Lopiding General Building Construction Co Ltd v Loduar (Civil Appeal E002 of 2023) [2024] KEHC 10046 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10046 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CIVIL APPEAL E002 OF 2023

RN NYAKUNDI, J

AUGUST 8, 2024

BETWEEN

LOPIDING GENERAL BUILDING CONSTRUCTION CO LTD ..... APPELLANT

AND

EDWARD LODUAR ..... RESPONDENT

JUDGMENT

Representation:

M/s Onyinkwa & Co. Advocates

M/s Simiyu Opondo Kiranga & Co. Advocates

1. The appeal is both on quantum and liability. In the trial Court the Respondent had sued the Appellant claiming general damages, special damages plus costs and interest of the suit arising from road accident that occurred on 4/12/2021, wherein it is alleged that the Respondent was lawfully riding motorcycle registration no. KMEP 540Y along Lodwar- Logurum Road when the appellant/ agent/servant carelessly/negligently drove motor vehicle registration No. KAW 141Y causing it to overturn thus injuring the Respondent.

2. In a response to the Plaint dated 28/02/2022, the Appellant blamed the Respondent for contributing to the accident. The Appellant denied that the respondent suffered injuries and incurred expenses as pleaded.

3. After trial Judgment was delivered on 18/08/2022 and the Appellant was found 100% liable and damages assessed as hereunder: -

    a. General Damages ..... Kshs. 2,700,000/=

    b. Damages for diminished earning capacity .... Kshs. 150,000/=

c. Special Damages ..... Kshs. 687,534/=

d. Total ..... Kshs. 414,000/=

e. Plus, costs and interests

4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (7) grounds: -

a. That the learned trial Magistrate erred in law in holding the appellant 100% liable and/or negligent at all in view of the evidence on record.

b. That the learned trial magistrate erred in law and fact in failing to properly analyse evidence adduced by the appellant thereby arriving at a wholly erroneous decision on the issue of liability.

c. That the learned trial magistrate erred in law and fact by adopting the wrong principles in the assessment of damages thus awarding damages that were inordinately high in the circumstances hence occasioning injustice.

d. That the learned trial magistrate erred in law and fact by awarding general damages that were inordinately high as compared to the injuries suffered by the respondent.

e. That the learned trial magistrate erred in law and fact by awarding damages for diminished earning capacity despite the fact that the same was not all proved during the hearing.

f. That the learned trial magistrate erred in law and fact in awarding special damages of Kshs. 687,534/= despite the fact that the same were not proved by way of receipts.

g. That the learned trial magistrate erred in law and fact in failing to consider the appellant's written submissions on both liability and quantum.

5. The appeal was canvassed vide written submissions. Both parties filed their submissions and I have carefully gone through the same. They are summarised as follows:

The Appellant's Submissions

6. The appellant began by reminding this court of its duty as a first appellate court. That the court is bound to reconsider the evidence, evaluate itself and draw its own conclusions even though it had no chance to see or hear the witnesses testifying. On this he cited Selle & another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123.

7. On liability it was submitted for the appellant that the trial magistrate erred in finding the appellant 100% liable because neither the testimonies nor the evidence adduced during trial pointed towards the blame worthiness of the appellant. The appellant submitted that the respondent availed two witnesses in a bid to prove the issue of liability against the appellant herein. That the police officer only testified as to the occurrence of the accident. He did not demonstrate or adduce evidence as to how the accident occurred. The police officer did not witness the accident and he confirmed that he was not investigating officer nor did he avail any sketch plans or drawings of the scene of the accident to aid the court in establishing the point of impact.

