



REPUBLIC OF KENYA



**KENYA LAW**  
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**S.S. Mehta & Son Co. Ltd v Maina (Civil Appeal E023 of 2021)  
[2023] KEHC 18356 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18356 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E023 OF 2021  
SC CHIRCHIR, J  
MAY 31, 2023**

**BETWEEN**

**S.S. MEHTA & SON CO. LTD ..... APPLICANT**

**AND**

**PETER NJUGUNA MAINA ..... RESPONDENT**

*(Being an appeal against the Judgement of Hon. M. Kinyanjui  
in Kandara PMCC NO. 98 of 2019 delivered on 27th May 2021)*

**JUDGMENT**

1. The Respondent filed civil suit No. 98 of 2019 at the Chief Magistrates' court in Kandara seeking for special damages ,general damages for pain and suffering and damages for diminished earning capacity suffered as a result of a Road accident which occurred on 16<sup>th</sup> January 2019. The suit was consolidated with CMCC NO. 101/2019, in which the Applicant had sought for damages for loss of user in respect of his Motor vehicle which was damaged during the same accident.
2. In a judgment delivered on 27<sup>th</sup> May 2021, the trial court awarded damages as follows; -
  - a. General damages kshs1,500/=
  - b. Loss of earning capacity khs.955,680/=
  - c. Damages for loss of user was dismissed.
3. The court also made an award on special damages but said damages do not form the subject matter of this appeal.  
Aggrieved by the judgment the appellant proffered this appeal.



## **Grounds of Appeal**

4. The Appellant has set out the following grounds of Appeal:
  - a. That the learned magistrate erred in law and fact in awarding general damages of kshs. 1,500,000/- which was inordinately high in the circumstances.
  - b. That the learned magistrate erred in both law and fact by proceeding to award loss of earning capacity of kshs. 955,000/- which award was inordinately high in the circumstances and which is not supported by the evidence adduced and produced in the matter.
  - c. That the learned magistrate erred in law and fact by failing to consider the evidence and exhibits on record, and the submissions and authorities cited by the appellant.

## **Appellant Submissions**

5. The Appellant submits that the award of kshs.1,500,000/- was inordinately high. It is further submitted that the trial court failed to consider the Appellant's medical evidence by Dr. Bodo which showed that the respondent sustained permanent disability of 10%. The appellant further contends that the trial court did not lay any basis for the award of kshs.1,500,000/-
6. It urges the court to substitute the award with kshs .600,000/= and have supported their proposal with several authorities. They argue that the case of Frankline Chilibasi vs. Kirangi Liston (2017) eKLR relied on by the respondent in the lower court consisted of more severe injuries compared to the present case.
7. On the loss of earning capacity, it is submitted that there was no legal or factual basis for the said award; that the respondent did not provide proof for the alleged earnings of kshs20,000 per month, and that in any event there was a contradiction on how much the Respondent actually earned. The appellant contends that indeed the fact that the respondent lost his claim for loss of user meant that he could not prove how much his earnings were and therefore there was no way he could have convinced the court on the claim for loss of earning capacity.

## **Respondent's Submissions**

8. It is the respondent's submission that the award was not excessive and cited several authorities, which he contends support the award made.
9. On loss of earning capacity, it is the Respondent's contention that the amount was reasonable and cites several past decisions to demonstrate that indeed the award herein was modest in comparison to the awards on the cited cases.
10. Finally, it is submitted that the trial court considered the evidence and submissions from both sides in arriving at its findings.

## **Summary of the Evidence on Quantification of Damages**

11. The Respondent's first witness was Dr. James Muoki. He told the court that the respondent suffered injuries as follows:-
  - Crush injury to the right foot



- Amputation of the 4<sup>th</sup> toe
  - Degloving injury of the right foot
  - Open fracture on the right fibula
  - Fracture of the left fibula
  - Cut wound on the face
  - Pain and concentration on the scalp
  - Pain and tenderness on the abdomen
  - Pain and tenderness on the chest.
12. He further told the court that the respondent underwent 2 operations, suffered severe deformation of the right foot and that the remaining 4 toes were permanently deformed. He assessed permanent disability at 40%.
  13. PW3 was the respondent herein. He told the court that his right 4<sup>th</sup> toe was amputated. He sustained fractures on both legs. He was injured on the chest and stomach. He was admitted at Thika Level 5 hospital for 13 days.
  14. He further told the court that the motorcycle which was damaged as a result of the accident was his, and used it as his source of income. The motorbike earned him about kshs.20,000 per month. He said he could no longer work as his legs are not healed. His disability was assessed at 40%.
  15. Dr. Bodo's report was produced by consent of the parties without calling the Doctor.

### **Determination**

16. This is the first appeal and the role of this court is to look at the evidence afresh, do its own assessment of the said evidence and arrive at its own independent decision (see Ann vs. Joseph Kiprono Civil Appeal No. 345 of 2000).
17. From the record, the court found both parties equally liable for the accident and consequently apportioned liability as such. The finding is not an issue in this Appeal.
18. I have considered the grounds of appeal, the record of the trial court the parties submissions and the authorities relied on. In my view the following are issues for determination.
  - a). Was the award on general damages too excessive?
  - b). Was the respondent entitled to damages for diminished earning capacity and if in the affirmative, was the award too excessive.

### **Whether the General damages was too excessive**

19. The principles upon which an appellate court can interfere with the trial's court discretion on assessment of damages has been restated in many decisions of the High Court and, the court of Appeal. In Butt vs. Khan (1981) KLR 349 the court of appeal stated: "an appellate court will not disturb an award on damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately low or high."



