



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.91 OF 2017

(FORMERLY NAKURU HCCA NO.86 OF 2016)

JOHN KURIA MBURE.....APPELLANT

VERSUS

MAGARI HIRE PURCHASE LTD.....1ST RESPONDENT

JAMAA & SONS SUPERMARKET LTD.....2ND RESPONDENT

WANJOHI CHARLES MWANGI.....3RD RESPONDENT

JUDGMENT

By an amended plaint dated 30/09/2014, the Appellant/ Plaintiff herein, John Kuria Mbure filed this suit against the Defendants/Respondents, Magari Hire Purchase Ltd, Jamaa & Sons Supermarket Ltd and Wanjohi Charles Mwangi (1st, 2nd & 3^r Respondents/Defendants), before the Nyahururu SPMCC 176/2013, claiming general damages for pain, suffering, cost of future medication/treatment and loss of amenities, general damages for diminished and or loss of earning capacity, loss of income for 10 months at Kshs.15,000/- per month and any other sum or period that the Honourable Court might deem fit, and special damages of Kshs.6,570/-, costs and interests.

This claim arises from injuries allegedly sustained by the Appellant from an alleged road accident involving motor vehicle KBS 224V Isuzu Pick-Up. The Appellant alleged that the said vehicle was driven by the lawful driver of the Respondents, who caused it to collide with the Appellant's motor cycle KMCN 822B.

The Appellant blamed the occurrence of the accident on the negligence of the Respondents which he particularized as follows;

- a) Driving at a speed that was excessive in the circumstances;***
- b) Driving in the path of the motor cycle;***
- c) Failing to stop in time or act in any manner at all to avoid the said accident;***
- d) Driving contrary to the Highway Code.***
- e) Failing to slow down, stop, swerve and brake and/or maneuver the said motor vehicle to avoid the accident;***
- f) Failing to have a proper look out while driving;***
- g) Losing control of the motor vehicle;***
- h) Failure to have regard for all road users;***
- i) Failing to give warning or hooting;***
- j) Failing to exercise due care and diligence expected of each driver.***

The Appellant also relied on the doctrine of *Res ipsa Loquitur*.

The Appellant claimed that as a result of the aforesaid accident, he sustained the following injuries;

a) Compound fracture of the right tibia

b) Compound fracture of the right medial and lateral malleolus with dislocation of the right ankle joint

The Respondents filed an amended statement of defence dated 02/10/2014 in which they denied the occurrence of the accident, or that their driver was involved in any accident, and that if at all an accident occurred, it was attributable to the negligence or contributory negligence of the Appellant. The Respondents particularized the Appellants acts of negligence as follows;

a) Riding on a path of the said motor vehicle Reg. No. KBS 224V Isuzu Pick – Up.

b) Riding motor cycle without due care and attention.

c) Riding without care for other road users especially motor vehicle Reg. No. KBS 224V.

d) Embarking on crossing the road/joining the road in the most absurd and unintelligent way knowing it was not safe to do so.

e) Disregarding the warning given to him by the driver of motor vehicle Reg. No. KBS 224V.

f) Riding in an unpredictable manner.

g) Volenti Non Fit Injuria

The Appellant filed a reply to the amended statement of defence denying all the particulars of negligence attributed to him.

The matter proceeded to hearing with the Appellant testifying. He recalled that he was riding motor cycle KMCN 822B from Kanyuambaki towards Ol Kalou – Njabini Road; that the feeder road is murrum and he stopped to join the main road. It was a T-junction. He saw an oncoming vehicle about 100 meters away and stopped about 3 meters from the road to allow it to pass but instead, the vehicle Reg. No. KBS 224V veered off the road and knocked him and stopped about 200 meters away. He said the vehicle was driven fast. Thereafter he was admitted in hospital for 3 days and after 1 year 3 months, he was admitted again. He sustained two fractures and a metal was fixed; that he now walks with a limp and uses a walking stick especially in cold season; he does not work anymore and needs Kshs.75,000/- to undergo another operation to remove the metal; that the case was reported to Engineer Police Station and the police blamed him for the accident and charged him but later withdrew the case – Traffic proceedings in Tr. Case 82/2014 (P-Exhibit 5). No other witnesses were called but the Counsel recorded a consent admitting the discharge summary as P-Exhibit 1 discharge; P-Exhibit 2 P3 form; P-Exhibit 3 Police Abstract; P-Exhibit 4 bundle of receipts; P-Exhibit 6 medical report by Dr. Kiamba; P-Exhibit 7a&b final medical report and receipts by Dr. Kiamba; P-Exhibit 8a&b;

The defence did not call any evidence in support of their case save that they produced the medical report dated 14/02/2014 by Dr. Malik as D-Exhibit 1.

