



REPUBLIC OF KENYA



**Kambura & another v Mbiu (Civil Appeal E017 of 2021)
[2023] KEHC 27364 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E017 OF 2021
JN ONYIEGO, J
DECEMBER 22, 2023**

BETWEEN

DINAH KAMBURA 1ST APPELLANT

PETER ATUTI 2ND APPELLANT

AND

**FLORENCE MUNANIE MBIU ALIAS MUNANIE MBIU ALIAS MUHAMIA
MBIU ALIAS MUNANIE MBIU RESPONDENT**

JUDGMENT

1. In her plaint dated 30.09.2019, the respondent/plaintiff averred that on or about 09.06.2019, she was lawfully travelling as a fare paying passenger in motor vehicle registration number KCD 769J. That on reaching, Ilibile area along Mwingi – Garissa Road, the defendants or their respective employee, servant, agent and or authorized driver so carelessly and negligently drove, managed and/or controlled the aforesaid motor vehicle thereby causing and/or permitting the same to lose control, veer off the road and violently overturn consequences whereof she sustained severe personal injuries hence suffered loss and damage.
2. The particulars of negligence were set out as follows:
 - i. Driving without due care and attention.
 - ii. Driving at an excessive speed in the circumstances.
 - iii. Creating circumstances that precipitated and caused the accident.
 - iv. Failing to keep and/or maintain any or proper look out.
 - v. Failing to exercise due care and skill reasonably expected of a driver of a motor vehicle in the circumstances.



3. The particulars of injuries were listed as follows:
 - i. Generalized and diffuse severe scalp skin tenderness.
 - ii. Tenderness of severe degree over the neck giving rise to restriction of all neck movements.
 - iii. Severe tenderness over the anterior chest wall.
 - iv. Brain oedema.
 - v. Fracture of 2 right ribs.
 - vi. Stable fractures of right 2nd neck vertebra.
4. Present complaints were noted as:
 - i. Neck pains.
 - ii. Frequent headaches.
 - iii. Neck is very stiff, cannot turn the head freely.
 - iv. Recurrent chest pains.
 - v. Permanent incapacity of about 15%.
5. Particulars of special damages were listed as follows:
 - i. Medical legal report by Dr. Muli Kes. 5,000,00.
 - ii. Medical legal report by Dr. Wokabi Kes. 2,500.00
 - iii. Medical legal report by Dr. Okere Kes. 2,000.00
 - iv. Copy of records KCD 796J Kes. 550.00
 - v. Treatment and medical expenses Kes. 17,100.00
6. The appellants entered appearance and further filed a defence dated 13.11.2019 denying the occurrence of the accident on the material day and that the respondent sustained injuries as pleaded in the plaint. They also denied the particulars of special damages as pleaded by the respondent. Without prejudice and in the alternative to the foregoing, they averred that the occurrence of the accident was caused solely and/or substantially contributed by the plaintiff's own negligence.
7. The particulars of the plaintiff's negligence were listed as follows:
 - i. Failing to take any or adequate precaution for her own safety.
 - ii. Failing to heed the instructions on safety precautions when travelling.
 - iii. Failing to heed the traffic rules and regulations when travelling.
 - iv. Failing to wear a seatbelt while traveling.
8. The respondent filed a reply to the appellant's defence wherein she denied every allegation of fact and law in the defence. She further denied every allegation of negligence attributed to her and put the appellants to strict proof thereof.
9. The matter proceeded to full hearing and the trial magistrate after considering the law and evidence adduced before him, reached a determination that the appellant was 100 % liable for the accident and



further awarded the respondent an amount of Kes. 1,800,000.00 as general damages and a sum of Kes. 20,250.00 as special damages.

10. The appellant being dissatisfied with the said judgment, listed seven (7) grounds of appeal in the memorandum of appeal dated 23.10.2021. The appeal is basically challenging the award on quantum.
11. The appeal was canvassed by way of written submissions although only the appellants complied with the order. It was submitted that an assessment on quantum in a claim for general damages is a discretionary exercise to which, the law has set dimensions for an exercise of discretion. That the same must be exercised judicially with great circumspection and upon some legal principles. It was urged that the said dimensions are vital such that when the trial court violates a legal principle, the appellate court will intervene the exercise of the said discretion.
12. Additionally, that awards must be within consistent limits and court awards for damages must be made taking into consideration comparable injuries or similar injuries and awards. Reliance was placed on the case of *Denshire Muteti v Kenya Power & Lighting Co. Ltd.* [2013] where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
13. This court was urged to disturb the award of Kes. 1,500,000/- as general damages and that of Kes. 300,000 in diminished earning capacity as the same were high considering that the plaintiff had sustained soft tissue injuries. Reliance to that end was placed inter alia on the case of *George Mugo & Another v AKM (minor suing through next friend and mother of A.N.K)* [2018] eKLR, where Kemei J. awarded Kes. 90,000/- for soft tissue injuries.
14. The court was further referred to the case of *Lamu Bus Service & Another v Carren Adhiambo Okello* (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kes. 200,000/- was reduced to Kes. 130,000/-.
15. The appellant proposed an amount of Kes. 80,000/- as the appropriate award for the claimant herein. Further, the appellant urged this court to award them costs of the appeal herein.
16. This court has considered the grounds of appeal and submissions by the appellant. As required of the 1st appellate court, am duty bound to re-evaluate, re-assess, re-consider and make an independent determination bearing in mind that I did not see nor hear the witnesses testify so as to be able to assess the demeanour of witnesses. See *Peters v Sunday Post* 1958 (EA) 424.
17. Having considered the record and grounds of appeal, the sole issue for determination is; whether after taking into account the nature of the injuries sustained by the respondent, comparable awards and inflation or passage of time, the award of the trial magistrate was inordinately excessive as to warrant this court to interfere.
18. The appellants have challenged the quantum awarded by the trial court. Circumstances under which this court can upset such a determination were laid down by the Court of Appeal in the case of *Mbogo & Another v Shah* [1968] EA where it was held that:

‘...that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.’



19. Similarly, Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA held that;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

20. From the plaint, it was noted inter alia that the respondent suffered generalized and diffuse severe scalp skin tenderness, tenderness of severe degree over the neck giving rise to restriction of all neck movements, severe tenderness over the anterior chest wall, brain oedema, fracture of 2 right ribs and stable fractures of right 2nd neck vertebra.
21. In the case of *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD* [2021] eKLR, the claimant had sustained multiple cut wounds on the right lower limb, bruises on the right lower limb, bruises on both elbows, bruises on the right iliac region, bruises on the frontal region, bruises on the temporal region, lacerations on the frontal region, cut wounds on the left iliac region, cut wounds on the frontal region, cut wounds on the temporal region, blunt trauma to the abdomen. Maina J set aside the Kes. 230,000 and substituted it with Kes. 180,000/.
22. In *Anthony Nyamwaya v Jackline Moraa Nyandemo* [2022] eKLR, Ochieng’ J (as he was then) found that Kes. 230,000.00 was sufficient for the plaintiff who sustained the following injuries: - Rugged cut wounds on the temporal region of the head; Tenderness on the neck; Tenderness on the anterior chest; Tenderness on the lower back; Tenderness on the shoulders; Swelling and tenderness on the right hand; Bruises on right index finger; Swelling, tenderness and bruises on both legs.
23. On diminished earning capacity, the appellants submitted that the same ought to be entirely set aside as the plaintiff did not prove any effect on her earning capacity.
24. In the case of *Butler v Butler* [1984] KLR 225, the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:
1. A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury
 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.
 4. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and / or at the date of the trial.



5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and
 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service if any.
25. In the instant case, the respondent pleaded for an order for general damages for reduced/diminished earning capacity but outrightly, did not submit on the same. It is trite that diminished earning capacity need not be specifically pleaded and proved. [Also see *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10).
 26. The respondent's incapacity was examined at 15% by Dr. Cyprianus Okoth Okere. The assessment of damages in respect to diminished earning capacity is also a discretionary matter and it depends on the circumstances of each case. Where a victim is an adult and employed, there is general consensus that the person's concerns that the person's earning capacity is diminished when say he loses an arm in an accident.
 27. In the case of *Blowplast Ltd v Julius Ondari Mose* [2018] eKLR the court reduced an award of Kshs. 1,000,000/= as damages for loss of earning capacity to Kshs. 400,000/= where the respondent suffered an amputated distal phalanx, fracture of the right index finger, and loss of dexterity/grip of the right hand; and where disability was fixed at 25%.
 28. In *John Kibicho Thirima v Emmanuel Parsimei Mkoitiko* (2017) eKLR the injuries involved fractures of the pelvis, right hand, leg, ribs and mandibles resulting to 35% incapacity. The plaintiff was awarded Kshs. 600,000/= for diminished earning capacity. In my view, the respondent suffered injuries which are comparable and closely similar to those suffered in case of Kibicho Thirima and Blow Plast Ltd above quoted.
 29. From the foregoing, it is my finding that the claim that the respondent suffered only soft tissue injuries is not correct. It is clear from the medical report which is not denied that she suffered fractures which are more serious than soft tissue injuries or even cut wounds. Considering the rate of inflation and comparable case law in almost similar injuries, I find an award of KES 800,000 as sufficient general damages for pain and suffering plus KES 200, 000 being general damages for diminishing earning capacity. As special damages was not challenged, the same shall remain. Regarding costs, each shall bear own costs. To that extent, the appeal herein partially succeeds with orders as hereunder.
 - i. Kes. 1,500,000.00 for general damages is hereby set aside and substituted with an amount of Kes. 800,000/-.
 - ii. An amount of Kes 300,000 is substituted with a sum of Kes 200,000/- as general damages for diminished earning capacity.
 - iii. No order to costs.

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

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J. N. ONYIEGO

JUDGE

