



**Finejet Limited v Musyimi (Civil Appeal E263 of 2021)
[2022] KEHC 12327 (KLR) (Civ) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12327 (KLR)

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

CIVIL

CIVIL APPEAL E263 OF 2021

JK SERGON, J

JULY 25, 2022

BETWEEN

FINEJET LIMITED APPELLANT

AND

MBITHI MUSYIMI RESPONDENT

*(Being an appeal from the judgement of Hon. A. N. Makau delivered
on 4th December, 2020 at Milimani in CMCC no. 4275 of 2019)*

JUDGMENT

- 1) Mbithi Musyimi, the respondent herein, was on October 27, 2016 or thereabout hit by motor vehicle registration no. KBE 780E and ZC6363 while walking along the Eastern bypass road near Benedicta school Nairobi. As a result of the accident the respondent sustained serious bodily injuries and suffered financial loss.
- 2) The respondent then filed a compensatory suit against Finejet Limited, the appellant herein and another before the Chief Magistrate's court. Hon. A. N. Makau, learned Principal Magistrate heard the suit and by her judgment delivered on December 4, 2020, she awarded the respondent as follows:
 - a) General damages
 - i. Pain & suffering ksh.4,000,000/=
 - ii. Future medical expenses ksh. 420,000/=
 - iii. Diminished earning capacity ksh.1,000,000/=
 - iv. KNH Credit undertaking ksh.1,500,000/=



- b) Special damages ksh. 6,000/=
 - c) Costs of the suit
 - d) Interest
- 3) The appellant was aggrieved and he preferred this appeal and put forward the following grounds:
- a) That the learned magistrate erred in law and fact by awarding future medical expenses of kshs.420,000/= diminished earning capacity of ksh.1,000,000/= and KNH Credit undertaking of ksh.1,500,000/= which items were not pleaded by the respondent.
 - b) That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
 - c) That the learned magistrate erred in law and fact in applying the wrong principals to arrive at the award.
 - d) That the honourable learned erred in law and fact in relying on extraneous evidence in arriving at the decision on award of damages.
- 4) When the appeal came up for hearing learned counsels appearing in this appeal filed written submissions with the approval of court.
- 5) I have re-evaluated the case that was before the trial court. I have also considered the rival written submission plus the authorities cited.
- 6) In the appeal, the appellant is basically challenging the award on quantum and not liability. It is the submission of the appellant that the trial magistrate erred by making the following awards
- i. Future medical expenses ksh.420,000/=
 - ii. Diminished earning capacity Ksh.1,000,000/=
 - iii. KNH Credit undertakings of ksh.1,500,000/=
 - iv. General damages for pain and suffering ksh.4,000,000/=
- 7) The appellant avers that the aforesaid awards were given yet they were not pleaded for. According to the appellant the sum of ksh.420,000/= which is in respect of future medical expenses was not pleaded hence it should not have been awarded.
- 8) The respondent on the other hand is of the submission that he made a prayer seeking to be paid future medical expenses hence disputing the appellant's assertion. The respondent referred to paragraph 8 of the plaint where he averred that he claimed that he requires vigorous assisted physiotherapy so as to move and rehabilitate the legs at an estimated cost of ksh.100,000/=.
- 9) It is also claimed by the respondent that he also requires removal of the metal implants at an estimated cost of ksh.120,000/= and further requires colostomy to be closed which would cost ksh.200,000/= making a total sum of ksh.420,000/= as future medical expense.
- 10) Having considered the rival submissions and having perused the pleadings it is clear that in paragraph 8 of the plaint the respondent averred that he required ksh.420,000/= to cover physiotherapy, removal of metal implants and closing of colostomy as future medical expense.



- 11) The respondent made the claim in the body of the plaint but he failed to make a specific prayer for it to be awarded future medical expenses. The law requires parties to expressly seek the sort of orders in the prayer section and not to merely state in the body of the plaint. I am persuaded by the submissions of the appellant that the trial court erred by awarding a sum of ksh.420,000/= for future medical expenses yet the respondent had not specifically prayed in the plaint. The respondent did not ask for judgment to be awarded future medication
- 12) As regards the award of ksh.1,000,000/= for diminished earning capacity, the appellant submitted that the prayer in this head should be part of the compensation for general damages for pain and suffering. The respondent made a prayer in paragraphs 10 and 11 of the plaint for diminished earning capacity and went ahead to prove the same.
- 13) The respondent on his part pointed out that the award for diminished earning capacity was pleaded separately and was independent of the general damages awarded for pain and suffering.
- 14) After a careful consideration of the rival submissions, I am of the opinion that a claim for diminished earning capacity can be specifically and separately pleaded for the same can form part of the claim of general damages for pain and suffering.
- 15) In the case of *Mumias Sugar Company Ltd =vs= Francis Wanalo* (2007) e KLR, it Was held inter alia that the loss of earning capacity can be claimed and awarded as part of general damages for pain and suffering and loss of amenities or as a vsepate head of damages as a token, modest or substantial depending on the circumstances of each case.
- 16) I am convinced that the prayer for diminished earning capacity though not specifically pleaded as a prayer in the plaint, the same can still be awarded as part of general damages as it happened in the case before the trial court. The challenge mounted against the award on diminished earning capacity therefore has no merit. However, there is a challenge on the amount awarded.
- 17) The trial court awarded a sum of ksh.1,000,000/= as a global figure as general damages for diminished earning capacity. There are guidelines which may also assist the court in assessing damages in this head like the applying the minimum wage obtaining at the time.
- 18) The respondent had claimed that he was earning a sum of ksh.1,200 per day as a mason. He was found to have suffered between 70% and 75% disability. The trial court was not convinced to apply the prevailing minimum wage but instead the court opted to award a global figure.
- 19) I am satisfied the learned trial magistrate applied the correct principle in assessing damages hence she cannot be faulted. The appellant has however complained that the quantum of damages given is excessive and an erroneous estimate of damages in the circumstances. I am persuaded by the appellant that award of ksh.1,000,000/= for diminished earning capacity is on the higher side and therefore the same should be adjusted downwards. I think a sum of ksh.700,000/= is a reasonable amount. Consequently the sum of ksh.1,000,000/= is set aside and is substituted with a sum of ksh.700,000/=.
- 20) The appellant further challenged the award in respect of KNH Credit Undertaking of ksh.1,500,000/= stating that the respondent never specifically pleaded to be awarded. The appellant argued that claim is a special damage in nature and the respondent ought to have specifically pleaded and proved. The appellant pointed out that the respondent only specifically pleaded to be paid ksh.6000/= as special damages in the plaint.



- 21) The respondent is of the submission that he pleaded in paragraph 12 of the plaint to be paid KNH Credit Undertaking of ksh.1,500,000/= and that he eventually provided the trial court with final invoices from Kenyatta National Hospital with Credit Undertaking.
- 22) It is not in dispute that in paragraph 12 of the plaint, that the plaintiff (respondent) claimed that he was treated at Kenyatta National Hospital where he was admitted for 28 days and treated upon executing a credit note for ksh.1,500,000/= being the cost of treatment for the entire period.
- 23) It should be noted that the claim is pleaded in the body of the plaint but not at the prayer section. The claim on this head is a special damage which should be specifically pleaded and proved.
- 24) I have perused the plaint and it is clear that the respondent did not specifically pray to be awarded ksh.1,500,000/= as a special damage. What the respondent pleaded for as special damages is stated to be ksh.6,000/=. The trial magistrate erred when she awarded the respondent the aforesaid amount of ksh.15,000,000/= as special damages yet it was not prayed for in the plaint. The award cannot therefore stand. The respondent however is entitled to be awarded ksh.6,000/= as special damages since the same was specifically pleaded and proved.
- 25) The other ground of appeal is to the effect that the award of ksh.4,000,000/= is high and excessive compared to awards made for similar injuries. It is the respondent's submission that the award of kshs.4,000,000/= as damages for pain and suffering is adequate and sufficient considering the injuries the respondent sustained.
- 26) It is not in dispute that as a result of the accident the respondent sustained the following injuries:
 - i. Compound (open) fracture of the right tibia
 - ii. Compound (open) fracture of the right fibia
 - iii. Fracture of the left femur
 - iv. Unstable fracture of the pelvis
 - v. Perineal injuries that destroyed the anus and rectum.
- 27) The respondent is said to have suffered permanent incapacity assessed at 75%. The trial magistrate awarded a sum of ksh.4,000,000/= as proposed by the respondent's advocate. The learned Principal Magistrate in making the award stated that she relied on the case of *Naftaly Muiruri =vs= Samuel & Another* (2018) e KLR which she found to be comparable though she noted that the injuries in the aforesaid case were more severe than those obtaining in the instant case.
- 28) She also stated that she considered that the rate of inflation had risen and therefore the award was sufficient.
- 29) In the case of *Kipkoskei Tangus Tesot =vs= Julius Kiprono Tanui* (2018) e KLR this court sitting in Narok, gave the claimant an award of ksh.2,500,000/= as general damages for pain and suffering in respect of the following injuries:
 - i. Crash injury of the left leg which resulted I amputation at the level of above the knee.
 - ii. Fractures of the right tibia
 - iii. Fracture of the right fibula
 - iv. Disability assessed at 80%



30) In *Sinohydro Tianjin Engineering Co. Ltd v Michael Onyano Asowa* (2021) e KLR the High court upheld on appeal the decision of the magistrate's court which awarded a sum of ksh.2,800,000/= as general damages for pain and suffering for the following injuries:

- i. Traumatic amputation of right 4th and 5th fingers
- ii. Severe crash injuries of right leg which led to amputation at the upper part of right thigh.
- iii. Disability assessed at 75%

31) I find the above authorities to be in respect of injuries which are near similar to those obtaining in this appeal. However, it should be noted that the percentage of disability is higher than obtaining in the instant case. I find that the trial court's award is higher than comparable cases, therefore the award has to be interfered with. I am convinced an award of ksh.3,000,000/= is reasonable in the circumstances for this head.

32) In the end, this appeal which is essentially against quantum is found to be meritorious hence it is allowed giving rise to issuance of the following orders:

- i. The appeal as against the award of kshs.420,000/= for damages for future medical expenses is allowed thus the award is set aside.
- ii. The award of ksh.1,000,000/= as damages for diminished earning capacity is hereby set aside and is substituted with an award of ksh.700,000/=.
- iii. The appeal as against the award of ksh.1,500,000/= in respect of KNH Credit Undertaking is allowed and is set aside.
- iv. The award of ksh.4,000,000/= as general damages for pain and suffering is set aside and is substituted with an award of ksh.3,000,000/=.
- v. In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party meets its own costs.

For avoidance of doubt, the awards made on appeal are as follows:

- a) Damages for pain and suffering ksh.3,000,000/=
- b) Damages for diminished earning Capacity ksh. 700,000/=
- c) Special damages ksh. 6,000/=
Totalksh.3,706,000/=
- d) Costs of the suit to be based on the above awards made on appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

