



**Mukhula v Pioneer Plumbers Limited (Civil Appeal 211 of 2018)
[2022] KECA 1397 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1397 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 211 OF 2018
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
DECEMBER 16, 2022**

BETWEEN

JACOB NYONGESA MUKHULA APPELLANT

AND

PIONEER PLUMBERS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 16th May, 2018 in HCCC No. 605 of 2015)

JUDGMENT

1. This is a second appeal arising from the judgment and order of the High Court of Kenya at Nairobi (Mbogholi, J.), dated and delivered on 16th May, 2018, in Nairobi HCCA No. 605 of 2015, reducing the lower court's award of damages for loss of earnings from the sum of Kshs.4,343,200.00 to Kshs.2,504,640.00. The appeal also contests the award of interest on general damages from the date of judgment.
2. The appellant herein commenced a suit by a plaint dated 20th February, 2012, in the Chief Magistrate's Court at Milimani in CMCC No. 2273 of 2012 seeking general damages for pain, suffering and loss of amenities of life; loss of earning or diminished earning capacity to be assessed by the court; special damages, costs and interest. The background to the appellant's case stemmed from his claim that he got injured while performing duties in the course of his work as an employee of the respondent. It was his contention that the accident was as a result of the respondent's negligence or breach of contract or statutory duty. The respondent, while admitting that an accident did occur, nonetheless denied liability, attributing the accident to the sole or contributory negligence of the appellant.
3. Eventually, the parties agreed on liability in the ratio of 75:25% in favour of the appellant. The learned Magistrate (C. Obulutsa) assessed damages, using the figure of Kshs.13,405.00 being the monthly salary, multiplied by 12 months in a year and a multiplier of 27 years, to make the following awards:



- a. Pain, suffering and loss of amenities of life Kshs. 2,600,000.00
 - b. Loss of earnings Kshs. 4,343,000.00
 - c. Special damages Kshs. 7,940.00
 - d. Less 25% contributory negligence Kshs.1,737,790.00
Total awarded Kshs.5,213,370.00
4. The respondent was aggrieved by the assessment of damages, on grounds that the trial court failed to appreciate the principles in awarding of damages, or even the submissions and decided cases, with the result that the damages awarded were excessive and exorbitant as the trial court failed to give proper consideration on the law and past decisions regarding quantum of damages. The respondent herein thus filed the appeal HCCA No. 605 of 2015 before the High Court.
5. The Judge at the High Court, in declining to interfere with general damages for pain, suffering and loss of amenities, noted the serious nature of the injuries sustained, and which necessitated management in the intensive care unit, and the high dependency unit; comparable awards. As regards the award for loss of earnings, the 1st appellate court acknowledged that the medical report showed that the appellant herein had suffered both physical and mental impairment, and would not be able to resume his previous duties as a plumber/welder, but there was no basis for concluding that he would not be able to engage in any work at all; and that on account of this, the trial court ought to have considered diminished earning capacity, and not loss of earning ability. The court considered the monthly salary of Kshs.13,405.00 and a multiplier of 20 years which was then worked at $13,405 \times 70/100 \times 12 \times 20 \text{ years} = \text{Kshs.}2,504,640.00$
6. Ultimately, the appeal succeeded in part as follows:
- a. General damages Kshs. 2,600,000.00
 - b. Loss of earnings Kshs. 2,504,640.00
 - c. Special damages Kshs. 7,940.00 Kshs. 5,112,580.00
 - d) Less 25% Kshs. 1,278,145.00
Total awarded Kshs. 3,834,435.00
- Interest on a) and b) at court rates from the date of the High Court's judgment, while interest on special damages was from the date of filing the suit. Each party was to bear its own costs, as the appeal succeeded in part.
7. Dissatisfied with this outcome, the appellant appeals to this Court on 9 grounds which basically contest the part of the decision reducing the award for loss of earnings or diminished earning capacity, and awarding interest from date of judgment on the awards of general damages and loss of earnings; no reason was given for reducing the multiplier by 7 years; and it is not clear why the learned Judge interfered with the award on interest yet there was no error complained about it in the appeal. The appellant proposes that the decision appealed from be set aside, and be substituted with the awards made by the trial court, interest under all heads do accrue from the date of judgment in the trial court, at court rates, until payment in full; and the appeal in the High Court be dismissed with costs.
8. The appellant's contention is that the learned Judge failed to consider that the appellant's own detailed description of how the accident affected his speech, movements, memory, hearing, and response to stressful situations, and that he was unable to do anything meaningful except sit around children; that the evidence presented in the medical reports confirmed that as a result of the accident the appellant



was not able to mentally and physically engage in work, and none ventured into what other type of work the appellant could perform; so the claim for loss of income was properly pleaded, and should have been upheld; that the learned Judge failed to take into account the age of the appellant, which was 27 years at the time of the accident; and that the learned Judge had no basis for applying the 70% ratio in the assessment.

9. The respondent in opposing the appeal submits that the learned Judge properly interfered with the trial court's award which was inordinately high as to represent an erroneous estimate for loss of earnings due to the appellant, as it was not based on any logical principle or judicial precedence, or factual evidence; a relevant factor had not been considered, namely that the medical reports merely indicated the appellant's inability to resume his previous duties as a plumber, as opposed to not being able to work at all, and this resulted in an unjust award. In support of this position we are referred to the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR where this Court pointed out that:

“...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.”

10. This is a second appeal, and our mandate in this regard has been enunciated in a long line of cases decided by this 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 it should not have considered or failed to consider matters it should have considered or looking at the entire decision, it is perverse to justice.
11. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, the main contention is whether the learned Judge misdirected himself or erred in his application of the law/legal principles and came to a wrong conclusion.
12. The first issue is whether there was a basis for interfering with the award for loss of earnings. To be able to address this, we must examine what constitutes loss of earnings vis a vis diminished earning capacity, since the root of the issue is for the trial court to differentiate the characteristics between loss of earning capacity and loss of future earnings. This Court while making a distinction between loss of future earnings and loss of earning capacity stated in the case of *SJ v Francesco Di Nello & Another* [2015] eKLR which we quote in extensor, that: -

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity.

Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, 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.”

The court proceeded to state that: -

“The correct position as in the Fairley case (supra) was restated by this Court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* Civil Appeal No. 251 of 1996, [1997] eKLR as hereunder: “Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as proved on a balance of probability... In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said: “Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

13. Our understanding is that loss of earnings connotes actual loss of income which can be quantified and assessed based on material evidence adduced, whilst loss of earning capacity relates to the claimant’s ability to earn a living in future. The learned Judge was of the view that what the appellant suffered only impacted on his ability/capacity to continue earning his livelihood in his previous duties, but did not totally obliterate his ability to earn. This view is contrary to the chain of local and comparative jurisprudence that we have referred to. Basing his findings on the two medical reports, the learned Judge, seems to have reached the conclusion that the extent of inability was equivalent to 70%, although no such assessment was indicated in the two medical reports.
14. The appellant’s lament is that the method of quantification adopted by the learned Judge had no basis or rationale. In this regard, we consider the approach in *William J Butler v Maura Kathleen Butler* [1984] eKLR where this Court stated: -

“The factors to be taken into account in considering damages under the head of loss earning capacity will vary with the circumstances of the case and they include such factors as age and qualifications of the claimant and his remaining length of working life, his disabilities and previous service if any.”
15. Certainly in awarding damages for loss of earning capacity a court ought to consider the fact that the loss of employment as a result of the claimant’s inability to carry out the duties and responsibilities, and inability to utilize the skills due to the accompanying pain and discomfort. The purpose for compensation is to cushion the injured individual, pegged on the full and fair disclosure of all the material facts as they relate to loss of income and or loss of future earning capacity. It then follows that the extent of the award will thus depend on all the circumstances of the case including the nature of injuries with a probable effect to impair continuation of normal duties as an employee or carry out the income generating activities.
16. Obviously, the factors to be taken into account are the factual circumstances of the claimant, including the nature of his injuries, the kind of information that he is able to put before the Court with regard to his income and employment prospects for the future, and where there is evidence to support its case, the multiplier/Multiplied method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity.



17. We acknowledge that the case of *Kigaragari v Aya* [1982 – 1988] IKAR 768 pointed out that the guiding principle in assessing damages includes being within limits set out by decided cases and also within limits the Kenyan economy can afford. To this extent, the respondent’s argument that the decided cases can offer importance and helpful guidance as to the correct approach is rational. However, the individual circumstances of each claimant must be taken into account, to avoid a blind following in the name of honouring the doctrine of judicial precedence.
18. In the instant case, whereas it is true that the medical report did not indicate a total inability to perform any kind of work, it would be totally short- sighted for us to ignore the effects of the mental and physical effects of the injuries particularly spanning atrophic brain changes resulting in a slow thought process, residual speech deficit with a bit of slurring, an unstable gait with shuffling of the feet, the detailed description given by the appellant, and of course the fact that unlike the learned Judge, the trial court had the opportunity to see and hear the appellant. These resultant conditions greatly affected the appellant’s ability to perform his previous duties like before. It is a fact that the appellant had been unable to work, and even if he could do minimal light work there was nothing to suggest that he had other skills that would easily open up opportunities for gainful engagement, and he had suffered loss of earnings. We are in agreement with the appellant that the learned Judge failed to take into account the appellant’s oral detailed description of his plight, and placed a premium only on the medical reports.
19. Indeed, this Court in *James Mukati Mavia v M.A. Bayusuf & Sons Ltd* eKLR [2013] stated that:

“The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future, is by taking the figure of the claimant’s present annual earnings, less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted, so as to allow for the fact that a lump sum is being given now, instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life.”
20. We take note the trial court had taken into account the appellant’s age; noted that some payments had been made by the respondent even after the injuries, and used a multiplier of 27 years (meaning that if the appellant’s life had moved on a straight line, he would be expected to work until attaining 54 years of age- not an unreasonable projection in our view, taking into account the life expectancy in Kenya in the year 2015 as given in the World Bank Data was 64.80 years, the retirement age in most sectors being 60 years, and of course the vagaries of life. The choice of multiplier is discretionary, but must be based on certain parameters, which we have alluded to in the preceding paragraph. The learned Judge gave no reason for reducing the multiplier by 7 years. It is also not clear the legal basis or principle for using a 70% ratio for disability, as none of the medical reports made such a finding, and it is apparent to us that the learned Judge erred in introducing a mathematical approach with no legal or factual basis, and there was no reason for upsetting the trial courts use of the multiplier.
21. There is also the issue revolving around the learned Judge’s interference with the interest as awarded by the trial court. The appellant contends that there was no appeal against the interest awarded, and the learned Judge had no basis for interfering with what was awarded. While acknowledging that interest is in the discretion of the court, on appeal, it must be shown that the trial court erred in exercise of



its discretion. In urging us to set aside the Judge’s order on the date of interest, reference is made to Halsbury’s Laws of England, Vol 26 page 276 paragraph 553 that:

“Every judgment debt carries interest from the date of judgment...when a plaintiff loses at the first instance but recovers judgment in the Court of Appeal, interest only runs from the date of the order of the Court of Appeal...when the effect of the order of the House of Lords is to restore a judgment of the Court of the first instance, which was reversed by the Court of Appeal, the judgment of the court of first instance is expressly standing as from the date when it was given.”

22. The respondent submits that interest on a decree for payment is purely within the court’s discretion, but must be exercised judiciously; and argues that the basis of awarding interest from the date of the judgment was premised on grounds that the appellant would not have been kept away from his monies, because none was ascertainable at the time of the institution of the suit, but interest on special damages would accrue from the date of filing the suit, because the appellant had incurred expenses from the date the suit was filed. In support of this submission, the respondent cites the case of *Shariff Salim & Anor v Malindu Kikava* [1989] eKLR.
23. We have keenly perused the memorandum of appeal as set out before the High Court, and note that no error was complained of against the award on interest. The trial court gave interest from date of judgment, and it has not been shown that the trial court erred in awarding interest which was to run from the date of the lower court’s judgment. We hold that the learned Judge misdirected himself in the exercise of his discretion on this limb, and this resulted in a miscarriage of justice.
24. Consequently, we find that the appeal is merited and we set aside the judgment of the High Court delivered on 16th May, 2018 and we reinstate the judgment of the Magistrate’s Court as follows:
 - a. Pain, suffering and loss of amenities of life Kshs. 2,600,000.00
 - b. Loss of earnings Kshs. 4,343,000.00
 - c. Special damages Kshs. 7,940.00
 - d. Less 25% contributory negligence Kshs.1,737,790.00
Total awarded Kshs. 5,213,370.00
 - e. Interest on damages shall accrue from the date of judgment in the trial court at court rates, until payment in full.
 - f. Costs of the appeal are awarded to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

