



**Kenya Builders & Concrete Company Limited & another v Kasuli (Civil Appeal E918 of 2023) [2024] KEHC 13940 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E918 OF 2023**

**TW OUYA, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**KENYA BUILDERS & CONCRETE COMPANY LIMITED ..... 1<sup>ST</sup> APPELLANT  
TITO MUTHINI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NICHOLAS MWANZIA KASULI ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. W.K. Micheni,  
CM, delivered on 7.08.2023 in Milimani CMCC No. E9021 of 2021)*

**JUDGMENT**

**Background**

1. For determination are the appeal lodged by Kenya Builders & Concrete Co. Ltd and Tito Muthini (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Appellants) vide the memorandum of appeal dated 7.09.2023 and the cross appeal filed by Nicholas Mwanzia Kasuli (hereafter the Respondent) vide the notice of cross appeal also dated 7.09.2023. Both the appeal and the cross appeal emanate from the judgment of Hon. W.K. Micheni, CM delivered on 7.08.2023 in Milimani CMCC No. E9021 of 2021 (the suit).
2. The Respondent instituted the suit against the Appellants by way of the plaint dated 15.06.2021 upon a claim for general and special damages as well as loss of earnings and future medical expenses, in respect of injuries allegedly sustained by the Respondent on or about 7.12.2020. It was averred that the Respondent was on the material date a pillion passenger aboard the motor cycle registration number KMFD 298R (the motor cycle) travelling along Outering Road-Kware Area when the 2<sup>nd</sup> Appellant, being a driver/agent of the 1<sup>st</sup> Appellant, so carelessly and/or negligently controlled and/or managed the 1<sup>st</sup> Appellant's motor vehicle registration number KCU 338A (the subject motor vehicle)



that it collided with the motor cycle, causing the Respondent to sustain serious bodily injuries. The Respondent therefore blamed the 2<sup>nd</sup> Appellant for the said accident and averred that the 1<sup>st</sup> Appellant was to be held vicariously liable.

3. Upon service of summons, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants entered appearance and filed a joint statement of defence dated 9.08.2021 denying the key averments in the plaint and liability.
4. When the matter came up before the trial court for hearing on 25.04.2023, the parties recorded a consent on liability in the ratio of 85:15 in favour of the Respondent and against the Appellants and for the production of the medical reports relied upon in the suit. Thereafter, parties canvassed the issue of quantum of damages through written submissions.
5. Finally, the trial court vide the judgment delivered on 7.08.2023 awarded damages in the manner hereunder:
  - a. General damages  
Pain, suffering  
and loss of amenities Kshs. 2,500,000/-  
Future medical expenses Kshs. 500,000/-  
Loss of earnings Kshs. 2,000,000/-
  - b. Special Damages: Kshs. 154,500/-
6. The trial court deducted 15% contributory negligence on both the general and special damages.

### **The Appeal**

7. Aggrieved with the outcome, the Appellants preferred the present appeal by way of the memorandum of appeal dated 7.09.2023 specifically challenging the finding on quantum of damages, premised on the following grounds:
  - I. That the Learned Magistrate erred in law and fact in finding that the Respondent had suffered a permanent incapacity of 100%.
  - II. That the Learned Magistrate erred in law and fact in disregarding the Appellants' doctors medical assessment report.
  - III. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 2,500,000 for general damages which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable.
  - IV. That the Learned Magistrate erred in law and fact in awarding the Respondent damages for loss of earning capacity yet he had not provided sufficient evidence to prove his earnings.
  - V. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 500,000 for future medical expenses which was not justified.
  - VI. That the Learned Magistrate erred in law and fact in awarding the Respondent special damages of Kshs. 154,500/- without evidence of receipts to justify the same.
  - VII. That the Learned Magistrate erred in law in disregarding the Appellant's submissions on quantum.



