REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 231 OF 2002

BETWEEN

JACKSON MUTUKU NDETEI……...……....…APPELLANT

AND

A.O. BAYUSUF & SONS LTD……RESPONDENT

***(Appeal from a judgment of the High Court of Kenya chakos (Mwera, J) dated 5th February, 2002* in H.C.C.C. NO. 417 OF 1998)**

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JUDGMENT OF THE COURT

This is the first and last appeal by *JACKSON MUTUKU NDETEI*, the unsuccessful plaintiff in the superior court, who was on 15th June, 1997 involved in a road traffic accident along Mombasa-Nairobi Road at Kapiti plains as a result of which he sustained grave injuries rendering him unconscious for three (3) weeks, degloving injury to the right lower leg, crush injury to the left leg leading to an above knee amputation of the same and injury to the right knee joint causing an anteromedial instability.

The appellant's claim for special damages and general damages was dismissed by the High Court of Kenya at Machakos, Mwera, J. on 5th February, 2002 and hence this appeal.

The appellant has preferred fourteen (14) grounds of appeal upon which the decision of the superior court is challenged and were argued by Mrs. Waweru on his behalf. The appellant is, nevertheless, entitled to expect from us that we will, on a first appeal as this one, subject the evidence on record to fresh evaluation and reach our own conclusions thereon. In *SELLE & ANOTHER VS. ASSOCIATED MOTORBOAT COMPANY LTD. & OTHERS [1968] EA 123*, the court held:

"*An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to, follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally……..*"

We reiterate that in the exercise of that jurisdiction however, we must, as the first appellate court, bear

in mind the caution made in *PETERS VS. SUNDAY POST LTD [1958] EA 424*, that is to say:

"*whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide……"*

The court must also be mindful of the further caution, and allow for it, that the trial court had the advantage of hearing and seeing the witnesses and is generally a better judge of their demeanour.

The most pertinent grounds of appeal which we believe will dispose of the issues raised in the appeal are reproduced as follows:-

"*1. THAT the learned Judge erred in dismissing the Appellant's suit despite clear evidence both by the Appellant and the Respondent that the Appellant was indeed involved in the accident on 15th June, 1997 in which he was hit and severely injured by the Respondent's motor vehicle registration No. KAG 004A/ZB5119.*

2. THAT the learned trial Judge misdirected himself in Law and facts in not finding that the accident involving the plaintiff and Motor Vehicle Registration Number KAG 004A/ZB5119 occurred on the date, time and place as pleaded in the amended plaint and that the same was caused by the negligence of the driver, servant or agent of the Respondent one Mr. Julius Kingoo Ndeti in driving and controlling motor vehicle Registration Number KAG 004A/ZB5119 along the Nairobi-Mombasa Highway along Kapiti Plains.

4. THAT the learned Judge erred in law and in fact in giving undue weight to the slight and inconsequential difference of the time of appellant's Hospital admission in patient notes despite cogent and overwhelming evidence of PW4 Dr. Simon Wambua Mukeka and defence witness DW2 Dr. Tatu Kamau both from Machakos General Hospital who clearly gave evidence that the appellant was admitted in the said hospital in the late hours on 15th June, 1997.

6. THAT the learned Judge further erred in failing to give due weight to the undisputed fact that the Police Abstract No. A254474 dated 19th June, 1997 (seemingly altered and forged) produced in evidence by the respondent was in complete variance with its carbon copy retained in the Police file. Had the learned Judge seen and found that this police Abstract did not tally with its carbon copy in the Police file, he would have readily ruled that the document offered no challenge to and did not discredit the appellant's evidence as contained in the police file which was the primary evidence.

11. THAT the learned Judge erred in first finding that the appellant had failed to prove his case altogether and later holding in addition that the appellant was 20% to blame for the accident. The appellant's case could either wholly not have been proved or proved to the extent of 80%.

