Nganga v Sinopec International Petroleum Services Corporations Limited (Employment and Labour Relations Appeal 57 of 2017) [2024] KEELRC 1627 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1627 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL 57 OF 2017

HS WASILWA, J

JUNE 26, 2024

BETWEEN

PAUL NGANGA ..... APPELLANT

AND

SINOPEC INTERNATIONAL PETROLEUM SERVICES CORPORATIONS LIMITED ..... RESPONDENT

(Appeal Against the judgement and decree of Hon. D. Nyambu(CM), delivered on 6th December, 2017 in Naivasha CMCC No. 222 of 2014.)

JUDGMENT

1. This Appeal arose from the judgement and decree of Hon. D. Nyambu(CM), delivered on 6th December, 2017 in Naivasha CMCC No. 222 of 2014.

2. The summary of the lower court case is that the appellant was employed by the respondent as a carpenter and on 1st February, 2013 while at work he was assigned duties of a mixer at Olkaria IV which was to deal with cement. That he worked in the said department and on 1st August, 2013 he started having health complications and upon seeking medical attention he was diagnosed with chest infection and back problems.

3. It is stated that the said health complications were caused by the negligence and or breach of statutory duty of care by the respondent when it failed to take adequate precautions for safety of the appellant while at work such as; failed to issue the appellant with a crane to be used to lift and move heavy bags of cement, and as a result he suffered loss and sought special damages of Kshs 4,032,680, general damages, loss of amenities and diminished capacity to earning together with costs and interest.

4. In defence to the said claim, the Respondent stated that there was no employment relationship between the parties and that there was no allocation of duty as alleged and the claims for negligence are without proof and should be dismissed.

5. After hearing both parties, the trial court found the appellant was an employee of the respondent and that he was exposed to injury and thus, it found the Respondent liable in negligence and in breach of statutory duty of care. In addition, the Court found the appellant to have contributed in liability of 20%. Hence damages were assessed together with special damages less the 20% contribution, awarding him a sum of Kshs 804,000.

6. The Appellant was dissatisfied with the court judgement, and filed the Appeal herein on 6 grounds as follows; -

    1. The learned Magistrate erred in law and fact by apportioning liability against the Appellant yet the Respondent did not tender any evidence to challenge the Appellant's testimony.

    2. The learned Magistrate erred in law and in fact by apportioning liability against the Appellant yet the Respondent did not prove that the Appellant had been issued with protective apparels and plant and 'machinery necessary to carry out the said task.

    3. The Learned Magistrate erred in law and in fact by proceeding to award minimal General Damages which were not commensurate to the injuries sustained by the Appellant despite the fact that the latter had never recovered to date.

    4. The learned Magistrate erred in law and in fact by dismissing the Appellant's claim on diminished Earning Capacity despite the fact that the same had been pleaded and specifically proved.

    5. The learned Magistrate erred in law and in fact by holding that for the Appellant to have succeeded in his claim under diminished earning capacity he ought not to have been doing casual jobs.

    6. The learned Magistrate erred in law and in fact by completely disregarding the Appellants submissions and the initial treatment notes wherein the Doctor had opined that the Appellant had to be retired on Medical Grounds.

    7. The Appellant proposed the following Orders; -

        a. The Appeal be allowed.

        b. The judgement of the lower court be set aside and the Court do proceed to enhance the judgement.

        c. The Respondent be found wholly liable for the said accident.

        d. The appellant be granted costs in the lower court file and also in the Appeal.

    8. The Appeal herein was canvassed by written submissions with the Appellant filing on the 8th July, 2019 and the Respondent filed on 19th November, 2019.

Appellant's Submissions.

9. The Appellant submitted on each grounds of Appeal and with regard to the first ground, it was argued that the Appellant's chest infection and back problems came as a result of the carrying heavy bags of cement over a long period of time that resulted in him having severe back injuries. He blamed the

accident on the Respondent as it had a duty to provide him with a crane and nasal masks. That the Respondent did not adduce any evidence to show steps, if any, taken to ensure that the environment in which the Appellant worked was safe and the Appellant was given protective gear. Therefore, without proof of the above, the Respondent ought to be held 100% liable. In this, he relied on the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that as was quoted by Justice Odunga in Civil Appeal N. 28 of 2015 Efil Enterprises Ltd v Dickson Mathambyo Kilonzo as follows;-

> " As a general proposition under *section 107(1) of the Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any patty the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

10. To buttress this arguments, the Appellant relied on the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where it was held that as

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language', each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

11. Accordingly, it was submitted that since the Respondent did not provide any evidence to controvert the Appellants case, the Appellant's case was therefore not controverted and hence the honorable court ought not to have apportioned liability.

12. On whether the learned trial Magistrate erred in law and in fact in apportioning liability against the Appellant yet the Respondent did not prove that the Appellant had been issued with protective apparels and plant and machinery necessary to carry out the said task. It was submitted that the learned magistrate eared in apportion the Appellant liability on the basis that he did not take any measure to ensure his own security, when he was an employee of the Respondent and being an employee the defence of Volenti non fit injuria does not apply to him. To support this, he relied the Halsbury's Laws of England 3rd Edition Vol 28 Paragraph *28* as was quoted by Justice Odunga in Civil Appeal N. 28 of 2015 *Efil Enterprises Ltd v Dickson Mathambyo Kilonzo* that;-

> " where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."

13. He also cited the Court of Appeal in the case of *Makala Mailu Mumende v Nyali Golf County Club* [1991] KLR 13 as was quoted by Justice Odunga in Civil Appeal N. 28 of 2015 Efil Enterprises Ltd v Dickson Mathambyo Kilonzo as follows;-

> " No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently,

dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."

14. In *Winfield and Jolowicz on Tort by WVH Rogers,* 14th Edition, London Sweet & Maxwell at page 213, it is stated as follows inter alia, that if a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty.

15. The Appellant also relied on the case of *Garton Limited v Nancy Njeri Nyoike* [2016] eKLR, Aburili, J held that as was quoted by Justice Odunga in Civil Appeal N. 28 of 2015 *Efil Enterprises Ltd v Dickson Mathambyo Kilonz*o, where it was held that;-

> "In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury...then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way...In this case I find that the appellant owed a common law duty of care to ensute the safety of the respondent while she was engaged upon her duties in the appellant's employment...For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg."

16. On whether the Learned Magistrate erred in law and in fact by proceeding to award minimal General Damages, it was argued that as per the Report of Doctor Obed Omuyoma , which was produced in evidence, the Appellant had sustained Intervertebral Disc Prolapsed(PID) and Chemical pneumonia seconding to chemical inhalation and was awarded permanent Incapacity at 40% and in similar case such as Kericho HICCC No. 56 of 2004 *James Nyabogo v Kipkebe Limited* [2007]eklr and the case of Juma Lukale Owitali v Eveready Batteries (k) Itd & Another (2017), where the plaintiff has suffered similar injuries, he was awarded Kshs 1,700,000 and 1,000,000 respectively.

17. Similarly, that the injuries sustained were confirmed by the Doctor and on the other hand the Respondent's doctor did not attend Court for cross examination and his report therefore could not be relied upon by the Court. Hence his injuries as captured by Doctor Obed Omuyoma remain uncontroverted and the award of damages enhanced.

18. On whether the Trial Magistrate erred in law and in fact in holding that for the Appellant to have succeeded in his claim under diminished earning capacity he ought not to have been doing casual jobs. It was submitted that the medical report by Dr Bodo confirmed that the Appellant suffered from loss of lumbar lordosis. In as much as the Doctor who was not a chest specialist confirmed that the Appellant did not suffer from a chest /lung disease, it is evident that his back had a problem. Hence he had been retired on medical grounds, thus his earning capacity was diminished. To support this view, he relied on the case of SJ v Francesco Di Nello & Another [2015] eKLR where the Court of Appeal gave the distinction between loss of earning capacity and loss of future earnings as stated in the case of *Sbi International Holdings (AG)Kenya v William Ongeri* [2018] eklr, where the Court held 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 LLYOD'S LAW REPORTS 40*."

19. Accordingly, that the Appellant had pleaded for loss of Future Earning Capacity and particularized the claim that at the time of the accident, he was a general worker earning a net salary of Kshs 20,237.00 per month and he continues to lose the said sum due to the incapacitating injuries that he sustained in the accident and he claims damages for diminished earning capacity. Therefore, that he ought to have been awarded the same.

20. In Conclusion, the Appellant urged this Court to arrive at a finding that the Appellant did prove his case on a balance of probability and proceed to enhance the judgment of the lower court and find the Respondent wholly liable for the said accident.