20. There is no dispute as to the nature of injuries sustained save on the decree of permanent disability. From the medical evidence , the respondent sustained a right fibula fracture, a left fibula fracture, degloving injury of the right foot, crush injury of the right foot, amputation of the right fourth toe and soft tissue injuries.
21. Can the award of kshs.1,500,000 be said to be excessive when considered against comparable awards for similar injuries? The trial court in awarding kshs.1,500,000 stated that she took into account the nature of the injuries and the authorities cited by the parties.
22. The guiding principles in assessing damages were set out in the case of Boniface Waiti & another vs. Michael Kanlki Kamau (2007) eKLR . The principles are as follows:
  - (a) An award of damages is not meant to enrich the victim but to compensate such victim for injuries sustained.
  - b). the award should be commensurate to the injuries sustained.
  - c). Previous awards in similar injuries sustained are mere guide but each can be treated on its own facts.
  - d). Previous awards to be taken into account to maintain stability of awards such factors as inflation should be taken into account.
23. I have considered the authorities cited by the parties herein on the part of the Appellant. The decision of Maina Onesmas –Vs Charles Wajohi (2019) eKLR Murambi & another vs. Citum (2004) Eklr, Njoki Joseph & another vs. Gerald Kihiu (2020) eKLR consist of different injuries which have no bearing in this case as the injuries are of a different nature and therefore not suitable for comparison.
24. The only other authority which has been cited and compares well in terms of injuries with the present case is Daniel Augustine & another vs. Patricia Kwamboka (2019) Eklr, but which, as pointed out by the Appellant, the injuries were indeed more severe in comparison. In the aforementioned case the court awarded kshs.1,200,000.
25. The respondent on the other, has quoted several authorities all of which reflect more serious fractures compared to the present case and thus do not provide a proper guide for assessment.
26. Considering the injuries sustained and comparable awards , I find that the award of kshs.1,500,000 was excessive and require the intervention of his court .I therefore set it aside. In arriving at this decision ,I have considered the following past decisions :
  - a). John Njega Maina vs. Humphrey Kinyua Bukenia (2016) eKLR. The appellant suffered fractures of tibia and fibula of both legs, friction burns and soft tissue injuries. The court awarded kshs.750,000. The year was 2016.
  - b). In the case of Jane Njeri Macharia vs. Godfrey Murimi Mnega & another (2020) eKLR. The claimant suffered compound fractures on both legs and the court awarded kshs.800,000 in October 2020
26. Guided by the above authorities, and taking into consideration inflation factors I find that an award of ksh.1,200,000 would be a fair compensation for the aforesaid injuries.

### **Damages for Diminished Earning Capacity**

27. It is the Appellant’s contention that there was no evidence of what the Respondent did for a living or what he earned and that since there was no proof of any earnings , the respondent was not entitled to



- damages for diminished earning capacity. They further reasoned that indeed the dismissal of his claim under loss of user in respect of the motorbike was proof enough that he had not established that he earned any income from it.
28. The Appellant's contention in this regard is erroneous. Loss of earning capacity or diminished earning capacity is in the nature of general damages and is an entitlement to the claimant whether or not they were previously engaged in any gain full work. In the case of *Mumias Sugar Co. Ltd vs . Francis Wanalo*, (2007)eKLR the court held:-“...the award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial and even when he is not employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to either losing his job in the future or in case he loses his job, his- diminution of chances of getting an alternative job in the market while the justification for the award where the plaintiff is not employed at the date of trial is to compensate the plaintiff for the risk that he will not get employed or suitable employment in future.”
29. Thus the Respondent was entitled to damages for diminished earning capacity whether or not he was gainfully employed at the time of the accident. The appellant told the court that he was a boda boda operator, a fact which was not contested. However, even if he had no proof of work or earnings, he would still be entitled to damages for diminished earnings capacity as held in the *Mumias sugar case* ( supra)
30. Loss of user on the other hand is in the nature of special damages , and the Respondent was required to strictly prove it . The trite law on proof of the two heads of damages are completely different. I therefore disagree with the Appellant's contention that both claims should have failed.
31. Turning back to loss of earning capacity or diminished earning capacity, the fact , and the degree , of incapacitation must be proved.( see *Charles Mwaniki vs Coastal Kenya Enterprises ltd*) The appellant told the court, “I can no longer work as my legs are not healed”. Dr. Muoki assessed permanent disability at 40 % while Dr. Bodo at 10%. In view of the variance on the percentages of the degree of disability ,I will take the average of 25%.
32. On the earnings, the trial court applied a minimum wage of kshs.7,240/- as there was no documentary proof of the respondent's earnings. I have no reasons to fault the trial court in this regard. The court opted applied a multiplier of 10 years, which in my view was rather modest.
- The trial court however failed to factor in the degree of disability. The respondent's disability was not 100%. There is reason to interfere therefore with the court's assessment in this respect.
33. I will assess loss of earnings capacity therefore as follows:
- $$\text{Kshs.7,240} \times 12 \times 10 \times 25/100 = 217,200$$
34. In conclusion I hereby make the following orders:
- The trial court award of kshs.1,500,000 in general damages is hereby set aside and substitute it with kshs.1,200,000
  - I set aside the award of kshs.955,680 on loss of earning capacity and substitute it with 217,200.
  - Both awards shall be subjected to appointment of 50%.
  - The other heads of damages will remain undisturbed.
  - All heads of damages will attract interest at court rates from the date of judgment of the lower court.



f). Each party to meet their costs in this Appeal.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF MAY  
2023**

**S. CHIRCHIR**

**JUDGE**

**In the presence of:**

Susan- Court Assistant

No appearance by the parties.