12. THAT the learned Judge erred in finding that in the alternative the appellant was only entitled to the paltry and meager sum of Kshs.450,000/= less 20% despite uncontroverted medical evidence from both parties abundantly demonstrating that not only had the appellant sustained injuries of utmost severity but also that his permanent incapacity ranged between 81/2% and 85%. The learned Judge also erred in not making express and specific findings on the extent of the appellant's injuries and thereby making a wholly inaccurate estimate of the general damages for pain and suffering and loss of amenities.

13. That the learned Judge erred in failing to consider and make findings on other heads of damages pleaded and claimed by the appellant in evidence such as costs of future treatment, future nursing care, loss of future earnings, and/or loss of future earning capacity and especially special damages".

We shall proceed to examine those grounds presently together with the detailed submissions of learned counsel, but first the facts as obtained from the evidence tendered by the appellant and all the witnesses

before the trial court.

The appellant was an electrical engineering student in his second year at Machakos Training Institute. On the material day he was travelling from Sultan Hamud to Nairobi in a motor vehicle registration number KTG 487, a semi-trailer owned by *A.O. BUYASUF & SONS LTD*, the respondent herein, which is a well-known transport company operating within the country and the neighbouring regional states. The appellant had been given a lift by the driver of the said motor vehicle one Mr. Kamau and was in the company of his nephew *David Kamwele (PW5)*, a turn boy to the said motor vehicle. A few kilometers after Konza town the motor vehicle developed gear problems and the driver parked it by the left side of the road towards Nairobi so as to find out the source of the problem. He then placed reflectors at the rear of the motor vehicle and suggested to PW5 that he (PW5) should go to Konza town to seek help. At that time the appellant walked in front of the motor vehicle along the left side facing Nairobi and into a thicket to relieve himself. After that he buttoned his fly and was about to walk back towards the motor vehicle when he saw a huge moving object, a green and yellow cabin of a lorry, which was traveling at a high speed and was on the grass verge. Within no time that lorry ran over him. The appellant became unconscious and only came to about three(3) weeks later at Kijabe Hospital to find his left leg amputated, the left eye swollen and the right leg badly injured.

For the purposes of this appeal, it is incontestable that the appellant was involved in a road traffic accident and did indeed receive serious injuries; that he was rushed to Machakos General Hospital and that he was later transferred to Kijabe Hosptial and that those injuries led to the amputation of his left leg. But, the main issue for determination both before this Court and in the court below is basically one of fact, the issue being whether the accident the subject matter of the suit occurred on the material date, time and place as alleged by the appellant in his Amended Plaint or at all.

The appellant testified that the accident occurred off the tarmac road on the grass verge towards Nairobi direction a few metres from a bridge. This testimony is confirmed by *George Kiburi (DW4)*, a loss assessor investigator called as a witness by the respondent. DW4 testified:

> "***The scratch marks went on for 15-20 metres along the road. They went from the centre of the road and curved to the left of the road. The bridge was some 5 metres away from general area of concentration."***

However, the most important witness, one who could be said to be an eye witness, is PW5. He testified that the appellant was about ten (10) metres or so in front of the motor vehicle KTG 487 when he saw a lorry motor vehicle registration number KAG 004A ZB 5119 moving in a zigzag manner from the Mombasa direction. As it was about to overtake their stationary vehicle that lorry lost control and hit their trailer and motor vehicle. The KAG 004A then veered off the road and hit the appellant crushing both his legs. Not long thereafter three police officers came and took the appellant to Machakos General Hospital. In cross-examination PW5 asserted:-

"*I saw lorry KAG 004A strike Ndetei. The left side of the cabin hit Ndetei on the face. He fell down and the trailer wheels crushed him. The lorry had resumed course to get back onto the road. Its trailer broke off and rolled. It was pulled along briefly but fell to partly block the road.*

It is not our lorry which crushed Ndetei when he tried to check its mechanical problem. Our lorry was damaged. He had to get another cabin to proceed with our journey.

