REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 272 OF 2017

CHINA SICHUAN INTERNATIONAL

COMPANY LIMITED.....APPELLANT

VERSUS

FELIX OUMA ODHIAMBO.....RESPONDENT

(Being an appeal against the Judgment and Decree of Hon.E.K. Usui

Principal Magistrate delivered on 5th May 2017 in Milimani CMCC No. 1270 of 2014)

JUDGMENT

The respondent was involved in an industrial accident on 31st October, 2013 while working for the appellant as a mason. He filed Civil Suit number 1270 of 2014 before the Chief Magistrate's Court, Milimani Commercial Courts. In its judgment delivered on 5th May, 2017, the trial court awarded the respondent Kshs.1,600,000 as general damages for pain and suffering and Kshs.4,680,000 for loss of earning. The appellant was held 100% liable. The appellant preferred this appeal on the following grounds:-

> **1. THAT the learned Trial Magistrate erred in law and fact in awarding an all inclusive figure of Kshs. 6, 280,000/- as damages which is manifestly excessive and not commensurate with the injuries as suffered.**
>
> **2. THAT the learned Trial Magistrate erred in law and fact in awarding Kshs. 4,680,000 under the head of lost earning that was manifestly excessive and inconsistence with the injuries suffered.**
>
> **3. THAT the learned Trial Magistrate erred in law and fact in its determination on the issue of liability, totally failed to take into account the defendant submissions and arrived at a wrong decision.**

Mr. Omangi appeared for the appellant. Counsel filed written submissions dated 21st January, 2021 and supplementary submissions dated 1st March, 2021. Mr. Kotonya appeared for the respondent and filled Written submissions dated 17th February, 2021.

On the issue of liability, counsel for the appellant submit that the trial court erred by holding the appellant 100%. The respondent's witness statement indicate that he was not aware who disturbed a wooden plank which fell from the upper floor of the building he was working in and hit his hand. There is material contradiction on how the accident occurred. The respondent in his witness statement state that the wood plank hit a stand and bounced back hitting him but in his evidence he stated that the wood plank hit the grill and then hit him in the shoulder. It is also not clear how the respondent was hit by a wooden plank which fell from above yet he was inside the second floor.

According to counsel for the appellant, there was no breach of employer's duty of care on the part of the appellant. There was no breach of any statutory duty by the appellant. Counsel referred to the case of **PURITY WAMBUI MURIITHI –V- HIGHLANDS MINERAL WATER CO. LTD (2015)eKLR** where the Court of appeal sitting in Nyeri stated:-

> **"Section 6(1) of the Occupational Safety and Health Act provides:-**
>
> **"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."**
>
> **It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where**

an accident happens due to the employees own negligence it would be unfair to hold the employer liable.

Further Section 13(1)(a) of the Occupational Safety and Health Act provides:-

"13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

With regard to quantum, it is submitted that the award is manifestly high. According to two medical reports by Dr. Wokabi and Dr Maina Ruga, the respondent suffered a fracture of the humerus with nerve injury. According to Dr Wokabi, the respondent suffered 80% disability while Dr Maina Ruga assessed disability at 50%. Counsel relies on the case of **JUDY NGOCHI –V- KAMAKIA ELESELELO LEDAMOI (2019) eKLR** where the Court of Appeal referred to the case of **SOUTHERN ENGINEERING COMPANY LTD. –V- MUSINGI MUTIA (1985) KLR, 730** where it was held:-

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 to 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 essential a matter of opinion judgment 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 an 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 inevitably 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 the 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, 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 any comparison between the awards in the respective cases can fairly or profitably be 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 a 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."

Mr. Omanga further referred to the case of **DENNIS NYAMENO OPONDA –V- ANWARALI & BROTHERS LIMITED & ANOTHER (2015) eKLR.** In that case, the claimant suffered fractured left clavicle, fractured right humerus, unstable multiple fractures of the pelvic bones, lacerated scalp wounds, right radial nerve injury leading to a right wrist drop and muscle wasting, blunt chest wall injury and urethral structures complicating pelvic fracture and prolonged catheterization. An award of Kshs.1,8000,000 was made in 2015.