- VIII. That the Learned Magistrate erred in law and fact by arriving at an award not based on any judicial precedent or authority.
  - IX. That the Learned Magistrate erred in law and in fact in using the global method in awarding the loss of earning capacity.
  - X. That the Learned Magistrate erred in law and in fact in failing to apply proper legal principles regarding quantum and thus arriving at a bad decision.
  - XI. That the Learned Magistrate grossly misdirected herself in treating the Appellant's submissions on quantum superficially thus arriving at an erroneous decision on quantum. (sic)
8. The Appellants consequently seek the following orders:
- I. The appeal herein be allowed.
  - II. The judgment delivered by the Honourable Wendy K Micheni on 7.08.2023 in Milimani CMCC No. E9021 of 2021 be set aside.
  - III. Costs of the appeal and proceedings in the lower court be awarded to the Appellants. (sic)
9. As earlier mentioned, the Respondent similarly challenged the award of the trial court by filing a notice of cross appeal dated 7.09.2023 featuring the grounds hereunder:
- I. That the Learned Magistrate erred in law and in fact in awarding the Respondent Kshs. 2,500,000/= which amount was inordinately too low taking into consideration the nature of injuries suffered by the Respondent.
  - II. That the Learned Magistrate having found that the Respondent was indeed gainfully employed erred in law and in fact in awarding the Respondent Kshs. 2,000,000/= for loss of earning capacity which amount was inordinately too low based on the age of the Respondent and his work description.
  - III. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 500,000/= for future medical expenses which award was unfairly too low considering the current inflation rate, the market rate of a quality prosthesis and the age of the Respondent.
  - IV. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 154,500 for special damages despite the Respondent providing receipts to prove special damages of Kshs.370,440.47.
  - V. That the Learned Magistrate erred in law and fact by failing to take into consideration the Respondents submissions on quantum and documents produced. (sic)
10. Consequently, the Respondent on his part seeks the following orders:
- I. The cross appeal herein be allowed in the following terms:-
    - a. General damages for pain, suffering Kshs. 5,000,000/=
    - b. Loss of earnings Kshs. 7,800,000/=
    - c. Future medical expenses Kshs. 6,000,000/=
    - d. Special Damages: Kshs. 370,440.47
  - II. The costs of the cross appeal and proceedings in the lower court be awarded to the Respondent.



## Submissions on the Appeal

11. Both the appeal and cross appeal were canvassed by way of written submissions. Counsel for the Appellants for one anchored his submissions on the decision in *Stephen Wangonde v The Ark Ltd* 2014 eKLR on the principles applicable when considering expert evidence. Counsel then proceeded to argue that in the present instance, the trial court was faced with conflicting assessments on permanent incapacity and therefore ought to have taken into account the two (2) medical reports which had been tendered to show the nature and extent of the Respondent's injuries, as well as the First Schedule of the Work Injuries Benefits Act (WIBA) which assesses loss of a single limb at 70% disability. That upon doing so, the trial court ought to have assessed the Respondent's permanent incapacity at 70% as opposed to 100%.
12. Regarding the award made on general damages for pain, suffering and loss of amenities, counsel for the Appellants argued that the same was inordinately high and not commensurate to the injuries sustained by the Respondent. The Appellants therefore urged the court to substitute the award made in the sum of Kshs.2,500,000/- with a sum of Kshs. 2,000,000/- while relying on the case of *Crown Bus Services Ltd, Peter Khakali & Ainus Shamsi Hauliers Ltd v BM (Minor suing through his mother & Next Friend) SMA* [2020] KEHC 1817 (KLR) where a minor who suffered amputation to his right leg above the knee was awarded a sum of Kshs. 2,000,000/- on appeal under a similar head; and the case of *C M (a minor suing through mother and next friend M N) v. Joseph Mwangangi Maina* [2018] eKLR in which Meoli, J. awarded a sum of Ksh.2,000,000/- on general damages for pain and suffering at the instance of a child who similarly suffered amputation of the right leg.
13. On the damages awarded for loss of earning capacity, counsel firstly argued that no proper evidence was tendered by the Respondent to demonstrate that as a result of the accident, his employment status changed. Secondly, counsel for the Appellants argued that the Respondent did not tender any evidence to show his earnings and hence he was not entitled to any award under the above head. On that basis, counsel faulted the trial court for making an award here, calling to aid the decision rendered in *Kenblest Kenya Limited v Musyoka Kitema* [2020] KEHC 9855 (KLR) where the court rendered that:

“ Additionally, the Respondent did not prove that as a result of the injuries sustained, he was exposed to either losing his job in the future or that in case he had lost his job, his chances of getting an alternative job in the labour market were slim. Even though, it was not mandatory for the respondent to plead the same, it is my finding that there was no evidence that the respondent was no longer in employment or that the chances of gaining employment in the future were diminished as a result of the injuries sustained and as such, no award was applicable under the head of loss of future earning capacity.”
14. In the alternative, counsel argued that should this court find that the Respondent was entitled to an award under the above head, then an award of Kshs. 500,000/- would suffice, taking into account the case of *Abdi Werdi Abdulahi v James Royo Mungatia & Joseph Mwongela Mungana* [2019] KEHC 2791 (KLR) where a similar sum was awarded within the context of a global figure, in the absence of any specific evidence to demonstrate a loss of earnings or inability to work.
15. Concerning the award made under the head of future medical expenses, it is the submission by counsel that the medical report which was relied on by the Respondent contained an exaggeration on the recommendation for the cost of prosthesis in the future. Counsel therefore urged the court to substitute the award made under this head with a more reasonable award in the sum of Kshs. 360,000/-.



16. Regarding special damages, the Appellants' advocate faulted the trial court for awarding a sum of Kshs. 154,500/- and yet only the sum of Kshs. 136,500/- was proved by way of receipts. Counsel therefore urged the court to substitute the award under that head accordingly. Ultimately, the court was urged to disturb the respective awards accordingly.
17. The Respondent on his part equally challenged the trial court's award under the respective heads of damages. However, as concerns the degree of permanent incapacity assessed by the trial court, the Respondent's counsel maintained that the same was correctly assessed at 100% upon consideration of the age of the Respondent at the time of the accident, coupled with the medical evidence on record which sets out the seriousness of his resulting injuries.
18. Be that as it may, his counsel relied inter alia on the decision in Catherine Njeri Njoroge v Benard N. Njeru [2016] KEHC 6040 (KLR) where the court awarded a sum of Kshs. 3,000,000/- to a plaintiff who suffered amputation of the lower right limb with 70% permanent incapacity, and the decision in Emmanuel Kombe Nzai also known as Kombe Emmanuel v Basari Company Limited & Horizon Company Limited [2017] KEHC 1466 (KLR) in which a plaintiff who suffered permanent degree incapacity of 80% was awarded a sum of Kshs. 6,000,000/-; to argue that the Respondent was entitled to at least an award of Kshs. 5,000,000/- for pain and suffering. That consequently, the award of Kshs. 2,500,000/- made by the trial court and being inordinately low, ought to be revised upwards accordingly.
19. Concerning damages for loss of earnings, counsel argued that the Respondent had tendered evidence to show that he was engaged in gainful employment as a port clerk, at all material times prior to the accident and earning a monthly salary of Kshs. 20,000/-. However, counsel faulted the trial court for taking a global approach as opposed to the multiplier approach adopted in the case of Alpharama Limited v Joseph Kariuki Cebron [2017] KEHC 1818 (KLR). The Respondent's counsel therefore urged the court, upon being persuaded by the just-cited case, to apply a multiplier relevant to the Respondent who was aged 22 years at the time of the accident and a multiplicand of Kshs. 20,000/- giving rise to an appropriate award of Kshs. 7,800,000/-.
20. On future medicals, it is counsel's contention that the Respondent was entitled to an award of Kshs. 6,000,000/- rather than the award of Kshs. 500,000/- made by the trial court, taking into account the fact that the Respondent would be required to replace the prosthetic leg every 3-5 years at an estimated cost of Kshs. 120,000/- according to the medical report tendered by the Respondent. That being guided by the World Health Organization (WHO) which sets the life expectancy at 62 years, the above-proposed award is reasonable in the circumstances.
21. Regarding special damages, it is counsel's contention that the trial court ought to have awarded the pleaded sum of Kshs. 370,440.47 the same having equally been proved, in line with the principles on special damages set out in the case of Maritim & Another v Anjere [1990-1994] EA 312, 316. Ultimately, counsel urged the court to allow the cross appeal and to disturb the respective awards by the trial court, accordingly.

### **Analysis and Determination**

22. The court has considered original record, record of appeal and the submissions made by the respective parties on both the appeal and cross appeal. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123 and Williams



Diamonds Limited v Brown (1970) EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278 equally stated that:

“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 principles in reaching the findings he did.”

23. The contention in the main appeal relates to the quantum of damages awarded by the lower court under all heads, which are viewed by the Appellants as being either inordinately high or wrongfully awarded. In contrast, the Respondent by way of the cross appeal terms the respective awards as either being inordinately low or awarded on the premise of misapplied principles. That said, the court will consider the appeal and cross appeal under the respective heads of damages.

24. In considering the appeal, the court will therefore be guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.”

25. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 that:

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

26. In Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR, the Court of Appeal reiterated the discretionary nature of general damage awards and exhorted that:

“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 in the first instance”.

27. Similarly, in Tayib v Kinany (1983) KLR 14, the Court exhorted inter alia that:

“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 and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (Emphasis added)

28. In respect of general damages under the head of pain, suffering and loss of amenities, the Respondent particularized his injuries in the plaint dated 15.06.2021 as comprising fracture of the right tibia and fibula, and gangrenous right leg leading to above knee amputation. The injuries were confirmed in the medical evidence constituting part of the Respondent’s bundle of documents, including the medical report prepared by Dr. Cyprianus Okoth Okere and dated 3.05.2021 (the first medical report). Therein, the doctor noted that the Respondent had received treatment at Tenwek Hospital where



- he underwent an above knee amputation and formalization on the right leg. The doctor classified the Respondent's injuries as maim in nature and stated that the Respondent would require a good prosthesis which would cost Kshs. 5,000,000/-. Consequently the doctor assessed degree of permanent incapacity arising from the injuries at 100%.
29. From a re-examination of the record, it is apparent that the Respondent underwent a second medical examination at the request of the Appellants thereby resulting in the medical report dated 25.02.2022 prepared by Dr. P.M. Wambugu (the second medical report). The doctor largely echoed the prognosis of his counterpart, save that he classified the Respondent's injuries as blunt trauma, skeletal and soft tissue in nature; before proceeding to assess degree of permanent incapacity at 70%. The said doctor likewise stated that the Respondent would require a prosthesis, at an estimate cost of Kshs. 120,000/- with a provision for replacement every 8-10 years due to natural wear and tear.
  30. In her judgment, the learned trial magistrate upon setting out the summary of the pleadings, evidence tendered and proposed awards by the parties, reasoned that the degree of disability assessed at 100% in the first medical report was accurate given the nature and extent of the Respondent's injuries particularly the leg injuries resulting in the above knee amputation. In the end, the learned magistrate proceeded to award a sum of Kshs. 2,500,000/- under the above head.
  31. Both the Appellants and the Respondent herein have firstly complained that trial court did not take into consideration their submissions and/or material filed in the suit. From a perusal of the record and in particular, the impugned judgment, there is nothing on the record to indicate that in making her award on damages, the learned trial magistrate necessarily overlooked or ignored the evidence, submissions and/or authorities relied upon by the Appellants.
  32. Suffice it to say that, the Respondent on the one part suggested the sum of Kshs. 5,000,000/- general damages for pain, suffering and loss of amenities while replying on the authorities similarly cited in her submissions on appeal, some of which are referenced hereinabove.
  33. On the other part, the Appellants proposed a sum of Kshs.1,800,000/- with reference inter alia to the case of John Kipkemboi & Thallmax Contractors v Morris Kedolo [2019] KEHC 8736 (KLR) where the High Court sitting on appeal awarded a sum of Kshs. 2,500,000/- to a plaintiff who had sustained amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury, with permanent incapacitation being assessed at 50%; and the case of and Teresiah Ngugi & Leaky Gichungu Kinuthia v Michael Masia Kimende [2018] KEHC 3879 (KLR) in which the appellate court substituted an award of Kshs. 2,000,000/- with one of Kshs. 1,500,000/- at the instance of a plaintiff who had suffered mild head injury with facial bruises, a blunt chest injury with fractural ribs, a cut wound right leg below and a compound fracture of the right tibia fibula.
  34. In making her assessment, the learned trial magistrate notably did not cite any guiding authorities. Be that as it may, it is apparent that in making her award, she indicated that she was more persuaded by the assessment of permanent incapacity of 100% arrived at in the first medical report, which reasoning this court finds fair in the circumstances and in view of the fact that it is common practice for medical reports prepared by different medical doctors to differ in assessment of degree of permanent incapacity. There was nothing to preclude her from being more persuaded by the assessment in the first medical report, and there is equally nothing to indicate that she necessarily disregarded the degree of permanent incapacity assessed at 70% in the second medical report.
  35. Suffice it to say that, upon considering the respective authorities cited in the suit, the court is of the view that among those cited by the Respondent, the case of Catherine Njeri Njoroge v Benard N. Njeru [2016] KEHC 6040 (KLR) in particular and which is equally cited earlier in this decision, involves comparable injuries to those sustained here, though the said case was decided a few years ago.



In any event, the court is of the view that the award proposed by the Respondent in the sum of Kshs. 5,000,000/- falls on the higher side. Likewise, the court finds that though the authorities cited by the Appellants also involve related injuries they were equally decided a few years ago.

36. Nonetheless, it is clear from a study of the respective medical reports that the injuries sustained by the Respondent were quite serious in nature, to the extent that he lost a part of his right leg through amputation above the knee.
37. In the premises, the court in addition to considering the applicable authorities referenced hereinabove, further considered the more recent case of *Edwina Adhiambo Ogot v James Kariuki* (2020) eKLR where an award of Kshs. 2,200,000/- was made on general damages in respect of a fracture of left humerus; Compound (open) fractures of the left tibia and fibular; Amputation of the left leg above the knee; and Intra uterine foetal death at 32 weeks (as per ultra sound), with degree of incapacity on the amputated leg being assessed at 50%. The court also considered the case of *Njoka v Siboyi & another* [2023] KEHC 24184 (KLR) in which an award of Kshs. 2,000,000/- was made on general damages, to a plaintiff who had suffered multiple fractures injuries resulting in amputation of the right leg, with permanent incapacity being assessed between 40% and 100%. It is apparent that the permanent incapacity assessed in the above-cited authorities was less than what was assessed in the present instance.
38. Upon therefore considering all the foregoing authorities; the nature of the injuries suffered by the Respondent coupled with the range of permanent incapacity assessed; as well as the current inflation rates, the court is of the view that the award of Kshs.2,500,000/- made by the learned trial magistrate constitutes a reasonable and fair award in the circumstances. The court therefore sees no reason to interfere with the same.
39. Turning to the award made under the head of future medical expenses, as earlier mentioned, the respective doctors by way of the first and second medical reports made mention that the Respondent would require a prosthetic leg, save with variations as to the estimated cost thereof. While in the first medical report, the doctor stated that the Respondent would require a good prosthesis which would cost Kshs. 5,000,000/-, the doctor who prepared the second medical report indicated that the Respondent would require a prosthesis, at an estimate cost of Kshs. 120,000/- with a provision for replacement every 8-10 years due to natural wear and tear.
40. The learned trial magistrate, upon reasoning that the cost of a quality prosthetic leg would ordinarily range between Kshs. 120,000/- and Kshs. 500,000/-, proceeded to award a sum of Kshs. 500,000/- under the relevant head. She however did not elaborate on how she arrived at the figure of Kshs. 500,000/- yet the same did not feature in either of the medical reports and was not advanced by either of the parties here.
41. On appeal, the Appellants on the one hand found the said award to be unjustified in the circumstances and instead proposed a sum of Kshs. 360,000/- under that head, while the Respondent on the other hand deems it inordinately low and urges that the same be revised upwards to a sum of Kshs. 6,000,000/-.
42. Having considered the foregoing, the court noted that whereas the learned trial magistrate reasoned in her judgment that the doctor who prepared the first medical report indicated that the Respondent would require a replacement of the prosthesis every 3-5 years, upon perusal of the said medical report as annexed to the record of appeal, the court did not come across any reference to that effect therein. Similarly, the court did not come across a separate copy of the said medical report in the lower court file constituting part of the record, to enable it verify the contents thereof on the above subject.



43. Be that as it may, it is noteworthy that the court is not an expert in the medical field and can only draw guidance from the expert evidence tendered. As such, the court is persuaded to apply the replacement period of every 8-10 years, as recommended in the second medical report.
44. It is apparent from the medical and related evidence on record that the Respondent was aged about 22/23 years, at the time of the accident. The court will therefore tabulate the replacements in line with the current retirement age of 60 years which seems to correspond fairly with the general life expectancy age, thereby implying that the Respondent may require a replacement of the prosthetic about four (4) times until then.
45. Upon therefore applying the sum of Kshs. 120,000/- coupled with replacement of the prosthetic approximately four (4) times during the Respondent's lifetime, the award under the above head is tabulated as follows:
- $$\text{Kshs. } 120,000/- \times 4 = \text{Kshs. } 480,000/-$$
46. In view of all the foregoing circumstances, the court deems it necessary to disturb the award made under the above head, accordingly.
47. This brings us to the award made under the head of loss of earning capacity, which was challenged by both parties herein, with the Appellants submitting that the same ought not to have been awarded, while the Respondent argued that the award made therein was inordinately low and therefore ought to be revised upwards.
48. In his submissions before the trial court, the Respondent argued that prior to the accident, he earned a monthly salary of Kshs. 20,000/-. That following the accident, he was hospitalized for a period of six (6) months during which time he did not earn an income to the tune of Kshs. 120,000/-. That subsequently, he lost his earnings and has been unemployed to date. The Respondent further submitted that given the assessment of permanent incapacity at 100%, he was entitled to an award under this head to be tabulated using a multiplier of 32 years thus:
- $$\text{Kshs. } 20,000/- \times 32 \times 12 = \text{Kshs. } 7,680,000/- (+ \text{Kshs. } 120,000/-) = \text{Kshs. } 7,800,000/-$$
49. In contrast, the Appellants argued that the Respondent did not demonstrate that as a result of his injuries, he was unable to earn an income.
50. Upon considering the above, the learned trial magistrate awarded the Respondent a global sum of Kshs. 2,000,000/-.
51. On the subject of damages for loss of earning capacity/loss of earnings versus loss of future earnings, the Court of Appeal in the case of *William J Butler v Maura Kathleen Butler* [1984] eKLR acknowledged that:
- “...compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”
52. A similar position was echoed by the Court of Appeal in the decision rendered in *SJ v Francesco Di Nello & Another* [2015] eKLR cited in the Plaintiffs' submissions, when it held thus:
- “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 Lloyd'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."

53. The above-cited decisions set out distinctively the difference between loss of future earnings, otherwise referred to as loss of income, and loss of earning capacity.
54. Flowing from the foregoing, loss of income/future earnings; being in the nature of special damages; must be pleaded and proved. Loss of earning capacity on the other hand (which is the head under which damages were sought before the trial court), is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. See *Cecilia W. Mwangi and Another v Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996* [1997] eKLR.
55. Upon re-examination of the pleadings and material tendered before the trial court, the court noted that the Respondent tendered a copy of a staff ID card and a letter dated 26.03.2021 signed by the Chief Executive Officer of Rannkata Trading Company Limited indicating that he was employed at all material times and earning a salary of Kshs. 20,000/- each month, between 5.06.2020 and 7.12.2020 the latter being the date of the accident. The above-referenced letter further stated that he worked as a motorcycle rider.
56. Upon further re-examination of the pleadings and material tendered before the trial court, it is apparent that permanent incapacity for the Respondent resulting from his injuries was assessed at between 70% and 100% going by the respective medical reports, as earlier mentioned. In that case, the court is satisfied that a degree of permanent incapacity would entitle the Respondent to an award of damages under the head of loss of earning capacity, given that a medical assessment of permanent incapacity infers limitation of a person's ability to work/earn a living moving forward. In any event, it is apparent from the record that the Respondent was in employment at all material times prior to the accident.
57. On the subject of earnings, it is apparent in the present instance that whereas the Respondent relied on the aforementioned letter and staff ID which collectively set out his employment, he did not tender any credible documentation to ascertain his earnings. It is also apparent from the record that the earnings set out therein are controverted by the Appellants. In the premises, the court finds that the Respondent's particulars of earnings were not proved by way of any credible evidence. Similarly, it is apparent that the Respondent's category of employment is not catered for in the Minimum Wage Regulations.
58. In the circumstances, the court concurs with the decision by the learned trial magistrate to take a global approach, though it would be necessary to mention that the said magistrate made no mention as to what guided her decision to award a global sum of Kshs. 2,000,000/- under the above head.
59. That notwithstanding, the court considered the case of *John Kipkemboi & Another v Morris Kedolo* [2019] eKLR where a Respondent who suffered amputation of the left leg was awarded a global sum of Kshs. 1,500,000/- for loss of earning capacity and the more recent case of *Simba Platinum Limited v Nicholas Auma Wandera* [2021] KEHC 1235 (KLR) involving a plaintiff with comparable injuries coupled with 100% degree assessment of permanent incapacity, was awarded a similar sum of Kshs. 1,500,000/-.



60. Taking into account the brief time that has passed since the foregoing authorities were decided and other vitiating factors, the court is persuaded to disturb the award made by the learned trial magistrate; which award fell on the higher side; and to revise it downwards, thereby substituting it with an award of Kshs. 1,800,000/- under that head.
61. This leaves the award in respect of special damages. It is trite law that special damages must be specifically pleaded and strictly proved. This was the position acknowledged by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated that:
- “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 Part Hotel Limited* [1948] 64 TLR 177 thus;
- “Plaintiffs must understand that if they bring actions for damages, it is for them 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.’”
62. Further Chesoni, J (as he then was) stated in the case of *Ouma v Nairobi City Council* (1976) KLR 304 that:
- “Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court’s view is as laid down in the English leading case on pleading and proof of damages, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533; -
- The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (Emphasis added)
- See also *Hahn -v- Singh* [1985] KLR 716.
63. In his pleadings, the Respondent sought a sum of Kshs. 370,440.47. however, the learned trial magistrate awarded a lower sum of Kshs. 154,500/-.
64. From its re-examination of the record, the court noted that some of the documentation tendered by the Respondent on this claim was illegible and there was therefore no way of ascertaining the sums sought. In addition, the Respondent adduced hospital bill records which equally do not constitute evidence by way of receipts, as is the legal requirement.



65. From its tabulation therefore, the court observed that the Respondent only tendered the following receipts: the receipt dated 3.05.2021 for the sum of Kshs. 3,000/- being payment for the medical examination; the hospital receipts issued by Tenwek Hospital and dated 29.12.2020 (Kshs. 57,000/-), 28.12.2020 (Kshs. 5,000/-), 28.12.2020 (Kshs. 15,000/-), a cash receipt dated 29.12.2020 for the sum of Kshs. 3,000/- and a slightly illegible receipt indicating the sum of Kshs. 50,000/-. The special damages arising from the aforementioned receipts total the sum of Kshs.133,000/- . On that basis, the court finds that the trial court erred in awarding sums not strictly proved. Consequently, the award under this head ought to be substituted with an award in the sum of Kshs. Kshs.133,000/-.

### **Disposition**

66. In the end therefore, the appeal partially succeeds, whereas the cross appeal fails. Consequently, the court hereby sets aside the trial court awards made on general damages for loss of earning capacity, future medical expenses and special damages. The award made under the head of pain, suffering and loss of amenities remains.

67. The judgment on appeal shall now read as follows:

a. General damages:

Pain, suffering and loss of amenities - Kshs. 2,500,000/-

b. Future medical expenses - Kshs. 480,000/-

c. Loss of earning capacity - Kshs. 1,800,000/-

d. Special damages - Kshs. 133,000/-

Total award - Kshs. 4,913,000/-

Less 15% contribution

Net: Kshs. 4,176,050/-(Four Million, One Hundred and Seventy-Six Thousand, and Fifty)

e. The Respondent shall have costs of the suit and interest on general damages at court rates from the date of judgment until payment in full, and interest on special damages at court rates from the date of filing suit until payment in full.

f. The cross appeal is hereby dismissed.

g. Parties shall each bear their own costs of both the appeal and the cross appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

ROA 14 days.

**HON. T. W. Ouya**

**JUDGE**

FOR APPELLANT.....OMAGWA

FOR RESPONDENT.....T. J MICHAEL

COURT ASSISTANT.....Martin

