



REPUBLIC OF KENYA



**Muinde v Yislam (Civil Appeal E025 of 2023)
[2024] KEHC 8822 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E025 OF 2023**

**RK LIMO, J
JULY 23, 2024**

BETWEEN

STELLA MASAA MUINDE ALIAS STELLA MUINDE APPELLANT

AND

YISLAM SALIM ALIAS SALIM YISLAM RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment of Hon. M.K Mwangi C.M in Mwingi CMCC No. E151 of 2021. The appeal is only on quantum of damages so I will go straight to that only issue in this appeal.
2. The cause of action of the suit filed in the lower court was tort of negligence relating to road traffic accident which occurred on 6th September 2021 along Mwingi – Nairobi road involving Motor Vehicle Registration No. KBE 043E in which Appellant was travelling as a fare paying passenger.
3. The Appellant particularized the injuries sustained in the plaint as follows;
 - a. Amputation of the left upper limb above the elbow joint.
 - b. Degloving injury ion the anterior side of the arm
 - c. Abrasion injury on the forehead 5cm by 4cm
 - d. Loss of consciousness for six hours
 - e. Deep cut wound on the anterior left knee, 2cm by 1 cm.
4. The Appellant also averred that she has present complaints as follows;
 - i. Pain on the left upper limb (at the stump).
 - ii. On and off recurrent headaches.



- iii. Dark scars on the forehead and left knee causing cosmetic embarrassment.
 - iv. Post traumatic stress disorder (PTSD)-acute phobia of travelling by road.
 - v. Permanent incapacity of about 55%.
5. The Appellant sought judgment against the Respondent herein as follows;
- a. Special damages aforesaid of Kshs 85,070/-
 - b. General damages for pain, suffering and loss of amenities
 - c. General damages for reduced/ diminished earning capacity
 - d. Cost of artificial upper limb estimated at Kshs 450,000/-
 - e. Psychiatric treatment at Kshs 40,000/-
 - f. Costs of the suit
 - g. Interest on (a), (b), (c), (d), (e) and (f) above at court rate and
 - h. Any other or further relief that the court may deem just to grant.
6. Upon hearing the parties, the Trial Court entered Judgment on 6th April 2023 in favour of the Appellant in the following terms;
- a. The Respondent was held 100% liable for the accident
 - b. Kshs 800,000/- was awarded as general damages for pain suffering.
 - c. Kshs 200,000/- awarded as damages for diminished earning capacity.
 - d. Kshs 85,000/- being special damages
 - e. Kshs 450,000/- cost of prosthesis
 - f. Kshs 40,000/- awarded for future medical care.
 - g. The Appellant was also awarded costs and interest of the suit.
- Total= Kshs 1,575,070
7. The Appellant dissatisfied filed the appeal on quantum raising the following grounds namely;
- i. That the Learned Magistrate erred in law and in fact in awarding general damages for pain, suffering and loss of amenities of Kshs 800,000/- which is manifestly and inordinately low bearing in mind the injuries sustained by the appellant.
 - ii. That the Learned Magistrate misdirected herself in law and in fact by failing to appreciate the evidence adduced by the appellant that gave rise to an inference that the nature of injuries sustained are serious and grave to attract a higher award.
 - iii. That the Learned Magistrate misdirected herself in law and in fact by awarding general damages for diminished earning capacity of Kshs 200,000/- which is manifestly and inordinately low bearing in mind the extent of incapacitation sustained by the appellant.
 - iv. That the Learned Magistrate erred in law and in fact by failing to consider the appellant's authorities on awards made in relation to similar injuries



