



**Tingwe v Okola (Civil Appeal E043 of 2022)
[2024] KEHC 4006 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E043 OF 2022
WM MUSYOKA, J
APRIL 19, 2024**

BETWEEN

LYDIAH NYATEGI TINGWE APPELLANT

AND

BRIGHT VIVIAN OKOLA RESPONDENT

*(Appeal from judgment and decree of Hon. EC Serem, Resident Magistrate,
RM, in Busia CMCCC No. E81 of 2020, of 21st November 2022)*

JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for compensation for personal injury, following a road traffic accident, along Mumias-Busia road, on 18th October 2020. The respondent was allegedly a fare-paying passenger in motor vehicle registration mark and number KCS 731L, said to have belonged to the appellant. The respondent allegedly sustained injury, and liability was attributed to the appellant, on account of negligence. The respondent filed a defence, denying the accident, and everything else pleaded in the plaint. She pleaded, in the alternative, that if such accident occurred, then it was authored by the respondent, or she substantially contributed to it.
2. A trial was conducted. 4 witnesses testified for the respondent, and none testified for the appellant. Judgement was delivered on 21st November 2022. Liability was resolved at 100% against the appellant. Kshs. 1,500,000.00 for general damages, Kshs. 1,500,000.00 for loss of earning capacity, Kshs. 350,000.00 for future medical expenses, Kshs. 11,306.00 for special damages, and costs were awarded to the respondent.
3. The appellant was aggrieved, hence the instant appeal. The appeal has faulted the trial court on several grounds: for awarding damages that were inordinately excessive and a gross over-estimation; disregarding the submissions and authorities filed by the appellant on quantum; exercising discretion improperly; awarding damages for loss; and awarding damages for future earnings and loss of earning



- capacity against the weight of the evidence; and the judgement was against the weight of the evidence and based on wrong principle on loss of earning capacity . The appellant asks that the award on general damages be set aside.
4. On 11th December 2023, directions were given, for canvassing of the appeal by way of written submissions. Both sides filed their respective written submissions.
 5. The appellant submits that the trial court did not take into account the principle that similar injuries should attract similar damages. She submits that although at the trial court she relied on *Joseph Kimani Karuru v. Moses Kimani* [2014] eKLR, with respect to pain and suffering, where Kshs. 1,200,000.00 had been awarded for similar injuries, the court did not consider that authority, and instead settled on a sum of Kshs. 1,500,000.00. She further submits that future medical expenses should not have been awarded at Kshs. 350,000.00. She cites *Tracom Limited v. Hassan Mohamed Adan* [2009] eKLR, on future medical expenses, where it had been stated that future medical expenses were in the nature of a special claim, and needed to be specifically pleaded and specifically proved. On the award of Kshs. 1,500,000.00 for loss of earning capacity, it is submitted that the same should not have been made, as no evidence was adduced on it. There was no proof that the respondent was working prior to the occurrence of the incident, it is submitted. She cites *Mumias Sugar Limited v. Francis Wanalo* [2007] eKLR, where it had been said that the award for earning capacity was available whether the claimant was in employment or not.
 6. On her part, the respondent cites *John Kipkemboi & another v. Morris Kedolo* [2019] eKLR and *Charles Oriwo Odeyo v. Apollo Justus Andabwa & another* [2017] eKLR, to submit that assessment of damages was a matter of discretion, and that the appellate court should interfere only in cases where there is clear case of application of wrong principles. It is submitted that the trial court properly exercised discretion in the manner damages were assessed and awarded. On loss of earning capacity, the respondent relies on *Mumias Sugar Limited v. Francis Wanalo* [2007] eKLR, to submit that one need not be in employment to be entitled to that award, and *Jacob Ayiga Maruja & another v. Simeone Obayo* [2005] eKLR, for the submission that loss of earning capacity can be established and assessed from employment, and, where no such evidence is available, especially for those not in formal employment, a global award may be resorted to.
 7. For the purpose of determining this appeal, I have very closely and carefully gone through the record of appeal, and the original trial court records, and I am fully acquainted with the material that was placed before the trial court by the parties, and I have also considered how the same was handled by the court, to enable me come to my own conclusions. Ultimately, the final determination will abide the pleadings placed before me by the parties, for parties are bound by their own pleadings. I will consider the matter based on the 3 issues identified by the appellant: whether the award of general damages for pain and suffering was excessive; whether the award for future medical expenses was properly made; and whether the award for loss of earning capacity was proper.
 8. The injuries sustained by the respondent are documented in the plaint, as a fragmented fracture of the left humerus, with missing fragments, which led to amputation of the left upper limb; and a degloving injury to the left upper limb. The said injury is also documented in the P3 Form placed on record, as well as the medico-legal report by Dr. Charles Andai. The respondent was also subjected to a second medical examination, and a report by Dr. Jenipher Kahuthu, was placed on record. The injury noted was a fracture of the left humerus with missing fragments and a degloving injury, and amputation of the left arm was done. Both doctors assessed the permanent disability at 65%.
 9. The respondent suggested Kshs. 4,500,000.00 for loss of pain and suffering, and cited several authorities, such as *CM (a minor suing through his mother and next friend MN) v. Joseph Mwangangi*



- Maina [2018] eKLR, where Kshs. 2,000,000.00 was awarded for a crush injury leading to amputation of the right leg below the knee; John Kipkemboi & another v. Morris Kedolo [2019] eKLR, where Kshs. 2,500,000.00 was awarded for a crush injury leading to amputation of the left leg below the knee; Grace Bledina Adhiambo v. Bowers Okelo & another [2017] eKLR where there was an amputation of the left arm above the elbow and a 68% disability, and an award of Kshs. 1,500,000.00 was made; and Easy Coach Limited v. Esther Kananu Inoti [2021] eKLR, where an award of Kshs. 3,500,000.00 was made for an amputation of the right arm at the mid-arm, with fracture of the left clavicle and other injuries. The appellant, on this limb, cited Joseph Kimani Karuru v. Moses Kimani [2014] eKLR, where the award of Kshs. 1,200,000.00 was made for amputation of the left arm above the elbow, resulting in 40% permanent disability.
10. The trial court relied on Joseph Wang'ethe v. EW [2019] eKLR, where an award of Kshs. 1,500,000.00 had been made for an amputation of the arm at the elbow joint, and where disability was assessed at 70%. Did the trial court apply the wrong principles in making that assessment of Kshs. 1,500,000.00? I do not think so. Even without considering any other decisions, the authority cited by the appellant was within the range. I mean Joseph Kimani Karuru v. Moses Kimani [2014] eKLR. The injury sustained was similar. However, the decision was made in 2014, and, therefore, it was a little dated, and the degree of disability in that case was assessed at 40%, compared with the 65% assessed in this case. The award made by the trial court of Kshs. 1,500,000.00 was justified. The decision, in Grace Bledina Adhiambo v. Bowers Okelo & another [2017] eKLR, cited by the respondent, where similar injuries were sustained, and disability was assessed at 70% and an award of Kshs. 1,500,000.00 was made, also within range. The trial court was deciding this matter in 2022, and an even higher award would have sufficed, to take into account the effect of depreciation of the Kenya Shilling between 2014/2017 on the one hand and 2022 on the other. I am not persuaded that I should interfere with the award by the trial court on this score.
11. On the award of future medical expenses, I note that the figure of the special damage was not pleaded in the plaint that was filed at the trial court, although it is stated that the same would be disclosed at the hearing. In his medical report, Dr Andai indicated that the respondent would need an artificial arm, whose cost he put at Kshs. 500,000.00. I wonder why that cost or element of future medical expenses was not specifically pleaded, given that the respondent had Dr. Andai's medico-legal report as at the date of the filing of the plaint. Perhaps, it was a measure designed at evading paying higher filing fees. Dr. Kahuthu assessed future treatment at Kshs. 350,000.00. I can understand the submission by the appellant that the future medical expenses were not specifically pleaded, given that the actual figure was not mentioned in the plaint, but I do not understand her argument that the award of Kshs. 350,000.00 was excessive, given that that was the amount suggested by the medical officer whose report she relied on. I believe that Dr. Kahuthu dealt with that aspect in the medico-legal report, in view of the pleading in the plaint, that the respondent would disclose the particulars, at the hearing. I see that Dr Andai's report was filed together with the plaint, as part of the bundle of evidence, and, therefore, the appellant had adequate notice of that claim. I believe that the amount was properly awarded, and I shall not interfere with it.
12. On the award of loss of earning capacity, the trial court relied on the principles stated in Butler v. Butler [1984] KLR 225, Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v. Augustine Munyao Kioko [2006] eKLR, John Kipkemboi & another v. Morris Kedolo [2019] eKLR and John Wamai and 2 others v. Jane Kituku Nziva and another [2017] eKLR, on what is taken into account, and how the assessment is done. The only concern raised by the appellant is that the respondent was not working, as no evidence relating to her employment or occupation was adduced. Yet she cites Mumias Sugar Limited v. Francis Wanalo [2007] eKLR, where it was stated that loss of earning capacity is compensable regardless of whether the claimant was in employment or not. In Jacob Ayiga Maruja & another v. Simeone Obayo [2005] eKLR and John Kipkemboi & another v. Morris Kedolo [2019] eKLR, it was stated that where there was lack



of material, on the earnings of the claimant, as at the date of the accident, the court resorts to award of a global figure, as opposed to using a multiplier. The trial court opted for the global figure, although it had been alleged that the respondent had been working as a hair-dresser, as at the hearing she led no evidence on her earnings, apart from stating that she had been employed as one. The appellant has not demonstrated that the global award made on that limb of compensation was not founded on the correct principles, and, for that reason, I shall not interfere with it.

13. In the end, I find no merit in the appeal herein, and I shall dismiss it, as I hereby do. The respondent shall have the costs. Orders accordingly.

DELIVERED DATED AND SIGNED AT BUSIA THIS 19TH DAY OF APRIL 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Ms. Anono, instructed by Mukisu & Company, Advocates for the respondent.

