



**Ndingu’ri v Sensei Institute of Technology Limited (Civil Appeal
E041 of 2021) [2022] KEHC 15425 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E041 OF 2021
HK CHEMITEI, J
NOVEMBER 17, 2022**

BETWEEN

SAMUEL MBUGUA NDIINGU’RI APPELLANT

AND

SENSEI INSTITUTE OF TECHNOLOGY LIMITED RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. DAISY MOSEE
(SRM) DATED 19TH MARCH 2021 IN NAKURU CMCC NO. 233 OF 2020)***

JUDGMENT

1. The appellant herein was involved in an accident on January 12, 2018 at around 2.00 pm while he lawfully sat within the defendant’s premises where he was enrolled for the course of plant operator when a heavy plant machinery (Forklift) was negligently driven within the said premises that it ploughed into him. He sustained bodily injuries namely, stable pelvic fracture, degloving injury and blunt injury to the right shoulder joint should leading to severe soft tissue injuries.
2. The trial court in its judgement apportioned liability between the parties on 50:50% ratio and awarded general damages of Kshs 800,000, special damages of Kshs 157,953 and re-admission of the appellant in the respondent’s institution to pursue his course since he had paid his fees in full.
3. Aggrieved by that judgement both on liability and quantum, the appellant filed this appeal *vide* memorandum of appeal dated April 19, 2021, setting out the following grounds of appeal:
 - a. That the learned trial magistrate erred both in law and in fact in apportioning liability at 50:50 between the appellant and respondent herein.
 - b. That the learned trial magistrate erred both in law and in fact in awarding damages for pain and suffering at Kshs 800,000.00/= subject to the apportioned liability of 50:50 for the injuries sustained by the appellant.



- c. That the learned trial magistrate erred both in law and in fact in declining to award damages for diminished earning capacity/ future earning capacity on account that nothing was adduced to show that the plaintiff would not perform well in his expected career path.
 - d. That the learned trial magistrate erred both in law and in fact in declining to either make a determination on damages for breach of contract or award damages for breach of contract to the appellant herein.
 - e. That the learned trial magistrate erred both in law and in fact in making a determination on costs that each party to bear own costs for the suit.
4. The appellant prayed for the following orders namely; that the lower court judgment delivered on March 19, 2021 be set aside, liability to be assessed and the same to be enhanced in his favour, an award for general damages for pain and suffering to be increased to a fair sum, damages for breach of contract and costs of lower court suit and that of this appeal be awarded in his favour.
 5. When this matter came up for hearing the court directed the same to be heard by way of written submissions which the parties have complied.

Appellants Written Submissions.

6. The appellant in his submission identified five issues for determination the first being whether the learned magistrate erred in law and in fact in awarding liability at 50:50. It was submitted for the appellant that the trial court upon analysing the evidence found that as much as the appellant had duty to take care of himself in that institution, the respondent being in charge of a petrol propelled vehicle equally had a duty to other persons within its premises to ensure always that its servants or agents were on the look out to avoid preventable harm to such persons. That the harm caused on the appellant was preventable had the respondent or his servants/agents kept adequate lookout. It was however the appellant's contention that the trial magistrate erred in the finding on liability for reasons that the respondents had not proved contributory negligence on part. He placed reliance on the case of *Simon Waweru v Alice Mwangeli Munyao* [2020] eKLR.
7. On the second issue, whether the learned magistrate awarded an inordinately low general damages for pain and suffering at Kshs 800,000.00 he submitted that the evidence by PW2 Doctor Omuyoma confirmed that the appellant suffered permanent disability classified at 30% and that the degree of injury was harm. He also stated that the appellant would not function optimally as a result of the injuries sustained in the accident.
8. The advocate for the appellant went on to submit that the appellant in the lower court had prayed for an award of Kshs 2,500,000/= and supported the same with case law among them being the case of *Peace Kemuma Nyang'era v Michael Thuo & another* [2014] eKLR where a similar award was granted in 2014 for pelvic injuries involving a fracture of the sacrum bone, fracture of the right superior public ramus of the pelvic bone and fracture of the inferior pubic ramus were noted. It was therefore the appellant submission that the award of Kshs 800,000/= for the severe soft tissue injuries he sustained leading to 30% permanent disability was manifestly low and the same should be substituted with an appropriate and fair award.
9. On the third issue, whether the learned trial court erred in failing to award damages for diminished earning capacity or future earning capacity the court's attention was drawn to the case of *Millicent Atieno Ochunyo v Katola Richard* [2015] eKLR where the court made reference to the decision in the *locus classicus* case of *Butler v Butler* [1984] KLR, which laid down the principles to be considered in determining whether an injured person was entitled to damages for loss of future earnings. The



appellant urged the court to consider a global award of Kshs 3,000,000/= as damages for his loss of future earning capacity.

10. On the fourth issue, whether the trial magistrate erred in declining to make an award of damages for breach of contract he submitted on behalf of the appellant that it was trite law that damages are awardable where it was proved that there was breach of contract occasioned loss and damages to a party to a contract. The appellant urged the court to exercise its discretion and award the said damages in the event it found that there was breach of contract.
11. On the last issue, on who should bear the costs, the appellant prayed for an award of costs in the event his claim was successful and set aside trial court decision that each party was to bear own costs.

Respondent's Submission

12. The respondent on its part also identified 5 issues similar to the ones raised by the appellant, for determination by this court.
13. On the first issue, whether the learned trial magistrate erred in law and in fact in apportioning liability at 50:50 between the appellant and the respondent it was submitted for the respondent that the appellant lied in his pleadings and testimony in the trial court. That the same were misleading and inconsistent with the respondent's witness testimony and evidence in court. That the appellant was the author of his own misfortunes by ignoring all the directives to move and by failing to apply the safety protocols instilled in him by the respondent. Further, that the appellant violated the institution's rule by being at the wrong place at the wrong time. The trial court ought to have settled instead on 100% liability on the part of the appellant.
14. On the second issue, whether the trial magistrate erred in law and fact in awarding damages for pain and suffering at Kshs 800,000/=: the respondent submitted that the trial court failed to consider the authorities it relied on and in particular, the case of *Swan Carriers Limited v Boniface Moseto Oyaro* [2019] eKLR and thus arrived at unjust decision. The respondent invited this court to apply the said authority and review the quantum downwards to reflect the principles of uniformity and compensate comparable injuries with comparable awards.
15. On the third issue, whether the trial magistrate erred in law and in fact in declining to award damages for diminished earning capacity or future earning capacity it was submitted that the appellant had tendered no evidence at the trial court which suggested that he would have been unable to perform well in his expected career path of a plant operator. The court's attention was drawn to the case of *Evans Juma Otwala v Jackline Kazungu Kambi* [2020] eKLR.
16. On the fourth issue, on whether the learned trial magistrate erred in law and in fact in declining to make a determination on award of damages for breach of contract the respondent held the position of the trial magistrate where she found that the respondent never stopped the appellant from continuing with his studies hence no issue of breach of contract arose in the circumstances. Further, that the appellant failed to adduce any evidence to the contrary.
17. On the last issue, on the trial court's determination on costs that each party to bear own costs for the suit the respondent place reliance on section 27 of the *Civil Procedure Act* which states in part that costs of and incidentals to suit should be in the discretion of the court or judge. Further, that in the case of *David Kiptum Kori v Kenya Commercial Bank & another* [2021] eKLR, the court held in part while considering the provision of the said section of the law held that that costs follow the cause or event. The respondent urged the court to dismiss the appeal with costs in its favour.



Analysis and Determination

18. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:
- “An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.
19. I have carefully perused the proceedings, the judgement, and the record of appeal as a whole including the parties' submissions. Three issues fall for determination;
- i. Whether the apportionment of liability was well founded.
 - ii. Whether the award on quantum was manifestly low in the circumstances.
 - iii. whether the learned trial magistrate erred in law and in fact in failing to award damages for diminished earning capacity or future earning capacity.
 - iv. whether the learned trial magistrate erred in law and in fact in declining to make a determination on award of damages for breach of contract.
20. In addressing the first issue it is evident that at the hearing in the lower court the appellant told the court that he was admitted as a student in the defendants' institution on January 8, 2018 and in support of his claim he produced his admission form and the same was marked as Pexh2. The appellant went on to testify that he was injured on January 12, 2018 while he sat by the fence together with his colleagues during lunch time break when a fork lift came to where they had sat and one of its fork hit and pressed him to the wall.
21. On cross examination, he confirmed that he had a licence and that he had classes that day. He also confirmed that they had been taught about safety, that he did not violate any instruction on where to sit and that on the material date he had practical lesson on forklifts in the afternoon.
22. On the respondent's part, DW1 its deputy principal told the court that he had come to testify because one of their students was hurt. He testified further that students upon admission were taken through safety procedures before going to the machines which was a legal requirement that one got a licence before he was trained and the appellant was not licensed to drive the fork lift.
23. DW1 told the trial court that on the fateful day the appellant was supposed to attend a class for the motor grader but he was in the fork lift class. He added that he had before the accident seen students seated next to the fence and he told them to move away from the place as it was near the fork lift. DW1 also told the court that there was a designated place for students to sit awaiting their turns on



the machines and that the appellant's accident was the only one since the respondent operations began in 2013.

24. On cross examination, he confirmed that he was the one in charge of trainings, and teaching safety standards. He also confirmed that according to the appellant's provision driving licence he was to attend a class for wheel shovel excavator. He however did not know who was driving the fork lift at the time of the accident. DW1 confirmed that he had not shown the court the designated sitting areas for students through photographs but he could avail the same if need be. He also confirmed that they did not speak to a Mr Rotich who was the instructor of the fork lift at the time of the accident and even the student driving it remained unknown.
25. In view of the foregoing evidence as adduced in the trial court, it is not disputed that an accident occurred on the material day and the appellant was injured. What is apparent is that it is not very clear who was to blame for the accident. For this court to interfere with the conclusions of facts by the trial court, it must be convinced that the finding is based on no evidence at all or it is just opaque. This is because the trial court had the benefit of hearing, seeing and observing the witnesses as they testified.
26. From the evidence as explained herein above by the witness of both parties, the court finds that the accident was caused by want of care on the part of the respondent which is an institution bestowed responsibility to safeguarding both the academic interests of and wellbeing of its students while at its premises. The respondent failed to adduce any evidence that it had a designated area where students could sit in order to avoid accidents during practicals. Further, DW1 could not establish who was driving the fork lift at the time of the accident and also failed to inquire from the instructor on the same.
27. The appellant on his part admitted to have been trained on safety precautions and thus he ought to have applied the same by moving away from the area where the fork lift was being driven once he noticed that someone was driving it. The incident took place at lunch time and there was no evidence that the appellant was distracted from seeing the forklift. More importantly the environment in which the parties operated was full of machinery and considering the fact that the appellant had been warned through training I find that he ought to have been more cautious.
28. Taking into consideration the above facts i find the sharing of liability as found by the trial court to be fair in the circumstances.
29. On the second issue, whether the award on quantum was manifestly low in the circumstances, PW2 who is a medical doctor testified that upon examining the appellant he noted stable pelvic fracture, degloving injury on the right groin with torn anaphor muscle, fractured right shoulder. He testified that at the time of examination the appellant was in pain, there was restricted movement on shoulder joint, inability to walk far, carry heavy objects, a scar to the right groin hence permanent disability of 35% and he classified the injury as harm.
30. Having perused the lower court record, I note that the injuries captured by Dr Omuyoma were similar to the ones captured in the discharge summary from Provincial General Hospital Nakuru (PGH) availed to the court by the appellant where he was first treated after the accident.
31. The Court of Appeal stated in *Mbaka Nguru and another v James George Rakwar* Nrb CA civil appeal No 133 of 1998 [1998] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”



32. Further, in *Penina Waithira Kaburu v LP* [2019] eKLR the court held as follows:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

33. In *Ali Malik Brothers Motor (K) Limited and another v Emmanuel Oduor Onyango* Nrb HCCA No 252 of 2016 [2018] eKLR, the plaintiff sustained a fracture of the pelvic sprain hymen and cuts of the right knee and was awarded Kshs 700,000/- which was affirmed by the High Court.

34. In *Reuben Mongare Keba v L P N* [2016] eKLR the court allowed the appeal and awarded the respondent Kshs 800,000/- in general damages where the injuries were; Fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg.

35. In *SBI International Holdings Ag (Kenya) v Amos Hadar* [2015] eKLR, the respondent sustained injuries which included fracture of hip injury, resulting in 40% permanent disability. The court upheld the trial court’s award of general damages, Kshs 800,000/= for pain and suffering.

36. In *Stephen Kihara Gikonyo v Peter Kirimi Kingori & another* [2007] eKLR, the plaintiff sustained central fracture dislocation of the right hip with right lateral popliteal nerve paralysis, head injury, cerebral concussion, oosteroarthritis right hip and the doctor assessed the permanent disability suffered by plaintiff at 35% and classified the injury as “grievous harm.”. The court awarded general damages of Kshs 800,000/= pain and suffering loss of amenities.

37. In view of the above cited authorities i find that the award on quantum for Kshs 800,000/= by the trial magistrate was not manifestly low in the circumstances. I have looked at the authority relied on by the appellant for the proposed quantum of 2,500,000/= and in that case the injuries were severe with multiple fractures unlike in his case.

38. In addressing the third issue, whether the learned trial magistrate erred in law and in fact in failing to award damages for diminished earning capacity or future earning capacity it is noted that at the lower court, Dr Omuyoma told the court that the appellant would not be able to function optimally after the injuries he sustained and had permanent disability of 35%.

39. In awarding damages under the head of loss of earning capacity, the Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR 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 the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to 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.” (Underlining added for emphasis).

40. Further, in the case of *Butler v Butler* [1984] KLR 225, the Court of Appeal pointed out factors to be considered when awarding loss of earning capacity in the terms below;

“The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

41. In *Cecilia W. Mwangi and another v Ruth W. Mwangi* Nyr CA civil appeal No 251 of 1996 [1997] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The 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.”

42. In the instant case I note Dr Omuyoma did not state that with this incapacity as a result of the disability, the appellant could not engage in any gainful employment in future. The appellant also made a claim for damages for diminished earning capacity in his testimony during the trial but failed to adduce any evidence to show his incapacity or prove the said claim. Additionally, I find that the appellant is still a student and is yet to gain qualification for future employment. In the circumstances, the appellant failed to prove that he was entitled to damages for loss of future earnings.

43. In light of the above cited authorities

44. and the circumstances of the present appeal, it clear that this court cannot award damages for breach of contract.

45. On costs, I find that the parties partially succeeded and i do not see any reasons to interfere with the trials courts discretion. In the premises each party shall meet their respective costs.

46. I think the court has started much to indicate that this court does not find any merit in the appeal and the same is hereby dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF NOVEMBER, 2022.

H. K. CHEMITEI.

JUDGE

