



**Wakasyaka v Yalla & 3 others (Civil Appeal 452 of 2018)  
[2022] KEHC 15842 (KLR) (Civ) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15842 (KLR)

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

**CIVIL**

**CIVIL APPEAL 452 OF 2018**

**JK SERGON, J**

**NOVEMBER 29, 2022**

**BETWEEN**

**DOROTHY JOYCE WAKASYAKA ..... APPELLANT**

**AND**

**BRIAN OPIYO YALLA ..... 1<sup>ST</sup> RESPONDENT**

**BRIAN OPIYO YALLA ..... 2<sup>ND</sup> RESPONDENT**

**YALLA ALICE ..... 3<sup>RD</sup> RESPONDENT**

**YALLA ALICE ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal against the judgment and decree delivered by Hon. I. Gichobi (Mrs.)  
(Senior Resident Magistrate) on 28th August, 2018 in Milimani CMCC no. 7904 of 2014)*

**JUDGMENT**

1. Dorothy Joyce Wakasyaka, the appellant herein, filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide the plaint dated December 17, 2014 and amended on December 20, 2017 and sought for both general and special damages in the sum of Kshs 175,303/= plus costs of the suit and interest thereon arising out of a road traffic accident.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were sued in their respective capacities as the driver and the registered owner of the motor vehicle registration number KBU 946Q (“the subject motor vehicle”) at all material times.
3. The appellant pleaded in the amended plaint that sometime on or about the April 12, 2014 she was lawfully walking along Accra Road in Nairobi when the subject motor vehicle being carelessly driven by the 1<sup>st</sup> respondent lost control and knocked her, causing her to suffer severe bodily injuries which are particularized under paragraph 6 of the amended plaint.



4. The appellant attributed the accident to negligence on the part of the respondents by setting out the particulars under paragraph 5 of the amended plaint.
5. Upon being served with summons, the respondents entered appearance and filed their joint statement of defence on September 15, 2014 to deny the averments made in the amended plaint.
6. At the formal hearing of the suit, the parties recorded a consent on liability in the ratio of 90%: 10% in favour of the appellant and against the respondents jointly and severally, and on production of the bundle of documents on record without calling their respective makers. The parties further consented to filing written submissions on quantum and on the award on special damages in the sum of Kshs 175,303/=.
7. In the end, the trial court in its judgment awarded general damages for pain and suffering in the sum of Kshs 450,000/= and special damages in the sum of Kshs 175,303/= (as per the consent) plus costs of the suit and interest thereon.
8. The appellant has sought to challenge the award made on general damages by way of the present appeal. The appellant has therefore put forward the following grounds of appeal vide her memorandum of appeal dated September 27, 2018:
  - i. That the learned trial magistrate erred in law and in fact in not considering the submissions of the appellant hence arriving at the wrong decision.
  - ii. That the learned trial magistrate erred in law and in fact in not taking into account the evidence which was placed before the court hence arriving at the wrong decision.
  - iii. That the learned trial magistrate erred in law and in fact in failing to follow the law regarding the award of damages.
  - iv. That the learned trial magistrate erred in law and in fact in relying heavily on the submissions of the respondent to write the judgment rather than the evidence which was before the court.
  - v. That the learned trial magistrate erred in law and in fact in not applying the minimum wage in respect to the salary hence arriving at the wrong decision.
  - vi. That the learned trial magistrate erred in law in not finding that the appellant had proved quantum against the respondent.
  - vii. That the learned trial magistrate erred in law and in fact in awarding damages which were too low and not in line with the evidence on record.
  - viii. That the learned trial magistrate erred in law and in fact in failing to give reasons for the judgment.
9. This court directed the parties to file written submissions on the appeal.
10. The appellant on her part submits that the award made on general damages for pain and suffering is inordinately low and therefore urges this court to substitute it with a more reasonable award in the sum of Kshs 1,500,000/= with reference to the case of *Leonard Kinuthia v William Sirma Kiboros & another* [2000] eKLR where the court awarded a plaintiff with fracture of right angle and comminuted fracture of the lateral malleolus and soft tissue injuries the sum of Kshs 700,000/= under a similar head.
11. The appellant also faults the trial court for declining to award any damages under the head of loss of future earnings and yet she had demonstrated that as a result of the injuries sustained from the accident, she was unable and unfit to perform her duties.



12. The appellant urges this court to tabulate an award under the above head by use of a multiplier of 6 years since she was aged 54 years as at the time of the accident; and a multiplicand of Kshs 32,885 supported by a pay slip to show her earnings, hence:  
$$32,885 \times 6 \times 12 = \text{Kshs } 2,367,720/=$$
13. It is also the submission by the appellant that she is entitled to an award in the sum of Kshs 504,000/= to cater for the cost of a househelp since she had to hire one following the accident, citing the case of *Rosemary Wanjiru Kungu v Elijah Macharia Githinji* [2014] eKLR in which the court awarded a similar sum under the same head.
14. In their reply submissions, the respondents argue that the award made by the trial court on general damages for pain, suffering and loss of amenities is fair and ought not to be disturbed, citing among others, the case of *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR where the court awarded the sum of Kshs 500,000/= on appeal at the instance of a fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle.
15. The respondents further support the decision by the trial court declining to award any damages under the heads of loss of future earnings and cost of hiring a househelp, in the absence of proof to warrant such an award.
16. I have considered the contending submissions on appeal and the authorities relied upon. I have also re-evaluated the evidence which the trial court had the opportunity to look at.
17. It is clear that the appeal lies against quantum, specifically the damages awarded/awardable under the heads of general damages for pain, suffering and loss of amenities; loss of future earnings and cost of hiring a househelp. The appellant has urged this court to disturb the same in line with the principles set out in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR 5 namely:
  - a. That the trial court took into account irrelevant factors or left out relevant factors when assessing damages; or
  - b. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.
18. I will therefore address the eight (8) grounds of appeal contemporaneously under the above heads.
19. In regards to damages under the head of pain, suffering and loss of amenities, the appellant proposed the sum of Kshs 1,500,000/= and quoted the case of *Leonard Kinuthia v William Sirma Kiboros & another* [2000] eKLR also cited hereinabove and forming part of the submissions by the appellant on appeal, where the court awarded the sum of Kshs 700,000/=; whereas the respondents proposed the sum of Kshs 400,000/= with reliance *inter alia*, on the case of *Lucy Muthoni Mucaki v Fridah Nyaguthii* [2015] eKLR where the High Court sitting on appeal revised downwards the award made on general damages from the sum of Kshs 650,000/= to the sum of Kshs 450,000/= for bruises at the base of the left big toe medially; spiral fracture of the tibia at left ankle joint; and dislocation of the left ankle joint with no indication on permanent disability.
20. The learned trial magistrate; upon weighing and taking into consideration the rival positions; settled on an award in the sum of Kshs 450,000/= under that head, mentioning that she found the authorities cited by the respondents to constitute more comparable and recent awards.
21. The medical reports and related evidence tendered echo the injuries particularized in the pleadings, that the appellant sustained a bimalleolar fracture of the right ankle and a blunt injury to the right shoulder.



22. In the medical report dated August 27, 2014 and prepared by Dr Cyprianus Okoth Okere, permanent incapacity was assessed at 30% with the appellant's injuries being categorized as grievous harm in nature. In the second medical report dated February 16, 2016 produced by the respondents, Dr PM Wambugu assessed the degree of permanent incapacity at 6% which is a variance from the earlier medical report.
23. That notwithstanding, upon my consideration of the authorities cited by the parties before the trial court, I observed that the one cited by the appellant was cited over 10 years before the impugned judgment was delivered and constituted injuries of a more severe nature weighed against those sustained herein. Concerning the authorities cited by the respondents, I also note that they were decided a few years back.
24. I therefore took into account the case of *Aloise Mwangi Kabari v Martin Muiya & another* [2020] eKLR where the High Court sitting on appeal considered injuries in the category of a compound fracture of right tibia and fibula, bleeding from left lower limb and a swollen leg, enhanced an award from the sum of Kshs 300,000/= to Kshs 500,000/=. I also considered the more recent case of *Hussein Sambur Hussein v Shariff A Abdulla Hussein & 2 others* [2022] eKLR where the court upon considering injuries in the nature of fractures of the right tibia and fibula leg bones (lower 1/3 bimalleolar ankle fracture), dislocation of the right ankle, bruise on the right leg and pain in the injured areas, with a permanent incapacity of 18%, awarded the sum of Kshs 600,000/= on appeal.
25. In view of all the foregoing circumstances, I am of the view that the award made by the learned trial magistrate fell on the lower side and would therefore warrant disturbance.
26. Taking into account the abovementioned authorities, the injuries sustained, the assessment made on permanent disability and inflation factors, I find an award of Kshs 600,000/= to be more suitable in the circumstances.
27. On damages for loss of future earnings, the appellant submitted before the trial court that at the time of the accident, she was aged 54 years and earning a salary of Kshs 32,885/= but that she was rendered unable to perform her duties.
28. The appellant therefore urged the trial court to apply the multiplier approach in tabulating her award under this head, thus:  
$$32,885 \times 6 \times 12 = \text{Kshs } 2,367,720/=$$
29. The respondents responded by submitting that in the absence of proof that the appellant had been rendered so incapacitated as to hinder her from performing her duties or earning an income, the appellant was not entitled to any award under that head.
30. In her decision, the learned trial magistrate reasoned that the appellant had not tendered anything to suggest that as a result of the accident, she was unable to continue working and that in any event, as at the time of the accident, the appellant was aged 62 years and hence a retired teacher. For those reasons, the learned trial magistrate declined to make any award here.
31. Upon my re-examination of the pleadings and evidence tendered at the trial, I concur with the reasoning arrived at by the learned trial magistrate as to the absence of any credible evidence to indicate or prove an inability to earn a living or a loss in earnings on the part of the appellant as a result of the accident.
32. Furthermore, none of the medical evidence tendered points to a degree of incapacity which is so grave as to render the appellant unable to work.



33. In arriving at my finding above, I am supported by the case of *William J Butler v Maura Kathleen Butler* [1984] eKLR cited in the submissions by the appellant and where the Court of Appeal acknowledged that:

“...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.”

34. In view of all the foregoing circumstances, I am satisfied that the learned trial magistrate acted correctly by declining to make any award under that head.

35. On the subject of damages to cater for the cost of hiring a househelp, it was the submission by the appellant before the trial court that following the accident, she was forced to hire a househelp to assist with household duties, at a monthly cost of Kshs 7,000/= multiplied by 6 years, and hence the amount to be awarded under this head be tabulated as follows:

$$7,000 \times 6 \times 12 = \text{Kshs } 504,000/=$$

36. The respondents replied by submitting that the appellant had not tendered anything to show that the decision to hire a househelp, if any, was the result of the accident in order to entitle her to an award under this head.

37. In her decision, the learned trial magistrate reasoned that the appellant did not tender evidence to justify her claim for an award here.

38. From my re-examination of the pleadings and evidence, I observed that the appellant was required to support her claim for an award under this head by way of credible evidence but she did not.

39. I therefore see no reason to doubt that the learned trial magistrate acted correctly in declining to award any damages under this head as well.

40. On the subject of consideration of the submissions and authorities cited by the appellant as well as the medical evidence tendered at the trial, upon my perusal of the impugned judgment, I have not come across anything to indicate that the learned trial magistrate overlooked the same or that she placed too much emphasis on the submissions filed by the respondents.

41. The upshot therefore is that the appeal succeeds in respect to the award made on general damages for pain, suffering and loss of amenities. The trial court’s award in the sum of Kshs 450,000/= made under that head is hereby set aside and enhanced to an award in the sum of Kshs 600,000/=.

42. Accordingly, the judgment shall now read as follows:

i. Pain, suffering and loss of amenities Kshs 600,000/=

ii. Special damages Kshs 175,303/=

Net l Kshs 775,303/=

Less 10% contribution Kshs 77,530.30

Grand total Kshs 697,772.70

iii. The appellant shall have interest on special damages at court rates from the date of filing the suit and interest on general damages at court rates from the date of judgment until payment in full.

iv. The appellant shall also have costs of the appeal to be borne by the respondents.



DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
29<sup>TH</sup> DAY OF NOVEMBER, 2022.

.....

**JK SERGON**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

