



**Ndolo v Elacy General Traders Limited (Civil Appeal E685 of 2021)  
[2024] KEHC 16773 (KLR) (Civ) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16773 (KLR)

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

**CIVIL**

**CIVIL APPEAL E685 OF 2021**

**NIO ADAGI, J**

**AUGUST 16, 2024**

**BETWEEN**

**DANIEL KIOKO NDOLO ..... APPELLANT**

**AND**

**ELACY GENERAL TRADERS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. M. Murage (SRM)  
in Milimani CMCC. No. E285 of 2019 delivered on 18/05/2022)*

**JUDGMENT**

1. The Appellant in the Memorandum of appeal dated 21/10/2021 has raised 6 grounds of appeal which basically challenge the judgment of the trial court on quantum.
2. I will therefore not delve into the issue of liability which the Appellant seem not to be challenging.
3. This being a first appeal, I am reminded of the primary role as a first appellate court namely, 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. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424
4. In the case of *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), the court held that:-

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court.  
A first appeal is a valuable right of the parties and unless restricted by law, the whole case



is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

5. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
6. The Appellant's case is that he was involved in a Road Traffic Accident on 31/8/2016 while carefully walking along Ladhies near OTC Bus Station, Nairobi, when the Defendant's authorized driver, servant and/or agent so negligently drove, managed and/or controlled motor vehicle registration No. KCB 337B that he violently knocked down the Appellant who has suffered serious injuries, great loss and damage.
7. The Appellant sued the Respondent for damages sustained during the accident. The Respondent denied the Appellant's claim and averred that any such occurrence as the Appellant may prove was caused solely or substantially contributed to by the Appellant's own negligence.
8. The Trial Court found the Respondent 100% liable and awarded the Appellant damages as follows: -
  - a. General damages for pain & suffering & loss of amenities.....Ksh.1,500,000/=
  - b. Future Medical Expenses.....Ksh. 185,000/=
  - c. Special damages..... Ksh. 2,550/=Total Ksh.1,687,550/= plus costs and interest
9. The Appellant being dissatisfied with the judgment of the trial court has now appealed to this court basically challenging the awarded damages particularly the general damages for pain & suffering & loss of amenities which it considers to be so low as to be erroneous vis a vis the injuries sustained by the Appellant and for the failure by the trial court to award damages for reduced earning capacity.
10. I have considered the grounds of appeal, the pleadings in the lower court, the evidence adduced before the trial court, the written submissions filed by counsel for the Appellant in the absence of the Respondent's submissions and the authorities cited.
11. Two major issues that stand out for consideration in this appeal are:
  - i. Whether the general damages were so low as to be erroneous vis a vis the injuries sustained by the Appellant
  - ii. Whether the trial court erred in law and in fact in failing to award damages for reduced earning capacity.



**i. Whether the general damages were so low as to be erroneous vis a vis the injuries sustained by the Appellant;**

12. The Appellant submitted that the Learned Trial Magistrate misdirected herself and erred in law and in fact by awarding general damages for pain and suffering that are so low as to be erroneous vis a vis the injuries sustained by the Appellant.
13. For an Appellate Court to interfere with an award of damages, it must be shown that the trial court in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that the wrong principle of law was applied.
14. The Appellant has cited the case of Butt vs. Khan {1981} KLR 349 relating to assessment of general damages on appeal.
15. In the case of Maraga V Musila (1984) 1 KLR 251, where the Court of Appeal when addressing its mind to this issue expressed itself thus;

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.
16. As per the medical report by Dr. W.M. Wokabi, the Appellant is said to have sustained the following injuries.
  - 1) Compound (open) fractures of left tibia;
  - 2) Compound (open) fracture of left fibula;
  - 3) Compound (open) fracture of talus bone
  - 4) Extensive skin loss on the lower part of the left leg
17. On treatment various surgical procedures were carried out. They involved the excision of lower tibia and fibula and removal of the talus bone. A false joint between the lower tibia and upper part of heel bone was created. When he was being examined on 7/3/2018 (2 years from date of accident) the Appellant was limping profoundly.
18. In the opinion of Dr. W.M. Wokabi the Appellant suffered a lot of pain from the major injuries that he sustained.

He also suffered a lot of pain after the major surgical procedures that the Appellant underwent.

The Appellant lost pieces of the lower tibia, fibula and the major bone of the ankle joint.

There are a lot if activities that the Appellant will not be able to achieve e.g. fast walking, jumping, dancing, sport and games etc.

The Appellant has permanent disability of 25%. (Twenty-five per cent)
19. I have considered that in assessing general damages in this case, the learned trial magistrate did not cite any comparable precedent he relied on in making the award for general damages although he states that



he took into account the injuries sustained by the Appellant and the authorities cited by the Parties in their submissions.