After considering the evidence on record and the submissions by both counsel, the court that found that the accident did not occur as alleged by the Appellant and apportioned liability at 20% as against the Appellant. The court made the following award of Kshs.300,000/- as general damages; Kshs.120,000/- for loss of income and proved special damages of Kshs.53,570/-. That is the decision that has been challenged on appeal on both liability and quantum. The grounds of appeal are as follows;

- 1. That the court erred by not properly analyzing the evidence on record while arriving at her finding on liability and quantum;**
- 2. That the court erred by reaching a decision on liability and quantum which is contrary to the evidence on record;**
- 3. That the court erred by holding that the Appellant was negligent and contributed to the accident;**
- 4. That the court erred by awarding general damages that were manifestly and inordinately low or not commensurate with the Appellant's injuries;**
- 5. That the court erred in not giving an award for lost earnings despite the same having been pleaded and proved as required by law;**
- 6. That the court erred by not awarding damages for diminished and or loss of future earning capacity despite the same having been pleaded and proved;**
- 7. That the court erred by not awarding cost of future medication and treatment though pleaded and proved;**
- 8. That the court erred by rendering a judgment that was not based on proper evaluation and consideration of the pleadings, evidence and applicable law and principles on award of damages;**

Mr. Ndungu counsel for the Appellant filed written submissions on 10/04/2018 which he highlighted. Counsel submitted that the trial

magistrate failed to analyze the evidence before her and erroneously held that the Appellant contributed to the accident; that only the Appellant testified and his evidence remains uncontroverted since the Respondent did not call any witness to controvert the same. Counsel urged that the court's finding on contribution is erroneous because there is no evidence to support it; that the reason given by the court that the Appellant stood too close to the road or did not swerve to avoid the accident is not supported by evidence; that the two reasons were not pleaded in the amended defence and the issues are not raised in the Respondent's submissions. Counsel relied on the decision in **Kipkebe Ltd vs Dismas Ngangau Omayio CA 36/2010** where the court observed that the courts are expected to act on the material or evidence before them but not advance theories in absence of evidence. Counsel also submitted that it amounted to the court filling gaps and making unsupported conclusions in favour of the Respondent. For that proposition, Counsel relied on **Caroline Waitihira Kago vs Stephen Muiruri CA 446/2012** where the court observed that it was not the duty of the court to fill in the gaps left by a party.

Counsel also urged that the trial court found the Appellant's evidence to be believable and credible and therefore contradicted itself by finding that if the driver of the motor vehicle was not to blame then there should have been other evidence available. That having found the Appellant's evidence to have been credible, the trial court could not have found him to be partially to blame for the accident. Counsel relied on **Section 143 of the Evidence Act**; which provides that no number of witnesses is required to prove a fact meaning that even one witness suffices to prove a fact. Counsel relied on the decision of **John Gitonga Germano & Another vs Rispa Paul Ogal C.A 94 and 95/2010 and NMG vs Muchemi Teresa CA 519/2013**. It was further submitted that stopping three meters from the road does not connote negligence on the part of the Appellant. Counsel cited the decision of **Laurie vs Reglan Building & Co. Ltd and Watson vs Thomas S Whitney & Co. Ltd**.

In conclusion, Counsel urged that the trial court should not have apportioned liability.

On the issue of quantum Counsel was of the view that the award was manifestly and inordinately low bearing in mind the injuries that the Appellant sustained which ended in 35 – 45% permanent disability; that the court did not analyze the medical reports and submissions of Counsel; that the court considered different authorities not relevant to the instant case as the Appellants injuries were more serious; that the Respondent had suggested an award of Kshs.450,000/- but the court made a less award of Kshs.300,000/-; that at first the court found that the Appellant's injuries were serious but later changed that they did not lead to any disability which was a misdirection. Counsel submitted that the court failed to consider some factors for example; the Appellants admission in hospital for four weeks, discharge with plaster cast for about a year; re – admission in hospital and surgery; affixation of a metal in the leg, shortening of the limp etcetera. The Counsel urged the court to enhance the general damages to Kshs.3,000,000/- and relied on the decision of **Charles Mathenge Wahome vs Mark Mboya Likanga (2011) eKLR** an award of Kshs.1,500,000/- and **Edward Mzamili Katana vs CMC Motors Group Ltd (2006) eKLR** where the Applicant suffered permanent disability of 30% and was awarded 2 million.

