



Majid v Toza (Civil Case 238 of 2021) [2023] KEHC 20487 (KLR) (17 July 2023) (Judgment)

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 238 OF 2021
DKN MAGARE, J
JULY 17, 2023**

BETWEEN

ALI KHER MOHAMED MAJID APPELLANT

AND

NASSIR ALI TOZA RESPONDENT

JUDGMENT

1. This is an appeal from the judgement and decree of the honourable P. Wambugu, given on 11/11/2021 in Kwale CMCC 321 of 2017. The appeal is on quantum only
2. The Appellant raised only three grounds of appeal. Though in submissions he has added other grounds, which were not in the memorandum of Appeal.

Appellant's submissions

3. The Appellant relies on the authority of *Ratilah Gova Sumaria & another v Allied Industries Limited* [2007] eKLR, where the court of appeal stated as doth: -
 - a. This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see Peters Vs. Sunday Post Ltd [1958] E.A. 424. *Selle & Another Vs. Associated Motor Board Co. Ltd. & Others* [1968] E.A. 123 And *Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu* [1982-88] 1 KAR 278. In the last case Hancox JA (as he then was) put it thus at p. 292 of the Report:-
 - b. “A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did.”
 - c. The first holding in that case is also relevant namely, that:-



- d. “The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”
4. The second case they relied on was *Sheikh Mushtaq Hassan v Nathaniel Mwangi Kamau Transporters & 5 others* [1986] eKLR, where the court of Appeal stated as doth: -

“And a member of an appellate court when he naturally and reasonably says to himself ‘what award would I have made?’ and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views of opinions so that their figures are not necessarily wrong if they are not the same as his own. *West (H) & Son v Shephard Ltd* [1964] AC 326, Lord Morris of Borth -Y-Gest.

And the judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country. Lord Denning MR in *Lim Poh Choo v Chamden and Islington Area Authority* [1979] 2 All ER 910 (CA); *Hancox JA Mariga v Musila* (1982-88) 1 KAR 507”

5. Their view was that Dr Ndegwa was not a specialist while doctor Mohammed, who wrote the report on behalf of the plaintiff, was a specialist.
6. On quantum the Appellant submitted that in the case of *Richard Ngetich & another v Francis Vosena Kidiga* [2020] eKLR, the Court held as doth: -

As held in the case *Becky Jemutai Chesire Vs. Vernon Oyaró Mochache & another* (2016) eKLR, it is uncommon that medical doctors and experts in the field of medicine disagree with each other. Being non-expert in the medical field, the trial magistrate erred grossly and had no reason to depart from the expert’s opinion, unless there is glaring evidence of departure from the investigations, which none was evident.

Having re-evaluated the medical reports and evidence, I find no reason to hold otherwise than as found observed and stated by the two medical doctors; that the Respondent suffered disability of a temporary nature.”

7. They also relied on the authorities of *Duncan Mwangi Kioria & Valley Bakery LTD & 2 Others* [2011] eKLR and *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR among others. They pray that the award be set aside and the court do award 700,000/=. This is supported by the authorities of *Moiz Motors Limited & another v Harun Ngethe Wanjiru* [2021] eKLR, where the court set aside an award of 700,000/= to 500,000/=. The injuries suffered were, the court, HON Justice Mwongo stated: -

“In his brief cross-examination Dr. Omuyoma said the Discharge Summary did not indicate a fracture, although the P3 Form did. This, according to the appellant’s submission “is the main bone of contention [.....] whether indeed the Plaintiff/Respondent suffered a Depressed Fracture of the skull and what award would be fair and just”.

I think the question in the main bone of contention is answered from the evidence. It is true that the Discharge Summary did not indicate any fracture. It did however indicate the X-rays done without particularizing the results. This cannot mean that there were no



results or that there were no injuries found by the investigations. In his evidence-in-chief Dr. Omuyoma stated that he relied on patient file from Naivasha Hospital, and that the “Skull X-ray confirmed depressed fracture of frontal bone.” In cross examination he confirmed:

“I saw [the] x-ray films but not a report”.

Having seen the x-ray, it is reasonable to expect that Dr. Omuyoma was able to read and interpret it, but he was not questioned on this aspect. The fracture was also indicated in the P3 Form filled at the hospital by a different officer who was not called to testify. I see no basis to find that the Discharge Summary was inconsistent with the P3, or to reject the existence of a fracture using the standard of on balance of probabilities.”

