Wambua & another v Opiyo & another (Civil Appeal E033 of 2023)
[2024] KEHC 13969 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13969 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E033 OF 2023

SM MOHOCHI, J

NOVEMBER 8, 2024

BETWEEN

JOSHUA MUASYA WAMBUA ..... 1ST APPELLANT

KUBER AGENCIES ..... 2ND APPELLANT

AND

PAUL J OPIYO ..... 1ST RESPONDENT

IRUNGU MARY ..... 2ND RESPONDENT

(Being an appeal from the judgment/decree of Hon. B. Mararo (PM) Delivered on the 10th February 2023, in Nakuru CMCC No. 1193 of 2016)

JUDGMENT

Introduction

1. The 1st Respondent was the Plaintiff in Nakuru CMCC No. 1193 of 2016, he is a distinguished retired military officer who at the material time subject to this case, was serving as General Officer Commanding Western Command Kenya Army, at the Rank of Major General having been promoted as such in November 2002.

2. That on the 18th January 2008 at the height of the infamous 2008 election violence he was travelling aboard motor vehicle registration number 78 KA 01 Land rover along Naivasha- Nakuru road when he was involved road traffic accident where his vehicle collided with motor vehicle registration number KAX 665S Mitsubishi Canter/lorry that was beneficially owned by the 2nd Appellant and was being driven by the 1st Appellant. The 2nd Respondent was the registered owner of motor vehicle registration number KAX 665S Mitsubishi Canter/lorry.

3. Following the aforesaid accident the 1st Respondent initiated a suit contending that had it not been for the negligence of the 1st Appellant the accident would not have occurred resulting in and occasioning upon him serious bodily injuries that abruptly ended his military career and that he had been on course to be promoted to the Rank of Lieutenant-General and deployment as either Commandant National Defence College, or the Commander Kenya Army, or the Vice Chief of General Staff and ultimately promotion to the Rank of General and assumption to the office of the Chief of General Staff.

4. By a judgment dated and delivered on 10th February 2023 in favour of the 1st Respondent the Court ordered as follows: - and Liability 80%, General damages for pain and Suffering Kshs 1,200,000/-, General Damages for Loss of Future Earnings Kshs 12,129,000/-, Special damages, Kshs. 10,700/- , Total discounted award Kshs 10,671 760/-

5. Being aggrieved by the said judgment, the Appellants' preferred this appeal in a Memorandum of Appeal dated 17th February 2023 contending that the Award was not justified or tenable in law on the basis not only of the evidence adduced but also on the sheer magnitude of the award.

6. That the Appellants' Memorandum of Appeal dated the 17th day of February, 2023, raises four key grounds of the appeal contending as follows;

    a. That, the Learned Trial Magistrate erred in law and fact in awarding the Respondent Ksh. 1,200,000/- on account of pain, suffering and loss of amenities which is excessive in the circumstances.

    b. That, the Learned Trial Magistrate erred in law and in fact in making an award for loss of future earnings as a general damage claim and in the absence of evidence that the Respondent suffered any loss of future earning and especially in light of evidence that the Respondent was retired from his employment normally after competently working in different departments after his injury without any loss or diminution of earning whatsoever.

    c. That, the latter award was astronomical and without any justification at all.

    d. That, the formulae used seem to borrow from cases of fatality in so far as loss of dependency is concerned. He wrongfully proceeded on the premise that the plaintiff was deceased and the claim was for loss of dependency.

    e. That, the Learned Trial Magistrate erred in law and in fact in applying, without any basis and contrary to the evidence on record, a disability ratio of 2/3 in computing loss of future earnings when the medical evidence showed that the Respondent only suffered permanent disability of 3% which evidence the Court accepted and used in computing and awarding damages for pain and suffering, thereby awarding the Respondent undeserved and punitive damages against the Appellant.

Appellant Submission

7. The Appellants framed the following two Issues for consideration;

    a. Whether the Appellants' appeal is merited?

    b. Who shall bear the costs of the appeal?

8. On the 1st issue as to whether the Appeal is merited? it was the Appellants submissions that, the instant appeal is merited as the Learned Trial magistrate totally misapprehended the nature of claim advanced by the 1st Respondent and improperly evaluated the evidence adduced while completely

ignoring the helpful submissions filed and thereby rendering a judgment that is totally untenable and not compensatory at all.

9. That, the remit bestowed on this Honorable Court to disturb the quantum of damages and awards made erroneously without recourse to the facts of a particular case by a Court bear relevance from the principles of the rule of law and the need to ensure that litigants are not unjustly enriched thereby occasioning gross miscarriage of justice.

10. That, the principles guiding this Court as the first Appellate Court in this context have long crystallized into law. in Kamfiro Africa Limited t/a "Meru Express Services (1976)" & another Vs Lubia & another No 2) [1985] KLR the Court started as follows:

> " The principles is be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one of that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

11. The Court in *Joho Vs Thoya (Civil Appeal E154 of 2022)* (2023) KEHC 23452 (KLR) (25 September 2022) quoted with approval the decision of the English Privy Council in Nance v British Columbia Electric Co Ltd where the Learned Judge ably pronounced himself as follows regarding disturbing quantum of damages:

> " I may add too that if these sums get too large, we are in danger of injuring the body Politic..... As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention"

12. That, in the instant case, it is apparent that the Learned Trial Magistrate failed to take into account the helpful submissions by the Appellants in rendering his judgment thus awarding damages that are inordinately high which is a wholly erroneous estimate of the damage.

13. That, this Honorable Court is therefore charged with the duty to uphold the rule of law and prevent the unjust enrichment of the 1st Respondent by disturbing the quantum of damages awarded and replacing the same with an award that is reasonable and reflective of the actual injuries suffered by the 1st Respondent.

14. It is submitted that, the Learned Trial Magistrate erred in law and fact in awarding the 1st Respondent Ksh, 1,200,000/-on account of pain, suffering and loss of amenities which is excessive in the circumstances, consideration being had to the medical evidence adduced in respect thereof, the nature and gravity of the injuries sustained, the level of recovery and the degree of permanent disability awarded by the doctors.

15. That, it is a long-held principle of law that damages awarded by Courts ought to mirror the actual injuries suffered by a claimant. The exercise of award of damages must therefore be carried out meticulously in conformity with the facts of the case while bearing in mind that the award of

unreasonable figures visits the root of justice and fairness. In A.A.M. Vs. Justus Gisairo Ndarera & Another (2010) eKLR the Court stated as follows:

> " Money cannot renew a physical frame that has been battered and shattered and all the Courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair"

16. That, the injuries suffered by the 1st Respondent qualify as mere fractures which did not result in any permanent disability. In particular, in the medical report authored by Dr. R.P. Shah tendered in evidence by the 1st Respondent specifies that the right bone femur and the left leg tibia fracture have successfully healed. The report continues to state that the 1st Respondent's permanent disability currently stands at only 3 percent and that the former is expected to be fully fit and resume his work at the end of 5 to 6 months.

17. That, given the foregoing and in conformity with the figures awarded by the Courts in similar cases, a sum of Kshs. 400,000/- ought to be sufficient as general damages for pain, suffering and loss of amenities. How the Learned Trial Magistrate arrived at the figure of Kshs. 1,200,000/- in this context beats logic.

18. Reliance is placed on the case of JMN (Minor Suing Through Next Friend and Father WWN v Petroleum & Industrial Service Ltd [2014] eKLR where the appellant suffered fractures of the right tibia and fibula and soft tissue injuries, the Court awarded the sum of Kshs. 350,000/- for loss of amenities. On appeal, the Appellate Court confirmed the award by the Lower Court asserting that the same was commensurate to the injuries suffered.

19. Further reference is made to the case of Kenya Power & Lighting Co. Ltd v Nehemiah Wachira [2014] eKLR the Appellate Court reduced the quantum of damages awarded by the Lower Court from Kshs. 700,000/- to the sum of Kshs. 500,000/-, The injuries suffered in this case are comparable to those suffered by the 1st Respondent in the instant suit.

20. And further, in the case of Johnson Mose Nyaundi (Minor suing through *Next Friend and Father) Wilfred Wadimbe Nyaundi v Petroleum and Industrial Service Ltd HCCA No. 183 of 2010*, the claimant was awarded Kshs. 350,000/- for loss of amenities by the Court for fracture of the right tibia and fibula together with soft tissue Injuries. The Claimant was dissatisfied with the judgment and upon appeal to the High Court, the award was confirmed as being commensurate to the injuries suffered.

21. That, it is apparent that the failure by the Learned Trial Magistrate to take into account the submissions of the Appellants proved fatal to the fairness of its decision to award an inordinately high award of Ksh. 1,200,000/- to the Respondents on account of pain, suffering and loss of amenities.

