



REPUBLIC OF KENYA



KENYA LAW
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**Kinyumu v Mutwiwa & another (Civil Appeal E087 of 2021)
[2024] KEHC 17205 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E087 OF 2021
TM MATHEKA, J
AUGUST 20, 2024**

BETWEEN

KALONDU KINYUMU APPELLANT

AND

WILSON NDOLO MUTWIWA 1ST RESPONDENT

KILONZO KINJA 2ND RESPONDENT

JUDGMENT

1. On 19/11/2021, the learned trial court in Kilungu PMCC No. 119 of 2019 delivered a judgment making the following award:-
Liability - 100% against the defendant General damages - 2,300,000
Special damages - 113,850
2. Aggrieved, the plaintiff/appellant brought this appeal on the grounds that the learned trial magistrate erred in awarding general damage of Kshs. 2,300,000 which were so inordinately low considering the injuries sustained by the plaintiff/appellant and the award of permanent disability at 60% that the court erred in failing to award future medical expenses and expenses for artificial prosthesis, and for diminished earning capacity, that the court erred in finding that the appellant had not pleaded for loss of earning capacity, and for failing to consider the appellant, submissions and authorities.
3. The appellant seeks from this - that the appeal be allowed, that the court re-assess the awards in light of the severity of the injuries, time lapse and inflation, and make an award for future medical costs, cost of artificial prosthesis, loss of earning capacity diminished capacity and award the appellant costs of the appeal.
4. To support her appeal counsel for the appellant Gesare Oginda & Co filed written submissions in which he summed the fact of the case, that the appellant was a fare paying passenger in motor vehicle



registration no KBW 193 belonging to the 1st defendant and driven by the 2nd defendant respondent - and the same was involved in an road traffic accident on 27/4/2017. The appellant sustained injuries as evidenced by the report by Dr. Wokabi dated 23/7/2019 indicating the following injuries;

- i. Severe crush injuries to the left leg leading to amputation at the level below the knee.
 - ii. Lacerations of the face & tongue
 - iii. Blunt soft tissue injuries of the chest & back & elbow
5. The injuries were classified as grievous harm, 60% per permanent disability.
 6. Counsel submitted that they submitted for the award of Kshs. 3,000,000 general damage before the trial court on account of the severity of the injury .
 7. It was submitted that the authorities submitted in the lower court for similar injuries were for awards above Kshs. 2,500,000. That the court was bound to make comparable award for comparable injuries as was stated in *Odinga Jackson Ouma vs Maureen Achieng Odera* [2016] eKLR; that the court did not consider the 60% disability award, inflation, passage of time e.t.c as was stated in *Nyambati Nyaswabu Eric vs Toyota Kenya Ltd & 2 others*[2019] eKLR.
 8. On the principles to be considered in a claim for loss of earning capacity the appellant relied on *Butler v Butler* [1984] eKLR and that even without documentary evidence the trial court could have awarded a global sum/used the measure of the wage of a general laborer; see *Nelson Ritari vs CMC Group Ltd* [2015] eKLR and *Jacob Ayiga Maruja & Another vs Simeon Obayo* [2005] eKLR among other cited authorities.
 9. This court was urged to make a reasonable award on loss of earnings.
 10. For respondent the firm of *Kimondo Gachoka & Co.* filed submission and submitted that the only issue for determination on the appeal was quantum.
 11. It is submitted the respondent was relying on the submissions made before the lower court; and that the appellant did not plead or prove on the cost of the artificial prosthesis and replacement , or loss of earning capacity in her plaint, and that the trial court was correct in refusing the awards .
 12. It is submitted that parties are bound by their pleadings and this position is settled as can be gleaned from numerous authorities, the Court of Appeal in *IEBC & Anor Vs Stephen Mutinda Mule & 3 others* [2014] eKLR *Daniel Otieno Migore Vs Sony Sugar Co. Ltd* [2018] eKLR & *Raila Amolo Odinga & Anor Vs IEBC & 2 others* [2017] eKLR.
 13. On the award made by the subordinate court, this court was reminded of the settled position that an appellate court will be slow to interfere with the exercise of discretion by the trial court – the principles are laid out in *Ann Kanja Kithinji* (Suing as the legal representative of the estate of Patrick Koome(deceased) citing *Kemfro Africa Ltd t/a Meru Express Service vs AMM Lubia & Anor* (1982-1988) I KAR 777.
 14. It is the respondent’s position that the award was inordinately high and ought to be reviewed downwards.
 15. To support this position the respondent cited 2 case which involved the amputation of the leg and awards of Ksh 1,300,000 & Kshs. 1,500,000 was made; these are quoted in *Monyoro Mong’are Shem & Another vs Timothy Mogaka Nyagaka* [2021] eKLR and *Kukawa Industries Ltd Vs Dama Kiti & Anor* [2017]eKLR the court awarded Kshs. 2,000,000 for similar injuries in this case



16. Also Charles Kiplang'at Koech V Benard Ngeitch [2021] eKLR where an award of Kshs. 1,800,000 was made for an injury that involved amputation of the leg.
17. This court is urged to review the award to Kshs. 1,500,000 dismiss the appeal with costs to the respondent.
18. From the submissions the only issue for determination is whether this court has any ground to disturb the award by the subordinate court.
19. I begin with the pleadings - The Plaintiff's claim was brought before the subordinate court via a plaint dated 2/9/2019 at para 7 it is pleaded that the plaintiff sustained the following injuries - severe crash injuries with amputation of the left leg below the knee, multiple fractures of the foot metatarsals, lacerations of the tongue and face, blunt soft tissue injuries of the chest, back, left elbow.
20. She pleaded that she required the use of an artificial leg which would cost Kshs. 250,000 and would last for 5 years. She sought the cost of an artificial leg over the years.
21. She also pleaded that she was unable to work - and claimed damages for loss of earning capacity or diminished earning capacity - that she was a business lady who earned Kshs. 5,000 per day at 105,000 pm, had not earned from April 2017 - to August 2019 - she sought damages as she would have worked up to 70 years (she was 46 at the time of the accident).
22. She sought judgment against the defendant's inter alia for pain suffering and loss of amenities, cost of artificial limb over the years, loss of earnings, before, after trial, before and after judgment; diminished/ loss of earning capacity.
23. The plaint was accompanied by a witness statement, the medical report, which indicated that she would require a "versatile prosthesis" at Kshs. 250,000 to be changed every 5 years.
24. In the defence dated 13/11/2019 the defendants denied the claims and put the plaintiff to strict proof thereof.
25. The matter was heard orally. The plaintiff testified - produced her documents, the medical report was produced by consent, and the defendant did not call any evidence .
26. The plaintiff submitted for general damage at Kshs. 3,000,000 citing cases the most recent being John Kipkemboi & Anor Vs Morris Kedolo [2019] eKLR where the sum of Kshs. 2,500,000 was awarded for similar injuries.
27. The defendant submitted on the medical report - that the plaintiff chose not to call the doctor, that the doctor did not produce any quotation to prove the alleged Kshs. 250,000 for the prosthesis.
28. On general damage they submit on Kshs. 1,000,000 relying on Charles Oriwo Odeyo vs Apollo Justus Andabwa & Another [2017 eKLR, Boniface Waiti & Anor vs Michael Kariuki Kamau [2007] eKLR where the judge awarded Kshs. 800,000 for Kshs. 450,000 for an amputation below the knee.
29. On future medical expenses it was submitted that there was no justification for the amount submitted - citing Wambaira & 17 others vs Kigora & 2 others [2004]eKLR; Kigaraari vs Aya (1982 - 1988) I KAR 768 - to the effect that damages must be within limits set by precedents; Cecilia Mwangi & Anor vs Ruth Mwangi Civil Appeal no. 251/1996 – to the effect that money cannot renew a battered, shattered physical frame and judges can only make what are regarded as reasonable compensation.



30. On loss of earning capacity it is submitted that the claim at Kshs. 5,000 pm was not proved - and that the damages on that head was awarded as part of general damages - see Henry Moriasi Osiemo vs Quid J Mohammed & Merrali Mfadhuli [2001] eKLR .
31. Let us turn to the lower court judgment. With respect to the artificial prosthesis - the learned trial court held that the appellant had not pleaded the same. The court said “if the same had been pleaded by the plaintiff and taking a look at the medical report, the same was deserved if the plaintiff had pleaded for the same I would have awarded Kshs. 750,000.”
32. I note that the same was pleaded, the sum of Kshs. 250,000 was pleaded at para 7 of the plaint, and there is prayer for cost of artificial limb. I do not know why the trial court stated it was not pleaded - it was pleaded, the medical report that made the proposition was not challenged and was produced by consent. There is no dispute that she sustained serious injuries, no dispute that the leg was amputated and she would need a prosthesis limb, I find that the same was pleaded, the same was proved and award the sum of Kshs. 500,000 for the same .
33. Regarding loss/diminished earning capacity - the plaintiff pleaded Kshs. 5,000 incomes per day but produced no evidence of the same. The trial court was right to find that the plaintiff had not proved the claim as alleged. The submission that the court could have applied the global sum award is not tenable. It is the plaintiff who pleaded that she was making Kshs. 5,000 per day, Kshs. 105,000 pm - she had the duty to prove that claim even on a balance of probability. She did not do so. There was no error in the finding by the lower court.
34. On issue of General Damages - the trial court assessed the general damages as per the cited authorities and arrived at Kshs. 2,300,000. This in in my view was a reasonable exercise of discretion of the trial court.
35. Hence in the circumstances it is my finding that liability was not in issue and remains 100%
36. The appeal succeeds in part and the Judgment of the subordinate court is set aside and substituted by the following award:

General damages: up held at Kshs. 2,300,000

Artificial limb at Kshs. 500,000

Special damages - upheld at Ksh 113,850 Total - Kshs. 2,300,000

Kshs. 500,000

Kshs. 113,850

Kshs. 2,913,850

The appellant will have costs and interest - from the date of the judgment in subordinate court.

DATED, SIGNED AND DELIVERED VIS CTS ON 20TH AUGUST 2024 MUMBUA T MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT



HIGH COURT DIV

DATE: 2024-08-20 20:12:32

