



**Obara v Midega Company Limited (Civil Appeal E015 of 2024)
[2024] KEHC 15126 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E015 OF 2024
RE ABURILI, J
NOVEMBER 25, 2024**

BETWEEN

ALICE ANYANGO OBARA APPELLANT

AND

MIDEGA COMPANY LIMITED RESPONDENT

*(An appeal arising from the judgment and decree in Kisumu CMCC No. 474
of 2019, delivered on 18th January, 2024 by Hon. M.I. Shimenga, SRM)*

JUDGMENT

Introduction

1. The appellant herein Alice Anyango Obara filed suit against the respondent Midega Company Limited vide a plaint that was amended on the November 26, 2021 in which the appellant sought general damages for pain and suffering, loss of earning capacity and loss of earnings, special damages of Kshs. 108,456.48 and costs of the suit for injuries that she sustained following a road traffic accident that occurred on the 28th February 2018.
2. The appellant averred that on that day, she was lawfully standing by the roadside off the Kisian –Bondo road on the right side facing the Bondo direction at St. Rita area when the respondent’s motor vehicle registration number KCD 907L that was moving towards the Bondo direction at a high speed swerved to its right into the opposite lane in an effort to overtake another motor vehicle but in the process of overtaking, the said vehicle was so carelessly, negligently driven causing it to go off the road on its right and knock down the appellant.
3. The respondent filed a statement of defence dated 28th May 2019 denying all the allegations raised by the appellant.



4. The trial magistrate after hearing the case and evaluating the evidence, apportioned liability at 80:20 in favour of the appellant. The trial magistrate awarded the appellant general damages of Kshs. 600,000 but declined to grant her damages for loss of earnings and earning capacity. Special damages were awarded as pleaded.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 2nd February 2024 raising the following grounds of appeal:
 - a. The learned trial magistrate erred both in law and in fact in awarding the appellant general damages for pain, suffering and loss of amenities which were inordinately low and not commensurate with the injuries suffered by the appellant.
 - b. The learned trial magistrate erred in fact and in law by failing to award the appellant general damages for loss of earning capacity and loss of earnings.
 - c. The learned trial magistrate erred in law by failing to critically analyze the evidence and submissions on quantum together with the authorities submitted by the parties consequently coming to a wrong conclusion on quantum.
 - d. The learned trial magistrate erred in law and fact in writing a judgement on quantum which is at variance with the pleadings, against the weight of evidence and contrary to the principles established by precedent.
6. The parties were directed to file written submissions to canvass the appeal but only the appellant filed her submissions.

The Appellant's Submissions

7. The appellant submitted that an award of Kshs. 5,000,000 as pleaded before the trial court, would be sufficient to compensate her for the serious injuries sustained as a result of the accident. Reliance was placed on the cases of:
 - a. *Denshire Wambua Muteti v Kenya Power & Lighting Company Ltd NBI C.A.C.A No. 60 of 2004* where the judges awarded the plaintiff Kshs. 1,500,000 in general damages for pain, suffering and loss of amenities for injuries comparable to those sustained by the appellant.
 - b. *Peace Kemuma Nyangéra v Michael Thuo & Another NBI H.C.C.C. No. 209 of 2013* & *Millicent Atieno Ochuonyo v Katola Richard NBI H.C.C.C. No. 38 of 2012* where in both cases, the courts awarded general damages of Kshs. 2,500,000 for injuries comparable to the appellant's.
 - c. *Kornelius Kweya Ebichet v C & P Shoe Industries Ltd Civil Case No. 1152 of 2002* where the court awarded Kshs. 1,000,000 as general damages where the plaintiff sustained a fibula fracture of the left lower limb done with O.R.E.F.
 - d. *Alphonse Muli Nzuki v Brian Charles Ochuodho Civil Appeal No. 141 of 2010* where the Court of Appeal at Mombasa upheld an award of Kshs. 800,000 for general damages to the respondent for comparable injuries.
8. On the award for loss of earnings and earning capacity, it was submitted that the appellant was entitled to an award under this heading. Reliance was placed on the case of *Mumias Sugar Company Limited v Francis Wanalo Kisumu COA No. 91/2023* where the court provided a basis for granting of an award under this heading where the appellant was not working, was working but does not have proof



of earnings or was working prior to the accident but after the accident he/she is unable to continue working. In the said case the court awarded a global award of Kshs. 500,000 under this heading.

9. The appellant on her part submitted that an award of Kshs. 800,000 would be sufficient under this heading considering that she was aged 57 at the time of the accident and was a farmer

Analysis and Determination

10. This This appeal is against quantum only. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
11. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 allowances in this respect”
12. With the above in mind, I will now proceed to determine the Appeal.
13. Having considered the record of appeal, the submissions and the authorities relied on by the respective parties, I opine that the only issue for determination is whether the quantum for general damages awarded by the trial court was inordinately low to warrant this court’s interference with the same.
14. The contest herein is not about the nature of injuries sustained by the respondent but rather the award of general damages made by the trial court.
15. In the amended plaint dated 26th November 2021, the appellant pleaded that she sustained the following injuries:
 - a. Complex fracture of the right hand distal radius with displacement of a cortical bone fragments.
 - b. Fracture of the right hand radius and ulna bones
 - c. Displaced fractures of the right superior and inferior public rami
 - d. Displaced fracture of the left superior public rami.
 - e. Fibula fracture of the left lower limb done with O.R.E.F.
 - f. Cervical hypolordosis due to muscles spasms and cervical spondylosis
 - g. Swollen leg
 - h. Head injuries with cut wound
 - i. Neck tenderness
 - j. Cut wound on the right cheek
 - k. Cut wound on the left elbow



- l. Lacerations on the head
 - m. Chest pain and tenderness
 - n. Backache
16. From the evidence adduced before the trial court, it is clear that the appellant sustained injuries in the nature of complex fractures of the right hand, multiple fractures of the pelvis, fracture of the fibula, cervical hypolordosis due to muscles spasms and cervical spondylosis which is basically a spine injury where the spine loses its natural curvature as well as soft tissue injuries to head, cheek, elbow, chest and back.
 17. On general damages for pain and suffering and loss of amenities, I have found the following cases relevant in terms of comparison:
 18. In the *Millicent Atieno Ochuonyo v Katola Richard* HCCC No. 38 of 2012 [2015] eKLR case in which the plaintiff sustained pelvic injuries with fracture of the right pubic ramus and diastasis of the pubis symphysis, the plaintiff was awarded Kshs. 2,000,000 in general damages.
 19. In *Penina Waithira Kaburu v LP* [2019] eKLR the Respondent who had inter alia had a history of fracture of the pelvis with the bilateral involvement of the superior and inferior pubic ramii was awarded Kshs 2,000,000.
 20. In *Kihara & another v Situma* (Civil Appeal 36 of 2018) [2022] KEHC 15666 (KLR) (17 November 2022) (Judgment), the court on appeal substitute the award of general damages of 2,000,000 with an award of Kshs 1,300,000 for injuries comprising fractures of the superior and inferior pubic ramii on the left side, fracture of the 3rd lumbar vertebrae and blunt injuries on the left leg.
 21. The Court of Appeal in *Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another* (No.2) (1987)) KLR 30 stated that: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”
 22. Guided by the comparable cases above, it is my finding that the award of Kshs 600,000/= for the serious multiple injuries sustained by the appellant herein was inordinately and manifestly low as to warrant interference by this court. The trend as demonstrated from the authorities I have cited above shows an award ranging from Kshs. 1,300,000 – Kshs. 2,000,000 for comparable injuries.
 23. I therefore set aside the trial court’s award of Kshs 600,000 for general damages for pain and suffering and loss of amenities and substitute therefore an award of Kshs. 2,000,000.
 24. Turning to the award for general damages for loss of earning and earning capacity, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss.
 25. However, it is the responsibility of the appellant to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.
 26. Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such



other factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure.

27. In this case, there was no evidence led on the appellant's earning. The appellant only testified that she was aged 57 years old at the time of the accident and that she was a farmer within Kisumu County and that after the accident she went back to farming.
28. PW5 Prof. Okombo testified that he examined the appellant a year after the accident and subsequently assessed her disability at 80%. It was his testimony in cross-examination however that he recommended orthopedic attention and physiotherapy and that if the appellant received the same, she should have fully recovered.
29. DW1, Dr. Kahuthu testified that she examined the appellant 2 years after the accident and had assessed her disability at 10%. It was her testimony that the appellant had regained functions of all the limbs that had fractured other than the left ankle joint. She however admitted that Prof. Okombo made a correct assessment of the appellant's disability due to the time he had examined the appellant.
30. The appellant in her grounds of appeal challenges the failure by the trial magistrate to award her damages for loss of earning capacity and loss of earnings. While discussing the assessment of damages for diminished earning capacity, the court in the case of *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR stated thus:

...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...." (Emphasis, my own)

31. Taking into consideration the fact that the appellant never proved her earning prior to the accident, it was impossible for the trial court to assess her earning capacity. Further, it is clear from the testimony that had the appellant followed through with his recommendation for orthopedic attention and physiotherapy, then she would have fully recovered. There's nothing that would have prevented her from going back to her farming activities.



32. Furthermore, the Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR stated inter alia that 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.
33. Again in the case of *Butter v Butter* (1984) KLR the Court of Appeal stated that: “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.”
34. See also Cecilia W. *Mwangi v Ruth W. Mwangi Court of Appeal Nyeri No. 251 of 1996*.
35. I thus find that the appellant failed to prove that she was entitled to loss of earnings and loss of earning capacity as pleaded. I find no fault in the trial court’s decision to decline to make any award under these headings.
36. The upshot of the above is that I find that the appeal is partially successful only as far as the award of general damages for pain and suffering is concerned. I set aside the award of Kshs 600,000 and substitute it with an award of Kshs 2,000,000 which damages will attract interest from the date of judgment in the lower court until payment in full. The lower court decree shall be amended to reflect the fresh award herein.
37. The award on special damages was never contested and is hereby upheld.
38. Each party to bear their own costs of this appeal as the appeal is only partially successful.
39. The lower court file to be returned forthwith with a copy of judgment via email.
40. Stay of execution of decree is granted for 45 days of today.
41. This file is closed, I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF NOVEMBER, 2024.

R.E. ABURILI

JUDGE

