Ongata Works Ltd v Mwangi (Civil Appeal E046 of 2021)
[2024] KEHC 5738 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E046 OF 2021

DKN MAGARE, J

MAY 9, 2024

BETWEEN

ONGATA WORKS LTD ..... APPELLANT

AND

GEORGE MAINA MWANGI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Hon. K.M. Njalale given on 18/8/2021 in Karatina PMCS 24 of 2021. The Appellant was the Defendant in the lower court.

2. The appellant filed a 9 – paragraph memorandum of Appeal. It is prolixious and unseemly. It is the best lesion on how not to write a memorandum of Appeal. The grounds are all on quantum. The prayers in the Memorandum of Appeal are surprising. There is no Appeal on liability.

3. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

Duty of the first Appellate court

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

7. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow

the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

8. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

9. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

10. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

11. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

12. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

13. This had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

14. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

15. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

c. The award is simply not justified from evidence.

16. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

17. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

18. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

19. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The only issue for determination is whether the court erred in assessment of damages.

Pleadings

20. The Respondent filed suit on 11/4/2021 against the Appellant and NIC Bank. The claim related to the Respondent was a rider of motor cycle Registration No. KMDM 381Y. The Appellant was the Registered owner of motor vehicle Registration No. KCB 008Q.

21. The Respondent listed the following injuries in the Plaint: -

a. Loss of consciousness for four hours

b. Complete fracture of the left femur

c. Blunt injuries on the head

d. Blunt injuries on the hands

e. Excessive blood hemorrhage

f. Bruises on the face

22. The Respondent also set out particulars of pain, loss of amenities and earning capacity in the Plaint: -

a. Recurrent pains on the left leg

b. Inability to walk, squat or stretch his left leg

c. Inability to perform heavy duties.

d. Permanent incapacity assessed at 30%.

23. The Particulars of special damages were set out herein as follows: -

a. Medical expenses Ksh. 1,000.00

b. Medical report Ksh. 5,000.000

c. M/V records Ksh. 940.00

Total Ksh. 6,940.00

Decision

24. Given that liability was entered at 80:20 in favour of the Respondent and there is no Appeal, it is unnecessary to deal with circumstances of occurrence of the accident. The court entered judgment in the following terms;

a. Liability 80:20

b. General damages Ksh. 600,000

c. Special damages Ksh 6,940

d. Future medical Expenses 200,000/=

e. Loss of earnings 129,270

Evidence

25. The parties proceed by documents on record. The question was therefore damages payable. This is the most unusual way to proceed in a suit. However, by proceeding on documents only the p arties forego any challenge on authenticity of the documents.

Appellants submissions

26. The appellant filed submission on 20/4/2023. They raised 3 issues.

a. Future medical expenses - Ksh. 200,000

b. Lost earnings - Ksh 129,270

c. General Damages - Ksh 600,000/=.

27. There is no dispute on special damages. The same had been pleaded and proved strictly.

28. On loss of earnings they submitted that the court does not have power to disturb damages unless they are too high. They stated that the figure of 12,926.53 is immediately inordinately high.

29. They stated that the plaintiff did not proof loss of earnings. On general damages they stated that the court did not consider the 2nd medical report and the fact that the court did not consider current decisions. The injury found was a closed fracture mid shift left femur. They stated the award is high but did not suggests the award. They referred to the case of Gladys Lyaka Mwombe -vs- Francis Mamatsi & 2 Others (2019) eKLR, Mwavila Joanthan -vs- Silvia Onunga (2017) eKLR and Michael Odiwuor Obongo –vs– Clavice Odera Ogunde (2021) eKLR. They suggested Ksh. 450,000/=.

Respondents submissions

30. They stated that the court had advantage of weighing evidence. The Respondent was in dire need of money. They stated that the sum of Ksh. 600,000/= was not inordinately excessive. They rely on the case of Nelson Rintari vs CMC Group Ltd (2015) eKLR and Jacob Angisa Marija and Another – v s- Simeone Obago (2005) eKLR.

