**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 31 OF 2018**

**BETWEEN**

**RACHAEL WAMBUI NGANGA……..….1ST APPELLANT**

**STEPHEN NG'ANG'A NGUGI…….....2ND APPELLANT**

**AND**

**RAHAB WAIRIMU KAMAU……..RESPONDENT**

***(Being an appeal from the original judgment and decree of Hon. K.M Njalale, Senior Resident Magistrate delivered on 29th January 2018 in Limuru Civil Case No. 231 of 2015)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**The Appeal**

1. The appellants, who were aggrieved by the decision of the trial court aforementioned lodged this appeal on 23rd February 2018. The appeal is premised on grounds THAT:

> ***a) The learned trial magistrate erred in law and fact in assessing general damages at Kshs. 1,266,477.50/- which was excessive in view of the injuries, loss and damage suffered by the respondent.***
>
> ***b) The learned trial magistrate erred in law and fact in that she applied the wrong parameters and principles to arrive at the award of Kshs. 1,266,477.50/- as general damages.***
>
> ***c) The learned trial magistrate erred in law and fact in that she considered the wrong principles and/or failed to take into consideration the relevant factors in awarding general damages and as a result arrived at an excessive figure.***
>
> ***d) The learned trial magistrate erred in law and in fact in failing to consider comparable conventional awards for general damages in similar cases.***
>
> ***e) The learned magistrate erred in law and in fact in that she failed to take into consideration the evidence of the appellants and submissions filed on their behalf.***

**The pleadings**

2. The respondent had filed a suit by way of an amended plaint dated 17th January 2017 in the lower court against the appellants where she sought general and special damages, loss of income for one year at the rate of Kshs. 4,100 per day, general damages for diminished earning capacity together with costs of the suit. The claim arose out of an accident that occurred on the 29th day of July, 2014 at around 11.30am involving the respondent and motor cycle registration number KMDF 842B owned by the appellants. The respondent claimed that she was a pedestrian carefully walking along Limuru road in Limuru when the appellants' agent, servant and/or employee riding the said motor vehicle

along the same road so carelessly/or recklessly rode, controlled and managed the said motor cycle that he knocked her down and caused her bodily injuries from which she suffered loss and damage. The respondent blamed the appellants' agent, servant and/or employee for negligence which were particularized in the plaint together with the injuries and loss.

3. The suit was defended by the appellants vide their statement of defence dated 7th September 2015 denying the allegations in the plaint therein. In the alternative, the appellants blamed the respondent for being negligent and solely causing and/or substantially contributing to the accident.

4. The suit proceeded to full hearing and at the conclusion of the trial the learned trial magistrate entered judgment for the respondent against the appellants as follows:

***Liability in the ratio of 80:20 as against the appellants***

***General damages Kshs. 500,000/-***

***Future Medical expenses Kshs. 120,000/-***

***Loss of income Kshs. 646,477.50/-***

***Special damages Kshs. 196,390/-***

***Less 20% contributory negligence***

***Total Kshs.1,462,867.50/-***

***Interest on general damages at court rates from the date of judgment.***

***Interest on special damages at court rates from the date of filing the suit.***

***Costs and interest of the suit***

**The Duty of this court**

5. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to: '***…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.***' This was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

***"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."***

**The appellants' submissions**

6. The appellants submitted that their major complaint against the trial court's judgement is the award of Kshs. 646,477/- for loss of income and Kshs. 120,000/- for estimated costs of surgery for removal of the *K-nail*. The appellants stated that the respondent neither pleaded nor made a specific prayer for the future surgery expense of Kshs. 120,000/- and that the she pleaded the same as part of special damages arguing that special damages are expenses that are already spent. The appellants added that there was no proof that the respondent had already spent this amount since at the time of testifying, the *K-Nail* had not yet been removed and as such, she could not claim the same as special damages. The appellants contended that since the respondent had neither pleaded the amount for future medical expenses nor prayed for the same, the court had no basis for awarding the same to her. The appellants cited the general rule that parties were bound by their pleadings and therefore the court could not award something that was not pleaded. Further, that any evidence led by the respondent which was at a variance with the averments in the pleadings ought to have been disregarded.

7. It was also submitted by the appellants that the award of Kshs. 646,477/- for loss of income was not merited at all. The appellants stated that the trial court, at page 5 of its judgment stated that the respondent merely alleged but never proved the damages claimed for loss of earnings and that having held that view, it ought to have dismissed the same for lack of evidence. The appellants stated that the trial court, by resorting to the minimum wage to find a way to accommodate the respondent was an error that resulted in double compensation as the court had already awarded the respondent general damages of Kshs. 500,000/-. The appellants stated that the case relied on by the trial court as the basis for applying the minimum wage was distinguishable from the instant case as the former was a fatal claim and there was no proof of income (**Nyamira Tea Farmers Sacco V Wilfred Nyambati Kireita**). The appellants stated that in the instant case, the respondent was still alive and thus loss of income had to be strictly proved.

8. In conclusion, the appellants submitted and prayed that the appeal be allowed and that this court sets aside the trial court's award of Kshs.120,000/- for future costs of surgery and the award of Kshs.646,477/- for loss of income and replace it with an order dismissing the

same for the reasons that the award of future costs of surgery was neither pleaded nor prayed for and that the award for loss of income was without merit and arrived at on application of the wrong principles of law.

**The respondent's submissions**

9. The respondent submitted that in as much as the appellants had taken issue with the award of general damages at Kshs.1,266,477.50/-, they did not indicate under what head of general damages the trial magistrate erred in awarding the said amount. The respondent stated that the figure of Kshs. 500,000/- awarded by the trial court could not be deemed to be excessive in the circumstances because in actual sense the amount was below what has been awarded for similar injuries in past decisions.

10. The respondent further submitted that the award of Kshs. 120,000/- for future medical expenses was supported by the doctor's medical report which broke down the expenses to be incurred during anticipated future surgery to remove the metallic *K-nail*. The respondent stated that she had claimed Kshs. 1,770,000/- for loss of income and diminished earning capacity but the trial court found that she had no proof to support her claim that she was earning Kshs. 4,100/- per day. The respondent stated that the decision relied upon by the trial court in resorting to the applicable minimum wage in the absence of proof of income was proper. The respondent added that in assessing the general damages, the trial magistrate put everything into consideration in view of the injuries, loss and damages suffered by her and arrived at a reasonable figure.

11. It was the respondent's further submission that the record of appeal was incomplete as it lacked the following documents:

**a) Reply to defence**

**b) Pre-trial questionnaire**

**c) Statement of agreed issues**

**d) Plaintiff's further statement dated 20th November 2016**

**e) Application for amendment of plaint-notice of motion dated 20th September 2016**

**f) Defendant's amended defence**

**g) Plaintiff's submissions filed on 10th January 2018**

**h) Defendant's submission dated 8th January 2018**

**i) Decree**

**j) Defendant's list of witnesses**

**k) Defendant's witness statement dated 10th March 2016**

12. The respondent stated that the requirement for copy of the decree appealed being included in the record of appeal can be discerned from ***Order 42 Rule 2 and Rule 13(4) of the Civil Procedure Rules.*** The respondent added that it had been held in several cases that an appeal will be struck out if its record of appeal does not contain the order or decree appealed from. The respondent thus submitted that in light of the above omissions, the record of appeal as filed by the appellants stood vitiated and therefore not sustainable and ought to be struck out.

13. The respondent also orally submitted that the supplementary record of appeal filed by the appellants on 10th September 2019 ought to be struck out as it was filed without the leave of court

14. The respondent finally urged this court to dismiss the appeal with costs to her as the same was frivolous, vexatious, incompetent, bad in law and was an abuse of the court's process.

**Issues for Determination**

15. Upon perusal of the record and written submissions together with the authorities cited therein by both parties and from my deduction, the following are the issues for determination:

**a) Whether the record of appeal is incompetent and ought to be struck out and whether the supplementary record of appeal filed on 10th September 2019 ought to be expunged from the record.**

**b) Whether the trial court erred in awarding the sum of Kshs. 1,266,477/- as the quantum of damages payable to the respondent by the appellants.**

**Whether the record of appeal is incompetent and ought to be struck out and whether the supplementary record of appeal filed on 10th September 2019 ought to be expunged from the record**

16. ***Section 65(1)(b) of the Civil Procedure Act*** provides:

> ***"(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—***
>
> ***……***
>
> ***(b) from any original decree or part of a decree of a subordinate court, on a question of law or fact;***
>
> ***……..”***