Our motor vehicle was towed to Machakos police station immediately Ndetei fell unconscious. He told me nothing of his pains. I took him to hospital and left him with his brothers.

We got to the hospital at 5 p.m. I did not report accident to police. We sent a passing motorist to report to police who were ahead of us on the road. They came to assist."

It is further the testimony of PW5 that the offending lorry was KAG 004A as it came swaying from side to side despite the fact that there was an oncoming vehicle and that the cabin of KAG 004A crushed

the appellant as it was making its way back into the road.

Police Constable Daniel Isuza (PW6) attached to Machakos Police Station testified for the appellant. He produced the Occurrence Book for 1997 and in particular for 15th June, 1997. He pointed out that the O.B. No. 16 showed that an accident occurred between motor vehicle KAG 004A Trailer ZA 5119 and a motor vehicle KTG 487 ZB 5108 - Mercedes. It was recorded that KAG 004A intended to overtake KTG 487 when it saw another motor vehicle heading from the direction of Nairobi and it retreated to the left and hit KTG 487. It swerved to the right and its trailer overturned. The accident occurred at 4.30 p.m. A pedestrian whose name was not immediately known was seriously injured and taken to Machakos District Hospital by a good Samaritan. The police on site also did not know his name. The investigating officers were Inspector *Mwenja, P.C. Mathenge* and *P.C. Irauka.* The said investigators recorded the information immediately they came from the scene. They could not establish the name of the pedestrian as they did not find him at the scene. PW6 also testified that on that very day the police station received two other accident reports and these, too, were recorded.

The police file contained a sketch map showing the scene of the accident. It is worthy of note that the route taken by KAG 004A as it veered onto the grass verge is visible and so is the position an injured pedestrian who was not identified lay.

The respondent denied that the accident occurred as pleaded and as narrated by the appellant. Julius Kingoo Ndeti (DW1) testified that on 15th June, 1997 he drove motor vehicle registration number KAG 004A pulling a trailer registered as ZB 5119 from Mombasa to Nairobi. After Konza, he found a stationary lorry motor vehicle registration number KTG 487 parked on the left side of the road towards Nairobi. The road was busy and there were three other lorries coming from the Nairobi direction. He tried to slow down by braking but the brake booster of the trailer burst and consequently his lorry could not slow down or stop. Near where the lorry KTG 487 stood was a trench and a narrow bridge. When the on-coming lorries passed, he swung back to the lane to his right so as to avoid hitting the lorry KTG 487. As the swing commenced, his trailer hit the trailer of the lorry KTG 487 as a result of which KAG 004A's trailer's left gates were ripped off, the loaded sacks of rice were swept out and the lorry was destabilized, swaying from the side to side but it came back to its right lane and stopped in the middle of the road as one faces Nairobi. Though the trailer of KAG 004A had overturned, the cabin was intact and it stopped near the lorry KTG 487. DW1 maintained that his lorry did not leave the road onto the grass verge nor did it swerve into a near bush. He denied that anyone was injured. He also did not see any body near the lorry KTG 487 which also, incidentally, belonged to the respondent.

Aboo Ali Athman (DW3) was employed by the respondent as a Road Patrol Manager. He testified that on 15th June, 1997 he was radioed at about 4.30 p.m. and asked to proceed to Kapiti Plains where an accident had occurred. When he arrived about one hour after the occurrence of the accident, he found that KAG 004A's trailer had overturned and had slid and stopped about 15-20 paces ahead of KTG 487. He saw marks on the road which showed that the trailer slid on the tarmac. The said marks started on the side of KTG 487. When he checked he noticed that the trailer was damaged. The marks on the road were made by the trailer's hinges. No part of the motor vehicle KAG 004A nor its trailer was off the road to the left. He never saw any injured person at the scene. He took the motor vehicle KAG 004A to the Machakos Police Base. It was only on the following day that the Police told him a person was injured in the accident. The Police gave his name as *Hassan Kisilu*. He told him that he had been admitted to Machakos General Hospital. He went to the said Hospital but did not find such a person. On 19th June, 1997 he took a Police Abstract NO. A 254474 DEXh. No. 2 from the said Police Station. The name Hassan Kisilu was inserted by the Police at the station at the time of filling the form.

