Coastal Kenya Enterprises Limited v Muchiri (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KECA 897 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 84 OF 2017

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

JULY 24, 2023

BETWEEN

COASTAL KENYA ENTERPRISES LIMITED ..... APPELLANT

AND

CHARLES MWANIKI MUCHIRI ..... RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nyeri (Ongaya, J.) delivered on 9th December 2016 in ELRC Nyeri Case No. 93 of 2016) Formerly Meru HCCC No. 84 of 2011)

JUDGMENT

1. The respondent Charles Mwaniki Muchiri (Muchiri) sued his employer Coastal Kenya Enterprises Limited (the appellant), for general damages for loss of earning capacity, lost years/diminished future earning prospects, and special damages for medical report. The damages allegedly arose from an accident during the course of Muchiri's employment in which Muchiri suffered severe head injuries with multiple scalp fractures.

2. Muchiri who was employed as an earthmover operator, was driving a grader from a construction site in Meru County when it was involved in an accident. Muchiri blamed the appellant for the accident, maintaining that the appellant was negligent in failing to provide a safe system of work, in engaging him to work on a defective grader, and in failing to provide him with appropriate protective gear.

3. In its statement of defence, the appellant admitted that an accident took place on the date and place alleged, but denied that the accident was caused by breach of any statutory duty of care or negligence on its part. The appellant maintained that the accident was solely or substantially contributed to by the negligence of Muchiri, as he drove the grader too fast, failed to keep any proper lookout, drove the grader while inebriated, failed to put on a helmet which was provided, failed to follow safety instructions issued to him, ignored his supervisor's instructions to wear a helmet, and failed to brake,

swerve or take any evasive action in order to avoid the accident. The appellant further denied that Muchiri suffered any injuries or any loss and damage as alleged in the plaint. It conceded that Muchiri had already been paid Kshs 1 million under the Workman's Compensation Act, out of the amount of Kshs 2,050,030 that was assessed by the Government.

4. Upon hearing the evidence and the submissions made by the respective parties, the learned Judge found the appellant liable and awarded Muchiri a total sum of Kshs 15,977,960 together with interest.

5. Being aggrieved, the appellant has lodged this appeal in which it has filed a memorandum of appeal raising 10 grounds. The grounds in the memorandum of appeal appear to be rather confused as they seem to refer to the appellant as the respondent. We reproduce the grounds in the memorandum of appeal verbatim as follows:

    i. The learned Judge misdirected himself by holding that the respondent was liable;

    ii. The learned Judge erred in law and fact by holding that the respondent caused undue delay in the matter thus denying the defendant the right to file its defence.

    iii. The learned Judge erred in law and fact by failing to account for sums already received by the claimant in the final award.

    iv. The learned Judge misdirected himself by concluding that a consent was entered into at any given time before or during the determination of the suit.

    v. The learned Judge erred in law and fact by not giving the respondent the opportunity to have a fair hearing before determination of the suit.

    vi. The learned Judge erred in law and fact by not setting out the entire points in issue and his reason(s) for making the decision.

    vii. The learned Judge erred in law and fact by not appreciating the effect of the cross-examination and submissions by the respondent in determination of the suit.

    viii. The learned Judge erred in law and fact by misdirecting himself as to the existence of evidence on record that formed part of his determination.

    ix. The learned Judge erred in law and fact by issuing an extremely excessive and punitive award.

    x. The learned Judge erred in law and fact by not dealing with issues raised and by giving a scanty Ruling.

6. In support of the appeal, the appellant filed written submissions in which it identified the issues for determination as: whether based on the evidence before the High Court there was proof of negligence; whether the learned Judge overstepped his mandate by filing in the gaps in Muchiri's case; whether the appellant was liable in the circumstances; and whether the learned Judge followed the correct principles in awarding damages.

7. In regard to proof of negligence, the appellant submitted that there was no evidence before the learned Judge of the grader being defective, as there was no evidence produced to establish that there were any defects on the grader, nor did Muchiri testify of any mechanical defects.

8. As regards the contention that the learned Judge overstepped his mandate, the appellant maintained that Muchiri never spoke of a defective grader and/or a mechanic being present to deal with known defects on the grader; that the learned Judge drew a wrong inference of the appellant knowing about the defects of the grader from the mere presence of the mechanic. The appellant submitted that the

learned Judge failed to address his mind to the fact that Muchiri had operated the grader before and had not complained of any specific problems. Relying on *Treadsetters Tyres Limited vs John Wekesa Wepukhulu, [2010] eKLR*, the appellant argued that the learned Judge ought to have dismissed Muchiri's claim for lack of evidence.

9. In regard to the burden of proof, the appellant argued that the burden of proof in an action of damages for negligence rests primarily on the plaintiff, who in order to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. In support, the appellant cited *Kiema Muthungu vs Kenya Cargo Handling Services Limited [1991] 2 KLR*; *Mwanyule vs Said t/a Jomvu Total Service Station [2004] 1 KLR 47*; *Anthony Mbwabi Khayimba vs Laxambhai Construction Limited, Civil Case No 223 of 2016*.

10. The appellant added that Muchiri had operated the grader for a continuous period of six months, and there was no evidence that the grader was defective, nor was there any evidence that Muchiri raised any issues regarding the operation of the grader with the appellant. Citing Section 13(1)(a) & (c) of the *Occupational Safety and Health Act* No 15 of 2007, the appellant argued that Muchiri had a degree of duty in ensuring his own safety and health, and those of other employees who may be affected by his own acts.

11. In regard to the principles upon which this Court can interfere with an award of damages, the appellant relied on *Nyota Tissue Products vs Charles Wanga Wanga & 4 Others [2020] eKLR* in which the Court (Muriithi, J) reduced an award of Kshs 1.2 million that was awarded for head injury with open depressed frontal skull fracture, to Kshs 500,000 as an award for pain, suffering, and loss of amenities. In that judgment, Muriithi, J considered several judgments, including *Bhatt vs Khan [1981] KLR 349* cited in *Shabbani vs City Council of Nairobi [1985] KLR 516*, 518-19; *Southern Engineering Co Limited vs Mutia [1985] KLR 730,* Arrow Car Limited vs Bimomo & 2 Others [2004] 2 KLR 101; *Kioga Haulers & Anor vs Phillip Mahiu Nyingi [2017] eKLR.*

12. As regards loss of earning capacity, the appellant cited Tayab vs Kinanu [1983] eKLR, where Hancox, J relied on the following principles set by this Court in *Butler vs Butler [1984] eKLR* in respect of a claim for loss of earning capacity.

> ' (a) That 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 paid as before the accident, are lessened by his injury;
>
> (b) 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 for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
>
> (c) damages under the head of loss of earning capacity and loss of future earnings which in English Law were formally included as unspecified part of the award for pain, suffering, and loss of amenities, are now quantified separately and no interest is recoverable on them;
>
> (d) loss of earning capacity can be a claim on its own, as where a 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;

(e) 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 improper to award under its own heading; and

(f) 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 qualification of the claimant, his remaining length of working life; his disabilities and previous service if any.'

13. The appellant also relied on *John Wamae & 2 others vs Jane Kituku Nziba and Anor [2017] eKLR*; and *Mumias Sugar Co Limited vs Francis Wanalo [2007] eKLR*, on the approach for assessing damages for loss of earning capacity. The appellant argued that loss of earning capacity is a different head of damages from actual loss of future earnings, as compensation for loss of future earnings is awarded for real assessable loss proved by evidence, whereas compensation for diminution of earning capacity is awarded as part of general damages. It faulted the finding by the learned Judge that Muchiri suffered 55% incapacity when he was able to get employment and even enrolled for training in less than a year after the accident. The appellant maintained that Muchiri ought to have been given damages for compensation for diminution of earning capacity as part of general damages, and therefore the learned Judge had erred in applying the multiplier method which gave an erroneous estimate and an amount that was inordinately high.

14. Finally, the appellant concluded that the learned Judge misapprehended the law in granting an extremely punitive and excessive award, and failed to take into consideration sums that were already paid to Muchiri. It maintained that the circumstances of the case did not warrant the award of Kshs 15, 977,960.

15. In his submissions, Muchiri dismissed the appellant's allegation that it was denied the right to file its defence arguing that the appellant filed a defence which is in the record of appeal. Muchiri argued that the appellant was given a fair hearing as it was accorded an opportunity to file witness statements and its documents on several occasions, and was even granted the opportunity to file additional documents before the hearing of the suit. Muchiri maintained that the brakes of the grader failed and the sleeving system also failed, a fact which was in his statement which was adopted as evidence. He maintained that the burden of proof shifted to the appellant to demonstrate that the grader was in a sound mechanical condition. However, the evidence on the grader being defective was not controverted, nor did the appellant adduce any evidence to prove that the grader was mechanically sound. Muchiri submitted that the trial court was right in finding the appellant liable, as there was no evidence from the appellant to contradict his evidence.

16. On the issue of general damages, Muchiri relied on Bhatt vs Khan [1981] KLR 349 on the principles upon which an appellate court can interfere with an award.

17. This being a first appeal, our responsibility as a first appellate Court is to reconsider the evidence and the law and come to our own conclusion, giving allowance for the fact that the trial court had the advantage of seeing the demeanour of the witnesses. (See *Abbok Odera t/a Odera & Associates vs John Patrick Machira t/a as Machira & Co. Advocates [2013] eKLR*).

18. From our perusal of the record and the submissions, we find several issues that arise for our determination. First, is whether the learned Judge failed to give the appellant a fair hearing before the determination of the suit; second, whether negligence or contributory negligence was established by either party; third, whether the trial court was right in finding the appellant liable; fourth, whether the

learned Judge followed the correct principles in awarding damages, and finally, whether there is any justification for this Court to interfere with the award.

19. With regard to the hearing of the suit in the trial court, the proceedings indicate that the matter was first fixed for direction on October 7, 2014, when the respondent's advocate indicated they were ready for hearing but the appellant's advocate indicated that Order 11 and order 3(2) of the *Civil Procedure Rules* had not been complied with. Following further mention, the matter was fixed for hearing of the suit on May 18, 2015. Between May 18, 2015 and June 17, 2016, the matter came up for hearing on at least two occasions but had to be adjourned at the request of the appellant.

20. On June 17, 2016, the parties agreed by consent to rely on pleadings and documents on record, and the defendant to file and serve witness statements by August 1, 2016, and hearing of the suit to proceed on September 28, 2016 for one and half hours.

21. On September 28, 2016, the respondent's advocate indicated that he was ready to proceed with 3 witnesses but the appellant's advocate was apparently not ready to proceed, and instead indicated that he was seeking production of further documents and wished to add a list of witnesses. He indicated that he needed to trace the witnesses who were at the scene and needed 10 days to file the documentation. This application was opposed by the respondent's advocate who saw it as an attempt to delay the hearing of the suit. This is what led to the order of the court that the parties had had enough time to deal with all pretrial issues and that in the interest of justice, the hearing of the suit would proceed on that day at 11.20 am.

22. Both the appellant's counsel and the respondent's counsel appeared before the trial court at 12.15 pm. and the hearing proceeded with the respondent calling Dr John Kimani Macharia, Simon Muchiri Wanjau (the respondent's father), and the respondent. These witnesses testified in-chief and were all cross-examined by the appellant's counsel. At the close of the respondent's case, the appellant's counsel sought leave to file a list of witnesses, documents, and expert witness report, but the court rejected the application noting that the respondent had not filed any witness statements or documents, and it would be prejudicial to allow the appellant to bring the documents after the close of the respondent's case. The court noted that the suit was filed on June 29, 2011 and the appellant filed its defence on July 9, 2012, and both parties had equal opportunity to avail all necessary materials before the court.

23. As the appellant had no evidence to offer, the court ordered the parties to file written submissions. The appellant and the respondent each filed written submissions, the appellant urging the court to strike out the case against it with costs, relying on the pleadings on record and its submissions.

24. In our view, it is clear that the appellant was not denied the right of hearing as it was given several opportunities to call evidence, including adjournments being granted at its request. The appellant having failed to take advantage of these opportunities, it cannot blame the trial court for refusing to adjourn the matter further. The court was under a duty to take the interest of both parties into account, and this required the matter being heard without unreasonable delay. We, therefore, reject the ground that the appellant was not given a fair hearing.

25. Muchiri explained in his evidence how he was involved in the accident. His evidence included the evidence of the doctor who examined him and a medical report which was prepared explaining the nature of the injuries he suffered. Muchiri's father, Simon Muchiri Wanjau also testified as to how he had to support his son following the injuries.

26. The trial judge in his judgment, accepted the evidence of Muchiri and found that the appellant knowingly assigned him a grader that had known defects, and made available a mechanic to deal with the defects should they arise. Although the appellant pleaded in its defence that Muchiri was solely

liable for the accident, or had substantially contributed to it, there was no evidence that was offered by the appellant in support of the pleadings in the defence. Pleadings are mere allegations of fact, and cannot take the place of evidence. See Mohammed & Another vs. Haidara [1972] EA 166. Therefore, the appellant failed to prove any negligence on the part of Muchiri.

27. The learned Judge had no reason to doubt Muchiri's evidence, regarding how the accident occurred or the fact that the appellant was negligent in assigning him a defective grader. The appellant had a statutory duty under section 13(1) of the *Occupational Safety and Health Act* 2007 to ensure that it employed a safe system of work. The grader that Muchiri was assigned was not safe to work on as it had defective brakes. The learned Judge cannot be faulted for finding that the appellant was negligent and in breach of its statutory duty. Clearly the learned Judge did not misdirect himself on the evidence on record. We are satisfied that the learned Judge was right in finding the appellant negligent and liable to Muchiri.

28. As an appellate court, our jurisdiction to interfere with the damages awarded by the trial court is circumscribed as has been stated in several decisions of this Court. The appellant has rightly quoted *Kemfro Africa Limited t/a 'Meru Express Services 1976' & another vs Lubia & Another (No 2) [1987] KLR 30*, in which the Court stated as follows:

> ' The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T);Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles'.

29. In Bhatt vs Khan [1981] KLR 349 at 356, Law JA stated:

> ' An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneousness estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low'.

30. In *Catholic Diocese of Kisumu vs Tete [2004] 2 KLR 55*, this Court held that:

> ' (i) 'The assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that award by the lower court simply because it would have awarded a different figure if it had tried the case at first instance.
>
> (ii) An appellate court can justifiably interfere with quantum of damages awarded by a trial court only if it is satisfied that the trial Court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one, or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneousness estimate'.

31. From the preceding cases, an appellate court can only interfere with the damages that were awarded by the trial court if the damages awarded are an erroneous estimate because they are either inordinately

high or low due to the trial Judge having proceeded on wrong principles or taken into account relevant or irrelevant factors, or misapprehending the evidence. With this in mind, we analyse the evidence to see whether there is any justification for this Court to interfere with the award.

32. The evidence before the trial court was that: Muchiri had sustained severe head injuries with multiple scalp fractures of which he had to undergo surgery; his residual injuries included slight physiological deficit and poor vision with a 5% risk of developing epilepsy; and that the injuries resulted in 65% incapacity.

33. The learned Judge awarded a sum of Kshs 5,000 as special damages incurred for the medical report, and Kshs 3 million for pain and suffering, taking into account the permanent incapacity of 65% and loss of enjoyment of life resulting from the injuries. The trial court also awarded Kshs 12,972,960 for loss of earning capacity and diminished future earning prospects.

34. The following extract of the judgment reveals how the learned Judge calculated the damages.

> ' The court has taken judicial notice that the prevailing general mandatory retirement age in Kenya is 60 years of age so that the plaintiff would have had 33 years of active service. The claimant had a promising bright future and by reason of the accident he lost future earnings prospects – the likely increase in his salary; which the court puts at 80% in view of his age and the outstanding capacity prior to the injury as demonstrated by his excellent academic performance which puts the multiplier at 180/100 x Kshs 28,000.00 making Kshs 50,400.00. The latest assessment of incapacity was put at 65% by CW1 on 03.05.2011 and the court takes it as the position on the measure of the incapacity. Thus for loss of earning capacity and loss of earnings prospects, the court awards the plaintiff 65/100 x 33 years x 12 months x Kshs 50,400.00 making Kshs 12,972,960.00.'

35. The learned Judge justified the award to Muchiri as follows:

> ' The court has considered the plaintiff's predicament flowing from the accident and the injuries he sustained and finds that the plaintiff has established that he is entitled to substantial compensation for the risk that he will not get employed or suitable employment in future. The court has considered that he is still under medical care and his circumstances may degenerate. He was a young person with high academic potential and qualifications, he had high likelihood to grow in his job of grader operator and also a high likelihood to take on another line of employment and most likely scale up successfully to the top and glory of his employment and all attached benefits. The court is persuaded that the plaintiff's employment expectations have been substantially ruined and the claimant is entitled as claimed for loss of employment capacity and attached loss of future earning prospects.
>
> The court considers that claims for loss of income when a plaintiff was unable to work due to injury; loss of future income due to the injury; loss of earning capacity due to injury; pain, suffering, and trauma (the non –economic loss); loss of future earnings prospects relating loss of future increase in income; expenses on treatment incurred or to be incurred in future in view of the injury; loss of amenities such as prospects of marriage; and loss of expectation of life or shortening of life are all claims which when they flow from an injury or disablement, as the case may be, while an employee is at work, are all claims which are beyond the provisions of the *Work Injury Benefits Act*, 2007 and are capable of being pursued in a suit before the court as they are heads of claims independent of the compensation under the Act.'

36. In this case, the trial Judge awarded a composite figure for loss of earning and diminished future earning prospects. We have set out the principles set out by this Court in Butler vs Butler (supra) in regard to a claim of loss of earning capacity which principles the trial court referred to. In that case, a claim for loss of earning capacity is distinguished from a claim for diminution of future earning capacity.

37. But first, let us deal with the issue in which the respondent had prayed for general damages for pain, suffering, and loss of amenities to include lost prospects for career advancement or lost future prospects. For pain, suffering, and loss of amenities, it was submitted that the respondent be awarded Kshs 5,000,000.00. The trial court however awarded Kshs 3,000,000.00. In making the award, the court stated that:

> ' Considering that assessment, the cited authority and the plaintiff's deteriorating well-being, the court considers that an award of Kshs 3,000,000.00 for pain and suffering will meet the ends of justice in this case.'

38. We find this reasoning sound and find no basis to disturb the same. The distinction between loss of earning capacity and loss of future earnings was brought out in the case of *SJ vs Francesco Di Nello & Another [2015] eKLR*, where this Court stated as follows:

> ' 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 a 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 MR 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'.

39. In *Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR*, this Court, pondering over the above stated that:

> ' The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.'

40. The said principles were envisaged in Butler vs Butler (supra), where the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity which principles we have already reproduced at paragraph 12 above.

41. To understand the nature of injuries suffered by the respondent, reliance was placed on the medical report by Dr John Kimani Macharia which indicated that the respondent sustained serious injuries on his head and legs. He had examined him on two occasions, April 30, 2011, and again on October 7, 2014. He reported the injuries sustained to include admission in hospital in an unconscious state; laceration and contusion over the forehead; a depressed fracture over the left parietal side of the skull; multiple basal and calvarial skull fractures; bilateral frontal intra-cerebral hemorrhage and brain oedema; soft tissue injuries over the right wrist and left ankle. He confirmed that the respondent had surgery (craniotomy) done with elevation of the depressed fracture piece.

42. Further, the respondent had been put on antibiotics, anticonvulsants and steroids cover and underwent nursing and physiotherapy care till discharge on August 9, 2008. As at the time of examination, he stated that the respondent complained of problems with smell and taste perception; occasional tempers or tantrums; pains over the upper limbs; reduced vision; and no convulsions had been reported. In his conclusion, he was of the opinion that the respondent had sustained a severe head injury with multiple skull fractures. It was his opinion that the respondent had recovered but had a slight psychological deficit and poor vision and had not developed convulsions but stood at a 5% risk of doing so. He assessed incapacity at about 65% in relation to the head injury and sequel.

43. The medical condition of the respondent came into play when the matter was heard by the trial court and the court was informed that the respondent scored an A in KCSE and held a Bachelor of Science in Clothing, Textile, and Interior Design, Second Class Honors (Upper Division) conferred by the Egerton University. He, subsequent to the injury, secured a teaching job at a high school but lost the job because he was assessed below capacity. This was further corroborated by the respondent's father who confirmed that after the accident he enrolled the respondent for the Chartered Accountant's course but he could not cope with the learning due to the injury as per the examination results slips filed in court which showed that he failed despite his previous outstanding academic ability. This only leads to the conclusion that the respondent suffered diminished academic ability and diminished capacity to work or to find an alternative job. It is upon this that the trial court concluded that by reason of the injury attributable to the appellant, the respondent lost employment and then suffered diminished capacity to ever get alternative or similar employment.

44. The appellant has submitted that the trial judge erred by adopting 65% incapacitation as the baseline for his calculations of the damages awardable without appreciating that even with the said incapacitation, the respondent proceeded to enroll for KASNEB and further sought a teaching job. We may point out that from the record and as earlier captured in this judgment, the percentage of 65% was not a creature of the trial judge but from the evidence of the medical reports that were produced in court. As such it is not true that the trial judge used a figure that he personally plucked from nowhere. It was upon the appellant to call witnesses to counter the medical evidence tendered by the respondent. Had this been done, then the trial court would have had a task of balancing and appreciating the various medical reports. We therefore do not find the reasoning of the appellant as to the percentage applied useful.

45. It is not in dispute that the respondent was a bright young mind aged 27 years at the time of the accident that left him helpless. The trial judge used a multiplier of 33 years based on the fact that the retirement age in Kenya is 60 years. The trial judge did not consider the relevant factors in play before granting these years. This Court in *Board of Governors of Kangubiri Girls High School & Another v*

Jane Wanjiku Muriithi & Another [2014] eKLR, held that the choice of a multiplier is a matter of the court's discretion which must be exercised judiciously.

46. In *Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No 59 of 2004 [2004] eKLR*, the Court also held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the person concerned, and the fixed retirement age, the period of expected dependency, the conditions of life of the person in question, the expected age he could have lived, keeping in mind that the standard of life and the life expectancy in Kenya has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. In this case, the trial court calculated the multiplier on the basis that the appellant would have been be in employment until he was 60 years and awarded a multiplier of 33 years.

47. Having concluded that the respondent would have worked until the age of 60 years, by awarding the maximum possible multiplier, the trial court failed to take into account the vicissitudes of life and the other imponderables as nobody knows for certain what the future holds. He could as well have passed on from other causes before attaining the retirement age of 60 years. It is also possible that he could have developed other conditions that would have prevented him from working until retirement age. To that extent, we are inclined to interfere with the multiplier. We think that based on the foregoing; 28 years would have been a reasonable multiplier.

48. On multiplicand, there was no evidence tendered by the appellant to counter the multiplicand of Kshs 28,000.00 used. As stated earlier, the appellant did not call any witness to controvert what the respondent testified to and presented in court. We take it as the trial judge rightly did that the respondent's evidence on this aspect of the claim was uncontroverted. The multiplicand was increased using a percentage of eighty (80%) given the fact that the respondent would have gotten some other jobs which would have paid higher or engaged in a better-salaried field. The trial judge stated that there was a likely increase in his salary; which he put at 80% in view of his age and academic credentials prior to the injury. This will work out to Kshs 50,400.00. However, just like the multiplier, the trial judge did not consider the fact that the respondent equally had a chance of not getting a job or even getting a low-paying job given the fact that in Kenya, there are many educated youths who do not have jobs. The best that the trial court ought to have done was to give a 50% increment which we think would suffice in the circumstances. Thus, it would work out to a total of Kshs 42,000. This would result in 65/100x27 x12 x42,000.00 making a total of Kshs 8,845,200.00.

49. In making these awards we identify ourselves with the words of Potter, JA in Rahima Tayab & Others vs Anna Mary Kinanu [1983] KLR 114; where it was held while relying on the oft-cited case of H West and Son Ltd vs Shephard [1964] AC 326 at 345 that:

> ' 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 endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.'

50. Lastly, the respondent was awarded Kshs 5,000.00 for special damages. Our perusal of the record and the submissions by both parties does not point to any challenge on this award and since the same was pleaded and strictly proved, we uphold it as awarded by the trial judge. In the end, the appeal fails on

all other grounds save on the issue of the award on loss of earning capacity and loss of future earnings. The trial court's finding on the same is hereby set aside. In the end, we make orders as follows:

i. For pain, suffering, and loss of amenities the award of Kshs 3,000,000.00 is upheld.

ii. For loss of earning capacity and loss of earnings prospects the award is reduced to Kshs 8,845,200.00.

iii. Special damages Kshs 5, 000.00

The appellant therefore shall pay the respondent a total of Kshs 11,850,200.00 plus costs in the trial court, and interest from the date of judgment in the trial court.

51. Lastly, since the appeal has only partially succeeded, there shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR