



REPUBLIC OF KENYA



KENYA LAW

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**Mutua & another v Oruma & 2 others (Civil Appeal 11 of 2018)
[2022] KEHC 18073 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 18073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL 11 OF 2018**

**JR KARANJA, J
JUNE 30, 2022**

BETWEEN

NDAMBUKI MUTUA 1ST APPELLANT

EPHRAIM GAKUARU KINYANGOI 2ND APPELLANT

AND

BONVENTURE WESONGA ORUMA 1ST RESPONDENT

CHABHADIYA ENTERPRISE LTD 2ND RESPONDENT

HASSAN JUMA SHIBENDE 3RD RESPONDENT

JUDGMENT

1. The Appellants, Ndambuki Mutua and Ephraim Gakuaru Kinyangoi, were the first and second Defendants respectively in this suit which was filed by the Plaintiff/first Respondent, Bonventure Wesonga, for loss and damages arising from a road traffic accident involving motor vehicle Registration Number KAX 343E Toyota S Wagon belonging to the first Appellant and driven at the time by the second Appellant and motor vehicle Registration Number KAV 803M Mitsubishi van belonging to the third Defendant Company, Oline Retreads Ltd and motor vehicle Registration Number KAL 101E Ford Wheel-Tractor belonging to the fourth Defendant/second Respondent, Chabhadiya Enterprises and driven at the time by the fifth Defendant/third Respondent, Hassan Juma Shibende.
2. In the amended plaint dated December 2, 2015, it was pleaded that on the August 31, 2012 the Plaintiff was travelling as a passenger in motor vehicle Registration Number KAX 342E – Toyota along the Busia-Mumias Road when it collided with motor vehicles Registration Number KAV 803M – Mitsubishi and Registration Number KAL 101E – Tractor thereby causing severe bodily injuries upon the Plaintiff.



3. The Plaintiff contended that the three motor vehicles collided as a result of the negligent, reckless and/or careless manner that they were driven at the time by the second Defendant/second Appellant, the third Defendant and the fifth Defendant/third Respondent.

The Plaintiff suffered loss and damage as a result of the accident and prayed for both general and special damages against all the Defendants jointly and severally together with cost of the suit and interest.

4. All the Defendants save the third Defendant denied the claim in its entirety and filed their respective statements of defence in that regard.

At the hearing of the suit, the Plaintiff/first Respondent [PW 1] testified and called three witnesses ie, a Traffic Police Officer, Collins Silumba (PW 2), and a doctor, Dr Charles Andai (PW 3).

The Defendants, it would appear, led no evidence to establish their defence or disprove the allegations made against them by the Plaintiff.

5. After hearing the parties, the trial Court rendered its Judgment on the September 14, 2018, more on the question of quantum of damages as the parties had recorded consent or agreed with the finding or liability made by the Court in Busia CMCC 214 of 2014, to the extent that liability be apportioned at the rate of 30% for each of the drivers of motor vehicle Registration Number KAV 803M – Mitsubishi Lorry and motor vehicle Registration Number KAL 101E – Tractor and 40% for the driver of KAX 343E – Toyota.

On the question of quantum, the trial Court awarded the Plaintiff a sum of Kshs 2 Million as general damages for pain and suffering and a further sum of Kshs One (1) Million for loss of future earning capacity.

Special damages were also awarded to the Plaintiff in the sum of Kshs 644,730/- and together with the aforementioned awards on general damages, the total award was Kshs 3,644,730/-.

6. Judgment was accordingly entered for the Plaintiff against the Defendants save the third Defendant together with costs and interest.

The trial Court ordered that the Judgment ought not be executed by the Plaintiff against the third Respondent for the reason that they were never served with any Court papers, never entered appearance nor participated in the proceedings.

Being aggrieved with the Judgment the Appellants preferred this Appeal against the three Respondents on the basis of the grounds set out in the Memorandum of Appeal dated October 8, 2018 and filed herein on October 11, 2018.

7. The hearing of the Appeal proceeded by way of written submissions which were filed by the parties through their respective Advocates ie, Messrs Peter Karanja Advocates, Bogonko, Otanga & Co. Advocates and Omwenga & Co. Advocates.

After due consideration of the Appeal on the basis of the supporting and opposing grounds and the rival submissions, the duty of this Court was to revisit the evidence and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

8. In that regard, it was notable that the occurrence of the accident in the manner alleged by the Plaintiff or the ownership of the ill-fated vehicles were factors which were never disputed or substantially disputed.

Indeed, liability did not fall as an issue or point for determination as the parties apparently agreed with the apportionment of liability between the Defendants made by the Court in Busia CMCC No 214 of 2014. This Appeal therefore turns on the question of quantum of damages.



9. In that regard, the factors to be considered by an Appellate Court in deciding whether or not to upset or interfere with damages awarded by a trial Court as was stated by the Court of Appeal in *Kemfro Africa Ltd Trading as Meru Express Service & another v A.M.M Lubia & Another* (1982 – 88) 1 KAR 777, are to the effect that the Appellant Court must be satisfied that the trial Court in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low so inordinately high that it must be wholly erroneous estimate of the damage.
10. The gist of the Appellant’s submission with regard to the award of damages made by the trial Court in the sum of Kshs 2 Million is that it was excessive as it did not accord with the principle that similar cases attract similar awards. The Appellants submitted that they relied on the authorities cited by them to ask the Court to award the Plaintiff a sum of Kshs 1.5 of the general damages for pain and suffering but while agreeing with them on the figure the trial Court proceeded to award Kshs 2 Million without any explanation.
11. On the award for loss of future earning capacity, the Appellants submitted that there was no evidence that the Plaintiff had any apprehension of not getting employed as an engineer and was at the time of the incident working as a project manager. That, there was no evidence of any risk of diminished earnings, yet the trial Court awarded Kshs 1 Million under the head. It was the Appellant’s contention that the figure was “plucked from the air” even as the trial Court agreed with the Appellant’s submissions.
12. In opposing the Appeal, the first Respondent submitted that the trial Court applied the correct principles in making the award in as much as the aspect of inflation was factored in to determine the impugned awards.
It is therefore the first Respondent’s contention that this Appeal lacks merit and ought to be dismissed.
The second and third Respondent did not in their submissions raise any significant issue with the award for pain and suffering. However, they contended that the award in respect of loss of future earning capacity was not justified since it was never pleaded by the Plaintiff and in any event, the award was meant to try and restore the Plaintiff to the position that he was before the accident and not to enrich him.
13. With regard to general damages for pain and suffering, there was sufficient evidence from the doctor (PW 3) indicating that the Plaintiff (first Respondent) suffered injury to his head and left upper limb. The injury on the head consisted of two cut wounds to the face. These were soft tissue injuries. The injury on the left upper limb resulted in a lengthy treatment period and amputation of the left forearm above the elbow. This was the most serious injury which per the medical report dated December 13, 2013 resulted in permanent disability of 50% of the left arm with complete healing of stump wound with scar formation.
14. Otherwise, the injuries were described by the doctor as serious soft tissue and skeletal injuries.
The Plaintiff proposed an award of Kshs 3.5 Million general damages for pain and suffering on the basis of the authorities cited by himself. The first and second Defendants/Appellants proposed an award of Kshs 1.5 Million under the head on the basis of the authorities cited by them while the fourth and fifth Defendants proposed the sum of Kshs 600,000/-. A consideration by this Court of the authorities cited by the parties in making their respective proposals leads to the irresistible conclusion that the victims in the authorities cited by the Appellants suffered injuries which were more comparable to the injuries suffered by the Plaintiff herein rather than the authorities cited by the first Respondent



(Plaintiff) which clearly showed that the degree of injury suffered by the victims in those cases was far beyond the injuries suffered by the Plaintiff herein.

