



REPUBLIC OF KENYA



**KENYA LAW**  
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**Athumani & another v David (Civil Appeal 22 of 2020)  
[2022] KEHC 10385 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL 22 OF 2020  
GWN MACHARIA, J  
APRIL 28, 2022**

**BETWEEN**

**ALI ATHUMANI ..... 1<sup>ST</sup> APPELLANT**

**AL KAMAR TRADING COMPANY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ALFAYO MATAYA DAVID ..... RESPONDENT**

*(Being an appeal from the judgment and decree in Chief Magistrate's  
Court at Naivasha CMCC No. 755 of 2016 delivered by Hon.  
Martin Mutua (Mr), RM delivered on the 29th day of May, 2020)*

**JUDGMENT**

**The Appeal**

1. The instant appeal is with respect to the judgment by Hon. M. Mutua, RM delivered on the 29<sup>th</sup> day of May, 2020 in Naivasha CMCC 755 of 2016-Dismus Alfayo Mataya David v Ali Athumani and Another where the trial court found in favour of the Respondent in the following terms:  
  
Liability 100% in favour of the Plaintiff  
  
General damages Kshs. 1,000,000.00  
  
Loss of earning capacity Kshs. 1,000,000.00  
  
Special damages Kshs. 3,500.00  
  
Costs and interests thereon.
2. The Appellants being aggrieved by the said decision of the learned trial magistrate filed their Memorandum of Appeal on the 17<sup>th</sup> day of June, 2020 seeking to have this Honourable Court interfere with the findings of the trial Court on both issues of liability and quantum.



3. The Appellants' Memorandum of Appeal set out 18 grounds that:

1. The Learned trial Magistrate misdirected himself and erred in law and fact by writing and delivering a judgment against reason and the weight of evidence.
2. The Learned trial Magistrate misdirected himself and erred in law and fact by disregarding reliable medical evidence and instead relying on the untruthful contradictory testimony of the Respondent.
3. The Learned trial Magistrate misdirected himself and erred in law and fact by ignoring the Appellant's 2nd Medical Report by Dr. M. Y. Modi and consequently failing to appreciate the true nature and extent of the injuries sustained by the Respondent, and the measure of damages commensurate to the Respondent's true injuries.
4. The Learned trial Magistrate misdirected himself and erred in law and fact by awarding damages for 'Loss of earnings/diminished earning capacity, without basis, while no such claim was specifically properly pleaded in the body of the plaint, and indeed none were addressed or proved by the Respondent at trial, hence no damages for 'Loss of earnings/diminished earning capacity' should have been awarded, especially where the Respondent had sustained a minor injury (a simple fracture of the ankle) that healed fully and never resulted in any permanent incapacity that rendered the unable to earn a living or diminished his earning capacity.
5. The learned trial Magistrate misdirected himself and erred in law and fact by assessing and awarding unreasonable, excessive Damages for 'Loss of earnings/diminished earning capacity' at Kshs. 1,000,000/- in respect of an unpleaded and unjustified relief, and which is so inordinately high as to represent an entirely erroneous estimate, and against the weight of evidence, while there was no evidence or basis at all in law or fact in support of such an unjustifiable award.
6. The Learned trial Magistrate misdirected himself and erred in law and fact by assessing and awarding unreasonable, excessive General Damages for Pain and Suffering at KShs. 1,000,000/- in respect of a minor injury (a simple fracture of the ankle that would normally attract general damages in the region of Kshs. 100,000 to 450,000/= at most) which was so inordinately high as to represent an entirely erroneous estimate, in respect of exaggerated injuries and degree of incapacitation, and against the weight of evidence, while there was no evidence or basis at all in law or fact in support of such an astronomical award.
7. The Learned Trial Magistrate erred in law and fact and misdirected himself by ignoring relevant binding case-law and disregarding the ratio decided in HCCA No. 686 of 2005, *Socfinaf Company Limited vs. Margaret Waitibera Mbugua*. HCCA No. 193 of 2012, *Kenyatta University v Isaac Karumba Nyuthe*, HCCA No. 110 of 2009, *Francis Ouma Oranja v Harun Murithi Waweru & Anr*, HCCA No. 21 of 2015, *Akamba Public Road Services v Abdikadir Adan Galgalo* And HCCC No. 1058 of 2006. *Delta Haulage Services Ltd vs. Complast Industries Limited & Another*.
8. The Learned trial Magistrate misdirected himself and erred in law and fact by disregarding the fact that the Respondent's doctor was guilty of exaggeration of injuries or degree of incapacitation
9. The Learned trial Magistrate misdirected himself and erred in law and fact by failing to note, appreciate and record the demeanor of the Respondent in court, and disregarding the fact that the Respondent was guilty of exaggeration of injuries or degree of incapacitation.



