



**Kyoga Hauliers Kenya Ltd v YAJ (Minor suing thro' his father and friend) JM
(Civil Appeal E007 of 2023) [2024] KEHC 9918 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E007 OF 2023**

DK KEMEL, J

JULY 26, 2024

BETWEEN

KYOGA HAULIERS KENYA LTD APPELLANT

AND

YAJ (MINOR SUING THRO' HIS FATHER AND FRIEND) JM ... RESPONDENT

*(Being an Appeal from the judgment of Hon C.A.S Mutai (SPM) in
Bungoma CMCC No. 180 of 2021 delivered on 3rd February, 2023)*

JUDGMENT

1. The appeal herein springs from the judgment of the trial court delivered on 3rd February, 2023 wherein the learned trial magistrate entered judgment in favour of the Respondent herein in terms of 100% liability against the Appellant and awarded the sum of 10,343,000/- in form of general and special damages. The Respondent was also awarded costs and interest of the suit.
2. The evidence adduced before the trial court was through the testimony of PW-1, JM who stated that the minor herein is his child who was then aged five years. That the minor was involved in an accident on 26th April, 2021 after which he was taken to Bungoma County referral Hospital and Reale Hospital Eldoret before a medical report was done by Dr. Sokobe and Dr. Gaya. He stated that he had to employ someone to take care of the minor regarding his toilet requirements. That the minor was initially on a wheel chair but now uses crutches.
3. PW-2 Christopher Luseka Musila stated that on the 26th April, 2024, he was on the road walking when he witnessed the accident herein involving truck registration number KBW 943E/ZE 4169 and a motorcycle which was carrying an expectant lady and a child. That both the truck and the motorcycle were heading in the same direction with heavy traffic on the road at the time.
4. That the accident happened when the truck driver overtook the motorcycle and immediately the cabin had bypassed the motorcycle, the driver swerved to its lane to avoid a collusion with an oncoming



vehicle. That as a result, the motorcycle was knocked down and the pillion passengers thrown off the road and that the rear wheels of the trailer ran over the lady and the minor herein. That the truck stopped about sixty metres from the point of impact whereas he was about twenty metres from the scene. According to him, the truck driver was to blame for the accident.

5. DW-1 was Kiribari Bashir who stated that he was driving the subject truck heading to Eldoret when at Bukembe area and while at a speed of 50 Kph, a motorist suddenly crossed the road from the right-hand side. That he tried applying emergency brakes in vain and rammed it on the front part of his motor vehicle.
6. After considering the evidence as above-stated, the trial magistrate ordered as follows;
 - a. Liability 100%
 - b. Pain and suffering 2,500,000/-
 - c. Loss of earning capacity 3,800,000/-
 - d. domestic worker 2,000,000/-
 - e. costs of artificial limb 2,000,000/-
 - f. special damages 43,000/-
7. The appellant being aggrieved by the award lodged the instant appeal raising the following grounds;
 - a. The learned trial magistrate erred by holding the appellant 100% liable in negligence in view of the evidence adduced.
 - b. The learned trial magistrate erred in adopting the wrong principles in assessment of the damages payable to the respondent.
 - c. The learned trial magistrate erred by failing to consider the appellant's submissions on the issue of quantum while assessing damages payable to the respondent.
 - d. The learned trial magistrate erred by awarding damages which were excessive in the circumstances in view of the injuries sustained by the respondent.
 - e. The learned trial magistrate erred by awarding the respondent Kshs 2,500,000 as general damages for an amputation above the knee which is inordinately high.
 - f. The learned trial magistrate erred by awarding the respondent Kshs 3,800,000 for loss of earning capacity failing to consider that the minor's future prospects are unknown and the award is inordinately high.
 - g. The learned trial magistrate by awarding the respondent Kshs 2,000,000/- for domestic worker which is speculative and there is no basis for the award in view of the evidence adduced.
 - h. The learned trial magistrate erred by awarding the respondent Kshs 2,000,000/- for cost of artificial limb when no evidence supported the same.
8. By directions of the court, the appeal was disposed of by way of written submissions. Both parties duly complied.
9. On the issue of liability, the appellant submits that the evidence presented by both the eye witness and the driver were contradictory yet the trial magistrate chose to accept the Respondent's testimony. That the police officer's testimony was hearsay as the said officer was not the investigating officer. That



the police abstract did not list the eye witness as a witness and that the trial magistrate therefore failed to make a concise analysis of the evidence. The decisions in Kennedy Nyangoya V Bash Hauliers Ltd (2016) eKLR and Mkube V Nyamuro (1983) eKLR have been cited.

