REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 71 OF 2019

SHREEJI ENTERPRISES LIMITED..APPELLANT

VERSUS

JOHN MUNGAI CHAI...RESPONDENT

(Being an Appeal from the Ruling delivered by Hon. N. C. Adalo (SRM)

in Mariakani PMCC No. 174 of 2017 on the 30th day of July 2019)

Coram: Hon. Justice R. Nyakundi

Kittony Maina Karanja Advocate for the appellants

J. N. Matara Advocate for the respondents

JUDGMENT

They appeal before me is against the trial Court's award for diminished earning capacity and Ruling on the appellant/defendant's notice of motion application before the trial Court dated 23.05.2019. The appellant aggrieved with the Ruling delivered on 30.06.2019 filed their memorandum of appeal dated 23.09.2019. The appeal raised four grounds of appeal are that:

> ***1). The Learned Magistrate erred both in Law and fact by dismissing the defendant's/appellant's notice of motion application for review dated 23.05.2019.***
>
> ***2). The Learned Magistrate erred both in Law and fact by failing to review part of her Judgment delivered on 16.04.2019.***
>
> ***3). The Learned Magistrate erred in Law and in fact by failing to consider the defendant/appellant's written submissions on the notice of motion application dated 23.05.2019 which provided sufficient reasons in Law and fact that merited a Review to lower the award of General Damages on diminished earning capacity in her Judgment dated 16.02.2019.***
>
> ***4). The Learned Magistrate erred in Law and fact by failing to consider the authorities relied on by the appellant in his submissions and sections of the statute therein cited.***

Wherefore, they prayed that the Ruling delivered on 30.06.2019 be set aside and the excessive general damages of Kshs.2,568,000.00/= for diminished earning capacity awarded to the plaintiff be reduced which is the gist of this appeal.

The duty of an appellate Court is well set out in the case of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & another C.A. No. 345 of 2000** where the Court held:

> ***"As a first appellate Court we are not bound by the findings of fact made by the superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P. stated in Peters v Sunday Post Ltd. {1958} EA 424, at 429:***
>
> ***"It is a strong thing for an appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness."***

***This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.* (See Ephantus Mwangi & Another v Wambugu {1983} 2 KCA 100:) or in accordance with the principles and guidelines.**

Further in **Robert Nsioki Kitavi v Coastal Bottlers Ltd {1982} – 198 IKAR 891 – 895**:

> ***"The appellate Court will only interfere with a trial Judge's assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate."***

At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. **(See Selle & Another v Associated Motor Boat Company Ltd & Others {1968} EA 123).**

Brief facts of the case

The respondent filed suit against the appellant vide plaint dated the 11.04.2017 and later an amended plaint dated 11.06.2018 for general and special damages and costs of the suit and interest thereof arising from a road traffic accident which was alleged to have occurred on or about the 10.09.2016 at around 9.00 am, while he was lawfully driving motor vehicle registration number KAQ 491U, a canter, along Mombasa-Nairobi Road when upon reaching Uwanja Wa Ndege Area, motor vehicle registration number KBV 780Z, a Volvo ZD 0237 Trailer was so negligently, carelessly and or recklessly driven along the said road by the appellant's driver that it collided head-on with motor vehicle KAQ 491U, a canter, as a result of which the respondent sustained serious bodily injuries and suffered pain, loss and damages. The plaintiff particularized his injuries as:

(a). Compound comminuted, segmented and displaced fractures of the right tibia.

(b). Compound, comminuted, segmented and displaced fractures of the right fibula.

(c). Segmented and displaced fractures of the right femur.

(d). Displaced fracture of the left distal tibia

(e). Displaced fracture of the left distal fibula.

(f). Deep cut wounds on both legs.

(g). Blunt injury to the chest.

The appellant filed a defence and the case proceeded to trial. The findings in the medical report prepared by **Dr. S. K. Ndegwa** assessed the degree of permanent disability at 28% and **Dr. Udayan Sheth** had however examined the plaintiff had opinioned that the degree of disability was 18%. At trial both parties recorded a consent on liability on 16.01.2019 at 15% against the plaintiff/respondent and 85% against the defendant/appellant.

The Learned trial Magistrate delivered Judgment on 16.04.2019 awarding:

1. General damages for pain and suffering	**Kshs.2,000,000.00**
2. Less 15% liability	**Kshs. 300,000.00**
3. Damages for loss of earnings	**Kshs. 256,800.00**
4. General damages for diminished earning	
Capacity	**Kshs.2,568,000.00**
5. Less 15% Liability	**Kshs. 385,200.00**
6. Special damages	**Kshs. 36,723.00**
TOTAL	**Kshs.4,176,323.00**

The trial Court also awarded costs of the suit and interest at Court rates from the date of Judgment until payment in full. The appellant filed a notice of motion application under certificate of urgency dated 23.05.2019 before the trial Court seeking the following orders:

1. …. Spent

2. That the Honourable Court hear and determine this matter in the first instance and service of the application be dispense with.

3. That the Court be pleased to stay execution of the Judgment of the Hon. N. C. Adalo made on 16th April 2019 pending the hearing and determination of this application.

4. That the order awarding the plaintiff/decree holder general damages for loss of diminished earning capacity be reviewed and set aside.

5. That the Court do make a decision of the level of permanent disability it estimates the plaintiff suffered to enable it make a proper award on general damages for diminished earning capacity.

6. That the costs of this application be provided for.

7. That such further and other relief be granted to the defendant/judgment debtor as this Court deems fit and expedient in the circumstances.

The grounds of the application were that; the Learned Magistrate erred in dismissing the appellant's application for review dated 23.05.2019, awarded general damages for diminished earning capacity before apportionment of liability which is an incomplete method of awarding general damages under the multiplier approach, trial Court failed to pronounce herself and decide an estimated level of permanent disability which should have informed her decision in awarding general damages for diminished earning capacity despite parties having filed submissions on the same and finally that the award was inordinately high and as such should be reduced.

The appellant's submissions

Counsel for the appellant, **Kittony Maina Karanja**, in their submissions dated 17.02.2020, submitted that this Court should set aside the Learned Magistrate's Ruling on the application for review as there was an arithmetical error in the Court's calculation for its award of general damages for diminished earning capacity. They submitted that in a case where the Court exercises its judicial discretion in making an award that is based on a mistake or error on the face of the record then the said judicial discretion is excessive injudiciously and on a whim. Counsel submitted that the failure of the trial Court to review its Judgment is unjustified as the Court did not correct the miscalculation of the award for general damages for diminished earning capacity an error apparent on the face of the record as such the Court should set aside the trial Court's Ruling on the aforesaid notice of motion application.

On the issue of what the general damages for diminished earning capacity should be, counsel submitted that the trial Court had failed to follow the principles set out in the Court of Appeal's decision in **Butler v Butler {1984} KLR 225** they set out factors such as age, and qualifications of the claimant, his remaining length of working life, his disabilities and previous service if any. They submitted that the trial Court failed to take into account the disabilities of the plaintiff before making its award as it awarded Kshs.2,568,000.00 which amount is inordinately high under the circumstances. They submitted that the trial Court in using the multiplier approach was ascertaining the real financial loss that the plaintiff had suffered or was likely to suffer as a result of disability, in doing so the Learned trial Magistrate awarded damages at 100% which is equal to a person who has become a quadriplegic or one who has no functions of his limbs whereas the plaintiff in this case has full function of his arms and a sound mind.

Counsel submitted that whereas the trial Court took into account the plaintiff's age and remaining length of work life and justified the same it failed to take into consideration the plaintiff's disabilities and did not justify or at least provide a reason for why it did not take into account the expert witness findings on the level of permanent incapacity or disability which is one of the factors to be considered before an award of general damages for diminished earning capacity is made hence a mistake or error on the face of the record. Appellant proposes a lower figure of Kshs.1,848,960 (72% x 21400 x 12 x10), 72% being the residual ability left once you subtract the estimated percentage disability given by **Dr. Udayan Sheth** to give the plaintiff's earning power within the reminder of the 10 years the trial Court estimated he would earn before retirement. Counsel argues that the current award deems the respondent has lost all earning capacity and cannot find an equal paying job yet the plaintiff testified that he is a German language interpreter or translator for which he can be remunerated equally or better.

They relied on the cases **of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another {1982-88} 1KAR 777, Butler v Butler {1984} KLR 225 and Mumias Sugar Company Limited v Francis Wanalo {2007}** for these submissions.

The respondent's submissions

The respondent through their advocate on record **J. N. Matara & Company Advocates** in their submissions dated 12.05.2020, submitted that the order of review sought by the appellant is provided for under Section 45 of the Civil Procedure Rules Chapter 21 Laws of Kenya and they are set out as:

1. There must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree or order was made.

2. There was a mistake or error apparent on the face of the record.

3. There were other sufficient reasons.

4. The application must have been made without undue delay.

They submitted that the appellant did not meet any of the criterion set and is not deserving of the orders sought.

For these submissions, counsel relied on the cases of **High Court Civil Appeal No. 181 of 2017, Nairobi, Francis Njoroge v Steven Maina and High Court Civil Appeal No. 24 of 2015, Kericho, SBI International Holdings (AG) Kenya v William Ambuga Ongeri**

Issues for determination

It is now settled Law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of Law and facts and come up with its findings and conclusions**. (Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424).** The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> ***1. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***2. In reconsidering and re-evaluating the evidence, the first appellant Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***3. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.***

These three principles are well settled and are derived from various binding and persuasive authorities including:

> ***(a). Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA)***
>
> ***(b). Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); Virani t/a Kisumu Beach Resort v Phoenix of East***
>
> ***(c). Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)***

I stand by the **Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424 where Sir Kenneth O'Connor** stated as follows:

> ***"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1) {1947} A.C. 484. "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial Judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of Law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given."***

I am guided by decision in the case of **Mumias Sugar Company Limited v Francis Wanalo {2007} eKLR** where the Court of Appeal held as follows:

> ***"….. loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as separate head of damages. The award can be a token, or modest or substantial depending on circumstances of each case. There is no formula for assessing loss of earning capacity."***

With this in mind, I have analyzed the evidence as this Court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this Court in my view:

> ***1. The Learned trial Magistrate's Ruling on the application for review.***
>
> ***2. Quantum of damages for diminished earning capacity.***

1. The Learned trial Magistrate's Ruling on the application for review

The **Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya v Ndungu Njau** held that:

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the Court proceed on an incorrect expansion of the Law."***

In the case of **Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 as cited in the case of Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers {2016} eKLR** the Court of Appeal held that:

> ***"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh."***

Similarly, in the case of **Nyamogo & Nyamogo v Kogo {2001} EA 170 cited in Veleo (K) Limited** the Court held as follows:

> ***"an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of Law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by along drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."***

Order 45, Rule 1 (b) is clear that for the Court to review its decision, certain requirements should be met. This Section provides as follows:

> ***"1. Any person considering himself aggrieved-***
>
> ***(a). by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b). by a decree or order from which no appeal is hereby allowed.***
>
> ***And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the Court which passed the decree or made the order without unreasonable delay.***
>
> ***(2). A party who is not appealing from a decree or order may apply for a review of Judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.***

The aforesaid rule is based on Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which states as follows:

> ***"Any person who considers himself aggrieved-***
>
> ***(a). by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b). by a decree or order from which no appeal is allowed by this Act.***
>
> ***May apply for a review of Judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.***

Under Section 80 of the Civil Procedure Act, the Court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously.

In **Origo & another v Mungala {2005} 2 KLR cited in JamenyMudaki Asav v Brown Otengo Asava & Another {2015} eKLR** the Court held:

> ***"Our parting shot is that an erroneous conclusion of Law or evidence is not a ground for review but may be a good ground for appeal. once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end."***

I have carefully considered the submissions of the applicant and the respondent and do find that the application is based on the fact that the Learned Judge did not consider crucial evidence. This is not a ground for review but it is a ground for appeal. Moreover, failure to analyze evidence is not a ground for review. Consequently, I find that there was no error apparent on the face of the record as the appellant's main contention is that the Learned trial Magistrate should have considered the expert opinion given by the appellant's physician and not the one

given by the respondent's, this is a good ground for appeal and not for review.

Having said that I will now turn over to the second issue at hand.

2. Quantum of damages for diminished earning capacity

In the case of **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142 of 2003** the Court of Appeal held that:

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate Court should not interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of Law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles (see Mariga v Musila {1984} KLR 257)."***

Furthermore, in **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM. Lubia and Olive Lubia {1982-88} 1 KAR 727 at p. 730 Kneller J. A.** said:

> ***"The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

The Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru {2014} eKLR** that:

> ***"the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

In the case of **Boniface Waiti & Another v Michael Kariuki Kamau {2007} eKLR** the Court stated that the assessment of damages in personal injury case by Court is guided by the following principles:

> ***1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***
>
> ***2. The award should be commensurable with the injuries sustained.***
>
> ***3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***
>
> ***4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.***
>
> ***5. The awards should not be inordinately low or high.***

In awarding damages under this head, the **Court of Appeal in Mumias Sugar Company Limited v Francis Wanalo {2007} eKLR** stated 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. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he losses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."***

The said principles were envisaged in **Butler v Butler (supra),** where the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

> ***a). A person's loss of earning capacity occurs where as a result of 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;***
>
> ***b). Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;***
>
> ***c). Damages under the heads of loss of earning capacity and loss of future earnings, which in English Law are formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no***

interest is recoverable on them;

d). Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;

e). Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f). The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

I shall also put my mind to the Court of Appeal's dictum in **Jacob Ayiga Maruja & another v Simeon Obayo {2005} eKLR** where it observed that:

"We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earing is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

In **Alpharama Limited v Joseph Kariuki Cebron {2017} eKLR** the Court said of assessment of damages for diminished earning capacity:

