REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NOS. 28 AND 30 OF 2018

(CONSOLIDATED)

DANIEL MAKAU MUTINDA.....APPELLANT

VERSUS

PATRICK NGEI MUTYETUMO.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate at Machakos Hon.A.G Kibiru deliverd on the 24th day Of February 2018 in Civil Suit 860 of 2012).

BETWEEN

DANIEL MAKAU MUTINDA.....PLAINTIFF

-VERSUS-

PATRICK NGEI MUTYETUMO.....DEFENDANT

JUDGEMENT

1. The suit in the trial court was initiated by the Appellant herein, **Daniel Makau Mutinda**, against the Respondent, **Patrick Ngei Mutyetumo**. In his amended plaint dated 26th November, 2010, the Appellant pleaded that the Respondent was the legal or beneficial owner of motor vehicle KAY 354J-ZC 1954 M/Benz Trailer which was at the material time being driven by the Respondent's agent while the Appellant was employed by the Respondent as a turn boy cum loader.

2. According to the Appellant it was a term of the said contract of employment between the Appellant and the Respondent and/or it was the duty of the Respondent to take all reasonable precaution for the safety of the Appellant while the Appellant was engaged upon his work, not to expose him to risk of damage, or injury which the Respondent knew or ought to have known, to provide a safe and proper system of working.

3. However, on or about the 13th February, 2009 the plaintiff was, in pursuance of the said contractual relationship, lawfully travelling in the said vehicle along Nairobi-Mombasa Rd when at Makindu Area the said Respondent's driver/agent so negligently drove the said vehicle that it was caused to lose control and overturn. The Appellant set out the particulars of the said negligence. As a result, the Appellant sustained injuries which he particularized and suffered loss and damage both special and general. According to him he suffered special damages in the sum of Kshs 5,200/- as well as loss of earning in the sum of Kshs 7,500/= per month and loss of future earnings and/or earning capacity in the same amount.

4. His claim was therefore for the said loss and damages as well as the costs of the suit.

5. In his defence, the Respondent denied that he was the registered owner of the said vehicle but admitted that the Appellant was his employee though he denied that the Appellant was employed as a mechanic. While admitting the occurrence of an accident on 13th February, 2009, he denied that the same was caused by the negligence on the part of his driver/agent. He denied that at the time the Appellant was in pursuance of his contract of employment and denied the particulars of negligence pleaded. Accordingly, the particulars of injuries suffered and special damages set out in the plaint were also denied. He also denied the claim for loss of earnings or earning capacity and sought for the dismissal of the suit with costs.

6. In his evidence, the Appellant testified that he was previously working as a turn boy before he was involved in an accident. According to him, he was employed by the Respondent, **Patrick Ngei**, as turn boy in his vehicle, a Mercedes Benz trailer registration No. KAY 354J. On the 13th February, 2009, he was working in the said vehicle when he was involved in an accident at Kyumbi when the vehicle overturned. It was his evidence that at the time the vehicle was being driven by one **Muua Maweu**. In support of his case the Appellant produced the demand letter, treatment notes, copy of P3 form, police abstract and copy of Workers' Injury Evaluation Form.

7. He testified that it was the said driver who was at fault in causing the accident. They were on the way to Mombasa from Kangundo and on reaching Kyulu near Man Eater's, a vehicle which was ahead of them suddenly stopped and though the driver tried to break, due to the fact that the vehicle was heavily loaded, the vehicle failed to stop and the driver tried to overtake the vehicle ahead and the vehicle overturned on the lane from Mombasa.

8. According to the Appellant, they had been on the road for two days from Kampala and the accident occurred at 6am. They had spent the night at Kibwezi where the vehicle had been checked and they left Kibwezi at 4am. It was his evidence that they were three people in the vehicle, the other person being a turn boy of another vehicle. The Appellant testified that he was seated behind the driver and was asleep at the time of the accident though he could feel how the vehicle was moving.

9. As a result of the accident, he was injured on the back and suffered a fracture on the back and a spinal injury. He was then taken to hospital at Voi District hospital where he was admitted and continued with outpatient clinic at Makindu. Upon reporting the accident to his employer, he filled the forms that he produced in court. It was his evidence that he was a turn body/loader and his salary was Kshs.7, 500/- per month as shown in the exhibited copy of Workers' Injury Evaluation Form. He testified that he had not gone back to work as he was not in a position to do the work of a turn boy since he could only walk with the help of a walking stick because whenever he tries to walk the legs go numb and his ears and chest also ache. As a result, he was compelled to wear a corset whenever travelling in a vehicle and at other times when at home since it helps his back. Though he was required to buy a buffer corset, he could not afford.

10. The Appellant testified that he was treated by **Dr Wokabi** and exhibited the report for which he paid Kshs 3,000/- and produced the invoice for the same. He therefore claimed general damages, loss of user and costs of the suit.

