



**Mutisya v Demamoe (Civil Appeal E033 of 2021)
[2023] KEHC 24470 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E033 OF 2021
SM MOHOCHI, J
OCTOBER 30, 2023**

BETWEEN

ALEX MUMO MUTISYA APPELLANT

AND

EVANS KAKAI DEMAMOE RESPONDENT

(Being an Appeal from the judgment/decree of Honourable Daisy Mose Senior Resident Magistrate delivered in Nakuru CMCC No. 14 of 2020 on 30th March, 2021)

JUDGMENT

Background

1. This appeal is one emanating from the lower court case CMCC No. 14 of 2020. The claim in the lower court arose from a road traffic accident that occurred on 29th July, 2018 along the Nakuru-Nairobi-Naivasha Road at Gateru area.
2. The Appellant was lawfully driving motor vehicle registration number KBY 048H, FH Lorry, when the Respondent's driver, now deceased, drove negligently and recklessly motor vehicle registration number KCK 630R, Toyota surf, that he deviated from his lane and caused the vehicle to collide with the said KBY 048H resulting in the Appellant sustaining serious injuries.
3. The Appellant pleaded that as a result of the accident he sustained, a displaced fracture of the right femur, tear of the extensor tendon of the right hand, tear of the extensor tendon on the left hand, and degloving injury on the right leg.
4. The Respondent entered appearance and filed his defence dated 30th January, 2020. He denied the entire claim, negligence, and occurrence of the accident.



5. In the alternative and on a without prejudice basis, the Respondent averred that, if the accident did occur, it occurred due to negligence on the part of the Appellant and prayed for the suit to be dismissed with costs.
6. Following the hearing, the trial court made an award as follows:
 - a. General damages for pain and suffering Kshs. 500,000/-
 - b. Future Medical Expenses Kshs. 250,000/-
 - c. Special damages in the sum of Kshs 267,075/-
 - d. Costs of the suit and
 - e. Interest on (a) and (b) above at court rates from the date of judgment until full payment.

Appeal

7. The Appellant being dissatisfied with that judgment lodged the present appeal vide the Memorandum of Appeal dated 8th April, 2021 based on the following grounds: -
 - i. That the Learned Trial Magistrate grossly misdirected herself in considering the value of the evidence and the submissions on quantum before her and consequently coming to a wrong conclusion on the same.
 - ii. That the Learned Trial Magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the Appellant.
 - iii. That the Learned Trial Magistrate erred in awarding a sum of Kshs. 500,000/= in respect to general damages which was inordinately low in the circumstances given the severity of the injuries as well as the degree of permanent disability thus occasioning a miscarriage of justice
 - iv. That the Learned Trial Magistrate erred in fact and in law in failing to take note of the severity of the injuries and the degree of permanent disability suffered by the Appellant and the consequential effect on the Appellant's earning capacity thereby failing to address the same.
 - v. That the Learned Trial Magistrate failed to sufficiently evaluate the evidence and the exhibits produced by the Appellant in support of his case thereby failing to note the severity of the injuries sustained by the appellant and thus arrived at an erroneous assessment of future medical expenses.
 - vi. That the Learned Trial Magistrate erred in failing to adequately consider the written submissions as well as comparable awards in judicial precedents annexed therein
8. The Appellants' appeal challenges the damages awarded, as being disproportionately low, and seeks that the finding of the trial magistrate be set aside or reviewed.
9. The Appeal proceeded by way of written submissions. The Appellant filed written submissions on 17th April, 2023. There are no submissions by the Respondent on record despite stating on 22nd June, 2023 that the submissions would be filed in 3 days thereon.



Submissions

10. The Appellant submitted in support of his Appeal summarily that in awarding damages the Learned Trial Magistrate awarded a sum that was inordinately low, did not consider the severity of the injuries and degree of permanent disability thus failed to award loss of future earnings, and that the learned trial magistrate did not consider the value of the evidence and came to a wrong conclusion on award of future medical expenses.
11. As to the participation of the Respondent in this suit, I note that the Respondent entered appearance and filed a defence. Despite being served with the hearing notice the Respondent was a no-show. At Appeal stage, the Respondent attended court and advised on their intention to file submissions but again failed to participate in the proceedings.
12. I associate fully with the position held by Matheka J. in *Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited* [2020] eKLR:

“It is my humble view that in their submissions counsel for the respondent failed in their duty as given under Section 1A of the *Civil Procedure Act* which states;

 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” (emphasis mine)
13. I shall proceed to determine the appeal.