8. They also relied on the case of *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR, where, the court set aside the award in the lower court where they had found as doth: -

“The doctor opines that the fracture of the skull is a very serious condition which can lead to post traumatic epilepsy and that it was a life long condition which needs permanent anti condition which needs permanent anti convulsant medication for the rest of his life and degree of injury was classified as grievous harm.”

The court set aside an award of 1,200, 000/= and awarded 500,000/=.”

The Respondent’s Submissions

9. In their submissions, the respondents stated that the authorities relied on by the Appellant were for significantly less serious fracture of the skull, in this matter they submit that the effects were bound to be enormous as conceded by the Appendant’s doctor, Dr Mohammed. He urged the court to look at the Respondent’s submissions at page 101 of the record. I shall revert to the authorities used in the lower court during analysis.
10. He relies on the authority of *Agnes Kamene Mulyali v Harvest Limited* [2017] eKLR, where the court of appeal held as doth: -

“We have looked at the decision that both the trial court and the learned Judge relied on, namely *David Kamande Ombui Vs. Kenya Bus Services* (Nairobi HCCC No. 281 of 1998)) and are immediately struck by the fact that the injuries therein seem to be significantly less serious than those suffered by the appellant...”

“The process of comparison is key to the proper assessment of general damages because, as was stated by Lord Morris of Borthy-Guest in the English case of *WEST (H) & SON LTD vs. SHEPH* [1964] A.C. 326 at 345;

“... 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 an endeavour 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”

Those sentiments were adopted by Potter J.A in *TAYAB vs. KINANU* [1982-88] 1KLR 90 cited by the appellant. We could not agree more.”



11. The Respondent posited that the case of Muthoni Mduati vs Wanyoike Kamau & 5 Others (2004) eKLR was authority for the position that issues must arise from pleadings. The issue of lost earnings or earning capacity was not appealed on. The decision stated as doth: -

“The Defendants say that the decision by the judge to apportion the property was an error apparent on the face of the record. It is for that reason that the Defendants have brought this application for review. And in support of their application the Defendants place reliance upon the decision by the Court of Appeal in Civil Appeal No 161 of 1991 Abdul Shakoor Sheikh Vs Abdul Najib Sheikh and 2 others. In that case, the superior court had dealt with an issue which was not properly before it, as it had not been pleaded in the plaint. The judge was criticised by the appellant for having made a gross error by granting a relief which had not been sought. The advocate for the respondent, in the said appeal, graciously conceded that the order went beyond the pleadings in the case. In its judgement the court of Appeal held that:

“as a general rule, therefore, a plaintiff is not entitled to reliefs which he has not specified.”

12. In his statement of claim. Pleadings play a very pivotal role in litigation. As stated in Bullen & Leake [12th edition] at page 3 under the rubric Nature of Pleadings:

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial”.

13. They state that order 42 is the guiding line on pleadings. The same was not listed in the grounds of appeal. Order 42 rule 4 provides as doth: -

“Grounds which may be taken in appeal [Order 42, rule 4.]

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

Analysis

14. The appeal is on quantum of damages. This involves all damages that were awarded. However, there is no complaint in the Memorandum of Appeal that the court awarded damages that were not pleaded. I will thus dismiss the first half of the ground that it was not pleaded.
15. However, it can be covered by other grounds for being inordinately excessive. If I find that it was inordinately excessive, then I shall address it. I will not, however, set aside the award as unpleaded. I will thus ignore all submissions on whether or not the damages for loss of earning capacity were pleaded and the difference with lost earnings.



The duty of the court.

16. 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.
17. This was aptly stated in the cases of *Peters vs Sunday Post Limited* [1985] EA 424 where the 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...”
18. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”
19. 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 it 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.”
20. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanour 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.
21. As regards to damages Justice D.S Majanja held as follows in the case of *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR: -

“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.”
22. 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 injured public must be at the back of the mind of the trial Court.



23. The foregoing was settled in the case of Mariga V. Musila [1984] KLR 251 where the Court of Appeal held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

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

25. The High Court, pronounced itself succulently on these principles in 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.

26. The foregoing statement had been ably elucidated by Sir Kenneth ‘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...”

27. 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.

28. So the court’s duty as the appellate court is threefold regarding quantum of damages is as follows: -

- 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 erroneous assessment of damages.
- c. The award is simply not justified from evidence.
- d. To be able to do this, I need to take into account similar injuries inflation and other comparable awards.

29. The injuries suffered and pleaded by the Respondent were: -

- a. Severe head injury involving
 - i. Comatose state
 - ii. Fracture of the right mastoid involving the occipital and temporal bones



- iii. Large right parietal extradural haematoma
 - iv. left frontal intradural haematoma
 - v. mass effect and brain edema
 - vi. Severe multiple bone, brain and soft tissue injuries
30. Special damages of 1,606,741 were pleaded.
31. The Respondent was 22 years old. He stated he could no longer work as he depends on his father at this tender age.
32. Dr. S.K Ndegwa filed a report dated 21/3/2018 where he examined the Respondent. He had improved. There was no neurological deficit. He concluded that there were severe bone, brain and soft tissue injuries. He gave 14 % disability. This he stated was due to:-
- a. deformity of the right side of the head
 - b. Loss of sense of taste and smell
 - c. Chronic headaches
 - d. Large surgical scar measuring 10cm, c shaped in an exposed area associated with loss of hair.
 - e. Being ruled out of sectors like security
 - f. Known risks of epilepsy or mental illness
 - g. The issue of security is an exaggeration as the plaintiff has already settled as a boda boda rider.
33. Dr Ndegwa also had another medical report with more less injuries. Upon hearing the parties and parties submitting, the court awarded judgement in favour of the Respondent as follows: -
- a. General damages 2,500,000
 - b. Diminished capacity 1,000,000/=
 - c. Special damages 1,606,741
 - d. Costs
 - e. Interest from the date of judgement till payment in full
34. This resulted in a three paragraph memorandum of appeal.
35. There is no appeal on special damages I however note that the court did not indicate the date from whence special damages were to attract interest. Majority of the special damages were incurred before filing of the suit. It is an established principle that special damages attract interest from the date of filing. Special damages are also not subject to contribution. It is general damages that are subject to contribution. This is simply to clarify the record.
36. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Hon Justice L. KIMARU, as then he was stated as doth: -

“The Appellant further asserts that, under this head liability had been agreed upon the parties by consent. The Respondent conceded 20% contribution so it follows that both the general damages and special damages should be subjected to 20% contributory negligence. The



trial magistrate is faulted as having erred in law and fact in disregarding this fact and not subjecting liability to 20% contributory negligence as agreed upon by parties. The court is thus urged to interfere and subject special damages to 20% contributory negligence. The special damages due to their specific nature and standards required to prove them, in my view should not be subjected to the apportionment. (See A.O Bayusuf & Sons Limited V. Samuel Njoroge Kamau[2008] eKLR)

37. In the case referred by the court, that is, A. O. Bayusuf & Sons Limited V Samuel Njoroge Kamau [2008] eKLR, the court, Hon. Justice Mugo stated as doth; -

“On the ratio of 50:50 contributory negligence I therefore award the Respondent a sum of Kshs. 125,000/= plus the proved special damages of Kshs. 2,400/= which in my view ought not be subjected to a reduction based on the apportionment of liability. Accordingly, the appeal succeeds in part and is hereby allowed with an award of Kshs. 127,400/= being made in favour of the respondent.”

38. Regarding the other damages, I am guided by the decision of Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, Kneller J.A. which was referred to earlier in the judgment

39. This was equally so held in the case of in Butt V Khan (1977) 1 KAR the Court of Appeal held as follows;

“An appellate court will not disturb an award of damages unless it is 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....”

40. Therefore, my duty is really simple, not to substitute the court’s discretion with mine. If I was sitting, I could have awarded a different figure. However, that is not important. It is whether the court misdirected itself in exercising its discretion. If not whether the court was plainly wrong.

41. The court relied on the principles set out in the case of Charles Oriwo Odeyo v Appollo Justus Andabwa & another [2017] eKLR, where justice S N Riechi, enunciated the principles to include but not limited to: -

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler Vs Butler (1984) KLR 225.

The assessment of damages in personal injury case by court is guided by the following principles: -

- a. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- b. The award should be commensurable with the injuries sustained.



- c. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- d. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- e. The awards should not be inordinately low or high (See Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR.”

42. He stated that he has considered the plaintiff’s authorities to be closer to the injuries suffered by the Plaintiff than the defendant’s authorities. I cannot see the consideration on the file. The said consideration must be in the judgement. How close were these authorities? These the only authorities on the subject. The closeness of submissions does not form the basis for award. Each case must turn on its own facts and recent authorities.

43. The respondent suffered what at the maximum we can say at 14% and at minimum 3% as per doctor Mohammed. I do not think there is a need to reconcile the reports, the loss of earning capacity being an aspect of general damages. The court will assess the best it can in the circumstances.

