

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 18 OF 2019

KIARIE JULIUS MBURU.....1ST APPELLANT

MOSES NGUGI WACHUKA.....2ND APPELLANT

VERSUS

FRANCIS MWANGI.....RESPONDENT

*(Being an appeal arising from the Judgment and Decree of the Honourable
B.M. Mararo, PM, delivered on 14/11/2018 in NAKURU CMCC NO. 210 of
2016)*

JUDGMENT

1. The background of this appeal is that the Respondent herein (Plaintiff in the Lower Court case) sued the Respondents vide a plaint dated 17th February, 2016 and filed on 29th February, 2016, seeking the following reliefs;-
 - 1) *Special damages of Kshs. 272,770.*
 - 2) *General damages.*
 - 3) *Costs of suit.*
 - 4) *Interest in (a) and (c) above.*
 - 5) *Any other further relief the Court may deem fit to grant.*
2. The claim arose from a road traffic accident that occurred on or about 22nd July, 2015, along the Nakuru-Eldoret Road at the Sobebe area. The Respondent herein, Francis Mwangi, was travelling as a passenger in a motor vehicle registered as No. KBP 831G when the 2nd Appellant, acting as the authorised driver and agent of the 1st Appellant, negligently managed motor vehicle registration No. KBB 879A. While attempting to overtake a lengthy column of traffic, the 2nd Appellant caused a head-on collision with the vehicle carrying the Respondent, resulting in the Respondent sustaining severe bodily injuries.

3. The Respondent asserted that the accident was solely caused by the negligence of the 2nd Appellant, making the 1st Appellant vicariously liable. Specific allegations of negligence pleaded include: driving at excessive speeds, failing to observe traffic rules, and failing to slow down or apply brakes to avoid the collision.
4. As a result of the accident, the Respondent, who was 43 years old and in robust health at the time, suffered displaced fractures of the right ulna, left humerus, and left femur. Due to the severity of these injuries, the Respondent avers that he is no longer capable of engaging in meaningful employment and is claiming damages for loss of earning capacity.
5. He therefore prayed for judgment against the Appellants herein, jointly and severally.
6. In their Amended joint statement of defence, the Appellants generally denied the claim and urged the court to dismiss the suit with costs.
7. However, on 23rd May 2018, the parties filed a consent on liability at 85:15% in favour of the Respondent as against the Appellants.
8. They also entered a consent on 23rd June 2018 on the production of documents.
9. In its Judgment dated 14th November, 2018, the trial court awarded the Respondent herein General damages of Kshs. 1,000,000; loss of earning capacity of Kshs 500,000 and special damages Kshs. 272,770 as pleaded. He was also awarded costs and interest.
10. Dissatisfied with that decision on quantum, the Appellants herein moved this Court vide a Memorandum of Appeal dated 22nd January, 2019 and based on the following grounds:-

1. THAT the learned trial Magistrate erred in law and fact by making an award for loss of earning capacity, notwithstanding the same was not pleaded.

2. ***THAT the learned trial Magistrate erred in law and fact by awarding damages for loss of earning capacity despite utter failure by the Respondent to place any material or evidence before the Court to show that the Respondent was indeed a businessman as claimed or to show the nature of business the Respondent was engaged in.***
3. ***THAT the learned trial Magistrate erred in law and fact by making an award for loss of earning capacity notwithstanding the fact that no iota of evidence was adduced to prove that the Respondent used to earn prior to the accident and/or to prove the Respondent's actual earnings.***
4. ***THAT the learned trial Magistrate erred in law, in fact and as a matter of practice, by failing to make a reasonable award of damages for loss of earning capacity which is proportionate to the injuries suffered and which takes into account the fact that the same would be paid in lumpsum.***
5. ***THAT the learned trial Magistrate erred in law and fact by making an award for loss of earning capacity that is excessive and so inordinately high that it must be a wholly erroneous estimate of the injuries.***
6. ***THAT the learned trial Magistrate erred in law and fact by awarding Kshs 272,770/ notwithstanding that this amount was not strictly proved.***

