



REPUBLIC OF KENYA



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**Koech & another v Muraya (Civil Appeal E154 of 2021)
[2023] KEHC 2251 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E154 OF 2021
TW CHERERE, J
MARCH 16, 2023**

BETWEEN

PAUL KOECH 1ST APPELLANT

LOLOMARIK LIMITED 2ND APPELLANT

AND

JOSEPH KINYUA MURAYA RESPONDENT

*(Being an Appeal from the Judgment and Decree in Meru CMCC 77 OF
2020 by Hon. E. Mbicha (SRM) on 08th February 13th October, 2021)*

JUDGMENT

1. On March 8, 2020, respondent was travelling in 2nd appellant's tractor registration number KTCB 855 Q which was allegedly driven negligently by the 1st appellant as a result of which it was involved in an accident and respondent suffered injuries.
2. Appellants by their statement of defence denied the claim and blamed respondent for exposing himself to danger.
3. By consent dated August 31, 2021, judgment on liability was agreed at 80:20% in favour of the respondent as against the appellants jointly and severally.
4. At the conclusion of the hearing, the learned trial magistrate by a judgment dated October 13, 2021 awarded the respondent KES 7,627,466/- less 20% contributory negligence.

The Appeal

5. Appellants being dissatisfied with the lower court's decision preferred this appeal and set out 6 grounds mainly challenging the award on general damages and loss of earning which according to them is excessive.



Analysis and Determination

6. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v Sunday Post Limited* (1958) EA at Pg 424.
7. I have considered the appeal in the light of the grounds of appeal and submissions filed on behalf of both parties.
8. Dr Macharia's report dated July 7, 2021 reveals that respondent suffered the following injuries:
 - a. Fracture left side of skull (zygomatic bone)
 - b. Injury to left eye
 - c. Soft tissue injuries left side of chest
9. At the time of examination about 12 months after the accident, respondent complained of poor vision left eye, headaches and swelling left side of head and numbness and pain left side of body.
10. The doctor noted that the fracture had healed with residual headaches and numbness that might lead to epilepsy and permanent poor vision on left eye from which he assessed permanent incapacity at 40%.
11. Dr Aswin Madhiwalla's report dated August 9, 2021 confirmed that respondent suffered the following injuries:
 - a. Fracture left side of skull (zygomatic bone)
 - b. Injury to left eye
 - c. Soft tissue injuries left side of chest
12. At the time of examination about 17 months after the accident, respondent complained of poor vision left eye and headaches.
13. The doctor noted that the fracture had healed with a 3.5 cm scar on middle of the trachea and 3 cm scar on left side of head. The left eye had poor vision, looked small and dilated. He assessed permanent incapacity of the left eye at 30%.
14. At the hearing, respondent proposed an award for general damages in the sum of KES 5,000,000/- and cited *Terry Kanyua Marangu v Wells Fargo Limited* [2014] eKLR where the court awarded KES 3,500,000/- for the following injuries:
 - i. Head injury and unconsciousness with Glasgow coma scale of 9/15.
 - ii. Cut wound on left upper lip
 - iii. Loss of two left upper incisors
 - iv. Cut wound on left wrist joint with multiple laceration on the distal surface of the hand.
 - v. Depressed fracture left frontal region which healed with obvious deformity.
 - vi. Peli-orbital left eye swelling with ecchymosis
 - vii. Cut wound right lower limb pre-tibia region



15. Appellants on the other hand offered KES 500,000/- and cited Specialized Aluminium Renovators Limited & another v Stephen Mutuku Musyoka [2021] eKLR where the court on appeal awarded KES 500,000/- for the following injuries:
- i. Fracture of the frontal nasal bones
 - ii. Fracture of nasal bones
 - iii. Fracture of right orbit
 - iv. Frontal lobe hemorrhage contusion
 - v. Bleeding into sinuses
16. Appellants also relied on Mombasa Maize Millers (Ksm) Ltd & another v Rengo Joshua Wafula [2017] eKLR where a sum of KES 400,000/- was awarded for:
- i. Facial injury with fracture
 - ii. Injury to right jaw and teeth
 - iii. Injury to chest
 - iv. Fracture right condylar (mandible)
17. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo V Shab* (1968) EA 93 and Kemfro Africa Limited t/a Meru Express Services(1976) & Anor vs Lubia & Anor, No 2 [1987] KLR 30).
18. The question that arises is whether a case has made for interference with the lower court's award on general damages. The principles upon which this court should proceed are those stated in the case of *Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs AMM Lubia & Another* [1998] eKLR in which the Court of Appeal held inter alia that
- “the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 high that it must be a wholly erroneous estimate of the damages”
19. The same principle was reinstated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the Court of Appeal in held: -
- 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
20. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be



that comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in *Simon Taveta v Mercy Mutitu Njeru* Civil Appeal 26 of 2013 [2014] eKLR thus:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.

21. Whereas the learned trial magistrate stated that the injuries in *Terry Kanyua Marangu v Wells Fargo Limited* (*supra*) were comparable to the injuries suffered by the respondent in this case, the respondent herein no doubt suffered far much less injuries and the award of KES 4,500,000/- is no doubt on the higher side. The authorities cited by the appellants refer to totally different injuries compared to the ones suffered by respondent herein. respondent’s injuries healed with 3 cm and 3.5 cm scars and 30% incapacity to the left eye and I find that an award of KES 1,000,000/- would be sufficient compensation.
22. Concerning loss of earning capacity, respondent stated that he stopped working for the 2nd appellant after the accident a fact that was not disputed. Loss of earning capacity. The learned trial magistrate appreciated the Court of Appeal holding in *James Mukatui Mavia v MA Bayusuf & Sons Limited* [2013] eKLR that the method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last.
23. Based on the respondent’s monthly salary of KES 15,279/- and assuming the respondent would have worked to the age of years and taking into account that he was aged 43 years at the time of the accident, the respondent sought an award calculated with a multiplier of 17 years. On the other hand, appellants proposed a multiplier of 7 years.
24. The learned trial magistrate applied a multiplier of 17 years and awarded the sum of KES. 3,116,916/- under this heading. Whereas the multiplier is justifiable, the learned trial magistrate failed to reduce the amount by 65% since respondent’s incapacity was on average assessed at 30% and 40% whose average is 35%.
25. The award on special damages was not disputed. For the reasons given on the foregoing analysis, I have come to the conclusion that the appeal has merit and it allowed in the following terms:
 1. The sum of KES 4,500,000/- in respect of general damages is set aside and substituted with the sum of KES 1,000,000/-
 2. The sum of KES 3,116,916/- awarded in respect of loss of earning capacity is set aside and substituted with $3,116,916 \times 35\% = 1,090,920.60$
 3. The sum awarded in respect of special damages shall remain as awarded by the learned trial magistrate
 4. Each party shall bear its own costs of the appeal

DATED AT MERU THIS 16TH DAY OF MARCH 2023

T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti



For Applicants - Ms. Njoki for Getrude Matata, Waithaka & Associates, Advocates

For Respondent - Mrs. Mwanzia for Muia Mwanzia & Co Advocates