10. On the issue of award of damages, the appellant submits that the award of Kshs 2,500,000/- in general damages is inordinately high as the trial magistrate failed to consider the relevant authorities thus adopting a wrong approach. The authority in Silvanus Ondiek Ochola V Delta Haulage services & Another (2009) eKLR and Salome Wakarindi Wachira V Siginon Freight Ltd & 3 Others (2007) eKLR have been cited in support of the proposition that the respondent was only entitled to an award of Kshs 800,000-Kshs1,200,000/-.
11. On the issue of loss of earning capacity, the appellant argues that the award of Kshs 3, 800, 000/- was speculative in that loss of income is awardable as general damages where the award is proved on a balance of probability. That since the deceased was aged five years, there was no evidence of prospective earnings as it was not established that the minor was school-going. The decisions in Joseph Nyaboke Nyanchari V Stanley Nyabuto (2021) eKLR and CM (minor suing through mother and next friend MN) V Joseph Mwangangi Maina (2018) eKLR have been cited in support of the proposition that a sum of Kshs 500,000/- to Kshs 900,000/- is sufficient.
12. On the issue of the award for artificial limb, the appellant submits that the award of Kshs 2,000,000/- is erroneous since the report by Dr. Sokobe fixed the price of acquiring a prosthesis at kshs 2,000,000/- while Dr Gaya indicated a sum of Kshs 50,000/-. That the award failed to consider the age of a minor who would require a final prosthesis at 19 years. That the trial magistrate did not take into consideration the 2nd medical report by Dr. Gaya.
13. For the respondent, it is submitted that the appellant ought to be held 100% liable for failing to keep safe distance from the motorcycle where the minor and her deceased mother were pillion passengers. That the accident occurred when the truck driver tried to overtake the motorcycle and quickly swerved to its lane to avoid a collision.
14. On the award of Kshs 2,500,000/-, it is argued that the reports by Dr Sokobe and Dr. Gaya assessed permanent disability at 60% and 70% respectively showing that the minor suffered extensive injuries. The authority in Crown Bus Services ltd & 2 Othere V BM(minor suing through his mother and next friend SMA) (202) eKLR, Abdi Werdi Abdulahi V James Royo Mungatia (2019) eKLR and Ernest Mbasu & another V Issa Wanga Swaka- Bungoma Civil Appeal No. E061 of 2022.
15. On the head of loss of earning capacity, it is urged that the minor was five years at the time of accident meaning his earning capacity had been hampered for several years to come and that his chances of engaging in meaningful employment diminished. The decision in Mumias Sugar Co. Ltd V Francis Wanalo (2007) eKLR has been cited.
16. On the award under future medical expenses, the respondent submits that the minor was aged only five years and therefore could need several replacements as he outgrows them as opined by Dr. Gaya. That the appellants did not give a contrary price.
17. On the issue of domestic worker, it is asserted that since the minor suffered 70% disability, he will not be able to carry out normal as he used before and therefore needs a domestic worker to help him through. That under Legal Notice No. 2 of 2018, a domestic worker earns approximately Kshs 7,240.95 and which is applicable in the circumstances.
18. On whether the trial magistrate applied the correct principles in reaching his decision, the Respondent argues that according to the decisions in Millicent Atieno V Katola Richard (2015) eKLR, the trial magistrate applied the correct principles in making the awards.