11. In cross-examination by **Mrs Isika** for the Respondent, the Appellant stated that the last time he went to the hospital for treatment was on 20th August, 2009 as per the treatment notes. He admitted that though the doctor prescribed a different type of corset, he could not afford it and he did not organize a fund raising. He however denied that he had fully recovered and stated that he could not do any work and had no capital to start a business. According to him both sitting for long and standing are a problem. He disclosed that he was standing in for a friend who was selling second hand clothes and that the business was not mine and his said friend even closed the business. He testified that the treatment booklet which he exhibited was the one that was used to treat him at Voi and at Kibwezi and he was unaware if he was issued with a discharge summary from hospital. He however insisted that he was admitted at Voi Hospital for a week and was going for check-up at Makindu Hospital. According to him, **Dr Wokabi** saw him on 29th September, 2010 and the doctor's report stated that he could not do heavy work. He however, stated that if he gets capital he can do business.

12. It was his evidence that they were three people in the vehicle and the driver also got injured on the abdomen and they went to hospital with him. However, upon examination the driver was found not to have any internal injury. As for the other turn boy whom they had given a lift, he was injured on the head as he had been sitting on the front at driver`s seat while the Appellant was on the bed behind the driver. According to him, there was only one seat next to the driver and there was no problem with him sitting on the bed though there was no belt on the bed. According to him, though he was asleep, he could see the vehicle going. He denied that he got injured because I was seated in the wrong place in the vehicle and asserted that it was not his fault that he got injured since even the other two occupants got injured.

13. According to the Appellant he did not know the registration number of the vehicle that was ahead of them though it was a trailer – tipper. Their vehicle overturned off the road on the right side as one faces Mombasa. At the hospital, he was x-rayed and given drugs. However, the other turn boy did not go with them to hospital as he was left in the vehicle. It was the Appellant's evidence that he did not know what injured him on the back.

14. The Appellant stated that they were not being issued with a pay slip but were signing on a book. He also had no appointment letter. Though he insisted that he paid for the invoice, he had no receipt. And the invoice had no stamp. According to him, he had a wife called **Faith Mwethia** and two children, the last born having been born in 2007 while the first one was born in 2001 in standard 1 and 7 respectively. It was his evidence that he went to school up to standard 7 and left school in 1998 but could not remember how old he was by then. According to him, he left school due to problems at home.

15. In re-examination, he clarified that the bed is for sleeping and resting and they were not prevented from using the bed since there was no warning. It was his evidence it was the defendant who was keeping the book they were signing for salaries.

16. In support of his case, the Appellant called **Dr Washington Wokabi**, a consultant Surgeon Practitioner in Nairobi, who testified as PW2. According to PW2, he held a Bachelor of Medicine and Surgery from University of Nairobi and a Masters Degree in Surgery from the same University. He prepared medical report for the Appellant on 29th September, 2010. According to him, the Appellant stated he was a loader and gave the history that he had been involved in a road traffic accident and was treated at the Voi District Hospital after which he was advised to have bed rest. X-ray revealed dislocation of his spine at the level of 2nd and 3rd lumbar. Upon examination, the Appellant complained of inability to do any work, bend or sit for long and numbness of both legs. According to PW2, his examination revealed that the Appellant's back was very still and he could not bend. He had x-ray that confirmed that the fractures referred to PW2 formed an opinion that this was a major injury. Though he was responding to treatment, he was recovering very slowly. He was disabled on his back to the extent that he could not work as a loader. PW2 confirmed that the Appellant had permanent incapability at 35%. In PW2's opinion the Appellant's condition was susceptible to deterioration and development of arthritis. PW2 disclosed that on the morning of his testimony, he had talked to the Appellant who confirmed that he had deteriorated. It was PW2's evidence that he relied on the documents stated in the report in preparing the report which he exhibited. It was his evidence that he charged Kshs. 2,000/- for the medical report and Kshs.15000/- for his court attendance and exhibited the receipt.

17. It was his evidence that it is advisable for victims of such injuries to wear a corset which is an aid to prevent unnecessary back movement which occasions pain though it is not a cure as the victim still looks disabled and is never likely to do manual work.

18. In cross-examination, PW2 stated that he did not do a clinical examination on the Appellant on the day of his testimony but only interviewed him. He denied that the Appellant was pretending that he has not recovered. To the witness, a corset is only to make one comfortable but cannot cure his medical condition. It only lessens the pain. According to PW2, the Appellant had a discharge summary when he was seen. In his evidence, when nerves become pressed they become numb and the back condition is pressing on the nerves. Neurological deficit, he explained means that there was no nerve weakness in his legs. Though the worst form of weakness would be paralysis, he confirmed that there was no paralysis. He could however be in pain though he could not comment on whether or not the Appellant could do clerical work or any other work he could do.

19. In re-examination, PW2 reiterated that the Appellant had not healed.

20. After the defence was granted several adjournments to call its witnesses, the case was closed without the defence adducing evidence.

21. In his judgement, the learned trial magistrate found that the Appellant's version on how the accident occurred was never challenged that the driver failed to control the vehicle and bring it to a stop when the vehicle ahead stopped suddenly. It was the court's finding that the driver did not keep a safe distance and was hence careless in his driving. He found that the Appellant did not in any way contribute to the accident and therefore held the Respondent 100% liable.

