



REPUBLIC OF KENYA



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**Kayaya v Katungi (Civil Appeal E060 of 2021)
[2023] KEHC 27283 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E060 OF 2021
SN MUTUKU, J
SEPTEMBER 26, 2023**

BETWEEN

BRENDA AYIELA KAYAYA APPELLANT

AND

FRED MWONGELA KATUNGI RESPONDENT

*(Being an appeal from the judgement and Decree of Hon S.M Shitubi
(CM) Mrs. In Kajiado CMCC No 74 of 2020; Brenda Ayiela Kayaya -
vs- Fred Mwangela Katungi issued and delivered on 16th September 2021)*

JUDGMENT

Introduction

1. This appeal originates from the judgment and decree of the lower court Hon. S. M. Shitubi, CM, in Kajiado CMCC No. 74 of 2020. The Plaintiff sought in that case general damages for pain, suffering and loss of amenities, loss of future earning capacity and costs of the suit with interest. She was awarded Kshs 2,362,000 as general damages made up of Kshs 1,700,000 for pain and suffering; Kshs 312,000 for future medical expenses; Kshs 1,350,000 for loss of future earning capacity and Kshs 22,695 for special damages as well as costs of the suit.
2. The Appellant sued the Respondent through a plaint dated 4th August, 2020 which was later amended on 10th December, 2020. She sought general damages for pain and suffering, future medical expenses, loss of future earning capacity, special damages plus costs and interest. The Respondent denied the claim through a statement of defence dated 7th September, 2020. Parties filed a consent on the issue of liability at 85:15%. The only issue being determined was quantum of damages.
3. The Appellant has raised the following grounds of appeal:



- i. That the Learned trial magistrate erred in law and in fact in taking into account irrelevant issues and arriving at a wrong conclusion.
 - ii. That the Learned Magistrate erred in law and fact in canvassing issues not before the court and arriving at a wrong conclusion.
 - iii. That the Learned Magistrate erred in law and fact in apportioning liability at 50:50 and failing to consider the Appellant's evidence and submissions in awarding very low damages.
4. The Appellant prays that the judgment of the trial court on quantum be set aside, and this Honourable court makes an appropriate judgement and determines the said suit finally and that the appeal be allowed with costs to the Appellant.
5. The Respondent raised a cross-appeal through a Memorandum of Cross Appeal dated 14th January, 2022 in which he has raised the following grounds:
- i. That the learned trial Magistrate erred in law and fact by failing to judiciously analyze the medical evidence on record thereby awarding Kshs. 1,700,000/- as general damages for pain and suffering which award is so inordinately high and erroneous estimate of the amount awardable to the Appellant.
 - ii. That the learned trial Magistrate erred in law and fact by making an award in respect of future medical expenses without medical evidence to prove the same which decision is untenable and unjust to the Respondent.
 - iii. That the learned trial Magistrate erred in law and fact in making an award in respect of loss of earning capacity without medical evidence to prove the same which decision is untenable and unjust to the Respondent.
6. The Respondents prays that the entire award made by the trial court be set aside and that this Honourable court do make a fresh assessment of damages based on medical evidence and the parties submissions on record. That the appeal be dismissed with costs of the appeal and cross-appeal.
7. The Appellants raised a Preliminary Objection (PO) dated 1st April, 2022 to the effect that:
- This Honourable Court lacks jurisdiction to hear the Memorandum of cross appeal dated January, 2022 by dint of section 79G of the *Civil Procedure Act*

Submissions.

8. This appeal was canvassed through written submissions. The Appellant's submissions are dated 7th March, 2023. It is argued in respect to the PO that this Honourable court lacks jurisdiction to hear the Memorandum of appeal dated 14th January, 2022 by reason of the provisions of section 79G of the *Civil procedure Act* which provides for the timeline within which an appeal from a subordinate court should be filed. The Appellant relied on *George Kianda & Another -vs- Judith Katumbi Kathenge & another* [2018] eKLR in which the court stated that:
23. ".....Secondly, this court is not aware of a procedure for filing of a cross-appeal in this court as opposed to the Court of Appeal. This court is however aware of the provisions of Order 42 Rule 32 of the Civil Procedure Rules which makes a reference to a cross-appeal but in a negative manner...



