



**Bonfide Clearing and Forwarding Company Limited & another v Alicheli
(Civil Appeal 9 of 2020) [2022] KEHC 3232 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 9 OF 2020
CM KARIUKI, J
MAY 26, 2022**

BETWEEN

**BONFIDE CLEARING AND FORWARDING COMPANY LIMITED 1ST
APPELLANT**

FRANCIS MBUGUA MAINA 2ND APPELLANT

AND

GLADICE ALICHELI RESPONDENT

*(An Appeal from the Judgment and/or decree of Honourable Magistrate
Hon S M Mwangi CMCC No. 242 of 2017 delivered on 26th may 2020)*

JUDGMENT

1. The arises appeal from a judgement of Nyahururu CM'S 242 of 2017 dated 26th May 2020 where the court in a road Traffic Accident awarded Respondent kshs. 6,957,850 in damages plus costs and interest.
2. The appellant being aggrieved by the said award lodged appeal and raised the following grounds;
 - i) That the Learned Trial Magistrate erred in law and fact in awarding Kshs. 2,500,000/= as general damages for pain, suffering and loss of amenities, Kshs. 1,000,000/= for loss of earnings in the absence of proof of income as required by law, Kshs. 2,400,000/= as cost of helper and Kshs. 1,050,000/= as cost for future medical expenses amounting to Kshs. 6,950,000/= which is excessive and unrealistic in the circumstances and against the injuries allegedly sustained and in total disregard to the Appellant's submissions.
 - ii) That the learned Trial Magistrate erred in law and in fact in applying a multiplier of 20 years to assess cost of a helper in total disregard to the contingencies and vicissitudes of life.



- iii) That the Learned Trial Magistrate erred in law and in fact in failing to consider the evidence tendered for and against the respondent on quantum.
3. The appeal is on quantum. The parties were directed to canvass appeal by way of submissions but only Respondent filed same.

Appellants Case and the Submissions

4. On general damages the appellant relied on the decision in *Mwavita Jonathan vs Silivia Onunga* HCCA No. 17 of 2017 where an award of Kshs. 400,000.00 was made for analogous fractures and *Kennedy Ooko Ouma vs Joseph Maina Kamau & Anor.* (2018) eKLR. Where permanent disability had been assessed at 85% claimant required hip replacement like in the instant case and an award of ksh 1,400,000. In this instant appeal, the respondent had lower permanent disability of 30% by Dr. Malik and 60% by Dr. Kiamba. Appellant submitted for a sum of sum of Kshs 500,000.00 for general damages which is well within the expected limit.
5. Considering the injuries in the cited decision were more severe to the ones sustained by the respondent, thus appellant submits that, the trial court ought to have awarded general damages at no more than Kshs. 800,000.00. Thus the trial the trial court erred in making an excessive award of Kshs. 1,000,000.00 which excessive. In *Charles Kiplangat Koech vs Bernard Ngetich* (2021) eKLR, the High Court awarded a sum of Kshs. 500,000.00 for loss of earning capacity in a case where there was evidence that the boda boda rider had lost his leg as a result of the accident.
6. On future medical expenses the plaintiff had pleaded for a sum of Kshs 850,000.00 as cost of hip replacement and Kshs. 200,000.00 as treatment for skin grafting. This pleading was supported by the report and testimony for Dr. Kiamba. During cross-examination (page 71 of the record), the doctor confirms that the evidence he has puts the hip replacement costs at Kshs. 400,000.0 at Karen Hospital. Dr. Malik testified and confirmed even in his report that the future treatment would cost Kshs. 300,000.00 in a mission hospital and NHIF would cover such treatment at 100%.
7. These were therefore two varying opinions from two professionals. Though their opinions are not binding to court, the trial magistrate ought to have weighed the same even through the strength of cross-examination. Dr Kiamba reduced his opinion to Kshs. 400,000.00 upon being cross-examined which was a sum quite close to the one suggested by Dr. Malik at Kshs. 350,000.00

In *Stephen Kingingi Wangonde v The Ark* (2016) eKLR, the High Court held:

“Expert evidence should be tested against known facts... it is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula against which actions are than to be rigidly judged with a mathematical precision. “

8. It is clear from the cited decision that the trial court ought to have tested the conflicting expert evidence on the basis of other evidence which the trial court has accepted and not external evidence which has not been adduced by parties or witnesses
9. The trial court awarded a sum of Kshs. 2,400,000.00 as the cost of hiring a helper. The trial Magistrate rightfully states in her judgment (page 188) that she is allowing the claim of costs of helper based on the period of working life and again states that she presumes the hip replacement and skin grafting will be done. If the treatment is done, then the need for helper will no longer be there.