22. That this award should not be allowed to stand and the same should be substituted with a reasonable award of Kshs. 400,000/-which is commensurate to the injuries suffered by the 1st Respondent.

23. It is further submitted that, the Learned Trial Magistrate erred in law and fact, in making an award for loss of future earnings as a general damages yet it is a special damages which must be specifically pleaded and proven. That in the 1st Respondent's witness statement which was the basis of his testimony in Court and which is captured in page 15 of the Record of Appeal, the 1st Respondent said as follows;

> " Due to the effects of the accident injuries,.... could not be deployed to the position of deputy army Commander....therefore the Kenya Army deployed me to serve in the office of the ACGS I had to retire in 2009"

24. That, nowhere in the testimony of the 1st Respondent or evidence adduced was it proved or suggested that in the course of his deployment, he lost any earnings attributable to his injury or at all. It was also not suggested that his retirement date would have been beyond 2009.

25. That, in addressing this sub-issue, the Appellants invite this Court to proceed and find that in making awards for loss of future income, the Courts ought to be guided by proof of documentary evidence as demonstrative of the claimant's earnings. This position was buttressed by the Court in Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, where the Court of Appeal held that

> " Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability."

26. That, the Learned Trial Magistrate awarded the Respondent an award for loss of future Income of Kshs. 12,129,000/-, which award is erroneous and is not backed up by any evidence proffered by the 1st Respondent that, he was rightly deserving of the said amount. It is akin to awards made under the Fatal Accident Act where dependents are compensated for loss of dependency where the accident leads to the death of their benefactor or source of their support.

27. The Learned Trial Magistrate erred in law by failing to appreciate the difference between 'loss of future income/earning' and 'loss of earning capacity/ability'. The former is a special damages claim and must be specifically pleaded and proven and backed up with real documentary evidence whereas the latter is a general damage claim but even so, it must be based on tangible proof of loss of earning capacity such as permanent disability before it is launched. My lord, we invite this Honorable Court to agree with our humble submission by looking into the following judicial precedence;

28. Reference is made to the case of *Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021)* [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment), Justice Mugambi at Kiambu Law Court pronounced himself as follows;

> " Diminished earning capacity refers to decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident, Diminished earning capacity need not be specifically pleaded and proved but lost of earnings must be specifically pleaded and proved, Usually, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss."

29. Further in the same case of Nyatogo (supra) at paragraph *33*, the Learned Judge stated as hereunder;

> " In claiming loss of future earnings, the appellant also appears to have limited it to the period from April 2017 to date filing of the suit but he also failed to compute with exactitude the amount of loss he was seeking being a special damage, In my view, the pleading was imprecise and incomplete as a special damage claim and could not therefore be properly determined considering the form and manner it was pleaded"

30. That the 1st Respondent did not plead the exact amount of loss that he intended the Honorable Court to award him. In fact, that Prayer (C) in the Plaint is ambiguous, mixed up and quagmired and is not awardable before any Court of law.

31. That, since parties are bound by their pleadings and cannot change their pleadings at the stage of submissions, the Appellant invites the Court to hold that, Prayer C in the Plaint for 'General Damages for loss of future income' does not exist in law and not tenable and/or awardable and no specific law that supports it. Further, just like cited case of Nyatogo (supra), the Appellant invites this Honorable Court to hold the view that, the 1st Respondent's prayer for loss of income is imprecise, incomplete, incompetent, inconsistent, ignoble and as such, it cannot be properly determined.

32. That in any event, the 1st Respondent did not produce any evidence to prove what he was earning per month. No pay-slip was adduced as evidence in Court in support of his income. It is difficult to ascertain what income the 1st Respondent lost as a result of the accident herein and to that effect, his claim is unmerited. Reliance is placed on the case of Jimnah Munene Macharia vs John Kamau Erera, Civil Appeal No. 218 of 1998 where the Court of Appeal stated as follows;

> " This witness produced no pay-slips; he was not able to say how much was deducted from the salary as PAYE and other outgoings normally shown in a pay-slip. He produced a letter (not authored by him).....which letter produced purported to show that the appellant was an assistant to the proprietor, holding the position of Audit and Tax manager earning Shs. 25,00(basis pay) plus monthly travelling expenses of Shs. 2,500/= allowances for up-country audits. The absence of payslips is important in this case. It is doubtful if the appellant was employed as an employed as an Audit and Tax Manager when he is not qualified accountant.....
>
> The Appellant himself gave evidence to the effect that his net salary was Shs. 22,000/- per month and although pay-slips were available he did not bring them to Court.
>
> The manner in which the appellant attempted to prove his claim for loss of earnings (salary) left a lot to be desired. It appears to us that his real earnings were being kept secret and his case was being bolstered by(the) production of a letter (not through its author) showing his salary whilst the pay-slips were being kept away from the Court.
>
> We are in the circumstances constrained to disallow the claim under this head of damages wholly."

33. That in the unlikely event that this Court implies that the 1st Respondent was meant to pray for General damages with respect to loss of future earning capacity, then the Appellants submits that, the figure of Kshs. 12, 129, 000/= arrived therein by the Learned trial magistrate is unreasonable and inordinately high and not comparable to any award in similar circumstances. reliance is placed in the above cited case of Nyatogo (supra) (Paragraphs *36* & 37), the Court proceeded and held as follows with respect to the loss of future earning capacity;

> " However, it is the responsibility of the respondent to demonstrate, by way of evidence the effect that injury would have on his earnings in the future in order to get an award under that head
>
> Such a claim should then be evaluated by the Court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of Incapacity and such other factors, In short, Court must show how it has arrived at that amount, it not just by coming up with a random figure."

34. That it is beyond peradventure that the 1st Respondent was discharged from duty on the grounds of age and the 1st Respondent's letter from the Director of Pensions dated the 12th day of July, 2009 is

demonstrative of this fact. The letter indicated that the reason for the discharge of the former was age grounds.

35. Further, that the Learned Trial Magistrate erred law and in fact, in applying, without any basis whatsoever and contrary to the evidence on record, a disability ratio of 2/3 in computing the loss of future earnings when the medical evidence on record clearly illustrated that the Respondent only suffered permanent disability of 3% which evidence the Court accepted and used in computing and awarding damages for pain and suffering(supra), thereby awarding the Respondent undeserved and punitive damages against the Appellant. (See page 158 line 7, Record of Appeal on the disability),

36. In any event of earning capacity is included in the general damages and once general damages for pain and suffering and loss of amenities have been done, then the former cannot be tabulated separately in order to avoid unjust enrichment and/or double compensation, as was aptly put in the case of Butler v Butler [1984] KLR 225 where the Court of Appeal held as follows,

> " Loss of eaming capacity can be a claim on its own, as where the 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 trial.
>
> 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.
>
> 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 services, if any....."

37. The Appellant further placed reliance in the case of Robert Jeriot v Geoffrey Nyakundi Abere [2021] eKLR where the Learned Judge proceeded as hereunder;

> " The trial Magistrate did not give any reasons for awarding damages under the two heads and it is my finding that the damages were not based on any evidence for the following reasons
>
> "In the absence of cogent evidence that the respondent lost an income as a result of the accident there was no basis upon which damages for loss of earning capacity could be awarded. As for loss of future earnings the same can only be awarded for real assessable loss proved by evidence which in this case was lacking. The amount sought should also have been specifically pleaded as it was known.
>
> In the premises the damages assessed under the two heads shall be set aside leaving only damages for pain, suffering and loss of amenities Kshs. 1,500,000 and the special damages assessed of Kshs. 105,200."

38. That, from the above judicial precedence, it has become trite law that the two heads of damages should not be awarded concurrently. Once the Honorable Court has awarded general damages for pain and suffering, it has always downed its tools and declined the invitation to award the general damages under the head of earning capacity. Therefore, the Appellant invite this Court not to venture into giving an award under the head of loss of earning capacity since it has already awarded under the head of pain and suffering.

39. That, it is therefore apparent that the 1st Respondent is not entitled to any award of loss of future earning capacity as he had not been rendered totally unemployable and can still engage in gainful employment despite his injuries.

40. With regards to who should bear costs of the Appeal, the Appellant submits that, it is a long-held principle of law that costs often follow the event. In this matter, it is apparent that the Appellant has proven the meritorious nature of the appeal and it is in order for this Honorable Court to award damages to the former.

1ST Respondents Submissions

41. In the lengthy written submissions by the 1st Respondent filed on 31st May 2024 submit that, on the 12th April. 2017, the parties recorded a consent on liability at the ratio of 80:20 in favour of the 1st Respondent. The only issue that remained was either the recording of a consent on the quantum of damages or evidence be taken for consideration and submissions be filed.