Duty of the Court

14. This being a first Appeal, I am guided by the decision in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.
15. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
16. Having gone through the record of appeal and the submissions by counsel, in my considered view the issues for determination are:
 - a. Whether this Court should interfere with the award of general damages;



- b. Whether the appellant is entitled to damages for loss of income/future earnings; and
- c. Whether the trial magistrate erred in failing to award the Appellant Kshs. 500,000 as future medical expenses.

General Damages

17. On whether this Court should interfere with the award of general damages, the criterion under which a first appellate court will interfere with an award of general damages was stated by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR as follows:

“An appellate court will not disturb an award for general 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...”

18. The principle was buttressed in the case of *Butler V Butler* [1984] KLR 225 where this Court held:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”

19. It is the Appellant’s position that the award for general damages is so manifestly low given the severity of the injuries to warrant the interference of this court.

20. In considering whether the award was too low and whether I should interfere with it, the Court of Appeal in *Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 stated that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

21. The general principle is that comparable injuries should as far as reasonably possible to attract comparable damages.

22. I will consider the advice given by Potter J. (as he then was) *Rahima Tayab and another v Anna Mary Kinaru* [1983] eKLR (Civil Appeal No.29 of 1982) that:

I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd v Shephard* [1964] AC 326 at 345::

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as



giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

23. Parties ought to be reminded that, no case would have similar facts with another, since no two accidents can result in similar and or identical sets of injuries.
24. At the trial, the Appellant adopted his witness statement and from the medical records, after the accident, the Appellant was taken to Nakuru PGH on 29th July 2018, x-rays on both hands and the right leg were taken. Surgical toilet was done and the wounds were dressed. He had a slab plaster of paris cast applied on the right lower limb from the foot to the hip. He was then transferred to Bishop Kioko Catholic Hospital where he was admitted from 3rd August, 2018 up to 18th September 2018. The x-rays of the lower and upper limbs were taken, the torn tendons were repaired and an open reduction and internal fixation of the fracture of the right femur was done with an intramedullary nail.
25. Surgical grafting was done on the wound on the right leg and was discharged and continued with medication to be followed up with orthopedic clinic. The Appellant was again re-admitted to hospital on 29th October, 2018 up to 2nd November 2018 with gastroenteritis. It was never disclosed as to whether the gastroenteritis was creature of the after effects of the accident or not. The Appellant was again admitted on 9th April, 2019 until 9th May, 2019 with delayed union where he was also found to have pus on the right thigh.
26. To back up the above course of treatment, the Appellant produced treatment records from the said hospitals as they appear in his list of documents dated 14th January, 2019 and a further list of documents dated 19th August, 2020. These included the medical report dated 22nd May, 2019, discharge summary, bundle of receipts showing his treatment journey and the medical report dated 16th March, 2020.
27. The Appellant underwent two medical examinations on 22nd May, 2019 approximately 10 months after the accident and the second conducted on 16th March, 2020 approximately 18 months after the accident.
28. Both medical reports by Dr. W. Kiamba confirmed the injuries pleaded and the doctor was of the opinion that the Appellant had muscle wasting on both hands especially the left hand and all movement of both wrist joints were restricted resulting into marked reduction of function. The fractured femur had united but the Appellant had shortening of the right leg by 6 cm. The degloving injury has resulted into permanent deformity with severe restriction of movements on the right lower limb resulting into marked reduction of function. The Appellant was awarded degree of permanent disability of 70%.
29. There is no dispute on the injuries suffered by the Appellant. The only question is whether the award of 500,000/- was too low as argued by the Appellant, or should be enhanced to 5,000,000 as proposed?
30. Counsel urged the court to find that the lower court’s award was too low and relied on several decisions namely; Richard Kibet Kebenei & 2 others v Veronica Muhonja Mugailwa [2020] eKLR James Joseph Rugendo v Kenya Power and Lighting Co. Ltd [2008] eKLR, Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR and Njuga Consolidated Co. Ltd & another v Lineth Chemutai Moritim [2019] eKLR.
31. I will proceed to analyse the authorities relied on by the Appellant in his submissions to wit:



