



REPUBLIC OF KENYA



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**Nderi v Matunda (Civil Appeal 107 of 2021)
[2025] KEHC 2162 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 107 OF 2021
PN GICHOHI, J
FEBRUARY 10, 2025**

BETWEEN

DOMINIC WAMUGI NDERI APPELLANT

AND

DANIEL OKERI MATUNDA RESPONDENT

*(An Appeal from the Judgement of Hon. A Mukenga (SRM) in
Molo CMCC No. 56 of 2020, delivered on 22nd September, 2021)*

JUDGMENT

1. The background of this Appeal is that Respondent instituted the suit against the Appellant by an Amended Plaintiff dated 19th October, 2020 seeking:-
 - a. General damages and costs of future operation and/or costs of change of prosthesis.
 - b. General damages for loss of earning capacity.
 - c. Special damages of Kshs. 107,230/= plus 16% VAT.
 - d. Costs of the suit.
2. His claim was that on 31st January, 2020, he was lawfully standing at Kamara stage near Jogoo Market along Nakuru-Eldoret road when the driver of motor vehicle registration number KAW 859 A/ZD lost control, veered off the road and hit him as a result of which he sustained very serious injuries. He blamed the Appellant wholly for this accident
3. The Respondent particularised the injuries sustained as:-Fracture of the lower 1/3 right femur.Fracture of the distal end of the right tibia and fibula.Above the knee amputation of the right leg.



4. The Appellant filed his Amended Statement of Defence dated 9th November 2020 and denied the whole claim. On liability he pleaded that in the alternative and without prejudice, if any accident occurred on the said date as alleged and which he still denied, the same was wholly caused and/or substantially contributed to by the negligence of the Respondent.
5. On quantum, he denied the particulars of injuries and that the Respondent was entitled to the damages sought thus putting the Respondent to strict proof.
6. Lastly he pleaded that he was improperly sued that no reasonable cause of action was raised against him and therefore, he would be seeking at an appropriate time to have the suit struck out with costs.
7. Upon hearing both parties the trial Court entered judgment in favour of the Respondent against the Appellant as follows:-General damages for pain and suffering.....Kshs. 2,000,000/= .Cost of future medical expenses.....Kshs. 1,200,000/= .Loss of earning capacityKshs. 800,000/= .Special damages.....Kshs 104,030/= .
Less 10% contributory negligenceKshs. 410,000/= .
Net award Kshs 3,693,627/=
8. Dissatisfied with that Judgement, the Appellant herein filed a Memorandum of Appeal dated 6th October, 2021, based on the following grounds; -
 1. That the learned trial magistrate erred in fact and in law in awarding future medical costs that were inordinately high which were neither specifically pleaded nor strictly proved.
 2. That the learned trial magistrate erred in fact and in law by failing to consider the Appellant's submissions and authorities on liability and future medical costs and hence arriving at an erroneous decision.
 3. That the learned trial magistrate erred in fact and in law by awarding future medical costs that were inordinately high as to constitute a miscarriage of justice in the circumstances of the case.
 4. That the learned trial magistrate erred in fact and in law by apportioning liability in the ratio of 90:10 in favour of the Respondent as against the Appellant.
 5. That the learned trial Magistrate's judgment on liability and future medical costs is not supported by the evidence that was tendered in Court by the parties.
9. Reasons whereof, the Appellant prayed that:-
 1. This Appeal be allowed.
 2. This Court sets aside the award of future medical costs and reduce the same.
 3. This Court sets aside the apportionment of liability in favour of the Respondent as against the Appellant and assess the same afresh and apportion it between the parties.
 4. The costs of the subordinate court and this Appeal be awarded to the Appellant herein.
10. The Appeal proceeded by written submissions. The Appellant's submissions are dated 20/5/2024 while those filed by the Respondents are dated 16/5/2024.

Appellant's Submissions

11. The Appellant submitted mainly on liability, award of future medical expenses and costs of the Appeal.



12. On liability, it was submitted that though the trial court found the Respondent 10% liable for the accident, more liability ought to have been apportioned to him. He argued that during hearing on 31st March, 2021, the Respondent (PW2) admitted to being blamed by the police for the accident and further, the police abstract dated 4th March, 2020 (PEX 6) also showed that the Pedestrian (Respondent) was to blame for the accident.
13. It was submitted that DW1, who was the driver of the subject motor vehicle testified that the Respondent appeared suddenly on the road in an attempt to cross the road without looking whether it was safe to cross the road.
14. In the circumstances, it was submitted that the Respondent ought to have been found 100% liable for the accident. The Appellant termed the trial court's finding on liability as unjust and urged this Court to reverse it.
15. In regard to the disputed award of future medical expenses, the Appellant cited the Court of Appeal decision of Tracom Limited and another V Hassan Mohammed Adan [2009] eKLR and submitted that future medical expenses are in the nature of special damages, which have to be specifically pleaded and proved.
16. In this case, the Appellant submitted that the prayer for future medical expenses is for the purchase of a prosthesis lower limb that would assist the Respondent in ambulation and cosmesis. He argued that in the Medical Report (DEXH.1), Dr. G.W.O. Mugenya specifically used the word 'may' to suggest that the suggested artificial limb is not a must mean and that the Respondent could function well without the said prosthesis.
17. The Appellant therefore concluded that the purchase of the prosthesis is a cosmetic improvement to the Respondent's body which should not be aided by this Court and therefore, the award of Kshs. 1,200,000/= was inordinately high.
18. On general damages for loss of earning capacity, the Appellant submitted that a multiplier of 10 years should be used herein as there was no evidence to prove that the Respondent would have lived to retirement age considering the uncertainties and vagaries of life. In support, he cited the case of Kajuna Idd Noor v Rapid Kate Services Ltd & 4 others [2013] eKLR where a multiplier of 10 years was used for a Plaintiff who was aged 34 years and suffered a permanent incapacity of 70% .
19. In the circumstances, the Appellant submitted that the Respondent would require to change the prosthesis two times and should this Court adopt the cost of the prosthesis as Kshs. 300,000/= as stated by Dr. Omuyoma, then the award ought to have been Kshs. 600,000 under that head.

Repondent's Submissions

20. On liability, the Respondent submitted that the courts are bound to consider whether the elements that constituted a tort of negligence are met in order to apportion liability.
21. On negligence, reliance was placed in the case of Jimmy Paul Semenyé vs Aga Khan Health Services T/ A Aga Khan Hospital & 2 Others [2006] eKLR, where the Court held:-

“Negligence means more than needless or careless conduct, whether in omission or commission, it properly connotes, the complex concept of duty of care of that duty and damage, thereby suffered by the person to whom the duty was owing. Negligence is therefore an act or an omission that results to harm to a person.”



22. Regarding duty of care, the Respondent cited the High Court decision in Nanji Premji Khetani v Raphael Charo Jefwa [2021]eKLR and submitted that in assessing liability and apportioning it on each party, the learned magistrate gave extensive reasons for that decision.
23. It was submitted that the trial court considered the testimony of the eye witness who told the court that the subject vehicle veered off the road to avoid a head on collision with an incoming vehicle, hitting the Respondent who was standing off the road at the stage.
24. The Respondent submitted that the court considered the fact that the Respondent did not scamper for safety even after seeing the said vehicle approaching and that is why he was held 10% negligent.
25. On the award for future medical expenses, it was argued that the claim was not only specifically pleaded at paragraph 7 of the Plaint dated 17th March, 2020 and also prayed for, but also justified reason being that in his Medical-legal report dated 12th August, 2020, Dr. Omuyoma stated that a prosthesis leg is usually changed between 3-5 years of use and each artificial limb which costs Kshs 300,000.
26. The Respondent further submitted that on the other hand, the Appellant's doctor (Dr. Mugenya) confirmed that a prosthesis will be needed although he neither gave an estimate of purchasing one nor did he state the number of times the same is to be changed and that left the court to rely on the opinion by Dr. Omuyoma in arriving at its decision.
27. It was further submitted that even though the Dr. Omuyoma suggested 7 times changes of the prosthesis leg, the trial court, exercised its discretion and awarded 4 times change leading to an award of Kshs. 1,200,000/= which the Respondent termed as not inordinately high so as to constitute miscarriage of justice as alleged by the Appellant.

Analysis and determination

28. It is settled that the first appellate court is under an obligation to re-evaluate the evidence and come to its own conclusions, except, it must give allowance to the fact that it neither saw nor heard the witnesses. See *Selle & Another Vs. Associated Motor Board Company Ltd.* [1968] EA 123.
29. Having considered the record of Appeal herein and the grounds of Appeal together with the rival submission by the parties, the issues for determination are:-
 1. Whether apportionment of liability by trial court should be interfered with.
 2. Whether the future medical expenses awarded are justified.
30. As rightly submitted by the Appellant, this Court has power to interfere with the judgment of the trial court in instances where such decision is not supported by law and where the decision amounts to miscarriage of justice.
31. On liability, the Respondent Daniel Okeri Matunda (PW2), testified that he was heading home from his farm on the material date 31st January, 2020. He stopped at Kamara stage near Jogoo market, along Nakuru-Eldoret Highway in order to board a Matatu home. It is then two vehicles driven at very high speed came heading to Nakuru, while the subject motor vehicle registration number KAW 859A/ZD 4683 which was heading towards Eldoret general direction, veered off the road in a bid to avoid head on collision but in the process hit him and he sustained serious injuries.
32. The Respondent's testimony was corroborated by John Mutahi Mungai (PW3), an eye witness who confirmed that the Respondent herein was standing off the road at Kamara stage, near Jogoo trading centre, when the Appellant's vehicle veered off the road and hit him injured him on his leg.



33. Police Constable No. 80333 Bernard Kiprop Bii (PW4) produced the Police Abstract dated 4th March 2020 and OB No. 17/31/1/2020. He testified that as per the Police abstract, the pedestrian was to blame for the accident.
34. He told the court that as per the point of impact, the pedestrian was hit by the left back tyre, which is not in line with allegation made by the driver of the lorry that the pedestrian tried crossing the road when he was hit. He stated that if indeed the pedestrian tried crossing the road, he would have been hit by the front tyre and not the back tyre.
35. He however stated that investigations in the matter have not been closed and therefore, it was wrong for the Investigation Officer to blame the pedestrian when investigations were still ongoing.
36. On his part, Duncan Simiyu (DW1) who was the driver of the subject motor vehicle told the court that he was heading to Eldoret from Nakuru and upon reaching Jogoo area, a pedestrian appeared from nowhere on the left side and hit himself on the left side of his trailer.
37. He explained that he stopped and went to check on Respondent and noted that he had fractured his leg. He took the Respondent to hospital and came back to the scene where he found police officers. He gave his version of how the accident occurred. He blamed the Respondent for the accident and the report was put in the OB but the that sketch map and plans were drawn when the Respondent was in hospital.
38. From that evidence in support of the Respondent's case as weighed against the Appellant's evidence, it is not probable that the Respondent tried to cross the road when he was hit in the circumstances herein. The matter was still under investigations and therefore, the driver had not been charged.
39. Since the accident occurred at a stage which is near a market, the Appellant ought to have taken precaution in the manner he drove and in particular, to slow down so as to avoid the alleged oncoming vehicles from Eldoret and at the same time consider the safety of Respondent and other pedestrians at the stage.
40. That is not to say that the Respondent did not have a duty to take precaution as he waited to board a vehicle at the said stage. However, his contribution to this accident would be minimal in the circumstances.
41. In its judgment, the trial court stated: -

“To what extent is the driver of the motor vehicle registration number KAW 859A/ZD 4683 to blame? The Plaintiff and the eye witness stated that they saw two vehicles speeding towards Nakuru, and one was overtaking. The trailer which was oncoming veered off the road to avoid a head on collision. The Plaintiff and his witness saw all these events unfolding but on their part did not take any evasive measures to avoid the accident. For that reason, the Plaintiff should also carry part of the blame. Probably, had he moved off further, or even attempted to scamper for safety, the accident may have been avoided, or the severity of the injuries lowered. For that reason, and taking all relevant factors into account, I find the Plaintiff contributed to the accident to the extent of 10%. The defendant will carry 90% of the blame.”
42. The above reasoning is justified and there is no reason to disturb the finding on liability.
43. On the issue of future medical expenses, the Court of Appeal in the case of Tracom Limited & another (supra) cited by the Appellant, had this to say: - “ 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.”

44. The Court went further and stated:-

“We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.”

45. In this case, the Respondent in his Amended plaint dated 19th October, 2020, at paragraph 7 pleaded:-

“...that the plaintiff shall require to change the artificial leg after 3-5 years until he dies at a cost of Kshs. 300,000 for each change.”

46. The said future medical expenses were also prayed for as prayer (a) of the Amended Plaint. This Court is satisfied that the claim was properly pleaded.

47. On whether the same was proved, the Appellant argued that though both Dr. Obed Omuyoma and Dr. G.W.O Mugenya, agreed that the Respondent might require a prosthetic limb, the word used is ‘may’, which show that the prosthesis leg is not a must but just a cosmetic improvement to his body.

48. A look at paragraph F of the report dated 12/08/2020 shows that under the heading Summary and Conclusion, Dr. Mugenya stated:-

“the Respondent walks using crutches hence unable to resume farming and other activities for daily livelihood. That he may require fitting a lower limb prosthesis (artificial limb) in future to assist him in ambulation and cosmesis.”

49. From the above, the doctor is clearly saying that the Respondent herein is unable to resume his farming activities for daily livelihood. The record shows that the Respondent was photographed and the photos were produced in court confirming the amputation of his high right leg above the knee.

50. The Respondent’s evidence was that he earns his daily bread through farming but since he is now walking with aid of crutches due to that amputation, he is unable to carry out the said activities on crutches hence the need for an artificial leg to be fitted on him.

51. This court is satisfied that the use of the word ‘May’ by the said doctor does not in any way suggest that the Respondent can earn a living without the said prosthesis.

52. On the cost of the prosthesis, Dr. Obed Omuyoma’s report dated 10/03/2020 specifically indicated that it is currently at Kshs. 300,000 and would require to be changed within a period of 3-5 years.

53. The Appellant made no suggestion of the cost of the Prosthesis limb. He did not suggest the number of times it would be changed. He has done it only in this Appeal suggesting that the change would be made twice in the Respondents lifetime making it a total of Kshs. 600,000/=. He supports this by citing decision in Kajuna Idd Noor (Supra) arguing that at age 34 and adopting five (5) years as frequency of changing the prosthesis.



54. However, in the above case, Wendoh J adopted a multiplier of 10 years in calculating loss of future earnings and not calculation of future medical expenses as in this case.
55. Even if the said case law were to be used, the Respondent's age is stated as 34 years. There is nothing to show that he would not have lived so as to change prostheses at frequency of 4 years adopted by the trial court, at the rate of Kshs. 300,000 suggested by Dr. Obed Omuyoma thus making a total of Kshs.1,200,000/= awarded herein.
56. Further, the Court of Appeal in Kamuya v Elgon *Kenya Limited (Civil Appeal 321 of 2018)* [2022] KECA 1404 (KLR)(16 December 2022) (Judgment) did not disturb High Court's holding that:-
- “The doctor's report indicates that the plaintiff will require prosthesis at a cost of 100,000/= and will change every 5 years. The plaintiff is now 42 years, I will award 400,000/= under this provision.”
57. In light of the foregoing, the amount awarded by the trial court in this case is reasonable and justified. There is no reason to disturb it.
58. In conclusion, the Appeal herein is without merit and therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2025.

PATRICIA GICHOHI

JUDGE

Mr. Ontita for the Appellant

Mr. Wafula for the Respondent

Ruto, Court Assistant

