



Muiruri v Tezo Quarries Limited & 2 others (Civil Appeal 129 of 2023) [2024] KEHC 8762 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 129 OF 2023**

**AC BETT, J
JULY 19, 2024**

BETWEEN

**PHILIS MUTHONI MUIRURI ALIAS PHYLLIS MUTHONI MUIRURI ALIAS
PHYLLIS MUTHONI MUIRURI APPELLANT**

AND

**TEZO QUARRIES LIMITED 1ST RESPONDENT
TEZO QUARRY 2ND RESPONDENT
STANLEY KAGUAMBA KAMANDE 3RD RESPONDENT**

(Being an appeal from the judgement and decree of the learned magistrate, Honorable O.M. Wanyaga (Mr.), SRM delivered on 28th November 2022 in Thika CMCC No. 530 of 2020.)

JUDGMENT

1. The Appellant herein sustained a displaced fracture to the right femur. Both parties agreed that the appellant sustained serious injuries with permanent incapacity. Liability was agreed by consent in the ratio of 85%:15% in favor of the appellant in the lower court.
2. Upon assessment and consideration of the parties' submissions, the Trial Magistrate made an award of ksh.900,000/= being general damages for pain and suffering, plus special damages as prayed. The appellant was dissatisfied with the amount awarded in general damages. She filed an appeal against the decision on the following grounds: -
 1. That the learned magistrate misdirected himself in law and in fact by failing to award general damages for diminished earning capacity.
 2. That the learned magistrate misdirected himself in law and in fact by failing to appreciate the degree and/or standard of proof for a claim on diminished earning capacity.



3. That the learned magistrate erred in law and in fact by failing to consider the totality of the evidence adduced that gave rise to an inference that the appellant's capacity to earn diminished.
4. That the learned magistrate erred in law and in fact by failing to consider the appellant's submissions and authorities on awards made in similar cases."

It is on the above grounds that the appellant urges the court to allow the appeal and make an award for general damages for diminished earning capacity.

3. In *Kemfro Africa Ltd And Another -vs- Lubia And Another*(1982-88) KLR, the Court of Appeal held as follows: -

"In deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge, an appellate court must be satisfied 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.

In assessment of damages the general method of 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."

4. In her evidence in the lower court, the appellant said that she could no longer walk for long after sustaining the fracture to the femur and that one leg has become shorter. She said that she was a business lady prior to the accident although she had no evidence to prove that she used to sell clothes.
5. In support of her claim, the appellant produced two medical reports. Dr. Wokabi, a consultant surgeon assessed the appellant's incapacity at 12%. He reported that the appellant suffered delayed bone union and it would take 2 years for the fracture to be fully united, and for the leg to be rehabilitated maximally albeit with residual incapacity. Dr. Okere reported a significantly higher incapacity of 40% arising from the fracture to the femur.
6. On their part, the respondents produced a medical report from Dr. Muhanda who examined the appellant eleven months after the accident. Dr. Muhanda's report was largely in agreement with the reports of the appellant's doctors save for the degree of incapacity which she assessed at 10%.
7. As the first appellate court, I am cognizant of my duty to subject the whole of the evidence of the trial court to a fresh scrutiny and re-evaluation in order to reach my own independent conclusion bearing in mind the fact that I did not see and hear the witnesses firsthand. See the case of *Selle -vs- Associated Motorboat Company Ltd*[1968] EA 123.
8. It is not in dispute that the appellant suffered a debilitating injury from the road traffic accident that occurred on 22nd January 2020 along Thika-Nairobi Superhighway involving motor vehicle registration number KCH 210Z and KBH 981R. What is in dispute is whether the injuries were so serious as to lead to diminished earning capacity which would warrant an award for general damages under their heading.
9. It is the appellant's advocate's submissions that the injuries sustained by the appellant were so grave as to limit her capacity to earn a living.
10. I have considered the evidence tendered by the appellant vis-à-vis the medical reports that were produced. None of the reports state that the appellant suffered shortening of her leg as a result of the fracture. However, it is clear from the said reports that the appellant was in crutches eleven months after



the accident. According to Dr. Wokabi, the appellant was expected to make optimal recovery in two years. I am inclined to agree with the reports of Dr. Wokabi and Dr. Muhanda and to put the appellant's permanent disability at a minimal 10%. Dr. Okere's assessment of 40% permanent incapacity was off tangent. Bearing in mind that Dr. Okere is a physician and lung specialist, his assessment of disability, which is a huge departure from his two counterpart's assessment is less reliable than their respective assessments of 10% and 12% permanent disability.

11. The trial magistrate held that it was not clear how the appellant's earning capacity was affected by the accident since she never told the court that she used to hawk clothes. He was of the opinion that general damages would be adequate compensation for the appellant in the circumstances.
12. On her part, the appellant had submitted that she was entitled to general damages for diminished earning capacity. Her advocate submitted that the trial magistrate erred in failing to appreciate that the appellant was incapacitated because of the accident and to appreciate that such incapacity would impact negatively on her earning capacity. It was their submissions that the court failed to appreciate the standard of proof for a claim of diminished earning capacity.
13. The respondents opposed the appeal and submitted that the appellant failed to prove that she was selling clothes. It was their submissions that the learned magistrate properly applied the legal principles for award of general damages for earning capacity as enunciated in the case of Milicent Atieno Ochuonyo -vs- Katola Richard[2015]eKLR where the Court of Appeal held:-
 4. Loss of earning capacity can be a claim of its own, as where the 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.
 5. 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 proper to award it under its own heading.
 6. 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."
14. Based on the above authority the respondents urge this court to dismiss the appeal as in their opinion, the trial magistrate properly exercised his discretion in awarding ksh.900,000/= being general damages for pain and suffering and dismissing the claim for diminished earning capacity.
15. In respect to the claim for general damages for diminished earning capacity, this court has to determine whether diminished earning capacity is the same as loss of future earnings. Blacks Law Dictionary, Tenth Edition defines "earning capacity" as: -

"A person's ability or power to earn money given the person's talent, skills, training and experience."
16. Taking into account the ordinary meaning of "diminished" in the context of the appeal, I find that the appellant's claim was in respect of reduced ability to earn by reason of her injury which required her to use crutches for approximately one year with a prognosis that she would fully heal in two years' time.



The appellant relied on the case of S.J. -VS- Fransesco D. Nello And Another[2015]eKLR where the court 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 a diminution in earning capacity. Loss of income as 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.”

17. In *Mumias Sugar Company Limited -vs- Francis Wanalo*[2007]eKLR, the Court of Appeal citing several English decisions held that:-

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

18. The characteristics of an award for loss of earning capacity and the principles on which it is assessed were more comprehensively enunciated in *Moeliker -vs- Rey Rolle And Company Ltd*[1977] 1 WLR 132. In that case Browne LJ said at page 140 paragraph B.

“This head of damages generally only arises where the plaintiff is at the time of the trial in employment, but there is a risk that he may lose his employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well-paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.”

19. Having considered the aforesaid decisions, I find that the appellant’s claim before the lower court for general damages for diminished earning capacity was properly proven. It is a claim for general damages and its proof is on a balance of probabilities. The appellant said that she could not perform numerous and social activities after the accident. It was her evidence that she could not walk for long and so she could not conduct business. Evidence of her incapacity was confirmed by the three doctors who examined her. The respondent’s contention was that although she said she sold clothes, she did not have sufficient evidence in proof of her claim. In his medical report dated 13th August 2020, Dr. Wokabi described the appellant under the title “occupation” as “Business”. The appellant was aged 37 years old at the time of the accident. She must have been engaged in an activity in support of herself. There was nothing produced by the respondent to disprove her claim to be a clothes seller. The trial magistrate did not doubt the appellant’s assertion that she was a clothes seller. It seems he only doubted the claim that she was a hawker. In his judgement, he stated: -

“She testified that she used to sell clothes. In her evidence, she stated that she cannot walk or work for long. She never told the courts that she sued(sic) to hawk clothes. It is thus not clear how the accident will affect her earning capacity. In any event the general damages awarded should be able to compensate the plaintiff for the suffering. The court will thus not award damages under this head.”

20. Upon careful analysis I find that the trial magistrate erred in holding that the appellant had not demonstrated how her injuries would affect her earning capacity. By postulating that the appellant could have only suffered diminished earning capacity if she was a hawker, the trial magistrate



misapprehended the evidence in some material respect. The entirety of appellant's evidence reflected a claimant who sustained serious injuries whereby she was subjected to numerous physiotherapy sessions in pursuit of rehabilitation to her leg. One year down the line, she still had to use crutches. She was forced to hire taxis to carry her for treatment and her evidence was that she could not walk for long so her business suffered as a result. If the trial magistrate had considered the evidence on record, he would have arrived at the inevitable conclusion that the appellant was entitled to general damages for diminished earning capacity.

21. It is trite law that a person whose capacity to earn is diminished by the negligent act of another is entitled to compensation. The appellant has proposed an award of ksh.500,000/=. She relies on the cases of Mariga -vs- Musila[1984] eKLR, Butler -vs-butler[1984]KLR 225 , Mumias Sugar Company Limited -vs- Francis Wanalo[2007]eKLR, and Elizabeth Nyawira Njoka -vs- Benjamin Okinda Siboyi Kerugoya Hcca No. 24 Of2019. I have considered the cited authorities and find the case of Mumias Sugar Company Limited -vs- Francis Wanalo(SUPRA) to be most relevant. The Court of Appeal in awarding a sum of ksh.500,000/= held thus: -

“In the instant case, the loss of earning capacity was claimed of part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3 ½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent incapacity was assessed by 15% by Dr. Juma, and at 10% by Dr. Raburu. Thus, the right hand has lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of the disability he could not do the job for which he was being trained in-mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labor market was not substantial. It was minimal. The Trial judge in assessing the multiplicand of ksh.7,000/= per month took into account that the Appellant was earning ksh.8,300/= per month during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/multiplier basis..... However, it was appropriate in the circumstances of this case to make a fair award for loss of earning capacity. We think that an award of ksh.500,000/= would be adequate compensation for the diminution of respondent's chances of employment in the labor market.”

22. The trial magistrate in dismissing the appellant's prayer for general damages for diminished earning capacity stated that general damages should be able to compensate her for the suffering. He totally overlooked her claim for general damages for diminished earning capacity. In doing so, the trial magistrate erred for it is apparent that he only considered general damages for pain and suffering alone. He ought to have considered the diminished earning capacity in his award. In Butler -vs- Butler[1984] KLR 225 Chesoni,Ag. JA rendered himself thus: -

“Whilst loss of earnings capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading...once it is in principle accepted that the victim of personal injuries who has lost his earnings capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity.”



23. Although the appellant did not furnish the court with evidence of proof of earnings, the court was duty bound to consider her prayer. In *Jacob Ayiga Maruja And Francis Karani -vs- Simeon Obayo*[2005]eKLR, the Court of Appeal held as follows: -

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

24. The appellant’s advocate urged the court to award the appellant ksh.500,000/= for diminished earning capacity. On his part, the respondent’s advocate said that an award of ksh.500,000/= under this head would be punitive as the appellant had been awarded ksh.900,000/= being general damages upon the trial magistrate exercising his discretion. The respondent then invites this court to consider their submissions before the lower court and submitted that for injuries comparable to those sustained by the appellant, courts have been giving awards of between ksh.400,000/= to ksh.650,000/=. More specifically, the respondent relied on the case of *Civicon Limited -vs- Richard Njomo Omwanja And 2 Others*[2019] eKLR. I have read the decision. The circumstances therein are different since the 3rd respondent had healed within three months and was walking with a cane and so the appellate court rightly discounted the doctor’s assessment of 30% incapacity. In any case, the injuries in the *Civicon* case (supra) were different as it was a simple fracture to the right tibia and fibula and no plating was done.

25. In support of its case before the lower court, the appellant had cited the cases of *Peter Karoka -vs- Mbaluka Malonza And Two Others*[2018] eKLR and *Maqsooda Begum Sroya -vs- Sunmatt Limited*[2017] eKLR.

26. I have considered the authorities cited by the parties. I have also considered awards made in other cases where the plaintiffs sustained comparable injuries. In *Pestony Limited And Another -vs- Samuel Itonye Kagoko*[2022] eKLR, C. Meoli Judge reviewed an award of ksh.1,400,000/= to ksh.800,000/= for a single fracture. Similarly, in *Nairobi Civil Appeal No. 774 Of 2022, Jacaranda Bodaboda Operations And Another -vs- Nyasero*[2023] KEHC 23806 (KLR), an award of ksh.750,000/= was made to the appellant who had suffered a fracture to the tibia and permanent disability assessed at 10%. These awards were similar to the award in the *Peter Karokacase*(supra).

27. Considering the totality of the injury sustained by the appellant and its residual effects, I am satisfied that the award of ksh.900,000/= made by the trial court was not so excessive as to persuade the court that the same should also cover the claim for general damages for diminished earning capacity.

28. Turning now to the appeal on the limb of the decision dismissing the appellant’s prayer for general damages for diminished earning capacity, I have carefully considered the parties submissions and the fact that no evidence of income were tendered to the court. I hold that a sum of ksh.300,000/= is adequate in the circumstances.

29. The judgment of the lower court is therefore reviewed so as to include an award of general damages for diminished earning capacity. The final award is as follows: -

- (a) General damages for pain and suffering ksh.900,000/=.
- (b) General damages for diminished earning capacity..... ksh.300,000/=.



- (c) Costs of removal of implant..... ksh.100,000/=.
- (d) Special damages ksh.122,150/=.
- Gross total ksh.1,372,150/=.
- Less 15% contribution ksh.205,882.50/=
- Net ksh.1,166,267.50/=

30. Costs of the suit of the lower court less 15%.

The respondent shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 19TH DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Mutua for the appellant

Mr. Mbirwe for the respondent

Court Assistant: Polycap Mukabwa