It is further submitted that the award of Kshs.4,680,000 under the head of lost earning was erroneous as it was neither pleaded nor proved. There is a distinction between loss of earning capacity and loss of future earnings. Counsel referred to the case of **SJ –V- FRANCESCO DINELLO & ANOTHER (2015)** eKLR where the Court of Appeal 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.

Mr. Omangi contend that the respondent sought compensation of Kshs.6,300,000 for loss of earnings. What was pleaded was loss of earnings as a special damages. It is trite law that special damages must not only be proved but specifically proved. Counsel referred the court to the case of **JOHN KIPKEMBOI & ANOTHER –V- MORRIS KEDOLO (2019) eKLR** where the court stated:-

"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."

Mr. Omangi further cited the case of **PIONEER PLUMBERS LIMITED –V- JACOB NYONGESA MUGHULA (2018)eKLR** where the

court stated as follows:-

> **"In the instant case, the respondent suffered both physical and mental impairment. It was shown that he would not be able to resume his previous duties as a plumber/welder. In assessing the appropriate award for loss of or diminished earning capacity the established principle was set out by the Court of Appeal in *James Mukatui Mavia v M. A. Bayusuf & Sons Limited* Civil Appeal No. 238 of 2004 as follows:-**
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> ***The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he 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, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065).'***

According to the appellant, there is no basis for the trial court's conclusion that the respondent will not be able to engage in work. He may not be able to resume his old duties but can do other type of work. It is submitted that the respondent suffered diminished capacity to earn as opposed to loss of ability to earn. The respondent was injured on the left hand. He confirmed that he is right handed and is therefore not 100% incapacitated.

Mr. Kotonya opposed the appeal. Counsel submitted that the respondent was earning Kshs.15,000 monthly. While at his place of work on 31st October, 2013, the respondent was injured on his left hand by falling piece of timber. The respondent confirmed that he was a trained mason. The case was based on negligence. The appellant owed a duty of care to its employees. That duty was breached when the respondent was exposed to the risk of injury. The appellant admit that the respondent was its employee and that the accident did occur. The appellant did not call any evidence and the circumstances of the case are as per the undisputed evidence of the respondent. The appellant was negligent in failing to secure the construction site so as to avoid any injuries such as the ones suffered by the respondent. Counsel maintain that the trial court correctly found the appellant liable.

On the issue of quantum, Mr. Kotonya urge that the awarded is justified given the circumstances of the case. The respondent suffered a fracture of the let humerus and traumatic injury to the left brachial plexus nerve bundle leading to total paralysis of the left arm. The entire limb is paralysed and there is dislocation of the left shoulder. Counsel referred to the case of **LOISE NJERI KARIUKI –V- BENDRICON KWAMBOKA & SAWERL GIKERA KARINGO (2013) eKLR** where the plaintiff suffered compound fractures of the fifth humerus and fractures on the right upper limb. Kshs.1,500,000 was awarded for pain and suffering.

Mr. Kotonya contend that the award of Kshs.4,680,000 is proper. At the time of the accident, the respondent had 36 years before retirement. The respondent pleaded for Kshs.6,480,000 being earnings for 36 years at the rate of Kshs.15,000 per month. The trial court considered the respondent's active earning period to be 26 years. Dr. Wokabi in his medical report confirmed that the respondent sustained a major irreversible damage with 80% incapacity. Counsel referred to the case of **MUMIAS SUGAR COMPANY LIMITED –V- FRANCIS WANALO (2007) eKLR** where the court referred to the case of **MOELIKER –V- REYROLLE & COMPANY LTD (1977) 1 WLR 132** where it was stated:-