It was also Counsel's submission that an award should have been made on loss of earnings; that having found that the Appellant did something for a living, the court should not have dismissed that claim for lack of proof because oral evidence sufficed to prove income and profession or the court could use the statutory minimum wage to award monthly income or apply an educated guess. Counsel relied on two decisions in **David Kajogi M'mugaa vs Francis Muthomi (2012) eKLR** and **Losiamuro v Lochab Brothers & Another (1991) KLR** where the Plaintiff was a trader in cattle and his trade was affected as a result of an accident. In absence of records or other evidence, the court elevated him to a messenger at the Mombasa Law Courts and estimated the salary at Kshs.1000/- and worked his earnings on that basis.

On the issue of diminished and loss of future earnings, Counsel urged that though pleaded, the court did not award it and therefore this court should do so in terms of the finding in **Mumias Sugar Co. Ltd vs Francis Wanalo (2007) eKLR** Counsel sought for future earnings of Kshs.1,260,000/- (see page 18).

On future medical treatment, the trial court was faulted for not awarding it. Counsel invited the court to consider the findings in the reports of Dr. Kiamba (page 121-3) and Dr. Malik (page 131-B) which are to the effect that the Appellant was fitted with implants which were later removed but interlocking nails were left and will require removal at a cost of Kshs.75,000/-; that the said claim has to be specifically pleaded but proved like general damages. Reliance is made on **Thomas Muendo Kimilu vs Anne Maina & 2 Others** where the court also observed that future medical costs can never be exact but can be proved later. Counsel prayed for an award of Kshs.100,000/- in future medical expenses.

Mukite Musangi Advocates counsel for the Respondents filed their submissions. Counsel did not attend court to highlight the submissions as was required of them but the court will consider them anyhow.

On the question whether the trial court properly analyzed the evidence, it was submitted that the Appellant was unable to prove that the accident was solely caused by the negligence of the 3rd Respondent; that having alleged that the Respondent was negligent, the onus was on the Appellant to prove that allegation in terms of **Section 107 and 108 of the Evidence Act**, on a balance of probabilities; that the Appellant admitted that the police had blamed him for the accident as per the abstract report and even though the charge was withdrawn, the standard of proof in civil cases is on a balance of probability and it cannot be imputed that the Respondent was 100% to blame.

On the question of negligence, it was submitted that the Plaintiff needed to prove causation and blame worthiness as it was considered in **Karanja vs Malele (1983) KLR 147** but that all the applicant did was to give a sequence of events; that PW1 produced the police abstract which showed that he was to blame for the accident and that therefore, the Appellant could not rely on the doctrine of Res Ipsa Loquitor. Counsel urged that since no investigations were conducted as to where the accident occurred, and how it occurred, the court should adopt the decision in **Hussein Omar Farah vs Lento Agencies CA NAI 34/2005** where the court held that both parties are equally to blame. Further it was submitted that the Appellants never adduced evidence to prove the particulars of negligence pleaded and the court should hold as did the court in **Nzoia Sugar Company Ltd vs David Nalyanya (2008) eKLR**; It was held that mere allegation that an accident occurred is not proof of negligence; that the Appellant failed to prove the driver's negligence and the causal nexus between the driver's negligence and the accident. Counsel cited **Statpack Industries vs James Mbithi Munyao HCCA 152/2003** where J. Visram held that "**a person making an allegation must prove a causal link between someone's negligence and his injury.**" He stated that the Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn; Counsel submitted that the Appellant had failed to discharge the burden of proof as to the occurrence of the accident and injury.

On the question whether the general damages are inordinately low: it was submitted that the appellate court can only interfere with an award

of damages if the aggrieved party satisfies two conditions;

- i. That the trial court took into account irrelevant factors when assessing damages; or*
- ii. The amount of damages is so inordinately high or low that the quantum awarded is wholly erroneous estimate of damages.*

Counsel submitted that the assessment was based on the injuries that were pleaded in the plaint that is; **compound fractures of the right tibia and compound fracture of right medial and lateral malleolus with dislocation of the right ankle joint** and urged the court to be guided by the decision in **West (H) & Son Ltd vs Shepherd (1964) AC 326 (pg 345)** and **Lim Poh Choo vs Camden and Islington Area Heath Authority (1979)1, AII ER 332** where courts have held that awards must be reasonable and assessed with moderation and be fair to the parties. In **Hassan vs Nathan Mwangi Kamau Transporters & 5 Others NR. HCA 123/1995** the court discouraged high awards because they will make insurance premiums too high. The court is enjoined to consider comparable awards made in the past and comparable injuries. In **Simon Taveta vs Mercy Mutitu Njeru CA 26/2013**, the Court of Appeal held, **“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.”**

On the prayer for lost earnings/income and loss of future earning capacity, it was urged that no evidence was adduced to prove that claim; that the same was not pleaded and no proof of lost earnings/income. That loss of future earning capacity deals with reduced capacity of an accident victim to earn in future but it does not mean that one cannot work and earn, that having been assessed at 30% permanent incapacitation, he is able to work and generate income.

On the issue of loss of income and future medication; the Appellant said he used to make Kshs.15,000/- per month and claimed loss of 10 months, but that the Appellant did not prove his earnings. Counsel urged that loss of earning capacity is a special damage that must be specifically pleaded and proved (see **Mohammed Hassan Musa & Another vs Peter M. Mailanyi & Another (2000) eKLR** and **Joel Motanya vs Swan Carriers Ltd (2015) eKLR**; Counsel urged the court to dismiss the appeal.

Having carefully considered the grounds of appeal, submissions on record, I am aware of the duty of the first appellate court under **Section 78 of the Civil Procedure Act** which is to evaluate, analyze and examine all the evidence tendered before the trial court, the law and come to my own conclusions. In doing so however, this court must allow for the fact that it neither saw nor heard the witnesses testify. This is the decision in **Selle vs Associated Motor Deal Co. (1968) EA 123; Isinya Roses Ltd vs Zakayo Ngongesa;**

The issues that seem to require determination in this matter are;

- 1) Whether the evidence on record was properly analyzed and whether the trial court was right in apportioning liability;*
- 2) Whether the award of general damages was manifestly low;*
- 3) Whether the court erred by failing to make an award for loss of earnings/income;*
- 4) Whether the court erred in failing to make an award for diminished and loss of future earning capacity;*
- 5) Whether the court erred in failing to make an award for cost of future medical treatment;*

On whether the trial court properly analyzed the evidence;

The Appellant is the only witness who testified in this case. The Respondents did not call any evidence to controvert PW1's testimony. PW1 stated that he was from Kanyuambaki going towards Ol-Kalou – Njabini road. He was on a feeder road which is murram. He wanted to join the main road but saw motor vehicle KBS 224V from about 100 meters away and was about 3 meters on the rough road from the main road, when the vehicle veered off the road and knocked him. In cross – examination the Appellant maintained that the Respondent's vehicle was on the main road but veered off to where he had stopped and continued to stop about 200 meters ahead. According to him, the Respondent's driver was driving at over 80kph. The Magistrate analyzed the evidence before her and she said **“The evidence was not controverted and in my view, cannot be disbelieved. It is credible evidence.”**

It is the Appellant who had the duty to prove on a balance of probability that the driver of KBS 224V was solely to blame for the occurrence of the accident. **Section 107 (1) of the Evidence Act** places the onus on the one who alleges to prove. **Section 107 (1) provides “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

It was the duty of the Appellant to prove that he was injured as a result of the negligent act or omission of the Respondent, which involves a duty of care owed by the Respondent to the Appellant. The two elements that need to be proved by the Plaintiff were discussed in **Karanja vs Malele (1983) KLR 147** where the court held; **“there are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion.”**

In Statpack industries case (supra) J. Visram said “a person making an allegation must prove a causal link between someone's negligence and his injury. He stated that a Plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn.”

In this case, the Appellant said that he was standing about 3 (three) meters off the road. The Respondent's vehicle was on the main road.

The fact of the vehicle veering off the road and hitting a person off the road is itself an act of negligence. It means that the driver was not in control of the vehicle. Vehicles do not ordinarily veer off the road to ram into people who are standing away from the road. The Appellant also testified that the driver was driving at over 80kph and he explained that one can know the speed of a vehicle even when outside the vehicle. The driver of the vehicle never testified to controvert the appellant's evidence or as to how the vehicle was driven. Driving at over 80kph at a T-junction where there are likely to be other vehicles entering the road is itself negligence. The driver did not testify or offer any other evidence to controvert what PW1 told the court. That is the evidence that was before the court and the court cannot venture away to look for other evidence. Once the trial court found that the evidence was believable and credible, there was no basis for the court going ahead held that the Appellant may have been too close to the road or failed to swerve. Had the Defendant availed other evidence, for example, on the place of impact, then one may have drawn such conclusion. The magistrate's finding was not supported by evidence and had no basis.

In the case of *John Gitonga Germano (supra)* the court was faced with a similar scenario where only the Plaintiff tendered evidence in support of his case and the court held;

“The Appellants did not adduce any evidence at the hearing of the main suit. The evidence therefore for consideration is that of the Respondent's and their witnesses. It is to be noted that a defence filed in court per se, in the absence of evidence in support is a mere denial and of no evidential value. And therefore in this case the evidence of the Respondents remained uncontroverted.”

The court made a similar finding in *Family Health International vs Jackson Musita Asira (2006) eKLR* where the court held that;

“From this court's evaluation of the evidence on liability, it agrees with the lower court. The Appellant's driver was negligent... It was incumbent on the Appellant to bring the motor vehicle's driver to testify and if anything controvert what the Respondent said about the accident. If the Appellant chose not to do so, then the learned trial magistrate cannot be faulted for so noting and accepting the Respondent's version of the story... The finding on liability stands.” See also *MMG vs Muchemi Teresa (2015) eKLR*.

The Respondents relied on the police abstract to suggest that the Appellant must have been to blame and even proposed an apportionment of liability at 50%. The police officers who wrote the abstract and decided that the Appellant was to blame did not testify. Besides, although the Appellant had been charged, the charge was withdrawn under **Section 87 (a) of the Criminal Penal Code**. There was therefore no evidence adduced in support of the allegation that the Appellant was to blame. The withdrawal of the charge would in my view mean that there was no evidence in support of the charge thereof. Besides, the blame of the Appellant by the police was subject to proof in court but it was not done. In my view the opinion of the police officer who did not testify is proof that the Appellant was negligent.

In the end, I find that after the magistrate believed the Appellant's testimony and found it credible, it meant the Appellant's version of how the accident occurred was correct as it was not controverted. It was therefore not open for the court to go ahead and contradict itself by finding that the Appellant contributed to the accident. This court is guided by the finding of the courts in *MMG case, and John Gitonga case (supra)* that since the Appellant's evidence was not controverted, that is the only evidence that the court will consider. I find that the trial court misdirected itself in apportioning liability. This court finds the Respondent's driver wholly to blame for the accident in which the Appellant was injured.

Of damages: Whether they were inordinately low;

There are set principles by which an appellate court will be guided on the invitation to interfere with or review an award of damages. In *Butt vs Khan (1977) KAR 1*, the court said;

“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.” See *Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini.V. A.M. Lubia and Olive Lubia (1982 – 1985) 1 KAR 727*.

In the instant case, the court made an award of Kshs. 300,000/- in general damages. In the amended plaint, the Appellant pleaded that he sustained the following injuries; ***Compound fracture of the right tibia, compound fracture of the right medial and lateral malleolus with dislocation of the right ankle joint.***

In support of the claim, the Appellant produced in evidence two discharge summaries because he was admitted twice, one dated 06/12/2012 and the second one dated 24/02/2014, a P3 form that assessed the degree of injuries as grievous harm. The Appellant testified that he sustained two fractures of his right leg and a metal was fixed in it, that he now walks with a limp or uses a walking stick. The Appellant was examined by Dr. Kiamba who prepared two reports dated 17/06/2013 and 19/06/2014. In the first report, the doctor observed that the Appellant suffered a compound fracture of the right tibia and compound fractures of the right medial and lateral malleolus with dislocation of the right ankle joint; that open reduction and internal fixation was done on the bimalleolar fracture and external fixation was applied to the right leg, which was removed on 07/01/2013 and a plaster of paris cast removed. Plaster of paris was removed on 03/04/2013 and another one applied and was still using crutches at the time and had not recovered. In the second report, the doctor observed that the Appellant could not walk without crutches and was still in pain and that the nails and screws that had been fixed would need to be removed in future. He assessed the degree of injury as grievous harm and a permanent disability of 40%.

The Appellant was also examined by Dr. Malik as per the report dated 14/03/2014. The said doctor was instructed by the Respondents. The doctor's opinion was that the Appellant sustained a compound comminuted fractures of his right lower leg; that he went through a series of operations and internal and external fixation of the fractures were done; that the Appellant ended up with shortening of his right leg and distorted shape of the right ankle joint; that the fractured malleolus and tibia were still not yet fully united and was unable to walk without crutches. In conclusion, Dr. Malik said that the appellant would develop post traumatic osteo-arthritis and awarded a permanent disability of

30%.

In assessing damages, the courts are guided by the principles laid down in *West (H) & Son Ltd. Vs Shepherd (1964) AC 326 at page 345 and Lim Poh Choo vs Camden and Islington Area Health Authority (1979) 1 All ER 332* which were approved in the Kenyan decision of *Cecilia W. Mwangi & Another vs Ruth W. Mwangi C.A. No. 251 of 1996*. In the West Case, the court said; **"But 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. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional..."**

In *Lin Poh Choo's case* Lord Denning M.R., reiterated the need for courts to award reasonable awards and be fair to both parties; that the court has to consider comparable awards for comparable injuries. The case of *Hassan vs Nathan (supra)* added its voice to the need for fair awards when the court said; **"Inordinately high awards will lead to monstrously high premiums for insurance of all sorts and it is to be avoided for the sake of everyone in the country."**

In the lower Court, the Respondent had suggested that an award of Kshs.450,000/- be made. However, counsel submitted that the award made by the court of Kshs.300,000/- was still fair. The suggestion by the Respondent is evident that the appellant suffered more serious injuries for which the award should have been more than Kshs.300,000/=.

The trial magistrate considered the decision in (1). *Charles Mathenge Wahome case (Supra)* where the Plaintiff suffered a fracture of the femur and soft tissue injuries which led to 25% permanent disability, a shortened leg and the court made an award of Kshs.1,500,000/-. (2). *Edward Mzamili Katana case (Supra)*, the Plaintiff suffered a head injury leading to concussion, cut wounds and bruises of the scalp and fracture of the left scapula, compound fracture, dislocation of the left elbow, chest injury of the left 5th, 6th and 7th ribs, fracture of the left femur upper 1/3 shaft. He underwent 4 operations and the leg was shortened, an award of Kshs.2,000,000/- was made in 2006.

In the lower court, the Respondent relied on the decision of *Thomas Kamau vs Target Guards Ltd & Another HCC 467/2007* where the Plaintiff suffered compound fracture of tibia and fibula, dislocation of the right knee and ankle as well as a degloving wound on the right thigh and multiple soft tissue injuries and the court made an award of Kshs. 300,000/-. It was not indicated which year the award was made but it must have been before 2008. In *Martin Wambua Njiraini vs Prof. Ezra Kiprono Maritim (2010) eKLR*, the Plaintiff suffered a fractured limb, underwent surgery, soft tissue injuries, shortening of the leg by 3cms. An award of Kshs.450,000/- in general damages in 2010.

I have given due consideration to all the decisions cited by both Counsel, the injuries sustained and awards made. No doubt the Appellant suffered serious injuries which were classified as grievous harm. He was admitted for four weeks, had plaster cast on the leg, underwent operation to affix nails and ended up with a shorter leg with threats of developing osteo arthritis. The decisions that were relied upon were made about 10 years ago. The decision of *Charles Mugambi* was never comparable to the instant case. The decision was made in 2011 about 8 years ago. The court in making an award of damages also takes into account the incidence of inflation. In my considered view, and taking all the principles of assessment of damages, I hereby allow an award of Kshs.2,000,000 in general damages.