31. They pray that the court dismisses the Appeal. They also set out the duty of the court vis- a- vis an appeal. In this they relied on the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court of Appeal (Visram, Sichale, & J. Mohammed, JJ.A) stated as follows: -

> " Further, 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 this Court 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."

32. They relied on the decision of the Court of Appeal, where it pronounced itself succinctly on the principles to apply regarding quantum the locus classicus case of Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

33. They also relied on the case of Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR. In that case Riechi J, stated as follows: -

> " This is a first appeal. The duty of the first appellant court is as was stated in Jabane vs Olenja (1986) KLR 66 where Hancox JA (as he then was) stated: -
>
> "I accept this proposition so far as it goes and this court does have power to examine and evaluate the evidence and finding of fact of the trial court in order to determine whether the conclusions reached on the evidence should stand (See Peters Vs Surway Post (1968 EA 424). More recently the court has held that it will not likely to differ from the finding of fact of the trial judge who had the benefit of seeing and hearing the witnesses and will only

interfere with them if they are based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

Analysis

34. The duty of the court regards damages was set out in the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

35. This covers general damages and other damages such as loss of earning capacity and future medical expenses. I shall therefore deal with each limb seriatim.

Future Medical Expenses

36. The Respondent pleaded and prayed for costs of future medical expenses. The court awarded a sum arose from a medical report by Dr. Cyprian Okoth Okere. He estimated and laid basis for the said sum.

37. On the other hand Dr. Wambugu P.M, postulated that a figure of Ksh. 75,000/= for loss of Future Medical Expenses will suffice. There was congruence that there was need for future medical expenses. The question was quantum thereof.

38. The loss of future medical expenses is of the same genre of special damages, they are within the general damages. They must be pleaded before being specifically being proved. The Court of Appeal, in the case of Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR (P. K. Tunoi, J.W.Onyango Otieno, P. N. Waki JJA) held that:

> "We readily agree that the claim for future medical expenses is a special though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated: -
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> "And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."
>
> We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."

39. A sum of Ksh 200,000/= was pleaded. The Respondent proceeded to prove the same though the report of Dr Okere. The Appellant attempted to disprove the said amount. They did not do a nice job in that. Their doctor examined the Respondent and came up with figures. They relied on standard gazette doctor's rates. The same are absolutely otiose in determining the cost of future medical expenses.

40. As held by the Court of Appeal, Tracom Limited & another v Hasssan Mohamed Adan [supra], future medical expenses are the approximate sum of money that the future medical expenses will require. They are not doctor's fees but a sum total of expenses. Therefore, picking one area of expense and flaunting it as cost of future medical expenses is disingenuous.

41. Secondly there was a prior report on future medical expenses. The second report was made with the report in mind it the second doctor's possession. He did not comment on the same or deal with any exaggeration. It is not enough to give a lesser quotation. It must be based on the facts on the ground, the errors in the initial report or some expert explanation for departure. This was not done.

42. The good doctor did not find it good enough to testify in opposition to the Respondent's prior report. Without the report having a critique of the earlier report, it serves no purpose. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
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> "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
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> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

43. The second doctor had the first report but failed to comment. I infer that there was nothing useful the doctor could have said. In any case expert evidence must be viewed with other evidence. In the case of *Kagina v Kagina & 2 others (Civil Appeal 21 of 2017)* [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the court of Appeal stated as follows: -

> " Bearing the above caution in mind, our position is that upon our perusal of the expert report tendered in evidence by the expert the appellant called to testify on his behalf, the oral

testimony tendered by the expert witness and his responses to questions put to him on cross-examination, in light of the totality of the record as appraised by the trial court in the first instance and now this Court on appeal, our position is that we wholly agree with the learned Judge's decision as to why the Judge discounted the said expert's evidence even though there was no contrary expert opinion to controvert it. Our reasons for reaching the above conclusion are as follows: firstly, the expert opinion evidence was not binding on the Judge, neither does it bind this Court. Second, it had failed the test of qualification as an expert report for the witness's failure to adduce evidence on his credentials. Third, the experts evidence of existence of alleged deceased's forged signatures on the impugned documents was contradicted by the evidence of the land registrar and district land adjudication officer who were witnesses called by the appellant himself in support of his application."

44. The other issue was the degree of disability. The Appellant's doctor indicated 4% disability. THE respondent's doctor indicated 30% disability. Looking at the surrounding circumstances, Dr Wambugu's report cannot be true. However, the court using its discretion believed the Respondent's doctor and rightly so. The nature and extent of injuries described cannot be 4% disability. In dealing with expert report, the court has to deal with the sub-structum of the case. In the case of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR, Justice Mativo as he then was stated as doth: -

> " It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence". An expert report is therefore only as good as the assumptions on which it is based.
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> An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.'

45. All factors considered, the court cannot interfere with the discretion of the court below. The court was right in awarding loss of future medical expenses as per Dr Okere's report. I therefore dismiss the aspect of future medical expenses.

General damages

46. The Appellant made a suggestion that the court reduces the award from Ksh. 600,00 to 450,000. The two amounts are within the same range. The Appellant was therefore giving the court an invitation to dismiss the Appeal. This because the court has no jurisdiction to substitute the court's discretion with its own. There must be a factor in the exercise of discretion that the court below erred by taking into consideration an irrelevant factor, omitting a relevant factor or was plainly wrong.

47. This court cannot accept an invitation to substitute one discretion for another. The Appellant relied on the decision in Mwavita Jonathan v Silvia Onunga (2017) eKLR which was decided 7 years ago. I do not find merit in the appeal on General damages. Consequently, the Appeal on general damages is dismissed.

48. The second aspect is award for future medical expenses. There were 2 doctor's reports. The two documents were produced by consent without calling the makers. The court believed the Appellant.

The suggestion by the Appellants doctor related to a closed fracture while the respondents doctor was for an open fracture. There is no sufficient reason to agree with one doctor or another given that both documents were thrown to the court.

49. In that aspect the lower court does not have advantage of seeing the witnesses. In that case this court and the court below are at least in the same pedestal. Why parties could produce two reports with differing conclusions without calling the makers is beyond fathoming. Recalling that the parties conceded to each other's documentation, there is no basis in terms of credibility for the reports. The task then falls on the court to interpret the reports without advantage of testimony. In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)* [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR), the court of Appeal, (PO Kiage, M Ngugi & F Tuiyott, JJ), where P O Kiage JA posited as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testifed. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already halfway heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary."

50. This court is in the same position. The lower court did not have the advantage of hearing the two doctors. The court therefore will analyse the two reports respecting rules of interpreting documents. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth: -

> "Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

51. The nature of the injuries were suffered was a single fracture of the femur. Dr Okere did not lay basis for the amounts suggested. On the other hand, Dr Wambugu was more scientific in his postulation. He had a baseline from whence he refered for the amounts. This was not objected to. I also note that it beats common logic to insert a plate at less than 10,000/= and remove it at Ksh. 200,000/=.

52. The amount has no scientific explanation from the Respondent's doctor to it. The figure was just thrown to the court. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

53. It is not enough to just raise it in the report. It must be supported by underlying facts. Dr Wambugu's report thus was the nearest approximation of what will be required. It is conceded that it should have been more detailed than it was. Nevertheless, faced with 2 expert reports, which ignore each other, the court must consider prudence and nature order of things. The experts must show their expertise and prove that the findings are reliable.

54. Whereas I do not agree with Dr Wambugu on the degree of injury, I hold that his report on loss of future medical expenses is more believable. The court had no basis to disregard his report on the face of lack of scientific findings in Dr Okere's report.

55. In the end I set aside an award of Ksh 200,000/= and in lieu therof, substitute with a sum of Ksh. 75,000/= for future medical expenses. Other than lofty scientific wordings, a report must make common sense. Any departure from common sense must have a cogent scientific basis supported by the general drift of evidence.

56. The last issue is what the court christened loss of earnings. The Respondent id not plead this. He pleaded loss of earning capacity. Therese 2 concepts are different loss of earning capacity is based on the degree of disability while loss of earnings is based on the actual losses incurred as a result of the accident.

57. Loss of earnings go hand in hand with the employment of the victim. loss of earning capacity of the other hand is notional. It can apply even for the unemployed. In the case of Beatrice Anyango Okoth v Rift Valley Railways (Kenya) Limited & another [2018] eKLR, the justice PJ O Otieno posited as follows regarding loss of earning capacity or diminished capacity as follows: -

69. 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 affected 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".

The 70. 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.

58. In the case of S J v Francesco Di Nello & another [2015] eKLR, the court of Appeal (okwengu, Mwilu & Odek, Jj.a) stated as follows on the different between the loss of earning capacity and loss of earnings as hereunder:-

> " 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 Llyod'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."
>
> Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings. The correct position as in the FAIRLEY case (supra) was restated by this court in the case of Cecilia Mwangi & Another V Ruth W. Mwangi CA No. 251 of 1996 as hereunder;
>
> > " Loss of earning is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as proved on a balance of probability."

59. Coming back to the limb, the court awarded loss of earning capacity for 10 years. The calculation was for 10 years for loss of earning capacity. There was no appeal by the respondent. The award was only Appealed by the Appellant herein.

60. After looking at the 30% disability, I agree with the court that there was loss of earning capacity. The award for 10 years is also the court exercised its discretion properly. This should workout as doth 30/100x10x12x12,936.5=Ksh. 465,715.8

61. Though the court calculated the same way. She arrived at Ksh 129,270. This is clearly erroneous mathematically. It is understood that mathematics is not a general science for everyone. The slip is

accordingly corrected. This is not changing the award or substituting the court's award. The same remains. However, no one has a right to an arithmetic error.

62. The plaintiff was alive. The minimum wage in Nyeri as at the time of on 27/8/2020 for a machinist was 14,315/=. The court could not say that did not know what the Respondent was doing when the parties had pleaded that that the deceased was a motor cycle rider.

63. However, the Respondent did not appeal. The court will therefore dismiss the Appeal on this limb. However, the court will and must correct the totaling both in the final figures and calculating of loss of earning capacity. This workout as follows.

    Loss of earning capacity 30% x Ksh.12936.55 x 12x10= Ksh. 465,715.8

64. As a result, I do not see any error in the decision of the court on loss of earning capacity. However, I allow the Appeal partly as aforesaid.

65. The Appeal has had a mixed result. Each party will bear their own costs.

Determination

66. The court makes the following findings;

    a. The court below made arithmetic and syntax error on characterization of loss of earning capacity. I shall for reason recorded above, set aside a total of loss of earning capacity from 129,270 being a miscalculation (30% x 10x 12x 12,936.55 and substitute thereof a round figure of 465,716/=.

    b. I set aside an award of Ksh. 200,000/= for future medical expenses and in lieu thereof substitute with a sum of Ksh. 75,000/=.

    c. The Appeal on General Damages is dismissed.

    d. Each party to bear their own costs.

    e. The respondent to have costs in the lower court.

    f. For avoidance of doubt, the damages awarded shall be as follows to the respondent together with interest

        i. General damages Ksh. 600,000/=

        ii. Loss of earning capacity Ksh 465,716/=

        iii. Future medical expenses Ksh 75,000/=

        Ksh. 1,140,716/=.

        iv. Less 20 % Ksh. 228,143.20

        Sub total Ksh. 912,572.80

        v. Add special damages Ksh. 6,940

        Totals Ksh. 919,512.80

        vi. Costs in the lower court.

        vii. Interest

        viii. Each party o bear their own costs in the Appeal.

g. The file is closed.

DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 9TH DAY OF MAY, 2024.

JUdgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

M/s Kosgei for the Appellant

Ms Wandi for the Respondent

Court Assistant Brian