



**Ngugi & another v Nuthoni (Civil Appeal E014 of 2024)
[2024] KEHC 12473 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E014 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

JOSEPH NGUGI 1ST APPELLANT

CECILIA MUKUHI KAGWIMA 2ND APPELLANT

AND

ESTHER NUTHONI RESPONDENT

JUDGMENT

1. The appellants herein were the defendants in the trial court in CMCC No.E049 of 2022, in which they were sued by the respondent vide a plaint dated the 14th day of June, 2022. The particulars of the claim are that, on the 14th, October, 2021, the respondent was traveling as a lawful passenger in motor vehicle registration number KBJ 190J owned and being driven by the 1st appellant when the same was involved in an accident along Slaughter Area along Meru- Runyenjes Road.
2. That as a result of the accident, the respondent suffered multiple injuries that caused her immense bodily pain and suffering as a consequence of which she was hospitalized and was left with permanent disability. The particulars of negligence and the injuries sustained by the respondent were particularized in the plaint.
3. The respondent prayed for special damages in the sum of Ksh.493,061, general damages for pain and suffering, future medical expenses at Ksh. 350,000, future earnings, loss of future earning capacity and the costs of the suit.
4. The appellants filed their statement of defence on the 8th day of August,2022 wherein they denied the occurrence of the accident, the ownership of the subject motor vehicle, the injuries and the alleged loss suffered by the respondent.



5. On the 18th May, 2023, parties entered a consent on liability at 90: 10 in favor of the respondent. The matter then proceeded for formal proof with the respondent testifying as the sole witness for her case. She adopted her witness statement dated 14th June 2022 as her evidence in Chief and produced documents filed together with the plaint. The statement that narrated how the accident occurred was adopted as her evidence in Chief and since liability is not in issue in this appeal, this court will not delve into the evidence that was adduced on liability. The appellants did not call any witnesses.
6. It was her evidence that following the accident, she sustained grievous injuries as a result of which she was rushed to Consolata Hospital Kyeni for initial treatment and first aid and she was referred to Kijabe Hospital where she underwent a surgery and was hospitalized for 19 days.
7. The trial court in a considered judgment delivered on the 30th January, 2024 awarded the respondent damages as follows;

General damages for pain and suffering.....Ksh.2,000,000
 Loss of amenities.....Ksh.300,000
 Loss of earning capacity.....Ksh.1,000,000
 Future medical expenses.....Ksh.350,000
 Special damages.....Ksh.394,206
 Making a total of Ksh 3,547,855 after concession of liability at 10%.

8. That judgment by the learned Magistrate is the subject of this appeal which was commenced by way of the Memorandum of appeal dated the 20th February, 2024 , seeking that the appeal be allowed with costs and that the trial court’s award on quantum be set aside and it be substituted with a reasonable award. The Memorandum of appeal has raised the following grounds of appeal;
 1. That the learned trial Magistrate erred in law and in facts by awarding general damages for pain and suffering in the sum of Ksh.2,000,000 which award is inordinately excessive considering the injuries sustained by the Respondent and therefore an erroneous estimate of damages payable in the circumstances of this matter.
 2. That the learned Magistrate erred in law and in fact by awarding loss of amenities as a separate and distinct award and without taking into account the substantial award made under the limb of pain and suffering thereby arrived at a net award that is inordinately excessive.
 3. That the learned trial magistrate erred in law and in fact by awarding damages for loss of earning capacity in the sum of Ksh.1,000,000 without any or any sufficient basis for awarding the same
 4. That the award of the learned trial magistrate on quantum is against the law and weight of the evidence on record.
9. The appeal was disposed of by way of written submissions and both parties complied with the directions on filing of submissions. As stated earlier in this judgment, the appeal is challenging the quantum of damages and in particular general damages, award on loss of amenities and loss of earning capacity.
10. The appellants have submitted that the trial court erred by awarding loss of amenities as a separate and distinct head and without taking into account the substantial award made under damages for pain and suffering. They have argued that this amounts to double compensation and reliance was placed on the case of Jacinta Kendi & another Vs. Rose Kimonda Cheboi (2020) eKLR. They have urged the court



to set aside the two awards and make a composite award of Ksh.1,500,000 and have relied on a number of authorities to wit; Rovin investments ltd Vs Edward Mumo Kyaka (2020) , Kanyia Vs. Mukeku (Civil appeal No. 84/2019 and that of Joyce Moraa Oyaro Vs Hussein Dairy Ltd (2016) eKLR where damages of Ksh.900,000, 1,200,000 and 1,300,000 respectively were awarded.

11. On the award of loss of earning capacity, it was submitted that the respondent failed to tender any evidence that she was earning Ksh 300,000 from her farming and therefore, the trial magistrate erred in making an award under this head. Reliance was placed on the case of SJ Vs Francesco Di & another (2015) eKLR in which the court held;

Claims under the 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 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 in general damages, once proved”

12. It was further submitted that the respondent also failed to tender any evidence under this head and that award made by the trial court was not anchored on any evidence whatsoever. They urged the court to allow the appeal.

