

6. The circumstances surrounding the occurrence of the accident are not disputed. The respondent was employed by the appellant at the material time. On the date of the accident, the respondent was at a construction site when he fell from a height and sustained injuries. He was initially admitted to Mater Hospital for two weeks. He was then transferred to Kenyatta National Hospital for another two weeks. After discharge from hospital, he continued to attend follow up examination at the hospital's neuro-surgery clinic.

7. The first issue to consider is whether this court ought to interfere with the trial court's award of general damages. An award of general damages for pain, suffering and loss of amenities is granted in exercise of the court's discretion. I therefore, bear in mind the well settled principle that an appellate court ought to only disturb an award of damages if the trial court took account a factor it ought not to have taken into account or failed to take into account factors that ought to have been considered or the award is so high or so low that it amounts to an erroneous estimate. (**Robert Msioki Kitavi v Coastal Bottlers Limited Civil Appeal 69 of 1984**).

8. The appellant has contested the award of Ksh. 2,600,000.00 being general damages for pain, suffering and loss of amenities, for being inordinately high, against the ordinary range of Ksh. 600,000 to Ksh. 1,500,000 for similar injuries. In its view, the trial court failed to consider the evidence that respondent was expected to make full recovery.

9. From the assessment of the evidence, it is not in dispute that the respondent suffered severe head injuries as a result of the accident. Three medical reports were submitted. The first report by Dr. Wokabi dated 7th December 2011 indicated that the respondent had suffered major head injuries, and was still experiencing problems in speech and balance. The doctor expressed the opinion that the respondent was expected to make full or near full recovery within a year's time and would not be gainfully employed for about one year.

10. A further examination was done by Dr. Wanyoike documented in his medical report of 6th August 2013. He observed that the respondent had experienced post severe head injury atrophic brain changes and would not, as a result be able to pursue his duties like before.

A subsequent report by Dr. Maina dated 23rd January 2014 indicated that while the respondent was in fair general condition, he had suffered residual speech deficit, unstable gait and traumatic injuries. In the doctor's view, the respondent would not be able to engage in his previous work as a plumber or welder. It is therefore, clear that contrary to the initial medical report, the respondent was not able to make full recovery as anticipated, and could not resume his previous duties.

11. Urging the court to maintain the award of general damages for pain, suffering and loss of amenities as awarded, the respondent relied on the findings of the court in **Sosphinaf Company Limited & James Gatiku Ndolo v Daniel Nganga Kanyi Civil Appeal No. 315 of 2001** where the court awarded Ksh. 2 million in general damages for pain suffering and loss of amenities in 2001. The plaintiff in that case had sustained compound depressed skull fracture and had developed post-traumatic epilepsy. The respondent also relied on the decision of the court in **Terry Kanyua Marangu v Wells Fargo Limited HCCC No. 18 of 2013** where the plaintiff had sustained injuries to forehead, nose and eyes; loss of two teeth, injuries to the left arm and right leg and general injuries to the head. She was awarded Ksh. 3.5 million in general damages for pain, suffering and loss of amenities.

12. From the evidence, the respondent sustained severe head injuries from the fall, which were listed as subarachnoid damage, subdural haematoma, brain swelling and fracture of left maxilla & left mastoid bone. These injuries were no doubt serious, and necessitated management in the intensive care units and high dependency units and consequent outpatient follow ups. While the respondent made remarkable recovery, he suffers post-traumatic effects of the accident captured as atrophic changes in the brain in the latest two medical reports. Considering the nature of injuries sustained by the respondent, the authorities cited and comparable awards, I find no reason to disturb the award of general damages for pain, suffering and loss of amenities

13. The second issue concerns the award for loss of earnings. The appellant submitted that the circumstances of the case did not warrant application of the multiplicand principle to award damages for loss of earnings since there was no evidence to show that the respondent had suffered any long-term disability or incapacity as a result of the accident. Furthermore, application of a multiplier of 27 years by the court was not supported by any of the respondent's authorities. The trial court was further faulted for applying the respondent's full salary in calculating damages thereby applying the wrong multiplicand.

14. In principle, a separate award for pain and suffering and loss of amenities and for loss of earnings has been awarded in previous decisions. This was reiterated by the Court of Appeal in **Mumias Sugar Co. Ltd v Francis Wanalo (2007) eKLR** in the following words:

'The award for 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 when 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 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.'

15. In the instant case, the respondent suffered both physical and mental impairment. It was shown that he would not be able to resume his previous duties as a plumber/welder. In assessing the appropriate award for loss of or diminished earning capacity the established principle was set out by the Court of Appeal in **James Mukatui Mavia v M. A. Bayusuf & Sons Limited Civil Appeal No. 238 of 2004** as follows:

'The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being

given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065).'

16. The trial court arrived at the award of Ksh. 4,343,220.00 for loss of earnings by applying the monthly salary of Ksh.13,405 x 12 years using a multiplier of 27 years. The trial court reasoned that on the basis of the medical reports submitted, the respondent would not be *able to mentally and physically engage in work*. However, I find no basis for the court's conclusion that the respondent would not be able to engage in work, since the doctors' reports only confirmed that he would not be able to resume his previous duties as a plumber/welder as opposed not to be able to work at all. I also find that contrary to the appellant's argument, the respondent did suffer some form of inability that impacted on his ability to continue earning his livelihood in plumbing/welding. Taking this into account, I am persuaded that the trial court ought to have considered that as opposed to loss of ability to earn, the respondent suffered diminished capacity to earn. Consequently, I find that the suitable award for loss of earnings/diminished capacity as follows: $Ksh. 13,405 \times 70/100 \times 12 \times 20 \text{ years} = Ksh. 2,504,640.00$. Judgment is therefore entered for the respondent as follows:

a. General damages - Ksh. 2,600,000.00

b. Loss of earnings - Ksh. 2,504,640.00

c. Special damages - Ksh. 7,940.00

-Ksh. 5,112,580.00

Less 25% - Ksh. 1,278,145.00

Total - Ksh. 3,834,435.00

d. Interest on (a) and (b) at court rates from the date of this judgment while interest in respect of special damages from the date of filing of the suit.

17. Since the appeal succeeds in part, each party shall bear its own costs.

Judgment read, signed and delivered in court this 16th day of May 2018.

A. MBOGHOLI MSAGHA

JUDGE