**Kariuki v Muthini (Civil Appeal E047 of 2021)**
**[2022] KEHC 14476 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14476 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CIVIL APPEAL E047 OF 2021**

**JM MATIVO, J**

**OCTOBER 28, 2022**

**BETWEEN**

**JOSEPH NJENGA KARIUKI ..... APPELLANT**

**AND**

**ROBERT SILA MUTHINI ..... RESPONDENT**

***(Appeal against the Judgment of Hon. C. Githinji, P.M. delivered on 18th March 2021, in Voi PMCC No. 193 of 2019)***

**JUDGMENT**

## Introduction

1. This appeal is against the judgment in Voi P.M.C.C No. 193 of 2019 both on quantum and liability. The appellant seeks and have the decision substituted with a determination by this court. In the said case, the Respondent sued the appellant claiming special damages of Kshs. 43,973/=, general damages for pain and suffering and loss of amenities; loss of future earning capacity and or diminished earning capacity; loss of earning from August 29, 2018 to April 30, 2019, costs of future medical care and treatment plus and costs of the suit and interests. The Respondent's claim arose from bodily injuries he sustained on August 29, 2018 when the motor vehicle KXX XX2M owned by the appellant in which he was a passenger overturned. He blamed the accident on the negligence of the appellant and or his authorized agent/driver.

## The Cross-appeal

2. The Respondent filed a cross-appeal citing a raft of grounds which can be abridged into: - (a) the learned magistrate erred in failing to award future medical costs; and, (b) the award on future earnings/ diminished earning is inordinately low.

**The Duty of a first appellate court**

3. A first appellate court 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. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*[1] and in *Peters v Sunday Post Limited*.[2]

4. 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]

5. 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.[4] 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*,[5] a court of first appeal can appreciate the entire evidence and come to a different conclusion.

**The trial in the lower court**

6. PW1 Dr. Hannif Mohamed Zizimawala examined the Respondent on December 17, 2018. He prepared the medical report dated the same date which he produced in court. PW2, PC Bernard Mwangi attached to Voi Police Station testified that the vehicle was overtaking on a continuous yellow line when it lost control and rolled several times. He said the driver was blamed for the accident. He however said he did not visit the scene.

7. The Respondent produced his bundle of documents in support of his case. He said that he is a teacher, that he suffers memory loss, that he is not able to perform his work. He sought to be compensated for the rest of his working life because the report said he may not continue working. On cross-examination, he stated that according to him he had recovered. His wife, PW4, testified that after the accident, the Respondent became aggressive, arrogant, that he fights everybody, uses harsh words, he is forgetful and his work as a teacher has been affected. She said he oversleeps and he does not take medication owing to lack of funds.

1 {1968} EA 123.

2 {1958} E.A. page 424.

3 See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

4 See *Kurian Chacko vs. Varkey Ouseph AIR* 1969 Kerala 316.

5 Cap 21, Laws of Kenya.

8. The appellant did not adduce evidence. However the medical report prepared by Dr Yahya dated September 1, 2020 was admitted in evidence by consent.

9. In the impugned judgment, the learned Magistrate found that the Respondent was merely a passenger and that the appellant never adduced evidence. After evaluating the evidence, she found that liability had been established as against the appellant on 100% basis. On damages, the learned Magistrate after considering the nature and extent of the injuries, she awarded Kshs. 2,500,000/= for pain and suffering; Kshs. 1,000,000/= for loss of earning capacity; special damages of Kshs. 43,273/= plus costs and interests.

**The appeal**

10. The appellant now seeks to upset the above verdict both liability and quantum. The core grounds cited are that the award is inordinately high; that the learned magistrate failed to evaluate the evidence properly; and, that the finding on liability was erroneous.

11. In her submissions, the appellant's counsel faulted the trial court for awarding an excessive sum aggregating to Kshs. 3,543,273/=. Acknowledging that award of damages is an exercise of judicial discretion as was held in *Butt v Khan*,[6] counsel faulted the learned Magistrate for awarding excessive damages under several heads. She argued that the doctor did not assess the degree of disability; that the medical report by Dr Dilraj indicated that the Respondent had reported to work and that his cognitive ability had improved. She invited the court to be guided by *Prem Gupta & another v Grimley Otieno*[7] in which the court awarded Kshs. 800,000/= as general damages for similar injuries with a permanent disability of 22%. Counsel also relied on *Gerald Ireri Harrisson & 2 others v Danson Ngari*[8] in which the court awarded Kshs. 800,000/= for compound fracture of the skull and a mild brain injury. She also referred to the Respondent's own statement on cross-examination that he had recovered and argued that an award of Kshs. 2,500,000/= was on the high side.