10. The Learned trial Magistrate misdirected himself and erred in law and fact by holding the Appellant liable in the above circumstances and entering judgment in favour of the Respondent in total disregard of the law particularly Section 3 subsection 4A of the Insurance (Motor Vehicles Third Party Risks) Amendment Act, 2013, Cap. 405.
  11. The Learned trial Magistrate consequently misdirected himself and erred in law and fact by failing to apply the law and find that the Respondent and the Respondent's doctor had Committed an offence and consequently recommend prosecution and consequently also reject the entire claim summarily.
  12. The Learned trial Magistrate misdirected himself and erred in law and fact by ignoring precedent and trite law that only what is specifically pleaded in the plaint and strictly proved can be awarded.
  13. The Learned trial Magistrate misdirected himself and erred in law and fact by ignoring the Appellants' written submissions on Court record and all the relevant pertinent issues raised therein and failing to address any of all the raised relevant pertinent issues in his judgement.
  14. The Learned trial Magistrate misdirected himself and erred in law and fact by showing open bias and hostility to the Appellant and its counsel in the course of proceedings against the Rules of Natural Justice and established practice regarding the sanctity of, meaning and import of fair play in the cause of delivery of justice and thereby denying the Appellants an opportunity to be properly heard in merited circumstances.
  15. The Learned trial Magistrate misdirected himself and erred in law and fact by recording proceedings selectively and failing to record all the proceedings in the course of trial, against the Rules of Natural Justice and established practice regarding the sanctity of, meaning and import of fair play in the cause of delivery of justice and thereby denying the Appellants an opportunity to be properly heard in merited circumstances.
  16. The Learned trial Magistrate misdirected himself and erred in law and fact by wrongly exercising his judicial discretion against the Appellants, and against reason and the Rules of Natural Justice in the circumstances of the matter.
  17. The Learned trial Magistrate erred in law and fact by delivering an error-prone judgment wholly unsupported by evidence on record.
  18. The judgment of the trial court, as written and delivered cannot be supported in law or fact.
4. Dissatisfied with the decision of the learned trial magistrate, it sought the following prayers:
- a. The Appeal be allowed.
  - b. The judgment and decree of the Trial Court in Naivasha CMCC No. 755 of 2016, Alfayo Mataya David v Ali Athumani & Kamar Trading Company Limited, against the Appellants be set aside and the Respondent's entire suit be dismissed all together against the Appellants.
  - c. In the alternative, the judgment and decree of the subordinate court in Naivasha CMCCNo. 755 of 2016, Alfayo Mataya David v Ali Athumani & Kamar Trading Company Limited against the Appellants be set aside and be replaced with lawful and reasonable damages.
  - d. The entire decretal sum plus interest accrued, deposited as security pending appeal, or any part thereof the court may deem fit and just, be released back to the Appellants advocates on record.



- e. The costs of the Appeal and the costs of the subordinate court suit appealed from be awarded to the Appellants.
  - f. This Honourable Court do grant any other or further relief it may deem fit and just to achieve the ends of justice.
5. The Appeal was canvassed by way of written submissions.