8. According to the Respondent, the onus was on the Respondent. That the respondent testified that on the material day, he was heading to Lodwar while the appellant was heading towards Lorogun, the opposite direction. The respondent stated that the appellant's driver herein attempted to overtake and that he saw the vehicle before the accident and tried to avoid the accident by swerving to the left. The

appellant maintained that since the onus was on the respondent to prove the claim, it was incumbent upon him to prove the same by providing evidence that indeed the appellant herein was negligent as a result of which the accident occurred. The appellant cited the decision in Tread setter tyres Limited versus John Wekesa Wephukhulu (2010) eKLR. The Appellant proposed that in the circumstances of the case, liability should be divided equally between the parties. The relied on the case of Hussein Omar Farah versus Lento Agencies (2006) eKLR (Nairobi Civil Appeal No. 34 of 2005)

9. On quantum, it was the appellant's submission that the awarded amount of Kshs. 2,700,000/= was manifestly excessive. That the trial magistrate failed to cite the authorities he relied on while making that determination. That the learned magistrate completely ignored the appellant's submissions on record and the cited authorities on the issue of quantum.

10. The appellant submitted that an award of Kshs. 700,000/= - Kshs. 800,000/= would suffice as reasonable compensation to the Respondent. In support of this, the appellant cited Kisumu HCCA No. 99 of 2014; Charles Oriwo Odeyo versus Apollo Justus Andawa & another (2017) eKLR where the court awarded Kshs. 800,000/= to the Plaintiff who sustained injuries leading to an amputation of the right leg below the knee to his inability to walk.

11. The appellant equally submitted on the general damages awarded of Kshs. 150,000/= on diminished earning capacity. It is submitted for the appellant that the respondent did not prove the same. According to the appellant, the respondent did not adduce any evidence in the form of a pay slip to prove that he was indeed earning Kshs. 60,000/= monthly. Moreover, the Respondent did not provide any evidence of his termination from employment. The appellant submitted that the respondent did not demonstrate how the injuries he sustained diminished his earning capacity. On this, counsel cited the decision in SJ Vs. Francessco Di Nello & Another (2015) eKLR.

12. The appellant further place reliance on the case of Paul Njoroge Versus Abdu Saburi Sabonyo (2015) eKLR, where the Court of Appeal declined to consider a claim for loss of earning capacity where the Claimant, a police officer, was still in office and had not shown that his employment was affected.

13. As to special damages, the appellant submitted that the Respondent herein only pleaded Kshs. 670,084 as special damages. That it was therefore erroneous for the Learned Magistrate to award special damages of Kshs. 687,534 when the same had not been specifically pleaded. The appellant was of the view that the respondent herein had a duty to prove that he actually made payments of the special damages he claimed. The appellant submitted that the respondent herein provided provisional in-patient bill breakdown of Kshs. 666,534, invoices as opposed to receipts. In support of this position, the case in Christine Mwigina Akonya versus Samuel Kairu Chege (2017) eKLR.

14. To this end, the Appellant submitted that the subordinate court's judgment be set aside in its entirety and this court be pleased to dismiss the Plaintiff's case with costs.

The Respondent's Submissions

15. The Respondent made submissions on two limbs; liability and quantum. As to liability, it was the Respondent's submissions that the same was determined on the basis of the facts that were presented before the trial court. That it was the Appellant's driver's own admission that the accident occurred when he veered off his lane in an attempt to overtake another vehicle. As a result, he collided with the Respondent, who was riding a motor cycle from the opposite direction.

16. The Respondent submitted that his version was similar and it was corroborated by the police who testified as PW2, blaming the Appellant's driver. Thus, the Respondent submitted that the trial court was right in finding the Appellant 100% liable.

17. On assessment of damages, the Respondent made reference to the decision in Loice Wanjiku Kagunda versus Julius Gachau and proposed that courts in facts such as these ordinarily award between Kshs. 2,500,000/= to Kshs. 3,500,000/= for similar injuries. In support of this proposal, he cited the case of Easy Coach Limited Versus Esther Kanonu Inoti (2021) eKLR. The Respondent therefore submitted that the award of Kshs. 2,700,000/= was sufficient.

18. It was further submitted for the Respondent that the award of Kshs. 150,000/= for diminished earning capacity was also reasonable since the Respondent is an amputee and unable to return to his work.