> **"This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial".**

This is a first appeal. The court has to evaluate the evidence adduced before the trial court afresh before drawing its own conclusion. Only the respondent testified. He informed the court that he is a mason. On 31st October, 2013 he was at his place of work on the 2nd floor of a building when a wooden plank fell from the 9th floor, hit the grill and hit him on the left shoulder. He was making a window partition. He fell down and was taken to Kenyatta National Hospital where he was admitted for two weeks. He suffered a fractured hand. He was earning Kshs.15,000 monthly. At that time he was 24 years old. He cannot work effectively any more. He pleaded for damages including loss of future earnings. He still had metal implants in the injured hand. He was a trained mason. At the time of the accident he had a helmet, gumboots and overall.

The appellant closed its case without calling any witnesses.

The appeal raises two issues namely:-

a) Liability

b) Quantum

On the issue of liability, the appellant contend that the respondent did not prove his case to the required standard. The respondent testified that he was working inside the 2nd floor of a building when he was hit by a wood plank which fell from above. It is therefore not clear how the respondent was injured. On his part, counsel for the respondent maintain that the plaintiff 's evidence is not controverted by any defence evidence.

The trial court in its judgment made the following finding:-

> **"The plaintiff's evidence is that he was injured by an object that fell from above him. This evidence is confirmed by the details supplied by the defendant in the DOSHI Form. From the circumstances of the accident, it is clear that the defendant did not secure the construction site in a manner that protected and/or safeguarded its employees against injury thus its employees were exposed to risk of injury. The work environment was unsafe. In the decided case PAUL GAKUNU MWINGA-V- NKR [2009] eKLR the court held that under both the common law and statute an employer is obligated to provide its employee with a safe system of work and safety appliances. In this case I find the defendant was in breach of 10 both statutory law and common law. I am not satisfied that the plaintiff contributed to the accident in any way and find he has established liability against the defendant fully.**

The evidence on record does prove that the respondent was employed by the appellant. Although the statement of defence dated 9th April, 2014 states that the respondent was not the appellant's employee, the uncontroverted evidence of the respondent does confirm that there did exist an employee/employer relationship.

The respondent's evidence is that he was inside the building. A wood plank fell from the 9th floor, hit the grill and then hit his left shoulder. He fell down and was taken to Kenyatta National Hospital. That is how the respondent suffered his injuries. The question then is, given that set of facts, can the respondent be held to have either caused or contributed to the occurrence of the accident? Can the appellant be blamed from the occurrence of the accident? Can it be held that the accident was caused by an act of God and no one is to blame for its occurrence? During cross-examination of the respondent, there was a suggestion that the wood plank could have been blown by the wind.

The facts of the case are that the respondent was injured at his place of work. He was inside the 2nd floor. He was injured when a wood plank fell from above. It does not matter if the wood plank was blown by the wind or was disturbed by a fellow worker. The respondent is entirely not to blame for the occurrence of the accident. The wood plank hit a grill on the window and it is the same wood plank which hit the respondent. This was an accident and the respondent cannot be expected to know what caused the wood plank to fall. The accident occurred at a construction site and it is only logical to conclude that the wood plank was part of the materials at the construction site.

It is true that the mere occurrence of an accident does not automatically make an employer liable. However, an employer has the duty of ensuring that the working environment is quite conducive and does not expose any employee to the risk of injury. Any accident which occurs during the course of employment and which cannot be attributed to the employee's own negligence will normally call into question the employer's working environment. I do find that the appellant is entirely to blame for the occurrence of the accident. The appellant ought to have ensured that all the lose wood planks were properly secured. I am in agreement with the findings of the trial court on liability.

The next issue is the award of Kshs 4,680,000 under the head of lost earning. It is submitted that the award is excessive and inconsistent with the injuries. Counsel for the appellant stressed the point that the computation for the award under lost earnings was erroneous. A global figure ought to have been pleaded as opposed to computation based on the respondent's salary.

