



**Ambale v Mutinda (Civil Appeal E769 of 2022)
[2024] KEHC 9926 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E769 OF 2022

AC BETT, J

JULY 26, 2024

BETWEEN

SHIDA WILLIAM AMBALE APPELLANT

AND

JOSEPH MUTINDA RESPONDENT

JUDGMENT

1. This is an appeal on quantum only. The appellant urges the court to re-evaluate the evidence and declare that the general damages of kshs.500,000/= awarded to the appellant was inordinately low considering the injuries and permanent incapacity suffered.
2. The genesis of the appeal is a road traffic accident that occurred on 19th June 2017 involving motor vehicle registration number KTL 027 voxywagon. The appellant claims that on the said date, the respondent or his driver drove a defective motor vehicle negligently and carelessly without any regard for others that he permitted its tyre to come out and violently hit the appellant thereby causing him grave injuries.
2. Although the appellant denied the respondent's allegations of negligence on his part, the parties entered a consent judgement on liability in favor of the respondent against the appellant at the ratio of 80%:20%. The parties also agreed have the documents attached to the respondent's list of documents admitted in evidence without calling the makers. The parties also agreed to file submissions on quantum. Consequently, the respondent did not tender oral evidence in support of his case.
3. Upon considering the parties' written submissions and the admitted documents, the court delivered a judgement in which he rejected the respondent's claim for loss of earning for five months. He assessed general damages at kshs.500,000/= and special damages at kshs.5,000/=. Aggrieved by the award, the appellant filed this appeal.



4. In his appeal, the appellant faulted the trial magistrate for misdirecting herself and ignoring the principles applicable and relevant authorities on quantum cited in his written submissions. The appellant also faulted the trial magistrate for making a finding that the appellant did not plead loss of earning in his plaint. The other ground of appeal is that the trial magistrate erred and misdirected herself in failing to consider that comparable injuries ought to attract comparable awards, and finally, in failing to award interest to the appellant.
5. The duty of an appellate court in a first appeal is well established. It is to subject the whole evidence of the trial court to fresh scrutiny and re-evaluation in order to reach its own independent conclusion bearing in mind the fact that it did not see and hear the witnesses firsthand. See the case of *Selle -vs- Associated Motorboat Company Ltd* [1968] EA 123.
6. In the present case, neither of the parties adduced oral evidence. Instead, they recorded a consent on liability and left the court to rely on the appellant's pleadings, documents, and both parties' written submissions.
7. From the plaint, it is evident that the appellant was claiming general damages for pain, suffering and loss of amenities as a result of the injuries sustained after being hit by the tyre that came off the respondent's motor vehicle. The appellant also claimed damages for loss of earnings for five months on the basis that prior to the accident, he was a glass fixer earning kshs.30,000/= a month but as a result of his injuries, he was not able to work for five months and suffered loss of income. The appellant also claimed special damages in the sum of ksh.11,750/= for expenses particularized in the plaint.
8. Since the appellant did not adduce oral evidence, the trial magistrate relied on his documents for proof of his case. The appellant had, among other documents, produced handwritten notes from Nitzana Occ. Therapy and Sensory Integration Therapy who conducted physiotherapy on the appellant, and MRI report dated 22nd June 2017 from the German Medical Centre, a P-3 form, and a medical report from Dr. G.K. Mwaura, Physician, of Kinoo Medical Clinic.
9. Dr. G.K. Mwaura examined the appellant on 1st November 2018. He detailed the injuries suffered by the appellant as cut wounds to the scalp, blunt injury-left shoulder, injury to the left brachial plexus (nerves) of the left upper limb at the shoulder and weakness to the left upper limb. According to the doctor, the appellant suffered permanent incapacity assessed at 30% to the left upper limb and due to muscle wasting to the left shoulder, the appellant was unable to use his left upper limb.
10. Despite both parties being granted leave to file their written submissions, only the respondent's submissions were on record at the time of writing this judgement.
11. In his submissions, the respondent chose to address the three issues raised in the appeal: -
 - a. Whether the appellant proved the claim for loss of earning capacity.
 - b. Whether the trial court erred in its award of general damages.
 - c. Whether the appellant was entitled to interest.
12. The respondent submitted that no evidence was adduced during the trial to prove that the appellant had lost his earning capacity and that it was not enough for the appellant to produce medical reports showing that the appellant had suffered permanent incapacity. He relied on the case of *Nguku -vs- Kiria-ini Farm* [2022] KEHC 342 (KLR) where the court stated that:

“Equally, the Appellant was obligated to prove the alleged diminished future earning capacity. The Respondent denied all these claims in their amended defence statement. No evidence



was led by the Appellant in respect to these alleged losses and expenses. Confirmation of the Appellant's incapacitation during the recovery period in Dr. Karanja's medical report was not enough. He contended that the appellant failed to prove that he was earning ksh.30,000/= as alleged and therefore the trial court did not err."

