

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAPSABET**

**CIVIL DIVISION**

**CIVIL APPEAL CASE NO. E001 OF 2021**

***BETWEEN***

**BENARD CHERUIYOT**

**KOECH:.....APPELLANT**

***AND***

**DEBROSO CONSTRUCTION COMPANY  
LIMITED:.....RESPONDENT**

---

*[Being an appeal from the judgment, decision of Hon. J. A. Owiti, Senior Principal Magistrate as she then was delivered on 29<sup>th</sup> March 2021 in SPMS CC Case No. 103 of 2017 involving Benard Cheruiyot Koech Vs. Debroso Construction Company Limited]*

**JUDGMENT**

**1.** The Appellant **Benard Cheruiyot Koech**, was aggrieved by the decision of the Senior Principal Magistrate at Kapsabet on quantum of damages made on 29<sup>th</sup> March 2021 in **Kapsabet CMCC No. 103 of 2017** and proffered six [6] grounds of appeal in respect thereof. He therefore prays that the award of damages made by the trial court be set aside and substituted for an enhanced award of damages commensurate with the injuries sustained by himself and the consequential effects.

- 2.** The claim by the Appellant/Plaintiff against the Respondent/Defendant, **Debroso Construction Company Limited**, arose from a road traffic accident which occurred on the 22<sup>nd</sup> December 2016 along the Kapsabet-Chavakali road at Kamobo involving the Appellant's Motor Vehicle Registration KCF 844Q and the Respondent's Motor Vehicle Registration No. KCG 730P and which resulted in the Appellant suffering serious bodily injuries for which he encountered loss and damages inclusive of general damages, special damages and damages for loss of income and for future medical expenses.
- 3.** The Respondent in his defence denied the claim in its totality, but at the hearing of the matter the parties entered into a consent on liability to the effect that liability be apportioned in the ratio of 75%:25% in favour of the Plaintiff/Appellant. The consent was adopted as an order of the court. Accordingly, the only issue which fell for determination by the trial court was the question of quantum of damages.
- 4.** In that regard, the trial court after consideration of the evidence availed before itself deemed it fit to award only general damages to the Plaintiff/ Appellant for pain and loss of earning in the total sum of 700,000/- less 25% contributory negligence i.e. Kshs. 450,000/-.

The award provoked this appeal which is opposed by the Respondent and was canvassed herein by way of written submissions filed herein by **Messrs Nyamurongi & Company Advocates** on behalf of the Appellant and **Messrs Mose, Mose & Mose Advocates** on behalf of the Respondent.

5. Being an appeal on quantum of damages, this court must be guided by the principles set out by the Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services [1976] & Another Vs. Aziri Kamu Mudika Lubia & Another [1982 - 1988]**<sup>1</sup> KAR 727.

Where it was stated that: -

**“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 that 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.”**

6. The same principles were applied in many other cases which arose at different stages in time including, **Butt Vs. Khan [198] KLR 349 and Kitavi Vs. Coastal Bottlers Limited [1985]KLR 470.**

In the former case **[Butt]** the Court of Appeal held that the Appellate Court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates and in the later case **[Kitavi]** the Court of Appeal held that an Appellate Court should only disturb an award of damages when the trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.

7. In essence, damages in law are not just about monetary compensation, but also redress and restoration.

Whereas general damages are not quantifiable, hence cannot be monetarily measured, special damages are monetarily quantifiable.

The Plaintiff/Appellant pleaded in his statement of claim dated 14<sup>th</sup> April 2017 that he suffered loss of consciousness for about three [3] hours. Fracture of the right femur with swelling of the right leg, several cut wounds on the right upper pre-libial area and multiple soft tissues injuries.

**8.** Such injuries fell within the realm of general damages together with the claim for loss of income or earnings either present or future.

The medical reports dated 20<sup>th</sup> January 2017 and 13<sup>th</sup> December 2020 [**P. Exhibit 4 & D Exhibit 1**] compiled by **Dr. Raute** and **Dr. Obondi** respectively more or less confirmed the injuries thereby confirming that the Plaintiff was entitled to general damages for pain, suffering and loss of amenities as pleaded in paragraph 6[a][b] and loss of income [earnings] as pleaded in paragraph 6[e] of the Plaint.

