



**Wamaitha v Kariuki (Civil Appeal 57 of 2021)  
[2024] KEHC 8037 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8037 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 57 OF 2021**

**AM MUTETI, J**

**JULY 3, 2024**

**BETWEEN**

**MARY WAMAITHA KAMAU ALIAS MARY WAMAITHA  
WAMAITHA ..... APPELLANT**

**AND**

**MARTIN KAMAU KARIUKI ..... RESPONDENT**

*(Being an appeal against the Judgement and decree in SRM Thika CMCC No. 1158 of 2017 Mary Wamaitha Kamau alias Mary Wamaitha -VS- Martin Kamau Kariuki, Judgement delivered on 31st March 2021 by MR WANYAGA SRM.)*

**JUDGMENT**

1. The appellant in this matter was travelling as a passenger aboard a motor vehicle KAN 168W along Nairobi-Thika road. The Motor vehicle was involved in an accident around Delmonte area where it rammed into another motor vehicle registration number KBQ 689P.
2. The Appellant sustained injuries in the said accident and filed claim which resulted into the Judgement the subject matter of this appeal.
3. The Appellant filed written submissions dated 25<sup>th</sup> April 2024 signed by Simon Ngunjiri Ngare Advocate. According to the appellant, he was aggrieved by the learned honourable magistrate's award of the sum of KSH 100,000 for diminished earning capacity.
4. In the appellants submissions at paragraph 5, he indicates that his four grounds of appeal essentially relate to the trial court's award on damages for diminished earning capacity. He urges that the said award of KSH 100,000 is manifestly low bearing in mind the standard of proof and evidence adduced.



5. It is therefore clear to me that the crux of this appeal is that the learned honourable magistrate did not give due weight to the evidence on the aspect of the diminished earning capacity. The Court of Appeal in *Selle v Associated Motor Boat and company limited* (1986) E.A 123 held that:-

An appeal to this court from the High court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.

6. Briefly put they are that, this court must consider 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 that respect. In particular this court is not bound necessarily to follow the trial Judge's findings of facts if it appears either that he has clearly failed on some points to take into 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 in general.

7. The decision of the court of appeal aptly captures the duty of this court sitting as a first appellate court on matters arising from the magistrate's courts. The submissions by the appellants counsel on the issue before me are in tandem with the grounds of appeal dated 1<sup>st</sup> April 2021.

8. At the hearing of this appeal Mr. Mutua Advocate for the appellant appeared and indicated that they intended to rely solely on the submissions they had filed and did not wish to highlight the submissions. The firm of Kimondo Gachoka who were on record for the respondents were not represented. I have also noted that the respondents did not file submissions.

9. In the circumstances I am left to consider the record as filed and analyse the evidence strictly on the single issue of diminished capacity to earn.

10. The appellants have cited a number of authorities on this particular issue of diminished capacity to earn. The cited decisions include :-

1. *Mumias Sugar Co. Ltd v Francis Wanalo* [2007] eKLR the learned Judges of the Court of Appeal awarded the sum of KSH 500,000 for loss of the fifth finger of the right hand and inability to fully extend the right hand finger for which permanent incapacity was assessed at 15% by Dr. Juma and 10% by DR. Raburu. The right hand lost a maximum of 15% of its function. The appellant in the matter was training for general mechanical fitting and mechanical engineering at the time of the accident.

2. In *John Kibicho Thirima -v- Emmanuel Parsmei Mkoitiko*[2017]eklr Lady justice Abunki observed as follows:-

160. In his testimony, the plaintiff stated that he was now a pastor and that his main problem was that he could not feed well. He did not say that as a pastor, he was unable to discharge his duties better when preaching. He did not say that as a result of the injuries, he could not get a better job in the labour market and that he had therefore resulted to being a pastor which was a lesser paying job. The defendant did not suggest that being a pastor was not his calling and that he only resorted to it after the accident.”

161. There is no presumption that pastors are engaged in less paying jobs compared to any other job.

11. In light of the two decisions cited above, the plaintiff (now appellant) is under duty not just to prove that he suffered injury but demonstrate through clear evidence how that injury has compromised his capacity to earn. It cannot be merely an assumption that every injury results in diminished capacity



- to earn. A plaintiff must prove what exactly inhibits him from earning that which he thinks he ought to earn.
12. Simply put, the appellant ought to persuade the court that by reason of the injury he has been rendered incapable to perform certain functions and by reason thereof, he is deprived of the capacity to realize his full potential. Diminished capacity to earn must also lie within the foreseeable consequences of the accident devoid of any other intervening circumstances. I have considered the totality of the appellants submissions and all the accompanying authorities and this court is not satisfied that the appellant has made a case for review of the figure awarded under this head. The authorities cited by the appellant clearly show that each of the parties led evidence as to how the injuries suffered affected their capacity to earn.
  13. I now turn to the evidence by the appellant in order to determine what is this that the accident caused her to have diminished capacity to earn. Her statement dated 15<sup>th</sup> December 2017 reads in part :-

As a result of the accident, I sustained severe injuries to my body, I catered for all medical and treatment expenses. The injuries I sustained are indicated in the treatment records, P3 form and medical report annexed to the list of documents”

“The doctor classified the injury in the P3 form as “grievous harm” The discharge summary from St. Mulumba Mission Hospital indicates that at the time of discharge she left with crutches”.
  14. The court just like has closely perused the record to see whether there was any other evidence tendered by the appellant to prove diminished capacity. The record shows that the appellant was called as PW3 and she reiterated her statement and relied on the medical documents. The plaintiffs’ statement did not even show what she was engaged in as a source of earning or means to a livelihood at the time of the accident and how the injuries diminished her continued capacity to earn. The evidence would have assisted this court in undertaking an objective assessment whether the injuries sustained in the accident rendered it impossible for the appellant to perform thus diminishing her earnings.
  15. This court just like the learned Honourable Magistrate was therefore left to figure out what was reasonable in the circumstances.
  16. It is my finding that there is no material placed before me to warrant my interference with the discretion of the learned Honourable Magistrate in awarding the sum of KSH 100,000 for diminished capacity. I have not found anything to persuade me either the magistrate misdirected himself on any principles of law or acted on irrelevant considerations to justify a review of the award (*Mbogo v Shab* (1986) eKLR followed.
  17. The appellant did not assist the court by adducing evidence to show in what way her capacity to earn got compromised. The Doctor PW1 upon cross examination stated :-

Without prosthesis one has to use crutches, it makes functionality easier since the hands are free”
  18. The doctor was testifying in support of the plaintiff but did not help her in demonstrating how she would have suffered diminished capacity to earn considering she left hospital in crutches and according to him, that made her functionality easier.
  19. In the circumstances I find the appeal has no merit and I therefore dismiss the same with no orders as to costs since the respondent did not appear at the hearing of the appeal



20. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY, 2024.**

**A. M. MUTETI**

**JUDGE**

In the presence of

Kiptoo: Court Assistant

Kimondo Gachoka for the Respondent

Mutua for the Appellant

