



**Musili v Mwendu alias Daniel Mutisya Mwendu (Civil Appeal
E022 of 2022) [2024] KEHC 8444 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E022 OF 2022**

**RK LIMO, J
JULY 9, 2024**

BETWEEN

RICHARD MUTHENGI MUSILI APPELLANT

AND

DANIEL MWENDE ALIAS DANIEL MUTISYA MWENDE RESPONDENT

JUDGMENT

1. This is an Appeal on quantum only and it arose from the Judgment of Hon. I.G Ruhu, Resident Magistrate delivered on 25th November 2021 vide Mwingi CMCC No. 32 of 2020.
2. The case itself arose from road traffic accident involving Appellant's Motor Vehicle Registration No. KCS 624D and Respondent's Motorcycle Registration No. KMCR 228K.
3. The parties herein by consent apportioned liability in the ratio of 80:20 in favour of the Respondent which was adopted by the trial court on 23rd September 2021 and judgment on quantum was entered in favour of the Respondent on 25th November 2021 as follows;
 - a. Kshs.800,000/- as general damages
 - b. Kshs 250,000/- being damages for loss of earning capacity.
 - c. Kshs 4,929/- being special damagesSub-Total Kshs 1,054,929/-
Less 20% liability
Total Kshs 843,944/-
4. The Appellants being dissatisfied with the trial court's judgment on quantum filed this appeal vide a Memorandum of Appeal dated 17th March 2022 on 6th April 2022 raising the following grounds;



- i. That the trial Magistrate erred in law and in fact by awarding the Respondent manifestly excessive general damages of Kshs 800,000/- that did not correspond with the sustained injuries.
 - ii. That the trial Magistrate erred in law and in fact by making reference to an authority that had multiple fractures with general damages of Kshs 500,000/- awarded before proceeding to award the manifestly excessive general damages of Kshs 800,000/-
 - iii. That the trial Magistrate erred in law and fact by failing to be guided by the doctrine of stare decisis and particularly precedents on relevant or similar injuries when awarding general damages
 - iv. That the trial magistrate erred in law and fact by travelling outside the pleadings and facts of the case to arrive at an erroneously excessive award on general damages.
 - v. That the trial Magistrate erred in law and in fact by failing to be guided by and sufficiently appreciate the appellant's submissions dated 25/10/2021
 - vi. That the trial Magistrate erred in law and fact by making a global award of Kshs 250,000/- on alleged loss of earning capacity when the Respondent did not prove the claim.
 - vii. That the trial magistrate erred in law and fact by awarding loss of earning capacity without any reasoning or backing by precedent.
5. The Appellant has faulted the trial court for relying on the case of Akamba Public Road Services - vs – Abdikadir Adan Galgalo (2016) eKLR which the Appellant feels had injuries not comparable with the Respondent's injuries adding that the injuries in the cited decision had severe injuries of fracture of both tibia and fibula with post arthritis and a 3% degree of incapacity. The Appellant submits that an award of Kshs. 300,000/= could have been fair. He relies on the following authorities:
- a. Rayan Investment Limited vs Jeremiah Mwakulegwa Kasha (2017) eKLR where the high court on appeal set aside an award of 500,000/- for general damages and substituted the same with an award of Kshs 300,000/-. The plaintiff therein sustained the following injuries; a fracture of the upper third of the right fibula, severe blunt trauma on the right wrist, bruises on the posterior aspect of the right elbow and a blunt trauma on the right wrist.
 - b. Daniel Otieno Owino & Anor vs Elizabeth Atieno Owour (2020) eKLR where the high court on appeal set aside an award of Kshs an award of Kshs 600,000/- as general damages and substituted it with that of Kshs 400,000/-. The plaintiff therein sustained the following injuries; Compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt Chest injuries and soft tissue injury on the lower left leg.
 - c. Mbithi Muinde William vs Rose Mutheu Mulatia (2019) eKLR In this matter, the high court on appeal found that an award of general damages of Kshs 700,000/- was for a plaintiff who had sustained a swollen tender-left wrist and left leg, fractured-left 5th metacarpal bone and fractured-right tibia. The court substituted the same with an award of Kshs 400,000/- as general damages for the injuries sustained.
6. The Respondent on the other hand has defended the trial court's assessment of damages. The Respondent submits that damages awarded by the court was justified and not excessive as averred by the appellant and asks the court to uphold the trial court's finding on quantum. On the question of injuries, the Respondent submits that he sustained the following injuries;



- a. Blunt injury to the right lower leg
 - b. Blunt injury to the left knee
 - c. Blunt injury to both elbows
 - d. Blunt injury to the left shoulder
 - e. Blunt injury to the lower back
 - f. Laceration on the upper lip
 - g. Bruise elbow on the right eye and
 - h. Fracture of the right fibula
7. The respondent defends the trial court's decision and submits that the trial court took submissions from both sides into account in its judgment. The respondent further faults the appellant for relying on authorities where accident victims suffered less severe injuries as compared to the injuries he sustained. It is submitted that the appellant has failed to provide a valid reason to justify this court's interference with the trial court's decision.

He relies on the following decisions:

- a. Stephen Wanderi Kamau & Anor vs Gladys Wanjiku Kungu (2006) eKLR where the plaintiff sustained the following injuries; compound fractures of the left fibula and tibia, extensive skin loss from the knee downwards which required skin grafting. Medical reports from two doctors agreed that the plaintiff would not have restored full function of her legs because the fracture had united but led to the left leg being shorter than the right leg. Degree of permanent disability was assessed at 20%. The plaintiff was awarded general damages at Kshs 600,000/-
- b. Ahmed Mohammed vs Abdulhafidh Mohamed Banragah (2004) eKLR In this case the plaintiff sustained a fractured left femur subtrochanteric and comminuted compound fracture left tibia and fibula which was treated by external fixation of tibiofibular and he was put on skeletal traction. He also required skin and bone grafting of the left tibia. He was operated on three times and was admitted in hospital for nine months. He suffered shortening of the left lower limb. Doctors opined that he would experience osteoarthritis of left lower limb joints and he was not able to walk without crutches. The court awarded the plaintiff Kshs 750,000/- in general damages.
- c. Alphonse Muli Nzuki vs Brian Charles Ochuodho (2014) eKLR In this case the plaintiff sustained compound comminuted fracture of right tibia and fibula and a degloving injury medial aspect of right leg and foot. He underwent three operations and was hospitalized for 42 days. The High Court maintained an award of Kshs 800,000/- awarded in general damages.
- d. Joseph Musee Mua vs Julius Mbogo Muigi & 3 Others (2013) eKLR In this case the plaintiff was injured as a result of the accident and was unconscious for about two days. He regained consciousness at Thika District hospital, where he was admitted for more than two months. He was also treated at Kenyatta National hospital and Kjiabe hospital, Kikuyu Mission hospital as well as Mariakani Cottage hospital. He underwent several operations and procedures. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He also suffered chest injury and right shoulder injury as well as bruises on the left elbow. He was awarded of Kshs.1,300,000/= as general damages.



8. The respondent has also defended the award of diminished earning capacity, relying on medical report from his doctor one Dr. Okere who assessed his physical incapacity at 10% as well as the appellant's doctor one Dr Maina Ruga who assessed the respondent's physical incapacity at 5 %. It is submitted that the incapacity has hindered the respondent from operating his business. The respondent has also justified the award of a global figure under this head stating that it is difficult to quantify an award for loss of future earning capacity given future uncertainties at play. In support of this submission, the appellant relies on the case of *Mariga vs Musila* [1984] KLR 257).
9. He further relies on a similar finding on an award for lost years in *Butler vs Butler* (1984) KLR 225 where the court stated as follows;

Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* (1973) 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did... ...what a victim whose earning capacity is diminished through an accident loses is an interest which if not saleable on the labour market, has an assessable value. It is therefore an economic loss of the same class as the 'lost years' for which the wrongdoer should fairly compensate the victim.

10. This appeal is on 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 Respondent. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete* [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages as follows:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

11. Similarly, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR the Court of Appeal restated principles applicable on appeal against quantum of damages 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. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A. that:

‘An appellate court will not disturb an award of damages unless it is so 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.”

12. This is the 1st Appellant court and the mandate of this court was well captured in *Selle – Vs- Associated Motor Boat Co* [1968] EA 123 where the court of appeal observed as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

13. Assessment of damages is a discretionary matter and generally an appellant court would rarely interfere with the exercise of discretion unless it is demonstrated that in assessment of damages the court took into account as irrelevant factor or left out a relevant issue or that the award is so inordinately low or high as to represent erroneous estimate.

14. In this instance the respondent pleaded the following injuries:

- i. Blunt injury to the right lower leg
- ii. Blunt injury to the left knee
- iii. Blunt injury to both elbows
- iv. Blunt injury to the left shoulder
- v. Blunt injury to the lower back
- vi. Laceration on the upper lip
- vii. Bruise below the right eye
- viii. Fracture of the right fibula
- ix. Permanent incapacity of about 10%

15. On 23rd September 2021, parties entered into a consent where they consented on first, the question of liability which was entered at 80:20 in favour of the respondent. Secondly, parties consented on adoption of their documents, the respondent’s list and bundle were marked as exhibit 1 to 10 while the second medical report by Doctor Maina Ruga dated 11th June 2021 was tendered as D-exhibit 1.

16. In the medical report by Dr Cyprianus Okoth Okere dated 24th March 2020 tendered by the respondent, injuries sustained by the respondent are as particularized in the plaint. On the section on opinion and prognosis, the doctor opined as follows;

“He sustained a fracture of the right fibula and blunt injuries to the left knee, both elbows, left shoulder, lower back and a laceration on the upper lip. The injuries can be classified as grievous harm. The degree of permanent incapacity is 10%.”

17. Going by the 2nd medical opinion by Doctor Maina Ruga the doctor listed the followings injuries:



- i. Cut wounds on the head and face
 - ii. Soft tissue injuries on left shoulder
 - iii. Injury to right leg with displaced fracture of right fibula midshaft
 - iv. Soft tissue injury to lower back
18. The doctor further opined as follows:
- “He was treated at Mwingi Level 4 hospital. X-ray right leg showed fracture of fibula. He was given injectable and oral medication and a P.O.P cast was applied on right leg. He was ambulated on crutches.”
- “This man suffered severe harm. He sustained cut wounds on the head and face, soft tissue injury in left shoulder and back and a fracture of right fibula. The cut wounds have healed leaving scars, soft tissue injuries have healed and the fracture of fibula has healed. I would assess his level of permanent incapacity at 5 % for the fibula fracture. He would benefit from physiotherapy for the left shoulder”.
19. The most significant injury sustained by the respondent in the present matter is the fracture of the fibula while the rest were severe soft tissue injuries which had healed. I do agree with the appellant that the authorities cited by the respondent were not comparable to the present case. The plaintiffs in those other decisions sustained multiple fractures and were hospitalized for multiple days even months which was not the case for the respondent. (refer to paragraph 11 above). Similarly, in the case referred to by the trial court, the plaintiff sustained fractures of the tibia and fibula and experienced post fracture arthritis while in this case, the respondent only fractured his right fibula (outer leg bone) hence the injuries sustained were slightly different.
20. The trial court awarded the respondent herein Kshs. 800,000/= as general damages which I find a bit high compared with cited comparable authorities where the awards are between Kshs. 300,000/= to Kshs. 400,000/=.
21. The trial court relied on the case of *Akamba Public Road Services - vs - Abdikadir Adan Galgalo* (supra) where the High Court reduced the amount in general damages to Kshs. 500,000/=. The injuries were fracture of right tibia and right fibula and blunt injury to the right ankle and partial disability placed at 3%.
22. In *Wycliffe Omurwa Masanta -Vs- Easy Coach Ltd & Another* [2019] eKLR, the Plaintiff suffered posterior dislocation of right hip joint, transverse fracture of right fibula, head injury, soft tissue injuries to the forehead right periorbital haematoma, laceration of the lower lip and swelling of the left leg. The high court upheld an award of Kshs. 500,000/= in general damages.
23. In light of the above this court finds that the award on general damages was high and this court finds while the trial court may have taken Covid situation into account that situation no longer obtains. On that ground this court finds that an award of Kshs. 500,000/= as general damages, would be a fair one taking everything into consideration like the nature of injuries sustained and comparative awards in cases with comparable injuries.
24. The appellant seems to have abandoned the appeal on the award of global sum of Kshs 250,000/= for loss of earning capacity as the same is not addressed in his submissions though it appeared as a ground for appeal. In the plaint, the respondent pleaded damages for diminished/ reduced earning capacity and in his witness statement, the respondent averred that he was 46 years old at the time of the accident



and that he had not been able to resume work following the accident. He did not indicate the kind of business he was engaged in but stated that his work involved a lot of manual work in walking, travelling in different markets and other activities.

25. In the case of *Butler vs Butler* [1984] KLR 225 the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:
- i. 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. 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. 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. 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. 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. 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.
26. In the case of *Alpharama Limited vs. Joseph Kariuki Cebon* [2017] eKLR the court stated;
- “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.”
27. Diminished earning capacity refers to decrease in a person's earning ability as a result of the disability suffered. In this instance, the respondent's disability was assessed at 10% by one doctor and 5 %. The appellant tendered their own medical report dated 11th June 2021 in which the doctor opined that the respondent would benefit from physiotherapy for his left shoulder was significant. This is because the examination was done more than 1 ½ years after the accident and even then, the respondent was still experiencing effects of the injuries sustained from the accident. Evidence from the respondent is that his work involved manual labour and pains and aches could affect his performance. In my view, the medical report proved on a balance of probabilities that the respondent's earning capacity was affected in the period of his recovery. The trial court was therefore well directed in making a global award of Kshs. 250,000/= for loss of earning capacity.

In the end this court partly finds merit in this appeal only to the extent of the awards of General damages. The award of Kshs. 800,000/= in General Damages is hereby reduced to Kshs. 500,000/=.



The awards on loss of earning capacity & special are sustained. For clarity the Respondent is granted the following:

- a. General Damages Kshs. 500,000/=
 - b. Loss of earning capacity Kshs. 250,000/=
 - c. Special damages Kshs. 4,929/=
- Sub-total Kshs. 754,929/=
- Less 20% as agreed Kshs. 150,986/=
- Total Award Kshs. 603,943/=

The Appellant will have half costs in this Appeal but the Respondent will have costs and interest of the above sum in the lower court at court rates.

DATED, SIGNED AND DELIVERED AT KITUI THIS 9TH DAY OF JULY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