Respondent's Submissions

21. The Respondent submitted also on the grounds of Appeal and with regard to the first ground; whether the learned magistrate erred in apportioning 20% liability on the Appellant, it was argued that the Appellant blames the Respondent for alleged injuries which occurred while undertaking assigned tasks by the Respondent. It was submitted that appellant was examined by two doctors, Dr. Obed confirmed that he relied on documents from Naivasha District Hospital and from Moi Ndabi dispensary. His findings on examination of the Appellant was that he was in a fair state of health. His vital signs were within normal limits, He did not carry out an X-ray on the Lumbar spine. His opinion was that the degree of injury was grievous harm and put permanent disability at forty percent (40%). Dr. Joab Bodo on the other hand re-examined the Appellant and by consent, the Respondent produced his medical report in court which report confirmed that the the Appellant's general condition was satisfactory. His chest was clear with normal air entry in both lungs. X-rays of the chest/lungs was clear with no evidence of chronic lung illness. There was tenderness in lower lumbar spine, straight leg raising test was reduced to 70 degrees on right leg and X-rays on the lumbar spine reveled loss of lumbar lordosis which is caused by muscle spasm of the lumbar spine. He stated that it was a common feature of the lumbar disc protrusion and put his permanent disability at ten percent (10%). He argued that though the Respondent did not avail any witness during trial, he cross-examined the Appellant and his witness, Dr. Omuyoma and effectively challenged their testimony and evidence being adduced.

22. It was submitted that Dr. Omuyoma did not take any consideration of the Appellant's general health prior to his employment, as it was established that the Appellant, confirmed that he worked as a farmer for 5 years and that at the time of the injury he was on a 3 months' contract with the Respondent.

23. On the alleged accident, it was argued that the Appellant alleged to have been treated in hospital on 1st August, 2013 but the treatment card indicate his first time of treatment as 3rd October 2013, contrary to the provisions of section 41 (1) of the *Work Injuries Benefits Act* that provides that an employee shall as soon as possible after the commencement of an occupational disease give written notice thereof to the employer where the employee was last employed, and in the prescribed manner to the Director.

24. It was argued that there was no proof/ or any indication that the appellant reported his injuries but that he only informed court that he reported to the Respondent after going to Naivasha District Hospital on 9th April 2014 which was close to one year later. Further that he did not demonstrate any action taken to mitigate his injuries. The laxity in reporting the injuries and seeking medical attention, informed the trial court's findings and the apportioning of liability. Also that the severity of the appellant's injuries could have been mitigated had he gone to seek medical attention immediately they arose and report the same to the Respondent.

25. On whether the Respondent proved that it issued the Appellant with protective gear, it was argued that the principles upon which the appellate court can interfere with the decision of the trial court as far as apportionment of liability is concerned are well settled and illustrated in the case of *Isabella Wanjiru Karanja v Washington Malele* [1983] eKLR KLR where the court held that; -

> " Apportioning of blame represents an exercise of discretion with which this court will interfere only when it is clearly wrong or based on no evidence or on the application of a wrong principle."

26. It was submitted that the courts have consistently held that whereas it is the duty of the employer to ensure the safety of its employee on their work place, there is a corresponding duty on the employee to watch out for their safety. The employees should thus take all necessary steps to ensure they mitigate any damage/injury they might sustain in their line of duty. In this, he relied on the case of *Tembo Investments Limited v Josephat Kazungu*, Civil Appeal No. 91 of 2003 (Mombasa) the court stated:

> " It is an acceptable principle in claims by an employee against an employer in cases like this that if the task to be performed by the former carries an element of risk or danger, the employer is not wholly ... responsible for taking precautions to ensure the servant's safety. That duty only goes as far as ... is reasonable and ... [as far as] the practical extent of taking precaution. Of course, the higher the risk, the higher the level of precaution, but never in full at all. The servant ought to share in that duty of taking precaution. Here the respondent was a watchman and he knew that his work was risky".

27. Similarly, that in this case it is evident that the Appellant did not take any measures to mitigate his loss as evidenced by his conduct during his employment, as he did not take much consideration for his wellbeing given the delay in seeking treatment upon noting the injuries as he continued working. Therefore, that on the balance of probability it can be assumed that the Appellant failed to take adequate precaution to ensure his own safety. Hence, he contributed to the said injuries by being incautious while performing his assigned duties.