The record shows that the original plaint dated 14th March, 2014 just pleaded for general damages and Kshs.2,600 as special damages. The plaint was amended on 15th December, 2014. A sum of Kshs.6,300,000 was awarded for loss of earnings. The amount claimed as special damages changed to Kshs.6,382,600 and this amount include a claim of 80,000 for removal of implant.

The appellant's main contention is that the respondent did not suffer 100% incapacity. What ought to have been awarded was loss of earning and not loss of future earnings. Mr. Omangi reiterated that what was pleaded was loss of earnings as a special damage while testifying, the respondent stated as follows:

> **"I was earning 15,000 per month. I was 24 years old at time of injury. I depended on masonry for my livelihood. I can not work effectively anymore. <u>I ask for loss of future earnings</u>. I also ask for compensation as per the plaint. I still have the metal plate in my hand**.(emphasis added)
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> **My discharge summary – exhibit (2)**
>
> **Dosh Form – exhibit (3)**

The plaint pleaded for loss of earning. The respondent testified that he was seeking compensation for loss of future earnings. The respondent was earning Kshs.15,000 monthly. There is a difference between loss of future earnings or income and loss of earning capacity. The latter simply implies that the claimant's capacity to earn has been reduced and therefore will not be able to earn what was being earned before the accident. In relation to an unemployed person, there is a reduction of the earning capacity of what could be earned before the accident. Therefore, it does not matter whether one is employed or not for damages for loss of earning capacity to be awarded. On the other hand, loss of future earnings entails the inability to earn again.

This issue has been explained in several cases. In the case of **NZUKI ISAAC MUVEKE –V- FRANCIS NJOGU NJEHIA (2021) eKLR** Justice Hellen Omondi (as she then was) observed as follows:-

> **"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."

There is the contention that loss of earning capacity is usually awarded as a global figure. The case of **BUTLER –V- BUTLER (1984) eKLR** seems to shed some light on this matter. The main judgment of Kneller J.A. observed as follows:-

"He then dealt with her loss of earning capacity which he made a separate head in his calculations. He found that after the accident in which her husband died, she would have had to start looking for work to support herself and her daughter but with her injuries, she would never be able to find a suitable job. She was a Kenyan citizen and a partly trained nurse and if she had been employed, she might have earned something like Kshs 6,000 a month as a secretary or in some administrative position in a local hospital. So he took Kshs 60,000 a year and multiplied it by 10, and said he would have awarded her Kshs 600,000 as damages for loss of earning capacity… Mr Guram, for the appellant, said the learned judge erred in law in making it a separate head, when it should have been just part of the general damages. The judge, he continued, calculated it on the basis of the salary she might have earned as a secretary or as an administrator, less a sum for the changes and chances of this fleeting world, and multiplied it by 10, when he should have plucked some appropriate figure from the air." (emphasis added)

Kneller Judge further held as follows:-

"The question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible, but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judge must do the best he can. The respondent has incurred Kshs 25,527.50 in further medical expenses since the end of May, 1983, according to invoices which were produced, by consent on her behalf, under rule 29 Court of Appeal Rules. In my opinion, the judge approached this head of damages with the right principles in mind. His conclusions are supported by the evidence. Standing back and looking at his award, in the circumstances, it was the right one. The result is that I would dismiss this appeal with costs but order that the interest be recalculated. Chesoni Ag JA and Nyarangi Ag JA agree and these now become the orders of the court." (emphasis added)

In the same case (Butler V Butler) Chesoni J observed as follows:-

"Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* [1973] 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering including loss of earning capacity, Kenya Pounds 44,000, a figure, in view of the result of the injuries suffered in this case, I would not consider too excessive as to justify this court's interference. What a victim whose earning capacity is diminished through an accident loses is an interest which, if not saleable on the labour market, has an assessable value. It is, therefore, an economic loss of the same class as the "lost years", for which the wrongdoer should fairly compensate the victim. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite heading of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if the damages are payable?

