



Registered Trustees of Kids Alive Kenya Trust & another v Manganga (Civil Appeal E224 of 2022) [2024] KEHC 4659 (KLR) (Civ) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4659 (KLR)

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

CIVIL

CIVIL APPEAL E224 OF 2022

WM MUSYOKA, J

MAY 6, 2024

BETWEEN

**REGISTERED TRUSTEES OF KIDS ALIVE KENYA TRUST 1ST APPELLANT
BENSON WOKABI WANJIRA 2ND APPELLANT**

AND

EZEKIEL ROBI DAVID MANGANGA RESPONDENT

(An appeal arising from the judgement of Hon. DW Mburu, Senior Principal Magistrate, SPM, delivered on 2nd July 2021, in Milimani CMCCC No. E4039 of 2020)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellants, for compensation, arising from a road traffic accident, which allegedly happened on 16th June 2019, along Narok-Mai Mahiu Road, involving the respondent and 2 vehicles. One of the vehicles, registration mark and number KCF 587R, belonged to or was controlled by the appellants, while the issue of the ownership of the other, registration mark and number KBB 136Z was not pleaded, as the owner or owners were not made party to the suit. The 2 vehicles allegedly collided, and the respondent was seriously injured in that event, and attributed negligence on the appellants, or their agents or servants. The appellants filed a defence, in which they denied liability, and attributed negligence on the respondent, who, it turned out, was also the alleged driver of the other vehicle, KBB 136Z.
2. Liability was resolved by consent, recorded on 9th November 2020, at 85:15 in favour of the respondent. Quantum was canvassed by way of written submissions. In the end, judgement on quantum was delivered, on 2nd July 2021. Damages were awarded at Kshs 3,000,000.00, for pain and suffering; Kshs 2,000,000.00 for loss of earning capacity; Kshs 300,000.00 for future medical expenses; and Kshs



- 8,550.00, for special damages. The total was Kshs 5,308,550.00, and, when the 15% contribution was taken into account, the final figure came to Kshs 4,512,267.50
3. The appellants were aggrieved, as to the compensation awarded, hence the instant appeal. The grounds, in the memorandum of appeal, dated 11th February 2022, revolve around the trial court erring in awarding general damages at Kshs 3,000,000.00, Kshs 300,000.00 for future medical expenses and Kshs 2,000,000.00 for loss of future earning capacity; ignoring the applicable principles and the authorities and submissions presented by the appellants; awarding damages that were inordinately high and excessive; and awarding damages that were excessive in the circumstances.
 4. Directions were given on 20th December 2023, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
 5. The appellants have submitted only on quantum, liability having been settled by consent. They point out that the injuries sustained by the respondent had largely healed, and that the degree of permanent disability was relatively low, at 17%. It is submitted that for pain and suffering, the court should have awarded a figure between Kshs 400,000.00 and Kshs 1,000,000.00, and several authorities are cited to support that contention, including *Michael Maina Gitonga v Serah Njuguna* [2012] eKLR (Ouko, J), *John Kibicho Thirima v Emmanuel Parsimei Mkoitiko* [2017] eKLR (Aburili, J), *Peace Kemuma Nyang'era v Michael Thuo and another* [2014] eKLR (Aburili, J), *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* [2012] eKLR (Mwongo, J), *Peter Gakere Ndiangui v, Sarah Wangari Maina* [2021] eKLR (Sergon, J) and *George Raini Atungu v Jared Ogwoka Ondari* [2021] eKLR (Ougo, J). On future medical expenses, it is submitted that there was no basis for the award of Kshs 300,000.00, for the expense recommended by Mr. Wokabi was Kshs 100,000.00. It is submitted that the proposals by Dr. Okere, of Kshs 300,000.00, for that expense, was not supported by any reasons. On loss of future earning capacity, it is submitted that there was no evidence that the respondent had lost his employment on account of the accident. *Kenya Power & Lighting Company Limited v Margaret Wanjiku Njunge* [2019] eKLR (Cherere, J) and *SO (minor suing through her next friend, JAM) v Kenya Power & Lighting Company Limited* [2021] eKLR (Kiarie, J) are cited.
 6. In his written submissions, the respondent largely supports the judgement of the trial court, on quantum. He relies on *Cheruiyot v Korir* [2021] KECA 222 (KLR)(W. Karanja, Makhandia & Kantai, JJA), *Rukia Mugoyia v Johnson Juma Ogutu & another* [2007] eKLR (Osiemo, J), *Samuel Ochieng Muga v Transmara Sugar Company* [2018] eKLR (M. Onyango, J), *Mumias Sugar Company Limited v Henry Khatolwa Amutoya* [2015] eKLR (Sitati, J) and *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR (Bosire, O'Kubasu & Githinji, JJA).
 7. On quantum, I note, from the plaint, the medico-legal report by Mr Wokabi, the police P3 form and the treatment notes, that the respondent had suffered very grave injuries. Mr. Wokabi summarised them as major blunt impact injury on the pelvis, fracture of the right acetabulum, fracture of the right iliac bone, fractures of both right public bones, major blunt impact injuries to the chest, multiple fractured ribs, right haemothorax, fracture of the right humerus, fracture of the proximal tip of the right ulna, and extensive muscle damage that affected the kidneys. He assessed permanent disability at 28%. Dr. Okere summarised the injuries into fracture of the right iliac bone, fractures to 5 ribs, right-sided haemothorax, fracture of the midshaft of the right humerus, left olecranon fracture and right anterior hip fracture. He assessed permanent disability at 30%. The respondent was seen for a medico-legal report by a doctor instructed by the appellant, Dr Wambugu, who identified the injuries as fracture right humerus, multi-right-sided fractures with haemothorax, pelvic injuries involving the right pubic and iliac bones, fracture right olecranon, head injury and blunt abdominal trauma. Permanent disability was assessed at 4%. So, the injuries noted by all these doctors were very serious. The authorities cited by the appellant understate these injuries, and are not comparable, for they relate