28. On whether the general damages awarded are commensurate to the injuries, it was argued that civil suits are meant to compensate victims for the loss suffered but not to enrich or punish the other party. The general method for assessment of damages should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct award in similar cases. Accordingly, that in this case, the Appellant claimed to have suffered; Inter vertebral Disc Prolapsed (PID), Chemical Pneumonia seconding to Chemical inhalation, Lower backache and Chronic cough but that Dr. Obed Omuyoma did not indicate that the Plaintiff would require any future medical treatment. Dr. Joab Bodo indicated that x-rays of the chest /lungs was clear with no evidence of chronic lung illness. This, he argued, showed that the Appellant still has capability to work as his incapacity was not 100% as he even admitted to doing minor jobs now, a further confirmation that he is engaged in gainful employment.

29. It was submitted that though Dr. Bodo did not come to court to provide his medical report, the parties by consent agree to the production of the same and did not challenge any of the contents therein, thus the evidence remain admissible. In support of this, the Respondent relied on the case of *Kisima Farm Limited v Julius Kaireba Marete* [2018] eKLR the court quoted the case of the *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR, where the Court of Appeal held that:

> " The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances

such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court."

30. Similarly, that the consent order to produce the medical report is binding on the parties as it was not obtained by fraud, or by collusion, or by any agreement contrary to the policy of the court and it would be unlawful at this juncture to ask this Honourable court to disregard the same in making its decision on this appeal.

31. The Respondent then cited the case of *Thomas Mothinji Mukhaya v African Diatomite Industries Ltd* HCC no. 10/96 [Nakuru], the plaintiff after inhaling diatomite dust complained of repeated chest pains and dry cough. He developed early silicosis and a chest x-ray revealed features of early emphysema and chronic extrinsic allergic alveolities. He was awarded Kshs. 450,000/= general damages for pain and suffering.

32. In *Paul Gakunu Mwinga v Nakuru Industries Ltd* decided in 2009 the plaintiff who was a weaver in the defendant's industry suffered "bysinusis-chronic dysponea" which is the chronic chest infection and chronic obstructive airway disease due to inhalation of dust as he was not provided with dust masks and the area was not well ventilated thereby exposing him to dust, the court made provision for an award of Kshs 750,000 general damages for pain and suffering.

33. Also in *George Morara Masitsa v Texplast Industries Limited* [2015] eKLR, where the plaintiff suffered a chest infection that subjected him to severe pains and coughs, recurrent chest pains and coughs as result of rhinitis, headaches and nasal congestion. The court awarded Kshs 100,000 as general damages for pain and suffering. In this instance, the said Plaintiff had since healed form the previous complaints.

34. Therefore, in the circumstances, it was submitted that the award granted by the trial court is justifiable given the assessment of injuries sustained.

35. On diminished earning capacity, it was argued that in assessing loss of earning capacity this Honourable court has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff may have suffered. In this, he relied on the case of *SJ v Francesco Di Nello & Another* [2015] eKLR where the distinction between loss of earning capacity and loss of future earnings was brought out 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."

36. Similarly, it was argued that the appellant pleaded for loss of future earning as special damages, which damages must be specifically pleaded and proven. It is submitted that the Appellant having testified and confirmed that he was working on a three (3) months contract cannot then claim for loss of future earning for a further period of 24 years as there is no proof he would have continued working there for that number of years. Therefore, that the special damages pleaded are speculative in nature and fail to meet the threshold of special damages which is that it is not enough to plead special damages but they must also be proved.

37. On the prayer for loss of amenities and diminished earning, capacity, it was submitted that once these claims are proved, it is awarded in the nature of general damages which is only awarded in instances the party is unable to work. It was argued that since the disability was gapped at 10%, and Dr. Obed Omuyoma, confirmed that his vital are within normal limits, he is not entitled to reliefs under this

head. In support of this, the Respondent relied Court of Appeal decision in *Butler v Butler* [1984] KLR 225, where the Court held as follows –

> " 1. A Person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury. 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded or real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages. 3, Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them. 4, Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial. 5) Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading. 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any."

38. On whether the trial court ignored the Appellant's submissions and initial treatment note on the position that the Appellant was to be retired on medical grounds, it was submitted that the trial court took in consideration both doctors reports and initial treatment notes having even noted that Dr. Omuyoma indicated that the Appellant's vital signs were within normal limits. Further that the trial court noted that from Dr. Joab Bodo's report, there was no evidence of chronic lung disease. As such, the trial court did assess the evidence before making its determination which in the circumstance is just.

39. In conclusion, the Respondent urged this Court to uphold the decision of the trial Court as the Appellant has failed to establish and/or demonstrate any of the grounds of its appeal or evidence to warrant the setting aside or enhancement of the trial court's judgment.