### **Background**

6. The Respondent initiated his claim against the Appellants vide a Complaint dated 24<sup>th</sup> day of August, 2016 and filed on the 26<sup>th</sup> day of August, 2016. It was the Respondent's case that he sustained injuries as a result of an accident which occurred on the 21<sup>st</sup> day of November, 2015 along Mai Mahiu-Nairobi Road. The Respondent averred that the said accident was a result of the negligence of the Appellants and/or their servants and/or employees who were in control of motor vehicle registration KBF 451A/ZC 9741 Renault Prime Mover which collided with motor vehicle registration number KBP 545B which the Respondent was travelling in as a passenger.
7. It was further averred by the Respondent that as a result of the said accident, he sustained the following injuries:
- a. Bimalleolar fracture (lower ends of tibia and fibula)-left ankle.
  - b. Blunt injury (tender)- anterior chest wall.
  - c. Wounds, bruises and swelling of the left foot.
  - d. Bruises on the right leg
8. As a result of the accident the Respondent blamed the Appellants fully on negligence and breach of duty of care as particularized in paragraph 3 of the Complaint.
9. The Respondent sought judgment against the Appellants for:
- a. Loss of earnings.
  - b. Special damages of Kshs. 3,500.00
  - c. General damages.
  - d. Costs of the suit.
  - e. Interests on a, b and c above.
  - f. Any other and/or further relief that this Honourable Court may deem fit and just to grant in the circumstances.
10. The Appellants filed a joint statement of Defence on the 2<sup>nd</sup> day of September, 2016 in which they denied the occurrence of the accident, negligence on their part and suffering of any injuries by the Respondent as a result of the aforementioned accident.

### **Summary of evidence**

11. The Respondent's case was supported by the testimony of two witnesses, the Plaintiff and a police officer.



12. PW1, CPL Daniel Kemboi of Mai Mahiu Traffic Base in his testimony blamed the Appellant's motor vehicle registration KBF 451A/ZC 9741 Renault Prime Mover. He indicated to court that he had visited the scene and upon considering the findings, it was the view of the police that they charge the 1<sup>st</sup> Appellant for careless driving and as such proceeded to issue the 1<sup>st</sup> Appellant with summons to attend court. He produced a copy of the occurrence Book Extract as P.Exhibit-1, the Police Abstract as P.Exhibit-2 and Summons to attend Court as P.Exhibit-3. PW-1 was not subjected to cross-examination as on the date of the hearing the Appellants were not present in court and the Trial Magistrate directed that the matter proceeds as service of the Hearing Notice had been established.
13. PW2, the Respondent herein testified on the 25<sup>th</sup> day of March, 2019 under oath. He adopted his statement filed on the 25<sup>th</sup> day of August, 2016 as his testimony and produced documents listed in the list of documents dated the 24<sup>th</sup> day of August, 2016. These were a copy of the Police Abstract, Copy of Statutory Notice issued under Cap 405 Laws of Kenya, Copy of Demand Letter, Copy of the subject motor vehicle Records and receipt for Ksh. 550/ and Copies of medical summaries from Kinoo Medical Clinic dated 20/6/2016 by Dr. Mwaura, Naivasha County Referral Hospital and Baraka Medical Clinic Lunga Lunga dated 25/11/2015 by Dr.Kioko.
14. The Respondent further testified that he had fully healed but had to put on an oversize shoe and could not normally undertake his duties.
15. On cross-examination, the Respondent averred that he does not currently work. That he was seated in front as a passenger and he sustained the injuries as contained in his documents.
16. The Appellants failed to call any witness on various instances and submitted that they wished to close their case. The Appellants produced a medical report by Dr. M.Y. Modi by consent.

## **Submissions**

### **Appellants' submissions**

17. The Appellants filed their written submissions on the 17<sup>th</sup> day of August, 2021. It was the Appellants' submission that the Respondent had colluded with the medical personnel to exaggerate the injuries sustained.
18. However, the Appellants acknowledged that their own Dr. Modi instructed to conduct a second medical examination confirmed the existence of a left ankle fracture and multiple soft tissue injuries.
19. The Appellants further urged the Court to set aside the award of Kshs. 1,000,000.00 for general damages of pain and suffering and substitute it with a figure in the region between Kshs. 100,000.00 and kshs. 450,000.00.
20. In support of the amount that would be commensurate with the injuries sustained by the Respondent, the Appellants cited three authorities, namely Socfinaf Company Limited vMargaret Waithera Mbugua [2010] eKLR (civil Appeal 686 of 2005), *Isaac Waweru Mundia v Kiilu Kakie Ndeti t/a Wikwatyo Servcies* [2012] eKLR And Francis Ouma Oranja vHarun Murithi Waweru & Another[2012]eKLR in which the Courts awarded Kshs. 80,000.00, Kshs. 350,000.00 and Kshs. 450,000.00 respectively.
21. On the issue of an award under loss of earning capacity, the Appellants submitted that the Respondent did not plead for awards under this header and as such, the learned trial magistrate erred in awarding the same. It was further submitted by the Appellants that the fracture sustained by the Respondent had fully healed and with no permanent deformity thus the loss of earning capacity ought not to have



been awarded and in the event the same was to be awarded, the amount of Kshs. 1,000,000.00 was inordinately high.

22. The Appellants also submitted that the Respondent was not incapacitated to the point he could no longer able to earn for himself and/or had a diminished earning capacity.

23. The Appellants relied on the authority of *Jackson Mogaka Tongi v Moses Mabels & Daniel Sokonyi Masibo* [1999] eKLR where it was held:

“On general damages the counsel has asked the court to award the plaintiff damages for loss of earning capacity which was not pleaded secondly no document was produced to show that the plaintiff was in salaried employment with anybody. The general rule is that the party is bound by his pleadings. The plaintiff cannot be awarded what he did not ask for in his pleadings. The claim for loss of earning capacity is disallowed for the reasons given.”

24. It was the Appellants’ case that on both general damages for pain and suffering as well as loss of earning capacity, the learned trial magistrate made awards that were inordinately high.

### **Respondent’s submissions**

25. The Respondent on his part filed their written submissions in opposition to the Appeal on the 28<sup>th</sup> day of September, 2021.

26. On the issue of liability, the Respondent submitted that the trial Court justifiably held the Appellants 100% liable for the accident as the testimony of the Respondent as to how the accident occurred was uncontroverted since the Appellants failed to call any witness despite being given multiple opportunities to do so. The Respondent urged the Court to refer to the position in *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR where the Court cited the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002 which cited the case of *Autar Singh Babra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

27. It was further submitted by the Respondent that he had not fully recovered as a result of the said accident, he had suffered 10% permanent incapacitation and was suffering from residual injuries. The Respondent had on trial indicated that he used to earn Kshs. 30,000.00 which he could not continue fetching as a result of the accident.

28. The Respondent further submitted that he has specifically pleaded the damages for loss of earning as per his Complaint and the learned trial magistrate rightfully awarded the same.

29. Additionally, the position by the Appellants that there was fraud involved leading to exaggeration of the injuries was unsubstantiated as no proof of fraud was tabled before the trial Court.

30. The Respondent in urging the Court to uphold the decision of the trial Court relied on the authority of *John Kuria Mbure v Magari Hire Purchase Ltd & 2 others* [2019] eKLR where the Court awarded Kshs. 2,000,000.00 in general damages for a compound fracture of the right tibia and right medial & lateral malleolus with dislocation of the right ankle joint.



31. The Respondent prayed that the appeal be dismissed with costs.

### **Analysis and Determination**

32. Being the first appellate court, this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.”

33. On the issue of liability, the same was not submitted on by the Appellants and the testimony of the Respondent having been uncontroverted, this Court, without delving into the same upholds the learned trial court’s decision to find the Appellants 100% liable for the said accident.

33. The Court is now tasked with making a determination as to whether the awards of Kshs. 1,000,000.00 as general damages for pain and suffering and Kshs. 1,000,000.00 for loss of earning capacity were inordinately high to warrant the interference by this Court having in mind that comparable injuries should attract comparable awards as was the position in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR.

34. The Court takes note of the doctrine 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 Taveta v Mercy Mutitu Njeru* [2014] eKLR.

35. It is crucial to note that in order for the appellate court to interfere with the award of the trial court, there has to be sufficient grounds and principles as was held in *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470) that:

“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.”

36. I stand guided by the principles on interfering with judicial discretion as laid down in the case of *Price and Another v Hilder* {1996} KLR 95 which laid down the following guidelines that:

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on



matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

37. Further, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A 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.’”