22. Based on authorities while declining to make awards for loss of earnings, loss of earning capacity and special damages, which in his view were not proved, the learned trial magistrate awarded the Appellant Kshs 1,000,000/- being general damages plus costs and interests.

23. This appeal by the appellant is based on the following grounds:

1) The learned trial magistrate erred in law and fact in evaluation of the evidence before him and in reaching a wrong conclusion in assessment of damages.

2) The learned trial magistrate erred in law and fact in not awarding damages for loss of future earnings and/or loss of earning capacity pleaded and proved by the Appellant.

3) The learned trial magistrate erred in law and fact in not awarding Special damages pleaded and proved by the Appellant.

4) The Learned Trial Magistrate erred in law and in fact in and/or failure of assessment of the evidence and submissions presented before him by the Appellant.

5) The learned trial magistrate erred in law and fact in failing to consider inflation in assessing general damages for pain and suffering.

6) That the trial magistrate made the award of Kenya Shillings One Million (Kshs. 1, 000, 000/=) only as general damages for pain and suffering on an entirely erroneous and low estimate of damages to which the appellant was entitled.

7) The learned trial magistrate erred in law and fact in failing to consider the appellant's injuries, residual injuries and/or permanent incapacity and inflation in his assessment of general damages for pain and suffering.

24. The Appellant therefore sought the following orders:

a) Increase General damages for pain and suffering

b) Award General and/or special damages for loss of future earnings and /or earning capacity

c) Award Special damages as pleaded and proved

d) And/or make such orders as this Honourable Court may think fit and just.

25. It was submitted on behalf of the Appellant that the trial magistrate made the said award of Kshs 1,000,000/= general damages for pain and suffering on an entirely erroneously and low estimate of damages to which the appellant was entitled. According to the Appellant, from the evidence by the Appellant and Medical Report by **Dr. Wokabi**, Workman's Compensation DOSH Forms, Treatment notes, Discharge Summaries produced in court and the Amended plaint, the injuries sustained by the Appellant were spinal injury, compression fracture of the thoracic spine L2 and L3, fracture of the lumbar spine 7, partial dislocation of the 2nd & 3rd lumbar vertebrae, dislocation of the left shoulder joint, contusion of the head leading to loss of consciousness, bruises at the back and soft tissue injuries to the muscle ligaments and discs. As a result, the Appellant experienced tiredness on walking, weakness of lower limbs, walking using a walking stick and wearing a lumbar corset, stiff and spastic back and inability to bend or extend, instability of the spine at lumbar region, tenderness and restriction of flexion and lateral flexion of the back, sexual dysfunction and disposition to osteoarthritis (lumbar spondylosis). His permanent disability was assessed at 45- 60%. It was contended that the trial court in his assessment of damages for pain & suffering failed to take into consideration material facts on the appellant's injuries residuals and rate of inflation and failed to consider the severity of the injuries sustained by the appellant hence the award by the trial court was inordinately low. To the Appellant, the trial magistrate proceeded on wrong principles, and misapprehended the evidence in material respect to the appellant's injuries and residual injuries and permanent incapacity and rate of

inflation and in doing so arrived at a figure which was inordinately low.

26. In support of his submissions, the Appellant relied on **Nancy Oseko vs. Board of Governors Masai Girls High School [2011] eKLR** where the plaintiff sustained chest injury Head compression fracture of the thoracic spine no 12 and loss of sensation from the level T-12 downwards Loss of motor function from same level downwards and other injuries and was awarded Kshs 2,500,000/= General damages for pain suffering and loss of amenities.

27. He also cited **Naftali Njoroge Njau vs. Polypipes (Steel Division) Limited [2016] eKLR** where the plaintiff sustained multiple soft tissue injuries involving the Lumbosacral spine, posterior chest wall and the legs and parapraxis and was awarded Kshs 3,000,000/= General damages for pain suffering and loss of amenities.

28. In view of foregoing and the cited Authorities, it was submitted that the award on damages for pain and suffering and the decision of the Learned Magistrate on damages for pain and suffering be reviewed and enhanced to a reasonable figure and/or as submitted before the lower court to Kshs 3, 500, 000/=.