19. On special damages, the Respondent submitted that the award of Kshs. 687,534 was supported by receipts that were produced before the trial court.

Analysis & Determination

20. Being a first appeal, the court is called upon to look into the evidence and factual information presented at the trial court, evaluate the same and make a determination, conscious of the fact that the trial court had the advantage of observing the demeanour of the witnesses. The Court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " ...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

21. I have indicated elsewhere in this judgment that the two limbs to this appeal are quantum and liability. I shall start with the issue of liability and then address the question of damages. The appellant has argued that the trial court erred in apportioning liability against the Appellant at 100% contrary to the evidence on record and/or adduced during trial.

Liability

22. Liability in road traffic accidents is ordinarily determined by identifying the party that caused or contributed to the accident. Whose fault was the accident?

23. The provisions of section 107,109 and 112 of the *Evidence Act* were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

24. The Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR held:

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> > 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally..."

25. It is evident that indeed an accident occurred on 4.12.2021 where the Respondent was lawfully riding motorcycle registration no. KMEP 540Y along Lodwar- Logurum Road when the appellant/agent/servant carelessly/negligently drove motor vehicle registration No. KAW 141Y causing it to overturn thus injuring the Respondent.

26. The appellant blames the respondent for the accident whereas the Respondent blames the appellant for causing the said accident. In determining the extent of the liability, it is important to consider the evidence adduced at the trial court.

27. According to the Respondent PW1, he testified that he was riding motorcycle registration No. KMEP 540Y. He was heading to Lodwar town. The Vehicle was heading towards lorogum. He testified that they were on the opposite direction and he was doing about 20km/hr with his helmet and reflective jacket on. He stated that he was on his lane. The driver attempted to overtake. He told the court that he saw the vehicle before the accident and swerved to the left. He further stated that the driver of the motor vehicle KAW 540Y was charged with a traffic offence and he was called as a witness when the driver was charged in court.

28. PW2 No. 95439 CPL Thaddeus Onyango told the court that motor vehicle registration No. KAW 141Y was being driven by Samuel Ekor, on reaching the accident location he knocked down one cyclist Loduar Edward who was riding motorcycle No. KMEP 570Y make Honda. That the cyclist got several injuries. On the leg and hand He was transferred to Lodwar County Hospital treated and admitted.

29. On cross examination he stated that he did not witness the accident. He did not produce the police file. The Sketch plan was not drawn.

30. DW1 on cross examination told the court that the accident occurred when he attempted to overtake. That the Plaintiff/Respondent was riding a motorbike from the opposite direction. He stated that the accident occurred on the right side. He avoided the motorcycle and on coming back to his lane, he hit the Plaintiff.

31. In Chao vs. Dhanjal Brothers Ltd & 4 Others [1990] KLR 482 the court held that:

> " Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred in spite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

32. Therefore, it is upon the Appellant to prove that indeed there was no negligence on its part. Placing the evidence on a legal scale of probabilities, it is more probable that not that the Appellant's driver was not careful enough when he was overtaking because evidently, the accident occurred on the Respondent's Lane while the Appellant was overtaking.

33. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

34. I have evaluated the evidence at the trial court and I find no reason to fault the trial court's decision on liability. Accordingly, the trial Court did not err in apportioning liability at 100% against the Appellant.

Quantum

35. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not

entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

36. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

37. I am to determine whether the award of general damages of Kshs. 2,700,000/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards".

38. It has long been held that an appellate Court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors.

39. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> "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. See Ilango v. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles."

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

41. The injuries suffered by the Respondent were enlisted in the pleadings as:

    a. Forehead lacerations

    b. Open Fracture of the right humerus

    c. Open fracture of the right ulna

    d. Fracture of the right index finger

e. Crushed right foot leading into below the knee amputation.

42. It should be appreciated that money cannot renew a physical frame that has been shattered or battered. The Respondent is only entitled to what in the circumstances is a fair compensation on the principle that comparable injuries should be compensated by comparable awards.