12. Counsel also argued that the award of Kshs. 1,000,000/= for loss of earning capacity was excessive (citing *Mumias Sugar Company Limited v Francis Wanalo*[9]). She submitted that no evidence was adduced to support loss of earning capacity and relied on *Butler v Butler*[10] in support of the holding that loss of earning capacity is a different head of damages from loss future earnings which must be proved by evidence. She also faulted the learned Magistrate for awarding future medical costs yet no evidence was tendered to support the claim. She relied on *Mourine Mukonyo v Embu Water and Sanitation Company*.[11] She also relied on the Respondent's evidence and his wife's testimony that the Respondent had stopped taking medication.

13. On her part, the Respondent's counsel submitted that the trial court properly found that the appellant was liable. She argued that the appellant never adduced evidence. (Citing *Mbaka Nguru and another*

6 [1978] e KLR.

7 [2018] e KLR.

8 [2018] e KLR.

9 [2007] e KLR.

10 [1984] KLR 225.

11 [2020] e KLR.

*v James George Rakwar*[12] and *North End Trading Company Limited (carrying on business under the registered name of Kenya Refuse Handlers Limited) v The City Council of Nairobi*[13] and *Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya*.[14])

14. On quantum of damages, she cited *Catholic Diocese of Kisumu v Tete*[15] in support of the principles upon which an appellate court can interfere with an award of damages and argued that the injuries, future medical expenses and loss of earnings/diminished earnings were all pleaded in the Plaint, and argued that the Respondent produced documents in support of the claim.

15. In support of the cross-appeal, she faulted the learned Magistrate for failing to award damages for future medical expenses. She argued that the learned Magistrate properly evaluated the evidence and arrived at the correct findings. Citing a raft of decisions, she urged the court to award Kshs. 9,241,248/= for diminished earning capacity which she tabulated as follows: Kshs. 96,263 x 8x12= Kshs. 9,241,248/=. Counsel relied on *Alpharma Limited v Joseph Kariuki Cebron*[16] which held that to assess loss of future earning capacity, the court must consider to what extent the claimant's ability to earn income will be affected in the future and how long the restriction will continue.

16. The Respondent's counsel also relied on *Mumias Sugar Company Limited v Francis Wanalo*[17] in support of the holding that 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. She relied on *Kennedy Olalo Ongoyo v Rebecca Kitagwa Kilunga & another*[18] in support of the holding that damages under this head are awarded at the courts discretion. She also relied on *Butler v Butler*[19] in support of the proposition that such damages are awarded for earning capacity lessened by the injury. She relied on *John Kipkemboi & another v Morris Kedolo*[20] in which the High Court described loss of earning capacity as diminution in earning capacity while loss of future earning is compensated for real assessable loss which is proved by evidence. She submitted that the Respondent proved the multiplier method. As for future medical expenses, counsel argued that the trial Magistrate misapprehended the evidence.

**Determination**

17. On liability, I find it useful to cite *Halsbury's Laws of England*[21] which states: -

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed

12 Civil Appeal No. 133 of 1998.

13 [2019] e KLR.

14 [2020] e KLR.

15 [2004] e KLR.

16 [2017] e KLR.

17 [2007] e KLR

18 Mombasa HCCA No. 153 of 2014.

19 [1984]KLR 225.

20 [2019] e KLR.

21 4th Ed at Para 662 (page 476).

by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."

18. The core question here is whether the evidence on record established that the appellant was 100% liable for the accident. Differently put, did the Respondent adduce sufficient evidence to establish the appellant was wholly to blame? The law pertaining to negligent conduct is based on the simple but broad premise of reasonable conduct. The law demands that a person, who is capable of taking care of himself and appreciating his own interests and the dangers thereto, that he takes the same reasonable precautions for his own interests as well as others.

19. Before the court was the testimony of the Respondent only. The appellant elected not to adduce evidence leaving the Respondent's evidence uncontroverted. In *Interchemie EA Limited v Nakuru Veterinary Centre Limited* it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. A similar position was held in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others* where it was held: - "it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

20. The appellant's counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness's evidence to weaken the opponent's case. Three, to undermine the witness's credibility. Fourth, to put the party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. To meet this standard, the appellant was required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent's evidence, he took the risk of leaving the Respondent's evidence unchallenged. Accordingly, the argument casting doubts on the findings on liability fails because the appellant never adduced evidence to rebut the Respondent's evidence.