44. Even if we were to pick the higher of the two and assume that the Respondent will work to a ripe old age of 70 years, and at 14% disability, it works out that he will have worked full capacity until 70, He will lose 48 years at 14% and minimum wage.

45. He was to earn at the minimum wage a sum of Ksh. 3,870, 720 at full capacity. With 14% disability, he will earn a sum of 3,328,819. This means he will have a diminished capacity of 541, 900. This works out as doth: -

$$14/100 \times 12 \times 48 \times 6,720(\text{being the minimum wage}) = 541,900/=$$

46. If we accelerate it for lump sum payment and other vicissitudes of life, diminished capacity is to the extent only of Ksh 500,000/=. The figure of 1,000,000/= is inordinately high. A sum of 200,000/= submitted by the Appellant has no basis. If we use 3% for calculation, it will not be commensurate with the actual injuries as seen by the trial court. Both doctors agree that his worst years are ahead.

47. In the case of John Kipkemboi & another v Morris Kedolo [2019] eKLR, Hon Justice W Musyoka, stated as follows: -

“In John Wamai and Two Other Vs. Jane Kituku Nziva and Another (2017) eKLR the court stated as follows: -

The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.’



48. In the case of *Oyugi Judith & Another V Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR the Court stated that –

“Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on “municipal rates.” The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J., in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J., in *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003*[2007] eKLR where he expressed the following view;

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

49. The same principle was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J., stated that:

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambala and Collins Ochieng Obambala the sum of Kshs. 700,000.00 each.”

50. In awarding damages under this head, the Court of Appeal in *Mumias Sugar Company Limited vs. Francis Wanalo* (2007) eKLR stated that

“...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he 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 the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”



51. In the above case he awarded Ksh. 1,500,000/= for someone with 50% disability. It is also important that we encourage the respondent to recover and pursue normal life like that he is entitled. It is thus not good for his health to exaggerate how he is incapacitated.

52. In *Mumias Sugar Company Limited vs. Francis Wanalo* [2007] eKLR the Court of Appeal observed that –

“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... In the instant case, the loss of earning capacity was claimed as part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent in capacity was assessed at 15% by Dr. Juma and at 10% by Dr. Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained – mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial. It was minimal. The trial Judge in assessing the multiplicand of Shs. 7,000/= per month took into account that the appellant was earning Shs. 8,300/= p.m. during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/multiplier basis.”

53. I therefore set aside a sum of 1,000,000/= given as loss of earning capacity and substitute thereto a sum of 500,000/=. It shall attract interest from the date of judgement in the lower court.

54. Coming to the issue of general damages, the appellant’s injuries were enumerated above. In the case of *Onyango & another v Muriu* (Civil Appeal 151 of 2017) [2022] KEHC 232 (KLR) (24 March 2022) (Judgment), the court, justice Muigai held as doth

“In *Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi* [1997] eKLR, as follows: “It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd –vs- Shephard* [1964] AC 326 at page 345: ‘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. The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo*



vs Camden and Islington Area Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab vs. Kinanu [1982-88] 1 KAR 90. Lord Denning Mr said: ‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to punish the defendant.”

55. The appellant used the authorities of Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR. In that authority justice Majanja awarded Ksh 500,000/= for head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. In awarding those damages he stated: -

“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 of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:

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.”

56. They also relied on the case of Sila Tiren & another v Simon Ombati Omiambo [2014] eKLR, where, justice FRED A. OCHIENG, as then he was, awarded 360,000/= in 2014 for The Plaintiff suffered, a fracture of the occipital bone of the skull, with bruises on the face and his right knee. He was unconscious at the time of the accident, and only regained consciousness on admission at the hospital. He remained hospitalised for 3 days. After discharge, he continued to complain of headaches. The doctor assessed the Plaintiff’s likelihood of epilepsy in future, at 4 to 5 %.
57. Finally, the Appellant had relied on Richard Ngetich & another v Francis Vosena Kidiga [supra], where the Victim had Total incapacity of a temporary nature for 4 weeks and permanent physical disability. The injuries were Head injury with an abrasion on right side of forehead according to Dr Malik and Head injury with extradural hematoma and compound fracture of the left occipital bone and bruises on the right side and pneumocranium of forehead, according to Dr. Wellington Kiamba.
58. In a nutshell those injuries are less serious than those suffered by the Respondent. Some are fairly old. They do not reflect the current trend and I have already discussed the authorities of Moiz Motors Limited & another v Harun Ngethe Wanjiru [2021] eKLR and others that were submitted on. They are fairly light injuries. There was also permanent disability. Whether at 3% or at 14 %.