We observe here that this witness only arrived at the scene more than one hour after the accident. That lapse of time was ample enough for the appellant to have been taken to the hospital without DW3 finding him at the scene. Moreover, DW3 not having been at the scene could not have seen the actual events leading to the accident. Our consideration of his evidence in this respect leads us to the inevitable conclusion that DW3's evidence was worthless. Moreover, he appeared to be a biased witness with a fixed mind out to absolve his employer. For example he testified that the accident never happened; that his employer's lorries were never involved in the accident; that none of the lorries were at fault and that

the appellant was not at the scene at all and therefore the appellant's story about having been involved in an accident was fabricated. This evidence will be ignored.

In our view, there was ample evidence to hold that the primary cause of the accident was the failure by DW1, the driver of the lorry KAG 004A, to exercise the degree of care and skill reasonably to be expected of a person driving a heavy lorry pulling a fully loaded trailer upon a busy highway with a broken lorry in front of him and trying to overtake despite three on-coming motor vehicles. It is to be noted that on his own admission DW1 accepted that there was a narrow bridge ahead of him and a trench by the side of the road. Despite this he did not reduce speed. We hold that, in traveling as he did, DW1 failed to have any or any sufficient regard for the safety of other road users, along or off the road; and was clearly wholly to blame for the negligence which resulted in the accident.

In a case with more or less similar facts *BROCKHURST V. WAR OFFICER [1957] CL Y 2388,* a Land Rover was parked in such a manner that only one way traffic was possible. As a result, an accident occurred when one of the two vehicles approaching to pass skidded. The owners of the Land Rover were sued for negligence. The Court of Appeal of England held that, while the parking was under the circumstances inconsiderate and selfish, it could not be held to be an actionable negligence or as contributing to the accident. A driver who had a common experience that many vehicles break down and park in all sorts of inconvenient places on a road ought to take care to avoid hitting such vehicles. Further, it is expected that a public transport vehicle driver should, at all times be aware of such obstacles on such road. A driver should not assume that the road will be clear at all times so as not to mind and look out or be prepared to slow down or stop suddenly in an emergency. In *GRANT V. SUN SHIPPING COMPANY LIMITED [1948] 2 All ER 238* at 247D it was said: "A prudent man will guard against the possible negligence of others when experience shows such negligence to be common."

In our view, therefore, on the evidence before the trial court, it cannot be said that the driver of KAG 004A did all that he could in the circumstances to prevent the accident occurring. The blame lay squarely at his door.

The learned Judge held the appellant guilty of contributory negligence and apportioned his blame at 20% for having not replied to the defence pleading that he was himself negligent. With respect, failure to plead did not occasion or contribute to the accident and the learned Judge's assessment lacked any basis. It is trite law that there are two elements in the assessment of liability, namely, causation and blameworthiness. See *BAKER V. WILLOUGHBY [1970] EAAC 467*. Again, to determine what caused an accident from the point of view of legal liability is a most difficult task. The question must be determined by applying common sense to the facts of each particular case. One may for example, find that, as a matter of history, several people have been at fault and that if any one of them had acted properly, the accident would not have happened and if a man had done what he omitted to do, the accident would certainly have been prevented. See *STAPLEY VS. GYPSUM MINES LTD [1953] 2 ALL E.R.478.*

We would, therefore, differ with the learned Judge in his apportionment of liability. We hold that DW1 was wholly to blame for the accident.