40. This court has considered the averments and submissions of the parties herein. This being a 1st appeal to this court, this court is obligated to re-evaluate the evidence afresh and make a determination on the same.

41. From the evidence adduced before the lower court, the Claimant was employed by the Respondent as a Carpenter. He indicated that while working in the cause of his duties on 1/2/2013 as a mixer at Okaria 1V which used to deal with cement, he started having health complications and upon seeking medical attention he was diagnosed with chest infection and back problems.

42. He averred that this infection was caused by the Respondent herein who failed to take any adequate precaution for his safety and caused him to lift and move heavy bags of cement as he was not issued with a crane for the said work.

43. During the hearing he produced his medical report and treatment notes and laboratory report as exhibits. He also produced his job card as an exhibit among other exhibits.

44. The Claimant sought to be paid damages for the pain, suffering, loss of amenities and diminished earning capacity plus costs of the suit.

45. The Respondent on their part denied any employer-employee relationship with the Claimant. They also denied any culpability on their part nor any act of negligence.

46. They averred that if there was any employer-employee relationship, the nature and course of duties bestowed on the plaintiff were made known to him and he voluntarily carried out the said duties with full knowledge of forceable hazards poised thereof.

47. The trial Magistrate upon considering the evidence and submissions of the parties, made a finding that the plaintiff was partly culpable for not taking any precautions to ensure his own safety. He also found the plaintiff 20% liable and Respondent 80%.

48. On quantum, he found for the Claimant and awarded him 1 million. In damages and special damages of 5,000/=

49. I have considered this evidence as adduced by the parties. It was disputed by the Respondent that the appellant worked for them but the appellant produced his job card as evidence that he was an employee of the Respondent. That in my view settles that issue. Whereas the appellant indicated he suffered injury at work, he didn't state that he was involved in an accident.

50. The appellant has faulted the trial court's decision to apportion liability against the appellant at 20% without any evidence to the contrary by the Respondent.

51. The appellants also faulted the quantum of damages awarded at 1 million compared to the injuries sustained by the appellant.

52. The appellants also faulted the learned Magistrate on claim of diminished earnings despite the fact that the same had been pleaded and specifically proved.

53. In considering the evidence adduced at the Lower Court and submissions filed before court, I do find that the doctor who examined the appellant indicated that he relied on treatment notes from Naivasha District Hospital. That the chest and back x-rays were taken but were found to be negative.

54. He indicated that all his vital signs were normal. The appellant on his part indicated that he gave his treatment notes to the Doctor which I believe are what he relied upon.

55. Another medical report was also produced by Dr. Joab Bodo and the report also showed that the appellant's general condition was satisfactory and his chest was clear with normal air flow.

56. There was however some tenderness in the lumber spine and leg raising was reduced by 70% on right leg. The chest was clear but the lumber spine x-ray revealed loss of lumber lordosis which is carried by spasm of muscles of lumber spine.

57. This second report is dated 29/6/2016 and was done by the Respondent's Doctor. The report of Dr. Omuyoma is dated 1/12/2014.

58. The conclusion one can adduce is that 3 years after examination by the Doctor after the injury in 2013, the appellant still had medical conditions associated with the injury suffered at work which included lumber problems and reduced leg movement.

59. It is true that the trial court didn't consider this aspect with a view of awarding the appellant damages for diminished earning which was pleaded and proved through these reports.

60. Given the injuries suffered, it is also clear that the trial court failed to consider submissions filed and especially case law cited on the quantum to be awarded.

61. The Respondents contended that the Claimant appellant knew what he was putting himself against by taking up the job that caused him injury but never indicated what he did or failed to do to make him a contributory of the injury. In the circumstances awarding him 20% contribution was without any basis.

62. In the circumstances it is my finding that the appeal has merit. I therefore allow it and find for the appellant and substitute the judgment for him in the following terms;

    1. Damages for pain and suffering considering the injuries suffered at Kshs 1,000,000/=

    2. Damages for future earnings on a multiplier of 5 years

       = 13,988 x 12 x 5 = 839,100

       Total = 1,839,100/=

63. The Respondent will pay costs of this case plus costs of the lower court plus interest at court rates with effect from the date of this judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Miss Muigai holding brief Mboga for Appellant – Present

Omwenga for Kiogora Mutai for Respondent – Present

Court Assistant - Fred