IN THE COURT OF APPEAL AT NYERI

(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.) CIVIL APPEAL NO. 7 OF 2020

BETWEEN

BOARD OF TRUSTEES OF THE ANGLICAN CHURCH OF KENYA DIOCESE OF MARSABIT.....APPELLANT

AND

BENSON BORU JARSO.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Marsabit (S. Said Chitembwe, J.) delivered oi 15th October, 2018

in

H.C. Civil Appeal No. 6 of 2018 Consolidated with Civil Appeal Nos. 4 and 5 of 2018.)

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JUDGMENT OF THE COURT

This is a second appeal from the original judgment of the Principal Magistrates' Court at Marsabit which found in favour of the respondent **Benson Boru Jarso**. A first appeal was partly allowed by **Chitembwe, J.** in a judgment delivered on 15th October, 2018.

Section 72 of the **Civil Procedure Act** provides on second appeal from decisions of the High Court:

> **"72.Second appeal from the High Court**
>
> **(1) Except where otherwise expressly provided**

in this Act or by any other law for the time being in force, an appeal shall lie to the Court of

Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte."

This Court considered that mandate and had this to say in the case of ***Charles Kipkoech Leting vs. Express (K) Ltd & Another [2018] eKLR*:**

"***This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact***

of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not

***interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.*"**

A road traffic accident occurred on 15th April, 2015 along the Marsabit - Moyale road when the motor vehicle registration mark KBE 518 P owned by the appellant (**Board of Trustees of Anglican Church of Kenya Diocese of Marsabit**) was driven negligently leading it to roll three times. The respondent and others in the said motor vehicle were seriously injured.

The respondent filed suit at the said magistrates' court and although the appellant filed a defence denying occurrence of the accident or injuries suffered by the respondent the parties agreed before the magistrate and it was recorded on 18th April, 2017 that liability be apportioned at 80:20 against the appellant.

Particulars of injuries suffered by the respondent were set out in the amended plaint and in a witness statement as comminuted fracture of the left radius-ulna with implants; fracture of the right femur with K-nails in situ, right lower limbs deformed; fracture of the right hip with screws in situ; squint eyes – pupils reacting to light; and cut wound on the scalp (right parietal area) with a scar.

In particulars of loss of amenities, loss of future earning capacity or future earnings it was pleaded in the plaint that the respondent was first managed at Marsabit County Hospital then transferred to AIC Kijabe Mission Hospital where he was admitted from 13th April, 2015 to 22nd May, 2015 where the following was

done: Pecan nail @ femur, debridement and external fixators or left forearm. On current complaints it was pleaded that the respondent walked with a limping gait; had a scalp scar; there was a wrist drop left hand, the hand was in upper bandage; eye pupils reacting to light; the left hand was deformed; the right lower limbs were deformed; the right femur had a k-nail and the right hip had screws. Future treatment would involve orthopedic follow up; occupational therapy; continuous physiotherapy and continuous analgesics to alleviate pain. The respondent would require refashioning of the fractured limbs at least three times for full recovery at Kshs.500,000 for each refashioning. A claim for special damages was abandoned at the hearing.

Two medical reports were produced before the magistrate by consent the parties not finding it necessary to call the doctors. The two reports confirmed the injuries which the respondent sustained in the accident.

The magistrate took evidence by the the respondent; documents were produced by consent; the respondent's case was closed and the appellant did not call any witness.

The magistrate considered the case and finding in favour of the respondent made the following awards:

i) Pain and suffering - Kshs.2,500,000
ii)Cost of future treatment - Kshs.1,500,000
iii)loss of earning capacity –Kshs.10,000x27x12-3,240,000
7,240,000
Less 20% contribution 1,448,000
5,792,000

Plus costs and interest.

The appellant was dissatisfied with those findings and filed a first appeal to the High Court of Kenya at Marsabit (the appeal was consolidated with two other appeals but this appeal is against the respondent only). The first appeal partially succeeded in that the Judge found that there was no prayer in the plaint for future medical expenses which award was set aside; the award of Kshs.2,500,000 for pain and suffering was found to be reasonable and was affirmed; the award for future medical expenses was reduced from Kshs.1,500,000 to Kshs.500,000; the multipliers of
27 years (loss of earning capacity) was reduced to 20 years (Kshs.10,000 x 20x12=2,400,000) making it all Kshs.5,400,000 less 20% contribution net Kshs.4,320,000. It was ordered that parties meet their costs of the appeal.

The appellant filed a notice of appeal against the whole judgment.

There are three grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by its lawyers **M/s Mithega & Kariuki, Advocates** where the learned Judge is faulted for not finding that the sum of Kshs.500,000 for future medical expenses was not pleaded; that the Judge erred in upholding the claim for loss of future earnings Kshs.2,400,000 *"... which award is speculative and whereas the claim was neither pleaded nor proved as required in law"*; that the Judge erred in law in upholding the award for general damages for pain, suffering and loss of amenities in the sum of Kshs.2,500,000

which award the appellant says is excessive considering the injuries sustained by the respondent. It is

proposed that we allow the appeal by setting aside the said judgment and decree; that the award of damages for future medical expenses and loss of future earnings be set aside, and the award of damages for pain, suffering and loss of amenities be discounted to *"... a reasonable minimum."*

When the appeal came up for hearing before us on 5th May, 2025 learned counsel **Mr. Nganga** held brief for **Mr. Kariuki** for the appellant but there was no appearance for the respondent who we were satisfied had been served with a hearing notice on 23rd April, 2025. Both sides had filed written submissions which were totally relied on without the appellant finding any need to highlight any part of the submissions.

The appellant in written submissions gives a background of the case before the trial court and the first appeal and identifies issues for determination in this appeal as: whether the award on general damages for pain and suffering at Kshs.2,500,000 is excessive; whether the claim on future medical expenses was pleaded and proved; whether the claim for loss of future earnings was pleaded and proved and, finally, who should bear costs for the appeal.

The appellant, on whether the award of Kshs.2,500,000 general damages for pain and suffering was excessive cites the case of ***Southern Engineering Company Limited vs. Maingi Mutia [1985] KLR*** 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 to prior decisions which are relevant to the case in question."

The injuries suffered by the respondent as particularized in the plaint are then set out and it is submitted by the appellant that the general rule is that comparable injuries should attract comparable awards. The case of ***Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR*** is cited where Ksh.3,500,000 was awarded in general damages - the plaintiff there suffered 100% permanent disability. We are invited to disturb the award under that head and substitute it with an award of Kshs.800,000.

On whether the claim for loss of future earnings was pleaded and proved the appellant submits that the respondent did not plead and prove the claim. It is submitted that the respondent failed to provide any real assessable loss to the standard required in law.

On whether the claim on future medical expense was pleaded and proved the appellant submits that parties are in law bound by pleadings and that evidence that is at variance with pleadings must be rejected. The case of ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR*** is cited in support of that proposition. We are invited to find that the award on future medical expenses is bad in law and should be set aside.

The respondent in written submissions also gives a

background of the case submitting that the issue before the two

courts below was on quantum only; that the trial court determined the issue of quantum of damages under the heads: special damages (this was abandoned): general damages for pain and suffering; costs of future treatment and loss of earning capacity - which were also the issues for determination on first appeal.

It is submitted by the respondent that the award for pain and suffering was not excessive considering the nature of injuries suffered by the respondent; that the award was reasonable.

