



REPUBLIC OF KENYA



KENYA LAW
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**Ileri v Owuor (Civil Appeal 82 of 2019)
[2022] KEHC 15661 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 82 OF 2019
KW KIARIE, J
NOVEMBER 25, 2022**

BETWEEN

BENSON KARIUKI IRERI APPELLANT

AND

VINCENT ONYANGO OWUOR RESPONDENT

*(Being an Appeal from the judgment and decree in Oyugis Principal
Magistrate's PMCC No. 38 of 2018 by Hon. J.P. Nandi –Principal Magistrate)*

JUDGMENT

1. Benson Kariuki Ileri, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No 38 of 2018. This was a claim that arose from a road traffic accident on June 4, 2017. The accident involved motor vehicle KBR 471W and motor cycle KMDV 713H where the respondent was a pillion passenger. As a result of the collision, the respondent sustained injuries. The appellant was held 100% liable and the respondent was awarded of Kshs 3,209,050/= general damages.
2. The appellant was dissatisfied with the award and filed this appeal through the firm of Omay & Company Advocates. He raised the following grounds of appeal:
 - a. The honorable principal magistrate proceeded to award damages for future medical expenses when the same were not particularized and specifically proved.
 - b. The honorable principal magistrate erred in law when he ignored the defendant's witness statement thereby treating the case as though the defence had got no evidence to offer.
 - c. The honorable principal magistrate erred in law and in fact when he awarded loss of future earning capacity when the same were not properly pleaded and particularized and even when he awarded the same, the awarding was so inordinately high as to amount to error.
 - d. The court's findings both on quantum and liability are against the weight of evidence.



3. The respondent opposed the appeal through the firm of Alwang'a & Company Advocates.
4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] E A 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. It was contended that the finding on liability was against the weight of the evidence. The evidence of Vincent Onyango Owuor (PW2) was that motor vehicle registration number KBR 471W which was being driven from Kisii direction left its lane and collided with motor cycle registration number cycle KMDV 713H on its lane, towards Kisii direction. He was a pillion passenger on the motor cycle. Due to the collision he sustained injuries. His evidence was supported by the evidence of CPL. Wilberforce Walubengo. He produced a police abstract which indicated that after the complained of accident, the driver of motor vehicle registration number KBR 471W was charged with an offence of careless driving. He was fined for the offence after he had pleaded guilty.
6. The defence did not call any evidence after the close of the plaintiff's case and the evidence of how the accident occurred was not contradicted. The learned trial magistrate was therefore justified to find that the appellant was 100% liable.
7. In order for the claim of future medical expenses to be awarded, it must be specifically pleaded and strictly proved. The Court of Appeal in *Tracom Limited & another v Hassan Mohamed Adan* [2009] eKLR, held:

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.
8. In paragraph 8 the respondent pleaded:

The plaintiff has a permanent disability of 20% and will need to have the implants removed at an estimate [sic] cost of Kenya shillings five hundred thousand.

He went on to pray for future medical expenses at paragraph 11 (c). I therefore find that the respondent had specifically pleaded for future medical expenses.
9. Dr Joseph Sokobe (PW3) adduced evidence and confirmed that the implants would cost Kshs 500,000/= to remove. This was therefore prove of future medical expenses.
10. The respondent sustained a permanent disability of 20% as a result of the complained of accident.
11. A claim of loss of future earnings must be specifically pleaded and proved. The respondent herein had pleaded the loss of earning capacity.
12. In his evidence the respondent testified that as a result of the injury to his hand, he is unable to make a living as a taxi driver. He testified that he was earning Kshs 4,000/ daily. He however did not prove this claim on earnings. The learned trial court used Kshs 30,000/= as the basis for calculation. In my view this was erroneous for there was no basis of the same. The respondent having failed to prove what he was earning, the minimum wage ought to have been resorted to. Other than claiming that he was a taxi driver, the respondent did not adduced any evidence to bolster his claim.



13. It is after establishing through evidence that he was a taxi driver, that he would have gone ahead to discharge his burden that due to the 20% disability, his earning capacity had been affected. In [Douglas Kalafa Ombeva v David Ngama \[2013\] eKLR](#), the Court of Appeal held that:

Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically.

14. I therefore find that the claim of loss of future earnings was not proved. The award of loss of future earning capacity by the trial court, is hereby set aside.

15. In order for a court in its appellate jurisdiction to interfere with the assessment of general damages, certain principles must be satisfied. The Court of Appeal in [Ali v Nyambu t/a Sisera Store \[1990\] KLR 534 at page 538](#) quoted with approval the principles laid down by the [Privy Council in Nance v British Columbia Electric Railways Co Ltd \[1951\]AC 601 at page 613](#) where it held that:

The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages ([Flint v Lovell \[1935\] 1KB 354](#)) approved by the House of Lords in [Davis v Powell Duffryn Associated Collieries Ltd \[1941\]AC 601](#).

16. The respondent sustained the following injuries:

- a. Fracture of the right femur;
- b. Fracture of the right tibia/fibula; and
- c. Fracture of the left fibula head.

He recovered and was left with a deformed right lower limb and suffered 20% permanent disability. For these injuries he was awarded Kshs 1,500,000.00 which the appellant claims is excessive.

17. In the trial court the appellant had proposed an award of Kshs 600,000.00. He relied on the case of [SAO \(Minor Suing Thro next Friend\) MOO v Registered Trustees, Anglican Church of Kenya Maseno North Parish \[2017\] eKLR](#). The respondent sustained the following injuries:

- a. Head injury with brain concussion and damage of right lower mandible jaw and left cheek;
- b. Blunt chest injury;
- c. Multiple friction lacerations/bruises on right elbow joint;
- d. Fracture of right tibia/fibula at mid shaft region;
- e. Compound fracture left tibia/fibula at distal metaphysic;
- f. Multiple cut wounds on left lower limb involving thigh down to knee region;
- g. Fracture left ankle joint involving malleolus bones; and
- h. Dislocation right ankle joint.



The respondent was awarded Kshs 600, 000.00.

18. I am satisfied that the injuries sustained by the respondent in the instant case are more severe than those in the decision relied upon. The respondent herein sustained a permanent disability of 20%. I have no reason to interfere with this award.
19. The appeal therefore partially succeed on the head aforementioned hereinabove. The appellant will be entitled to have costs of this appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF NOVEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE

