



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutura v Mutwiri (Civil Case E005 of 2022)
[2022] KEHC 15517 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E005 OF 2022
TW CHERERE, J
NOVEMBER 21, 2022**

BETWEEN

REUBEN MUTWIRI MUTURA APPELLANT

AND

SILAS MUTWIRI RESPONDENT

*(Being an appeal from the Judgment and Decree in Maua CMCC
NO. 28 OF 2020 by Hon. R.T.Gesora (CM) on 16th December, 2020)*

JUDGMENT

Background

1. On July 8, 2018, Respondent was a pillion passenger on motor cycle xxxx when it collided with Appellant's motor vehicle xxxx as a result of which the Respondent suffered bodily injuries.

The trial

2. Respondent blamed the driver of motor vehicle xxxx for driving on the lawful lane of the motor cycle thereby causing the accident.
3. Appellant did not tender any evidence. At the conclusion of the trial, the learned trial magistrate found the accident motor vehicle was driven negligently and found Appellant liable at 100% and proceeded to award Respondent damages as follows:
 - 1) General damages Kes 900,000/-
 - 2) Lost earnings Kes 200,000/-
 - 3) Special damages Kes 10,500/



The Appeal

4. Appellant dissatisfied with the lower court's decision preferred this appeal only on quantum.

Analysis and Determination

Quantum

5. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* [1968] EA 93 and [*Kemfro Africa Limited t/a Meru Express Services \(1976\) & another v Lubia & another, No 2 \[1987\] KLR 30*](#)).
6. In *Catholic Diocese of Kisumu v Tete [2004] eKLR* the Court of Appeal identified the circumstances under which an appellate court can interfere with an award of damages as follows:

' It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.'
7. Again, in [*Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others \[1986\] KLR 457*](#), the Court of Appeal stated that:

' This court, I remind myself, is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge:

 - (a) Proceeded on a wrong principle; or
 - (b) Misapprehended the evidence in some material respect.

And a member of an appellate court when naturally and reasonably says to himself 'what figure would I have made?' and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.'
8. The Respondent medical report prepared by Dr Mwititi on February 1, 2020 reveals that he suffered fracture of right femur. At the time of examination, about 7 months after the accident, the doctor noted that Respondent lost the function of his right leg and depended on relatives for upkeep.
9. At the hearing, the Respondent prayed for Kes 1,000,000/- and cited [*John Mwangi Munyiri & another v Paul Wachira Njuguna \[2020\] eKLR*](#) where the court awarded the sum of Kshs 900,000/= for injuries in the nature of comminuted compound fracture of the right tibia and fibula with permanent incapacity of between 30% and 50%.



10. Appellant offered Kes 200,000/- and placed reliance on [*TAM \(Minor Suing Thro' her father and next friend JOM\) v Richard Kirimi Kinoti & another \[2015\] eKLR*](#) where the High Court enhanced an award of Kes 160,000/- to Kes 250,000/- where the Appellant had sustained bruises and a fracture of the left femur and a metal plate was inserted in the fractured leg. where the High Court enhanced an award of Kshs 160,000/- to Kshs 250,000/- where the Appellant had sustained bruises and a fracture of the left femur and a metal plate was inserted in the fractured leg.; [*Ibrahim Kalema Lewa v Esteel Company Limited NBI HCCA No 475 of 2012 \[2016\] eKLR*](#) where the Court upheld an award of Kes 300,000/- on appeal in 2016 where the plaintiff sustained an inter trochanteric fracture of the left femur. He was admitted to hospital for 2 months and his physical disability assessed at 25%. The doctor noted that he would not attain normal functional capacity of his limb and [*Bhachu Industries Ltd v Peter Kariuki Mutura Nrb HCCA No 503 of 2009 \[2015\] eKLR*](#) where the Court upheld an award of Kes 300,000/- where the respondent had sustained injury to the chest and thigh and a fractured femur.
11. The Court of Appeal in [*Stanley Maore v Geoffrey Mwenda Nyr CA Civil Appeal No 147 of 2002 \[2004\] eKLR*](#) settled the principles to be applied in assessing damages and stated that:
- 'Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.'
12. The Appellant submits that the lower court award of Kes 900,000/= for a single fracture of the femur was disproportionate, unfair and not justified, the appellant in support relies in the case of [*Peter's V Sunday Post Limited \[1958\] EA 424*](#) as cited in the case of [*FM \(Minor suing through Mother and next friend MWM v JNM & another \[2020\]eKLR*](#) Sir Kenneth O'Conner stated as follows:-
- ' It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who had had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand'.
13. I have considered the authorities cited on behalf of both parties. The authority cited on behalf of Respondent is a recent cases relating to more serious injuries than the ones suffered by relates to more serious injuries than the ones suffered by the Respondent in this case. The ones cited on behalf of Appellant are comparable but I note that they are about 6 years old. I have considered the lapse of time and the fact that there was no evidence that Respondent had sought any further treatment since he was discharged from hospital on July 19, 2019 and I find that an award of Kes 900,000/- was I the circumstances on the higher side. The same is reduced to Kes 500,000/-.
14. Concerning the award for lost earnings, Appellant submitted that the same was not neither pleaded nor proved and placed reliance on [*Douglas Kalafa Ombeva v David Ngama \[2013\] eKLR*](#) where 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.



15. Appellant similarly relied on [Nzuki Isaac Muveke v Francis Njogu Njebia \[2021\] eKLR](#) where the court held that:

' In the instant appeal and as indicated above, the appellant did not prove that as a result of the injuries sustained, he was exposed to either losing his job in the future or that in case he had lost his job, his chances of getting an alternative job in the labour market were slim. Indeed, there was no evidence presented that the chances of gaining employment in the future were diminished as a result of the injuries sustained and I cannot fault the trial court's findings on this limb.

16. Respondent did not make any submissions under this heading. I have considered the case of [Fairley v John Thomson Ltd \[1973\] 2 Lloyd's Law Reports 40](#) wherein Lord Denning MR stated as follows concerning loss of earnings:

' It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.'

17. In another case, the Court of Appeal in [SJ v Francesco Di Nello & another \[2015\] eKLR](#), stated as follows:

' Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.

18. There being no doubt that Respondent neither pleaded nor proved loss of earning, I agree with Appellant that the sum was not due to the Respondent and ought not to have been awarded.

19. Concerning special damages, Respondent only proved Kes 5,500/- and not Kes 10,500/- awarded by the trial court.

20. From the foregoing, I find that this appeal has merit and it is allowed in the following terms:

- 1) The sum of Kes 900,000/- in respect of general damages is set aside and substituted with the sum of Kes 500,000/-
- 2) The sum of Kes 200,000/- awarded in respect of loss of earnings is set aside in its entirety
- 3) The sum of Kes 10,500/- in respect of special damages is set aside and substituted with the sum of Kes 5,500/-
- 4) Respondent shall bear the costs of the Appeal

DATED AT MERU THIS 21ST DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances



Court Assistant - Morris Kinoti

For the Appellant - Mr. Nganga for Kimondo Gachoka & Co. Advocates

For the Respondent - Ms. Asuma for Mutembei & Kimathi & Co Advocates