43. In Akhwaba Olubuliera Nicodemus v Dickson Shikuku [2020] eKLR the respondent sustained injuries on the right clavicle bone and crush injury to the right leg leading to below-knee amputation of the right leg and was awarded Kshs 2,000,000/- as general damages.

44. In Rai Cement Limited v Michael Ochieng Otieno [2022] eKLR the respondent therein sustained the following injuries: multiple fractures of the right tibia and fibula leading to amputation of the right lower limb below the knee; massive damage of the right sypra-pelvic and lower abdominal region; fracture of a rib from the right rib cage, with multiple soft tissue injuries; and soft tissue damage of the right hip region with haematoma. The respondent in that case was awarded Kshs 2,500,000/-.

45. In the case of Crown Bus Services & 2 others versus BM (Minor suing through his mother & next Friend) SMA) (2020) eKLR, the brief facts of this case were that the respondent suffered multiple injuries but of significance was amputation of the right leg above the knee. The court awarded Kshs. 2,500,000/= as general damages for pain and suffering and loss of amenities.

46. At this point, it is important to note that when it comes to the issue of assessment of damages, comparable injuries should as far as possible be compensated by comparable awards. The court is however conscious of the fact that no two cases are usually similar in terms of the nature and extent of the injuries sustained. The Court of Appeal in Stanley Maore vs Geoffrey Mwenda [2004] eKLR stated as follows-

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

47. I have considered the injuries sustained by the Respondent and keeping in mind that no injuries can be completely similar and further time and inflation. I find that an award of Kshs. 2,700,000/= issued by the trial court is sufficient. I find no fault in the assessment of damages as appropriately guided in the Kemfro case (supra) on the jurisdictions of an appeal court to interfere or sustain the findings of the trial court.

48. On aspect which is often overlooked on assessment of damages but of enormous practical importance in accident injury cases is the way our legal system deals with the cost of time, express the true interest and inflation. The effects of inflation is a factor which should not be ignored for it considerably diminishes the purchasing power of the sum awarded to the Claimants. There is also considerable time lag from the date of judgment until compensation is obtained through execution process which is also laborious and generally not precise as expressly provided in the Civil Procedure Rules. The monetary policy governed by central Bank of Kenya continues to set the markup base rate in reference to various indicators which ideally govern the interest rates and inflation. Therefore, on assessment of damages, inflation comes into play at the time of judgment. The catastrophic bout of inflation which rocks any world economy and not sparing our own economy must cause some level of adjustment on compensation awarded. The theory of inflation is the cost push and pressure on pricing of risks could be expressed in multiple ways which should not be ignored by trial courts.

49. On the diminished earning capacity, the court in the case of Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR stated thus:

> "...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". 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...."

50. I am in agreement with the case of Paul Njoroge vs Abdu Saburi Sabonyo [2015] eKLR where the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his employment was affected. Having gone through the record, I have not seen any evidence to show that the Respondent's employment has been affected. The decision of the trial court is therefore reversed for this very reason. An award for loss of future income compensates a Plaintiff/Claimant for earnings that he/she would have earned had he/she not been injured. This is a quantifiable sum based on actuarial or expert labour-economic evidence. The starting point for any trial court is to assess admissible evidence to establish the difference between the earnings the Plaintiff/Claimant will make in light of his/her injuries on the amount he/she would have made but for the accident, that amount is lost. Simply, on this limb of damages, the law envisages the capacity itself to earn that has been lost and must be quantified. It is therefore not about earnings that are being calculated. When it comes to loss of future earning capacity, which is pleaded in the Plaint, and described as an asset in various descriptive words, the court must look at the loss of capacity to earn any future income which has been occasioned by the severe injuries suffered by the Plaintiff/Claimant to deprive him/her an opportunity to earn any income. It also depends from the nature of the business being carried out by the Plaintiff/Claimant, the nature of employment or occupation prior to the accident. As a consequence, the court must gaze into the crystal ball by undertaking an inquiry which is evidence based. What sort of a career was the accident Plaintiff involved in before he suffered the disability occasioning him/her to lose the opportunity to work? What were his/her prospects and potential prior to the accident. Essentially with that in mind, the court then hinges towards loss of earning capacity of which compensation must be met and not loss of earnings. In this appeal, the above injury was never conducted by the trial court. There is no evidence that the Respondent/Plaintiff had been rendered less capable overall from all types of employment within the police force. I agree there is an assertion by the Respondent/Plaintiff that due to the accident he is less marketable or attractive as an employee of the police force, but interesting enough. He failed to produce any letter of termination

