



**Coast Development Authority v Jerega (Civil Appeal E373 of 2023)
[2024] KEHC 13163 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E373 OF 2023
JK NG'ARNG'AR, J
OCTOBER 31, 2024**

BETWEEN

COAST DEVELOPMENT AUTHORITY APPELLANT

AND

ERIC AGUSIOMA JEREGA RESPONDENT

*(Being an appeal against the Judgment and decree of the Hon. R. N. Akee (SRM)
delivered on 19th October 2023 in Mombasa Chief Magistrate's Court Civil
Suit No. E115 of 2022, Eric Agusioma Jerega v Coast Development Authority)*

JUDGMENT

1. The background of the appeal is that on or about 30th November 2021, while the Respondent was cycling along Sheikh Abdalla Road whereupon reaching Malindi stage area, motor vehicle registration number KCP 077K knocked the Respondent from behind causing the Respondent to suffer serious injuries and great loss and damages for which the Appellant was liable and/or vicariously liable.
2. Particulars of the injuries, pain and suffering as pleaded are fracture dislocation of left head femur with avascular necrosis, bruises and abrasions on the right forearm, bruises and abrasions on the right feet, bruises and abrasions on the left feet, shortening of the left limb, stiffness of the left knee, stiffness of the left hip, bruises/abrasion scar on right forearm, bruise/abrasion scar on both feet, diminished capacity to work and undertake other activities of daily living, 35% incapacity due to post traumatic arthritis and stiffness of left hip/knee, post traumatic shortening of left lower limb, lifetime of recurring post fracture pains on the left hip area especially when walking and working, and fracture site is a point of weakness and can easily fracture in future.
3. The Respondent sued the Appellant as the insured owner of the motor vehicle registration number KCP 077K make Toyota Prado which was insured in the name of the Appellant, and the Respondent served the Appellant's insurance company, Takaful Insurance of Africa with the requisite notice under



the Insurance Motor Vehicle (Third Party Risk) Act and with the judgment as against the insured owner. That the Respondent is a mason by profession and earned Kshs. 15,000 a month and as a result of the accident was unable to engage in the construction work. That the Respondent would require future medical expenses to purchase pain killers for bone and joint medication assessed at Kshs. 3,000 per month for at least 2 years, that he would require physiotherapy sessions at the cost of Kshs. 6,000 for 40 sessions and that he would require total hip replacement at the cost of Kshs. 200,000.

4. The Respondent prayed for judgment against the Appellant jointly and severally for general and special damages, future medical, loss of earning capacity/diminished earning capacity/loss of future earning capacity, and costs of and incidentals to the suit plus interest. The Respondent in their submissions in the trial court was that it was agreed between the parties that the ratio of liability be 25:75 for the Respondent to Appellant, they urged the court to award Kshs. 2,500,000 for general damages, Kshs. 16,417.90 (wages) x 12 months x 30 years (multiplier) x 35% (percentage of incapacity) = Kshs. 2,068,655.40 for the loss of earning capacity/diminished earning/loss of future earning capacity, Kshs. 54,050.00 for special damages and Kshs. 298,000 for future medical costs. The Appellant on the other hand submitted that liability was consented, they proposed Kshs. 600,000 for general damages, under loss of future earning capacity they proposed for the court not to award under the head as there was no proof of earning, they proposed Kshs. 298,000 under future medical expenses, and Kshs. 54,050 under special damages.
5. The suit was heard in the trial court and judgment delivered on 19th October 2023 where the court awarded Kshs. 500,000 for general damages, Kshs. 1,260,000 for loss of earning capacity, Kshs. 54,050 for special damages, and Kshs. 189,000 for future medical expenses less 25% liability of Kshs. 500,762 which gave a total of Kshs. 1,502,287, together with costs of the suit and interest from the date of judgment.
6. Being dissatisfied, the Appellant appealed against the awards on general damages through the Memorandum of Appeal dated 19th December 2023 on grounds that the learned trial magistrate grossly misdirected herself in treating the evidence and submissions on general damages before superficially and consequentially coming to an erroneous conclusion on the same, that the learned trial magistrate misdirected herself on the principles applicable in awarding loss of future earnings which was already provided for in the award for general damages thus constituting a double award made at the detriment of the Appellant, that the trial magistrate erred in law and fact in awarding loss of future earnings and ignoring authorities employed and submissions presented which completely melted down the Respondent's case, and that the learned trial magistrate failed to apply herself judicially and to adequately evaluate the evidence and exhibits tendered on general damages and thereby arrived at a decision unsustainable in law. The Appellant prayed that the appeal be allowed and that judgment of the trial court be set aside with costs.
7. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 27th May 2024 while the Respondent filed submissions dated 1st July 2024 which have been considered by this court.
8. The role of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”



9. I have considered the Record of Appeal dated 24th May 2024 and submissions by the parties. The issues for determination are: -
- a. Whether the award of general damages was proper in the circumstances
 - b. Whether the award of loss of earning capacity ought to have been provided for in the award for general damages, whether the trial court applied authorities and submission in awarding under the head and whether the decision arrived at was sustainable in law
 - c. Who should bear costs.
10. An appellate court has the discretion to interfere with matters quantum but only where it is established that there was an insignificant or excessive award of damages or the court relied on the wrong principles. The holding in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR was to the effect that: -
- “An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low ...”
11. The Appellant maintained that an award under loss of earning capacity/diminished earning capacity/loss of future earning capacity was already captured under the general damages for pain and suffering, and that the award under both heads constituted an incident of double award.
12. The Court of Appeal in *Mumias Sugar Company Limited vs Francis Wanalo* (2007) eKLR stated: -
- “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 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 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 appropriate financial loss that the plaintiff has suffered as a result of the disability.”
13. The decision of the trial court to award under loss of earning capacity cannot be faulted by this court as the award could also be made under a separate head and the amount awarded depended on circumstances of each case.
14. Inasmuch as it has been established that there is no formula in assessing loss of earning capacity, the court in *Alpharama Limited v Joseph Kariuki Cebon* (2017) eKLR gave guidance on assessment of loss of earning capacity as follows: -
- “... To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant



for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired". According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. 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 for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors ..."

15. The trial court in its discretion to apply the multiplicand or use the global sum approach settled for the multiplicand method which it considered to be appropriate in calculating sufficient compensation owing to the fact that the Respondent had suffered 35% disability. The Respondent in their trial court submissions had proposed a multiplicand of Kshs. 16,417.90 (wages) x 12 months x 30 years (multiplier) x 35% (percentage of incapacity). However, the trial court settled for Kshs. 10,000 x 12 (months) x 30 (years) x 35% (permanent incapacity) = 1,260,000.
16. The Appellant on the one hand submitted that the manner in which the trial court arrived at the award under the head of loss of earning capacity/diminished earning capacity/loss of future earning capacity was erroneous as the judgment lacked clarity on the source of the Kshs. 10,000 used for the computation as the plaint dated 19th January 2022 indicated that the Respondent was employed and earned Kshs. 15,000. The Respondent on the other hand submitted that considering the Respondent did not possess a pay slip, to prove his earnings, he implored the court to be guided by the Minimum Wage Regulation which provides that Kshs. 16,417.90 is adequate for a mason. That in balancing the interest of both the Appellant and the Respondent, the court fairly exercised its discretion when it settled for Kshs. 10,000.
17. I find that the trial court rightly awarded general damages and loss of earning capacity under separate heads and the amounts awarded were in accordance with pleadings of the parties and in the interest of justice. The decision of the trial court cannot therefore be faulted.
18. Accordingly, the appeal herein has no merit and is dismissed. Costs to the Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31ST DAY OF OCTOBER, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Barbera Advocate for the Appellant (holding brief)

Baya Advocate for the Respondent (holding brief)

Court Assistant – Mr. Samuel Shitemi