10. It was thus a misapprehension of the principles for the trial court to go ahead and use 20 years as a multiplier since the respondent would have worked upto 40 years. If the hip replacement is done with the next one year, then it would mean that the respondent would not need a helper for the next 20 years?
11. Secondly, the trial court never considered vicissitudes of life in arriving at this figure of 20 years.
12. It will be a dangerous precedent if you were to allow anyone to come and make such an allegation and the court accepts such evidence as proof enough to the claim
13. The Court to bear in mind the following excerpt from the case of *West (H) & Son Ltd v Shepherd* (1964) A.C. 326 at page 345 in deciding on the general damages awardable to the plaintiff.

“but money cannot renew a physical frame trial has been battered and shattered all that Judges and courts can is to award sums, which must be regarded as giving reasonable compensation. In the process there must be to endeavour 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 what amounts which are awarded are to a considerable extent conventional.”

14. In *lim Poh Choo*'s case, on the other hand, Lord Denning M.R., was also for the case of making reasonable awards, fair to both parties and stated thus: -

In considering damages in personal injury claims, it is often said:

“the defendants are wrongdoers so make them pay up in full. They do not deserve any consideration”

Respondent's Case and Submissions

15. It was Dr. Kiamba's testimony that he examined the respondent two times and prepared medical reports. He further testified that the Respondent had severe pain in the pelvis, pain and swelling on the right leg and inability to walk and stand. He stated that the Respondent suffered severe asteroathritis on the right upper joint.
16. The respondent relied on Dr. Kiamba's final medical report which is at page 41 of the record of appeal and on the Doctor's testimony at the trial court. The doctor testified that the Appellants' doctor Malik agrees with him on the injuries sustained by the Respondent. The doctor indicated that due to the severity of the injuries sustained by the respondent, he awarded a permanent disability of 60% while Doctor Malik awarded 30% permanent disability.
17. It was his testimony that the disability is 60% because the Respondent suffers osterioathritis of the hip joint which is very stiff, the right knee and ankle joint are severely restricted on movement and she can hardly put down her right foot and Doctor Malik agrees with the same.
18. The doctor further stated that even if the wounds and infections are treated and osterioathritis cleared, the right leg is deformed that the patient can never walk without support. He added that the Respondent is in her reproductive age and both doctors agreed that she suffered multiple fractures of the pelvis. He stated that there is separation of the central part of the pelvis and with such complications, she cannot deliver normally and doctors will have to do Cs ad noted that Doctor Malik does not comment on this and therefore the figure of 30% permanent disability by Doctor Malik is so low.



19. The doctor also noted that Doctor Malik stated that the Respondent suffered total incapacity meaning she cannot function at that level and then awards a permanent disability of 30% which is low and stated that he disagrees with it.
20. It was the doctor's testimony that the tibia is exposed and needs grafting and that muscles are wasted on the right hip joint which means the limb is reduced.
21. The appellants' doctor Malik also agreed with doctor Kiamba that the Respondent requires skin grafting and that the right hip joint was stiff due to dislocation and the blood supply and cartilage had been damaged thus making post traumatic arthritis inevitable.
22. Dr. Malik stated that the fracture of the tibia had not fully united with a gaping wound on the lower leg which had an exposed part of the tibia. The treatment of the fracture requires drilling of the exposed bone to allow graduation tissue to form gradually.
23. From this medical report, it is clear that Doctor Malik agrees with the position held Dr. Kiamba. From the observations made by Doctor Malik, it is questionable on how he could award a permanent disability of 30% to a patient who was far from healing. This is a clear indication that the medical report by Malik was incomplete.
24. Dr. Malik having examined the Respondent on 13/3/2018 and Dr. Kiamba having conducted a second examination of the Respondent on 9/5/2019 which informed the doctor to reach a higher permanent disability percentage of 60%, Dr. Malik would have deemed it fit to conduct a further examination of the Respondent was indeed capacitated to that extent or not then put in his conclusive medial report but that was not the case. What was left to be relied on court on the actual state of the Respondent.
25. The Respondent at the trial court submitted for Kshs. 5,000,000/= as general damages, for pain suffering and loss of amenities and relied on the case of *James Njau v Goreti Wakwibugi & another* (2007) eKLR where the plaintiff had sustained fracture of the right acetabulum, fracture of the femur, dislocation of the hip and soft tissue injuries and was awarded Kshs. 3,000,000/= for pain, suffering and loss of amenities.
26. The Respondent in submitting for Kshs. 5,000,000/= took into consideration the age of the authority relied on, the vicissitudes of life, the factors of inflation and the serious nature of the injuries sustained by the Respondent which led to her being awarded 60% permanent disability.
27. The Appellants on their part submitted for Kshs. 500,000/= as damages for pain, suffering and loss of amenities awardable to the Respondent.
28. From the trial court's judgement notes at page 158 to 169 of the record of appeal, the court took into account the evidence both oral and documentary adduced in court by both parties and the submissions of both parties.
29. The trial court at page 177 of the record of appeal noted that the amount submitted for by the Appellants of Kshs. 500,000/= was inordinately low and that of the respondent of Kshs 5,000,000/= was a bit high. The court stated that it had considered the relevant awards and taken proper account of the Respondent's injuries.
30. The trial court went ahead to state that what was evident was the Respondent's state at the time of the hearing which the court had a chance to see that she was still experiencing a lot of pain due to the injuries sustained, the wound was still open though dressed and how she struggled to walk, stand or sit were all seen to be extremely difficult and painful.



31. The court also took into consideration the inflation of the economy, the Kenyan shilling and the new pandemic of covid 19 when giving its award. The court awarded the respondent Kshs. 2,500,000/= under this head.
32. It is the Respondent's submission that the award of Kshs. 2,500,000/= was reasonable and not enriching considering the severity of the injuries sustained by the Respondent and loss therefore pray that this Honourable court does uphold the award of the trial court under this limb.
33. On loss of earning and earning capacity the Respondent testified at the trial court that she was a cashier earning Kshs. 20,000/= per month which monies she cannot earn now and only depends on other people's support and even has to spend more money in paying a domestic worker since she cannot work due to the very severe injuries she sustained.
34. The respondent having not produced any documentary evidence of her employment and earnings. In order to rely on Kshs. 20,000/= as her earnings relied on the case of [*Jacob Ayiga Maruja & another v Simeon Obayo*](#) where the court held that proof of a person's occupation or earning should not only be through production of documents as there are many people who do not keep records and yet they earn their livelihood in various ways.
35. The Respondent testified that she cannot work anywhere and is assisted by other people. At the time of the accident the Respondent was 19 years and the Respondent submitted that she still had 41 years to work.
36. The Respondent testified that she cannot work anywhere and is assisted by other people. At the time of accident, the Respondent was 19 years and the Respondent submitted that she still had 41 years to work.
37. The Respondent submitted for Kshs. 9,840,000/= as damages for loss of earnings and earning capacity.
38. The trial court in its judgment notes at page 180 of the record of appeal noted that damages for loss of earning capacity is supposed to compensate the plaintiff for the risk that she may not get employment in future as a result of the injuries she sustained. The court went further to state that the court must apply principles to ensure that the damages awarded are adequate and not excessive to compensate for the financial loss in cases where the plaintiff is not employed.
39. The trial court at page 181 of the record of appeal went ahead to note that the respondent had not produced evidence to prove she was engaged in what gainful activity however it was clear that she had no engaged in any activities from the time of the accident for it was evident she could not do anything gainful due to the injuries and pain as noted above and the doctors who examined the Respondent awarded her 60% and 30% permanent disability respectively which made the respondent's situation worse in terms of her capacity to secure a job in the future.
40. The trial court was guided by the case of [*CM \(A minor suing through the mother and next friend M N v Joseph Mwangangi Maina*](#) (2018) eKLR and awarded the respondent Kshs. 1,000,000 under this head.
41. The respondent submits that the trial court's reasoning with regards to loss earnings and earning capacity was proper and the award of Kshs. 1,000,000 as damages under this head was proper and the Respondent prays that this Honourable court upholds the same.
42. The court noted that though NHIF caters for treatment, it never pays 100%, further NHIF covers its contributing members since the respondent is unemployed and cannot work or even take care of herself and son, it raises doubt as to how she would be contributing for NHIF to be eligible to some amounts being catered for under the said cover.



43. The trial court taking into consideration the economy and the current covid -19 pandemic which timeline is unknown, the court found it reasonable to award the respondent Kshs 850,000/= for hip replacement and Kshs. 200,000/= for skin grafting and other infections thus awarded Kshs. 1,050,000/= as future medical expenses.
44. It is the Respondent's submission that the trial court was properly guided in its award for future medical expenses and the amount was reasonable in the circumstances.
45. on cost for domestic worker the Respondent at page 73 of the record of appeal testified that as a result of the injuries she sustained she can no longer engage in any activity any she has a domestic helper who takes care of her and her 4 year child. It was her testimony that she pays the domestic helper Kshs. 10,000/= per month.
46. The domestic helper testified at the trial court as recorded at page 75 and 76 of the record of appeal. She stated that she is employed by the respondent and she does house chores, take care of the respondent and her child as the respondent cannot do anything. She stated that the Respondent pays her Kshs. 10,000/= per month.
47. The respondent at the trial court submitted that she was 19 years and she has over 41 years to live. She submitted that she would need a domestic helper to a long time. She submitted for a multiplier of 41 years in determining the costs for the domestic worker and submitted for Kshs. 4,920,000/= as costs for the domestic worker.
48. The trial court took into consideration the evidence and submissions relevant to this head and stated that it shall assess the amount from her 20th year till 40 years. The trial court tabulated the costs as follows:
Kshs. 10,000/=x12months x 20 years = Kshs. 2,400,000/=
49. It is submitted that the court considered the Respondent would live for 40 years which is reasonable and realistic thus adopting a multiplier of 20 years which we find reasonable. It is submitted that the trial court did not error in adopting a multiplier of 20 years and therefore court is urged to upholds the same. Court upholds the trial court's award of Kshs. 2,400,000/= as the costs for the domestic worker.

Issues, Analysis and the Determination

50. After going through pleadings, proceedings and submission I find the issues are whether the trial court in awarding damages took into account an irrelevant factor, or left out of account a relevant one or that short of this the amount is inordinately low or so high that it must be a wholly erroneous estimate of the damages? And what is the order as to costs?
51. In awarding Kshs. 2,500,000/= as general damages for pain, suffering and loss of amenities, the court stated that it had considered the relevant awards and taken proper account of the Respondent's injuries went ahead to state that what was evident was the Respondent's state at the time of the hearing which the court had a chance to see that she was still experiencing a lot of pain due to the injuries sustained, the wound was still open though dressed and how she struggled to walk, stand or sit were all seen to be extremely difficult and painful.
52. The court also took into consideration the inflation of the economy, the Kenyan shilling and the new pandemic of covid 19 when giving its award.
53. In the court's judgment at page 177 of the record of appeal, the court simply states that it "has considered relevant awards...."the trial court does not state which decisions specifically it considered.



This would have been necessary considering that it had found that the submission relied on by the appellant was too low and that of the respondent was too high.

54. The appellant relied on the decision in *Mwavita Jonathban vs Silvia Onunga* HCCA No. 17 of 2017 where an award of Kshs. 400,000.00 was made for analogous fractures.
55. In this cited decision, permanent disability had been assessed at 85%. In this instant appeal, the respondent had lower permanent disability of 30% by Dr. Malik and 60% by Dr. Kiamba. Appellant submitted for a sum of sum of Kshs 500,000.00 for general damages which is well within the expected limit.
56. In *Kennedy Ooko Ouma vs Joseph Maina Kamau & Anor.* (2018) eKLR, the High Court awarded a sum of Kshs. 1,400,000.00 to a plaintiff whose similarly would have required total hip replacement. The plaintiff therein had sustained analogous injuries and had sought an enhancement of the award to Kshs. 2,000,000.00 but the Judge noted at page 5 of the decision that an award of Kshs. 2,000,000.00 would be inordinately high court and thus awarded Kshs. 1,400,000.00.
57. Taking to account the injuries, disability by both doctors and persuasive case of *Kennedy Ooko Ouma* supra I find the award of ksh was excessive in the circumstances and thus reduce same to ksh 1,500,000 as general damages for pain, suffering and loss of amenities.
58. On ground that award of 1,000,000/= for loss of earnings was made in the absence of proof of income as required by law ,the court makes the following view.The future earnings or diminished earning capacity, has a wealth of authorities which enunciate the principles that guide courts in the award of damages for loss of future earnings or diminished earning capacity. In *Butler v Butler*, [1984] KLR 225, the Court of Appeal differentiated the damages awarded in the aforesaid two limbs in the following terms:

“ A plaintiff’s loss of earning capacity occurs where, as a result of his 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. ... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages. ...”
59. The factors to be considered in assessing damages under either of the limbs depends on the circumstances of each case. As was well stated in the case of *Catherine Gatwiri V Peter Mwenda Karaai*, [2018] eKLR, the court considers the disadvantage the injured party will suffer in future from not working because of the injuries and take into account factors such as age, qualifications of the injured person, his remaining work life, disability among others.
60. In this case, the two medical reports authored by Doctors confirm that the appellant’s had suffered permanent incapacity of between 30%-60%. However, none of the doctors stated that with this incapacity, the appellant could not engage in any other gainful employment in future other than what she was doing before the accident nor did appellant also make such a claim in her evidence during the trial to that effect. In the circumstances, the appellant failed to prove that she was entitled to damages for loss of future earnings.
61. However, given that one of her legs had fracture, needed skin grafting- hip fixing and that she suffered permanent disability assessed between 30%-60%, I am satisfied that her capacity to do certain jobs such



- as manual to earn a living was diminished by the injuries she had sustained in the accident. It is not disputed that the appellant was about 20 years at the time of the accident.
62. Considering all relevant factors and doing the best that I can, I reduced the award of ksh 1 million to award her damages for diminished earning capacity in the sum of KShs.600,000.
 63. On award of Kshs. 2,400,000/= as cost of helper The trial court awarded a sum of Kshs. 2,400,000.00 as the cost of hiring a helper. The trial Magistrate rightfully states in her judgment (page 188) that she is allowing the claim of costs of helper based on the period of working life an again states that she presumes the hip replacement and skin grafting will be done. If the treatment is done, then the need for helper will no longer be there.
 64. It was thus a misapprehension of the principles for the trial court to go ahead and use 20 years as a multiplier since the respondent would have worked upto 40 years. If the hip replacement is done with the next one year, then it would mean that the respondent would not need a helper for the next 20 years?
 65. Secondly, the trial court never considered vicissitudes of life in arriving at this figure of 20 years. Taking to account all the circumstances of the case, possibilities of fixing of the hip, vicissitudes etal,the period of user of a helper is scaled down to 5 years thus amount reduced to ksh 600,000.
 66. Kshs. 1,050.000/= as cost for future medical expenses;under this head, the respondent had pleaded for a sum of Kshs 850,000.00 as cost of hip replacement and Kshs. 200,000.00 as treatment for skin grafting. This pleading was supported by the report and testimony for Dr. Kiamba. During cross-examination (page 71 of the record), the doctor confirms that the evidence he has puts the hip replacement costs at Kshs. 400,000.0 at Karen Hospital. Dr. Malik testified and confirmed even in his report that the future treatment would cost Kshs. 300,000.00 in a mission hospital.
 67. These were therefore two varying opinions from two professionals. Though their opinions are not binding to court, the trial magistrate ought to have weighed the same even through the strength of cross-examination. Dr Kiamba reduced his opinion to Kshs. 400,000.00 upon being cross-examined which was a sum quite close to the one suggested by Dr. Malik at Kshs. 350,000.00
 68. In *Stephen Kingingi Wangondu v The Ark* (2016) eKLR, the High Court held:

“ Expert evidence should be tested against known facts... it is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula against which actions are than to be rigidly judged with a mathematical precision. “
 69. It is clear from the cited decision that the trial court ought to have tested the conflicting expert evidence on the basis of other evidence which the trial court has accepted and not external evidence which has not been adduced by parties or witnesses. In this case, the evidence on record was that by Dr. Kiamba who conceded to a sum of Kshs. 400,000.00 as the cost of treatment in Karen hospital and Dr. Malik who had fixed the cost of future treatment at Kshs. 300,000.00 in a mission hospital. The varied opinion by Dr.Kiamba who had initially put the cost of treatment at Kshs. 850,000.00 would thus be easily watered down by these subsequent evidence. It was thus wrong for the trial court to admit that she was not a doctor by profession (see page 185 record of appeal) and then proceed to make decision based on her own experience and thoughts about the health care system in Kenya (see page 186)
 70. Thus I take Dr Malik ksh 350,000 proposal as it is more credible for fixing hip joint and ksh 200,000 for skin grafting total 550,000.
 71. Thus in sum the trial court award is adjusted as follows;



- (i) General damages for pain, suffering and loss of amenities ksh 1,500,000
 - (ii) Dimished capacity of earning ksh 600,000
 - (iii) Domestic helper ksh 600,000
 - (iv) Future medical expenses ksh 550,000
- TOTAL 3,250,000

Parties to bear their own costs in the appeal.

**JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT NYAHURURU THIS
26TH DAY OF MAY 2022.**

CHARLES KARIUKI

JUDGE

