



REPUBLIC OF KENYA



KENYA LAW
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**Njihia & another v Wanjiku (Civil Appeal 50 of 2022)
[2024] KEHC 9639 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 50 OF 2022**

**H NAMISI, J
JULY 15, 2024**

BETWEEN

JULIUS NGANGA NJIHIA 1ST APPELLANT

JOHN CHEGE 2ND APPELLANT

AND

JACKSON KARANJA WANJIKU RESPONDENT

(Being an Appeal from the judgement of Hon. V. Kachudho (Mr.) Senior Principal Magistrate delivered on 28th February 2022 in Thika CMCC No. 798 of 2019)

JUDGMENT

1. This appeal arises out of an accident that occurred on 27 June 2017 involving the Respondent, who was fare paying passenger in KAS 681N Nissan Matatu and the 1st Appellant's motor vehicle registration number KAU 193P Mitsubishi Lorry, along Thika- Garissa road. As a result of the collision, the Respondent sustained the following injuries:
 - i. Fracture left acetabulum;
 - ii. Central dislocation of the left hip joint;
 - iii. Intertrochanteric fracture of the left femur;
 - iv. Soft tissue injuries to the right eye
 - v. Soft tissue injuries to the left index finger
2. By Plaint dated 27th November 2019, the Respondent instituted proceedings against the Appellants, seeking general damages, special damages of Kshs 1,226,108/=, loss of earnings and earning capacity, costs of the suit and interest. The Respondent pleaded the following residual injuries:



- i. Pain left lower limb
 - ii. Inability to walk without support
 - iii. Surgical scar on the left thigh running across the left hip joint
 - iv. Shortening of the left lower limb by approximately 3cm
 - v. Complete stiffness of the left hip joint
 - vi. Inability to flex index finger
 - vii. Significant reduced vision of the right eye
 - viii. Permanent disability of 50%
3. The Appellants filed their Statement of Defence dated 4th January 2020, denying the Respondent's claims in toto.
 4. On 31st May 2021, at the hearing of the case in the trial court, the Respondent called 3 witnesses. PW1 – the Appellant – adopted his Witness Statement dated 27 November 2019 and produced a bundle of documents attached to the List of Documents dated 27th November 2019.
 5. PW2 – PC Charles Mwandime from Thika Police Station, produced the Police Abstract dated 8th August 2018. It was his testimony that investigations were conducted and that motor vehicle KAU 193P was blamed for the accident.
 6. PW 3 – Dr. Jeniffer Kahotho, a General Practitioner, testified as to the treatment that the Respondent received following the accident. It was her testimony that the Respondent was admitted at Kenyatta National Hospital for 3 months where he underwent hip reconstruction. His femur was then fitted at Kijabe Hospital. When the Doctor examined him, the Respondent was walking with a limping gait and was scheduled for total hip replacement. She assessed his disability at 50:10
 7. At this point, in the absence of the Appellants, the trial court directed that submissions be filed and reserved the matter for judgement. On application by the Appellants, the matter was reopened and the Respondent's witnesses were cross examined. The Appellants, however, did not call any witness or adduce any evidence.
 8. In its judgment, the trial court found the Appellants to be 100% liable for the accident. On the issue of quantum, noting the injuries sustained by the Respondent, the trial court awarded Kshs 2,500,000/- for pain and suffering; Kshs 1,162,752 for loss of earning and/or earning capacity; Kshs 800,000 for future medical costs and Kshs 425,558 for special damages. The court also awarded costs and interest to the Respondent.
 9. The Appellants, being dissatisfied by the judgement of filed a Memorandum of Appeal dated 22nd March 2022 on the following grounds:
 - i. That the learned Magistrate erred in fact and in law in awarding the Respondent herein Kshs 2,500,000/- as general damages for pain and suffering, an amount that was evidently excessive in view of the circumstances and shared liability;
 - ii. That the learned Magistrate erred in law and in fact by awarding a multiplier that is on a higher side in view of the Respondent's age as at the time of the accident;



- iii. That the trial court seemed to have a predetermined mind in the full hearing and final determination of the matter based on the frustrations occasioned upon the Appellants' counsel regarding ex parte hearing and closure of the Respondent's cases;
 - iv. That the learned Magistrate erred in law and in facts by ignoring the issues raised in the submissions and precedents cited by the Appellants;
 - v. That the learned Magistrate erred in fact and in law by failing to give a reasoned judgement;
 - vi. That the learned Magistrate erred in law and in facts by holding in favour of the Respondent without adequate evidence.
10. Directions were given to canvass the appeal by way of written submissions. Both parties filed their respective submissions dated 22nd January 2024.
11. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the parties. This appeal relates only to the issue of the quantum of damages assessed by the trial court. More specifically, the Appellants have challenged the award of Kshs 2,500,000 for general damages and the multiplier used by the Court in arriving at the award of Kshs 1,162,752 for loss of earning and/or earning capacity. The Appellants' last ground of appeal touches on the issue of liability.
12. Regarding the issue of frustrations occasioned upon the Appellants' counsel, the record indicates that counsel for the Appellants did not appear in Court on 31 May 2021 when the matter was scheduled for hearing. Thereafter, the matter was mentioned on 21st June 2021, 19th July 2021 and 30th July 2021. Each time, counsel for the Appellants was not present. Thereafter, the Appellants filed a Notice of Motion dated 21st July 2021 seeking to have proceedings reopened, which orders were duly granted. The Appellants had their day in Court, but they did not call any witnesses. I am, therefore, at pains to comprehend what frustrations Counsel for the Appellants is referring to, yet it is clear that the Appellants were accorded an opportunity to be heard, in line with their constitutional right to a fair hearing and the rules of natural justice.

Analysis & Determination

13. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that, "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".
14. With respect to liability, the same is determined on the basis of evidence and the facts of the case, and the applicable law. The burden of proof on a balance of probabilities, falls on he who alleges. In this instance, the burden of proof fell on the Respondent.
15. Section 107 (1) of the *Evidence Act* provides that



1. Whoever desires any Court to give judgment as to any legal right depending on the existence of facts which he asserts must prove that those facts exist;
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
16. By virtue of sections 107, 108 and 109 of the *Evidence Act*, the trial court was expected to test the evidence presented by the Respondent and whether it discharged the burden of proof on a balance of probabilities. In this case, the respondent adduced evidence that he was a fare-paying passenger in Nissan matatu which collided with the 1st Appellant's motor vehicle, which was being driven by the 2nd Appellant. This accident occasioned the injuries he sustained. The matter was reported to the police, who conducted investigations and blamed the 1st Appellant's motor vehicle for the accident.
17. The Appellants submitted that the Respondent did not prove his case on a balance of probabilities and that the trial court was unfair and unjust in awarding 100% liability on the part of the Appellants. The Appellants submitted that in the alternative, should this Court find the Appellants liable, then the same should not exceed 50%.
18. It is important to note that once the Respondent had discharged his duty of proving that the Appellants owed a duty of care to other road users, that the said duty of care was breached and that subsequently the Respondent suffered injuries, that the onus was now on the Appellants to prove that the Respondent did in fact contribute, and was liable to share in the liability. The Appellants failed to call any evidence to controvert the evidence presented by the Respondent.
19. It is, therefore, my view that there is no need to interfere with the finding of the trial court on the issue of liability. This ground of the appeal fails.
20. In an appeal on quantum, the court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were set out in the case of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR* thus:
- 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 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.
21. On the issue of quantum, the Respondent testified that he lost consciousness soon after the accident. He woke up at St. Murumba Hospital, Thika and was then referred to Kenyatta National Hospital where he was admitted and discharged a month later. Two months later, he was admitted for a week at the Thika Level 5 Hospital for hip replacement surgery. He was then taken to Muranga Hospital and later to AIC Kijabe Hospital where a metal insitu was inserted into his fractured femur. He was informed that he would need a total hip replacement. The Respondent produced treatment notes and/or discharge summaries from each of these facilities.
22. Additionally, PW3 – Dr. Kahuthu produced a Medical Report dated 1st October 2019. In her opinion, the Respondent suffered prolonged pain and suffering following the accident. She noted that healing was incomplete at the time and estimated that his hip replacement would cost Kshs 600,000. She further noted that once fixed, the hip replacement would need to be changed every 5 to 10 years. The



- Doctor further observed that the Respondent's hip movements were completely restricted and assessed his disability at 50%.
23. The Respondent further provided a Medical Assessment Report for Persons with Disabilities from the Ministry of Health. The conclusion thereof by the Director of Medical Services is that the Respondent ought to register a person living with disability.
24. Once again, none of this evidence was controverted by the Appellants.
25. Turning to whether the general damages awarded by the trial court were exceedingly high, I am guided by the principle in the assessment of damages that an award must reflect the trend of previous, recent and comparable awards. In the case of *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*, the Court of Appeal held:
- “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.”
26. I have looked at various cases for comparable awards. In the case of *Catholic Diocese of Kisumu -vs- Tete [2004] eKLR*, the plaintiff suffered several injuries including, fractures of both superior and inferior rami with associated dislocation of the left hip joint. His permanent disability was assessed as 50%. In dismissing the appeal, the Court of Appeal held that the learned Judge applied the correct principle in assessing the general damages and the award of Kshs 1,300,000 as general damages was not no inordinately high.
27. In the case of *Amazon Energy Ltd -vs- Magdaline Nthenya Mathias & Another [2019] eKLR*, the plaintiff (deceased) suffered several injuries including displaced fracture of the right femur thigh bone and fracture of the right clavicle shoulder blade bone. The doctor's conclusion was that the deceased has suffered 50% permanent partial disability due to multiple lower and upper limb fractures, multiple joint stiffness, multiple skull fractures, disfiguring facial scar, weak fracture sites that were points of weakness as they could re-fracture, the insertion and removal of metal implants that would weaken the bone. The court substituted an award of Kshs 3.5 million with an award of Kshs 2.5 million for general damages.
28. In *Edwin Otieno Japaso Vs East Coach Bus Ltd [2016] eKLR*, the victim who suffered 25 % disability was awarded kshs.1,500,000 which was enhanced to kshs.2,000,000 on appeal.
29. In *James Mbugua & Another -vs- John Mbugua Mburu [2020] eKLR*, the plaintiff sustained severe injuries including commuted fracture of the right acetabulum and dislocation of the right hip joint. His disability was assessed at 50%. The Court upheld the trial court's award of Ksh 2.3 million for pain and suffering.
30. In view of the foregoing, and bearing in mind the age of the cited cases, it is my considered view that the award by the trial court of Kshs 2.5 million as general damages for pain and suffering is not excessively high as to warrant this court's interference.
31. On the issue of diminished earning capacity, in the case of *Nyatogo -vs- Minin Bakeries Ltd (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR)*, the court stated thus:
- Diminished earning capacity refers to decrease in a person's earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been



lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.

Usually, loss of earning capacity is concerned with the effect of the injury on the person's future earning ability as opposed to the present loss.

However, it is the responsibility of the respondent to demonstrate, by way of evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.

Such a claim should then be evaluated by the court based on the nature of the injury vis-vis the type of work done by the person, his age, how long the injuries might last, the degree of incapacity and such other factors. In short, court must show how it has arrived at that amount, it not just by coming up with a random figure.

32. In this instance, the trial court, in agreeing with the Appellants' submissions, calculated the loss of earning and/or earning capacity as follows:

$\text{Kshs } 24,224 \text{ (minimum wage)} \times 12 \text{ months} \times 5 \text{ Years (taking into account the uncertainty of life)} = \text{Kshs } 1,162,752/-$

33. I note that in the above formula, using a multiplier of 5 years, the resulting amount is erroneous. However, a glance at the Appellants' submissions to the trial court reveals that the Appellants contended that 4 years is an appropriate multiplier considering that the Respondent was 51 years old and due to retire at the age of 55 years. The error in the trial court's equation could be attributed to a typographical error, but the resulting sum is correct using a multiplier of 4 years. Bearing in mind that the resulting figure of Kshs 1,162,752/- is exactly as submitted by the Appellants, I am once again at pains to comprehend this ground of appeal.

34. In view of the foregoing, I am not persuaded to interfere with the award by the trial court. The appeal lacks merit and the same is dismissed with costs of Kshs 40,000 to the Respondent.

DATED AND DELIVERED AT KIAMBU THIS 15 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform In the presence of:

....Mr. Ondeng h/b for Nyandoro.....for the Appellants

....Ms. Wairimu..... for the Respondent