Analysis and determination

19. The duty of this court sitting as a first appellate court was stated in *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) thus;

A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

20. The issues raised by this appeal revolve around liability for the accident and quantum to be made in the circumstances. This being a court of first appeal, I am called upon as of duty to peruse the record and satisfy that the findings by the trial court were supported by evidence and the relevant legal principles on the subject.
21. On the issue of liability, PW-2 Christopher Luseka Musila who allegedly witnessed the accident narrated to court how the accident occurred. The sum of his evidence in that court was that the truck and the motorcycle were travelling in the same direction facing Webuye general direction from Kanduyi near Salmond area. He narrated that the truck was trailing the motorcycle and that the truck tried to overtake the motorcycle but due to an oncoming vehicle, the truck driver swerved to the left after the cabin had successfully bypassed the motorcycle. His testimony was that as a result thereof, the motorcycle was knocked down and that the truck overran the minor and her mother who passed on.
22. Jackline Were, a police officer attached to Bungoma Police station testified confirming the occurrence of the accident as the investigating officer had been transferred.
23. The other evidence was by the Appellant's driver who stated that the accident occurred when the rider suddenly came onto his lane from the right-hand side. That he tried applying emergency brakes in vain and rammed on the front part of his motor vehicle.
24. I have also considered submissions and the authorities cited herein. It is not in dispute that a party alleging bears the burden of proving as per the dictates in Section 107-109 of the *Evidence Act* Cap 80. I get guidance from the decision by Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 where the learned judge (as he then was) stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

25. Similarly, the court in *TREADSETTERS TYRES LTD –VS- JOHN WEKESA WEPUKHULU* [2010] eKLR where Ibrahim J (as he then was) allowed an appeal and quoted Charlesworth & Percy on Negligence, 9th Edition at P. 387 on the question of proof, and burden thereof where it is stated:-

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called



on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise,

- (1) whether on that evidence, negligence may be reasonably inferred and
- (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

26. The trial magistrate on the issue of liability held that the minor was five years old and a pillion passenger and could not therefore contribute to the occurrence of the accident at that tender age.
27. I have considered the above decisions and I am persuaded that the appellant is wholly to blame for the accident for the reason that according to the eye witness, the truck and the motorcycle were heading in the same direction and that the truck was trailing the motorcycle. I find the accident occurred when the truck driver tried to overtake and on seeing an oncoming car, swerved to the left lane knocking down the motorcycle hence the accident.
28. I have perused through the driver’s evidence and find the same not truthful. His account of the exact place of the accident is not truthful. The speed at which he alleged to have been driving at could not have caused such an impact. He must have been over speeding and failed adhere to the Highway Code of traffic and that he had no regard for other road users. Had he driven at a low speed, the accident could have been avoided. The minor was a pillion passenger and thus had no control over motorcycle or the Appellant’s truck. It is noted that the Appellant did not rope in the motorcyclist as a third party for purposes of contribution and indemnity. In the circumstances, i find that the trial magistrate correctly held the appellant 100% to blame.
29. On the issue of quantum, the general principles for the award of damages were stated in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*:

“It is trite law that 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 awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor 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 erroneous estimate.”
30. With the above in mind, i set down to analyze the quantum as awarded in the trial court. I propose to start with the head under general damages for pain and suffering. The minor herein sustained serious injuries leading to amputation of the leg above the knee. The medical reports prepared by Dr. Sokobe and Dr. Gaya both show the extent of injuries sustained. The permanent disability according to Dr. Sokobe is 60% and 70% according to Dr. Gaya. I have also considered the proposals given by the parties.
31. Going by the precedent for instance in *Koru Holy Family Mission Hospital v Koech (Civil Appeal E003 of 2021)* [2022] KEHC 3082 (KLR) (17 June 2022) (Judgment) where Kshs 2,200,000/- was awarded under this head where permanent disability was assessed at 70%. The respondent had undergone amputation at the knee.
32. In the instant case, i find the award of kshs 2,500,000/- reasonable in light of the injuries sustained, the age of the minor, the pain accompanying the injuries, the period spent in hospital and generally the fact that the minor will have to live with the scar for the rest of his life. Having considered the authorities



cited by the appellant, i find the same inapplicable for the reason that they were decided long time ago and do not represent the trend of decided cases.

33. The next award is that of Kshs 3,800,000/- for loss of earning capacity. In arriving at this award, the trial magistrate considered the decision in John Kipkemboi & Another V Morris Kedero, Kakamega HCA 88 of 2017 and Bungoma HCA E002 of 2020 Amadalo Maurice Musasia V Peter Kirui Ndaina where Kshs 1,500,000/- and 3,730,000/- were awarded respectively. In the trial court, the appellant had proposed Kshs 100,000/- while the Respondent proposed Kshs 5,000,000/-.
34. The justification for the award was stated in Mumias Sugar Company Limited –Vs- Francis Wanalo (2007) eKLR where the basis of an award for loss of earning capacity was stated as follows:-

“...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.”
35. The minor herein was aged five years at the time of the accident and definitely not employed. There is however the fact that he may not be able to undertake meaningful and strenuous activities due to the disability and therefore his ability to earn income most likely diminished due to the accident.
36. I have examined the trend of decided cases particularly CM (a minor suing through mother and next friend) MN –Vs- Joseph Mwangi Maina (supra), the court increased an award of Kshs. 500,000/= to Kshs. 900,000/= for loss of earning capacity to a minor aged seven years whose leg was amputated leading to 40% permanent disability.
37. In Joseph Wang’ethe v Ew [2019] eKLR, the Court of Appeal confirmed an award by the High Court by Aburili J of Kshs Ksh.2,628,960/- for diminished/loss of earning capacity for a minor who was aged five years at the time of accident and suffered 70 % permanent disability.
38. Going by the above decisions, i do find that the trial court’s award was on the higher side considering the fact of the minor’s age and that the future is uncertain. I find that an award of Kshs 2,500,000/- sufficient in the circumstances.
39. The next award is that of domestic worker. There is no doubt the minor will not be able to perform his household chores and would need a helper. The doctor confirmed that he now uses crutches.
40. The trial court in arriving at the award considered the provisions of the Minimum Wages Legal Notice No. 2 of 2018 and awarded a global sum of Kshs 2,500,000/- basing on the provision that a domestic worker earns Kshs 7, 240.95. the appellant on its part made no submissions on the issue in the trial court.
41. This award is normally granted where evidence is adduced to show that the victim of a tort will need to engage the services of a house help to perform his household chores. In this case, the Appellant made



no representation on the issue in the trial court and only raised it on appeal despite the same having been pleaded at paragraph 8 of the plaint.

42. Had the same been raised by the Appellant, the trial court could have definitely addressed it. I therefore find that in the circumstances of the case, the nature of the injuries sustained, the age of the minor and the fact that the disability would live with him for the rest of his life, i find the award merited and hereby confirm it.
43. The trial magistrate also awarded costs for prosthesis in the sum of kshs 2,000,000/-. The two doctors who authored the reports agree that the minor would need the same periodically as he grows and that the final one at the age of 19 when he would have stopped growing. Dr. Sokobe opined that Kshs 2,000,000/- would be sufficient though Dr Gaya opined that the present prosthesis was acquired for Kshs 50,000/ but he didn't fix a sum though.
44. The appellant in this appeal argues that the trial magistrate failed to consider the 2nd medical report.
45. I have considered the authority in Tracom Limited & Another –vs-Hasssan Mohamed Adan [2009] eKLR stated:
- “...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it.....”
46. Having perused the pleadings and the evidence on record, i find that despite finding that the minor would need prosthesis periodically, the 2nd medical report did not capture the probable price of acquiring one leaving the evidence of Dr. Sokobe unchallenged. The appellant ought to have tabled evidence showing a contrary price for the court to make a choice from.
47. In the end, i find the award on this head proper and within limits.
48. For the above reasons, i find the appeal partially successful only on the limb under loss of earning capacity which is hereby set aside and substituted therewith a sum of Kshs 2, 500,000/-. All the other amounts shall remain undisturbed. The Respondent will have judgement made up as follows:
- a. Liability against the Appellant.....100%
 - b. Pain and suffering.....Kshs 2, 500, 000/
 - c. Loss of earning capacity..... Kshs 2, 500, 000/
 - d. Domestic worker.....Kshs 2, 000, 000/
 - e. Cost of artificial limb.....Kshs 2, 000, 000/
 - f. Special damages..... Kshs 43,000/
- Grand Total.....Kshs 9,043,000/

The appellant is awarded 1/3 costs of the appeal while the Respondent will have full costs in the lower court.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY

OF JULY 2024

D.KEMEI

JUDGE



In the presence of :

.....for Appellant

.....for Respondent

.....Court Assistant