17. ***Order 42 Rule 2 of the Civil Procedure Rules*** provides as follows:-

> ***"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."***

18. ***Order 42, Rule 13(4)(f) of the Civil Procedure Rules,2010*** *provides*;

> ***"(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—***
>
> ***(a) the memorandum of appeal;***
>
> ***(b) the pleadings;***
>
> ***(c) the notes of the trial magistrate made at the hearing;***
>
> ***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
>
> ***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
>
> ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***
>
> ***Provided that—***
>
> ***(i) a translation into English shall be provided of any document not in that language;***
>
> ***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."***

19. The Supreme Court of Kenya, in the case of ***Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR*** held as follows at paragraph 41:

> ***"Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."***

20. The Court of Appeal in ***Chege v Suleiman [1988] eKLR*** firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

> ***"But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal."***

21. The High Court in ***Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] eKLR*** held as follows:

> ***"12. Despite the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word "shall" in Order 42 Rule 2 of the Civil Procedure Act contemplates that the furnishing of the decree or order is mandatory and cannot be wished away.***

*……..*

***15. It was very clear that the Appellant's omission to seek leave to file a Supplementary Record of Appeal to attach a copy of the decree he was appealing from rendered his Appeal incompetent. Having said so, whereas in the cases of Ndegwa Kamau T/A Sideview Garage vs Isika Kalumbo [2016] (Supra), Kulwant Singh Roopra vs James Nzili Maswii [2014] (Supra) and Joseph Kamau Ndungu vs Peter Njuguna Kamau [2014] (Supra) Ngaah J struck out the appeals therein because the decrees that were being appealed from had not been annexed in the respective records of Appeal, this court took a different position that it would be too draconian to strike out the Appeal herein.***

***16. This court's thinking was informed by the fact that it inadvertently admitted the Appeal herein before it had satisfied itself that the decree the Appellant was appealing from had been filed and it would thus be unfair to visit its omission on the Appellant herein for no fault of his own.***

***20. For the foregoing reasons, the upshot of the court's decision was that although the Appellant's Petition of Appeal that was lodged on 27th July 2017 was incompetent for want of annexing of the certified copy of the decree to his Record of Appeal, he is hereby directed to file and serve a Supplementary Record of Appeal annexing the necessary documentation by 26th June 2018."***

22. In ***Paul Karenyi Leshuel V Ephantus Kariithi Mwangi & Another (2015) eKLR***, the court explained the essence of a decree thus,

***"the Court of Appeal …. In Civil Appeal No. 7 of 1998, MUNICIPAL COUNCIL OF KITALE –VERSUS- FEDHA (1983) eKLR held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent ….. One may ask why so much importance is attached to this document: the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist …… much as this requirement is contained in the rules, it is not, in my humble view, a requirement that can merely be dismissed as a procedural technicality that maybe swept under the carpet; the question whether or not there is indeed an appeal which calls for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself for without an appeal, properly so called, any attempt to invoke and exercise that jurisdiction would be in vain."***

23. From my understanding therefore, ***Order 42, Rule 13(4)(f)*** above requires the judgment and decree appealed from to be part of the record. In the present appeal, a perusal of the record of appeal shows that the appellant attached a copy of the judgment together with the certified copy of the lower court's proceedings however, there is no certified copy of the decree attached as is mandatorily required. The appellants did not respond to this issue either orally or in their written submissions meaning it remained uncontroverted. As has been stated by the binding decisions of the Supreme Court and the Court of Appeal(supra), failure to include a decree is fatal as the same goes to the root of the appeal and jurisdictional aspect of the court. Observing the doctrine of stare decisis, I hold the same view in respect of the present appeal and find that the appeal is incompetent for the absence of the decree on record. (Also see H.A Omondi J in Ruth ***Anyolo v Agnetta Oiyela Muyeshi [2019] eKLR*** L.W Gitari J in ***Nancy Wamunyu Gichobi v Jane Wawira Gichobi [2018] eKLR***).

