



**Nyamohanga & another v Kitheka (Civil Appeal 51 of 2020)
[2023] KEHC 1433 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 51 OF 2020
REA OUGO, J
FEBRUARY 28, 2023**

BETWEEN

MWITA STANLEY WANDA 1ST APPELLANT

LUCAS MWITA NYAMOHANGA 2ND APPELLANT

AND

JOYCE MWENDE KITHEKA RESPONDENT

*(Being an appeal from the judgment of the Honourable E.A Obina Principal
Magistrate delivered on the 11th August 2020 in Kisii Civil Suit No 558 of 2018)*

JUDGMENT

1. This appeal challenges the finding of the trial magistrate on quantum. The suit before the subordinate court was that on December 1, 2017 the respondent was riding on motor cycle registration No KMED 615K along Kisii Migori Road when the appellant's driver who was in control of the appellant's vehicle, KCM 602H, negligently drove the vehicle causing it to hit the respondent. As a result of the accident the respondent sustained the following injuries: fracture of the right tibia, fibula and humerus; deep cut wound on the frontal region, right temporal region and right foot; and blunt trauma to the lower back.
2. The parties agreed on liability at the ration of 80:20 in favour of the respondent. The trial magistrate at the conclusion of the hearing arrived at the following award in favour of the respondent:
 - a. General damages Kshs 2,000,000/-
 - b. Future medical expenses Kshs 200,000/-
 - c. Special damages Kshs 244,000/-
 - d. Cost and interest



3. Both parties are aggrieved by the finding of the subordinate court and the appellant has filed his memorandum of appeal dated August 25, 2020, while a cross appeal has been preferred by the respondent and filed on April 21, 2021. The grounds raised in the memorandum of appeal are as follows:
 1. The trial court erred in both law and fact in failing to appreciate the plaintiff's exact injuries as presented by the examining doctors hence failed to determine the exact degree of the plaintiff's injuries.
 2. The learned magistrate erred in law by awarding the plaintiff an award under pain and suffering which way outside the plaintiff's own submissions.
 3. The learned magistrate erred in law and fact by awarding the plaintiff under loss of future earnings yet the amount was neither specifically pleaded nor proven.
 4. The learned trial magistrate erred in law and fact by awarding a judgment award that is way excess compared to the awards for analogous injuries.
 5. The learned magistrate erred in law and fact by failure to apply the entire decretal amount to the liability concession.
 6. That the learned magistrate erred in procedure as despite the court closure due to covid-19, she failed to verify service of mention dates for submissions and even judgment date hence denying the appellants a chance to file submissions.
4. The respondent's grounds for the memorandum of cross appeal were as follows:
 1. The learned trial magistrate erred both in law and in fact in failing to consider both the pleadings, the evidence and the submissions on the loss of future earning capacity and thereby ended up not awarding the respondent (now appellant) damages under this head.
 2. That the learned trial magistrate erred both in law and in fact in failing to appreciate that there was sufficient evidence and authorities to support a claim for loss of future earning capacity.
 3. Spent
5. The injuries sustained by the respondent have been disputed. The respondent was treated at Oasis Specialist Hospital. In the discharge summary, it is noted that the respondent complained of pain the right arm and the right leg. The results of radiology revealed that she sustained fracture of the right humerus and tibia/fibula. The medical report by Dr Morebu confirmed that the appellant had sustained the injuries enumerated in her plaint. Dr Morebu who examined the respondent 4 months after the accident observed that she was unable to walk without support. He opined that recovery was expected to take very long time and that she would require physiotherapy and occupational therapy. He concluded that the respondent would require another operation to remove the metal implants. The surgery would cost approximately Kshs 200,000/-. I find that there was sufficient evidence that the respondent proved that she sustained the injuries listed in her plaint.
6. Although a second medical exam was done by the appellant's doctor, they did not produce the medical report. I also note that at the close of the hearing in which both counsels for the parties were present, a further mention date was given in the presence of both counsels. The appellant cannot therefore fault the trial court for failing to attend court or file its submissions.



7. I now turn to consider whether the trial magistrate abused his discretion in awarding damages. In *Mbogo & Another v Shah* [1968] EA 93, the court, (Sir Newbold, P.) stated at page 96:

A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.

