



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Joho v Mohmed (Civil Appeal E108 of 2022)
[2024] KEHC 7739 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E108 OF 2022**

**M THANDE, J
JUNE 21, 2024**

BETWEEN

YUSUF ABUBAKAR ALI JOHO APPELLANT

AND

OMAR NGARI MOHMED RESPONDENT

*(An Appeal from the Judgment of Hon. D. Sitati Resident
Magistrate delivered on 17.10.22 in Kilifi SPMCC No. E118 of 2020)*

JUDGMENT

1. The Appellant challenges the decision of trial court in respect of a suit instituted by the Respondent against him claiming both general and special damages arising from a road traffic accident. In his plaint dated 30.11.2020, the Respondent averred that he was travelling along the Mombasa Kilifi Road near the bamburi Cement area as a fare paying passenger in motor vehicle registration number KCC 952W, which collided with motor vehicle registration number KG 5100 BQ 549T driven by the Appellant.
2. Following a hearing, the trial Magistrate entered judgment in favour of the Respondent against the Appellant as follows:
 - a. Liability 100%
 - b. General damages for pain and suffering Kshs. 950,000/=
 - c. General damages for loss of earning capacity Kshs. 350,000/=
 - d. Future medical costs Kshs. 659,500/=
 - e. Special damages Kshs. 3,200/=Total Kshs. 1,962,700/=



- f. Costs of the suit and interest.
3. The Appellant is aggrieved by the award on quantum of damages, preferred the Appeal herein. The summarized grounds of appeal are that the trial Magistrate erred in fact and in law in:
1. Assessing damages that were manifestly excessive and incomparable with current judicial awards for analogous injuries.
 2. Completely misapprehending the principles governing assessment of damages, thereby arriving at an erroneous decision with regard to general damages.
 3. Failing to take into account relevant factors in evaluating the evidence on record on quantum.
 4. Failing to exercise discretion judiciously in awarding damages.
 5. Acting on the wrong principles of law leading to general damages that were inordinately high that represented an erroneous estimate.
4. The Appellants prayed that the impugned judgment be reviewed and/or set aside to the extent of the finding on quantum. The Appellant also prayed for costs.
5. I have re-examined the entire record and given due consideration to the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 by Sir Clement De Lestang v P. as follows:
- An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 E.A.C.A. 270).
6. In the 5 grounds of appeal raised, the only issue to be determined are whether the learned Magistrate erred on quantum.
7. The record shows that the injuries suffered by the Respondent as enumerated in the medical report by Dr. Darius W. Kiema dated 29.9.2020 are fracture of the proximal right femur with displacement; bilateral segmental and comminuted tibial fractures with distal fibula fractures; post traumatic arthritis and stiffness of both ankles, both knees and right hip joint; post traumatic shortening of right lower limb and cut/laceration wound in the nasal bridge and right big toe. The doctor assessed the Respondent's partial permanent disability at 60%. The Respondent produced a medical report dated 6.10.21 in which Dr. Salim K. Noorani assessed the Respondent's partial disability at 20%.
8. It is the Appellant's case that the award of damages is excessive given the nature of the injuries sustained by the Respondent. Under general damages for pain and suffering, the Appellant submitted that he had proposed an award of Kshs. 700,000/= in the trial court. He argued that having relied on the case of *James Okongo v Elmat Sagwe Ogega* [2021] eKLR, where an award of Kshs. 900,000/= was made



on 27.5.21, there was no justification for the trial court to increase the award to Kshs. 950,000/= in the less than 1 year. On his part, the Respondent submitted that the amount awarded was not exaggerated or excessive but fair under the circumstances. It was within the boundaries of awards for similar injuries and should not be disturbed.

9. In arriving at the said amount, the trial Magistrate noted that Kshs. 900,000/= had been awarded in the cited case of James Okongo for comparable injuries. She however took into consideration the effect of inflation from 2021 and awarded Kshs. 950,000/=. The impugned judgment was delivered on 17.10.22. This is over 1 year later. In the premises, I find the same to be reasonable.
10. On the head of general damages for loss of earning capacity, the Appellant faulted the trial Magistrate for awarding the sum of Kshs. 350,000/= without factual or legal basis or demonstration as to how the figure was arrived at. It was submitted that the Respondent had told the trial court that his work involved watering trees but that he had no proof of the income earned prior to the accident.
11. In the case of James Mukatui Mavia v M. A. Bayusuf & Sons Limited [2013] eKLR, the Court of Appeal stated:

The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065).

12. For the Respondent, it was submitted that as a result of the injuries sustained by the Respondent and the level of incapacity/disability suffered, the Respondent is no longer able to effectively undertake his work as caretaker. As such, he is entitled to an award for diminished incapacity.
13. Loss of earning capacity occurs where as a result of injury, a person's chances in the future of any work in the labour market or work that is as well paid as before the accident, are lessened by his injury (see Butler v Butler [1984] KLR 225).
14. I have looked at the record and agree with the Appellant that no evidence was placed before the trial court regarding the amount the Respondent earned for the work he did prior to the accident. It is now settled that an award for compensation under this head may be made whether or not a party was employed at the time of the accident. In the case of in Mumias Sugar Company Limited . Francis Wanalo [2007] eKLR cited in John Kipkemboi & Another v Morris Kedolo [2019] eKLR the Court of Appeal stated:

The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing



the loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of the disability.

15. In her decision, the trial Magistrate stated that from the Appellant's evidence, she was satisfied that his claim that he was no longer able to carry heavy objects or do the heavy duties of watering trees was sufficiently proved. Considering that there was shortening of the Appellant's leg as confirmed by both doctors and being guided by Dr. Noorani's report as an orthopedic surgeon, which assessed the disability at 20%, the trial court awarded Kshs. 350,000/=.

16. The award of damages is discretionary and an appellate court should be slow in interfering with a trial court's exercise of discretion in this regard. In the case of Butt v Khan [1981] KLR 349 Law, J.A stated as follows:

An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

18. I have considered the nature of the injuries sustained by the Respondent including the fact that as a result of the same, he will walk with a limp due to the shortened leg. I do not find the amount awarded to be inordinately high, neither do I find that the learned Magistrate proceeded on wrong principles. I am also satisfied that she did fully understand the evidence before her as she arrived at the award. In light of this, I find no reason to disturb the award.

19. The Court is also guided by the decision in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia[1982 –88] 1 KAR 727 at p. 730 where Kneller J.A. said:-

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 that 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 a wholly erroneous estimate of the damage.

20. No submissions were made by the Appellant on the other awards.

21. In light of the foregoing, my view is that the sums awarded are reasonable and are adequate to compensate for the injuries suffered by the Respondent. Accordingly, I find no reason to interfere with the same. The upshot is that the Appeal is devoid of merit and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIA MS TEAMS THIS 21ST DAY OF JUNE 2024

.....

M. THANDE

JUDGE

