fact in failing to consider the appellants submission and in so doing he arrived at an erroneous decision.

(Pg. 5-7 of Record)

Background to the appeal

3. The Appellant vide the plaint dated 12th November 2020(pg. 8-11) and amended on 13th November 2020(pg. 92-94) supported by a verifying affidavit sworn on an even date, sought before the trial magistrate court the following reliefs: -

   a. General Damages for pain suffering.

   b. Damages for loss of future earning capacity and/or diminished earning capacity.

   c. Special damages of Kshs. 507,350.00 being the cost for copy of records, police abstract, medical laboratory test, and future medical costs

   d. Costs of this suit with interests at courts rates; and

   e. Any other or further relief that this honourable court may deem fit to grant.

4. The plaint had been accompanied by a list of witnesses dated 12th November 2020, the Appellant's Witness statement dated an even date, his list of Documents dated 12th November 2020, and his bundle of documents (Pg. 8 – 95 of the record are all pleadings by the Appellant before the lower court).

5. The claim was opposed. The 1st Respondent/1st Defendant entered appearance (pg.96) and filed a Statement of Defence dated 25th November 2020, which was accompanied by a list of witnesses dated on an even date and the list of documents with no listed documents of even date (Pg.-97-100).

6. The appellant filed a reply to the defence, his list of issues for determination; the pretrial questionnaire, and his case summary all dated (pg. 101-108 of record).

7. The 1st respondent filed a motion to institute third-party proceedings dated 7th July 2021(pg. 109-115) and a subsequent chamber summons for directions on the third-party notice dated 14th September 2021(pg. 116-119). The application was allowed by consent on 16/8/21.

8. The matter proceeded by way of viva voce evidence virtually on 10th February 2022. The Appellant testified as PW1, Dr. Washington Wokabi testified as PW2 and PC Sarah Muruka testified as PW3(pg. 373-374).

9. The 1st respondent then filed a notice of motion application for leave to file defence out of time and to re-open the defence case dated 2nd March 2022(pg. 120-124). The court issued directions (pg. 125).

10. The application for leave was opposed by the appellant in the replying affidavit sworn on 11th March 2022(pg. 126-130). The 1st respondent filed a supplementary affidavit sworn by his advocate,

Maurice Muli Nzavi sworn on 5th May 2022(pg. 131-132). Parties filed submissions on the motion (pg. 133-186). The court allowed re-opening of the defence case in ruling of 5/8/2022 (pg.187-189).

11. The Defendants did not call any witnesses. Parties filed submissions. The Appellant plaintiff filed submissions in the lower court(Pg. 190- 330).the respondent submissions(pg. 331-353) The judgement was delivered on 25th November 2022 (Pg. 354-367) and the decree thereof. (Pg. 368) The trial magistrate entered judgement in favour of the Appellant as follows: "...I have considered the injuries sustained by the plaintiff I have also considered that, at the time of the trial, the fractures were fully healed. Taking note that a fracture takes ordinarily long to heal, it follows that, also the soft tissue injuries had at time healed as well. In view of this, and taking note that, the permanent incapacity of 12%, cited in the medical report isn't considered, for reasons already stated, I find the amount sufficient to compensate the Plaintiff to be Kshs. 1,000,000. REASONS WHEREFORE judgment is hereby entered as follows: - a. the Defendant is hereby held 100% liable for the accident. B. the plaintiff is awarded Kshs. 1,000,000 as general damages. The plaintiff is awarded Kshs. 100,000 for future medical expenses. D. the plaintiff is awarded Khs. 7,150 a special damage

    The prayer seeking loss of earning capacity is denied.

    The plaintiff is awarded the costs of the suit together with interest on (b)(c) and (d) grated ta court rates, from the date of judgement..." (pg.366-367).

Written Submissions at Appeal

12. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Ong'ato, Ochieng & Company Advocates were dated 20th March 2024. The Respondents did not file any submissions.

Determination

13. The principles which guide this court in an appeal from a trial court are now well settled. In Selle And Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013*, the court opined:- 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions."

Issues for determination

15. The Appellant submitted globally on the grounds of appeal in the memorandum of appeal, asserting that the appeal has merit and ought to be allowed.