42. Although the 1st Respondent tendered his evidence on the 6th November, 2019 and closed his case the 1st and 2nd Appellants and 2nd Respondent did not call any witness. The Trial Magistrate Honourable B. Mararo was transferred from the Nakuru Court and the file was placed before Honourable Orenge and was then allocated to Honourable E. A. Nyaloti. In the fullness of time the cause was placed before the Honourable B. Mararo to write the judgment. The record shows that, the 1st Respondent's Submissions were filed on 14th May, 2020 and the 1st and 2nd Appellants filed theirs on the 14th February, 2020.

43. That, 1st and 2nd Appellants and 2nd Respondent did not call any evidence to controvert the 1st Respondent 's evidence. Page 151 of the filed Record of Appeal records that Counsel for the Appellants (original Defendants) Mr. Kisilah as stating: -

> " Kisilah: we have agreed the documents filed 23/05/11- P.Exhibit. 1 &2" but this is a clear error because the List of Documents appearing at Pages 17 to 30 in the Record of Appeal was filed on 23rd February, 2011 and is dated that very date and not 23rd May, 2011."

44. That, the impugned judgment is at Page 156 to 159 of the Record of Appeal and in essence it is against these twin findings:

    a. General Damages for pain and suffering Kshs. 1,200,000/-

    b. Loss of Future Income Kshs, 12,129,000/-

45. That the award by the Trial Court is not only consistent with the case pleaded by the Plaintiff/ Respondent but also the solid and uncontroverted evidence adduced. The Plaintiff/ Respondent's injuries sustained made him retire at the rank of Major-General. From his evidence, he would probably have attained the rank Lieutenant-General and in the fullness of time of General.

46. That, the 1st Respondent was entitled to an award of loss of earning capacity which appears in the judgement as "Loss of future income". This unfortunate misnomer by the Trial Court should not be used in this appeal to deny the 1st Respondent what he deserves. The driver of KAX 665 S was the 1st Appellant Joshua Muasya Wambua and the 1st Respondent's evidence included the Police Abstract Form Page 23 of the Record of Appeal which shows that the said driver was charged in Naivasha Traffic Case No. 3 of 2008 and convicted of Causing Death by Dangerous Driving and Careless Driving and this clearly shows that the Appellant was to blame for the accident.

47. That, in fact, the 1st Respondent was extremely magnanimous and generous to record consent absorbing 20% liability.

48. That, the 1st Respondent testified on 6th November, 2019 and the evidence (see Page 148 to 157 of the Record of Appeal) shows that at the time of the accident he held the rank of Major General in the Kenya Army and was in charge of the Western Command (page 148 of Record of Appeal). On the date of the accident Kenya was undergoing civil strife (post-election violence) and the Western part of Kenya was his responsibility. After the accident he was taken to Naivasha District Hospital then evacuated to Karen Hospital in Nairobi and was hospitalized for Eighteen (18) days from 19th January, 2008 to 7th February, 2008. At Page 149 of the Record of Appeal, the 1st Respondent testified as follows:

> " The military requires physical mobility. I was in constant pain high back right knee left leg right femur and left tibia. It had significant impact. I was taken from my command and redeployed to DOD as staff officer. It also not require much movement through I still had to visit troops. I was required to attend to the medical board and they made their recommendations Page 6-9 it culminated in my retirement from the forces Pages 10-12 disability clause relating to me I consulted Dr. Muganye. I appeared before him and he prepared a medical report."

49. That, the 1st Respondent recorded a Witness Statement dated 28th August, 2021 and tendered oral testimony. No evidence was called by the Appellant to challenge or contradict that evidence. The 1st Respondent put in evidence the 13 Form (Pages 18 to 20 of the Record of Appeal), Karen Hospital's Discharge Summary (Page 22 of the Record of Appeal) and Dr. George W.O. Mugenya's Medical Report (Pages 78 to 80 of the Record of Appeal). The documentation constitutes irrefutable and unassailable proof that the 1" Respondent serious injury and he suffered serious pain and hence the hospitalization for eighteen (18) days. This must be assuaged and remedied by appropriate and reasonable compensation.

50. That, the award by the Trial Court of Kshs 1,200,000/- was consistent with evidence led and the Appellants proposition of Kshs. 400,000/- is not only too low but derisory. The precedents/authorities read on by the Appellant's do not bring forth any legal principle or rule of law that Kshs. 400,000/- is the figure to be awarded for pain and suffering. The authorities relied upon by the Appellants have not demonstrated that the injuries at issue involved similar or greater injuries than those sustained by the 1st Respondent. That proposition commends itself for rejection.

51. Reference is made to the case of Elizabeth Wairimu Ribiru V Paul Kinyanjui Ndung'a (Suing on Behalf of the Estate of the Late Joram Ndung'u Mwaniki) & 2 Others Civil Appeal No. 37. of 2023 urging the Court to undertake a review and evaluation of the evidence as a standard of appeal.

52. The 1st Respondent further recites verbatim the evidence he adduced in support of his case emphasizing the fact that the 1st and 2nd Appellants and 2nd Respondent did not call any evidence to controvert it.

53. That Dr. R. P. Shah's Report which is later in time (Dr. Mugeya's Report is dated 18th May, 2011) has not identified any flaws in Dr. Mugenya's findings. Both reports went into evidence by consent. The award of Kshs. 1,500,000/- is deserving and given that the 1st Respondent was in hospital for three weeks and by reason of the accident one of his legs became short.

54. That, Grounds No. 2, 3 and 4 of the Memorandum of Appeal attacks the Judgement for making an award for loss of future earnings and hence the appeal that the 1st Respondent was underserving of the award of Kshs. 12,129,000/-, This attack is not justified at all for the following reasons:

a. In Paragraph 8 of the Plaint the claim for loss of income and its particulars are specifically pleaded in line with the guiding text in Bullen and Leake and Jacob's Precedents of Pleadings 13th Edition at Page 305 where the author states as follows-

> "Special damages in personal injury cases. In an action for damages for personal injuries where a Plaintiff makes a claim for loss of earnings or future earning capacity or other expenses, he must prepare particulars of such claims, where appropriate, in the form of a schedule, and serve the same upon all other parties; thereafter each party must indicate whether and to what extent each item claimed is agreed on what counter proposal is made;

b. that the 1st Respondent tendered evidence which is at Page 15 of the Record of Appeal as follows:

> "As at January 2008, I was based at Gilgil. I was the General Officer commanding (GOC) Western Command between 2007 and 2008 and prior thereto GOC Eastern Command between 2005 to 2007. Due to the accident injuries I suffered, I was re-deployed to serve as the Assistant Chief of General Shelf (ACGS) and thereafter discharged. As Major General the officers which the Kenya Army could deploy me included
>
> "GOC Eastern Command, GOC Western Command, Assistant Chief of General Staff (ACGS), Commandant, Defence Staff College, Deputy Army Commander".
>
> ".....Having held the rank of Major General at senior level, I had a real opportunity for promotion to the rank of Lieutenant General and eligibility to be deployed to any of the following offices:-
>
> > Office of Commandant, National Defence College, Vice Chief of General Staff, Army Commander, I would then be eligible to rise to the rank of full General and hold office of Chief of General Staff. The residual effect of the accident injury made it difficult for to warn promotion to the rank of Lieutenant General and they diminished my career prospects and therefore I had to retire in 2009".

55. The 1st Respondent wonders how the Appellants expected him to mitigate his injuries and shortened leg caused by the demonstrated negligence (given his conviction in Traffic Case in the traffic case at Naivasha) of the 1st Appellant?

56. That, the 1st Respondent's pleading meets the threshold as guided by the text in Bullen and Leake and Jacob's, Precedents of Pleadings. The 1st Respondent's evidence is not challenged nor controverted in any way and it was the basis of the finding by the Trial Court that led to the award of Kshs. 12,129,000/-. On the whole the Trial Court was correct in entering judgement as it did and there is no reason to deny the 1st Respondent what he was awarded by the Trial Court. And thus pray for the dismissal of the Appeal with Costs.

Damages for loss of income

57. This Appellate Court is enjoined to undertake an exhaustive examination as was held in the case of Santosh Hazari vs. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179

> "A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it."

58. The issues that crystalize for my consideration are as follows;

a. Whether the 1st Respondent was entitled to an award of loss of future earnings?

b. Whether the Judgment award of general damage was excessive in the circumstance?

59. 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 to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

60. Damages award of future earnings is an award of general damages. See *Koyi v Obanga & 2 others (Civil Appeal 73 of 2017)* [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment):

> 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.

61. The learned magistrate analyzed that, the Appellant that the Plaintiff has proved that he was earning a basic salary of Kshs. 303.225 /= and he was set to retire at the age of 60 years however, the occurrence of the accident his prospects noting that, the 1st Respondent was deployed to other department so he did not completely loss his income during the said period. As such, the Trial Court proceed to find as follows under this head;

> Minimum wage of the Plaintiff per month x no. of years x no. of months in a year
>
> 303, 225 x 5 x 12 x 2 /3 =12,129,000/=.
>
> Consequently, in the absence of such evidence of earnings, a lump sum award is appropriate.

62. In the case of Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR stated thus; ...

> "To assess loss of earning capacity in the future, the Court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the Courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is

assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired."

63. This Court is of the view that the learned magistrate erred in law and in fact, in finding that the Respondent had five years (5) years more to work at the point of discharge, this fact was not proved and, in its misdirection, arrived at a supposition that no prudent man would act on such a supposition while ignoring the 1st Respondent's letter from the Director of Pensions dated the 12th day of July, 2009 that explicitly indicate that the 1st Respondent retired on the grounds of age and he is earning his pension.

64. Courts are enjoined to Appreciate evidence within the parameters of the *Evidence act* as is provided for in Section 3 as follows;

> " fact in issue" means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows;
>
> (2) A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.
>
> (3) A fact is disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> (4) A fact is not proved when it is neither proved nor disproved."

65. Career progression in the Kenya Defence Force is anchored on performance within the contract band and that the Commissioned officer's promotion and or retirement is not a natural consequence but rather is within the exclusive jurisdiction of the Defence Council.

66. This Court equally notes that the Respondent was not discharged on medical grounds but rather on the grounds of Age.

67. It thus means that after the Accident the Respondent was redeployed to lighter duties and allowed to continue working to his natural retirement age.

68. This Court equally finds that the prospects of the Respondent being promoted to the Rank of Lieutenant-General was not guaranteed or assured and was exclusively a decision by Defence Council.

69. In Kivati v Coastal Bottlers Ltd the Court of Appeal stated: -

> " The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

70. With that said, the Court is persuaded to disturb the finding on loss of future earnings set the same aside completely as the 1st Respondent retired naturally having attained his age of retirement and he is now on pension.

Pain and Suffering

71. In the case of *Achacha v Litunya (Civil Appeal E044 of 2021)* [2022] KEHC 3332 (KLR) (30 June 2022) (Judgment) an award of Ksh. 800,000 general damages were confirmed upon appeal. In Benuel Bosire vs Lydia Kemunto Mokora (2019) eKLR, the Court reduced an award of Kshs. 2,000,000 to Kshs. 700,000 where the respondent had a single compound fracture for which disability had been assessed at 40%. In SBI International Holdings (AG) Kenya vs William Ambunga Ongeri (2018) eKLR, the respondent sustained 40% permanent disability. The Court upheld the trial Court's award of General Damages at Ksh. 800,000/=.

72. In the case of *Koyi v Obanga & 2 others (Civil Appeal 73 of 2017)* [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment) the appellant Court awarded Kshs.400,000 general damages where the medical report assessed the injured persons at 40% permanent disability.

73. The doctors for the Appellants and the 1st Respondent arrived at a permanent disability of 50%. In this case, the evidence showed that the Appellant suffered 50% disability due to the commuted fractures midshaft of Right Femur and the Fracture of upper 1/3 left Tibia. He was not only hospitalized twice but had to contend with the use of crutches for one year.

74. This Court finds the Trial Magistrate erred when assessing damages for pain and suffering and that the global award made thereon of kshs 1,200,000 was excessive in the circumstances and from comparable cases, an award of Kshs. 800,000 is appropriate to compensate him under this head.

75. This Court thus finds merit in the Appeal and allows the same, the Judgment award dated 10th February 2023 is hereby set-aside and substituted as follows;

    General Damages for Pain and Suffering Kshs 800,000/-

    Special Damages Kshs 10,700/-

    Total Award Kshs 810,700/-

    Less Contributory 20% Kshs 162, 140/-

    Net Award Kshs 648,560/-

76. The Costs of the Appeal are awarded to the Appellant.

    It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 8TH DAY OF NOVEMBER, 2024

.....

Mohochi SM

Judge