29. It was further submitted that the Learned Trial Magistrate erred in law and fact in not awarding damages for Loss of future Earnings and/or loss of earning capacity pleaded and proved by the Appellant. The Court was urged to re-evaluate the evidence in support of the Appellant's claim for loss of future earnings and/or loss of earning capacity which evidence, it was contended, was amply in support of the claim and reference was made to the duly signed and stamped Workman's Compensation Forms which were filled, signed and submitted to the Respondent's insurer and duly signed by the Respondent to prove his earnings as Kshs 7, 500/= per month. It was noted that since the Respondent did not challenge or call any evidence to controvert the Respondent s evidence on occupation and earnings of the appellant, the appellant did produce documentary evidence of his occupation and income. It was submitted that by faulting the Appellant's evidence of earnings on account of him not having a payslip and appointment letter, the trial magistrate erred both in law and fact as he ignored and failed to take into account the appellant's evidence on his earnings and reasons as to why he did not have any pay slips or appointment letter. According to the Appellant, it has been held and it is now trite law that courts should not subscribe to the view that the only way of proving earnings is by way of documents and reliance was placed on the decision by the Court of Appeal in **Jacob Ayiga Maruja & Francis Karani vs. Simeon Obayo (suing as the Administrator of the Estate of Thomas Ndaya Obayo Kisumu Civil Appeal No 167 of 2002 (2005) eKLR.**

30. The Court was therefore urged to award the Appellant damages for loss of future earnings using the multiplier of 35 years (since the Appellant was 27 years) and multiplicand of Kshs 7,500/= totalling Kshs 3, 150, 000/=. In the alternative, it was submitted the court trial should have awarded the appellant damages for loss of earning capacity using the same multiplier/multiplicand as loss of future earnings. In support of this position, the Appellant relied on **Butler vs. Butler (1984) KLR 225** and **Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR**.

31. In view of the foregoing, the court was urged to calculate the loss of future earnings and/or loss of earning capacity as for "lost years' and use multiplicand, multiplier and earnings of the plaintiff at the time of the accident. According to the Appellant, at the time of the accident and filing of the suit herein, the Appellant pleaded and testified that he was an active young man of 27 years of age who was employed by the Respondent as a Turn boy and could have carried worked to a ripe old age of 70 years and above as well as increase his career prospects and income. It was noted that the official retirement age for Public Officers in Kenya is 60years. He was earning Kshs 7, 500/= per month. He produced a WIBA4 Form duly signed by the Respondent and Ministry of Labour to prove his earning. Since the Appellant's occupation and earnings were not disputed and or challenged by the Respondent, the court was urged to hold that the DOSH/WIBA4 Forms are sufficient documentary evidence of the Appellant's occupation and earnings.

32. The court was therefore urged to hold that on a balance of probabilities the Appellant proved his claim for loss of future earnings and/or loss of earning capacity and proceed to assess and award the same.

33. As for loss of earnings, it was submitted that under Paragraph 8(a) of the Amended Plaint, the Appellant claimed loss of earnings at the rate of Kenya Shillings Seven Thousand & Five Hundred (Kshs. 7,500/=) per month from the date of the accident to date of filing suit herein which equals Kenya Shillings One Hundred and Sixty-Five Thousand (Kshs 165, 000/=) yet the trial court did not consider this claim and or make any award under the said heading. According to the Appellant, from the Medical Reports and injuries sustained by the Appellant and his own evidence clearly point to the fact that at the time this suit was filed the Appellant had not been able and was not able to engage in his trade as a turnboy and/or any meaningful work or at all and he quantified the loss of earnings under Paragraph 8 (a) of the Amended Plaint.

34. The Appellant therefore urged the court to find that there is just cause to interfere with the trial court's decision on awards of damages as follows:

a) Increase General damages for pain and suffering to Kshs 3,500,000/=

b) Loss of Earnings from date of accident to date of filing suit Kshs 165,000/=

c) Award General and/or special damages for loss of future earnings and /or earning capacity Kshs 3,150,000/=

d) Award Special damages as proved

e) And/or make such orders as this Court may think fit and just to

35. The Respondent also appealed and after both appeals were consolidated his appeal was deemed to be a cross appeal. On his part he faulted the judgement on the grounds that the learned trial magistrate erred in law and in fact by:

1) Awarding the Appellant damages to the tune of Kshs. 1,000,000/= which is inordinately high.

2) Finding that the Appellant had the Respondents liability.

3) Failing to take into account the Respondent's submissions.

4) Arriving at the conclusion on liability that was not supported by the evidence on record.

5) By relying on the wrong principles of law to arrive at the judgment.

36. The Respondents therefore prayed that:

a) The judgment of the trial court be set aside in its entirety and this Honorable court do make its own findings.

b) The costs of the appeal and those of the lower court be borne by the Appellant.

37. It was submitted on behalf of the Respondent that traffic rules requires that when the vehicle is in motion, the passengers should fasten their seat belts. The Appellant did not follow such regulation which amount to a traffic offence under the Kenyan Law. According to the Respondent, the Appellant chose to give up his seat for another person and chose to sleep at the back of the vehicle even though they had spent the night at Kibwezi. It was therefore submitted that from the foregoing, it is clear that the driver of the Respondent tried all means to mitigate the situation at hand but the mechanical errors occurred which should not be weighed against the appellant.

38. According to the Respondent, the claim by the Appellant that the vehicle was heavily loaded yet he is the turn boy should explain how he did not care about his life and that of his colleague at the road since he is the one that loads the vehicle and off loads it. It was therefore submitted that the Appellant did nothing to mitigate the situation as he is supposed to be the 3rd eye to the driver which he chose to neglect his duties and his carelessness in the circumstances should not be meted against the Respondent. In the circumstances, the injuries sustained by the Appellant could not be of such magnitude if not for his negligence. In support of his case, the Respondent relied on the case of **Peter Okello vs. Clement Ochieng [2006] eKLR**.

39. In the same breath, the court was urged to apportion liability at 50:50 since the Appellant largely contributed to the injuries he sustained.

40. As regards the quantum, it was submitted that the evidence on record does not reflect the appellant's actual condition at the time of the hearing and at the time of the appeal as the permanent incapacity has gone down. Taking into consideration the type of injuries sustained by the Appellant and the amount of damages awarded by the trial court, it was submitted that the award is inordinately high. The Respondent based his submission on the case of **Abdi Haji Gulleid v. Auto Selection (K) Ltd & Another [2015] eKLR** where the Plaintiff sustained grievous injuries to the spine, serious injuries to the upper limbs and wedge compression fracture at the back of L1 spine. The permanent incapacity was assessed at 25% by **Justice Nyamweya**. General damages was assessed and awarded at Kshs 925,757/= in place of the Kshs 300,000/= awarded by the lower court. He also relied on the case of **Nicholas Njue Njuki v. Eliud Mbugua Kahuro [2014] eKLR, where Ngaah, J** awarded Kshs 3,800,000/= in general damages for pain, suffering and loss of amenity for unstable fracture dislocation of lumbar vertebrae leading to spinal cord damage; complete paralysis in the lower limbs; incontinence of stool and urine. Permanent incapacity was assessed at 100%. It was however noted that in that case the totality of injuries is more severe that the present case and disability in the present case is only at 35%. Reliance was placed on this court's decision in **Dorcas Mututho Ileve vs. Muithya Lydia [2018] eKLR** where the court awarded the sum of Kshs 600,000.00 for pain suffering and loss of amenities to the Appellant who had suffered head injury with loss of consciousness and intracranial bleeding, fracture of right radius-distal end, fracture of cervical and thoracic vertebral bones, and fracture of the sternum and 6th rib.

41. Taking into consideration the injuries sustained in the following cases, it was contended that the Appellant's injuries were not as severe as the above cases and the damages awarded were less than the Appellant's. To the Respondent, these are more recent cases up to 2018 and therefore the same covers the present economic times. It was therefore the Respondent's position that the trial court's award of Kshs 1,000, 000/= was inordinately high in the circumstances and prayed that the same be set aside and the award of Kshs 600,000/= be awarded taking into account the injuries and the case law cited above.

42. On the loss of earnings, it was submitted that during the hearing, the though the Appellant alleged that he was earning a salary of Kshs 7500/=, he did not place any evidence before court to prove that indeed he was earning the amount as alleged yet the courts have held severally that the loss of earnings is a special damage which must be strictly proved. This was based on the case of **Ndoro Kaka Kakondo vs. Salt Manufacturers [K] Limited [2016] eKLR.**

43. On the issue of loss of earning capacity, the same ought to be awarded under the vote of general damages as was stated in the case of **William J Butler vs. Maura Kathleen Butler [1984] eKLR.**

44. It is the Respondents submission that the loss of earning capacity should have been pleaded as a general damage and the damages awarded by the court covers the same.

45. Regarding special damages, it was submitted that though the Appellant pleaded special damages of Kshs 5,200/=however the same was not proved and therefore was not awarded at the trial court. It was therefore the Respondents submission that the trial court did not error in denying the award of special damages as the same was not proved as is the requirement.

46. The Respondent concluded that he proved his case on the balance of probabilities and the trial courts award of general damages at Kshs1000,000/= be overturned and the same be substituted with the award of Kshs 600,000/= which is reasonable taking into account the

degree of injuries sustained by the Appellant and the negligence by the Appellant.

Determination

47. I have considered the foregoing. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

48. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

49. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

50. Nevertheless, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

51. In this case, it is clear that the issue to be resolved is whether the respondent, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

52. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

53. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

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

54. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

55. The learned trial magistrate who heard the evidence made a finding that the Respondent herein was 100% liable. As was held by the Court of Appeal in **Ngare Rashid Ngare vs. Kwale Saw Mills [1988-92] 2 KAR 280:**

> **"A Court of Appeal should not lightly reverse the learned Judge's findings of fact and will only do so where there is a misdirection in law regarding the necessity of corroboration of certain eye witnesses evidence, when they did not require such corroboration."**

56. In his evidence which was unchallenged, the Appellant testified that their vehicle which was heavily laden failed to brake and instead attempted to overtake a vehicle which it was following and in the process overturned. Clearly that was evidence of negligence on the part of the Respondent and unless the Respondent showed that the accident was caused by factors beyond his control, there is no way he can avoid liability. In **Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR**, the Court of Appeal noted that the evidence of the respondent regarding the occurrence of the accident and the circumstances under which the accident occurred were not controverted.

