REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E243 OF 2021

JANE WANJOHI KIBARU.....PLAINTIFF

VERSUS

CYNTHIA GATHONI MBORA.....1ST DEFENDANT

PURITY MUTHONI MBORA.....2ND DEFENDANT

JOHN MBORA.....3RD DEFENDANT

JUDGMENT

THE CLAIM

Jane Wanjohi Kibaru (hereinafter referred to as the plaintiff) filed this suit on 3/11/2021 vide a plaint dated 2/10/2021. She sued Cynthia Gathoni Mbora, Purity Muthoni Mbora and John Mbora (hereinafter referred to as the 1st, 2nd and 3rd defendants respectively) on account of a road traffic accident that allegedly occurred on 9/12/2020 at Masimba area along Mombasa-Nairobi Highway. The plaintiff averred that on 9/12/2020, she was lawfully travelling as a fare paying passenger in motor vehicle registration number KCJ 214X along the aforementioned road when either of the defendants or their driver so carelessly and negligently drove motor vehicle registration number KCJ 214X that he lost control and permitted the said motor vehicle to veer off its lane and collide with motor vehicle

registration number KCR 092E. As a result, the plaintiff sustained severe injuries, loss and damage.

The 1st and 2nd defendants were sued as the registered owners of motor vehicle registration number KCJ 214X, whereas the 3rd defendant was sued as the beneficial owner and controller of the said motor vehicle at the material time. The plaintiff relied on the doctrine of *Res ipsa loquitor* and pleaded the following particulars of negligence as against the defendants and/or driver of motor vehicle registration number KCJ 214X:

a) Driving without due care and attention;
b) Driving at an excessive speed in the circumstances;
c) Creating circumstances that precipitated and caused the accident;
d) Failing to keep and/or maintain any or any proper look out;
e) Failing to exercise the care and skill reasonably expected of a driver of a motor vehicle in the circumstances;
f) Failing to brake in time or at all;
g) Failing to have due regard to the safety and wellbeing of passengers lawfully travelling in motor vehicle registration number KCJ 214X and in particular the plaintiff;
h) Failing to have due regard to other traffic lawfully using the said road, and in particular motor vehicle registration number KCR 092E;
i) Failing to stop, to slow down, to swerve or in any other way so as to manage and/or control the said motor vehicle and avoid the accident;
j) Failure to swerve and/or take any evasive action;
k) Failing to keep and/or maintain motor vehicle registration number KCJ 214X on its lane and hence causing the accident;
l) Overtaking and/or trying to overtake when it was not safe to do so;
m) Driving a defective motor vehicle.

The plaintiff pleaded the particulars of injuries and those of special damages and averred that as a result of the accident, she sustained incapacitating injuries and could no longer engage effectively in any economic venture. That her ability to compete effectively in

the labour market had been severely curtailed. The plaintiff thus prayed for judgment against the defendants for:

1) General damages for pain, suffering and loss of amenities;
2) Special damages of Ksh. 57,920/=;
3) General damages for diminished/reduced earning capacity;
4) Costs of the suit and interest.

THE DEFENDANTS' DEFENCE

The defendants entered appearance on 26/11/2021 and filed a joint written statement of defence on 10/12/2021. The defendants denied being the registered and beneficial owners of motor vehicle registration number KCJ 214X. The defendants admitted the occurrence of the accident on the material date and place bur denied that the plaintiff was a passenger in the accident motor vehicle. They further denied that the accident motor vehicle was carelessly and negligently driven, denied that the motor vehicle collided with motor vehicle registration number KCR 092E, denied that the plaintiff sustained injuries and further denied the particulars of negligence pleaded by the plaintiff.

The defendants denied the applicability of the doctrine of *Res ipsa loquitor* and averred that the accident was solely caused and/or contributed to by the negligence of the driver of motor vehicle registration number KCR 092E. The defendants pleaded several particulars of negligence as against the driver of KCR 092E. I will not reproduce the particulars of negligence because the driver or even the owner of motor vehicle registration number KCR 092E was not made a party to this suit. The defendants denied the particulars of injuries, special damages and complaints pleaded by the plaintiff and further denied that the plaintiff can no longer engage effectively in any economic venture or that her ability to compete effectively in the labour market was curtailed. The defendants prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The Plaintiff's Case

Two witnesses were called on behalf of the plaintiff. PW 1 was Doctor Esther Musyoki. She testified that she examined the plaintiff and prepared a medical report. The witness

stated that she assessed permanent incapacity of the plaintiff at 25% as her thumb was amputated. The doctor produced in evidence the medical report and payment receipt for the medical report. PW 2 was the plaintiff herself. She adopted her statement filed in court as part of her testimony. Her testimony was that on 9/12/2020 she was a passenger in motor vehicle registration number KCJ 214X which was travelling from Nairobi to Mombasa. That when they reached Masimba area, the driver of the said motor vehicle attempted to overtake in the face of oncoming traffic. In the process, the motor vehicle collided with an oncoming motor vehicle. The plaintiff stated that she was injured as a result of the accident. She produced documents in support of her claim.

The Defence Case

The defendants did not attend court nor call any witnesses in support of their case.

FACTS NOT IN DISPUTE

From the pleadings, the following facts are not in dispute:

a) An accident occurred on 9/12/2020 at Masimba area along Mombasa-Nairobi Highway;
b) The accident involved motor vehicles registration numbers KCJ 214X and KCR 092E.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

i. Whether the defendants were the owners of motor vehicle registration number KCJ 214X at the material time;
ii. Whether the defendants or the driver of motor vehicle registration number KCJ 214X were to blame for the accident;
iii. Whether the plaintiff was involved in the accident;
iv. Whether the plaintiff sustained injuries as a result of the accident;
v. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
vi. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on the evidence on record and submitted that the police abstract and copy of records showed that the defendants were the owners of motor vehicle registration number KCJ 214X at the time of accident. That no contrary evidence was tendered by the defendants. The plaintiff relied on her testimony and submitted that the same was not controverted by the defendants. She also alleged that she was a mere passenger and could not have been blamed for the accident as she was not in control of any of the motor vehicles involved in the accident. The plaintiff argued that the defendant blamed a third party but did not take out a third party notice. The plaintiff urged the court to find the defendants 100% liable for the accident. The plaintiff relied on several authorities whose copies were annexed.

On quantum, the plaintiff submitted a sum of Ksh. 800,000/= in general damages for pain and suffering and relied on the following authorities:

a) ***Blowplast Limited v Julius Ondari Mose [2018] eKLR,*** wherein Ksh. 600,000/= was awarded on appeal in 2018, to a respondent who sustained amputated distal phalanx and comminuted fracture of right index finger, degloving minor injury to the pulp of the right middle finger and cut wound on the right thumb.
b) ***Muiruri & another v Nduku [2023] KEHC 21637 (KLR),*** wherein Ksh. 900,000/= was awarded on appeal in 2023 to a victim who sustained crushed left hand, degloving injury on the left thumb with total loss of tissue cover, exposing the bones, degloving injury on the left index finger with a fracture of the distal phalanx and total loss of tissue cover, bruises on the dorsum of the left hand, bruises on the posterior forearm and deep cut on the left palm.

On the issue of general damages for diminished earning capacity, the plaintiff proposed an award of Ksh. 700,000/=. She further urged the court to award Ksh. 57,920/= as special damages. The plaintiff also prayed for costs of the suit and interest.

THE DEFENDANTS' SUBMISSIONS

The defendants did not file any submissions.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the plaintiff as well as the authorities relied upon. There is sufficient evidence to prove that the defendants were the owners of motor vehicle registration number KCJ 214X. This was exhibited by the police abstract and copy of records from the Registrar of motor vehicles.

Liability

There is only one version as to how the accident occurred. This is the version given by the plaintiff. Her testimony was that the driver of the defendants' motor vehicle attempted to overtake when it was not safe to do so. There was oncoming traffic. As a consequence, the two motor vehicles collided. It is the duty of the plaintiff to establish or prove negligence on the part of the defendants. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of ***Kirugi & Another v Kabiya & 3 Others [1987] KLR 347***, the Court of Appeal held thus:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

The plaintiff relied on the doctrine of *Res Ipsa Loquitor*. Is the doctrine applicable in this case? In the leading case of ***Scott v London and St Katherine Docks Co (1865) 3 H & C 596***, Erle CJ at page 600 held as follows:

"There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

In Black's Law Dictionary 9th Edition page 1424, the principle is defined as follows:

"[Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."

The Dictionary goes further to explain the circumstances the Court will infer negligence as follows:

"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."

"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability … The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

Kennedy L.J. in ***Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548*** at p. 551 as follows:

"….that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the

occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

The Learned Judge then continued:

"Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."

In ***Henderson v Henry E Jenkins & Sons [1970] AC 282*** at 301 Lord Pearson stated:

"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

In the case of ***Embu Public Roads Services Ltd v Riimi (1968) EALR 22,*** the Court of Appeal held as follows:

"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident".

From the foregoing, it is clear that the doctrine of res *ipsa loquitor* applies only where circumstances are established which afford reasonable evidence, in the absence of explanation by the defendant, that the incident leading to the injuries arose from their negligence. In an appropriate case, the plaintiff establishes a *prima facie* case by relying upon the fact of the incident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the incident. Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case.

On the basis of the evidence on record, a *prima facie* case of negligence has been established against the driver of KCJ 214X as there is a causal link between the driver of the accident motor vehicle and the injuries that were sustained by the plaintiff. The plaintiff's evidence established a *prima facie* case of negligence against the defendants' driver. In my view, the doctrine of *Res ipsa loquitor* would apply in the absence of any explanation from the defendants. The defendants did not attend court to give a counter-narrative and neither did the driver of motor vehicle registration number KCJ 214X. In the case of ***Embu Public Road Services v Riimi [1968] 1 EA 22***, the Court of Appeal observed that where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence".

As already indicated, no evidence was adduced by the defendants. A motor vehicle which is being driven by a prudent driver cannot just veer to the wrong lane and collide with another motor vehicle. It is a clear sign of recklessness or negligence. I find that the doctrine of *Res ipsa loquitor* applies to the circumstances of the case. The plaintiff was a mere passenger who had no control over any of the motor vehicles. As rightly submitted by the plaintiff, no third party notice was taken out by the defendants in respect of the owner or

driver of motor vehicle registration number KCR 092E. Therefore, no liability can attach to the owner or driver of motor vehicle registration number KCR 092E. I am inclined to hold the driver of motor vehicle registration number KCJ 214X 100% liable for the accident.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

In the case of ***Morgan v Launchbury [1972] ALL ER 606***, it was held, *inter alia*, that:

"To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

Similarly, In **Kaburu *Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR*** the Court of Appeal held that:

"Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of ***Kenya Bus Services Ltd v Humphrey [2003] KLR 665; [2003] 2 EA 519***, the Court of Appeal cited ***Kansa v Solanki [1969] EA 318*** wherein it was held that:

" Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises* that it was driven by a person for whose negligence the owner is responsible *(See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as

the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

It was not denied that the driver of motor vehicle registration number KCJ 214X was driving in the course of his employment with the defendants. Consequently, I find the defendants **100% vicariously liable** for the accident.

Quantum

The medical evidence on record indicates that the plaintiff sustained the following injuries following the accident:

i. Amputated right thumb;
ii. Multiple cuts on the left forearm;
iii. Cuts on the left elbow;
iv. Cuts on the left shoulder.

Doctor Esther Nzomo, a medical practitioner who examined the plaintiff on 22/4/2021 assessed total permanent disability at 25%. There is no contrary evidence with respect to the plaintiff's injuries. I find that there is sufficient evidence to prove that the plaintiff sustained injuries as a result of the accident. Given the finding on liability, the plaintiff is thus entitled to damages as against the defendants.

It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts, although comparable injuries should receive similar awards. This Court has to bear in mind the principles that guide assessment of damages as espoused in ***West (HI) and Sons Ltd v Shepherd [1964] AC 326*** where Lord Morris said:
"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all

this is said it still must be that amounts which are awarded are to a considerable extent conventional".

I am also guided by Lord Denning's decision in ***Kim Pho Choo v Camden & Islingtom Area Health Authority, [1979] 1, ALL ER 332*** which was adopted in the case of ***Nancy Oseko v Board of Governors Masai Girls High School [2011] eKLR*** where Wendoh, J stated that:

"In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. .....the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant."

The Court of Appeal in ***Southern Engineering Company Ltd v Musingi Mutia [1985] KLR 730*** 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."

The following principles are germane in assessing damages for personal injury claims:

i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
ii. The award should be commensurate to the injuries suffered;
iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
v. Awards should not be inordinately too high or too low.

Based on the above principles, I proceed to assess the damages payable as follows.

General Damages for pain, suffering and loss of amenities

The plaintiff suffered injuries which were classified as maim or grievous harm. In my opinion, the authorities relied upon by the plaintiff are comparable, although they involved more severe injuries. On my part, I have further considered the following authorities:

1) ***West Kenya Sugar Co Ltd v Joseph Sore Shirambula [2021] KEELRC 2149 (KLR)***

The plaintiff and respondent in the appeal herein sustained an amputation of the distal phalanx left index finger at the distal interphalangeal joint and crush injury to the left index

finger. The trial court awarded Ksh. 600,000/= on 26/8/2015. On appeal, the award was reduced to Ksh. 450,000/= on 17/2/2021.

2) ***Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge [2019] KEHC 3874 (KLR)***

The plaintiff and respondent in the appeal sustained soft tissue injuries to right index finger and thumb, soft tissue injuries to left and 5th fingers, soft tissue injuries to face, and soft tissue injuries to anterior chest wall. The Respondent lost distal phalanx of the right thumb and left little finger whereas the right index finger healed with a deformity and left ring finger healed with surgical scars. The trial court awarded Ksh. 800,000/= on 5/4/2018. On appeal, the award was reduced to sh. 500,000/= on 12/9/2019.

3) ***Otieno v General Motors East Africa Ltd & 2 others [2022] KEHC 11475 (KLR).***

The plaintiff and appellant in the appeal sustained soft tissue injury to the face, traumatic amputation of the left thumb at the proximal phalanx, fracture of the middle phalanx of the left finger and severe soft tissue injury of the left hand. The trial court awarded Ksh. 250,000/= on 30/9/2019. On appeal, the award was enhanced to Ksh. 450,000/= on 14/7/2022.

Given the nature of the injuries sustained by the plaintiff herein, whose permanent disability was assessed at 25% and the age of some of the awards in the above authorities coupled with the vagaries of inflation, I find that an award of Ksh. **650,000/=** in general damages would suffice. I award the same.

Special Damages

The plaintiff pleaded special damages as follows:

a) Medical report……Ksh. 2,000/=
b) Treatment and Medical expenses……Ksh. 53,370/=
c) Copy of records……Ksh. 550/=

Total……Ksh. 57,920/=

It is trite law that special damages must be **specifically pleaded** and **strictly proved**. In ***Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** the court said: -

"It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"

In ***Ouma v Nairobi City Council [1976] KLR 304*** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L. J's Judgment on page 532 and 533 in ***Ratcliffe v Evans [1832] 2Q.B. 524*** an English leading case on pleading and proof of damage:

" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The receipts for the medical report and medical expenses amounted to more than what was pleaded. I will award **Ksh. 57,920/=** as pleaded.

Damages for diminished/reduced earning capacity.

In the authority of ***William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)***, the Court of Appeal held:

"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. The English Court of Appeal made an award under this head in Ashcroft v Curtin [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction……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. The difference was explained in this way:

'… compensation for loss of future earnings, is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the

general damages.'- Lord Denning MR in Fairley v John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40, 42 (CA).

These sums used to be included as an unspecified part of the award of damages for pain and suffering and loss of amenity. The figures were 'plucked from the air'. Later, in England, damages under this head had to be separately quantified: Jefford v Goe [1970] 2 QB 130, and no interest is recoverable on them: Clark v Rotax Aircraft Equipment Ltd [1975] 1 WLR 1570. (Emphasis supplied)

In the case of ***Tile & Carpet Center Warehouse v Okello [2022] KECA 5 (KLR),*** the Court of Appeal held that loss of earning capacity, as opposed to loss of earning which must be specifically pleaded and strictly proved, falls within the category of general damages but must also be proved on a balance of probabilities. The court further rejected the argument that it was improper for the lower court to award damages for loss of earning capacity which damages were neither pleaded nor prayed for. In as much as it is not mandatory to specifically plead for such damages, there must be a basis for the award.

The medical report by Dr. Esther Nzomo indicates that the plaintiff suffered 25% permanent incapacity. The plaintiff testified that she was a business lady operating a cyber café and accounting services. She further testified that she could not type nor write using her right hand and is compelled to hire a person to do the work at an extra cost. With the thumb amputated, the plaintiff cannot have a firm grip. The fact that the plaintiff's injuries had an impact on her earning capacity cannot be overlooked, especially considering the nature of her work. There is no evidence to show that the plaintiff was completely locked out of earning any income as a result of the injuries.

In ***Mumias Sugar Company Limited v Francis Wanalo [2007] KECA 485 (KLR)***, the Court of Appeal held:

"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 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 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." (Emphasis supplied)

Having regard to the degree of incapacity that the plaintiff suffered, the risk of the plaintiff not being able to find employment in the labour market was not substantial. It was minimal. Consequently, I find an award of **Ksh. 200,000/=** under this head to be reasonable. I award the same. As already indicated, this amount will not attract any interest.

DISPOSITION

In summary, I hold that the plaintiff has proven his case on a balance of probabilities as against the defendants. Consequently, I make the following awards:

1) General damages for pain, suffering and loss of amenities.....Ksh. 650,000/=
2) Special damages.....Ksh. 57,920/=
3) Damages for diminished earning capacity.....Ksh. 200,000/=

Total.....**Ksh. 907,920/=**

The plaintiff is also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

In the case of ***Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR***, the court stated that:

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of ***Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4*** (8th April 2015) stated in part, as follows:

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that <u>for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment</u>……..Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see ***Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR).*** Consequently, interest on general damages shall accrue at court rates from the date of judgment/decree until payment in full and on Special

damages, from the date of filing suit to the date of judgment/decree. No interest is awardable on damages for diminished earning capacity.

DATED, SIGNED AND DELIVERED VIA CTS THIS 23RD DAY OF DECEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.