



REPUBLIC OF KENYA



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**Ounda v Wilberforce (Civil Appeal E016 & E018 of 2023  
(Consolidated)) [2024] KEHC 7451 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7451 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E016 & E018 OF 2023 (CONSOLIDATED)**

**RL KORIR, J**

**JUNE 19, 2024**

**BETWEEN**

**ELIZABETH AKINYI OUNDA ..... APPELLANT**

**AND**

**ABUBAKAR WILBERFORCE ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Principal Magistrate, Omwange J.  
at the Principal Magistrate's Court at Sotik, Civil Suit Number E74 of 2021)*

**JUDGMENT**

1. The Appellant (then Plaintiff) sued the Respondent (then Defendant) for General and Special Damages that arose from a road traffic accident involving Motor Vehicle Registration Number KAJ 825D in which she was a passenger.
2. The trial court conducted a hearing where the Appellant (then Plaintiff) testified in person. The parties recorded a consent on liability on 30th August 2022 in the ratio of 80:20 in favour of the Appellant. Both parties then closed their respective cases.
3. In its Judgment delivered on 17th March 2023, the trial court awarded a total of Kshs 2,688,504/= as General and Special Damages to the Appellant (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, the Appellant filed her Memorandum of Appeal dated 3rd April 2023 and relied on the following grounds:-
  - i. That the learned trial Magistrate erred in law and in fact in declining and/or omitting to award the Appellant damages for loss of future earnings despite the Appellant pleading and producing evidence in support of such an award.



- ii. That the learned trial Magistrate erred in law and fact by disregarding the Appellant's evidence and submissions and thereby not finding that the Appellant deserved to be paid loss of future earnings.

### **Cross Appeal**

5. The Respondent (Abubakar Wilberforce) was also aggrieved with the Judgment of the trial court on quantum and filed his Memorandum of Appeal dated 13th April 2023 and relied on the following grounds:-
  - i. That the learned trial Magistrate erred in law and fact in using the wrong principle in the assessment of damages thereby arriving at an erroneous decision.
  - ii. That the learned trial Magistrate erred in law and fact by misdirecting himself in his assessment of damages awardable to the Respondent which was manifestly high.
  - iii. That the learned trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant.
  - iv. That the learned trial Magistrate erred in law and fact by failing to consider the submissions by the Appellant.
6. The court by consent of the parties consolidated the two appeals for hearing on 21<sup>st</sup> September, 2023 with appeal No. E016 of 2023 being the main appeal and appeal No. E018 of 2023 being the cross-appeal.
7. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.

### **The Plaintiff's/Appellant's case.**

8. Through her Amended Plaintiff dated 17th August 2021, the Appellant stated that on 4th November 2012 while aboard Motor Vehicle Registration Number KAJ 825D, the said motor vehicle was involved in a road traffic accident and as a result, she suffered serious injuries.
9. It was the Appellant's case that the Respondent was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4 of the Plaintiff.
10. That as a result of the accident the Appellant suffered the following injuries:-
  - i. Neck femur fracture.
  - ii. Odontoid fracture (dens type 3).
  - iii. Spinal cord injury.
  - iv. Central cord syndrome.
  - v. Pelvic injury.
  - vi. Recto-vaginal fistula.
  - vii. Head injury.
  - viii. Degloving injury of the occipital region of the head.



11. The Appellant prayed for special and general Damages, loss of future earnings and future medical expenses against the Respondent.

#### **The Respondent's/Defendant's Case.**

12. Through his Statement of Defence dated 16th September 2021, the Respondent denied the occurrence of the accident on 4th November 2012 and further denied that that it was the registered or beneficial owner or driver of Motor Vehicle Registration Number KAJ 825D. The Respondent also denied being negligent in the causing the road traffic accident.
13. It was the Respondent's case that if the accident occurred then it was caused by the Appellant's negligence. The particulars of negligence were contained in paragraph 5 of the Defence.
14. The Respondent denied that the Appellant was aged 25 years of age and that she worked as a casual labourer at JKIA earning Kshs 800/= per day. That the Appellant was not entitled to an award on future earnings.
15. On 21st September 2023, this court directed that the Appeal and the Cross Appeal be heard by way of written submissions.

