



REPUBLIC OF KENYA



**Ngare v Karanja & another (Civil Appeal 92 of 2019)
[2024] KEHC 990 (KLR) (Civ) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 990 (KLR)

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

CIVIL

CIVIL APPEAL 92 OF 2019

AN ONGERI, J

FEBRUARY 9, 2024

BETWEEN

NANCY WAMBUI NGARE APPELLANT

AND

STEPHEN KARANJA 1ST RESPONDENT

ISAAC KAMAU 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. B. J. OFISI
(RM) in Milimani CMCC NO. 417 of 2017 delivered on 23/1/2019)*

JUDGMENT

1. The appellant, Nancy Wambui Ngare Sued the two respondents in Milimani CMCC No. 417 of 2017 seeking general damages for pain and suffering, general damages for loss of amenities and financial loss, special damages of Kshs.30,000 plus costs and interest for injuries the appellant sustained on 13/11/2015 along Ronald Ngala Street/River Road when she was hit by motor vehicle registration no. KCD xxx.
2. The appellant averred that she was a pedestrian walking at the pedestrian lane when the said motor vehicle lost control and veered off the road and knocked her down inflicting severe injuries on here.
3. The parties entered into a consent on liability on 13/9/2018 and apportioned liability at 80:20% and the trial assessed damages as follows

General damages for pain & suffering ksh.300,000

Special damages ksh. 30,000

Total ksh.330,000



Less 20% liability (ksh.66,160)

Payable ksh.264,640

4. The appellant has appealed against the assessment of damages on the following grounds;
 - i. That the learned trial magistrate erred in law and fact and misdirected herself in failing to consider the submissions by the appellant together with the authorities relied on by the appellant in the lower court.
 - ii. That the learned trial magistrate erred in fact and in law and misdirected herself in finding that the respondent is entitled to general damages of kshs.300,000/= which amount is inordinately low in the circumstance.
 - iii. That the learned trial magistrate erred in law and fact by making a decision on quantum that was against the weight of evidence.
 - iv. That the learned trial magistrate wholly erred in law and fact in arriving at his said decision.
5. The parties filed written submissions as follows; the appellant submitted that according to the medical report by Dr. Wandugu the injuries sustained by the appellant were classified as grievous harm. It was the appellant contention that the trial court did not consider other documents submitted which included her witness statement, pleadings and medical reports which were essential to her case.
6. The applicant submitted that she claimed for damages under various heads among the damages for loss and diminution of earning capacity, damages for loss of amenities and damages for pain and suffering. The trial court failed to consider the appellants submissions on the same and never indicated their reasoning for every head and issue identified by the parties.
7. The appellant submitted that she has a business and the injuries she sustained reduced her ability to work and provide for herself. This position is supported by Dr. Wandugu's observation and conclusion in his medical report; that the appellant would experience chronic disabling pains, permanent weakness of the left foot and he assessed permanent function disability at 10%. The appellant's wounds were degloving and so severe that she had to be admitted for two months at Kenyatta National Hospital and an additional 3 weeks at St. Mary's Mission Hospital.
8. On damages for pain and suffering the appellant relied on the case of *Hellen Kwamboka Onchong'a v John Ouko Oyoo* [2010] eKLR Where the court awarded Kshs. 800,000 for pain and suffering for degloving injuries necessitating surgical operation and skin grafting. Under this head the appellant submitted the sum of Kshs. 1,500,000 would be sufficient.
9. On damages for loss and diminution of earning capacity the appellant relied on *Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others* [2022] eKLR where the court awarded Kshs. 700,000 for reduction/diminution of earning capacity, noting that diminution should be awarded on a balance of probabilities. The court went on to state that the Plaintiff's capacity to compete effectively in an economic venture and labour market had severely been curtailed. Under this head the appellant submitted the sum of Kshs. 600,000 would be sufficient.
10. On damages for loss of amenities the appellant relied on *GNM v Alex Wachira Waura and another* [2022] eKLR where the court awarded the Plaintiff Kshs.700,000 for general damages for pain and suffering and loss of amenities. Under this head the Appellant submitted that the sum of Kshs. 300,000 would be sufficient.
11. The issues for determination in this appeal are as follows;



- i. Whether the assessment of general damages for pain and suffering was inordinately low.
 - ii. Whether the Trial Court failed to award damages for loss of earning capacity.
12. The appellant submitted that the trial court misdirected herself in failing to consider the appellant's submissions.
 13. Further, that the amount of kshs.300,000 awarded was inordinately low and that the same was made against the weight of evidence.
 14. The appellant sustained the following injuries;
 - i. Degloving injuries to the (L) ankle joint and foot
 - ii. Blood loss
 15. The trial court relied on the case of *I.A (minor suing through next friend and father) v Kariuki Jane & another* (2018) eKLR.
 16. I have considered the following comparable authorities
 - a. In *Tononoka Rolling Mills Ltd v James To Boso Were* [2015] eKLR in which the court awarded Kshs. 850,000 for fractured left femur, degloving injury left thigh and pain, blood loss and soft tissue injuries.
 - b. In *Wycliffe Lumula Mmasi v Ernest Waitbaka & Another* (2020) eKLR L. Njuguna J made an award of Kshs. 800,000/= to a claimant who had sustained extensive degloving injury on the right foot and extensive skin loss.
 - c. In *Kiru Tea Factory & Another v Peterson Watbeka Wanjobi* (2008) eKLR the High Court upheld an award of Kshs. 800,000/= for degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius, ulna and right iliac bone and generalized pains.
 17. I find that the Trial Court did not consider the submissions by the Appellant and further that the amount awarded in respect of general damages for pain and suffering was inordinately low and against the weight of evidence.
 18. On the issue as to whether the Trial Court failed to award damages for loss and diminution of earning capacity, I find that the Trial Court would not have a basis upon which to make such an award since the plaintiff did not adduce evidence to establish that her earning capacity was diminished after the accident.
 19. I also find that the Respondents did not submit on the award of damages in respect of diminished earning and the consent did not indicate whether the same were payable.
 20. However, in respect of general damages for pain and suffering, I have considered the authorities above which are comparable and I award general damages of ksh.800,000.
 21. I set aside the trial court's award of Kshs. 300,000 and substitute it with an award of kshs.800,000 plus special damages of 30,800.
 22. The total is Kshs.830,800 (less 20% contributory negligence(Kshs.166,160)) the amount payable to the Appellant is ksh.664,640.



23. Judgment be and is hereby entered in favor of the appellant against the respondents in the sum of kshs.664,640 plus costs and interest from the date of the trial court’s judgment until payment in full.

24. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