16. The court finds that the issues placed by the Appellant for determination in the appeal is on quantum and award of damages and formulates the issues for determination in the appeal as follows: -

    a. Whether the trial magistrate erred in his finding on the Probative value of the evidence of Dr. Wokabi

    b. Whether the learned magistrate's award of general damages was inordinately low.

    c. Whether the Learned magistrate arrived at the wrong finding in failing to award future medical costs of hip replacement and award for loss of future earning capacity.

Appellant's submission

17. The appellant was knocked down by the 1st Respondent's motor vehicle Registration number KAD 992Y as he was walking along Mombasa Road at Reliance Area on 15th November 2017.

18. He submits that due to the injuries suffered in the accident he could no longer carry on his work as a long-distance truck driver and his employment was terminated by his former employer Kuehne Nagel on 13th November 2019 two years after the accident.

19. He submits that the trial court in its judgement of 1st December 2020(Pg. 354-367 of the Record) granted general damages of Kshs. 1,000,000, special damages of Kshs. 107,150 and declined to grant future medical costs for hip replacement surgery and future earning capacity or diminished earning capacity.

20. The appellant asserts that the trial magistrate held that the oral testimony of Dr, Wokabi (PW2) was at variance with his medical report of 11th November 2020 and disregarded it entirely. That the said holding affected the learned magistrate's entire assessment of quantum and led her to decline to grant some prayers.

21. The appellant submits that he suffered the following injuries: -

    a. Displaced fracture of the left sacral bone at the sacroiliac bone,

    b. Complex comminuted fracture of the left acetabulum with intra-articular extension;

    c. Displaced fracture of the left ischium

    d. Commuted segmental fracture of the left femur with ventral angulation of the proximal fragment

    e. Depressed fracture of the right superior pubic ramus

    f. Loss of normal muscle fat planes and fat stranding in the anterior, lateral and posterior compartments of the thigh suggestive of edema

    g. Thickening and edema of the scrotal wall with hypervascularity of the scrotum

    h. Laceration on the left forehead; and

    i. Physical and psychological pain.

22. He submits hat he also suffered complications as follows: -

    a. Pain on the pelvis region

    b. Inability to walk fast, for long and far

c. Inability to sit down for long

d. Weakness of the left leg

e. Not able to drive yet

f. Limping due to shortened limb

g. Wasting away of the bulk of the muscle of the left thigh

h. Surgical scar on the outer aspect of the left thigh

i. 12% permanent incapacity;

j. Development arthritics of the left hip joint.

23. The appellant submits that the injuries were supported through his witness statement (pg.14-16 of record) and his documents produced in the list of documents dated 12th November 2020(pExh-1-16 (pg.17-46 of Record)

24. He submits that Dr. Wokabi (PW2) produced the Medical Report dated 11th November 2020(p-ex-9) (Pg.44-46 f record)); PC Sarah Muruka (PW3) produced the Police Abstract (P-Exh-1 and P3 Report(P-Exh-2) filed on 21st March 2018(Pg.20-21 of record).

25. The appellant submits that his employment was terminated through the letter of termination dated 13th November 2019(P-Exh-11), and he produced his payslip(P-Exh-12) and bank statements(P-Exh-13) (pg.50-62).

26. He submits that through the medical report from Avenue Healthcare requested by his employer Kuehne dated 1st February 2019, the orthopaedic surgeon declared him unfit to work as a long-distance truck driver.

27. He submits that the 1st Respondent never called any witness or produced an alternative medical report to counter his evidence and thus his case was uncontroverted.

28. He submits that despite the order for joinder of third party, the 2nd respondent chose not to participate in his case.

29. The appellant submits that Dr. Wokabi prepared his medical report upon considering all the documents i.e. Discharge Summary, medical reports from Avenue Hospital, medical report from Aga khan University Hospital, x-rays, CT-Scans (P-EXH-3 to 8).

30. The appellant submits that the learned trial magistrate erred in finding that the Medical Report of Dr, Wokabi was at variance with his oral testimony, by holding that the said doctor in his report found that the appellant had suffered injuries that were treated non-surgically, but went ahead to find that there was surgery required for removal of a metal implant yet no surgery had been conducted.