20. The Appellant's injuries were serious enough bearing in mind that he suffered a lot of pain from the major surgical procedures that he underwent. He lost pieces of the lower tibia, fibula and the major bone of the ankle joint according to Dr W.M. Wokabi who also assessed permanent disability at 25%. I think the trial magistrate overlooked these facts hence I hold that the award was inordinately low and did not reflect the extent of the injuries sustained by the Appellant.
21. Being guided by the decision *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura and Another* [2015] eKLR where the plaintiff sustained multiple soft tissue injuries, blunt injury to the head, failure fracture of the right radius/ulna, compound fracture of the right and left tibia and fibula and was awarded Kshs.2,000,000.00.
22. In the circumstances and for these reasons, I would after taking into account the inflation rate and age of the decision, increase the award of general damages to Kshs. 1,800,000.00.

**ii. Whether the trial court erred in law and in fact in failing to award damages for reduced earning capacity.**

23. On this issue, the learned trial magistrate dismissed diminished earning capacity as the same was not proved. He found that the Appellant had only raised the issue in submissions but did not adduce evidence to the court to be able to allow the same.
24. At the hearing, Dr. W.M. Wokabi testified that the Appellant suffered a lot of pain from the major injuries that he sustained and that as a student, there are a lot of activities that the Appellant will not be able to achieve e.g. fast walking, jumping, dancing, sport and games etc. The Appellant has permanent disability of 25%. (Twenty-five per cent)
25. The Appellant relies on the case of *Mumias Sugar Limited v Francis Wanalo* (2007) eKLR where the court held 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 of 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 the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future...”

26. In the case of *Beatrice Anyango Okoth v Rift Valley Railways (Kenya)Limited & another* (2018) eKLR the court in making an award for diminished capacity stated thus:

“69....damages under this heading are awarded where is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered....70... The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula in assessing damages for lost and diminished earning capacity provided the judge takes into account the relevant factors....”

27. Diminished earning capacity refers to decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the



accident. Diminished earning capacity need not be specifically pleaded and proved but lost of earnings must be specifically pleaded and proved.

28. The case of *Mumias Sugar Limited v Francis Wanalo* (supra) cited by the Appellant is distinguishable from the Appellant's case for the reason that the case dealt with the issue of loss of earning capacity as opposed to reduced earning capacity in the instant case. In addition, the Respondent who was injured in that case was on a four-year apprenticeship for general fitting and mechanical engineering and was attached to the Appellant's factory. The Appellant was paying the Respondent Shs.8,300/= per month during the four years of apprenticeship and upon expiry of the apprenticeship the Respondent left the company on 20<sup>th</sup> December, 1998. The superior court awarded the Respondent Shs.200,000/= as general damages for pain suffering and loss of amenities, Shs.1,500/= as special damages and Shs.2,016,000/= for loss of earning capacity.
29. I have perused through the Plaint dated 21/1/2019, and I note that the Appellant at paragraph 7 of the Plaintiff pleaded as follows:

“At the time of the accident, the Plaintiff was a University Student with prospects of a very bright future. As a result of the accident, the Plaintiff's studies were put on hold thus delaying his graduation thus losing any opportunities that he would have benefited from as a graduate. He suffered a permanent disability of 25% and therefore claims damages for reduced earning capacity. He will also require special shoes to raise the soles of the right foot at a cost of Kshs. 5,000/= per year”.
30. The Appellant did not adduce any evidence of his earning whether before, at the time of the accident or at trial and how the accident had affected the same. The position is that the Appellant was a university student at the time of the accident.
31. To buttress this point, I rely on the case of *Catherine Gatwiri vs Peter Mwenda Karaai* [2018] eKLR where the court held that in arriving at an award for diminished earning capacity, the court will consider the disadvantage the respondent will suffer in future for not working because of the injuries and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others. The said case cited the case of *Paul Njoroge vs Abdu Saburi Sabonyo* [2015] eKLR where the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his employment was affected.
32. The Appellant did not prove that he had an income or any sort of earning whether through being employed or self employed that was reduced as a result of the accident.
33. In the end, I do not fault the trial court in dismissing the Appellant's claim for damages for reduced earning capacity for the reason that he had not proven to the required standard that his earning capacity had been affected by the injuries and therefore the award under this head was rightly dismissed.
34. The special damages of Kshs.2,550.00 were specifically pleaded and proved. I therefore find no reason for interfering with the trial court's decision on the award of special damages.
35. In the upshot, I find the appeal succeeds partially and I make the following orders
  - a. The award of Kshs.1,500,000.00 awarded to the Appellant as general damages is set aside and substituted thereof with an award of Kshs.1,800,000/=.
  - b. Future Medical Expenses of Ksh.185,000/= is upheld.
  - c. Damages for reduced earning capacity is disallowed



- d. Special damages of Kshs.2,550/= is upheld.
- e. The award for general damages will attract interest at court rates from the date of judgement in the trial court while the special damages will attract interest at the same rate from the date of filing suit till payment in full.
- f. The Appellant will also have half the costs of the appeal

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 16<sup>TH</sup> DAY OF AUGUST  
2024**

**NOEL I. ADAGI**

**JUDGE**

