



REPUBLIC OF KENYA



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**Ireri v Gioko (Civil Appeal E017 of 2022)
[2024] KEHC 12543 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E017 OF 2022
RM MWONGO, J
OCTOBER 16, 2024**

BETWEEN

RUTH WANJIRA IRERI APPELLANT

AND

VICTOR WACHIRA GIOKO RESPONDENT

(Being an appeal from the judgment delivered on the 23rd February, 2022 by Hon. Cheruto C. Kipkorir, Principal Magistrate Kerugoya Court in CMCC E020 of 2020)

JUDGMENT

Brief Facts

1. The Appellant sued the Respondent in the trial court in relation to a traffic accident that occurred on the 26th August, 2019 along Kutus Kerugoya Road. The Appellant particularized the injuries she sustained as:
 1. Fracture of the left radial ulna.
 2. Fracture of the right symphysis and injuries to the pelvic region, chest, right lower limb and left upper limb.
2. The parties entered into a consent on liability wherein they agreed that judgment be entered in the ratio of 80:20 in favour of the Appellant as against the Respondent. The said consent was adopted and the learned trial magistrate made an award of K.shs.1,600,550.00 made up as follows; general damages were Kshs 1,300,000.00, Future medical expenses K.shs.300,000.00 and special damages of K.shs.550.
3. One of the elements rejected by the trial court was an alleged professional undertaking of Kshs.805,665/= under which the law firm of Ombuna Ongeru & Company apparently undertook to pay upon finalising the recovery of compensation claim.



4. Dissatisfied, the appellant appealed raising the following grounds:
- a. That the trial magistrate erred in holding that the Appellant's evidence did not include the professional undertaking whereas this was duly pleaded and was in the list of documents.
 - b. That the trial court erred in questioning the validity of the professional undertaking based on its form whereas the agreement was duly executed signed and acceptable to the parties to it and was enforceable as between the parties to the professional undertaking.
 - c. That the trial magistrate erred in law and fact in holding that the professional undertaking document which was produced by consent of the parties without calling the makers required to be verified at the written submissions stage which was totally impossible and overtaken by events.
 - d. That the trial magistrate erred in interfering or questioning a duly signed contract binding on the parties to the undertaking whereas none of the parties to the contract had raised any objection to its form which they had signed and were bound by its obligations.
 - e. That the trial magistrate erred in holding that there were two different contracts in the body of the undertaking whereas there was only one signed by the parties to the contract and forming the professional undertaking.
 - f. That the trial magistrate erred in making an award for general damages which was manifestly low as to result to a complete miscarriage of justice.
 - g. That the trial magistrate erred in declining to make an award for diminished earnings on the basis that it was not pleaded whereas the same was duly pleaded.

Appellant Submissions

5. The appellant's submissions are made out in four prongs.

The authenticity and validity of the professional undertaking

6. The appellant submits that the professional undertaking document is dated the 26th May, 2020 and appears in the list of documents at page 12 of the Record of Appeal. It is drawn between the law firm of Ombuna Ongeru & Company Advocates, the PCEA Kikuyu Hospital Thogoto and the PCEA counsel Wamaitha Ndungu Advocates. The agreement clearly spells out the parties to the agreement who are PCEA Kikuyu hospital and the law firm of Ombuna Ongeru & Company Advocates the amount forming the outstanding hospital bill of Kshs. 805, 665 which the law firm of Ombuna Ongeru & Company Advocates undertook to pay upon finalizing the recovery of the compensation claim dues.
7. The trial court perused the form of the undertaking by questioning the validity of documents already admitted by counsels of both parties in the suit by consent. The appellant submits that the agreement which forms the undertaking was legally viable, was valid signed and drawn by the two firms. The parties to the agreement had specific reasons for requiring that the two law firms jointly draw the document. Parties can decide on the form which a document or agreement can take as long as the same is binding on them, is enforceable as between the parties to the agreement, and does not offend the law.

Requiring the professional undertaking to have annexures

8. The Appellant argues that the trial magistrate failed to appreciate what a professional undertaking entail. The sum incurred and which forms the subject matter of the professional undertaking are clearly



stipulated in the undertaking. The assertion by the court that the appellant was required to attach receipts or invoices is not factored in law when it comes to undertakings of this nature. The sum incurred and which formed the basis of the undertaking is clearly spelt out in the undertaking.

The award on general damages was manifestly low

9. The award of Kshs.1,300,000/-as general damages was manifestly low considering the debilitating nature of the appellant's injuries. The medical report by Doctor Kayo and the medical summary can be summarized as follows:

Fracture of the pelvis, fracture of the left ulna and radius, fracture of the right symphysis, fracture of the pelvic region, surgery and metal implant to the right tibia, pubic symphysis and left radius and ulna which had metal plating done, permanent disability at 50% assessed.