Of Loss of earnings/Income;

At paragraph 10 (c) the Appellant prayed for 10 months loss of income at Kshs.15,000/- per month. The Applicant sought a sum of Kshs.120,000/- under that head. The Appellant claimed that he had not worked for 10 months and his salary was 12,000/-. The trial court dismissed the said claim for the reason that the Appellant did not support the claim with documentary evidence. The court did however appreciate that in this country, there are people who engage in farming and yet do not keep records and that payments may not be evidenced by documents, but she was persuaded by the decision that loss of earnings had to be strictly proved.

I think that the court was very correct in observing that in this country not everybody keeps records of their earnings especially in the informal sector of farming and other small businesses. But that does not mean that they are not earning a living. Such issue was considered in *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko (2006) eKLR* where the Plaintiff who did not keep records was allowed to prove his earnings using sales book as proof. I do agree that the court contradicted itself on insisting on documentary evidence because it could have relied on oral evidence because it believed the Appellant. Alternatively the court would have taken into account the minimum wage in arriving at an award on loss of income. In *David Kajogi M'mugaa vs Francis Muthomi (2012) eKLR*, the court considered the situation where people are illiterate and do not keep books or documents and the court found it reasonable to make an award based on minimum wage. In *Losiamuro case (supra)* the Judge used his educated guess work to make an award. There is no doubt that the Appellant was immobilized due to the injuries sustained in the accident with the Respondent's vehicle. He could not undertake any economical activity for some time and I would adopt the minimum wage to calculate the earnings he lost during the 10 months. Respectively, minimum wage is about Kshs.12,000/-. In *Damaris case (supra)* the court adopted the figure Kshs.5,000/- on minimum wage. In 2014, it may have been about Kshs.8,000/-. I find that the Appellant lost income of about Kshs.80,000/- (8,000 x 10 months).

Of diminished and or loss of future earnings;

At paragraph 7 of the plaint, the Appellant stated that he had not been able to return to work due to the injuries sustained. He prayed for the same at paragraph 10 (c). The Appellant faulted the trial court for failing to consider this claim though specifically pleaded. What is diminished earning was discussed in the case of *Mumias Sugar Co. Ltd (supra)*. The court said:

"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 loses 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 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 Appellant prayed for a sum of Kshs.1,260,000/=. From a consideration of the above cited case, the award is entirely the discretion of the court. Due to the injuries that the Appellant suffered, his capacity to earn was indeed diminished in that he could not carry out farming as he ordinarily did and will also affect his future earnings. I will assess the diminished capacity to earn at Kshs.300,000/-.

Of future medical cost;

The Appellant has complained that the trial court erred for not making any award on cost of future treatment/medication pleaded. At paragraph 7B of the Amended Plaintiff, and paragraph 10 (d) of the plaintiff. At paragraph 7B, the estimated cost of medication was put at Kshs.75,000/-, but the trial court held that it was not proved.

In Dr. Kiamba’s medical report dated 17/06/2014, he indicated that in future, the metal, screws and nails fixed in the appellant’s leg will require to be removed. Dr. Malik confirmed that indeed there was affixation of screws in the Appellants legs. Dr. Kiamba’s report indicated that the said nails and fixations need to be removed and is not controverted in any way. On what should be awarded, I adopt the decision of J. Emukule in *James Thiongo Githiri vs Nduati Njuguna* where the court said that in such cases, the loss is continuing because it cannot be ascertained what the cost of removal of nails will be. The estimate of Kshs.75,000/- was made in 2014. We are now in 2019, 5 years later. The cost cannot remain at Kshs.75,000/-. The Appellant’s submission of an award of Kshs.100,000/- is reasonable and I will allow that claim and award Kshs.100,000/- for future medical treatment.

In the end, I allow the appeal and set aside the lower court’s finding on liability and the award. Instead, I find the Respondent wholly liable for the occurrence of the accident and resultant injuries to the Appellant. I make the following award;

1. General damages for pain and suffering Kshs.2,000,000.00/-

2. Loss of income Kshs.80,000.00/-

3. Future medical costs Kshs.100,000.00/-

4. Diminished earnings Kshs.300,000.00/-

The Appellant will also have costs and interest from the date of judgment. **1)**

Dated, Signed and Delivered at NYAHURURU this 26th day of September, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Chuma Mburu holding brief for Njuguna for appellant

Ms. Chelule holding brief for respondent

Soi – Court Assistant