



**Musa & another v Naibei (Civil Appeal 234 of 2020)
[2022] KEHC 11585 (KLR) (Civ) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11585 (KLR)

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

CIVIL

CIVIL APPEAL 234 OF 2020

JK SERGON, J

JULY 25, 2022

BETWEEN

MOHAMUD AHMED MUSA 1ST APPELLANT

ABDIKADIR ABDULLAHI 2ND APPELLANT

AND

JOAN NATALIA NAIBEI RESPONDENT

(Being an appeal against the judgment delivered by the M.W.Murage (MS) (SRM) delivered on 29th May 2020, in Milimani Commercial Courts Civil Suit No.10791 of 2018)

JUDGMENT

1. The respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated December 6, 2018 and for judgment against the respondent in the following manner:
 - i. Special damages in the sum of Kshs.3,750/=
 - ii. General damages for pain and suffering
 - iii. Provision for future medical expenses of Kshs.300,000/= per year for 7 years
 - iv. Loss of earning capacity
 - v. Loss of career prospects/progression
 - vi. Costs of this suit and interest on (a), (b), (c), (d) and (e) above at court rates
 - vii. Any other or further relief as this Honourable Court may deem fit and just to grant.



2. The respondent averred in her plaint that on or about October 1, 2018 at around noon or thereabout, the plaintiff was performing her regular duties as a security guard in Nairobi's Kileleshwa Estate at Pauka Court along Kandara Road when the second appellant, who was the vehicle's driver, agent, or servant for the 1st appellant, drove and or managed motor vehicle registration number KCC 009D so negligently that he allowed it to lose control, veer off the road, and strike the respondent. As a result, the respondent suffered severe injuries, causing grave harm, leading to the amputation of her left foot thereby making her permanently disabled.
3. The respondent pleaded in her plaint that at time of the injury, she was employed by MOCAM Security as a guard earning a gross salary of Kshs.15,028/= per month however, she can no longer perform her duties since the said date and has lost her earning capacity at the age of 23 years.
4. The respondent further pleaded in her plaint that she was set to enroll for a course in Tours and Travels in the year 2019 and has lost her further career prospects as she cannot enroll for such a course or perform tasks related to it and despite the elaborate medical care given to her, she still needs an artificial leg prosthesis at a cost of Kshs.300,000/= which is to be changed after every 7 years.
5. The appellants entered appearance on being served with summons and filed its statement of defence on 1st March, 2019 respectively to deny the respondent's claim.
6. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent against appellants in the sum of Kshs.2,000,000/= in general damages, loss of future earning capacity in the sum of Kshs.4,580,064/=, future medical expense in the sum of Kshs.1,200,000/= plus a further Kshs.3,750/= for special damages.
7. Being aggrieved by the aforementioned judgment, the appellants sought to challenge the same by way of an appeal. Through its memorandum of appeal dated June 8, 2020 the appellant put in the following grounds:
 - a) That the learned magistrate erred in law and in fact in failing to give due regard and consideration to the appellants' submissions on quantum of damages and thereby awarded the plaintiff amount in general damages which was excessive.
 - b) That the learned magistrate erred in law and in fact in awarding general damages for pain and suffering for Kshs.2,000,000/= which was manifestly excessive.
 - c) That the learned magistrate erred in law and in fact in applying a multiplier of 27 years in computing damages for loss of future earnings and failed to consider the element of bulk payment and thereby reached an award of Kshs.4,580,064/= for loss of future earning capacity.
 - d) That the learned magistrate erred in law and in fact in failing to consider the factor of how the prosthesis would have restored the respondent's mobility and his ability to engage in alternative income earning activity and thereby reached an award of Kshs.4,580,064/= for loss of future earning capacity.
 - e) That the learned magistrate erred in law and in fact in applying the respondent's gross income of Kshs.15,028/= in computing the claim for lost income without any consideration of the statutory deduction and other expenses which the plaintiff would ordinarily incur during his employment and thereby reached an award of Kshs.4,580,064/= for loss of future earning capacity.
 - f) That the learned magistrate erred in law and in fact in assessing the cost of prosthesis at Kshs.300,000/= despite the respondent's doctor having conceded during the cross



examination that this amount was based on the rates in private hospitals but would vary to Kshs.100,000/= in a public hospitals and thereby reached an award of Kshs.1,200,000/= for future medical expenses.

8. Directions were given that the appeal be disposed of by way of written submissions. Both sides have filed their respective written submissions, which I have read through and noted the arguments advanced.
9. In their submissions in support of the appeal, the appellants advanced a sum of Kshs.1,000,000.00 for pain and suffering and relied on the case of *Boniface Waiti & Another v Michael Kariuki Kamau* (2007) eKLR that one of the key principles of the awards of damages is that they should be inordinately low or high and should be commensurable with the injuries sustained.
10. On the issue of assessment and award of damages for loss of future earning capacity where the trial court awarded the sum of Kshs.4,580,064/=-, the appellants submitted that the trial court ought to have taken into account that the respondent had claimed and awarded the damages for future medical expenses being the cost replacing the artificial prosthesis which would have improved her mobility and ability to continue with life.
11. The appellants relied on the case *Mumias Sugar Company Ltd v Francis Wanalo* (2007) eKLR where the court stated as follows:-

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can 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 is no formula for assessing loss of earning capacity. Nevertheless, the Judge has 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 has suffered as a result of disability.”