13. With respect to the second issue, the respondent submitted that the award was commensurate to the injuries suffered by the appellant. The respondent made reference to the appellant's doctor's report dated 1st November 2018 and to the respondent's medical report dated 10th September 2021 showing that the appellant suffered permanent incapacity assessed at 10% as opposed to Dr. Mwaura's assessment of 30%. I note that the respondent did not produce their doctor's medical report and so, it should be ignored in the determination of this appeal. Nonetheless, the respondent contended that the appellant suffered soft tissue injuries only and so the award of ksh.500,000/= was adequate compensation.
14. The respondent relied on the case of *Lake Naivasha Growers -vs- Muigai Thuka* [2020] eKLR, and *Michael Okello -vs- Priscilla Atieno* [2021] eKLR where an award of ksh.250,000/= was given in both instances.
15. On whether the appellant was entitled to interest, the respondent referred to Section 26(1) of The *Civil Procedure Act* which states: -

"Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate, as the court deems reasonable to be paid on the principal sum adjudged for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate so adjudged from the date of the decree to the date of payments or to such earlier date as the court thinks."
16. On the basis of Section 26(1) of The *Civil Procedure Act*, the respondent submits that the awarding of interest is discretionary and since the appellant did not put forward anything to prove that the court exercised its discretion wrongfully, then the decision must be upheld. The respondent urges this court to dismiss the appeal.
17. Section 107(1) of The *Evidence Act*, Cap 80, Laws of Kenya provides: -

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove the facts."

The above is the legal burden of proof. However, Section 109 of the same Act provides for the evidential burden of proof as follows: -

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
18. Since the parties recorded a consent of liability and agreed that the appellant's documents be produced as evidence, the parties dispensed with the legal burden of proof of liability for the accident and the resultant injuries suffered by the appellant. This is because the medical report produced by the appellant was identical to a large extent with the pleadings. The trial court therefore relied on the medical report by Dr. G.K. Mwaura in assessing the general damages payable for pain, suffering and loss of amenities.



19. On the claim for loss of earning capacity, the trial court held that there could be no award under this head without sufficient proof. In his pleadings, the appellant made a case for loss of earning capacity. It was therefore incumbent upon him to lead evidence to prove that he suffered such incapacity as a result of the injuries sustained in the accident, as to render him incapable to work. Had the appellant chosen to take the witness stand, perhaps he would have adduced evidence to show that he was earning prior to the accident and to demonstrate his incapacity to earn subsequent thereto. In the case of *Mumbi M'nabea -vs- David M. Wachira* [2016] eKLR the court of appeal stated in regard to the standard of proof in civil liability: -

“In our jurisdiction, the standard of proof in civil liability claims is on a balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen.”

20. By opting to rely on the documentary evidence and submissions, the appellant overlooked the fact that in his statement of defence, the respondent had expressly denied the claim that the appellant lost earnings of ksh.30,000/= per month for five months. The appellant needed to take the stand, confirm his incapacitation, the length thereof, as well as his alleged monthly earnings. His failure to take the stand meant that he failed to discharge the burden of proof as required by Section 109 of The *Evidence Act*. In the case of *Daniel Torotich Arap Moi And Another -vs- Mwangi Stephen Murithi And Another* [2014] KLR, the Court of Appeal held: -

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in the submissions could not come to his aid. Such a cause 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 a better case. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

21. The appellant's claim was in the nature of special damages. Special damages must be strictly proven. In *David Bagine -vs- Martin Bundi* [1997] eKLR, the Court of Appeal had this to say:-

“It has been held time and again by this court that special damages must be pleaded and strictly proved.....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter -vs- Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it.”

22. In his pleadings, the respondent asked for loss of earnings for five months or loss of earning capacity. In his submissions, he chose to canvass the claim for loss of earnings but halfway through his submissions, chose to submit on a claim for loss future earnings for 15 years. The appellant's claim thus became convoluted. But even if it were not convoluted, oral evidence would still have been necessary to prove the claim by the appellant for loss of future earnings. It was imperative that the court be first convinced that the appellant's incapacity led to loss of earning capacity. I say so because the injury sustained by the appellant was to the left arm. The second, third and fourth particulars of injuries in effect all refer to injury to the left hand. No evidence was led that the appellant was left-handed and could no longer



engage in meaningful work. Grant it, he suffered great pain and weakness to the left upper limb. But there are many other people who suffer body pains and still engage in meaningful work.

23. It was the appellant's other ground of appeal that the general damages of ksh.500,000/= was inordinately low considering the injuries and permanent incapacity suffered. The appellant suffered injury to two areas of his body. He had cut wounds to the scalp, and nerve injury to his left upper limb that led to weakness of the said left upper limb. The appellant and the examining doctor were not called to testify to prove or clarify the injuries.
24. The treatment records and medical summary from Athi River Shelom Community Hospital were not produced. The trial court therefore depended on Dr. G.K. Mwaura's report. In *Sentogo And Another -vs- Uganda Railways Corp Kampala Hccs No.263 Of 1987*, Byagumisha J. Citing Tharkar on Evidence 12th Edition stated: -

“Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence who attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped, and they become incapable of expressing correct opinion.”

25. The observation by Byagumisha J. above is evident in the manner in which Dr. G.K. Mwaura wrote his medical report. I have searched my mind and I do not find much difference with the following sets of injuries:
- i. Blunt injury-left shoulder.
 - ii. Injury-left brachial plexus (nerves) of the left upper limb at the shoulder.
 - iii. Weakness-left upper limb.

In my opinion, all the above sets of descriptions refer to a blunt injury to the left upper limb resulting in nerve damage and weakness to the said left upper limb. So, in essence, the appellant suffered two sets of injuries only albeit with the injury to the left arm being more severe.

26. It is an established principle in general damages for personal injuries that comparable injuries ought to attract comparable awards. In *Charles Owino Odeyo -vs- Apollo Justus Andabwa And Another [2017] eKLR*, the Court of Appeal held: -
1. An award of damages is not meant to enrich a victim but to compensate such victims for the injuries sustained.
 2. The award should be commensurate with the injuries sustained.
 3. Previous awards for similar injuries sustained are a mere guide but each case must be treated of its own facts.
 4. Previous awards are to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
 5. The award should not be inordinately low or high.”
27. In considering whether to disturb the award by the trial court, I must be alive to the guiding principles of the Court of Appeal as well as the nature and extent of the injuries sustained by the appellant and the rendition in the *Butt -vs- Khan [1981] KLR 349* case.



28. I have agonized over the failure by the appellant to call testify or call witnesses. As a result, there was no basis laid to justify the doctor's assessment of 30% permanent incapacity to the left upper limb for a patient who suffered soft tissue injuries and nerve damage. In the absence of submissions by the appellants, I have resorted to the submissions he made to the trial court and the authorities referred to therein. In the lower court, he appellant asked for an award of ksh.1,500,000/= and based his submissions on the following authorities – Judy Ngochi -vs- Kamakia Ele Selelo Ledamoi [2019] eKLR and Joseph Kimathi Nzau -vs- Johnson Macharia [2019] eKLR. In the latter case, the respondent suffered head injuries due to fracture of the skull bone, tenderness of severe degree in the right chest anteriorly, fractures of the 1st and 2nd ribs and fracture of the clavicle bone. He also had hematoma of the scalp and of the right chest. The award was ksh.800,000/=. In the Judy Ngochi case (supra), the respondent suffered blunt injury to the right arm, fracture right humerus, blunt injury left shoulder, fracture left clavicle, chip fracture of the right acromion and lacerations to the little finger. The injuries necessitated implants to the left clavicle and right humerus. An award of ksh.1,500,000/= in general damages was made.
29. The injuries in the foregoing cases cannot be said to be similar in nature and extent to the injuries suffered by the appellant herein. They cannot therefore attract a similar sum in general damages as the injuries are much more severe, involving multiple fractures.
30. The trial court relied on Elizabeth Wangui Njiru -vs- David Mwangi Ngugi And Another [2020] eKLR, a 2020 decision where the appellant had suffered a degloving injury with tender involvement on the right upper limb, an injury of the right ring and small fingers and injuries in the right upper limb which resulted in a healed scar on the right upper limb, a stiff right wrist joint as well as a stiff right finger. The scar was said to have affected the appellant's beauty as a woman and the court found that she lost functionality to the right hand with permanent incapacity of 45%. There was on and off numbness due to nerve involvement and the appellant was awarded ksh.500,000/=.
31. It is my finding that the injuries sustained by the appellant in the Elizabeth Wangui Njiru (supra) case were closer in similarity to the injuries sustained by the appellant herein but more severe. In his discretion, the trial magistrate took the foretasted into account, the age of the authority and the injuries sustained by the appellant herein in making the award of ksh.500,000/=.
32. The guiding principles in the award of damages is that whereas no two injuries are alike, comparable injuries should, as far as possible be compensated by comparable awards upon taking consideration the age of the comparable awards and the inflationary trends prevailing in the country. I find that the trial magistrate neither misdirected herself nor ignored the principles applicable and relevant authorities on quantum cited in the appellant's written submissions.
33. Turning now to the issue of interest, the respondent, citing Section 26 of The *Civil Procedure Act*, submitted that it is discretionary. That is not the correct position. The award of interest is not discretionary. As couched, Section 26, empowers the court with the discretion to decide the period from which interest should start or continue accruing and at what rate. However, it is well settled that payment of interest on general damages should run from the date of judgement. See Shariff Salim And Another -vs- Malundu Kikava [1989] eKLR and Prema Lata -vs- Peter Musa Mbiyu [1965] EA 592 where the Court of Appeal held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and the date of judgement. The trial magistrate



therefore ought to have awarded interest as provided by the law. In making this determination, I am guided by Section 26(2) of the *Civil Procedure Act* which provides that:-

“Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum.”

The trial magistrate therefore erred in failing to expressly provide for interest.

34. For all the above reasons, I find that the appeal lacks merit on all other grounds save for the one on interest. The appeal is hereby dismissed with costs. However, the respondent shall pay the appellant interest at court rates on special damages from the date of filing till date of payment, and on general damages and costs from the date of judgement till date of payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF JULY, 2024.

A. C. BETT

JUDGE

In the presence of:

..... for the appellant

..... for the respondent

Court Assistant: Polycap Mukabwa