On whether loss of earning capacity needed to be specifically pleaded and proved the respondent cited the case of ***Sosphinaf Company Limited & James Gatiku Ndolo vs. Daniel Ng'ang'a Kanyi [2006] eKLR*** where it was held:

> ***"The loss of earning capacity is a prospective financial loss which is awarded as part of general damages and which does not have to be specifically pleaded (see*** *Butler v. Butler* ***[1984] KLR 225). The case of*** *Kantilal Khimji & another v. Joseph Mutunga Wambua* ***– Civil Appeal No. 135 of 1988 (unreported) cited by the appellants' counsel did not decide that such a claim should as a matter of law be pleaded. That case merely decided that a claim for loss of earnings from the date of the accident to the date of the trial are special damages which should be specifically pleaded. In this case, the loss of earning capacity was a direct consequence of the accident which justified an award in the form of general damages. In our view, the learned Judge applied the correct principles in making the award."***

On whether costs of future expenses needed to be specifically pleaded and proved the respondent cites **Sosphinaf Company Limited** (supra) where it was held:

> ***"Similarly, the claim for future medical treatment was part of the general damages which did not have to be specifically pleaded."***

We have considered the record of appeal, submissions made and the law and this is how we determine the appeal.

Considering the approach taken by both sides in written submissions we address each ground of appeal as set out in the Memorandum of Appeal.

i) **Whether the claim for future medical expenses in the sum of Kshs.500,000 was pleaded or proved or whether there was need to plead and prove**:

This is how this claim was made in the amended plaint:

> **"Particulars of loss of amenities, loss of future earning capacity or future earnings."**
>
> **"The plaintiff was first managed at Marsabit County Hospital then referred to AIC Kijabe Mission Hospital where he was admitted between 13th April, 2015 to 22nd May, 2015 (39) days, where the following was done:**
>
> **-Pecan nail @ femur.**
> **-Debridement and external fixators or left forearm.**
>
> **<u>Current complaints</u>**
>
> **-Walk with a limping gait.**
> **-Has scalp.**
> **-Wrist drop left hand, hand was in upper bandage.**

-Eye pupils reacting to light.
-Left hand deformity.
-Right lower limps deformity.
-Right femur with k-nail.
-Right hip with screws. Future treatment

-Orthopedic follow up;
-Occupational therapy;
-Continuous physiotherapy
-Continuous analgesics to alleviate pain.

The plaintiff needs refashioning of the fractured limbs at least three times for full recovery. This will cost at least Kshs.500,000 for a single refashioning to be done at least three (3) times intermittently and he claims damages for the loss of future earnings and/or earning capacity, loss of amenities and loss of future earning capacity."

There was the medical report by Dr. John Mwanzia of the County Government of Marsabit (Marsabit County Referral Hospital) which detailed the injuries suffered by the respondent. The doctor recommended that the respondent require orthopedic follow up; occupational therapy and continuous physiotherapy and analgesics to alleviate pain; that the respondent require refashioning of the fractured limbs at least three times for full recovery at a cost of Kshs.500,000 for a single refashioning to be done at least three times intermittently. This medical report was produced in evidence by consent of the parties and the appellant did not call any medical evidence to counter what Dr. Mwanzia had found on examining the respondent and the recommendations he made about future treatment of the respondent.

The trial magistrate considered whether that claim was pleaded and whether it was awardable and had this to say in the judgment:

> **"… I am persuaded that being a future medical expense and recommended by an expert, the Doctors postulation must stand, and it is in form of a general damage sloughing** (sic) **from the accident. I am persuaded by the Court of Appeal reasoning in SOSPHINAF'S case (supra), in paragraphs 3 of page 4, that the claim for future medical treatment was part of the general (sic) during which did not have to be specifically pleaded…"**

The magistrate awarded Kshs.1,500,000 for future medical expenses which award was reversed and reduced by the Judge on first appeal who found the claim was properly pleaded but:

> **"…Dr. Mwaniza did not testify to explain as to why the respondent would undergo three refashioning operations or procedures. My view is that once the implants serve their purpose, operations would be done to remove them. The doctor's opinion may not be actually put into action. I do find that a sum of Kshs.500,000 is sufficient for future medical expenses…"**

It was Dr. Mwanzia's professional opinion, in an unchallenged medical report, that three refashioning operations were required to put the respondent back to a near normal position after the accident and it is difficult to follow the reasoning of the Judge who undid what the magistrate had done in awarding damages for future medical expenses which the doctor had recommended.

However, as there is no cross-appeal the less we say on this the better.

We find, like the two courts below, that the claim for future medical expenses was pleaded and proved. This ground of appeal fails and is dismissed.

ii) **Whether the Judge erred in making an award for loss of future earnings**.

This claim was pleaded as part of (i) above. The respondent had testified that he was seriously injured in the accident and had become incapacitated and could no longer compete in the job market; that he had suffered memory loss; that at the time of the accident he was 28 years old and a shop attendant and Mpesa assistant earning between Kshs.15,000 - 20,000. The magistrate found that the respondent had not produced any pay-slip to prove earnings and took minimum wage at Kshs.10,000. The magistrate considered retirement age as 60 years and gave a multiplier of 27 years (Kshs.10,000 x 27 x 12 = Kshs.3,240,000) as general damages for loss of future earnings. The Judge interfered with this award. He said:

> **“Both the respondent’s evidence and witness statement does not indicate how much he was earning monthly. The age is given as 28 years. I do agree with the amount of Kshs.10,000 applied as the respondent’s monthly salary by the trial court. He was both a shop attendant and a M-pesa operator. I will however reduce the multiplier of 27 years and replace it with 20 years. This leads to a total loss of income of Kshs.10,000 x 20 x 12 = 2,400,000.”**

The appellant complains that this claim was not pleaded or proved. We have already found that it was pleaded in the amended plaint.

There was no doubt that the respondent had suffered such serious injuries that he could not resume his previous occupation.

The magistrate analysed the evidence and found that the respondent was entitled to the minimum wage. This was upheld by the Judge on first appeal. The magistrate gave a multiplier of 27 years for a 28 year old but the Judge reduced it to 20 years. No reasons were assigned for this action by the Judge but, again, there is no cross-appeal. We find the award to be reasonable and the complaint by the appellant has no basis or merit and it is dismissed.

(ii) General damages for pain, suffering and loss of amenities.

The doctors report showed that the respondent had suffered serious injuries that included comminuted fracture of the left radius-ulna with implants; fracture of the right femur with K-nails in situ, right lower limbs deformed; fracture of the right hip with screws in situ; squint eyes – pupils reacting to light; and cut wound on the scalp (right parietal area) with a scar. Some of the fractures required future operations.

The trial magistrate considered the mandate in assessment of damages as was identified by this Court in **Sosphinaf Company Limited** (supra) as follows:

> ***"The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by the trial Judge and will invariably depend on the peculiar facts of each case."***

The magistrate also considered factors such as inflation, passage of time and authorities with similar injuries and awarded Kshs.2,500,000 general damages for pain, suffering and loss of amenities. This award was affirmed by the Judge on first appeal who found it to be reasonable in the circumstances.

We identify and associate ourselves with the holding of this court in **Sosphinaf Company Limited** (supra) on the task a Judge faces when assessing damages in injury cases.

The predecessor of this Court (the Court of Appeal for East Africa) in the oft-cited case of ***Butt vs. Khan [1978] eKLR*** had this to say on the mandate of an appellate court where damages have been awarded by a trial court:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

We have considered the injuries suffered by the respondent and the approach adopted by the trial court in assessing

damages;

the award of Kshs.2,500,000 (general damages for pain suffering and loss of amenities) as affirmed by the Judge on first appeal. The award is not inordinately high at all. The magistrate and, later, the Judge did not proceed on any wrong principles; they fully appreciated the evidence and reached the correct conclusions. The award was reasonable in the circumstances.

We have not found any merit in any of the grounds of appeal. This appeal is dismissed with costs to the respondent here and below.

Dated and delivered in Nyeri this 11th day of December, 2025.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR