



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Shakombo (Civil Appeal 127 of 2022)
[2024] KEHC 4432 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 127 OF 2022
DKN MAGARE, J
APRIL 15, 2024**

BETWEEN

ROSE WANGECI KARIUKI APPELLANT

AND

RASHID KIVYASO SHAKOMBO RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable Senior Resident Magistrate, Hon. G. Kiage on 26/7/2022 in Mombasa CMCC E244 of 2021.
2. The Court gave directions on hearing of the Appeal in October, 2023. The parties however did not file the submissions in time.
3. The Respondent filed suit on 8/2/2021. He claimed damages arising from an accident on 12/1/2021 while aboard Tuk Tuk Registration No KWTA 2637 make Piaggio along Likoni Ukunda Road. The Respondent is said to have suffered the following injuries: -
 - a. A deep cut to the left eye brow involving conjunctiva
 - b. A deep cut to the left eye brow involving nasal bridge
 - c. Laceration of the left eye brow
 - d. Blunt trauma to the left lower back
 - e. Posttraumatic loss of vision to the left eye with conjunctivitis.
4. The Respondent pleaded the following special damages:
 - a. Medical report Kshs 2,000/=
 - b. P3 Form Kshs 2,500/=



- c. Treatment and medical expenses Kshs 18,050/=.
5. The Appellant filed defence on 26/2/2021. They denied occurrence of the accident. They stated in any case of it occurred then the same was due to the negligence of the Respondent.
6. The Appellant was pleaded to be the owner of Motor Vehicle Registration No KCF 470F. They blamed the owner of Motor Vehicle Registration No KWTA 2637. The Respondent underwent second medical examination and was examined by Dr. N.D. Mnjala. The Plaintiff testified and produced several documents. The Appellant did not testify. The court found the Respondent had proved their case and awarded as follows: -
 - a. 100% liability
 - b. Special damages 15,250
 - c. General damages 1,700,000
7. The Respondent proved loss of earning capacity. However, the court declined quiet erroneously that no income was proved. This was erroneous because loss of earning capacity though it needs to be pleaded is in the nature of General Damages. Concomitants there is no need to show special loss.
8. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in *Butler v Butler* [1984] KLR 225, as follows:-
 - a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
 - b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
 - c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
 - d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
 - e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and
 - f. 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.



9. The Appellant filed a very concise memorandum of Appeal with one ground of appeal as doth: The Learned Trial Magistrate erred in failing to apply the principles applicable to the assessment of damages and ended up awarding damages that were excessive and not commensurate to the injuries.

Analysis

10. 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.
11. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
12. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows:-
- “.. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
14. In the case of *Peters v Sunday Post Limited* [1958] EA 424, 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...”
15. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019) eKLR, Justice D.S Majanja held as doth:
- “General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”



16. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the Trial Court.
17. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No 43 of 1983 (1984) KLR where the Court of Appeals held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstances and effect of the injuries of the claimant but some degree of [uniformity] is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”
18. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.
19. So my duty as the appellate court is threefold regarding quantum of damages: -
 - a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
 - b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
 - c. The award is simply not justified from evidence.
20. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.
21. By a Medical Report dated 22/1/2021, by Dr. Darius Wambua Kiema, he stated the Respondent suffered the following injuries:-
 - a. A deep cut to the left eye brow involving nasal bridge and conjunctiva
 - b. Posttraumatic loss of vision to the left eye
 - c. Diminished capacity to work
22. The doctor estimated the cost of eye surgery to be between 120,000 to 300,000/= partial permanent disability was assessed at 30%. This is a proper case to state that there was total loss of vision.
23. The Plaintiff suffered permanent disability of 30% with no visual acuity of the left eye. The court awarded Kshs 1,700,000.
24. Regarding special loss of earning capacity, the formula proposed by the Respondent was correct save that only that a sum of Kshs 15,000 will have sufficed as monthly earnings an award of Kshs 540, 000/= will have been awarded. This is made up of Kshs 15,000 x 10 x 12 x 30%. However, there is no Cross Appeal for the same. I shall let sleeping dogs lie.
25. On General Damages the court used comparable authorities and awarded Kshs 1,700,000/=. The only issue therefore is whether the damages were inordinately excessive or plainly wrong. The main injury was loss of vision to the left eye.



26. The High Court, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie 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.

27. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

28. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

29. In *Peter Oduor Shikuku v Magimu Engineering and General Contractors Ltd and another* (2021) eKLR. The court awarded Kshs 2,000,000/= for the loss of the left eye.

30. In the case of *Amazon Energy Ltd. v Magdaline Nbenya Mathias and another* (2019) eKLR, the court awarded Kshs 2,500,000/=. In the case of *David Wafula Wepukulu v Kawaru Singh Construction Ltd.* (2019) eKLR damages of Kshs 1,200,000/= were awarded for fairly similar injuries.

31. I therefore find the award of Kshs 1,700,000/= is not inordinately excessive. There is no reason to interfere with the court’s discretion.

32. In the circumstances, the Appeal lacks merit and is accordingly dismissed with costs of Kshs 145,000/=

Determination

33. The Court makes the following orders: -

- a. The Appeal lacks merit and is accordingly dismissed with costs of Kshs 145,000/=.
- b. The file is closed.
- c. The lower court file be returned to the lower court.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF APRIL, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr Mbithi for the appellant



Miss Annah Kamau for the Respondent

Court Assistant - Brian

