



Watu Credit Limited & another v Oracha & another (Civil Appeal E059 of 2023) [2024] KEHC 3752 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E059 OF 2023
RE ABURILI, J
APRIL 9, 2024**

BETWEEN

WATU CREDIT LIMITED 1ST APPELLANT

JOSEPH OUMA OMANYO 2ND APPELLANT

AND

JULIANA ORWA ORACHA 1ST RESPONDENT

CAR & GENERAL (TRADING) LIMITED 2ND RESPONDENT

*(An appeal arising out of the Judgement and decree of the Honourable
S.N. Telewa in the Chief Magistrate's Court at Kisumu delivered
on the 29th March 2021 in Kisumu CMCC No. E567 of 2021)*

JUDGMENT

Introduction

1. The appellants herein as well as the 2nd respondent were sued by the 1st respondent for general damages and special damages of Kshs 31,270 following the injuries sustained in a road traffic accident that happened on the 14th September 2021 when the 1st respondent was a pillion passenger aboard motorcycle registration number KMFP 303D being ridden along the Kisumu – Busia road when the said motorcycle was so negligently ridden that it fell causing an accident.
2. The name of the 2nd respondent was struck of the proceedings having proved that it had sold the suit motorcycle to the appellants herein.
3. Consequently, the appellants filed their statement of defence denying the averments by the 1st respondent and prayed that the suit be dismissed with costs.



4. Liability was settled at 80: 20 in favour of the plaintiff/ 1st respondent and the trial magistrate awarded the 1st respondent Kshs 1,800,000 as general damages and Kshs 168,000 for loss of earning capacity as well as Kshs 30,720 for special damages.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 19th April 2023 setting out the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact making the award of general damages in the said judgement that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the 1st respondent.
 2. The learned trial magistrate erred in law and in fact entering judgement for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unsupportable by any authority or precedent.
 3. The learned trial magistrate erred in law and in fact in failing to correctly appreciate the plaintiff's injuries and in misapprehending the same thus arriving at an erroneous award of damages.
 4. The learned trial magistrate erred in law and in fact in awarding damages for future earning capacity at Kshs 168,000 when such damages had neither been pleaded nor proven as required by law.
 5. The learned trial magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general and special damages.
 6. The learned trial magistrate totally ignored and/or paid lip service to the appellant's submissions and authorities therein cited.
 7. The learned trial magistrate erred in law and in fact in awarding general damages under heads not pleaded and/or proved as required by law.
6. The parties filed written submissions to canvass the appeal. However, the submissions by the appellants were not properly uploaded to the efilng system although they were sent to the Judge's email address in word format in full. This court has nonetheless considered the said submissions in this Judgment, wherein the appellant's counsel relied wholly on the submissions made in the lower court proposing that the general damages awarded by the trial court be set aside and substituted with an award of between Kshs 350,000 and Kshs 600,000.
7. The appellant's counsel relied on the following cases, arguing that the award by the trial court was manifestly exorbitant and not commensurate with the injuries sustained by the 1st respondent.
 1. *Gerald Odera Omollo v Rose Anyango Rayola* [2022] eKLR Migori HCCA No 25 of 2019. The Respondent suffered a fracture of the right femur, contusion on the pelvis, blunt trauma to the chest and laceration of the left leg. The respondent was likely to develop chronic osteoarthritis due to the instability and the limping gait. The doctor opined that she needed physiotherapy follow up for a long time and analgesics. The High Court upheld an award of general damages at Kshs 600,000/- in March 2022.
 2. *Sylvester Onyango Lire v Isack Ouma Shikuku* [2022] eKLR Siaya HCCA No E031 of 2021. The Respondent suffered a fracture to midshaft left femur, fracture pelvis, laceration on the right inguinal region and laceration of the scrotum 34. The respondent had healed with no



permanent disabilities. The High Court set aside the trial court's award of Kshs 850,000/- in general damages and substituted it with an award of Kshs 650,000/- general damages in March 2022.

3. *Koyi v Obanga & 2 others* (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment) Neutral citation: [2022] KEHC 9772 (KLR). The injuries sustained by the Appellant were a displaced fracture of the left tibia, fracture of the left femur, laceration of the left leg and soft tissue injuries on the chest. The Appellant had suffered a 40% permanent disability. The High Court upheld an award of Kshs 400,000/= general damages in July 2022.
4. *Parvat Builders v Makau* (Appeal 81 of 2022) [2023] KEELRC 575 (KLR) (8 March 2023) (Judgment) The respondent had sustained fractured left femur – upper 1/3 and a swollen tender and deformed left thigh. The ELRC Court set aside the trial court's award of Kshs 1,400,000/- in general damages and substituted it with an award of Kshs 600,000/- general damages in March 2023.
5. *Said & another v Kamau* (Civil Appeal 108 of 2014) [2023] KEHC 20045 (KLR) (29 June 2023) (Judgment) the Respondent sustained injuries on the forehead, lacerations on both forearms and fracture to the right femur bone. At the time of the examination, he had 2 scars on the forehead, left forearm and on the right thigh. The examining doctor concluded that the Respondent would be predisposed to arthritis. The High Court affirmed an award for general damages for pain and suffering at Kshs 600,000/- in June 2023.

The 1st Respondent's Submissions

6. The 1st respondent submitted that in spite of their submissions before the Trial Court, the appellants had proposed a new award of Kshs 600,000 as just compensation under this head whereas at the Trial Court they had proposed a sum of Kshs 400,000 and that this demonstrated that their earlier proposals were either outdated or irrelevant and/or unreasonable given the circumstances of this particular case.
7. It was submitted that the authorities relied on by the appellants did not capture the specific circumstances of this specific case but rather that in making the award for general damages for pain, suffering and loss of amenities, the court has to consider the degree of pain and suffering as was held in the case of *Ziro Chimba Ziro v Jarson Wario Elema & another* [2015] eKLR.
8. The 1st respondent reiterated that the award by the trial court was just and relied on the following cases;
 - i. *Duncan Mwangi Kioria v Valley Bakery Limited & 2 others* [2016] eKLR where an award of Kshs 1,500,000 was accorded to a plaintiff who suffered similar injuries and the same degree of disability of 15% without the multiple soft tissue injuries and the award was accorded in the year 2016.
 - ii. *Haco Industries (K) Limited v Tabitha Njoki Njeru* [2021] eKLR where the Plaintiff suffered similar injuries with an apportionment of 15% permanent disability. The Plaintiff was awarded 1 million after an appeal on quantum of general damages.
 - iii. *Catholic Diocese of Kisumu v Tete* [2004] eKLR where the plaintiff suffered similar injuries and was accorded an award of 1.3 million, an award that was upheld by the Court of appeal.

Analysis and Determination

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA



- 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga & another* (1988) KLR 348).
10. I have carefully and keenly read and understood the proceedings, the judgement appealed against as well as the Record of Appeal, the grounds thereof and the parties' submissions. The parties apportioned liability by consent in the ratio of 80:20 in favour of the 1st respondent against the appellants and as such the only issue for determination is whether the trial court erred in its award of the general damages.
 11. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of *Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another* (1982-88) I KAR 777:

“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor 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 wholly erroneous estimate of the damages.”
 12. According to the record, the respondent pleaded and testified that the plaintiff sustained the following injuries;
 - i. Spiral fracture of midshaft femur
 - ii. Deep cut wounds on the left leg
 - iii. Both Knees swollen
 - iv. Chest pain
 - v. Back pain
 - vi. Pain on the pelvic region
 - vii. Multiple bruises on the left leg
 13. PW2 Philip Kilimo, a clinical officer at Kisumu County Hospital corroborated the nature of injuries sustained by the 1st respondent. It was her testimony that the 1st respondent sustained soft tissue injuries and a fracture of the leg and further that the 1st respondent's leg was at a tag of 20 degrees whereas it ought to be at 100 degrees and further that the 1st respondent was awarded 15% permanent disability. It was her testimony in cross-examination that she examined the 1st respondent 54 days after the accident and that she relied on the discharge summary and notes from JOOTRH. PW2 produced the P3 form as PEX3.
 14. The burden of proof lies with he who alleges. This is the stipulation in Sections 107-109 of the *Evidence Act*. The appellants closed their case without calling any witnesses or producing any documents.
 15. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)*



Kisumu HCCC No 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

16. The fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not. (See Kirugi and another v Kabiya and others [1983] eKLR).

17. The 1st respondent despite the absence of evidence from the appellant was obligated to prove its case on a balance of probabilities.
18. It is my finding that the 1st respondent proved her case on a balance of probabilities that she sustained injuries involving a fracture of the mid shaft femur, soft tissue injuries to the legs, chest back and pelvis and further that these injuries led her to sustain a disability assessed at 15%.
19. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No 147 of 2002 [2004] eKLR where the Court of Appeal held:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

General Damages

20. The appellants impugned the trial court’s award of Kshs 1,800,000 as general damages on the grounds that the same was inordinately high and was not based on comparable awards and suggested that this court award the 1st respondent Kshs 600,000. This was far from their proposal in the trial court where they urged the court to grant the 1st respondent Kshs 400,000 as general damages.
21. On her part, the 1st respondent urged this court to uphold the trial court’s award of general damages and noted that the disparity in the appellants’ award demonstrated that the appellants had relied on irrelevant cases.
22. General damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff – see Halsbury’s Laws of England 4th Ed. Reissue Vol 12(1) at page 348, paragraph 883.



23. The sentiments of the English court in *Lim Poh Choo v Health Authority* (1978) 1 ALLER 332 were echoed by Potter JA in *Tayab v Kinany* (1983) KLR14, quoting dicta by *Lord Morris Borth-y-Gest in West (H) v Sheperd* (1964) AC 326, at page 345 as follows:
- “But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (emphasis added)
24. I have considered the injuries sustained by the 1st respondent. As earlier herein stated, the 1st respondent sustained a fracture of the femur as well as soft tissue injuries to the back, leg, chest and legs.
25. In the case of in *Christine Mwingina Akonya v Samuel Kairu Chege* Kiambu HCCC No 12/2016, Ngugi J. awarded the Plaintiff Kshs 4,000,000 as general damages for pain, suffering and loss of amenities. The Plaintiff sustained Fracture of the right femur, fracture of the ribs 3-6, pain in the right side of the chest and the right thigh and persistent pain in the right knee leading to surgery for metal implants removal and knee replacements. I acknowledge that the injuries detailed in the case above were more serious than those sustained by the 1st respondent.
26. In the case of Catholic Diocese of Kisumu supra relied on by the 1st respondent, the Court of Appeal upheld the award of Kshs 1,300,000 as general damages where the plaintiff sustained injuries to Head injury –moderate to severe conclusion, 2. Fractures of both superior and inferior rami with associated dislocation of the left hip joint, Comminuted fracture mid-shaft of the left femur, Contusion to the left knee, Deep cut wound to the left foot 8cm 1.5 cm, cut wound on the scalp –17cm and Soft tissue injuries to the chest. Further, the plaintiff suffered permanent physical disability to the extent of 45%. In my view these were more severe injuries than those sustained by the 1st respondent.
27. However, in the case of *Tom Obita Ndago & another v Alfonse Omondi Otieno* [2015] eKLR the award of Kshs 800,000 was affirmed on Appeal in respect of the Plaintiff who sustained fracture of the left femur which resulted in shortened left leg.
28. In *Board of Management St Paul Thomas Academy & another v Mwangi* (Civil Appeal 33 of 2022) [2024] KEHC 3118 (KLR) (3 April 2024) (Judgment) where the respondent sustained a fracture of the left femur and bruises on the left upper limb with degree of disability assessed at 5%, the appellate court reduced an award of general damages from Kshs 1,000,000 to Kshs 700,000.
29. Taking into consideration all the above, the authorities cited by both counsel and bearing in mind that this court ought to make awards which are reasonable and in tandem with precedent, the court is inclined to set aside the award granted by the trial court as I find the same to be inordinately high and substitute it with an award of Kshs 850,000.

Damages for Future Earnings

30. The appellants impugned the trial court’s award for future earnings on the grounds that the same was neither pleaded nor proven as required by law.
31. The 1st respondent pleaded and testified that she was a grocery vendor earning Kshs 6,000 per month and that since the accident, she was unable to continue with the business.



32. The trial court noted that although the 1st respondent had told court that she used to earn Kshs 6,000 per month and that she used to sell vegetables, it noted that she did not produce documentary proof of the same. The trial court went on to note that the claim fell under general damages and there was no need to have it specifically pleaded and thus went on to award the 1st respondent Kshs 168,000.
33. In the case of *SJ v Francesco Di Nello & another* [2015] eKLR where the principles of loss of income were explained thus:
- “claims under this head of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award of general damages once proved....”
34. While discussing the assessment of damages for diminished earning capacity, the court in the case of *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR 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”. According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors....” (Emphasis, my own)
35. In the instant case, the 1st respondent pleaded for loss of future earnings and not loss of future earning capacity. She stated that she was running a grocery business earning Kshs 6,000 per month. She however did not produce any evidence of the said business that she carried out nor evidence of making the amount claimed. Not even a trading license was produced as an exhibit.
36. I reiterate that Loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages, whereas loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability. See *Cecilia W. Mwangi and another v Ruth W. Mwangi* NYR CA Civil Appeal No 251 of 1996 [1997] eKLR.



37. In *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal restated that:
- “Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”
38. In the absence of evidence that the 1st Respondent lost income during this period or any period after the accident occurred, this court is of the view that the 1st Respondent never lost any income as a result of the accident and thus the award of Kshs 168,000 by the trial court was not supported and must be set aside.
39. The special damages were not contested and thus the same remain the same.
40. The upshot of the above is that the trial court’s judgement rendered on the 29th March 2023 is hereby set aside and substituted with the following awards:
- i. General damages – Kshs 850,000 less 20% contribution plus interest at court rates from date of judgment in the lower court until payment in full.
 - ii. Loss of future earnings: Nil
 - iii. Special damages – Kshs 30,720 plus interest at court rates from the date of filing suit in the lower court until payment in full
- Total damagesKshs 710,720
41. Each party to bear their own costs of the appeal.
42. This file is closed and the lower court file to be resubmitted forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY of APRIL, 2024

R.E. ABURILI

JUDGE

