



REPUBLIC OF KENYA



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**Chelimo v Njami (Civil Appeal E001 of 2023)
[2024] KEHC 12000 (KLR) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E001 OF 2023**

AC MRIMA, J

OCTOBER 7, 2024

BETWEEN

DAVID KIPKEMOI CHELIMO APPELLANT

AND

HIRAM MWANGI NJAMI RESPONDENT

JUDGMENT

Background:

1. On 16th December 2019, David Kipkemoi Chelimo, the Appellant herein, was involved in a road traffic accident at Ortum along the Kapenguria – Lodwar Road. He sustained some injuries that led to the amputation of the right leg below the knee.
2. The Appellant was a Turnboy in a Motor vehicle registration number KBB 738F make Nissan Diesel Lorry. Their vehicle was involved in a collision with Motor vehicle registration number KCF 953W make Hino Lorry.
3. Through the Complaint dated 20th August 2020, the Appellant instituted Kapenguria Chief Magistrates Civil Case No. 23 of 2020 [hereinafter referred to as ‘the suit’]. It was his case that the Respondent was negligent and responsible for causing the accident. He claimed various reliefs.
4. The Respondent challenged the suit through the Statement of Defence dated 7th October, 2020. He denied occurrence of any accident. Alternatively, he averred that if any accident occurred then he was not liable, but the Appellant and the owner and driver of the Nissan Diesel lorry in which the Appellant was travelling in.
5. The suit was heard. By a judgment rendered on 1st February 2023, the trial Court found the Respondent wholly liable for the accident. The Court also awarded General Damages for pain and suffering at Kshs. 1,500,000/=; Special Damages at Kshs. 89,134/=; Future Medical expenses at Kshs.



350,000/= and Loss of future earning capacity at Kshs. 600,000/= all amounting to the sum of Kshs. 2,539,134/=.

6. The Appellant appealed against the said judgment.

The Appeal:

8. The appeal was mainly on the trial Court's assessment of quantum.

9. Through the Memorandum of Appeal dated 24th February 2023, the Appellant urged the following grounds of appeal: -

1. That the learned trial magistrate erred in law and in fact in awarding an inordinately low sum of Kshs.1,500,000/- as general damages for pain, suffering and loss of amenities which was against the weight of evidence adduced before the court and was not in tandem with decided cases on similar injuries.
 2. That the learned trial magistrate erred in law and fact in awarding an inordinately low sum of Kshs.600,000/- for loss of future earning capacity without taking into account the individual circumstances of the appellant.
 3. That the learned trial magistrate erred in law and in fact in failing to apply a multiplier approach in assessing loss of future capacity.
 4. That the learned trial magistrate erred in law and in fact in failing to apply proper legal principles while assessing general damages for pain and suffering and loss of future earning capacity and thus arriving at a wrong decision.
 5. That the learned trial magistrate erred in law and in fact in failing to take into account the evidence adduced in court and the submissions on quantum put forth by the appellant.
 6. That the learned trial magistrate erred in her evaluation and analysis of the pleadings and the evidence adduced before the court.
10. The Appellant further urged his case through written submissions dated 14th March, 2024.
11. In making his case on the awards, the Appellant submitted that the awards on General Damages for pain and suffering and Loss of future earning capacity were relatively low going by the evidence on record. He referred to various decisions in support of the contention.
12. The Appellant urged this Court to review the General Damages for pain and suffering to Kshs. 5,000,000/= and the Loss of future earning capacity to Kshs. 3,780,000/= by considering the Appellant's monthly salary of Kshs. 15,000/= and a multiplier of 21 years since the Appellant was 39 years old at the time of the accident.
13. The Appellant prayed that the appeal be favourably allowed.
14. The Respondent challenged the appeal through written submissions dated 25th March, 2024.
15. It was his case that the trial Court did not err in making the awards. He submitted that the awards were very reasonable going by comparative awards on similar injuries and faulted the Appellant's urge for the Court to adopt the multiplier approach in assessing loss of future earning capacity.
16. The Respondent referred to various decisions in urging this Court to dismiss the appeal with costs.



Analysis:

17. From the foregoing appreciation of the disputants' respective cases, the issues that arise for determination are as follows;
 - i. Whether the trial Court's assessment of quantum of damages in respect to pain and suffering was proper.
 - ii. Whether the trial Court ought to have used the multiplier approach in assessing damages for the loss of future earning capacity, and if so, whether the award made was proper.
18. This Court will, hence, consider the issues sequentially, but first the Court's role in this appeal.
19. As the appeal is on quantum of damages, this Court reiterates that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)
20. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly 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. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
22. Having laid down the law guiding the determination of this appeal, this Court will now deal with the issues raised by the Appellant.

Damages for pain and suffering:

23. The injuries sustained by the Appellant are not in doubt. He lost his leg below the knee.
24. This Court has carefully considered the parties' submissions and the decisions they relied on. The Court has also considered manner in which the trial Court handled this issue.
25. The Appellant relied on two decisions. They were *Rift Valley Railways (K) Ltd vs. Francis Kebaso Nyang'au* (2018) eKLR where an award of Kshs. 3,500,000/= for amputation of the left lower leg, intestinal injuries and crushed testicles was made by the High Court on 9th November, 2018.
26. The other decision was *Ngooro Timothy & Another vs. Daniel Mutuga Wangechi* (2020) eKLR where an award of Kshs. 3,000,000/= for a degloving injury/crush injury of the right foot resulting to below knee amputation of the right limb was made by the High Court on 7th May 2020.



27. In support of the trial Court's award, the Respondent relied on five decisions. They were Pyramid Packaging Ltd vs. Humphrey W. Wangala (2020) eKLR where the Plaintiff sustained a traumatic amputation of three fingers on the left hand that resultant to 15% permanent disability. He was awarded Kshs. 650,000/=. There was also Charles Oriwo Odeyo vs. Apollo Justus Andawa & Another (2017) eKLR where the Court awarded Kshs. 800,000/= to a Plaintiff who sustained an amputation of the right leg below the knee, hence disable to walk.
28. The decision in Joyce Moraa Oyaro vs. Hussein Dairy Ltd (2016) eKLR had the sum of Kshs. 1,300,000/= made for an amputation of the lower right limb. In Nelson Njihia Kimani vs. David Marwa & Another (2017) eKLR Kshs. 1,500,000/= was awarded for an amputation of the lower right limb with 40% disability. And, in Duncan Kinyua & Another vs. Boniface Kigunda (2020) eKLR where the Plaintiff suffered a crush injury of the right leg extending to the knee joint and a traumatic amputation of the right little finger and he was awarded Kshs. 1,800,000/= in compensation.
29. In the impugned judgment, the trial Court considered the two decisions which were relied upon by the now Appellant both at trial and on appeal. The Court observed that the injuries sustained by the Claimants in the said two decisions were more serious than those sustained by the Appellant thereby settling at Kshs. 1,500,000/=.
30. The Respondent had submitted for the sum of Kshs. 400,000/= on this head.
31. A careful consideration of the decisions relied upon by the Respondent, on one hand, shows that the awards on amputation of the lower limbs have been raising from around Kshs. 1,300,000/= in 2016 to Kshs. 1,800,000/= in 2020. Going by that trend, a decision made in 2023 would definitely attract a higher award than in 2020. On the other hand, the decisions relied upon by the Appellant indicated that Courts in 2018 and 2020 have been awarding between Kshs. 3,000,000/= and Kshs. 3,500,000/= on like injuries.
32. There is no contention that the injuries sustained by the Appellant were serious. The Appellant sustained a permanent disability assessed at 35%.
33. On a balanced scale of fairness and in consideration of the decisions referred to above, it is this Court's finding that the award made by the trial Court on damages for pain and suffering was low compared to the injuries sustained by the Appellant. This Court hereby enhances the award to Kshs. 3,000,000/=.
34. Therefore, the appeal succeeds on the first issue.

Damages for loss of future earning capacity:

35. This issue revolves on two sub-issues. They are whether the trial Court erred in not using the multiplier approach in assessing damages under this head; and, whether the award of Kshs. 600,000/= was reasonable.
36. On the first sub-issue, it seems that the Appellant's understanding of the difference between loss of future earning capacity and loss of future earnings is blurred. Although the Appellant referred to decisions which dealt with the two, he still confused the two heads in his quest for damages.
37. The Court in S.J. v Francesco Di Nello & another (2015) eKLR laid bare the difference between the two heads of damages as under: -

...Claims under these 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 diminution in earning capacity.



Loss of income or 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 of general damages once proved.....

38. In *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR the Court of Appeal held that loss of earning capacity 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. The Court faulted a trial Court for using the multiplier/multiplicand approach in assessing damages for loss of earning capacity.
39. To buttress the point further, in *Paul Njoroge vs Abdu Saburi Sabonyo* [2015] eKLR, the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his employment was affected.
40. It is, therefore, clearly established that a claim for loss of future earning capacity or diminished earning capacity is a general damage claim and that there is generally no formula for assessing such loss. A Court just awards a token depending on circumstances of each case. Such an award may also be factored in the main claim for general damages for pain, suffering and loss of amenities or be sought separately. Its an issue of choice on the Claimant.
41. On the other hand, loss of future earnings is a special damage claim. This is where the multiplier approach may be used in arriving at the compensation. Under this head, the Court considers the income, the multiplicand and the multiplier and by use of a mathematical formula, computes the redress. Alternatively, a Court may also award a global sum depending on the circumstances of a case say where the Claimant was unemployed and his/her engagement in life is not part of the remuneration provided for under the Employment law.
42. In the instant case, the Appellant prayed for damages for loss of future earning capacity in his plaint and not loss of future earnings. He, however, sought to use the multiplier approach for damages under the claim for loss of future earning capacity. That was erroneous. [See *Mumias Sugar Company Ltd vs. Francis Wanalo* case (supra)].
43. The trial Court was, therefore, right in making a global award on this head.
44. What follows is now a consideration of whether the award of Kshs. 600,000/= made under this head was reasonable.
45. Without much ado, by considering the circumstances of this case and the revised award on general damages, the award made by the trial Court remain reasonable.
46. The upshot is, hence, that the appeal under this head fails.

Disposition:

47. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
48. Having said as much, the appeal herein partly succeeds and the following final awards do hereby issue: -



Liability: - 100%
Pain and suffering - Kshs. 3,000,000/-
Loss of future earning capacity - Kshs. 600,000/-
Future medical expenses - Kshs. 350,000/=
Special Damages - Kshs. 89, 134/-
Total.....Kshs 4,039,134/-

Orders accordingly.

49. Since the appeal has partly succeeded, each party to bear their own costs. However, for clarity, the Respondent shall bear the costs of the suit before the trial Court.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 7TH DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mugwe, Counsel for the Appellant.

Mr. Amwayi, Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

