



REPUBLIC OF KENYA



**Wanjiru v Kiarie & another (Civil Appeal E734 of 2022)
[2025] KEHC 356 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 356 (KLR)

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

CIVIL

CIVIL APPEAL E734 OF 2022

JM OMIDO, J

JANUARY 23, 2025

BETWEEN

ANNIE NDATA WANJIRU APPELLANT

AND

LILIAN NYAMBURA KIARIE 1ST RESPONDENT

DANIEL KURIA WAWERU 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. C.K. Cheptoo, Principal Magistrate delivered on 16th August, 2022 in Nairobi Milimani CMCC No. E8564 of 2020)

JUDGMENT

1. This appeal was preferred by Annie Nduta Wanjiru (hereinafter referred to as “the Appellant”), against the judgement and decree of Hon. C.K. Cheptoo, Principal Magistrate delivered on 16th August, 2022 in Nairobi Milimani CMCC No. E8564 of 2020, which was a tortious liability claim.
2. In the matter before the lower court, the Appellant herein was the Plaintiff while the Respondents herein were the Defendants.
3. Judgement on liability in the lower court was entered in favour of the Appellant at 100% against the Appellants. The trial court proceeded to assess and award the Appellant special damages at Ksh.5,550/-; general damages for pain, suffering and loss of amenities at Ksh.700,000/-; and future medical expenses at Ksh.200,000/-. The Appellant was also awarded costs of the suit and interest.
4. Being aggrieved with the judgement of the trial court on the quantum, particularly the award made under the head of pain, suffering and loss of amenities, the Appellant presented the following grounds of appeal vide the Memorandum of Appeal dated 12th September, 2022:



1. That the learned trial Magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing damages and thereby arrived at a very low award on damages.
2. That the learned trial Magistrate misdirected himself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgement on damages.
5. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
6. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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.”
7. Going to the record of the trial court, the relevant evidence as concerns quantum is that the Appellant was involved in a road traffic accident and sustained bodily injuries.
8. The Appellant testified before the trial court and stated that the injuries that she sustained included a degloving injury to the right foot and a fracture of the right femur. She was treated at Uhai Neema Hospital and later referred to Kenyatta National Hospital for further management.
9. The Appellant stated that on 23rd October, 2019, she was examined by Dr. Cyprianus Okoth Okere, who prepared a report on his findings. She produced the following documents, inter alia, to support her case: P3 form. Police abstract. Medical report prepared by Dr. Okere. Receipt for Ksh.5,000/- for the medical report. Case summary from Kenyatta National Hospital.
10. As per Dr. Okere's report, the Appellant sustained the following injuries in the accident: Degloving injury to the right foot. Fracture of the right femur.
11. The doctor stated in his report that the Appellant was treated with medications, knee brace backslab, debridement ORIF and skin grafting. At the time of examination, the Appellant complained of pain on the right upper leg and itching on the right foot. The doctor observed that the Appellant had a skin grafted area on the dorsum of the foot and a surgical scar on the upper leg laterally. There was an implant in situ.
12. Dr. Okere classified the injuries as grievous harm and assessed permanent incapacity at 30%. He estimated that removal of the implant would cost the Appellant about Ksh.200,000/-.
13. As stated above, the only issue in respect of which the present appeal was presented in the award of Ksh.700,000/- under the head of pain, suffering and loss of amenities, which the Appellant complains was inordinately low and the disallowed claim for loss of past, present and future earnings.



14. The first issue for this court to determine then is whether the amount assessed and awarded as compensation to the Appellant under the above head was in error and/or inordinately low.
15. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of Price & another v Hidler [1996] KLR 95 as follows:

“The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”

16. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.

It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

17. There is also the authority of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

18. In the matter before the lower court, the Appellant submitted and proposed an award of Ksh.2,500,000/- for pain, suffering and loss of amenities and relied on the High Court authority of Michael Njagi Karimi v Gideon Ndung'u Nguribu & another [2013] eKLR.
19. On their part, the Respondents submitted that an award of Ksh.450,000/- would adequately recompense the Appellant for the injuries that she sustained under the head of pain, suffering and loss of amenities. The Respondents relied on the authorities of Aloise Mwangi Kahari v Martin Muiya & another [2020] eKLR and SDV Transami (K) Limited v Scolastic Nyambura [2012] eKLR.



20. With respect to both sides, the authorities relied upon were not apt for the reason that the one that the Appellant relied upon was in respect of injuries that were much more severe than those that the Appellant sustained while those relied upon by the Respondents were in respect of injuries that were of a much lesser severity than those that the Appellant sustained.
21. When a court is confronted with a situation in which the authorities that the parties present do not provide a suitable guidance, it obligates the court to proceed to find suitable decisions that aptly guide it. I will in the premises fault the learned trial Magistrate as it would seem that he reached a figure on the award without taking guidance from decided cases on comparable injuries.
22. I would also add what the Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* [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.”
23. The authority of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR is in my view a useful guide in determining the compensation for the injuries that the Appellant sustained.
24. In that case, the Respondent suffered fractures of the right femur and left tibia fibula. The doctor noted that the tibia fibula fractures were compound while the femur fracture was simple. It was also noted that the respondent’s right thigh had surgical scars and some bruising which had since healed but that the nail was still in situ and she would have to undergo surgery to remove the nail.
25. The court assessed damages at Ksh.1,200,000/- in a judgement delivered on 15th December, 2020.
26. As the injuries are comparable to those that the Appellant sustained, it is my view that the amount of Ksh.1,300,000/- would aptly compensate her.
27. It is then my view and finding that the award that the trial court made for pain, suffering and loss of amenities was inordinately low. I reach the opinion that the trial court, in the exercise of its discretion was wrong as the learned trial Magistrate did not take into consideration comparable awards and so arrived at a wrong conclusion. There is therefore basis upon which I can interfere with the discretion of the trial court.
28. The second issue that the Appellant raised in the appeal through his submissions was that the learned trial Magistrate fell into error in failing to award the Appellant compensation under the claim for loss of past, present and future earnings.
29. With regard to this claim, the Appellant pleaded that before the accident, she was a healthy and happy individual. She urged that her physical physique was greatly and adversely affected with the effect that she was left at a disadvantaged position and was thus unable to engage in any constructive ventures, especially in the informal sector. The Appellant did not produce any proof of earnings prior to the accident.
30. The law relating to loss of future earnings is that the same falls in the category of special damages, which must not only be specifically pleaded but also strictly proved (see *Hussein v Hakika Transport Services Limited & another (Civil Appeal 42 of 2022)* [2023] KEHC 24903 (KLR) (27 October 2023) (Judgment); *Trundell v EWK (Minor suing through mother and next friend WK) (Civil Appeal E57 of 2021)* [2023] KEHC 25275 (KLR) (7 November 2023) (Judgment); and *Kenya Power & Lighting*



Co. Limited v Tuva (Civil Appeal E289 of 2022) [2024] KEHC 3335 (KLR) (Civ) (5 April 2024) (Judgment).

31. Where a party does not present evidence of a real actual loss, then a claim for loss of future earnings fails as the same is then not strictly proved as is the requirement in law. A court can only order compensation for loss of future earnings where the party claiming proves the real assessable loss by way of evidence.
32. The claim for loss of future earnings is different from that of loss of earning capacity which is one in which the court awards general damages of a global amount. Loss of earning capacity results in a case where the injured party's earning capacity is diminished. A party who proves diminution of earning capacity may be compensated by an award in general damages of a global nature.
33. Said in another way, general damages under loss of earning capacity are awarded where it is proved that owing to the injury suffered by the party claiming the same, his chances of getting a job in the labour market are diminished or lessened.
34. It is apparent that although the Appellant pleaded under the head of loss of future earnings (which she fashioned as "loss of past, present and future earnings"), she mixed up the said claim with that of loss of earning capacity in her submissions, yet the latter was not pleaded.
35. Be that as it may, as there is no evidentiary material to strictly prove the special damages claim under the head of loss of future earnings the claim was not sustainable. Effectively then, the learned trial Magistrate was correct in holding that as there was no evidence adduced to prove the earnings of the Appellant, the claim was not sustainable.
36. Being of the foregoing findings, I will allow the appeal only to the extent that I set aside the award of Ksh.700,000/- made by the learned trial Magistrate in favour of the Appellant under the head of general damages for pain, suffering and loss of amenities and substitute the same with an award of Ksh.1,300,000/-.
37. As Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs shall follow the event, I order that the Respondent bears the costs of the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 23RD DAY OF JANUARY, 2025.

JOE M. OMIDO

JUDGE

For The Appellant: Ms. Aluodo For Mr. Kulecho.

For Respondents: Ms. Nanjira For Mr. Kabita.

Court Assistants: Mr. Ngoge & Mr. Juma.

Ms. Nanjira: I seek 30 days stay.

Ms. Aluodo: No objection.

Court: There shall be stay of execution for 30 days.