57. It was however contended that the Appellant, by lying on the bed and not using the safety belt contributed to the extent on injuries sustained. In effect it was being alleged that the Appellant was contributorily negligent. In **Ngare Rashid Ngare vs. Kwale Saw Mills** (supra), it was held by **Hancox, CJ**, that:

> **"Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself."**

58. The Respondent did not however plead contributory negligence on the part of the Appellant. As is stated in ***Charlesworth and Percy on Negligence,*** Seventh Edition at pages 146 – 147:

> ***"If the defendant intends to rely upon an averment of contributory negligence such allegations must be specifically pleaded against the plaintiff."***

59. That was the position of the Court of Appeal in **Maina Kaniaru & Another vs. Josephat Muriuki Wan'gondu Civil Appeal No. 14 of 1989.**

60. Consequently, the issue of contributory negligence was not part of the pleadings before the trial court. Even if it had been so, as was held by the Court of Appeal in **Ali Ahmed Naji vs. Lutheran World Federation Civil Appeal No. 18 of 2003**:

> **"First, as the learned Judge rightly pointed out, the respondent was bound by its pleadings wherein the nature of the defence to be raised was never mentioned apart from denying the averments in the plaint. Agreed issues were apparently filed on 10th January, 2001 and it appears that the cause of the accident as narrated...before the Judge was never part of those issues. But even if it had been an issue, the position would be that the appellant gave one version as to the cause of the accident and...the driver gave a different version. The learned Judge who had the opportunity to see and hear the two of them testify before her, accepted one version and rejected the other and it was not alleged before us that there was absolutely no evidence before her to warrant her conclusions…The appeal before us is, of course, a first appeal and is therefore, by way of a rehearing, but it would be a strong thing indeed for the Court to reverse the Judge on purely issues of fact, unless of course the Court is convinced that her decision on those issues are perverse as not being supported by any evidence or that they are unsupportable on the evidence available on the record. We are satisfied that there was sufficient evidence to support the Judge's conclusions on the issue of liability and in any case, the respondent's claims as stated...were not part of their pleadings. We accordingly confirm the learned Judge's findings on liability with the result that the cross-appeal must inevitably fail."**

61. In the premises, there is no basis upon which this court can interfere with the learned trial magistrate's finding on liability.

62. Regarding loss of earning and loss of earning capacity, the distinction between the two was explained succinctly in **Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR** where it was held that:

> **"There is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution in earning capacity is awarded as part of general damages…The award for damages under loss of earning capacity only arises where a plaintiff at the time of the trial is in employment, but there is a risk that he may lose this**

employment at some time if future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is different from an actual loss of future earnings, which can already be proved at the time of the trial. The claim for loss of future earnings is assessed on the ordinary multiplier/multiplicand basis. In contrast where there is a substantial risk that a plaintiff at some future date before the end of his working life will lose his job and be thrown into the labour market, the assessment of risk and damages is much more difficult. No mathematical calculation is possible and the multiplier/multiplicand approach is impossible or inappropriate and it is impossible to suggest any formula for determining the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market. It is not correct that whenever a plaintiff established a claim under the head of loss of earning capacity, the damages are to be considerable and that it can never be right to award only a few hundred pounds damages. Each case must depend on its own facts, but if the court decides that the risk of the plaintiff losing his present job, or of his being unable to get another job or an equally good job or both, are only slight, a low award is right. If as will be rare both are negligible or fanciful no award should be made. If one or both are real or substantial, but neither is serious, the award should not be a token or derisory award but should generally be in hundreds of pounds. If both risks are serious, the compensation should generally be in thousands of pounds…A court can, in appropriate cases, give an award for loss of future earnings and for loss of earning capacity to the same plaintiff so long as the overlap of the two awards of damages is avoided…Loss of earning capacity can be a claim on its own apart from a claim for general damages for pain and suffering (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then or at the date of the trial). Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity. At any rate, what is in a name if damages are payable. This type of claim (loss of future earnings) could be a claim on its own and the figure need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure would be based…T**he award of loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of the trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."**

63. However, the same Court in **Kanini vs. A M Lubia & Olive Lubia [1982-1988] 1 KAR 727** seemed to have taken a different view on the issue whether loss of earning capacity is only awardable to a person who is in employment at the time of the injury. In that case it expressed itself as hereunder:

"We do not know if the learned Judge rejected this claim [loss of earning capacity] on the ground that the appellant, being a refugee in Kenya, was, by law, not allowed to engage in employment or on the ground that there was no sufficient evidence to prove that he had previously worked in Somalia. On the latter issue we have set out the appellant's evidence. He had worked as a forklift operator and he gave the names of his previous employers. He had sought to produce documents to support that claim but unfortunately for him, he was not allowed to produce them because "he was not the maker of the documents." But the learned Judge did not specifically say she disbelieved his oral evidence with regard to his previous employment. The Judge actually accepted the submission of the respondent's counsel that the appellant being a refugee had no earning capacity. We think the appellant had lost some earning capacity as a result of the accident...True he could not be employed in Kenya, but there was no evidence that he will always remain a refugee in Kenya; he could at some future date return to his native country or go to some other country where he could be employed. The loss of earning capacity will always remain with him and it is unreasonable to hold that he can only be compensated for that loss if he was employable in Kenya. We think the approach adopted by the learned Judge was not fair to the appellant. But it is clear that one cannot tell when the appellant would be able to return to his country where he would be employable. While we agree that he has suffered some loss which he himself put at Shs 4,000/- per month, we think it would not be right to give him many years of a working life, seeing that it is uncertain when and if he will be able to be employable again. Accordingly, we would give him five working years and at the rate of Shs 4,000/- per month we award him a sum of Kshs 4000 X 5 X 12 = Shs 240,000/- on the head of loss of earning capacity."