On his part, Nyarangi JA stated as follows:

"The trial judge held, on the evidence available, that the respondent's visible occupation would have been to work as a secretary and that she could expect a net figure of Pounds 3,000 per annum. The trial judge was here doing his best, to assess in monetary terms, the loss of earning capacity. It was immaterial that the respondent had not been in salaried or similar employment. This type of claim could, as Kneller JA says, be a claim on its own and the figure need not be plucked from the air, because the plaintiff would be expected to furnish the material on which a reasonable figure could be based. The figure of Kshs 800,000 must be the result of a mathematical calculation, using such relevant factors as the respondent's age and secretarial qualifications and the nature of her injuries. It appears that for once, arithmetic succeeded to provide the answer demanded by common sense: See *Daniel v Jones* [1961] 1 WLR 1103 and *Ashcroft v Curtin* [1971] 1 WLR 1731. The trial judge approached the aspect of the claim correctly and it has not been demonstrated that the award should be interfered with: *Butt v Khan* Civil Appeal No 40 of 1977 and *H West & Son v Shephard* [1963] 2 All ER 625 at page 635. (emphasis added)

Similarly, in the case of **SJ –V- FRANCESCO DI NELLO & ANOTHER (2015)eKLR**, the Court of Appeal made the following observation:

"There can be no doubt that the appellant sustained such injuries as to reduce, to the extent of 100% his earning capacity. That was clear from his doctor's report. What remains then is the issue of assessing the amount of damages to be awarded.

As already evidenced in the case of CECILIA MWANGI (supra) once a case is found proved on a balance of probability, which we find was proved in the case before the trial court. <u>The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to suggest any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market</u> – see Brown L.J's judgment in the case of MOELIKER V REUROLL & CO. LTD [1977] IWLR 132.(emphasis added)

In our present case the appellant was only 15 years old when the accident that rendered him 100% paraplegic happened. He lost his power to establish a family of his own. He lost his competitive edge in the work place. And lost the employment of a full limped life, and no doubt diminished his capacity to earn. He is entitled to general damages as pleaded in his further re-amended plaint and proved in his oral evidence and the medical evidence of PW2. Doing the best we can with the evidence on record and in the circumstances of this case, we would assess general damages for loss of earning capacity at a sum of Kshs.1,500,000/-."

The respondent was examined by two medical doctors. The first report by Dr. S.K. Ndegwa dated 10th March 2014 describes the injuries as:

- Fracture of the left humerus

- Traumatic injury to the left brachial plexus nerve bundle leading to a total paralysis of the left upper limb.

The second medical report by Dr. Maina Ruga dated 12th June 2014 describes the injuries as Fracture of left humerus with nerve injury. The doctor made the following observations:-

"He has an arm sling to support the left arm. The arm has weakness and he cannot do any work using the arm. . . this is likely due to the nerve injury. I would assess his level of permanent incapacity at 50% (fifty percent)"

Dr. Ndegwa had recommended a second medical examination. There is reference to a medical report by Dr. Wokabi dated 27th October 2014 that was provide by consent. The judgment notes that Dr. Wokabi assessed permanent incapacity at 80%. The report by Dr. W.M. Wokabi makes the following observations:-

<u>Present condition:</u>

Today he had complaints that:-

i. He has paralysis of the entire left upper limb. He cannot do any form of work with this limb.

Examination revealed the all the left upper limb muscles are wasted. The entire limb is also paralysed from shoulder down. The shoulder joint is also dislocated due to the muscle paralysis. There is a surgical scar on the left arm.

<u>OPINION</u>

He sustained a major injury on the left upper limb that caused a fracture of the left humerus.

With the internal fixation of this fracture with a metal plate the fracture united. He also sustained major irreversible damage of the network of nerves that supply the limb. The paralysis he has will never recover. This paralysis will confer permanent disability of 80% (eighty percent). He will never be gainfully employed in a manual capacity. Considering that the upper limb is completely paralysed. There will be no merit to remove the metal plate.