31. The appellant submits that the Trial magistrate erred in disregarding Dr. Wokabi's testimony (Pg. 258) as the report clearly distinguishes the form of treatment of each injury suffered by the appellant.

32. The appellant submits that despite the magistrate relying on the medical report of Avenue Healthcare to award damages the same were inordinately low and the magistrate failed to consider comparable awards in authorities supplied (Pg. 190-201).

33. He submits that the magistrate purported to rely on PW V Peter Murithi Nagri (2017) eKLR and reduced the award by 600,000 stating that the appellant suffered 20% incapacity and urine incontinence which was not the case.

34. He submits that in his case he suffered 12% incapacity and no urine incontinence, and fractures in both pelvis , fracture of upper third of his femur and scrotum , muscle wasting away on his left thigh, inability to sit down and walk for long and lost his employment, which contrasted wit PW where he had suffered fracture of left femur which was operated on and fixed with metallic plate, fracture of left fibula and tibia Malleoli and fixed with K-wires and plated and injuries to the pelvis causing fractures.

35. He submits that the learned magistrate failed to consider the full extend of his injuries as compared to those of PW and that the trial magistrate failed to consider the inflation since the decision he relied on had bene made 6 years prior and that the same award was erroneous and ought to be set aside.

36. The appellant submits that the learned magistrate failed to consider the authorities supplied on comparable injuries i.e. Sabina Nyakena Mwanaga v Patrick Kigoro & Another (2015) eKLR (Pg.245 to 250) where an award of Kshs. 3,000,000 had been awarded in 2015 for a fracture of the pelvis fracture of the humerus, fracture of the right knee, fracture of the condyle, bruises on the face, severe Retroperitoneal haemorrhage and multiple soft tissue injuries.

37. He submitted that he relied on other authorities i.e. Peter Kemuma Nyangera v Michael Thuo & Another(2013)eKLR (Pg.251-256) where 2,500,000 was awarded in 2013 for fracture of sacrum bone, fracture of the right superior pubic ramus of the pubic bone, right hip bone, fracture of the right ischium bone part of the pelvis, haematoma on the thighs , lumbar sacral lower part of spine between 2 buttons. ; and Florence Hare Mkaha v Pwani Tawakal Mini Coach and Another (2012)eKLR(Pg.257-264) where Kshs. 2,400,000 was awarded in 2012.

38. The appellant relied on the decision in Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit Vs NIA (suing through her next friend IAIS) & 3 others (2018)eKLR where Kshs, 2,500,000 was awarded for injuries of a fracture of right humerus, fracture of right femur , fracture of pelvic joint , where fractures of the pelvis were treated conservatively (non-surgically) while those in the femur and humerus were treated surgically as in the appellant's case, which award was 6 years ago and in fact the appellant's injuries were more.

39. The appellant submits that the learned magistrate erred in deviating from the principle set on predictability, consistency in awards in falling to consider nature and circumstances of each case, and inflation.

40. The Appellant submits that the learned magistrate found that the P3 form was falsified to read the date of the accident and that the magistrate could not consider physical pain as injury to assess damages (Pg. 365).

41. The appellant submitted that the p3 form was authentic and the police PC Sarah Muruka (PW3) confirmed that the P3 and the police abstract were authentic as the accident occurred on 15th November 2017, the P3 was issued on 20th March 2018 to the appellant and it was filled on 21ts March 2018.

42. He submits that a person who suffers a fracture must have physical pain and the appellant testified that he was experiencing a lot of pain within the pelvis and left femur necessitating use of painkillers a position confirmed in the medical report., which evidence was uncontroverted.

43. The appellant submits that the trial magistrate erred in finding that the appellant suffered no physical injuries as misdirected as it is uncontroverted that the appellant suffered fractures, which affected the

assessment of damages and awarded an inordinately low award of Kshs. 1,000,000 which he states ought to be substituted with Kshs. 5,000,000.

44. He submits that the trial magistrate failed to award 400,000 as future medical costs for hip replacement asserting that the Medical report of Dr. Wokabi was unreliable (Pg.359). the appellant asserts that she suffers risk of developing arthritis which hen necessitates that need for the hip replacement in the future, which he asserts was corroborated by the medical report and x-rays. He relied on the decision in Rift Valley Railways (Kenya)Ltd V Beatrice Anyango Okoth & Another (2022) eKLR.

