



REPUBLIC OF KENYA



**Mnyaturu v Mulela (Civil Appeal E207 of 2021)
[2024] KEHC 13119 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E207 OF 2021
JK NG'ARNG'AR, J
OCTOBER 31, 2024**

BETWEEN

AGOSTINO KISINGO MNYATURU APPELLANT

AND

ROBERT MULINGE MULELA RESPONDENT

(Being an appeal against the Judgment and decree of the Hon. M. L. Nabibya (PM) delivered on 7th October 2021 in Mombasa Chief Magistrate's Court Civil Suit No. 284 of 2020, Agostino Kisingo Mnyaturu v Robert Mulinge Mulela)

JUDGMENT

1. The background of the appeal is that the Respondent was the registered or insured and/or beneficial owner of motor vehicle registration number KTCB 559U 3604 make New Holand Tractor insured by Madison General Insurance Kenya Limited. That on or about 28th September 2019, the Appellant was lawfully travelling as a fare paying passenger aboard motor vehicle registration number KAT 028Z which was moving from Changanwe heading to Miritini along the old Mombasa-Nairobi road whereupon reaching Wayani are, motor vehicle registration number KTCB 559U/ZD 3604 make New Holland Tractor which was headed towards the Changanwe direction which was so driven, managed and/or controlled by the Respondent's authorized driver, agent, and/or servant and at a high speed encroached on the lane of motor vehicle registration number KAT 028Z, on noticing the encroachment, the driver of motor vehicle registration number KAT 028Z took an evasive action of swerving to his left to avoid collision but a pillar of the trailer knocked the body of the matatu from the middle to the rear and as a result of the impact whereof, the Appellant sustained serious injuries and has suffered great loss and damages for which the Respondent is liable and/or vicariously liable.
2. Particulars of pain suffering and injuries are compound comminuted right fracture proximal radius/ulna bones and distal ulna bone, compound supracondylar fracture right humerus, vascular and neurological injury right upper limb-right branchial plexus injury leading to hypoesthesia right hand,



fracture right scapula bone with displacement, blunt trauma chest with fracture ribs and right sided haemothorax leading to chronic respiratory insufficiency, degloving injury right upper limb inclusive of right axilla, multiple scars extensive scars right upper limbs with marked stiffness of all joints-wrist, elbow and shoulder, loss of all grip right hand as well as prosupination supination movements right wrist/elbow joints, done surgical toilets and stitching of wounds, antibiotics, analgesics, insertion of underwater seal chest tuber right side, tetanus toxoid injection and wound care done, done open reduction and fixation of proximal ulna/radius fractures, complain of pains and stiffness of right wrist, elbow and shoulder, not able to use right upper limb, and has easy fatigability.

3. The Appellant prayed for judgment against the Respondent for general damages and future medical expenses to be assessed by the court, special damages of Kshs. 96,179 and costs of the suit plus interest.
4. The suit was heard in the trial court and judgment delivered on 7th October 2021 where the court found liability to be 100% against the Defendant, Kshs. 1,000,000 awarded for general damages, Kshs. 250,000 as cost of future medical expenses, Kshs. 80,207 as special damages, costs, and interest at court rates.
5. Being dissatisfied, the Appellant appealed against the judgment through the Memorandum of Appeal dated 3rd October 2021 on grounds that the learned trial magistrate erred in law and fact by misapprehending the evidence on record specifically the severity of the injuries sustained thereby made an award for general damages for pain, suffering and loss of amenities that was inordinately low and unfair in the circumstances, that the learned trial magistrate erred in law and fact by failing to make any award for loss of earning capacity in the present case which was unjust and unfair in the circumstances of the case, that the learned trial magistrate erred in law and in fact by failing to address the issue of loss of earning capacity when there was sufficient evidence that the Plaintiff/Appellant's hand was paralysed and he would never work as a driver thereby making the award by the trial magistrate manifestly low and unjust, and that the learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and the authorities cited therein thereby arrived at an unjust decision on the quantum of damages.
6. The Appellant prayed for orders that the appeal be allowed with costs, that the judgment on quantum be set aside and the court be pleased to reevaluate the evidence on record and enhance the award for general damages for pain, suffering and loss of amenities, and that the honourable court be pleased to analyse the evidence on record and the Appellant's submissions and make an award for loss of earning capacity.
7. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 20th December 2023 while the Respondent filed submissions dated 9th January 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 8th May 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether the award for general damages for pain, suffering and loss of amenities was inordinately low in the circumstances



- b. Whether the trial court ought to have made an award for loss of earning capacity
 - c. Who should bear costs
10. The Appellant submitted that the injuries sustained were confirmed by the evidence tendered in court and that there was no dispute as to the nature and extent of the injuries sustained save for the level of permanent incapacity. That while Dr. Kiema assessed the same at 70%, Dr. Udaya Sheth assessed the permanent incapacity at 50%. That the Appellant testified that his right upper limb nerves are paralysed and as such he can no longer use his right hand and that this position was echoed by the two doctors. The Appellant proposed a sum of Kshs. 1,800,000 and that the award of Kshs. 1,000,000 was therefore manifestly low in the circumstances.
11. In *Mehari Tewoldge T/A Mehari Transporters Ltd v Muasya Maingi* (2013) eKLR- the plaintiff suffered 8% incapacity as a result of the injuries was awarded Kshs. 1,500,000/- general damages, in *Teresiah Ngugi & another v Michael Masia Kimende* (2018) eKLR disability degree (70%) and the court awarded Kshs. 1,500,000/= as general damages for pain and suffering and loss of amenities.
12. On whether the trial court ought to have made an award for loss of earning capacity, it is the opinion of this court that the same was not pleaded in the trial court and the same cannot be determined by this court. Loss of earning capacity can be claimed and awarded as part of general damages as was held by 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. In the upshot, the appeal partially succeeds, the award of Kshs. 1,000,000 of the trial court is set aside and substituted with Kshs. 1,500,000 for general damages for pain and suffering and loss of amenities. Costs to the appellant.

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

.....
J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Kazungu Advocate for the Appellant

Bosire Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

