IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWILU & ODEK, JJ.A)

CIVIL APPEAL NO. 177 OF 2008

S J …….……..APPELLANT

VERSUS

FRANCESCO DI NELLO ……..……1ST RESPONDENT

SACHA FRANCESCA …….....…….2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court at Nairobi (Hon. Lady Justice Ang'awa) delivered on 22nd November, 2002

in

Civil Case No. 681 of 1997)

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JUDGMENT OF THE COURT

1. On the 16th April, 1994 at about 2.00 a.m. along Langata South Road **S J** (appellant) was a lawful passenger in motor vehicle registration number KAC 320W which was being driven by **SACHA FRANCESCA** (2nd respondent) when a self-involving accident occurred. The appellant sustained serious injuries.

2. The appellant had a suit filed on his behalf by his next friend and father as he was a minor at the time material to the cause of action. The plaint was variously amended to accommodate claims that continued to arise as time went by. The last of the amendments was the Further Re-Amended Plaint dated 6th November, 2002 vide which particulars of special damages and projected expenses were given. In addition to the special damages, the plaintiff sought damages for pain, suffering and loss of amenities, loss of future earnings and/or lost years, other incidental expenses and future pecuniary expenses.

3. When the judgment was finally delivered the appellant was awarded a sum of Kshs.1,500,000/= in respect of general damages for pain, suffering and loss of amenities; certain special losses were allowed in varying sums of money together with interest at the rate of 24% until payment in full; the claims for loss of future earnings and/or lost years and future medical expenses were declined. Being aggrieved by that outcome the appellant filed this appeal and raised grounds of appeal which we think expedient to reproduce, as we hereunder do, to bring out the clear nature of the

grievance;

> ***"1. THAT having found the respondents liable in negligence to the appellant and having computed liability at 100% against the respondents jointly and severally, the learned judge erred in law and in fact by failing to award the appellant damages under the head of loss of future earnings*** (emphasis ours)

2. ***THAT despite sufficient evidence having been placed before her, the learned judge erred in law and in fact by find that the appellant did not lose his capacity to earn*** (emphasis ours)

3. ***THAT the learned judge erred in law and in fact by failing to find that the appellant shall require future medical treatment as a result of which the learned judge failed to make a provision for future medical expenses*** (emphasis ours)

4. ***THAT as a result of the foregoing the learned judge erred in law in finding that the appellant was entitled to only Kshs.1,500,000/= under the head of general damages***

   (emphasis ours)

4. Based on those grounds of appeal the appellant now prays for orders awarding damages under the heads of loss of future earnings, loss of earning capacity, and future medical expenses and an enhancement of general damages from 1.5m, and for the costs of the appeal.

5. **BERYLY OUMA** learned counsel for the appellant abandoned ground 1 of the appeal and consolidated arguments for grounds 2 and 4. Counsel submitted that it was clear from the medical report in respect of the appellant that he had become a 100% paraplegic and incapable of using his limps and perform tasks as well as compete in the work market at the early age of 15 years. Counsel's further submission was that it matters not that at the time of the accident the appellant was not using his earning capacity; he was still entitled to damages under the head of loss of earning capacity.

6. On the issue of the inadequacy of the general damages for pain, suffering and loss of amenities, and the justification for its enhancement from the awarded sum of Kshs.1.5 million, counsel told us was the trial court did not take into consideration the fact that the appellant had been rendered impotent by the accident as a result of which he would never raise a family. That the trial judge did not consider the young age of the appellant at the time of the accident and also based her judgment on very old precedents. Counsel suggested that a sum of Kshs. 5 million would be appropriate remedy under this head.

7. The appeal was strenuously opposed and learned counsel for the respondent

   MR. WAMBUGU GITONGA told us that no damages could be awarded under the head of loss of earning capacity as there was no pleading for the same, and according to counsel damages for loss of earning capacity must be specifically pleaded and further, it must be shown to be based on payments in the relevant industry. Counsel added that in the instant case the appellant did not lose capacity to earn, as he could use a motor vehicle for camping purposes to earn a living, he was therefore entitled to nil under this head.

8. Mr. Wambugu Gitonga was of the view that there was no justification for enhancing the award of general damages for pain, suffering and loss of amenities as the authorities relied on to arrive at the sum of 1.5 million were a year or two older than the date on which the case herein was decided.

9. This is a first appeal. As such the burden placed on the court to discharge is that of conducting a re-trial being careful only to give allowance for the fact that we did not see the witnesses give evidence and are therefore not best suited to assess their demeanour and credibility. This court

must also be careful not to interfere with findings of fact and the proper exercise of judicial discretion of the trial court – see **SELLE V ASSOCIATED MOTOR BOAT CO. LTD. [1968] E.A 123** wherein it was held;

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this regard. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally." See also HAHN V SINGH [1985]KLR 716.***

10. What were the trial judge's findings in respect of loss of earning capacity as raised in ground 2 of appeal? Was a claim for loss of earning capacity pleaded and was evidence on the same led? And must a claim for loss of earning capacity be specifically pleaded and the calculations of damages be based on payments in the relevant work industry of the victim of injury?

    As regards whether or not damages for loss of earning capacity were pleaded, we find paragraph 7 of the Further Re-Amended Plaint instructive. It states;

> ***"7. By reason of the matters aforesaid, the plaintiff sustained severe injuries which have, inter alia, permanently disabled and incapacitated the plaintiff and completely changed and affected the plaintiff's lifestyle, future prospects, ability to care for himself and <u>earning capacity</u> and the plaintiff has been subjected to pain and suffering and loss and damage for which the 1st defendant is vicariously liable*** (emphasis provided).

    Additionally that further re-amended plaint prayed for damages for pain, suffering and loss of amenities at its paragraph 10.

11. The availed evidence of the appellant's injury which resulted from the accident and rendered him a paraplegia came from Professor Benato F. Roberto, a consultant neurosurgeon who gave evidence as PW2. Below is what the neurosurgeon said of the appellant on his 5th review of the appellant on 23rd January, 2002;

> ***"--- his condition still remains the same as before with paraplegia and sensory loss at T10. His condition is not going to change in future and permanent invalidity has to be evaluated at [100]%."***

12. What then did the learned trial judge do with the above finding by the doctor and the additional evidence led by the appellant? The learned trial judge, while considering that evidence stated;

> ***"Basically what the doctor stated in evidence that (sic) from his experience and knowledge once a person becomes a paraplegia there is no known cure or recovery. There may be a slim chance for young people but this must be achieved within a certain period. That period having past*** (sic) ***the plaintiff's condition remains permanent.***
>
> ***In evidence the plaintiff illustrated how he was in pain and how he had to be rehabilitated to live with his condition at a hospital in England. Here he learnt*** (sic) ***how to manage himself and how to undergo physiotherapy which he continued on his return to Kenya. He visited several countries to try to find a cure. This will be discussed further below."***

When "**further below**" the learned trial judge got to discuss "Loss of Earning Capacity" herein below quoted is what she stated:

> ***"As stated earlier there is no proof that the plaintiff is unable to have a capacity to earn. He is well from the T10 upwards and can use his TOSO well. He now drives, which is a fact that makes him even more independent. I decline this award this as having not been proved."***(sic)"

13. Was the learned trial judge right in her such finding? Hardly. Her conclusion was neither based on a correct assessment of the adduced evidence nor was it based on the correct principles of law. Having dismissed the claim under loss of future earnings as unproved because no industry evidence was led and, after noting that the appellant had not yet found employment as at the date of hearing, and after advising the appellant to continue looking for a job as he was still young, the learned trial judge proceeded to dismiss the claim under loss of earning capacity, erroneously confusing the two heads of loss and clearly misapprehending how the law treats claims under each of those two heads.

14. 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 LLYOD'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."***

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings. 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 CA No. 251 of 1996** as hereunder;

> ***"Loss of earning 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."***

15. The neurosurgeon having found as he did as set out in paragraph 11 above, there was no doubt left in the mind of any reader of the medical report that the appellant was rendered incapable of using his body from T10 downwards. There was no evidence that he could gainfully use the remaining upper torso to any meaningful extent or at all. What remained is the appellant's evidence and the medical report which showed him as 100% paraplegic. With that in mind the learned trial judge should have found proved, the claim under loss of earning capacity. To the extent that she did not so find, she erred and it is now our duty to right that misdirection. 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."

16. There can be no doubt that the appellant sustained such injuries as to reduce, to the extent of 100% his earning capacity. That was clear from his doctor's report. What remains then is the issue of assessing the amount of damages to be awarded. As already evidenced in the case of **CECILIA MWANGI** (supra) once a case is found proved on a balance of probability, which we find was proved in the case before the trial court. The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematicalcalculation because it is impossible to suggest any formular for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market – see **Brown L.J's** judgment in the case of **MOELIKER V REUROLL & CO. LTD [1977] IWLR 132.**

    In our present case the appellant was only 15 years old when the accident that rendered him 100% paraplegic happened. He lost his power to establish a family of his own. He lost his competitive edge in the work place. And lost the employment of a full limped life, and no doubt diminished his capacity to earn. He is entitled to general damages as pleaded in his further re-amended plaint and proved in his oral evidence and the medical evidence of PW2. Doing the best we can with the evidence on record and in the circumstances of this case, we would assess general damages for loss of earning capacity at a sum of Kshs.1,500,000/-.

17. The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of

    OSSUMAN MOHAMED & ANOTHER V SALURO BUNDIT MOHUMED, Civil Appeal No. 30 of 1997 (unreported) wherein the following passage, in the case of **KIGARAGARI V AYA [1982 – 1988] IKAR 768** is employed;

    "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

    And as to the extent to which an appellate court can interfere with a trial court's assessment of general damages, the principles are well established,

    see **SALIM ZEIN AND ANOTHER V ROSE MULEE MUTUA Civil Appeal No. 147 of 1994** in the following words;

    "The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage."

18. Taking the above to mind we now turn to consider whether or not the award of general damages for pain, suffering and loss of amenities to the tune of 1.5 million is adequate. We are also mindful of what this court said in the case of

    MASENO NGALA & ANOTHER V DAN NYANAMBA OMARE Civil Appeal No. 320 of 2002, quoting from **RAHIMA TAYAB AND ANOTHER V ANNA MARY KINARU [1987-88]1 KAR 90** wherein **POTTER JA** gave the following advice:-

    "I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West(H) & Son Ltd. v Shephererd (1964) A.C. 326 at pg. 345:-

"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 consent 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."

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Poh Choo v Camden and Islington Area Health Authority [1979]1 AII ER 332 at 339:

"In considering damages in personal injury cases, it is often said: "The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is the tax payers who have to pay. It is worthy recording the wise words of Parke B over a century ago:

"Scarcely any sum could compensate a laboring man for the loss of a limp, yet you do not in such a case give him enough to maintain him for life --- You are not to consider the value of existence as if you were bargaining with an annuity office --- I advise you to take a reasonable view of the case and give what you consider fair compensation."

Later in his judgment, at 341, Lord Denning had this to say about extravagant awards:-

"I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the

shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of taxpayers. They have to be carefully husbanded and spend on essential services. They should not be dissipated in paying more than fair compensation."

19. The appellant sought 5 million by way of general damages for pain, suffering and loss of amenities. The respondents countered that with an offer of 1m, and the court awarded a sum of Kshs.1.5 million. Considering all the authorities relied upon by both sides, the age of those authorities vis-à-vis the date of the instant injury to the appellant, the age of the appellant at the time of injury, on our part we consider the cases of **GEOFFREY MUTUBA (MINOR) V MANIE KURIA & ANOTHER, NBI HCCC NO. 821 OF 1991** wherein **Msagha J** awarded a sum of Kshs.2m for pain, suffering and loss of amenities on 17th April, 1993 for paraplegia and resultant disabilities; **JAMES NYAMBOGA MASOGO V KIPKEBE LIMITED Civil Appeal no. 225 of 2007**, where an award of general damages for pain, suffering and loss of amenities was confirmed by this Court to a manual labourer rendered 80% incapable of earning to the tune of Kshs.1.7m; to be closer to the adequate damages for similar injuries.

In that regard we do not find that the learned trial judge properly assessed general damages for pain suffering and loss of amenities. We think that a proper case for our interference has been made out. We so interfere andaward a sum of Kshs.2.2 million in respect of general damages for pain, suffering and loss of

amenities.

21. As regards ground 3 of appeal that the learned trial judge failed to find that the appellant shall require future medical treatment, the trial court found that nothing was said about it during the hearing. Our perusal of the record shows that to be the correct position. Save for the pleading under the hearing

    "Projected Expenses over the next (5) years", no evidence was led and proof given to support the amounts sought thereunder. The nature of this loss is a special damage which must be strictly proved. There was no such strict proof or at all. And not surprisingly there was not much of a submission on the same when the appeal was canvassed before us. It is trite that he that alleges must prove and in this case such proof is strict proof. A plaintiff (appellant) cannot throw material at the court without discharging his/her onus of proof and expect success. Ground 3 of appeal therefore fails.

22. In the end grounds 2 and 4 of appeal succeed with the result that the appeal is allowed to the extent that we set aside the award of the trial court and substitute thereto judgment for the appellant in the sum of Kshs. 2.2 million in respect of damages for pain, suffering and loss of amenities. We were informed by counsel from the bar that the decretal sum has since been settled in full. The difference between the High Court award and the award of 2.2 million which we now grant is Kshs.700,000/=. The trial court declined an award under the head of damages for loss of earning capacity. As already stated earlier, under this head of loss there shall be judgment in damages to the tune of Kshs.1.5 million. Accordingly there shall be final orders as follows:-

a. Judgment be and is hereby entered for the appellant for pain, suffering and loss of amenities in damages to the tune of 2.2 million, with the sum of Kshs.700,000/= attracting interest at court rates from the date of the High Court judgment until payment in full.

b. Judgment be and is hereby entered for the appellant in the sum of Kshs.1.5 million in respect of damages for loss of earning capacity. There shall be no interest on this sum. That is the law.

c. The appellant shall have the costs of the appeal.

DATED and **DELIVERED** at **NAIROBI** this 19th day of June, 2015.

H. M. OKWENGU

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR