



Ondoto v Kigotho (Civil Appeal E358 of 2023)
[2024] KEHC 13223 (KLR) (Civ) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13223 (KLR)

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

CIVIL
CIVIL APPEAL E358 OF 2023

TW OUYA, J
OCTOBER 31, 2024

BETWEEN

MOSES OBERA ONDOTO APPELLANT

AND

SILAS KAMAU KIGOTHO RESPONDENT

*(Being an appeal from the Judgement of the Honourable B. Cheloti
Principal Magistrate sitting at the Chief Magistrate Court at Milimani
CMCC Case No. E9511 OF 2021 dated 14th day of April 2023)*

JUDGMENT

Background

1. The Appellant herein filed a suit No. E9511/2021 emanating from a road traffic accident that occurred on the 27th day of February 2021 involving Motor Vehicle registration number KCQ 925L and the Appellant herein along Ngong – Kiserian road in which the Appellant obtained a judgement in the sum of Kshs. 900,412.50 at a liability ratio of 75:25 in favour of the Appellant as against the Respondent herein.
2. The Appellant being dissatisfied with the judgement of the trial court filed an appeal vide memorandum of appeal premised on the following grounds:
 - a. That The Learned Magistrate erred in law and in Fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing damages and thereby arrived at a very low award on general damages.



- b. That The Learned Magistrate erred in law and in Fact by awarding future medical expenses at a sum of Kshs. 200,000/= which is inordinately too low and inconsistent with the doctor's report and/or advisory.
 - c. That The Learned Magistrate erred in law and fact by failing to award damages on loss of past, present and future earnings as was properly pleaded and considering the severity of injuries sustained by the plaintiff.
 - d. That The Learned Trial Magistrate herself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgement on damages.
3. The Appellant prays for orders that:
 - a. The Appeal be allowed.
 - b. Judgement of trial court be set aside and this court do re – assess judgement on Quantum based on the evidence on record.
 - c. Costs of both Lower and High Court.
 4. The Appeal was canvassed by way of written submissions by both parties. The Appellant submitted on three key issues:

a.What is the appropriate Quantum on general damages?

The Appellant relied on the authority of Said Sweilem Geithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others (2015) eKLR where the Court of Appeal held that:

“ This court will not normally interfere with the exercise of discretion by a judge of the court below,.....The court of appeal may only interfere Judicial discretion if satisfied: The Judge misdirected himself on law; or That the misapprehended the facts; or That he took into account or considerations of which he should not have taken account; or That he failed to take into account of considerations of which he should have taken into account; or That his decision, albeit discretionary one, was plainly wrong. The Judges concluded that the Learned judge must be guided by the interest of justice of the matter, properly exercised his discretion in accordance with those very overriding principles.....”

5. The Appellant prayed for damages for the injuries sustained as a result of the accident. He submitted that an award in the region of ksh.3,000,000for general damages would be reasonable. The Appellant relied on various authorities particularly in the case of John Kinyua Murage & 2 others Vs Joseph Onyango Obura [2018] eKLR where general damages was assessed at ksh. 2,500,000 for compound fractures of the right tibia, skin and muscle loss of the right leg behind the knee, permanent disability was assessed at 45%.
6. Similarly, he relied on the case of Zipporah Nangila Vs Eldoret Express Limited & 2 others [2016] eKLR, where the plaintiff sustained comminuted compound fracture of the distal and fibular, fracture of the left distal and fibular and was awarded ksh.2,400,000 as general damages.

b.Whether the award of Loss of past, present and future earnings should be awarded.

7. The Appellant prayed for damages under this head from the injuries sustained as a result of the accident. He submitted that according to Dr. Okere's medical report, the Appellant was aged 29 years, was working as a boda boda rider but he cannot operate again having been incapacitated. Prior to the



accident, he was earning ksh. 30,000 per month, lack of documentary evidence notwithstanding. He relied on the Court of Appeal case of Jacob Ayiga Maruja & another Vs Simon Obayo [2015] eKLR where it was held as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

8. He further submitted that the trial court acted on wrong principles of the law, it took into account an irrelevant factor or failed to take into account the relevant authorities, thereby failing to give an award under this head. That the trial magistrate placed reliance on the case of SJV Francesco Di Nello & Another [2015] eKLR. where the appellant herein did not assert diminution in earning capacity as decided by the trial magistrate. The Appellant submitted that as a result of the injuries sustained, he was unable to work and that he can no longer work as a rider anymore having been rendered totally incapacitated. He maintains that the authority relied upon by the trial magistrate is irrelevant as compensation for loss of future global sum earnings is awarded for real assessable loss proved by evidence. He prays that this appeal should be allowed in the circumstances and the Appellant awarded a global sum of Ksh. 1,000,000/= under this head.

c. Whether the award on Future Medical Expenses should be interfered with

9. The Appellant relies on the court of appeal in the case of Tracom Limited & another Vs Hassan Mohamed Adan [2009] eKLR which held that:

“We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd Vs Gituma [2004] 1 EA 91, this court stated:

“And as regards future medication (physiotherapy), the law is well established that although an award of damages to meet the costs thereof is made under rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal right should be pleaded.”

10. According to Dr. Okere’s report, as submitted by the Appellant, he has implants that may be removed in future and recommended that the same will be done at a cost of about ksh.500,000. With the foregoing, the Appellant specifically pleaded and proved the same amount before the trial court which they pray should be awarded as recommended.
11. The Respondent also submits on the three issues as follows:
 - a. Whether this court should disturb the decision of the trial court
He relies on the case of Civil Appeal No. 69 Of 1984 Kivati v Coastal Bottlers Ltd and cites that it is settled that an appellate court will not interfere with an award of the trial court unless:
 - b. The trial court acted under a mistake of law; or



- c. Whether the trial court acted in disregard of principles; or
- d. Where the trial court took into account irrelevant matters or failed to take into account relevant matters; or
- e. Where the trial court acted under misapprehension of facts; or
- f. Where injustice would result if the appellate court does not interfere; or
- g. Where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.

b. Whether the award for general damages and future medical expenses by the trial court was inordinately low

- 12. While he concurs that an award for general damages is an exercise of discretion of the trial court but it should be within limits set out in decided case law and must not be inordinately so low or so high to reflect an erroneous figure. It must also take into account prevailing economic environment, the trend of previous, recent and comparable awards.
- 13. The Respondent does not dispute that the Appellant herein sustained fractures of the left tibial plateau and left femur with permanent disability assessed at 10% by a second medical opinion. He submits that in the authority of John Kinyua Murage & 2 others Vs Joseph Onyango Obura [2018] eKLR which the Appellant has relied on, damages were assessed at kshs. 2,500,000 for compound fractures of the right tibia, skin and muscle loss of the right leg behind the knee and permanent disability assessed at 45%. And; Zipporah Nangila Vs Eldoret Express Limited & 2 others [2016] eKLR, where the plaintiff sustained comminuted compound fracture of the distal and fibular, fracture of the left distal and fibular and was awarded kshs. 2,400,000 as general damages with the degree of incapacitation assessed at 70%.
- 14. The Respondent distinguishes that the two authorities relied upon by the Appellant show plaintiffs who suffered more grievously with higher incapacity than the plaintiff in the instant case who suffered only 10%.
- 15. The Respondent Submits that the court should consider the authorities of Joseph Mwangi Thuita v Joyce Mwole (2018) the Plaintiff suffered injuries of fractured right femur, compound fracture, right tibia and fibular, softening of the right leg and episodic pain of the right thigh with inability to walk without support and the court awarded 700,000 as general damages. In Alex Wanjala v Pwani Oil Products & Another (2019) eKLR the Appellant sustained closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus, closed fracture of the right femur with the court awarding kshs. 600,000 for general damages. In Blue Horizon Travel Co. Ltd v Kenneth Njoroge (2020) eKLR the court awarded the respondent Ksh. 400,000/= for more serious injuries which were cut wounds on the head, cut wounds on the right forearm, bruising on both head and right forearm, fractured ribs L1 -6 and R11-12, right hemothorax, fracture dislocation of the right hip and fracture dislocations of the right shoulder joints.

Future Medical Expenses

- 16. The Respondent submits that the trial court's award of kshs. 200,000 for future medical expenses was reasonable. He urges the court to not only consider Dr. Okere's report who recommended that the removal of implants will cost kshs. 500,000 but also to consider the second medical opinion by



Dr. Michelle Muhanda who examined the Appellant in 2022 and observed that the wounds were completely healed and that:

“The plate, screws intramedullary nail requires removal that may cost up to eighty thousand Kenya shillings (80,000/=). The degree of permanent incapacity will be 10%.”

17. He relied on the Court of Appeal holding in the case of *Tracom Ltd & Another v Hassan Mohamed Adan* (2009) that a claim for future expenses is a special claim within general damages and needs to be specifically pleaded and proved before a court can award it. In addition, he cites three other authorities to re-enforce his argument that the appellant’s proposed award of kshs.500,000 for future medical expenses is way on the higher side and maintains that the award kshs. 200,000 by the Trial court should not be interfered with.

c)Whether the trial court erred in not awarding the Appellant damages for loss of past present and further earnings

18. The Respondent submits that the Appellant should not be awarded without proof on a balance of probabilities. He relies on the authorities of *Bonham Carter v Hyde Park hotel Ltd* (1948)64T.L.R.177 and *Evans Juma Otwala v Jackline Kazungu Kambi* (2020) eKLR and posits that earning capacity falls within the category of special damages to be proven strictly and that the appellant ‘s duty is to make a full disclosure of all the material facts as they relate to loss of income or loss of future earning capacity. It is the Respondents submission that the Trial court award was reasonable and should be upheld and the Appeal be dismissed.

Analysis And Disposition

19. This court has considered original record, record of appeal and the submissions on record plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1.
20. The issue as to whether and when an appellate court can disturb an award of the trial court was settled by the Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 which stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

21. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court’s view that liability is not an issue in this appeal and that the issues for determination are hinged on the reasonableness of the award on general damages, future medical expenses and, loss of past, present and future expenses. I will address each one of them one after the other.

General damages for pain and suffering

22. It is not disputed by the parties that the Appellant herein sustained fractures of the left tibial plateau and left femur with permanent disability assessed at 50%. According to Dr. Okere’s report at the time of the trial, the Appellant’s present complaints were: pain on the left lower limb, difficulty in walking and inability to perform a heavy duty. On the other hand, a second opinion by doctor Michelle Muhanda in



27th April 2022 that the appellant was completely healed and that it would cost kshs. 80,000 to remove the implants. She assessed permanent disability at 10%. The Trial court awarded damages as follows:

Total award at Ksh. 900,412.50

- i. General damages awarded at Kshs. 1,000,000.
- ii. Special damages awarded at Ksh. 5,500.
- iii. Future medical expenses awarded at Ksh. 200,000

(Ksh. 1,000,000 + Ksh. 5,500 + Ksh. 200,000 = Ksh. 1,200,550 less 25% liability)

23. The Appellant's view is that the above award is extremely low and should be enhanced to kshs 3,000,000 as was pleaded and submitted by the Defendant. The Respondent urges the court to uphold the award of kshs. 1,000,000 citing that the Appellant relied on authorities where appellants suffered more severe injuries with incapacity assessed at between 45-70% while the Appellant herein had less severe injuries with incapacity assessed at 50% by Dr. Okere and 10% by a second opinion.
24. I therefore considered the authority of Nelson v Ochieng [2023] KEHC 2780 (KLR) in which the High Court sitting on appeal, upheld an award in the sum of Kshs.2,000,000/- in respect of injuries particularized as multiple fractures of the right lower limb, comminuted fractures of the right leg femur bone, fragmented/comminuted fractures of the tibia/fibula bones on the right leg with malunion, among other fractures and deep cut wounds, as well as chest pain. However, it is noteworthy that in the above-cited case, permanent incapacity was assessed at 80%, unlike in the present case where permanent incapacity is much lower.
25. I similarly considered the case of Nguku v Kiria-ini Farm [2022] KEHC 342 (KLR) involving a plaintiff with fracture of the 5th, 6th and 7th ribs, fracture of the pelvis right pubic sysisysis (sic) and acetabulum, multiple bruises of the arms; where the court awarded a sum of Kshs. 1,800,000/- on appeal in the absence of any assessment of degree of incapacity.
26. Considering that injuries in the above two instances are more grievous than in the instant appeal, I have also noted that the authorities relied upon by the Respondent are extremely on the lower side considering the gravity of the injuries. I am also alive to factors of time and inflation considering that some of the cases were decided as early as 2018. I am therefore inclined to enhance the amount on general damages to a sum of kshs.1,300,000.

Future medical expenses.

27. This was awarded at kshs. 200,000 which is considered to be extremely low by the appellant who urges the court to proceed by Dr. Okere's report that the Appellant will require removal of implants at the cost of kshs.500,000. Contrary to the above, the Respondent urges the court to rely on the second opinion medical report where the doctor, Michelle Muhanda observed that:

“The plate, screws intramedullary nail requires removal that may cost up to eighty thousand Kenya shillings (80,000/=).”

In light of the above, this court concurs that, with the trial court award of kshs. 200,000 was reasonable and this court will not interfere with that finding.

Loss of past, present and future expenses

28. The trial court did not award this prayer on the basis that loss of future earning ought to be proven. The Trial court relied on the case of SJ v Fransesco Di Nello & Another (2015) eKLR where the



Appellant submitted that as a result of the injuries sustained, he was unable to work and that he can no longer work as a rider anymore having been rendered totally incapacitated. The Appellant did not assert diminution in earning capacity as decided by the trial magistrate in the instant case.

29. This court is persuaded by the authority of Court of Appeal case of Jacob Ayiga Maruja & another Vs Simon Obayo [2015] eKLR where it was held as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

29. In the case of Joan Marie Shultz v George Mburu Wachira & Another (HCCC 857 of 2005) Judge Ongeri Asenath quoted Kneller in the case of Butler v Butler that:

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference as explained by Lord Denning M.R in Fairly v John Thompson (Design Division) Ltd (1973) ... Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.” In this case Judge Asenath Ongeri awarded the plaintiff general damages for loss of earning capacity in addition to general damages for pain and suffering and special damages. In the instant case, this court is inclined to award the Appellant Kshs. 500,000 general damages for loss of earning capacity.

30. Liability ratio will be maintained at the rate of 75:25 per cent for the factors considered by the trial court and will not be disturbed.
31. Special damages will remain at Kshs. 5,500 as was proved in the trial court.

Determination

32. This appeal succeeds partially and the final award will therefore read as follows:

1. Total Award at kshs. 1,503,750
General damages for pain and suffering kshs. 1,300,000
General damages for loss of earning capacity kshs.500,000
Future Medical expenses kshs. 200,000
Special damages kshs.5,500
Less 25% Liability = kshs. 1,503,750
Special damages will attract interest from 20th May 2021
2. Costs of the Appeal to the Appellant

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER 2024

HON. T. W. OUYA

JUDGE



For Appellant Mucheli

For Respondent Balala holding brief for Kimani

Court Assistant Martin