from the National Police Service or evidence of variation of duties which negatively impacted his monthly income of Kshs. 60,000/=. In addition, the respondent/Plaintiff never adduced evidence that he is less valuable to himself as a person capable of earning income in a competitive labour market. What standard of proof was expected of the Respondent/Plaintiff? It is as settled under Section 107(1), 108 and 109 of the *Evidence Act*. That evidence on loss of earnings must be real and substantial and not mere speculation or conjecture. The threshold issue for this court to sustain the claim on diminished earning capacity awarded by the learned trial magistrate of Kshs. 150,000 appears to me to be erroneous for lack of evidence to discharge the burden of proof on a balance of probability. Undoubtedly, for the respondent/Plaintiff there was no medical evidence to support the diminished capacity to earn income in the future and if so the extent to which the ability is diminished. I place reliance in the persuasive case of Bradley v Dymond 2002 BCCA 284, to decline any award under this limb. The court had this to say:

> "The trial judge's task was to assess the appellant's lost earning capacity, not to provide insurance for loss of a job. While evidence of the value of the income stream from full time employment is fundamental .... It cannot be determinative. The trial judge must gaze into the future with the benefit of all the evidence to assess two uncertainties: what might have been and what might have been and what might be. Both require an assessment of the physical, emotional, and hat might be. Both require an assessment of the physical, emotional, and mental capacity of a claimant, of his character, of the family, community and economic forces at work."

51. Had the Respondent/Plaintiff succeeded in proving award of damages on loss of earning capacity, the formula to be used would have been to postulate a minimum annual income loss for his remaining years of work, have it multiplied with the annual projected loss by the number of years remaining to arrive at the present value of his loss of earning capacity. Practically speaking, that was not the case here before trial courts. The monetary diminished earning capacity, awarded by the trial court of Kshs. 150,000/= bears no evidential support

52. Turning to special damages, Kshs. 670,084/= was pleaded. In the case of *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

53. The appellant took issue with the fact that the Respondent produced provisional in-patient bill break up of Kshs. 666,534 as opposed to providing receipts. When PW3 testified, he told this court that the cost of treatment for the first time was Kshs. 666,534/=. That there were other payments for the 2nd admission which was Kshs. 187,751/=, which was paid by NHIF. On cross examination, the witness acknowledged receipt of the said amount. I am of the view that these invoices connote the fact that the respondent herein received treatment services as a result of the injuries which he suffered due to the accident and which was caused by negligence on the part of the appellant. It is my opinion that in that case, the said invoices can be taken as evidence of an expense on the part of the respondent.

54. The upshot of it is that the Respondent is awarded special damages in the sum of Kshs. 666,534/=.

55. In the end the Appeal substantially succeeds save for the Claim of diminished earning capacity and therefore judgment is entered in favour of the Appellant in the following terms;

    i. Liability .....100% against the Appellant

ii. General Damages..... Kshs. 2,700,000/=

iii. Special Damages..... Kshs. 666,534/=

iv. Total .....Kshs. 3,366,534/=

v. Plus, costs and interest

56. It is so ordered. 30 days interim stay granted.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST 2024.

In the Presence of:

M/s Nyabuto for the Appellant

Opondo for the Respondent.

.....

R. NYAKUNDI

JUDGE