



REPUBLIC OF KENYA



KENYA LAW
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**Gichure & another v Muthengi (Civil Appeal E607 of 2021)
[2023] KEHC 26769 (KLR) (Civ) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E607 OF 2021

DAS MAJANJA, J

DECEMBER 22, 2023

BETWEEN

ROBINSON GICHURE 1ST APPELLANT

AGNES WACHANA 2ND APPELLANT

AND

JOHN WAMBUA MUTHENGI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.L. Lewa, PM dated 25th August 2021 at Magistrate Court Nairobi, Milimani in CMCC No. 8364 of 2021)

JUDGMENT

1. In the Memorandum of Appeal dated 22.09.2023, the Appellants' appeal is against the judgment of the Subordinate Court dated 25.08.2021 complaining about the general damages awarded by the trial court which they state are inordinately high and that the court erroneously awarded damages for loss of earning capacity in the circumstances of the case. They further complain that the court ignored their written submissions.
2. It is not disputed that the Respondent was injured in a road traffic accident that took place on 10.12.2015 while the Respondent was aboard the Appellants' motor vehicle. The trial court found the Appellants fully liable and awarded the Respondent Kshs. 1,200,000.00 as general damages for pain and suffering, Kshs. 200,000.00 for future treatment costs, Kshs. 138,000.00 for loss of earnings and Kshs. 1,000,000.00 for loss of earning capacity. The appeal is therefore on the two heads of damages; general damages for pain and suffering and loss of earning capacity.
3. I will deal with the issue of general damages for pain and suffering first. According to the Plaintiff, the Respondent sustained the following injuries; compound fracture of the left tibia and fibula, fracture



of the midshaft of the left femur, crush injury of the left foot, laceration on the left eyebrow and bruises on the left elbow. The Respondent produced a Hospital Discharge Summary from Kenyatta National Hospital (KNH) dated 20.06.2016 which showed that he was admitted to KNH on 07.04.2016 and discharged on 06.06.2016. He was later admitted to St Luke's Orthopaedic and Trauma Hospital which confirmed by the report dated 30.08.2016 that the Respondent was admitted to the facility where external fixator was removed from the left tibia and fibula which had bone loss and non-union. That the infected pin sites were cleaned and plating done with bone grafting. Dr Cyprianus Okoth Okere examined the Respondent and prepared a report dated 16.11.2016. At the time of examination, the Respondent was unable to walk without crutches and the wound on the left lower leg had not healed and was discharging pus. Dr Okere concluded that the Respondent suffered grievous harm and assessed permanent disability at 50%. He noted that the Respondent required Kshs. 200,000.00 for removal of the implant in the future.

4. The Respondent was further examined by Dr P. M. Wambugu who prepared a report dated 18.02.2019. He confirmed the injuries sustained by the Respondent. At the time, the Respondent complained of non-healed wounds on his left leg discharging pus, scarred left shin, scarred and deformed left heel, stiffness of the left ankle joint and metal plants in situ. As regards the lower limb, Dr Wambugu noted that the Respondent was walking with a left sided limping gait aided by an elbow crutch. The limb had shortened by 2.0 cm and the heel was absent and the wound defect had been covered by a rotational flap. The ankle joint was held by a fixed plate and the knee joint full flexion movements were restricted. The doctor concluded that the Respondent would be unable to exert himself using the leg and awarded 40% permanent incapacitation. He also stated that the Respondent would require Kshs. 200,000.00 for future medical expenses to deal with removal implants and infections.
5. Both parties cited several decisions to guide the court in assessing damages. The Respondent proposed Kshs. 1,500,000.00. He cited *Korneliys Kweya Ebichet v C & P Shoe Industries Limited* [2008] eKLR where the claimant was awarded Kshs. 1,000,000.00 having sustained blunt trauma on the forehead and a compound fracture of the left tibia and fibula bone and *Francis Ndungu Wambui and 2 Others v VK (a minor suit through next friend and mother MCWK)* [2019] eKLR where the claimant was awarded Kshs. 1,000,000.00. He had suffered soft tissue injuries to the upper limbs, compound fractures of the distal tibia and fibula shaft as well as loss of consciousness for 30 minutes after the accident.
6. The Appellants proposed Kshs. 500,000.00 as general damages. They cited *Jitan Nagra v Abednego Nyandusi Oigo* [2018] eKLR where the court awarded the plaintiff Kshs. 1,000,000.00 which was reduced on appeal to Kshs. 450,000.00 for laceration on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. In *Tirus Mburu Chege and Another v JKN and Another* [2018] eKLR, the plaintiff sustained fractures on the tibia and fibula on both legs, blunt injuries on the forehead, broken upper right second front tooth, nose bleeding and consisted loss of consciousness. The Appellate Court reduced the award of Kshs. 800,000.00 to Kshs. 500,000.00. In *Continental Hauliers Ltd and 2 Others v Isack Kipkemei Bitok* [2019] eKLR the court reduced an award of Kshs. 600,000.00 to Kshs. 400,000.00 on account of a fracture of the left femur which led to plaintiff walking with a limping gait and shortening of the leg and a cut wound on the left forearm. In *Mwamvita Jonathan v Silvia Onunga* [2017] eKLR, the court reduced an award of Kshs. 1,000,000.00 to Kshs. 400,000.00 for the plaintiff who sustained soft tissue injuries and fracture at the hip joint which required corrective surgery involving insertion of surgical plates and screws. Permanent incapacity was assessed at 85%.



7. The Appellants are correct to note that the trial magistrate did not consider the submissions for it is not evident from the judgment that the court engaged with the decisions cited by the parties to come to a conclusion of awarding Kshs. 1,200,000.00. It is established that general damages are damages at large. The award ought to reflect the nature and gravity of the injuries and compensate the claimant fairly in the sense that it puts him to the position, in so far as money can, he would have been before the accident took place. The general approach should be that comparable injuries should as far as possible be compensated by comparable awards bearing in mind that no two cases are exactly alike (see *Stanley Maore v Geoffrey Mwenda* [2004]eKLR). While the court must also take into account the value of the shilling and inflation trends, the court should eschew astronomical awards which injure the body politic and strive to ensure that awards make sense and result in fair compensation (see *Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR and *Jabane v Olenja* [1986] KLR 661).
8. Although the reasoning of the trial magistrate was inadequate, taking into account the nature of the injuries and the cases cited, I do not think the award of Kshs. 1,200,000.00 was inordinately high considering the decisions. The Respondent sustained not only a compound fracture but suffered a crush foot with disability assessed at 40%. I affirm the award of general damages. In *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 the Court of Appeal 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 or 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 inordinately high or low.
9. The Appellants complain that the court made an award for loss of earning capacity despite the evidence showing the Respondent was engaged in another well-paying job. He urges the court to set aside the award or in the alternative re-assess it downwards. The Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR dealt with loss of earning capacity as a head of damage. The court cited, with approval, the following decisions: *Fairley v John Thompson Ltd* [1973] 2 Lloyd's Rep. 40, 41 per Lord Denning:
- It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.
- And *Moeliker v Reyrolle & Co. Ltd.* [1977] 1 WLR 132, 140B per Browne L.J:
- This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.
10. In the plaint, the Respondent pleaded that he could not engage in his work as a high school teacher for a period of 1 year commencing 10.12.2015 to 10.12.2016. He stated that since the accident he was unable to work as he was not permanently employed. That at the time of he was employed he was earning, Kshs. 11,500.00 per month. He testified that he could not continue teaching as this involved standing and waking around which he couldn't do because of his injuries. He however stated that he was doing online projects after the accident.



11. The trial magistrate accepted the evidence that the Respondent could no longer work as a teacher hence awarded a global sum of Kshs. 1,000,000.00 being the compromise between the Respondent’s proposal of Kshs. 2,000,000.00 and the Appellant’s proposal of Kshs. 500,000.00,

“having considered the proposal made by counsels, the current inflation and the youthful age of the plaintiff.”

12. It is clear the trial court did not indicate the reason for disregarding either party’s proposal. The Respondent proposed Kshs. 2,000,000.00 and relied on *Zipporah Nangila v Eldoret Express Limited and 2 Others* [2016] eKLR where the court awarded Kshs. 1,440,000.00. The court observed that,

“While assessing a claim for damages for loss of earning capacity, factors as age and qualifications of the claimant, his disabilities and previous abilities must be taken into account.”

It also called in aid *John Kipkemboi and Another v Morris Kedolo* [2019] eKLR where the court awarded Kshs. 1,500,000.00.

13. The Appellants on the other hand, contended that the Respondent had not proved that as a result of the injuries sustained he could no longer teach or get another well-paying job or that the chances of getting an alternative job were slim. He pointed out that from the evidence, the Respondent was in fact engaged in paying online work. The Appellants proposed that the amount of Kshs. 12,000.00 proposed by the Respondent ought to be reduced by 60% to take into account the 40% disability. He cited *James Thiongo Githiri v Nduati Njuguna Ngugi* [2012] eKLR where the court took into account the incapacity in calculating the amount due. It also urged the court to adopt a global award approach as demonstrated by *Benuel Bosire v Lydia Kemunto Mokora* [2019] eKLR.

14. In *Moeliker v Reyrolle & Co. Ltd (supra)* per Browne L.J., summarised the approach in awarding damages for loss of earning capacity. He observed that,

“...each case must depend on its own fact but if the court decides that the risks of the Plaintiff losing his present job or his being unable to get another job or an equally good job or both are only slight, a low award is right.”

In this case, the Respondent stated that he was a teacher employed by the Board of Management. He did not give his qualifications to enable the court determine his prospects of employment either as teacher or in any other position. While I accept that the level of disability may disadvantage the Respondent’s ability to get employment immediately, he may be able to earn other forms of income. In his testimony, he stated that he was earning money from online activities. In this case, I hold that the multiplier approach may not be appropriate in light of the paucity of evidence adduced by the Respondent to support his case. I would however, hold that the injuries had affected his future prospects and would award him Kshs. 500,000.00 under this head of damages.

15. For the reasons I have set out above, I now order as follows:
- a. The Appeal is allowed to the extent that the judgment of the Subordinate Court dated 25.08.2021 is set aside only to the extent that the award for loss of earning is substituted with an award of Kshs. 500,000.00.
 - b. The parties shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.



D.S. MAJANJA

JUDGE

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Mr Mungai instructed by G. N. Mugo Advocates for the Appellants.

Ms Munanie instructed by Namiinda and Company Advocates for the Respondent.