#### **The Appellant's Submissions. (Elizabeth Akinyi Ounda)**

16. In her submissions dated 29th September 2023, the Appellant submitted that the award by the trial court on general damages was not inordinately high and ought to be upheld. That the award was in tandem with the injuries suffered. It was her further submission that the Respondent did not produce any document to rebut her testimony and evidence in court. That the trial court applied the correct principles and took into account all the relevant factors when it assessed the general damages. She relied on *Simon Taveta vs Mercy Mutitu (2014) eKLR*.
17. It was the Appellant's submission that the trial court ought to have awarded her loss of future earnings. That she pleaded the same in her Amended Plaintiff where she stated that she earned Kshs 800/= daily, a fact which was uncontroverted.
18. The Appellant submitted that documentation was not the only way courts could use to prove income. She relied on Section 2 of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 and *John Kipkemoi & another vs Morris Kedolo (2019) eKLR*. That courts are ordinarily mandated to use documentary evidence to prove income but in the absence of documentary evidence, courts use the minimum wage regulation. She relied on *Crown Bus Services Ltd & 2 others vs Jamilla Nyongesa & Aminda Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) (2021) eKLR* and *Jacob Ayiga Maruja & another vs Simeon Abayo Civil Appeal No. 167 of 2002*.
19. The Appellant proposed that if the court adopted the Regulation of Wages (General Amendment) Order, 2012, then the award on future earnings be Kshs 2,730,000/= or if it adopted her submissions in the lower court then the award be Kshs 4,032,000/=.
20. It was the Appellant's submission that the failure by the trial court to award her loss of future earnings was prejudicial as she had specifically pleaded it and provided sufficient evidence to that effect.
21. In his submissions dated 15<sup>th</sup> January, 2024, the Respondent submitted that the award given by the trial court was exorbitant and failed to take into account prevailing comparable awards. That the trial court did not consider his authorities which dealt with comparable injuries as follows:-*Kennedy Ouko Ouma Dachi Vs Joseph Maina Kamau and Another (2018)* where the court awarded kshs. 1,400,000 as general damages.*Fredrick Cleaning services and Another Vs Daniel Meshack Shikanga (2017)eKLR*



where the appellant had an amputation with 50% disability and was awarded kshs. 1,500,000 as general damages.

22. The Respondent further submitted that the Appellant did not suffer fracture of the femur nor recto-vaginal fistula and therefore never underwent gynaecological surgery.
23. On special damages, the Respondent submitted that the same ought to be specifically pleaded and proved and that the trial court correctly awarded kshs. 10,630/- which was proven.
24. The Respondent urged the court to allow the appeal with costs. It relied on Sukaru Industries Limited Lense Awuor Nyagumba and Another (2019)eKLR.
25. I have perused and considered the Record of Appeal dated 9th May 2023, the Cross Appeal dated 13th April 2023 and the Appellant's written submissions dated 9th September 2023 and the Respondents written submissions dated 15th January 2024. The two issues that arise for my determination are as follows:-
  - i. Whether the general and special damages awarded were inordinately high
  - ii. Whether the trial court ought to have awarded the Appellant the loss of future earnings.

**i. Whether the general and special damages awarded were inordinately high**

26. The trial court awarded the Appellant Kshs 2,800,000/= as general damages.
27. As per the Amended Complaint, the Appellant suffered the following injuries: -
  - i. Neck femur fracture.
  - ii. Odontoid fracture (dens type 3).
  - iii. Spinal cord injury.
  - iv. Central cord syndrome.
  - v. Pelvic injury.
  - vi. Recto-vaginal fistula.
  - vii. Head injury.
  - viii. Degloving injury of the occipital region of the head.
28. In proving the said injuries, a bundle of treatment notes and Medical Report by Dr. Morebu Peter Momanyi were produced by consent as P.Exh 10 and P.Exh 11 respectively. The treatment notes and Medical Report confirmed the injuries sustained by the Appellant. The Medical Report stated that the Appellant was unable to walk without support and assessed her permanent disability at 50%. The Report further stated that the Appellant would need Kshs 200,000/= to remove the metal implants on her neck and Kshs 350,000/= for correcting the rectal vaginal fistula. It is salient to note that the nature of the injuries sustained by the Appellant was not disputed.
29. In this Appeal, the Respondent has disputed the injuries sustained by the Appellant. They have made reference to a medical report by one Dr Wambugu PM dated 18<sup>th</sup> August, 2022 which they submit the trial court failed to consider.
30. I have looked at the trial record. In the proceedings of 30<sup>th</sup> August, 2022, parties produced a number of exhibits by consent. Dr Wambugu's medical report was not among the documents produced. On



- 2<sup>nd</sup> September, 2022, the defence closed its case without producing the same report. It is clear to me therefore that the Dr Wambugu's medical report was not produced in evidence and cannot be produced at this appeal stage without following the laid down procedures.
31. For this court to interfere with an award, it must be satisfied that the trial magistrate has misdirected himself in some manner and as a result arrived at a wrong decision, or that it was clear from the case as a whole that the trial magistrate was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice.
32. In the present case, the Appellant submitted on the issue of general damages that the award of Kshs 2,800,000/= was fair considering the nature of injuries she suffered. She implored this court to uphold the award.
33. It is judicial practice that the general approach in awarding damages for injuries is that comparable injuries should as far as possible be compensated by comparable awards. I have found the following cases quite helpful in terms of comparison:-
- i. In *Wurano Tosha & another vs DMK* [2021] eKLR, the Respondent suffered a fracture of the 2nd rib, left sacroiliac distruption, pelvic fracture, perineal laceration and ymphysis (sic!) public diastasis. The High Court reduced the award of Kshs 3,200,000/= to Kshs 2,500,000/=.
  - ii. In *A M M v Sisters of Mercy, Kenya t/a Mater Hospital* (2018) eKLR, the court awarded Kshs 1,000,000/= to the Plaintiff who had suffered a tear of the vaginal wall, rectal vaginal fistula, vaginal stenosis, recurrent urinary tract infections, vaginitis, loss of ability to have normal sex, loss of ability to have normal delivery and loss of pregnancy.
  - iii. In *Peter Mogaka vs Zipporah Gesare Omuya* (2022) eKLR, the court upheld the award of Kshs 3,200,000/= to the Respondent who had suffered a severe head injury thereby losing consciousness and was managed in ICU while in comatose for 3 months, a fracture of the cervical bone C6-7 leading to obstruction of the upper airway tracheotomy, rapture of the oesophagus necessitating tracheotomy, compound fracture of the left tibia/fibula leading to above knee amputation, compound fracture of the left tibia/fibula leading to loss of bone, trauma of the back, multiple disfiguring lacerations on the head and extensive decubitus (ulcers of the pelvic).
34. Granted, there are no authorities with similar injuries as the ones suffered by the Appellant but the aforementioned authorities guided this court as to the range of the appropriate comparable awards. Having considered the authorities above and the nature of the injuries suffered by the Appellant, it is my finding that the Kshs 2,800,000/= awarded as general damages by the trial court was reasonable and I so uphold.
35. With regards to the Special Damages, the Respondent particularized them as follows:-
- Medical Expenses Kshs 152,070/=
  - Police Abstract Kshs 550/=
  - Motor Vehicle Records Kshs 550/=
  - Medical Reports Kshs 13,500/=
36. It is trite law that Special Damages ought to be specifically pleaded and proved. I have looked at the trial court file and found that the Respondent produced receipts for the Medical Report, from Machakos



Imaging Centre and Kenyatta National Hospital all totalling to Kshs 10,630/=. This is the amount that was correctly awarded by the trial court.

**ii. Whether the trial court ought to have awarded the Appellant the loss of future earnings.**

37. The Appellant contended that the trial court erred when it failed to award her the loss of future earnings. It was her case that she specifically pleaded the same in the Amended Plaintiff. The Appellant further stated that documentary evidence was not the only way of determining income and that courts had used the minimum wage route.

38. The Court of Appeal in *SJ vs. Francesco Di Nello & Another* (2015) eKLR held as follows:-

“Claims under the heads 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 in general damages, once proved. This was the position enunciated in *Fairley V John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.” (Emphasis mine)

39. Further, in the case of *Douglas Kalafa Ombeva vs David Ngama* (2013) eKLR, the Court of Appeal held 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”.

40. From the above authorities, there is a distinction between a prayer for loss of future earnings and a prayer for loss of future earning capacity. The former is a special damage that has to be specifically pleaded and proved and the latter is awardable under general damages. I have looked at the Amended Plaintiff dated 17th August 2021 and I have noted that the Appellant/Plaintiff in paragraph 5 of the Amended Plaintiff specifically pleaded for loss of future earning capacity.

41. It is trite that parties are bound by their pleadings. In this case, the Appellant specifically pleaded for loss of earning capacity, which award was granted under the award on general damages. She did not plead for loss of future earnings as stated in her Appeal and her submissions dated 29th September 2023. I find persuasion in *James Sakalpo vs Noor Musimil Malagamis & another* (2022) eKLR where the court held:-

“Although the Appellant gave evidence that would have been fit for a claim of loss of future earnings, his prayer in the Plaintiff is for loss of earning capacity which according to the holding in the authority above is compensated by an award of general damages once proved.....”

42. It is my finding therefore that the trial Magistrate did not err when he failed to give an award under the head of loss of future earnings. The loss of future earning capacity which the Appellant pleaded was already covered under the award on general damages.



43. In the final analysis and having considered the Record of Appeal in its entirety, it is my finding that the trial court arrived at the correct figures when assessing and awarding the general damages, special damages and the future medical expenses and there was no reason for this court to interfere with the same.
44. In the end, the Appeal dated 3rd April 2023 and the Cross Appeal dated 13th April 2023 are dismissed. Each party is to bear their own costs in the Appeal and Cross Appeal while the costs in the original suit remain as awarded by the trial court.
45. This Judgement disposes of Civil Appeal No. E016 and Civil Appeal No. E018 of 2023.  
Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF JUNE, 2024.**

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**R. LAGAT-KORIR**

**JUDGE**

**Judgement delivered in the presence of Ms Koko for the Appellant; Mr Nyachiro for the Respondent and Siele(Court Assistant)**