12. On loss of future earning capacity, the appellants submitted that the award of Kshs.1,200,000/= be set aside as the general statement by PW2 who is not a medical expert on the orthopedic field was not sufficient evidence to prove the claim to the standards set in law.
13. The appellants cited and urged this court to consider the judgment by the Court of Appeal in *Tracom Limited & Hassan Mohammed Adan* (2009) eKLR where the court held as follows:

“We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd vs. Gituma* (2004) 1 EA 91, this Court, stated:-

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof.



That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”

14. The respondent supported the judgment of the trial magistrate stating that the same was commensurate with the injuries sustained.

15. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs. Associated Motor Boat Co. Ltd. & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

16. The appeal herein is on quantum of damages awarded by the trial court. The principles applicable in considering an appeal on quantum are as was stated by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-1988) KAR 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. It must be shown 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 either inordinately high or low.”

17. After considering the memorandum of appeal and the written submissions lodged herein, I am persuaded that the following are the issues for determination -

- a. Whether the trial court acted on wrong principles of law in making the award of damages; and
- b. if (a) above is answered to the affirmative, which sum would be sufficient compensation.

18. I will then consider the appeal on the three sub-headings, i.e the award on pain and suffering; the award on Loss of future Earning Capacity and the award on Future medical expenses.

19. The Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown 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 either inordinately high or low..’

20. In the instant suit, the trial magistrate awarded Kshs. 2,000,000.00 as damages for pain and suffering, which amount the appellant regards as inordinately high. The respondent agrees with the trial magistrate on the award.
21. The respondent herein sustained the following injuries –a crush injury to the left foot, fractures and wounds, multiple bruises and leg amputation and left foot mobilized with another. The doctor assessed incapacitation at 50% due to the amputation.
22. In *Kurawa Industries Limited vs. Dama Kiti & another* [2017] eKLR an authority relied upon by the respondent the court stated that -

“The scenario given by the above awards show that damages for amputation of one’s leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries. There is the case of Samuel Musinga Mwatete (2012) eKLR where Kshs.1.5 million was awarded in 2012. The case of Patrick Mbatba Kyengo was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of Cosmas Mutiso Mwema (2014) eKLR.’

23. In the case of *Bayusuf Freighters Limited vs. Patrick Mbatba Kyengo* (2014) eKLR where the Court of Appeal made an award of Kshs.1,600,000.00 for similar injuries. It should be noted that the said decision was delivered in 2014. As stated in the case of *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & another* [2017] eKLR, the court in making an award for general damages must always consider the prevailing inflation rates.
24. It is evident from the aforementioned authorities that the trial magistrate issued an award that was reasonable in light of the respondent’s injuries as well as the inflation rates and the fact that the aforementioned authorities are not particularly current. A Kshs.2,000,000/= award is adequate compensation for pain and suffering, thus I won’t change the award as it was made at the trial court.
25. I shall now consider whether the respondent proved that he was entitled to the award of loss of earning capacity. The respondent cited the Court of Appeal decision in *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR where the court stated:

“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market; while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can 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 is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct principles and take



the relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

26. In *Butler V Butler* [1984] KLR 225 at 232 Kneller JA stated:
- “Loss of earning capacity 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 by Lord Denning M.R. in *Fairely vs John Thompson (Design & Contracting Division)Ltd*[1973]2Lloyd’s Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”
27. Damages under the head of loss of earning capacity can be classified as general damages but these have also to be proved on a balance of probability. (See *Cecilia W. Mwangi & another vs Ruth W. Mwangi* [1997] eKLR).
28. Disability as a result of the accident on the part of the respondent was assessed at 50%. No doubt the respondent’s capacity to earn was greatly diminished. At the time of trial, she had not resumed duties at her place of work. The respondent was earning Kshs.14,316/= per month and produced her identity card which proved she was 23 years old had 27 years as the correct assumption that she would work till the age of 50 years as a guard. Based on the principles enunciated in the authorities I have set forth above, am persuaded that the assessment of damages by the trial court on this head was spot on.
29. On the issue of future medical expenses, the respondent submitted that PW2 Dr. George Kungu Mwaura assessed his permanent degree of incapacity at 50% and recommended further medical expenses for artificial leg that costs Kshs.300,000/= in an average hospital and had to be changed after every 7 years totaling to Kshs.2,100,000/= however the court decided to award a lesser figure of Kshs.1,200,000/=.
30. There was no evidence that was produced by the appellants before the trial Court to rebut this finding.
31. I, agree with the finding of Matheka J, in the case of *Geoffrey Kamuki & another -vs- RKN (Minor suing through her late father and next friend ZKN* [2020] eKLR, where he stated: -
- “...To demand a specific sum to be proved specifically like special damages would be unreasonable. This is a claim for money not yet spent, for money estimated to be spent depending on how the claimant’s body is responding to treatment among other things. It is not always clear at that time of filing the case what these future costs may be. The prognosis could change for the better or for the worse depending on the circumstances. Is it not for the same reason that defendants will often seek second medical opinions in injury-based claims? Where they believe that the plaintiff has healed from their injuries, they do so to influence the ultimate award of general damages for pain and suffering. This happens even when the case is already before court and it may well be in the middle of the trial. A plaintiff such as this one ought not to be denied the award because she did not have a figure in mind. It was pleaded, and if the appellant was disputing it, the right place would have been at the trial. Respondent could have done so by bringing evidence to controvert it...”
32. I find that the claim on future medical expenses was pleaded and proved in evidence by the medical report that was provided by PW2.
33. Having found so, the award of Kshs.1,200,000/= was therefore properly awarded.



34. The upshot therefore is that the appeal lacks merit and is dismissed with costs.

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 1st Appellant

.....for the 2nd Appellant

.....for the 1st and 2nd Respondents