to lesser largely soft tissue injuries. The respondent has not helped much, in terms of citing more recent decisions on comparable injuries.

8. I have considered the following authorities on comparable injuries. In *Wurano Tosha & another v DMK* [2021] eKLR (Chitembwe, J), the appellant had sustained complex pelvic fractures, a fracture of the left transverse process, a fracture of the coccyx, a fracture of the 4th metatarsal and fractures of the 2nd to 4th ribs, with permanent disability at 22%, and an award of Kshs 2,500,000.00 was made. In *Penina Waithira Kaburu v LP* [2019] eKLR (Ngaah, J), the appellant had sustained multiple fractures of the pelvis, and an award of Kshs 2,000,000.00 was made. The injuries sustained by the respondent were a lot more serious, and the degree of permanent disability was a lot higher. I am persuaded that the award of Kshs 3,000,000.00, made by the trial court, was within the range.
9. The appellant has raised issue with the award of future medical expenses at Kshs 300,000.00. That figure was assessed by Dr. Okere, for removal of implants. Mr. Wokabi proposed the more conservative figure of Kshs 100,000.00, for the same. Dr Wambugu did not address himself to it. The proposals by Mr. Wokabi and Dr. Okere were made in 2020, no doubt based on the value of the local currency then. We are now in 2024. I doubt that the local currency enjoys the strength that it had then. I shall not interfere with the trial court award, based on the opinion of Dr. Okere.
10. There was also the argument about the award of future loss of earning capacity. The prognosis by Mr. Wokabi was that he would achieve maximum rehabilitation within a maximum of 15 months, but with 28% disability. There was no suggestion that he would be unable to resume his duties as a police officer. Dr. Okere did not express himself on that. Dr. Wambugu opined that the fractures had united, the pains would subside with time, and the scars, though permanent, were clinically insignificant.
11. Was there justification for that award, given that there was no proof that the respondent had lost his employment, nor that he was likely to in the future? The trial court cited *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR (Bosire, O’Kubasu & Githinji, JJA), where it was stated that such an award could be made whether or not the claimant was still in employment, to compensate him for the risk of losing employment in the future, given the disability that the injury had exposed him to. In that case, permanent disability was assessed at 10% to 15%. An award, by the trial court, of Kshs 2,016,000.00, was reduced to Kshs 500,000.00 on appeal. The principle, in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR (Bosire, O’Kubasu & Githinji, JJA), was applied correctly by the trial court, but I believe the figure awarded was on the higher side, considering that there was no proof that the respondent had lost his employment, or was likely to. A more conservative amount should have been considered, to cushion him in future in that eventuality. Kshs 600,000.00, should have sufficed. See also *Kaluworks Limited v Nicholus Ngome Kombo* [2020] eKLR (Nyakundi, J), *Dickson Chomba Muriuki & another v Stanley Gikunda aka Mukindia* [2021] eKLR (Ong’udi, J) and *JM (A minor suing through the father and the next friend CMK) v Githuya Transporters (K) Ltd* [2022] eKLR (Limo, J).
12. In view of the above, the award of Kshs 2,000,000.00, for loss of future earning, is hereby set aside, and is substituted with an award of Kshs 600,000.00, which shall be subjected to contribution. The appeal succeeds to that limited extent. There shall be no order on costs. The appeal herein is disposed of in those terms. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6TH DAY OF MAY 2024.

WM MUSYOKA

JUDGE



Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Keiro, instructed by Kamotho Njomo & Company, Advocates for the appellant.

Mr. Musyoki, instructed by The Musyoki Junior, Advocates for the respondent.

