



**Mogusu & another v Kamau (Civil Appeal E1122 of 2023)
[2024] KEHC 15329 (KLR) (Civ) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15329 (KLR)

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

CIVIL

CIVIL APPEAL E1122 OF 2023

RC RUTTO, J

NOVEMBER 29, 2024

BETWEEN

SAMUEL MOGUSU 1ST APPELLANT

LEVIS TRADING COMPANY COMPANY LIMITED 2ND APPELLANT

AND

JOSEPH MAINA KAMAU RESPONDENT

(Being an appeal from the judgment of the Honourable L. B. Koech (SPM) delivered on 14th July 2023 in Milimani Commercial Courts Civil suit No E9204 of 2021)

JUDGMENT

1. The Appellants being dissatisfied with the award of quantum lodged this appeal. The facts of the dispute are that the Respondent who was a lawful pillion passenger on motorcycle registration number KMCL 323H filed a plaint dated 18/6/2021 seeking judgment against the Appellants for special damages of Kshs. 694,316.08/=, general damages for pain and suffering and loss of earnings capacity, costs and interest. The 1st Appellant was sued in his capacity as the driver of motor vehicle KCP 539B that was so negligently driven on the wrong lane and hit the motorcycle as a result of which the Respondent sustained severe injuries. The 2nd Appellant was sued in his capacity as the registered owner of the motor vehicle.
2. The Appellants filed a joint statement of defence dated 11/7/2021 denying liability and blamed the Respondent for the accident and sought orders that the suit be dismissed with costs.
3. The parties consented on liability at 80:20 in favour of the Respondent and proceeded to submit on quantum by way of submissions. The trial court in a judgment delivered on 14/7/2023, adopted the consent on liability at 80:20 in favour of the Respondent, and proceeded to awarded the Respondent



Kshs. 800,000/= as compensation for general damages. The trial court also awarded special damages of Kshs. 194,316/= and future medical expenses of Kshs. 450,000/= costs and interest.

4. The Appellants being dissatisfied with that judgment, brought this appeal as contained in the amended memorandum of appeal dated 26/10/2023. The Respondent responded to the appeal by filing a cross-appeal dated 7/5/2024 having being similarly dissatisfied with the judgment.

The Appeal

5. The Appellants' amended memorandum of appeal is based on grounds that: the trial court awarded general damages of Kshs. 800,000/= which was excessive; the trial court erred in awarding Kshs. 450,000/= for future medical expenses which was not proven and was excessive in the circumstance; the trial court erred in awarding Kshs. 194,316/= for special damages whilst the award was unwarranted and excessive; and that the trial court did not consider the Appellants' submissions. The Appellants sought orders that the trial court's award on quantum, future medical expenses and special damages be set aside.
6. The Respondent cross-appealed on grounds that; the award on damages was inordinately low and non-commensurate with the nature of injuries; the trial court disregarded the medical reports filed by both parties; the trial court erred in failing to award damages on loss of earning capacity despite evidence of 16% permanent liability; and that the trial court erred in failing to appreciate the principle of stare decisis from the Court of Appeal on awards for general damages and loss of earning capacity. The Respondent thus prayed that the award of Kshs. 800,000/= for general damages be set aside and instead, it be replaced with general damages of Kshs. 4,000,000/= and that the Respondent be awarded Kshs. 2,672,640/= for loss of earning capacity. The Respondent also prayed for costs of the suit.

Analysis and Determination

7. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424.
8. 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 where the court held that: -

“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.”

9. This court will then proceed to address itself under the following heads;

a. Whether the award of Kshs. 800,000/= for general damages was inordinately high or low.

10. The first issue for consideration is whether the trial court erred in awarding Kshs. 800,000/= for general damages. Was the award inordinately high or low? The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds



support in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR where 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.”

11. The Appellants submission was that although the Respondent sustained fracture of the femur as per the medical report dated 18/5/2021, the trial court did not consider the 2nd medical report dated 29/7/2021 which indicated that the Respondent had recovered from the injuries. The Respondent on the other hand submitted that the amount was too low considering that he suffered 16% permanent capacity and will require hip replacement.
12. I have carefully considered the record before me. As per the medical report by Dr. Wokabi dated 18/5/2021, the Respondent suffered fracture of the neck of the left femur which was operated on and fixed with a metal implant. At the time of the examination, the Respondent was walking with crutches and the x-ray showed that the fracture had not united. The doctor recommended total hip replacement surgery at Kshs. 500,000/=. The 2nd medical report by Dr Wambugu similarly indicated that the Respondent had suffered fracture of the neck of the femur and multiple bruises. The doctor awarded him 12% degree of permanent incapacitation and recommended total hip replacement surgery at Kshs. 400,000/=. The P3 form similarly indicated that the plaintiff suffered fracture of the neck of the femur.
13. The trial court relied on David Kimathi Kaburu Vs. Dionisuis Mburugu Hana which awarded the plaintiff Kshs. 630,000/= in the year 2017 and the award was upheld in Civil Appeal 18 of 2016 David Kimathi Kaburu Vs. Dionisuis Mburugu Itirai (2017) eKLR. In that case, the plaintiff suffered fragmental fracture midshaft femur and intertrochanteric fracture thus the case was relevant. The trial court considered the inflation rate and the nature of injuries suffered by the plaintiff and awarded Kshs. 800,000/=.
14. In assessing whether the award was inordinately high or low, I rely on the following cases: first is Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR where Odunga, J (as he then was) dealt with a fracture of the femur, and stated thus: “in this case, the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body.” There, the court awarded Kshs 600,000/- in general damages.
15. Secondly, is Kihara & another *v Mutuku (Civil Appeal 27 of 2018)* [2022] KEHC 15626 (KLR) (17 November 2022) where the court upheld an award of Kshs. 700,000/= for blunt injuries to the chest, blunt injuries on the left thigh which developed into ecchymosis, bruises on forearms and Fracture of the right femur.
16. Third is Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR where the court set aside an award for Kshs. 1,400,000= and substituted it with an award of Kshs. 800,000/= for a fracture of the left femur (mid-shaft) and swollen left tender thigh.
17. Lastly, is Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages.



18. From the above authorities, and taking into consideration the time lapse and changing economic circumstances between when the authorities were delivered and now, and further taking into consideration that no amount can restore the claimant to exactly how he was before the accident occurred or even take away his pain and suffering, I find that the award of Kshs. 800,000/= as general damages was sufficient. It was neither inordinately high or low. I have taken into consideration the serious injuries sustained by the Respondent, given that even at the time of the medical examination, he was still unable to walk without support.
19. I therefore find that in assessing the damages, the trial court did not take into account an irrelevant factor or leave out of account a relevant one having considered the injuries suffered as per the medical records before the court and having considered other awards for similar injuries. I find that the award of Kshs. 800,000/= was commensurate with the injuries and circumstances of the case and the same is upheld.

b. Whether the award of Kshs. 450,000/= for future medical costs was justified.

20. The Appellants submitted that the award of Kshs. 450,000/= was excessive and the same ought to have been reduced to Kshs. 400,000/= as per the medical report dated 29/7/2021.
21. As regards future medical expenses, the established precedents are to the effect that an award for future medical expenses must be specifically pleaded and proven. Ringera, J (as he then was) in *Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002* held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in *Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisomo Civil Appeal No. 154 of 1993*, held that cost of future medical operation is special damages, which must be pleaded.
22. In this instance, I note that the same was specifically pleaded in the plaint and was supported by documentary evidence. The plaintiff pleaded a sum of kshs 500,000/= hence the issue is whether the award of Kshs. 450,000/= was excessive. Both medical reports indicated that the Respondent would require a hip replacement. The medical report filed by Dr.Wambugu dated 29th July 2021 recommended hip replacement at a cost of Kshs. 400,000/= whereas Dr. Wokabi report dated 18th May 2021 estimated the cost at Kshs. 500,000/=. The trial court awarded Kshs. 450,000/=. Having met the two in the middle, I find that the award of Kshs. 450,000/= for future medical costs was not excessive and the same is upheld.
23. I am further guided by the case of *Cold Car Hire Tours Limited Vs. Elizabeth Wambui Matheri (2015) Eklr* where the court awarded Kshs. 400,000/= for hip replacement in the year 2015.

c. Whether the trial court erred in failing to award loss of earning capacity

24. In *Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR* as quoted in *Hamo Transporters Company Ltd & Another vs Dorcus Wangui Kiriro [2019] eKLR* the court while addressing itself to the issue of loss of earning capacity, held that loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as separate head of damages, as a token, modest or substantial depending on circumstances of each case.
25. In the case of *Alpharama Limited vs. Joseph Kariuki Cebon [2017] eKLR* the court stated: -

“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.”



26. It was the Respondent's case that the trial court ought to have awarded loss of earning capacity as he sustained 16% permanent disability and could not walk or sit for long hours and had a shortened limb by 1.5cm thus was unable to deliver his work efficiently as he used to before the accident.
27. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say: -
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
28. It is trite that he who alleges must prove as provided for in Sections 107 and 108 of the *Evidence Act*. It was thus upon the Respondent to prove the contention of earnings before the same could be allowed. I note that in the plaint, though the Respondent pleaded that he earned Kshs. 48,000/=, no document was produced to support that contention. The Respondent admitted this fact in his submissions before this court. There was nothing produced to prove such earnings or any earnings at all. It was only pleaded that the Respondent was a clerk at Swami Container Depot but there was nothing to support this allegation of employment such as an employment letter and or payment slip.
29. I therefore do agree with the trial's court finding that the allegation of earnings of Kshs. 48,000/- were not proven. The Respondent did not prove on a balance of probability that he was in employment before the accident as alleged. Further, though the Respondent pleaded that he sustained 16% permanent disability and was unable to walk or sit for long hours, I note that the percentage was not so high so as to interfere with the Respondent's day to day life and the award of Kshs. 800,000/= for general damages was sufficient compensation for the Respondent's injuries.

d) Whether the award for special damages was excessive

30. The test to be applied in an award of special damages is clearly articulated in the cases of *Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990* and *Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681* which laid down the principle that special damages in addition to being pleaded must be strictly proved.
31. The Respondent pleaded special damages of Kshs. 694,316.08/=. However, from the receipts adduced before the trial court, the total amounted to Kshs. 194,316/=. It therefore cannot be said that the award of Kshs. 194,316/= was excessive whereas such damages were specifically proven. The trial court's award is thus upheld.
32. The upshot is that, this Court finds no reason to disturb the judgment of the lower court. Consequently, I find no merit in both the appeal and the cross-appeal and both the amended memorandum of appeal dated 26/10/2023 and cross-appeal dated 7/5/2024 are hereby dismissed. Each party shall bear their own costs.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2024

For Appellant:



For Respondent:

Court Assistant:

