



**Mala v Thurania & another (Civil Appeal 34 of 2022)
[2024] KEHC 15984 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 34 OF 2022
AC MRIMA, J
DECEMBER 19, 2024**

BETWEEN

STEPHEN WANYONYI MALA APPELLANT

AND

VICTOR KIVUTI THURANIRA 1ST RESPONDENT

CLEOPHAS MUCHOLWA 2ND RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. T. Omonio (Resident Magistrate)
in Kitale Chief Magistrates Civil Case No. 37 of 2020 delivered on 17th October 2022)*

JUDGMENT

Background:

1. Stephen Wanyonyi Mala, the Appellant herein, instituted the Plaintiff dated 13th February 2020 against Stephen Wanyonyi Mala and Cleophas Mucholwa, the 1st and 2nd Respondents herein respectively. He sought compensation for injuries he sustained as a result of road traffic accident, he claimed, was caused by the Respondents' negligence.
2. Briefly, before the trial Court, the Appellant, then the Plaintiff, pleaded that on 5th September 2019 at about 6.00pm, he was riding a donkey cart along Webuye-Kiminini road when the 2nd Respondent negligently drove the motor vehicle registration No. KAS 998S, knocking him down and as a result, sustained serious bodily injuries.
3. The Appellant particularized injuries as; head injury extradural haematoma, painful swelling of the left temporal region, blood clot with pressure on the left side of the head, chest pains, fracture of left parietal and occipital bones, painful swelling brises, swollen knee joint and psychological trauma.
4. The Appellant claimed general damages, special damages interests thereon and costs of the suit.



5. The 1st Defendant, now Respondent, did not enter appearance. The 2nd Respondent, then 2nd Defendant, filed a Statement of Defence dated 29th July 2020. He denied the occurrence of the accident and denied having caused it. He put the Plaintiff to strict proof. It was his case that if the accident occurred it was as a result of the Plaintiff's negligence.
6. The 2nd Respondent posited that the Appellant suddenly drove his donkey cart onto the road when it was not safe to do so thereby causing the accident. It was further its case that the stopping the donkey cart onto the lawful way of the oncoming motor vehicles caused confusion and hence the accident. He attributed the accident wholly to the Appellant for failure to exercise due care, skill and prudence. He posited that the injuries could only be his responsibility. He urged the trial Court to dismiss the case with costs.
7. At the hearing of the case, it was only the Appellant who prosecuted his case since neither the 1st nor the 2nd Respondents participated.
8. Upon considering the evidence presented by the Appellant and the pleadings filed, the trial Court was of the finding that the Respondents were wholly to blame for the accident. The Court also made various award. Under pain and suffering, the sum of Kshs. 500,000/- was made. As regards future medical expenses, the trial Court awarded Kshs. 200,000/-. For loss of earning, the Appellant was not awarded damages for failure to prove extent of incapacity. Special damages were also allowed.

The Appeal:

9. The Appellant was dissatisfied with the findings of the trial Court in respect to the quantum of damages. The appeal is, therefore, on the assessment of damages. Through the Memorandum of Appeal dated 31st October 2022, he asserted Grounds of Appeal as hereunder: -
 1. That the trial magistrate erred in law and fact in awarding meagre general damages on the head of pain and suffering and loss of amenities of Kshs. 500,000/- when the appellant suffered grave injuries.
 2. The trial magistrate erred in law and in fact in disregarding the Appellant's cited authorities and relied on case law that do not match the circumstance of the case.
 3. The trial magistrate erred in law and in fact in awarding a meagre award of Kshs. 200,000/- on the head of future medical expenses when the Appellant had proved the said item on balance of probabilities.
 4. The trial magistrate erred in law and in fact in denying the appellant an award on loss of earning capacity against overwhelming evidence on record.
 5. The trial magistrate erred in law and in fact in acting with a lot of biasness hence arriving at a wrong decision.
10. In further support of the Appeal, the Appellant filed written submissions dated 30th January 2024. Under the head pain and suffering, the Appellant claimed that Kshs. 6,500,000/- was a reasonable amount. He relied on the decision in Terry Kenya Marangu -vs- Wells Fargo Limited (2014) eKLR.
11. In submitting on the claim under future medical expenses, the Appellant stated that an award of Kshs. 2,000,000/- would have been sufficient.
12. On the clam of loss of earning capacity, the Appellant submitted that he can no longer work. He referred to the medical report where the Doctor stated that the skull was expected to unite in part and



that it was a serious injury that needs frequent medication. The Appellant claimed that he was entitled to an award of Kshs 6,227,277/-.

The Respondents' case:

13. Despite service, as evidenced by the Affidavit of Service dated 31st January 2024, both Respondents did not participate in the appeal.

Analysis:

14. From the foregoing, the only issue for determination is whether the learned trial Magistrate, in the circumstances of the case, properly assessed the damages under pain and suffering, future medical expenses and loss of earning capacity.
15. As the appeal is on quantum of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)
16. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -

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.
17. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
18. With the foregoing principles, this Court will now sequentially address the issues.

i. Pain and Suffering:

19. The Appellant testified as PW1. He adopted his witness statement and produced his copy of identification card, demand notice, P3 form, medical report, payment receipts, treatment notes, X-ray, bundle of receipts, motor vehicle search and police abstract respectively as exhibits.
20. It was his evidence that he is not fully healed and is still attending Moi teaching and referral hospital for treatment. He stated that his doctor recommended that he should go to Kenyatta National Hospital with Kshs. 1,000,000/- for treatment.
21. In his statement, the Appellant replicated the injuries he suffered as captured in the introductory segment of this judgment. The Appellant pleaded that an award of Kshs. 6,500,000/- was appropriate. The Appellant quoted the decision in *Terry Kenya Marangu -vs- Wells Fargo Limited* (2014) eKLR and that of *Wainanina Mwaura Antony -vs- Ibere Henry Mururu & 2 Others* (2021) eKLR where the Court awarded Kshs. 3,500,000/- and Kshs. 3,000,000/- respectively for pain and suffering.



22. This Court has intently gone through the said two decisions. The damages awarded therein were based on injuries which were similar to the ones sustained by the Appellant. The Trial Court, in a bid to ascertain the appropriate awardable damages, went to great detail in analysing the decisions in *Densire Muteti Wambua -vs- Kenya Power & Lighting Company Ltd* and the one in *Telkom Orange Kenya Limited -vs- ISO Minor* suing through his next of friend and mother.
23. In the cases relied upon by the Court, the nature of the injuries was head injury occasioning depressed skull, fracture of the skull, loss of consciousness, scars on the left temporal parietal area, risk of seizures as long-term complication with disfiguration resulting from the scalp and leg scars. In the former case the court awarded Kshs. 500,000/-.
24. According to the Medical Examination Report produced as exhibit 4, the Appellant suffered severe head injury, loss of consciousness (acute epidural haematoma) and the degree of injuries was assessed as 'grievous harm'.
25. Whereas the injuries, especially those of the head, in the case of *Terry Kenya Marangu -vs- Wells Fargo Limited (2014)* eKLR may seem to be similar to the ones in the instant case, the ones the Appellant sustained are slightly less severe. I say so because in the *Terry Kenya Marangu* case [supra], the Doctor indicated that the victim suffered memory lapses, visual impairment, recurrent tearing of the eye, frontal skull defect due to head trauma making her brain susceptible to injury, psychological trauma due to facial deformity and recurrent headaches. The Doctor recommended titanium implants, surgery fees, plastic surgery fees, neurosurgeon fees, maxillofacial surgeon, plastic surgery fees, hospital bill among other payables. Concededly, the injuries in the instant case are not a reflection of the foregoing as per the Medical Report. They are less severe.
26. The trial Court in this case was not faulted for considering an irrelevant factor or leaving out a relevant one. It was argued that the Court awarded an inordinately low amount. Going by the nature of injuries sustained by the Appellant and the award made on pain and damages, this Court is not persuaded that the award is inordinately low. The Court affirms the award by the trial Court.

(ii) Future medical expenses:

27. Superior Courts have settled the law regarding this head. The Court of Appeal in *Kenya Bus Services Ltd. – vs- Gituma (2004)* EA 91, observed as follows: -

... And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the 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 rights should be pleaded...
28. In Civil Appeal No. 26 of 2013, *Simon Taveta v Mercy Mutitu Njeru [2014]* eKLR, the Court of Appeal spoke further to the foregoing as follows: -

...we are of the view that taking into account the 100% disability on the part of the respondent and the injuries sustained, we make an award of Kshs. 3,500,000/= which we consider is not inordinately excessive as general damages for pain and suffering and loss of amenities. No award is made for future medical care as the same was neither pleaded nor proved as special damages. (emphasis added).



29. Having combed through the Complaint, it is indeed discernible that the Appellant surmounted the first hurdle. In paragraph 7, he pleaded for future medical expenses. The Appellant's proof of future medical expenses was in the Medical Report by Dr. Mulianga Ekesa which was produced as exhibit 4. The Doctor opined that the Appellant will need counselling to allay his trauma and shall be on anti-inflammatory agents to relieve the aches.
30. There were no other proof of future medical expenses. In comparison with the decision in Terry Kenya Marangu case [supra], the future medical expenses therein were proved to be steep as compared to the ones made in this case.
31. In the circumstances, I do not find any justification to disturb the trial Court's assessment of Kshs. 200,000/-.

iii. Loss of earning capacity:

32. Under this head, the Plaintiff pleaded for loss of earning in paragraph 6 of the Complaint. In his written submissions, he urged the Court to award him Kshs. 6,227,277 on the argument that he can no longer work.
33. Whereas this is a general damage claim, it must be demonstrated by way of evidence. Plaintiffs must avail in Court proof that as a result of an accident, their earning capacities will be diminished to a certain extent. As was correctly pointed out by the trial Court, there was no backing of the claim of incapacity. The Medical Report did not speak to any incapacity of the Appellant's limbs or any other incapacity, temporary or permanent, attributable to the accident.
34. The claim, therefore, fails.

Disposition

35. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
36. In the end, the appeal wholly fails and is hereby dismissed with no order as to costs.
37. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF DECEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wamalwa, Learned Counsel for the Appellant.

Chemosop/Duke – Court Assistants.

