REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.83 OF 2015

NZUKI ISAAC MUVEKE.....APPELANT

VERSUS

FRANCIS NJOGU NJEHIA.....RESPONDENT

(An appeal from the judgment and decree of the Hon. Tom Mark Olando, RM Eldoret, delivered on the 22nd of July 2015 in Eldoret CMCC No. 253 of 2014).

JUDGMENT

1. The appellant **(NZUKI ISAAC MUVEKE)** had filed a claim against the respondent (**FRANCIS NJOGU NJEHIA)** seeking for general and special damages and loss of future earnings capacity.

2. The appellant's case is that on the 31st of October 2013, he was lawfully in motor vehicle Registration Number KBK 255B along the Eldoret-Nakuru Road when the respondent unlawfully, carelessly, negligently and or recklessly, drove motor vehicle Registration Number KBT 242T in such a way that it rammed into the Motor Vehicle that the appellant was in resulting in serious bodily injury, loss and damage to the appellant.

3. The respondent filed his memorandum of appearance on the 12th of May 2014 and statement of defence on the 20th of May 2014 denying the appellant's claim.

4. The matter proceeded to full hearing and on the 22nd of July 2015, the trial court delivered its judgment whereby the appellant herein was awarded **Kshs. 350,000/=** as general damages, **Kshs. 22,950/=** as special damages totaling to **Kshs 372,950/=**. The court also awarded costs and interest of the suit to the appellant.

5. By consent of parties, liability had been apportioned in the ratio of 80%:20% in favour of the appellant herein. Consequently, the learned magistrate discounted the total amount of **Kshs 372,950/=** by 20% contribution, leaving a net balance of **Kshs 298,360.**

6. Being dissatisfied with the trial court's judgment, the Appellant has filed the instant appeal challenging the damages given and the failure by court to grant loss of future earnings and loss of earning capacity. In particular, the appellant via his memorandum of appeal dated the 27th of July 2015 cites the following grounds of appeal;

> ***1. THAT the Learned trial Magistrate erred in law and fact in awarding damages which were inordinately low so as to amount to gross under-estimation of the loss suffered by the Appellant***
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> ***2. THAT the Learned trial Magistrate erred in law and in fact in failing consider and appreciate the Applicants claim and pleadings more particularly the Plaint and Submissions***
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> ***3. THAT the Learned trial Magistrate erred in law and fact in disregarding the Appellant's submissions and authorities as regards quantum***
>
> ***4. That the Learned trial magistrate erred in law and in fact in the exercise of discretion***
>
> ***5. THAT the Learned trial Magistrate erred in law and in fact in failing to award damages for loss of future earnings and loss of earning capacity against weight of evidence***
>
> ***6. THAT Learned trial Magistrate erred in law and in fact in failing re and/or record all the evidence and/or testimonies adduced in court thereby omitting important material which were necessary for determination of issues in question.***

7. When the matter came up for mention on directions on how the appeal will proceed, it was agreed that the appeal be canvassed by written submissions. And both the Appellant and Respondent have filed their respective submissions.

Appellant's Submissions

8. In his submissions dated the 16th of December 2019, the appellant submitted that court ought to interfere with the damages awarded by the trial court by substituting the amount of Kshs.298,360/= as awarded by the trial court, with Kshs. 1,000,000 as submitted by the appellant in the lower court.

9. The appellant also submitted that an appellate court should not interfere with the lower court assessment of damages unless the principles laid down are met and relied on the authority in ***Robert Msioki Kitari vs Coastal Bottlers Ltd 1985.*** In this regard, he submitted that the trial court did not take into account all relevant factors and that it did not apply the correct principles in assessment of damages in its judgement and as a result, this court should interfere with the damages given.

10. As regards grounds 1-3 as listed in the Memorandum of Appeal, the appellant submitted that the amount given by court was too low and relied on the case of ***Bashir Ahmed vs Uwair Ahmed Khan (1982-1988) and Joseph Kimanthi Nyau vs John Macharia Civil Appeal 198 of 2015*** to the effect that the amount awarded was too low considering the injuries suffered by the appellant and as such court should review the amount upwards.

11. The appellant further relied on a couple of cases including ***Abdi Haji Guleid vs Auto Selection (K) Limited & another 2015 eKLR and Joseph Musee Mua vs Julius Mbogo Mugi & 3 others 2013 eKLR*** where court awarded Kshs.925,757 and Kshs 1,300,000 for injuries suffered by the plaintiffs in those cases and argues that the amounts awarded by the lower court in this case, were inordinately low.

12. On the issue of the failure to award damages for future earnings and loss of earning capacity against weight of evidence, the appellant relied on the cases of ***Joel Motanya vs Swan Carriers Ltd 2015 eKLR, William J. Buttler vs Maura Kathleen Buttler 1984 eKLR, Kimatu Mbuvi vs Augustine Munyao Kioko 2001 eKLR and Wambua vs Patel 1986 KLR 336*** and submitted that the plaintiff at the time of trial was a driver earning Kshs.18,000/= but that the documents to support this claim were in the custody of the employer. However, he submitted that the court should have put into consideration in the fact that the appellant earned a living even though he did not have any documentation to prove the same and award him future earnings.

13. Finally, the appellant submitted that the amount awarded was not commensurate with the injuries suffered by the appellant and faulted the trial court for failing to take into account the evidence showing the extent of the appellant's injuries.

14. For these reasons, the appellant relied on the cases of ***Rosemary Wanjiru vs Elijah Macharia Githinji & another 2014 eKLR and Nancy Oseko vs Board of Governors Masai Girls High School 2011 eKLR*** and requested court to set aside the impugned judgement and assess damages at Kshs.3,000,000.

Respondent's Submission

15. In reply, learned counsel for the respondent submitted that the award of the trial court was in tandem with the injuries suffered and that a critical analysis of the principles governing the award of damages prove that the award of Kshs.350,000 was proper. Counsel therefore urged this court not to interfere with the award of damages that was given by the trial court arguing that the learned magistrate not only considered the submissions made by the appellant but also considered the evidence on record including that of Dr. Embenzi who stated that the appellant had healed well from the fractures sustained save for the occasional pains. He relied on the cases ***Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR and Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457***.

16. Counsel further submitted that in the case of ***Joseph Mutua Kinuthai v David Kamande Kinuthia HCC 621 of 1988,*** the court awarded Kshs 120,000/- as general damages in comparable injuries as those suffered by the appellant herein thus the award does not warrant interference by this court. Furthermore, the respondent submitted that the appellant was hospitalized for four days and within some months prior to hearing, had resume work as a driver as noted in the appellant's own testimony at trial. In this regard, the respondent noted that is indicative of the fact that the injuries sustained by the appellant had healed without residual effects and or permanent loss.

17. In addition, the respondent submitted that the authorities relied on by the appellant were very severe as compared to the injuries sustained by the appellant and therefore invited court to distinguish the two.

18. On the award of loss of future earnings, the respondent maintained that the same was not proved on a balance of probability and thus do not have any basis and was therefore properly dismissed due to failure to prove as a whole, the claim to future earnings to the requires standards.

19. Counsel consequently submitted that the court enters judgement in his favour and uphold the judgement and decree of trial court, dismiss the appellant's appeal and award costs to the respondent.

Analysis and Determination

20. An outstanding feature is that there seems to be lack of specificity in what the appellant seeks considering that in his submission, the appellant requests court at one point to substitute the amount of Kshs 298,360/= with Kshs. 1,000,000 and at a different point requests court to assess damages at Kshs. 3,000,000 and in his memorandum of appeal he requests court to assess the damages afresh.

21. Having said so, it is important to note that this being a first appeal, the court is obliged pursuant to **Section 78 of the Civil Procedure Act**, to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified.

22. This legal principal was pronounced in the case ***Francis Ndahebwa Twala vs Ben Nganyi, Siaya Civil Appeal No. 5 of 2017,*** where the court stated thus;

> ***"……. This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -***
>
> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

23. In the current appeal, the appellant is challenging the quantum of damages. The appellant's contention is that the damages awarded are inordinately low thus the court should review the same.

24. It must be pointed out that there is no uniformity at the moment in the general method of approach and award of general damages in Kenya. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards and there is need to establish standards of compensation that cut across comparable circumstances. It is therefore prudent that guidelines for the assessment of general damages in personal injury cases be developed by the Attorney General of the Republic of Kenya which will be a step forward in marking out target area and assisting practitioners and judges to decide, after all the evidence is heard, what is the right sum to award in a given case. England for example has established such guidelines that guide courts in awarding damages taking obviously into account the circumstances of each case. ***See David Kemp, Damages for Personal Injury and Death, Sweet & Maxwell, 7th Edition, 1999 at 142-147***.

25. As rightly noted by the learned judge in ***Angela Katunge Musau vs China Wu Yi Limited & another Civil Appeal 23 of 2018: -***

> ***"The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation."***

26. In this regard, it is trite law the award of damages is a discretionary exercise that can only be disturbed by an appellate court if it is established that the trial court misdirected itself, or took into consideration irrelevant facts or omitted to take into consideration facts which it ought to and as a result ended up in a wrong conclusion.

27. This principle was enumerated by the court of Appeal in ***Child Welfare Society of Kenya vs Republic, Ex-parte Child in Focus Kenya & AG & Others [2017] eKLR*** which cited with approval the decision in ***Mbogoh & Another vs Shah [1968] EA 93***, as follows: -

> ***"37. Sir Clement De Lestang V-P in Mbogoh & Another Vs Shah [1968] EA 93 stated thus:***
>
> ***"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

28. The court President, ***Sir Charles Newbold*** in the same case stated:

> ***"For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice."***

29. Subsequently, ***Madan JA (as he then was) in United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (K) Ltd (1985) eKLR*** developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members of the trial court. He thus stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following mattes are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

30. It is clear from the above caselaw that a figure reached by the trial court is not to be disturbed on appeal unless it is based on some erroneous principle that it is too low or so excessive that it must have been based on some incorrect reasoning. That is to say, an award of general damages must not be interfered with unless the trial judge acted on an erroneous principle, or the award is too low or so high as to amount to an entirely erroneous estimate. The onus is therefore on the appellant to show that the estimate is to tinged with errors as to make it incumbent on the appellate court to interfere. See ***Richard Kuloba, Measure of Damages for Bodily Injuries, Law Africa Publishing (K)***

Ltd, 2006 **at 25-28.**

31. It is on this premise that the court in ***Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 held that:***

> ***"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect."***

32. The question that arises therefore is whether the trial judge in awarding general damages at Kshs. 350,000, special damages at Kshs. 22,950 and failing to award loss of future earnings acted on wrong principles or misapprehended the facts or did for these or other reason made a wholly erroneous estimate of the damage suffered.

33. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in ***Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730*** where it was held that:

> ***"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."***

34. In the instant appeal, appraising the evidence before the trial court on quantum, the appellant who was the plaintiff testified as **PW1** and called one other witness to support his case on the injuries he sustained following the undisputed accident that occurred on the 31st of October 2013 on the Eldoret-Nakuru Highway.

35. The appellant testified on the 3rd of November 2014 that on the 31st of October 2013 that while driving, he was involved in an accident and sustained injuries to the chest, fractures on the right and left legs and back pain. The P3 form and report by Dr Magare-Gikenyi dated 6th April 2014 indicated that the appellant had a wedge fracture of the spine with tenderness around the lumbar region, the left lower limb was swollen on the distal 1/3, comminuted fracture distal 1/3 of the left tibia and fibula, bruises and laceration on various parts of the body with severe pain and blood loss in the affected areas. The Dr noted that the appellant was still walking in crutches with difficulty in walking, sitting or doing heavy duty. In a medical-legal report by Dr. Magare Gikenyi undated, he indicated that he examined the appellant on the 6th of April 2014 and noted that the appellant was in a fair state of health but classified the degree of injury as grievous harm noting that the appellant looked psychologically disturbed and needed follow up.

36. This was further confirmed by Dr. Joseph Embanzi who noted in the medical treatment summary dated the 16th of April 2014 that the appellant sustained serious injuries including wedge fracture of the spine at T12, tenderness around lumbar region and closed comminuted fracture distal 1/3 of left tibia and fibula.

However, on cross-examination, **PW2 Dr. Paul Kipkorir Rono,** who produced the report by Dr. Imbenzi, noted that the only injury in the discharge summary is the fracture of the distal tibia.

37. It is also clear from the evidence produced at trial that the appellant was hospitalized for four days having been admitted on the 31st of October 2013 and discharged on the 4th of November 2013 as noted by PW2 and also as recorded in the discharge summary form marked **PEXH-1.** The discharge summary form also indicate that an X-Ray was done and a splinting and P.O.P bone knee cast applied on the appellant which lasted for 5 months. A lumbar corset was also provided for the appellant which he used for 3 months.

38. Furthermore, Dr. Joseph Embenzi on the 16th of April 2014 via his medical treatment summary marked **PEXH-9** noted that the appellant had 2 reviews on the 17th of December 2013 and later on on the 4th of February 2014 which examination indicated that there was good healing. Dr. Embenzi finally noted that on the appellant's last review on the 18th of March 2014, it was confirmed that the fracture had UNITED and he only had residual left ankle pain for which analgesics were prescribed.

39. This is further confirmed by the report of **Dr. V.V Lodhia of Eldoret Hospital** dated the 12th of March 2015 noting that the appellant's left leg was normal and the back had normal movements with no neurological deficit. He further noted that the appellant's injuries had

healed well with slight post injury functional deficit and awarded a 5% permanent disability award.

40. Furthermore, Dr. V.V Lodhia indicated he was not presented with X-RAY films for his review despite the fact that the appellant during examination in chief alleged that he underwent X-Ray and the same was produced during evidence and marked PEXH 6(a)-(L). However, Dr. V.V Lodhia did an X-Ray on the 12th of March 2015 which indicated that the left distal leg was completely healed together with both tibia and fibula with only a slight mal-union.

41. From the above evidence, it is clear that the magistrate identified the injuries suffered by the appellant as contained in the medical report of Dr. Joseph Embenzi notably back pain with tenderness around regions, wedge fracture of the spine at T-12 level, injury to lower limb, tenderness in left leg with crepitus distal 1/3, commuted compound fractures distal 1/3 of the left tibia, fracture of the knee and trauma to the chest. It is also clear that the appellant had healed save for pain as documented in report by Dr. V.V Lodhia on the 12th of March 2015.

42. From the above evidence, the question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately high that it must be a wholly erroneous estimate of the damages, or that it was inordinately low.

43. In assessing appropriate damages, this court, like the trial court, takes cognizance of the fact that such an exercise is not a mathematical exercise and the court, in doing the best that it can, takes into account the nature and extent of the injuries sustained in relation to awards made by the court in similar cases.

44. In the instant appeal, the appellant was awarded **Kshs.350,000** as **general** damages for pain and suffering less the 20% contribution to give a figure of Kshs.298,360/=. I take cognizance of the fact that pain and suffering may refer to a lot of matters including discomfort, inconveniences, loss of taste and smell and so forth. Compensation therefore for pain and suffering is only concerned with the subjective feelings of a plaintiff and as such, a plaintiff who is permanently unconscious feels no pain or discomfort and it follows that he or she cannot not be awarded damages for pain and suffering. This should however be contrasted with a plaintiff who bears pain bravely. Such a person undergoes pain and receives damages under this head. The duration and intensity of the plaintiff's suffering justifies this head constituting a substantial element in the quantum to be awarded. ***See Richard Kuloba (Supra) at 10.***

45. Did the trial magistrate in awarding damages take into account the pain and suffering of the appellant by looking at comparable compensation in comparable injuries hence his reliance on the ***Joseph Mutua Kinuthia vs David Kmande Kinuthia HCCC No. 621 of 1998.***

46. For example, in ***Joseph Kimanthi Nyau vs John Macharia, Civil Appeal No. 198 of 2015***, the appellant sustained much serious injuries including head injury, fracture of the 1st and 2nd ribs and fracture of the clavicle bone. These injuries are much more than those suffered by the appellant in the present case. Similarly, in ***Abdi Haji Gulleid vs Auto Selection (K) Ltd & another 2015 eKLR***, the injuries suffered by the appellant were serious and grievous as compared to the current case. In that case, the appellant suffered serious and grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture of the back at L1 with a permanent and functional incapacity of 25%.

47. In ***Joseph Musee Mua vs Julius Mbogo Mugi & 3 others (supra)***, the injuries sustained by the appellant included injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow. Moreover, he underwent multiple surgeries and procedures and was hospitalized for more than 2 months. Furthermore, in ***Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & another (2014) eKLR***, the plaintiff sustained compression fracture of the T12 and L1 causing irreversible spinal cord damage at that level as a result of which she was completely paralyzed and would remain paralysed permanently and would never recover function. The injuries sustained by the appellant in this case are far much worse that those sustained by the appellant herein.

48. Finally, in ***Nancy Oseko vs Board of Governors Masai Girls High School 2011 eKLR***, the appellant suffered chest injury with accumulation of blood in the chest, head compression fracture of the thoracic spine no 12, loss of sensation from the level T-12 downwards, loss of motor function from same level downwards, loss of control of urine and stool**.** She also underwent an operation of the spine where metals were fixed to stabilize the spine, an open chest operation to remove blood; underwent physiotherapy, occupational therapy; ambulating her on a wheelchair. It was also established that the appellant had permanent loss of the ability to walk, to control stool and urine and the ability to engage in sexual life.

49. Admittedly the decisions cited by the appellant deal with far more serious injuries as compared to what he suffered. On the other hand, what decisions has the respondent sought to rely on?

In ***Joseph Mutua Kinuthai v David Kamande Kinuthia (supra),*** the plaintiff sustained compound fracture of right tibia and fibula, fracture of femur and midshift, fracture of left tibia and fibula bones and laceration wounds and the court awarded Kshs. 120,000/- in general damages. Clearly, this authority demonstrates injuries almost similar to those suffered by the appellant herein. Moreover, in ***Peter Kirumba Munyingi vs Wynack Enterprises*** **HCCC 26 of 2001** the court awarded damages of Kshs. 150,000 for similar injuries**.**

50. Furthermore, the Court of Appeal in ***Kenya Bus Services vs Samuel W Njoroge*** **(C. A 133 of 2001, Nairobi)** reduced the award of Kshs.1.2 million given by the High Court to Kshs.500,000/= for injuries to the right shoulder and hip and the right leg which was amputated below the knee, and where an artificial leg was given. These injuries were far more serious than the injuries in the case before this Court. **I however note that the respondent also cited decisions with far less severe and less extensive injuries and residual effects, with far more favourable prognosis**

51. I am minded of the views expressed in the case of **Gicheru V Morton and Another (2005) 2 KLR 333** where the Court stated:

> ***"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal 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 small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

I also take into consideration the sentiments by Madan (JA) (as he then was), in **UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page 579:**

> ***"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."***

52. In **MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986** (unreported) Madan, JA again, aptly observed that "an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award."

> ***"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."***

53. Therefore, keeping in mind that what guides the courts is not just limited to past decisions and nature of injuries, but the court also ought to have taken into consideration the residual effects which from Dr. Magare's report indicated that the appellant was psychologically disturbed. It is also not clear whether the court took into account the 5% disability ratio assessed in favour of the appellant. I think in considering comparable awards, a court must also be alive to the trends and economic trends such as the dwindling value of the Kenyan shilling. I refer to what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar [1998] eKLR** that:

> ***"The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions."***

In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy, although the court should avoid astronomical awards while at the same time strive to ensure that the final award makes sense and fairly compensates the claimant (**see Kigaraari v Aya [1982-88] 1 KAR 768, Ugenya Bus Service v Gachoki [1982] eKLR and Jabane v Olenja [1986] KLR 661**).

I am persuaded that if the trial court had taken into account these factors, then the sum awarded as damages would have been significantly higher.

Lest I begin to appear as though I am plucking figures from the abacus, I refer to **Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR** where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right led and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages.

b) **Pauline Gesare Onami v Samuel Changamure & Another (2017) eKLR** where the plaintiff suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft and the court upheld the trial court's award of Kshs. 600,000.

Guided by all these factors, I find that relevant factors were not considered and the damages awarded in the sum of Kshs 350, 000 less the 20% contribution which resulted in a total sum of Kshs Kshs. 298,360/- as general damages was inordinately low as to warrant interfering with the same. Consequently, I find that the general damages of Kshs. Kshs. 298,360/= awarded by the trial court warrants being set aside and substituted with a sum of Kshs. 500,000/.

54. As regards award of damages for future earnings and loss of earning capacity, the appellant submitted that the learned magistrate erred by not conserving the fact that the appellant earned a living despite lack of documentary evidence to substantiate the same.

55. It is important to note that loss of earning and future earnings are two separate and distinct concepts. This distinction between loss of earning capacity and loss of future earnings was brought out in the case of ***SJ vs. Francesco Di Nello & Another [2015] eKLR*** where the Court of Appeal stated as follows:

> ***"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 as follows:***

> ***"It is important to realize that there is a difference between an award for loss of earnings 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."***

56. Loss of earning capacity is therefore compensable. The same must however be specifically pleaded and strictly proved as was held by court in ***Joel Motanya vs Swan Carriers Limited (2015) eKRL***.

The Court of Appeal in ***William J Butler v Maura Kathleen Butler [1984] eKLR*** noted that: -

> ***"A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in Ashcroft v Curtin [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction."***

57. As such, earnings already lost by the time of trial and prospective loss of earnings are included. Consequently, loss of earning capacity can be classified both as special damages that is past loss and general damage, that is prospective loss even though there would appear to be no substantive difference between the two, the dividing line depending purely on the accident of the time that the case comes on for hearing. ***See Harvey McGregor, McGregor on Damages, 16th Edition, Sweet & Maxwell Limited, 1997 at 1020***.

58. Courts have evolved a particular method for assessing loss of earning capacity. As ***McGregor (Supra)*** notes, '***This amount is calculated by taking the figure of the plaintiff's present annual earnings less the amount, if any, which he or she can now earn annually and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years***.'

59. In the instant case, the appellant admits that there was no evidence adduced to prove that indeed he was earning Kshs. 18,000 as a driver. The reason being that the documents proving the same was in the custody of the appellant's employer at the time. The respondent does not dispute that the appellant was a driver but notes that the driver did not provide any supporting evidence that he was earning Kshs.18,000 per month prior to the accident.

60. The trial court pointed out that a report by Dr. Embenzi wherein he concluded that the appellant had healed save for occasional pain which can be managed by analgesics. Furthermore, as held in Douglas ***Kalafa Ombeva v David Ngama [2013] eKLR***: -

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

61. In the instant appeal and as indicated above, the appellant did not prove that as a result of the injuries sustained, he was exposed to either losing his job in the future or that in case he had lost his job, his chances of getting an alternative job in the labour market were slim. Indeed, there was no evidence presented that the chances of gaining employment in the future were diminished as a result of the injuries sustained and I cannot fault the trial court's findings on this limb.

The upshot is that the appellant appeal succeeds in part. Each party shall bear its own costs.

VIRTUALLY- DELIVERED AND DATED THIS 25TH MAY 2021 AT ELDORET

H. A. OMONDI

<u>JUDGE</u>