11. The Appellant therefore prayed that the appeal be allowed with costs and the judgment on quantum be quashed, set aside and/or varied as follows:-

1. ***The award of damages for loss of earning capacity be quashed or varied downwards;***
2. ***A lower award for special damages be made.***

12. This Appeal was canvassed by written submissions.

Appellant's submissions

13. The Appellant submitted on four issues.
14. On whether the learned trial Magistrate erred in law by awarding damages for loss of earning capacity, it was submitted that the trial court committed a fundamental error by awarding a substantive sum for loss of earning capacity that was not properly pleaded in the Respondent's Plea. They argued that the Respondent only provided a skeletal assertion of an incapacity to engage in meaningful employment without detailing his specific occupation, pre-accident earnings, or the nature of his business.
15. Citing *Cecilia W. Mwangi & Another Vs Ruth W. Mwangi, Civil Appeal No. 251 Of 1996*, they maintain that such damages must be specifically pleaded and strictly proved. Furthermore, they contend that the award lacks evidentiary support, as the only mention of the Respondent's vocation was a single line in a medical report listing him as a businessman without supporting records like bank statements or tax returns. The Appellants rely on *Butler vs. Butler [1984] KLR 225* to argue that since the court had no evidence of the Respondent's qualifications or previous service, the award of Kshs. 500,000/= was an exercise in guesswork that should be set aside.
16. On whether this court should interfere with the award of the trial court under loss of earning capacity, the Appellants argued that appellate interference is necessary to prevent a miscarriage of justice. Referencing the standards set in *Butt vs. Khan [1981] KLR 349* and *Mbogo & Another vs. Shah (1968) 1 E.A. 93*, they asserted that the trial Magistrate misdirected himself by proceeding on the wrong principle that a substantial award could be made without proof.
17. They submitted that the award is manifestly excessive and inordinate because the Magistrate misapprehended the evidence, treating a vague description in a medical report as sufficient proof of financial loss.

Consequently, they maintain the estimate is wholly erroneous and must be fully quashed.

18. On whether the award of special damages was specifically proved, the Appellants contended that the trial court erred in awarding the full sum of Kshs. 272,770/= for special damages. They argued that special damages require strict proof and that an analysis of the evidence shows a deficit in corroboration. Specifically, they point out that Kshs. 112,950/= of the claim was supported only by invoices, which are merely claims for payment rather than definitive proof of expenditure.
19. Citing *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 Others, Civil Appeal No. 192 of 1992*, they emphasised that documentary evidence of actual payment is required. They further challenge a Kshs. 8,000/= receipt made out to the Respondent's advocates rather than the Respondent himself. They submit that only the corroborated amount of Kshs. 159,820/= should be allowed.
20. Lastly, on whether this Appeal is merited and should be allowed, the Appellants conclude that the combination of pleading failures, the evidential void, and misdirection in legal principles makes the appeal highly meritorious. They pray that the court allow the appeal, set aside the Kshs. 500,000/= award for loss of earning capacity, and reduce the special damages to the proven figure of Kshs. 159,820/=, with costs awarded to them.

Respondent's Submissions

21. To start with, the Respondent emphasised the Court's duty as the first appellate court. Relying on the principles in *Kenya Ports Authority v Modern Holdings EA Limited [2017] KECA 293 (KLR)* and *Selle & Another v Associates Motor Boat Co. Ltd & Another [1968] EA 123*, the Respondent submits that while the court must re-evaluate the evidence, it should be cautious about disturbing the findings of the trial court unless it is

shown that the magistrate acted on wrong principles or that the award was so inordinately high or low as to be an erroneous estimate. The Respondent maintains that the trial magistrate had the advantage of hearing the witnesses first hand and that the assessment of damages was a proper exercise of judicial discretion.