10. Consequently, the appellant proposes the sum of Kshs.4,000,000/-The authority of Penina Waithira Kaburu Versus L.P 2019 (ekLR) was attached to the submissions and has similar injuries. The Respondent only attached the authority of [*George Njenga v David Wachira Mwangi NYK HCCCA No.1 OF 2015*](#) in which there was only a single fracture of the pelvis and is therefore not comparable to the appellant injuries which have multiple fractures.

Diminished earnings

11. According to the appellant the trial magistrate found that the issue of diminished earnings was not pleaded. This is contrary to the fact that the issue of diminished earnings was duly pleaded under paragraph 6 of both the initial plaint dated 15th September, 2020 and the subsequent amended plaint dated 12th February 2021. The ingredients are: permanent disability and the sum of money she used to make as a business lady.
12. The appellant submits that the trial court should have utilized the information pleaded in both Plants to make a finding on the diminished earnings.

Respondent Submissions

13. The Respondents submissions were also made out under four prongs.

Whether the honourable court has power to interfere with the trial court's judgment

14. The respondent submits that this court has power to interfere with the trial court's judgment where it is satisfied that the trial court had misdirected itself. According to the respondent, the trial magistrate, relied on law and case law in arriving at the judgment delivered hence the same is wholly supported by laws. There is no error that was committed and it is the Respondent's submission that the court should not interfere with the judgment of the trial court.

Whether quantum of damages should be interfered with

15. The respondent submits that the that the judgment of the trial magistrate was regular well within the law and based on the evidence submitted by the parties before the honourable trial magistrate. Besides that, the trial magistrate's award on general damages and quantum was guided by case law and the same can be deduced from the trial court's judgment and the submissions of the Respondent in the trial court.



16. According to the appellant and the respondent's doctor's medical report, it can be deduced that the appellant sustained the following injuries; compound fracture of the left radius and ulna, open book pelvic fracture and fracture of the right tibia and fibula.

Professional undertaking

17. The amount claimed by the appellant in the professional undertaking of Kshs.805,663.00 is not supported by any evidence as noted by the trial court. The invoice supplied is for Kshs 70,000/=.

General damages for diminished earnings

18. The respondent submits that the damages for diminished earnings have not been pleaded vide the amended plaint dated 12th February, 2021 as it can be seen on page 27 of the Record of Appeal. The respondent cites the case of Daniel Otieno Migore v South Nyanza Sugar Co.Ltd [2018] eKLR, where Mrima J held as follows:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

19. The respondent submits that diminished earnings have been considered by the trial court as part of the general damages. The Plaintiff has already been compensated and if the court finds an award under this heading, the Plaintiff will be compensated twice. This was the position in the case of: Hamo Transporters Company Ltd & another v Dorcus Wangui Kiriro [2019] eKLR, it was stated:

“I am guided by decision in the case of Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR where the Court of Appeal held as follows: “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. The award can be a token, or modest or substantial depending on circumstances of each case. There is no formula for assessing loss of earning capacity.”

Issues for Determination

20. The issues for determination are as follows:
1. Whether the professional undertaking should be considered.
 2. Whether quantum of damages should be interfered with.

Analysis and Determination

Whether the professional undertaking should be considered

21. The appellant submits that the professional undertaking document is dated 26th May, 2020 and appears in the list of documents at page 12 of the Record of Appeal. It is indicated to be an agreement between the Law firm of Ombuna Ongeri & Company Advocates, and the PCEA Kikuyu hospital. On its cover page it is indicated to be drawn by Ombuna Ongeri Advocates, counsels Wamaita Ndungu Advocates.



22. The agreement spells out the parties to the agreement who are PCEA Kikuyu hospital and the law firm of Ombuna Ongeri & Company Advocates. It states the amount forming the outstanding hospital bill of Kshs. 805, 665 which the law firm of Ombuna Ongeri & Company Advocates undertook to pay upon finalizing the recovery of the compensation claim dues.
23. The respondent submits that the amount claimed by the appellant in the professional undertaking K.shs.805,663.00 is not supported by any evidence as noted by the trial court. The invoice supplied is for only Kshs 70,000/=.
24. The trial court held that the authenticity of the professional undertaking was questionable. There was no evidence adduced to show that the plaintiff incurred the said medical expense. An invoice would have sufficed or a letter from the hospital.
25. I have perused the professional undertaking. A professional undertaking is a clear statement by its author asserting, confirming and certifying that its author or maker would pay sums undertaken upon the conditions indicates in it.
26. In its preamble, paragraph 2, the appellant is alleged to have incurred a hospital bill, partly paid, but outstanding in the amount of Kshs.805,663/=. Even assuming that the undertaking was drawn by or authored or made by the firm of Ombuna Ongeri Advocates, there is no basis in the evidence provided, for the court to ascertain the amount of Kshs.805,663/=. There was no evidence that the said amount had been incurred in hospital bills, as the only invoice shown from the hospital was for Kshs. 249,390/=, of which 70,390/= had not been paid.
27. In light of the afore noted incongruity, it is impossible to relate the undertaking to the bill. Further, there is no demand that appears to have been made by the hospital. Given these challenges and the uncertainty as to authorship, the trial court was entitled to decline the undertaking or make a payout thereon.