8. The appellant submitted that the award by the trial magistrate of Kshs 2,000,000/- was not backed by any judicial precedent. They pointed out that the respondent in its submissions urged the subordinate court to make an award of Kshs 1,200,000/-. The appellant submitted that an award of Kshs 800,000/- would be most appropriate and relied on the cases of *Ouru Super Stores v Geoffrey Gichana Onwari* [2018] eKLR and *Thomas Muendo Kimilu v Anne Maina & 2 Others* Civil Case No 6 of 2007. The appellant also submitted that there was no evidence to support an award of damages for loss of earning capacity. The appellants submitted that for the award to be made under the head loss of earning capacity, the respondent was required to show that she sustained some disability. There was no evidence led to show the respondent sustained any form of disability.
9. The firm of M/s Khan & Associates made submissions on behalf of the respondent. It was submitted that the award by the trial magistrate cannot be said to be excessive considering that the respondent was not able to walk without support as a result of the injuries. They relied on the case of *Mwaura Muiruri v Suera Flowers Limited & Another* [2014] eKLR where a plaintiff that had sustained comminuted fractures of the right humerus upper and lower thirds of the tibia and compound fractures of the upper and lower 1/3 tibia fibula was awarded Kshs 1,750,000/-. They further submitted that Dr Morebu opined that the respondent had sustained paralysis of the right upper limb and thus the respondent was entitled to damages of loss of future earning capacity.
10. I have considered the evidence that was before the subordinate court and find that there was no evidence led by Dr Morebu that the respondent had sustained paralysis of the right upper limb. Dr Morebu in his report expected that the respondent's recovery would take a long time. He also noted that she was unable to walk without support and therefore could not go about her chores as the sole breadwinner to her family. As per the evidence by Dr Morebu in his medical report, the only conclusion that can be drawn is that the respondent was likely suffer loss of income during the recovery period. Dr Morebu opined that due to her injuries the respondent was expected to take a long time to heal. The difference between loss of income and loss of future earning capacity was explained by the Court of Appeal in *SJ vs Francesco Di Nello & Another* [2015] eKLR where the court stated:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in *Fairley V John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning MR said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”



11. The respondent did not plead loss of future earning and she neither presented any evidence in support of the same. In fact, the same was not awarded by the trial magistrate for good reason. The cross appeal filed by the respondent therefore fails.
12. The injuries sustained in the *Mwaura Muiruri case* (supra) are far much more severe than those sustained by the respondent herein. In *Ouru Super Stores v Geoffrey Gichana Onwari* [2018] eKLR I found that an award of Kshs 800,000/- was sufficient for a plaintiff who sustained soft tissue injuries, fracture of the left humerus bone mid 1/3 and fracture of the left tibia/fibula and permanent disability was anticipated. The court in *Alphonza Wothaya Warutu & another v Joseph Muema* [2017] eKLR sustained an award of Kshs 800,000/- for a plaintiff that had sustained deep cut wound on the forehead and right lower leg; compound fracture on the midshaft of the right humerus; and deep cut wound on the right lower leg.
13. Having considered that the injuries sustained by the respondent herein were not as serious as those in the above cited authorities as well as the rate of inflation among other factors, I find that an award of Kshs 850,000/- is sufficient compensation. The award of Kshs 2,000,000/- on general damages is hereby set aside as substituted with an award of Kshs 850,000/- less 20% contribution as agreed in the lower court.
14. The awards of special damages and future medical expenses were not challenged in the appeal. For avoidance of doubt the award shall be made up as follows:
General damages Kshs 850,000/-
Less 20% contribution Kshs 170,000/-
Kshs 680,000/-
Future medical expenses Kshs 200,000/-
Special damages Kshs 244,000/-
Total Kshs 1,124,000/-
15. The appeal having been successful, the appellant shall have the costs of the appeal. Apart from the special damages, interest on the damages shall run from the date of judgment before the trial court.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF FEBRUARY 2023.

R.E. OUGO

JUDGE

In the presence of:

Mr. Oduor For the Appellant

Respondent Absent

Aphline /Wilkister C/A