21. I now turn to the question of damages. The law on circumstances under which an appellate court would interfere with an award of damages is settled. At the risk of repeating the 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.[22]

22. 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.

[22] The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli* {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G).

The award must also take into account the prevailing economic environment. The Court of Appeal in *Kivati v Coastal Bottlers Ltd*[23] 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."

23. As was held in *Ken Odondi & two others v James Okoth Omburah t/a Okoth Omburah & Company Advocates*[24] "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.

24. Turning to the facts of this case the learned Magistrate awarded general damages of Ksh. 1,000,000/= for loss of future earning capacity. The concept of future earning capacity and or 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.

25. The starting point in proving any loss of earning capacity or diminished earning capacity claim is the existence of a "qualifying injury." In order to be worthy of a charge on diminished earning capacity or loss of future earnings, 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.

26. However, injuries such as the following are, by their nature, easily categorized as "permanent": loss of a finger;[25] loss of several toes;[26] lasting facial disfigurement;[27] severe burns to upper extremities and torso.[28] 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;[29] traumatic cervical syndrome which impedes ability to lift and bend;[30] leg fracture which impedes ability to run and reduces general activity level;[31] chronic cervical sprain superimposed on normal aging process.[32]

23 Civil Appeal No. 69 of 1984

24 Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

25 *Swartley v Tredyffrin Easton School District*, 430 A.2d 1001(1981); *McKnight v City of Philadelphi*a, 445 A.2d 778 (1982)

26 *Mattox v City of Philadelphia*, 454 A.2d 46 (1982)

27 *Fish v Gosnell*, 463 A.2d 1042 (1983)

28 *O'Malley v Peerless Petroleum Inc*., 423 A.2d 1251 (1980).

29 *Janson v Hughes*, 455 A.2d 670 (1983)

30 *Lewis v. Pruitt*, 487 A.2d 16 (1985).

31 *City of Philadelphia v Philadelphia Transportation Company*, 162 A.2d 222 (1960).

32 *Williams v Dulaney*, 480 A.2d 1080 (1984)

27. 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.

28. Talking about the absolute necessity of medical evidence, the Respondent relied on several medical documents. Dr. Hannif, PW1 prepared the medical report dated December 17, 2018. He never indicated in his report that the Respondent had suffered any permanent disability. The degree of harm (if any) was not given. Dr. Hannif described the Respondent as a teacher by profession and went further to state that he "may be on medication on long term basis." The use of the word may in the said Medical Report is notable. Being on medication for long is not the same as permanent incapacity or inability to work. On the question of memory loss, the doctor wrote "retrograde amnesia from time of the accident up to October 17, 2018." The accident was on August 29, 2018. From the doctor's report, the amnesia lasted up to October 17, 2018. There is no other report suggesting otherwise. This casts doubt whether the injury resulted in permanent disability.

29. I note that the report from the Agha Khan University Hospital dated November 8, 2018 underscored the need for an up dated medical report. However, the doctor was clear that there was an improvement, albeit, slow. The report dated September 1, 2018 mentioned presence of features of degenerative disc disease as L4/L5 level. The report did not attribute this degeneration to the accident.

30. The medical reports on the alleged memory loss are wanting. 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.

31. It is essential that a factual basis be laid for experts' opinion and that such opinion be based on facts established by the evidence and founded on logical reasoning. The court must first consider whether the underlying facts relied on by the witnesses have been established on a *prima facie* basis. If not, then the experts' opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a *prima facie* basis. It can be disregarded. If the relevant facts are established on *prima facie* basis, then the court must consider whether the experts' view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that an opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied.

32. 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. 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 most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess.

33. Even though expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[33] As I have stated in several of my previoys decisions, four consequences flow from this. Firstly, expert evidence does not "trump all other evidence."[7] It is axiomatic that judges

[33] *Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons* [2010] E.W.C.A. Civ 54.

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.[9]

34. 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.[12] 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.

35. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[34]

36. A further criterion for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd v Minories Finance Ltd and Another*[35] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

37. A court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[36] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[37] or manifestly illogical.[38] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[39] The Respondent's alleged memory loss (if any) is not supported by cogent reasoning by way of medical evidence. Much more was required from the doctors. The Medical evidence relied upon by the Respondent did not establish permanent disability.

34 *Jakto Transport Ltd. v. Derek Hall* [2005] E.W.C.A Civ. 1327.

35 *Routestone Ltd. v Minories Finance Ltd. and Another*; *Same v. Bird and others* [1997] B.C.C. 180.

36 *Drake v Thos Agnew & Sons Ltd*. [2002] E.W.H.C. 294.

37 *Gorelik v Holder* 339 Fed. App 70 (2nd Cir 2009)

38 *Golville v Verries Pechet et du Cauval Sciete Anonyme* (Court of Appeal (Civil Division), unreported, 27 October 1989).

39 *Makita (Australia) Pty. Ltd. v. Sprowles*, {2001} N.S.W.C.A. 305

38. Even if assuming such a disability was proved, there is one important aspect the trial court failed to consider, that is, its effect on his future employment. This is because, in addition to the injury being "permanent" in nature, a plaintiff seeking to establish a diminished or loss of future earning capacity claim must prove that the permanent injury has some effect on employment prospects. The Respondent is still a teacher, at least by the time he gave evidence. There was nothing from his employer to show that he has terminated as a result of the injuries. He provided no evidence to show that he has been fired or retired on medical grounds. This underlying point is best illustrated by the case of *Kearns v Clark*.[40] 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.

39. 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 to the explanation of the term earning capacity.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*,[41] 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.

40. 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.*

[40] 493 A.2d 1358 (1985).

[41] 97 A.2d 813 (1953).

*Mwangi*,[42] 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*,[43] 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."

41. The Court of Appeal in *S J v Francessco Di Nello & another*[44] 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."

42. 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 four important points are clear. One, the memory loss was not proved to the required standard. The medical opinion on this issue is mnifestly wanting. 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. As at the time of adducing evidence, the Respondent was still employed as a teacher. Nothing was said to suggest he will be fired. 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 court might render a verdict. Six, Dr. Udayan R. Sheth in his report dated August 20, 2020 stated that CT scan done on October 11, 2018 was normal. This report

[42] NYR CA Civil Appeal No. 251 of 1996 [1997] e KLR

[43] [2013] e KLR.

[44] [2015] e KLR.

was admitted in evidence. It also happens to be the latest report on record. Its contents are in consonant with yet another earlier report dated October 11, 2018 which concluded that brain was normal. These two medical reports cast serious doubts on the alleged claim on memory loss, especially its permanence.

43. Flowing from the above discussion, it is my finding that there was no basis at all for allowing the claim for loss of earning capacity to the tune of Kshs. 1,000,000/=. This finding also extinguishes the cross-appeal on this point. It will suffice to state that the formula deployed by the Respondent's counsel including the suggested multiplier and multiplicand is totally speculative and unsupported by the law and facts on record.

44. I now turn to the question whether there are any grounds at all to interfere with the award of Kshs. 2,500,000/= for damages for pain and suffering. Granted, any legal process should yield an appropriate compensation that is compensation, which is neither too much, nor too little. The compensation must remain fair, reasonable and just. The compensation must be fair to the injured person. It must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.

45. Dr. Udayan R Sheth stated in his report dated August 20, 2020 that the Respondent was normal. None of the medical reports on record described the injury as permanent nor was there any attempt to assess the degree of harm. I have carefully considered the trial court's reasoning for the award under this head. I have also addressed my mind to the law and authorities and in particular similar awards for comparable injuries. I have read all the medical reports and the manner in which the injuries were described. I am persuaded that the said award is excessive. I hereby reduce it to Kshs. 2,000,000/=. I find that the Special damages were proved as the law requires.

46. The upshot is that cross-appeal is dismissed. The appellant's appeal is allowed to the extent herein below stated. In the end, I order that the judgement and decree issued in Voi P.M.C.C No. 193 of 2019 is set aside and substituted with the following orders:-

    a. Judgment be and is hereby entered in favour of the Respondent against the appellant on liability on 100% basis.

    b. The Respondent is awarded General damages for pain and suffering in the sum of Kshs. 2,000,000/=.

    c. The Respondent is awarded Special damages in the sum of Kshs. 43,273/= plus interests from the date of filing suit in the lower court until date of payment.

    d. Interests on (b) above from the date of the judgment of the lower court.

    e. The appellant shall bear the costs of the suit in the lower court.

    f. Each party shall bear its own costs for this appeal.

    Orders accordingly

**SIGNED AND DATED AT VOI THIS 19TH DAY OF OCTOBER 2022**

**John M. Mativo**

**Judge**

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF OCTOBER 2022**

**OLGA SEWE**

**JUDGE**