Mbithe & another v Okwakori (Civil Appeal 721 of 2019)
[2023] KEHC 2747 (KLR) (Civ) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 721 OF 2019

CW MEOLI, J

MARCH 23, 2023

BETWEEN

JACINTA MBITHE ..... 1ST APPELLANT

MULWA CALEB MUSYOKI ..... 2ND APPELLANT

AND

EDWIN MASINGO OKWAKORI ..... RESPONDENT

(Being an appeal from the judgment of E. Wanjala (Ms.) (SRM) delivered on 28th September 2018 in Nairobi Milimani CMCC No. 1834 of 2016)

JUDGMENT

1. This appeal emanates from the judgment delivered on September 28, 2018 in Nairobi Milimani CMCC No 1834 of 2016. The suit, brought by Edwin Masingo Okwakori, the plaintiff in the lower court (hereinafter the Respondent) was commenced by way of a plaint filed on March 30, 2016 (and amended on June 21, 2018) against Jecinta Mbithe and Mulwa Caleb Musyoki the 1st and 2nd defendant/defendants in the lower court (hereinafter the 1st & 2nd Appellant/Appellants). The Respondent's claim was for damages on account injuries sustained as a result of a road traffic accident that occurred on September 8, 2014.

2. It was averred that at all material times the 1st Appellant was the driver of motor vehicle registration number KBZ 043K (hereafter accident motor vehicle) while the 2nd Appellant was the registered owner of the said vehicle. That the Respondent was cycling along Magadi Road when the 1st Appellant as the agent of the 2nd Appellant's so negligently drove, managed or controlled motor vehicle KBZ 043K that it rammed into the rear of the Respondent's bicycle throwing the Plaintiff off the bicycle and as a result he sustained injuries, and has suffered loss and damage.

3. The Appellants filed a joint statement of defence on April 30, 2018 denying the key averments in the plaint and liability. On their part they averred in the alternative that the accident was caused by or substantially contributed to by negligence on the part of the Respondent.

4. The suit proceeded to a hearing during which the Respondent was the only party to adduce evidence. In its judgment, the trial court found the 1st Appellant wholly to blame and the 2nd Appellant as the registered owner of the suit vehicle vicariously liable. The court proceeded to award damages as hereunder: -

   General Damages – KES 3,000,000.00/-

   Special Damages – KES 510,372.55/-

   Past Lost Earnings – KES 658,235.00/-

   Future Loss of earnings – KES 2,310,000.00/-

   Future Medical Expenses – KES 500,000.00/-

   Total KES 6,978,607.55/-

5. Aggrieved with the outcome, the Appellants preferred this appeal challenging the finding on quantum, based on the following grounds:-

   > " a. That the learned magistrate erred in law and fact by awarding the Respondent an excessive amount of KES 3,000,000 for pain, suffering and loss of amenities.
   >
   > b. That the Honorable learned magistrate erred in law and in fact in awarding past lost earnings to the Respondent amounting to KES 658,235/- yet same was not pleaded for in the plaint.
   >
   > c. That the learned magistrate erred in law and fact by awarding the Respondent 100% of the damages for loss of future earnings yet the Respondent was only 55% permanent incapacitated.
   >
   > d. That the quantum of damages is excessive and an erroneous estimate of the damage that may be awarded to the Respondent due regard to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstance." (sic)

6. The Appeal was canvassed by way of written submissions. As evidenced by the Appellant's memorandum of appeal, counsel's submissions were riveted on quantum of damages. Concerning the award on general damages, counsel called to aid the decision in *John Kibicho Thirima v Emmanuel Parsmei Mkoitiko* [2017] eKLR, and restating the Respondent's injuries and sequela urged the court ought to review the award to KES 2,000,000/-. Addressing the award of past lost earnings, it was contended that the same was neither pleaded nor proved and hence no award ought to have been made under the said head. Counsel cited *SJ v Francesco Di Nello & another* [2015] eKLR and *Joel Motanya v Swan Carriers Limited* [2015] eKLR in supporting the submission that the claim for lost earnings was a special damage claim that ought to be pleaded and strictly proved . He urged the court to set it aside.

7. Regarding lost future earnings or diminished earning capacity, counsel asserted that while the Respondent's earnings and incapacity were not disputed, the trial court erred in adopting a multiplier of 25 years . That the resultant award ought to be reviewed downwards by applying a multiplier of 20

years in recognition of the uncertainties of life. For this submission, he relied on the decision in *Rahab Micere Murage & anor v The Attorney General & 2 others* Nairobi Civil Appeal No 179 of 2003.