Whether quantum of damages should be interfered with

28. The appellant submitted that the award of Kshs.1.300,000/-as general damages was manifestly low considering the debilitating nature of the appellant's injuries. The medical report by Doctor Kayo and the medical summary can be summarized as follows:

Fracture of the pelvis, fracture of the left ulna and radius, fracture of the right symphoysis, fracture of the pelvic region, surgery and metal implant to the right tibia, pubic symphysis and left radius and ulna which had metal plating done, permanent disability at 50% assessed.

29. The Appellant was also examined by Dr.Wambugu P.M. who noted the following injuries in his medical report dated 22nd February 2021;

Compound fracture of the left radius and ulna, open book pelvic fracture and fracture of the right tibia and fibula. Additionally, he stated permanent incapacitation can only be assessed after the treatment suggested. He assessed costs of future medical expenses of Kshs.200,000/=.



30. The Appellant's submissions filed on the 14th of January 2021 proposed the sum of Kshs.4,000,000/- The authority of Penina Waithira Kaburu Versus L.P 2019 (ekLR) was attached to the submissions and has similar injuries. There, the court held:

“By way of recapitulation, it cannot be denied that the respondent suffered severe injuries and endured a lot of pain in the process. He was admitted in hospital and operated on no less than two occasions. What's more, he is likely to be operated on in future, the two doctors having been agreement that the urethral stricture may recur. His doctor went further to warn that besides the recurrence of the stricture and the need for an operation, the respondent was also exposed to the danger of impotence. Apart from the damage to his body and body organs, the respondent also lost his valuable time while undergoing treatment; he couldn't attend college in his indisposed state. Taking all these factors into account, I am hesitant to disturb the learned magistrate's award of Kshs. 2,000,000/= in general damages.”

31. The injuries sustained in the Penina case are more severe than those of the appellant, hence the case is distinguishable. The trial court did not however, consider this authority as the same was not brought to its attention or annexed.
32. The trial court relied on the decisions in Joseph Njuguna Gachie v Jacinta Kavuu Kyengo [2019] eKLR, where the Respondent sustained blunt temporal injury with swelling, facial bruises, blunt injury on the left forearm, communitated fracture left radius and dislocated left ulna joint. He was found to be clinically stable and no disability was anticipated. On an appeal, the court reduced the amount awarded as general damages from Kshs.950,000/= to Kshs.450,000/=. The injuries there were less serious than those in the present case.
33. In my view the award of general damages by the trial court of Kshs.1,300,000/=was reasonable. The trial court also relied, for its decision on general damages, on the following cases. Hussein Dairy Limited & Anor v Asha Moteo Athman & 3 Ors [2021] eKLR where Kshs. 600,000/= was awarded; Geoffrey Kariuki & Anor v RKN (A minor suing through her late father ZKN) [2020] eKLR where Kshs.450,000/= was awarded; and Alpharama Limited v John Murigi Wairegi [2018] eKLR where Kshs.650,000/= was awarded.

Diminished earnings

34. The appellant submitted that the trial magistrate stated that the issue of diminished earnings was not pleaded, when in fact the appellant assert, diminished earnings was duly pleaded under paragraph 6 of both the initial plaint dated 15th September, 2020 and the subsequent amended plaint dated 12th February 2021.
35. The respondent submits that diminished earnings have been considered as part of the general damages. This was the position urged in the case of: Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR where the Court of Appeal held as follows:
- “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. The award can be a token, or modest or substantial depending on circumstances of each case. There is no formula for assessing loss of earning capacity.”
36. Further, the appellant did avail any evidence of diminished earnings to support her claim hence the same was properly concluded as part of the general damages. The claim fails on that account.



37. In addition, in the case of Douglas Kalafa Ombeva v David Ngama [2013] eKLR it was held:

“While loss of earnings falls under the head of special damages, which must be specifically pleaded and proved, loss of earning capacity on the other hand, falls under the head of general damages and would need to be proved on a balance of probabilities. See Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR where this court stated that:

Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”

38. As to whether I should disturb the award, I would cite the well-known principle in the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982 - 88] KAR 5, the Court of Appeal stated as follows on the issue of higher courts interfering with damages awarded in a Lower Court:

“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.”

Disposition

39. Ultimately, and for all the foregoing reasons the appeal fails on all grounds and is hereby dismissed with costs.

40. Orders accordingly.

DATED AT KERUGOYA THIS 16TH DAY OF OCTOBER, 2024.

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R. MWONGO

JUDGE

Delivered in the present of:

1. Ombuna - for Appellant
2. Khisa - for Respondent
3. Murage, Court Assistant