24. The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.”
9. The Appellant argued that there was an inexcusable inordinate delay in filing the cross-appeal given that the Memorandum of appeal was filed on 12/10/2021 while the Memorandum of cross appeal was filed on 25/1/2022, over 99 days after the time within which to file an Appeal had lapsed and over 103 days after the filing of the Memorandum of appeal and therefore the Respondent ought to have sought leave of the court. The Appellant argued that the Respondent’s argument that the Memorandum of appeal was served late did not hold water as they knew of the existence of the delivered judgement.
10. On the issue of quantum, the Appellant argued that by the nature of the injuries pleaded in their amended plaint found at pages which were proved and supported by the medical evidence would be adequately compensated by an award of Kshs 7,500,000/- for pain, suffering and loss of amenities; that the medical evidence provided was not challenged by the Respondent and that the learned magistrate erred in holding that the 1st and 3rd authorities cited by the Appellant referred to more serious injuries than those suffered by the Appellant.
11. The Appellant relied on various cases including the case Richard Boke Chacha & 3 others -vs- Linus Kaikai [2020] eKLR, where the injuries suffered were scalp injuries, T2-Y5 thoracic spine cord injury with resultant paraplegia, uterine fibroids and bilateral ovarian endometriosis, left forearm fracture and lower limb weakness, which injuries were similar to those suffered by the Appellant. In that case the Plaintiff was awarded Kshs 7,000,000 as general damages for pain, suffering and loss of amenities.
12. The Appellant also cited Ngure Edward Karega -vs- Yusuf Doran Nassir [2014] eKLR, where the Plaintiff sustained spinal injuries similar to the Appellant herein and where the award was Kshs 5,000,000 for general damages for pain and suffering. Other cases have been cited where the award for general damages for pain and suffering ranged between Kshs 2,000,000 to Kshs 5,000,000.
13. On the issue of future medical expenses, the Appellant argued that due to the spinal injury, the Appellant was recommended for physiotherapy and analgesics twice a month, with each session costing 7,500 inclusive of transport and that she would also need medical expenses for the collar and back support. It was submitted that the Appellant had suggested 5 years of treatment would be reasonable, which would amount to Kshs 13,000/- per month for 12 months for 5years giving a total of Kshs. 780,000/-.
14. It was submitted on the issue of loss of earning capacity, that the magistrate erred in holding that the Appellant’s monthly salary was Kshs 5,400 after the trial court agreed with the evidence of the Plaintiff that she was a trained professional beautician and salonist. It was submitted that at the very least the magistrate should have adopted the minimum market rate of wage for a hairdresser which is a minimum of Kshs. 10,000.
15. It was submitted that the Appellant was 25 years old at the time of the accident and the multiplicand of 25 years was agreeable giving a total of Kshs 3,000,000 for loss of future earning capacity.
16. It was submitted that although the Appellant has pleaded for Kshs 42,150 as special damages, she did not avail all the receipts and therefore an award of Kshs 26,700/- was a reasonable award for special damages. It was also submitted that the Appellant ought to be paid costs of this appeal and the lower court.
17. The Respondent’s submissions are dated 6th July, 2023. Two issues have been raised for determination, namely: whether the cross-appeal is properly before the Court and whether the sums awarded by the



trial court in quantum are either inordinately high or inordinately low to warrant interference by the Honourable Court?

18. On the first issue, the Respondent argued that the law under Order 42 Rule 32 of the Civil Procedure Rules provides for filing of cross- appeals but without providing the procedure on timelines for so doing; that what is required is that the cross- appeal be filed within a reasonable time which they did and further that there is no allegation made that there was an unreasonable delay in filing the cross-appeal.
19. The Respondent relied on *Bulsho Trading Company Ltd-vs- Rosemary Likhola Mutakha & another* [2020]eKLR and *Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi* [2018] eKLR to the Order 42 Rule 32 of the Civil Procedure Rules provides for cross-appeals but fails to provide procedure for filing of the same and that all that was required was for the applicant in a cross-appeal to file it within reasonable time after service of the memorandum of appeal. It was submitted that the Appellant has failed to explain when the memorandum of appeal was filed.
20. The Respondent maintains that the cross-appeal was filed within a reasonable time and therefore the PO ought to be dismissed with costs to the Respondent.
21. On the second issue, the Respondent submitted that the medical report dated 3rd December 2020 by Dr. Wambugu P.M is clear on the injuries sustained by the Respondent as the anterior wedge compound fracture of T7 vertebra, blunt trauma to the leg and puncture wound left arm and that the doctor further noted that the Plaintiff had made adequate recovery and assessed permanent incapacity at 4%. It was submitted that the medical report dated 30th July, 2020 by Dr. Okere confirmed the injuries but the doctor did not award any permanent incapacity.
22. It was submitted that, going by the medical evidence the injuries pleaded in the Appellant's amended plaint and cited in her submissions in the trial court were highly exaggerated; that the trial court fell into error by considering what was pleaded instead of relying on the medical evidence; that the amount of Kshs. 1,700,000/- for general damages for pain and suffering was inordinately high and that an amount of Kshs. 500,000 would be adequate compensation. The Respondent cited *Malindi HCCA No. 62 of 2019, Obed Elphas Njiru -vs- Barisa Abdalla Salim* where the Respondent had sustained the chip fracture of the back-bone vertebrae, blunt object injury to the back and bruises on the back and lower limbs and where Dr. Ajoni Adede assessed the disability at 2.5% while Dr. Udagan Sheth noted that the Respondent would not suffer any permanent incapacity and where the trial court awarded the Respondent Kshs. 900,000/- but the same was reduced to Kshs. 550,000/- on appeal. It was urged that this court should set aside the award and assess the same afresh, taking into account the medical evidence on record.
23. On the issue of future medical expenses, it was submitted that the trial court erred by awarding an amount of Kshs. 312,000/- without medical evidence in support of the claim; that the trial court only relied on the pleadings and submissions of the Appellant in awarding damages this heading and that the trial court made a grave error by purporting to speculate on an area of expertise it lacked the competence to make a determination without evidence.
24. On the issue of loss of future earning capacity, it was submitted that the trial court erred in awarding damages under this heading as no medical evidence was availed to prove that the permanent incapacity would disable her from engaging in her job as a hair dresser and beautician.
25. It was submitted on special damages that the same should be maintained and that the appeal should be dismissed with costs for the cross-appeal to the Respondent.



Analysis and Determination

26. Being the first appeal, this court has a duty to examine the entire record of the lower court and make its own independent findings. I have read the record and noted that the only issue the trial court was called upon to arbitrate was the issue of quantum given that parties had filed a consent on liability at 85-15% in favour of the Appellant. Further, all documents in support of the Appellant's claim were admitted in evidence by consent of both parties. These documents included medical reports. The makers of those medical reports were not called to explain them in court.

27. Before delving into the issues raised on the appeal and cross-appeal, this court must determine the issue of the PO raised by the Appellant. The PO challenges the jurisdiction of this court to by dint of section 79G of the *Civil Procedure Act*. This section provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

28. The nature and effect of PO has been described in various authorities as a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* (1969) EA 696). As stated in the *Owners Of The Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) eKLR, a question as to the jurisdiction of the court, which may be raised by way of a preliminary objection, ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it.

29. The instant PO raised by the Appellant is that the cross- appeal was filed outside time without leave of the court and therefore an afterthought meant to prejudice the Appellant. Appeals from a subordinate court to the High Court are filed within thirty days from the date of the decree or order appealed against by, excluding such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order, by dint of section 79G of the *Civil Procedure Act*.

30. The view advanced by the Appellant, as far as I can understand, is that the Respondent ought to have filed an appeal within 30 days after judgment and decree failing which he ought to have filed the cross-appeal within 30 days after service of the memorandum of appeal by the Appellant. I have read the submissions of the Appellant. The issue as to when the Respondent was served with the memorandum of appeal is not addressed to show when service was effected. The submissions of the Appellant on that issue are that:

“The Memorandum of Appeal was filed on 12th October 2021 while the Memorandum of Cross Appeal was filed on 25th January 2022, over 99 days after the time within which to file an appeal had lapsed and over 103 days later after the Memorandum of Appeal was filed. Such a delay was inordinate and inexcusable. The Respondent ought to have sought leave of the court to file the Memorandum of Cross Appeal, or rather include a prayer for leave to file the said Cross Appeal in its Application for stay of execution. The argument that the Memorandum of Appeal was served late, which is not the case, holds no water. At the very least, the Respondent knew of the existence of the subject judgment as the proceedings were



not ex-parte. It has not been shown why the Respondent did not appeal the said judgment in time if indeed it was dissatisfied.....”

31. Order 42 Rule 32 of the Civil Procedure Rules is clear that cross-appeals are allowed. I am alive to the view advanced in authorities like *George Kianda & another* case cited by the Appellant, that parties ought to file separate appeals with a view to consolidating them. However, I subscribe to the view that any party dissatisfied with any judgment or decree is at liberty to appeal against such judgment or decree either directly or by cross-appeal after service of the memorandum of appeal by another party. This is the view taken by the court in *Bulsho Trading Company* case and *Kenya Power & Lighting Company* case cited by the Respondent.
32. I find no evidence as to when the memorandum of appeal was served upon the Respondent. With such evidence lacking this court is not able to estimate the time within which the cross-appeal ought to have been filed to conclude that there was an inordinate delay in filing it. I therefore give the Respondent the benefit of doubt and make a finding that the cross-appeal was filed within reasonable time. Consequently, the PO fails and is hereby dismissed.
33. Turning on the issue of quantum, given that this is the main issue on the appeal and cross-appeal, I have noted that the Appellant produced by consent a medical report by Dr. Wambugu. I have not seen that report in the Record of Appeal. The lower court file does not form the record of this court sitting on appeal. It is only from the judgment of the lower court that I have noted the trial court stating as follows:

“From Dr Wambugu’s report the Plaintiff suffered skeletal and soft tissue injuries from which she has since made adequate recovery. The fracture of the 7th thoracic spine has united. He gave 4% degree of permanent incapacity. Reports from German Medical Centre show that she had healed remarkably though with mild diffuse L5/S1 disc compressing the bilateral traversing nerve roots”.
34. It is worth noting that the injuries contained in the pleadings must be supported by medical evidence. I have noted from the judgment of the lower court that the trial magistrate compared the injuries suffered by the Appellant with injuries suffered by the claimants in several authorities as enumerated in the judgment of the lower court. The trial magistrate was persuaded that the injuries sustained by the Appellant would be adequately compensated by the award of damages captured in the judgment.
35. The Appellant accuses the trial magistrate of taking into account irrelevant issues and canvassing issues not before the court leading her to a wrong conclusion. She is also accused of apportioning liability at 50-50 basis. The Appellant has not pointed out in her submissions which these irrelevant issues are or what issues not before the court the trial magistrate considered leading to wrong conclusion. Secondly, from the record of the judgment, it is clear that the trial magistrate apportioned liability at 15% to the Appellant. On the other hand, the Respondent accuses the trial court of awarding high award of damages that are inordinately high.
36. On my part, sitting on appeal, I have considered the injuries sustained by the Appellant against the injuries in the authorities cited by the Appellant in the submissions, and I find no fault in the award of damages by the trial court. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that;

“An appellate Court will not disturb an award of 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 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”.

37. Further in the case of *Savanna Sawmills Ltd Vs Gorge Mwale Mudomo* (2005) eKLR the court stated as follows: -
- “It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”
38. I am persuaded that the trial magistrate took into account all the relevant issues while granting an award of Kshs.1,700,000/- for pain and suffering. I find no wrong principle applied by the trial magistrate to necessitate my interfering with the award given.
39. On future medical expenses, the Appellant submitted that an award of Kshs. 780,000/- would be reasonable. The reason being that the Appellant was recommended for physiotherapy and analgesics twice a month, with each session costing Kshs.7,500/- for at least 5 years. The Respondent argued that the trial court erred in awarding under this head as there was no medical evidence to support this claim.
40. I have noted from the record that, the trial court when assessing this stated that, “the amended plaint the plaintiff made specific plea for future medical expenses. In her further statement she states that she needs future medical expenses Kshs.13,000/- per month for physiotherapy so that she can walk again. In the medical Thoracic spine Radiotherapy report from scan Lab Kitengela dated 24th April, 2020, it was observed that there was early marginal sclerosis demonstrated, apart from the healing anterior wedge compression fracture at D6. I am forced to look deeper into the reports since the parties simply produced them by consent without calling the makers.”
41. The trial magistrate relied on the case of *Geoffrey Kamuki & Another-vs- RKN* (minor suing through her late father and next friend ZKN (2020) eKLR. She did not agree with the 5 years proposed by the Appellant, instead taking the view that the problem could be corrected in 2 years, thereby calculating the amount payable as Kshs 312,000/-
42. Future medical expenses must be specifically pleaded and proved, though it is a claim within general damages. See the Court of Appeal decision, *Tracom Limited & another v Hasssan Mohamed Adan* [2009] eKLR. The record shows that the Plaintiff pleaded, under paragraph 6 of the Amended Plaint, future medical expenses. Parties herein consented to the production of the Plaintiff’s list of documents and further list of documents. This excluded the makers of the documents so produced from testifying. The list of documents produced include medical reports from the German Centre dated 12th August, 2020 and 31st August, 2020 indicating that the Appellant was receiving physiotherapy. I am therefore inclined to conclude that there was indeed proof of the future medical expenses. The amount awarded by the trial court, in my view, is not too high or too low to make this court intervene. The trial magistrate in exercising her discretion on the issue awarded an amount of Kshs 312,000/ which I find reasonable considering that the Report by Dr. Wambugu dated 3rd December, 2020 had assessed permanent incapacity at 4%.
43. On the issue of loss of future earning capacity, the Appellant argued that though the trial magistrate was correct in finding that the Appellant is entitled to claim under this head, she disagreed with the trial court’s finding that the monthly salary of the Appellant could be Kshs 5400/-and submitted that the magistrate should have applied the minimum wage for a hairdresser which is Kshs 10,000/-



44. On the same issue, the Respondent submitted that the trial magistrate erred by awarding under this head as there was no medical evidence to support that the Appellant suffered permanent incapacity. I have noted from the medical report of Dr. Wambugu that the Appellant's permanent incapacity was assessed at 4% and therefore it is not true that there was no evidence on the issue. The report was produced by consent of the parties. I have noted from the record that there was no evidence that the Appellant indeed earned Kshs 18,000/- per month. In my view therefore, the trial magistrate exercised her discretion in finding that an amount of Kshs. 5400/- was adequate. In that regard therefore, the magistrate did not use wrong principles in determining the issue of quantum.
45. The conclusion I make after considering rival submissions in this appeal is that the Appellant and the Respondent have not adduced evidence to persuade this court, sitting on appeal, why it should interfere with the discretion of the trial magistrate in her decision to award damages as shown in her judgment dated 16th September 2021. Consequently, the appeal and the cross-appeal fail. Both are dismissed.
46. It is my finding that I have no reason to disturb the findings of the trial court for reasons that there is no evidence to point to this court to the conclusion that the trial magistrate proceeded on wrong principles, or that she misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. I therefore affirm the judgment of the lower court.
47. Parties herein had filed an appeal and a cross-appeal. Therefore, each party shall bear own costs for the appeal and cross-appeal respectively. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2023.

S. N. MUTUKU

JUDGE

