



REPUBLIC OF KENYA



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**Lavuta v Kalengo (Civil Appeal E042 of 2021)
[2022] KEHC 12990 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 12990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E042 OF 2021
JM MATIVO, J
SEPTEMBER 21, 2022**

BETWEEN

DAVID SILLA LAVUTA APPELLANT

AND

ALFRED MLATI KALENGO RESPONDENT

(Appeal from the Judgment and decree of the Principal Magistrate Hon. C.K. Kithinji, in PMCC No. E20 of 2020, Voi delivered on 11th August 2021)

JUDGMENT

1. The appellant appeals against the judgment in Voi P M CC No E 020 of 2020 delivered on August 11, 2021. In the said case, the Respondent had sued the appellant for recovery of general and special damages in respect of personal injuries he sustained in a road traffic accident on July 11, 2020. The Respondent was a pillion passenger in motor cycle registration number KMFE 310 B which collided with the motor vehicle KCR 846 K along Voi/Kariokor Road. He blamed the accident on the careless driving of the Respondent/driver or agent particulars whereof as particularized in paragraph 6 (i) to (viii) of his Plaint dated November 2, 2020.
2. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co Ltd & others* and *Peters v Sunday Post Limited*). A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and



- then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.
3. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
 4. In his plaint, the appellant averred that he sustained a compound fracture of the left fibula/tibia and due to the severity of the injuries, he required future medical treatment for physiotherapy for 6 months costing Kshs 30,000/= per month and removal of the implants after 2 years costing Kshs 200,000/=. He also claimed special damages of Kshs 138,960/= as particularized at paragraph 7 of the Plaint. Also, he claimed general damages plus costs of the case and interests.
 5. Judgment on liability was recorded by consent on June 9, 2021 on the basis of 15% as against the Plaintiff (the Respondent in this appeal) and 85% as against the defendant (now the appellant in this case). The issue of damages was left to the court to determine.
 6. The Respondent in his evidence adopted his Witness Statement dated January 22, 2021. He said he sustained a fracture on the left leg, a metal plate was inserted on the leg. He produced his identity card, police abstract report, copy of records, P3 form; medical report; receipts; treatment notes; x-ray films; taxi receipts; demand letter and a Statutory Notice.
 7. The appellant (defendant in the lower court) did not tender any evidence.
 8. The learned Magistrate after evaluating the evidence, the law and authorities entered judgment in favour of the Respondent for Kshs 800,000/= for pain and suffering; Loss of earning capacity-Kshs 450,000/=; Future medical expenses Kshs 380,000/=; Special damages Kshs 179,759/=; less 15% contribution leaving a balance of Kshs 1,809,759/= plus interests at court rates from the date of the judgment and costs of the case.
 9. The appellant seeks to set aside the entire award of damages on grounds that the learned Magistrate erred in awarding the said sums. The gravamen of the appellant's case is that most of the treatment arose from recently diagnosed diabetes which apparently contributed to worsening of the wound. He argued that the witness was advised by the doctor that the diabetes was caused by life style changes. He argued that to create a nexus between the accident and the diabetes, medical evidence was required. He cited Jane Wangui Obwongi v Lawrence John Aburi and Mary Wairimu Njuguna v Kenya Power & Lighting Company Limited in support of the proposition that there is no proximate cause between the diabetes and the accident. He argued that the diabetes appears in the treatment notes issued 6 months after the accident. He also argued that the wound was found to be dirty which cannot be blamed on the accident.
 10. Counsel cited Henry Hidayat Ilanga v Manyema Manyoka which citing decided cases underscored the applicable principles upon which an appellate court can interfere with an award of damages. He argued that the award on pain, suffering and loss of amenities was inordinately high and cited a raft of decided cases. He argued that an award of Kshs 400,000/= would suffice. He also argued that the court did not address itself to the evidence in awarding Kshs 380,000/= for future medical expenses being costs of physiotherapy for 6 months at the rate of Kshs 30,000/=. Additionally, he submitted that the claim for loss of earning capacity was not proved, that his work was not disclosed, nor was it shown that the incapacity would diminish his earning. (Citing Mumias Sugar Company Limited v



Francis Wamalo & Edwin Adhiambo Ogol v James Kariuki). He argued that the medical report does not indicate that the Respondent suffered any permanent incapacity as a result of the accident nor did the Respondent disclose what he was doing for a living. He also cited Florence Njoki Mwangi v Chege Mbitiru in support of the holding that it is necessary for the claim for loss of earning capacity to be supported by medical evidence. Additionally, he cited Cecilia W. Mwangi & another v Ruth W Mwangi in support of the proposition that a claim for earning capacity has to be proved on a balance of probability. Lastly, he urged the court to set aside the special damages attributed to treatment of high blood pressure.

11. On April 7, 2022, I directed both parties to file written submissions and scheduled the matter for mention on May 6, 2022. By the said date only the appellant's submissions were in the court file. The Respondent did not attend the virtual session. The appellant's counsel informed the court that both parties had filed submissions. When I retired to write the judgment, I noted that the Respondent's submissions were not in the court file. However, in the file I noted submissions filed by the Respondent in respect of HCC Criminal Appeal No. E0042 of 2021. Accordingly, I wrote this judgment without the benefit of the Respondent's submissions.
12. The law on circumstances under which an appellate court would interfere with an award of damages is settled. At the risk of repeating the otherwise undeniable principles, it will suffice to state that an appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.
13. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. The Court of Appeal in *Kivati v Coastal Bottlers Ltd* stated: -

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”
14. As was held in *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates* “an appellate court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge.
15. Turning to the facts of this case the learned Magistrate awarded general damages of Ksh 800,000/= for pain and suffering. The injuries were a fracture of the fibula/tibia which necessitated implants which would require removal in future at a cost of Kshs 200,000/= and a 6 months physiotherapy at a cost of Kshs 30,000/= per month. At the time of examination on September 23, 2020, he was still on crutches with no weight bearing of the left leg, grossly swollen with 2 surgical scars, the ankle joint had restricted movement of the knee joint.
16. The appellants counsel attributed the wound to dirt and diabetes which he said could not be blamed to the accident. To him, there was no nexus between the diabetes and the accident, so the damages for pain and suffering and future medical expenses for treatment of diabetes which he argued was caused



- by life style changes could not be burdened on the appellant. He also cited absence of further medical evidence to prove the nexus between the accident and the diabetes.
17. The appellant's argument is attractive. But that is how far it goes. It ignores the eggshell skull rule or the thin skull rule, neatly summarized by the statement that "you take your victims as you find them." This essentially means that the frailty of the person cannot be used as a defence to escape liability.
 18. Even in cases where the injuries are worse than one would have anticipated, the negligent party is still responsible for all the consequences. The eggshell skull rule gets its name from a common example often used to describe a situation where the plaintiff would be able to recover when their damages are worse than expected. In this example, there is an imaginary person who has an extremely thin skull, as fragile as an eggshell, even though the person looks completely normal. This person is hit in the head by someone else. A normal person would have been a little injured, but the person with the eggshell skull dies.
 19. So according to the eggshell skull rule, the person who hit the eggshell skulled person will not be just liable for the little injury but for the death of the person also even though, it was unforeseeable. The eggshell skull rule says that the person who hit the eggshell skulled person will be responsible for the extreme consequences that the person with the eggshell skull suffered, not just the amount of harm a normal person would have suffered. The eggshell skull rule is often also called thin skull rule. It follows that, even assuming that the appellant was diabetic prior to the accident, or he was susceptible to diabetes, and the sedentary life caused by the broken leg worsened it, the appellant cannot escape liability for the consequences of his negligence or omission. As for the amount awarded, I have evaluated the authorities cited before me and the learned Magistrate's evaluation of the law and authorities. I find no misdirection on the part of the learned Magistrate in arriving at this award. I uphold the award of Kshs 800,000/=.
 20. As for loss of earning capacity, the learned Magistrate awarded Kshs 450,000/=. I notice that the Respondent in his witness statement said he was a business man, that he was doing real estate agency and construction works. He never gave details. He never said how much he was earning nor did the medical report indicate the nature or degree of incapacity and how he was limited hampered by the injuries or how long it will take for him to revert to his business. The medical report did not give an indication of the degree of permanent injury (if any). It is therefore not clear how the sum of Kshs 450,000/= was arrived at.
 21. The concept of diminished earning capacity recognizes that every individual, given his mental and physical abilities, has an inherent and/or acquired ability to earn money, i.e., the person has a certain "economic horizon." When that person is injured and suffers a loss of those mental or physical capabilities, there is a corresponding decrease in his ability to earn income. That, in essence, is the claim for lost earning capacity.
 22. The starting point in proving any diminished earning capacity claim is the existence of a "qualifying injury." In order to be worthy of a charge on diminished earning capacity, case law indicates that the injury must be a permanent one. There is no statutory definition of permanent injury. No clear definition of the term "permanent" is recited in reported cases; rather, one must fashion a definition by inference from the particular injuries which have been deemed sufficient to support the claim.
 23. However, injuries such as the following are, by their nature, easily categorized as "permanent:" loss of a finger; loss of several toes; lasting facial disfigurement; severe burns to upper extremities and torso. In addition to those obvious examples, however, the following less obvious injuries have been deemed to be sufficiently permanent. Soft tissue cervical and lumbar injuries which may produce "flare-ups" with excessive activity; traumatic cervical syndrome which impedes ability to lift and bend; leg fracture



which impedes ability to run and reduces general activity level; chronic cervical sprain superimposed on normal aging process.

24. In toto, these cases suggest the following general rule: an injury is “permanent” when it involves some constant, visible loss, or where it will likely produce persistent symptoms (though perhaps not constantly so) into the future. In the latter instance there must apparently be medical testimony to establish the likelihood of future symptoms. Thus, even the classic soft tissue injury may support a charge on diminished earning capacity if competent evidence establishes that the injury has not resolved itself and that a regular pattern of symptoms may occur in the future.
25. Talking about the absolute necessity of medical evidence, the appellant’s doctor never suggested any permanent disability as a result of the injuries. Granted, expert evidence forms an important part of litigation. This is because it is vitally important for the courts to get the necessary help from those skilled in particular fields and in the different technologies in forming an opinion and coming to a conclusion. Such crucial evidence should not be scanty. The doctor should always give a basis and reasoning for his opinion and where he considers the injury is of such a nature as to occasion permanent incapacity, he should say so and go a step further and give the degree of disability.
26. Even assuming that such a disability was proved, (which is not the case), there is one important aspect the trial court failed to consider, which is, the effect of the disability on his future employment/ business considering the nature of his business or work. This is because, in addition to the injury being “permanent” in nature, a plaintiff seeking to establish a diminished earning capacity claim must prove that the permanent injury has some effect on employment prospects. This underlying point is best illustrated by the case of *Kearns v Clark*. Here, the plaintiff, a housewife suffered the functional loss of one of her kidneys — undoubtedly a permanent condition — but she was denied a charge on diminished earning capacity because there was no indication that the injury would adversely impact upon her employability. The court explained its rationale as follows: -

“...In order for a jury to be permitted to consider a future loss of earning power, it is necessary that there be competent evidence of the likelihood that disability will continue in the future. Evidence that permanent injury has been sustained is not equivalent to evidence that future earning capacity has been impaired. (Citation omitted.) There must be some evidence from which a jury can reasonably infer that earning power will probably be reduced or limited in the future.” *Kearns, supra*, at p. 1364.

27. Hence, in addition to proving the permanence of the injury, a plaintiff seeking compensation for diminished earning capacity must establish some effect on future earning ability. To appreciate the broad interpretation of the “effect on employment” requirement, I refer back to the earlier explanation of the term earning capacity. As noted earlier, this term refers to the general “economic horizon” of any individual given his particular education, training, skills, etc. By definition, therefore, the concept is concerned primarily with the effect an injury may have on one’s future rather than one’s past. As such, one of the fundamental principles to have emerged in this area of the law is that a plaintiff may be entitled to damages for lost earning capacity even though he has suffered no actual wage loss as of the time of trial. The rationale for this principle was best explained in *Bochar v J B Martin Motors*, in these terms: -

“(A) tortfeasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident The office worker who loses a leg has obviously had his earning ability impaired even though he



can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injury sustained as a result of the tortfeasor's negligence? That is the test. And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident." Bochar, *supra*, at p 815.

28. The basic principle in respect of an award of damages in this kind of action is that the compensation must be such as to place the Plaintiff, as far as possible, in the position he or she would have occupied had the wrongful act causing injury not occurred. The onus of showing that there is sufficient likelihood of such loss rests upon the Plaintiff. In *Cecilia W Mwangi and Another v Ruth W Mwangi*, 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." Similarly, in *Douglas Kalafa Ombeva v David Ngama*, 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."

29. The Court of Appeal in *S J v Francesco Di Nello & another* held :-

"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."

30. Decisional law is in agreement that loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages whereas loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. By now two important points are clear. One, the alleged disability was not proved at all. As stated herein above, the medical opinion did not suggest any degree of permanent incapacity. Two, to succeed in a claim of diminished earning capacity a plaintiff must prove that he has:-(a) a permanent injury which has some adverse effect on his employability/business. Three, in proving an injury's effect on his employability (either present or future), plaintiff may establish disability from a particular job or a general class of work. Four, as to the necessity of expert testimony, the cases suggest that the only issue on which such testimony is mandatory is the "permanence" of the non-obvious injury. Five, once the plaintiff has a physician state that his injury is permanent, the balance of the foundation for the diminished earning



capacity claim can usually be provided by the plaintiff himself, a co-worker, or any other person who provides a reasonable basis from which a jury might render a verdict. Flowing from the foregoing, it is my finding that the award for loss of earning capacity was not proved at all. I hereby set it aside.

31. Next, I will address the claim for future medical expenses. The general principle behind the quantification of an award for future care is that the court should seek to put the plaintiff into a position as close as possible to the position that they would have been in but for the accident. However, the award should not be so excessive as to allow for a windfall for the plaintiff. With regard to the medical evidence required for such an award, Justice McLachlin (as she then was) of the British Columbia Supreme Court, stated that the test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence. These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.
32. With regard to competing options for future care, the court in *Brennan v Singh* indicated that the test is “whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money.
33. Although the plaintiff may have to prove, on a balance of probabilities, that the tortious act or omission was the operative cause of the harm suffered, it is not necessary for them to establish that the future care loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring; - Speculative possibilities unsupported by expert or other persuasive evidence should be ignored, whereas substantial possibilities based on such expert or persuasive evidence must be considered in the assessment of damages for personal injuries. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Therefore, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative.
34. In the doctor’s own opinion, removing the metal plates would require an approximate sum of Kshs. 200,000/=. Additionally, he opined that the Respondent will require physiotherapy for 6 months at the rate of Kshs. 30,000/=. Considering the professional opinion by the doctor, and I absence of evidence to the contrary by the appellant, I find and hold that the award of Kshs 380,000/= was supported by the material before the court. I find no reason to temper with it.
35. I now turn to the special damages. In the Plaintiff, the Plaintiff pleaded Kshs. 138,960/=. The court awarded Kshs 179,755/=. I have not seen an amended Plaintiff. Its not clear how the court allowed an un pleaded sum under special damages. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved with as much particularity as circumstances permit. The court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* observed that: -

“...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of... the degree of certainty and particularity depends on the nature of the acts complained of..

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council vs Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon* Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:



“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in *Ratcliffe v Evans* [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

36. Similarly, the Court of Appeal in *Hahn v Singh* held that:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

37. Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt meets the test. See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*; *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages.

38. The amount pleaded in the Plaintiff is Kshs 138,960/=. As stated earlier, it is not clear how the lower court allowed a sum of Kshs 179,755/= in excess of what was pleaded in absence of an amendment to the Plaintiff. Also, some of the receipts submitted in the lower court are illegible. I am unable to ascertain the amounts or the nature of the payment(s). Some receipts appear to have been issued after the Plaintiff was filed, yet no amendment was sought to accommodate the late expenses (if any). With great difficulty, I will only allow the pleaded sum of Kshs 138,960/= trusting that the lower court appreciated that the submitted receipts supported the said sum since the trial court had the advantage of hearing the parties first hand.

39. Accordingly, I hereby allow the appellant’s appeal to the extent discussed above and substitute the lower court judgment/deed with the following orders: -

- a. Liability be and is hereby entered at 15% as against the Respondent and 85% as against the Appellant.
- b. General damages for pain and suffering-----Kshs 800,000/=
- c. Future Medical expenses-----Kshs 380,000/=
- d. Special damages-----Kshs 138,755/=
- Total-----Kshs 1,318,755/=



Less 15%-----Kshs 197,813.25

Balance-----Kshs 1,120,941.75

- e. The above sum shall attract interests from the date of the judgment of the lower court.
- f. The appellant shall bear the costs of the lower court plus interests thereon at court rates.
- g. Each party shall bear its own costs for this appeal.

Orders accordingly

SIGNED, AND DATED AT VOI THIS 19TH DAY OF SEPTEMBER 2022

John M Mativo

Judge

Dated, Signed and Delivered virtually this 21st day of September 2022

OLGA SEWE

JUDGE