**9.** It is settled that the Award of damages is a matter within the discretion of the trial court and cannot be interfered with by an appellate court unless the discretion was exercised in breach of the applicable principles as set out in the case of **Charles Okiwo Odeyo Vs. Appollo Justus Andabwa & Another [2017] eKLR**, to wit: -

- (1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.**
- (2) The award should be commensurate with the injuries sustained.**
- (3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.**

**(4) Previous awards be taken into account to maintain stability of awards but factor such as inflation should be taken into account.**

**(5) The awards should not be inordinately low or high.**

**[See also, John Kipkemboi & Another Vs. Morris Kedolo [2019] e KLR and Boniface Waiti & Another Vs. Michael Kariuki Kamau [2007] eKLR]**

No amount of money is enough to compensate for bodily injuries but the court is required to do the best it can on the basis of the parameters specified hereinabove.

**10.** In this case, the trial court awarded a sum of Kshs. 700,000/- less 25% contributory negligence i.e. Kshs. 450,000/- as general damages for pain and loss of earnings. This was in effect a wholly inclusive or joint award for both pain and loss of earnings and appears to have been the ignition key for this appeal.

**11.** The trial court in arriving at the impugned award apparently relied on the medical report by **Dr. Obondi [D. Exhibit 1]** dated 13<sup>th</sup> December 2020 more than that of **Dr. Raule [P. Exhibit 4]** dated 20<sup>th</sup> January 2017 is assessing

general damages for pain, suffering and loss of amenities and in doing so, stated as follows: -

**“There is no doubt that Koech [meaning Plaintiff] was reviewed 4 years after occurrence of accident. The discharge summary produced as P. Exhibit 2a from racecourse hospital confirms that Koech was hospitalized on the 22.12.2016 and discharged on the 27.02.2016 having suffered a fracture of the right fibular femur 1/3 and ‘k’ nail insertion recommended. He had attended 2 section of physiotherapy at Londiani Sub County Hospital as at 20.01.2017.”**

**12.** The court stated further that: -

**“There is no documentary evidence of loss of consciousness even though Koech pleaded loss of consciousness for 3 hours in his plaint filed in court on 13.06.2017. The statement of Koech filed in court on 13.06.2017 is silent on him having suffered loss of consciousness as result of occurrence of the accident. Koech testified in court on the 16.09.2019 and stated that he had healed properly save that he cannot drive a vehicle unless the K**

**nail inserted on his right leg is removed. As per Dr. Obondi who reviewed the Plaintiff on 13.12.2020, there is no evidence of permanent disability suffered by Plaintiff as opposed to when he was attended to by Dr. Raule on the 20.1.2017. I find the report of Dr. Obondi to be more reliable in providing the current status of the Plaintiff than Dr. Raules.”**

**13.** The trial court therefore concluded that the Plaintiff suffered a fracture of the right femur with no permanent disability as indicated in the medical report by **Dr. Obondi** which was the latest and disclosed the Plaintiff’s current status as opposed to the report by **Dr. Raute** compiled during the healing process. This court would find no reason to disagree with the finding aforementioned as it was based on solid and reliable medical evidence which clearly disclosed that the major injury suffered by the Plaintiff was the fracture of the right femur. The other proven injuries were less serious comprising of cut wound and multiple soft tissue injuries.

**14.** It is clear from the impugned judgment of the trial court that the court took into consideration comparable cases cited by both parties and settled for the sum of Kshs.

700,000/- less 25% contributory negligence as adequate and reasonable compensation for pain, suffering and loss of amenities even though the Plaintiff had proposed a sum of Kshs 2[two] million and the Defendant a sum of Kshs. 300,000/-.

**15.** Notably, there was no mention of the claim for loss of income or earning in the judgment thereby implying that it was omitted despite having been pleaded by the Plaintiff as such loss rather than loss of earning capacity. These are distinct sets of damages as herein alluded to by the Respondent in its submissions in which it submitted that the Plaintiff/ Appellant pleaded for lost income at the rate of Kshs. 6,492/- yet in the memorandum of appeal he introduced a totally different claim of loss of earning capacity.

**16.** Indeed, ground one [1] of the memorandum of appeal alludes to the appellant losing his earning capacity as a driver. This was completely different from what was pleaded in paragraph [6] [e] of the plaint as follows: -

**“[e] Particulars of lost income:**

**At the time of the accident the Plaintiff was a driver contracted by United Millers Limited earning Kshs. 1,082/- per day for 6 working day per week. The Plaintiff has**

**been unable to resume his employment and has and is suffering loss of income which he claims at the rate of Kshs. 6,492/- per week with effect from 22.12.2016.”**

**17.** In his evidence By way of his witness statement dated 14th April 2017, the Appellant never provided any material in support of the pleading, neither did he mention about the claim and show how he suffered loss and damage in that regard. To complicate matters and create more uncertainty as to what the Plaintiff was claiming between loss of earning and loss of earning capacity he submitted before the trial court that general damages for loss of earning capacity can be awarded under the composite head of general damages or as a separate award. He cited the Court of Appeal decision in **Sosphinaf Company Limited James Gatiku Ndoto Vs. Daniel Ng’ang’a Kanyi [2006] e KLR** to buttress the point.

**18.** Oblivious of the fact that a party is bound by his pleadings, the Plaintiff proceeded to claim and pray for damages for loss of earning capacity, yet in his pleadings he claimed and prayed for loss of income/ earnings.

In the case of **SJ Vs. Francesco Di Nello & Another [2005] e KLR**, cited herein by the Respondent the Court of Appeal held that loss of income of future earning is

compensated for real assessable loss which is proved by evidence.

**19.** The factors foregoing clearly show that damages for loss of earning/ income and damages for loss of earning capacity are distinct. Whereas loss of earnings/ income falls under the category of special damages, loss of earning capacity falls under general damages **[See, Apharana Limited Vs. John Murigi Wairegi [2018] e KLR]**

**20.** In the American Case of **Connolly Vs. Pre-Mixed Concrete Company [1957] 49 Cal 2d 483,** it was held that: -

**“Loss of earning power is an element of general damages which can be inferred from the nature of the injury without proof of earnings or income either before or after the injury and damages in this respect are awarded for the loss of ability thereafter to earn money.”**

It would follow that to recover damages for loss of earnings, a claimant must prove the amount of earnings he will be reasonably certain to lose in the future as a result of the injury. But, to recover damages for loss of capacity or ability

to earn income as a result of the injury, the claimant would be required to prove the reasonable value of the loss.

**21.** In this case, the trial court in its judgment was silent with regard to the Plaintiffs claim for loss of income/ earnings as pleaded, but this fact in the opinion of this court was not prejudicial to the Plaintiff because the claim in any event, was not established and proved by necessary evidence and could not therefore have been granted as prayed.

**22.** As regard special damages, the Plaintiff claimed a sum of Kshs. 10,000/- under the head and produced a payment receipt in respect thereof from **Dr. Mauris N. Raute** dated 20<sup>th</sup> January 2018. This was payment for the medical examination of the Plaintiff by the good doctor. Not only was the amount pleaded it was also specifically established and proved.

**23.** In sum, for all the reasons and factors stated hereinabove this court is unable to find any breach by the trial court of the principles applicable for award of damages. It cannot be said that the exercise of direction in this matter was improper. This court therefore finds that the Plaintiff/Appellant was deserving of the awards made in his

favour by the trial court. They were reasonable, adequate and fair, neither inordinately low nor inordinately high. This appeal is devoid of merit and is hereby dismissed with costs to the Respondent whose cross-appeal is also dismissed. It is accordingly ordered.

**Dated and delivered this 12<sup>th</sup> day of March 2026**

**HON. J. R. KARANJAH,  
JUDGE**