38. I have considered the rival submissions by parties, the evidence on record and the authorities cited by both counsel and appreciate that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as “possible comparable” to the other person’s injuries, and the after effects.
39. It is contested that the Respondent suffered permanent disability. The rival reports by Dr. Modi for the Appellants and Dr. Mwaura for the Respondent on whether there was permanent incapacitation suffered by the Respondent calls for determination by this Court.
40. It was the Respondent’s uncontroverted testimony that he was deformed as a result of the said accident and has to wear bigger shoes. Further, the medical report assessed his permanent incapacitation at 10%.
41. The Court in the case of *Stephen Kinini Wangondu v The Ark Ltd* [2016] eKLR in offering guidance to conflicting expert opinions noted that:

“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. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is not obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided: it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of 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 experts, before making any findings of fact, even provisional ones.”

42. Further, the Court of Appeal in *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* CA 203/2001[2007] 1 EA 139 held:

“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.”

43. In view of the foregoing, I am of the considered view that the Respondent suffered permanent incapacitation as he testified on the same and was not subjected to cross examination on what activities he previously did that he was incapable of performing pursuant to the accident as he claimed. Further, the P. Exhibit-3, the Police Abstract noted that the Respondent’s degree of injury was grievous harm, thus corroborating his evidence.
44. The trial Court duly noted the nature of the injuries sustained by the Respondent and based the award for general damages for pain and suffering on the same.
45. I now grapple with whether any of the authorities cited stands within the general rules of application on injuries and awards similar with those suffered by the Respondent. Indeed, in the case of *Finlays Horticulture Kenya Limited v Grace Wacugu Chiira* [2020] eKLR the Court upheld an award of Kshs. 1,000,000.00 for pain and suffering and loss of amenities where the Claimant had suffered severe dislocation of the left ankle joint; and fracture of the left malleolus which injuries I find comparable to the instant case.
46. It is my considered view that the award of Kshs. 1,000,000.00 for pain and suffering is commensurate with the injuries suffered by the Respondent thus this Court’s discretion is not invoked to disturb the same.



47. On the issue of loss of earning pleaded by the Respondent, I am guided by the principles in *S J v Francesco Di Nello & another* [2015] eKLR where the Court of Appeal 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.”

48. Further, in the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

49. Additionally, I make reference to the case of *Cecilia W. Mwangi and Another vs Ruth W. Mwangi* NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The 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.”

50. The Respondent vide its Plaintiff prayed for loss of earnings. These are special damages that ought to have been specifically proved. In his statement, he indicated that he was employed and earned Kshs. 30,000.00. There was no indication as to whether or not his employment was terminated due to his incapacitation. It would therefore be prudent to assume that he continued earning his salary as an employee. Further, no such proof of employment or earning was tendered before the trial Court for consideration. In the absence of evidence that the Respondent lost income during the period he was recovering or any period after the accident occurred, I am inclined to conclude that no income and/or earnings were lost.

51. What is interesting is that the Respondent sought loss of earnings in his Plaintiff. However, the learned trial magistrate proceeded to award loss of earning capacity which is distinct from loss of earnings. This finding was erroneous in the circumstances of the foregoing settled law.



52. Parties are pre bound by their pleadings as was held in the case of *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014]eKLR that:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

53. Further, I borrow from the decision of Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings”. The same was published in [1960] Current Legal Problems at p. 174 whereof the author stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

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

54. I am of the considered view that the Respondent failed to prove loss of earning which is a special damage and the learned trial magistrate erred in awarding the same under loss of earning capacity which was not pleaded by the Respondent.

### **Disposition**

55. In conclusion, I find and upon re-evaluation of the evidence that the appeal partially succeeds and the award of loss of earning capacity is set aside. The final award is calculated as follows:

General damages Kshs. 1,000,000.00

Special damages Kshs. 3,500.00

Net total. Kshs. 1,003,500.00

56. I direct that each party shall bear its costs of the Appeal.

57. The sum of Kshs.2,174,020.00 deposited as security be released to the Appellants upon deduction of the awarded amount, costs in the the trial court as well as interests on Kshs. 1,003,500.00 at Court rates



from the 29<sup>th</sup> day of May, 2020 when the trial court delivered its judgment. The costs of the Appeal awarded to the Appellants which shall also be deducted from the deposit on security.

58. It is hereby so ordered.

**DATED AND DELIVERED AT NAIVASHA THIS 28TH DAY OF APRIL, 2022.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Kinyanjui for the Appellants.

Mr. Kamau for the Respondent.

