Kihara & another v Mutuku (Civil Appeal 27 of 2018)
[2022] KEHC 15626 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 27 OF 2018

RM MWONGO, J

NOVEMBER 17, 2022

BETWEEN

RUTH WAIRIMU KIHARA .... 1ST APPELLANT

KIHARA RAGAE .... 2ND APPELLANT

AND

VICTORIA KALONDU MUTUKU .... RESPONDENT

(Being an Appeal arising from the judgement and Decree of the Honourable E. K. Nyutu, C.M. delivered on 17/04/2018 in Engineer CMCC No. 165 of 2015)

JUDGMENT

Background

1. This appeal and cross-appeal are one of a series of five appeals emanating from cases in the lower court (CMCC Case Nos 150, 151, 152, 153 and 165 of 2015). The claim in the lower court arose from a road traffic accident that occurred on August 12, 2015 along the Nairobi-Naivasha road at Kariko area at around 8.00am.

2. The Plaintiff/Respondent in the case that relates to this appeal (CMCC No 165 of 2015) was a lawful passenger in motor vehicle GKB XXXE Toyota Land Cruiser, when the Defendants' vehicle Reg. No KBZ XXXZ Isuzu Canter, was driven so negligently and recklessly by their driver, that he caused it to collide with the said GKB XXXE. This resulted in the plaintiff sustaining serious injury, loss and damage.

3. The driver and other passengers in vehicle Reg No GKB XXXE were: Sammy Kiprotich Chebon, Chief Inspector Victoria Mutuku; Rukia Khakasa Namaswa and Wilson Ndolo Mwangangi, who, having been injured, also sued. The suits in the series were CMCC Case Nos 150, 151, 152 and153 of 2015. It was indicated that CMCC No 150/2015 was the lead file. Mr Khayega was for all the plaintiffs

and Mr Ombui was for the defendants. The trial magistrate rendered individual judgments on each file rather than formally consolidating the suits, but liability was, by consent of the parties, determined in CMCC no 150/2015.

4. At the hearing, the plaintiffs in case Nos 150; 151; 152, 153 and 165 tendered their evidence. It was agreed that the evidence of PC Meshack Ngugi and the driver Sammy Kiprotich Chebon would apply to all the suits. Dr WM Wokabi filed a medical report in respect of each plaintiff, which was produced as an exhibit by the respective plaintiffs in their testimony without objection. The defendants closed their cases without tendering any evidence.

5. It was agreed that liability be dealt with in CMCC No 150/2015. On appeal the same arrangement pertained. Thus, in the appeal therefrom, HCCA No 35 of 2018, the question of liability for the accident has been discussed in great detail and dispensed with. At the end, this court found the driver and the appellants 100% liable for the accident. In the absence of evidence, no liability could be apportioned to the respondent.

6. Following the hearing, the trial court made an award as follows:general damages, Kshs. 700,000/- special damages of Kshs 24,706/- andcosts of the suit and interest.

7. The award was for the following injuries specified in Dr W.M. Wokabi's report who examined the plaintiff on August 12, 2015:

   a. blunt injuries to the chest,

   b. blunt injuries left thigh which developed into ecchymosis,

   c. bruises on forearms and

   d. Fracture of the right femur.

   The doctor opined that she suffered pain from the injuries, that the injuries would rehabilitate reasonably but with residual pains that will persist indefinitely; permanent incapacity was assessed at 12 % and the removal of the K-Nail would be at a cost of Kshs 120,000/-.

8. I have seen at pages 107-108 of the record of appeal a medical report by Dr M S Malik, addressed to E M Juma & Ombui Advocates for the appellant. That report however did not feature as an exhibit in the proceedings in the lower court and I shall ignore the said document.

9. The record of proceedings is scanty consisting of three pages, but the lead file shows that after the plaintif gave evidence, and relied on the evidence of the driver Sammy Kiprotich Chebon and PC Meshack Ngugi, the plaintiff and defence both closed their cases.

The Appeal and Cross Appeal

10. The appellants' appeal challenges the quantum of damages awarded as being disproportionately high, and seeks that the finding of the trial magistrate on quantum be set aside or reviewed.

11. The Respondent fled a cross-appeal impugning the magistrates award for general damages as too low and for failing to include an award for future medical costs.

12. The grounds of appeal are that:

    1. That the learned magistrate erred in law and in failing to consider the appellants submissions.

    2. That the learned Trial Magistrate erred in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.

3. That the learned trial magistrate erred in applying wrong principles and failing in taking into account material facts arriving at an erroneous award.

4. That the learned Trial Magistrate erred in law and in fact in disregarding the Appellant's submissions and on all points of fact and of law in as far as the award of damages is concerned

5. That the learned trial Magistrate erred in law and in fact in awarding KShs.700,000/- as general damages plus special damages of KShs. 24,706 which are excessive and unrealistic in circumstances against the injuries allegedly sustained

13. The grounds of the cross appeal are summarized as follows:

a. That the trial court erred in law and fact in awarding the plaintiff a sum of Kshs 700,000/- in general damages which was disproportionately low

b. That the trial court erred in law and fact in failing to award Kshs 120,000/- as future medical expenses to remove a K-Nail from the Respondent's fractured bone

c. That the trial court erred in law and fact in failing to make an award for diminished earning capacity despite the evidence and legal authority.

14. The applicable principles for determination of this matter as a first appeal are set out in the case of *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor 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 has 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. 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……"

15. The court's duty is further amplified in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123, pursuant to which the court is essentially required to consider the evidence adduced, evaluate it and draw its own conclusions, bearing in mind that it did not hear or see the witnesses who testified. If the court comes to different conclusions, it must state them and consider whether the trial court relied on wrong principles or applied principles that were inappropriate.

16. Neither the evidence of the plaintiff as to her injuries, nor that of Dr. Wokabi was seriously contested. In their submissions, the appellants assert that the awards under each head were inordinately and manifestly high.

Analysis and determination

17. In the lower court the plaintiff testified that she was travelling in the GKB XXXE vehicle whilst seated at the front and wearing her seatbelt alongside 6 others in the vehicle. She narrated the presence of mist limited their speed due to poor visibility when the Defendants motor vehicle veered off its lane and rammed into the vehicle, she was in despite the Plaintiff's driver's attempt to avoid the collision. Shef testified that she was in shock and intense pain and could hear her colleagues writhing in pain except for one passenger, James Magondu, who escaped unhurt. The Plaintiff testified that onlookers as well as police officers took her to hospital at Kijabe and then transferred to the Nairobi west Hospital where she was admitted for 18 days. The Plaintiff averred that she suffered a fracture of the right femur, blunt injuries to the chest, minor injuries to the upper limbs and received treatment for 4 months.

18. At the lower court, the plaintiff proposed an award of Kshs 2,500,000/- She relied on the following authorities:

- *Devna Pandit v Kennedy Otieno Obara & Anor* Nbi HCCC No 491 of 2011 decided in 2015; where the plaintiff suffered a fractured dislocation left hip with a fractured head of femur, fracture of left tibia comminuted and fracture in the right face/maxilla where Justice Njuguna awarded Kshs2,000,000/- for damages, loss of amenities and pain and suffering.

- *Regina Mwikali Wilson v Stephen M.Gichuhi & Another* Nairobi HCCC 728 of 2007 decided in 2015; where the plaintiff suffered multiple fractures of the ride side involving fractures to the 3rd, 4th ,5th and 6th ribs, comminuted fractures of the right radius bone fracture of the right femur involving the neck shaft and supra condoler region fracture of the right tibia and fibula bones on the same leg. on the left leg fracture to the femur and a deep cut wound on the left knee and abrasion wound over the right supra orbital above the right eyebrow and was awarded Kshs2,500,000/-.

- *Charles Wanyoike Githuka v Joseph Mwangi Thuo & 2 Ors* Nakuru HCCC No 68 of 2005 decided in 2008; where the plaintiff suffered a fracture mid-shaft of the right femur amongst other injuries and was awarded KShs 2,500,000 for general damages.

19. With regard to future medical expenses the Plaintiff relied on the authority of *Stanley Nderitu Kariambati v Jolie Ngoy Mwamba Alias Jolly Wambua & Anor* [2015] eKLR supported by the discharge summary form from Nairobi West Hospital that a metallic implant would be required to be removed after 3-4 years at an estimated cost of KShs120,000.00. This claim was corroborated by Dr. Wokabi.

20. For Diminished earning capacity, the Plaintiff relied on the case of *Mwaura Mwiruri v Suera Flowers Ltd & Anor* [2014] eKLR which cited the guiding principles under this head laid out in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR that:

> " the award for loss of earning capacity can be made both when the plaintiff is employed and even when he is not so employed"

21. The Plaintiff, a Chief Inspector of Police, submitted that her permanent incapacity was determined at 12% by the medical report which was produced as an exhibit. This incapacity renders her position as Officer Commanding Station in jeopardy as she could potentially be demoted or lose her job totally.

22. The defendants proposed an award of Kshs 200,000/- for general damages, and relied on the case of *Hassan Noor Mahmood vs Tae Youn Ann* [2004] eKLR. The defendants based their argument on the fact that investigations were inconclusive as to who caused the accident

23. On the basis of liability at 100%, the trial court made its award guided by the authorities of:*Mary Pamela Oyioma v Yess Holdings Limited* [2011] eKLR where the plaintiff was awarded 900,000 for comminuted fracture of the right femur; a compound fracture of the right tibia; a fracture of the left tibia; soft tissue injuries of the right shoulder and multiple cut wounds over the whole body*Robert Gitau Kanyiri v Charles R. Kahiga & 2 others* HCCC No 22 of 2009 Nakuru where the plaintiff suffered the following injuries: fractures of the right radius; fracture of the right ulna; fracture of the left humerous with subsequent infection; fracture of the right femur with subsequent infection and malunion; blunt head injury; multiple soft tissue injuries

24. On appeal the appellants submitted that the award was inordinately high and cited the cases of *Said Abdulahhi & Anor v Alice Wanjira* Nairobi HCCA No.147 of 2013 where the plaintiff suffered fracture of the right humerus and with soft tissue injuries and permanent incapacity of 10% had

an award of KShs 600,000 reduced to KShs 300,000/-; and the case of [*Morris Miriti v Nahashon Muriuki and Anor*] Meru HCCA No. 43 of 2014 [2018] eKLR where the plaintiff suffered tender chest, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral heamophreino thorax, left lung contusion and fracture of the right scapula the court affirmed the award for KShs.300,000/-.

25. In her cross appeal the respondent argued that the award of general damages was too low and proposed Kshs 1,250,000/-. She relied on:*Ndathi Mwangi & 2 others v Benson Lumumba Ndivo* Naivasha HCCA No,18 of 2015 where this court awarded KShs 1,250,000/- for fracture of the ulna; Compound fracture of the femur in the middle one third; Compound displaced fracture of the left tibia and fibula; Soft tissue injuries and Laceration on the right leg;*Prima Management Ltd v Wilson Suba Kindaranga* Nairobi HCCA No. 229 of 2012 where the plaintiff suffered a fracture of the left femur and the trial courts award of KShs 900,000 was upheld.

26. For future medical expenses the Respondent argued that they were specifically proved and relied on Exhibit 1 at page 86, the Discharge Summary form which indicates the removal of a K-Nail at a cost of 120,000 and also the medical report of Dr Wokabi. This evidence remained uncontroverted, and the court ought to have made an award under this head.

27. As for diminished earning capacity the Respondent relied on the authority of *Mwaura Muiruri v Suera Flowers Ltd & Anor* [2014] eKLR where the award for loss of earning capacity is justified to a plaintiff who is employed to compensate them for the risk that the disability has exposed her to of either losing her job in the present or in future, or for diminution of her chances of getting an alternative job in the labour market. The Respondent notes that at the time of trial, she was employed as an officer with the Kenya Police Service as Officer Commanding Station, Eldama Ravine Police Station; and as a direct result of the injuries, she suffered 12% incapacity which affected her performance.

    She urges that the court was wrong in failing to make an award under this head.

28. Having carefully considered the parties' submissions, the material on record, and the law applicable my view is as follows.

General damages

29. The starting point is that comparable injuries should as far as possible be compensated by comparable awards, taking into account that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda*, Nyeri CA Civil Appeal No.147 of 2002 [2004] eKLR 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."

30. There is no dispute on the injuries suffered by the respondent. The only question is whether the award of 700,000/- was too high as argued by the appellant, or should be enhanced to 1,250,000/- as argued in the cross appeal. Thus, whether the trial court applied wrong principles to arrive at an award that was unreasonable in comparison to the injuries sustained and compared to similar cases.

31. In *Said Abdallah's case* the plaintiff was hit as he stood by the roadside and fell as a result of which he suffered a fracture of the right humerus bone (upper arm), which was a severe harm and spiral fracture. The doctor also stated that the level of permanent incapacity was 10%. The injury to the plaintiff here

was fracture of the femur which is the thigh bone. In Morris Miriti's case the injuries suffered were fractures to the ribs. The proper comparison of injuries should be like for like.

32. In *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right led and episodic pain (r) thigh with inability to walk without support, the court awarded Kshs. 700,000 as general damages.

33. In *Jackson Mbaluka Mwangangi v Onesmus Nzioka & another* [2021] eKLR Odunga J dealt with a fracture of the femur, and stated:

> " In this case the Appellant sustained blunt injury to the right shoulder and fracture of the left femur. The femur or the thigh bone is the large upper leg bone that connects the lower leg bones (knee joint) to the pelvic bone (hip joint). It is the longest, heaviest, and strongest bone in the human body.
>
> There, the court awarded Kshs 600,000/- in general damages.

34. The Court of Appeal in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 aptly stated that:

> " The appellate court 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 proceeded on a wrong principle or misapprehended the evidence in some material respect...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..."

35. On the basis of the above positions, I see nothing in the authorities on injuries to the femur to suggest that there is need to interfere with the award of the trial court on general damages.

Future Medical Expenses

36. On this head, the plaintiff pleaded at paragraph 8 of the plaint for Kshs 120,000/- to remove the interlocking K-Nail. The judgment of the trial magistrate is completely silent on this aspect. To that extent, the judgment is incomplete as it failed to address a matter in issue for which evidence was adduced.

37. As already stated the medical report of Dr Wokabi was not contested. He clearly stated that:

> " ...the fracture was fixed with an interlocking K-Nail ....
>
> ...The Interlocking K-Nail could be removed at any time after 3 to 4 years as(*sic*) at an estimated cost of Sh 120,000/-(one hundred and twenty thousand)"

38. It is not uncommon to award future medical costs on the estimate of a doctor. In *Bhachu Industries Limited v Peter Kariuki Mutura*, NRB HCCA No.503 of 2009 [2015] eKLR, the Plaintiff suffered an injury on the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- including 50,000/- for removal of K-Nail.

39. It is clear that the Doctor did indicate that the K-Nail could be removed at a future time three or 4 years hence. it appears from his use of the word “could” that there is an option to either remove it or retain the K-Nail in situ. To that extent, the requirement of pleading the future medical cost and the doctor’s report having estimated the cost of removal, satisfied the requirement of award of future medical costs.

40. In the court’s discretion, I would therefore allow the award of 120,000/- under this head. The amount is therefore allowed and payable.

Diminished Earning Capacity

41. The respondent faulted the trial court for not awarding her damages for diminished earning capacity despite her prayer in the plaint for “damages for diminished earning capacity” at paragraph 9. She asserts that she proved that she was an employee of the Kenya Police Service and had suffered permanent disability of 12%, affecting her performance.

42. The doctor’s report stated that the former vitality of her leg would never be fully achieved and residual permanent disability of 12% will always persist.

43. In her witness statement the respondent said nothing whatsoever about her diminished earning capacity. In her oral evidence she testified that she cannot stand for long; that she cannot run and the accident had affected her work as a police officer. She however did not state how the accident affected her earning capacity

44. In cross examination she said her work is sometimes physical but she is incapacitated by the accident. However, she admitted that she continues to get her full pay.

45. Loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. In her submissions but not in her evidence, the respondent stated she was apprehensive that her injuries exposed her to either losing her job in future or in case she loses her job, her diminution of chances of getting an alternative job in the labour market.

46. In *Butler v Butler* [1984] KLR 225 the Court of Appeal differentiated the damages awarded for loss of earning capacity and loss of future earnings in the following terms:

> “ A plaintiff’s loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. ... It 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 in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages. ...”

47. The Court of Appeal in the *Butler case* enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

> “ A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.
>
> Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable

loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and /or at the date of the trial.

Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not improper to award it under its own heading."

48. In *Alpharama Limited v Joseph Kariuki Cebron* (2017) eKLR, the court held the following on the issue:-

"...To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired. (Emphasis added)

49. In this case, the plaintiff did not submit any evidence regarding her remuneration or her age, or retirement age, and having conceded that she continues to earn her full salary, there is nothing upon which the court can calculate her diminished earning capacity. Any attempt to make a calculation in her favour would be based on mere speculation. This, the court cannot be engaged in.

50. Accordingly, there is no basis to make an award under this head and the cross appeal on this point fails.

51. As there was no challenge on special damages founded on any arguments, there is no basis for interfering with that award which was based on receipts produced in court.

Disposition

52. Ultimately, the appeal is dismissed and the cross appeal succeeds only in respect of the award of damages for future medical expenses in the amount of 120,000/-, which are hereby awarded.

53. In all other respects the trial court's award is affirmed

54. Each party shall bear their own costs of the appeal

Orders accordingly.

DATED AT KERUGOYA THIS 17TH DAY OF NOVEMBER, 2022

R. MWONGO

JUDGE

In the presence of:

Mr. Ombui for the Appellants

Mr. Khayega for the Respondents

Quinter Ogutu Court Assistant