- a. James Joseph Rugendo v Kenya Power and Lighting Co. Ltd (supra) the Plaintiff had sustained 70% permanent disability following electrical shock which caused: bilateral damage of upper limbs –radial- ulna and median nerve, third degree electrical burns to 40% of both palms and hands, gangrene to right leg leading to amputation below the knee and gangrene to the left dorsal aspect leading to amputation of the left big toe and part of the second toe.
 - b. Njuga Consolidated Co. Ltd & another v Lineth Chemutai Moritim (supra) the victim suffered deep burns on the head, chest, back, both upper and lower limbs, and compound fracture to right tibia and fibula bones. the burns covered an excess of 60% body surface area and occasioned a lot of pain and loss of fluid. Further pain was experienced in subsequent surgical skin grafting and dressing over the long treatment and recuperation period. The resultant disfigurement occasioned by scarring over more than 80%.
 - c. In Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another (supra) the Plaintiff suffered extensive compound fractures of the left tibia and fibula and extensive damage to the soft tissues of the left leg as well as a fractured left collarbone. Treatment included initial internal fixation of the fracture with a metallic plate, and subsequent amputation of the left lower limb above the knee. He was awarded 60% permanent disability.
32. The above cases are in my opinion, not the very best to gauge the award of general damages. The victims in the first two suffered burns on their bodies which is a different ball game altogether, in terms of nature of injuries, severity, treatment and long-term effects. The injuries were more severe. There was also amputation unlike in this case where the Appellant has not undergone any amputation.
- d. Richard Kibet Kebenei & 2 others v Veronica Muhonja Mugailwa (supra) the Respondent suffered multiple severe soft and bony tissue injuries which healed with complications resulting in permanent disability of 70% and for which she was in various hospitals as an in and out patient.
33. It is imperative to note that the nature of the injuries in Richard Kibet Kebenei & 2 others v Veronica Muhonja Mugailwa (supra) was never discussed nor identified on Appeal thus this is equally not a reliable authority to assess the award of damages.
34. The Appellant has had a long and painful journey to recovery. He has also had a reduction of function in 3 limbs two being the upper limbs and one lower limb goes to show how severe the injuries were. At 36 years of Age, the life of the Appellant changed drastically and exceptionally.
35. This court is however going to insist that an award of general damages should be seen as compensation to make good the financial loss which was as a result of wrongful act.
36. The 70% permanent disability suffered by the Appellant according to the medical report indicated that the Appellant could never resume his usual duties as a driver in future it did not however state that the appellant could not engage in other income earning activities.
37. The Appellant in his submissions contends that he lost his ability to take care of his young family. The court Richard Kibet Kebenei & 2 others v Veronica Muhonja Mugailwa (supra) further stated that
- “It is instructive to note that the 70% permanent disability suffered by the respondent did not mean that she could not continue with her job, only that her performance would be lower and strainful. After all, “disability is not inability”.



38. This Court associates itself with the case *Wycliffe Lumula Mmasi v Ernest Waithaka & Another* (2020) eKLR where L. Njuguna J made an award of Kshs. 800,000/= to a claimant who had sustained extensive degloving injury on the right foot and extensive skin loss. The court also cited the case of *Kiru Tea Factory & Another v Peterson Watheka Wanjohi* (2008) eKLR where the High Court upheld an award of Kshs. 800,000/= for degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius, ulna and right iliac bone and generalized pains.
39. In the case of *Damaris Wamucii Kagechu v Joseph Kirui & another* [2019] eKLR, the plaintiff sustained fractures on both legs which led to inconvenience in movement associated with pain. Mbogholi J awarded a sum of Kshs 1,500,000/= in general damages for pain suffering and loss of amenities in 2019.
40. In this instant the Appellant sustained a displaced fracture of the right femur, a tear of extensor tendon of the right hand, tear of the extensor tendon on the left hand and degloving injury on the right leg.
41. Nevertheless, this court is of the view that, the trial magistrate ought to have considered more specifically the consequences that the injuries predisposed the Appellant to. The course of treatment was long since he was in an out of hospital for extended periods of time. The Appellant as a result of the accident had reduced movement in 3 limbs which greatly affected his quality of life, has permanent scarring physical and mentally. I feel the award of Kshs. 500,000 in general damages was inordinately low and that an award of Kshs. 1,500,000/- is adequate in the circumstances.

Loss of income/future earnings

42. On Whether the appellant is entitled to damages for loss of income/future earnings;
43. Ahe Appellant in ground 4 of his Appeal faulted the Learned Trial Magistrate for not addressing the consequential effect on the Appellant’s earning capacity. The Appellant submitted under the head loss of income/future earnings in his submissions on appeal and in the lower court.
44. It is pleaded at paragraph 8 of the Amended Plaintiff that;

“As a consequence of the accident and the resultant injuries to the Plaintiff, his quality of life has been prejudiced and further he has and will be unable to resume his business and duties as a driver and thus has lost his future earnings of approximately Kshs. 40,000 per month which he used and would have continued to use to sustain his young family were in not for the road traffic accident I question.”

