



**Njoka v Siboyi & another (Civil Appeal 24 of 2019)
[2023] KEHC 24184 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 24 OF 2019
FN MUCHEMI, J
OCTOBER 26, 2023**

BETWEEN

ELIZABETH NYAWIRA NJOKA APPELLANT

AND

BENJAMIN OKINDA SIBOYI 1ST RESPONDENT

STEPHEN ASITIBA WESA 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. M. Kivuti
(SRM) delivered on 4th April 2019 in Baricho PMCC No. 126 of 2016)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Baricho Senior Resident Magistrate in PMCC No. 126 of 2016. The claim arose from a road traffic accident whereas by consent, liability was apportioned at the ratio of 15:85 with the respondents bearing 85%. The appellant was awarded general damages of Kshs. 2,000,000/- for pain, suffering and loss of amenities, future medical expenses of Kshs. 750,000/- and special damages of Kshs. 924,979/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law in awarding Kshs. 2,000,000/- as general damages for pain & suffering which amount is inordinately low;
 - b. The learned trial magistrate misdirected herself in law and in fact by failing to award general damages for diminished earning capacity or such an award on general damages for pain and suffering as is commensurate to the degree of incapacity.



- Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

- The appellant submits that the injuries she sustained are incapacitating and adversely affected her work as a hawker. Her right leg was shortened and thus is unable to do any form of work making her dependent on others. The appellant states that she used to earn Kshs. 3,000/- from her hawking business and she currently uses crutches to ambulate.
- The appellant further submits that the medical opinion of the four doctors who examined her was that she was incapacitated with the least degree being 40% assessed by Dr. Ruga. Prof. Ating'a who found that she had suffered permanent disability at 100%. Dr. Kirugo assessment was at 60% and Dr. Wokabi at 45%. The doctors were in agreement that she could not ambulate on her own and she had to use crutches and further that she was not fully healed requiring her to undergo further treatment and surgery before healing. The appellant submits that the evidence was not controverted. From the foregoing, the appellant submits that the trial court failed to appreciate that she was incapacitated and the degree of incapacitation. Further, the trial court failed to appreciate the standard of proof for a claim on diminished earning capacity.
- The appellant relies on the cases of *S. J. vs Francesco Di Nello & Another* [2015] eKLR, *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR and *Butler vs Butler* [1984] KLR 225 and submits that whilst claim for diminished earning capacity is within the rubric of general damages, it is not wrong to make a separate award for it. The appellant further submits that in failing to make a separate award the trial court held that she did not plead actual loss. The appellant argues that the learned magistrate did not elaborate what she meant by stating that the appellant did not plead actual loss. The appellant states that she pleaded, led evidence and submitted for a separate award. She maintains that in paragraph 6 of her Amended Plea, she had pleaded for both damages for diminished earning capacity and pain suffering and loss of amenities.
- The appellant submits that she led evidence that she was incapacitated and the said evidence was not controverted as the respondents' doctor, Dr. Maina Ruga confirmed in his medical report that she was incapacitated. The appellant further submits that although the trial court quoted the decision by the Court of Appeal in *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR, it failed to follow the dictum of the court. The appellant argues that the said decision was binding on the trial court and it ought to have followed it.
- The appellant submits that it is trite law that a person whose capacity to earn is diminished by the negligent act of another is entitled to compensation. To support her contentions, the appellant relies on the cases of *Mariga vs Musila* [1984] eKLR, *Butler vs Butler*, *Mumias Sugar Company Ltd vs Francis Wanalo* [2007] eKLR and *Regina Mwikali Wilson vs Stephen M. Gichuhi & Another* [2015] eKLR. The appellant further relies on the case of *S. J. vs Francesco Di Nello & Another* (supra) and submits that there is no established formula in calculating an award for diminished earning capacity. The general approaches by courts are either a global sum as in *Mumias Sugar & Company vs Francis Wanalo* (supra) or based on a multiplier/multiplicand formula as in *Butler vs Butler* (supra). The appellant submits that a global award is sufficient and accordingly urges the court to award a sum of Kshs. 1,500,000/-. She further relies on the case of *Mumias Sugar Company Limited vs Francis Wanalo* (supra) where the court awarded Kshs. 500,000/- to the respondent who sustained 10% - 15% permanent incapacity.
- The appellant submits that even assuming the court was to adopt the multiplier/multiplicand approach, it would no doubt result to a higher figure as she was a hawker earning Kshs. 3,000/- per day which translates to approximately Kshs. 90,000/- per month. She further pleaded that she was 37 years



old as at 2016 and assuming that she would retire at the age of 60 years, the appellant argues that a multiplier of 23 years would suffice. Therefore the award would work out as follows:-

90,000/- x 23 x 12 = 24,840,000/-.

10. The appellant submits that the said award is much higher than the sum proposed under a global award and therefore urges the court to award the sum as submitted.
11. The appellant submits that she sustained the following injuries:-
 - a. Fracture of the right femoral condyle;
 - b. Compound fracture of the right lower tibia;
 - c. Compound fracture of the right lower fibula;
 - d. Fracture of the right tibia at the knee tibial plateau;
 - e. Fracture of the right thigh/knee with wound. Thigh bone was exposed;
 - f. Fracture of the right radius bone;
 - g. Infection of the right femur bone with bone loss in the femur; and
 - h. Constant discharging sinus in the right distal thigh.
12. The appellant submits for an award of Kshs. 3,000,000/- for the said injuries and relies on the case of James Gathirwa Ngungi vs Multiple Hauliers (EA) Limited & Another [2015] eKLR where the plaintiff sustained fracture of the right tibia and fibula, fracture of the left radius, fracture of the left ulna, head injury, deep cut wound on the parietal region and soft tissue injuries and bruises of both hands with multiple facial cuts and lacerations. The court awarded a sum of Kshs. 1,500,000/- as general damages for pain, suffering and loss of amenities on 13/2/2015. Further in Michael Njagi Karimi vs Gideon Ndungu Nguribu & Another [2013] eKLR the plaintiff sustained fracture of the radius and ulna, fracture of the right tibia and fibular and segmental fracture of the femur. Degree of permanent incapacitation was assessed at 30%. The court awarded Kshs. 2,000,000/- as general damages for pain, suffering and loss of amenities on 22/8/2013. In Guardial Singh Ghataurhae vs Parminder Singh Manku & 3 Others [2018] eKLR the plaintiff sustained a comminuted fracture of the right tibial plateau and metaphysic, fracture of right patella, comminuted fracture of right distal radius, osteoarthritis of the right knee, fracture of four ribs on the right side and severe lacerations, bruising and scarring. The court awarded Kshs. 2,500,000/- as general damages for pain, suffering and loss of amenities on 23/11/2018. In Gabriel Mwashuma vs Mohammed Sajjad & Another [2015] eKLR the plaintiff sustained a segmental left femur fracture, compound fracture left patella and femoral condyle, comminuted left distal tibia/fibula, fracture right fibula and soft tissue injuries to the right knee. The court gave an award of Kshs. 3,000,000/- as general damages for pain, suffering and loss of amenities on 2/7/2015. Further in Sabina Nyakenya Mwanga vs Patrick Kigoro & Another [2015] eKLR the plaintiff sustained multiple soft tissue injuries, fracture of the right upper arm, fracture of distal femur right thigh bone, fracture of the right patella knee, fracture of the pelvis and fracture of distal radial wrist. Permanent disability was assessed at 42%. The court made an award of Kshs. 3,000,000/- for general damages for pain, suffering and loss of amenities on 22/10/2015.
13. The appellant submits that the trial court in arriving at the award of Kshs. 2,000,000/- did not state which decision she found comparative nor did she do a comparative analysis of the decisions cited to her. The appellant relies on the case of Swiss Contact Limited & Peter Munguti Kieti vs Esther & Another [2019] eKLR and submits that it was imperative for the learned trial magistrate to make a comparative analysis for the purposes of certainty and uniformity.



14. The appellant urges the court to be guided by the decisions in Gabriel Mwashuma vs Mohammed Sajjad & Another (supra) and Sabina Nyakenya Mwanga vs Patrick Kigoro & Another (supra) as the injuries are similar to hers and the degree of incapacitation was assessed at 30% - 60% and 42% respectively. The appellant argues that the decisions are fairly recent, being less than four years old as at the time of the lower court's judgment. The appellant thus submits that she is entitled to an award for diminished earning capacity or in the alternative she prays for enhancement of the general damages as submitted.

The Respondent's Submissions

15. The respondent submits that the appellant was examined by four doctors. Dr. Wokabi in his report dated 1st November 2016, documented the appellant's injuries as fractures of the right femoral condyle, right tibial plateau, right lower tibia and right lower fibula. He indicated that the fracture of the right radius had clinically re-united and functionality of the limb rehabilitated. He assessed permanent disability at 30%. In his updated report dated 31st May 2023, the doctor assessed permanent disability at 45%. Dr. Cyprianus Okoth Okere in his report dated 2nd September 2016 documented the appellant's injuries as compound fracture of the right tibia fibula and fractures of the right femur comminuted, right distal radius and right tibial plateau. He assessed permanent disability of the right leg at 60% and right arm at 10%. Dr. E. O. Ating'a in his report dated 23rd July 2018, the appellant's injuries were indicated as fractures of the distal right femur (compound), tibial plateau on the right knee, distal tibia and fibular (compound) and right radius distal third. He assessed permanent disability at 100%. Dr. Kirugo S. N. in his report dated 13th August 2018 documented the appellant's injuries as fractures of the right radius bone, right thigh/knee with wound, fracture of the right tibia at the knee plateau and fracture of the distal right tibial/fibula. He further indicated that the fracture of the right radius, right tibial plateau, right distal tibia and fibula had healed. He assessed permanent disability at 60%.
16. The respondents submit that the appellant was re-examined by Dr. Maina Ruga and in his report dated 15th January 2018 he confirmed the appellant's injuries and assessed permanent disability at 40%.
17. The respondents thus submit that an award of Kshs. 500,000/- would be reasonable compensation for the injuries sustained by the appellant. In support, they rely on the cases of Ram Gopal Gupta vs Nairobi Tea Packers Limited & 2 Others [2017] eKLR, Jitan Nagra vs Abdinego Nyandusi Oigo [2018] eKLR, John Gitonga Kiarie vs Safari Jira Ndege [2017] eKLR, Akamba Public Road Services vs Abdikadir Adan Galgato [2016] eKLR and Florence Njoki Mwangi vs Peter Chege Mbitiru [2014] eKLR.
18. The respondents further rely on the cases of Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another [2017] eKLR where the court made an award of Kshs. 800,000/- for injuries leading to amputation of his right leg below the knee, injuries on the left leg leading to inability to walk, injuries on the head leading to concussion and bruises and lacerations on legs and hands. Further in Ismael Longishu Kobei vs David Kariuki Gichangi & Another [2018] eKLR where the court awarded Kshs. 2,000,000/- for fracture of the right femur, fracture of the left femur, fracture of the left tibia plateau, fracture of the left 2nd metatarsal, fracture of the left navicular bone, deep cut wound on the right temporal region, deep cut wound on the right elbow, cut wound on the right leg. Permanent disability to the extent of 60%.
19. The respondents rely on the case of Butt vs Khan [1981] KLR 349 and submit that the appellant has not shown that the trial court award was inordinately low so as to represent an erroneous estimate or that the trial court misapprehended the evidence on some material respects and proceeded on wrong principles.



20. The respondents submit that loss of earnings is a special damage claim which ought to be pleaded and proved. In the appellant's evidence she testified that she was a hawker and as a result of her leg injury, she was unable to continue with her business. The respondents argue that the appellant did not substantiate her claims and at the very least she ought to have presented a business permit or tickets to prove payment of hawking fees to the county government. Further, the appellant could have presented a witness to corroborate her claim of being a hawker. The respondents urge the court not to overlook the possibility that the appellant was a housewife and only wants to unjustly enrich herself. To support this contention, the respondents rely on the case of *Swalleh C. Kariuki & Another vs Viloet Owiso Okuyu* [2021] eKLR.
21. The respondents further submit that the incapacitation did not result to any loss of limb and thus did not render the appellant totally incapacitated to work. The respondents argue that assuming that the appellant was a hawker, she could still engage in some activity that could earn a living while using mobility aids. Further, the respondents argue that the appellant did not lead evidence that the chances of getting an alternative job in the labour market or that's he is not able to open an alternative business in future were diminished as a result of the injuries sustained. As such, the respondents urge the court not to make an award for diminished earning capacity.
22. The respondents submit that the appellant delayed prosecuting the present appeal and thus is not entitled to any interest. The appellant filed the appeal in the year 2019 however, she filed her record of appeal on 19th May 2023 after being served with a mention day to take directions by the Honourable Registrar.

Issues for determination

23. The main issues for determination are:-
 - a. Whether the trial court erred in awarding an inordinately low award for general damages;
 - b. Whether the trial court erred by failing to award general damages for diminished earning capacity.

The Law

24. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
25. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.



26. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

27. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the trial court erred in awarding an inordinately low award for general damages.

28. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general 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 below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

29. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 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.”

30. According to the Further Amended Plaintiff dated 28th August 2018 the appellant sustained the following injuries:-

- a. Fracture of the right femoral condyle;
- b. Compound fracture of the right lower tibia;
- c. Compound fracture of the right lower fibula;
- d. Fracture of the right tibia at the knee tibial plateau;
- e. Fracture of the right thigh/knee with wound. Thigh bone was exposed;



- f. Fracture of the right radius bone;
 - g. Infection of the right femur bone with bone loss in the femur; and
 - h. Constant discharging sinus in the right distal thigh.
31. These injuries were confirmed by Dr. Wokabi in his report dated 1st November 2016 and 31st May 2023, Dr. C. Okoth in his report dated 2nd September 2016, Dr. E. O. Atinga in his report dated 23rd July 2018, Dr. Kirugo S.N. in his report dated 13th August 2018 and Dr. Maina Ruga in his report dated 15th January 2018. The doctors all found that the appellant suffered incapacitation of her leg and assessed degree of incapacitation as follows:- Dr. Wokabi assessing permanent disability at 40%, Dr. Okoth at 60%, Dr. Atinga at 100%, Dr. Kirugo at 60% and Dr. Ruga at 40%. Further to that, Dr. Atinga and Dr. Kirugo testified as the appellant's witnesses. Dr. Atinga testified that the appellant's limb was not functional at all and was already short by 6cm. Dr. Kirugo testified that the appellant had a bone infection and the only way to treat it is to amputate the leg. Both doctors stated that the appellant used crutches to be able to move around.
32. The trial magistrate awarded a sum of Kshs. 2,000,000/- for general damages for pain and suffering and diminished earning capacity. The respondent submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the appellant. He urges the court to award Kshs. 500,000/- and relies on the cases as quoted above. The appellant submits that the award is inordinately low and is not comparable to the injuries she sustained.
33. Looking at the decisions relied on by both parties, the decisions cited by the respondent contain injuries that are less severe than those suffered by the appellant whilst the ones cited by the appellant are more comparable in the circumstances. Taking into consideration that comparable injuries ought to attract comparable awards, it is my considered view that the sum of Kshs. 2,000,000/- is reasonable compensation as general damages for pain, suffering and loss of amenities.
34. The learned magistrate in his judgment indicated that she took into consideration the fact that the appellant sustained very serious injuries and risked having her right leg amputated. She further took into account the awards in the authorities relied on by both parties, the degree of permanent disability, passage of time and inflationary trends and settled on an award of Kshs. 2,000,000/- as general damages for pain suffering and loss of amenities and diminished earning capacity. It is however my considered view that the trial magistrate misapprehended the applicable principles by making an award for both general damages and diminished earning capacity under one head.
35. On the issue of diminished earning capacity/loss of earnings, I am guided by the principles in *S. J. vs Francesco Di Nello & Another* [2015] eKLR where the Court of Appeal held that:-
- 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 for 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 in general damages, once proved. This was the position enunciated in *Fairley vs John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 at page 14 wherein Lord Denning M. R said in part 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.

36. Similarly in *Ndoro Kaka Kakondo vs Salt Manufacturers (K) Limited* (2016) eKLR stated:-
Damages for loss of future earning capacity and/or diminished earning capacity, unlike damages for loss of earnings, is a type of remedy based on the claimant's potential earning power. It focuses on the claimant's ability to earn income. The remedy is granted based on the difference in potential earning power, not on what the claimant actually earned in the past. Even if a person is unemployed at the time the injury occurs, he would be entitled to pursue damages for loss of future earning capacity or diminished earning capacity. This item is therefore treated as general damages which though not required to be specifically pleaded, must be proved on the balance of probability.
37. It is evident that for a party to succeed in a claim, of future earning capacity there is need to show that the capacity to earn has been lessened compared to how it was before the accident. It therefore does not mean that the capacity to earn must be totally lost.
38. The trial court stated that the appellant did not plead actual loss and thus proceeded to give an award for general damages for pain suffering and loss of amenities together with diminished earning capacity. Guided by the above cases, it is my considered opinion that the trial magistrate misapprehended the applicable principles and gave two awards under one head on ground that the appellant did not plead actual loss. From the foregoing, it is evident that diminished earning capacity are general damages and should not be pleaded but the claim ought to be proved on a balance of probabilities. The appellant in her Further Amended Plaintiff dated 28th August 2018 specifically pleaded for the award of diminished earning capacity. The appellant said she was 37 years old at the time of the accident which is a fairly young age with a long life ahead of her. Further that she was a hawker earning Kshs.3,000/- per day but due to the accident she can no longer engage effectively in her hawking business and she has to use crutches to move around.
39. Further it is a fact that the appellant was incapacitated and even the trial magistrate acknowledged that her injuries were serious and stated that she risked having her right leg amputated. Although the trial magistrate took into consideration that the appellant suffered incapacitation of between 40% - 100% he overlooked that fact because it buttressed the impact of the amputation on the appellant's earning capacity. The respondents' submissions that the appellant ought to have proved that she could not work elsewhere or do a different job altogether do not hold in the circumstances. Neither is it relevant whether the appellant had a job before the accident as was alleged by the respondents. Evidently it is a question of whether the appellant's income is now less because of the incapacity caused by the accident.
40. The reports of the doctors are not at variance in that the permanent capacity was assessed at 40-60%. It was acknowledged that the appellant will not be able to run the errands of a hawker due to the permanent incapacity. This court takes judicial notice that the job requires a lot of running up and down. It requires one to move from one place to another and even go to wholesale shops to source for goods to sell. Due to the permanent incapacity, the appellant will not be able to hustle like she used to do before the accident. She therefore requires to be compensated for that loss adequately.
41. I have considered the cases relied on by the appellant and noted that the degree of incapacity was in most of them lower than that of the appellant. Most of them were decided between 2013 and 2018. the court gave awards ranging between Kshs.500,000/- to 1,000,000/- between 2015 to 2018 depending on the degree of permanent incapacity. The appellant's case was decided in 2019. Taking into consideration the degree of permanent incapacity as assessed by the various doctors which I give an average of 50% and taking into consideration factors of inflation, I hereby award damages for loss of earnings at Kshs.1,200,000/-.



42. The other awards remain undisturbed. The total award amounts to Kshs.4,874,000/- subject to the contributory ration of 85: 15.
43. The appellant shall have the costs of this appeal.
44. The appeal is partly successful.
45. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 26TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 26th day of October, 2023.