59. The Respondent did not want to mend that which ain't broken. They relied on authorities at page 101 of the record. They relied on the authority of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR, where the court stated as follows regarding experts: -

“But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. In *Ndolo v Ndolo* [1995] LLR 390 (CAK), this Court stated: -

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: “Because this is the evidence of an expert, I believe it.”

60. The respondent urged the court to rely on Dr Ndegwa's second report. The tragedy is that the doctors and all medical evidence are not in agreement of the extent of the injuries. The nature of the injuries were serious. Dr Mohammed did not support his report with cogent reasons for giving 3%. Dr Ndegwa is detailed. I believe as the court below did, the report by Dr Ndegwa. He defended his report on cross examination while Dr Mohammed indicated that the disability is just an opinion. Though we have no medical background, the injuries were enumerated by the two doctors. The p3 and treatment record where the Respondent stayed in ICU for 17 days., coupled by the ramifications that both doctors agree will arise from these injuries, I believe Dr Ndegwa.

61. I hold and find that the Respondent suffered 14% disability and I do not have a basis to believe Dr. Mohammed's report on permanent disability.

62. The case of *Terry Kanyua Marangu v Wells Fargo Limited* [2014] eKLR, related to super serious injuries. It is not related in any way with the injuries suffered by the Respondent.

63. The case of *Sosphinaf Company Limited & James Gatiku Ndolo v Daniel Ng'ang'a Kanyi* [2006] eKLR, was decided way back in 2006. Though slightly closer to the current case, it is more serious, there is an unsightly scar the size of a duck's egg, bones were removed and was hospitalised for 4 ½ months.

64. The injuries in those cases and the other 2 are so old that they cannot reflect the current awards. There is only 1 fracture of the right mastoid involving occipital and temporal bones. Other serious injuries were oedema.

65. In the case of *Panniack Investments Limited v Davidson Mwanzia Kamuta* [2018] eKLR the Respondent had suffered less severe injuries being; fracture of the left temporal-parietal bones, acute epidural hematoma on the left temporal parietal lobes, mass effect with midline shift, effacement of the sulci and basal cisterns, Concussion with lucid moments; and bleeding from the left ear (otorrhea) Hon Lady Justice, Njoki Mwangi, held as follows: -

In the said circumstances, the case of *Mutinda Sammy vs Tawfiq Bus Services* (supra) was more applicable to this matter. It is the finding of this court that the award of general damages in the sum of Kshs. 800,000/= was not inordinately high to result in an erroneous estimate of general damages.

66. In the case of *Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna* [2022] eKLR, the court confirmed an award of 850,000/= for head injury with loss of consciousness, fracture of the right



zygoma (facial bone), multiple facial lacerations, blunt injury to the shoulders and blunt injury and bruises to both lower limbs.

67. In *Muteti Peter & another v Veronica Mutua Masika* [2021] eKLR, the court confirmed an award of Ksh 1,300,000/= for a fracture of the base of proximal phalanx of the right hand, linear fracture of the right parietal bone, Linear fracture right temporal bone and Partial opacification of the right mastoid air cells and the middle ear among others. The award was made in 2015.
68. Having regard to all these injuries I am of the considered opinion that an award of Ksh 2,500,000/= was excessive in the circumstances. A proper award should be a sum of Ksh.1,700,000/=. I therefore set aside the award of Ksh. 2,500,000/= and substitute with a sum of Ksh. 1,700,000/=

Determination

69. The upshot is that I allow the appeal partly as follows: -
- a. The award of general damages for pain suffering and loss of amenities and for diminished earnings are hereby set aside. In lieu thereof the court enters judgement for the Respondent against the Appellant as follows: -
 - i. Liability as agreed at 80: 20
 - ii. General damages:-
 - a. for pain, suffering and loss of amenities Ksh 1, 700,000
 - b. for diminished capacity Ksh. 500,000
 - iii. Subtotal Ksh. 2,200,000/=less 20% contribution Ksh. 440,000/=
- General Damages Due Ksh. 1,760,000/=
- b. General damages to attract interest from the date of judgement in the lower court.
 - c. Special damages as awarded by the court below 1,606,741/= with interest from the date of filing suit in the lower court but not subject to contribution.
 - d. I therefore award judgement for Ksh 3,366,741/= for the respondent as against the Appellant, as aforesaid.
 - e. The changes are minimal. The circumstances require that each party bears its costs in this Appeal.

The file is closed.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of July, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Julu for the Respondent

Mr. Mauko for the Appellant