8. Lastly, on the exercise of the power of the appellate court to review damages, counsel cited the provisions of Section 78 (2) of the *Civil Procedure Act* and the decision in *Oluoch Eric Gogo v Universal Corporation Ltd* [2015] eKLR. He contended that the Appellants have raised factual and legal issues that justify the review of the awards made by the trial court.

9. Counsel for the Respondent prefaced his submissions with general submissions to the following effect. First, he reiterated the severity of the injuries sustained by the Respondent and the subsequent extensive treatment including surgical interventions. He pointed out that the Respondent had been rendered disabled . That the awards of damages made by the trial court were well founded. Citing the decision in *Simon Muchemi Atako & another v Gordon Osore* [2013] eKLR he urged the court not to disturb the awards, the Appellants not having demonstrated that the trial court arrived took into account irrelevant matters or failed to take into account relevant factors or that the awards were so manifestly excessive as to represent an erroneous estimate.

10. Moving on to the specific awards, he defended the award for past lost earnings and future loss of earnings as factually and legally correct while reiterating the discretionary nature of the latter. He stated that the Appellants had not demonstrated any error on the part of the trial court. In concluding, counsel defended the multiplier of 25 years adopted in the lower court and urged the court to dismiss the appeal with costs.

11. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider 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 this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The appeal before this court turns on the question of quantum of damages, specifically for pain and suffering, past lost earnings, and future loss of earnings, in view of the extent of the Respondent's injuries. There was no dispute in the lower court and on this appeal regarding the specific injuries sustained by the Plaintiff and the resultant sequela.

13. In considering the appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia* [1987] KLR 30. It was held in that case 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages."

14. The same court stated in Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] 1 KAR 5 that:

> " 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".

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1979) EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete* Kisumu Civil Appeal No 284 of 2001; [2004] eKLR.

15. The Respondent had particularized his injuries at paragraph 4 of the plaint as follows: -

a. "Dislocation of the right sacral iliac joint and midline of the right pelvis with upward tilted hemi pelvis.

b. Abrasion of the forearm.

c. Septic wound right buttock.

d. Shortened right leg by 6cm.

e. Fracture of the condyles right femur.

f. Fracture of the right patella.

g. Risk of arthritis of the right hip, back and sacral joint.

h. Operation done to repair torn tendons.

The right hip joint was operated and the dislocation was reduced and fusion of the hip joint was also done. The stiff right knee joint was also manipulated. However, the right hip joint is narrow and the head of the right femur has collapsed. The leg is shorter by 5cm. Consequently the Plaintiff requires further surgery to totally replace the hip and another surgery to fuse the knee joint. Both operations are estimated to cost KES 600,000/-. And the Plaintiff prays for those future medical costs. He has 30% permanent incapacity and is unable to work and in suffering loss of earnings or diminished earning capacity."

16. In its judgment, the trial court after restating and examining the respective parties' evidence stated as follows: -

> "...Quantum
>
> .....Based on the Plaintiff's injuries cited authorities, the degree of permanent disability of 55% and inflation, I am of the opinion that an award of KES 3,000,000/= would suffice in general damages for pain and suffering and loss of amenities.

Special damages

Parties are in agreement that an award of KES 510,372.55/=, based on the amended plaint be awarded as pleaded and proved by way of receipts.

Past lost earning

The Plaintiff pleaded for lost earnings for 47 months from October 2014 to August 2018 at KES 14,000/= per month he proved his earnings by a bank statement from Equity bank where his salary was being paid through, the defendants made no submissions on this head of damages I take it is not objected to I award past lost earnings as follows KES 14,000 per month x 47 months = 658,235/=

Future loss of earnings

.....on this issue parties are in agreement on all aspects except on the multiplier considering that the Plaintiff had 32 years to work taking into account the preponderance of life, I will take a multiplier of 25 years thus under this head I make the following award; KES 14,000 x 12 months x 25 years divide by 55% = 2,310,000/=

Future medical

I award KES 500,000/= for the hip replacement as pleaded proved by the medical report dated 24.4.2018

.....

The upshot is that I enter judgment for the Plaintiff against defendants jointly and severally..... Total KES 6,978,607.55/=. The Plaintiff is awarded costs of the suit. Interest to apply from date of judgment on general damages and on special damages from the date of filing the suit." (sic)

17. During the trial, three medical reports, all by Dr. W.M. Wokabi were tendered as PExh.1a, PExh.2a & PExh.3a while three discharge summaries were produced as PExh.5a, PExh.5b & PExh.7, respectively. The earliest report, PExh.1a, was prepared some two months after the accident. It essentially captured the Respondent's injuries based on the P3 form (PExh.8) and the discharge summary from Kenyatta National Hospital (KNH) (PExh.7) and included Dr. Wokabi's own diagnosis of a further skeletal and seemingly severe injury to the pelvis that had apparently been missed by attending doctors thus far. Although this injury was not challenged by the Appellants at the trial, it was evidently not included in the discharge summary from Kenyatta National Hospital or P3 form (see PExh.7 &8). Equally, this court found no reference in Dr. Wokabi's three reports to any x-rays or other procedure used in diagnosing the said injury which was stated to have been "missed" during initial treatment at Kenyatta National Hospital.

18. Nor did the Respondent produce any discharge summary or report regarding alleged surgery at Coptic Hospital or other hospital to correct the said pelvic injuries. Indeed the second medical report by Dr.Wokabi is fairly vague as to the nature and purpose of the surgery, stating only that the Respondent did not know what the alleged surgery entailed and that the Respondent in future would require a total hip replacement (See third medical report). On their part, the Appellants did not arrange for a medical examination of the Respondent by their own doctor.

19. The 2nd medical report (PExh.1b) is dated August 4, 2015. It stated in part that: -

> " I can confirm that he is still undergoing rehabilitation. The operation to fuse the right hip did not succeed in that there is still mobility at the hip joint meaning it failed...A total hip

replacement if carried out can allow him to walk better and even reduce the shortening of the leg to a great extent. Such surgery would cost Sh. 400,000/=.... At a later date the knee joint could be fused in a better anatomical position of full extension.... Although the joint would remain permanently still it would be a much better option. Such surgery to fuse the joint would cost Sh. 200,000/=...If successfully done it would also allow him to step flat on the ground with his foot. As he is now today, he is still very disabled...Presently, I assess his disability at 30%." (sic)

20. The 3rd medical report (PExh.1a) dated 24.04.2018 stated in part that;-

..... "I can confirm that a lot has been done since I last examined him 2 ½ years ago.....He has a leg that is weak, painful and stiff at all its joint of hip, knee, ankle and foot. With a leg in this condition, he has a lot of difficulty getting around. For all he is exhibiting and complaining about I assess permanent disability at 55%. He is scheduled to undergo a total hip replacement. The surgery will cost him Sh. 500,000/=. He will require to raise the soles of the right foot with a boot or calipers at cost of Sh. 10,000 every year. Chronic limping will predispose him to develop arthritis of the lower back and even left hip joint" (sic)

21. The foregoing material was not put to any serious challenge at the trial. Before the trial court, the Respondent in his submissions urged an award of general damages in the sum of KES 4,000,000/- while relying on a raft of decisions including *Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & another* [2015] eKLR, *James Thiongo Githiri v Nduati Njuguna Ngugi* [2012] eKLR, and *James Katua Peter v Simon Mutua Muasya* [2008] eKLR. The Respondent on his part urged the court to award KES 800,000/- citing the case of *Julius Kiprotich v Eluid Mwangi Kihohia* [2006] eKLR. Looking at these cases, the injuries involved in the Respondent's authorities were markedly more severe while injuries in the Appellant's authorities barely compared with those in the present case.

22. Undoubtedly, the injuries suffered by the Respondent herein were severe and must have caused him a great deal of pain and extended periods of morbidity, not to mention several surgical procedures. Equally the injuries predisposed him to severe sequela. Nonetheless, as observed by the English Court in *Lim Poh Choo v Health Authority* [1978]1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* [1983] KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* [1964] AC 326, at page 345:

> "But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional."

23. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. As observed, the authorities cited by the respective parties before the trial court were hardly on all fours with the instant case. In an apparent attempt to tidy things over, the Appellants have in the instant appeal sought to rely on the decision in John Kibicho Thirima (supra).

24. The trial court did not have the benefit of that decision. In that regard, court entirely agrees with Ochieng J in his judgment in *Silas Tiren & another v Simon Ombati Omiambo* [2014] eKLR wherein

the learned Judge took exception to the introduction of new authorities at the appeal stage, stating inter alia that:

> " None of these 3 cases were placed before the trial court ... in effect the learned trial magistrate was not given the benefit of the case law which has now been placed before me, on this appeal. That means that this court has been invited to assess a decision arrived at by the trial court using a yardstick that was not made available to that court. In my understanding of the law an appeal process is intended to correct the errors made by the trial court ... it should determine the correctness or otherwise of the decision being challenged, using the same material which had been placed before the trial court... The appellate court is not, ordinarily, expected to receive new or further evidence. To my mind, the exercise of placing wholly new authorities before the appellate court and using them to either challenge or to otherwise support the decision of the trial court is not a proper use of the mechanism of an appeal."

25. The trial court rehashed in some detail the evidence before it in respect of the Respondent's injuries, primarily the medical reports. And the respective parties' submission. But beyond this, the trial court did not expressly compare the injuries with authorities of superior courts cited by the parties. Nevertheless as observed by the Court of Appeal in Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No 284 of 2001; [2004] eKLR the award of general damages is discretionary and "an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance".

26. The Respondent's injuries were severe. That said, it appears upon my own review of all the material presented before the trial court that, the Appellants' complaint regarding the award on general damages appears justified; the award appears excessive in the circumstances of this case as the cases cited by the Respondent represented somewhat different but multiple and severe injuries. Considering the injuries sustained by the Respondent, and the attendant sequela, the trial court's award in general damages was excessive and ought to be, and is hereby reduced to KES 2000,000/- (Two Million).

27. Turning now to the award for past lost earnings, the Appellants have correctly argued that these were neither pleaded nor proved and no award ought to have been made under the said head. The distinction between lost earnings and diminished earning capacity is settled. The Court of Appeal in S J v Francesco Di Nello & Another [2015] eKLR while making the distinction stated that: -

> " 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 or 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 in general damages, once proved. This was the position enunciated in Fairley v John Thomson Ltd[1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:
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> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

28. The court proceeded to state that: -

> " The correct position as in the Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & Another v Ruth W. Mwangi CA No 251 of 1996 as hereunder:
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> "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved."
>
> In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:
>
> "Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

29. It is the court's finding that the Respondent failed to specifically plead or prove the claim for past lost earnings. The bank statement tendered as P.Exh. 6 to which I will soon revert did not suffice. Hard proof of the actual loss ought to have been tendered. The award for past lost earnings must therefore be set aside.

30. Concerning the claim for damages in respect of diminished earning capacity, the Court of Appeal in *Mumias Sugar Co. Ltd v Francis Wanalo* [2007] eKLR restated the findings in *Butler v Butler* [1984] KLR 225. In that case, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The court stated:

> " The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in the labour market, while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in the future.....The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity nevertheless the Judge has to apply the correct principles and take the relevant factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability."

31. In the present case, the evidence of Dr. Wokabi was unchallenged; the Respondent's permanent incapacity was assessed at 55%. The trial court adopted a multiplier approach based on the asserted earnings of the Respondent via Pexh.6. This document though not disputed by the Appellants covered the period from September 1, 2014 to July 28, 2015 and contained a single deposit of a sum of KES 14,005.20, which according to the narration could be salary paid by Karen Embers to the Respondent's account on the same date when the accident occurred.

32. To be useful in assessment, the bank statement ought to have captured a longer period prior to the accident to confirm that the Respondent's monthly income averaged the sums claimed. Or alternatively, the Respondent ought to have tendered pay slips or the engagement letter with Karen Embers to supplement the statement. Thus, in my view the bank statement alone could not give a

clear picture of the average earnings of the Respondent before the accident and in the circumstances the multiplier approach was inappropriate. There is no hard and fast rule that the multiplier method applies universally to all situations.

33. The Respondent testified that he worked as a housekeeper or waiter. Admittedly, though not totally incapacitated, the Respondent could not return to that trade or indeed easily secure formal employment. However, he potentially could engage in less strenuous income earning activity in the informal sector to support himself. In the court's view, a global award of KES 1,500,000/- as damages for diminished earning capacity suffices.

34. In the result, the court allows the appeal, and will vary the lower court judgement as follows:-

    a. The award of general damages in respect of pain and suffering is reduced to KES 2000,000/- (two million).

    b. The award of damages in respect of past lost earnings is hereby set aside.

    c. The general damages awarded for diminished earning capacity are reduced to a global sum of KES 1,500,000/- (One Million Five Hundred Thousand).

    All other awards made by the trial court remain unchanged. Parties will bear their own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Ms. Moraa for the Appellant

Mr. Kaburu for the Respondent

C/A: Carol