



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Osman v Munyaka & another (Civil Appeal E123 of 2021)
[2023] KEHC 21860 (KLR) (22 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E123 OF 2021**

**OA SEWE, J
AUGUST 22, 2023**

BETWEEN

MOHAMED RAUF OSMAN APPELLANT

AND

JOHN NJENGA MUNYAKA 1ST RESPONDENT

JOSEPHINE WANDIA NJENGA 2ND RESPONDENT

*(Being an Appeal from the judgment of Hon. Francis Kyambia (CM), delivered
in Mombasa on 20th August, 2021 in Mombasa CMCC No. 749 of 2019))*

JUDGMENT

1. The appellant was the plaintiff before the lower court in Mombasa Chief Magistrate's Civil Case No. 749 of 2019: Mohamed Rauf Osman v John Njenga Munyaka and Another. He sued the two respondents for general and special damages, loss of future earnings as well as interest and costs of the suit. His cause of action was that on or about the November 16, 2018, while lawfully walking at the pavement along Jomo Kenyatta Avenue, the 2nd defendant drove the 1st respondent's Motor Vehicle Registration No. KBR 642S, Toyota Probox, so recklessly that she caused it to veer off the road and hit him.
2. The appellant further contended that, as a direct result of the accident, he sustained a fracture of his right femur thigh bone and a blunt object injury to the right thigh. He claimed special damages of Kshs. 492,696/= in respect of the treatment expenses he incurred as well as the sum paid for medical examination and report. He averred that at the time of the accident he was 56 years old and in good health; and was operating an active garage from which he earned approximately Kshs. 200,000/= per month; and therefore that the respondents were liable to him for his pain, suffering and loss of amenities.



3. The respondents denied the claim and put the appellant to strict proof of his allegations. In the alternative, they averred that if indeed the alleged accident occurred, then the same was solely caused by or substantially contributed to by the negligence of the appellant. They further denied that the appellant incurred special damages in the sum of Kshs. 492,196/= as alleged or at all. Thus, they prayed for the dismissal of the appellant's suit with costs.
4. Upon hearing the parties, Hon. Kyambia, Chief Magistrate, came to the conclusion that the appellant had not proved negligence as against the 2nd respondent. He accordingly dismissed the suit with costs. Being aggrieved by that decision, the appellant filed this appeal on August 27, 2021 on the following grounds:
 - (a) That the learned magistrate erred in law and fact by finding that the appellant did not prove negligence against the 2nd respondent and in proceeding to dismiss the claim with costs;
 - (b) That the learned magistrate erred in fact by holding that the appellant was crossing the road when he was hit by the 2nd respondent while ignoring the evidence of the appellant and the police officer on the occurrence of the accident;
 - (c) That the learned magistrate erred in law and fact in failing to appreciate that on the basis of the material and evidence placed on record the appellant had proved his case on a balance of probabilities as required by law in civil cases;
 - (d) That the learned magistrate erred in law and fact by failing to appreciate the doctrine of *res ipsa loquitur* pleaded by the appellant;
 - (e) That the learned magistrate erred in law in disregarding the persuasive authorities presented by the appellant and in failing to give reasons for not being persuaded by the said authorities on quantum of damages;
 - (f) That the learned magistrate erred in law in failing to set out the authorities that guided him in reaching his determination on quantum of damages;
 - (g) That the learned magistrate erred in law in disregarding the appellant's submissions;
 - (h) That the learned magistrate erred in law and in fact in failing to make an award on loss of future earning capacity.
5. The appeal was urged by way of written submissions, pursuant to the directions given herein on June 13, 2022. Ms. Mboku for the appellant filed her written submissions on July 12, 2022. In respect of Grounds 2 and 3, counsel submitted that sufficient evidence was adduced by the appellant to demonstrate that he was hit by the left side of the suit motor vehicle; and that the learned magistrate was wrong in finding that the appellant was hit while crossing the road. She relied on *Masembe v Sugar Corporation and Another* [2002] 2 EA 434 for the proposition that, had the 2nd respondent exercised due care and attention, she would have avoided the accident.
6. In Ms. Mboku's submission, the appellant's testimony was more believable and consistent and therefore made a connection between his injuries and the negligence of the 2nd respondent. She relied on *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 and *Isabella Wanjiru Karanja v Washington Malele*, Nairobi Civil Appeal No. 50 of 1981 in support of her submissions.
7. In respect of Grounds 6 and 7 of the Memorandum of Appeal, Ms. Mboku submitted that, the lower court should have, in declining to be persuaded by the authorities cited by the parties, explained its reasons in his judgment. In her submission, the award made by the lower court was inordinately low;



- and should therefore be set aside and be substituted with the Court's own judgment on liability and quantum.
8. On behalf of the respondents, Ms. Kerubo filed her written submissions on September 23, 2022. She defended the lower court's decision and submitted that the appellant had indeed failed to prove negligence as against the 2nd respondent. Counsel cited Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the case of *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, and *William Kabogo Gitau v George Thuo & 2 Others* (supra), among others, for the proposition that the burden of proof was on the appellant to prove his case on a balance of probabilities even if the case was heard on the basis of formal proof. Counsel then furnished a summary of the evidence adduced before the lower court to demonstrate that the conclusion reached by the lower court was inescapable.
 9. Ms. Kerubo further urged the Court to dismiss the appellant's other grounds of appeal, including his claim for loss of future earnings, on the ground that he failed to prove negligence against the respondents. On the authority of *Cecilia W. Mwangi & Another v Ruth W. Mwangi* [1997] eKLR and *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR, counsel urged the Court to find that the appellant failed to specifically plead or prove loss of future earnings. In particular, counsel submitted that the appellant failed to prove that he owned a garage or that he was earning Kshs. 200,000/= per month from the garage. She accordingly urged that the appeal be dismissed with costs.
 10. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court and come to its own conclusions in respect thereof, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses. (see *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
 11. In his evidence before the lower court, the appellant testified on February 26, 2020 and adopted his witness statement dated May 20, 2019. He therefore stated that he was involved in a road traffic accident on November 16, 2018 while on his way to Shibu Mosque, opposite Nawal Centre. He explained that he was walking on the pavement along Jomo Kenyatta Avenue when he was hit by the 1st respondent's Motor Vehicle Registration No. KBR 642S, Toyota Probox. He further stated that the road was then under construction and the traffic police officers had closed one section of the road to vehicular traffic.
 12. Thus, according to the appellant, the 2nd respondent, in total disregard of traffic rules, was driving on the wrong side of the road; and that in that process she hit him on the right hip thereby causing him to fall down between the pavement and the car. It was thus his evidence that he fractured the right femur thigh bone from the impact of the accident. The appellant further stated that he was treated at Mewa and Pandya Hospitals; and that his treatment included a hip replacement procedure. The plaintiff also told the lower court that he presented himself before Dr. Adede for examination and a medical report, and that it was ascertained by Dr. Adede that he had suffered 22% permanent incapacity. He therefore testified that he could no longer fend for himself or his family. He produced a bundle of documents, including his treatment documents, invoices and receipts in proof of his claim for general and special damages.
 13. Dr. Ajoni Adede (PW2) testified before the lower court on 11th November 2020. He confirmed that he examined the appellant and prepared a medical report in that regard dated 26th April 2019. He confirmed that the appellant paid him Kshs. 2,500/= for his services for which he issued a receipt; and that in his assessment, the appellant suffered disability of 22% due to the hip injury.
 14. The appellant's last witness was PC Vincent Mabege (PW3). He confirmed that a road traffic accident occurred on 16th November 2018 at about 14:45 hours near Barclays Bank roundabout along Jomo Kenyatta Road. He further confirmed that one part of the road, the road towards Mwembe Tayari, was



- closed for repairs; and that the accident involved a motorist and a pedestrian. He further stated that a Police Abstract and P3 Form were issued to the appellant.
15. The 2nd respondent, Josephine Watuda Njenga (DW1), testified before the lower court on March 29, 2021. She adopted her witness statement dated September 9, 2019 and confirmed that on the date of the accident, she was driving from Tudor, Mombasa heading towards Majengo and that on reaching Jomo Kenyatta Avenue-Digo Road roundabout she found that the road was closed for construction and a Police officer was directing motorists to share the opposite road with on-coming vehicles. She added that she was doing about 30 kph and therefore that it was not true that she veered off the road and knocked the appellant on the kerb. She added that she took the appellant to hospital and paid for his medication initially. According to her, she heard a bang from the rear part of the vehicle and suspected that the appellant stumbled on the car and was therefore the author of his own misfortune since she was not charged with any offence.
 16. Penina Wanjiru Waithaka (DW2) who was in the company of the 2nd respondent, confirmed that one side of the road was closed and that they were directed by the police to use the single lane that was available. She added that the 2nd respondent was driving at a low speed of about 20 kph and that it was not true that the 2nd respondent hit the appellant while on the road. She likewise stated that she heard a bang from the rear of the car and on checking saw the appellant lying on the road.
 17. I have given careful consideration to the evidence adduced before the lower court and it is plain therefrom that the parties were in agreement that a road traffic accident occurred on the 16th November, 2018 involving the 1st respondent's Motor Vehicle Registration No. KBR 642S, which was then being driven by the 2nd respondent; and that at the time, one side of the dual Jomo Kenyatta Road from the Barclays Bank of Kenya Limited (now ABSA) roundabout towards Mwembe Tayari was closed to traffic for repair purposes. There is also no dispute that the appellant sustained bodily injuries in the said accident and was taken to hospital by the 2nd respondent. What was disputed was whether the appellant proved his allegations of negligence against the 2nd respondent.
 18. Needless to say that, in a civil case such as this, the burden of proof lies on the party who alleges the existence of certain facts. (See Sections 107, 108 and 109 of the [Evidence Act.](#)) Accordingly, in *Statpack Industries v James Mbithi Munyao* [2005] eKLR, it was held: -

“...it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same...”
 19. Similarly, in the case of *Nzoia Sugar Company Limited v David Nalyanya* [2008] eKLR, the court held: -

I am aware of the principle that where negligence is pleaded, the acts of negligence must be proved and that there should be no liability without fault.
 20. In the case herein, the appellant pleaded negligence on the part of the 2nd Respondent. It was therefore incumbent on him to prove all the particulars thereof set out at paragraph 9 namely:
 - (a) Carelessly driving Motor Vehicle Registration No. KBR 642S Toyota Probox;
 - (b) Causing Motor Vehicle Registration No. KBR 642S Toyota Probox to veer off the road and hit the plaintiff.



- (c) Driving on the wrong side of the road;
 - (d) Driving at an excessively high speed in the circumstances;
 - (e) Failing to heed to the Highway Code;
 - (f) Failing to stop, brake, swerve or in any other manner avoid the said accident;
 - (g) Causing the said accident.
21. Although the appellant had blamed the 2nd respondent for driving on the wrong side of the road, his own witness, PW3, who was on duty at the roundabout on that day testified before the lower court and explained that one side of the road was closed to vehicular traffic and that he directed motorists, including the 2nd respondent, to share the single lane that was available for use with oncoming traffic. In the circumstances, no blame can be attributed to the 2nd Respondent for driving on the wrong side of the road or for failing to comply with the Highway Code.
22. As to whether the 2nd respondent veered off the road and hit the appellant on the road kerb, again PW3, who was at the scene and witnessed the accident had the following to say in cross-examination:
- “One side of the road was closed. All vehicles were using one section of the road. The impact was near the pavement. The plaintiff was hit from the side of the vehicle. The plaintiff was on the road. The vehicle was being driven at low speed. The kerb at the middle of the road was raised. The driver could not drive up the kerb...It is not possible for the vehicle to veer off to the kerb and hit the plaintiff as the vehicle was being driven at low speed. No charges preferred against the defendant. I cannot confirm that the defendant hit the plaintiff at that speed.”
23. The foregoing evidence in fact corroborates the evidence of the 2nd respondent and her witness (DW2) as to the circumstances in which the accident occurred and the speed at which the 2nd respondent was driving. It totally displaces the appellant’s assertion that the 2nd respondent was driving at an excessively high speed or that the suit motor vehicle veered off the road and hit him on the pavement. In fact, PW3 could not confirm whether the cause of the accident was by the carelessness of the 2nd respondent and therefore opted not to prefer any charges against the 2nd respondent.
24. In the premises, I find no reason for faulting the finding of the trial court that the appellant had failed to prove the particulars of negligence alleged against the respondents on a balance of probabilities. Indeed, as was observed by Sir Kenneth O’Connor in *Peters vs. Sunday Post Limited* [1958] EA 424:
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”
25. On quantum, it is trite that a court of first instance has the obligation to assess damages that would have otherwise been payable, even where liability is not established. This obligation was restated by the Court of Appeal in *Andrew Mworu Kasaya v Kenya Bus Service* [2016] eKLR thus:
- “...the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in *Mordekai Mwangi Nandwa versus Ms. Bhogals*



Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:

“The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court’s then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment”

This principle has religiously been followed by the courts below...”

26. I note that the learned magistrate made an assessment of what he would have otherwise awarded as general damages had the appellant proved his case. He took into account the injuries sustained by the appellant and the treatment received, including hip replacement and the ensuing disability of 22%. It is noteworthy that that although reference was made to the alternative report by Dr. Udayan Sheth in which liability at 5%, he was never called as a witness to produce his report or justify his opinion before the lower court; and therefore that the learned magistrate correctly disregarded that report.
27. Nevertheless, the learned magistrate ought to have made a justification for his assessment of Kshs. 2,500,000/=, which he did not do. It is a cardinal principle that comparable injuries should attract comparable awards, hence the need to advert to precedent. This was emphasized by the Court of Appeal in *Stanley Maore v Geoffrey Mwenda* [2004] eKLR, thus:

“...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.”
28. I however have no reason to conclude that the omission affected the overall assessment, taking into account the following comparable decisions:
 - (a) *Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another* [2012] eKLR in which the plaintiff suffered fractures of the right superior and inferior rami of pubis, fracture of the ischium, fracture of the acetabulum, fracture of lateral condyle of femur, dislocation of left knee with torn collateral ligament; skin grafting surgery on left leg and left leg shortened by 4 cm. She was awarded Kshs. 2,400,000/=.
 - (b) *Peace Kemuma Nyang’era v Micahel Thuo & Another* [2014] eKLR in which the plaintiff was awarded Kshs. 2,500,000/= for a fracture of the sacrum bone, fracture of the right superior pubic ramus, fracture of the right ischium/inferior pubic ramus of the pelvic bone, haematoma on both thighs and lumbo-sacral haematoma.
 - (c) *Joseph Kahinda Maina v Evans Kamau Mwaura Ngugi Njenga & Habit Gulam Janet* [2014] eKLR in which the plaintiff sustained fractures including fractures of the pelvis, mandible, acetabulum roof of the left hip and other soft tissue injuries and was awarded Kshs. 2,400,000/= as general damages for pain, suffering and loss of amenities.
 - (d) *James Mbugua & Another v John Mbugua Mburu* [2020] eKLR in which the plaintiff suffered fractures of the teeth, deep cut wound on the lower lip and chin, comminuted fracture of the left femur, comminuted fracture of the right acetabulum and dislocation of the right hip joint and fracture of the right inferior ramus of the pelvis. The plaintiff underwent surgery with



prospects of future medical procedures. The High Court upheld an award of Kshs. 2,263,693 as general damages for pain suffering and loss of amenities.

29. It suffices therefore that the assessment be within the range of current judicial thinking on the subject. Indeed, as acknowledged by Madan, JA (as he then was) in *Ugenya Bus Service v Gachiki*, (1976-1985) EA 575, at page 579:

“General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.”

30. Hence, in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal held thus:

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 high that it must be a wholly erroneous estimate of the damages.” (Also see *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR)

31. In the premises, I would have found no reason to disagree with the lower court’s assessment of general damages. As to loss of future earnings, it is now settled that there is a difference between loss of earnings and loss of future earning capacity. Loss of earnings is in the nature of special damages and must not only be specifically pleaded but also proved. Thus, in *Cecilia W. Mwangi and Another vs Ruth W. Mwangi* [1997] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just “throw figures at the judge and ask him to assess such damages.”

32. The Court of Appeal reiterated this stance in *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, and stated that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically.”

33. Moreover, in *S J v Francesco Di Nello & Another* [2015] eKLR the Court of Appeal made the distinction thus:

“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 wherein Lord Denning M. R. said as follows:

“It is important to realize that there is a difference between an award for loss of earning 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.” Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”

34. A look at the Plaint dated May 20, 2019 confirms that the appellant pleaded loss of earning at paragraphs 6, 7 and 8 thereof as well as at Prayer (c) of his prayers. In support thereof he stated that at the time of the accident he was 56 years old and was due to retire at the age of 60 years. He added that he was in good health and was operating an active garage from which he would make approximately Kshs. 200,000/= per month. The appellant further testified that he had lost the capacity to fend for himself and his family since he could not bend or work in his garage. He however failed to prove, by way of evidence, that he was operating a garage before the accident or his income therefrom. In fact, he conceded in cross-examination that:

“I have a garage but I have not carried anything to show that I have a garage.

35. The subordinate court was therefore correct in holding that there was no basis for awarding the claim of future earnings. (see *Tracom Limited & Another v Hassan Mohamed Adan* [2009] eKLR).
36. In the result, I find no merit in the Appeal dated August 27, 2021. It is hereby dismissed with an order for each party to bear own costs, given the circumstances of the case.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF AUGUST 2023

OLGA SEWE

JUDGE