64. In this case there was uncontroverted evidence that the Appellant was as a result of the injuries sustained by himself no longer able to carry out his duties. He clearly lost his earnings. It is true as was held in **Hahn vs. Singh [1985] KLR 16,** that loss of earning is special damages and must not only be pleaded but strictly proved; the facts leading to such loss must be pleaded. This position was reiterated in the case of **Ndoro Kaka Kakondo vs. Salt Manufacturers [K] Limited [2016] eKLR** where the court had the following to say:

"Loss of earnings is claimed as special damages. It must be specifically pleaded and strictly proved. The Court understands this to comprise lost wages. It is a specific figure, based on the Claimant's rate of monthly salary, and the years expected to continue working."

65. It is not in doubt that the Appellant pleaded loss of earning. The contention was however whether he was able to prove his earning. It is true that the Appellant had no pay slips showing what he was earning because according to him, no such documents were given to him and they simply used to sign in a book when receiving salaries. The fact of employment of the Appellant was never denied. The Respondent did not adduce any evidence showing how much the Appellant was being paid since there was no allegation that the Appellant was offering *pro bono* services. One of the documents exhibited was a form known as DOSH 1 filed by the Respondent where the Appellant's earnings were indicated as Kshs 7,500. The same figure was disclosed in DOSH/WIBA 4. Clearly there was evidence as to what the Appellant was earning. As was appreciated by the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo (2005) eKLR**:-

"……..we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways…we reject any contention that only documentary evidence can prove these things."

66. The Respondent's own evidence could be properly relied upon by the Appellant and the Court in arriving at a just decision just as was the case in **Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR**, where the court stated that:

"The respondent in addition produced an internal investigation report of the accident by the appellant's Security Officer dated 24th July 1999 and the accompanying statements of witnesses…The investigation report was produced as an exhibit without any objection by the appellant's counsel and the report exonerates the respondent from any degree of contributory negligence and blames the appellant's servant for the accident who admitted in his statement that he operated the crane and caused the accident."

67. It is therefore my finding that the Appellant proved that he was earning Kshs 7,500/- and the learned trial magistrate erred in finding that he failed to prove his earning. He was clearly entitled to loss of earning from 13th February, 2009 till 29th November, 2010 a period of 20 months which works out as follows;

7,500.00 x 20 = 150,000.00

68. As for loss of future earning capacity, from the medical report of **Dr Wokabi**, it was clear that the recovery process of the Appellant was bound to be slow with possibility of him developing osteoarthritis. This head of damages was discussed in details in **Butler vs. Butler (1984) KLR 225** where the Court of Appeal observed that:

"A plaintiff's loss of earning capacity occurs where, as a result of his 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…Compensation for diminution of earning capacity is part of general damages…the question is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries?...The factors to be taken into account, will vary with the circumstances of each case. Examples include, age, the qualifications of the plaintiff, his disabilities…In my judgment the...Civil appeal No 66 of 1982, provide clear authority for separate compensation for loss of earning capacity which, as I have already observed, is akin to the loss of the whole period for which a person has been deprived of his ability to earn…assess in monetary terms , the loss of earning capacity…the figure...must be a result of a mathematical calculation using relevant facts as...age qualifications and the nature of injuries…"

69. In **Mawji Govind & Company vs. Munga Civil Appeal No. 161 of 1989** same Court of Appeal held that:

"The cardinal point to remember is that the plaintiff must support any claim for loss of earning capacity by evidence. No mathematical calculation is possible in assessing this kind of claim and damages under this head must be separately quantified. There ought to be evidence to cover such relevant factors as the salary of the plaintiff at the time of the injury, if he is earning less at the time of the trial, if he has lost his job, if there is any substantial risk that he will at some future date before his retiring age lose his job and be caused to look for another job, the plaintiff's age and qualification, length of service and of course the nature of the plaintiff's disability. So that in assessment for loss of earning capacity, all sorts of factors need to be considered."

70. In **Cuossens vs. Attorney General [1999] 1 EA 40** it was held that:

"The general rule regarding measure of damages applicable both to contract and tort is that sum which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation…In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been lost, or expenses which have actually been incurred up to the date of trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages and in this category falls income or earnings lost between the time of injury and the time of trial…But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of trial. It is therefore awarded as part of the general damages…An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore, important that evidence should be given to the court of as many solid facts as possible. One of the solid facts that must be proved to enable the court assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of the injury…The method of assessment of loss of income or earnings applies equally to claims based on personal injury as well as to those for loss of dependency arising from fatal accidents…Sometimes it is impossible, though the justice of the case requires some award to be made or arithmetic has failed to provide the answer which common sense demands…A plaintiff's loss of earning capacity occurs where as a result of his 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…It is a different head of damages from an actual loss of future earnings, which can readily be proved at the time of the trial. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution of earning capacity is awarded as part of the general damages…The question is what is the present value of the risk that at future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on.

Mathematical calculation may not be possible but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the judges must do the best they can…The assessment of damages is more like an exercise of discretion by the trial Judge and the appellate court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would or he has taken into consideration matters he ought not to have considered or not taken into account those matters he ought to have considered and in the result arrived at the wrong decision…Loss of earning capacity is a claim on its own and the figure need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure could be based. The figure should be based on mathematical calculation using such relevant factors as the respondent's age and qualifications and the nature of the injuries sustained."

71. In this case the Appellant was 27 years old at the time of the accident. The Court was urged to award him damages for loss of future earnings using the multiplier of 35 years and multiplicand of Kshs 7,500/= totaling Kshs 3, 150, 000/=. In such matters however as appreciated by **Ringera, J** (as he then was) In **Hannah Wagaturi Moche & Another vs. Nelson Ndomo Muya Nairobi HCCC No. 4533 0f 1993:**

"In determining the right multiplier the right approach is to consider the age…the balance of earnings life… the vicissitudes of life, and the factor of accelerated payment in lump sum."

72. In this case, there is no guarantee that the Appellant was going to work as a turnboy/loader for 35 years. Old age was surely bound to catch up with him and render him unable to carry on with that kind of work. In my view 15 years was more appropriate. In the circumstances his award for loss of earning capacity works out as follows:

Kshs 7,500 x 12 x 15 = 1,350,000.00

73. The said will is to be discounted by Kshs 200,000.00 to cater for the fact of payment in lumpsum leaving a balance of Kshs 1,150,000.00

74. As for the award for pain and suffering, in **Bencivenga vs. Amino [1986] KLR 269**, it was held that:

"Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which the society deems fair, fairness being interpreted by the court in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff including his age and any unusual deprivation he may suffer is reflected in the amount of the award…The award of damages must be fair, bearing in mind the previous decisions and moreover, each case has its own circumstances which may not be overlooked including the age of the plaintiff and any unusual deprivation he may suffer. The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, as far as can be done by an award of money, as he would have been had the accident not happened…In cases in which there are Kenyan decisions on the point, in which the main essentials bear a reasonable measure of similarity to it, Kenya decisions should be used to the exclusion of the others, save those from the neighbouring jurisdiction with similar conditions to Kenya. Only when there are no local decisions on the point should resort be had to English and other authorities, and then only as helpful indicators…General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When the court is ponderingly struggling to seek a reasonable award, it does not aim at precision. It knows that it is placed in an inescapable situation for criticism by one party or other, sometimes by both sides. It does not therefore aim to give complete satisfaction but do the best it can. It knows that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. They are remembered but ignored. We have inflation with us and we have to live with the exorbitance, which the inflation has brought into our lives."

75. Similarly, in **Kigaragari vs. Agripina Mary Aya [1985] KLR 273; Vol. 1 KAR 768; [1976-1985] EA 224,** it was held that:

"The Court of Appeal should develop the common law of Kenya in a consistent way as regards damages. Awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must rest heavily upon the court. The largest application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover. If the sums get too large we are in danger of injuring the body politic. As large sums are awarded so premiums for insurance rise higher and higher…It is of course desirable that so far as possible comparable injuries should be about or nearly equally compensated: However, the comparison should be confined to decisions of local courts, other decisions e.g. overseas ones serving merely as a guide."

76. It was therefore appreciated in that case that:

"For the Court of Appeal to interfere with an award of damages it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred…The difference in two amounts would, alone, not be a justification for interfering with the award, bearing in mind that the assessment of damages is basically a matter of judicial discretion and remembering that in this sphere there are inevitably differences of view and opinion."

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

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

78. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"

79. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

80. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

81. I have considered the authorities cited and I am not satisfied that any of parties has met the threshold for interfering with the award for general damages for pain and suffering. I decline to interfere therewith.

82. In the premises, the appeal as regards the loss of earnings and loss of earning capacity succeeds. The decision dismissing the same is hereby set aside and substituted therefore an award of Kshs 150,000.00 and 1,150,000.00 respectively. Save for that the judgement is confirmed. The interest on loss of earnings will accrue from the date of filing suit while the interest on loss of future earning capacity will accrue from the date of the judgement in the lower court. For avoidance of doubt, the cross appeal fails and is dismissed. As the Appellant has not wholly succeeded he is awarded half the costs.

83. It is so ordered

Judgement read, signed and delivered in open Court at Machakos this 4th day of February, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Tum for Mrs Isika for the Respondent

CA Geoffrey