Before the trial court Mr. Omangi appeared for the appellant. His submissions dated 13th September 2016 partly reads as follows:-

"The alleged loss of earnings are not specific whether they are future of present. This leaves the court to speculation and which we submit is not the duty of the court.

However, should Your Honour consider the pleadings reflective of special damages, then we consider your discretion to note the nature of job the plaintiff was doing as prone to risks. The plaintiff was being paid Kshs. 500/- per day. He would work for six days with an exception of Sunday. This will give 24 days per month at Kshs. 12,000/- per month.

He testified that he was 24 years old as at the time of the accident. Owing to the preponderance of life a multiplier of 25 years will suffice. Considering that the latest re-examination was done by Dr. Maina Ruga, he gave disability at 50%. This will give: -

50/100 x 25 x 12 x 12,000 Kshs. 1,800,000/= and which we recommend.

However, the pleadings are not specific whether this is a special damage which should be strictly proved. We leave it to your discretion. As this was unexpected, we urge you to find the plaintiff contributed

30% for not being watchful. This being a construction site, he had a duty to take care of won self from such unforeseen incidents."

From the decision in Butler V Butler (supra) and **S.J. –V- FRANCESCO DI NELLO & ANOTHER** (supra), it is established that even when the court is awarding damages for loss of earning capacity, reference can be made to the claimant's age, his current earnings and earning capacity if not employed and the period the income earning capacity will be suffered. In the Butler case the claimant was expected to earn Kshs.6,000 monthly, Justice Porter awarded her Kshs.60,000 yearly which means he did not take a full twelve (12) months income. That amount was multiplied by 10 years making an award for loss of earning capacity of Kshs.600,000. One of the grounds of appeal was that the calculations were made on the basis of salary which the claimant might have earned but a global figure ought to have been awarded. The three judges of the Court of Appeal found no fault in how Porter J had computed the damages for loss of earning capacity and dismissed the appeal.

The respondent was working as a Mason. The court takes judicial notice of the fact that Masons work effectively when they use both hands. The medical evidence does prove that the respondent could not continue his duty as a mason. He was a duly trained mason. The latest medical report by Dr. Wokabi was done almost one year after the accident. The doctor opines that the respondent will never be gainfully employed in a manual capacity as the left limb is permanently paralysed. The question will be what other alternative employment would the respondent be able to do? I am satisfied that given his nature of work, the respondent cannot be engaged in the same work as a mason. It will also need some extra effort for him to convince an employer to take him as a supervisor. The respondent pleaded for loss of income. This cannot be interpreted to mean loss of earning capacity. He was 24 years old. Counsel for the appellant proposed a multiplier of 25 years before the trial court. The trial court adopted a multiplier of 26 years which I find to be reasonable. The judgment indicate that the award of Kshs.4,680,000 was for loss of earnings. The appellant had employed the respondent. The monthly salary of Kshs. 15,000 is not disputed although there was the submissions before the trial court that the respondent used to earn Kshs.500 daily. In my view, the appellant could have disproved the respondent's evidence that he was earning Kshs.15,000 monthly by providing the payroll for its staff or even payment vouchers. I am satisfied that the respondent use to earn Kshs.15,000 monthly.

Given the circumstances of the case, I do find that the respondent is entitled to damages for loss of future earnings as opposed to damages for loss of earning capacity. I do equally find that the award of Kshs.4,680,000 awarded by the trial court for loss of earnings is not excessive. The presumption is that the respondent's income would have remained static for the entire period of 26 years. I do take into account the fact that the payment is being made as a lump-sum in advance. There is the possibility that the respondent would have lost his employment or that he would have improved his skills and become a building contractor. All these preponderances are possible.

The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY, 2021.

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S. CHITEMBWE

JUDGE