Having resolved grounds 1,2, 4 and 11 of the grounds of appeal in favour of the appellant, we now turn to consider whether the appellant was injured in the accident as pleaded. In the judgment the learned Judge held that:

"*……..If indeed Ndetei was injured at Konza it was not in the accident involving the defendant's motor vehicle KAG 004A/ZB 5119…..…"*

The reason the learned Judge gives for holding so is:

"*This finding is arrived at on the following grounds. When an accident occurs and police come in as the case was here one file is opened and only one entry appears in the occurrence book. This the court takes notice of and P.C. Isuza (PW6) testified that that was the position. It should therefore follow that the*

source of information is only confined to the Occurrence Book entry and the investigation file. Here we have Exh.P15 and 16. The information or material issuing from or related to these must also be similar or the same. Such information/material will be in the form of recorded statements, remarks by the police. All the documents the police issue in regard to that single accident ought to originate from a single source e.g. police abstracts. Now how come this court was given some three or so police abstracts bearing conflicting or lack of detail from one to the other?"

With respect to the learned Judge it is not easy to follow this criticism. He is directing the flaw in the police records at the appellant who was not, in any case, the author of the said records. Again, a witness in examination-in-chief or in cross-examination, only answers the questions he is asked. *PW6 (PC Isuza)* gave uncontradicted evidence on his visit to the scene of the accident, what was recorded in the O.B. , the covering report, the sketch plan and his visit to the Machakos General Hospital. We see no sufficient reason for the learned Judge to have rejected absolutely the evidence of PW6. The learned Judge in our view appears to have placed much reliance in the discredited evidence of DW3 which we have totally rejected.

For the foregoing reasons we are compelled to reach the conclusion that the appellant is right in his grounds of appeal numbers 6 and 7 that the learned Judge erred in failing to give due weight to the undisputed fact that the Police Abstract report No. 254474 dated 19th June, 1997 could not be used to discredit the appellant's case. Furthermore, the learned Judge in dismissing the appellant's case only relied on the secondary evidence in the form of the seemingly altered police files and totally ignored viva voce testimony of the appellant and his witnesses, PW5 and PW7, which evidence vividly describe how the accident occurred and which lend corroboration to each other. The learned Judge had no good reason for rejecting such evidence as it was clearly the best evidence on the issues before him.

The other very important evidence we ought to examine is that of *Dr. Kamau Tatu (DW2)* who was the Medical Officer of Health at Machakos Hospital. She testified that the appellant was admitted in the early hours of 15th June, 1997 at 12.50 a.m. However, she was unable to trace the appellant's admission registration. But she had no doubt whatsoever that the appellant had been admitted at the hospital and it could as well be that it was late on that day. The name Hassan Kisilu was not in any of the Hospital records. Further, she did not think that the time alteration in the records was suspect. From her evidence, it was conclusively proved that the appellant was a victim of a road traffic accident and had been immediately thereafter taken to Machakos General Hospital. We hold, therefore, from the analysis of the Hospital notes that the appellant was treated at the said Hospital as testified by the appellant. The notes also corroborate the nature of the injuries. They also corroborate the evidence of PW4 that the appellant was taken to that hospital by police officers. They show with certainty that the appellant is actually the road traffic accident victim that was injured along Mombasa Road on 15th June, 1997 and was admitted from that day to 18th June, 1997.

We have considered the testimony tendered on behalf of the respondent. With respect, it could not avoid liability in that it has not shown either that there was no negligence on its driver's (DW1) part which did not cause or contribute to the accident or that there was a probable cause of the accident which did not connote negligence on its part. The respondent has further not shown that the accident was due to circumstances not within its driver's control. In the circumstances, we hold DW1 wholly to blame for the accident – or mathematically 100% liable.

The consequence of our holding is that the learned Judge's finding on negligence was not based on the entire evidence tendered before the trial court but on misapprehension of that evidence. Again, in our view, with great respect to him, the learned Judge has been shown, demonstrably, to have acted on wrong principles in reaching the findings he did as his impression based on the demeanour of the appellant and his witnesses, was inconsistent with the evidence in the case generally. We are satisfied that on these questions of fact and degree he was wrong and so this Court is under duty to interfere with his decision. We do so.

