



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 97 OF 2019**

**KALUWORKS LIMITED ..... APPELLANT**

**VERSUS**

**NICHOLUS NGOME KOMBO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Mariakani by Hon. N. C. Adalo (SRM) on 12<sup>th</sup> November, 2019 in Mariakani SPMCC No. 288 of 2015)*

**Coram: Hon. Justice R. Nyakundi**

**Mogaka Omwenga & Mabeya Advocates for the Appellant**

**IRB Mbuya Advocates for the Respondent**

**JUDGEMENT**

The appellant in this matter was sued by the respondent on the 17th September 2015 in the Senior Principal Magistrate Court at Mariakani in which suit the respondent claimed damages for injuries allegedly sustained while working for the appellant as a machine operator. In the suit, the respondent blamed the appellant for the injuries and gave particulars of negligence and breach of statutory duty as a result of which the respondent sustained severe injuries.

On the 27th of October 2015, the appellant filed a memorandum of appearance and a statement of defence in which the appellant denied every allegation set out in the plaint, save for the description of the parties. The appellant even denied the particulars of negligence, injury and loss were all denied with an alternative, he lamented that if the accident had indeed happened, then the respondent ought to take full liability. The appellant, therefore, prayed that the respondent's suit be dismissed.

**Facts and Procedural history**

Upon hearing of the matter on the 19th of October 2016, the respondent testified as PW1 and in support of his testimony, he called **Dr. Ndegwa** on the 15th of August who testified as **PW2**. **Dr. Ndegwa** proffered a medical report detailing the injuries suffered by the plaintiff as a result of the accident. In his testimony before the trial Court, the respondent asserted that he was assigned by the appellant to set the Dye Setter. He was required to remove its housing and replace it. In doing so, he went to the shearing machine to cut some pieces of plastic shells which were required in the circumstances. After having switched off the shearing machine, he then proceeded to pick the plastic pieces and upon picking the same, the sheer knives dropped and chopped off three of his fingers. He was taken to Pandya Hospital for treatment. He produced the discharge summary before the lower court which was marked as Exhibit 1.

He produced a demand made by his advocate to the Appellant which was marked as Exhibit II and the medical report marked as MFI-III (a) and the receipt for medical expenses showing Kshs.2,500/= marked as MFI-III (b). **PWII Dr. Ndegwa** affirmed that he treated the respondent after he had been injured in an industrial accident by a shearing machine. According to **Dr. Ndegwa**, he sustained traumatic computation of total phalanx of the right index, middle and ring finger. He was admitted for four days at Pandya Hospital and was taken to surgical treatment for toileting wounds.

**PWII** asserted that the respondent visited the hospital over a year later and he was complaining of pains on all the injury. He examined the injuries and opined that the respondent had sustained 25% permanent disability. The respondent is right-handed and as such, he can't write or hold things. He lamented that the fingers affected were important. He was paid Ksh.2,500/= for the medical report and Kshs.10,000/= to attend court. He produced the medical report as Exhibit 3(a) and receipt of Kshs.2,500 as Exhibit 3b. He also produced the court attendance report as Exhibit 4. Upon cross-examination, he conceded that he was not the treating doctor, as such the medical report is based on an

opinion and treatment notes. He also acknowledged that professionals may vary in opinion. The prosecution, therefore, closed its case.

The matter was, set for defence hearing on the 3rd of September, 2019. In this regard, the parties recorded a consent apportioning liability at 85:15 in favour of the respondent. The parties further adopted a second report by **Dr. Udayan Sheth** dated 26/02/2016. The same was produced, as defence Exhibit 1. The consent was, therefore, adopted as an order of the court.

In the lower court Judgment, the Learned Magistrate awarded Kshs.800,000/= as general damages, loss of earnings Kshs.1,872,000/=, special damages Kshs.2,500/= which came to a total of Kshs.2,273,325/= after discounting 15% liability.

It is that Judgment that the appellant is seeking to set aside with the instant appeal. The appellant challenges award of the loss of earning capacity using the multiplier approach, that the learned Magistrate awarded loss of earnings despite the respondent not having pleaded in his 1<sup>st</sup> claim that the alleged failure by the Learned Magistrate to consider the appellant's submissions on the issue of earning capacity.

The appellant, therefore, proposed that the Judgment and Decree of **Honorable N.C. Adalo (SRM)** made on 12 November 2019 in **Mariakani SPMCC No. 288 of 2015** awarding the respondents Kshs.1,872,000/= be varied and/or be set aside by this Honorable Court.