15. Indeed, the trial Court agreed with the Appellants proposal of Kshs 1.5 Million but instead awarded a sum of Kshs 2 Million for pain and suffering. In doing so, the trial Court indicated that the enhanced amount was due to inflation, a factor which is normally brought into play in assessment of damages for the obvious reasons that it leads to a rise in the cost of living. This Court does not think that the amount was unreasonable and excessive in the circumstances neither was it based on consideration of irrelevant factors by the trial Court.
16. In any event, the grounds of Appeal do not raise any issue with that award of Kshs 2 Million for pain and suffering, but do raise serious issue with the award of Kshs 1 Million for loss of future earning capacity. This is the same issue that the second and third Respondents have brought up in this Appeal. The Appellants made a proposal of Kshs 500,000/- on the basis of the cited authority while the first Respondent/Plaintiff proposed a sum of Kshs 1.5 Million on the basis of the cited authority.
17. The trial Court took into consideration the cited authorities and awarded Kshs 1 Million damages for loss of future earning capacity. The Appellants together with the second and third Respondent held the view that the amount was rather excessive and/or was not justified at all for want of proof.
18. The Court of Appeal in *Mumias Sugar Co. Ltd v Wanalo* [2007] 2 KLR 74, held that:-

“There was a difference between an award of damages for loss of future earning capacity. Compensation for loss of future earning was awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity was awarded as part of general damages”.

Here, the claim by the Plaintiff was for loss of future earning capacity which fell under general damages for pain, suffering and loss of amenities, but could also be claimed as a separate head of damages.
19. Nevertheless, as was held in the aforementioned case the award for loss of earning capacity could be made where the Plaintiff was employed to compensate him for the risk that the disability had exposed him of either losing his job in future or in case he lost the job, his diminution of chances of getting an alternative job, in the labour market. That, the award could also be made at the time of the trial and even when the Plaintiff was not so employed to compensate him for the risk that he would not get employment or suitable employment in future.
20. In this case, the evidence by the Plaintiff/first Respondent was that he was employed at the time as an irrigation engineer with G. North & Sons Ltd. And by the time he testified in Court he had healed completely from his injuries which left him with an amputated left forearm, the functionality of which was reduced to 50% thereby rendering it 50% disable. Nonetheless, the Plaintiff indicated that the disability did not amount to inability as it never cost him his job as an irrigation engineer and did not interfere or was not expected to interfere with his normal earnings prior to the accident.
21. The Plaintiff’s apprehension or fear that the disability could affect his salary if he were to be employed by another company was not justified as he did not indicate that he was due to change his employer or move out of his employment in search of greener pastures. In any event the Plaintiff’s apprehension was based on mere speculation.



22. In the Mumias case (*supra*) the Court of Appeal also held that:-

“Loss of earning capacity could be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There was no formulae for assessing loss of earning capacity.

Nevertheless, a Court had to apply the correct principles, and take the relevant factors into account in order to ascertain the real or approximate financial loss that the Plaintiff had suffered as a result of disability”.

Since the Plaintiff/first Respondent indicated that his disability did not affect his job and earnings therefrom it would follow that he was entitled to a token or modest award under the head of general damages.

23. Therefore, it is this Court’s opinion that the award of the Kshs 1 Million made by the trial Court for loss of future earning capacity was in the circumstances rather excessive and is hereby reduced by half to the extent that the Plaintiff/first Respondent is entitled to only Kshs 500,000/- which is reasonable compensation, the element of inflation being considered.
24. As to special damages, these must not only be pleaded but also specifically proved by necessary documentary evidence. What was pleaded by the Plaintiff was the sum of Kshs 640,730/- which was specifically established by relevant documentary evidence. In any event, this appeal is essentially on the general damages and is partly allowed to the extent that the award made by the trial Court respecting loss of future earning capacity in the sum of Kshs 1 Million is set aside and dismissed for the sum of Kshs 500,000/- under the head.
25. Otherwise, with regard to the other awards the Appeal stands substituted with each party bearing their own costs.

Ordered accordingly.

DELIVERED AND SIGNED THIS 30TH DAY OF JUNE, 2022.

J.R. KARANJAH

JUDGE