The appellant complains that the quantum of damages; both special and general, as would have been awarded to him was so inordinately low as to represent an entirely erroneous estimate and that the learned

Judge had acted on wrong principle. He contended that the global sum of Shs.450,000/= less 20%, despite uncontroverted medical evidence which demonstrated injuries of utmost severity with permanent incapacity between 82% and 85%, was paltry and meager. The appellant also submitted that the learned judge inadvertently omitted future treatment and nursing care, loss of future earnings and/or loss of future earning capacity. Mr. Buti for the respondent concedes that the global award of Shs.450,000/= made by the learned Judge was manifestly low and was not commensurate with the injuries suffered in the accident. He suggested an award of Shs.750,000/=.

The appellant was aged 27 at the time of the accident. He was an electrical engineering student. He aspired to be a middle grade electrical engineer after the completion of his course. The medical reports from Machakos General Hospital, Kijabe Hospital and those prepared by Dr. Matheka (26/10/1998), Dr. Bhanji 18/9/1997 – exhibit No. 1-and a subsequent one dated 1/2/2000 – exhibit No. 2-by Professor G.M. Sande are very clear on the serious and grave injuries sustained by the appellant.

The conclusion and prognosis by Professor Sande is as follows:

> ***"Mr. Ndetei's main injuries were on the lower limbs; there was massive trauma to the left lower limb which trauma necessitated amputation early in his treatment. He has been left with an above knee amputation and now uses a wheel chair for mobility.***

He suffered massive soft tissue injury of the right leg and posterior to the right knee for which he required multiple skin grafting. This has led to contracture of the right knee, loss of sensation over the skin grafted areas of the leg and recurrent oedema of the right foot because of compromised circulation in the leg. The compromised circulation is a permanent feature.

He runs a small but definite risk of developing malignant change in the hypopigmented skin in the right leg.

On the standard permanent disability workman's compensation scale, I categorise Mr. Ndetei's permanent disability as follows: -

"*1. Above knee amputation on the left……...50% (fifty per cent)*

2. Dysfunction of the right lower limb as a result of damaged soft tissue

(the global muscle wasting in this limb is a result of disuse) as equal to the loss of the right lower limb at the ankle Joint … 32 ½ % (Thirty Two and a half per cent)

TOTAL <u>82 ½ %</u> Eighty Two and half per cent)

In addition to this permanent disability, Mr. Ndetei is subject to lifelong pain in the right knee and right ankle joints."

Dr. Bhanji in his report put the permanent incapacity at 85%. He concluded: -

"*The frequent urinary tract infections are, as pointed out in my previous medical report, as a result of him being immobilized in a wheelchair and so is the muscle wasting of the right leg.*

In my opinion, management of different problems, which he has, needs to be addressed as soon as possible in order to mobilize this young man so that he may get along with his life and find gainful employment."

There is no doubt whatsoever, in view of the medical reports, that the appellant had suffered serious injuries which have occasioned him much loss and damage and the not-too-easy question is: *What will be a fair and reasonable compensation to award the appellant for his pain and suffering and loss of amenities bearing in mind the cardinal principle that awards should, as far as possible, not violently*

depart from the awards made by the courts in cognate cases? Both counsels have furnished us with awards made by the courts in comparable cases. These awards, we note vary widely, depending of course, on the nature and severity of the injuries; and also, perhaps on the Judge's own subjective judgment of what is fair and reasonable. We have been referred to the awards made in *JAMES MUNYIRI V AMOS MURIITHI CYRUS HCCC NO. 137 OF 1992; MOHAMED MWINYI HAJI V COAST BUS MOMBASA HCCC NO. 33 OF 199*3 (unreported); *JOHN OKELO ARATE V. GEORGE AYUKA OTIENO – NAIROBI HCCC 109 OF 1984* (unreported). The awards in these cases for similar injuries varied from Shs.1,3000,000/= to Shs.2,890,000/=, the latter award being that of a plaintiff aged 3 years at the time of accident for above knee amputation on both legs. Taking into account the considerable decline in the value of money since the earlier awards were made and the fact that money cannot restore the appellant to his previous health status, we think that a reasonable award under this head should be Shs.2,000,000/=.

According to Dr. Bhanji the appellant, in not distant future will, require a refashioning of the amputation stump through an operation which he estimated will cost about Shs.150,000/= and physiotherapy for several weeks at a sum of shs.1,500/= per session. Dr. Bhanji testified that urinary tract infections will continue in so far as the appellant is immobilized on a wheel chair. The appellant estimates that he should be awarded an allowance of about Shs.5,000/= per month for 3 years from the date of filing suit which is Shs.360,000/=. This, in our view is not an unreasonable estimate. Further, Dr. Bhanji recommends an above knee prosthesis which would have moveable joints which is as close to his natural limb as possible. Its cost is estimated at Shs.1,000,000/=. Taking everything into account we would accept this estimate and award a global sum of Shs.1,000,000/= which we think is reasonable and proper compensation under this head of treatment.

The appellant has put the cost of future care at Shs.252,000/=, at the rate of Shs.3,000/= per month for 84 months. The amputation and the disability of the appellant's right leg are such as to make it completely impossible for him to move the wheel chair without the assistance of a third person. We accept this sum as reasonable.

We now turn to compute the appellant's loss of future earnings or loss of future earning capacity.

The appellant was taking an Electrical Engineering Craft course. He had successfully completed his first year and had been permitted to proceed to second year and was due to be attached, according to his evidence to Kenya Pipeline Corporation, for industrial operations. Upon completion of his training, his work would have entailed general electrical wiring and maintenance. This is work that involves climbing heights and easy mobility is an essential element of this work. Had he completed his job he would have entered gainful employment earning Shs.6,250/= per month. The position would not have been static and his grades would have improved with time and so would have his salary. Now due to this injury, the appellant had to stop his course. His relatives or himself can hardly cater for his sustenance presently due to drugs and personal care, let alone be able to finance his education. Further, he can not pursue this course due to the present disability. He has lost his future earnings or his future earning capacity. Due to his disability, it would be impossible for him to be engaged in any other profitable trade in the future, and yet were it not for the accident he would have become a professional in his own line of training. We agree with Mrs. Waweru that time has run out for him to commence any other professional line and thus his lot in life has completely changed.

Under this head we would assess the appellant's earning at Shs.7,500/= per month and adopt a multiplicand of 15 years. The award herein is quantified at Shs.1,350,000/=.

This brings us to the last head of damages, namely, special damages which in this context is the sum which the appellant himself expended out of his own pocket as a result of the accident or which he lost by it. We are satisfied that the appellant had proved that he was entitled to recover the sum of shs.725,475/= which according to law he had strictly to prove it, a feat which he performed, though the learned trial Judge totally ignored it.

Taking into account all that we have said in the foregoing paragraphs, we allow the appeal, set aside the judgment and decree of the superior court made on 5th February, 2002 and substitute therefor a

judgment holding the respondent 100% guilty of negligence.

In the result we enter judgment for the appellant against the respondent as follows: -

(a) General damages for pain and

Suffering and loss of amenities Shs.2,000,000.00

(b) Cost of future treatment 1,000,000.00

(c) Cost of future care 252,000.00

(d) Loss of future earning or

future earning capacity 1,350,000.00

(e) Special damages 725,475.00

Shs.5,327,475.00

The total award so made shall bear interest at court rates. The appellant shall also have the costs of the suit in the superior court as well as the costs of this appeal to be paid by the respondent.

Dated and delivered at NAIROBI this 25TH day of May 2007.

P.K. TUNOI

……..…….……

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR