



REPUBLIC OF KENYA



KENYA LAW
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**Nelson v Ochieng (Civil Appeal E005 of 2022)
[2023] KEHC 2780 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E005 OF 2022
RE ABURILI, J
MARCH 22, 2023**

BETWEEN

AWILI NELSON APPELLANT

AND

PURITY ACHIENG OCHIENG RESPONDENT

*(An appeal arising out of the Judgement and Decree of the Honourable
Lester Simiyu (SPM) in the Chief Magistrate's Court at Siaya
delivered on the 17th December 2021 in Siaya CMCC 81 of 2016)*

JUDGMENT

Introduction

1. The respondent herein sued the appellant before the trial court for damages as a result of personal injuries that she sustained as a result of a road traffic accident which occurred on the December 26, 2015 involving the appellant's motor vehicle registration number KBS 126X. On the December 5, 2018, the parties recorded a consent on liability in the ratio 80:20 against the appellant/defendant in favour of the respondent/plaintiff.
2. In her judgement, the trial magistrate found in favour of the respondent as follows:
Special damages – Kshs 125,000
Diminished/Loss of earning capacity – Kshs 1,402,608
Future Medical Expenses – Kshs 500,000
General damages – Kshs 2,000,000
Sub Total – Kshs 4,027,608
Less 20% contribution Kshs 805,521.60



Net award Kshs 3,22,086.40

3. The trial court further awarded the respondent costs of the suit and interest at court rates.
4. Aggrieved by the said judgment and decree, the appellant filed his Memorandum of appeal dated February 8, 2022 in which he raised the following grounds of appeal:
 - i. That the quantum of general damages for pain and suffering and loss of amenities is inordinately high erroneous, oppressive and punitive and amounts to miscarriage of justice.
 - ii. The learned trial magistrate totally ignored misapprehended and/or paid lip service to the appellant's submissions and authorities therein cited, and totally failed to analyse or apply them.
 - iii. The learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards, and ignoring completely the appellant's submissions thereon and thereby making an award inconsistent with the said principle.
 - iv. The learned trial magistrate erred in law and in fact in making an award of Kshs 2,000,000 in general damages without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous and which amounts to a miscarriage of justice.
 - v. The learned trial magistrate erred in law and in fact in awarding Kshs 500,000 for future medical expenses when no such sum had been pleaded and proved without any evidence that such treatment was needed.
 - vi. The learned trial magistrate erred in law and in fact when she held without reference to any precedent or legal basis that the multiplier applicable was 25 years and then proceeding to award damages for loss of future earning capacity based on the said arbitrary multiplier.
 - vii. The learned trial magistrate erred in law and in fact in awarding Kshs 500,000 for future medical expenses when no such sum had been pleaded and proved without any evidence that such treatment was needed.
 - viii. The learned trial magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages, damages for loss of future earning capacity and future medical expenses.
5. The appeal herein was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that in making an award of Kshs 2,000,000, the trial court ignored a cardinal principal in the assessment of damages that comparable injuries should as far as possible be compensated by comparable awards, which principle was set out and upheld in the cases of *Simon Taveta v Mercy Mutitu Njeri* (2014) eKLR as well as in the Court of Appeal case of *Morris Mugambi & Another v Isaiah Gituru* Nairobi CA No. 138/2002.
7. The appellant submitted that the authorities cited by the respondent in the trial court were not comparable to this case and that the trial court ought to have found so. It was submitted that in



- applying the case of *Cornelius Kweya Ebichetu C & P Shoe Industries Limited* [2008] eKLR, the court made an error of principle by relying on a case that showed different and dissimilar injuries from those suffered by the respondent.
8. The appellant submitted that a sum of Kshs 800,000 was sufficient for general damages for pain and suffering and loss of amenities as was set out in the cases of *Sanganyi Tea Factory Company Limited v Patrick Onano Chungo* [2019] eKLR, *Florence Njoki v Chege Mbitiru* [2014] eKLR, *Reuben Mongare Keba v LPN* [2016] eKLR, *South Sioux Farm Limited & Another c Christine N. Simiyu Wanzala & Another* [2019] eKLR, *Ndathi Mwangi & 2 Others v Benson Lumumba Ndivo* [2018] eKLR and that of *Peter Wainaina Kinyua v Peter Gitbendi Njeri* [2018] eKLR.
 9. On loss of earning capacity, it was submitted that whereas the trial magistrate was right in using the minimum wage of Kshs 5844.20, she used a multiplier that was inconsistent with other decided cases that showed a multiplier of between 15 – 20 years.
 10. The appellant submitted that even though the choice of multiplier was within the discretion of the court, the discretion must be exercised judiciously and not whimsically and further that comparable awards in comparable cases should be given as was held in the case of *Board of Governors of Kangubiri Girls High School & another Jane Wanjiku Muriithi & another* [2014] eKLR. It was submitted that the respondent did not cite any precedent to support a multiplier of 30 years whereas he had cited a number to support the multiplier of 15 years.
 11. Regarding the award for future medical expenses, it was submitted that Dr. Okombo who examined the respondent in 2017 was not a surgeon but a physician and further that he did not provide what future treatment he had stated would entail whereas Dr. Odondi who examined the respondent on behalf of the appellant did not recommend any future treatment.
 12. The appellant submitted that it was not enough for the respondent to plead future treatment but that the nature of the treatment and need for the treatment must be proved and shown as was held by the Court of Appeal in the case of *Mbaka Nguru & Another v James George Rakwar* [1998] eKLR.
 13. The appellant also submitted that in some cases, the High Court has refused to follow to accept the assessment by physicians as opposed to surgeons as held in the case of *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR. The appellant thus submitted that for lack of proof that future medical treatment was necessary, the award for future medical expenses ought to be set aside.

The Respondent's Submissions

14. The respondent submitted that she proved her case before the trial court on a balance of probabilities and further that the appellant had not demonstrated how the trial magistrate proceeded on wrong principles or that she misapprehended the evidence in some material respect so as to arrive at a figure that was inordinately high.
15. The respondent submitted that the award of Kshs 2,000,000 in general damages for pain and suffering awarded by the trial court was reasonable and was not inordinately excess. Reliance was placed on the authorities adduced during the trial before the lower court.
16. Regarding the multiplier used in making an award for loss of earning capacity it was submitted that the injuries occurred when the respondent was 27 years old whereas the normal retirement age is 60 years thus the trial court's adoption of a multiplier of 25 years was agreeable. Reliance was placed on the cases of Nairobi HCCA No. 189 of 2012, *Wycliffe Kisah Diginyi v Elijah Mungai Njoroge and Another* where a multiplier of 18 years was adopted for a 42-year-old plaintiff and the case of Nakuru



HCCC No. 403 of 2012, *Ziporrah Nangila v Eldoret Express Ltd & 2 Others* in which a multiplier of 8 years was adopted for a 51-year-old plaintiff.

17. On future medical expenses, the respondent submitted that she pleaded Kshs 500,000 for future medical expenses in the amended plaint and further that the medical report by Dr. Okombo clearly stated the type of future medical treatment that the respondent would require.
18. It was submitted that the trial magistrate exercised her jurisdiction judiciously while directing her mind to the facts of the case, the evidence before her, nature and extent of the respondent's injuries as well as the relevant judicial authorities and could therefore could not be faulted.

Analysis and Determination

19. I have considered the grounds of appeal, the rival submissions and entire evidence adduced before the trial court. It is clear, as earlier stated that this appeal is purely on the issue of quantum of damages only. Accordingly, the only issue for determination is whether the quantum of damages awarded should be disturbed.
20. The principles to be observed by an appellate court in deciding whether to disturb quantum of damages were set out in the case of *Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia* (1982-88) 1 KAR 727 and restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others* [2004] eKLR that:

“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. The same was reiterated in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal held that:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A 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.’”
22. In the present appeal, the Appellant asserts that the award was inordinately high and that the trial court disregarded authorities on comparable injuries and compensation and based its assessment on cases where the Plaintiff had suffered more severe injuries.



23. From the amended plaint dated November 30, 2017 and filed on the December 1, 2017, the plaintiff/respondent pleaded that as a result of the road traffic accident occasioned by the appellant, she suffered the following injuries:
- a. Multiple fractures of the right lower limb
 - b. Comminuted fractures of the right leg femur bone
 - c. Fragmented/comminuted fractures of the tibia/fibula bones on the right leg with malunion
 - d. Loss of bone on the right leg tibia bone
 - e. Degloving wound on the right leg
 - f. Multiple deep cuts on the right lower
 - g. Deep wound on the right heel
 - h. Multiple fractures on the right lower limb
 - i. Malunion and osteopenia on the tibia
 - j. Proximal fibula shaft fracture
 - k. Chest pain
24. The averments on injuries suffered were supported by the discharge summary produced by the plaintiff/respondent as PEx 2, 3 & 4.
25. The plaintiff/respondent also produced a medical report by Dr. Okombo as PEx 5 in which he examined the plaintiff/respondent a year and half after the accident and in which he confirmed that the fractured bones were healing with malunion and needed correction by an orthopaedic surgeon, that the unhealed wounds needed daily dressing with administration of antibiotics and on healing would leave scars that need reconstructive surgery; that the treatment the plaintiff/respondent was to receive would cost Kshs 500,000 and that the degree of incapacity was 80%.
26. On his part, the appellant filed an amended defence dated 8.8.2018 denying the plaintiff/respondent's claim and putting her to strict proof thereof. The appellant further produced DEx1, a medical report by Dr. John Ouma Odondi in rebuttal in which the doctor who examined the respondent on the 16.6.2017 found that the respondent's limbs were shortened by 4cm, 83cm Rt and 87cm Lt. Dr. Odondi further found that the right leg had a deformity and scar measuring 21cm that was 10cm at the widest point with hypo pigmentation. He also found that the respondent had stiffness in both knee and ankle joints of the right side.
27. Dr. Odondi concluded that the respondent suffered severe fractures that had to undergo several operations and that she remained with severe shortenings with joint stiffness and that there were limited chances that she could regain good function of the leg even in the best hands.
28. I have considered the authorities relied on by both parties herein who also cited the same authorities that they placed before the trial court in this appeal.
29. From the evidence on record, I note that the respondent suffered the injuries as pleaded before the trial court. The medical reports provided by both parties were clear that the respondent suffered severe injuries that exposed the respondent to prolonged morbidity and severe incapacity and as concluded



by the appellant's doctor, there were limited chances that she could regain good function of the leg even in the best hands.

30. I have examined other relevant decisions. In the case of *Gabriel Mwashuma v Mohammed Sajjad & another* [2015] eKLR, the plaintiff sustained injuries of Segmental left femur fracture, Compound fracture left patella and femoral condyle, Comminuted left distal tibia/fibula (pilon) fracture, Fracture right fibula and Soft tissue injuries right knee and the court awarded him Kshs 3 million in general damages.
31. In the case of *Gideon Ndungu Nguribu vs Michael Njagi Karimi* [2012] eKLR the plaintiff suffered a fracture of the thigh bone and humerus. He was awarded Kshs 2,000,000/= for pain and suffering in 2012. In the case of *Charles Wanyoike Githuka v Joseph Mwangi Thuo & 2 Others* [2008] eKLR the award was Kshs 2 Million. The Plaintiff in that case suffered fracture mid-shaft of the right femur, segmental fractures of the left femur, compound fracture of the right lower leg (fibia & Fibula bones), fracture of the right tibia plateau (knee joint), and fracture of the right ankle joint.
32. Accordingly, I find that the trial magistrate's award for general damages was well within the range provided for in comparable cases. I thus find no reason to interfere with the same. I uphold the award of kshs 2,000,000.

Future Medical Expenses

33. The appellant submitted that it was not enough for the respondent to plead future treatment but that the nature of the treatment and need for the treatment must be proved and shown and further that Dr. Okombo who examined the respondent in 2017 was not a surgeon but a physician.
34. I do note that in the respondent's amended plaint dated November 30, 2017 and filed on the December 1, 2017 at paragraph 5A, the respondent claimed for future medical expenses of Kshs 500,000. This is further substantiated by the medical report by Dr. Okombo that was produced by the respondent as PEx 5 in which the Doctor confirmed that the fractured bones were healing with malunion and needed correction by an orthopaedic surgeon, that the unhealed wounds needed daily dressing with administration of antibiotics and on healing would leave scars that need reconstructive surgery and that the treatment the plaintiff/respondent was to receive would costs Kshs 500,000.
35. The appellant urged this court to refuse to follow the assessment by Dr. Okombo who is a physician as opposed to a report that would have been given by a surgeon as held in the case of *Akamba Public Road Services v Abdikadir Adan Galgalo* [2016] eKLR.
36. I have perused the aforementioned Akamba case supra and note that the court therein questioned whether they would be bound by a report of a non-surgeon, in this case a family physician, but never dismissed the said medical report. In addition, the issue as canvassed was before a court of concurrent jurisdiction and thus not binding on this court. Despite the fact that the plaintiff's doctor was a physician and not a surgeon, the doctor was clear that the plaintiff would require a surgeon to operate on her. In addition, albeit the appellant's doctor did not mention the need for future medical expenses, he did not rule out that need in view of his assessment of the injuries sustained by the respondent and even concluded that those injuries were severe and that "there were limited chances that she could regain good function of the leg even in the best hands." That kind of prognosis in my view require further specialised medical attention as the appellant's doctor was not shown to be the final determinant on the question of future medical attention on the plaintiff who suffered very severe injuries.



37. I therefore find that the respondent proved her claim for future medical expenses on a balance of probabilities. I thus uphold the trial court's finding on the same as pleaded and proved.

Loss of Future Earning Capacity

38. The trial court awarded the respondent Kshs 1,402,608 for diminished/loss of earning capacity. The appellant while agreeing with the trial magistrate for using the minimum wage, faulted her for using a wrong multiplier, i.e. 25 years contending that the respondent did not refer to authorities to support that multiplier and submitted that the court ought to have used a multiplier of 15 years.

39. In the case of *Humphrey Okumu Odondi v Imperial Driving School* [2018] eKLR, where the plaintiff was 28 years old, the appeal court upheld the trial court's multiplier of 23 years acknowledging that the plaintiff would have worked until 60 years, which is the retirement age in Kenya but also taking into account the vagaries and uncertainties of life.

40. In this case, the plaintiff was aged 28 years at the time of the accident. I find no reason to interfere with the discretion of the trial magistrate who used the multiplier of 25 years as the same is reasonable and within the comparable cases.

Disposition

41. In end, I find and hold that the appellant's appeal herein is devoid of merit. It is hereby dismissed. The awards made by the trial court are upheld.

42. The respondent shall have costs of this appeal assessed at Kshs 30,000.

DATED, DELIVERED AND SIGNED AT SIAYA THIS 22ND DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