24. On whether the supplementary record of appeal filed on 10th September 2019 ought to be struck out, I note that the document contained in the said record was a medical report of the respondent by one Dr. W.M Wokabi which was produced as *Pexhibit 10* in the lower court. I fail to see any prejudice that could be occasioned to the respondent for the failure by the appellants to seek leave before filing the said document. In any case, this document was within the knowledge and possession of the respondent and was her own document anyway. I refer to ***Article 159 (2) (d) of the Constitution of Kenya*** and the overriding objectives of the **Civil Procedure Act** as stated under ***Section 1A and 1B*** which mandates the court to consider the wider interests of justice before coming to a decision to strike out an offending document such as the one in the instant case. (Also see the Court of Appeal in ***Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 Others [2011] eKLR***.

**Whether the trial court erred in awarding the sum of Kshs. 1,266,477/- as the quantum of damages payable to the respondent by the appellants**

25. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, cited the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** at p. 730 where Kneller J.A. said:-

***"The principles to 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 the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."***

The Court further makes reference to the case of Gicheru **V Morton and Another (2005) 2 KLR 333** where the Court stated:

***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

See also ***Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.***

The Court further references the venerable **Madan, JA *(as he then was),*** on the difficulties that confront a judge in assessment of general

damages in the context of personal injuries claims as follows in ***UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575***, *at* page *579:*

> ***"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 a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."***

26. The Court of Appeal in the ***Gicheru V Morton and Another Case (*****supra)** goes on to hold that:

> ***"In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See JABANE V OLENJA, (1986) KLR 1.***
>
> **In MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986**
>
> ***(unreported) Madan, JA again, aptly observed that "an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award."***
>
> **……**
>
> ***"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."***

27. From the record, the respondent sustained a compound fracture of the left tibia and left fibula injury. This evidence was not controverted by the appellants.

28. In ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** the Court of Appeal observed thus:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."***

29. The appellants have largely challenged the trial court's award of Kshs. 646,477/- as loss of income and Kshs. 120,000/- as estimated future costs of surgery and I must now determine whether the awards under these heads were reasonable and based on the right principles.

**Future costs of surgery**

30. The Court of Appeal, in the case of ***Tracom Limited & another v Hasssan Mohamed Adan [2009] eKLR (*****P. K. TUNOI, J.W. ONYANGO OTIENO, P. N. WAKI JA)** held that:

> ***"We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated:-***
>
> ***"And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded."***
>
> ***We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require."***

(Also see the Court of Appeal, in the case of ***MBAKA NGURU & ANOR. vs JAMES GEORGE RAKWAR [1998] eKLR*** **(**Omolo, Tunoi and Shah JJ.A).

31. That being the position in law, it is incorrect for the appellants to submit that special damages under the head of future medical expenses have already been spent for the same to be awarded. Future medical expenses are awarded by a court for expenses that have not yet been spent but then again the same has to be pleaded and proved by providing an approximate or estimate figure. The question then is whether the claim for future medical expenses was pleaded in the instant case before the trial court for it to make an award on it and if so, whether the same was proved. I have perused the respondent's amended plaint dated 17th January 2017 and more specifically paragraph 4 under the head of '**Particulars of Special Damages'** in the body of the plaint which indicated:

**"f) Future treatment 120,000"**

32. Clearly the issue of future treatment was specifically pleaded in the body of the plaint and I do not agree with the submissions of the appellants that the same was never pleaded or that it ought to have been raised under the prayers' head for the issue to be regarded as pleaded. Such an approach would be against the principle of substantive justice under ***Article 159(2) of the Constitution of Kenya*** in that our jurisprudence and no longer countenances this kind of technical and formalistic justice (See ***Civil Appeal No. 19 of 2016, Anchor Limited Vs. Sports Kenya)***. The respondent, in her own testimony stated that she would require to remove the metal rod placed in her leg and produced the medical report by Dr. W.M Wokabi (*Pexhibit 10*) who opined that the estimated cost for the removal of same was Kshs. 120,000/-. It can thus be said that the issue of future medical expenses/treatment was plainly before the trial court both in the pleadings and in evidence and the court had a duty to make a determination on it. On whether this future cost of surgery was proved, I find that the said medical report itemizing the estimated cost of the surgery by Dr. Wokabi was uncontroverted by the appellants and as such the claim was proved on a balance of probabilities.

33. To this end, this ground of appeal by the appellants lacks merit and is accordingly dismissed as I uphold the trial court's decision under this head of Future medical expenses.

**Loss of income**

34. In ***Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR***, 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."***

35. Similarly, in the case of ***Douglas Kalafa Ombeva v David Ngama [2013] eKLR***, the Court of Appeal held that:

> ***"Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically"***

36. The Court of Appeal in ***S J v Francessco Di Nello & another [2015] eKLR***, held *inter alia* that:-

> ***"Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.***
>
> ***This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 wherein Lord Denning M. R. said as follows:***
>
> ***"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."***
>
> ***Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings."***

37. From the above cited authorities, loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages whereas loss of earning capacity is in the nature of general damages and need not be specifically pleaded though it has to be proved. That being the case, from the record and more specifically the amended plaint dated 17th January 2017, the respondent prayed for "**loss of income for one year at the rate of Kshs. 4,100 per day**" and "**general damages for diminished earning capacity."** The respondent further pleaded in her plaint and also testified that at the time of the accident she used to sell porridge and chapatti in Muguga making Kshs. 3,700/- a day for six days a week and Kshs. 400/- selling fruits, sweets, sodas, juices, etc at the same place. The respondent added that after the accident she was unable to get back to work due to her injuries for about one year and lost income for this period. The respondent further testified that she did not have proof to show what she was earning per day and that she never kept records of her businesses as she did not anticipate an accident. In her judgment, the learned trial magistrate stated that the respondent had not proved the damages claimed under both heads of loss of income and diminished earning capacity and that she had "merely alleged". However, the learned trial magistrate reverted to the regulations of wages in finding the respondent's applicable minimum wage of Kshs. 12,926.55 and relied on the case of Nyamira ***Tea Farmers Sacco V Wilfred Nyambati Kireita(supra)***. The learned trial magistrate then relied on Dr. Wokabi's report which indicated that the *K Nail* would be removed after 3 years from the date of examination in 2015 and in calculating the period the respondent would lose income, the learned trial magistrate used the date of the accident upto when the said K-Nail would be removed in 2018(50 months)

38. From the record, it was not disputed that the respondent was a vendor at Muguga selling porridge, chapatti and fruits. Since the respondent admitted that she did not keep records or have any proof of earnings, should her claim for loss of income have been summarily dismissed for this reason? I do not think so. The trial court ought to have taken judicial notice of the fact that most Kenyans in the informal business sector, otherwise termed '**jua kali'** or the Kenyans who supply us with farm and food produce **('mama/baba mboga'**) rarely keep formal records and books of accounts because of the fast-cash transactional nature of their businesses. Indeed, it would be a travesty of justice if the court would insist on business people from this sector to always provide evidence by way of documents to prove their earnings.

The Court of Appeal was alive to this situation in the case of ***Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR*** where they stated that:

> ***"We do not subscribe to the view that…….. the only way of proving 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, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. "***

39. The view taken by the Court of Appeal in the ***Jacob Ayiga Maruja Case [above]*** has been applied by the High Court in many decisions in which it has been held that if the income of the deceased/injured person is not proved, then the court may base the earnings of such a person on the applicable minimum wage. (See Wendoh J in **Beatrice*W. Murage –Vs- Consumer Transport Ltd & Anor (2014) eKLR*** *and* ***C. Kariuki J*** *in* ***John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR****)*

40. Based on the foregoing, I find that the trial court did not err in reverting to the applicable minimum wage in the absence of proof of earnings of the respondent in the circumstances and I accordingly uphold the award under the head of loss of income.

**Conclusion and Disposition**

41. In conclusion, it is my finding that the trial court applied the correct principles and took into account relevant factors in awarding the sum of Kshs. 1,462,867.50/- as the quantum of damages payable to the respondent and subject to 20% contributory negligence. The said sum was reasonable, sound and judicious in the circumstances and I find no reason for this court to disturb this award on quantum.

42. For the reasons give above, I find and hold that the instant appeal is not only unmerited but incompetent as well and the same is hereby dismissed with costs to the respondent. The stay of execution orders issued by the court on 3rd October 2018 and extended on 22nd October 2018,27th February 2019 and 18th March 2019 be and is hereby vacated.

43. Orders accordingly.

Judgment written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

Judgment delivered, dated and countersigned in open court at Kiambu on this **11th** day of **June, 2020**

**CHRISTINE W. MEOLI**

**JUDGE**