45. He asserted that the magistrate erred in failing to award loss of future earning capacity or Diminished earning capacity by failing to rely on the Medical report of Dr. Wokabi and by confusing the same with loss of earning.

46 He submits that the loss of earning capacity ought to be proved on a balance of probability on the appellant's chances of getting a job in the labour market as compared as before his injuries on whether the same are diminished or just lowered. He relied on the case of Margaret Odhiambo Koyi v Obanga & 2 other (2022) eKLR.

47. The appellant asserts that the trial magistrate erred in confusing between the loss of earning capacity and loss of earning and thus arrived at wrong findings.

48. He submits that he was earning Kshs. 67,756.72 as long-distance truck driver and due to his injuries, his employer terminated his employment due to his permanent incapacity, a position which was not controverted.

49. He submits that he lost a lucrative job with a renowned international company in this period of immense unemployment and he has been unable to find a similar employment seven years down the line.

50. He submits that the Medical report of Avenue healthcare dated 1st February 2019(P-Ex-8) found him incapable of performing his duties under the contract of employment necessitating his termination on 13th November 2019, 2 years after the accident.

51. He asserts that his permanent disability was ascertained as 12% as per Dr. Wokabi's medical report. The appellant asserts that the court in James Mukatui Mavia v M.A. Bayusuf Sons Limited (2013) eKLR the court then had found the appellant therein he could not continue to work as a driver. The appellant asserts that the trial court in that case found that the appellant therein failed to obtain alternative employment, which position was overturned in the court of appeal and the court awarded damages for loss of earning capacity.

52. The appellant asserts that the reason for his termination was clearly proved by his termination after two years due to his unfit physique to work.

53. He submits that the court should use the multiplier-based approach as he has produced his payslip and bank statement that he was earning a salary of Kshs. 67,756.72, and he gave uncontroverted testimony that he was 43 years old at the time of the accident and he could have worked up to 60 years. He relies on the Court of Appeal's finding in James Mukatui Mavia v M.A. Bayusuf Sons Limited (2013) eKLR, Tile & Carpet Center Warehouse v Okello (2022) eKLR and Rift Valley Railways Kenya Ltd V Beatrice Anyango Okoth & Another (2022) eKLR.

54. The appellant asserts that using the multiplier ratio of (Kshs. 67,756.72*72(60-43 years) *12 months *12/100 permanent incapacity =Kshs. 1,658,648.51) and thus the trial magistrate erred under the ground 9 of the appeal in failing to award loss of diminished earning.

Analysis.

55. It is not in dispute that an accident occurred and the appellant sustained injuries, what is before the court is a question on damages awarded.

56. The duty of the appellate court is well spelt out in the case of Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates {2013} eKLR that "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

57. Additionally, what the court is to bear in mind is that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See Simon Tavera v Mercy Mutitu Njeru {2014} eKLR).

58. Notably, of greater significance is the acknowledgment that the court does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though there are no sufficient grounds. The rationale is both constitutional and statutory that where a Judgment has been made by a competent court an appellate court is estopped from asserting the contrary position unless on the well settled principles as propounded in Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470).

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety 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 a figure which was either inordinately high or low.

Whether the trial magistrate erred in his finding on the Probative value of the evidence of Dr. Wokabi

59. In awarding damages, the trial court was to be guided by the medical report of Dr Wokabi who testified as PW2. the trial magistrate found that the said testimony by PW2 was flawed and lacked probative value as through his medical report he had told the court that all the appellant's injuries were treated conservatively (non-surgically) yet during hearing he stated that the appellant underwent surgery to fix a metal implant (Pg.358 of record).

60. The appellant asserts that the trial magistrate erred in failing to adhere to the said evidence by misdirecting himself. I agree. The medical report (pg.44 of the record) stated that: -

> " on the pelvis he was diagnosed to have sustained the following major Injuries
>
> a. ..
>
> b. ...
>
> c. ..
>
> d. ..

e. ..

All the injuries were treated conservatively (non-surgically)

He was on bed rest for a period of 3 months.