### **Grounds of Appeal.**

The appellant was aggrieved by the Judgment more so the approach adopted by the Lower Court in calculating the loss of earning capacity. It, therefore, lodged an appeal being **Malindi HCCA 97 of 2019** vide a memorandum of appeal dated 18th November 2019 and filed in court on 21<sup>st</sup> November 2019. The grounds of appeal were inter alia:

- a) That the Learned Magistrate erred in law and fact in making an award under the head of loss of earning capacity using the multiplier approach.*
- b) That the Learned Magistrate erred in law and fact in making an award on loss. 3 of earnings when the same was never sought for.*
- c) That the Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions on the issue of loss of earning capacity.*

The appellant, therefore, prayed that the Judgment and decree made on 12 November 2019 awarding the respondent Kshs.1,872,000 /- be varied and/or set aside by this Honourable Court and that the Appeal is allowed with costs.

### **The Appellant's submissions**

The Appeal is only on quantum as liability was settled at 15% against the Respondent and 85% against the Appellant. The only contention is the award of Kshs.1,872,000 /- as loss of earning capacity though the Learned Magistrate's disposition captured the same as loss of earnings. The appellant is adamant that the Learned Magistrate did not make any distinction between the loss of earning capacity and loss of earnings. The appellant cited paragraph 15 of the Judgment (See page 66 of the record of appeal), where the Learned Magistrate held as follows:

*"On the issue of loss of earning capacity, it is clear from the evidence that the Plaintiff will no longer be able to work as he used to and that his earning capacity will be diminished for the rest of his life. Having been a machine operator, he can no longer do the same job after the loss of his three fingers..."*

In the appellant's view, the finding is not supported by evidence. It is further lamented that according to the evidence on record the Respondent went back to work hence the finding that the respondent cannot do the same job is based on speculation and conjecture. It was argued that the Learned Trial Magistrate adopted a multiplier approach to calculate the loss of earning capacity with no justification given as to why the same was adopted. The appellant also contended that the two medical reports were made varied percentages of permanent disability. The appellant was aggrieved that **Dr. S.K. Ndegwa** opined that permanent incapacity is 25% whereas **Dr. Udayan Sheth** opined that the degree was 10%.

The Learned Trial Magistrate having considered the two reports and the authority cited, she adopted **Dr. Udayan's** opinion but from the Judgment, the learned Magistrate did not consider the case-law cited by the appellant concerning whether multiplier or global approach should be adopted.

The Appellant supported its position by citing the case of **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR**, where the Court of Appeal had this to say:

*"...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..."*

The appellant submitted that in adopting the multiplier approach, the Learned Trial Magistrate created an impression that the respondent had been incapacitated which is not the case. The appellant cited the case of **Wanalo (supra)**, the Court went ahead to state thus;

***“The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent incapacity was assessed at 15% by Dr Juma and 10% by Dr Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All that he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained - mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial was minimal. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand multiplier basis. In this, the learned Judge erred in principle.”***

In light of the above foregoing case, the respondent's right hand lost a maximum of 10% of its function based on **Dr. Udayan Sheth's** medical report. The appellant contended that there was no evidence that as a result of the injuries, the respondent could not do the job of a machine operator and on the contrary, there is solid evidence as earlier pointed out that the respondent went back to work. The appellant is therefore adamant that it was an error for the Learned Trial Magistrate to adopting the multiplier approach. In essence, the appellant argued that the award of Kshs.1,872,000/= be set aside.

On the second ground, the appellant contested the award of loss of earnings on the ground that it was never prayed in the first instance. According to the appellant, the respondent in his plaint dated 11th September 2015 had pleaded loss of future earnings. However, no evidence was led to support the pleading. To support this position, the appellant cited the case of **Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 cited in S.Jv Francesco Di Nello & another [2015] eKLR**, in which case a distinction between loss of future earnings and loss of earning capacity was made. It was held thus,

***“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 amputation in earning capacity is awarded as part of general damages.”***

The appellant advanced the contention that no evidence was led to justify an award under the loss of future earnings. Neither did the respondent submit on the same in his submissions dated 13th September 2019. The appellant, therefore, submits that there was no basis for such an award which is found Learned Magistrate's Judgment at paragraph 17, under the heading ***“loss of earnings.”***

Consequently, the appellant submitted that this was an error which this Honourable Court can correct, and the respondent having pleaded loss of future earnings, he was expected to lead evidence in support of his claim which evidence he failed to tender. Further that to confirm that handicap, the respondent ought to have submitted on this head and thus it was not open for the Trial Court to make any finding on the same.

In conclusion, the appellant reiterated its grounds of appeal as contained in the memorandum of appeal dated 18th November 2019 and filed in court on 21<sup>st</sup> November 2019 and prays that the same be allowed in the manner prayed in the appeal. Counsel also annexed herewith the authorities cited highlighting the relevant portions to guide the Honourable Court which I have given due regard.

#### **Respondent's submissions.**

The respondent's counsel view herein is that liability is not contested and what the appellants front is an issue against the assessment damages on loss of earning capacity

The respondent counsel humbly submits that the legal position by the trial Magistrate on the loss of earning capacity was sound given the extent of injuries and the level of permanent disability sustained by the respondent as a result of the accident. Counsel argued and asserted that the respondent sustained injuries with 25% permanent disability to wit:

- a) Severe injuries of the right hand involving:***
- b) Traumatic amputation of the index finger;***
- c) Traumatic amputation of the middle finger; and***
- d) Traumatic amputation of the ring finger.***

In counsels view the Court should be guided by the following issues:

- a) Whether or not the learned magistrate erred in law and fact in making an award for loss of earning capacity using the multiplier approach;***
- b) Whether or not the legend magistrate erred in law and fact in making an award that was never sought for; and***
- c) Whether or not the appeal is merited?***

On whether or not the Learned Magistrate erred in law and fact in making an award for loss of earning capacity using the multiplier approach, the counsel contends that the injuries he sustained were corroborated by the testimony of **Dr. S.K. Ndegwa** and the medical report dated 23.07.2015 where he opined that the respondent herein had sustained 25% permanent disability as a result of the accident due to:

- a) *Deformity on the right hand;*
- b) *Chronic pains c) Impaired grip of the right hand;*
- c) *Cosmetic embarrassment due to the scars and deformity;*
- d) *Inability to do fine work with the right hand;*
- e) *Stiffness of the right index finger;*

It is asserted that the respondent herein was at all material times to the occurrence of the accident employed by the appellant herein as a machine operator and therefore it suffices to say that he was engaged in gainful employment. In support of his position, the counsel aligned himself with the Court of Appeal decision in **Mumias Sugar Company Limited -Vs- Francis Wanalo (2007) eKLR** cited in **John Kipkemboi & Another -Vs- Morris Kedolo [2019] eKLR** where the Honourable Court 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 the 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 the 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 the disability."*

The respondent also cited the case of **Butler -Vs. Butler** cited in **John Kipkemboi & Another -Vs- Morris Kedolo [2019] eKLR** where the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows

- a) *A person's loss of earning capacity occurs were 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 heads of loss of earning capacity and loss of future earnings, which in English law ere formerly included as an unspecified part of the award for pain, suffering and loss of amenity, 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 it 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 qualifications of the claimant: his remaining length of working life: his disabilities and previous service if any."*

Learned Counsel further contended that the award the Learned trial Magistrate on the loss of earning capacity is sound. He also invited the court to consider the authority in **Kemfro Africa Ltd T/A Meru Express & Another -Vs- A.M. Lubia & Another (No.2) (1987) Klr 30 Cited In Elizabeth Bosibori & Another -Vs- Damaris Moraa Nyamache [2017] eKLR** at page 8 where the Honourable court held:

*"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the Judge in assessing damages took into account a relevant 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 damages"*

The respondent also cited the authority in **Sofia Yusuf Kanyare -Vs- Ali Badi Sabre & Another Nairobi Hccc No.478 Of 2007 Cited In Elizabeth Bosibori & Another -Vs- Damaris Moraa Nyamache [2017] ECLR** at page 8-9 where the Honourable court listed the principles that the court must bear in mind when assessing damages. They include:

- a) *An award of damages is a matter of discretion on the part of the court that is seized of the matter.*
- b) *The award should not be high or low, the award is not meant to enrich the victim but to try as much as possible to restore him/her in the position they were before the accident.*
- c) *Award in past decisions are meant to be mere guidelines and each case should be mere guidelines.*

*d Where awards in past cases are taken into consideration their age rate of inflation, as well as the value and power of the Kenyan Shilling, should be taken into consideration.*

It is the respondent counsel submissions that the award arrived at by the Learned trial Magistrate is neither excessive nor based on wrong principles of law. The counsel banked his arguments on the fact that evidence confirmed the respondent was in gainful employment: both medical reports adduced in evidence by the parties confirm that the plaintiff indeed sustained permanent disability as a result of the accident and that the plaintiff was injured on his right hand and therefore being right-handed, he would be unable to fend for himself and his dependants like before. With that the respondent counsel vehemently opposed the appeal in its entirety.

### **Analysis and Determination**

I have carefully considered the case on appeal as encapsulated in the memorandum of appeal, the evidence on the record as well as the written submissions made by the respective Counsels which I shall refer to as necessary in the ensuing deliberations. In the instant appeal, the court is attired to answer whether the trial Magistrate erred in law and fact by failing to consider the evidence on record and consequently reaching an erroneous conclusion on the quantum of loss of earning capacity.

Having outlined the case at the Magistrate court as I am obliged to do. As a point of departure, I am inclined to restate the legal principle as regards the exercise of discretion by the superior court over jurisdiction of a subordinate court or inferior tribunal. **Sir Clement De Lestang, VP** was succinct in his summation in **Mbogo v Shah 1968 EA 93**, where he held as follows:

*"I think it is well-settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration and in doing so arrived at a wrong decision."*

As regards the question of damages, the court in the case of **Butt v Khan 1982-1988 1 KAR** pronounced itself as follows:

*"An appellate court will not disturb an award of damages unless if it is so inordinately high or low as to represent an entirely erroneous 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"*

This court in **P.J Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No.6 of 2017 (2018) eKLR** held as under:

*".....it is generally accepted from the laid down legal principles on the assessment of quantum that personal injuries are difficult to access with precision and accuracy so as to satisfy the claimant. The court's discretion has been left to individual judges to exercise judicious with respect to the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter."*

The appellant's bone of contention is that the approach adopted by the lower court in calculating the loss of earning capacity to the tune of Kshs.1,872,000/= using the multiplier approach was erroneous. The appellant contends that the award on the loss of earning capacity had not been sort for by the respondent.

The test to be applied in an award of damages under this head is as clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store CAppeal No. 5 of 1990, Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. This principle was earlier enunciated by non-other than **Lord Goddard CJ** in **Bonham Carter v Hydie Park Home Ltd 1948 64 TLR 177** where he stated thus:

*"Plaintiffs must understand that if they bring actions for damage, it is for them to prove damage, it is not enough to write down the particulars and, so to speak them then at the head of the court saying "This is what I have lost, I ask to give me these damages." There have to prove it sometimes it is impossible, though the justice of the case requires some award to be made or as **Holmeyd CJ** said in **Dantee v Jones 1961 IWL 1103, 1109 C** "arithmetic has failed to provide the answer which common sense demands." The England court in **Ashcroft v Curtin 1971 IWL 1103, 1109 C** on the plaintiff's loss of earning capacity as a result of the injury which reduced his chances of any work in the labourer market or work held that he was entitled to compensation for loss of earnings, capacity, which is awarded or real assessable loss proved by evidence, compensation for diminution of earning capacity is awarded as part of the general damages."*

Further guidance on the principles for assessing such damages was given by the Court of Appeal in **Moeliker v Rey Volelo & Co 1977 IWL 132** which stated that:

*"the question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own, where the plaintiff had not worked before the accident or in addition to another where the plaintiff was on employment when and as at the date of trial. The factors to be taken into account will vary with the circumstances of each case examples include age and qualifications of the plaintiff, his remaining length of working life, his disabilities, previous service if any and so on. Mathematical calculation may not be possible but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the Judge must do the best he can."*

In Kenya also a common law jurisdiction the principles to be observed on the assessment of damages for loss of earning capacity has been laid down none other than the Court of Appeal in the case of **Mumias Sugar Company Limited vs Francis Wanalo Kisumu Civil Appeal**

No. 91 of 2003 (2007) eKLR: where the Court expressed itself as follows:

*“From the above analysis of the English case law and the decision of this Court in Butler v Butler [1984] KLR 225, the following principles: among others, emerge. The award for loss of earning capacity can be made both when the plaintiff employed at the time of the trial and even when he is not so employed. The justification for the award when the 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 the case he loses the job, his diminution of chances of getting an alternative job in the labor 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”*

(See also SBI International Holdings v William Ambuga Ongeru 2018 eKLR,)

The appeal at hand is founded upon a personal injury claim envisaged on the following injuries sustained by the respondent:

- a) *Traumatic amputation of the index finger.*
- b) *Traumatic amputation of the middle finger.*
- c) *Traumatic amputation of the ring finger.*

The injuries above have been established to have caused the respondent a 25% permanent disability in the opinion of **Dr S.K. Ndegwa** in the medical report dated 23/07/15. A disparity was seen when the appellants submitted that the degree of incapacity according to the 2nd medical report by **Dr Udayan Sheth** was 10%. The Learned Magistrate guided by the authority cited by the appellant, **Simon Mutisya Kavii vs. Simon Kigutu Mwangi (2013) eKLR** was inclined to adopt 10% as the level of permanent disability as opposed to 25%. I have no reason to depart from this finding by the learned magistrate. Neither did the parties labour to raise questions as regards the degree of injury in the instant appeal. The Learned Magistrate went on to find that an award of Kshs.800,000/= would suffice as general damages for pain and suffering and the same is not in dispute herein.

I'm persuaded to restate a few principles as far as the award of damages is concerned. In the English Court in the case of **West (H) & Son Ltd v Shephard [1964] AC 345**, it stated as follows:

*“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”*

Similarly, the **Court in Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR** opined thus:

*“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well-settled principles to avoid disparity on similar cases and facts.”*

It is noteworthy that the appeal is on quantum as liability was by way of consent settled and apportioned at 15%:85% for the respondent. The only contention raised by the appellant is as regards the award of Kshs.1,872,000/= as loss of earning capacity. Learned Counsel for the appellant pointed out that the Learned trial magistrate did not make any distinction between loss of earning capacity and loss of earnings. It is argued that the Learned Magistrate's finding is not supported by any evidence as the respondent resumed work after the incident. The respondent further argued that there was no justification given by the Learned magistrate as to why the multiplier or global approach was adopted.

Learned Counsel for the appellant cited the Case of **Mumias Sugar Company Limited v Francis Wanalo (Supra)**, to advance the contention that there is no formula for assessing of earning capacity hence the judicial officer has to apply the correct principles and take the relevant factors into account so as to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of the disability. Learned Counsel for the appellant, therefore, argued that by adopting the multiplier approach the Learned Magistrate created an erroneous impression that the respondent is totally incapacitated. In the Learned Counsel's view, the global award was unreasonable.

On the other hand, the Learned Counsel for the respondent submitted that the award made by the Learned trial Magistrate on the loss of earning capacity is sound. Reliance has been placed on the case of **Mumias Sugar Company Limited v Francis Wanalo (Supra)** support the argument that when the plaintiff is employed at the trial and even when he is not so employed. It is also argued that the appellant herein has failed to adduced evidence justifying the Learned trial Magistrate court should have made a global award of Kshs.550,000/=. It is, therefore, the respondent's submission that the award of Kshs.1,872,000/= ought not to be disturbed.

The Learned Counsel for the appellant seems to suggest that the loss of earning capacity would only suffice if the appellant had been totally

incapacitated. In **Mumias Sugar Company Case (supra)** the court succinctly addressed this question when it propounded that the award of 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 hence the appellant's argument does not hold water.

The counsel Appellant also argued that the use of the multiplier approach by the Learned Magistrate was erroneous. Learned Counsel resorted once again to the 2007 case, **Mumias Sugar Company Case (supra)** which states that there is no formula for assessing loss of earning capacity and that the judge has to apply the correct principles and take the relevant factors into account to ascertain the real or approximate financial loss that the plaintiff has suffered a result of the disability. There has been a method evolved by the courts for assessing the loss of earning capacity. The court stated in **James Mukatui Mavia vs. M. A. Bayusuf & Sons Limited [2013] eKLR**

***“ The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065).”***

Given the foregoing authority, the appellant's position is clearly debunked. The Learned trial magistrate after having established according to the dosh1 form, he earned Kshs.7,800/= per month, him being 25 years at the time of the accident and that he could have worked for 25 more years, went on to adopt a multiplier of 20 years as opposed to 25 years. The loss of earning capacity was awarded at 1,872,000/=. I am not able to find the award to be inordinately high or low as to represent an entirely erroneous estimate. I agree with the learned magistrate's view that the lack of three phalanges is indeed incapacitating being that the plaintiff is right-handed, adopting the multiplier approach would be adequate as the chances of the plaintiff securing another job would be minimal if not none. Analogously, I find that the appellant appeal on damages for loss of earning capacity is not meritorious. I, therefore, find no reason to interfere with the Learned trial Magistrate's award of Kshs.1,872,000/=.

In the end, the appeal fails for lack of the merit. It is hereby dismissed with costs of the appeal to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1<sup>ST</sup> DAY OF OCTOBER 2020**

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Juaje for Mbuya for the respondent