22. On whether the award for Loss of Earning Capacity was Sustainable, the Respondent strongly defends the award of Kshs. 500,000/= for loss of earning capacity. Responding to the Appellants' claim that this head of damage was not specifically pleaded. He cites *Tile Carpet Center Warehouse v Okello [2022] KECA 5 (KLR)* and *Kibet v Alunda [2024] KECA 64 (KLR)* and argued that loss of earning capacity is a head of general damages and, as such, a prayer for general damages in the Plaint is sufficient to cover it.
23. The Respondent contends that, unlike loss of future earnings, which is categorised as special damages and requires a specific mathematical formula and strict proof of income, loss of earning capacity, on the other hand, compensates for the risk that the claimant's ability to compete in the labour market has been weakened. They argue that the Respondent's status as a businessman, combined with the permanent nature of his injuries, justifies a global award.
24. The Respondent further elaborated on the distinction Between Loss of Earning Capacity and Loss of Future Earnings by citing *S J v Francesco Di Nello & Another [2015] eKLR* and *Butler v Butler [1984] KLR 225*, the Respondent submits that loss of future earnings involves a calculation of real, assessable financial loss, whereas loss of earning capacity is a compensation for the diminution of the plaintiff's capital asset, that is their ability to work. He argued that even if a plaintiff is not currently employed or cannot prove a specific salary, the court is entitled to award a global sum if the injuries have clearly impaired their future prospects. Accordingly, the

Respondent maintains that the trial magistrate correctly identified this distinction and applied the appropriate global sum method.

25. On whether the award of Special Damages was justified, the Respondent, while acknowledging the rule that special damages must be strictly proved, argued that the trial court was presented with sufficient documentary evidence to justify the award. They submit that the various receipts and invoices produced during the trial provided a reasonable basis for the expenses incurred due to the accident. The Respondent urges the court to find that the Appellants have not demonstrated any misapprehension of the evidence by the trial magistrate that would warrant a reduction of the special damages sum.

Analysis and Determination

26. For emphasis, this is an appeal on quantum of damages only, as Liability was recorded by consent in the ratio of 85:15 in favour of the Respondent as against the Appellants herein.
27. This being an appeal on quantum damages, this court is guided by the legal principle enunciated in **Butt –vs- Khan (1981) KLR 349**, which was applied in **Kemfro Africa Ltd t/a Meru Express Service & Gathongo Kanini –vs- A.M Lubia and Olive Lubia (1982 – 1988) I KAR 727 at page 730**, wherein Kneller JA stated 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 for East Africa to be that it must be satisfied that either the Judge in assessing 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.”

28. Based on the Memorandum of Appeal and the rival submissions filed herein, the Appellants fundamentally challenge two heads of damages awarded by the trial court: the award for loss of earning capacity and the award for special damages.
29. Regarding the award for loss of earning capacity, the Appellants contend that this head of damage was not specifically pleaded in the Plaint and, consequently, the trial court erred in awarding it, when it fell outside the scope of the pleadings. Conversely, the Respondent maintains that the claim for loss of earning capacity was sufficiently articulated within the body of the Plaint, asserting that the loss was both pleaded with requisite clarity and established on a balance of probabilities through the evidence adduced at trial.
30. The Court of Appeal in *Tile & Carpet Center Warehouse v Okello (Civil Appeal 74 of 2019) [2022] KECA 5 (KLR)*, distinguished between loss of earning capacity and loss of earnings thus:-

“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. See CECILIA W. MWANGI & another v RUTH W. MWANGI [1997] eKLR. In S J v Francesco Di Nello & another [2015] eKLR, this Court held that: Loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in FAIRLEY V JOHN THOMSON LTD [1973] 2 LLOYD’S LAW REPORTS 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by

evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

31. The Court of Appeal in ***Tile & Carpet Center Warehouse*** (supra) went on to say: ***“It follows therefore that the appellant’s contention that the award should be set aside for not being specifically pleaded is not sustainable, as the respondent prayed for general damages.”***

32. It is thus evident that the Court of Appeal has progressively settled the principle that loss of earning capacity resides within the realm of general damages. Consequently, where a party has pleaded the substance of the claim within the body of the Plea and sought general damages in the prayer for relief, such a head of damage is properly before the court. In such circumstances, the claimant is merely required to discharge the burden of proof to the requisite standard, without the strict necessity of specifically itemising loss of earning capacity as a distinct prayer.