13. On her part, the respondent urged the court to uphold the judgment of the trial court and dismiss the appeal. On the award on general damages for pain and suffering, She relied on the cases of Umoja Rubber Products vs. Bobson Rimba Lewa eKLR and that of Roba Doti Guyo vs. Jiang Zhongmei Engineering Company (2015) wherein Ksh.2,200,000 and Ksh.2,500,000 respectively were awarded. On the award under loss of amenities, reliance was placed on the guidance in Halsbury’s Laws Of England on what damages under this head entails and when the same may be awarded and on the case of Mwaura Muiruri vs. Suera Flowers Limied & another (2014). On the loss of earning capacity, it was submitted that the respondent was a business woman engaged in farming, retail business among other activities and that as a result of the accident, she will never be able to continue with her business effectively as she cannot use her left hand optimally. She further submitted that loss of earning capacity was compensable and reliance was placed on the case of *Njoroge & another Vs Chege (Civil appeal 30 of 2019)* in which the court held that, a victim whose earning capacity has been diminished by the defendant’s negligence is entitled to compensation for the lost years. Reliance was also placed on the cases of Mumias Sugar Company Limited Vs Francis Wanalo (2007) eKLR as quoted in the case of Hamo Transporters Company limited & another Vs Dorcus Wangui Kiriro (2109) eKLR . She urged the court to dismiss the appeal.

14. The injuries sustained by the respondent are set out in the Medical report by Dr.G.K Mwaura dated the 22nd April, 2022 as follows;

- 1) Fracture of left Humerus
- 2) Wounds.....chest left side
- 3) Crush injuriesleft hand fingers.

Left humerus fracture was fixed internally using metal implants and the crushed left-hand fingers were amputated. She developed Diabetes Mellitus and high blood pressure. She is unable to lift heavy objects using left upper limb. The degree of incapacity was assessed at 45 %. The doctor also assessed the future medical expenses at a total of Ksh.350,000, for artificial left hand and removal of implants at Ksh.150,000 and 200,000 respectively. According to Dr Wambugu P.M who prepared the second



medical report for the respondent, dated the 8th, August, 2023 he awarded the respondent 50% as the degree of incapacity.

15. From the evidence on record and the submissions by the parties, the following are the issues for determination;
- 1) Whether the award of general damages for pain and suffering is inordinately high?
 - 2) Whether the award on loss of amenities is inordinately excessive.
 - 3) Whether there was any basis of awarding damages under the head of loss of earning capacity
 - 4) Who should pay the costs of the appeal.
16. On the general damages, the court is guided by the following authorities; the case of *Kanyia Vs Mukeka (Civil appeal 84 of 2019)* where the plaintiff who had suffered injuries leading to amputation of his left 4 fingers and a fracture of the mid shaft femur and a 45% degree of incapacity was awarded Ksh.1,200,000 and the case of Nelson Njihia Kimani Vs David Marwa & another Eklr where the court awarded Ksh.1,500,000 for amputation of the lower right limb and 40% incapacity. I note that these cases were decided a while ago and due to passage of time and the element of inflation, the amount Ksh.2,000,000 awarded by the trial court is reasonable.
17. The appellants have also taken issue with the Ksh.300,000 awarded for loss of amenities. In the case of Jacinta Kendi & another Vs Rose Kimonda (2020) eKLR, the court had this to say about damages under this head;

“..... however, I find that the trial court’s award of Ksh 300,000 under the head of loss of amenities was based on the wrong principle and went against jurisprudence, practice and precedent. This award amounted to double compensation and ought not to have been awarded when an award under the head of general damages for pain and suffering had been awarded”

I fully associate myself with this finding and hold that the learned magistrate erred in awarding damages under that head.

18. On whether there was a basis for awarding damages for loss of earning capacity, the case of Mumias Sugar Company limited Vs Francis Wanalo as quoted in Hamo Transporters Company Limited & another vs Dorcus Wangui Kiri (2019) can offer some guidance on this, where the court stated;

..... loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering, and loss of amenities or as a separate head of damages, as a token, modest or substantial depending on the circumstances of each case. The court added that there is no formula for assessing loss of earning capacity.

19. In the case of Butler Vs Butler (1984) KLR 225 the Court of appeal enumerated the principles to be considered in a claim of this nature as follows;
- 1) A loss of earning capacity occurs where as a result of the injury, his chances in the future of any work in the labor market or work, as well paid as before the accident are lessened by his injury
 - 2) 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 of diminution of earning capacity is awarded as part of general damages.



- 3) Damages under the head 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.
- 4) 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 and/or at the date of the trial
- 5) 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 proper to award it under its own heading; and
- 6) The factors to be taken into account in considering damages under the head of loss of earning 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, and his disabilities and previous service if any. Under this head there is evidence adduced by the respondent that she was a business lady and when she was involved in the accident, she was in the process of ferrying farm produce from the farm to the market. Though she did produce proof of how much she was earning from her business, the appellants have not denied that she had hired their vehicle to transport her produce to the market. The injuries she sustained left her with 50% degree of incapacity meaning that she will not be able to earn a living at the rate at which she was earning before the accident. In all fairness, it is my considered view that the amount of Ksh.1,000,000 that was awarded by the trial court is reasonable under this head.

20. In the end, I find that the appeal partially succeeds for the reasons I have given above.

21. Each party to bear its own costs of the appeal.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent

