Waithaka v Kariuki (Civil Appeal 38 of 2023)
[2024] KEHC 14052 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 38 OF 2023

DKN MAGARE, J

NOVEMBER 11, 2024

BETWEEN

DAVID WAITHAKA ..... APPELLANT

AND

PRISCAH NAMBALE KARIUKI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. V. Kosgei, Resident Magistrate dated 25/4/2023 arising from Karatina MCCC No. E002 of 2022.

2. The appeal is on the quantum of damages only. The Memorandum of Appeal, however, is a classical study on how not to write a memorandum of appeal. The Appellant filed a prolixious 8 - paragraph argumentative memorandum of appeal dated 23rd May 2023. The grounds are argumentative, unseemly and do not please the eye.

3. The memorandum of appeal anticipated by law is concise with distinct heads stipulating the grounds of objection to the decree or order appealed against, without any argument or narrative. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

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

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

5. The repetitiveness of the grounds of appeal as can be seen in this appeal is inimical to proper drafting of the Memorandum of Appeal and it is the umpteenth time this court is pointing to this mishap, tirelessly. I wish that parties would draw concise and non-repetitive grounds. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the Court of Appeal observed that : -

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

6. The memorandum of appeal raises only one issues, that is: the learned magistrate erred in law and fact in the assessment of damages and ended up awarding an estimate of general damages that was inordinately low as to occasion injustice to the Appellant. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

Pleadings

7. In the Plaint dated 17/1/2022, the Plaintiff claimed damages for an accident that occurred on 4/12/2021 involving motor vehicle registration number KCY 850V when the plaintiff was a pedestrian along Nyeri-Karatina at Kirigu area.

8. The Plaintiff pleaded special damages as well as general damages. The appeal is on general damages only. The injuries were pleaded as follows:

    a. Fracture of the right proximal tibia with displacement.

    b. Bruises to the facial region

    c. Pain and swelling to the right ankle

    d. Blunt injuries to the chest

    e. Pain, bruises, swelling to the upper limbs.

9. The Respondent entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint. Subsequently liability was agreed between the parties by 80:20 in favour of the Appellant against the Respondent. In a judgment delivered on 25/4/2023, the lower court entered judgment for the Appellant as follows:

    a. Liability as agreed 80:20

    b. General damages for pain, suffering and loss of amenities - Ksh. 400,000/-

    c. Future medical expenses - Ksh. 200,000/-

    d. Special damages – Ksh. 5,140/-

    e. Loss of earnings – nil

    f. Loss of earning capacity -nil

10. Aggrieved by the finding of the subordinate court, the Appellant lodged the memorandum of appeal herein. The appeal is in respect of general damages for pain, suffering and loss of amenities, special damages, loss of earnings and loss of earning capacity. Only two aspects are unchallenged; liability and future medical expenses. The challenge on loss of earnings appears halfhearted.

11. The appeal proceeded by way of written submissions. Due to the fact that it is a single-issue appeal, I will subsume most of the submissions in my analysis save for pertinent matters pointed out below.

Evidence

12. The Plaintiff testified in court and relied on her witness statement with bundle of documents dated 11/10/2022 and further bundle of documents dated 26/10/2022. In cross examination, it was his case that he had not healed and continued with treatment. That he was a driver and the injuries had restricted his earnings, where he was paid Ksh. 2,000/- a day and Ksh. 1,000/- per mileage.

13. PW2 was Paul Kibaya Njogu who testified that he employed the plaintiff and was paying him Ksh. 36,000/- per month and mileage of Ksh. 2,000/- each day. In cross examination, it was his case that he assigned the plaintiff one lorry as driver and that he had no evidence that he paid the plaintiff.

14. Both medical reports filed by the parties were by consent produced in evidence as respective exhibits in support of their cases. The Respondent opted to close his case without calling witnesses.

The Appellants' Submissions

15. The Appellants filed submissions dated 22/7/2024 and submitted that the award of Ksh. 1,500,000/= in general damages would be adequate compensation for the injuries suffered by the Appellant. The Appellant relied on the cases of Frankline Chilibasi Spii v Kirangi Liston [2017] eKLR, Michael

Murage v Dorcas Atieno Ndwala [2019] eKLR, Dorcas Wangithi Nderi vs Samuel Kuburu Mwaura & Another (2015) eKLR, James Gathirwa Ngugi v Multiple Hauliers (EA) Limited & another (2015) eKLR and Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR.