"…… To assess loss of earning capacity in the future, the Court must consider to what extent the claimant's ability to earn income will be effected in the future and for how long this restriction will continue. The traditional approach adopted by the Courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired." According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the Court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the Court applies in assessment of damages. It is not the only one. The Court would be properly entitled to make a global award because there is a general agreement in decisions rendered by Courts that there is no formula for assessing damages for lost or diminished earning capacity provided the Judge takes into account relevant factors. In this matter, the fact that the plaintiff has been rendered legless for life, her age at the time of accident and therefore the period she has been consigned to live with reduced mobility, her qualification at the time and that she might not effectively fit back into the job of a port clerk, are relevant factors to be taken into account."

The determination of damages will involve the principles laid down in various judicial decisions such as in the case of **Yorkshire Electricity Board v Naylon {1968} AC 52G** where the Court held that:

"It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L. C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a 'positive measure of happiness' or of a 'predominantly happy life'."

I have considered the rival submissions on the quantum of damages, the authorities cited by the appellant and respondent in their submissions as well as the proposed award by the appellant. Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan {1982-88} KAR 5** where the Court held that:

"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

In the case of **Savanna Saw Mills Ltd v Gorge Mwale Mudomo {2005} eKLR** the Court stated as follows:

"It is the Law that the assessment of damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of its own for that awarded by the Court simply because it would have awarded a different figure if it had tried the case at the first instance…"

For this I shall rely on the Court of Appeal's decision in the case of **Gitobu Imanyara & 2 others v Attorney General {2016} eKLR**, where the Court of Appeal held that:

"…… it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that <u>this Court</u>

<u>should be convinced either that the Judge acted upon some wrong principle of Law or that the amount awarded was so extremely high or so very low as to make it, in the Judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.</u> This is the principle enunciated in Rook v Rairrie {1941} 1 All ER 297. It was echoed with approval by this Court in Butt v Khan {1981} KLOR 349 when it held as per Law, J.A. that:

> ***'An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*** *(Emphasis is mine)*

I concur with the Learned Judge in the case of **Civil Appeal Number 17 of 2015 & 18 of 2015 Malindi Moses Akumba & another v Hellen Karisa Thoya {2017} eKLR** that:

> ***"……each life is important and equal and that there should be no distinction between a poor man and a rich one, no distinction between one who is working and an unemployed person."***

It is appellant's contention that the Learned trial Magistrate should consider that the respondent is still capable of using his arms and thus not entirely quadriplegic and that the trial Court should have used **Dr. Udeyan Shetha's** assessment on disability before concluding its findings on an award for general damages for diminished earning capacity. I take cognizance of the fact that the respondent was an able bodied, healthy individual who was employed as a driver. He now moves with the help of crutches and has to rely on others for assistance in particular his wife. This must have been a tremendous change of circumstances for him and I am sure has had a bearing on his mental state. He might not be quadriplegic but he is surely not playing football any time soon. Having said that, I consider the case of **Board of Governors of Kangubiri Girls High School & another v Jane Wanjiku Court of Appeal sitting at Nyeri in Civil Appeal No. 35 of 2014 eKLR** where the Court pronounced itself as follows:

> ***"The choice of a multiplier is a matter of the Courts discretion which discretion has to be exercised judiciously with a reason."***

However, in reference to the decision in the case of **Kwanzia v Ngalah Rubia & Another Ringera J** as he then was read as follows:

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of Law or a dogma. Can and must be abandoned where facts do not facilitate its application …. To insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do."***

What amounts to proof on the above factors depends on the circumstances and character of each particular case.

I take judicial notice that from the latest World Bank data life expectancy in Kenya is between 64 and 69 years. I also take judicial notice that the minimum wage in Kenya is based on the region and occupation of various categories of workers. The appellant proposed on variation of the sum of being the residual ability left once you subtract the estimated percentage disability given by **Dr. Udayan Sheth** to give the respondents earning power within the reminder of the 10 years the trial Court estimated he would earn before retirement.

Determination

The discretionary jurisdiction of the first appellate Court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of **Shah (supra), Paul v E.A. Cargo Handling Services Ltd {1974} EA 75.** For the above reasons, the appellant's appeal is not persuasive enough to overturn the decision of the trial Court on quantum.

I hold the view that the grounds are not well-founded in fact and Law to warrant this Court to exercise discretion to interfere with impugned Judgment. In light of the above circumstances I consider the appeal if so being the subject matter of this Court lacks merit the same is dismissed with costs interim stay of 15 days granted with leave to apply.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF NOVEMBER 2020

....

R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

1. Wangombe advocate for the appellant

2. Matara advocate for the respondent