



**Maina & another v Achieng (Civil Appeal E113 of 2023)
[2024] KEHC 11640 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E113 OF 2023
REA OUGO, J
SEPTEMBER 26, 2024**

BETWEEN

MAGDALLINE CHEPTIONY MAINA 1ST APPELLANT

JOHN WEKESA 2ND APPELLANT

AND

AISHA ACHIENG RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G.A Adhiambo
(SPM) delivered on 6/9/2023 in Kimilili SPMCC No E231 OF 2021)*

JUDGMENT

1. The respondent's claim in the lower court was that on 12/8/2021 at Kamukuywa bridge along Kitale-Webuye road, the appellants drove motor vehicle registration number KCT 753J Isuzu FRR so negligently and as a result lost control and caused serious injuries to the respondent. The respondent claimed to have sustained the following injuries:
 - a. Left-sided (temporal scalp laceration)
 - b. Degloving wound on the left arm
 - c. Crush injuries to the distal phalanx of the left index finger
 - d. Crush injury of the distal phalanx of the left middle finger
 - e. Left middle phalanx fracture of the right
 - f. Left proximal phalanx fracture of the ring finger
 - g. Laceration of the left small finger



2. The respondent sought general and special damages, costs and interest in the suit.
3. The trial magistrate in her judgment held the appellants jointly and severally liable and apportioned liability at 90:10 in favour of the respondent. She made the following award on damages:
 - a. General damages pain and suffering Kshs 700,000/-
 - b. General damages for diminished/loss of earning capacity Kshs 800,000/-
 - c. Special damages Kshs 303,142/-

Total Kshs 1,803,142/-

Less 10% contribution Kshs 180,314.20/-

Amount payable Kshs 1,622,827.80/-
4. The appellants aggrieved by the trial magistrate's award on damages have filed this instant appeal on the following grounds:
 1. That the learned trial magistrate erred in law and in fact in adopting the wrong principles in the assessment of damages thereby arriving at an excessive award.
 2. That the learned trial magistrate erred in law and in fact in awarding damages for loss of earning capacity when the same was not specifically pleaded.
 3. That the learned trial magistrate erred in law and in fact in awarding special damages which were not strictly proved.
 4. That the learned trial magistrate erred in law and in fact by considering irrelevant factors and ignoring factors hence arriving at an erroneous decision on the damages awarded to the respondent herein.
 5. That the learned trial magistrate erred in law and in fact by failing to consider the submissions by the appellants on quantum thus awarding excessive damages in the circumstances.
5. The appeal was canvassed by way of written submissions.
6. The appellant, in their submissions, attacked the trial magistrate's award of general damages, pointing out that she relied on the case of *Pietro Cannobio v Joseph Amani Hinzano* [2016] eKLR, in which the court noted that the respondent suffered multiple amputations of the left index finger, left ring finger, and left little finger with permanent incapacity assessed at 18%, and the respondent was awarded Kshs 700,000/-. The appellants argue that the injuries in *Pietro Cannobio v Joseph Amani Hinzano* [2016] eKLR were more severe than those sustained by the respondent herein.
7. The appellants submit that an award of Kshs 400,000/- would suffice instead of Kshs 700,000/- general damages awarded by the subordinate court. They relied on the case of *Peter Maina Gachigi v Chinga Tea Factory Ltd* [2020] eKLR where the court made an award of Kshs 400,000/- after the plaintiff sustained a fracture of the proximal phalanges of the middle, ring and little fingers of the right hand and compound dislocation at the base of the 3rd to 5th metacarpal bones of the right hand. In *Crystal Industries Ltd v Sevvasa Mutunga Kilonza* (2015) eKLR the court awarded Kshs 400,000/- for a crush injury resulting in multi-fracture, loss of middle finger and fixed deformity of the right index finger.
8. On loss of earning capacity, the appellants submit that the respondent did not plead for loss of earning capacity. In *World Explorers Safaris Limited v Cosmopolitan Travel Limited & Another* [2021] eKLR



the court held that parties are generally confined to their pleadings and there is no basis for the court to award sums not pleaded in the plaint.

9. The appellants submit that the respondent did not prove that that as a result of the injuries, she was exposed to either losing her job in the future or that in case she had lost her job, her chances of getting an alternative job in the labour market were slim – see *Kenblest Kenya Limited v Musyoka Kitema* [2020] eKLR. The appellant faulted the finding of the trial magistrate on loss of earning capacity as it was made in consideration that the respondent suffered 30% permanent disability yet the report by Dr. Gaya was improperly produced and wrongly admitted in evidence. The appellants point out that the report by Dr. Kisrio did not indicate any degree of permanent disability.
10. On the award of special damages, the appellants submit that the respondent produced receipts amounting to Kshs 198,417/- and the award of Kshs 303,142 was unjustified.
11. The respondent in opposing the appeal submitted that the medical report by Dr. Gaya indicated permanent disability at 30% and the award of Kshs 700,000/- was commensurate to the injuries and pain suffered. Although the respondent did not suffer any amputation, the degree of permanent disability rendered her fingers useless.
12. The respondent submitted that loss of earning capacity need not be pleaded as observed by Lord Denning in *Fairley v John Thomson Ltd* (1973) 2 Lloyd's Law Reports 4 on page 14 where he stated that 'learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and must be proved as though it was a claim under loss of income or future earnings'. The loss of earning capacity was alluded to in paragraph 13 of her submissions at the lower court.
13. On special damages, the respondent maintained that special damages of Kshs 303,142 were pleaded and proved.

Analysis And Determination

14. The appellant in this appeal has challenged the award made by the trial court on general and special damages which he argues was too high. In an appeal against assessment of damages, an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another* (No 2) Civil Appeal No 21 of 1984 [1985] eKLR thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, 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 damage.”
15. The respondent produced into evidence a report by Dr. Joshua Kisrio of Moi Teaching and Referral Hospital which confirmed the respondent's injuries listed in the plaint. Dr Edwing Kipchirchir Rono (Pw2) produced the medical documents from Moi Teaching and Referral Hospital where the respondent had gone for treatment. The appellant was correct to observe that the report by Dr. Joshua Kisrio did not assess permanent disability.
16. The appellant however intended to rely on the medical report by Dr. Z. Gaya which assessed permanent disability at 30%. However, the appellant closed its case without calling any witnesses or producing any documents. Therefore, the medical report by Dr. Z Gaya was not produced as evidence. The trial



magistrate was therefore in error when she held that the respondent suffered 30% permanent disability based on the appellant's second medical report. In any event, the burden of proving any permanent disability lies with the respondent who was the plaintiff and the nature and extent of injury could only be proved by the respondent. There was therefore no evidence of permanent liability.

17. The trial magistrate relied on the case of *Pietro Cannobio v Joseph Amani Hinzano* [2016] eKLR where the respondent therein suffered multiple amputations of the left index finger, ring finger and small finger with permanent disability assessed at 18%. In this case, there was no amputation and neither was there evidence of permanent disability. In the case of *Stanley Maore v Geoffrey Mwenda NYR CA* Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

18. In the *Peter Maina Gachigi v Chinga Tea Factory Ltd* [2020] eKLR disability was assessed to be between 30-60% while the Crystal Industries Ltd case is too old as the decision was made in 2015.
19. I have considered the awards made by the court in *Stejes Agencies Ltd v Makali* [2023] KEHC 22809 (KLR) awarded Kshs 350,000/- where the plaintiff sustained soft tissue injuries and a fracture of the proximal phalangeal bone of right little finger. The respondent in *Emmanuel Ithau Nyamai & Daily Trucks Limited v Paul Kipsang Samoei* [2021] KEHC 4401 (KLR) was awarded Kshs 300,000/- after sustaining soft tissue injuries and a fracture of the 1st phalange of the right index finger. The injuries in these cases are slightly less severe given that the respondent in this case fractured 3 fingers i.e. the left index finger, middle finger and ring finger. In that regard, an award of Kshs 450,000/- would be most appropriate taking into account the injuries sustained.
20. On the award of loss of future earning capacity, the respondent did not plead the same but sought general damages. In my view loss of future earning capacity is a general damage claim. The trial court ought in awarding damages under this head, did so based on the wrong conclusion that the respondent suffered 30% disability. I have already held that this was not the case. The court of appeal in *Kibet v Alunda* [2024] KECA 64 (KLR) held that before making such an award the court must consider the following:

“...it is clear that a court will accept an invitation to make an award for “loss of earning capacity” once it is established that there is a risk that the level of disability suffered by a plaintiff diminishes his chances of returning to work at the same level, working the same hours or that the disability may be long-term. This, in other words, can be equated to a diminished earning capacity which decreases an individual's earning ability as a result of the disability. It is, however, distinguishable from “loss of earnings” which ordinarily is an assessment of the actual loss of earnings as a result of the accident. In this regard, the current known earnings of the claimant are used to determine what the plaintiff is awarded. This is a special loss because it is a known loss which can be calculated. The claim must therefore be specifically pleaded and proved as special damages. It does not matter whether a party infuses the word “future” into the two distinct claims as either way, the end result is that “loss of earning capacity” concerns the estimated loss that the plaintiff is likely to suffer in future while “loss of earnings” is actual and determinable as it is tied to the plaintiff's current earnings.”



21. In this case, there was no evidence of any level of disability that was likely to affect the respondent's chances of returning to work at the same level. There was no evidence of permanent disability. Therefore, the award in my view was unmerited.
22. On special damages, the only receipts produced by the respondents were those issued by Moi Teaching and Referral Hospital. Other receipts including those showing how much expenses he incurred in transport were not produced. Pexh 10 (a)-(d) and Pexh 9(a) to (n) total Kshs 222,376/-.
23. In conclusion, I find the appeal is meritorious and the trial court's finding on damages is hereby set aside. Therefore, I make orders as follows:
 - 1 General damages of Kshs 450,000/-are awarded.
 - 2 The award of Kshs 800,000 for future earning capacity is set aside.
 3. The award of special damages of Kshs 303,142/- is set aside and substituted with an award of Kshs 222,376/-.
24. The award shall be subjected to the apportioned liability. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Nyabuto - For the Appellant

Respondent - Absent

Wilkister -C/A

