



**Tizi Hauliers v Nzaro (Civil Appeal E050 of 2023)  
[2024] KEHC 16909 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 16909 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E050 OF 2023  
F WANGARI, J  
JANUARY 19, 2024**

**BETWEEN**

**TIZI HAULIERS ..... APPELLANT**

**AND**

**MWANDETO KIVELANGE NZARO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. Nyariki  
delivered on 28th February, 2023 in MSA CMCC No. E529 of 2020)*

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. J. Nyariki, Senior Resident Magistrate dated 28/2/2023 arising from Mombasa CMCC No. E259 of 2020. The Appeal is on quantum.
2. There is also a Cross Appeal dated 28<sup>th</sup> March 2023. The Cross Appellant appeals against the failure to award lost earnings, interest at court rates and low general damages.
3. In the Plaint dated 26<sup>th</sup> August 2020 the Plaintiff claimed damages for an accident that occurred on 10/12/2019 involving Respondent's Motor Vehicle Registration Number KCK 176Q, while the Plaintiff was cycling along Kilindini Road.
4. It was further pleaded that the accident was caused by the driver of the motor vehicle who lost control and veered off the road hence the accident. The Plaintiff set out particulars of negligence and pleaded special damages of Kshs. 185,434 plus General Damages.
5. The Plaintiff also pleaded injuries as follows:
  - i. Compound and segmental fracture of the right tibia and fibula
  - ii. Fracture on the right humerus



- iii. Open pelvic fracture
  - iv. Head injury with loss of consciousness
  - v. Deep cut to the right parietal area of the scalp
  - vi. Blunt trauma to the chest.
6. The Appellant entered appearance and filed its Statement of Defence denying the particulars of negligence and injuries pleaded in the Plaint. The Trial Court heard the parties and proceeded to render Judgement on 28<sup>th</sup> February 2023. In the Judgement, the Court found 100% liability against the Defendant.
7. The court awarded as follows:
- a. General damages 2,000,000
  - b. Future medical expenses Kshs. 611,000
  - c. Special damages Kshs. 182,234
8. Aggrieved by the finding of the Trial Court, the Appellant who was the Defendant in the Lower Court lodged a Memorandum of Appeal hence this Appeal and the Plaintiff in the Trial Court also logged a Cross Appeal.

#### **The Appellant's case**

9. The Appellant called Dr. Udayan who relied on his medical report dated 29<sup>th</sup> January 2021. He awarded 5% permanent disability for the Plaintiff. It was his case on cross examination that the external fixator needed to be removed and the Plaintiff would not be able to walk as before. He also stated that the fracture on the right hand is not a disability.

#### **The Respondent/Cross Appellant's.**

10. The Respondent called 3 witnesses. PW1 was Dr. Darius who relied on the Medical Report dated 22<sup>nd</sup> April 2020. He testified that the Plaintiff suffered 75% disability. Further that the bones had not reunited.
11. PW2, was the Plaintiff. It was his case that he was admitted at the Coast General Hospital from 10<sup>th</sup> December 2019 to March 2020. He further testified that he still had a metal in his leg and could not do any work.
12. PW3, the Police Officer testified that the accident occurred when the motor vehicle was overtaking a truck and hit the Plaintiff who was coming from the opposite direction.

#### **The Appellant's Submissions**

13. The Appellant submitted that the award in general damages of Kshs. 2,000,000 was inordinately high and did not reflect a commensurate assessment of damages to the injuries suffered. Counsel submitted that an award of Kshs. 1,000,000 would have been adequate compensation to the Plaintiff and relied on the case of P.W v Peter Muriithi Ngari (2017) e KLR.
14. On the Cross Appeal, it was submitted that the Plaintiff did not prove future medical expenses and the same ought to have been dismissed. It was also submitted that the damages for lost earnings would not



be awarded because the Cross Appellant had not prayed for such damages and did not lead evidence to prove them either.

### **Respondent's submissions**

15. On the part of the Respondent, it was submitted that the Respondent suffered injuries that were serious and the award of Kshs. 2,000,000 in General Damages was not adequate compensation and was inordinately low.
16. Counsel relied inter alia on the case of Dancun Kimathi Karagania v Ngugi David & 3 Others [2016] eKLR where it was submitted that the Plaintiff sustained similar injuries and was awarded Kshs. 5,000,000 in General Damages.
17. Counsel also submitted that the trial court erred in not awarding damages for lost earnings and asked me to reassess the damages considering this ground.
18. The Cross Appellant however did not appeal against the award for future medical expenses.

### **Analysis**

19. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

20. In the cases of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

21. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

### **Quantum**

22. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant



one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

23. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure.
24. Where damages are said to be at large or inordinately, they must be reassessed with a view bringing them in commensurate with similar injuries.
25. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda v Stage Coach International Services Limited & Another* Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
26. Furthermore, in *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- “Because this is the evidence of an expert, I believe it.”...”
27. There is no dispute that the Respondent suffered a compound and segmental fracture of the right tibia and fibula, open pelvic fracture, fracture of the right humerus, head injury with loss of consciousness, a deep cut wound to the scalp and blunt trauma to the chest.
28. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
29. The principle on the award of damages is settled. In *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
  - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  - 2) The award should be commensurable with the injuries sustained.
  - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.



- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high.
30. The Trial Court relied on the case of *Duncan Kimathi Karagania v Ngugi David & 3 others* (2016) e KLR. In that case, I note the Plaintiff suffered:
  - a. Blunt head injury with loss of consciousness for over two hours.
  - b. Lacerations over the face on both sides.
  - c. Comminuted fractures of the maxilla bilaterally
  - d. Compound fracture of the mandible.
  - e. Comminuted fracture of the right humerus.
  - f. Articular region of the elbow surface of radio carpal.
  - g. Multiple laceration of the hands and forearms.
31. The Court awarded the Plaintiff a sum of Kshs 4,000,000 general damages for pain, suffering and loss of amenities in 2016. Similarly, in *P.W v Peter Muriithi Ngari* [2017] eKLR, the Plaintiff suffered:
  - a. A fracture left femur which was operated on and fixed with a metallic plate.
  - b. Fractures of the left fibula and tibia malleolus which were operated on and fixed with K-wires and plates.
  - c. Blunt injuries to the pelvis causing fractures of the pelvis.
32. The Court therein awarded Kshs. 1,600,000 in 2017.
33. I now analyze similar fact cases on quantum. I have considered the injuries suffered by the Plaintiff, the pleadings and authorities cited and I proceed as follows;
34. In *Duncan Kimathi Karagania* (supra) relied on by the Trial Court, the injuries are largely dissimilar to this case. Therein, the Plaintiff largely suffered fractures to the maxilla and mandibles. These are head regions affecting the mouth. On the other hand, in this case, the injuries largely affected the upper and lower limbs.
35. Conversely, in the case of *P.W v Peter Muriithi Ngari* (supra) also referred to by the Trial Court, the injuries are largely similar to the injuries herein. However, the injuries herein are slightly more severe because unlike that case, here, the injuries also involved the fracture of the humerus and cut wound to the scalp.
36. I also refer to the case of *Pocylene W. Kinuva Alias Roselyne Muthui Katee v Ocharo Kibira & 3 Others Nakuru HCC No. 237 of 2002* where the Plaintiff suffered a transverse fracture of the right tibia and fibula, compound segmental fractures of the left tibia and fibular bones and posterior dislocation of the left hip with an acetabulum fracture and was awarded Kshs.1,500,000 in 2009. In my view, the injuries in the case of *P.W v Peter Muriithi Ngari* (supra) and *Pocylene W. Kinuva* (supra) are compatible to this case.
37. Therefore, stemming from the Award by the Trial Court of Kshs. 2,000,000 in General Damages, I do not support the view that this was inordinately high award. It was not also inordinately low. The Trial



Court properly considered the parameters of inflation and lapse of time and granted an award that was commensurate to the injuries suffered in the circumstances of the case before him. I therefore decline the Appeal and cross appeal against the award on General Damages.

38. With respect to damages for loss earning, in *Parvin Singh Dhalay v Republic* [1997] eKLR; [1995-1998] 1 EA 29, it was held that,

“However, in certain circumstances loss of profits could be included within a claim for general damages...General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”.

39. The Trial Court established that the Plaintiff did not pray for lost earnings. In the submissions, I note that Respondent made attempt to calculate lost earnings based on the minimum wage bill. However, during trial, there was no mention of lost earnings just as the same was not pleaded and prayed for in the Plaintiff. The Court could not award damages without facts stated and proved. I therefore find no reason to disturb the Trial Court’s finding on the award of damages under this head.

40. In the case of *Alpharama Limited v Joseph Kariuki Cebon* [2017] eKLR the court stated thus:

“...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”

41. On future medical expenses, in the case of, *Tracom Limited & Another v Hassan Mohamed Adan* Civil Appeal Number 106 of 2006, the Court of Appeal 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”.

42. On this, the Appellant’s case was that future medical expenses were in the nature of special damages and needed to be proved which the trial court awarded when the Respondent did not prove them.

43. In my view, future medical expenses are based on medical opinion. They as such constitute an amount of pecuniary loss which the Plaintiff can prove based on the facts pleaded. I am persuaded by the



reasoning of Odunga J, (as he then was) in *Bash Hauliers Limited v Peter Mulwa Ngulu* [2020] eKLR where the learned Judge stated as follows:

“ 34. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded”.

44. In this case, the Respondent in his *Plaint* expressly pleaded that he would incur costs to cater for future medical expenses. He stated that he would require Kshs. 100,000 per year for at least 3 years, crutches at Kshs. 7,500 (three-yearly) and Kshs. 250,000/- for the removal of the plates.

45. On future medical expenses, the Trial Court awarded Kshs. 611,000. The opinion of the Plaintiffs' Medical Doctor was that the Plaintiff suffered 75% permanent incapacity and would require Kshs. 100,000 per annum for physiotherapy and Kshs. 250,000 for the removal of the fixed metal plates.

46. On the other hand, the Appellant's Medical Doctor opined that the Plaintiff was still under treatment and he needed to review the Plaintiff after 3 months. He confirmed in his testimony that the Plaintiff never went back to him and would not be able to walk again as before. He estimated injuries to have occasioned 5% permanent disability to the Plaintiff. It was held by the Court of Appeal in *Jackson K Kiptoo v The Hon Attorney General* [2009] KLR 657 that:

“The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

47. In this case, I do not find the Medical Report by the Plaintiff's Doctor to contradict the Medical Report of the Defendant's Doctor on the issue of future medical expenses. The only point of divergence in the two reports is on the percentage of permanent disability which in my view may be used to assess General Damages and earning capacity and not damages for future medical expenses.

48. The Defendant's Medical Report and evidence did not negate the fact that the Plaintiff would require expenses on physiotherapy and removal of the metal plate. It was upon the defense medical officer to project whatever costs would apply in his view for consideration by the Court. He did not. I find no reason to disturb the finding of the Trial Court which neither considered irrelevant factors nor failed to consider relevant factors.

49. In the circumstances, I do not find merit in the Appeal and the Cross Appeal. However, the Respondent raised a Ground on the absence of a finding by the Trial Court on interest. For the avoidance of doubt, interest on the Judgment sum will accrue at court rates from the date of Judgment.

### **Determination**

50. In the upshot, I make the following orders: -

- i. The Appeal on General Damages is dismissed.
- ii. The Appeal on Future Medical Expenses is dismissed.
- iii. The Cross Appeal is Dismissed.
- iv. Each party to bear their own cost in the Appeal/Cross Appeal.
- v. The Respondent/Cross Appellant shall have costs and interest in the Lower Court at court rates from the date of the Judgment.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Ms. Monari Advocate for the Appellant

Musau Advocate for the Respondent

Barile, Court Assistant