16. On diminished earning capacity, the Appellant submitted that he was a driver and had earnings of Ksh. 2,000/- per day and Ksh. 1,000/- per mileage. That this position was supported by the employer and the learned magistrate erred by not granting this prayer.

Respondent's submissions

17. On the part of the Respondent, it was submitted that the award by the subordinate court was proper and not too low. Reliance was also placed on the case of Nzuki Isaac Muveke vrs Francis Njogu Njehia (2021) eKLR to submit that the Appellant did not prove loss of earning. He did not however mention that the court herein handled the said case while in practice. In that case, H.A. Omondi, J, as she was then, stated as follows: -

> 55. It is important to note that loss of earning and future earnings are two separate and distinct concepts. This distinction between loss of earning capacity and loss of future earnings was brought out in the case of SJ vs. Francesco Di Nello & Another [2015] eKLR where the Court of Appeal stated as follows:
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> "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:
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> "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."

Analysis

18. 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 subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

19. This court thus bears in the mind that the jurisdiction to review the evidence should be exercised with caution in that it is not enough that the appellate court might have come to a different conclusion if it were sitting as the lower court. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , 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..."

20. Therefore, 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 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 resubordinate 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..."

21. While reevaluating the applicable estimate of damages, I have to also consider whether the learned magistrate in assessing the damages, took into account irrelevant facts or left out of account a relevant one, or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Servcie 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 subordinate 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.

22. Therefore, it is thus settled that for the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. Where damages are found to be at large or inordinately low I will interfere. They must be commensurate with similar injuries.

23. Fact finding is primarily the duty of the subordinate court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*. It is not for the appellate court to set aside the subordinate court's exercise of discretion and substitute its own simply because if it had been the subordinate court it would have exercised the discretion differently.

24. It is my duty to give proper respect to the opinions of experts bearing in mind that such opinions are not, as it were, binding on the courts and the courts must accept them and evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " While the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

> "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 subordinate court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

25. There is no dispute that the Respondent suffered a fracture of the right proximal tibia and soft tissue injuries. There are two medical reports to that effect. However, the parties differ on the severity of the injuries and permanent disability. However, the court below eschewed this issue and circumnavigated the same though lexicographicide, conjecture, surmise and rhetoric. The court dealt with the issue as doth:

    Disability was rated at 2% by the defendant's counsel. The plaintiff's doctor assessed at 5%. The plaintiff's doctor indicated that healing was expected but with pain and weakness are to persist(sic).

    The court will adopt a global approach in awarding the damages.

26. It is evident that the Appellant's doctor and that of the Respondent have a different idea of what constitutes permanent disability. The medical Report by Dr. G.K Mwaura for the Appellant assessed the degree of permanent incapacity to be 5% while the medical report by Dr. Adegu William settled for 2% permanent incapacity.

27. The court below had an impression expression of the witnesses. An expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

28. The court notes that Dr. Adegu William examined the Appellant and inferred that the Appellant was normal across the right lower limb joint and carried out daily activities without support with a normal walking gait and without a limp. This was recorded on 18/7/2022 about 8 months after the Appellant's medical report dated 3/12/2021.

29. After finding nothing wrong with the Appellant, Dr. Adegu William proceeded to find 2% permanent disability. This is surprising since according to the doctor, there was no disability. In other words, there was no basis for the 2% disability. Hence, according to the good doctor, there was no basis for awarding the Appellant 2% disability when he was as fit as a fiddle. The award of 2% disability is so statistically insignificant as to amount to anything. The report is thus unbelievable since its conclusion is not born from the facts.

30. On the other hand, Dr. G.K. Mwaura examined the Appellant when he was using crutches and with inability to stand for long or lift heavy objects. He had implants and permanent disability was assessed at 5%. This report is more reliable and believable. The injuries enumerated had congruence with the degree of permanent disability. The opinion by Dr. G.K Mwaura was more believable as it was based on medical findings.

31. The medical report by Dr. Adegu William was internally incoherent in attributing to the Appellant full recovery without any incapacity and in the same breath postulating 2% permanent disability. In the circumstances, the report by Dr. G.K. Mwaura reflects more on the injuries suffered. Opinions are not,

as it were, binding on the courts or that the courts must accept them, hook, line and sinker as stated succinctly in the case of Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, that:

> " While the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "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 subordinate court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

32. It is clear that the court did not make a decision on disability. If the court had considered the medical report, it would have come to the conclusion that the Appellant had a specific degree of disability. It was for the subordinate court to fail to make a finding on the percentage of permanent disability as postulated by the two experts. The failure resulted in the court proceeding on what she called a global award. With due respect, there is nothing like a global award for damages for pain, suffering. A global award is limited in scope and applicability. It is more useful in fatal accidents.

33. Such lack of finding goes to the very core of assessment of damages, in which case it is easy to conclude that it must be satisfied that either the court in assessing the damages, took into account an irrelevant fact or left out a relevant one, or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages. Leaving out the degree of disability, definitely amounts to leaving out of account a relevant factor. Taking into consideration a so-called global award is taking into account an irrelevant matter.

34. The position this court holds is that in assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This can be achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR posited that comparable injuries should attract comparable awards.

35. The principles on the award of damages for pain, suffering and loss of amenities are well settled as enunciated in the case of Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR, where the court set out the principles which guide the court in the assessment of damages in a personal injury case, which include but not limited to:

    i. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    ii. The award should be commensurable with the injuries sustained.

    iii. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    iv. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

v. The awards should not be inordinately low or high.

36. This court has perused various decisions that have dealt with the question of quantum of damages for similar injuries. Some of these cases were independently researched while others were referred to by the parties. The main injuries suffered was the fracture of the right proximal tibia with displacement. Faced with a similar matter, the court in the case of Sammy Mugo Kinyanjui & Another vs Kairo Thuo (2017)eKLR awarded a sum of Ksh. 600,000/=. The party therein had suffered fracture of the right tibia. Further, that plaintiff had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula. The case was however decided over 7years ago.

37. On the other hand, in the case of Pauline Gesare Onami v Samuel Changamure & another [2017] eKLR, the Plaintiff sustained fractures of the tibia and fibula bones of both legs in addition to laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. Omondi J. upheld an award of Kshs. 600,000/- in 2017. This was equally 7 years ago and the injuries were more serious.

38. The court erred in disregarding the percentage of disability. This resulted in a misdirection in this material aspect and an award which was so inordinately low that it must be a wholly erroneous estimate of damages. An award of Ksh. 400,000/= in the circumstances, was plainly wrong and an inordinately low estimate of damages.

39. The nearest estimation of damages was in the case of Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR, where a Respondent had sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the tibia and fibula and had been awarded Ksh. 700,000/= in 2021.

40. Though the injuries were more or less similar, the degree of permanent disability was lower therein. Having regard to the fact that the injuries have healed with a small permanent disability of 5% and inflation, an award of General Damages of Ksh. 750,000/= will suffice.

41. Secondly, the Appellant raised issues with the judgment in respect of failure to award damages for diminished earning capacity or loss of earning capacity. These kinds of damages are contradicted as against lost earnings. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in Butler vs. Butler [1984] KLR 225, as follows:-

a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;

b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;

c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the subordinate;

e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and

f. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

42. Loss of future earnings is also known as lost earnings. This is a special damage kind of claim that is extrapolated from the records. The award for lost earnings is for real assessable loss proved by evidence and material to show earnings. If there are no earnings foregone, then there are no lost earnings.

43. On the other hand, compensation for diminution of earning capacity dealing with future losses of the nature of estimation of potential loss base on the degree of disability. These are general damages kind of loss. Upon problematizing, conceptualizing and contextualizing the question of lost earnings and loss of earning capacity, the question to be solved is whether the Appellant was entitled to damages for diminished earning capacity and for lost earnings.

44. It was uncontroverted evidence of the Appellant that he was employed as lorry driver. The employer stated that the Appellant was earning Ksh 2,000/= per day and Ksh 1,000= for mileage. The later amount was neither pleaded nor proved. It is expected that the employer, could at least produce evidence of payment even for a week, which was not done. However, the evidence of employment was clear. In absence of such evidence, the court is duty bound to use the minimum wage for people of that class in estimating loss of earning capacity.

18. For umpteenth time, it must be emphasized that the claim for loss of earnings must be proved. The Court of Appeal in the case in S J v Francesco Di Nello & another [2015] eKLR while making a distinction between loss of future earnings and loss of earning capacity stated that:

> "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 or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:
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> "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."

45. In the case of Cecilia W. Mwangi & Another V Ruth W. Mwangi [1997] eKLR, the Court of Appeal postulated as doth:-

> This is not the way to prove loss of earnings, or loss of earning capacity. Even the bank statements she produced were for the period after the accident. Although the learned judge did correctly point out that she did not produce any document to support her claim the learned judge proceeded to work out her loss of earning capacity at shs.10,000/= per month/ -. The period of 36 months, for loss of earnings was more than even what the respondent's doctor had pointed out as the respondent being out of action. Dr. Bhanji put the period at

25 months. We have, in the circumstances, no alternative but to set aside the award for loss of earning capacity in its entirety.

46. As for loss of earnings, this is the actual loss incurred when the Appellant was not able to engage in his income earning work of a driver after the accident. The Appellant was admitted to the Karatina Sub-county hospital on 3/12/2021 and was discharged on 6/12/2021 after 4 days and subsequently admitted to Kabete Gardens Hospital from 7/12/2021 to 21/12/2021. There was no evidence led on failure to be paid during the period. Evidence that the employer hired someone else is not enough. The actual earnings are crucial. The employer's evidence fell far short of the claim. There was no evidence of prior earnings. It is not enough to plead that this is what I was earning. Some evidence of that earning must be produced. However, he never tendered actual evidence of the loss. This being in a nature of special damages, cannot be awarded without evidence. In the circumstances the loss of earnings or future earnings is dismissed.

47. The Appellant testified that on 4/12/2021 he was a driver of an FFR Lorry. The applicable minimum wage lies in the Regulation of Wages (General) Amendment Order, 2018. The payable income was Kshs. 18,881.21 per month. A period of 10 years is sufficient to establish a new normal having regard to other vicissitudes of life. The degree of disability of 5% will suffice as hitherto stated. This works out as follows: -

Loss of earning capacity = Ksh. 18,881.21 X 5% X 10 X 12

= Ksh. 226,574.52

48. The next issue was the question of special damages. The Appellant pleaded a sum of Ksh. 5,865/=. 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. In the case of David Bagine vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for 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"

49. Receipts were produced for all except a police abstract. However, postage is not a special damage but party costs. Therefore, the said sum of Ksh 115/= was not proved. The sum of Ksh.200/= for a police abstract was equally not proved. The rest of the amount, being Ksh 5,500/= was proved. I set aside the award of Kshs. 5,140/= and in lieu thereof, substitute with a sum of Ksh 5,500/=.

50. The issue of costs is governed by Section 27 of the *Civil procedure Act*, which provides as follows:

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary

directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

51. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

52. In the end I partly allow the appeal with costs of Kshs. 70,000/= as the Appellant was largely successful.

Determination

53. In the upshot, I set aside the judgment and decree given by Hon. V. Kosgei, Resident Magistrate on 25/4/2023 in Karatina MCCC No. E002 of 2022 and substitute with the following:

a. Liability remains as 80; 20 as agreed by consent.

b. The award of general damages for pain, suffering and loss of amenities is set aside and in lieu thereof substituted with an award in general damages of Ksh. 750,000/=.

c. The dismissal of the claim of diminished earning capacity is set aside and in lieu thereof substituted with an award of Kshs. 226,574.52.

d. The appeal on loss of earnings is dismissed.

e. In the end I enter judgment as follows:

f. This works out as follows: -

i. Liability 80:20

ii. General damages for pain, suffering and loss of amenities ksh750,000/=

iii. Diminished earning capacity assessed at Ksh. 226,574.52.

Subtotal - Ksh. 976,574.52

Less 20% - Ksh. 195,314.90

Sum due Ksh. 781,259.62

Add future medical expenses Ksh. 200,000/=.

Special damages ksh 5,500/=.

Loss of earnings nil.

Total Ksh. 986,759.62

g. Specials and future medical expenses shall not be subjected to contribution.

h. The Appellant shall have the costs of the appeal assessed at Kshs. 70,000/-.

i. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF NOVEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No Appearance for parties

Court Assistant – Jedidah