33. In this case, the Respondent pleaded at paragraph 8 of the plea dated 17th February, 2016, thus:-

“The Plaintiff avers that owing to the injuries sustained as a result of the said accident, he is not capable of engaging in any meaningful employment and he shall therefore claim for damages for loss of earning capacity.”

34. Further, the Respondent sought general damages as the second prayer in his plea. It thus follows that the prayer for loss of earning capacity was pleaded.

35. On whether the same was proved, the Court of Appeal in ***Mumias Sugar Company Ltd v Wanalo (Civil Appeal 91 of 2003) [2007] KECA 485 (KLR)***, clarified instances when such awards can be granted by the Court thus:-

“ From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among

others, emerge. 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.”

36. In this case, the Appellant contend that the Respondent failed to lead evidence as to his specific business activities, rendering the trial court’s award fundamentally erroneous.
37. It is a settled principle that the absence of formal proof of employment does not necessarily defeat a claim for loss of earning capacity. The Court of Appeal has held that even where a party cannot prove a specific salary or employment, a court is entitled to adopt a global sum approach to compensate for the diminution of a party’s future capacity to work.
38. This Court notes that, while the record is limited to the medico-legal report dated 13th November 2015 identifying the Respondent as a businessman, the Court take notice that he was an economically active member of society

before the accident. Consequently, in the absence of a mathematical basis for calculation, the trial court was entitled to grant a global award.

39. On the question of whether the quantum of Kshs. 500,000/= was excessive, guidance is drawn from the Court of Appeal in *Mumias Sugar Company Ltd v Wanalo [2007] KECA 485*. In that case, the court set aside a structured multiplier award and substituted it with a global sum of Kshs. 500,000/= for a claimant who was unemployed at the material time and had a disability assessment of 15%.
40. Applying that precedent to the present appeal, I note that the Respondent herein sustained displaced fractures of the right ulna, left humerus, and femur, resulting in a 30% permanent functional disability, a degree of impairment double that in the *Wanalo case*.
41. Considering the severity of the injuries which necessitate the use of supportive aids for mobility, this Court is satisfied that the trial court applied the correct legal principles in arriving at the award of Kshs. 500,000/=. That award is modest, reasonable, and within acceptable judicial limits under the circumstances.
42. Regarding the award for special damages, the legal position is well-settled. Special damages must be specifically pleaded and strictly proved. From the record of appeal, this Court notes that the Respondent tendered comprehensive evidence to support the claim. This evidence includes a receipt from Valley Hospital for Kshs. 700/= and a series of receipts from PCEA Kikuyu Hospital, specifically: Receipt Nos. 134148 and 134149 for Kshs. 100,000/= each; No. 134377 for Kshs. 13,000/=; No. 135400 for Kshs. 30,000/=; No. 135401 for Kshs. 5,750/=; No. 094476 for Kshs. 14,420/=; No. 135412 for Kshs. 500/=; and No. 136657 for Kshs. 400/=.
43. Furthermore, the Respondent produced a medico-legal receipt in the sum of Kshs. 8,000/=. While I note the Appellants' objection that this receipt was issued in the name of the firm of Wachira Mbutia & Company Advocates,

it is evident that the expenditure was incurred for the primary purpose of procuring the medical report for the Respondent, Francis Mwangi. Consequently, this Court is satisfied that the special damages in the sum of Kshs. 272,770/= were both specifically pleaded and strictly proved to the required standard.

44. Accordingly, this Court finds that the Appellants have failed to demonstrate any misdirection or error in principle by the learned trial Magistrate. The assessment of both special and general damages was grounded in law and supported by the documentation and testimony provided.
45. Consequently, this Court finds no merit in the Appeal, and therefore, it is dismissed in its entirety and with costs to the Respondent.

Dated, signed and delivered at Nakuru this 20th Day of April, 2026.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Karanja for the Appellant

Mr. Mbuthia for Respondents

Erickson , Court Assistant