- v. That the Learned Magistrate misdirected herself in law and in fact by failing to appreciate that similar injuries should generally attract similar awards and thereby arriving at erroneous awards.
8. The Appellant submits that the assessment of general damages by the trial CMs court was too low. She also takes issue with damages awarded for diminished earning capacity.
9. The Appellant contends that an award of Kshs. 3 Million on General Damages would have been fair in her view. She relies on the following authorities;
- a. *Loise Awour Maseno v Deasons (K) Limited t/a Sun-City Bus Services* [2009] eKLR where the Plaintiff suffered traumatic amputation of the left arm among other injuries and was awarded Kshs 1,500,000/- in general damages and Kshs 1,080,000/- as damages for loss of future earning capacity.
 - b. *Grace Beldina Adhiambo v Bowers Okelo & Anor* [2017] eKLR I have not been successful in getting the judgment on this matter where the injuries sustained are referenced. The appellant herein has annexed a Ruling pertaining to stay of execution and even there, the injuries are not particularized as alleged by the Appellant. In the court's ruling, the court referenced that the Plaintiff was awarded Kshs. 5,733,407/= which is not the same figure indicated by the Appellant herein.
 - c. *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR where the court, Chitembwe J awarded general damages of Kshs 2,200,000/-. The Plaintiff sustained amputation of the left arm below the elbow.
 - d. *Roba Doti Guyo v Jiang Zhongmei Engineering Company* [2015] eKLR the Plaintiff suffered a crushed hand which was amputated. He was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities in 2015.
10. The second issue is on damages awarded for diminished earning capacity. The appellant submits that she sustained permanent incapacity which was assessed at 55% by Dr Munyoki. It is submitted that justification for the award is to compensate the appellant for the risk of disability exposed to her. It is submitted that the appellant testified that the injuries sustained affected her ability to work as she previously worked Kelpat Industries in Thika where she earned Kshs 20,000/- per month but stopped working and that she was relying on her sister for subsistence. It is submitted that the appellant is entitled to a global award of damages for diminished earning capacity at 2,000,000/-. The appellant has cited the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR where the Court held that justification for an award loss of earning capacity when a plaintiff is employed is to compensate them for the risk that the disability has exposed them to. The court also held that the award can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as separate head of damages, as a token, modest or substantial depending on circumstances of each case. The court added that there was no formula for assessing loss of earning capacity.
11. There was no response from the Respondent in this appeal despite service.
12. This court will however, determine this appeal on the merits. The duty of this court is to re-evaluate the evidence tendered and drawn own conclusions.
13. This appeal is only on the question of quantum hence the only issue for determination is whether the trial magistrate made a correct assessment of the damages in relation to the injuries sustained by the Appellant.



14. The general approach or principle in assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards. The Court of Appeal illustrated the principle in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR when it observed as follows;
- “The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions”.
15. A similar position was held in the case of *Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother* J N [2018] eKLR where Majanja J. held as follows;
- “General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002* [2004] eKLR that: ‘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.’”
16. The question of assessment of damages is a question of discretion and the principle applicable on appeal is that an Appellate Court would rarely interfere with an exercise of discretion by a lower court unless it is shown that the trial court applied wrong principles or took into consideration irrelevant factors and failed to consider relevant ones or that the assessment is so extremely low or high as to represent erroneous estimate.
17. The above principle was well stated in the case of *Gitobu Imanyara & 2 Others –v- Attorney General* [2016] eKLR where the court of Appeal stated as follows;
- “...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”
18. The Appellant sustained the following injuries;
- i. Amputation of the left upper limb above the elbow joint.
 - ii. Degloving injury on the anterior side of the arm
 - iii. Abrasion injury on the forehead 5cm by 4cm
 - iv. Loss of consciousness for six hours
 - v. Deep cut wound on the anterior left knee, 2cm by 1 cm.



19. The trial court award General Damages of Kshs. 800,000/= for pain and suffering.
20. Nature of injuries sustained by the Appellant is not in dispute. She suffered traumatic amputation on the left arm five centimeters above the elbow joint and the same were corroborated by a medical report done by Dr. Kennedy Munyoki and dated 22nd November 2021.
21. In the two precedents cited by the appellant of *Roba Doti Guyo v Jiang Zhongmei Engineering Company* [2015] eKLR, the plaintiff suffered a crushed hand which was amputated and was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities. Additionally, in *Umoja Rubber Products Limited v Bobson Rimba Lewa* [2015] eKLR, the plaintiff suffered an amputation of the left hand below the elbow and he was awarded Kshs 2,200,000/= as general damages for his pain and suffering which sum was upheld on appeal. Both cases were determined in 2015
22. In the case of *Simba Platinum Limited v Nicholas Auma Wandera* [2021] eKLR, the plaintiff sustained injury to the left hand with wounds and fractures leading to amputation at the shoulder joint, injury to the left eye with a cut wound, injuries to the leg, chest and back. The High Court on appeal upheld an award of Kshs 2,000,000/= as general damages for pain, suffering and loss of amenities.
23. In the case of *Joyce Moraa Oyaro v Hussein Dairy Ltd.* [2016] eKLR Kshs. 1,300,000/- was awarded in general damages to a 41-year-old woman for loss of her right leg by amputation.
24. This court notes that in the above authorities the claimants suffered fractures apart from amputation of their limbs. The trial court in his instance assessed General Damages at Kshs. 800,000/= which appears to be too low and not comparable to other awards of similar nature in the cases cited above. This court finds that the Appellant deserves a little more under general damages. I find that had the trial court considered authorities with comparable nature of injuries, the award on general damages would have been higher. This court finds that an award of Kshs. 1.7 million would have been fair and I so hold.
25. On diminished earning capacity the Appellant pleaded that she worked at Kelpari Industries and earned Kshs. 20,000/= per month and that she lost her job as a result of the injuries she sustained.
26. The Court of Appeal in the case of *Butler v Butler* [1984] KLR 225 enumerated the following principles to be considered in respect of a claim for loss of earning;
 - i. That a person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury
 - ii. That loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
 - iii. That damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them.
 - iv. That loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and / or at the date of the trial.



- v. That loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and
 - vi. That the factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service if any.
27. Diminished earning capacity refers to decrease in a person's earning capacity due to the disability suffered. It is distinct from cost of earnings which looks at what the person actually lost as a result of the accident. Loss of earning must be specifically pleaded and proved but diminished earning capacity need not be specifically proved. The factors relevant for consideration by court are nature of injury, type of work done by the person to earn a living, degree of incapacity, age and other factors.
28. The Appellant at the trial stated that she used to work at Kelpari Industries in Thika but tendered no evidence to show that she was employed there and used to earn Kshs. 20,000/= per month. She also did not tender evidence to demonstrate that she lost her job because of the injuries she sustained. The only evidence tendered to prove loss of earning capacity or incapacity was the medical report by Dr. Kenedy Musyoki dated 22nd November 2021. The said doctor's prognosis was as follows;
- “The stump wound has healed. The forehead wound has healed leaving behind a dark scar. The left knee would have healed leaving behind a scar. The amputation stump is painful which she describes as moderate pain at the bone level. She experiences prosthetic pain on the left upper limb. She has severe post-traumatic stress disorder (PTSD) which is characterized among other symptoms by acute phobia of traveling by road”.
29. He estimated permanent partial disability at 55% and indicated that the appellant needed an artificial upper limb at an estimated cost of Kshs 450,000/- He also opined that the appellant needed psychiatric treatment as she suffered severe Post Traumatic Stress Disorder (PTSD).
30. In situations where the nature of work or the effect on the injuries on one's earning capacity is not very clear, courts approach when the nature of injuries are clear established is usually a lump sum award.
31. In *Alpharama Ltd v Joseph Kariuki Cebron* [2017] eKLR, the court held a similar position by stating as follows;
- “...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...”

32. The above position indicates that where a person’s loss of diminished earning capacity can be determined on the basis of a salary or determinate income, then a “multiplicand” approach is preferable but where the income is indeterminate, then a lump sum or global award is preferable.
33. In this instance, the Appellant was a 22 years old at the material time and her ability to perform chores requiring both arms is affected significantly. The trial court used correct criteria in adopting a lump sum but the award of Kshs. 200,000/= under this head was too low. This is so in light of the following authorities;
 - a. In the case of *Simba Platinum Limited v Nicholas Auma Wandera* (*supra*), where the plaintiff sustained injury to the left hand with wounds and fractures leading to amputation at the shoulder joint, injury to the left eye with a cut wound, injuries to the leg, chest and back. The High Court on appeal upheld an award of Kshs 1,500,000/= as damages for loss of earning capacity
 - b. *John Kipkemboi & Another v Morris Kedolo* [2019] eKLR where the Respondent suffered amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/= for loss of earning capacity.
34. An award of Kshs. 1.5 million in my considered view is fair and I so find. In the premises this court finds merit and is allowed. The award made by the trial court on General Damages & diminished earning capacity is set aside in it’s the Appellant is awarded as follows;
 - a. General Damages Kshs. 1,500,000/=
 - b. Damages for diminished earning capacity Kshs. 1,500,000/=
 - c. Special damages Kshs. 85,000/=
 - d. Cost of prosthesis Kshs. 450,000/=
 - e. Future medical care Kshs. 40,000/= Total Kshs. 3,575,000/=

The Appellant will have costs and interests of the above amount from the date of Judgment in the lower court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD DAY OF JULY 2024.

HON. JUSTICE R. LIMO

JUDGE