On the left leg, he was diagnosed to have sustained communicated multiple fragment fractures of the left femur. He was operated on and the fractures were fixed with a metal plate...".

61. I agree with the appellant that indeed the injuries were treated differently where some were treated with no surgery while others like the left femur fracture was treated with surgery leading to the fixation of a metal implant.

62. The Trial Magistrate in disregarding the medical report of D. Wokabi, only considered a portion of the report without reading it entirely which made him arrive at the wrong finding as regards the award of damages.

d. Whether the learned magistrate's award of general damages was inordinately low.

63. In dealing with the appeal on quantum I will rely on the decision of the Court of appeal in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5 where the court held 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".

64. Further, In the case of Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR, the court stated as follows: "It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ..."

65. The appellant herein urged the court to enhance the award of general damages from Kshs 1,000,000/- to 5,000,000 based on the pleaded injuries as testified on by Dr. Wokabi at 100% on liability.

66. It is not in dispute that the appellant proved that she suffered following injuries from the medical report: -

a. Fracture of the Pelvis

b. fracture of the Hip Joint,

c. Scrotal injury

d. Multiple Fracture of the left femur

67. The doctor also concluded that the appellant suffered a permanent disability of 12% (Pg. 44-45 of record).

68. For pain and suffering, the trial magistrate awarded 1,000,000/- which he found to be appropriate within the circumstances.

69. The magistrate relied on PW V Peter Murithi Nagri (2017) eKLR where the award in that case was reduced by 600,000 with the trial court stating that the appellant therein suffered 20% incapacity and urine incontinence.

70. The appellant submitted that in his case he suffered 12% incapacity and no urine incontinence, but rather he suffered fractures in both pelvis, fracture to upper third of his femur and scrotum, muscle wasting away on his left thigh, inability to sit down and walk for long and lost his employment, which contrasted with PW(supra) where PW had suffered fracture of left femur which was operated on and fixed with metallic plate, fracture of left fibula and tibia Malleoli and fixed with K-wires and plated and blunt injuries to the pelvis causing fractures.

71. He submits that the learned magistrate failed to consider the full extend of his injuries as compared to those of PW and that the trial magistrate failed to consider the inflation since the decision he relied on had been made 6 years prior and the same award was erroneous and ought to be set aside.

72. The appellant submits that the learned magistrate failed to consider the authorities supplied on comparable injuries i.e. Sabina Nyakena Mwanaga v Patrick Kigoro & Another (2015) eKLR (Pg.245 to 250) where an award of Kshs. 3,000,000 had been awarded in 2015 for a fracture of the pelvis fracture of the humerus, fracture of the right knee, fracture of the condyle, bruises on the face, severe Retroperitoneal haemorrhage and multiple soft tissue injuries.

73. He submitted that he relied on other authorities i.e. Peter Kemuma Nyangera v Michael Thuo & Another(2013)eKLR (Pg.251-256) where 2,500,000 was awarded in 2013 for fracture of sacrum bone, fracture of the right superior pubic ramus of the pubic bone, right hip bone, fracture of the right ischium bone part of the pelvis, haematoma on the thighs , lumbar sacral lower part of spine between 2 buttons. ; and Florence Hare Mkaha v Pwani Tawakal Mini Coach and Another (2012(eKLR)Pg.257-264) where Kshs. 2,400,000 was awarded in 2012.

74. The appellant relied on the decision in Board of Trustees v of the Anglican Church of Kenya Diocese of Marsabit Vs NIA (suing through her next friend IAIS) & 3 others (2018)eKLR where Kshs, 2,500,000 was awarded for injuries of a fracture of right humerus, fracture of right femur, fracture of the pelvic joint, where fractures of the pelvis were treated conservatively (non-surgically) while those in the femur and humerus were treated surgically as in the appellant's case, which award was 6 years ago and in fact the appellant's injuries were more.

75. The respondent in the lower court proposed an award of Kshs. 450,000 relying on the cases of Civicon Limited v Richard Njomo Omwancha & 2 others (2019) eKLR; Muthamiah Isaac V Leah Wangui Kanyingi (2016) eKLR; and Lilian Wanja v Cyprian Mugendi (2016) eKLR considering that the appellant had fully recovered from his injures as per the medical report Dr. Wokabi.

76. As I have stated before, it is almost impossible to find an authority where one person's injuries are fully comparable to another person's injuries. However, a court is to consider what is as far as possible comparable" to the other person's injuries, and the after-effects.

77. Moreover, in the case of *Kensilver Express Limited v Nzangu (Civil appeal E039 of 2021)* [2022] KEHC 10331 (KLR) (20 July 2022) the court stated that: -

> 'Notably, it must be understood that money can never compensate a person for the injuries sustained. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents. [See Court of Appeal in Stanley Maore vs Geoffrey Mwenda Nyeri CA No 147 of 2002].
>
> 31. Having done the same, I am of the opinion that the cases cited by the appellant presented injuries that are not exact but are comparable to the

appellant's injuries. I have also taken note that the appellant cited the case of Kamau Paul & Another v Lydia Muringe Waikwa [2021] eKLR and Peris Mwikali Mutua v Peter Munyao Kimata [2008] eKLR where cited in the appellant's trial submissions and the same was available to the trial magistrate for consideration.

32. Accordingly, guided by the aforementioned cases and the principles for the assessment of damages as enshrined in the case of Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR where the Court of Appeal stated as follows:-i."The assessment of damages in personal injury case by a court is guided by the following principles:ii.An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.iii.The award should be commensurable with the injuries sustained.iv.Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.v.Previous awards to be taken into account to maintain the stability of awards but factors such as inflation should be taken into account.vi.The awards should not be inordinately low or high"

78. I am inclined to find that the trial court's award was appropriate considering that the appellant made a full recovery of most of his injuries, there is no need to interfere with the trial court's award.

Future medical costs

79. The appellant submits that the trial magistrate erred in failing to award future medical costs of Kshs. 400,000 for hip replacement by holding that the Medical report by Dr. Wokabi was faulty which we have found was a misdirection by the magistrate. The question is was the appellant entitled to the cost of hip replacement of Kshs. 400,000 and if yes. At what rate?

80. The law on the claim for future medical expenses was settled in the case of Tracom Limited and another v Hassan Mohamed Adan [2009] eKLR where the Court of Appeal stated that:

> " We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this court, stated:-"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded." We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require." [Emphasis mine]"

81. The trial court found that Dr. Wokabi's testimony on hip replacement was not accurate since the medical reports by Dr, Chege and Dr. Juma were not clear on the procedure or if it was required(pg.359)

82. Having found that the medical report of Dr. Wokabi was wrongly disregarded, then in considering it, the cost of Hip replacement was proposed by the said doctor as Kshs. 400,000 which was expressed as follows: -

> "he is also maximally rehabilitated on the pelvis like in similar cases of the fractures of a hip join possibility of the left hip joint developing arthritics will be very high. in his lifetime he may require a total hip replacement surgery. Such surgery today costs shs. 400,000/--....) (Pg. 45 of Record).

83. Dr. Wokabi testified that the cost of the future medical costs was based on the costs in a private hospital (Pg. 373 of record). There was no contrary medical cost provided by the respondents as relates to the cost of hip replacement, which was duly pleaded by the appellant and which was provided in the medial report.

84. The court in Kimathi Muturi Donald v Kevin Ochieng Aseso [2021] eKLR held that: -

> " In Kennedy Ooko Ouma DachivJoseph Maina Kamau& Another[2018] eKLR, the court substituted the award of Kshs. 1,000,000 with Kshs. 1,400,000 for a fracture to the acetabulum. Noting the seriousness of a hip fracture, the learned judge stated:
>
> > "A fracture to the tibia or femur for instance, is very different from a hip fracture, especially in terms of long-term consequences to the victim's health, and especially mobility. Besides, the awards in the authorities cited by the Respondents are too low. In my view, the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis."
> >
> > Further, in the case of Geoffrey Maraka KimchongvFrechiah Hugiru[2020] eKLR, the respondent suffered a cut wound on the cheek which was tender, blunt trauma to the pelvis which was tender and a fracture of the right acetabulum. The Appellate Court found an award of Kshs. 1,000,000 to be fair and reasonable considering that there was no specific indication in the Medical Reports that the Appellant would require hip replacement."

85. The appellant pleaded and duly produced evidence for the award of the hip replacement which the law provides should be on a balance of probability. The respondent submits that costs of hi replacement was not necessary as per Dr. Wokabi's testimony and thus the same was not necessary in his submission before the lower court (pg. 332 the Record). The appellant was thus entitled to the award of Kshs. 400,000 in future medical cost for the hip replacement and the trial magistrate in failing to consider the evidence of Dr. Wokabi arrived at the wrong finding.

Award for loss of future earning capacity.

86. The appellant pleaded that his employment was terminated two years after the accident after the medical report requested by his employer Kuehne of 1st February 2019 by Dr. Peter Gikurumi Gichuhi started that he was unfit to work (pg. 36 to 43 of the record).

87. The appellant produced the termination of employment dated 13th November 2019(pg. 50 or record) which termination was on medical grounds due to the appellant's prolonged incapacity. The appellant produced his pay slip of February 2014(pg. 51 of record).

88. The appellant asserts that using the multiplier ratio of (Kshs. 67,756.72*72(60-43 years) *12 months *12/100 permanent incapacity =Kshs. 1,658,648.51) and thus the trial magistrate erred under the ground 9 of the appeal in failing to award loss of diminished earning.

89. The court in *Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021)* [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment) held that: -

> " Usually, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss.
>
> 36. However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.
>
> 37. Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure".

90. The trial court in this present case did not consider the appellant's evidence on loss of employment based on medical grounds and did not belabor to consider whether the appellant was entitled to the damages for loss of future earning capacity.

91. The appellant submitted that he was 43 years old at the time of the accident and he could have worked up to the age of 60 years. He was earning, Kshs. 67,756.72 monthly with 12% permanent incapacity.

92. The Court of Appeal decision in Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR where the court stated:

> " The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market; while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take

the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

151. In Butler V Butler [1984] KLR 225 at 232 Kneller JA stated:

> "Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in Fairely vs John Thompson (Design & Contracting Division) Ltd [1973]2Lloyd's Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages."
>
> 22. Damages under the head of loss of earning capacity can be classified as general damages but these have also to be proved on a balance of probability. (See Cecilia W. Mwangi & another vs Ruth W. Mwangi [1997] eKLR) ..."

93. There is no formula prescribed for calculating diminished earning. As held in Mumias Sugar Company Limited vs Francis Wanalo(supra)... 'the judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability" ...

94. I find that the trial court's finding that the appellant did not prove loss of future earning was misdirected considering that the appellant produced the termination letter for termination on medical grounds arising from the accident.

95. I find that denying the appellant damages for diminished earning capacity was thus erronous in the circumstances and I reverse that finding. The question now becomes, what would be the amount of damages to award on that head. I will proceed on the basis that damages for diminished earning capacity can be awarded as part of general damages.

96. Dr Wokabi estimated it at 15%. The view of this court is that what is critical here is that all the medical report point to a future prognosis of osteoarthritis in future due to the injuries sustained. Further, the appellant had his health impaired as result of the accident which had a toll on his productivity which led to him losing his job and affected his job sustainability hence impacting on his future earning ability unlike before when was in full health.

97. The medical report of Peter Gichuhi (pg.29 of record) indicated that as of January 9th, 2018, the appellant was 46 years old. The appellant was terminated on 13th November 2019 when he was 47 years old. He continued to earn after the accident occurred, he did not state he was not earning after the accident.

98. The court in Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR held that: -

> " On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors...."

99. I would thus award an additional global figure of Kshs 600,000/- bearing in mind what he used to earn before the accident.

100. Consequently, the appeal partially succeeds as follows: -

1. The appellant is entitled to future medical cost of kshs.400,000 for hip replacement.
2. The appellant is awarded kshs.600,000 for loss of future earning capacity.
3. The learned Magistrate erred in disregarding the testimony of Doctor Wakabi.
4. The court will not disturb the award on general damages.

101. The appellant is to have costs of the appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF JULY 2024.

S. MBUNGI

JUDGE

In the presence of

Court Assistant: Elizabeth Angong'a

Appellant- Advocate Ochieng - present

Respondents/ Absent