45. What therefore was the Appellant seeking? Was it loss of earning capacity or loss of future earning? The Court of Appeal in *S J v Francesco Di Nello & another* [2015] eKLR had this to say:

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.”

46. The import of the above authorities is that, loss of future earning and loss of future earning capacity are two distinct heads. Further, loss of future earnings must be pleaded and proved as they are in the nature of special damages. Loss of future earning capacity need not be pleaded as it is in the nature of general damages.
47. Having said that, from the record and more specifically the Amended Pleat at paragraph 8 the Appellant pleaded that he lost his future earnings rather than lost his earning capacity.
48. The Appellant has submitted on loss of future earning capacity. He even relied on *Alpharama Limited vs Joseph Kariuki Cebon* (2017) eKLR and the case of *Mumias Sugar Company Limited vs Francis Wanalo* (2007) eKLR where the courts deliberated on the award of loss or reduced of earning capacity which was awarded in both cases. In *Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Chukulisa Roba Halakhe* [2019] eKLR the court deliberated on the earning capacity of the Respondent and noted the same had not been affected as she had been working.
49. Parties are bound by the pleadings and the court will address itself on what was pleaded. The Appellant Pleaded loss of future earnings and that he was earning Kshs. 40.000 per month prior to the accident.
50. In *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment) the court opined that:
 - “ 36. However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.
 37. Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure.”
51. The Appellant states to have been in business, he never gave evidence of what business he was engaged in or even the name of the business. I have equally perused the record and I have not seen any evidence of the same.
52. The Appellant attached a bank statement from Equity Bank which appears to have been dormant from 2016 to sometime in May, 2018 when it was re-activated. Those accounts have not been explained nor used prove his monthly earnings.
53. The Appellant having been injured to the extent of not being able to find a suitable job in future or loss of his job as submitted, had lost his capacity to earn which was not pleaded and can therefore not be awarded.
54. To this end, I find that, there is no error apparent on the face of the record or misdirection of fact or law in not awarding damages for loss of future earnings. The learned trial magistrates should have



addressed the same since it was pleaded, that in itself however, does not negate the fact that there was no evidence before the trial court for the same to be awarded. The ground of appeal thus fails.

Future medical expenses

55. Finally, on whether the trial magistrate erred in failing to award the Appellant Kshs. 500,000 as future medical expenses;
56. The Appellant was dissatisfied with the quantum for future medical expenses, the Appellant faulted the trial court for awarding a lesser amount contrary to what was proven by the evidence on record and severity of the injuries.
57. The Court of Appeal in the case of Tracom Limited & Another –vs-Hasssan Mohamed Adan [2009] eKLR stated: -
- “...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it.....” (emphasis mine)
58. Therefore, the law on future medical expenses is well settled and that it has to be pleaded and proven.
59. The Appellant at paragraph 7(a) of the Amended plaint dated 7th February, 2020 stated: -
Future medical expenses (removal of nails) Kshs. 500,000
And the Plaintiff claims for damages
60. I find this was well pleaded. As to whether the same was proven, there are two medical reports on record. The doctor in his medical report dated 22nd May, 2019 assessed the costs of medical expenses in future at Kshs. 500,000 for removal of the 1m nail in his right leg. This was not challenged. The second medical report dated 16th March 2020 which was as result of a second medical examination did not give the cost of future medical expenses.
61. The costs of removal of the 1m nail were estimated by the doctor in the first medical report. At the time the second medical examination was being conducted, the 1m nail had not been removed and would still require removal in future. I don't see why the cost of future medical expenses should have changed or reduced without evidence to controvert it. I do find that under this head, the Appellant sufficiently proved his claim for Future Medical Expenses. The ground of Appel thus succeeds
62. The total award is therefore as follows:
- a. General damages Ksh. 1,500,000
 - b. Special damages Ksh. 267,075
 - c. Future medical expenses Kshs. 500,000
- Total Ksh. 2,267,075
63. The Appeal succeeds to the extent stated above. Consequently, the lower court judgment is set aside and substituted with a judgment for the total sum of Ksh. 2,267,075 .
64. The Appeal having succeeded partially, each party there will be no orders as to costs.
It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS AT NAKURU



THIS 30TH DAY OF OCTOBER, 2023.

MOHOCHI S.M.

JUDGE OF THE HIGH COURT

