REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 69 OF 2016

CONSOLIDATED WITH

CIVIL APPEAL NO. 70 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

CATHERINE GATWIRI.....APPELLANT

AND

PETER MWENDA KARAAI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Makori, CM

dated 5th December 201 at the Chief Magistrates Court at Meru

in Civil Case No.13 of 2016)

JUDGMENT

1. Both parties are dissatisfied with the judgment of the trial court and have both filed appeals which I have consolidated.

2. This appeal arises from a claim by the respondent following a road accident that took place on 27th February 2015 along the Maua-Meru road. According to the plaint, the respondent was a passenger in motor vehicle registration KBU 635F belonging to the appellant. He contended that the appellant drove the vehicle recklessly and caused it to hit a bump, veer off the road and roll over into a ditch causing him to suffer injuries. After hearing the case, the trial magistrate found the appellant 70% liable and made the following award:

General Damages	Kshs. 1,500,000.00
Special Damages	Kshs. 76,705.00
Gross amount	Kshs. 1,576,000.00
Less 30%	
Net Award	**Kshs. 1,103,693.50**

3. Both appeals are on liability and quantum. I will deal with the issue of liability first. The appellant contends that the trial magistrate erred in failing to hold that the accident was inevitable and that the appellant did not act negligently in the circumstances. The respondent counters this by arguing that the trial magistrate erred by apportioning liability when the appellant was a passenger and could not have contributed to the accident.

4. In dealing with the issue of liability, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess

their demenour (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). Further, an appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles (see ***Ephantus Mwangi and Another v Duncan Mwangi Wambugu*** **[1982 – 88] 1 KAR 278**).

5. The evidence of the parties was straight forward. Peter Mwenda Karaai (PW 1) recalled that early in the morning on the material day he was a passenger in the appellant's motor vehicle. He told the court that the vehicle was speeding and the respondent did not manage it well causing it roll over. In cross-examination, he stated that vehicle was moving over 100kph and that the bumps that had been illegally erected were not there on the previous day. He stated that the driver tried to avoid the bump but it was too late and the tyre burst.

6. Albert Mugambo Gituma (PW 2), who was also a passenger in the appellant's vehicle, testified that he had sued the appellant in another suit, ***Meru CMCC No. 236 of 2015***, in which they had recorded a consent on liability in which they had apportioned liability at 85:15 against the appellant. In cross-examination, he agreed that the appellant was not driving well although he could not estimate the speed of the vehicle. He also agreed that the bumps on the road were new and that the appellant tried to control the vehicle but failed to do so.

7. The appellant, Catherine Gatwiri (DW 1), recalled that as she was driving on the material day, there were three regular bumps which she passed but hit another bump that had been erected by members of the public. She stated that she could not immediately control the vehicle as it hit the bump and the tyre burst. She blamed the bumps.

8. The trial court considered the evidence and concluded the appellant was driving at a high speed and as a result hit the bump causing a tyre burst causing the vehicle to roll several times. He held the appellant 70% liable for the accident.

9. I have reviewed the evidence on my own and it is not in dispute the respondent was a passenger. He was not in control of the vehicle nor did he erect the bumps. In the circumstances he could not bear any liability for the accident. There was evidence that the issue of liability between PW 2 and the appellant had been settled by consent in another case but unless the parties agreed to adopt the same in the present case, the court could not apply the consent. At any rate, I have looked at the proceedings relating to the present case and although the parties expressed the intention to record a consent on liability, they did not do so. The trial magistrate therefore erred in purporting to apportion liability in face of the clear fact that the respondent was a passenger.

10. The appellant contended that the trial magistrate failed to consider the defence of inevitable accident. The essence of inevitable accident is that where the circumstances are such that a prima facie case of negligence is made out against a party, it is for that party to show that the misfortune occurred by an accident, the cause of which was such that he could not, by any act of his, exercising proper care, caution and skill, have avoided its result. In other words, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill (see ***Devshi v. Kuldip's Touring Co.*** **[1969] EA 189**, ***Embu Public Road Services Ltd v Riimi*** **[1968] EA 22** and ***Msuri Muhiddin v Nazzor Bin Self Elkassaby and Another*** **[1960] EA 207**).

11. Both PW 1 and PW 2 testified that the appellant was driving at a high speed. DW 1 recalled that she had just passed three regular bumps before she met the bump that had been erected by members of the public. If she was driving at a reasonable speed after passing the three bumps, she could have seen the other bump, slowed down and controlled the vehicle. This is not a case where the tyre burst before hitting the bump but it burst because the vehicle hit the bump at a high speed.

12. The totality of the evidence is that the appellant was driving at a very high speed, failed to maintain a look out on the road for any obstruction including the possibility of a newly erected bump and was therefore unable to control the vehicle causing it to hit the bump, burst the tyre and roll over. I reject the defence of inevitable accident as it is not supported by the facts. Since the respondent was a passenger and did not erect the bumps, he could not have contributed to the accident. I therefore find and hold that the trial magistrate erred in apportioning liability. I accordingly hold the appellant 100% liable.

13. I now turn to the issue of quantum of damages. The appellant's case is that the trial magistrate erred in awarding inordinately excessive general damages for pain and suffering against the weight of evidence. The respondent complained that the award of general damages was inordinately low and that the trial magistrate failed to award damages for diminished earning capacity and future medical expenses.

14. The nature and extent of the respondent's injuries was not in dispute. According to the plaint, he sustained the following injuries; cut wound on the forehead, fracture of the left scapular, fracture of the left clavicle, fracture of 3 ribs and compound fracture of the tibia and fibula. A summary of the respondent's injuries and course of treatment was summarised in the report of Dr Nicholas Koome dated 5th January 2016 which was produced in evidence.

15. The respondent was admitted to St. Theresa Mission Hospital on 16th July 2015 and discharged on 3rd August 2015. The malunited fracture was repaired and a locked plate inserted. He was put on antibiotics, analgesics and physiotherapy. When the doctor examined him he noted scars on the face, deformity of the left clavicle, pain over the scapula with low power in the left upper limb, a surgical scar on the right shin and shortening of the right lower limb by 2cm. The respondent also had paresthesia over the right shin.

16. In Dr Koome's opinion, the respondent could not ambulate properly due to considerable loss of power in the left upper limb as well as pain over the left scapula. He assessed the degree of injury as grievous harm with permanent incapacity of 20%. The doctor noted that the implant would require to be removed on a future date and would cost about Kshs. 140,000/-. He also opined that the respondent would require future visits to specialists for a period of one year at an approximate cost of Kshs. 100,000/-. Finally, he observed that the respondent was at the risk of developing osteoarthritis of the right knee owing to shortening of the right lower limb.

17. On the issue of general damages, the respondent submitted before the trial court that a sum of Kshs. 4,000,000/- was reasonable compensation. He cited the case of ***James Ngungi v Multiple Hauliers and Another*** **NRB HCCC No. 658 of 2009 [2015] eKLR** where the plaintiff sustained a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left

proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands multiple facial cuts and lacerations and a pathological /re-fracture of the right leg. He was awarded Kshs. 1,500,000/- in 2015.

18. The appellant contended that the sum of Kshs. 400,000/- was adequate to compensate the respondent. The respondent relied on the case of ***Peter Gichuru Mwangi v James Kabathi Mwangi*** **NRB HCCC No. 343 of 2000 [2001]eKLR** where the plaintiff sustained a head injury, ophthalmic injury to the right eye, severe face injuries, right zygomatic complex fractures, orbital fractures, nasoethmodial complex fracture, comminuted palatal fracture of bone loss on the left side, compound comminuted lefort II fracture, complex dentoalverolar injuries, compound mandibular fracture and complex oral tissue fracture. He was awarded Kshs. 600,000/- in 2001.

19. The trial magistrate in awarding Kshs. 1,500,000/- as general damages held that, *"I have considered the authorities cited in this matter and the injuries sustained by the plaintiff who will also require future treatment and remove of the implant. I will award Kshs. 1,500,000/- in General Damages for pain and suffering and loss of amenities including future medical expenses."* [Emphasis mine]

20. From the judgment, it is apparent that instead of making a separate award for future medical expenses, the trial magistrate factored this into the award of general damages. The respondent did not plead future medical expenses in the plaint. It is well established that future medical expenses must be pleaded and proved as the Court of Appeal held in ***Kenya Bus Services Ltd v Gituma*** **[2004] EA 91**:

> *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 damages 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 rights should be pleaded.*

21. In ***Simon Taveta v Mercy Mutitu Njeru*** **NYR CA Civil Appeal No. 26 of 2013 [2014]eKLR** the trial judge awarded Kshs. 4,000,000/- as general damages for pain and suffering, *"including future medical expenses and /or eventualities."* The Court of Appeal set aside the award of the trial court on the ground that it was a misdirection as the claim for future medical expenses was not pleaded and could not be part of the award of general damages. This case is on all fours with the present case where the trial magistrate factored in the award of general damages the aspect of future medical expenses which were not pleaded. The award for general damages is therefore set aside. As this is a first appeal, I must now assess the appropriate level of damages.

22. I have considered the authorities cited by the parties to guide the court in reaching its decision. The award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable award for comparable injuries. The case cited by the parties are widely apart. It would be appropriate for counsel in such cases to cite several decisions to assist the court reach a fair decision as it is the overall duty of the court to ensure that an award of damages is fair and consistent across the board having regard to the principle I have stated that comparable injuries should attract similar awards.

23. I have considered the two decisions and I am of the view that the sum of Kshs. 500,000/- as general damages is reasonable in the circumstances and would fairly compensate the respondent. I reject the claim for future medical expenses as this was not proved.

24. The final issue is whether the respondent is entitled to an award for diminished earning capacity as claimed in prayer (c) of the plaint. This claim was neither considered nor awarded by the trial court. The respondent contended that he was a prison officer and a farmer and as a result of the accident, he lost the opportunity and prospects of future promotions. He also submitted that the as a farmer he made an average of Kshs. 500,000/- annually which he could not pursue as a result of the accident.

25. In response, the appellant submitted that the claim was not proved in evidence and income proposed was not presented in evidence. His counsel termed the claim as baseless without basis.

26. Diminished capacity is normally referred to as loss of earning capacity which is compensation for the diminution of earning capacity as a result of injuries suffered. It is usually awarded as part of the general damages under the head general damages for pain, suffering and loss of amenities. In ***Butler v Butler*** **[1984] KLR 225**, **235**, Chesoni Ag. JA observed as follows:

> *Loss of earning capacity or earning power may and should be included as an item within general damages ... but where it is not so included, it is not improper to award it under its own heading as the learned Judge did in this case.*

27. In ***Cecilia W. Mwangi and Another vs Ruth W. Mwangi*** **NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR**, the Court of Appeal drew the distinction between loss of earnings and loss of earning capacity as follows.

> *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.*

28. Thus in arriving at an award for diminished earning capacity, the court will consider the disadvantage the respondent will suffer in future for not working because of the injuries, and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others.

29. The respondent, in his testimony, only stated he was earning about Kshs. 500,000/- per year from farming. This evidence was not supported by any other evidence for example, the location of the farm, what he growing and such evidence as would enable the court assess the claim. In such circumstances, I hold that the claim was not proved to the required standard. Likewise, the respondent did not show that his position within the Prison Service was imperilled as a result of his disability. In ***Paul Njoroge v Abdul Saburi Sabonyo*** **NRB CA Civil Appeal No. 133 of 2005 [2015]eKLR**, the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his employment was affected.

30. Although the trial magistrate did not make an award for diminished earning capacity, I have considered the evidence on record and I decline to make an award under this head.

31. This is an appeal contesting the trial court's decision on quantum of damages. The principles upon which this court act were summarized by the Court of Appeal in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another*** **[1982-88] 1 KAR 777** as follows:

> *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.*

32. In light of the principles I have cited, I find and hold that the trial magistrate erred in awarding the damages for future medical expenses which were not pleaded as part of general damages. I also decline to award the damages for diminished earning capacity.

33. For the reasons I have stated, I allow the respondent's appeal to the extent that I set aside the trial court finding apportioning liability and substitute the same with a finding that the appellant was fully liable for the accident. I also allow the respondent's appeal to the extent that I set aside the award of general damages of Kshs. 1,500,000/- and substitute it with an award of Kshs. 500,000/-. I dismiss the respondent's appeal on the claim for future medical expenses and diminished earning capacity.

34. The total award shall be as follows;

General Damages	Kshs. 500,000.00
Special Damages	Kshs. 76,705.00
Total	Kshs. 576,705.00

35. The amount shall accrue interest at court rates from the date of judgment in the trial court while the special damages shall accrue interest from the date of filing suit.

36. The appellant shall bear the full costs before the subordinate court. Since both parties have won and lost in equal measure, each party shall bear their respective costs of this appeal.

DATED and **DELIVERED** at **MERU** this **5th day of June 2018.**

D.S. MAJANJA

JUDGE

Mr Kariuki instructed by Mithega & Kariuki Advocates for the appellant.

Mr Mbogo instructed by Mbogo & Muriuki Advocates for the respondent.